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THE BENEFICIAL OWNER CONCEPT IN INTERNATIONAL TAX LAW:

A CRITICAL REEVALUATION

MASTER THESIS

MASTER OF LAWS - TAXATION

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TABLE OF CONTENTS

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To my parents, for everything.

LIST OF ABBREVIATIONS

AG	Advocate General
ATAD I	Council Directive (EU) 2016/1164 of 12 July 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market
ATAD III	Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU
BEPS	Base Erosion and Profit Shifting
CIVs	Collective Investment Vehicles
CTA	Covered Tax Agreement
DTT / DTTs	Double Tax Treaty / Double Tax Treaties
ECJ	European Court of Justice
EU	European Union
GAAR	General Anti-Avoidance Rule
IFA	International Fiscal Association
IRD	Interest and Royalties Directive (Council Directive 2003/49/EC of 3 June 2003)
LOB	Limitation on Benefits
MLI	Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting
OECD	Organisation for Economic Co-operation and Development
OECD MTC	OECD Model Tax Convention on Income and on Capital
PE	Permanent Establishment
PPT	Principle Purpose Test
PSD	Parent-Subsidiary Directive (Council Directive 2011/96/EU of 30 November 2011)
Savings Directive	Savings Directive (Council Directive 2003/48/EC of 3 June 2003)
UBO	Ultimate Beneficial Owner
UK	United Kingdom

Chapter 1 – Introduction

1.1. Presentation of the subject

The concept of 'beneficial ownership' is in all likelihood the most important of undefined terms in international tax law, even though it has been thoroughly covered and discussed in academic literature and courts, remaining to this day a highly disputed issue.

The actual enforcement of the beneficial ownership requirement exacerbates the uncertainties surrounding its interpretation, since there are a multitude of approaches being followed. Furthermore, and depending on the adopted approach, the concept may not be bullet proof since (i) it is not capable of addressing all components of the conduit problem; (ii) it only applies to dividends, interest and royalties; and (iii) the interaction of beneficial ownership with general anti-avoidance rules remains extremely controversial.

In this context and realizing the utter importance of the definition of the concept, we chose to study the underlying issues, in order to clarify what should be the scope and fundamental purpose of the beneficial owner concept (focused on the OECD MTC).

1.2. Structure of the thesis

The present work will commence by going through the existing provisions regarding beneficial ownership, namely on the OECD MTC as well as EU Law.

A thorough historical analysis of the concept and its evolution in the OECD MTC, Commentaries, and EU Law will not be provided, given the exceptional literature already existent in this regard, which already fully covers these aspects (and which will be duly referenced throughout the work and in the bibliography section).

It should be noted that owing to the similarities of distribution / payment rules set by the OECD MTC provisions regarding dividends, interest and royalties, we will discuss the beneficial owner without systematically differentiating the particularities

of these types of income – furthermore, at times the neutral terminology ‘income’ will be used.

The focus will then be set on the potential interpretation of the beneficial owner concept, which will hopefully pave the way to defining its purpose and scope.

Finally, as a premise to a conclusion, the structures to be covered as well as the fact that the concepts of abuse and beneficial ownership remain intertwined – even in a post-BEPS context – will be discussed.

Chapter 2 – Beneficial Owner Concept

2.1. Beneficial Ownership in the OECD MTC and Commentaries

2.1.1. Brief overview

The beneficial owner concept was first introduced into the OECD MTC[1] in 1977, in articles 10 (dividends), 11 (interest) and 12 (royalties)[2]. The purpose of the inclusion of this term was to limit the taxing right of the State of Source on passive income[3][4].

According to the discussions of the OECD working party[5], the concept was included due a concern that the abovementioned articles would apply to an agent or nominee who had a legal right to the income[6]. However, the addition of the beneficial owner

[1] The OECD MTC is a model for bilateral double tax treaties, which focuses on eliminating tax related obstacles on cross border transactions while preventing tax evasion and avoidance. In addition, it is also a harmonizing instrument countries resort to for international double taxation issues. Unless specifically identified, the present thesis refers to the current 2017 version of the OECD MTC.

[2] The beneficial owner concept was introduced fourteen years after the OECD published the first Draft MTC in 1963. It should be noted that most countries follow the OECD MTC, irrespectively of being member states of the OECD, which means that the term was included in most treaties signed after 1977.

[3] The provisions at stake - articles 10 (dividends), 11 (interest) and 12 (royalties) of the OECD MTC - attribute taxing rights between the State of Residence and the State of Source.

[4] Passive income is defined by the OECD, in its Glossary of Tax Terms, as "income in respect of which, broadly speaking, the recipient does not participate in the business activity giving rise to the income, e.g. dividends, interest, rental income, royalties, etc.".

[5] The present thesis will not address the historical development of the beneficial ownership concept in the OECD MTC. In this regard, please refer to Angelika Meindl-Ringler, *Beneficial Ownership in International Tax Law*, Series on International Taxation Vol. 58 (Wolters Kluwer. 2016), 14 *et seq.*

[6] As mentioned in the public response by John Avery Jones, Richard Vann and Joanna Wheeler, to the OECD Discussion Draft "*Clarification of the Meaning of 'Beneficial Owner' in the OECD Model Tax Convention"* Public Comment (2011), the concern with agents and nominees benefiting from treaties was voiced by the UK, which suggested the adoption of a subject-to-tax test. For more detail also see Angelika Meindl-Ringler, 15 *et seq.*

requirement was not clear as to whether its fulfillment should be seen as a mere condition to access tax treaty benefits or as a specific anti-avoidance rule[7].

In reality, most authors considered that the 1977 Commentaries[8] were ambiguous since, on the one hand, it simply stated that "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". However, and on the other hand, it is indisputable that the 1977 Commentaries established a direct connection between beneficial ownership and the improper use of DTTs[9].

While the present thesis will not thoroughly address the historical OECD materials (and its evolution), it is important to state that the beneficial owner concept was chosen over a subject-to-tax clause[10], and its intention was to exclude agents and nominees from DTTs benefits, considering that these intermediaries are usually not themselves subject to tax on the income received (*i.e.*, in their State of Residence).

As per the above, and as further addressed below, it is possible to argue that the succinctness of the 1977 Commentaries, as well as its subsequent amendments, led

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[7] Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?* in: Maisto, Guglielmo, et al, Current Tax Treaty Issues, 50th Anniversary of the International Tax Group, EC and International Tax Law Series Vol. 18 (IBFD. 2020), 585 *et seq.*

[8] Notwithstanding the conciseness of the 1977 Commentaries being point out by the majority of authors as a negative trait, it is important to emphasize that it was what paved the way for future developments regarding the beneficial owner concept. Unless specifically identified, the present thesis refers to the Commentaries included in the 2017 version of the OECD MTC.

[9] Robert Danon, Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 585 *et seq*.

[10] According to Luc de Broe, this choice indicates that the beneficial owner requirement and the subject-to-tax test seem both to address the fact that only persons that are potentially subject to double taxation can claim treaty benefits. See Luc de Broe, *Chapter 16: Should Courts in EU Member States Take Account of the ECJ's Judgment in the Danish Beneficial Ownership Cases When Interpreting the Beneficial Ownership Requirement in Tax Treaties?* in: Current Tax Treaty Issues: 50th Anniversary of the International Tax Group (G. Maisto ed., IBFD 2020), Books IBFD, 664 *et seq.*

to some uncertainty as regards the meaning and scope of the beneficial ownership requirement - which is still verified today.

