Beneficial Ownership and Income Receipt under Double Taxation Conventions: Considerations following the Planet Case

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On 20 May 2022, the French Conseil d'État delivered a judgment known as the Planet case. In this decision, the Court held as a matter of principle and for the first time that in a triangular situation, when passive income is paid to a person who is not the beneficial owner thereof, the double taxation convention applicable between France and the state of residence of the actual beneficial owner is directly applicable, irrespective of the recipient of the income not being a resident of that state. This article addresses the ramifications of this landmark decision, taking into consideration its grounding in international case law and the amendments made to the OECD Commentary. In this respect, the relation and interaction between the requirement of income allocation and the beneficial ownership limitation are discussed, followed by a review of the practice of several jurisdictions. The findings of the Rapporteure publique and Court in the Planet case are then analysed and contrasted with Swiss case law and practice.

Am 20. Mai 2022 fällte der französische Conseil d'État ein Urteil, das als «Fall Planet» bekannt wurde. In diesem Urteil stellte der Gerichtshof erstmals grundsätzlich fest, dass in einer «Dreieckssituation», in der passive Einkünfte an eine Person gezahlt werden, die nicht Nutzungsberechtigter ist, das zwischen Frankreich und dem Wohnsitzstaat des Nutzungsberechtigten geltende Doppelbesteuerungsabkommen unmittelbar anwendbar ist, unabhängig davon, dass der Empfänger der Einkünfte nicht in diesem Staat ansässig ist. Der vorliegende Beitrag befasst sich mit den Auswirkungen dieser Grundsatzentscheidung unter Berücksichtigung ihrer Grundlage in der internationalen Rechtsprechung und der Änderungen des OECD-Kommentars. In diesem Zusammenhang werden das Verhältnis und die Wechselwirkung zwischen dem Erfordernis der Zurechnung von Einkünften und der Beschränkung des Nutzungsberechtigung erörtert, gefolgt von einem Überblick über die Praxis in verschiedenen Rechtsordnungen. Anschliessend werden die Feststellungen, die Rapporteure publique und des Gerichts im «Fall Planet» analysiert und mit der Schweizer Rechtsprechung und Praxis verglichen.

Content

I. Introduction[1]

1. General Considerations

Bilateral double taxation conventions operate on the basis of a core principle: the allocation of taxing rights on different types of income, between two contracting states referred to as the state of residence and the state of source. In general, the taxing right of the state of source is partially or fully restricted, whereas the state of residence is given the right to tax the income of its residents.[2] The restriction of the state of source's right to tax is subject to four conditions being met: there must be a person (i) to which the convention applies;[3] this person must be a resident of one of the contracting states (ii);[4] the income must have been paid to this person, i.e. the income must be allocated to the person (iii);[5] lastly, with regards to passive income (dividends, interest, and royalties), the beneficial ownership limitation must be satisfied (iv).[6]

The articulation of the requirement of income allocation with the beneficial ownership limitation is not an issue when the recipient of the income is also its beneficial owner. In the context of structures which involve intermediaries, there is also no issue when the intermediary is not allocated the income from a tax perspective, for instance because

1 The author is grateful to Prof. Dr. Robert J. Danon for his valuable comments.

2 It follows from the non-expansive effect of double taxation conventions (*effet négatif*), that double taxation conventions only provide for rules which restrict the taxing rights of contracting states. Moreover, the taxing rights given by a double taxation convention constitute a power, but not an obligation, to levy taxes on the allocated income, and must be implemented in domestic law to that effect. The non-expansive effect may however be limited by provisions contained in double taxation conventions, see e.g., in Swiss case law, Federal Supreme Court, TF/BGer, 25 January 2017, 2C_606/2016, para. 3.5.

3 As defined by Article 1(1) OECD Model. Unless otherwise specified the references to the OECD Model found hereinafter relate to the OECD Model Tax Convention in its version of 21 November 2017.

4 Article 1(1) and article 4 OECD Model.

5 This has been described as a personal attribution of income requirement. See Brian J. Arnold/Jacques Sasseville/Eric M. Zolt, Summary of the Proceedings of an Invitational Seminar on Tax Treaties in the 21st Century, 56(6) Bulletin for International Fiscal Documentation 233–245 (2002), p. 240, noting that «*The participants noted that some tension has always existed in treaties between taxing income and taxing persons. There are often no specific treaty rules for attributing income to particular taxpayers, although some provisions refer to «income received or derived», which implies a connection between the income and a particular taxpayer*». Also see Kees van Raad, International Coordination of Tax Treaty Interpretation and Application, 29(6/7) Intertax 212–218 (2001), p. 215, sec. II.4; Robert J. Danon, Switzerland's Direct and International Taxation of Private Express Trusts: With Particular References to US, Canadian and New Zealand Trust Taxation, Schulthess 2004, p. 296; Robert Danon, Clarification of the Meaning of «Beneficial Owner» in the OECD Model Tax Convention – Comment on the April 2011 Discussion Draft, 65(8) Bulletin for International Taxation 437–442 (2011), p. 440, sec. 3.3.

6 See articles 10(2) [dividends], 11(2) [interest] and 12(1) [royalties] of the OECD Model.

it acts as an agent. This is also the case if the intermediary is a sham[7] or results from a simulation, as it will generally be disregarded for tax purposes. In all the foregoing hypotheses, the person to which the income is allocated and the beneficial owner are the same person, because the intermediary is not taken into consideration.

An issue however arises when, within a group structure, an intermediary receives an income which is allocated to it, but of which it is not the beneficial owner. Such situations present a dissociation between the status of beneficial owner and that of income recipient. This issue was clarified by the OECD Commentary in 1995, followed by an additional clarification in the 2014 OECD Commentary. These amendments to the OECD Commentary are discussed in the following section (I.2). The question has also been, seldom, considered in international case law as well as, relatively frequently, by Swiss courts.

The issue may conceptually be divided into two fact-patterns: the first one covers situations where the apparent beneficial owner and the real beneficial owner are residents of the same state, whereas in the second fact-pattern, sometimes described as «triangular situations» the apparent beneficial owner and the real beneficial owner are residents of different states. Tax authorities tend to be more permissive when confronted with the first type of fact-pattern, perhaps because treaty shopping can be excluded prima facie in these situations.[8]

This issue was recently raised in the *Planet* case, in which the French Conseil d'État (Supreme Administrative Court) ruled, as a matter of principle, that in triangular situations the real beneficial owner is entitled to treaty benefits, i.e. on the basis of the double taxation convention between his state of residence and the state of source, notwithstand-

7 Robert Danon/Daniel Gutmann/Margriet Lukkien/Guglielmo Maisto/Adolfo MartínJiménez/Benjamin Malek, The Prohibition of Abuse of Rights After the ECJ Danish Cases 49(6/7) Intertax 482–516 (2021), pp. 500–501.

