

Article

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Determining the Beneficial Owner of Dividend Income Compared to Other Items of Income in International Taxation: *nihil sub sōle novum*¹

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Abstract: This article focuses on how the concept of beneficial ownership (BO) is determined and applied in international taxation. Although the article analyzes the concept of BO under tax treaties, i.e., the major source of law reducing or eliminating withholding taxation (WHT) on cross-border income at the source state, it is by analogy relevant to European Union (EU) law. The analysis aims to verify whether the meaning of BO in legal provisions regulating WHT on dividend income is the same as under provisions dealing with such taxation on other types of income (typically interest and royalties). The article answers that research question affirmatively, arguing that the concept of BO should be understood in the same way under all provisions concerning WHT on income. This argument follows from the observation that the concept of BO has one and the same income allocation function under these provisions. In contrast, the anti-abusive function should be essentially dismissed, especially in the presence of general anti-abusive rules such as the principal purposes test (PPT) or the general anti-avoidance rule (GAAR). This approach to determining BO is agnostic, and so it applies alike to WHT on income under tax treaties across the globe and EU law.

Keywords: Dividend Income; Beneficial Owner; International Taxation; Withholding Tax; Tax Policy; Tax Certainty

1 Introduction

From its emergence in the first tax treaties,² through its evolution in international³ and European Union (EU)⁴

International Taxation and Biosemantics – Why a Redundant, Paradoxical and Harmful Concept Can Be a Potent Weapon in the Hands of the Tax Authorities,” *Bull. Intl. Fisc. Docn.* 77, no. 2 (2023), <https://www.ifa.nl/media/3xvnbfxb/beneficial-ownership-in-international-taxation-and-biosemantics.pdf>. In 2023, the author was awarded with the International Fiscal Association (IFA) Mitchell B. Carroll Prize for the book.

² E.g. Article XI(2) of the Canada – United States tax treaty from 1942, as modified by a protocol to it, <https://www.treaty-accord.gc.ca/text-texte.aspx?id=102363>. However, its use was not related to the derivation of income, but to the ownership of shares, and thus deviated from the meaning and function of the concept of BO, well known under modern tax treaties based on the Organization for Economic Co-operation and Development (OECD) Models Tax Conventions on Income and on Capital (OECD MTC), as released so far in 1977, 1995, 2003, 2010, 2014, and 2017. Cf. Richard J. Vann, “Beneficial Ownership: What Does History (and Maybe Policy) Tell Us,” in *Beneficial Ownership: Recent Trends*, eds. M. Lang et al. (IBFD, 2013), sec. 19.3.1.

³ The first use of the concept of BO in respect of income from dividends, interest, and royalties with the coverage of nominees, agents, and trusts was in the 1966 Protocol to the UK-US tax treaty (1945). This approach was followed by the UK in many of its treaties thereafter. See Vann n 2, sec. 19.3.2. On April 14, 1977, the OECD MTC was published. Unlike its predecessor from 1963 (the Draft Model), the OECD Model from 1977 included the concept of BO in Articles 10, 11 and 12 as a result of the third report of November 4, 1970 of the Working Party (WP) No. 27 of The Fiscal Committee (Luxembourg — France — Netherlands) (Received October 16, 1970), *Proposals for The Amendment of Articles 11 And 12 of The Draft Convention, Relating to Interest and Royalties Respectively, and of The Commentaries Thereon*, FC/WP27(70)2 (November 4, 1970), p. 1.

⁴ See Art. 1(4) of Council Directive 2003/49/EC of June 3, 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (IRD), Official Journal of the European Union, L 157/49, June 26, 2003. For the origin of the concept of BO under the IRD see C. Secchi, “Report on the proposal for a

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¹ The article develops ideas contained in the author’s earlier work, Błażej Kuźniacki, *Beneficial Ownership in International Taxation* (Edward Elgar Publishing, 2022), <https://www.e-elgar.com/shop/gbp/beneficial-ownership-in-international-taxation-9781802206067.html>; Błażej Kuźniacki, “Beneficial Ownership in

tax law until now, the concept of beneficial ownership—or “beneficial owner” (BO)—has given rise to disputes between tax authorities and taxpayers around the world. Despite more than 50 years of attempts by the OECD to clarify its meaning and scope, it remains ambiguous and unresolved, not only among tax authorities and courts, but also among scholars.⁵

Irrespective the justified criticism of the concept of BO in the scholarship, including far-reaching conclusions about its deletion from international and EU legal orders, especially in presence of general anti-abusive rules such as the general anti-avoidance rule (GAAR) or the principal purposes test (PPT),⁶ it remains regarded as a potent weapon in the arsenal of tax authorities to attack presumably abusive behaviors involving conduit entities.⁷ For instance, the Canadian court and the UK court handed down judgments regarding the concept of BO in December 2023 and April 2024, respectively.⁸ Hence, it is still worth closely examining the concept of BO from various perspectives in order to contribute

to the science and practice of tax law by answering important research questions.

This article aims to answer the research question concerning the determination of BO with respect to dividend income, as compared to other relevant items of income (typically: interest and royalties). Although the comparison covers the approach to determining that concept under tax treaties—the major source of law reducing or eliminating withholding taxation (WHT) of cross border income at the source state—it is also relevant to EU directives. The analysis will verify whether the meaning of BO in legal provisions regulating WHT on dividend income differs from that under provisions dealing with such taxation of other items of income, or whether it is the same.

The meaning, scope, and function of the concept of BO under these provisions will not be examined in-depth in this study, as the author has covered this in his previous work.⁹ In particular, it concludes that (i) the concept of BO should be determined on the basis of legal analysis rather than economic grounds and (ii) it has an income allocation rather than an anti-abusive function. This article will reveal a close connection between the legal approach to determining the concept of BO and its income allocation function, on the one hand, and an identical method of determining it for income from dividends, interest, and royalties, on the other hand. To demonstrate that connection and its importance for a maximally uniform and predictable application of the concept of BO, the article will delve into the reasons for taking a legal approach to determining the concept of BO and its income allocation rather than an anti-abusive function. It will be argued that such an approach to determining the concept of BO ensures its convergent application for all items of income it covers under tax treaties and EU law. This does not mean, however, that an income allocation function cannot lead to an anti-abuse effect. It can, of course, because an appropriate allocation of income, which is based on real rather than simulated circumstances, will eliminate most blatant tax avoidance conduit arrangements.¹⁰

Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States,” (September 3, 1998) COM(98)0067 – C4-0195/98 – 98/0087(CNS)). By contrast, the concept of BO is not explicitly included in the Council Directive 2011/96/EU of November 30, 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states (PSD) from the Official Journal of the European Union, L 345/8, December 29, 2011.

⁵ For the relevant literature, without being exhaustive, see Kuźniacki n 1 in footnote 4 at p. 2. See also Charl P. Du Toit, “Beneficial Owner: The Enigma Storms Ahead,” *Bull. Intl. Fisc. Docn.* 75, (2021); Dennis Weber, “EU Beneficial Ownership Further Developed: A View from a Different Angle,” *World Tax J.* 14, no. 1 (2022); Kuźniacki (2023) n 1.

⁶ See Robert Danon et al., “The Prohibition of Abuse of Rights After the ECJ Danish Cases,” *Intertax* 49, (2021) 6/7: 515–516; Kuźniacki (2022), *supra* n 1, 344–346; Kuźniacki (2023) n 1, 48–49, 52–53.

⁷ Jiménez in: Lang et al. (2013) n 2, Chapter 1.

⁸ See Tax Court of Canada (TCC), judgment of December 13, 2023, *Husky Energy Inc. v. The King*, TCC 167 (2023); The Court of Appeal (Civil Division), judgment of April 15, 2024, *Hargreaves Property Holdings Limited (Appellant) v The Commissioners For His Majesty’s Revenue And Customs*, EWCA Civ 365 (2024). For an analysis of the former case, see Błażej Kuźniacki, *BO Bites Husky, GAAR Remains Toothless – Part I. International treaty autonomous BO-GAAR relationship*,” *Kluwer Tax International Blog*, April 22, 2024 and “Part II. The (Toxic) Relationship of BO and GAAR in Light of the Husky Energy case,” *Kluwer Tax International Blog*, April 24, 2024, <https://kluwertaxblog.com/>.

⁹ Kuźniacki (2022) n 1, Chapters 1 and 5; Kuźniacki (2023) n 1.

¹⁰ See Kuźniacki (2023) n 1, 47: “Such situations typically concern agents, nominees and sham conduit arrangements and transactions. This does not mean, however, that the concept of BO is an anti-abuse rule, as it does not contain anti-abuse premises. Indeed, this anti-abuse effect principally follows from the relevant interpretation of the treaty provisions in concert with domestic rules governing evidentiary procedures.”

However, it is very different from identifying the function of a rule with its effect.

The previous research and the observations stemming from it constitute building blocks for the current study. Notably, the same method of determining the concept of BO and the same function it carries under all the relevant provisions lead to the conclusion that its determination for the purposes of dividend income remains the same as for other items of income. Indeed, it will follow from the analysis below that there is nothing special about the meaning of BO as it applies to dividends, as opposed to its application to interest, or royalties (or any other income). This remains valid even though dividends may differ from interest and royalties in various ways, i.e., (1) they are less predictable and rely upon the shareholders of a company and a decision of the board of directors before payment; (2) their flow can be more easily separated from the ownership of the underlying shares (although it is always possible in the case of interest to separate the interest coupons from the underlying debt); and (3) they are typically not tax-deductible at the level of their payer. Still, none of these or other potential differences suggest that the concept of BO in the case of dividends should have, in any sense, a different meaning from the concept of BO as it applies to interest or royalties (or any other income as the case may be).¹¹ The exception from this assumption applies only to the anti-abusive, economic approach to determination of the concept of BO that is rejected in this study.¹²

This observation remains equally valid in respect to tax treaties and EU law (although the PSD does not use the term BO), insofar as BO is an autonomous concept of international tax law that should be understood and applied the same way under different legal sources.¹³

Likewise, the concept of BO has the same income allocation function¹⁴ regardless of the item of income it applies to and all the other circumstances taken into consideration. In that regard, a nuance is worth reiterating here, namely that the mentioned function of the concept of BO should not be identified with the possible effect of its application as being, in certain circumstances, anti-abusive. This does not mean that the concept of BO acquires an anti-abusive function, just as ordinary rules of evidence do not become anti-abusive merely because their proper application may lead to the prevention of abusive tax avoidance.¹⁵

The global reach and relevance of the article stems from its agnostic approach that considers BO as an autonomous concept of international tax law (including EU law). As a result, the article is germane to all legal sources of relevance to levy WHT on cross-border payments of income that require the determination and identification of the BO of the income, such as the relevant provisions of tax treaties, EU law, and domestic tax law of countries and jurisdictions around the globe.

The legal nature of the research article means that it mainly relies on a traditional dogmatic approach that undertakes a legal analysis of issues covered by the research questions.¹⁶ The main analytical research method consists of the general rule for the interpretation of treaties enshrined in Article 31 of the Vienna Convention on the Law of Treaties¹⁷ (VCLT) and the general rule for the interpretation of tax treaties under Article 3(2) of the OECD MTC. The latter is a *lex specialis* rule for the interpretation of tax treaties compared to the general rule for the interpretation of international treaties, as set out in Article 31 of the VCLT. This means that, as a rule, the interpretation of a term

¹¹ See Philip Baker, “The Meaning of “Beneficial Ownership” as Applied to Dividends under the OECD Model Tax Convention,” in *Taxation of Intercompany Dividends Under Tax Treaties and EU Law*, ed. Guglielmo Maisto (IBFD, 2012), sec. 6.3.

¹² See more *infra* sections 4–5.

¹³ To avoid any confusion, it is noteworthy to state the obvious: this article focuses only on the concept of BO in relation to WHT of cross border income; it does not relate to or is by any extent connected with the concept of (ultimate) beneficial owner (UBO), which is specific to anti-money laundering (AML) and countering the financing of terrorism (CFT). The concept of UBO applies to individuals (natural persons) and serves anti-abusive and anti-fraud purposes from the perspective of the resident countries. See Financial Action Task Force (hereinafter the ‘FATF’), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* –

The FATF Recommendations (2012), 110; OECD, *OECD Steering Group on Corporate Governance, Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (2001), 14. This understanding of the concept of BO (i.e., this is relevant to UBO) was very clearly disconnected from tax treaties by the OECD in the 2014 update to the Commentary. See paras 12.6, 10.4, and 4.5 of the Commentary to Articles 10, 11, and 12, respectively.

¹⁴ This function is explained in sec. 2.8 below.

¹⁵ Cf. Kuźniacki n 1, marg. n. 3.254 at 170.

¹⁶ For a scholarship using this method in comparative tax law research, see e.g., Peter Koerver Schmidt, *Dansk CFC-beskatning – I et internationalt og komparativt perspektiv* (Karnov Group, 2013), 36.

¹⁷ Done in Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, 331.

used in a tax treaty—“a treaty term”¹⁸—should first be made in accordance with the principle contained in Article 3(2) of the OECD MTC.¹⁹ Still, the general rule for the interpretation of international treaties in Article 31 VCLT is fully applicable to the interpretation of Article 3(2) OECD MTC itself, as well as to other provisions of the tax treaty.²⁰

The author explained and closely examined the overarching relevance of the general rule of treaty interpretation to determine the concept of BO in his previous research.²¹ In nutshell, the linguistic, contextual, and purposive interpretation of the concept of BO form one tightly integrated process of legal interpretation in good faith that aims to achieve the purpose(s) of the relevant provisions in which that concept is embedded. The concept of BO cannot be modified exclusively by its interpretation in such a way that its scope will be expanded with the result of narrowing down the right to benefit from exemptions and reduced WHT rates contrary to the purpose of the legal norm in which this concept is included. To do so, it would be necessary to change the content of the very provisions in which the concept of BO is included.

The use of a general rule for the interpretation of a treaty is valid not only in respect of interpretation of the concept of BO under tax treaties, but also EU law, in particular the IRD and the PSD. This follows from the fact that EU Treaties (e.g. TFEU, TEU) and directives (e.g. the PSD and the IRD) constitute multilateral treaties among the EU member states. Consequently, the mentioned legal acts of the EU are international treaties that fall within the scope of application of the VCLT, especially the principle of good faith that permeates the entire process of treaty interpretation.²²

The CJEU recognized that the principles codified in the VCLT are binding on the institutions and constitute part of the *acquis communautaire*.²³ In fact, the CJEU applies a canon of legal interpretation that is reflected in the general rule of interpretation in Article 31 of the VCLT: integrated linguistic, contextual, and purposive interpretations in good faith. There is, therefore, a far-reaching convergence of the canons of interpretation of EU law by the CJEU and of international law by international tribunals. This contributes to the stability and uniformity of legal interpretation in cross-border cases.²⁴ The convergence of the canons of

order that is seemingly different from “ordinary international treaties”. See CJEU: February 5, 1963, 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*; July 15, 1964, 6/64, *Flaminio Costa v. E.N.E.L.* However, in its Opinion in O-1/91 EEA Agreement, the CJEU observed that, although the ECC Treaty constitutes the constitutional charter of the EU, it is still “concluded in the form of an international agreement.” See CJEU Opinion, December 14, 1991, 1/91, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, ECLI:EU:C:1991:490.