2.1.2. Articles 10 (dividends), 11 (interest) and 12 (royalties)

The inclusion of the beneficial ownership requirement in the OECD MTC, was made through the amendment of the wording of articles 10 (dividends), 11 (interest) and 12 (royalties). As elucidated in the Commentaries to these articles, the limitation comprised by this term was intended to operate as a condition to limit the taxing right of the State of Source and had the purpose to clarify the term 'paid to'[11].

For example, article 10 (dividends) [12] of the OECD MTC establishes that:

> *1. Dividends **paid** by a company which is a resident of a Contracting State **to** a resident of the other Contracting State may be taxed in that other State.*
>
> *2. However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the **beneficial owner** of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:*

[11] The wording of paragraph 1 of article 12 (royalties) was subsequently amended in the 1997 update, and no longer includes the expression "paid to". Currently, paragraph 1 read as follows: "1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.".

[12] Although articles 11 (interest) and 12 (royalties) have slightly different wordings when compared to article 10 (dividends), the Commentaries on these articles relevant for the issues under discussion in the present thesis (*e.g.*, concept of paid, the term beneficial ownership, agents and nominees, conduit companies, etc.) are virtually the same. For ease of reference, and completeness purposes, we reproduce herein paragraphs 1 and 2 of article 11 (interest) – as for paragraph 1 of article 12 (royalties) please refer to the previous footnote: "1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, interest arising in a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.".

> *a) 5 per cent of the gross amount of the dividends if the **beneficial owner** is a company which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividend);*
> *b) 15 per cent of the gross amount of the dividends in all other cases.*
> (emphasis added)

The introduction of the beneficial ownership requirement in paragraph 2 of article 10 (dividends) set out that the State of Source does not automatically lose its taxing rights simply because that income was paid directly to a resident of the other Contracting State – *i.e.*, being a resident of the other Contracting State does not automatically mean that the recipient may benefit from this specific provision of a DTT.

In spite of the fact the wording of such articles has been subject to some amendments in order to fine tune its application, the changes made to the Commentaries throughout the years greatly surpass the changes made to the articles themselves.[13] Thus, hereinafter, we will focus on the Commentaries themselves.

In light of the above, it is possible to verify that the articles (*i.e.*, the OECD MTC itself) do not offer a definition of the term 'beneficial owner'. However, the OECD, through the Commentaries, provides guidance on the interpretation of the meaning of the beneficial ownership concept, as per the paragraph[14] reproduced below:

[13] In this sense, Felipe Vallada states that "It clearly was the desire of the OECD to avoid changing the wording of these articles and interfere with the meaning of beneficial ownership through amendments to the Commentary." Felipe Vallada, *Beneficial Ownership under Articles 10, 11 and 12 of the 2014 OECD Model Convention*, in: Lang, M. et al: The OECD-Model-Convention and its Update 2014 (Linde Verlag. 2015), 30.

[14] Commentary on article 10 (dividends), paragraph 12.1.

Since the term "beneficial owner" was added to address potential difficulties arising from the use of the words "paid to … a resident" in paragraph 1, it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries). The term "beneficial owner" is therefore not used in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries[1]), rather, it should be understood in its context, in particular in relation to the words "paid … to a resident", and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.

Based on the above, one can attest that the Commentaries clarified that the beneficial owner term (i) does not refer to any domestic technical meaning (*i.e.*, the concept should not be defined in accordance with the national law of a country), (ii) should not be used in a narrow technical sense, but (iii) should be understood in its context and in the light of the object and purpose of a DTT – *i.e.*, should have an autonomous meaning.

The Commentaries then proceed to clarify that the beneficial owner concept should not apply to a resident of a Contracting State acting in the capacity of agent or nominee, or to conduit companies. According to the Commentaries, the beneficial owner requirement tackles a specific form of DTT abuse (*i.e.*, interposition of an intermediary recipient), hence, it should not be seen as restricting the application of other anti-abuse provisions[15].

Furthermore, the Commentaries lay down that the limitation imposed is concerned with the beneficial ownership of the income - dividends, interest, and royalties - and not with the ownership of the underlying entity / assets. That is to say that it should not be mistaken with the concept of UBO[16].

[15] Commentary on article (10), paragraph 12.15.

[16] In accordance with Directive (EU) 2015/849 of the European Parliament and of the Council, of 20 May 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist

2.1.3. Principles in interpreting beneficial ownership

Deriving from the lack of definition of the concept of beneficial owner, the OECD left space to open interpretation. The issue that arises thereafter is that, depending on the interpretation given, there is the risk of the envisaged concept of beneficial ownership being devoid of connection to its original meaning and purpose.

For instance, if the beneficial owner requirement is seen as a condition to access DTTs' benefits, it will encompass a broad anti-abuse provision, connected with corporate substance, economic substance over legal form and subject-to-tax clauses.

On the other hand, if the proper use of beneficial ownership would be the mere clarification of the term "paid to", it would essentially be no more than an attribution-of-income rule[17].

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financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, commonly now as the 5th AML Directive, defines UBO as: *any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:*

(a) in the case of corporate entities:

(i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information.

A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership. A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership. This applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control. Control through other means may be determined, inter alia, in accordance with the criteria in Article 22(1) to (5) of Directive 2013/34/EU of the European Parliament and of the Council (29);

(…)

[17] Robert Danon, *Interest (Article 11 OECD Model Convention),* in: Lang, M. et al, Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives, EUCOTAX Series on European Taxation Vol. 20 (Wolters Kluwer. 2008), 94 *et seq.* Danon

Despite the above, and before further entering into the exceedingly complex world that is the discussion of the approach that should be followed when applying the beneficial owner concept, we will establish less controvert principles.

Autonomous meaning vs. domestic interpretation

Although currently almost indisputable, the question whether to apply a domestic view or an international contextual meaning, when interpreting the beneficial owner concept, was once a heated debate.

As already stated, the meaning of the term beneficial owner was never defined within the OECD MTC. In these situations, we should refer to article 3 (general definitions) of the OECD MTC, which establishes the general definitions of terms and determines that in case of undefined terms, a domestic tax meaning should apply unless the context otherwise requires[18] [19].

While literature and jurisprudence took several years to reach a consensus, nowadays it is extensively accepted that the beneficial ownership concept should be defined

defends that the beneficial ownership should be interpreted in view of its systematic (attribution-of-income) and teleological (relation with treaty shopping) interpretation.

[18] Paragraph 2 of article 3 (general definitions) reads as follows: "As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 25, 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, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.".

[19] The issue is then to determine if this a case of "the context otherwise requires" or a domestic definition should be used. In this context, please see Felipe Vallada, 39 *et seq,* and Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?,* 597 *et seq.*

autonomously[20]. This position was advanced in the Indofood case[21]: “the term "beneficial owner" is to be given an international fiscal meaning not derived from the domestic laws of contracting states”.

Furthermore, the 2014 updates of the OECD MTC clearly settled this debate by stating that the beneficial ownership term: “was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries).”[22]

In light of the above, it is uncontroversial that the only arguable position is to confer an autonomous and contextual treaty meaning to the concept of beneficial ownership.

Narrow technical sense

Another topic that was somewhat controverse for quite some time is whether the term should be used in a narrow technical sense.

However, and similarly to above, the 2014 Commentaries put an end to the discussions in this regard by specifically stating that: “The term “beneficial owner” is therefore not used in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries[1]), rather, it should be understood in its context, in particular in relation to the words “paid … to a resident”, and in light

[20] Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?* 598, has expressed that the beneficial owner concept should have an autonomous meaning, which was subscribed in several IFA Congresses. Furthermore, this interpretation is aligned with the principle of treaty override.

