

Financial instruments in the OECD model tax convention

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Chapter 4

Summary of conclusions

- 332 This section is an abstract of the most important conclusions found so far, briefly summarising the storyline of this study.
- 333 The OECD MTC is a collective law in the sense of a multi-jurisdictional compromise. It aggregates the heterogeneous peculiarities of individual (domestic) or cultural (regional) tax laws and tax systems into a generic and autonomous taxonomy.¹⁷⁶⁸ In this respect, the OECD MTC shares the same nature with other collective tax laws. This justifies them to be consulted as inspirational legal sources for the systematic interpretation of the OECD MTC, particularly as regards aspects and concepts under the *substance over form* principle.¹⁷⁶⁹ The approach can help interpreting and applying the OECD MTC more consistently by consulting other legal sources, which have similar problems to solve or are even closer to a solution of these problems.
- 334 This study takes the transaction-based approach as a basis of its analyses. It derives the income classification directly from the effective operation rather than indirectly from its source or origin¹⁷⁷⁰, like the asset-based approach taken by the OECD MTC does¹⁷⁷¹. In that the transaction-based approach decomposes the object of law into the asset-related and the transaction-related bit of information, the asset-based approach implies and requires the transaction-based approach¹⁷⁷². Consequently, the transaction-based approach is no substitute for the asset-based approach but rather an enlargement and breakdown of it. The benefit of this approach is that it provides a better understanding of multiple aspects in the interpretation and application of the OECD MTC. These include, for instance, fundamental concepts such as *beneficial ownership*, the realisation principle or the role of the payment profile. But they also help to solve practical problems such as the delimitation of *income* and capital *gains*, the qualification of accrued interest and the classification of ambiguous financial instruments.

¹⁷⁶⁸ See par. 18.

¹⁷⁶⁹ See par. 45.

¹⁷⁷⁰ See par. 52.

¹⁷⁷¹ See par. 58.

¹⁷⁷² See par. 54.

- 335 Risk is a mathematical and economic¹⁷⁷³ parameter, and therefore a more quantitative one¹⁷⁷⁴. It is principally limited in allowing conclusions on the qualitative aspects and concepts of law¹⁷⁷⁵. In that, risk is however not only an important interpretative and/or applicative assessment factor for methodologically evaluating the relative importance of potential differentiators or criteria for the classification of income from financial instruments. The most relevant risk types for this study are symmetric versus asymmetric risk¹⁷⁷⁶, formal versus material risk¹⁷⁷⁷, legal versus non-legal risk¹⁷⁷⁸ and underwriting versus timing risk¹⁷⁷⁹. Although risk is principally masked, it can often be spotted by behavioural adaptations of the contracting counterparties of financial instrument to their risk exposures. The systematic approach of this study, the mere existence of certain types of risk therefore makes it possible in many aspects to reveal qualitative indications and conclusions towards the nature of the underlying transaction or operation. In that, it particularly helps to limit, structure and allocate the relevant and significant attributes for the interpretation and application of the OECD MTC.
- 336 This study focuses on genuine legal concepts of income classification, whereas derivative legal concepts are out of scope¹⁷⁸⁰. While these typically trigger the same legal consequences, the difference between them is that the latter implies and requires the former as a necessary precondition¹⁷⁸¹. Whether a legal provision or term in the OECD MTC belongs to the one or the other concept can often be concluded neither from their wording nor from their purpose, intention or function¹⁷⁸². Therefore, this study primarily concentrates on the systematic element of interpretation. From this systematic element of interpretation the most important conclusions can be drawn:
- The mere existence of financial instruments as the asset¹⁷⁸³ and consequently also the income or transaction¹⁷⁸⁴ require a cautious invocation of the *substance over form* principle.
 - Risk must be separated into legal and non-legal risks¹⁷⁸⁵.
 - “Non-legal rights and obligations” are not relevant for the classification of income types from financial instruments into the distributive articles of the OECD MTC¹⁷⁸⁶.
 - Time represents a physical parameter and therefore is principally incompatible with and inaccessible to legal interpretation¹⁷⁸⁷. However, time aspects interact and therefore bear a nexus with a broad number of

¹⁷⁷³ See par. 65.

¹⁷⁷⁴ See par. 60.

¹⁷⁷⁵ See par. 218.

¹⁷⁷⁶ See par. 64.

¹⁷⁷⁷ See par. 65.

¹⁷⁷⁸ See par. 66.

¹⁷⁷⁹ See par. 67 et seqq.

¹⁷⁸⁰ See par. 75.