23 For the relevant CJEU case law, see, in particular *NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26/62, 12 (February 5, 1963); *Opinion 1/91 on the Draft Agreement between the Community on the one hand and the Member States of the European Free Trade Association on the other hand on the European Economic Area*, Case 26/62, (December 14, 1991), ECLI:EU:C:1991:490, para. 14; *Procedural issue relating to a seizure of goods belonging to Metalsa Srl. Reference for a preliminary ruling: Tribunale di Milano – Italy*, C-312/91, (July 1, 1993), ECLI:EU:C:1993:279, para. 14; *Nour Eddline El-Yassini v Secretary of State for Home Department*, (March 2, 1999), C-416/96, ECLI:EU:C:1999:107, para. 47; *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, (November 20, 2001), C-268/99, ECLI:EU:C:2001:616, para. 35; *Brita GmbH v Hauptzollamt Hamburg-Hafen*, (February 25, 2009), C-386/08, ECLI:EU:C:2010:91, paras 42-43. For the authoritative scholarship, see, in particular F. Berman, “Community Law and International Law: How Far Does Either Belong to the Other?”, in *The Clifford Chance Lectures Volume I: Bridging the Channel*, ed. Bjorge Markesinis, (Oxford University Press, 1996), 269; Giuseppe Tesaro, *Diritto comunitario*, Third Edition (Casa editrice dott. Antonio Milani, 2003), 90–91; Richard Gardiner, *Treaty Interpretation*, (Oxford University Press, 2008), 120–125; J. Crawford, *Brownlie’s Principles of Public International Law*, 8th edition (Oxford University Press, 2012), 368; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014), 38.

24 See more on convergence in international law *A Farewell to Fragmentation: Reassertion and Convergence in International*

18 I.e. a term used in the treaty irrespective of its definition in the treaty.

19 Alexander Rust, “Article 3,” in *Klaus Vogel on Double Taxation Conventions*, eds. Alexander Rust and Ekkehart Reimer, 4th edition (Wolters Kluwer Law & Business, 2015), marg. n. 110 at 207.

20 John Avery Jones, “Treaty Interpretation”, in *Global Tax Treaty Commentaries*, ed. Richard Vann (IBFD, 2017), sec. 4.1.

21 Kuźniacki n 1, sections 2.III-VI.

22 Cf. Luc De Broe, “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*, ed. Richard Vann (IBFD, 2020), sec. 16.2.1. The author of the present article acknowledges here that the CJEU has historically held that the then EEC Treaty (now: TFEU) constitutes an autonomous legal

interpretation of EU law and of international law have their common origin in Article 31 of the VCLT.

The article focuses on developments in the concept of BO under the OECD MTC, rather than the PSD and the IRD, for two reasons. First, the concept is not articulated explicitly in PSD at all, which deals with dividend income, while the overall purpose of the article is to verify whether the determination of BO in respect to dividend income is different as compared to other relevant items of income. Second, the CJEU acknowledged the *relevance of the OECD materials*, as interpreted dynamically (1996 version of the OECD Model and successive amendments of that model and its commentaries), when interpreting the concept of BO under the IRD to bolster its economic-factual approach in determination of that concept.²⁵ Hence, the relevant references to the concept of BO under EU law will be made as an excursus after examining the developments of that concept under tax treaties (OECD documentation). However, due attention will be given to the CJEU case law regarding the concept of BO in section 3.1 below, given its importance in shaping the EU approach to determining that concept.

The legal analysis of the concept of BO under the general rule on treaty interpretation and the general rule on tax treaty interpretation will be supplemented by law in action—relevant tax jurisprudence. The jurisprudence helps clarify whether the concept of BO has the same meaning when it applies under various provisions regulating WHT reductions and exemptions.²⁶ The use of jurisprudence from various states is additionally justified by the lack of an international court with jurisdiction to decide on cases concerning relations between tax treaty law and domestic tax law of contracting states.²⁷ Tax treaty jurisprudence may therefore offer

relevant guidance on the judicial understanding of the concept of BO in respect of dividend income and other items of income.²⁸ Nevertheless, the interpretative weight of jurisprudence does not go beyond the quality of the reasoning of courts in the cases analyzed. This weight will therefore be determined in relation to the persuasiveness of the court's reasoning in a particular case and how it has interpreted the concept of BO and a given tax treaty.²⁹ Courts must also consider the differences and similarities between the facts of a case, the wording of the interpreted treaty and domestic provisions regarding WHT. To this extent, the article gives jurisprudence interpretative weight depending on the plausible interpretation of the provisions in question by courts based on a critical analysis.³⁰

The article unfolds below as follows. Section 2 contains the essence of the developments of the concept of BO under tax treaties based on the OECD documentation and under EU directives. Section 3 consists of the author's observations on the relevant international and EU tax jurisprudence concerning the concept of BO. Section 4 conveys the author's own approach and proposed solution in determination of the concept of BO in respect of all items of income without any exceptional treatment of dividend income. Section 5 provides conclusions.

2 The essence of development of the concept of BO

2.1 The origin of including the concept of BO to the OECD MTC

The main proponent for including the concept of BO to the OECD MTC at the forum of the OECD was the

Law, eds. Mads Andenas and Eirik Bjorge, (Cambridge University Press, 2015).

²⁵ The CJEU, the Danish BO cases on the IRD, paras 90 and 122. See also 13. Stefanie Geringer, "Is the OECD Able to Exert Influence on the Essence of OECD-Inspired EU Secondary Law?," in *The Power to Tax in Europe*, (Bloomsbury Publishing, 2023).

²⁶ Cf. Bertil Wiman, "Att jämföra rätt," in *Festskrift till Nils Mattsson*, eds. Kristina Stål and Per Thorell (Iustus, 2005), 510; Andreas Bullen, *Arm's Length Transaction Structures: Recognizing and Restructuring Controlled Transactions in Transfer Pricing* (IBFD, 2011), 65.

²⁷ See Gustaf Lindencrona and Nils Mattsson, "Arbitration in Taxation: An Introduction," *Intertax* 42, no. 3 (2014): 161–162; Lotfi Maktouf, "Resolving International Tax Disputes Through Arbitration," *Arbitration International* 4 (1988): 32–51.

²⁸ Cf. W. J. Wagner, "The Role and Functions of Legal Professions: A Comparative Study," *The University of Miami Inter-American Law Review* 3, (1985):661 ff.

²⁹ See Michael Lang, "The term 'Enterprise' and Article 24 of the OECD Model Convention," in *The Meaning of "enterprise", "business" and "business Profits" Under Tax Treaties and EU Tax Law*, ed. Guglielmo Maisto (IBFD, 2011), 120; Michael Lang, *Introduction to the Law of Double Taxation Conventions*, 2nd edition (IBFD and Linde Verlag, 2013), 56. Cf. David Ward, "Use of Foreign Court Decisions in Interpreting Tax Treaties," in *Courts and Tax Treaty Law*, ed. Guglielmo Maisto (IBFD, 2007), 161.

³⁰ Cf. Bullen n 16, 65.

UK. It also was a trendsetter in including the concept of BO in tax treaties.³¹ In fact, the genesis of adding the concept of BO to the OECD Model in 1977 is closely related to the UK's needs at the time, resolving the taxpayer's problem of income allocation.³² This problem arose from the peculiar legal regulations in force in that country.

The UK regarded trustees and nominees as taxpayers, and therefore they were entitled to benefits under UK tax treaties in respect to income received from abroad, even though the income was received for the benefit of other people, known as the beneficiaries of the trust. This model of taxation developed in the UK due to the fact that the right to property was originally seen as an indivisible right, but in light of the principle of equity, the concept of the divisibility of the right to property developed. The property right was divided into two categories: legal and economic, which can accrue to different entities. In other words, under the principle of equity, the right to property may be simultaneously divided between two people in different ways. One person, who holds only the legal title to an asset, without being able to use it or benefit from it, is called the legal owner. This person is a trustee in a trust. The other person, who has the right to benefit from and control the asset, is called the beneficial owner.³³ This person is the beneficiary in the trust. If the beneficiaries of the trust were not UK tax residents, the UK trustees were not taxed on the income received on their behalf in the UK, while also retaining the rights to benefit from UK tax treaties.

The UK delegation to the OECD was concerned that such rules on income allocation to the beneficiaries of trusts could lead to an abuse of the UK tax treaties. If the beneficiaries were tax residents of a different state than the of the trustees of the trust, the payments paid to the trustees would be subject to double non-taxation. They would be exempt from WHT in the source state of the payments under the tax treaty between the UK and the source state, and not subject to tax in the UK, which would be the resident state of the recipient of the payments (the trustee), in accordance

with the domestic rules mentioned above concerning the allocation of income for tax purposes. Hence, the resident of a third state could reduce WHT in a source state with which the UK has a tax treaty in force by interposing a UK resident nominee or trustee who would not be subject to UK tax on income from the source state.³⁴

In 1963, as a result of these concerns, the British delegation to the OECD expressed the need to add the subject-to-tax clause³⁵ or the concept of BO to Articles 10 and 12 of the OECD MTC,³⁶ in order to eliminate the risk of an abuse of tax treaties by non-residents through trustees and nominees.³⁷ In the view of the British delegation, the concept of BO was supposed to be a panacea on the unreasonable effects of the rule on income allocation under tax treaties, allowing for an exception from relying on those rules in certain situations. Somewhat surprisingly, all UK treaties concluded in the 1960s included a subject-to-tax, and later BO, requirement for dividends, interest, and royalties.³⁸ This shows that the UK problem did not actually exist, but the UK most likely desired to have the subject-to-tax clause or the concept of BO in the OECD Model "to save arguments when negotiating treaties."³⁹

³⁴ Avery Jones in: Lang et al. (2020) n 2, Chapter 20.

³⁵ According to this clause, the source state grants the benefits under a tax treaty to an entity from the resident state only if the income distributed from the source state is effectively *subject to tax* in the resident state at the level of its entity receiving that income. This refers to effective taxation (i.e., leading to an actual obligation to pay tax) and not only to formal liability to tax (i.e., not necessarily leading to an actual obligation to pay tax, for example due to tax exemptions). Currently, the addition of a subject to tax clause is considered by the OECD as an optional legal measure under Pillar 2 in order to address the tax challenges of the digitalization of the global economy. OECD, "Chapter 9," in *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint* (2020), <https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint-abb4c3d1-en.htm>.

³⁶ Although the UK only explicitly referred to Articles 10 and 12 of the OECD Model in their comments submitted to the OECD, their wording suggested coverage of Article 11 as well.

³⁷ *Observations of Member Countries on Difficulties Raised by the OECD Draft Convention on Income and on Capital (Note by the Secretary of the Committee)*, TFD/FC/216 (May 9, 1967) 14, <https://www.taxtreatieshistory.org/data/html/TFD-FC-216-E.html>.

³⁸ Avery Jones in: Lang et al. (2013) n 2, Chapter 20.

³⁹ Ibid.

³¹ Cf. Angelika Meindl-Ringler, *Beneficial Ownership in International Tax Law* (Wolters Kluwer, 2016), 134 ff.

³² Vann in: Lang et al. (2013) n 2, ssec. 19.4.1.

³³ Ademola Abass and Richard Clements, *Equity & Trusts: Text, Cases and Materials* (Oxford University Press, 2011), 22. For taxation of trustees and beneficiaries in trusts see: Catherine Brown, "Symposium: Beneficial Ownership and the Income Tax Act," *Canadian Tax Journal* 51, (2023): 403–404.

As a result of the UK's pressure, during the 27th session of the OECD's Fiscal Committee, from September 19 to 27, 1967, the committee created Working Party 27 (WP27) consisting of the delegations to the OECD from Luxembourg, France, and the Netherlands. Its task was to revise the rules on the taxation of interest and royalties in accordance with Articles 11 and 12 of the OECD in order to respond to the concerns of the British delegation. This issue in relation to Article 10 of the OECD MTC was the subject of WP23, which mainly concentrated on the differing corporate shareholder tax systems in the OECD's member states and how they could be reconciled in a tax treaty framework. This topic was discussed later as a result of the work of WP1 in 1973.⁴⁰

In its first report from December 30, 1968, WP27 heavily opposed the British delegation's suggestion to add a subject-to-tax clause to Articles 11 and 12 (and by analogy to Article 10) of the OECD Model, because it would be contrary to the principal purpose of tax treaties based on the OECD Model.⁴¹ With regard to the concept of BO, WP27 stated that "it is evident that relief in the country of source applies only if the recipient is actually a resident in the other contracting state. This is stated clearly in the text of paragraph 1. Moreover, determining who the true recipient is and their state of residence is "a matter of administration and inspection."⁴² In addition, WP27 perceived the problem raised by the UK delegation with determining

the "true recipient" in the resident state as strictly procedural by nature (administrative and evidentiary). In the same vein, that problem appeared to be perceived by the US in the course of negotiating the tax treaty with the UK.⁴³ Accordingly, WP27 did not see a problem with determining the beneficial owner of income from the perspective of an abuse of tax treaties. Likewise, it did not refer to any substantive anti-abusive measures as a remedy for the UK problem. The first report of WP27, therefore, did not recommend adding the concept of BO, as it would be redundant (there is no need to add a concept already implicitly existing in tax treaties) and possibly complicating the application of tax treaties (an assumption that any addition of new terms to tax treaties must mean "something new").⁴⁴ In its second report, on February 16, 1970, WP27 changed its mind with regard to the concept of BO, recommending its addition to Articles 11 and 12 of the OECD MTC, in order to exclude agents and nominees from treaty benefits under these provisions:

The second solution consists in taking into consideration the State of residence of the beneficial owner, the dividends, interest, or royalties and in disregarding the State of residence of the person having the receipt of such income, *whether so doing in the name and on behalf of the beneficial owner, or in his own name but on behalf of the beneficial owner. There is no reason to think that the case of the person acting manifestly as an agent in the name and on behalf of the beneficial owner gives rise to any difficulties.* It may be otherwise with the trustee acting legally in his own name out on behalf of the beneficial owner. It is probable that certain States have no difficulty from the legal standpoint in attributing to the beneficial owner income received through a trustee. *Such States would, however, be in no way harmed by the insertion into the Model Convention of a text to ensure legal safety in other States for whom the interposition of a trustee could cause complications.* The Working Party therefore recommends that there be written into the Model Convention a provision whereby the "beneficial owner text" would be applied.⁴⁵ (emphasis added by the author)

According to WP27, adding the concept of BO to Articles 11 and 12 of the OECD Model would not be

⁴⁰ Working Party No. 1 of the Committee on Fiscal Affairs on Double Taxation and Working Group No. 23 (Germany – Belgium), *Revision of Article 10 of the 1963 Model Convention, and the Commentary Thereon*, CFA/WP1(73)2 (31 Jan. 1973) 2, [https://www.taxtreatieshistory.org/data/html/CFA-WP1\(73\)2E.html](https://www.taxtreatieshistory.org/data/html/CFA-WP1(73)2E.html); Summary of Discussions at the Seventh Meeting of Working Party No. 1 on Double Taxation (13–15 February, 1973) DAF/CFA/WP1/73.5 & Corrigendum (11 April 1973) 5, <https://www.taxtreatieshistory.org/data/html/DAF-CFA-WP1-73.5E.html>.