[21] Indofood (Indofood International Finance Ltd. v. JPMorgan Chase Bank NA, London Branch, [2006] EWCA Civ 158) is a cornerstone case in international taxation, which dealt with the meaning of beneficial ownership in Double Tax Treaties in a situation where a company was artificially inserted into a structure to obtain the benefits of treaty relief - “treaty shopping” case.

[22] Commentary on article 10 (dividends), paragraph 12.1.

of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance."[23]

UBO

Finally, and as previously mentioned, the beneficial owner requirement is intended to clarify queries arising from the use of the words 'paid to', therefore this term should be ascertained in relation to the income being paid and should not be focused on the ownership of the asset which generated such income – *e.g.*, when discussing the payment of dividends, the beneficial owner should be determined in relation to the income itself and not to the ownership of the shares of the company paying the dividends.

The Commentaries also shed some light in this regard: "the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments[1] that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets. That different meaning of "beneficial owner" cannot be applied in the context of the Article."[24]

The Commentaries in this regard are intrinsically connected with the narrow term the concept should have – *i.e.*, the concept has a purpose and should be used for that purpose and not be widened to cover other situations.

2.1.4. Typical transactions

Although the Commentaries have shed some light on the use and purpose of the term beneficial owner, they never provided a definition of the term and relied on a negative definition of the concept – *i.e.*, instead of defining who should be considered a

[23] Commentary on article 10 (dividends), paragraph 12.1.

[24] Commentary on article 10 (dividends), paragraph 12.6.

beneficial owner, the OECD identified three examples of persons that are not entitled to the status of beneficial owner, namely agents, nominees and conduits[25].

In this context, the next question to arise is how to define agents and nominees, since neither the OECD MTC nor the Commentaries give a definition and, once again, the meaning varies from State to State. Furthermore, it is important to understand how agents and nominees differ from conduit companies.

2.1.4.1. Agents and nominees

As briefly stated above, and similarly to the issue with the meaning of beneficial ownership, the concept of agent and nominees varies in accordance with the domestic legislation of the State.

Notwithstanding, it is broadly accepted that an agent or a nominee is a person (individual or company) who acts for and on account of another (the "principal"). In the case in discussion, one can state that the agent or nominee is a person who follows the instructions of the principal and has no control over the income received.

As per the Commentaries, the utilization of agents and nominees would be inconsistent with the object and purpose of the OECD MTC[26], since the relief or exemption should not be given regardless of the status of the direct recipient of the income – *i.e.*, although an agent or nominee qualifies as a resident of the other Contracting State, a case of double taxation could potentially not be verified given

[25] Stef Van Weeghel: *"It is clear that one goal has been accomplished with the introduction of the term and that is that agents and nominees are excluded from treaty benefits and rightly so."*. Stef van Weeghel, *Dividends (Article 10 OECD Model Convention)* in: Lang, M. et al, Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives, EUCOTAX Series on European Taxation Vol. 20 (Wolters Kluwer. 2008), 69 *et seq.*

[26] The object and purpose of the OCED MTC is to prevent situations of double taxation, by allocating taxing rights over the income between the State of Source and the State of Residence. In the case of article 10 (dividends), 11 (interest) and 12 (royalties), the State of Source should grant relief or exemption to the resident of the other Contracting State.

that the recipient (agent or nominee) may not be seen as the owner of the income, for tax purposes, in its State of Residence.

In this context, the application of the DTT could, in fact, result in a double non-taxation situation – *i.e.,* the income not being taxed in neither State.

Therefore, it is pacific among authors that excluding agents and nominees from treaty benefits is in line with the original meaning and purpose of the beneficial owner requirement.

2.1.4.2. Conduit companies

The third and final example foreseen by the Commentaries are conduit companies[27]. From its denomination it is already possible to infer that conduit companies are channel entities, which sole activity is to receive income and transfer it to other entity (either another conduit company or to the beneficial owner).

In spite of having a much broader use in tax structuring, when compared with agents and nominees, conduit companies have an important common trait with the other persons, which is all of them have very limited powers in respect of the income received.

Hence, the Commentaries stated that "it would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned."[28]

[27] Conduit companies are defined in OECD's Glossary of Tax Terms as a "company set up in connection with a tax avoidance scheme, whereby income is paid by a company to the conduit and then redistributed by that company to its shareholders as dividends, interest, royalties, etc.".

[28] Commentary on article 10 (dividends), paragraph 12.3.

The Commentaries then refer to the report from the Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies"[29], which identifies the autonomy of a person as a critical element to consider when determining if such person can be qualified as the beneficial owner.

Another element identified as crucial is the "right to use and enjoy" the income "unconstrained by a contractual or legal obligation to pass on the payment received to another person".[30]

As further addressed below, the Commentaries made in this regard may lead to uncertainty, since (i) they begin to address the beneficial ownership as an attribution-of-income provision; yet (ii) the reference to narrow powers and the obligation to forward the income are pointers that are used when countering tax avoidance and evasion.[31]

A delineation between pure DTT shopping by using conduit company and other forms of treaty abuse has to be made – *i.e.*, the interposition of a conduit company should be distinguished from tax treaty shopping associated to an abusive restructuring.[32]

[29] In this report, the Committee on Fiscal Affairs concluded that a conduit company should not be deemed as the beneficial owner when it has very narrow powers in relation to the income received, thus acting a mere fiduciary or administrator.

[30] Commentary on article 10 (dividends), paragraph 12.4.

[31] See Angelika Meindl-Ringler, 52 et seq. Angelika concludes that "adding conduit companies to the Commentary indicates a shift to a stronger anti-avoidance focus of beneficial ownership".

[32] In this regard, Danon argues that "a restructuring takes place in order to cause the application of the relevant tax treaty or of a more favourable treaty provision (rule shopping). The problem thus does not lie in the way in which income is transferred to a non-resident through a conduit company. Rather, at issue are the circumstances surrounding the restructuring (typically the timing and/or sequence of events) that may appear awkward and hence abusive." Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 594.

2.2. Beneficial Ownership in EU Legislation

The concept of beneficial owner was introduced in EU Law in 2003. The requirement was included in the Savings Directive and in the IRD and both directives foresaw a definition of the concept. On the other hand, the term was never included in the PSD (in its original version nor on later amendments).

As addressed below, the concept of beneficial owner in the Savings Directive (which has been repealed) is not aligned with the definition and objective of the one included in the IRD.

2.2.1. Savings Directive

The Savings Directive required an automatic exchange of information regarding private savings income. Its purpose was to ensure that interest payments made in one Member State to residents of other Member States were taxed in accordance with the laws of the State of Residence of the beneficial owner[33].

The Savings Directive has been repealed in March 2015 and replaced by Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU[34] as regards mandatory automatic exchange of information in the field of taxation, given the large overlap of scope of the Directives. Despite this fact, we will be addressing the Savings Directive given its aim and specific definition of beneficial owner, which read as follows:

Article 2 (definition of beneficial owner)

1. For the purposes of this Directive, and without prejudice to paragraphs 2 to 4, "beneficial owner" means ***any individual*** *who receives an interest payment or*

[33] Paragraph 1 of Article 1 (Aim) of the Savings Directive establishes that: "The ultimate aim of the Directive is to enable savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident for tax purposes in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State.".