¹⁷⁸¹ See par. 73.

¹⁷⁸² See par. 74.

¹⁷⁸³ See par. 77.

¹⁷⁸⁴ See par. 79.

¹⁷⁸⁵ See par. 78.

¹⁷⁸⁶ See par. 80.

¹⁷⁸⁷ See par. 81.

legal and economic aspects by interacting with them. That is why they are attached to them and basically share their same legal fate¹⁷⁸⁸.

On the one hand, the separation of genuine and derivative concept helps to focus on the actual root causes of challenges to the OECD MTC. On the other hand, the key insight of focussing on the systematic interpretation is: which attributes of financial instruments and the OECD MTC are generally accessible to an autonomous or an domestic interpretation respectively. With regard to the autonomous interpretation, they also set the scope of aspects for which the interpretation and/or application of the OECD MTC might be inspired by other comparable legal sources. In combination, the approach fosters the primary law and thus strengthens the legal certainty and the role of the OECD MTC as the world's leading and most influential standard template for the negotiation of DTC.

337 Aggregation and disaggregation are applicative techniques for preparing the legal case as a pre-step for the subsequent abstract interpretation of the law.¹⁷⁸⁹ While the application actually refers to the object of the legal issue, the interpretation refers to the target of the legal issue. The approach transferred from finance theory and domestic tax policy making of “atomising” and replicating the economic risk-return profile of financial instruments by options as their ultimate building blocks¹⁷⁹⁰ principally allows us to draw conclusions towards legal differentiators. In imperfect tax systems such as the OECD MTC it leaves a theoretical residuum of building blocks with specific risk characteristics¹⁷⁹¹. Combined with the systematic considerations by the IAS/IFRS and the techniques of finance theory, this approach led to the following conclusions:

- Aggregation cannot be justified by the *substance over form* principle¹⁷⁹². It would create highly erratic or arbitrary and eventually coincidental results, which would not be in line with the purpose, intention and function of the OECD MTC's distributive articles.
- The necessity of disaggregating financial instruments for the application of the OECD MTC cannot be generally rejected.¹⁷⁹³
- Legal risks in general¹⁷⁹⁴ and membership rights in particular¹⁷⁹⁵ must be excluded from disaggregation.
- Financial instruments not formally referring to a *share* as their underlying are not *shares* pursuant to Art. 10(3) OECD MTC and are not profit-participating *debt-claims* pursuant to Art. 11(3) OECD MTC¹⁷⁹⁶.
- Subordination has a major influence on the investor's exposure to business risk, in that it represents the primary absorber for business losses¹⁷⁹⁷.
- The maturity of financial instruments considerably affects their risk-return profiles, in that the default risks increase the longer the durations are¹⁷⁹⁸.

¹⁷⁸⁸ See par. 195.

¹⁷⁸⁹ See par. 85 et seq.

¹⁷⁹⁰ See par. 89.

¹⁷⁹¹ See par. 92.

¹⁷⁹² See par. 95.

¹⁷⁹³ See par. 96.

¹⁷⁹⁴ See par. 101(2).

¹⁷⁹⁵ See par. 106(6).

¹⁷⁹⁶ See par. 103(3).

¹⁷⁹⁷ See par. 107.

¹⁷⁹⁸ See par. 107(2).

- Financial instruments with a mere notional or floating principal cannot be *shares* pursuant to Art. 10(3) OECD MTC or *debt-claims* pursuant to Art. 11(3) OECD MTC. However, they are an indicator for *other income* pursuant to Art. 21(1) OECD MTC¹⁷⁹⁹.
- The temporal payment profile¹⁸⁰⁰ and the origin of the capital or principal¹⁸⁰¹ basically have little interpretation significance. This is why the time-based and risk-based components are not to be separated by way of disaggregation.
- Option rights and optional components are not to be separated from their underlyings but instead represent an integral part of them¹⁸⁰².

The key insight of these conclusions is to set the scope and an important limitation for the *substance over form* principle. By providing a clear rule against a consolidated view of separate legal instruments, it accentuates the legal form of financial instruments as the general baseline. It actually determines the upper limitation and the largest logical unit for the interpretation and application of the OECD MTC. On the other hand, the approach gives important guidelines for certain fields of potential differentiators, in that it further limits their number and indicates their significance.