⁴¹ '[C]ontrary to the spirit and the general arrangement of the Draft Convention' to use the exact language of WP27. Working Party No. 27 of the Fiscal Committee (Luxembourg – France – the Netherlands), *Preliminary report on suggested amendments to articles 11 and 12 of the Draft Convention*, relating to interest and royalties, respectively, FC/WP27(68)1 (30 December) 14, [https://www.taxtreatieshistory.org/data/html/FC-WP27\(68\)1E.html](https://www.taxtreatieshistory.org/data/html/FC-WP27(68)1E.html).

⁴² Working Party No. 27 of the Fiscal Committee (Luxembourg – France – the Netherlands), *Preliminary report on suggested amendments to Articles 11 and 12 of the Draft Convention*, relating to interest and royalties, respectively, FC/WP27(68)1 (December 30, 1968) 14.

⁴³ Ibid.

⁴⁴ Cf. Adolfo Martín Jiménez, *Beneficial Ownership*, ed. Richard J. Vann (2020), n 20, ssec. 2.2.1.

⁴⁵ Working Party No. 27 of the Fiscal committee (Luxembourg – France – the Netherlands), *Report on suggested amendments to Articles 11 and 12 of the Draft Convention*, relating to interest and royalties, respectively, FC/WP27(70)1 (February 16, 1970) 14, [https://www.taxtreatieshistory.org/data/html/FC-WP27\(70\)1E.html](https://www.taxtreatieshistory.org/data/html/FC-WP27(70)1E.html).

a significant change for the vast majority of OECD member states, because these states, unlike the UK, did not apply rules to allocate income for tax purposes to a person that is not entitled to that income, such as a nominee or a trustee.⁴⁶ Thus, the addition of the concept of BO to Articles 11 and 12 of the OECD MTC was intended to solve a uniquely UK problem (allegedly) without detriment or complication to the application of tax treaties by the other states, but also without much need for such an amendment to the OECD Model from their perspective. Therefore, in the end, the other OECD member states did not object to the implementation of the British delegation's idea.⁴⁷ As a result, in the third report of November 4, 1970, WP27 produced a redraft of Articles 11 and 12 with the BO condition and the commentary attached to only the first paragraph of these provisions.⁴⁸

2.2 The first clarification of the OECD on how to understand and determine BO in the 1977 OECD MTC

The OECD MTC was published on April 14, 1977. Unlike its predecessor from 1963 (the Draft Model), the OECD Model from 1977 included the concept of BO in Articles 10, 11, and 12. Table 1 below sets out the wording that makes up the concept of BO under these provisions.

As a result of adding the concept of BO to the OECD Model in 1977, that concept was commonly added to tax treaties worldwide concluded or modified after 1977.

The OECD expressed an identical approach to understanding the concept of BO to dividend, interest, and royalty income from the very origin of that concept in MTC (1977). In paras 12, 8, and 4 of the commentary on Articles 10, 11, and 12 of the OECD Model (1977), respectively, we can read 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. States which wish to make this more explicit are free to do so during bilateral negotiations. (emphasis added by the author)

This implies that the concept of BO under the 1977 OECD MTC: (1) explicitly excluded only two types of intermediaries – agents and nominees – from the scope of beneficial owners that may benefit from Articles 10, 11, and 12; and (2) it had only a clarificatory function on the understanding of the payments of dividends, interest, or royalties from the source state to the resident state of the recipient under Articles 10, 11, and 12.⁴⁹ That is to say, the function of the concept of BO since its addition to the OECD MTC was to clarify the allocation of income to the taxpayer for the purposes of the proper application of tax treaties, and that the status of the beneficial owner should be assessed from the perspective of the tax law of the resident state of recipient of dividends, interest, or royalties.⁵⁰ There was no difference in that regard between the various items of income.

Accordingly, no single distinction regarding dividend income that would be of legal meaning and consequence in determining BO of that income arises from the 1977 OECD MTC and Commentary.

In the author's opinion, the above approach of the OECD reflects the views of WP27 that the role of the concept of BO was to clarify the allocation of income to the taxpayer for the purposes of properly applying the provisions of the tax treaties, as could be interpreted

⁴⁶ Avery Jones in: Lang et al. (eds.) (2013) n 2, Chapter 20.

⁴⁷ Jiménez in: Vann (ed.) (2020), n 44, sec. 2.2.1.

⁴⁸ Working Party No. 27 of The Fiscal Committee (Luxembourg — France — Netherlands) (Received 16 October 1970) *Proposals for The Amendment of Articles 11 And 12 of The Draft Convention*, relating to interest and royalties, respectively, and of *The Commentaries Thereon*, FC/WP27(70)2 (4 November 1970) 1.

⁴⁹ The first sentence of paras 12, 8, and 4 of the commentary to Articles 10, 11, and 12 OECD MTC (1977), respectively, unequivocally indicates that the concept of BO was added to that Model to clarify the meaning of the words “paid ... to a resident” in respect of dividends or interest paid to a resident under Article 10(1) and Article 11(1) and to clarify the meaning of the payments of royalties made to intermediaries under Article 12(2). It can be questioned whether the concept of BO is the best way to explain the expression “paid...to a resident” or “payments of royalties made to intermediaries,” since the concept itself is not clear and precise. Therefore, its addition to the OECD MTC in 1977 appears to be a logical error in definition by trying to clarify the unknown by the equally unknown (*ignotum per ignotum*). See Felipe Vallada, “Beneficial Ownership Under Articles 10, 11 and 12 of the 2014 OECD Model Convention,” in *The OECD-Model-Convention and its Update 2014*, eds. Michael Lang et al. (IBFD/Linde, 2015), 43.

⁵⁰ See Meindl-Ringler (2016) n 31, p. 334; Adolfo Martín Jiménez, “Beneficial Ownership: Current Trends,” *World Tax Journal* 2, (2010): 53.

Table 1

Article 10(2) dividends	Article 11(2) interest	Article 12(1) royalties
However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that state, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed: a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends; b) 15 per cent of the gross amount of the dividends in all other cases.	However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that state, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest.	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.

Source: the author's work. (emphasis added by the author)

from the wording of Articles 10(1), 11(1), and 12(1) in the OECD MTC already prior to 1977.⁵¹ Notably, neither the OECD MTC nor the Commentary, unlike the reports of WP21,⁵² referring to conduit or holding companies as intermediaries that escape the pool of beneficial owners under Articles 10, 11, and 12. This implies that the concept of BO added to Articles 10, 11, and 12 of the OECD Model in 1977 should not be equated with the anti-abusive, economic concept of

BO that apparently could be deduced from the reports of WP21. It also is this author's view that para. 10 of the Commentary to Article 1 of the 1977 OECD MTC, which implies that the concept of BO covers some of the situations of abusive tax avoidance under tax treaties,⁵³ was added to that MTC due to the conflation of the works of WP21 with those of WP27. They both used the same term "beneficial owner" for different purposes: WP21 for anti-abusive and anti-fraud purposes from the perspective of a resident state, while WP27 for proper income allocation purposes from the perspective of a source state.⁵⁴

⁵¹ WP27 in *Preliminary report on suggested amendments to articles 11 and 12 of the Draft Convention*, relating to interest and royalties, respectively, FC/WP27(68)1 (December 30, 1968), at p. 14. The same view was previously expressed by the US and New Zealand during the negotiations regarding tax treaties with the UK. See United States, "Technical Memorandum of Treasury Department Concerning Proposed Protocol Amending the Income Tax Convention between the United States and the United Kingdom," (1966) Document 93-30729B; The National Archives (UK) Public Record Office, File IR 40/17246, February 14, 1966. Taylor, John, "The Negotiation and Drafting of the 1967 United Kingdom – Australia Taxation Treaty," in *Studies in the History of Tax Law*, ed. John Tiley (Hart Publishing, 2011), 440 and 453.

⁵² A note by the United States Delegation on Tax Avoidance Through the Improper Use or Abuse of Tax Conventions (Received on November 14, 1961), Fiscal Committee, TFD/FC/135, <https://www.taxtreatieshistory.org/data/html/TFD-FC-135E.html>. It was not until the third report of WP21 of December 14, 1967 that the term "beneficial owner" appeared. However, it was presented in a different way and in a different context than in which the same term was used in the report of WP27 of February 16, 1970. The use of the same term at a similar time, but in different contexts, was very unfortunate for its appropriate understanding under tax treaties. Vann in: Lang et al. (eds) (2013) n 2, sec. 19.4.2.

2.3 Further developments under the Conduits Report in 1986

Paragraph 14(b) of the OECD's report "Double Taxation Conventions and the Use of Conduit Companies"⁵⁵ (the Conduits Report) from 1986 places conduit entities in the group of agents and nominees excluded from the scope of beneficial owners. It clarifies the meaning of such an intermediary, defining a "conduit"⁵⁶ as "a person [who] enters into contracts or takes over

⁵³ "Some of these situations are dealt with in the Convention, e.g. by the introduction of the concept of "beneficial owner" (in Articles 10, 11 and 12) [(...)]."

⁵⁴ Vann, in: Lang et al. (eds) (2013) n 2, ssec. 19.4.2.

⁵⁵ OECD, *Double Taxation Conventions and the Use of Conduit Companies*, adopted by the OECD Council on November 27, 1986, Paris.

⁵⁶ Jiménez in: Vann (ed.) (2020) n 44, ssec. 2.2.3.

obligations under which he has a similar function to those of a nominee or an agent,” “the formal owner of certain assets [who] has very narrow powers which render it a mere fiduciary or an administrator acting on account of the interested parties.” Consequently, a conduit is an intermediary obliged to act in respect of the received income on account of interested parties, just as an agent or a nominee would act.

These characteristics of a conduit were identical for all items of income covered by the concept of BO under Articles 10, 11, and 12. It further strengthens the observation that the determination of the concept is the same for dividend income as it is for interest and royalty income.

The author observes that that the OECD wanted to address the concerns of tax authorities of its member states via the Conduits Report, due the lack of anti-abusive provisions in the OECD MTC at the time and the OECD’s position whereby the international principle *pacta sunt servanda* would prevent the contracting states from applying their domestic anti-abuse rules and doctrines to deny treaty benefits.⁵⁷ As a result, the Conduits Report brings more confusion to the understanding and policy goals of the concept of BO. The motivation of the OECD appears to be pleasing the tax authorities of its member states with more ambiguous, anti-abusive characteristics of the concept of BO, as if it included several anti-abusive solutions in its wording and structure,⁵⁸ or even as if it was a kind of GAAR with the embedded substance over form mechanism.⁵⁹ The OECD promoted such an inconsistent and vague approach to the concept of BO irrespective of the income to which this concept supposed to apply at the time.

2.4 The Partnerships Report from 1999

In 1999, the OECD’s Committee on Fiscal Affairs (CFA) released a report on “The Application of the

OECD Model Tax Convention to Partnerships”⁶⁰ (the Partnerships Report) setting out solutions to the problem of applying tax treaties to partnerships.⁶¹ In this report, the OECD reinforced the idea that the source countries should take into account how an item of income arising in its jurisdiction (the resident state from the perspective of the source state applying the treaty) is treated in the jurisdiction of the taxpayer claiming the benefits under the treaty.⁶² Thus, according to the solutions provided by the Partnerships Report, an allocation of income from dividend, interest, or royalties to an entity under the tax law of its resident state is decisive in determining the beneficial owner of that income and the proper application of the treaty with the resident state by the source state of that income. The principles in the Partnerships Report confirm and even reinforce the original purpose and perception of the concept of BO in light of tax treaties, insofar as they require the source state to determine the beneficial owner based on the actual allocation of income to the income recipient by the resident state of that recipient. At the same time, the source state should disregard the effect of rules on the income allocation of the resident state whenever they generally allocate an income to an entity, but in certain circumstances they waive that allocation, meaning that the income flows through the entity located in the resident state to other entities.⁶³

Such an approach to determining the concept of BO was presented in the Partnerships Report without any distinction between dividend, interest, or royalty income under Articles 10, 11, and 12 OECD MTC. Thus, the determination of that concept remained the same for all items of income it covers. The merged approach under the concept of BO and the general approach under the

⁵⁷ Cf. Jiménez in: Vann (ed.) (2020) n 44, sec. 2.2.3.

⁵⁸ See more Carlo Garbarino, *Judicial Interpretation of Tax Treaties: The Use of the OECD Commentary* (Edward Elgar Publishing, 2016), paras 1.41–1.123, 47–79.

⁵⁹ Saurabh Jain, *Effectiveness of the Beneficial Test in Conduit Company Cases* (Online Books IBFD, 2013), sec. 4.3.4, sec. 4.12, 4.34.

⁶⁰ OECD, “The Application of the OECD Model Tax Convention to Partnerships,” *Issues in International Taxation* 6, (1999).

⁶¹ For well-known polemic with these solutions, see Michael Lang, *The Application of the OECD Model Tax Convention to Partnerships A Critical Analysis of the Report Prepared by the OECD Committee on Fiscal Affairs* (Linde, 2000).

⁶² The Partnerships Report, paras 53–54. See also Adolfo Martín Jiménez, “Beneficial Ownership,” in *Global Tax Treaty Commentaries*, ed. Richard Vann (IBFD, 2020), sec. 2.2.6.1.

⁶³ Cf., Adolfo Martín Jiménez, “Beneficial Ownership,” in *Global Tax Treaty Commentaries*, ed. Richard Vann (IBFD, 2020), sec. 2.2.6.1.; Richard Vann, “Beneficial Ownership: What Does History (and Maybe Policy) Tell Us,” in *Beneficial Ownership: Recent Trends*, eds. Michael Lang et al. (IBFD, 2013), sec. 19.5.3; Brian Arnold, “International – Tax Treaty News,” *Bulletin for International Taxation* 7, (2010): 308.

Partnerships Report is now reflected in para. 13 of the Commentary to Article 1 of the 2017 OECD MTC, which clarifies that the source state needs to follow the rules of income allocation in the resident state, unless tax transparent partnership (albeit seen as the tax resident by the state of its commercial registry) receives the income on the account of other entities (also other than its partners), for example as their agent or nominee.

