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ARTICLE

Beneficial Ownership Interpreted, To What Extent Are the OECD and the EU on the Same Wavelength?

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The interpretation of the concept of 'beneficial ownership' in the field of cross-border taxation is the subject of dispute among the international community. From 1977 onwards, a major question is how beneficial ownership should be defined for tax treaty purposes. After the concept of beneficial ownership was included in the EU's Interest and Royalties Directives, the same question arose for the interpretation of the concept from an EU perspective. The authors examined both the Organisation for Economic Cooperation and Development (OECD) and EU concepts separately from a historical and teleological perspective and attempted to find common grounds for interpretation, especially after the Court of Justice of the EU (CJEU) judgment in the Danish cases. They conclude their research by suggesting potential ways forward for a better alignment of the OECD's and EU's interpretation of the beneficial ownership concept.

Keywords: Beneficial ownership, Interest and Royalties Directive, tax treaties, abuse, treaty interpretation, EU, OECD, interest, dividend, royalties.

1 Introduction

The interpretation of the concept of 'beneficial ownership'[1] in the field of cross-border taxation is the subject of dispute among the international community. Originally originating in English Trust Law,[2] beneficial ownership was neither intended for application in a tax treaty context nor was it known by many states that operate in the context of tax treaties. Regardless, on initiative by the United Kingdom, the Organisation for Economic Cooperation and Development (hereinafter OECD) and the United Nations (henceforth referred to as UN) decided to incorporate the concept into their model tax conventions on the avoidance of double taxation in 1977 and 1980, respectively.[3] Consequently, nearly all existing bilateral tax treaties contain the rule of beneficial ownership, i.e. in order to gain entitlement to relief from withholding tax at source on cross-border flows of dividends, interests, and royalties, the resident recipient must qualify as the *beneficial owner* of those items of income.

From 1977 onwards, a major question is how should beneficial ownership be defined for tax treaty purposes? This is a question that the OECD and the UN have not yet officially answered. National jurisprudence on the matter is inconsistent with courts and tax authorities construing the concept in different ways. In parallel, a body of academic literature has also accumulated. In this context, it has become extremely complex to reach consensus on a fixed interpretation.

An additional layer was brought to the discussion when the European Union (hereinafter EU), apart from other institutional bodies and individual countries included the concept of beneficial ownership in the Interest and Royalty Directive (hereafter IRD) in 1998. Therein, beneficial ownership similarly operates as a requirement to qualify for double tax relief from withholding tax at source in intra-EU flows of interests and royalties.[4] Contrary to the OECD Model Tax Convention (MTC), the IRD does contain a definition.[5] Still, it can be questioned how the constitutive elements of the definition are to be interpreted and, subsequently, how the EU definition relates to the OECD concept. In the 2019 landmark case, *N Luxembourg I et*

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1 The words *term*, *rule*, *notion,* and *concept* will be used interchangeably to refer to beneficial ownership throughout this article.

2 J. F. Avery Jones et al., *The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States*, 60(6) Bull. for Int'l Tax'n 246 (2006).

3 A. Meindl-Ringler, *Beneficial Ownership in International Tax Law,* 17 (Kluwer Law International 2016).

4 M. Distaso & R. Russo, *The EC Interest and Royalties Directive – A Comment,* 44(4) Eur. Tax'n 143 (2004); European Commission, *Proposal for a Council Directive on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Associated Companies of Different Member States*, COM(1998)67 final 2 (4 Mar. 1998).

5 European Commission, *supra* n. 4, Art. 3(1)(c).

al v. Skatteministeriet,[6] the Court of Justice of the EU (hereinafter CJEU) ultimately provided some guidance on the interpretation of the definition.[7]

It is widely agreed that the beneficial ownership rule seeks to tackle so-called 'treaty' or 'directive' shopping.[8] As an anti-abuse tool, beneficial ownership balances different perspectives on the same situation. On the one hand is the granting of relief from withholding tax at source in appropriate cases which is of crucial importance for both the protection of taxpayers from double taxation and the functioning of the investment market. On the other hand is the rejection of such a privilege in inappropriate cases which is of crucial importance for the securement of state revenue and sovereignty.

While the relevance of the existence of the beneficial ownership rule seems to be clear, interpretative uncertainty prevents its correct and uniform application thereby undermining its efficiency. To be more explicit: lacking a clear definition of beneficial ownership and leaving its interpretation to all individual countries, there is no globally uniform approach while stakeholders would appreciate working with a concept that is applied broadly. Therefore, the authors will attempt to answer the question of what is beneficial ownership and how uniformity in application of beneficial ownership should be reached within the context of both international institutions towards the future from the OECD and EU perspectives. The main focus of this article is on finding common ground for the beneficial ownership concept while taking into account the OECD MTC and EU law. The authors try to place this common ground into an acceptable approach on beneficial ownership towards the future.

The first paragraph is dedicated to the concept of beneficial ownership as operating in a tax treaty context. The focus therein is exclusively on the OECD perspective. The second paragraph is devoted to beneficial ownership as a rule of EU Law. For the sake of the comparative analysis, both paragraphs will follow the same structure: the history, the main characteristics, and the interpretation of the MTC/IRD concept are examined respectively. The purpose herein is to provide an analysis of the historical and legislative evolution of the concept as well as the leading academic conclusions that have thus far been drawn. The third paragraph is centred around convergence. As this phenomenon occurs over the course of time,[9] convergence between the OECD and the EU concepts of beneficial ownership are determined over three separate sections, each referring to a time span, with the decision of the CJEU in *N Luxembourg I et al v. Skatteministeriet* as a time marker. The three periods, therefore, are as follows: (1) before the CJEU judgment in *N Luxembourg I*; (2) the short period directly following *N Luxembourg I*; and (3) after *N Luxembourg I* et al. The latter section is devoted to contemplating alternatives for the future while reflecting on the conclusions drawn in the two previous sections. The final paragraph summarizes this work.

2 Beneficial ownership

2.1 *History*

2.1.1 *Origins*

Beneficial ownership finds its roots in equity and, more specifically, in the English law of trusts.[10] In this regard, it is important to distinguish equity from common law as the latter does not acknowledge the concept. It is also important to note that the term 'equitable ownership', which originates from equity, is sometimes used interchangeably with the term beneficial ownership under tax law.[11]

Equity developed as a set of remedies that correct the strictness of common law[12]; the trust figures among its major achievements.[13] A trust is created by a trustor who transfers legal title of a property to a trustee, i.e. the legal owner, who holds it on trust for the benefit of the beneficiary, specifically, the beneficial owner.[14] This practice, therefore, gave rise to duality of ownership which subsequently created a fully-fledge concept: equitable or beneficial ownership.[15] Common law holds the contrasting view that ownership is indivisible.[16]

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[6] The words *case, judgment, decision,* and the name *N Luxembourg I et al* will be used interchangeably to refer to *N Luxembourg I et al v. Skatteministeriet* throughout this article.

[7] CJEU, 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet*, ECLI:EU:C:2019:134.

[8] This phenomenon is associated with tax treaties, EU Directives, and other instruments that restrict the availability of tax privileges to a circle of qualifying persons, i.e. those who fall within a defined scope, most often expressed in, inter alia, a residency requirement. To illustrate, bilateral tax treaties benefits are restricted to residents of one or both of the two contracting states. By the same token, an EU directive intends that the favourable tax regime it offers will only be accessible by EU residents.

[9] In the words of Mattei & Pes, 'an analytical definition of convergence must emphasize the aspect of time, showing a process by which two or more legal systems become rather than are, more alike', *see* U. Mattei & L. G. Pes, *Civil Law and Common Law: Toward Convergence?* 267–280 (Vernon Press 2010).

[10] Avery Jones et al., *supra* n. 2, at 246.

[11] C. P. Du Toit, *Beneficial Ownership of Royalties in Bilateral Tax Treaties,* 112–113 (IBFD 1999).

[12] B. A. Worley, *Le « trust » et ses applications modernes en droit anglais,* 704 (Revue internationale de droit comparé 1962).

[13] *Ibid.*, at705.

[14] R. Clements & A. Abass, *Equity & Trusts: Text, Cases and Materials,* 22 (OUP Oxford 2011).

[15] *Ibid.*, at 21; D. W. M. Waters, *The Concept Called 'The Trust',* 53(3) Bull. for Int'l Tax'n 120 (1999).

[16] Du Toit, *supra* n. 11, at 113.

What should be retained from the above is that, theoretically, beneficial ownership stems from the split of the property law title of full ownership into two distinct types of ownership: legal and beneficial.[17] The legal owner refers to the individual who merely holds legal title to the property without having the rights to enjoy the fruits of it, and the one who has the rights to control or to dispose of it for his own benefit is the beneficial owner.[18] Thus, the former holds it for the benefit of the latter who is the ultimate beneficiary.

Although the concept of beneficial ownership was borrowed in various other contexts, e.g. corporate law, this article is focused on its application in tax law. As the economy has evolved, beneficial ownership has gained 'fiscal utility' which was found to be of an increasing relevance to a range of different situations in which, for the most part, loss in state revenue is at stake. Consequently, increasingly more countries (such as the United States, Canada, and Australia) focused on the concept from this angle, leading to some of them to incorporate it implicitly or explicitly in their domestic tax law.[19]

2.1.2 *The Steps Towards Beneficial Ownership in an International Tax Context*

2.1.2.1 The OECD Model Tax Convention on Income and on Capital and Double Tax Conventions

Since World War II, the economy has been experiencing an era of globalization driven by the increasing mobility of trade and investment. Stimulating the growth of a globalized economy has required states across the world to work towards the elimination of impediments to free flows of trade and investment. Against this background, the need notably arose for cooperation at a transnational level on relief for taxpayers from international double taxation on their items of cross-border income.

In 1956, European senior tax officials undertook a project that eventually resulted in the 1963 Draft of the OECD Model Tax Convention on Income and on Capital (hereafter: MTC) which is a set of norms laid down in a model treaty that has gradually been taken as a reference point in matters of double taxation on a worldwide scale. The 1963 OECD MTC, however, did not yet include a beneficial ownership requirement.

2.1.2.2 The 1966 United Kingdom-United States DTC

The term 'beneficial ownership' was used for the first time in a tax treaty in relation to income within the ambit of the 1966 Supplementary Protocol-covering Trust, Nominees, and Agents-to the United Kingdom (UK)-United States (US) double tax convention (hereafter: DTC) of 1945.[20] The term was introduced as a substitute to a subject-to-tax clause in connection with the application of Articles VI (Dividends), VII (Interests), and VIII (Royalties).[21] This was exposed in a note to the protocol in the following manner: 'Relief from tax on dividends, interest and royalties … in the country of origin will no longer depend on whether the recipient is subject to tax in the other country but will depend on the income being *beneficially owned* by a resident of the other country (emphasis added)'.[22]

Subsequently, to qualify for treaty-relief in respect of cross-border dividends, interests, and royalties, the recipient resident of the other contracting state had to beneficially own these items of income. Beneficial ownership was subsequently added to other DTCs such as the UK-Netherlands DTC in 1968, Australia-Japan in 1969, and UK-Spain in 1975.[23]

2.1.2.3 1977 OECD MTC

In 1977, beneficial ownership was added to the updated OECD MTC, indicating the relevance of the concept in regards treaty abuse. During the drafting stages, the United Kingdom requested that draft Articles 10 (Dividends), 11 (Interests), and 12 (Royalties) be modified. It considered these articles as defective since the sole requirement for relief was to be a resident in the other contracting state and thus could apply to persons with a mere legal right to the income though not being the true recipients.[24] The United Kingdom considered such a structure as a channel for abusive constructions since taxpayers could easily benefit from DTC provisions by only interposing a company in a jurisdiction

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[17] C. Brown, *Symposium: Beneficial Ownership and the Income Tax Act,* 51(1) Can. Tax J. 403–404 (2003).

[18] C. P. Du Toit, *The Evolution of the Term 'Beneficial Ownership' in Relation to International Taxation Over the Past 45 Years,* 64(10) Bull. for Int'l Tax'n 3 (2010).

[19] Avery Jones et al., *supra* n. 2, at 246; Distaso & Russo, *supra* n. 4, at 148.

[20] Meindl-Ringler, *supra* n. 3, at 134.

[21] *Ibid.*, at 140; R. Vann, *Beneficial Ownership: What Does History (and Maybe Policy) Tell Us*, in *Beneficial Ownership: Recent Trends* 275 (Michael Lang et al. eds, IBFD 2013).

[22] Du Toit, *supra* n. 11, at 180.

[23] F. Vallada, *Beneficial Ownership Under Articles 10, 11, and 12 of the 2014 OECD Model Convention*, in *The OECD-Model-Convention and its Update 2014* 26 (Michael Lang et al. eds, Linde Verlag GmbH 2015).