[34] It should be noted that these directives do not provide a definition of beneficial ownership.

any individual for whom such a payment is secured, unless he provides evidence that it was not received or secured ***for his own benefit****, that is to say that:*

(a) he ***acts as a paying agent*** *within the meaning of Article 4(1);*

(b) he ***acts on behalf of an entity****, with or without legal personality, and discloses to the economic operator making or securing the interest payment the name, the legal form, the address of the place of establishment of the entity, and, if it is in a different country or jurisdiction, the address of the place of effective management of the entity;*

(c) he ***acts on behalf of a legal arrangement*** *and discloses to the economic operator making or securing the interest payment the name if any, the legal form, the address of the place of effective management of the legal arrangement and the name of the legal or natural person referred to in point (c) of Article 1a; or*

(d) he ***acts on behalf of another individual*** *who is the beneficial owner and discloses to the paying agent the identity of that beneficial owner in accordance with Article 3(2).*
(emphasis added)

In defining the beneficial owner concept[35] the Savings Directive focused on the individual receiving the interest income for his own benefit. Furthermore, the Savings Directive also assumed beneficial ownership unless the recipient shows that he is in fact not the beneficial owner.

Based on the above, and although the definition foreseen in the Savings Directive also excludes agents acting for another person, it does not add considerable value to the discussion at hand, since (i) it is focused on individuals only; and (ii) the concept of beneficial ownership is more in tune with the concept adopted for anti-money

[35] The Savings Directive explicitly restricts the definition of beneficial ownership to its own scope. See paragraph 1 of article 2 (definition of beneficial owner), which starts with "For the purposes of this Directive…".

laundering purposes[36] than with the term in a treaty context. To make it clear, this is not a criticism of the definition included in the Savings Directive, since the established concept is aligned with its purpose which is countering tax avoidance and not the granting of benefits to taxpayers[37].

2.2.2. IRD

The IRD is designed to eliminate withholding taxes on cross-border interest and royalties' payments within a group (*i.e.*, between associated companies or their PEs) arising in an EU Member State, provided the recipient is the beneficial owner of the interest.

Aligned with the general EU tax policy, which objective is the elimination of tax obstacles to cross-border economic activity, the purpose of the IRD is to eliminate double taxation and reducing administrative burdens, in order to balance cross-border with domestic transactions. However, and similarly to the purpose of the DTTs, the goal is to facilitate and unburden international commerce and not to give rise to abuse / non taxation situations[38].

As a measure to ensure that the income is taxed at least once and by the rightful Member State, the IRD provides that[39]:

Article 1 (Scope and procedure)

1. Interest or royalty payments arising in a Member State shall be exempt from any taxes imposed on those payments in that State, whether by deduction at source or by assessment, ***provided that the beneficial owner of the interest or royalties***

[36] Please refer to footnote 16.

[37] See Angelika Meindl-Ringler, 306 *et seq.*

[38] While at the same time guaranteeing that the payments in question are taxed at least once. Taxing the beneficial owner ensures that the income is taxed in the state in which the connected expenses are also deductible. Angelika Meindl-Ringler, 299.

[39] For simplicity purposes, we will only address the provision concerning companies and not PEs. For further detail in this regard, please see Angelika Meindl-Ringler, 301 *et seq.*

is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State.

(…)

4. A company of a Member State shall be treated as the beneficial owner of interest or royalties only ***if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person****.*
(emphasis added)

The beneficial ownership requirement was included in the IRD as a measure to prevent the artificial interposition of an intermediary in order to benefit from an withholding tax exemption.

Contrary to the OECD MTC, the IRD contains a proper definition of beneficial owner, however, that does not necessarily mean that determining its exact meaning is an easy task[40], since the definition included in the IRD is also ambiguous – *i.e.,* *"*receives those payments for its own benefit" is a quite vague expression.

In this regard it is worth mentioning that the EU Commission itself stated that "the 'beneficial owner' condition of Article 1 is specifically designed to tackle artificial conduit arrangements"[41], thus implying that the beneficial owner requirement is meant to target a specific form of abuse[42].

[40] Luc de Broe, *Chapter 16: Should Courts in EU Member States Take Account of the ECJ's Judgment in the Danish Beneficial Ownership Cases When Interpreting the Beneficial Ownership Requirement in Tax Treaties?*, 667 *et seq.*

[41] Commission of the European Union, 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) 179 final (17.4.2009).

[42] Luc de Broe, *Chapter 16: Should Courts in EU Member States Take Account of the ECJ's Judgment in the Danish Beneficial Ownership Cases When Interpreting the Beneficial Ownership Requirement in Tax Treaties?*, 667 *et seq.*

Given the above, there is enough space to interpret the definition of beneficial owner in an economic way (*e.g.*, "for its own benefit" can indicate an economic benefit) or to take a more legal approach (*e.g.*, the beneficial owner receives the income in its own name and not "as an intermediary, such as an agent, trustee or authorised signatory").

2.2.3. PSD

The PSD addresses the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. Its main purpose is to eliminate double taxation on those intragroup payments – *i.e.*, payments between subsidiaries and parent companies.

As already glanced at, the PSD does not include an explicit beneficial ownership requirement nor, naturally, a definition of this term.[43]

Nevertheless, it has been questioned whether the reference to distributions 'received by' can be construed as a tacit beneficial ownership requirement:

Article 1

1. Each Member State shall apply this Directive:

(a) to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States;

(…)

Namely, PSD's application was questioned under the Danish cases, which are commonly referred to as "beneficial ownership" cases, even though there is no beneficial ownership requirement in the PSD.

In respect to the Danish case which concerned the interpretation of the PSD, the question referred was whether a DTT drafted in accordance with the OECD MTC and encompassing the concept of beneficial owner may constitute an agreement-

[43] The PSD has a GAAR in place as from 2015.

based anti-abuse provision as referred to in the PSD. The ECJ did not answer the questions regarding the interpretation of the concept of beneficial owner.

However, it should be noted that the opinion of authors as to whether the ECJ has or not read an implicit beneficial owner requirement in the PSD, is far from being unanimous[44].

We will not further address this case in the present work. The purpose of mentioning it was to draw attention to the intricacies surrounding the beneficial owner and the fact that the concepts of abuse and beneficial ownership remain intertwined.

2.2.4. Danish Cases

On 26 February 2019, the ECJ ruled a landmark decision[45] regarding withholding tax on dividends and interest paid by Danish companies to companies in other Member States, commonly referred as the Danish Cases[46]. The cases entailed the application

[44] Denis Weber, *European Union / International EU Beneficial Ownership Further Developed: A View from a Different Angle*, Vol. 14 No. 1, (World Tax Journal.2022), 4.

[45] Even though the beneficial ownership being one of the most disputed topics in international tax law, the Danish Cases were the first time the ECJ has been called upon to give its opinion on the meaning of beneficial owner. See Luc de Broe, Luc de Broe, *Chapter 16: Should Courts in EU Member States Take Account of the ECJ's Judgment in the Danish Beneficial Ownership Cases When Interpreting the Beneficial Ownership Requirement in Tax Treaties?*, 663 *et seq.*

[46] Please note that the present thesis will not analyze the ECJ judgments in a way to produce a conclusion on its rightness, accuracy, or limits. The aim is to merely evidence the importance of the term beneficial owner and the confusion surrounding its application. For a thorough analysis of the ECJ ruling, please see Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*; Susi Baerentzen, *European Union/International - Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest – A New Test to Disentangle Abuse from Real Economic Activity?*, World Tax Journal, Vol. 12 No. 1 (2020); Luc De Broe, Luc and S. Gommers, *Danish Dynamite: The 26 February 2019 CJEU. Judgments in the Danish Beneficial Ownership Cases*, EC Tax Review Vol. 28 Issue 6 (Wolters Kluwer. 2019); Jeroen J.M. Janssen, and, Mónica Sada Garibay, What should be the scope of beneficial owner concept?, Intertax, Vol. 48 Issue 2 (Wolters Kluwer. 2020).

of the PSD and IRD to vastly used holding structures (*e.g.*, part of the cases involved Luxembourg intermediary holding companies)[47].