2.5 The 2003 update of the Commentary to the OECD MTC

On January 28, 2003, the OECD adopted significant changes to the Commentary to the OECD MTC directed at preventing the abuse of tax treaties.⁶⁴ The changes were proposed in the Report on Restricting the Entitlement to Treaty Benefits.⁶⁵ They included, among other things, several recommendations from the Conduits Report⁶⁶ and the Report on Harmful Tax Competition⁶⁷ that allow tax treaties to be interpreted in an anti-abusive way without changing the content of tax treaties.

The new wording of para 12 to Article 10 of the 2003 OECD MTC reads as follows:

The requirement of beneficial ownership was introduced in paragraph 2 of Article 10 to clarify the meaning of the words “paid ... to a resident” as they are used in paragraph 1 of the Article. It makes plain that the state of source is not obliged to give up taxing rights over dividend income merely because that income was immediately received by a resident of a State with which the State of source had concluded a convention. The term “beneficial owner” is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. (emphasis added by the author)

Similar amendments were added to paras 8 and 4 to Articles 11 and 12, respectively. All of them seem to be clarificatory by nature and thus could be applied to all tax treaties, i.e., also those negotiated and concluded

before 2003. Their language is the same for all items of income without any distinguishable features attributed to dividend income. They affect the understanding of the concept of BO in the same ways by clarifying that this concept:

1. was added to the OECD Model to clarify the meaning of the words “paid ... to a resident” in respect to dividends or interest paid to a resident under Article 10(1) and Article 11(1), and to clarify the meaning of the payments of royalties made to intermediaries under Article 12(2);
2. is a treaty autonomous concept (term) the understanding of which shall be contextual and purposive rather than following from domestic laws of the OECD member states.

This Commentary, in the author’s view, confirms that the concept of BO was added to the OECD MTC in order to clarify the allocation of income to the taxpayer for the purposes of the proper application of tax treaties, and that the status of the beneficial owner should be assessed from the perspective of the tax law of the resident state of the recipient of dividends, interest, or royalties.⁶⁸

The next change in the Commentary to the 2003 OECD MTC in respect to the concept of BO was the addition of para 12.1 to Article 10, which reads as follows:

Where an item of income is received by a resident of a Contracting State acting in the capacity of agent or nominee, it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the immediate recipient of the income as a resident of the other Contracting State. The immediate recipient of the income in this situation qualifies as a resident, but no potential double taxation arises as a consequence of that status, since the recipient is not treated as the owner of the income for tax purposes in the State of residence. *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.* For these reasons, the report from the Committee on Fiscal Affairs entitled “Double Taxation Conventions and the Use of Conduit Companies” concludes that *a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or*

⁶⁴ OECD, *OECD Model Tax Convention on Income and on Capital* (adopted by the OECD Council on January 28, 2003).

⁶⁵ OECD, *Restricting the Entitlement to Treaty Benefits* (adopted by the OECD Committee on Fiscal Affairs on November 7, 2002).

⁶⁶ See *supra* sec. 2.3.

⁶⁷ OECD, “Harmful Tax Competition: An Emerging Global Issue” (Paris, January 20, 1998).

⁶⁸ See more Kuźniacki n 1, sec. 3.IX.B.

administrator acting on account of the interested parties.
(emphasis added by the author)

Almost identical amendments were added to paras 10 and 4.1 to Articles 11 and 12, respectively. This indicates that no distinction should be given to determining the concept of BO to dividend income as compared to interest and royalty income in accordance with the 2003 Commentary to the OECD MTC.

It is worth pointing out that this change affects the understanding of the concept of BO in a considerably far-reaching way, in comparison to what could be interpreted from the previous versions of the Commentary to Article 10, 11, and 12 and the relevant OECD reports. It explicitly excludes conduit entities from the scope of beneficial owners. Despite the explicit reference in this respect to the Conduits Report, the manner in which the conduits were excluded in the above quoted part of the Commentary shows aberrations from the Conduits Report. Notably, in the last sentences of the quoted passage of the Commentary (paras 12.1, 10, and 4.1 to Articles 10, 11, and 12 of the 2003 OECD Model, respectively), reference is made to the conclusions of the Conduits Report, indicating that this report “concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, *as a practical matter*, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.” The emphasized phrase “as a practical matter” does not appear in the Conduits Report in relation to the conduit’s “very narrow powers which render it a mere fiduciary or an administrator acting on account of the interested parties.”⁶⁹ The OECD’s statement added to the Commentary is therefore incorrect and constitutes, at most, a distorted conclusion from the Conduits Report. It falsely suggests that the conclusions of the Conduit Report led to the need to examine conduits based on the existence of a very narrow entitlement to income received due to practical considerations, rather than due to legal or contractual obligations.

To the extent that the 2003 Commentary appears to require determining the very narrow powers of an intermediary under factual rather than legal or contractual obligation, it brings the concept of BO close to nonsensical.⁷⁰ Scholars have rightly observed that

the concept of BO has never been and should not be based on the examination of factual obligations,⁷¹ but should remain limited to the examination of legal or contractual obligations.⁷² From this policy point of view, a beneficial owner of income from dividend, interest, and royalties is only the ultimate economic owner of that income. This understanding of the concept of BO has never been intended under tax treaties, nor in the Conduits Report.⁷³ At most, it was used for seemingly similar policy purposes only in the works of WP21 in the context of preventing fraud such as tax evasion in the broader spectrum of cross-border issues considered from the perspectives of resident countries.⁷⁴ As history shows, however, this concept of BO has never been added to the OECD MTC.⁷⁵

2.6 The 2014 update of the Commentary to the OECD MTC

The 2014 update of the Commentary to the OECD MTC seems to significantly restrict its scope of application by carving out from the pool of beneficial owners only entities engaged with mutually interdependent payments of dividends, interest, and royalties. Paras 12.4, 10.2, and 4.3 of the 2014 Commentary to Articles 10, 11, and 12, respectively, read as follows:⁷⁶

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*

⁶⁹ The Conduits Report, para 14(b).

⁷⁰ Cf. Daniel Gutmann, “Chapter 21,” in *The 2011 Discussion Draft on Beneficial Ownership: What Next for the OECD?*, eds. Lang, et al. (2013), n 2.

⁷¹ The rejection of the concept of BO determined solely on facts and circumstances may be nuanced in specific circumstances that give birth to the paradox theory of the concept of BO in relation to its alleged anti-abusive role. See Kuźniacki (2022), n 1, ssecs. 3.XI.E.2-3.

⁷² Eric Kemmeren, *Preface to Arts 10 to 12*, eds. Alexander Rust and Ekkehart Reimer (2015), para. 37, 723; Daniel Smit, *The Concept of Beneficial Ownership and Possible Alternative Remedies in Netherlands Case Law*, eds. Lang et al. (2013), n 2, secs. 5.2, 5.3; Jiménez in: Vann (ed.) (2020), sec. 2.2.5; Michał Wilk, *Klauzula rzeczywistego beneficjenta (beneficial ownership) w międzynarodowym prawie podatkowym* (Wolters Kluwer Polska, 2015), sec. 4.5.

⁷³ Jiménez in: Vann (ed.) (2020), ssec. 2.2.5; Vann in: Lang et al. (eds.) (2013), ssec. 19.5.2.

⁷⁴ See *supra* sec. 2.1.

⁷⁵ See *supra* sec. 2.2.

⁷⁶ The text in square brackets has been added by the author to reflect the content of the Commentary consistently for Articles 10, 11, and 12.

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.* This type of obligation would *not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment* and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 22 to 48 of the Commentary on Article 1. 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 [11 and 12] refer to the beneficial owner of a dividend [interest or royalties] as opposed to the owner of the shares [the debt claim with respect to which the interest is paid or the right or property in respect of which the royalties are paid], which may be different in some cases. (emphasis added by the author)

Again, there is no distinction between the way the concept of BO operates towards dividend income as compared to interest and royalty income.

In respect to all items of income covered by the concept of BO, the Commentary focuses on establishing legal or contractual restrictions on the use and enjoyment of the specific stream of income received. If such restrictions result from a legal or contractual obligation on the part of the recipient of the income to transfer that income to another entity, then the recipient does not seem to be a BO of that income. However, not every contractual or legal obligation to pass on the payment received to another person is enough to exclude a person from the scope of the BO of that income, but only some, i.e., only if it is dependent on the direct recipient receiving that income. Only if the contractual or legal obligation means that the obligation to pass on the income to another person is conditional (dependent) on the receipt of that income does the obligation *taint* the relationship between the person paying the income and the direct recipient of the income. The tainted relationship in respect to receiving and transferring income arising from the mentioned obligations deprives the direct recipient of that income of BO over it.⁷⁷

⁷⁷ Kemmeren in: Rust & Reimer (eds.) (2015), n 72, marg. n. 38 at p. 724.

Such obligations can be called “qualified obligations.”⁷⁸ Recipients of the income remain BOs over it, even if they transfer that income to another person, just as long as that transfer does not arise from a qualified obligation. Anything less than a qualified obligation does not deprive the recipient of BO.⁷⁹

However, even when a qualified obligation occurs, it will not always exclude the status of BO with the effect of the denial of benefits under Articles 10, 11, and 12 of the OECD MTC. Indeed, it can be argued that there must be some abuse of the treaty protection in order for the treaty benefits to be denied.⁸⁰ To this end, in this author’s view, it must also be demonstrated, based on the relevant circumstances, that the sole, or at least main intention of the establishment and operation of the structure with the intermediary, is to obtain benefits under Articles 10, 11, or 12 in a manner contrary to the purpose of these provisions. A denial of treaty benefits in respect of such payments of income would be justified under Article 31 VCLT, insofar as it precludes the abuse of Articles 10, 11, or 12 of the tax treaty between the source state of the income received by the intermediary and the resident state of the intermediary by the person that ultimately receives that income from the intermediary.

⁷⁸ The concept of a qualified obligation is functionally similar to a “mutual interdependence” test, which asks the question of whether the transactions of payment and repayment of income by its direct recipient are ‘mutually interdependent’ on each other: the stronger the mutual or reciprocal dependence or interdependence between the income and the duty to pass it on, the weaker the power to decide on its use and the more remote the status of beneficial ownership. Beat Baumgartner, *Das Konzept des beneficial owner im internationalen Steuerrecht der Schweiz* (2010) Schulthess Verlag. Switzerland: *Tribunal fédéral* (the Swiss Federal Supreme Court), Judgment, May 5, 2015, 2C_364 and 377/2012.

⁷⁹ Cf. Baker in: Maisto (ed.) (2012), n 11, sec. 6.3; Luc De Broe and Sam Gommers, “Danish Dynamite: The 26 February 2019 CJEU. Judgments in the Danish Beneficial Ownership Cases,” *EC Tax Review* 28, (2019): 292; Pablo Hernández González-Barreda, “Holding Companies and Leveraged Buy-Outs in the European Union Following BEPS: Beneficial Ownership, Abuse of Law and the Single Taxation Principle” (Danish ECJ Cases C-115/16, 116/16, 117/16, 118/16, 119/16 and 299/16) *European Taxation* 59, (2019): 417.

⁸⁰ Baker in: Maisto (ed.) (2012), n 11, sec. 6.3. Daniel Gutman gave an example that vividly shows that the existence of a qualified obligation to pass it on to other persons will not be enough to deny treaty benefits: “the owner of a house who uses the rent to reimburse the loan which served to purchase the house.” Gutmann in: Lang et al. (eds.) (2013, n 79, Chapter 21).

2.7 The 2017 update of the Commentary to the OECD MTC

In 2017, the updated Commentary almost did not touch on the concept of BO at all, apart from minor changes that were dictated by the far-reaching anti-abusive changes to the OECD MTC as a result of the implementation of the BEPS Action 6, most importantly the addition of Article 29, which includes the LOB clause in paras 1–8 and the PPT in para. 9. Consequently, paras 12.5, 10.3, and 4.4 of the Commentary to Articles 10, 11, and 12⁸¹ respectively, refer to the new Article 29 (the LOB clause and the PPT) and the anti-abusive principles put forward in the Commentary to Article 1 (‘Improper use of tax treaties’).⁸² In addition, these passages of the Commentary in 2017 indicated that the concept of BO does not deal with “other cases of abuse,” rather than, as the 2014 version of the Commentary explained, with “other cases of treaty shopping.” Again, this change was not made to add or subtract any meaning from the concept of BO per se, as it was driven solely by the fact that in 2014 the PPT had not been added to the OECD MTC. Since this rule aims to address all forms of treaty abuse, not just abusive treaty shopping,⁸³ it was logical to replace the seemingly narrower phrase “other cases of treaty shopping” with the broader “other cases of abuse.”

The biggest impact of the 2017 update of the OECD MTC and its Commentary in respect of the concept of BO stems from the inclusion of the PPT, i.e., when comparing the scope of the PPT with the concept of BO, one cannot shake off the impression that the PPT has almost completely reduced any anti-abusive role of that concept. Indeed, the Commentary to the PPT (Article 29(9) of the 2017 OECD MTC) indicates that the PPT covers “limitations on the taxing rights of a Contracting State in respect to dividends, interest, or royalties arising in that state, and paid to a resident of the other state (who is the beneficial owner) under Article 10, 11, or 12.”⁸⁴ This suggests that the PPT,

rather than the concept of BO, addresses all conduit cases that lead to abuses of tax treaties.⁸⁵ The OECD’s examples of the application of the PPT further enhance this observation.⁸⁶

Still, the OECD did not provide any wording in the 2017 MTC and the Commentary that would imply that the concept of BO should be determined differently in respect to dividend income in comparison to interest and royalty income.

2.8 The concept of BO as income allocation rule for purposes of all relevant items of income

In the author’s view, the analysis in sections 2.1–2.7 demonstrates that the concept of BO appears to be an income allocation rule for the purposes of all relevant items of income. It is worth explaining what the author means by considering the concept of BO as an income allocation rule rather than an anti-abusive rule for the purposes of all items of relevant income under tax treaties. In general, it means that the concept of BO primarily ensures the proper operation of Articles 10, 11, and 12 of the OECD MTC by following the actual (rather than simulated) allocation of income.

An actual (effective/real) allocation of income is a heightened tax-specific notion of when income belongs to a person (natural or legal), i.e., it is about connecting income to a taxable person rather than allocating the taxing jurisdiction. The allocation of income is triggered solely by the domestic tax law of contracting states, while the concept of BO is a threshold factor to establish whether the limit on WHT under a tax treaty in the source state should apply or not. This threshold factor is met when income from the source state is actually allocated to the resident state. Consequently, the concept of BO requires a careful analysis of facts that trigger an actual allocation of income under the domestic law of the contracting state in conjunction with a precise legal analysis of that law and the relevant tax treaty provisions (usually: equivalents of Articles 10, 11, and 12 of the OECD MTC under a treaty between the source state and the resident state) and

⁸¹ All references in this section are made to the 2017 version of the Commentary and the relevant numbering of its paras, unless otherwise indicated.

⁸² These principles are included in paras 57 et seq. of the Commentary to Article 1. They include “a guiding principle,” domestic general anti-abuse rules, substance-over-form, and economic substance doctrines.