[24] Meindl-Ringler, *supra* n. 3, at 15.

with a more favourable DTC with the source state.[25] It proposed the insertion of either a subject-to-tax clause or a beneficial ownership test.[26] It also suggested that the latter could be the object of a separate provision applying to other articles of the MTC.[27] OECD Members ultimately agreed that the beneficial ownership option was to be preferred. However, it was not agreed that the term be part of a separate article.[28,29]

Therefore, in order to benefit from the limitations on source taxation, the recipient must be the beneficial owner of the income. Articles 10 and 11 OECD MTC were clarified by the following commentary:

> Under paragraph 2, the limitation of tax in the State of source is not available when an intermediary, such as an agent or nominee, is interposed between the beneficiary and the payer, unless the beneficial owner is a resident of the other Contracting State. States which wish to make this more explicit are free to do so during bilateral negotiations.[30]

Accordingly, intermediaries such as agents and nominees do not qualify as beneficial owners under the MTC. The meaning of agents and nominees is not further defined. In general, they have in common to act for a principal. As a result, they do not have control over the items of income they receive. Being an agent or a nominee is not perceived as an independent status.[31]

Lastly, beneficial ownership makes an appearance in the commentary to Article 1 under the heading 'improper use of the convention'. The OECD exposed that the introduction of the concept deals with simple treaty abuse situations involving persons who act through intermediaries artificially established in one of the contracting states. The purpose is 'to obtain treaty benefits which would not be available directly to such person'.[32]

Certain aspects of the concept caused uncertainty among OECD members and, notably, its scope; it was not fully clear what beneficial ownership encompassed in a tax treaty context, even to common law countries. This lack of clarity was exacerbated when the term had to be interpreted by civil law jurisdictions and translated into the different languages.[33] Further guidance on beneficial ownership in the following OECD publications was certainly expected. Naturally, the adoption of the term by the OECD also marks the introduction of beneficial ownership in those DTCs signed after 1977 that draw upon the MTC. Additionally, in 1980, the UN included the term in the same articles of its MTC.

2.1.2.4 The 1995 Amendments

In 1995, the terminology of Article 11(2) of the OECD MTC as discussed above was changed from 'if the recipient is the beneficial owner of the interest' to 'if the beneficial owner of the interest is a resident of the other Contracting State'.[34] The provision on dividends (Article 10(2)) was modified in the same way. It was found necessary to further clarify that the limitation of source taxation remains available when, though an intermediary (such as an agent or nominee) is interposed between the payer and the beneficial owner, the latter is a resident of the other contracting state. It is also submitted that the intermediary may be located in a contracting state or in a third country which implies that only the beneficial owner must be resident in a contracting state for the sake of Articles 10 to 12 OECD MTC.[35] Article 12(1) OECD MTC was modified two years later in 1997.[36] The beneficial ownership requirement itself still reads the same even though the interpretation of the concept has evolved.

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[25] From a UK perspective, this was possible due to a combination of two domestic law provisions: first that the recipient of income (foreign or many types in the United Kingdom) could be taxed without being entitled to it and, second, that a UK resident nominee for a non-resident was not taxable by receiving foreign income. The effect of the two domestic law provisions together, therefore, was that a UK resident nominee was liable to tax because he would be taxable if he received domestic income but was not liable to tax on foreign income. *See* more extensively, J. Avery Jones, *The Beneficial Ownership Concept was Never Necessary in the Model*, in *Beneficial Ownership: Recent Trends* 333 (M. Lang et al. eds, IBFD 2013).

[26] *Ibid.*, at 16.

[27] Vann, *supra* n. 21, at 284.

[28] *Ibid.*; Meindl-Ringler, *supra* n. 3, at 17.

[29] Ultimately, the introduction of the beneficial ownership requirement appeared to no longer be necessary since the inclusion of the second sentence to Art. 4, para. 1 of the OECD MTC (referring to a 'person' instead of an 'individual') already solved the United Kingdom's problem. *See* more extensively, Avery Jones, *supra* n. 25, at 333.

[30] OECD Model Tax Convention (1977): Commentaries to Arts 10, para. 10 to and Art. 11, para. 8. The same commentary was made to Art. 12 OECD MC albeit with a change in wording necessary to adapt to the article. *See* OECD Model Tax Convention (1977): Commentary to Art. 12, para. 44.

[31] Meindl-Ringler, *supra* n. 3, at 49.

[32] OECD Model Tax Convention (1977): Commentaries to Art. 1, paras 9–10.

[33] Vann, *supra* n. 21, at 288.

[34] S. van Weeghel, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States* 56 (Kluwer Law International 1998); Meindl-Ringler, *supra* n. 3, at 32.

[35] OECD Model Tax Convention (1995): Commentaries Art. 10, para. 12, Art. 11, para. 8 and Art. 12, para. 4; Meindl-Ringler, *supra* n. 3, at 32.

[36] Meindl-Ringler, *supra* n. 3, at 32.

2.2 *Concept of Beneficial Ownership*

2.2.1 *Scope*

In the OECD MTC, the application of the beneficial ownership requirement is limited to Articles 10, 11, and 12 on cross-border flows of dividends, interests, and royalties, respectively. The three articles distribute the taxing rights between the state of source and the state of residence in the same fashion. The primary taxing right is afforded to the state of residence (subject to the obligation to grant relief for double taxation[37])[38] while the state of source is entitled to withhold tax on (outbound) payments. The taxing rights of the state of source are, however, subject to limitations; withholding tax is to be reduced if, among others, the income concerned being beneficially owned by a resident of the other contracting state, the state of residence.

2.2.2 *Purpose*

2.2.2.1 Introduction

There are two main perspectives to the primary purpose that beneficial ownership aims to serve in a tax treaty context: (1) beneficial ownership intends to counter abuse and (2) beneficial ownership functions for attributing income. Both perspectives will be discussed in the below information. The authors suggest – as a spoiler alert – that a combination of both purposes should be preferred.

2.2.2.2 Anti-abuse

A common view is that the beneficial owner test primarily serves to counter abuse.[39] More specifically, it would prevent treaty advantages from being available if the recipient of the dividends, interests, or royalties is an interposed intermediary with nothing more than a legal right to the payment that it holds for the benefit of an ultimate interdependent third party who, without this artificial chain, would not have direct access to these benefits as it is a resident of a third non-party tax jurisdiction.[40] Accordingly, the test seeks to protect the bilateral nature and the residency requirement of tax treaty entitlement from the above form of abuse.[41] This goal has several interlinked anti-abusive facets.

The most eminent one is to eliminate the possibility for taxpayers to treaty-shop through structured arrangements. Treaty-shopping can be described as the attempt by persons who are resident of third states to indirectly access the benefits of a treaty between two contracting states.[42] According to Rosenbloom, it connotes a premeditated effort to take advantage of the international tax treaty network and a careful selection of the most favourable tax treaty for a specific purpose.[43] The choice of a particular DTC will be influenced by factors such as the level of the tax rate reduction for withholding taxes on dividends and interest as the rates suggested by the MTC are not obligatory. States can establish lower thresholds (but not higher) or an exemption in the state of source (as applies for royalties).[44] Besides causing a loss in state revenue, treaty-shopping undermines state sovereignty.[45] Another facet is to combat tax avoidance.[46] Through treaty-shopping, the third party genuinely avoids paying *full* withholding taxes on its payment to the state in which it arises (state of source). This, in turn, illegitimately restricts the source state's taxing rights that are especially crucial to developing countries that are often home to investments but not to investors. The clause also helps to safeguard the source country's interests.

Even among those that attach an anti-abusive purpose to the requirement, debate continues as to whether it (should) constitute(s) a narrow rule that tackles only a specific form of abuse or a broad rule that applies to any form of treaty abuse, hence the United Kingdom and the UN thought to convert it into a general clause.[47] Contrary to the United Kingdom's

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[37] Articles 10(1)(2), 11(1)(2), 12(1) OECD Model Tax Convention (2017).

[38] Primary in the case of Arts 10 and 11 OECD MC and exclusive in the case of Art. 12 OECD MC.

[39] D. G. Duff, *Beneficial Ownership: Recent Trends*, in *Beneficial Ownership: Recent Trends,* 50–51 (M. Lang et al. eds, IBFD 2013).

[40] A. V. Demin & A. V. Nikolaev, *The Beneficial Owner Concept in the Context of BEPS: Problems and Prospects,* 13(1) Fin. L. Rev. 3 (2019).

[41] *Ibid.*, at 2.

[42] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6–2015 Final Report,* OECD/G20 Base Erosion and Profit Shifting Project 17 (OECD Publishing 2015).

[43] H. D. Rosenbloom, *Tax Treaty Abuse: Problems and Issues,* 15 L. & Pol'y in Int'l Bus. 766 (1983).

[44] OECD Model Tax Convention (2017): Commentaries to Art. 10, para. 13 and Art. 11, para. 7.

[45] OECD BEPS Action 6 Final Report, *supra* n. 42, at 9.

[46] Treaty shopping is a form of tax avoidance. As stated by De Broe, tax avoidance can be described as 'strategies pursued by a taxpayer to reduce his tax liability by carefully structuring the factual situation and the legal or contractual basis. The taxpayer stays within the law, discloses all facts to the tax authorities, but may act against the object and purpose ("spirit") of the law.' *See* L. De Broe, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties, and EC Law in Relation to Conduit and Base Companies,* Doctoral Series vol. 14, v (IBFD 2008).

[47] To illustrate, Avery Jones, Vann, and Wheeler argue that 'the sole purpose of the concept should be the exclusion of custodians and persons in a similar situation from treaty protection in their own right' and that 'extending the beneficial ownership concept beyond custodian and similar situations simply invites confusion and disputation'. *See* J. F. Avery Jones, R. Vann & J. Wheeler, *OECD Discussion Draft 'Clarification of the Meaning of "Beneficial Owner" in the OECD Model Tax Convention' Response by John Avery Jones, Richard Vann and Joanna Wheeler* 5 (2011), http://www.oecd.org/tax/treaties/48420432.pdf (accessed 9 Dec. 2020).

initial suggestion, beneficial ownership only relates to the passive income articles in the MTC instead of making it a stand-alone requirement for tax treaty application. Vann contends this can be explained through three attributes that are peculiar to these provisions: they are the only ones in the MTC that contain a fixed rate reduction from source taxation, the revenue depends on payment rather than income that is derived, and such a payment is often made to intermediaries.[48,49] Allegedly, the combination of the three renders Articles 10, 11, and 12 OECD MTC particularly susceptible to issues of abuse[50] which beneficial ownership seemed to alleviate.

2.2.2.3 Attribution of Income

Other authors characterized the beneficial ownership test as an attribution of income rule.[51] Accordingly, the search for the beneficial owner entails determining whether the recipient of the income is subject/liable[52] to tax on that income under the law of the state of residence.[53]

A negative outcome suggests that the recipient might not be the (true) owner but most importantly means that there is no risk of double taxation. Thus, the recipient should theoretically not be entitled to treaty-benefits thereby rendering the beneficial ownership test as no longer being relevant.[54]

A positive outcome indicates that the recipient is likely to be taxed twice on the same item of passive income and, since the primary purpose of the model is to avoid double taxation, treaty-benefits should be available, which renders the recipient the entitled owner. Perhaps this is all it comes down to as the beneficial owner would thus be the person to whom the income is attributed for tax purposes.[55]

2.2.2.4 The Authors' Perspective: A Combination of the Two Approaches

According to the authors, the two purposes above are not mutually exclusive. Therefore, the authors prefer a combination of both approaches. As a first step, the tax liability of the recipient in the state of residence could be assessed, however, this should not be conclusive that treaty-benefits should be granted. A second step involves assessing whether other factors, i.e. treaty abuse, do not render the granting of relief inappropriate.[56] From that perspective, the anti-abuse character of the beneficial ownership requirement appears to be more relevant.

2.2.3 *Nature*

No consensus has been reached as to whether the beneficial ownership requirement is a legal as opposed to an economic test. Stated differently: whether an inquiry into the beneficial owner of a specific case should be performed on an *economic* or *substantial* basis, i.e. based on the facts, as opposed to *formally* or *legally,* i.e. based on a legal analysis. Under a more formal approach and despite the actual economic situation, it would be easier to structure a situation to meet the beneficial ownership requirement.

Although both perspectives have proponents, the economic one seems to receive the most support. This is also true for the authors. An influencing factor is the substance-over-form principle, a general anti-avoidance tool referred to several times throughout the MTC as an alternative (domestic) measure to which the contracting states to a DTC may have recourse under certain circumstances.[57] The OECD Glossary of Tax Terms defines it as follows: 'Doctrine which allows the tax authorities to ignore the legal form of an arrangement and to look to its actual substance in order to prevent artificial structures from being used for tax avoidance purposes'.

The principle looks beyond the form, i.e. to the facts and circumstances, in order to focus on the economic reality of the transactions in a specific situation. It often entails investigating factors such as whether the recipient of the income has 'economic substance', e.g. power over the income and assets as well as the capacity to use them, a real economic

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[48] Vann, *supra* n. 21, at 284.

[49] For the discussion on the concept of 'paid', also *see* para. 2.3.3.2.1.

[50] J. Wheeler, *The Attribution of Income to a Person for Tax Treaty Purposes,* 59(11) Bull. for Int'l Tax'n 479 (2005).

[51] The authors disagree with the view that the beneficial ownership rule is only an attribution of income rule. Such a view implies denying that the concept was, first and foremost, introduced to deal with treaty abuse situations. Both legislative history and current OECD MC material are evidence that there is more to it. In the authors' opinion, allocating income is a function that the concept has, in the first phase, an anti-abuse test. Indeed, the beneficial owner will be the one who is attributed income for income tax purposes as, otherwise, no risk of double taxation occurs, and the granting of treaty benefits becomes irrelevant. However, stopping there does not prevent the recipient from acting as an intermediary and transferring the treaty-favoured income to a resident of a third state, *see* 2.2.2.3.

[52] Both are mentioned in the literature. Being subject-to-tax and liable to tax are distinct requirements. The former usually determines whether the actual tax treatment occurs, and the latter is less strict and looks more at whether the income is attributed for tax purposes and whether a person is liable to tax irrespective of the actual taxation (tax-exempt entities are usually liable to tax but not subject to tax). *See* Meindl-Ringler, *supra* n. 3, at 11–12.