8 See OECD, OECD Model Tax Convention: Revised Proposals Concerning the Meaning of «Beneficial Owner» in Articles 10, 11 And 12, 19 October 2012 to 15 December 2012, available at: https://www.oecd.org/ctp/treaties/Beneficialownership.pdf, p. 14, para. 30 and the case law examples mentioned *infra* at footnote 79. Such cases generally amount to rule shopping which can be dealt with by applying the appropriate distributive provision, see thereupon Robert Danon/Emmanuel Dinh, La clause du bénéficiaire effectif (art. 10, 11 et 12 MC OCDE), Article 1, para. 94, in R. Danon et al. (eds.), Modèle de Convention fiscale OCDE concernant le revenu et la fortune, Helbing Lichtenhahn 2014, p. 32. In contrast, see Federal Administrative Court, TAF/BVGer, 30 October 2008, A-2163/200. In this case, the court refused a withholding tax refund on the basis of the Germany-Switzerland double taxation convention (RS/SR 0.672.913.62) despite the fact that the German conduit company was entirely controlled by individuals who were German residents. Also see Robert J. Danon/Hugues Salomé, The BEPS Multilateral Instrument: General overview and focus on treaty abuse, FStR 2017/3 197–246, p. 218, footnote 229.

ing the fact that the income was directly paid to a recipient who is a resident of another state.

This article begins with general considerations on the context surrounding the foregoing issue. First, the evolution of the OECD Model and its Commentary on the topic are discussed (I.2). The relevant case law and practice at the international level are then addressed (I.3). This presentation is followed by a discussion of the *Planet* case, considering both the judgment and the conclusions of the Rapporteure publique (II). Following this analysis, the conclusions of the Rapporteure publique and the French Conseil d'État's decision are contrasted with Swiss case law and practice (III).

2. Evolution of the OECD Model and Commentaries

The first OECD Model and Commentary, published in 1963,[9] did not use the term «beneficial owner». The expression was introduced in the 1977 OECD Model and Commentary, with few indications on the concept: it was simply opposed to intermediaries interposed between the beneficiary and the payer, such as agents and nominees, who were barred from obtaining a limitation of tax in the state of source.[10] The OECD Commentary further stated that states who wished to could «*make this more explicit*» during bilateral negotiations.[11]

2.1. The 1995 Amendment

In 1995, articles 10 and 11 of the OECD Model were amended, a corresponding modification of article 12 followed in 1997. With this amendment, the wording of articles 10(2) and 11 (2) OECD Model was changed from «(...) *if the recipient is the beneficial owner of the dividends/interest*» to «(...) *if the beneficial owner of the dividends/interest is a resident of the other Contracting State*.» This adaptation of the OECD Model thereby removed the connection between the terms recipient and beneficial owner, the former being deleted from articles 10(2) and 11(2). According to the OECD Commentary, this 1995 amendment was intended to clarify the «*consistent position*» of all OECD member states that treaty benefits remained available when the income was paid to an intermediary, if the beneficial owner of the income was a resident of the other contracting state.[12] It follows that treaty benefits are also available when the beneficial owner is not the recipient of the income.[13] In fact, if this were not the case, the amendment would have been purposeless.

9 OECD, Draft Double Taxation Convention on Income and Capital, 6 July 1963.

10 See OECD Model: Commentary on Article 10 (1977), para. 12; OECD Model: Commentary on Article 11 (1977), para. 8; OECD Model: Commentary on Article 12 (1977), para. 4.

11 Ibid.

12 OECD Model: Commentary on Article 10 (1995), para. 12.

13 Angelika Meindl-Ringler, Beneficial ownership in international tax law, Kluwer Law International: Alphen aan den Rijn 2016, p. 33.

2.2. The 2014 Amendment

This interpretation was further confirmed in the 2014 OECD Commentary and the 2012 preparatory works which preceded it. The issue addressed therein concerned the expression «such dividends» in article 10(2), which «*could lead to the conclusion that these dividends must be dividends that are paid direct to a resident of a Contracting State, which would be problematic where the direct recipient and the beneficial owner of the dividends are residents of two different States*.»[14] This interpretation was found to be at odds with the Commentary which «*clearly indicates that such an interpretation should be rejected* (...)»[15] while also suggesting «*that some States may wish to adopt a clearer wording in their bilateral treaties*.»[16] The Working Party thus decided to remove any remaining doubts by introducing a clearer wording in articles 10(2) and 11(2), which were subsequently amended with a deletion of the term «such». The term was indeed considered to pose a misinterpretation risk because it could imply that the limitation of tax in the state of source would no longer be available in conduit situations, as the second dividend, i.e. the one paid by the intermediary company to the real beneficial owner, would not qualify as «such dividend».[17] The Working Party also showed concern regarding the OECD Commentary which, until then, worked on the assumption that the recipient and beneficial owner were residents of the same contracting state, which was however not a condition for the beneficial owner's treaty entitlement.[18] Contrary to the 1995 amendments, no subsequent modifications were made to article 12, which used the expression «beneficially owned» and thus did not require a change of wording.

2.3. Consequences of the Modifications to the OECD Commentary

The 1995 and 2014 modifications, both to the OECD Model's text and Commentary, clarify that there is no need to be the recipient of an income to be its beneficial owner. In the author's view, the changes to articles 10(2) and 11(2) were specifically made to allow the autonomous application of these provisions without requiring a prior application of articles 10(1) and 11(1). Therefore, the status of recipient in the state of residence is no longer a determining factor in this context. Furthermore, the deletion of the term «such dividends» in 2014 clearly emancipates article 10(2) from article 10(1) as the term drew a link between the dividends mentioned in article 10(1) and the beneficial ownership thereof under article 10(2).

14 OECD, OECD Model Tax Convention: Revised Proposals (n. 8), p. 14, para. 30. Also see Danon/Dinh (n. 8), p. 33, Article 1, para. 95, regarding the previous version of the OECD Commentary.

15 OECD, OECD Model Tax Convention: Revised Proposals (n. 8), p. 14, para. 30.

16 Ibid. This statement was already found 1977, see OECD Model: Commentary on Article 10 (1977), para 12.

17 See, OECD Model: Commentary on Article 10 (2014), para. 12.7 and OECD Model: Commentary on Article 10 (2017), para. 12.7.

18 OECD, OECD Model Tax Convention: Revised Proposals (n. 8), p. 14, para. 30.

Moreover, the 1995 and 2014 modifications clarify that tax treaty benefits remains available when the «*beneficial owner and the recipient are resident in different countries and the beneficial owner's residence state's right to tax the beneficial owner is generally not questioned*.»[19] The possibility of a dissociation between the direct recipient and the beneficial owner of the dividends is further underlined by the OECD which states that the beneficial owner of a dividend may be another person than the owner of the shares, which would exclude the direct recipient as a beneficial owner.[20] The foregoing is a substantial exception to the functioning of double taxation conventions, which generally operate on the premise of an income allocation requirement. It is contended here that the OECD has nonetheless established that the application of article 10(2) and 11(2) is autonomous, in the sense that the state of source must reduce its taxation if the beneficial owner of the income is a resident of another contracting state, without a requirement for personal allocation of the income to the beneficial owner.