- 338 *Beneficial ownership* is an indirect relation between a subject (i.e. a person) and an object (i.e. the asset or transaction) by way of composite legal transactions¹⁸⁰³. The concept must be separated into *beneficial ownership* in the income or transaction and *beneficial ownership* in the asset¹⁸⁰⁴. While the former serves the (re-)attributional purpose, the latter serves the anti-abuse purpose¹⁸⁰⁵. The (re)attributional aspect subsists explicitly in Art. 10(2) and 11(2) OECD MTC but implicitly in Art. 13(5) and 21(1) OECD MTC. In contrast, the anti-abuse aspect subsists in Art. 10(2) and 11(2) OECD MTC only¹⁸⁰⁶. The concept does not affect the genuine legal concepts and the interpretation of the terms *dividends* and *interest*¹⁸⁰⁷. It replaces one subject by another instead of (re-)classifying one object into another¹⁸⁰⁸. Consequently, it leaves the general principles and requirements to the inflow untouched (i.e. the *income*) but applies them to the outflow (i.e. the re-attribution) in a comparably less stringent manner¹⁸⁰⁹. The concept of *beneficial ownership* might principally be operationalised by a narrow risk test similar to the IAS/IFRS concept of *economic relationship*.¹⁸¹⁰ In systematic correspondence to the converse approach for the disaggregation scheme, this risk test is founded on a causal relation between the in- and outflows of individual transactions¹⁸¹¹. This causal relation must be quantitatively observable by an expected negative correlation depending on the same risk, and the in- and outflows must proportionate in approximately equal amounts or benefits. Where there is a dominating credit risk because of a time gap between the in- and outflow of an individual transaction, there cannot possibly

¹⁷⁹⁹ See par. 107(3).

¹⁸⁰⁰ See par. 107(4).

¹⁸⁰¹ See par. 107(5).

¹⁸⁰² See par. 107(7).

¹⁸⁰³ See par. 119 et seqq.

¹⁸⁰⁴ See par. 127.

¹⁸⁰⁵ See par. 128.

¹⁸⁰⁶ See par. 142.

¹⁸⁰⁷ See par. 124 and 129.

¹⁸⁰⁸ See par. 132.

¹⁸⁰⁹ See par. 140.

¹⁸¹⁰ See par. 135.

¹⁸¹¹ See par. 137.

be an *economic relationship* between them. As a consequence, a non-dominating credit risk is not capable positively verifying *beneficial ownership*, whereas a dominating credit risk is capable negatively falsifying it¹⁸¹². The key outcome of this section for the application of the OECD MTC to financial instruments is to introduce the concept of *beneficial ownership* as an important link between the various differentiators. It helps to better understand the treatment of basic terms such as *income*, accrued *interest* or capital *gains*. In that, it also contributes to avoid narrowing the view and thus constricting some crucial attributes towards meaninglessness.

- 339 The concept of *beneficial ownership* leads to the systematic conclusion that the term *income* has to be separated into an autonomous and qualitative aspect of its causal or contextual nature on the one hand and the domestic and quantitative determination of the tax base on the other¹⁸¹³. This makes negative income accessible to the general principles of the OECD MTC. The actual separation of the *income's* causal or contextual nature from its mathematical sign also means its independence from the *income's* amount¹⁸¹⁴. As a consequence, the absence of any *income* from a financial instrument at all does not remove the necessity and feasibility of classifying it into the distributive articles of the OECD MTC.
- 340 The terms *paid* in Art. 10(1) and 11(1) OECD MTC and *from* in Art. 10(3) and 11(3) OECD MTC form one logical unit or concept to be interpreted autonomously¹⁸¹⁵. They further limit the domestic interpretation of *income*¹⁸¹⁶.
- 341 *Capital* pursuant to chap. IV of the OECD MTC cannot be distinguished from *income* pursuant to chap. III of the OECD MTC economically but only legally.¹⁸¹⁷ Consequently, any *income* including capital *gains* must be realised at least by way of a legal event that creates a new right arising from a domestic field of law that is precursory to its tax law.¹⁸¹⁸ Thus, the OECD MTC represents a realisation-based tax system rather than an accretion-based tax system, being subject of a limited autonomous interpretation. Such a realisation principle sets the scope for the classification of income types from financial instruments in so far as deemed or notional income is basically not accessible to the OECD MTC.¹⁸¹⁹ The differentiator of capital *gains* pursuant to Art. 13(5) OECD MTC as opposed to the other income types of financial instruments is that the legal event must refer *to* the asset, in that it impairs the mathematical number of the critical ownership rights *in* the asset.¹⁸²⁰
- 342 The key benefit of these sections for the interpretation and application of the OECD MTC is to demonstrate and disentangle the ambiguous meaning of the term *income* as an important link between the treaty law and the domestic tax law. As such, it particularly contributes to the understanding and role of the realisation

¹⁸¹² See par. 138.