[53] J. D. B. Oliver et al., *Beneficial Ownership,* 54(7) Bull. for Int'l Tax'n 322 (2000); Meindl-Ringler, *supra* n. 3, at 334; D. G. Duff, *Beneficial Ownership: Recent Trends,* in *Beneficial Ownership: Recent Trends,* 16 (Michael Lang et al. eds, Amsterdam 2013).

[54] Oliver et al., *supra* n. 53, at 322.

[55] *Ibid.*; A. M. Jiménez, *Beneficial Ownership: Current Trends,* 2(1) World Tax J. 53 (2010).

[56] Oliver et al., *supra* n. 53; Jiménez, *supra* n. 55; Meindl-Ringler, *supra* n. 3, at 333–334.

[57] B. Kosters, *Substance Over Form Under Tax Treaties,* 19(1) Asia-Pacific Tax Bull. 6–7 (2013)..

activity, employees, etc.[58] Some authors believe the principle to be inherent in tax treaties and based on international law.[59] Similarly, it has been argued that, when the beneficial ownership requirement is absent in a treaty, implicit anti-abuse doctrines such as substance-over-form gives rise to the same result.[60] It has also been observed that the substance-over-form approach was usually favoured by domestic courts when searching for the beneficial owner in a case.[61] Hence, there are states that hold the concept of beneficial ownership in a tax treaty to be based on the doctrine.[62]

Others maintain the finding of the beneficial owner to be the outcome of strict legal observations. Those authors prefer an inquiry into what ownership an intermediate person possesses in order to determine whether it possesses those of a beneficial owner.[63] An argument in favour of a legal test is the certainty that it would bring if clear legally binding conditions are followed (instead of basing an analysis on facts and circumstances). However, according to the authors, the more economic analysis is to be preferred as it is actually the legal constructing of interposed companies that could cause treaty-shopping. This would jeopardize the purpose of the beneficial ownership requirement.

2.3 *Reasonings on the Beneficial Ownership Concept*

2.3.1 *No Definition of Beneficial Ownership and No OECD Court*

It goes without saying that reference would primarily be made for a definition of beneficial ownership if it were embodied in the relevant articles. Elaborating on other interpretative material would only be secondary. Similarly, if an OECD court existed, referring to how the OECD interprets beneficial ownership would be straightforward as a reference to case law would suffice. This, however, is not the case. The OECD MTC does not include a definition, and there is no OECD court. As such, additional interpretational guidance is to be sought elsewhere.

Insofar as the MTC and those tax treaties modelled on it are concerned, Article 3(2) OECD MTC lays down an interpretative rule 'for terms used in the Convention but not defined therein'.[64] In parallel, the OECD commentaries are known to constitute an interpretative aid of a special importance in regards tax treaties' provisions in spite of their non-binding character.[65] This is reiterated throughout the preamble of the MTC in which it is stated that, inter alia, the intention of the commentaries is to illustrate or interpret a provision, that they became a 'widely-accepted guide to the interpretation and application' of DTCs' provisions, and that 'member countries should conform to the MTC as interpreted by the Commentaries'.[66]

While, in the previous paragraphs, the focus was on the beneficial ownership coming into existence, the following paragraphs will provide for an overview of the material interpretative issues in OECD documents.

2.3.2 *Article 3(2) OECD Model Convention: Domestic or Autonomous Treaty Meaning?*

An interpretative clause has the special feature of being a dependent provision as its primary function is to 'refer to other substantial norms'.[67] An inquiry into Article 3(2) OECD MTC is concerned with how the OECD intends undefined substantial norms – beneficial ownership included – to be construed by interpreters rather than with the OECD's own interpretation of those undefined terms.

The article can be divided into three limbs: (1) regarding the application of the convention at any time by a contracting state, any term not defined in the convention shall have the meaning that it has at that time under the law of that state for the purposes of the taxes to which the convention applies, (2) unless the context otherwise requires, or (3) the competent authorities agree to a different meaning pursuant to the provision of Article 25 OECD MTC.[68] As the article is open to interpretation, which of the two limbs applies in the case of beneficial ownership is highly debated.

Notes

[58] Meindl-Ringler, *supra* n. 3, at 10 and 323.

[59] De Broe, *supra* n. 46, at 444.

[60] Van Weeghel, *supra* . 34, at 165–166.

[61] Jiménez, *supra* n. 55, at 51.

[62] Kosters, *supra* n. 57, at 9.

[63] Du Toit, *supra* n. 18, at 9.

[64] OECD Model Tax Convention (2017): Commentary to Art. 3, para.11.

[65] B. J. Arnold, *The Interpretation of Tax Treaties: Myth and Reality,* 64(1) Bull. for Int'l Tax'n 8 (2009); K. Cejie, *The Commentaries on the OECD Model as a Mechanism for Interpretation with Reference to the Swedish Perspective,* 71(12) Bull. for Int'l Tax'n 665 (2017).

[66] OECD Model Tax Convention (2017): Introduction, points 3, 15, 28, 29, 29.2, 29.3.

[67] E. van der Bruggen, *Unless the Vienna Convention Otherwise Requires: Notes on the Relationship Between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties,* 43(5) Eur. Tax'n 143 (2003).

[68] The third limb: ' … or the competent authorities agree to a different meaning pursuant to the provision of Art. 25' can be put aside for now as it is the object of case-by-case observations and does not leave much opportunity for debate. If the contracting states to a tax treaty have a mutual agreement (MA) on the meaning of the term beneficial ownership, it is clear that this common interpretation will prevail over any other.

The OECD commentaries bring the following precisions: the domestic law refers to the law of the state of source that is in force 'when the Convention is being applied, i.e. when the tax is imposed'.[69] It does not necessarily refer to tax law but to any branch of law under which beneficial ownership has a meaning, however, if a tax meaning exists, it should be used.[70] When the undefined term has a meaning for purposes of 'the laws imposing the taxes to which the Convention applies', that meaning shall prevail over all others.[71]

Arguments based on the terminology used by the OECD under Article 3(2) have been advanced in favour of a domestic meaning of beneficial ownership. A common one is that the word 'require' is a word of some force and, accordingly, only a 'reasonably strong' context could prevail over the application of a domestic meaning.[72] As it is allegedly more difficult to apply a treaty meaning rather than a domestic one, it has been argued that Article 3(2) OECD MTC 'establishes a preference for domestic interpretation'.[73] Another argument is that the provision does not require a precise definition of beneficial ownership but only that the concept has a meaning under the law of the state applying the convention, which eases the application of a domestic meaning.[74]

Whether 'the context otherwise requires' under Article 3(2) OECD MTC is another debated question.[75] The term context poses difficulties. According to the OECD commentaries, it is determined particularly by both the intention of the contracting states when signing the convention and the meaning given to the undefined term in the other contracting state (than the one applying the convention) which leaves a margin of freedom to the competent authorities.[76] The context is usually understood as including the MTC and its commentary.[77] It is generally agreed that its meaning differs from and is wider than the 'Vienna context' of the Vienna Convention on the Law of Treaties (VCLT).[78] A common view is that it must be interpreted broadly enough[79] to comprise 'anything that can normally be taken into account or to which one may have recourse in interpreting the treaty'.[80]

The authors follow the OECD's approach in this discussion. The OECD has been firm on the point that the context otherwise requires when interpreting beneficial ownership.[81] The 2003 amendments constitute a first indication for which it was stated that beneficial ownership 'should be understood in its context and in light of the object and purposes of the Convention … '. The 2014 amendments made the intention of the OECD clear by stating that beneficial ownership should not be given a domestic meaning. The one allusion that was made to a domestic meaning of beneficial ownership in 2011 was subsequently deleted in 2012.

Most scholars agree and hold that beneficial ownership should be given an autonomous treaty meaning (also referred to as international (fiscal) meaning or contextual meaning).[82] Solid arguments have been advanced. For instance, beneficial ownership initially did not have a meaning at all in most civil law states and still often does not.[83] Further, even when beneficial ownership does have a meaning under domestic law, as is the case in a significant amount of common law countries, it is a specific one that does not easily adapt to the context of a tax treaty.[84]

Notes

[69] OECD Model Tax Convention (2017): Commentary to Art. 3, para.11 . This is known as the 'ambulatory approach'.

[70] OECD Model Tax Convention (2017); Commentary to Art. 3, para. 13.1; M. N. Kandev, *Tax Treaty Interpretation: Determining Domestic Meaning Under Article 3(2) of the OECD Model,* 55(1) Can. Tax J. 40 (2007).

[71] OECD Model Tax Convention (2017): Commentary to Art. 3, para.13.1.

[72] J. F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model-I,* 1 Brit. Tax Rev. 108 (1984).

[73] In the words of Kandev. *See* Kandev, *supra* n. 70, at 68.

[74] Du Toit, *supra* n. 11, at 173; Meindl-Ringler, *supra* n. 3, at 295.

[75] Kandev, *supra* n. 70, at 68; Meindl-Ringler, *supra* n. 3, at 292; Bruggen, *supra* n. 67, at 143.

[76] OECD Model Tax Convention (2017): Commentary to Art. 3, para. 12.

[77] Meindl-Ringler, *supra* n. 3, at 293; Bruggen, *supra* n. 67, at 147.

[78] Avery Jones et al., *supra* n. 72, at 104; Meindl-Ringler, *supra* n. 3, at 292; Bruggen, *supra* n. 67, at 144.

[79] Avery Jones et al., *supra* n. 72, at 104; Meindl-Ringler, *supra* n. 3, at 292; Bruggen, *supra* n. 67; Kandev, *supra* n. 70, at 68.

[80] In the words of Avery Jones et al. *See* Avery Jones et al., *supra* n. 72, at 104.

[81] Already in 2000, Libin came up with the conclusion that the drafters of the OECD Model had 'the intention to develop an international understanding, a common meaning of the term that would be used, and would be understood, by all countries that adopt the OECD Model'. *See* Oliver et al., *supra* n. 53, at 315.

[82] OECD Model Tax Convention (2012): Revised Proposals Concerning the Meaning of 'Beneficial Owner' in Arts 10, 11 and 12, at 3.

[83] Meindl-Ringler, *supra* n. 3, at 296.

[84] Meindl-Ringler, *supra* n. 3. If, in such common law situation, the domestic interpretation of beneficial ownership should be followed for tax treaty purposes, it could have, in the authors' opinion, the unsuitable effect that several companies cannot be considered the beneficial owner of certain items of income for tax treaty purposes, for instance, when those companies are in liquidation. It should be made clear that these companies, as well as trusts that do not distribute income, could be considered as beneficial owners for tax treaty purposes.

2.3.3 *The Evolution of OECD Guidance on Beneficial Ownership*

2.3.3.1 The Use of Conduit Companies Report 1986

In 1986, the OECD published the Conduit Companies Report in relation to the improper use of tax conventions through artificial entities discussed in the commentary to Article 1 OECD MTC 1977.[85] In essence, it excludes, in addition to agents and nominees, conduit companies from the scope of the beneficial owner profile.[86]

A reference is made to the beneficial ownership test depriving agents and nominees from treaty benefits under Articles 10–12 OECD MTC. It is further stated that this would equally apply to 'other cases where a person enters into contracts or takes over obligations under which he has a similar function to those of a nominee or an agent'. The report notes in this regard that, likewise, 'the limitation is not available when, *economically*, it would benefit a person not entitled to it who interposed the *conduit company* as an intermediary between himself and the payer of the income' (emphasis added).[87]

A conduit company is usually a corporation but can also be a partnership, a trust, or a similar entity.[88] Guidance is provided as to when such entities should, just like agents and nominees, not be regarded as the beneficial owner of the income, specifically, when 'though the formal owner of certain assets, it has very narrow powers which render it a mere fiduciary or an administrator acting on account of the interested parties (most likely the shareholders of the conduit company)'.[89]

The work recognizes that, in practice, it is difficult for the state of source to categorize an entity as an intermediary on the basis of these criteria. The only guideline it provides is the fact that an entity merely holding assets or rights is indicative that further examination might be necessary but not sufficient to draw a conclusion.[90] The report somehow suggests that agents and nominees were taken as examples of persons that should be barred from treaty benefits.[91] It began to construct a beneficial ownership test with excluding attributes common to a nominee, an agent, and a conduit company. A formal owner holding very narrow powers should be deprived from treaty privileges which renders it a fiduciary or administrator accountable to a third party.[92] As a practical hint, it draws attention to holding companies. In addition, the wording of the text adds an economic dimension to it. What matters is who economically benefits from the situation at hand.

2.3.3.2 The Amendments to the OECD Model Convention Commentary 2003

Beneficial Ownership Clarifies 'Paid … to a Resident'
The OECD states introduced the concept of beneficial ownership to clarify the meaning of the words 'paid … to a resident' in relation to the articles on dividends and interests.[93] The wording 'was introduced … to' casts doubt as it suggests that it constitutes the requirement's original and main purpose while it does not actually, or at least not clearly, align with the OECD's initial discussions in 1977. This has also contributed to the qualification of the test as an attribution of income rule.[94] The remark is often made that having recourse to an undefined term (beneficial ownership) to clarify another undefined term (paid to) is unlikely to be fruitful.[95]

As far as royalties are concerned, beneficial ownership is said to clarify the application of Article 12 'in relation to payments made to intermediaries',[96] which is clearer than the explanation under Articles 10 and 11.[97]

Both statements are followed by the same explanatory word: the mere fact that the income was immediately received by (replaced by 'paid direct to' in 2014)[98] a resident of a state with which the state of source has concluded a convention should not suffice for the latter to surround its right to tax such income. Therefore,

Notes

[85] OECD, *Double Taxation Conventions and the Use of Conduit Companies* (OECD Publishing 1986), point 1.

[86] *Ibid.*, point 14 b.

[87] *Ibid.*

[88] *Ibid.*, point 2.