In contrast, the application of article 23A/B of the OECD Model, which provide for the elimination of double taxation in the state of residence, has not been considered in the foregoing amendments.[21] In this respect a tension is perceivable as both articles 23A(1) and 23B(1) provide that they are only applicable if the resident «*derives income or owns capital which may be taxed in the other Contracting State in accordance with the provisions of this Convention*». Income allocation is therefore necessary under articles 23A and 23B.[22]

A barrier for the beneficial owner to obtain an exemption or credit in the state of residence, under article 23, therefore appears. This is because unlike the operation of articles 10(2) and 11(2) which is autonomous, and stems from a direct application of the double taxation convention between the state of source and the state of residence, the double taxation convention between the state of source and the state of residence cannot apply with regards to article 23, as the income received by the resident is not «derived from» the state of source, but from the other state of residence, i.e. that of the intermediary (apparent beneficial owner). It is in fact sensible that article 23 does not apply in such situations as it would not be legitimate to require the state of residence to grant a tax credit for an income which has potentially not yet entered the taxable base of the real beneficial owner, as no double taxation would have occurred.

19 Meindl-Ringler (n. 13), p. 39.

20 OECD Model: Commentary on Article 10 (2017), para. 12.4 *in fine* (paragraph added in the 2014 OECD Commentary). The same remark holds true for the beneficial owner of the interest and the owner of the debt-claim, (OECD Model: Commentary on Article 11 (2017), para. 10.2), as well as the beneficial owner of royalties and the owner of the right or property in respect of which the royalties are paid (OECD Model: Commentary on Article 12 (2017), para. 4.3).

21 Danon/Dinh (n. 8), p. 33, Article 1, para. 95 *in fine*.

22 Danon, trusts (n. 5), p. 322.

This dichotomy, between the requirement for personal income allocation under article 23 and the autonomous application of articles 10(2) and 11(2), in fact confirms that effective, subsequent, receipt of the passive income by the real beneficial owner is not relevant for the application of provisions calqued on articles 10(2), 11(2) and 12(1) of the OECD Model.

Following the 2014 amendments, the policy of the OECD is that income allocation is no longer relevant for the application of articles 10(2) and 11(2). Therefore, the state of source's right to tax is limited as long as the beneficial owner is a resident of the state of residence, irrespective of whether the income is allocated to the beneficial owner. It follows that the systems of some jurisdictions, under which only the income recipient is able to file a withholding tax refund request, suggest that treaty benefits are contingent on income allocation. This view is however at odds with the position of the OECD, as the latter has precisely dissociated income allocation from beneficial ownership.

2.4. Subsequent OECD Commentary and UN Model and Commentary

No further changes were made in the 2017 OECD Commentary. It is however noteworthy that the principle set forth in the 2014 version of the Commentary was confirmed in one of the examples given in the Commentary on Article 29(9), relating to the principal purpose test.[23]

A parallel, albeit deferred, incorporation of the above-mentioned modifications made to the OECD Model and Commentary took place in the UN Model and its Commentary in 2001,[24] 2011[25] and 2017.[26] The 2021 edition of the UN Model and Commentary,[27] which implements modifications made to the 2017 OECD Commentary, did not include additions concerning beneficial ownership, replicating the policy of the OECD.

3. International Tax Treaty Practice

International practice is generally in line with the aforementioned position of the OECD Commentary. It should be stressed that international practice does not usually interpret the OECD Commentary as granting a derivative benefits test in the situation where ben-

23 OECD Model (2017): Commentary on Article 29, para. 182, example I: when a collecting society collects royalties on behalf of its rightsholders, the tax treaty between the state of source and their state of residence applies.

24 UN Model: Commentary on Article 10 (2001), para. 5, including the 1995 amendments to the OECD Commentary.

25 UN Model: Commentary on Article 10 (2011), para. 13, quoting, inter alia, OECD Model: Commentary on Article 10 (2003), para 12.

26 UN Model: Commentary on Article 10 (2017), para. 15 which includes the 2014 amendment to the OECD Commentary which have been maintained in the OECD Model: Commentary on Article 10 (2017), paras 12–12.7.

27 UN Model: Commentary on Article 29 (2021), para. 35, which includes the OECD Model: Commentary on Article 29 (2017), para. 182, example I.

eficial owners are not the direct recipient of an income. Rather, most practices consider a direct application of the double taxation convention between the state of source and the state of residence of the real beneficial owner.

Another important issue, with regards to the question of conduit structures, is the extent to which abuse of rights is considered in the determination of beneficial ownership. As will be seen hereinafter, some jurisdictions tend to blend their findings in this context. The following section begins with a review of existing case law in Italy and Denmark. The administrative practices of the United States and the United Kingdom are then considered.

3.1. Italy

In 2019, the Italian Supreme Court was presented with a case involving a Japanese pension fund which had received Italian dividends. These dividends had prior been forwarded by payments made to US entities.[28] The Japanese pension fund was therefore not a direct recipient of the dividends. The Italian tax authorities were of the opinion that only dividends paid directly to a recipient were eligible for treaty relief, i.e. to the exclusion of mere beneficial owners, and therefore denied the withholding tax refund request.[29]

The Appellant argued that while the 1969 convention, based on the 1963 OECD Model, indeed made no reference to beneficial ownership, the term recipient [of the dividends][30] had to be construed as corresponding to the beneficial and ultimate owner of the dividends. The Italian Supreme Court agreed with the Appellant and held that the term beneficial owner did not appear in the convention as it predated 1977, but that an interpretation in good faith under articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT),[31] in light of the object and purpose of the treaty, led to the conclusion that the notion of beneficiary/recipient coincided with that of beneficial owner.[32,33]

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28 Corte suprema di cassazione (Italy), 30 September 2019, no. 24288.

29 Ibid., para 1.1.

30 The Italian text of the convention uses the term «beneficiario», whereas the English version states «recipient». Article 29 of the Italy-Japan double taxation convention of 29 March 1969 provides that Italian, Japanese and English are equally authentic and that the English text shall prevail in case of any divergence of interpretation.

31 Vienna Convention on the Law of Treaties of 23 May 1969, RS/SR 0.111.

32 Corte suprema di cassazione, no. 24288 (n. 28): «*Nel caso in esame, l'interpretazione secondo buona fede dell'art. 10 della Convenzione, alla luce dell'oggetto e dello scopo del Trattato, porta a ritenere che la nozione di «beneficiario» coincida con quella di «beneficiario effetivo», sebbene l'espressione sia stata esplicitamente introdotta solo nelle Convenzioni redatte sulla base dei successivi Modelli OCSE*».