⁸³ BEPS Action Plan No. 6, paras 19, 24, 26 and 27.

⁸⁴ Para. 175 of the Commentary to Article 29(9) of the OECD Model (2017).

⁸⁵ Cf. Robert Danon, ‘The PPT in Post-BEPS Tax Treaty Law: It Is a GAAR but Just a GAAR!’, *Bulletin for International Taxation* 74, (2020): ssec. 3.2.2 at footnote No. 129.

⁸⁶ See also Stef van Weeghel, ‘A Deconstruction of the Principal Purposes Test’, (2019) 11 *World Tax Journal* sec. 8.

EU directives. If real facts trigger the allocation of income under the tax law of the resident state, then the allocation is actual; if not, then the allocation is simulated (not real/ineffective). An allocation of income is not real, for example, when the transaction described in the documentation between companies does not take place in reality. This is the case when the documentation says that payments are transferred from one company (resident in a source state, e.g., Italy) to a second one (resident in the resident state, e.g., the Netherlands), but in reality, the payments bypass the second company and are transferred directly to a third company (not resident in the resident state, e.g., the United States).⁸⁷

Even though in many countries such a simulated allocation of income can be ignored for tax purposes as a sham transaction (i.e., fraud under general law), in a cross-border scenario it may be very complicated for the tax authorities of the source state to establish whether or not the allocation of income to a resident of the resident state is real. It is also necessary extremely fact sensitive and requires a near-flawless exchange of tax information between the source state and the resident state.⁸⁸ The concept of BO aims to ensure that the tax authorities of the source state will perform that arduous task in a proper way. Otherwise, a tax treaty with the resident state may be applied in an improper way. This shows that the notion of the “real allocation of income” refers to a general legal reality, i.e., to the allocation of income based on real facts. The tax reality is, in turn, valid when facts are legally valid and factually established (when they are real) for all general law purposes, but for tax law alone, they are to be disregarded. They can be disregarded, for instance, under GAARs, the PPT, or other anti-tax avoidance

measures such as substance-over-form or economic substance doctrines.⁸⁹

Accordingly, the claim of this article is that the concept of BO does not operate to disregard the allocation of income by the resident state as followed by the source state for the purposes of tax treaties and EU directives in accordance the anti-tax avoidance measures mentioned above. This is the role of those measures, and the concept of BO does not have premises of tax avoidance, in contrast to the mentioned measures, which could lead to ignorance about the allocation of income in line with the letter of the law. Consequently, the concept of BO is a search for legal substance at the level of the entity (often: an intermediate entity) in the resident state that receives income from the source state rather than the economic substance.⁹⁰ As Frederik Zimmer clarified, the legal substance “most often refers to the characterization that emerges from a close study of the rights and obligations in a legal relation,” and its main function “is to point out that sham or simulation transactions and wrong legal characterizations by the taxpayer will be disregarded for tax purposes.”⁹¹

This is also the claim of this article, namely that the determination of facts towards an allocation of income to the intermediary entity should be assessed mainly from the perspective of the resident state of that entity, which is usually a direct recipient of the income from the source state. To this end, the source state should enter into an exchange of tax information with the resident state in order to gather the relevant information for an appropriate application of a tax treaty with the resident state. If a resident state refuses to enter into such an exchange of tax information agreement, or it makes inappropriate claims in order to pursue its own interests under such agreement, making it impossible for the source state to obtain genuine tax information allowing it to determine the status of BO, then the source state should be entitled to deny tax benefits

⁸⁷ See, for example, UK: High Court (London Chamber), March 2, 2006, *Indofood International Finance Ltd. v JP Morgan Chase Bank NA, London Branch*, [2006] STC 1195; July 18, 2006, *Audiencia Nacional* (the Spanish National Court), Case 1110/2003, JUR/2006/204307, July 18, 2006. Similar and associated cases decided by *Audiencia Nacional* are July 18, 2006, JUR/2007/8915 and JUR/2007/16549; November 10, 2006, JUR/2006/284679; July 20, 2006, JUR/2007/16526; November 13, 2006, JUR/2006/284618; and March 26, 2007, JUR/2007/101877.

⁸⁸ This is the reason why the OECD explicitly acknowledged serious difficulties in applying the concept of BO by the source state to conduits already in 1986, not least by recognizing that it will be highly burdensome for the source state to gather the information necessary to identify a foreign recipient of the income as a conduit. The Conduits Report, para. 14(b) *in fine*.

⁸⁹ Commentary on Articles 10, 11, and 12, paras 12.5, 10.3, and 4.4, respectively.

⁹⁰ Although it varies among countries, the notion of “economic substance” in this study is understood as an anti-tax avoidance concept that allows the tax authorities to “go beyond the factual and interpretative stage and substitute facts that lead to taxation for facts that reduce or avoid taxation.” Brian J. Arnold and Stef van Weeghel, “Chapter 5: The Relationship between Tax Treaties and Domestic Anti-Abuse Measures,” in *Tax Treaties and Domestic Law*, ed. Guglielmo Maisto (Online Books IBFD, 2006), sec. 5.4.2.

⁹¹ Frederik Zimmer, “General Report: Form and Substance in Tax Law,” *Cahiers de droit fiscal international* 87a, (2002): 24–25.

stemming from Articles 10, 11, and 12 and the IRD and the PSD.⁹² This is justified by analogy to the reasoning of the CJEU under EU law aiming to ensure effective fiscal supervision.⁹³

There are three means of interpretation that support such an approach.

First, whenever there is a conflict of income allocation between the resident state of a payment's recipient and the source state of the payment, paras 53–54 of the Partnership Report indicate that the source state should take into account how an item of income arising in its jurisdiction is treated in the jurisdiction of the taxpayer claiming the benefits under the treaty, i.e., in the resident state of the income recipient. These principles are now reflected in the 2017 OECD MTC and its Commentary and now apply to all entities, not only to partnerships.⁹⁴ The Commentary highlights that, in the case of fiscally transparent partnerships acting as agents or nominees, the source state is not required to follow the income allocation of the resident state to determine BOs, which is an obvious example of a lack of BO.

Second, the purposive interpretation of Articles 10–12 of the OECD MTC pulls towards the elimination of double taxation without creating opportunities for double non-taxation or reduced taxation of dividend, interest, and royalty income stemming from abusive tax avoidance.⁹⁵ Following only the allocation of income

by the source state may create opportunities for non-taxation or reduced taxation through tax avoidance, including through treaty-shopping arrangements aimed at obtaining relief provided in a tax treaty for the indirect benefit of residents of third states. For instance, the source state of dividend income allocates that income to a foreign company, while the resident state of that company does not. Hence, there is no taxation of that income in the resident state. The source state does not tax that income as well because the tax treaty with the resident state exempts the dividend income in that situation. This results in the double non-taxation of dividend income. The elimination of double taxation by applying the WHT exemption in the source state under the tax treaty with the resident state is not reasonable because it takes a place in a situation in which double taxation is not possible, thereby creating opportunities for double non-taxation. By contrast, if the income allocation of the resident state is followed instead of the source state to determine the BO, the identified risk of tax avoidance is eliminated—the source state provides relief under the tax treaty only if the resident state allocates income paid by a resident of the source state. At the same time, this approach does not create any risk of double taxation—if the resident state allocates income, then the source state provides relief under the tax treaty. Hence, the presented interpretative approach fulfils the main operative purpose of Article 10 without creating opportunities for tax avoidance. The same is valid for Articles 11 and 12 (interest and royalties).

Third, if the source state's income allocation would be conclusive for tax treaty purposes (i.e., determining the BO), that would be at odds with the principle of interpretation in good faith and the common intention approach to determine the concept of BO. The approach to determining the concept of BO that is most compatible with the principle of interpretation in good faith and common intention would be to do so by considering the allocation of income by the source state and the resident state, rather than only the former or the latter. However, as the two interpretative means show (see the above paragraphs), following the income allocation by the resident state is better suited to fulfil both purposes of Articles 10–12 of the OECD MTC, i.e., to eliminate double taxation without creating opportunities to avoid taxation. This also is a better way of respecting the principles of interpretation in good faith and common intention and resolving the conflicts of income attribution for tax treaty purposes.

From the perspective of the resident state, income may be allocated under ordinary rules allocating income

⁹² The author is aware that the reference to the IRD and the PSD is controversial because all EU member states are legally obliged to genuinely exchange tax information under Council Directive 2011/16/EU of February 15, 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, consolidated text, OJ L 064 March 11, 2011, 1. However, in practice, it may happen that the tax authorities from one EU member state will not effectively be able to exchange tax information with another EU member state. See, for example, CJEU (October 11, 2007) *Européenne et Luxembourgeoise d'investissements SA (ELISA) v Directeur général des impôts and Ministère public* (C-451/05), ECLI:EU:C:2007:594, paras 10, 47–53; Cf. Michael Lang, 'The Legal and Political Context of ECJ Case Law on Mutual Assistance,' *European Taxation*, no. 5 (2012): 200–201.

⁹³ E.g., CJEU (February 26, 2019) *X-GmbH v Finanzamt Stuttgart – Körperschaften* (C-135/17), ECLI:EU:C:2019:136, paras 71, 74 and 89–94. Cf. Błażej Kuźniacki, 'X-GmbH v Finanzamt Stuttgart – Körperschaften: Abuse of Tax Law and Exchange of Tax Information in EU law,' *Modern Law Review* 85, (2022): 488–506, <https://doi.org/10.1111/1468-2230.12665>.

⁹⁴ See Article 1(2) of the 2017 OECD MTC and para. 13 of the Commentary on this Article.

⁹⁵ See the new preamble to the 2017 OECD MTC.

to its residents or via extraordinary rules that have an anti-tax avoidance function, e.g., under GAARs, the PPT, substance-over-form, or economic substance doctrines. If the income fails to be allocated to the entity in the resident state, either under the former or the latter rules, then the source state should respect that situation also for the purposes of applying tax treaties.⁹⁶ The source state is free to apply its own domestic anti-tax avoidance measures to disregard the tax consequences of the allocation of income by the resident state for purposes of tax treaties and EU directives. However, this cannot be done via the concept of BO, which is not an anti-tax avoidance rule (measure) and cannot be applied as a handy substitute for any of them.

To finalize that the approach in order to properly determine the facts in connection with the concept of BO, it is worth referring to Zimmer's observation whereby "there is a difference of principle between establishing the facts on the basis of rules of evidence and deciding whether the legal conditions for declaring tax avoidance are fulfilled."⁹⁷ The premise of this article is that the source state must take into account the allocation of income by the resident state, and therefore a holistic approach is needed. It means that the facts on the basis of rules of evidence and the legal conditions for determining tax avoidance, as applied by the resident state, are of relevance when applying the concept of BO by the source state, insofar as they allow the source state to apply a tax treaty or the IRD or the PSD with the resident state in line with the actual allocation of income from the source state to a resident in the resident state.

2.9 Excursus to EU law

The concept of BO is explicitly included in Article 1(1) of the IRD, which determines the subjective and objective scope of its application:

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** is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State. (emphasis added by the author)

Article 1(4) of the IRD describes the role that has to be attributed to the recipient of interest or royalties to be deemed as their beneficial owner:⁹⁸

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 by the author)

By comparison, the PSD does not use the term "beneficial owner" or "beneficially owned" at all. One may therefore conclude that it is impossible to compare the determination of the concept of BO of dividend income to that of interest and royalty income under the EU, because the concept does not exist in respect of dividend income.

Nevertheless, in the author's view, the concept of BO can be interpreted from the wording of the PSD, in particular its Article 5: "Profits which *a subsidiary distributes to its parent company* shall be exempt from withholding tax." This is subject to a critical caveat: the concept of BO can be interpreted from the PSD only if its function, as stemming from that interpretation, is to ensure that the PSD applies only to the actual (rather than simulated) allocation of dividend income by its payment (distribution) from a subsidiary to its parent company.⁹⁹ In the author's view, the same observation on the function of the concept of BO applies to the IRD and to Articles 10, 11, and 12 of the OECD MTC. The point to be clarified here is that the concept of BO, understood as income allocation rule, is to be determined identically for dividend income as for interest and royalty income, not only under Articles 10,

⁹⁶ Cf. The Partnerships Report, para. 53. See also Jiménez in: Vann (ed.) (2020), n. 44, ssec. 2.2.6.1; Matthias Valt, *Income from Royalties. Article 12*, eds. Alexander Rust and Ekkehart Reimer (2015), para. 38, 987.

⁹⁷ Zimmer, n. 91, p. 31. Cf. Brian J. Arnold, "Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model," *Bull. Intl. Tazn.* 58, no. 6 (2004): 251–252, Journals IBFD and Frederik Zimmer, "Domestic Anti-avoidance Rules and Tax Treaties – Comment on Brian Arnold's Article," *Bull. Intl. Tazn.* 59, no. 1 (2005): 25, Journals IBFD.

⁹⁸ It is not an actual definition of the concept of BO, since the wording of Article 1(4) of the IRD is limited to a description of the role that has to be attributed to the recipient of interest or royalties to be deemed as their beneficial owner Juan Lopez Rodriguez and Georg Kofler, *Beneficial Ownership and EU Law*, eds. Michael Lang et al. (2013), n 2, sec. 16.3.2.

⁹⁹ See *supra* section 2.8 of this article.

11, and 12 of the OECD MTC, but also under the IRD and the PSD.¹⁰⁰

The conclusions about the lack of an anti-abuse function in the concept of BO may be inferred from the materials of the EU Commission on the IRD, in the context of the wording and purposes of that directive. In the Proposal to the IRD from 1998, the Commission pointed out that the proposed directive “includes provisions to ensure that Member States are not precluded from taking steps to combat fraud or abuse.”¹⁰¹ However, there is no indication that the concept of BO come under those anti-abusive provisions. Although the EU Commission later indicated, in 2009 in its Report on the application of the IRD that the concept of BO “aims at ensuring that relief under the [d]irective is not wrongfully obtained through the artificial interposition of an intermediary” (“artificial conduit arrangements”),¹⁰² this indication has never been supported by the wording of the IRD, which distinguishes between the concept of BO in Article 1(1) and (4) and the anti-abusive rule in Article 5.¹⁰³ The concept of BO must be interpreted literally and strictly, rather than broadly and purposively, in order to properly safeguard the achievement of the principal purpose of the IRD, which is to eliminate the double juridical taxation of interest and royalty payments from subsidiaries to their parent companies in the EU.¹⁰⁴ A strict literal interpretation of the concept of BO cannot appropriately target conduits that hide companies not meeting the conditions to benefit from the IRD because they have, for instance, tax residence outside the EU, meaning that direct payments to them would trigger

higher WHT.¹⁰⁵ To effectively target such arrangements, and thus to prevent the abuse of the IRD, it appears more appropriate to rely on the transpositions of Article 5 of the IRD (and Article 1(2) of the PSD) by EU member states to their domestic tax laws, instead of a broad and purposive interpretation of the concept of BO.