[89] *Ibid.*, point 14 b.

[90] *Ibid.*

[91] Meindl-Ringler, *supra* n. 3, at 49; D. Weber, *The Proposed EC Interest and Royalty Directive*, 9(1) EC Tax Rev. 23 (2000).

[92] Du Toit, *supra* n. 11, at 218; B. Malek, *The Concept of Beneficial Ownership in Tax Treaty Practice*, Master Thesis University of Lausanne 10 (2018), https://serval.unil.ch/resource/serval:BIB_C262197C500A.P001/REF (accessed 9 Dec. 2020).

[93] OECD Model Tax Convention (2003): Commentaries to Art. 10, para. 12 and Art. 11, para. 8.

[94] Jiménez, *supra* n. 55, at 53.

[95] Vallada, *supra* n. 23, at 42.

[96] OECD Model Tax Convention (2003): Commentary to Art. 12, para. 4.

[97] Meindl-Ringler, *supra* n. 3, at 41.

[98] OECD Model Tax Convention (2014): Commentaries Art. 10, para. 12 and Art. 11, para. 9.

currently, the resident still must pass the beneficial owner threshold.[99]

A more constructive interpretation of the OECD's intent involves focusing on this limb and not the first one. What should be retained is that beneficial ownership makes the restriction of source taxation – and thus the availability of treaty privileges – dependent on 'more substantive characteristics' [100] of those privileges' claimant. In the authors' view, Meindl-Ringler remarkably observed that the concept does not clarify 'paid to' but elucidates the required characteristics of the claimant.[101] A further consideration is that, in this aspect, a link between beneficial ownership and the protection of the source state's interests can be established. Thus far, the explanation is not yet satisfactory and still leaves too many open ends.

Prevention of Fiscal Evasion and Avoidance

The commentary continues by mentioning that the term is not to be used in a narrow technical sense. This statement will be discussed below as it was further clarified in 2014. Instead, it is provided that 'it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance'.[102] This supports the view that the OECD intends the concept to carry an anti-abuse connotation.

No Risk of Double Taxation

The amended 2003 commentary brings a new perspective to the exclusion of agents, nominees, and 'resident simply acting as a conduit for another person who in fact receives the benefit of the income concerned'[103] from treaty protection. Other than stating that the involvement of such intermediaries enables abuse, the OECD indicates that they are denied the limitation of source taxation on account of the fact that 'no potential double taxation arises'. It is further explained that this is so as, although being residents of the other contracting state (state of residence), the latter does not treat them as 'the owner of the income for tax purposes'.[104] This implies that facing a potential risk of double taxation is a condition to qualify as the beneficial owner.

'As a Practical Matter'

The amendments further incorporate the considerations of the 1986 report in the body of the model convention commentary text albeit with modifications. Notably, it provides that, whether one has very narrow powers should be established from a factual perspective[105]: ' … a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, *as a practical matter*, very narrow powers … ' (emphasis added).[106] Accordingly, what appears decisive is the powers that a specific person has in practice, suggesting that the powers as formally/legally distributed are not decisive.

2.3.3.3 The 2014 Amendments

Introduction

In 2011, a draft entirely dedicated to the clarification of the meaning of 'beneficial owner' in the model was published with the aim to propose modifications to the existing commentaries to Articles 10–12 OECD MTC (as amended in 2003).[107] Public comments were gathered, and the draft was revised in 2012[108] to eventually be incorporated into the MTC in 2014.

No Narrow Domestic Technical Meaning

Precision was made in regards the 2003 statement that beneficial ownership 'is not used in a narrow technical sense'. The OECD clarifies that it does not intend the term 'to refer to any technical meaning that it could have had under the domestic law of a specific country (such as the meaning that it has under the trust law of many common law countries)'.[109] Rather, it should be understood in its context in light of the object and purposes of the convention.

It is worth mentioning that the discussion draft 2011 initially proposed to end the clarification with the following sentence: 'This does not mean, however, that the domestic law meaning of "beneficial owner" is automatically irrelevant for the interpretation of that term in the context of the Article: that domestic law meaning is applicable to the extent that it is consistent with the

Notes

[99] OECD Model Tax Convention (2003): Commentaries to Art. 10, para. 12 and Art. 11, para. 8.

[100] In the words of Meindl-Ringler. *See* Meindl-Ringler, *supra* n. 3, at 44.

[101] Meindl-Ringler, *supra* n. 3, at 40.

[102] OECD Model Tax Convention (2003): Commentaries Art. 10, para. 12 and Art. 11, para. 8 and Art. 12, para. 4.

[103] In reference to the Conduit Company Report 1986, *supra* n. 85.

[104] OECD Model Tax Convention (2003): Commentaries to Art. 10, para. 12.1, Art. 11, para. 8.1, and Art. 12, para.4. This approach coincides with both the Partnership Report 1999 and the Collective Investment Vehicles Report 2010. Elaborating on those reports is outside the scope of this study.

[105] Du Toit, *supra* n. 18, at 5.

[106] OECD Model Tax Convention (2003): Commentaries Art. 10, para. 12.1, Art. 11, para. 8.1 and Art. 12, para. 4.1.

[107] OECD, *OECD Clarification of the Meaning of 'Beneficial Owner' in the OECD Model Tax Convention Discussion Draft*, 29 Apr. 2011–15 July 2011 (OECD, Publishing 2011).

[108] OECD, *OECD Model Tax Convention: Revised Proposals Concerning the Meaning of 'Beneficial Owner' in Articles 10, 11 and 12,* 19 Oct. 2012–15 Dec. 2012 (OECD Publishing 2012).

[109] OECD Model Tax Convention (2014): Commentaries to Art. 10, para. 12.1, Art. 11, para. 9.1 and Art. 12, para. 4.

general guidance included in this Commentary'.[110] It was subsequently deleted in the 2012 revised draft as it was considered 'potentially confusing'.[111]

Beneficial Owner Defined?

The 2014 amendments mark the first attempt by the OECD to provide a definition of the term.

If Commentary§10.2 to Article 11 is considered, it essentially establishes the following elements:

> Where the recipient of interest does have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the "beneficial owner" of that interest. It should also be noted that Article 11 refers to the beneficial owner of interest as opposed to the owner of the debt-claim with respect to which the interest is paid, which may be different in some cases.[112]
>
> Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person.[113]

The definition is centred around two ownership attributes, specifically, 'the right to use and enjoy'. Focusing on the enjoyment of the income intimates that an important factor is the economic benefit derived from the dividends, interests, or royalties.[114]

Against all odds, terms such as 'powers' or 'control' are not discussed.[115] It is nonetheless provided that the right to use and enjoy must not be constrained by a contractual/legal obligation to forward the payment that is received to another. If such an obligation exists, the recipient would not qualify as the beneficial owner. Legal documents usually lay down the existence of the obligation, however, the OECD indicates that it might be necessary to perform a facts and circumstances analysis, i.e. to examine the substance of the case. As such, the OECD focuses on the owner of the passive income (i.e. dividends, interests, or royalties) as opposed to the owner of the underlying assets (e.g. shares, debt-claims, right, or property).[116]

Beneficial Ownership Targets a Specific Form of Abuse

The OECD explicitly mentions that 'the concept of beneficial owner deals with some forms of tax avoidance (i.e. those involving the interposition of a recipient who is obliged to pass on the interest to someone else)' but 'does not deal with other cases of treaty shopping'.[117] The intention is clear that the requirement as introduced under Articles 10, 11 and 12 OECD MTC targets only these specific cases.

As other forms of treaty shopping may occur, it was necessary to specify that the granting of the beneficial owner status to a resident recipient in the other contracting state does not automatically imply the granting of the limitation on tax at source to that person. In the event of other cases of abuse, treaty benefits should also not be granted.[118]

The OECD provides examples of different ways to address those situations that are not dealt with under the beneficial ownership test: specific anti-abuse provisions in treaties, general anti-abuse rules, and substance-over-form or economic substance approaches. It also clarifies the relationship between the beneficial ownership requirement and those rules, specifically, that the requirement does not and must not be understood to exclude their application.[119]

2.3.3.4 BEPS Action 6, MLI and the 2017 OECD MC

Around the time that the 2014 OECD MC was published, the OECD initiated its Action against Base Erosion and Profit Shifting (BEPS). In 15 Action Plans, the OECD wanted to come with an approach with the broadest possible scope to counter mismatches, abuse, and double non-taxation. BEPS Action Plan 6 related to the prevention of tax treaty abuse.

Already in the original discussion draft, the OECD explained the history of tax treaty abuse and how this was countered in the past. One of the examples provided

Notes

[110] OECD, *supra* n. 107, at 3.

[111] OECD, *supra* n. 108, at 3.

[112] OECD Model Tax Convention (2014): Commentaries to Art. 10, para. 12.4, Art. 11, para. 10.2 and Art. 12, para. 4.3.

[113] *Ibid.*

[114] R. Danon, *Clarification of the Meaning of 'Beneficial Owner' in the OECD Model Tax Convention-Comment on the Apr. 2011 Discussion Draft,* 65(8) Bull. for Int'l Tax'n 439 (2011).

[115] *Ibid.*

[116] OECD Model Tax Convention (2014): Commentaries to Art. 10, para. 12.4, Art. 11, para. 10.2 and Art. 12, para. 4.3.

[117] *Ibid.*

[118] *Ibid.*

[119] *Ibid.*

was the coming into existence of the beneficial ownership requirement. The discussion draft recognized[120]:

Finally, the on-going work on the clarification of the 'beneficial owner' concept has allowed the OECD to examine the limits of using that concept as a tool to address various treaty shopping situations. As indicated in proposed paragraph 12.5 of the Commentary on Article 10, which was included in the latest discussion draft on the meaning of 'beneficial owner'[121]*:*

> *{w}hilst the concept of "beneficial owner" deals with some forms of tax avoidance (*i.e. *those involving the interposition of a recipient who is obliged to pass on the dividend to someone else), it does not deal with other cases of treaty shopping and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.*

Essentially, the OECD considered beneficial ownership a method to avoid the abuse of tax treaties but only in scope of the Articles 10 to 12 OECD MTC. Besides that, as stated by Bergedahl, the concept of beneficial ownership is potentially a potent mechanism with which to counter treaty shopping. However, history demonstrates that the absence of a text-based definition together with divergent meanings ascribed by domestic courts has diluted the efficacy of the concept.[122] As such, many forms of treaty abuse could still arise. Therefore, the OECD aimed at finding an alternative way to counter tax treaty abuse besides the application of the more specific beneficial ownership requirement. These included amending the preamble to the OECD MTC to make it clear that the aim of a treaty is not only to prevent double taxation but to prevent double non-taxation and abuse as well and by the introduction of more general anti-abuse measures in the tax treaty.[123]

As a result of that, a remark on beneficial ownership was no longer made in the Public Discussion Draft on the Follow up Work on BEPS Action 6.[124] In the Revised Discussion Draft for BEPS Action 6, a proposal was made for new Articles 11 and 12. Both articles still referred to beneficial ownership as a requirement. The concept, however, was not further elaborated on nor was it defined and no examples were provided on how to interpret it.[125,126]

In the final report, it was agreed to add an entire explanatory section to the Commentary of Article 1 of the OECD MTC to address tax avoidance through tax conventions.[127] This part of the commentary begins with a more general remark that tax treaty abuse should be able to be countered by a general anti-abuse measure, i.e. the so-called Principal Purpose Test (or PPT) that is included in Article 29, paragraph 9 of the OECD MTC. Some authors indicated that the sole application of beneficial ownership was insufficient to prevent treaty abuse, therefore, an additional (and not a replacement) PPT had to be introduced.[128] In the current point 63 of the Commentary to Article 1, it was added:

For instance, some forms of tax avoidance have already been expressly dealt with in the Convention, e.g. *by the introduction of the concept of 'beneficial owner' (in Articles 10, 11, and 12) and of special provisions such as paragraph 2 of Article 17 dealing with so-called artiste-companies. Such problems are also mentioned in the Commentaries on Article 10 (paragraphs 17 and 22), Article 11 (paragraph 12) and Article 12 (paragraph 7).*

Apparently, the already existing and targeted anti-abuse rule of beneficial ownership appeared to be insufficient for countering all forms of treaty abuse. In that respect, the new PPT was included in the 2017 OECD MTC. This broadens the scope of treaty anti-abuse possibilities. It does not, however, limit the scope of beneficial ownership as a requirement on its own.[129] Beneficial ownership, as a Specific Anti-Abuse Rule (hereafter: SAAR), can still co-exist beside the PPT.[130] Even though

Notes

[120] OECD, *BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances,* Public Discussion Draft 14 Mar. 2014–9 Apr. 2014 (OECD Publishing 2015).

[121] OECD, *supra* n. 108.

[122] C. Bergedahl, *Anti-Abuse Measures in Tax Treaties Following the OECD Multilateral Instrument – Part 1,* 72(1) for Int'l Tax'n (2018).

[123] In principle, this would not have an effect on the beneficial ownership requirement in itself. However, as stated by De Broe, it cannot be excluded that courts may – based on the tax treaty's stated objective of prevention of tax avoidance and independently from the PPT – deny the status of beneficial owner to a recipient of income. This individual's right to use and enjoy the income must not be constrained by a legal or contractual obligation to pass on the payment i.e. received to another person but when the facts and circumstances show that, in substance, the recipient pays on most of the income that he receives. *See* L. De Broe, *Role of the Preamble for the Interpretation of Old and New Tax Treaties and on the Policy of the Prevention of Treaty Abuse,* 74(4/5) Bull. for Int'l Tax'n (2020).