33 In contrast, in the *Colgate* case (Tribunal Supremo (Spain), 23 September 2020, no. 3062/2020, ECLI:ES:TS:2020:3062), the Spanish Supreme Court refused to recognise an implicit beneficial ownership limitation in article 12(1) of the Switzerland-Spain double taxation convention of 26 April 1966

The view held by the Court in the 2019 judgment, which was justified by previous case law[34] in which the Italian Supreme Court had held that the beneficial ownership limitation is a «general clause» of the international tax system,[35] was later confirmed in 2021.[36] The Supreme Court held in the 2021 case that, under its case law, the beneficial owner is the person subject to the jurisdiction of the other contracting state, which has real legal and economic control[37] on the received income. According to the Court, such a real legal and economic control may exist even where the income has been received through interposed persons, precisely because a functional, rather than formal, interpretation of the beneficial ownership limitation is followed.[38]

It is noteworthy that the Italian Supreme Court considered, in the 2019 case, that refusing treaty benefits to a mere intermediary as well as granting such benefits to beneficial owners serves the purpose of the double taxation convention.[39] This finding of the Italian Supreme Court arguably draws inspiration from the OECD Commentary, which states, since 2003, that the term beneficial owner «(…) *should be understood in its context,* (…) *and in light of the object and purposes of the Convention, including avoiding double taxa-*

(RS/SR 0.672.933.21), which provided: « *Les redevances provenant d'un Etat contractant* ***et payées à un résident*** *de l'autre Etat contractant sont imposables dans cet autre Etat* » (emphasis added). On this judgment, see Adolfo Martín Jiménez, Spain: The Never-Ending Story of Beneficial Owner: The Colgate Case, in G. Kofler et al. (eds.), Tax Treaty Case Law around the Globe 2021, Linde Verlag/IBFD 2022, sec. IV.B. While this case law concerns the interpretation of the term «paid to» in double taxation conventions which do not incorporate the beneficial ownership limitation, a contradiction appears with Swiss precedent which has considered that the terms «beneficiary» and «beneficial owner» are equivalent in double taxation conventions. See thereupon the decision of the Swiss Federal Supreme Court, TF/BGer, 5 May 2015, BGE/ATF 141 II 447, *Total Return Swaps*, reported in 18 ITLR 138, para. 4.2 *in fine*, and the *V SA* case (Federal Tax Commission, JAAC/VPB 65.86, 28 February 2001, CRC-2000-055, para. 7bbb).

34 Corte suprema di cassazione, 16 December 2015, no. 25281.

35 Corte suprema di cassazione, no. 24288 (n. 28), para. 1.3: «*E stato anche detto, in tema di convenzione Italia-Cipro per evitare le doppie imposizione (il cui articolo 10 è identico a quelle oggetto di esame), che nell'ordinamento fiscale internazionale vige la clausola del beneficiario effettivo, in virtù della quale può fruire dei vantaggi garantiti dai trattati solo il soggetto sottoposto alla giurisdizione dell'altro Stato contraente, che abbia l'effettiva disponibilità giuridica ed economica del provento percepito, realizzandosi altrimenti una traslazione impropria dei benefici convenzionali o addirittura un fenomeno di non imposizione*».

36 Corte suprema di cassazione, 13 April 2021, no. 17746, para. 3.1.

37 Ibid.: «*reale disponibilità giuridica ed economica*».

38 Ibid.: «*In tal senso è stato soggiunto che l'effettività della reale disponibilità giuridica ed economica del provento può esservi anche laddove il compenso sia stato percepito tramite un soggetto interposto proprio in considerazione di un'interpretazione funzionale della clausola generale dell'ordinamento fiscale internazionale del «beneficiario effettivo'*».

39 Corte suprema di cassazione, no. 24288 (n. 28), para. 1.3: «*D'altro canto, risponde alle finalità della Convenzione, sia impedire che si avvantaggi del regime convenzionale un mero intermediario, sia consentire la fruizione dei benefici convenzionali da part dell'effettivo titolare dei diritti, che sia residente nello Stato contraente*».

tion and the prevention of fiscal evasion and avoidance.»[40] It follows from this excerpt of the OECD Commentary that beneficial ownership should be interpreted both to ensure the elimination of double taxation, e.g. by granting treaty benefits despite the beneficial owner not being the direct recipient of the income, and with a view to prevent avoidance, which connects the limitation's application with the existence of an undue treaty benefit. The existence of such an undue treaty benefit naturally draws a connection between beneficial ownership and treaty abuse (see hereinafter sections 3.2 and 3.4).

In conclusion, the Italian Supreme Court's view reinforces the argument that beneficial ownership is not solely a tool designed for tax administrations and courts to deny treaty benefits, but may be relied upon by a qualifying person, irrespective of their indirect receipt of passive income.

3.2. Denmark

Following the Court of Justice of the European Union's (CJEU) 2019 landmark *Danish cases*,[41] which focused on the notion of abuse of rights (despite being commonly associated with beneficial ownership), the Danish Eastern High Court delivered a decision on 3 May 2021.[42] This judgment directly followed the preliminary ruling request made by the High Court to the CJEU, and the latter's judgments.

In part of the judgment, known as the *NetApp* ruling, the Danish High Court refused to apply the Parent-Subsidiary Directive[43] as well as the Denmark-Cyprus double taxation convention, because the Cyprus conduit company to which Danish dividends had been paid was not the beneficial owner thereof. However, the Danish Eastern High Court granted a relief to the Appellant (i.e. the Cypriot company) on the basis of article 10 of the Denmark-United-States double taxation convention, as the real beneficial owner of the dividends at hand was a listed company in the United states.[44] The High Court con-

40 OECD Model: Commentary on Article 10 (2003), para 12; OECD Model: Commentary on Article 10 (2017), para. 12.1. This is also stated with regards to interest and royalties (OECD Model: Commentary on Article 11 (2017), para. 9.1 and OECD Model: Commentary on Article 12 (2017), para. 4).

41 CJEU, 26 February 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others*, ECLI:EU:C:2019:134 and CJEU, 26 February 2019, Joined Cases C-116/16 and C-117/16, *T Danmark and Y Danmark*, ECLI:EU:C:2019:135. On these judgments see, inter alia, Danon et al. (n. 7).

42 High Court of Eastern Denmark, Case B-1980–12, *Danish Ministry of Taxation v NetApp*, partially reported in the International Tax Law Reports: 23 ITLR 907. This decision was delivered following the *T Danmark and Y Danmark*, C-116/16, C-117/16 (n. 41) case, which the referring court had submitted to the CJEU.

43 Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2015 L 21, 28 January 2015.

44 See *Danish Ministry of Taxation v NetApp* (n. 42), at 933–934. Another dividend paid by the Danish subsidiary was not deemed eligible (see 23 ITLR 907, at 935) for a treaty relief under the Denmark-

sidered that the absence of treaty benefits «*implies that the situation does not constitute abuse of law, since the dividends could have been distributed tax exempt from the Danish subsidiary to the beneficial owner in the country in question* [i.e. the United States].»[45]

While this decision was contingent on a listed company in the United States being eligible as the beneficial owner under the United States-Denmark double taxation convention, the reasoning of the High Court revolved around the notion of abuse of rights, which supported a recharacterization of the facts of the case. It may nonetheless be inferred from this judgment that a beneficial owner need not be a direct income recipient. On this point, the case law of the Italian Supreme Court and the Danish Eastern High Court therefore converge.