3 The author’s observations on selected tax jurisprudence

3.1 Introductory remarks and justification for the selection from the EU, the US, and Canadian tax jurisprudence

This section constitutes the author’s observations on selected tax jurisprudence on the concept of BO, in order to supplement the ongoing analysis with the law in action.¹⁰⁶ The overall conclusion is that the tax jurisprudence approaches in the EU, the US, and Canada to determining the concept of BO remain the same with respect to dividend income compared to interest and royalties.

The selection of US, Canadian, and CJEU tax jurisprudence is dictated by their relevance and importance to the subject matter of this article. The judgment of the United States Tax Court (USTC) of August 5, 1971 in the *Aiken Industries* case is one of the most important and at the same time one of the first judgments concerning the concept of BO in international jurisprudence.¹⁰⁷ It predates the inclusion of the concept of BO to the OECD MTC in 1977, so it sheds a light on its development, constituting a vital contextual (historical) source about its understanding in tax treaty practice of the then and now the largest economy in the world. The judgments of the Tax Court of Canada

¹⁰⁰ See more in Błażej Kuźniacki, *Rzeczywisty beneficjent a podatek u źródła: Alokacja dochodu czy przeciwdziałanie nadużyciom międzynarodowego i unijnego prawa podatkowego?* (Poland: Wolters Kluwer, 2022), section 4.4.

¹⁰¹ Carlo Secchi, *Report on the proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States*, (September 3, 1998) COM(98)0067 – C4-0195/98 – 98/0087(CNS), 8.

¹⁰² *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*, (April 17, 2009) COM(2009)179 final, 3 and 8.

¹⁰³ Cf. Bodil Tolstrup and Nikolaj Bjørnholm, “Beneficial Ownership – Withholding Tax on Dividends and Interest from the Danish Perspective,” *Bulletin for International Taxation* 506, (2011).

¹⁰⁴ Cf. Rodriguez and Kofler, n 98, ssec. 16.3.4 and sec. 16.4.

¹⁰⁵ Ibid.

¹⁰⁶ The limitation of words in this article does not allow for a full analysis of the tax jurisprudence. Instead, this section presents observations stemming from an in-depth analysis of the relevant tax jurisprudence in the author’s previous work. See Kuźniacki (n. 1), chapters 4–6. Particularly for the analysis of the judgments commented in this article, see Kuźniacki (n. 1), sections 5.I and 5.V and chapter 6.

¹⁰⁷ The United States of America: The USTC judgment, August 5, 1971, *Aiken Industries, Inc. v. Commissioner of Internal Revenue*, 56 T.C. 925, (U.S.T.C. 1971), <https://case.text.com/case/aiken-indus-inc-v-commr-of-internal-revenue>.

(TCC) and the Federal Court of Appeal (FCA) on the landmark *Prévost* case,¹⁰⁸ in turn, are seen as effective judicial transplants of the OECD documentation by citing and faithfully following them in light of the general rule of treaty interpretation.¹⁰⁹ They decoded the meaning of the beneficial owner of dividends in a narrow legal way, closely in line with its perception as a rule of income allocation. This tax jurisprudence contributed to the uniform, international fiscal meaning of the concept of BO. Finally, the CJEU judgments in the Danish BO cases are of particular relevance as they constitute the only case law of the CJEU that touches upon the concept of BO under EU law. Despite the lack of formal status of CJEU judgments as universally binding EU law (there is no *stare decisis* principle),¹¹⁰ its judgments have the status of *de facto* precedents.¹¹¹ In addition to these doctrines, the case law of the CJEU is also a source of general principles of EU law, such as the general principle of a prohibition on the abuse of rights under EU law, which are considered as additional sources of EU primary law.¹¹²

3.2 The CJEU in the Danish BO cases (February 26, 2019) regarding dividend and interest income

Any overview of the tax jurisprudence on the concept of BO should start with the CJEU case law in the Danish BO cases. Although the CJEU only explored the meaning of the concept of BO under the IRD, due to

the fact that only that directive uses the term “beneficial owner,” it did refer to that concept also while examining the PSD, even though that directive does not use the term “beneficial owner” or “beneficially owned” at all.

In the author’s view, the CJEU did not consider the interpretation of the concept of BO as a standalone and exhaustive interpretation of that concept under the IRD, but merely as an interpretative steppingstone to a denial of WHT relief under the IRD via the general principle of the prohibition on the abuse of rights under EU law, which was necessary to deny this tax benefit in the peculiar legal and factual circumstances of the Danish BO cases. In particular, in its earlier case law the CJEU stated that the Danish tax authorities cannot rely on the domestic anti-abusive judicial doctrine to deny benefits under EU secondary law.¹¹³ Thus, they later used the concept of BO as a handy replacement for a statutory anti-abusive rule to prevent abuse of EU secondary law, i.e., the IRD and the PSD in the Danish BO cases.

This, in conjunction with the highly complex tax structures of the taxpayers in the Danish BO cases, sheds light on the CJEU’s reasoning: it tangled up the concept of BO with the concept of an abuse of rights under the IRD and the PSD to allow the Danish tax authorities to prevent an abuse of the IRD and the PSD without a clear-cut statutory legal basis for doing so. It did not appear to be fully consistent with its previous case law (*Kofoed* case).¹¹⁴ The mentioned

¹⁰⁸ Canada: Tax Court of Canada, judgment, April 22, 2008, *Prévost Car Inc. v. Her Majesty the Queen*, 2008 TCC 231; Federal Court of Appeal, judgment, February 26, 2009, *Canada v. Prévost Car Inc.*, FCA 57, [2010] 2 F.C.R. 65.

¹⁰⁹ Carlo Garbarino, *Judicial Interpretation of Tax Treaties: The Use of the OECD Commentary* (Edward Elgar Publishing, 2016), paras 1.31–1.32, 10.

¹¹⁰ Article 288 of the TFEU does not list the CJEU judgments as EU legal acts.

¹¹¹ Tomasz Konciewicz, *Zasada jurysdykcji powierzzonej Trybunału Sprawiedliwości Wspólnot Europejskich. Dynamiczna koncepcja wspólnotowego wymiaru sprawiedliwości* (Wydawnictwo Prawo i Praktyka Gospodarcza, 2006), 136; Joanna Helios and Wioletta Jedlecka, “Wykładnia prawa Unii Europejskiej ze stanowisko teorii prawa,” *Prace Naukowe Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, e-Monografie*, no. 118: 43–44.

¹¹² “Sources of European Union Law,” March 13, 2020, <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=LEGISSUM:l14534&from=EN>.

¹¹³ The European Union, the CJEU, judgment, July 5, 2007, *Hans Markus Kofoed v Skatteministeriet*, ECLI:EU:C:2007:408 (C-321/05), paras 42–46. Some scholars were of the opinion that the domestic anti-abusive judicial doctrine did not seem to meet the requirements under the principle of proportionality and the principle of legal certainty under the CJEU’s judgment in the *Kofoed* case. Adam Zalasinski, “Case-Law-Based Anti-Avoidance Measures in Conflict with Proportionality Test – Comment on the ECJ Decision in *Kofoed*,” *European Taxation* 47, (2007): 571–576. That opinion seemed to be shared by the Danish tax authority, which, following the CJEU’s judgment in *Kofoed*, closed the case. Denmark: Skatteministeriet “Bekræftende til genmæle – skattefri ombytning af aktier i henhold til den i 1993 gældende regel i aktieavancebeskatningslovens” (November 29, 2007) Press release SKM2007.843.DEF, para. 13, <https://www.skat.dk/SKAT.aspx?old=1717537&vld=0>.

¹¹⁴ In *Kofoed*, the CJEU examined ‘whether, in the absence of a specific transposition provision transposing Article 11(1)(a) of Directive 90/434 into Danish law, that provision may nevertheless apply in the case in the main proceedings.’ See CJEU, July 5, 2007, *Hans Markus Kofoed v Skatteministeriet*, C-321/05, EU:C:2007:408, para. 44. This is not the same as directly applying the general principle of prohibition of abuse of rights

entanglement appears to be simply a by-product of bridging the CJEU's reasoning on that concept with the mentioned general principle of EU law. However, to prevent an abuse of EU secondary law, the CJEU relied on the general principle of prohibiting an abuse of rights under EU law. The concept of BO was not decisive to this end. In fact, the CJEU has never stated that the lack of the status of BO is a self-standing and conclusive factor of an abuse of rights under the IRD and PSD. Nor has the CJEU actually classified the concept of BO as anti-abusive rule. The confusing reasoning of the CJEU in respect of the concept of BO begs for a corrective interpretation of the CJEU's judgments in the Danish BO cases in accordance with Article 31(1) VCLT and EU primary law in order to disentangle the concept of BO from the concept of abuse. This could be done by adopting a narrow and legal approach to the concept of BO, leaving a broad anti-abusive effect to GAARs and PPTs, as applied in line with the general principle of the prohibition on an abuse of rights under EU law. Irrespective of whether it concerns dividend, interest, or royalty income, the concept of BO under EU law should not be seen as an anti-abusive rule in light of the CJEU's judgments in the Danish BO cases.

3.3 The US Tax Court in the Aiken Industries case (August 5, 1971) regarding interest income

Turning to the national tax jurisprudence, the USTC's judgment in the *Aiken Industries* case¹¹⁵ seems to enhance a non-abusive, legal approach to the concept of BO insofar as the court focused on identifying Industrias's legal obligation to transfer the interest

received from Aiken (formerly: MPI) in full to ECL. This approach brings the USTC's understanding of the concept of BO close to its autonomous international fiscal meaning, which emphasizes the identification of a qualified legal or contractual obligation that makes the receipt of payments conditional on their further payment to another entity.¹¹⁶ The USTC further referred to the principle of "dominion and control" over the income, only to conclude that the treaty term "received by" means a corporation of a CS receiving income "as its own, and not with the obligation to transmit it to another [corporation]." As a result, the USTC did not recognize the BO of a corporation that was simply "a collection agent" with respect to the income it received, or, to put it differently, "merely a conduit for the passage [of income]" from the source state to the resident state of the ultimate recipient of that income. Such a company could not be deemed as having received the income as its own.

This reasoning, in this author's view, merged the concept of BO with the rule of income allocation, thereby allowing the scope of beneficial owners to exclude only entities such as agents or nominees, including functional agents or nominees such as conduits that do not receive income on its own, but on account of other entities. Thus, the judgment in the *Aiken Industries* case does not confirm that the concept of BO is an anti-abusive rule. The US tax jurisprudence since the *Aiken Industries* case enhances that observation.

The courts did not rely on the concept of BO to prevent abusive tax avoidance. Instead, they did so via the application of the anti-abusive step transaction doctrine, which was the jurisprudential prototype of the US concept of economic substance.¹¹⁷ These judgments

under EU law, as decided in the Danish BO cases. See paras 89 and 117 of the Danish BO cases on the PSD and the IRD, respectively. However, the CJEU stated in *Kofoed* (para. 44) that a transposition of the anti-abuse rule under the EU directive does not necessarily require a legislative action providing that a national measure is 'sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights and obligations.' Entangling the concept of BO with the general principle on prohibiting an abuse of rights under EU law does not meet the criteria of sufficient precision, clarity and predictability of rights and obligations of taxpayers under the PSD and the IRD.

¹¹⁵ The United States of America: The USTC judgment, 5 August 1971, *Aiken Industries, Inc. v. Commissioner of Internal Revenue*, 56 T.C. 925 (U.S.T.C. 1971), <https://casetext.com/case/aiken-indus-inc-v-commr-of-internal-revenue>.

¹¹⁶ See *supra* sec. 2.8. See more Kuźniacki, *supra* n 1, sections 3.II-3.IV and 3.XI.E.2.

¹¹⁷ The USTC, Judgment, November 6, 1995, *Northern Indiana Public Service Company (NIPSCO) v. Commissioner of Internal Revenue*, 105 T.C. 341 (U.S.T.C. 1995), https://casetext.com/case/northern-ind-pub-serv-v-commr-of-internal-revenue?PHONE_NUMBER_GROUP=P&sort=relevance&resultsNav=false&q=; the USTC, judgment, November 2, 1996, *SDI Netherlands B.V. v. Commissioner of Internal Revenue*, 107 T.C. 161, 107 T.C. 10 (U.S.T.C. 1996), https://casetext.com/case/sdi-netherlands-bv-v-commr-of-internal-revenue-1?PHONE_NUMBER_GROUP=P&sort=relevance&resultsNav=false&q=; the USTC, judgment, December 20, 1999, *Del Commercial Properties Inc. v. Commissioner of Internal Revenue*, T.C. Memo 411, <https://www.courtlistener.com/opinion/4555299/del-commercial-properties-inc-v-commissioner/>; the US Court of Appeals (District of Columbia Circuit), judgment, June 8, 2001, *Del Commercial*

confirm that the economic substance test derives from and is valid for the application of the anti-abusive judicial doctrine. It did not come from nor is it relevant to the concept of BO. This case law also led the US legislator to recognize that the concept of BO does not have any meaningful role in combating abusive treaty shopping. At the domestic level, this role was taken over by specific anti-conduit provisions aimed against back-to-back financial arrangements and transactions that could be seen as a direct response to the case law discussed above.¹¹⁸ At the tax treaty level, the anti-treaty shopping role was accorded to the comprehensive and detailed LOB clause, which has been added to US tax treaties on a regular basis since 1981, when this clause found its way into Article 22 of the US Model Convention.¹¹⁹

3.4 The Canadian Federal Court of Appeal: *Prévost* case (February 26, 2009) regarding dividend income

In the *Prévost* case, even more clearly than the *USTC* in *Aiken Industries* case, the TCC and the FCA interpreted the concept of BO in accordance with its autonomous, international fiscal meaning. Such an interpretative approach to the concept of BO resulted in its effective judicial transplant from the OECD international materials into the Canadian tax treaty soil.¹²⁰ According to the Canadian tax jurisprudence,

“a non-resident holding a company receiving a dividend will be considered to be the beneficial owner” unless it “has absolutely no discretion as to the use of the funds received.”¹²¹ By comparison, the OECD much less clearly says that “a conduit cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers rendering it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.”¹²² Consequently, even if one may say that the courts in the *Prévost* case to some extent deviated from the meaning of the concept of BO as presented by the OECD materials,¹²³ they did so with a very positive effect for the stability and predictability of access to benefits under tax treaties. Their strict and legal understanding of the concept of BO under the Dutch–Canadian tax treaty appeared to be more in line with the canons of interpretation relevant to that concept under the VCLT than the OECD’s clarifications. In particular, in addition to the reference to the OECD materials, the TCC and the FCA referred to the understanding of the concept of BO from the Canadian and Dutch perspectives, which was a manifestation of a good faith interpretation seeking to ascertain and give effect to the common intention of both contracting states of the tax treaty.¹²⁴

Alternatively, it could be said that the meaning of the concept of BO in the *Prévost* case was in line with its international fiscal meaning *sensu stricto*, i.e., following from its strict context—the words “paid to . . . a resident” point to a rule of income allocation. Indeed, the TCC and the FCA considered it decisive for the determination of the status of beneficial owner that, under Dutch tax and commercial law, PHB.V. was the taxpayer on and the owner of the income from the dividends paid by *Prévost*. Such an interpretive approach coincides with the autonomous international meaning of the concept of BO that may be deduced from the Partnerships Report, incorporated into the

Properties, Inc. v. Commissioner of Internal Revenue Service, Appellee. No. 00-1313, <https://caselaw.findlaw.com/us-dc-circuit/1231554.html>. For the analysis of this case law, see Yariv Brauner, “Beneficial Ownership in and outside US Tax Treaties,” in *Beneficial Ownership: Recent Trends*, eds. Michael Lang et al. (IBFD, 2013), Chapter 9.