[124] OECD, *Follow up Work on BEPS Action 6: Preventing Treaty Abuse*, Public Discussion Draft 21 Nov. 2014–9 Jan. 2015 (OECD Publishing 2014).

[125] With Bergedahl, the authors agree that, since the BEPS Actions and its follow-up have not touched upon the beneficial ownership concept as such, the interpretation of the concept as described above is still the standing interpretation. *See* . Bergedahl, *supra* n. 122.

[126] OECD, *BEPS Action 6: Prevent Treaty Abuse*, Revised Discussion Draft 22 May 2015–17 June 2015 (OECD Publishing 2015). According to Hattingh, the working method is now to recommend hard law changes to actual tax treaties to address tax treaty abuses such as forum shopping as opposed to changing the commentary and leaving treaty language static as the latter approach did not always result in the desired outcome of uniform tax treaty interpretation. He even mentions: 'there is evidence that this very working method caused divergence of outcome in tax treaty cases decided by domestic courts that dealt with the meaning of similarly worded concepts in functionally the same type of dispute (e.g. beneficial owner cases, […])'. *See* J. Hattingh, *The Relevance of BEPS Materials for Tax Treaty Interpretation,* 74(4/5) Bull. for Int'l Tax'n (2020).

[127] OECD BEPS Action 6 Final Report, *supra* n. 42. This was included in the Commentary to Art. 1 of the 2017 OECD MC.

[128] *See* R. Karadkar, *Action 6 of the OECD/G20 BEPS Initiative: The Effect on Holding Companies*, 71(3/4) Bull. for Int'l Tax'n (2017).

[129] I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects – Part 1,* 73(11) Bull. for Int'l Tax'n (2019).

[130] The relation between beneficial ownership and the PPT is very well described by Zahra. In summary, he acknowledges their co-existence but also clearly points to the fact that, even if the recipient of passive income can be qualified as the beneficial owner (and thus meets the SAAR requirement), the treaty benefit can still be denied based on

the newly introduced PPT broadens the anti-abuse toolkit for contracting states, this does not directly affect the interpretation of the more targeted instrument of beneficial ownership.[131] As a result thereof, the authors will not specifically address the PPT and its relation to beneficial ownership in this article.

2.4 *Concluding Observations*

The concept of beneficial ownership has had a long history. It is to be given an *autonomous treaty meaning* that is distinct from the meaning that the concept has under common law jurisdictions (e.g. under trust law) from which it originates.

The OECD has attached an *anti-abuse* purpose to this tax treaty version of beneficial ownership. Beneficial ownership can now be considered as an anti-abuse rule that targets a specific form of treaty-shopping: the interposition of an intermediate recipient to illegitimately access otherwise inaccessible treaty benefits. The test has been shaped in a rather negative manner with the OECD drawing attention to attributes that a recipient should *not* possess if it wants to qualify as the beneficial owner. Such excluding attributes include having, as a practical matter, very narrow powers over the income received to the point of acting as a fiduciary/administrator that is accountable to a third party. Stated differently, in order to be the beneficial owner, the recipient should have the right to use and enjoy the income unconstrained by a contractual or legal obligation to pass on the payment that is received to another person. If a resident recipient entity (e.g. a company) does not appear to possess them, this entity will be considered as a conduit.

Lastly, the wording of the commentaries points at an *economic* construction of the test rather than a legal one. The use of expressions such as, inter alia, 'economically', 'as a practical matter' or 'in substance' support this view. The right to 'enjoy' the income focuses on the economic benefit that is derived by the recipient from the income.[132]

3 Beneficial ownership in the IRD

3.1 *History*

3.1.1 *The 1990 Draft*

A first draft of the IRD was proposed by the European Commission in 1990.[133] Beneficial ownership could not yet be found therein. The initiative was prompted by both the ideal of an internal market free from tax obstacles and the willingness to ensure equality of tax treatment between national and transnational transactions. The elimination of double taxation was considered a key element in this regard. [134] To that end, the commission suggested the abolishment of withholding taxes levied on interest and royalty payments between parent companies and subsidiaries situated in different Member States.[135] In 1994, the proposal was withdrawn as it could not be unanimously agreed within the council.[136]

3.1.2 *The 1998 Draft*

In 1998, the commission proposed a new, revised draft with the same objectives.[137] The scope of the exemption provided for in the 1990 draft was extended from payments between EU 'parent companies and their subsidiaries' to payments between EU associated companies including their permanent establishments (PEs). The exemption was, at the same time, restricted through the inclusion of the beneficial ownership requirement.[138] The

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the PPT (treaty GAAR). *See ibid.*, para. 3.4.2. In opposition, the authors must acknowledge that Danon actually pointed to the opposite situation that it would also be possible that treaty benefits would be denied based on a broad interpretation of beneficial ownership when the treaty benefits would have been granted under the PPT (since that would not be met). In that respect, *see* R. Danon, *The PPT in Post-BEPS Tax Treaty Law: It Is a GAAR but Just a GAAR!,* 74(4/5) Bull. for Int'l Tax'n (2020); and R. Danon, *The Beneficial Ownership Limitation in Articles 10, 11 And 12 OECD MC and Conduit Companies in Pre and Post BEPS Tax Treaty Policy – Do We (Still) Need It?,* in *Contemporary Tax Issues* (G. Maisto ed., IBFD 2020). Both perspectives, however, make clear that Beneficial Ownership and PPT can still be applied in a parallel way.

131 Some authors even question whether the PPT, as an open norm, would suffer the same fate as beneficial ownership and be subjected to divergent interpretations. *See* C. Bergedahl, *Anti-Abuse Measures in Tax Treaties Following the OECD Multilateral Instrument – Part 2,* 72(2) Bull. for Int'l Tax'n (2018).

132 Weber, *supra* n. 91, at 23.

133 European Commission, *Proposal for a Council Directive on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Parent Companies and Subsidiaries in Different Member States*, 91/C53/02, OJ C 53/26 (6 Dec. 1990); Distaso & Russo, *supra* n. 4, at 143.

134 *Ibid.*, Preamble points 1–3.

135 *Ibid.*, Art. 1.

136 Distaso & Russo, *supra* n. 4, at 143; European Commission, *supra* n. 4, at 2.

137 European Commission, *supra* n. 4.

138 S. Raventós, *On the Interest and Royalties Directive, or How an Espresso Measure May Become a Decaf One,* 40(7) Eur. Tax'n 286 (2000). As the beneficial ownership requirement was incorporated into the OECD Model Tax Convention in 1977, it may be wondered why the EU did not already introduce the requirement in the 1990 Draft. Rodriguez and Kofler suggest that two circumstances are of relevance in this regard. Between 1977 and 1998, an increasing number of countries, including EU Member States, inserted the requirement in their DTCs thereby familiarizing themselves with the term and learning how to use it. Thus, while preparing the 1998 draft, the EU could draw attention to the absence of the clause in the 1990 draft and properly discuss the need for it. *See* J. Lopez Rodriguez & G. Kofler, *Beneficial Ownership and EU Law*, in *Beneficial Ownership: Recent Trends* 475 (Michael Lang et al. eds, IBFD 2013). The authors would add that, between 1990 and 1998, the OECD made significant amendments to the clause in the MTC such as those in 1995. This also coincides with the statement of the CJEU in *N Luxembourg I* that the IRD; draws upon Art. 11 of the OECD *1996* Model Tax Convention and pursues the same objective, namely avoiding international double taxation; *See N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §90.

explanatory memorandum to the 1998 draft provided that taxing rights over interest or royalty income should be allocated to the Member State of residence of the beneficial owner of the income in order to better prevent double taxation. The note continues with stating that it is equally important to eradicate any tax liability in the Member State where the income arises. The adequate way to deal with this was found to be 'through a Directive which enshrines the principle that Member States should not impose taxes on interest and royalties arising in their territory but *beneficially owned* by non-resident companies, in order to ensure that such income is taxed only once in the Member State in which the beneficial owner is established' (emphasis added).[139] The implementation of EU legislation in this respect was deemed necessary as neither the Member States' domestic measures nor the tax treaties between them solved the issue in a way that suited the requirements of the internal market.[140]

The term beneficial owner is defined under Article 3(1)(c) of the 1998 draft text itself in the following way: 'The "beneficial owner" of payments of interest or royalties is a company of a Member State or a permanent establishment which holds those payments for its own benefit and not as an agent, trustee or nominee for some other person'.[141]

Unlike the OECD, the EU provided a definition of beneficial ownership as soon as the term was introduced in EU legislation. Both a company and a PE can be beneficial owners. Agents, trustees, and nominees are excluded as they hold payments 'for some other person' as opposed to 'for their own benefits'. The enumeration appears to be exhaustive. The European Council adopted the IRD in 2003 in which the text is significantly based on the 1998 draft. It was subsequently amended to constitute the directive as it currently stands, including amendments to the definition of beneficial ownership (see paragraph 3.3).

3.2 *Concept*

3.2.1 *Scope*

Article 1(1) IRD requires Member States to exempt outbound interest and royalty payments (arising in their territory) made between associated companies situated in different EU Member States, including their (EU) PEs, on the condition that the receiving entity be the beneficial owner of those payments. Beneficial ownership is thus a requirement that must be fulfilled by a recipient company/PE located in the EU in order for it to have access to the benefits of the IRD.

3.2.2 *Purpose*

In the words of the commission, the beneficial ownership condition seeks to ensure 'that relief under the Directive is not wrongfully obtained through the artificial interposition of an intermediary'.[142] The commission also stated in respect of Article 5 IRD dealing with fraud and abuse of the directive that 'the 'beneficial owner' condition is *specifically* designed to tackle artificial conduit arrangements'.[143] More precisely, the condition targets arrangements through which a non-qualifying (e.g. non-EU) creditor interposes a qualifying intermediate recipient in the EU in order to have access to the benefits of the directive to which it would not have access if the interest/royalties were paid directly to it.[144]

This type of arrangement is a form of 'directive shopping' which connotes a premeditated effort to take advantage of the limitation on source taxation provided for in the directive. Just as with treaty shopping, directive shopping is a form of tax avoidance that occurs to the detriment of the state of source. [145]

3.2.3 *Nature*

The IRD is not indicative in this respect. Insofar as companies are concerned, the 'payments for its own benefit' component of the 1998 draft definition of beneficial ownership was retained in the IRD. The authors contend that such terminology refers to 'the economic effects deriving from the payments' or the 'economic benefits'[146] and that, accordingly, the beneficial owner under the IRD is 'the person that enjoys the economic result, the profit'[147] or 'the economic recipient of the income'.[148]

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[139] European Commission, *supra* n. 4, at 3.

[140] *Ibid.*

[141] *Ibid.*, Art. 3(1)(c).

[142] European Commission, *Report from the Commission to the Council in Accordance with Article 8 of Council Directive 2003/49/EC on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Associated Companies of Different Member States,* COM/2009/0179 final 3 (17. Apr. 2009). This was brought to the author's attention in Lopez Rodriguez & Kofler, *supra* n. 138, at 217.

[143] European Commission, *supra* n. 142, at 8.

[144] Lopez Rodriguez & Kofler, *supra* n. 138, at 218.

[145] De Broe, *supra* n. 46, at 13.

[146] *Ibid.*, at 148.

[147] Lopez Rodriguez & Kofler, *supra* n. 138, at 241.

[148] Distaso & Russo, *supra* n. 4, at 148.

3.3 *Reasonings on the Beneficial Ownership Concept*

3.3.1 *Definition*

The actual definition of beneficial owner in the 1998 draft set out above was deleted and replaced by two articles, i.e. Articles 1(4) and 1(5) IRD. In 2009, the commission stated that the term beneficial owner as used under the IRD is one of EU law. Additionally, it should be interpreted uniformly throughout the Union as different interpretations by the Member States would affect the application of the IRD.[149]

However, it should be noted that, according to Article 288 of the Treaty on the Functioning of the European Union (TFEU), directives are binding 'as to the result to be achieved' but leaves the choice of form and methods to achieve those results, i.e. to fulfil the objectives of a directive, to the discretion of Member States. Therefore, EU Directives, by nature, allow Member States some freedom as to their implementation and interpretation.[150] This applies to the IRD and thus to the definition of 'beneficial owner' as under Articles 1(4) and 1(5).[151]

3.3.1.1 Article 1(4) of the Interest and Royalty Directive

Article 1(4) IRD lays down the circumstances under which a company qualifies as the beneficial owner of the interest and royalties, specifically, 'only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorized signatory for some other person'.

The central element appears to be receiving the payments for an individual's own benefit and not as an intermediary for some other person. It is generally held that the definition is rather broad and vague.[152] Moreover, both the added expression 'such as' and the use of 'or' indicate that the list of intermediaries is not exclusive.[153] Therefore, the (vague) central element of the definition is only explained with examples.[154]

'Nominees' no longer appear under Article 1(4) IRD, and no specific reason was provided in this regard.[155] Instead, authorized signatories are excluded, together with agents and trustees, from the definition because, as stated above, they receive payments for 'some other person' and thus not for their own benefit.

3.3.1.2 Article 1(5) of the Interest and Royalty Directive

Article 1(5) IRD lays down two cumulative conditions that must be met for a PE to be treated as the beneficial owner of the payments: (1) the debt-claim, right, or use of information in respect of which interest or royalty payments arise must be effectively connected with that permanent establishment and, (2) the interest or royalty payments must represent income in respect of which that permanent establishment is, in the Member State in which it is situated, subject to one of the taxes mentioned in Article 3(a)(iii) of the directive.

As a PE does not constitute a separate legal entity, the directive clarifies that, if it qualifies as a beneficial owner in respect of an item of income, no other part of the entity as a whole (e.g. the head office of the PE) can qualify as such regarding the same payments (Article 1(6) IRD).