3.3. United States

The Internal Revenue Service (IRS) has published interesting guidance on conduits in a double taxation convention context, namely in the US Treasury Regulations, which provide for a «conduit financing arrangement» clause.[46] Under these administrative guidelines, if a conduit entity is disregarded by the IRS, it is also disregarded with respect to the applicable double taxation conventions. It follows that the conduit entity is not entitled to claim treaty benefits under the double taxation convention between its state of residence and the United States for payments which fall under a conduit arrangement. However, the financing entity, i.e. the real beneficial owner, may «*claim the benefits of any income tax treaty under which it is entitled to benefits in order to reduce the rate of tax on payments made pursuant to the conduit financing arrangement that are recharacterized*.»[47]

The conduit financing arrangement clause has been described as a specific anti-abuse rule which «(...) *under the regulations, is explicitly a replacement to beneficial ownership as interpreted under the relevant case law* (...) *that focused, similarly, on back-to-back financing arrangements*.»[48] This is confirmed by the Treasury Department and the IRS, whose view is that «*these regulations supplement, but do not conflict with, the limitation on benefits articles in tax treaties. They do so by determining which person is the beneficial owner of income with respect to a particular financing arrangement. Because the financing entity is the beneficial owner of the income, it is entitled to claim the benefits of any*

United States double taxation convention because the taxpayer was not able to sufficiently substantiate that the dividend at hand had been paid.

45 *Danish Ministry of Taxation v NetApp* (n. 42), at 933.

46 US Treasury Regulations § 1.881–3(a)(3)(ii)(C), Conduit financing arrangements.

47 Ibid.

48 Yariv Brauner, Beneficial Ownership in and outside US Tax Treaties, in M. Lang et al (Eds), Beneficial Ownership: Recent Trends, IBFD: Amsterdam 2013, sec. 9.6.2.

income tax treaty to which it is entitled to reduce the amount of tax imposed (...) on that income.»[49]

In that regard, these authorities considers «*that the regulations provide the current correct interpretation of the beneficial ownership language in US tax treaties* (...).»[50] In this context, the conduit is an apparent beneficial owner, and the financing entity is the real beneficial owner. Under the practice described above, treaty benefits are thus granted to the beneficial owner in situations where the direct recipient is a disregarded conduit. It can therefore be inferred from the published statements of the IRS and Treasury Department that, under United States practice, beneficial owners are not required to be the direct income recipient of passive income. It should be noted that this approach has been described by a commentator as amounting to treaty override.[51]

3.4. United Kingdom

In the United Kingdom, guidelines on beneficial ownership were adopted following the *Indofood* decision.[52] One of the main findings of this landmark case was that beneficial ownership was to be given an «international fiscal meaning»,[53] which implied a substance over form analysis. The British tax authorities, HM Revenue & Customs (HMRC), had concerns that this decision, which concerned a commercial litigation, could deter capital market transactions, specifically those involving special purpose vehicles.[54]

British administrative guidelines, namely the Internal Manual of HMRC, were therefore modified to provide for an exclusion of the application of the beneficial ownership limitation in situations where the transaction could be considered bona fide. This practice rests on the premise that beneficial ownership is applied in the context of double taxation conventions and that the latter's objective should therefore be considered. HMRC's opinion in that regard is that «*Where there is no abuse of the DTC, there is no need, in practice, to apply the «international fiscal meaning» of beneficial ownership*.»[55]

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49 US Federal Register, Vol. 60, No. 155, Friday, August 11, 1995, Rules and Regulations, Conduit Arrangements Regulations, pp. 40997 et seq., at p. 40999.

50 Brauner (n. 48), sec. 9.6.2.

51 Ibid.

52 *Indofood International Finance Ltd v JPMorgan Chase Bank NA, London Branch* [2006] EWCA Civ 158, 2 March 2006, reported in 8 ITLR 653.

53 Ibid., para. 42.

54 Robert J. Danon, The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It? in G. Maisto (ed.), Current Tax Treaty Issues. 50th Anniversary of the International Tax Group, IBFD 2020, sec. 15.2.6.2.

55 HMRC internal manual, International Manual: INTM332060 – Double Taxation applications and claims: Indofood: Impact on particular cases, Capital market transactions involving Special Purpose Vehicles (SPVs), 9 April 2016, available at: https://www.gov.uk/hmrc-internal-manuals/international-manual/intm332060 (last accessed 1 October 2022), para. 2.

HMRC's policy was likely inspired from the conduit arrangement clause found in United States practice, as such a clause was directly introduced in the 2001 double taxation convention between both states.[56] This clause can be described as including an anti-conduit rule with a main purpose test «*in the sense that in order for treaty benefits to be denied it must also be established that the main purpose (or one of the purpose purposes) for the interposition of a conduit entity was to obtain increased tax treaty benefits.*»[57] HMRC's position has in this respect been described as a «*prominent example of blurring between beneficial ownership and abuse*».[58]

A distinction can here be made between the practices of the United States and United Kingdom. In the United States, administrative guidelines allocate the treaty benefits of the beneficial owner to the person controlling the conduit's income, the latter being disregarded. Hence, following an anti-abuse analysis, the conduit is ignored, and the real beneficial owner recognised as such. In that sense, the United States practice construes beneficial ownership as being complementary to the anti-abuse approach, which tends to exclude an application of the beneficial ownership clause in non-abusive situations. In contrast, the United Kingdom's approach is to directly carve out the application of the beneficial ownership limitation in situations where no abuse is found, i.e. bona fide situations.[59] While these practices differ in their methodology, specifically the order thereof, they lead to similar results.

4. Intermediary Conclusion

In the context of the application of provisions based on articles 10, 11, and 12 of the OECD Model Tax Convention (OECD MC), the application of double taxation conventions between the state of source and the state of residence of the beneficial owner has been challenged in situations where income passes through a recipient interposed between the parties, such as a conduit company. The question of the equivalence of the beneficial owner with the direct recipient of a passive income may often arise in practice. In such situations, whether the beneficial owner is nonetheless entitled to the tax relief provided by the double taxation convention has been debated but is generally accepted by courts and tax administrations, albeit under different justifications. The common feature in most of these practices is the high regard they have for the object and purpose of the double taxation convention when interpreting the beneficial ownership limitation.

56 Danon, Beneficial Ownership (n. 54), sec. 15.2.6.2.

57 Ibid.

58 Robert J. Danon, Conduit Companies Involving Interest Payments under Double Taxation Conventions: A Beneficial Ownership or a Principal Purpose Test Problem? in G. Maisto (ed.), Taxation of Interest Under Domestic Law: EU Law and Tax Treaties, EC and International Tax Law Series vol. 19, IBFD 2022, sec. 9.2.