¹⁸¹³ See par. 139.

¹⁸¹⁴ See par. 201.

¹⁸¹⁵ See par. 151.

¹⁸¹⁶ See par. 152.

¹⁸¹⁷ See par. 158.

¹⁸¹⁸ See par. 163(1).

¹⁸¹⁹ See par. 173.

¹⁸²⁰ See par. 160 et seqq.

principle in the distinction between *income* pursuant to chap. III of the OECD MTC, capital *gains* pursuant to Art. 13(5) OECD MTC and *capital* pursuant to chap. IV of the OECD MTC.

- 343 Financial instruments are particularly sensitive to contextual or situative determinants.¹⁸²¹ This is why legal entitlements have a dual purpose of potentially representing both the economic return for legal obligations and parts of the economic operation itself.¹⁸²² Therefore, the legal entitlements must be subject of a precedent analysis in order to determine whether they represent the former (then to be interpreted domestically) or the latter (then in so far to be interpreted autonomously). Apart from this, the various legal criteria are principally equivalent.¹⁸²³ The main outcome of this section is to call attention to some peculiarities of financial instruments and to recommend a respective orientation for the perspective in which the OECD MTC should be applied in this respect.
- 344 Within the scope of this study¹⁸²⁴, matters of attribution and ownership are not accessible to the treaty principle of *substance over form* other than the concept of *beneficial ownership*¹⁸²⁵. In particular, there is no inherent systematic principle like an “economic ownership” in the Art. 10(3), 11(3), 13(5) and 21(1) OECD MTC. In order to constitute a *debt-claim* pursuant to Art. 11(3) OECD MTC¹⁸²⁶ or capital *gains* pursuant to Art. 13(5) OECD MTC¹⁸²⁷, the transfer of the capital as principal may consequently not be a mere economic one but must necessarily be a legal one. The result of this section for the interpretation and application of the OECD MTC is to strengthen the role and purity of the *beneficial ownership* concept. In that, it provides clarity in regards to alternative concepts of attribution and ownership and thus helps to further focus on the relevant aspects when dealing with financial instruments.
- 345 The voluntariness test describes potential payment conditions due to the source’s subjective decision on whether or not there shall be a payment or distribution.¹⁸²⁸ Voluntariness represents a sufficient maximum condition for constituting *other equity rights* and consequently also for *dividends* pursuant to Art. 10(3) OECD MTC.¹⁸²⁹ In the sense of a non-exclusive verifier, it can also be interpreted from the term’s etymological origin. Multilateralism in the sense of an involvement of more than two contracting parties can be an indicator for voluntariness, but neither be its verifier nor a falsifier for its complement of involuntariness.¹⁸³⁰
- 346 Involuntariness is represented by the redemption obligation in the sense of an absolute and unconditional legal right to be repaid¹⁸³¹ and can likewise be interpreted from the term’s etymological origin¹⁸³². However, it has merely the status of a necessary minimum condition (i.e. not of a verifier) for constituting time value of

¹⁸²¹ See par. 180.

¹⁸²² See par. 181.

¹⁸²³ See par. 182.

¹⁸²⁴ See sec. 1.2.

¹⁸²⁵ See par. 187.

¹⁸²⁶ See par. 297.

¹⁸²⁷ See par. 359 and seq.

¹⁸²⁸ See par. 188.

¹⁸²⁹ See par. 285.

¹⁸³⁰ See par. 191.

¹⁸³¹ See par. 289.

¹⁸³² See par. 285.

money¹⁸³³ and consequently also for genuine *debt-claims* and *interest* pursuant to Art. 11(3) OECD MTC¹⁸³⁴. The material test for the formal criterion of involuntariness is self-execution.¹⁸³⁵ It describes the absence of any payment condition at all.¹⁸³⁶ The redemption obligation and therefore Art. 11(3) OECD MTC do not apply to repurchase obligations.¹⁸³⁷