In all the cases, the Danish Tax Authorities refused access to the relevant Directive (either IRD in respect to interest withholding tax exemption and PSD in respect to dividend withholding tax exemption), arguing that the Luxembourg holding companies were conduit entities, which only function was to channel funds from Denmark to non-EU countries without paying withholding tax in Denmark (nor in other EU Member States) and, hence, these companies could not be considered to be the beneficial owner of the income.

It was also expressed by the ECJ that the IRD concept of beneficial ownership has an autonomous EU law meaning, which must be interpreted consistently across the EU. However, and sort of contradictorily[48], the ECJ also mentions that the OECD's beneficial owner concept is relevant when interpreting the one present in the IRD[49].

Another relevant conclusion of the ECJ was that in case the recipient transfers the income to the actual beneficial owner, and the latter satisfies all conditions of the IRD, then it can benefit from the withholding tax exemption provided by the IRD[50].

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[47] In summary, part of the cases concerned investments made by private equity funds, involving Luxembourg intermediary holding companies between the funds. Some cases related to the application of the IRD involving the use of back-to-back shareholder debt financing, whereas others related to the application of the PSD, where a Luxembourg holding company was held indirectly by several private equity funds.

[48] The ECJ's opinion deviates from the one shared by AG Kokott, since the ECJ nuances the autonomous EU law interpretation of the IRD's concept (by considering the OECD's concept of relevance), and the AG argues that the concept should be interpreted autonomously and independently from the OECD's concept. Furthermore, the AG also emphasized that both the OECD MTC and Commentaries are not legally binding, and thus should not have a direct effect on the interpretation of an EU Directive. See Opinion of Advocate General Kokott, N Luxembourg 1 and Others v Skatteministeriet, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2018:143 (2018), paragraph 50 et seq.

[49] Interestingly, the ECJ did not offer any guidance as to how the OECD's concept is relevant.

[50] This conclusion is aligned with the approach foreseen in the OECD Commentaries, which allow the actual beneficial owner to claim treaty benefits when it receives the income from the intermediary.

It should also be noted that the ECJ concluded that the beneficial owner concept should be interpreted economically. On the other hand, AG Kokott favored a more legalistic interpretation[51] by stating that the beneficial owner is "the person entitled under civil law to demand payment of the interest"[52].

The approach of the ECJ has also been criticized in the literature, on the basis that some authors assume that the economic interpretation adopted, implies that the abuse pointers used and indicated by the ECJ should be taken into consideration for the concept of beneficial ownership.

In light of the above, it is possible to conclude that there is not a comprehensive coordination between EU tax law and international treaty provisions, mostly due to the fact that ECJ used a broad economic concept of beneficial owner, whereas the OECD follows a narrower concept[53].

Taking into account the overall picture, and although the decisions of the ECJ deal with directive shopping, it is fair to say that they have prompt the debate surrounding beneficial ownership and prohibition of abuse.[54]

[51] According to the AG, a beneficial owner collects a payment in his own name and for his own account, which is not the case for an agent or authorized signatory (which do not act in their own name) or a trustee (does not act for its own account). Opinion of Advocate General Kokott, paragraph 38 et seq.

[52] Opinion of Advocate General Kokott, paragraph 37.

[53] For a comprehensive analysis of complex interconnections between EU and tax treaty law, in light of the ECJ judgements, please see Carla de Pietro, *Beneficial Ownership, Tax Abuse and Legal Pluralism: An Analysis in Light of the CJEU's Judgment Concerning the Danish Cases on Interest*, Intertax Vol. 48 Issue 2 (Wolters Kluwer. 2020).

[54] Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 602 *et seq.*

Chapter 3 – Approaches to beneficial ownership

As it is possible to understand from the previous chapter, there are several approaches when it comes to interpreting the beneficial ownership concept. It is also interesting to note that the approach followed many times differs based on the person / situation the author / court is trying to tackle.

Some authors uphold that only a legal approach should be followed when discussing beneficial ownership[55]. On the other hand, some other argue that the beneficial ownership should be determined from a substance-over-form perspective[56].

For example, Danon is of the opinion that "beneficial ownership focuses exclusively on the intensity of the ownership attributes enjoyed by the recipient of the income".[57] Whereas Hamra and Korving suggest a combined approach of a broader anti-abuse rule and attribution-of-income interpretation.[58]

Notwithstanding the above, it is important to note that each approach has its advantages and shortcomings, needless to say at this point that this is a very complex subject.[59]

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[55] "…du Toit has argued that a conduit company is not the beneficial owner only where it has a legal or contractual obligation to pay the specific income it receives". Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 626. For a summary of the position of key authors in this regard, please see Angelika Meindl-Ringler, 77 *et seq.*

[56] As for Vogel he argued that "the old dispute of form versus substance should be decided in favor of substance". Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 626.

[57] Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 626

[58] C. Hamra and J.J.A.M. Korving, *Beneficial Ownership Interpreted, To What Extent Are the OECD and the EU on the Same Wavelength?*, Intertax Vol. 49, Issue 3 (Wolters Kluwers. 2021), 259 *et seq.*

[59] See Angelika Meindl-Ringler, 321 *et seq.*

3.1. Broad anti-avoidance rule

The concept, or rather the requirement, of beneficial ownership is often interpreted and applied considering a substance-over-form[60] or economic approach. This means that when applying the concept what is being considered is the factual and effective situation[61].

According to this approach, the beneficial ownership should focus on factual circumstances and the existence of economic control - interdependence between the income and the obligation to transfer such income.[62] Well, in order to apply this view, it is virtually impossible to merely look at the transaction at stake – *i.e.*, payment of income from State of Source to recipient resident in State of Residence – instead of looking to the whole structure that encompasses the involved parties.

Therefore, this interpretation leads to apply the requirement as a broad anti-avoidance rule, since the factual situation is the focal point – *i.e.*, in order to analyze the factual situation, other features will unavoidably be taken into consideration such as the existence of substance at the level of the recipient, the economic rationale underlying the transaction, etc.

Thus, when applying the beneficial ownership test taking a substance-over-form perspective, this will lead to the overlapping with other anti-abuse measures.

When looking at the Commentaries on the OECD MTC, regarding agents and nominees, it is possible to verify that States may include more specific anti-avoidance

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[60] The Glossary of Tax Terms of the OECD defines substance over form doctrine as a "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 form being used for tax avoidance purposes".

[61] Angelika Meindl-Ringler "This becomes apparent, for instance, in the Indofood decision, the Swiss cases, the decisions by the Danish National Tax Tribunal or the Indonesian courts. There are also a number of commentators that favour an economic approach to beneficial ownership (*e.g.*, Vogel, Danon, Kemmeren or Baumgartner)", 321.

[62] Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 611 *et seq.*

rules in their DTTs[63]. Therefore, if the beneficial owner requirement was used as a broad anti-avoidance rule, some of the other anti-abuse provisions would become redundant and lacking utility.

Notwithstanding the above, and in order not to skew the analysis and perspective of the approaches, it must be reinforced that this approach was followed by several authors and courts which established a clear connection between beneficial owner and abuse. Although discussing abuse in a Directive context, the Danish cases are a very recent example of a decision which favors a substance-over-form approach when determining the meaning of beneficial owner.

In addition, the beneficial owner requirement is frequently brought up as a broader anti-avoidance rule in relation to conduit structures.[64]

3.2. Attributes-of-ownership

The expression itself already sheds light on its own meaning since the attributes-of-ownership approach focuses on the actual true owner. Commonly, when thinking of ownership the words that come to our minds are control, possession, right to use, property, etc.