59 Ibid. and HMRC internal manual, International Manual: INTM332060 (n. 55) para. 2.

The OECD Commentary is clear on the issue and states that when the recipient and the beneficial owner of dividends, interest, and royalties are not the same person, the benefits of the double taxation convention concluded between the state of source and the state of residence of the beneficial owner remain available. This is expressed as follows: «*subject to other conditions imposed by the Article, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State*.»[60]

II. The Planet Case

At the international level, case law and administrative practices have confirmed the validity of treaty relief being granted to beneficial owners who are not the direct recipients of a passive income. On 20 May 2022, the French Conseil d'État (Supreme Administrative Court) delivered the *Planet* judgment.[61] In this decision, the Conseil d'État held, as a matter of principle and for the first time,[62], Revue de droit fiscal no. 24, 16 June 2022, comm. 232, p. 1. in a triangular situation, that when passive income is paid to a person who is not the beneficial owner thereof, the double taxation convention applicable between France and the state of residence of the actual beneficial owner is directly applicable, irrespective of the recipient of the income – i.e. the apparent beneficial owner – not being a resident of that state.[63] The facts of the case and findings of the Court are discussed in the following sections.

1. Facts of the Case

Société Planet is a French resident company which is involved in the distribution of sports programmes to fitness clubs, which were developed by a company in New Zealand. Between 2011 and 2014, Société Planet paid royalties to a Belgian company and a Maltese company.[64] All these royalties were paid in exchange for the sub-licensing of group fitness programmes, which were initially licensed to the Belgian and Maltese companies

60 OECD Model: Commentary on Article 10 (2017), para 12.7.

61 Conseil d'État (France), 20 May 2022, no. 444451, *Société Planet*, ECLI:FR:CECHR:2022:444451.20220520, reported in Revue de droit fiscal no. 30, 28 July 2022, comm. 291, p. 1; the conclusions of the Rapporteure publique, Ms Céline Guibé are reported at pp. 1–5. An English translation of the judgment and conclusions of the Rapporteure publique is forthcoming in the International Tax Law Reports (ITLR).

62 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 60), p. 2: « *La question de l'application de la convention conclue avec l'Etat de résidence du bénéficiaire effectif, une fois écartée la convention conclue avec l'Etat de résidence du bénéficiaire apparent, ne s'est, en pratique, jamais posée*. » Also see, Daniel Gutmann/Stéphane Austry, Convention fiscale et clause de bénéficiaire effectif. À propos de *CE,* 20 mai 2022, n° 444451, Sté Planet

63 Gutmann/Austry (n. 62), p. 1.

64 CE, *Société Planet* (n. 61), para. 1.

by the New Zealand company.[65] The French and New Zealand companies had previously entered into an agency agreement pursuant to which the French company would collect licence fees from affiliated clubs and would then pay royalties equivalent to 30% of these amounts to the New Zealand company.[66] Following an audit, substantial withholding taxes were collected from Société Planet. Consequently, the agreement scheme and payment structure for the concerned amounts were modified.[67] In 2011 and 2012, royalties were paid to the Belgian and Maltese companies, which were controlled by the New Zealand company's manager.[68]

Following a second audit, the tax authorities considered that the previous agency agreement entered into with the New Zealand company still applied as it had not been terminated, irrespective of the new contracts entered into in 2011 and 2012 with the Belgian and Maltese companies. Regarding the 2011 tax year, it was determined that the New Zealand company was the real beneficiary of the income paid.[69] For the 2012 to 2014 taxes, it was not considered relevant to determine whether the Maltese or New Zealand company was the real beneficiary of the paid amounts,[70] as the withholding tax rates on royalties provided for in the double taxation conventions with France and these two states are identical (10%).[71]

The French company challenged this assessment, primarily on the question of whether the amounts paid to the Belgian and Maltese companies were service payments or royalties. Following an analysis of the relevant agreements, the first lower court arrived at the conclusion that the payments qualified as service payments,[72] whereas the appellate court regarded the payments as royalties.[73]

The French company, which had standing as the debtor of the withholding taxes, brought an appeal to the Conseil d'État, arguing that the appellate court had erred in law by qualifying the payments as royalties under the France-New Zealand double taxation convention. Furthermore, Société Planet argued that the contracts entered into in 2011 and

65 The double taxation conventions between Belgium and France provides for taxation only in the state of residence, whereas the Malta-France and New Zealand-France double taxation conventions additionally provide for the state of source's right to tax royalties at 10%.

66 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 3.

67 Ibid.

68 Ibid.

69 Ibid.

70 Ibid.

71 Ibid.

72 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 3; see Tribunal administratif de Marseille, 18 May 2018, nos. 1605447, 1605448, 1705980.

73 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 3; see Cour administrative d'appel de Marseille, 15 July 2022, no. 18MA04302.

2012 demonstrated that the New Zealand company was not the beneficial owner of the payments and that the France-Belgium and France-Malta double taxation conventions therefore applied.[74]

2. Findings of the Conseil d'État and Conclusions of the Rapporteure publique

As is usual for decisions of the Conseil d'État, the conclusions of the Rapporteur publique, which are intended to guide the Court's decision,[75] were published and give an insight in the Court's reasoning as the Court followed the conclusions. The judgment and conclusions are analysed together hereinafter.

The main issue to be decided by the Court was formulated by the Rapporteure publique, Ms Céline Guibé, as determining whether a double taxation convention ratified with the state of residence of the beneficial owner applies in a triangular configuration.[76] The conclusions of the Rapporteure publique include four core findings. First, that previous French case law on beneficial ownership did not contradict the assertion that a beneficial owner could be granted treaty benefits despite not being the direct recipient of an income. Second, that the OECD Commentary supports the granting of treaty benefits to the real beneficial owner in so-called triangular configurations; moreover, foreign courts and tax administrations share this view. Third, that previous and subsequent OECD Commentaries were relevant for the interpretation of the double taxation convention between France and New Zealand. Fourth, that such an interpretation of the France-New Zealand double taxation convention was in accordance with the object and purpose of the treaty. Lastly, the Rapporteure publique made remarks on the issue of a potential obligation of tax authorities to identify beneficial owners.

The case presented a particularity with regards to prior French case law on beneficial ownership: the tax administration had from the outset applied the double taxation convention with the state of residence of the person that it considered to be the beneficial owner of the royalties,[77] i.e. the New Zealand company. In previous cases, the tax administration had simply argued that the apparent beneficial owner could not avail itself of treaty benefits, without making conclusions as to the application of the double taxation between France and the state of residence of the real beneficial owner.[78] Prior case law

74 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 3.

75 The Conseil d'État has however no obligation to follow the Rapporteur publiquc's legal reasoning or conclusions.

76 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 3. This question was, as noted by C. Guibé, not decided in the *Bank of Scotland* case (see Conseil d'État, 29 December 2006, no. 283314, *Bank of Scotland*, reported in 9 ITLR 683).

77 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 3.