- 347 The concept of duration or maturity, which is reflected by the redemption obligation¹⁸³⁸, can be more precisely described in the stochastic sense as a more or less certain or uncertain condition¹⁸³⁹. It is most meaningful when being replaced with the stochastic concept of remuneration.¹⁸⁴⁰ In that, it becomes a hybrid concept, which is, at the same time, both time-based and risk-based. The subjacent conflict or dualism between aspects of time and those of risk must be solved in favour of the former where the two overlay.¹⁸⁴¹ This leads to the conclusion that the absence of a duration or maturity cannot be a differentiator for the income types of financial instruments. Where a duration of legal time periods actually exists, it can only be reduced by way of economic interpretation, and not extended.¹⁸⁴²
- 348 Participation in profits and losses is a relative concept and subordinate to a non-participation in profits and losses¹⁸⁴³. The two form a multi-static array of unlimited forms or states in the sense of a flexible or fluid “more or less” spectrum. As a consequence, it is systematically divided into the two different aspects of profits and losses on the one hand and participation or non-participation on the other.¹⁸⁴⁴ While actual profits and losses as *income* are to be determined by reference to domestic tax law, the question whether there is participation in that *income* also allows an autonomous interpretation. However, the purposive weakness of this approach in not allowing objective or universal statements, potentially deserves a cautious invocation and therefore relatively little interpretation significance of the participation in profits and losses criterion.¹⁸⁴⁵ The criterion is legally reflected by the attribute *participating in profits* in both Art. 10(3) and 11(3) OECD MTC. It represents a constituent element of the term *other rights* but an extending modification of the term *debt-claims*.¹⁸⁴⁶ Set into a relationship with the negating insertion *not being debt-claims* in Art. 10(3) OECD MTC, this interaction of the two provisions on different logical levels is the interpretational justification that the term *debt-claims* bears itself no genuine right to participate in profits. Beyond that, the attribute *participating in profits* is, however, not capable of serving as a differentiator for distinguishing equity and debt.¹⁸⁴⁷

¹⁸³³ See par. 242(3).

¹⁸³⁴ See par. 291.

¹⁸³⁵ See par. 289.

¹⁸³⁶ See par. 189.

¹⁸³⁷ See par. 292.

¹⁸³⁸ See par. 296.

¹⁸³⁹ See par. 196.

¹⁸⁴⁰ See par. 198.

¹⁸⁴¹ See par. 199.

¹⁸⁴² See par. 197.

¹⁸⁴³ See par. 204.

¹⁸⁴⁴ See par. 205.

¹⁸⁴⁵ See par. 206.

¹⁸⁴⁶ See par. 273.

¹⁸⁴⁷ See par. 280 and 295.

- 349 Modifications of the payment profile represent a time-based remuneration:
- independent of its periodicity, if the remuneration is either time-based or risk-based but time-equivalent¹⁸⁴⁸;
 - if an uncertainty refers only to the timing risk of when the remuneration is paid, but not to the underwriting risk of whether or not it is paid at all¹⁸⁴⁹;
 - where modified amounts from remuneration payments, analysed by grouping them together as a coherent whole, are exactly and certainly compensated by other remuneration payments from the same financial instrument¹⁸⁵⁰;
 - if deferred payments bear compound interest¹⁸⁵¹; and
 - independent of currency risk¹⁸⁵².

The *income* or transaction is basically to be classified according to the dynamic forward-looking view¹⁸⁵³. This is at the date of *income* payment, but in consideration of the remaining expectable lifetime of the financial instrument.

- 350 Unless they are time-equivalent¹⁸⁵⁴, positive modifications of the payment profile still represent a participation in profits and – in contrast to the time value of money¹⁸⁵⁵ – negative ones as well. The word *profits* in Art. 10(3) OECD MTC also includes losses. As a consequence, business risk is necessarily contained in and inextricably coalesced with both the participation in profits and losses (remuneration risk) and the capital or principal itself (termination risk).¹⁸⁵⁶ Nevertheless, the two aspects must be kept separated because the term *debt-claims* in Art. 11(3) OECD MTC, which bears itself no termination risk, is extended only by the remuneration risk¹⁸⁵⁷. This conceptual deficiency within the OECD MTC is due to the necessity that the underwriting risk in general and thus also the business risk in particular must be subsidiary to the redemption obligation requirement in order to constitute *debt-claims* as a legal construct (form over substance).¹⁸⁵⁸ Thus, the negating insertion *not being debt-claims* in conjunction with the attribute *participating in profits* turns out as to be the interpretational key element for the debt-equity distinction¹⁸⁵⁹. It leaves the crucial aspect of business risk only in the form of termination risk as a residuum within the term *other rights* and therefore Art. 10(3) OECD MTC.
- 351 Termination risk is the non-legal underwriting risk towards a non-perfect recovery of the capital or principal at maturity.¹⁸⁶⁰ It is capable of falsifying time equivalence and consequently the time value of money.¹⁸⁶¹ Termination risk arises where the pay leg of a financial instrument, separated by way of disaggregation,

¹⁸⁴⁸ See par. 211 et seq.