Another implication of the nature of a PE is that it receives income for the benefit of the entity as a whole but never individually. Thus, as an alternative to the 'benefit requirement' of the definition applying to companies, it is required that the investment asset be effectively connected to the PE to substantiate that the latter has a genuine right to the income. The subject-to-tax requirement seeks to ensure that the PE is exempted from source tax on the income received only when there is a risk of double taxation.[156]

3.3.2 *Interpretation by the CJEU*

Unlike the OECD MTC, the interpretation of the IRD is subject to court review, i.e. the CJEU.

The CJEU had never provided in-depth guidance on the interpretation of beneficial ownership under EU tax law.[157] However, in 2016, it was asked to interpret the requirement from an EU law perspective in the so-called 'Danish cases' in *N Luxembourg I.*[158] The authors will

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[149] European Commission, *supra* n. 142, at 4.

[150] Meindl-Ringler, *supra* n. 3, at 309–310.

[151] Also *see* J. Korving, *Internal Market Neutrality* (Sdu 2019), § 7.2.

[152] Meindl-Ringler, *supra* n. 3, at 310; K. Eicker & F. Aramini, *Overview on the Recent Developments of the EC Directive on Withholding Taxes on Royalty and Interest Payments,* 13(3) EC Tax Rev. 142 (2004); Lopez Rodriguez & Kofler, *supra* n. 138, at 241.

[153] Meindl-Ringler, *supra* n. 3, at 300; Lopez Rodriguez & Kofler, *supra* n. 138, at 241.

[154] Eicker & Aramini, *supra* n. 152, at 142.

[155] Lopez Rodriguez & Kofler, *supra* n. 138, at 221.

[156] Meindl-Ringler, *supra* n. 3, at 301.

[157] Lopez Rodriguez & Kofler, *supra* n. 138, at 236.

[158] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7.

further elaborate on these cases in paragraph 4 and compare the interpretation with the OECD approach towards beneficial ownership.

4 Beneficial ownership interpreted: The OECD and the EU, on the same wavelength?

4.1 *Convergence Phase I: Before N Luxembourg I*

When the 1998 Draft of the IRD was published, the question rapidly arose as to the relationship between the two interpretations of the concept. Considering the fact that the directive postdates the inclusion of the concept in the model in 1977, the main interrogation was whether beneficial ownership as construed by the OECD had any type of 'influence' over beneficial ownership as defined in the directive or even whether both instruments referred to one and the same interpretation of the concept, i.e. that of the OECD MTC.[159]

Most scholars, including the authors, arrived at the following conclusion: 'beneficial owner' under the IRD carries an autonomous EU law meaning that is independent from the one that can be found in the OECD MC.[160] They based their view on different grounds such as the absence of a reference to the OECD MTC in the IRD,[161] the fact that the MTC and the IRD allegedly pursue purposes that substantially differ,[162] the fact that the directive concept explicitly excludes trustees but the model concept does not,[163] that conduit companies are excluded from the model concept but not from the concept in the directive or that the concept covers PEs in the directive but not in the model.[164] The argument was also made that the inclusion of a definition of the concept in the directive would be 'superfluous' if the meaning that the concept has in the model was to be applied.[165]

Other scholars find that the interpretation of beneficial ownership in the model has a bearing on beneficial ownership in the directive[166] and/or that the concept in the model and the concept in the directive are not so different.[167]

It can be questioned whether both perspectives actually differ. In the authors' perspective, beneficial ownership having an autonomous EU law meaning[168] does not mean that the CJEU cannot interpret the concept by finding inspiration in other sources of law, such as the OECD MTC and its commentaries, without being bound by them.[169]

4.2 *Convergence Phase II: Beneficial Ownership Interpreted and Discussed by the CJEU in N Luxembourg I et al V. Skatteministeriet*

4.2.1 *Factual Background*

In *N Luxembourg I et al*, one of the questions Denmark referred to the CJEU related to the interpretation of the concept of 'beneficial owner of the interest' for the purposes of Article 1(1) and (4) of the IRD.[170]

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[159] L. Hinnekens, *European Commission Introduces Beneficial Ownership in Latest Tax Directives Proposals Adding to the Confusion with Regard to its Meaning,* 9(1) EC Tax Rev. 43–44 (2000); Oliver et al., *supra* n. 53, at 324; Lopez Rodriguez & Kofler, *supra* n. 138, at 236; Meindl-Ringler, *supra* n. 3, at 303.

[160] This opinion is in accordance with the statement of the European Commission according to which the term beneficial ownership 'as used in the context of the Directive is one of Community law', *see* European Commission, *supra* n. 142, at 4. This line of reasoning coincides with, among others, the judgment of the CJEU in *Hoekstra*, where it was held that the terms 'worker' and 'activity as an employed person' found in Regulation No 3 of the council on social security for migrant workers (16 Dec. 1958) 'may not be defined by reference to the national laws of the Member States but have a Community meaning'. If it were to be otherwise, 'the Community rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally without any control by the Community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty' (CJEU, 23 Mar. 1982, Case C-53/81, *D.M. Levin v. Staatssecretaris van Justiti*e, ECLI:EU:C:1982:105, §11). *See* CJEU, 19 Mar. 1964, Case C-75/63, *M.K.H. Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten,* ECLI:EU:C:1964:19, which was brought to this author's attention in C-53/81 *Levin* §11. Following this reasoning, by analogy, if beneficial ownership were to be defined according to tax treaties' definitions, EU rules on a common system of taxation applicable to intra-EU interest and royalty payments would be frustrated as the meaning of the term could be fixed and modified without control by the EU institutions thereby affording Member States the ability to exclude certain persons at will from the benefit of the directive.

[161] Hinnekens, *supra* n. 159, at 43–44; Oliver et al., *supra* n. 53, at 324; Meindl-Ringler, *supra* n. 3, at 304.

[162] Hinnekens, *supra* n. 159; Oliver et al., *supra* n. 53; Meindl-Ringler, *supra* n. 3.

[163] Weber, *supra* n. 91, at 23; Meindl-Ringler, *supra* n. 3, at 304.

[164] Meindl-Ringler, *supra* n. 3, at 304.

[165] *Ibid.*

[166] Oliver et al., *supra* n. 53, at 205; S. Martinho Fernandes et al., *A Comprehensive Analysis of Proposals To Amend the Interest and Royalties Directive,* 51(9/10) Eur. Tax'n 402 (2011); Lopez Rodriguez & Kofler, *supra* n. 138, at 235–236.

[167] Meindl-Ringler, *supra* n. 3, at 304.; Martinho Fernandes et al., *supra* n. 166, at 402; F. Avella, *Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention,* 4(2) World Tax J. 120 (2012); M. Q. Rossi, *Tax Treaties, Beneficial Ownership of Income and Domestic Anti Abuse Measures, Italy's Perspective*, ABA Section of Taxation Foreign Lawyers Forum Committee 3 (2007).

[168] CJEU, 3 July 1986, Case C-66/85, *Lawrie-Blum*, ECR 2121, §16.

[169] Also *see* Opinion AG Kokott 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet*, ECLI:EU:C:2018:143.§52.

[170] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7.§83.

Stated in simple terms, non-EU private equity funds established a group of companies[171] in EU Member States – such as Luxembourg and Denmark – with the purpose of acquiring a large Danish service provider, T Denmark.[172] In order to purchase T Denmark, the private equity funds granted loans to N Denmark 1, a company that was subsequently held by companies established in Luxembourg (A Luxembourg Holding and C Luxembourg).[173] The debt securities related to the loans, in the form of interest, were remunerated from N Denmark 1 to the private equity funds and subsequently transferred by the latter to A Luxembourg Holding which in turn transferred the amount to C Luxembourg.[174] Later on, N Denmark 1 merged with C Luxembourg to become N Luxembourg 1.[175]

The Danish tax authorities refused to apply the exemption from the Danish interest withholding tax on the grounds that A Luxembourg Holding and C Luxembourg were not the beneficial owners of the interest but operated as mere conduits for the private equity funds.[176] N Luxembourg 1 contests the existence of fraud or abuse.[177]

4.2.2 *The Decision*

According to the Advocate General (AG) Kokott, 'the concept of beneficial owner must be interpreted under EU Law autonomously and independently of Article 11 of the 1977 OECD Model Tax Convention or subsequent versions'.[178] Taking a more civil law approach, she holds the beneficial owner to be the person entitled under civil law to demand payment of the interest, in other words, the civil law owner of the interest-bearing claim.[179]

The CJEU addressed the concept of beneficial ownership under Article 1(4) IRD in depth. Below, the authors will address the specific phrases from the CJEU and compare them to the OECD's interpretation (as explained above) of the beneficial ownership concept.[180] A comparison between the Article 1(5) IRD concept of beneficial ownership (in relation to PEs) with the OECD MTC concept is out of scope of this publication.

1 The concept of 'beneficial owner of the interest' of Article 1(1) IRD 'cannot refer to concepts of national law that vary in scope'.[181]

Likewise, the OECD has held that beneficial ownership should not be given a domestic meaning.[182] The OECD and the CJEU, therefore, agree that a meaning that transcends the definition that the term has in the national law of the Member States should be given to the term.

2 'The concept must be interpreted as designating an entity which *actually* benefits from the interest that is paid to it' (emphasis added).[183] According to the court, this *economic approach* is confirmed by both Article 1(4) IRD that also refers to 'the economic reality'[184] and the various expressions used by the Member States in their respective languages under the directive. More precisely, the latter 'underscores that the term "beneficial owner" concerns not a formally identified recipient but rather *the entity that benefits economically from the interest received and accordingly has the power to freely determine the use to which it is put*' (emphasis added).[185]

The OECD also adopts an economic approach to beneficial ownership.[186] The OECD's 'right to enjoy the income' is quite similar to the CJEU's 'economically benefit' from it. Likewise, having 'the power to freely determine the use of the income received' can be put in line with 'the right to use the income unconstrained by a legal or contractual obligation to pass it on to someone else'. It is also consistent with the OECD requirement that the recipient should not have, as a practical matter, only narrow powers over the income that is received.

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[171] These facts pertain to C-115/16 i.e. concerned with the proceedings of N Luxembourg 1. The other companies brought proceedings in joined cases the facts of which will not be presented as they are similar to those of C-115/16. The CJEU issued an abstract decision on the question of the interpretation of the beneficial ownership concept that equally applies to the other cases involving the payment of interest and the IRD.

[172] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §30.

[173] *Ibid.*, §32.

[174] *Ibid.*, §34.

[175] *Ibid.*, §32.

[176] *Ibid.*, §41.

[177] *Ibid.*, §43.

[178] Opinion AG Kokott (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 169, §55.

[179] *Ibid.*, §47.

[180] The comparison is limited to the beneficial ownership concept. For a more extensive summary of the Danish cases, please read L. van Hulten & J. Korving, *Svig og Misbrug: The Danish Anti-Abuse Cases*, 47(8/9) Intertax (2019).

[181] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §84.

[182] *See supra* para. 2.3.2.

[183] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §88.

[184] *Ibid.*

[185] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §89.

[186] Meindl-Ringler, *supra* n. 3, at 75.

3 As is clear from the IRD, 'only an entity established in the European Union can be a beneficial owner of interest … '[187]

In the same way, only an entity that is resident in the other contracting state may be the beneficial owner under the model.

4 According to the CJEU, the 1998 draft formed the basis of the IRD. It is further stated in this regard that, as is apparent from the 1998 draft, the IRD 'draws upon Article 11 of the OECD 1996 MTC and pursues the same objective, namely avoiding international double taxation'.[188]

The CJEU clarifies that the entire text of the 1998 draft and not only those elements in respect of which a direct reference to the 1996 MTC is made are based on the 1996 MTC, including the beneficial ownership requirement.

By making this reference, the interpretational link between the beneficial ownership requirement in the IRD and the OECD MTC is made. It indicates that the IRD adopted the term 'beneficial owner' from the model.[189] This is reflected in the language used for the definition of the term provided for under Article 3(1)(c) of the 1998 draft that excludes 'agents, nominees and trustees' because they hold a payment for some other person.[190] In terms of scope, the draft went further with the exclusion of trustees and the covering of PEs. However, this does not alter the resemblance with the 1996 MTC Commentaries that exclude an intermediary such as an agent or nominee. The essence is the same. Some authors contend that this is the reason why the text of the IRD does not provide any clarity in regard the meaning of the concept because it was simply taken from the OECD MTC.[191]

5 The concept of beneficial owner as appearing in DTCs based on the 1996 MC and 'the successive amendments of that model and of the commentaries relating thereto' are relevant when interpreting the IRD. [192] The comment is then made that ' … such an interpretation, even if it draws on the OECD's documents, has its basis in the directive itself and in its legislative history reflecting the democratic process of the European Union'.[193] 'Under the Model and its commentaries, conduit companies are excluded from the concept of beneficial owner … '..[194]

This statement of the CJEU goes to the heart of the matter in a straightforward manner. Contrary to AG Kokott's opinion,[195] the CJEU takes the approach that 'successive amendments' to the 1996 MTC and its commentary were relevant in interpreting the IRD concept of beneficial ownership. This is caused by the reference to the OECD MTC in the original IRD proposal. Additionally, the references made by the CJEU to exclude conduit companies and the fact that a narrow technical context should not be given to the concept demonstrate that the CJEU adhered to the 2003 OECD MTC Commentary. Consequently, the CJEU also took into account the 2014 amendments to the MTC that provide for guidance that is more detailed on the meaning of the term. Basically, and read in conjunction with the previous statement (4), it is now more difficult to argue that the IRD meaning of beneficial ownership is independent from the meaning that the term has in the MTC.