¹¹⁸ Michael J. Miller and Mark Stone, “The Evolution of Limitation on Benefits, Beneficial Ownership, and Similar Rules: Recent Trends and Future Possibilities,” *Tax Management International Journal* 37, (2008): 719 ff.

¹¹⁹ John Bates et al. “LOB Articles in Income Tax Treaties: The Current State of Play,” *Intertax* 41, (2013): 395 et seq. Barnabás M. Kerekes, “Limitation on Benefits Clauses – Function, Purpose and History,” in *Preventing Treaty Abuse*, eds. Daniel Blum and Markus Seiler (Linde 2016), 174 ff.; Reuven S. Avi-Yonah and Oz Halabi, “US Treaty Anti-Avoidance Rules: An Overview and Assessment” *Bulletin for International Taxation* 71, (2012): 238–242.

¹²⁰ Carlo Garbarino, *Judicial Interpretation of Tax Treaties: The Use of the OECD Commentary* (Edward Elgar Publishing 2016), para. 1.32 at 10. The judgment in the *Prévost* case was most recently praised by Charl Du Toit, who said that “if courts and tax administrations carefully and correctly follow and apply

the rules of international treaty interpretation, as was the case in *Prévost*, there will be less controversy and uncertainty.” Du Toit, n 5, sec. 2 *in fine*.

¹²¹ TCC, judgment, April 22, 2008, *Prévost Car Inc. v. Her Majesty the Queen*, 2008 TCJ 231 (TCC), para. 100.

¹²² Para. 12.3 of the 2017 version of the Commentary on Article 10 (earlier para. 12.1, i.e., from 2003). Cf. para. 14(b) of the Conduits Report.

¹²³ Nathan Boidman and Michael Kandev, “News Analysis. Canadian Taxpayer Wins *Prévost* Appeal,” *Tax Notes International*, (2009): 864–865.

¹²⁴ Cf. Kemmeren, n 72, para. 56 at 729–730.

2003 version of the Commentary and retained in its current version from 2017. That is to say, the concept of BO is first and foremost a rule clarifying the allocation of income to the taxpayer for the purposes of Articles 10, 11, and 12, which should be considered from the perspective of the resident state of the recipient, in that case the Netherlands.¹²⁵ In that sense, the Canadian courts simply followed a stricter and more legal side of the OECD's clarifications on the concept of BO, rather than its *quasi*-anti-abusive side cited above. As a result, the judgments in the *Prévost* case remove from the circle of beneficial owners only those conduits that have absolutely no freedom to dispose of the payments they receive, or where the payments automatically flow through them.¹²⁶ Such situations involve sham arrangements or transactions in which the income is not actually allocated to a conduit at all, and therefore no treaty between the source state of the income and the resident state of the conduit applies.¹²⁷ Moreover, this very hesitant approach by the TCC and the FCA towards piercing the corporate veil under the concept of BO was supported by the Conduits Report, which says that such an approach is "incompatible with the principle of the legal status of corporate bodies, as recognized in the legal systems of all OECD member countries, and except in cases of abuse."¹²⁸

This shows that the TCC and the FCA completely rejected a broad anti-abusive interpretation of the concept of BO, and thus the legitimacy of examining the substance of the company receiving payments to determine its status as a beneficial owner.¹²⁹ Apart from these advantages of a purely legal nature, such an approach to the concept of BO, namely the narrow, strict and legal approach to the concept of BO in the *Prévost* case, fits neatly in with the current OECD global tax policy, according to which it is the PPT and/or the LOB clause that are the dominant anti-treaty abusive rules, while the concept of BO has a marginal role in this respect at most.¹³⁰

3.5 Judicial pragmatism in the legal interpretation of the concept of BO

The significant difference in reasoning of the national courts and the CJEU analyzed above appears to stem from the extreme malleability of the concept of BO and its ambiguity. This, however, was of no importance for the courts determining the concept of BO under dividend income, compared to interest and royalty income. The courts did not give any legal or factual significance to it. What mattered, however, were the facts and circumstances indicating tax avoidance. Although in such circumstances the Canadian and the US courts managed to resist interpreting and applying the concept of BO in an anti-abusive economic way, the CJEU case law in the Danish BO cases failed to resist this temptation.

This is an example of the judicial pragmatism in legal interpretation of the concept of BO:¹³¹ the courts choosing to follow an interpretative approach under each and every theme as it suits their vision of the concept of BO in a particular case and moving in the direction of the outcome they want to achieve. This is an example of the reversed approach to legal interpretation: First deciding the status of the beneficial owner, and then looking for the interpretive path that will lead to their pre-determined decision, or at least what seems to fit it best.¹³² Their decisions typically result from arguments that consider empirically identifiable factual consequences with which the courts agree or disagree. The disagreements stem from the consequences in the form of abusive treaty shopping or directive shopping, and the agreements from the lack thereof. In the former cases, the courts feel justified to rely on the broad, economic, and anti-abusive approach to the concept of

¹²⁵ Cf. Jiménez, n 44, ssec. 5.5.1. See more Kuźniacki, n 1, sec. 3.VII and ssecs.3.XI.E.1-2.

¹²⁶ Kemmeren, n 72, para. 56 at p. 730.

¹²⁷ See more Kuźniacki *supra* n1, ssecs. 3.V.B.3 and 3.XI.E.2-3.

¹²⁸ Conduits Report, para. 24(i).

¹²⁹ Michael Kandev, "Treaty Shopping After *Prévost* Car. What Does The Future Hold?" *International Tax Seminar* 12, (2009).

¹³⁰ Jiménez, n 44, ssec. 5.5.1. See *supra* sec. 2.7. See more Kuźniacki, n 1, sec. 3.XII.

¹³¹ By "pragmatic approach to interpretation", the author means the lack of adherence to the fundamental canons of interpretation, or a very loose way of approaching them. Instead, the judges (consciously or not) appear to follow the view of the pragmatists that "no single interpretive source or methodology is adequate, that no single plain meaning exists, and that no single legislative intent or purpose can be discovered." Rebecca Kysar, "Interpreting Tax Treaties" 101 *Iowa Law Review*, (2016): 1392 For the views of early pragmatists, see William Eskridge, Philip Frickey, and Daniel Farber, "Statutory Interpretation as Practical Reasoning," *Stanford Law Review* 42, (1990): 321-322.

¹³² See more Kuźniacki *supra* n 1 ssec. 2.II.B. See more generally: Robert A. Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press 2010), 240-244; Krzysztof Pleszka, "Następstwa decyzji w sądowym stosowaniu prawa," *Państwo i Prawo* 12, (1988): 69-70.

BO. In such cases, the courts use the OECD materials as a pretext to create biased meanings of the international concept of BO against abusive tax avoidance. Regrettably, such interpretative pragmatism to the concept of BO has been followed not only by the CJEU, but also by many other courts.¹³³ This interpretative approach cannot be commendable because it reads in that concept abusive premises that never occurred in its wording under tax treaties or the EU directives, i.e., the tax avoidance intention and the lack of economic substance. It pours fuel on the fire of the divergent and very worrisome understanding of the concept of BO that is loosely linked with the implicit subjective and blurred tax avoidance intentions of the taxpayer in combination with the undefined concept of economic substance.¹³⁴

4 The author's observations

First and foremost, the analysis shows that the concept of BO should be determined the same way under provisions on WHT of dividends, interest, and royalties. There is no legal basis, either under tax treaties that implement Articles 10, 11, and 12 of the OECD MTC, or under the domestic tax laws of EU member states that implement the IRD and the PSD, to treat dividend income in a special way in comparison to interest and royalty income. Even the lack of the explicit reference to the concept of BO under the PSD does not change this observation, providing that the concept is interpreted and applied in a narrow, legal way, as an income

allocation rule instead of an anti-abusive rule.¹³⁵ This follows from the assumption that the concept of BO, as a rule of income allocation, is implicit to all tax treaties and EU directives, since it reflects their basic logic of operation, i.e., no treaty or directive application without an actual and effective allocation of income from a source state to a recipient from a resident state. Following this logic ensures a convergent application of the concept of BO under tax treaties and the EU directives in general, and with respect to all items of relevant income (dividend, interest, and royalty) in particular.

In the author's view, the observation about taking the same approach when determining the concept BO to dividend income compared to interest and royalty income is supported by primary legal sources and their interpretation of the tax jurisprudence. It can also be supplemented by another important observation: The concept of BO in respect to all relevant items of income ensures the proper operation of Articles 10, 11, and 12 of the OECD MTC and the provisions of the IRD and the PSD by following the actual (rather than simulated) allocation of income. Accordingly, the concept of BO is hardly distinguishable from any evidence rule applicable by tax authorities to determine facts relevant for income allocation, rather than an anti-abusive rule allowing tax authorities to re-determine facts established in accordance with the evidence rule. The anti-abusive function of the concept of BO should be dismissed, especially in the presence of general anti-abusive rules such as the PPT in tax treaties or GAARs in domestic tax laws.¹³⁶ This means that the pragmatic and prevailing approach of the tax authorities around the globe—(1) the appropriate meaning of BO does not matter (if it exists at all) as long as its application allows WHT to be levied on foreign taxpayers (investors); (2) the anti-abusive function of the concept of BO, including the quest for economic substance, appears successful in

133 E.g. the Court of Appeal (the UK), March 2, 2006, *Indofood International Finance Ltd. v. JP Morgan Chase Bank NA, London Branch*, [2006] STC 1195, ITLR (2006) 653. *Conseil d'État* (The French Supreme Administrative Court), judgment, December 29, 2006, *Ministre de l'Economie, des Finances et de l'Industrie v. Société Bank of Scotland*, No. 283314, 9 ITLR 683 et al.; Tax Court of Indonesia (*Pengadilan Pajak*), judgment, April 28, 2010, case No. PUT/23288/PP/M.11/13/2010; Spain (*Real Madrid* cases): *Audiencia Nacional* (the National Court), July 18, 2006, Case 1110/2003, JUR/2006/204307; *Audiencia Nacional* are: July 18, 2006, JUR/2007/8915 and JUR/2007/16549; November 10, 2006, JUR/2006/284679; July 20, 2006, JUR/2007/16526; November 13, 2006, JUR/2006/284618; and March 26, 2007, JUR/2007/101877; The Swiss *Tribunal fédéral*, judgment, May 5, 2015, 2C 364/2012, 2C 377/2012 (*Swiss Swap* case).

134 Cf. Luc De Broe, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies* (IBFD, 2008), 713; Jiménez, n 44, sec. 6.4.

135 See *supra* sec. 2.8 and observations below in this section.

136 The same observation is valid to situations in which the limitation on benefits (LOB) is included in tax treaties. Although very extensive and complex anti-treaty shopping clauses like an LOB can be easily criticized, they at least benefit from less litigation, and draw clear lines (although not always reasonable lines) between what is acceptable and what not in comparison to the concept of BO. Cf. Błażej Kuźniacki, "Implementation and Application of the LOB Clause in BEPS Action 6/MLI: Legal and Pragmatic Challenges," in *International and EU Tax Multilateralism: Challenges Raised by the MLI*, ed. Ana Paula Dourado (IBFD, 2020), 291–292.

most cases of levying WHT, and thus this function is assigned to that concept—is methodologically incorrect and thus prone to scholarly criticism and reversal under judicial review. All this is detrimental to the stable and predictable functioning of tax treaties and EU law. Moreover, applying the concept of BO on an anti-abusive basis in an economic way should be done in accordance with the principle of an abuse of rights, which follows from the principle of good faith.¹³⁷ According to the author’s research and experience in work with tax litigation, that is not the case in the practice of tax authorities and the vast majority of courts.

Although it can be argued that a narrow and legal approach to the concept of BO only shifts the problem of legal uncertainty from that concept to the GAAR/PPT level, such an argument misses an important point. The application of the GAAR is often safeguarded by domestic procedural rules to ensure overall consistency and reflect the serious nature of disputes in this area. Typically, the GAAR can be applied only by the top tax authorities, as approved by senior tax officers. Taxpayers can ask advisory bodies for their opinions in advance and receive safeguarding opinions from the top tax authorities. This aims to “promote overall consistency in the application of the rule.”¹³⁸ Nothing like that applies to the concept of BO. In addition, applying the concept of BO without premises of abuse to prevent tax avoidance is considerably more problematic under the rule of law than doing so via the GAAR, which has such premises.

A narrow, legal approach to the concept of BO, identifying it with the income allocation rule, also makes a lot of sense for a uniform application of that concept to various items of income. That is to say, the tax rules in a resident state that allocate income to a taxpayer

typically do not distinguish between dividend, interest, and royalty income. The same is valid in relation to the ordinary rules on evidence in tax law, which aim to draw tax consequences from real rather than sham or simulated facts. If real facts speak in favor of the allocation of income from the source state to a taxpayer from a resident state, then that taxpayer is the beneficial owner of that income. Following such an approach to determining the concept of BO ensures its uniform application irrespective of the type of item of income.

By contrast, a broad, anti-abusive, economic approach to the concept of BO is susceptible to a divergent determination of that concept with respect to items of income, because of the lack of any anti-abusive premises of its wording. As a result, the tax authorities of the source state, who are pro-fiscally motivated to prevent tax avoidance, apply the concept of BO as if it was a GAAR or a PPT, even though that concept does not contain premises for applying the GAAR or the PPT. The tax authorities simply apply legally undefined—at least not defined in the concept of BO—concepts of tax avoidance intention and economic substance to determine the beneficial owner of the income. The application of such concepts to determine the concept of BO (deprived of their premises, which exist in other rules (GAARs and PPTs)) is prone to a divergent and unpredictable application by the tax authorities and the courts. In that regard, it should be kept in mind that dividend distributions differ from interest and royalty payments to an important extent for the purposes of determining tax avoidance and economic substance. Namely:

1. Dividend distributions constitute passive, non-tax-deductible income (no risk of erosion of the tax base) in the source state, while interest and royalty income may be active and are usually tax-deductible (risk of erosion of the tax base) in the source state;
2. There is nothing like an arm’s length dividend, even in cases where dividends are diverted abroad for tax-avoidance purposes, therefore dividend distributions are not subject to transfer pricing rules¹³⁹ while interest and royalty payments are;

¹³⁷ The principle of abuse of rights has been recognized as a general principle of law (GPL) under Article 38(1)(c) of the Statute of the ICJ (signed June 26, 1945, entered into effect on October 24, 1945) – one of many manifestations of the principle of good faith – by several investment tribunals. For the relevant case law and its analysis see Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (OUP, 2020), 61. For determining economic substance and the importance of doing so in accordance with the principle of an abuse of rights to deny benefits under tax and investment treaties see Błażej Kuźniacki, “The Compatibility of the Substance Over Form Doctrine with Tax and Investment Treaties – a Case Study of Lone Star v. the Republic of Korea,” *The ICSID Review—Foreign Investment Law Journal*, (2024).