¹⁸⁴⁹ See par. 213.

¹⁸⁵⁰ See par. 215.

¹⁸⁵¹ See par. 216.

¹⁸⁵² See par. 217.

¹⁸⁵³ See par. 214.

¹⁸⁵⁴ See par. 276 et seq.

¹⁸⁵⁵ See par. 349.

¹⁸⁵⁶ See par. 279.

¹⁸⁵⁷ See par. 280.

¹⁸⁵⁸ See par. 346 et seq.

¹⁸⁵⁹ See par. 282 and 293.

¹⁸⁶⁰ See par. 232.

¹⁸⁶¹ See par. 242(2).

transfers a cash amount that is not solely dependent on the time value of money or an equivalent number of financial instruments.¹⁸⁶² In that, termination risk can principally be determined without applying different classification schemes for various classes of financial instruments (ring-fencing). The material termination risk test includes the formal criterion of a nominal value.¹⁸⁶³ The nominal value represents the redemption value and therefore a logical link between and fixation of what the creditor transfers to the debtor for lending (receive leg) and what the debtor owes in return to the creditor as the repayment (pay leg).¹⁸⁶⁴ This fixation is the legal justification for the transferrable finding from the IAS/IFRS that the pay leg and the receive leg correspond to each other under the *fixed-for-fixed condition* in a direct way and under the *fixed-for-variable condition* in an indirect way, whereas under the *variable-for-fixed* they correspond in neither way. Consequently, where there is no such link there cannot be any provision of capital. As a result, a mere notional or floating principal is a falsifier for *dividends* pursuant to Art. 10(3) OECD MTC¹⁸⁶⁵ and for *debt-claims* pursuant to Art. 11(3) OECD MTC¹⁸⁶⁶ and therefore a verifier for *other income* pursuant to Art. 21(1) OECD MTC¹⁸⁶⁷.

- 352 Subordination cannot be operationalised in a purposeful way as an autonomous differentiator, as it is determinable only on an individual or situative basis not allowing objective or universal statements.¹⁸⁶⁸ Instead, subordination must be interpreted formally and therefore pursuant to the domestic law, giving rise to potential qualification conflicts.
- 353 Coverage and collateral are economically substitutable. This allows the use of coverage as a differentiator for identifying counterparty risk in a potentially more reliable manner than collateral, in that it is capable of negatively falsifying credit risk.¹⁸⁶⁹ Fully covered obligatory financial instruments are not considered *debt-claims* pursuant to Art. 11(3) OECD MTC, but must rather be classified according to their underlying's nature.¹⁸⁷⁰
- 354 Sources of funds for repaying capital or principal provisions or contributions are not capable of serving as an autonomous differentiator for distinguishing equity and debt¹⁸⁷¹. The reasons are:
- Proceeds from the liquidation of assets are individual or situative, not allowing objective or universal and significant new statements.¹⁸⁷²
 - Business profits are to be determined by reference to domestic tax law.¹⁸⁷³
 - (Re-)financing sources bear a nexus with business profits, making any attempt to disentangle the two in order to reach an autonomous interpretation impossible.¹⁸⁷⁴

¹⁸⁶² See par. 348.

¹⁸⁶³ See par. 299.

¹⁸⁶⁴ See par. 298.

¹⁸⁶⁵ See par. 282.

¹⁸⁶⁶ See par. 299.

¹⁸⁶⁷ See par. 337.

¹⁸⁶⁸ See par. 220 et seq.

¹⁸⁶⁹ See par. 229.

¹⁸⁷⁰ See par. 303.

¹⁸⁷¹ See par. 251.

¹⁸⁷² See par. 244 et seq.

¹⁸⁷³ See par. 246.

¹⁸⁷⁴ See par. 250.