78 Gutmann/Austry (n. 62), p. 1. See in that regard CE, *Bank of Scotland* (n. 76).

did not, however, exclude the possibility of applying the double taxation convention between France and the state of residence of the real beneficial owner.[79] Moreover, there were some occurrences where the French tax administration and courts had granted treaty benefits to beneficial owners who resided in the same state as the apparent beneficial owner.[80]

Unlike the royalties provision found in the current OECD Model, article 12(2) of the France-New Zealand double taxation convention mentions both a beneficial owner and the person receiving the income.[81] As underlined by the Rapporteure publique, the provision's wording could be understood as suggesting that only recipients of the income paid by a French payer are concerned by the provision.[82] Such an interpretation would mean that the beneficial ownership limitation would only be met where the income recipient and the beneficial owner coincide.[83] In the case at hand, with regards to the double taxation convention between the state of source and the state of residence of the apparent beneficial owner, treaty benefits would therefore be denied as the income recipient would not qualify as a beneficial owner. Furthermore, because the real beneficial owner would not be the recipient of the income, the double taxation convention between the state of source and the state of residence of the real beneficial owner would also not be applicable.

This view was found by the Rapporteure publique to be in contradiction with the OECD Commentary. As discussed above (section I.2), the OECD Commentaries indeed pro-

79 According to commentators the issue had not been raised by the parties in *Bank of Scotland* (n. 76). See thereupon Yohann Bénard, Fraude à la loi et Treaty Shopping : que penser de la décision Bank of Scotland ?, Revue de jurisprudence et des conclusions fiscales (RJF) 3/07 no. 322 (2007) 319–327, p. 322.

80 This was namely the case in CE, 13 October 1999, *Diebold Courtage*, reported in 2 ITLR 365, where a derivative benefits approach was taken in relation with a transparent Dutch entity and its resident partners, and in CE, 5 February 2021, no. 430594 and 432845, *Performing Rights Society*, ECLI:FR:CECHR:2021:430594.20210205, where the French tax administration had accepted to refund the withholding tax levied on royalties paid to a British resident company, which collected royalties on the behalf of copyright holders, in proportion to the percentage of rights which corresponded to the works of members who were British residents, see Philippe Martin, Note, pp. 5–7 in Bénéficiaire effectif : identification de la convention fiscale applicable, Revue de droit fiscal no. 30, 28 July 2022, comm. 291, p. 6.

81 See Convention between the Government of New Zealand and the Government of the French Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, 30 November 1979, available at https://www.legislation.govt.nz/regulation/public/1981/0020/latest/whole.html (last accessed 1 October 2022): Article 12(1) provides: «*Royalties arising in a State and paid to a resident of the other State may be taxed in that other State*.» Article 12(2) provides: «*However, such royalties may also be taxed in the State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties the tax so charged shall not exceed 10 per cent of the gross amount of the royalties*.»

82 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 5.

83 Ibid.

vide since 1977 that the exemption (or relief) in the state of source remains available when an intermediary is interposed between the payer and the beneficiary, but that the beneficial owner is a resident of the other contracting state. This «*consistent position of all the* [OECD] *Member countries*»[84] was specified in the modifications made to the OECD Commentary for the 1997 OECD Model, which no longer took into account the person to whom the passive income was paid. Further, while this modification resolves the issue for conventions drafted according to the new Model, it is considered within the Commentaries to be a mere clarification on the scope of the beneficial ownership limitation.[85]

The Rapporteure publique, in favouring an economic rather than literal reading of article 12,[86] considered that with respect to passive income provisions, only an economic interpretation would be in accordance with the double taxation prevention objective of double taxation conventions. This economic interpretation was therefore based on the object and purpose of the treaty. The conclusions of the Rapporteure publique rely on the OECD Commentary, both in its version predating the double taxation convention at hand as well as subsequent versions. In this regard the Rapporteure publique relied on the *Valueclick* decision wherein the Conseil d'État recognised a «persuasive value» to subsequent OECD Commentaries.[87] The differences between the current OECD Model and the text of article 12 in the treaty at hand were not deemed relevant to the extent that these departures did not concern the identification of the beneficial owner but the extent of the granted treaty benefit, i.e. a full exemption (as provided in the OECD Model) or partial taxation in the state of source (as provided in the double taxation convention between France and New Zealand).[88]

Another interesting consideration of the Rapporteure publique, which was likely inspired from Italian case law, to which she referred in her conclusions,[89] is that if it is in accordance with the object and purpose of a double taxation convention to deny treaty

84 OECD Model: Commentary on Article 10 (2017), para. 12.7; the «consistent position» is mentioned since 1995.

85 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 4; see OECD Model: Commentary on Article 10 (2017), para. 12.7.

86 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), pp. 4–5.

87 Ibid., p. 4, footnote 12. See on this matter CE, 11 December 2020, no. 420174, *Société Conversant International Ltd, anciennement dénommée Valueclick International Ltd*, ECLI:FR:CESSR:2020:420174.20201211.

88 CE, no. 444451, *Sté Planet*, Conclusions of Céline Guibé (n. 61), p. 5.

89 Ibid., p. 4.

benefits to mere intermediaries, it is equally in accordance with the double taxation convention to grant treaty benefits to the real beneficial owner.[90]

The final remarks of the Rapporteure publique concerned the identification of beneficial owners. Whilst conceding that this did not affect the outcome of the case, she stated that the possibility for tax administrations to apply, respectively the taxpayer's possibility to avail itself of the double taxation convention concluded with the state of residence of the real beneficial owner, does not amount to an obligation to identify the real beneficial owner in all situations where it appears than an income recipient is a mere intermediary. These considerations, which draw from the CJEU's case law,[91] do not however affect the findings of the Rapporteure publique that there must be an ex officio application of the double taxation convention entered into with the state of residence of the real beneficial owner in all situations where this person is identified or identifiable.[92]

In light of her findings, the Rapporteure publique concluded that the appellate court had not erred in law insofar as it had applied the France-New Zealand double taxation convention in lieu of the France-Belgium and France-Malta double taxation conventions. However, the appellate court failed to determine whether the New Zealand company qualified as a beneficial owner under the relevant convention. As such, it was advised that the case be sent back to the appellate court in order for this analysis to be conducted.

The Conseil d'État followed the Rapporteure publique's conclusions. In doing so the Conseil d'État agreed on the substantive findings concerning the interpretation of the France-New Zealand double taxation – and arguably the most important pas of this judgment – i.e. that treaty benefits are available to the beneficial owner, irrespective of the income having been paid to an intermediary in a third state.[93] The Conseil d'État held in this regard: « *Eu égard à leur objet, et telles qu'elles sont éclairées par les commentaires formulés par le comité fiscal de l'Organisation pour la coopération et le développement économique (OCDE) sur l'article 12 de la convention-modèle établie par cette organisation publiés le 11 avril 1977, et ainsi d'ailleurs qu'il résulte des mêmes commentaires publiés respectivement les 23 octobre 1997, 28 janvier 2003 et 15 juillet 2014 et en dernier lieu le 21 novembre 2017, les stipulations du 2 de l'article 12 de la convention fiscale franco-néo-*

90 Ibid., p. 4, compare Corte suprema di cassazione, no. 24288 (n. 28), para. 1.3 (see above n. 39) as well as OECD Model: Commentary on Article 10 (2003), para. 12 and OECD Model: Commentary on Article 10 (2017), para. 12.1.