6 The term beneficial owner 'must be understood not in a narrow technical sense but as having a meaning that enables double taxation to be avoided and tax evasion and avoidance to be prevented'.[196]

Even though it could have been argued that, due to the autonomous EU definition of beneficial ownership under the IRD and contrary to the OECD MTC, conduit companies could be within the scope of the IRD,[197] the CJEU now made it clear, in accordance with the OECD MTC, that the IRD should also be interpreted as excluding conduit companies from the scope of the beneficial ownership concept.[198] This coincides with the statement of the commission in 2009 that the requirement of beneficial ownership in the IRD is specifically designed to tackle artificial conduit arrangements.[199]

Notes

[187] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §89.

[188] *Ibid.*, §90.

[189] Martinho Fernandes et al., *supra* n. 166, at 402; J. D. B. Oliver, *The Proposed EU Interest and Royalties Directive,* 27(6/7) Intertax 205 (1999); Lopez Rodriguez & Kofler, *supra* n. 138, at 235.

[190] Lopez Rodriguez & Kofler, *supra* n. 138, at 219.

[191] Martinho Fernandes et al., *supra* n. 166, at 402.

[192] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §90.

[193] *Ibid.*, §91.

[194] *Ibid.*, §92.

[195] Opinion AG Kokott (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 169, §53.

[196] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §92.

[197] Meindl-Ringler, *supra* n. 3, at 304.

[198] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §92.

[199] European Commission, *supra* n. 142, at 8.

7 'The mere fact that the company which receives the interest in a Member State is not its "beneficial owner" does not necessarily mean that the exemption … is not applicable. It is conceivable that such interest will be exempt … in the source State when the company which receives it transfers the amount thereof to a beneficial owner who is established in the European Union … '.[200]

It appears that the 1995 Update to the OECD MC Commentary which provides that 'the limitation of tax in the State of source remains available when an intermediary […] is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State'[201] found its way into the above paragraph of the decision. In the OECD MTC, the mere fact that the company that receives the income is an intermediary does not mean that the tax at source should not be limited. The limitation will remain available in the source state where the intermediary passes on the amount to a beneficial owner resident in the other contracting state.

4.2.3 *N Luxembourg I Et Al V Skatteministeriet Concluding Observations: A Converging Approach*

The interpretation by the CJEU reinforces and establishes that the meaning that should be provided to beneficial ownership in the IRD and the meaning that should be given to the concept in the MTC share quite a few common grounds. Additionally, the MTC concept does have a bearing on that of the directive. More than that, the meaning under the IRD can no longer be said to be fully independent from the meaning of the MTC as it is now established that the MTC and the concept therein are relevant to the interpretation of the concept in the IRD. It could be stated that both meanings are now formally 'intertwined' even without actual specific reference in the IRD on this point.

The above, however, must not be taken as meaning that both interpretations are identical concepts in the two instruments. It should not be forgotten that, upon its inclusion in the IRD, beneficial ownership therein became and remains a term of EU law and, even after the judgment of the CJEU, discrepancies remain between the two.

4.2.4 *Potential Discrepancies between IRD and MTC: Trustees?*

The beneficial ownership concept in the IRD differs from the MTC concept in two primary ways: (1) the concept of beneficial ownership in the IRD explicitly encompasses PEs (in Article 1(5) IRD) while this is not the case in the MTC and (2) some of the examples of recipients[202] that are excluded from the scope of the concept in the directive, i.e. trustees, are not explicitly omitted from the MTC. As the beneficial ownership concept in relation to PEs is not within the scope of this publication, the authors will focus on the second discrepancy.

The MTC has mostly been silent on the position of trustees in the context of the beneficial ownership concept. Legislative history demonstrates that, insofar as Article 11 OECD MTC is concerned, the proposal had initially been made to explicitly exclude trustees together with intermediaries from the scope of the beneficial ownership test. Such explicit reference, however, was not incorporated into the final version. [203] In 2014, a suggestion was made in a footnote to a commentary to Articles 10 to 12 OECD MC. When specifying that beneficial ownership should not be given a domestic technical meaning 'such as the meaning that it has under the trust law of many common law countries' the OECD deemed it necessary to make the following remark:

> *For example*, where the trustees of a discretionary trust do not distribute interest earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognised as a separate taxpayer) *could* constitute the beneficial owners of such income for the purposes of Article 11 even if they are not the beneficial owners under the relevant trust law (emphasis added).[204]

The peculiarity of the role that trustees have in a discretionary trust is the discretion they enjoy vis-à-vis the distribution of income.[205] Apparently, the OECD seems to adopt the position that, in the rather specific context set out above, i.e. when a trustee, due to its discretion, forbears distributing the income for a certain period, such trustee could end up constituting the beneficial owner of such income under Articles 10, 11, and 12 OECD MTC.[206] Another influencing factor is that a trustee in that position might be taxed on the income and face a risk

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[200] *N Luxembourg 1, X Denmark A/S, C Denmark I and Z Denmark ApS v. Skatteministeriet* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 7, §94.

[201] OECD Model Tax Convention (1995): Commentaries to Art. 10, para. 12, Art. 11, para. 8 and Art. 12, para. 4.

[202] Authorized signatories are also not explicitly excluded from the scope of the model. The exclusion of these entities signatories from the scope of the beneficial owner under the directive is almost never discussed in the academic literature. The reason behind i.e. that, just like agents, nominees, fiduciaries, and administrators, such recipients, by definition, can only act on account of a third party without discretion, and this is not debated. Therefore, there is not much opportunity for discussion. It somehow goes without saying that, according to the rules of the model, an authorized signatory would also not qualify as a beneficial owner.

[203] Meindl-Ringler, *supra* n. 3, at 360.

[204] OECD Model Tax Convention (2014): Commentaries to Art. 10, para. 12.1, Art. 11, para. 9.1 and Art. 12, para. 4.

[205] Meindl-Ringler, *supra* n. 3, at 109.

[206] A. van Boeijen-Ostaszewska et al., *Clarification of the Meaning of 'Beneficial Owner' in the OECD Model Tax Convention Response from IBFD Research Staff* 3 (IBFD 2011), http://www.oecd.org/tax/treaties/48413407.pdf/ (accessed 9 Dec. 2020).

of double taxation.[207] Apart from the latter situation, the OECD does not provide any other circumstances under which a trustee might qualify as beneficial owner.

However, trustees do not receive income for their own benefit which explains why they are excluded from the scope of Article 1(4) IRD. Instead, they are 'under a fiduciary obligation ultimately to disburse the trust income to other persons …'.[208]

Hence, several scholars regarded the footnote as being difficult to reconcile or even (completely) inconsistent with the concept of beneficial ownership as described under the MTC and, in particular, with the 'right to use and enjoy the income' criterion.[209] While it could be argued that a trustee might, under certain circumstances, have 'the right to use' the income, it clearly does not have 'the right to enjoy' it. Additionally, it remains ambiguous how not distributing the income for a certain period might lead a trustee to have such a right. The OECD should perhaps have been more explicit on this point.

According to Avery Jones, Vann, and Wheeler, the definition of 'the beneficial owner' in the MTC 'appears to exclude all trustees or trusts from the ambit of the beneficial ownership concept … '.[210] The comment was recurrently made that, had beneficial ownership in the MTC been defined with more emphasis on control over the income rather than enjoyment, the footnote could be more accurate.[211]

By deduction, there is room to conclude that, apart from the specific circumstance described in the footnote, trustees are to be excluded from the scope of the current MTC concept of beneficial ownership. The exclusion of classic trustees is generally not debated.[212]

Yet, even in the context of the footnote, it is far from clear how a trustee can qualify as a beneficial owner under the MTC after the 2014 update.[213] The OECD itself seems to be cautious when making its point: the remark appears in a footnote to the commentary rather than in the text itself, and the use of words such as 'for example' or 'could' makes it almost seem like an hypothesis the veracity of which is not well-established.

Therefore, when it appears from the outset that 'the IRD concept explicitly excludes trustees while this is not the case under the MTC', the MTC concept is also generally interpreted as excluding trustees. Further, even if the point made in the footnote was to be more established, the circumstance is so specific that only a limited group of trustees would be concerned, i.e. not excluded from the MTC concept. Thus, even in the latter case, the approach of the IRD and the MTC regarding trustees would differ only to a minor extent.

4.3 *Convergence Phase III: Beneficial Ownership after N Luxembourg I*

As can be inferred from the above, with the delivery of *N Luxembourg I* by the CJEU, the EU, and the OECD institutions are achieving accordance regarding the interpretation of the beneficial ownership concept. Although discrepancies remain, the two approaches converge to an important extent. At this stage, the authors do acknowledge another development in which the EU and OECD concur in relation to the abuse of their respective instrument: the shift from targeted anti-abuse rules (such as the beneficial ownership requirement) to general anti-abuse rules (hereafter: GAARs) (like the PPT for tax treaty abuse, the GAAR in the EU Anti-Tax Avoidance Directive and the principle of abuse of EU law from an EU perspective).[214] Even though this shift to general anti-abuse rules might have an impact on the actual application of targeted or specific anti-abuse rules, it is beyond the scope of this article to address that. The authors' focus is solely on the comparability between the beneficial ownership concepts. The present paragraph seeks to find the most appropriate way forward for a uniform application of the beneficial ownership concept for the future.

4.3.1 *Global Concept of Beneficial Ownership?*

4.3.1.1 Conceptualization

As part of the conceptualization of ideas and solutions for the future, this section examines the opportunity for making the OECD and the EU's work *fully* converge toward a unified solution: the building of a global concept with a fixed interpretation that can be applied on a worldwide scale.[215] A

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[207] Meindl-Ringler, *supra* n. 3, at 360.

[208] As stated by Avery Jones, Vann & Wheeler. *See* Avery Jones, Vann & Wheeler, *supra* n. 47, at 1.

[209] Van Boeijen-Ostaszewska et al., *supra* n. 206, at 3; Avery Jones, Vann & Wheeler, *supra* n. 47, at 1; Danon, *supra* n. 114, at 439.

[210] Avery Jones, Vann & Wheeler, *supra* n. 47, at 1.

[211] Danon, *supra* n. 114, at 439; Meindl-Ringler, *supra* n. 3, p.111.

[212] Meindl-Ringler, *supra* n. 3, at 360.

[213] Avery Jones, Vann & Wheeler, *supra* n. 47, at 1; Van Boeijen-Ostaszewska et al., *supra* n. 206, at 3; Danon, *supra* n. 114, at 439; Meindl-Ringler, *supra* n. 3, at 109.

[214] *See supra* para. 2.3.3.4.

[215] It could fairly be argued that the development of a global concept of beneficial ownership is an already ongoing process. According to Le Golf, 'global law is a multicultural, multinational and multidisciplinary legal phenomenon finding its roots in international and comparative law and emerging through the international legal practice that was prompted by the globalization of the world economy'. It emerges from 'actions undertaken and efforts deployed by a multitude of institutions … impacting directly or indirectly the international scene'. Le Golf further explains that the strong interaction between international law practitioners and international organizations leads to a

uniform application of the understanding of beneficial ownership would create legal certainty for both taxpayers and tax authorities for using the concept irrespective from the perspective either from the EU/IRD or an OECD/tax treaty position.

The quest of a solution should, in the authors' view, begin around the pursuance of two key aims: (1) achieving *interpretative certainty* thereby ensuring the *correctness* of the concept's application and (2) guaranteeing the *uniformity* of the concept's application. Both elements will be discussed below.[216] A more uniform interpretation would be desirable, especially for cases when tax treaty application and an IRD application would concur.[217] After the Danish cases, it could occur that the benefits of the IRD should be denied as there would not be a payment to a beneficial owner for EU purposes. It would be considerably strange if, under those circumstances, a taxpayer could still benefit from reduced tax treaty rates because the beneficial ownership requirement would be deemed to be met for OECD/tax treaty purposes.[218] Following that, the feasibility of such a cooperation will be briefly discussed.

4.3.1.2 Interpretative Certainty: Decreasing Fragmentation, Diffusion and Confusion

The OECD and the EU are distinct international/supranational organizations. Yet, their members are significantly overlapping. EU Member States count for more than half of the current OECD members, i.e. 22 EU Member States out of 36 OECD members.[219] The European Commission participates in the work of the OECD, however, it has no voting rights. Conversely, among the 27 EU Member States, only five[220] are not OECD Members.

Each EU Member State that is an OECD Member has been introduced to the concept of beneficial ownership, both as part of Articles 10, 11, and 12 OECD MTC and its commentaries as well as for the application of the IRD. Following *N Luxembourg I,* EU Member States are now also aware of the concept as interpreted by the CJEU. Theoretically, EU Member States must distinguish between the OECD concept and the EU concept depending on whether a situation is examined under the MTC or IRD.[221] The authors believe that the distinction between two interpretations of the beneficial ownership conception presents important disadvantages. It is inconvenient for the Member States that are concerned to maintain balance between one and the other as it increases the 'fragmentation'[222] and inconsistency of the concept's 'normative regulations'[223] and could add ambiguity. It should be recalled that, even after *N Luxembourg I*, divergences between the two approaches remain thereby diffusing the meaning of the concept within the legal heritage of the respective Member States.

As previously seen, the authors are of the opinion that the inclusion of an explicit definition of beneficial ownership in the IRD would be 'superfluous' if the meaning that the concept has in the model was also to be applied for IRD purposes.[224] *N Luxembourg I* does not establish that the meaning the concept has in the MTC has to be applied in IRD situations, however, it nonetheless assigns an importance to the meaning that the MTC concept has in determining the meaning of the IRD concept. The authors agree that there is something superfluous and redundant but also confusing, in having two separate and still diverging, yet intertwined, interpretations of the same concept.