Although, at a first glance, the attributes-of-ownership seems a very straightforward approach, it entails several shortcomings. There are several ownership attributes which may be allocated to different persons (*e.g.*, it is possible to have the legal property but not the right of use). In such cases, in which we are not facing a full and indivisible ownership, the question that arises is how to determine which attribute of ownership should prevail (over the other).

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[63] Commentary on article 10 (dividends), paragraph 12.5.

[64] Jain develops his approach to beneficial ownership as an anti-avoidance rule in the specific context of conduit structures. Saurabh Jain, *Effectiveness of the Beneficial Ownership Test in Conduit Company Cases*, thesis submitted to Victoria University of Wellington in fulfilment of the requirements of the degree of Doctor of Philosophy in Commercial Law (2012).

In addition, another issue is the underlying burden of proof of showing the beneficial ownership following such interpretation.

Despite the above, and based on a literal interpretation, it must be reckoned that the beneficial ownership requirement focuses on ownership attributes[65]. Thus, in our opinion, in a theoretical way this approach seems to be quite logical and straightforward, however its weaknesses show when put to practice.

For instance, if we consider control (*i.e.*, the power of the recipient of the income to control the ultimate attribution of the income) as the key ownership attribute, the way to ascertain such control, should be determined and tested from a substance-over-form perspective.

On the other hand, Felipe Vallada[66] states that this approach is not aligned with the original use of the term, although it recognizes its potential usefulness. According to Vallada, following this approach opens the possibility to be argued that a domestic meaning should be applicable, which could be a step back in defining the use of the term.

3.3. Forwarding approach

According to the forwarding approach, a person cannot be the beneficial owner if it is obliged to forward the income received to another person.

In this context, this interpretation can be seen as a variation of the attributes-of-ownership approach, in the sense we have a recipient with a right to receive income (under an agreement or ownership, etc.), however, the income is not at his disposal since there is an obligation to pass it on to someone else.

[65] Robert Danon, *Interest (Article 11 OECD Model Convention)*, 94.

[66] Felipe Vallada, 29 et seq.

As already sort of covered when we discussed agents, nominees, and conduits, please note that the obligation to forward the income can derive from a legal or contractual obligation[67] or be verified on the basis of facts and circumstances.

In this regard, Angelika Meindl-Ringler[68] argues that although the forwarding approach does not require a tax avoidance motive or a tax advantage, when applied, it works for tackling conduit situation - thus embodying a narrow anti-avoidance provision.

The OECD Commentaries explicitly include this approach as a requisite when determining beneficial owner under article 10 (dividends)[69]:

> *In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the dividend is not the "beneficial owner" because* ***that recipient's right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person****. 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 dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person.*
>
> *(…)*
>
> *Where the recipient of a dividend does have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the "beneficial owner" of that dividend. It should also be noted that Article 10 refers to the beneficial owner of*

[67] Please note that when mentioning a contractual obligation in this regard it does not include CIVs. In this regard please check the Commentaries on the OECD MTC, 61 *et seq.*

[68] Angelika Meindl-Ringler, 325 *et seq.*

[69] The same commentary, with applicable changes, also exist as regards interest and royalties. Commentary on article 11 (interest), paragraph 10. and commentary on article 12 (royalties), paragraph 4.3.

a dividend as opposed to the owner of the shares, which may be different in some cases.

3.4. Attribution-of-income approach

Moving on to the last approach (to be specifically addressed in the present thesis), we will now cover the attribution-of-income interpretation, which is a test dealing specifically with the recipient of the income.

It is possible to argue that the OECD intends to subordinate the granting of benefits to the characteristics of the recipient[70]. In this context, and if we looked at the introduction of the beneficial ownership as a mere clarification of expression 'paid to', the concept would be essentially a attribution-of-income rule.[71]

The determination of the beneficial owner based on the attribution-of-income approach, must be made from the perspective of the State of Residence, since it is in accordance with the rules of this State that it is possible to determine whether the tests above are met.

The advantages of this approach is that it excludes agents and nominees, it effectively eliminates double taxation and should be rather easy to apply for the State of Residence. On the other hand, the attribution-of-income approach focuses on the domestic law of the State of Residence, even though the State that actually applies the DTT is the Source State – *i.e.*, this might prove problematic since it puts the burden of determining how the income would be treated in the Residence state on the Source State.

This approach also raises additional queries regarding the specific tax status of the recipient, namely, concerning its applicability to tax-exempt entities, whether it

[70] Considering the first clarifications to be in the 'agenda' concerned the term 'paid to'. Commentary on article 10 (dividends), paragraph 12.1.

[71] Benjamin Malek, *The concept of beneficial ownership in tax treaty practice*, Master Thesis, University of Lausanne (2018), 6.

should take into consideration deductible expenses or losses[72] or even the potential applicability of domestic anti-abuse rules such as CFC rules[73].

The way the above uncertainties are settled varies in accordance with the interpretation given to the tests (liability-to-tax approach or subject-to-tax method).

Under a tax liability test, it is possible for a person to benefit from a DTT, even if the income in question is not actually taxed, either by the application of deductions, losses, or a domestic exemption. On the other hand, a subject-to-tax clause should demand that such particular income is, in fact, subject and not exempt from taxation - however, this depends on the applicability of the clause itself by the States.

[72] "It is not always clear whether tax-exempt entities are covered by such liability-to-tax clauses (…) This will often depend on whether a person is generally liable to tax and only in a second step exempt or whether the person is tax-exempt from the beginning. A tax-exempt entity will, however, always be excluded under a traditional subject-to-tax clause." Angelika Meindl-Ringer, 331. See also the commentaries on article 4 (resident), paragraphs 8.11. *et seq.*

[73] The 2015 BEPS Action 3 Report on Designing Effective Controlled Foreign Company Rules set out approaches to the strengthening of CFC rules which focused on ensuring the taxation of certain categories of Multinational Enterprises' income in the jurisdiction of the parent company - in order to reduce the incentive to shift profits from a market jurisdiction into a low-tax jurisdiction (usually an offshore).

Chapter 4 – Scope of beneficial ownership concept

After analyzing the different approaches followed when applying the beneficial owner concept, it is possible to confirm that the path chosen depends on the type of situation or person the author / court is trying to address.

As such, it may be necessary to take a step back and first define what structures do we intend to cover with the beneficial owner concept. Already shedding light on the last chapter, since we are of the opinion that the concept should not be broadly used, it is important to clearly define the scope of beneficial owner, given the abundancy of rules that already target abuse situations.

4.1. What should be the scope of the beneficial ownership concept?

Fast forward into this stage of the work, and having already analyzed the structures, the objective, and the approach, we are faced with a myriad of options of addressing the beneficial owner concept which are almost overwhelming - even in the limited context of the present thesis, which is mostly encircled by OECD MTC and EU Law (more specifically IRD).

Still of today, it remains controversial whether the beneficial owner requirement should be seen as a mere condition to access tax treaty benefits or a specific anti-abuse rule.