Instead, the determination of these sources bears a comprehensive and inextricable nexus with that of the *income*. They actually represent an inseparable mix or “infection” of the former by the latter. In that, they are entirely subject of the domestic interpretation¹⁸⁷⁵ and therefore give rise to potential qualification conflicts¹⁸⁷⁶. Due to the phrase *whether or not carrying a right to participate in the debtor’s profits*, this also applies to *debt-claims* pursuant to Art. 11(3) OECD MTC.¹⁸⁷⁷

- 355 Limb 2 of Art. 10(3) OECD MTC acts as a general clause for limb 1 in the sense of an intersection¹⁸⁷⁸, whereas limb 3 acts as a special clause for limb 2 in the sense of a carve-out¹⁸⁷⁹. As a consequence, limb 2 can share its attributes with limb 1 (upwards) but not take any attribute from limb 3 (downwards). In particular, the attribute *other corporate rights* as such is not relevant for the interpretation of the term *other rights*.¹⁸⁸⁰ Instead, it is to be interpreted autonomously and actually means equity *rights* as opposed to *debt-claims*. Consequently, the word *other* in limb 2 is to be understood in a different sense than the word *other* in limb 3.¹⁸⁸¹
- 356 The meaning of the word *debt-claim* is not limited to cash but also includes non-cash obligations.¹⁸⁸² The purpose of the *debt-claim* and whether or not it is securitised or subordinated¹⁸⁸³ is not relevant for its classification pursuant to Art. 11(3) OECD MTC, nor is the deduction from the debtor’s tax base¹⁸⁸⁴.
- 357 The difference between accrued interest and other forms of imputed interest is that the latter is no remuneration for the main or principal service of financing.¹⁸⁸⁵ However, to the author’s understanding, the consensus view that accrued interest shall be considered *paid* is not a justifiable legal principle but rather appears to be a common or best practice¹⁸⁸⁶.
- 358 The following illustration visualises and summarises the understanding of debt-equity delimitation as represented in this study:

¹⁸⁷⁵ See par. 251.

¹⁸⁷⁶ See par. 252.

¹⁸⁷⁷ See par. 302.

¹⁸⁷⁸ See par. 260 and 272.

¹⁸⁷⁹ See par. 267 and 272.

¹⁸⁸⁰ See par. 272.

¹⁸⁸¹ See par. 270 and 272.

¹⁸⁸² See par. 300 et seq.

¹⁸⁸³ See par. 304.

¹⁸⁸⁴ See par. 305.

¹⁸⁸⁵ See par. 306.

¹⁸⁸⁶ See par. 307 et seqq.

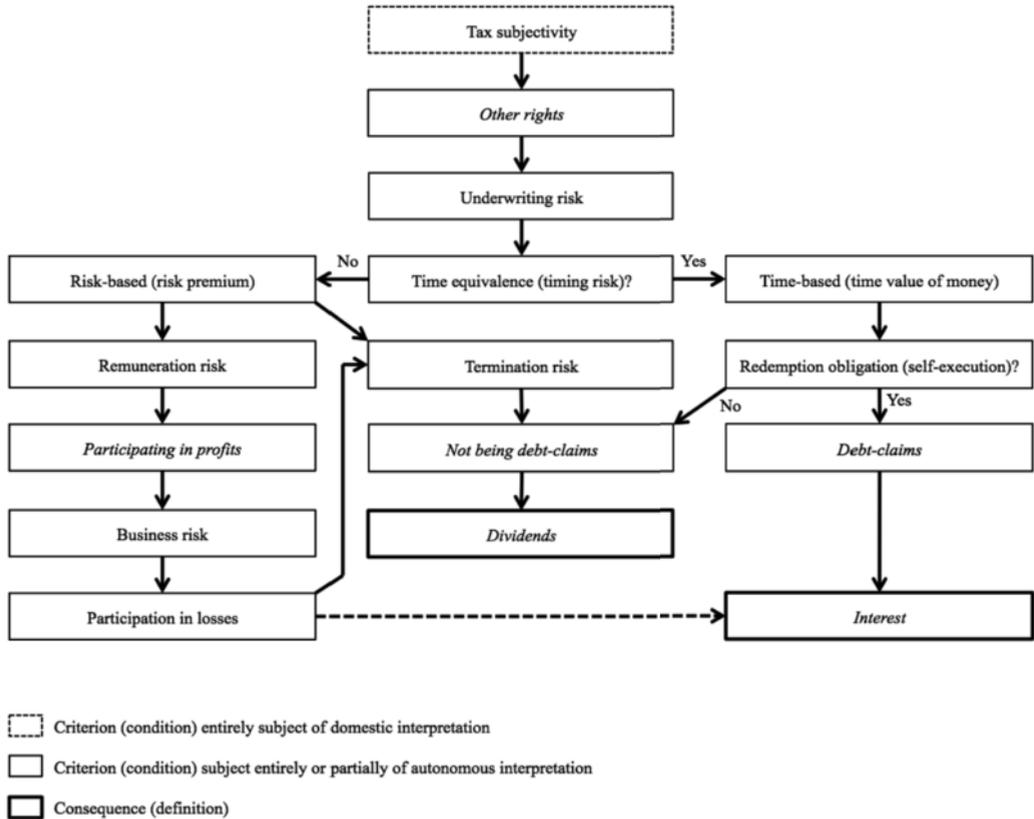


Illustration 23: Logical debt-equity delimitation scheme (high-level)