¹³⁸ See para. 183 of the Commentary on Article 29(9) [PPT] of the 2017 OECD MTC.

¹³⁹ Cf. OECD, *Designing Effective Controlled Foreign Company Rules, Action 3 – Final Report*, Paris: OECD, October 5, 2015, paras 8–9.; Mitchell A. Kane, “Milking versus Parking: Transfer Pricing and CFC Rules under the Internal Revenue Code,” *Tax Law Review* 66, no. 4 2013, 493.

3. Distributions of dividends follow from a formal decision of shareholders or directors of a company, while interest and royalty payments may stem from non-related third parties.

Consequently, the tax authorities may take a very different approach during tax-avoidance related audits of dividend distributions that they might towards interest and royalty payments. In particular, it will be more difficult, or outright impossible in some cases, to search for economic substance of dividend distributions. Doing so in respect of interest and royalty payments may be much easier. Accordingly, following the anti-abusive, economic approach to the concept of BO will inevitably *de facto* lead to its divergent application in relation to dividend income as compared to interest and royalty income. This divergence vanishes if the concept of BO is determined on the basis of a legal analysis that identifies it using an income allocation rule.

Determining BO on an anti-abusive basis in an economic way is difficult to resist because of the connotations of the concept of BO with abusive treaty shopping and economic ownership in its origin and evolution.¹⁴⁰ However, for the reasons provided above, the tax authorities and courts should resist this temptation. In that regard, two important points are noteworthy insofar as they reveal that determining BO through a narrow, legal approach is not only most accurate (more *lege artis*), but also leads to achieving goals similar (if not identical) to those that would be achieved by taking an anti-abusive and economic approach (both significantly ambiguous and prone to considerable discretion on the side of the tax authorities).

First, the concept of BO cares principally and directly about the proper (actual) allocation of income. Typically, achieving that principal goal of the concept of BO leads to tax avoidance being prevented through the denial of entitlement to benefits under tax treaties and EU directives to entities that often facilitate abusive treaty shopping or directive shopping, e.g., abusive conduit companies. However, this does not mean that the concept of BO should be applied in an anti-abusive way. It merely means that the concept of BO can and often does have an anti-tax avoidance effect indirectly, by requiring the state of residence of the recipient of dividend, interest, and royalty income to allocate the income properly. There is no direct targeting of abusive

tax avoidance.¹⁴¹ This is clearly confirmed by the lack of abusive tax avoidance premises in the concept of BO, unlike with GAAR or PPT.

Second, the *Prévost* case indicates that the BO is not an entity through which income flows automatically or in a predetermined way.¹⁴² The Commentary to Articles 10, 11, and 12 of the 2014-2017 OECD MTC (paras 12.4, 10.2 and 4.3 respectively) clarifies that the BO is not an entity that receives payments (dividends, interest, or royalties) only because it was under a legal obligation to pass it to another person. In both situations, it seems unlikely that a state, be it a source state or a resident state, allocates income to such an entity. Principally, such an entity does not even fall within the core element of the foundation concept of income, which means that income is represented by an increase in the person's economic power.¹⁴³ For example, in the *Husky Energy* case, the evidence shows that the Luxembourg tax authorities (the resident state of Luxembourg companies) did not allocate income from dividends paid by a Canadian company (Husky Energy) to Luxembourg companies due to the existence of the legal obligation under the share lending agreements for the latter companies to pay the amount of received (actually or hypothetically) dividends to companies in Barbados.¹⁴⁴ The Luxembourg companies did not even have enough money to pay 5% WHT in Canada. To meet this tax obligation, they needed to take an intercompany interest-free loan that was subsequently waived.¹⁴⁵ Consequently, they clearly did not have

¹⁴¹ See, by analogy to transfer pricing rules, Yariv Brauner, "Transfer Pricing and Tax Avoidance," in *Tax Avoidance Revisited in the EU BEPS Context*, ed. Ana Paula Dourado (EATLP International Tax Series, IBFD, March 1, 2017), sec. 3.4: "The application of the detailed arm's length rules in the regulations combats much of the tax avoidance attempted by related parties, but it does so indirectly and only through the prism of the literal arm's length and prescribed regulations. There is no direct targeting of abuse or tax avoidance."

¹⁴² See *supra* sec. 3.4.

¹⁴³ It stems from the Schanz-Haig-Simons notion of income and, according to a seminal work of Kevin Holmes, serves best the notion of income for tax purposes. See Kevin Holmes, *The Concept of Income* (IBFD, 2001), Chapters 2 & 13.

¹⁴⁴ See *Husky Energy* case, para. 282: "Therefore, except for the borrowing fee paid by [HWEI/LF Luxembourg] and possible income obtained from entering into this transaction (see below), the SLA will be neutral for [HWEI/LF Luxembourg] both from an accounting and tax perspective."

¹⁴⁵ *Ibidem*, para. 282: "On the other hand, all the dividends declared by Husky during the period of the SLA will be paid to [HWEI/LF Luxembourg] net of a 5 % withholding tax

¹⁴⁰ See *supra* sections 2.1–2.7.

economic ownership over the dividend income.¹⁴⁶ This demonstrates that, in typical BO-tax avoidance related cases, the allocation of income approach to determining BO ensures that benefits under tax treaties are not available to entities that are not the economic owners of the income.¹⁴⁷ There is no need to apply an economic approach to achieve that goal.

The final observation by the author is that it would be a wise tax policy decision to delete the concept of BO from tax treaties and EU law, and from OECD and UN MTCs, because: (1) its application has been continuously disputable for more than 50 years (wasting human and financial resources);¹⁴⁸ (2) its primary function can be fulfilled very well by evidentiary rules in conjunction with the effective exchange of tax information and the proper interpretation of tax treaties and EU directives

(thus the concept of BO is redundant); (3) its alleged and highly contentious anti-abusive function has been entirely taken over by the PPT and GAARs; (4) an appropriate interpretation of tax treaties and EU directives, in concert with a rigorous application of domestic evidentiary rules, help to eliminate granting WHT relief for sham or simulated structures or transactions. Whenever the PPT or GAAR may apply to prevent an abuse of tax treaties, the PSD or the IRD, the concept of BO is superfluous in its anti-abusive function. The same is valid whenever a domestic judicial anti-abusive doctrine may apply to prevent abusive tax avoidance under tax treaties and EU directives, i.e., if a constitutional legal order means it can be relied on to prevent abusive tax avoidance. Whenever an appropriate interpretation of tax treaties and EU directives, in concert with the rigorous application of domestic evidentiary rules, allow tax authorities to draw tax consequences from actual events rather than from sham or simulated structures or transactions existing only on paper or digitally, the concept of BO is also redundant. In all cases, the concept of BO is confusing and breeds protracted and expensive tax disputes between taxpayers and tax authorities without any improvement to tax systems around the globe.

The proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes¹⁴⁹ (FASTER) seems to be a good forum to discuss the usefulness of the concept of BO. However, the lack of willingness of the European Commission to even define the concept of BO for EU law purposes¹⁵⁰ implies that the decision about its deletion is out of question. Likewise, it is unlikely that such a decision will be taken by the OECD or other tax policymakers. Instead, policymakers prefer a pragmatic approach that enhances the ambiguous and unpredictable application of the concept of BO as it continues to benefit tax authorities in many cases. Therefore, as of now and in the foreseeable future, only jurisprudence may contribute to the clear and predictable application of the concept of BO in respect to dividend income and other relevant items of income.

in accordance to Article 10.2(a) of the Canada-Luxembourg Treaty. However, under the SLA, [HWEI/LF Luxembourg] will be obliged to repay the gross amount of Husky dividends to [the Barbcos] without any deduction of taxes withheld. This 5% shortfall will be financed by [HWL (or one of its subsidiaries)] or [a group company] by means of an interest-free loan that will be subsequently waived.”

146 See also the tax expert evidence provided by the Respondent (the Canadian Revenue Agency, CRA), i.e., “Expert Witness Opinion concerning §11 of Luxembourg’s Tax Adaptation Law of 1934” written by Werner Haslehner (September 21, 2022), p. 4: “With respect to the application of §11 StAnpG to the securities lending transaction at issue in the cases before the Court, it is my opinion is that, on balance and in consideration of all the facts, L.F. Luxembourg S.A.R.L. (‘LF Luxembourg’) and Hutchison Whampoa Europe Investments S.A.R.L. (‘Hutchison’) would not be considered to retain economic ownership and thus be the proper subject for the attribution of assets for tax purposes under §11 StAnpG.”

147 Cf. Błażej Kuźniacki, “BO Bites Husky, GAAR Remains Toothless – Part II. The (Toxic) Relationship of BO and GAAR in Light of the Husky Energy case,” Kluwer Tax International Blog, April 24, 2024, <https://kluwertaxblog.com/2024/04/24/b-o-bites-husky-gaar-remains-toothless-part-ii-the-toxic-relationship-of-bo-and-gaar-in-light-of-the-husky-energy-case/>.

148 The UN Committee of Tax Experts identified the nucleus of the problem with the concept of BO, which is the waste of resources of taxpayers and tax authorities on time-consuming and expensive, protracted litigation in respect of the understanding and application of that concept. See the UN Committee of Experts on International Cooperation in Tax Matters, *Eighteenth Session: Update of the UN Model Double Taxation Convention Between Developed and Developing Countries – Beneficial Ownership*, E/C.18/2019/CRP.10 (UN 2019), April 23–26, 2019, paras 21–22, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-04/18STM_CRP10-Update-UN-Model-Double-Taxation_Beneficial-Ownership.pdf.

149 European Commission, Brussels, June 19, 2023 COM(2023) 324 final 2023/0187(CNS), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0324>.

150 See Georg Kofler, Błażej Kuźniacki, Juliane Kokott, Benjamin Angel, Pia Dorfmueller, Maria José Garde, Eric Kemmeren and Theres Neumüller, “Seminar F: IFA/EU,” in *IFA Global Congress*, Cancun, October 25, 2023, slide 17, <https://www.ifa.nl/my-ifa/congress-documents/2023-cancun>.

5 Conclusions

This article positively verified the hypothesis that the meaning of BO in legal provisions regulating WHT on dividend income is no different than under provisions dealing with WHT of other items of income, such as interest and royalties, despite existing factual and legal differences corresponding to payments of these items of income. This conclusion follows from the application of the methodology described in section 1 to relevant materials, including the wording of the concept of BO under tax treaties and EU law, its understanding under the OECD documentation as well as national and EU jurisprudence and scholarship. Notably, even if the jurisprudence on the concept of BO differs significantly from its function, the courts did not change their approach to determining the meaning of BO because of different items of income. That factor has been of no significance. Thus, the subtitle of this article is *nihil sub sōle novum*, suggesting its main observation in respect to the subject matter: The determination of BO of dividend income compared to other items of income in international taxation remains the same.

However, if the anti-abusive, economic approach applies to determine the concept of BO, then its determination may differ depending on the items of income it covers. This stems from three factors. First, distributions of dividend appear to be connected with a lower risk of tax avoidance and base erosion in comparison to interest and royalty payments. Second, transfer pricing rules do not apply to dividend distributions, while they do to interest and royalty payments. Third, the concept of economic substance does not make much sense to dividend distributions, while it does to interest and royalty payments. Considering these differences and that all the mentioned items of income constitute highly mobile income which is difficult to track in cross-border scenarios covered by tax treaties and the EU directives by the tax authorities and courts, the determination of the concept of BO by the tax authorities of the source states in accordance with the anti-abusive, economic approach raises a high risk of divergences in respect to different items of income.

Although such divergences may persist even in respect of the same item of income, determining the concept of BO based on legal analysis rather than economic analysis would, in the author's view, eliminate this phenomenon. Such an approach attributes an income allocation rather than an anti-abusive function to the concept of BO income. The former function

simply follows a legal decision of the resident state of the income recipient based on real (not sham or simulated) facts. This ensures more convergence when determining the concept of BO, irrespective of the items of income which it covers. By contrast, the anti-abusive, economic approach to determining the concept of BO not only confuses and complicates its application to dividend income in comparison to interest and royalty income, but may also unjustifiably differentiate between them. This exacerbates the divergent determination of the concept of BO depending on the items of income it covers. The situation reveals a close connection between the legal approach to determining the concept of BO and its income allocation function, on the one hand, and the identical method of determining it for dividend, interest, and royalty income, on the other. It also reveals a new reason for taking a legal approach towards determining the concept of BO rather than an economic one, and its income allocation function rather than anti-abusive function.

Nevertheless, it is worth reiteration that the economic approach to determine BO does not need to differ from the legal one. In typical BO-related tax cases in which an entity receiving income cannot be considered as its BO, there is no increase in an economic power of the entity because (i) income flows automatically through the entity or (ii) the only reason why entity received that income was a legal (contractual) obligation to pass it further to another entity (those two situations often overlap). Therefore, such income at the level of that entity does not even fall within the core element of the foundation concept of income. In typical BO-tax avoidance related cases, the allocation of income approach to determining BO ensures that benefits under tax treaties are not available to entities that are not the economic owners of the income. There is no need to apply an economic approach to achieve that goal. The legal approach focusing on an allocation of income suffices.

Accordingly, the article advocates for a legal reading of the concept of BO that allows it to be applied as an income allocation rule instead of an anti-abusive rule. In addition to the reasons presented above, the author views such an interpretative approach as more appropriate under Article 31(1) of the VCLT. Altogether, it ensures greater uniformity and predictability when applying the concept of BO under tax treaties and EU law, irrespective of the items of income it covers.

De lege ferenda, the author postulates deleting the concept of BO from tax treaties and EU law, as well as from OECD and UN MTCs, due to its redundant,

confusing, and harmful role in international tax law. This role appears to arise from the long-standing, quasi-legislative work of the OECD on MTC, which for more than five decades has brought a great deal of uncertainty to the concept of BO. The burden of this uncertainty fell on the taxpayers to the benefit of the tax authorities in most cases, without guaranteeing a good tax policy reason for it in line with the rule of law. Such a reason could be ensured if the concept of BO consists of anti-abusive premises, as PPTs and GAARs do, and thus will apply only to prevent abusive tax avoidance. Although this would be something new under the sun, this would be equally redundant. The tax world does not need another PPT or GAAR. The tax world definitely does not need the concept of BO applied as if it was a PPT or a GAAR. This would only accelerate the entropy of the tax universe.