Likewise, the discussion on how to interpret the concept of beneficial owner either based on a substance-over-form or legal approach is still very much alive, although it is possible to argue that, recently, a substance-over-form interpretation has been favored.[74]

[74] When analyzing the substance-over-form versus a legal interpretation, Danon provides us with a astonishing summary analysis of the courts cases, and concludes that besides the Canadian Prévost and Velcro cases, most cases adopt the substance-over-form approach. Furthermore, Danon considered that, although based on the prohibition of abuse, the Danish cases also followed a substance-over-form interpretation. See Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and*

In this regard, it is worth mentioning that the final changes to this concept were made in 2017. The amendments were quite restricted[75] and mainly intended to clarify that the beneficial owner requirement does not prevent the application of anti-abuse rules, in particular, LOB and PPT, as included in paragraph 12.5 of the Commentaries on article 10 (dividends), which reads as follows[76]:

> *12.5 The fact that the recipient of a dividend is considered to be the beneficial owner of that dividend does not mean, however, that the limitation of tax provided for by paragraph 2 must automatically be granted. This limitation of tax should not be granted in cases of abuse of this provision (see also paragraph 22 below). The provisions of Article 29 and the principles put forward in the section on "Improper use of the Convention" in the Commentary on Article 1 will apply to prevent abuses, including treaty-shopping situations where the recipient is the*

12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?. 611 *et seq.*

[75] Luc de Broe, *Chapter 16: Should Courts in EU Member States Take Account of the ECJ's Judgment in the Danish Beneficial Ownership Cases When Interpreting the Beneficial Ownership Requirement in Tax Treaties*, 665.

[76] The 2014 version was only slightly different, for completeness purposes included below is a comparison of the wording of 2014 with the changes included by 2017 (strikethrough for deletions and underline for insertions): 12.5 The fact that the recipient of a dividend is considered to be the beneficial owner of that dividend does not mean, however, that the limitation of tax provided for by paragraph 2 must automatically be granted. This limitation of tax should not be granted in cases of abuse of this provision (see also ~~paragraphs 17 and~~ paragraph 22 below). ~~As explained~~ The provisions of Article 29 and the principles put forward in the section on "Improper use of the Convention" in the Commentary on Article 1~~, there are many ways of addressing conduit company and, more generally,~~ will apply to prevent abuses, including treaty-shopping situations~~. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches~~ where the recipient is the beneficial owner of the dividends. Whilst 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 abuses, such as certain forms of treaty shopping, that are addressed by these provisions and principles and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.

beneficial owner of the dividends. Whilst 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 abuses, such as certain forms of treaty shopping, that are addressed by these provisions and principles and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.

In light of the above, it is possible to conclude that according to the OECD the beneficial owner requirement should not be used to tackle tax avoidance, thus it should not be a broad anti-avoidance provision, even though it can be quite effective for some cases.[77]

4.2. Structures ideally covered

In light of the above and considering that we understand the beneficial owner concept should not be a broad anti-avoidance rule, the concept should be restricted to exclude interposed intermediaries, such as agents and nominees only.[78]

As for conduit companies, it will very much depend on the lack of autonomy[79], of the company itself in what concerns its right to decide whether and to whom the income it receives is to be paid.

Apart from the above typified intermediaries, it is harder to clearly define the persons to be targeted since it naturally depends on a case-by-case analysis. However, what we intend to achieve with the exercise of trying to limit the structures covered, is to counteract the inclination and tendency (including a personal bias of the author) to try to apply the beneficial owner concept to the majority of the situations of abuse.

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[77] Felipe Vallada, 47.

[78] Stef van Weeghel, *Dividends (Article 10 OECD Model Convention)* in: Lang, M. et al, Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives, EUCOTAX Series on European Taxation Vol. 20 (Wolters Kluwer. 2008), 69 *et seq.*

[79] Robert Danon, *Interest (Article 11 OECD Model Convention)*, 96 *et seq.*

In this context, we are of the opinion that the beneficial owner requirement should not be extrapolated to other measures / provisions than the ones that it is specifically foreseen for.

4.3. Co-existence with anti-abuse provisions and strategies

We will now address how does the beneficial owner interacts with other anti-abuse provisions and how it plays with the post-BEPS tax world, namely, with the changes enacted under Action 6 of BEPS.[80]

In summary, the BEPS Action 6 final report recommends that DTTs should include PPT and LOB rules either (i) simultaneously, or (ii) only PPT or (iii) LOB, supplemented by special rules for countering conduit companies.

Some authors argue that a side effect of these changes was the fueling of the discussion and uncertainties surrounding the beneficial owner concept.

4.3.1. LOB

The LOB rule is a provision of DTTs to refuse the granting of tax benefits where there is abuse when applying the treaty provisions[81].

Under the LOB rule, the granting of treaty benefits is contingent on the entities meeting certain conditions – *e.g.*, legal nature of the entity, ownership, general activities – which were designed in order to prove that the beneficiary has an actual relation with its State of Residence.

[80] Action 6: 2015 Final Report Preventing the Granting of Treaty Benefits in Inappropriate Circumstances". The Action 6 Report focuses on preventing treaty abuse where taxpayers are engaged in treaty shopping and other treaty abuse strategies which undermine tax sovereignty by claiming treaty benefits in situations where such benefits were not intended to be granted.

[81] The LOB rule was originally established by the US Model Tax Convention, in force since 1981, and is present in virtually all DTTs entered into by the US.

In this context, the LOB can be a general permission to refuse to grant benefits in a case, or constitute a specific test included in the DTT. The following tests can be performed / approaches can be followed under a LOB[82]: (i) a test for ownership or the look-through approach; (ii) the subject-to-tax test; (iii) the general *bona fide* provision[83]; (iv) the activity provision (benefits under the treaty are provided if the income recipient carries out active entrepreneurial activity in the state of his residence and the income gained is related to such activities); among others[84].

As for the potential overlapping of rules within the OECD MTC, the LOB clause only applies to deny a DTT benefit if a person is already the beneficial owner. The inclusion of the LOB clause does not override the beneficial ownership requirement since both clauses are applied alongside each other in different moments.

This is clearly foreseen in the Commentaries[85]: "Paragraph 1 does not extend in any way the scope of the benefits granted by the other provisions of the Convention. Thus, a resident of a Contracting State who constitutes a "qualified person" under paragraph 2 must still meet the conditions of the other provisions of the Convention in order to obtain these benefits (e.g. **that resident must be the beneficial owner of dividends in order to benefit from the provisions of paragraph 2 of Article 10**) and these benefits may be denied or restricted under applicable anti-abuse rules such as the rules in paragraphs 8 and 9." (emphasis added)

Notwithstanding the LOB covering several tests, it is not designed for nominees and agents, and its application to trusts raises several issues. An interesting approach on the relationship between beneficial ownership and LOB is laid down by Yoshimura[86] which establishes an own approach to beneficial ownership based on its scope compared to LOB clauses: "Theoretically, the concept of beneficial owner is a more

[82] Alexander V. Demin and Alexey V. Nikolaev, *The Beneficial Owner Concept in the Context of Beps: Problems and Prospects*, Financial Law Review No. 13 (2019), 8.

[83] In summary, it requires that the transaction is performed on the basis of valid business reasons.

[84] For further detail on the tests under a LOB please see: Koichiro Yoshimura, *Clarifying the Meaning of 'Beneficial Owner' in Tax Treaties*, Tax Notes International No. 761 (Tax Analysts. 2013), 767.

[85] Commentary on article 29 (entitlement to benefits), paragraph 8.

[86] Koichiro Yoshimura, 779 *et seq.*

desirable measure since it is based on the very nature of conduit transactions, if perfect enforcement of it is guaranteed. However, perfect enforcement can hardly be achieved, and the cost to more closely examine the relationship between the two transactions can be high, especially for tax authorities. Therefore, an LOB clause, which can be judged based on more easily available facts, becomes necessary. This division of functions between an LOB clause and beneficial owner looks reasonable."

In this context, it should be noted that neither rules should replace the other, although there is an overlap to a certain extent, the LOB clause cannot cover all the arrangements that are covered by beneficial ownership and vice versa.

4.3.2. PPT

A GAAR was also introduced by the MLI[87] in the OECD MTC to deal with other forms of abuse, including treaty shopping situations not addressed by the LOB rule. This GAAR is called the PTT and focuses on the principal purposes of arrangements or transactions.