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quasi-legislative instrument in response to the needs of a globalizing economy; *see* P. Le Golf, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization,* 14(1) Ind. J. Global Legal Stud. 126–133 (2007). The OECD and the EU are the two main institutions for which the work leads, influences, and molds the interpretation of the term and the contours of the concept of beneficial ownership. The OECD MC beneficial ownership material has existed for forty-two years through the non-binding MC Commentary. Through its judgment in *N Luxembourg I*, the CJEU has enabled the essence of the commentary to be binding and consistent throughout the Member States thereby widely spreading is application. According to Le Golf, the existence of the CJEU is a major advantage of the EU in terms of harmonization of the law.

[216] As these two key aims are closely related, the scopes of the following sections may overlap.

[217] Especially since Hattingh already explained that even the beneficial ownership concept under the OECD MTC has led to different interpretations by domestic courts in the OECD member countries. *See* Hattingh, *supra* n. 126. In order to avoid comparable issues for situations when the IRD and OECD MTC concur, a more uniform interpretation would be beneficial.

[218] In the view of the authors, it would be undesirable that IRD benefits (i.e. a withholding tax exemption) should be denied in a certain intra-EU cross-border situation by absence of a beneficial owner while the parallel application of a tax treaty provision between the taxpayers who are concerned would lead to a withholding tax exemption or rate reduction only because, under tax treaty law, there appears to be a beneficial owner. In the authors' opinion, this would be contrary to the principle of Union loyalty under Art. 4(3) TEU.

[219] *See* OECD, *List of OECD Member countries – Ratification of the Convention on the OECD,* https://www.oecd.org/about/document/list-oecd-member-countries.htm (accessed 9 Dec. 2020).

[220] Bulgaria, Croatia, Cyprus, Malta, and Romania.

[221] Van Hulten & Korving, *supra* n. 180, at 800.

[222] Those expressions were used by Demin and Nikolaev. *See* Demin and Nikolaev, *supra* n. 40, at 3.

[223] *Ibid.* The authors agree that this point is also closely related to the point on uniformity.

[224] Meindl-Ringler, *supra* n. 3, at 303–304. Prior to *N Luxembourg I*, the interpretation of the ideal in the directive was unsettled. Following the general pattern of EU law with its own rules, concepts, and principles, it could have been expected that the court would give the directive concept a distinct EU law meaning that substantially differs from the meaning that it has in a tax treaty context. For instance, if the CJEU would have accorded with the opinion of AG Kokott, such a distinction, i.e. between a directive and a model concept, although still inconvenient, would appear to be more 'justified'. However, this is not the case. As established above, the judgment of the CJEU has led to the co-existence of two separate, yet intertwined, interpretations of beneficial ownership.

4.3.1.3 A Uniform Application

Diverging interpretations among states could disrupt the hope for a uniform application of beneficial ownership under the MTC and IRD while, considering the cross-border transactions to which it applies under both instruments, a certain degree of practical uniformity is required for it to fulfill the non-negligible purpose of counteracting abuse. Conversely, the possibility for diverging interpretations might as well lead to abuse on the part of the tax authorities excessively denying directive or treaty benefits thereby leading to double taxation. Lastly, it also creates areas of uncertainty and unpredictability for tax authorities and taxpayers thereby leading to a growth in tax disputes.[225]

As a potential remedy, the OECD and EU could adopt a fixed, unified, and precise definition of the term. Most importantly, such a definition should be adopted at a global level for it to be commonly accepted, to fit the needs of a globalized economy, and to meet the challenges of the global fight against harmful tax practices. In fact, tax abuse affects the world community in which different governing systems co-exist, including the OECD and the EU. It is important that those systems have a common and clear understanding of what the concept entails. This would notably improve administrative cooperation between both EU Member States as well as between EU and non-EU Member States to identify and tackle 'the interposition of intermediaries to illegitimately access otherwise inaccessible tax benefits' abusive practices.[226]

Considering that beneficial ownership as a cross-border tax concept is, in fact, primarily[227] regulated by the MTC and the IRD, the OECD and the EU are the two main institutions that could influence and mold the interpretation of the term and the contours of the concept of beneficial ownership, including a common definition in both instruments.

4.3.1.4 Would It Be Feasible?

The EU participates in the OECD. In fact, it 'enjoys a special and unique full participant status which enables it to fully engage, participate and contribute to the work of the OECD on an equal footing with full Members'.[228] The EU has its own delegation and undertook to cooperate fully in the achievement of the goals of the OECD.[229] It may be elected as a member of the bureau of subsidiary bodies[230] and 'participate fully in the preparation of texts, including legal acts, with an unrestricted right to make proposals and suggest changes'.[231] The European Commission is a member of the OECD Council which is the OECD 'overarching decision-making body'.[232] The EU Delegation of the OECD regularly engages in a dialogue, inter alia the area of taxation, with the experts from the European Commission.[233] The EU and the OECD, therefore, cooperate on a regular basis. This is legally written in the Supplementary Protocol No. 1 to the Convention on the OECD. The EU's legal basis establishing the cooperation between the EU and the OECD is Article 220 TFEU pursuant to which 'the Union shall establish all appropriate forms of cooperation with […] the Organisation for Economic Cooperation and Development'.

The EU is also a member of the G20 forum. The G20 members work together to promote global economic growth through the coordination of fiscal, monetary, and economic policies.[234] For that purpose, they organize the so-called 'Summits on Financial Markets and the World Economy'; referred to as the G20 summits/meetings.[235] The OECD is always invited to cooperate as a guest together with other international organizations (IOs).[236]

Other than through the direct involvement of the EU in the work of the OECD, the G20 or any other IOs, the EU and the OECD are led to cooperate and coordinate their actions in various contexts as two distinct systems facing global challenges and demands including, in the context of a key priority of international tax policies, the fight against harmful tax practices for the prevention of international tax avoidance and evasion. This cooperation has already led to the creation of the BEPS Action Plan (OECD) and its rapid implementation in the EU following these OECD guidelines via the Anti-Tax Avoidance Directives (EU).

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[225] Demin & Nikolaev, *supra* n. 40, at 3–4.

[226] European Commission, *Communication on the Application of Anti-Abuse Measures in the Area of Direct Taxation – Within the EU and in Relation to Third Countries*, COM(2007)785 final 6 (10 Dec. 2007).

[227] The UN is omitted as its beneficial ownership-related material significantly accords with that of the OECD.

[228] *See* OECD, *European Union and the OECD*, https://www.oecd.org/eu/european-union-and-oecd.htm (accessed 9 Dec. 2020).

[229] *See* OECD, *Status of the European Commission Within the OECD*, https://www.oecd.org/legal/europeancommissionstatus.htm (accessed 9 Dec. 2020).

[230] For more details on the subsidiary bodies, *see* OECD, *Rules of Procedure of the Organisation* 14–16 (OECD Publishing 2013).

[231] *See* OECD, *supra* n. 229.

[232] *Ibid.*

[233] *Ibid.*

[234] *See* OECD, *What Is the G20?,* https://www.oecd.org/g20/about/ (accessed 9 Dec. 2020).

[235] M. Crowley; *What Is the G20?.* https://www.nytimes.com/2019/06/27/world/asia/what-is-the-g20.html (accessed at 11 Dec. 2020).

[236] *See* OECD, *supra* n. 228.

In relation to BEPS, especially Action 6 on *the prevention of treaty abuse and abusive tax behaviours* relates, to some extent, to beneficial ownership.[237] Most scholars and the OECD consider the concept as an instrument that tackles BEPS.[238] Even though the OECD ultimately preferred the PPT as a tax treaty GAAR over beneficial ownership, the latter was still considered as an instrument that co-existed next to the PPT. The authors concur with the view that beneficial ownership fits within the framework of the BEPS Action Plan and is of practical value in this regard.[239]

However, as indicated before, the beneficial ownership concept has been omitted from the structure of the OECD's BEPS Action Plan, i.e. its inclusive framework that emphasizes the need for cooperation, global harmonization of practices, implementation of common standards, and converging initiatives.[240] As the beneficial ownership test has been used under the MTC and IRD for years in order to counter abuse, the authors do believe that it is feasible and coherent to extend cooperation between the OECD and the EU to the interpretation of the beneficial ownership concept. The next paragraph will include the alternative output for a more harmonized approach of the OECD and EU concepts of beneficial ownership under which the OECD would copy the EU concept.

4.3.2 *Alternative approaches: Defining Beneficial Ownership in a Double Tax Convention Using Article 1(4) IRD and N Luxembourg I et al v. Skatteministeriet*

As a first alternative, the OECD could copy the definition of beneficial ownership from the IRD and include that in the MTC or its commentaries. The benefits of this approach are manifold. Member States would no longer have to differentiate between the IRD concept and the MTC concept of beneficial ownership, and a definition of the term would surround the concept as applying in a tax treaty context with more certainty (thereby compensating for the lack of a definition in the Model). Practically, this alternative has an enormous hurdle as this would also mean that all OECD countries should accept the interpretations taken by the CJEU. As seen in the Brexit process, the United Kingdom as a non-EU Member State wanted to diverge from the legal interpretations as provided by the CJEU as soon as possible.

Technically, however, this approach could work without many amendments. From an overall EU perspective, beneficial ownership as a context under the IRD maintains its EU interpretation. Individual countries could copy that interpretation that, essentially, already does not deviate too much from the current OECD approach anyway. Formally, though, these individual countries, including the non-EU members of the OECD, would transpose parts of their sovereignty to an institution that they do not acknowledge for any other issue. As such, the authors do not consider this as a valuable alternative.

5 Concluding remarks

This article aimed at discovering what comparative law had to offer in the attempt to define and address the concept of beneficial ownership from the OECD and EU perspectives. The CJEU's first interpretation of the ideal of beneficial ownership provides material for an interesting comparative analysis of it. In the midst of interpretative ambiguousness, it was reasonable to concentrate on the presence of analogies in order to grasp the aspects of the conception on which there is consensus among regulatory institutions. The purpose was to elucidate the appropriate direction to take when faced with the interpretation of beneficial ownership. Taking the study a step further, the presence of analogies between the two appropriations of the concept was used to assess if there can somehow be a solution in the future.

After comparison, this study found that the OECD and the EU approaches and interpretations of the concept of beneficial ownership converge to a considerable extent. In essence, this is evidenced by the existence of the following analogies: (1) the term beneficial owner must not be understood in a narrow technical context but as having a meaning that enables double taxation to be avoided and tax evasion and avoidance to be prevented; (2) conduit companies are excluded from the scope of the beneficial owner; (3) beneficial ownership should be applied and interpreted following an economic approach; and (4) beneficial ownership should be given a meaning that transcends the meaning that the term has under national law. It can be observed that consensus is reached on fundamental aspects pertaining to (1) the purpose, (2) the nature, (3) and the meaning of the ideal. While the above takeaways were made explicit, it is sufficient to say that the CJEU held the OECD MC 1996, its commentary, and the successive amendments of that model to

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[237] Action 6 of the BEPS Plan targets the issue of treaty shopping and conduit companies. As was seen throughout this thesis, this issue is tackled by the beneficial ownership concept of Arts 10, 11, and 12 OECD MC. Demin & Nikolaev, *supra* n. 40, at 4–5; OECD BEPS Action 6 Report, *supra* n. 42, at 17.

[238] Demin & Nikolaev, *supra* n. 40, at 4–5.

[239] *Ibid.*

[240] European Parliament, *Resolution on Tax Rulings and Other Measures in Similar Nature or Effect*, 2016/2038(INI) (6 July 2016), P8_TA(2016)0310, point AS.

be relevant when interpreting the notion of beneficial ownership as contained in the IRD. Taking this into account, most – and maybe all – interpretational issues on beneficial ownership in bilateral intra-EU relations should be resolved. Differences in interpretation can remain when an EU Member State and a non-EU country is involved. In that situation, however, there would be no concurrence of a tax treaty and the IRD and, consequently, the country involved can use 'its own' beneficial ownership concept. This could, theoretically, lead to the existence of two beneficial ownership concepts within one EU Member State; i.e. one for intra-EU situations and one for other cases. From a more pragmatic approach, it may be expected that this would lead to extensive internal debate in the country that is concerned. Therefore, this option would probably not be chosen.

From a global tax policy perspective, the authors have identified that, within the OECD's BEPS Project, attention has shifted away from beneficial ownership (as a rather specific anti-abuse rule that especially applies to passive income) to a more general anti-abuse rule in the form of the PPT (followed by the ATAD GAAR in an EU context). This shift of perspective is acknowledged. However, even though arguments are used to claim that beneficial ownership could be abolished as an anti-abuse requirement, especially after the creation of the PPT, it is still included in the current OECD MTC even post-BEPS and after the Multilateral Instrument-(MLI). As a consequence of that, the authors would still urge for a more uniform interpretation of the OECD and EU beneficial ownership concepts.

Therefore, a more global solution is not preferred. This can be achieved either by the EU accepting a global definition and interpretation (e.g. by the OECD but under the condition that the interpretation provides for more clarity than that under the current situation) or the other way around. The authors, however, would not expect the latter solution to be feasible, especially from the perspective of non-EU members of the OECD. EU acceptance of a renewed OECD beneficial ownership standard appears to be achievable.[241] Work, however, still needs to be done at a global level to finetune the beneficial ownership context before it can, one on one, also be applied by the EU/CJEU.

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[241] Even though, as has been seen before, it appears that policy shifts away from beneficial ownership to a more general anti-abuse solution in the form of a PPT.