- 359 The main outcome of these sections is not only to introduce, analyse and distinguish some inherent concepts in what is discussed in the jurisprudential research and discourse as potential differentiators between debt and equity. In particular, these concepts are embedded and discussed in a thorough legal interpretation of Art. 10(3) and 11(3) OECD MTC. Beyond that, those concepts are also operationalised into concrete tie-breaking tests. In addition, the sections further analyse the relations between these classifiers and their relative significance. In that, they are re-evaluated against each other and reduced to a compact set of clear and meaningful differentiators for the interpretation and application of the OECD MTC to financial instruments. As the key objective, the study thus recommends a system of classifiers, which are coherent, consistent, universal, complete, mutually exclusive, justifiable, autonomous, objective, resilient and operationalizable¹⁸⁸⁷.
- 360 As regards capital *gains* pursuant to Art. 13(5) OECD MTC, the term *alienation* must be subject of a differentiated interpretation. The reason is that it actually coalesces the following different aspects:¹⁸⁸⁸

¹⁸⁸⁷ See sec. 1.1.2.

¹⁸⁸⁸ See par. 314.

- A change in the asset attribution, which must be interpreted formally or legally and therefore under the terms of domestic tax law pursuant to Art. 3(2) OECD MTC.¹⁸⁸⁹
- A transfer transaction as a result from that change, which must likewise be interpreted formally or legally and therefore under the terms of domestic tax law.¹⁸⁹⁰
- The realisation of this transaction, which includes partial disposals and is subject of a limited autonomous interpretation applying form over substance.¹⁸⁹¹ It requires at least a legal event arising from a domestic field of law that is precursory to its tax law and refers *to* the asset, in that it impairs the mathematical number of the critical ownership rights *in* the asset pursuant to domestic law.
- The attribution of the capital *gain* from this realised transaction, which is subject of the *substance over form* principle in the form of the *beneficial ownership* concept.¹⁸⁹²

361 Hence, the *substance over form* principle theoretically takes effect only upon the subjective attribution of the capital *gains*, i.e. the pass-through of the realised *income* rather than the ownership rights in the asset itself.¹⁸⁹³ This view is however not of major relevance for the theory of interpreting Art. 13(5) OECD MTC (but may be relevant for the practice of its application). The reason is that the genuine attributee of capital *gains* is always identical with the attributee of the asset itself.¹⁸⁹⁴ Only with this reservation and to this extent does the author agree with the majority view that the term *alienation* could in result be said to require a “change in economic ownership”.¹⁸⁹⁵

362 Cases of unilateral termination without a transfer to another person or subject are not included in the term *alienation* pursuant to Art. 13(5) OECD MTC.¹⁸⁹⁶ Among the bilateral transfers to another person or subject, the return for the disposal is not relevant either. As a consequence, the term *alienation* also includes non-cash exchange transactions and transactions without any return at all. That is why the information to what extent the ratio between the number of the critical ownership rights in the asset and their proportional value changes as a result of the transaction¹⁸⁹⁷ cannot be used as a differentiator for capital *gains*.¹⁸⁹⁸

363 The key benefit of these sections is to complement the recommended debt-equity delimitation by a corresponding analysis and presentation of capital *gains*. In that, the study not only contributes to the better understanding and application of numerous DTC to financial instruments; altogether, it also reveals and demonstrates the limitations, deficiencies and areas for potential improvements of the OECD MTC when tackling the specific challenges of modern financial instruments.

¹⁸⁸⁹ See par. 315.

¹⁸⁹⁰ See par. 317 et seqq.

¹⁸⁹¹ See par. 320.

¹⁸⁹² See par. 321.

¹⁸⁹³ See par. 322.

¹⁸⁹⁴ See par. 323.

¹⁸⁹⁵ See par. 324.

¹⁸⁹⁶ See par. 326.

¹⁸⁹⁷ See par. 162 and 253.

¹⁸⁹⁸ See par. 326.

364 While Art. 21(1) OECD MT is a residuary clause for all other distributive articles of the OECD MTC¹⁸⁹⁹, the definition and delimitation of gambles is in result not relevant for this study¹⁹⁰⁰.

¹⁸⁹⁹ See par. 328.

¹⁹⁰⁰ See par. 330 et seq.