The MLI purpose is to amend thousands of bilateral DTTs concluded to eliminate double taxation in an harmonized and streamlined process, which has been open for signature since January 2017[88].

The MLI is divided into several parts with different focus points. Part III of the MLI is entitled 'Treaty Abuse' and encompasses article 6 (purpose of a covered tax

[87] Following the release of the OECD report "Addressing BEPS" in February 2013, the OECD and G20 countries adopted a 15-point action plan to address BEPS. The BEPS initiative has been designed to be implemented by way of both domestic tax reforms and reform of treaty provisions. Action 15 of the BEPS initiative focused on the development of a MLI in order to swiftly implement, amongst other things, the tax treaty measures developed in the course of the OECD BEPS initiative. Broadly, the MLI operates to modify tax treaties between parties to the convention, where both parties have opted for the MLI to apply to the relevant treaty.

[88] On 7 June 2017, 68 countries signed it in a formal event which occurred in Paris. For its (constantly) updated status regarding signatory countries, see https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.

agreement) and article 7 (prevention of treaty abuse) which contain the minimum standard for protection against the abuse of treaties under Action 6.

The PPT is the default minimum standard for prevention of treaty abuse, which introduced a new requirement for DTT access that needs to be properly interpreted, and is foreseen in article 7 (prevention of treaty abuse) in the MLI[89] according to which:

> *Notwithstanding any provisions of a Covered Tax Agreement, a **benefit** under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is **reasonable to conclude**, having regard to all relevant facts and circumstances, that obtaining that benefit was **one of the principal purposes** of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the **object and purpose** of the relevant provisions of the Covered Tax Agreement.*
> (emphasis added)

It should be noted that the Report[90] provides useful guidance as to how to interpret some key terms embodied within the PPT. In this regard, we note that the term "benefit" includes all limitations (*e.g.*, a tax reduction, tax exemption or refund) on taxation imposed by the State of source – which, for instance, was not clear when interpreting the beneficial owner requirement under an attribution-of-income approach.

The PPT explicitly states that obtaining a treaty benefit should be "one of the principal purposes" of any arrangement or transaction. It is further clarified in the report that obtaining the treaty benefit does not need to be the sole or dominant purpose of entering into an arrangement or transaction, thus it could be a principal purpose alongside various other commercial and non-tax purposes.

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[89] See paragraph 9 of article 29 of the OECD MTC.

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

Similarly to the OECD's approach as regards the application of the beneficial owner test (as depicted in the Commentaries), the treaty benefit will not be denied if granting that treaty benefit under some specific circumstances would be in line with the "object and purpose" of the treaty provisions.

As regard the term 'reasonable to conclude', it is necessary to note that there is no further guidance as to what the expression is intended to imply, aside from its ordinary meaning – being left open to interpretation.

The PPT contains two tests in order to determine whether the benefit of the DTT should be granted in a specific situation, (i) a subjective test based on the question of determining the aim of the taxpayer[91]; and (ii) an objective test according to which the treaty benefit can be granted if granting that benefit would be in accordance with the object and purpose of the relevant treaty provision.

In light of the above, it is possible to conclude that, within the OECD MTC, the PPT has a broader scope when compared with the beneficial owner requirement, since it applies to all distributive rules and to all forms of treaty abuse, particularly abusive restructurings[92] and conduit situations.[93]

Therefore, and at least to what concerns conduit companies there is a possible overlap between the beneficial owner requirement and the PPT, which raises issues in determining the order of application of both rules[94], even though, as previously mentioned, the Commentaries indicate that the beneficial owner should not prevent the use of other provisions tackling abuse.

As already mentioned regarding the LOB, it is in line with the structure of the OECD MTC and Commentaries that the beneficial ownership test should be met first when

[91]It may be argued that the fact that "one of the principle purposes" has been chosen for instead of "the sole / predominant / essential purpose" makes it easier to establish that the subjective test is met.

[92] Commentary on article 29 (entitlement to benefits), paragraph 182.

[93] Commentary on article 29 (entitlement to benefits), paragraph 187.

[94] Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 656 et seq.

considering the access to a DTT - under articles 10 (dividends), 11 (interest) and 12 (royalties) - if satisfied, the PPT could still come into play to neutralize these benefits.

Finally, and from a practical perspective, it may be inquired whether the beneficial owner and the PPT would lead to the same outcome in a conduit case.[95] Well, depending on the interpretation given to the beneficial owner the answer may be affirmative. Danon has argued that "the approach taken under the PPT rule is different from the one that could be favored under a broad interpretation of beneficial ownership which only focuses on the existence of an interdependence between two income streams and **tends to ignore the underlying purposes of the structure or arrangement**" (emphasis added)[96].

We believe that, especially as from the last changes to the OECD MTC in 2017, it became clear that the beneficial owner is not the ideal provision to tackle conduits[97]. This is confirmed by the fact that if a State wished to opt out of the PPT rule, it must then adopt anti-conduit mechanisms that achieve a similar result[98].

[95] Robert Danon, *Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, 659.

[96] Please also refer to the examples foreseen in the Commentary on article 29 (entitlement to benefits), paragraph 187.

[97] Also, the Conduit Companies Report states that beneficial ownership can only deal with conduit structures in a very rudimentary way.

[98] Commentary on Article 29 (entitlement to benefits), paragraph 187.

Chapter 5 – Conclusion

As aforesaid, the OECD's beneficial owner concept has been thoroughly discussed and has increased immensely in complexity over the years.

In this context, we would like to start to establish that we agree with an international tax meaning of beneficial ownership, which is a non-controversial topic. On another note, and also undisputable in our view, the beneficial ownership is a matter of who receives the income for one's own use (*i.e.*, whether it can claim the income for its own account and benefit), and thus should not be confused with the UBO.

Furthermore, we are of the opinion that the concept should not be understood as a subject-to-tax clause (which is not so non-controversial). The focus of the beneficial owner concept should rather be on ownership attributes, in regard to the income in question, and thus should exclude agents, nominees, and conduits (with very narrow powers over the income from treaty benefits, since we already concluded the beneficial owner is not the most adequate measure to target conduits).

Well, when it comes to apply the beneficial owner concept is when we enter into troubled waters. Based on the analysis performed, we agree with a double approach when applying the beneficial owner concept – *i.e.*, liability-of-tax (which can be analyzed under an attribution-of-income approach, since the liability-to-tax under the DTT itself may be overlooked or focused on the taxpayer and not on the income itself), which should be followed / applied in conjunction with an attributes-of-ownership approach.

In our view, the attributes-of-ownership is the approach which will better tackle the actual structures that should be targeted by the beneficial owner requirement. As regards the attribute that should prevail, we favor the notion of control (which should be determined considering who supports the risk) – the need to rank attributes was one of the outlined disadvantages / difficulties in applying this approach.

In its turn, the applicability of this interpretation will partake of the forwarding approach – since we believe it to be a great pointer of lack of control.

Furthermore, the beneficial owner concept should be clearly limited to target pure intermediaries – *i.e.*, it should focus on the interposed company, and not on the surrounding restructuring, since there are more than adequate anti-avoidance rules to tackle abuse.

For instance, a clear indicator of the state of the art in this regard is the current proposal for ATAD III, laying down rules to prevent the misuse of shell entities for tax purposes. This proposal aims at introducing an EU-wide "substance test", in order to allow Member States to identify undertakings that are engaged in an economic activity but do not have minimal substance and, in the view of the Commission, are misused to obtain tax advantages ("shell entities").

When it comes to international tax measures, we are of the opinion that we should streamline the most the provisions already existing, and clearly establish its purposes and limits, otherwise we risk depleting them.

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