91 CJEU, *T Danmark and Y Danmark* (n. 41), para. 118.

92 CE, *Société Planet* (n. 61), p. 1, para. 2. Also see Gutmann/Austry (n. 62), p. 3 and Cyril Valentin/Juliette Brasart, L'arrêt *Planet* : retour sur Terre pour la notion de bénéficiaire effectif ? À propos de *CE, 320 mai 2022, n° 444451, Sté Planet, concl. C. Guibé*, 2022(3) Fiscalité Internationale 137–147, p. 137, para. 2.

93 CE, *Société Planet* (n. 61), p. 1, para. 3.

zélandaise sont applicables aux redevances de source française dont le bénéficiaire effectif réside en Nouvelle-Zélande, quand bien même elles auraient été versées à un intermédiaire établi dans un État tiers ».[94]

In other words, the Court held that a beneficial owner may avail itself of treaty benefits irrespective of the recipient of the passive income being another person. Furthermore, the Court confirmed its recent ambulatory interpretation with respect to the OECD Commentary, by stating that the foregoing view was grounded on the 1977 OECD Commentary but also on the versions published in 1997, 2003, 2014 and 2017, whereas the double taxation convention at hand was concluded in 1979.[95] Commentators see these references as a confirmation of the Court's position that subsequent OECD Commentaries are of persuasive relevance.[96]

The Conseil d'État then stated that an ex officio obligation to apply the double taxation convention with the state of residence of the real beneficial owner exists, on the grounds that such a treaty determines the scope of domestic tax law.[97] In essence, this ex officio obligation therefore relates to the rule of law principle. Commentators have opined that this ex officio obligation concerns all situations where the beneficial owner is identified.[98]

Finally, the Conseil d'État confirmed that the appellate court had erred in law. This did not affect the application of the double taxation convention in a triangular configuration, which the Court confirmed, but concerned a procedural mistake of the appellate court. The latter had held that the France-New Zealand double taxation convention was applicable to the case at hand solely on the basis of the tax administration's assertion that the New Zealand company had to be considered to be the beneficial owner of the payments in light of the initial agreement between the French and New Zealand companies. According to the Conseil d'État, the mistake laid in the appellate court's lack of analysis of the beneficial ownership of the New Zealand company.[99]

III. Swiss Practice and Relevance of the Planet Case

The Conseil d'État's decision and the conclusions of the Rapporteure publique, with regards to triangular configurations, are noteworthy given the uneven treatment of such situations in different jurisdictions.[100] The following section summarises Swiss tax treaty

94 Ibid.
95 Ibid.
96 Gutmann/Austry, (n. 62), p. 2, referring to the example of CE, *Valueclick* (n. 87).
97 CE, *Société Planet* (n. 61), p. 1, para. 2.
98 Gutmann/Austry, (n. 62), p. 3.
99 CE, *Société Planet* (n. 61), p. 1, para. 4.
100 Also see Danon et al. (n. 7), pp. 512–513.

practice in situations where beneficial owners and income recipients are different persons. This practice is analysed and then contrasted with the findings of the *Planet* case.

In Switzerland, a body of case law pertaining to the availability of treaty benefits to beneficial owners who are not the direct recipients of passive income has emerged on several occasions. This case law, which has consistently led to a denial of treaty benefits, may be divided into three groups, which rest on different reasoning.

1. Direct Application of the Double Taxation Convention with the State of Residence of the Real Beneficial Owner

In the first group of decisions, courts were submitted arguments which amounted to comparing the tax benefits granted by the conduit structure with structures where the income would be directly paid to its real beneficiaries. The Swiss Supreme Court has considered that the fact that the real beneficiaries could avail themselves of equivalent relief – namely because they were residents of jurisdictions which had entered into double taxation conventions with Switzerland – is not relevant.[101] This is correct insofar as the beneficial ownership of an intermediary company is assessed. Moreover, the residence of the real beneficial owner is of no incidence in the strict analysis of the beneficial ownership of an intermediary company. However, once such an intermediary entity is deemed not to be the beneficial owner of a passive income, there remains the possibility – and necessity – of applying the relevant double taxation convention with the state of residence of the real beneficial owner. Therefore, in this subsidiary analysis, the fact that a double taxation convention exists between Switzerland and the state of residence of the real beneficial owner is relevant as it is a precondition to obtaining a treaty relief.

In this context, another interesting position is followed by the British tax authorities (HMRC) (see above section I.3.4). The latter have adopted administrative guidelines following the landmark *Indofood* decision, whereby the beneficial ownership limitation is treated as an anti-avoidance clause. Under this approach, the limitation is not applied in situations where an intermediary entity is the income recipient and a double taxation convention exists between the United Kingdom, acting as a state of source, and the state of residence of the real beneficial owner.[102] Rather, in such instances, the withholding tax rates are adjusted – to the extent to which they differ – to reflect those provided under the treaty with the state of residence of the real beneficial owner. Therefore, while this practice relies on the application of the double taxation convention between the state of source and the state of residence of the apparent beneficial owner, it leads to a result equivalent to the application of the double taxation convention entered into with the state of residence of the real beneficial owner.

[101] Federal Supreme Court, BGE/ATF 141 II 447 (n. 33), para. 5.2.1 *in fine*.
[102] HMRC internal manual, International Manual: INTM332060 (n. 55), para. 2.

Such practices have been rejected by Swiss courts which follow a formal approach and tend to consider beneficial ownership to be a precondition for the application of double taxation conventions, such as, e.g., the residence requirement. This view, which takes into account the nature of beneficial ownership, is understandable given the notion's hybridity, in that it pertains both to the prevention of treaty shopping as well as to the entitlement to treaty benefits. It is however unconvincing with regards to the object and purpose of double taxation conventions and of the beneficial ownership limitation. However, irrespective of beneficial ownership's nature and the extent to which such nature should exclude its application in abusive situations, the principal issue with the Swiss Supreme Court's view is that it eludes the fact that what is at stake is the direct application of the double taxation convention between the real beneficial owner's state of residence and Switzerland. It is interesting to note in this regard that the *Planet* case supports that the application of the second double taxation convention in such situations is required by the rule of law principle.[103] Under international law, the non-application of a double taxation convention may also amount to a violation of article 26 of the VCLT, which provides that «*every treaty in force is binding upon the parties to it and must be performed by them in good faith*».[104]

2. Procedural Obstacles

A second reasoning revolves around procedural issues and was raised on one occasion by the Supreme Court in a 2015 case[105] relating to the Switzerland-Luxembourg double taxation convention.[106] The Appellant, a Luxembourg company, was considered not to be the beneficial owner of Swiss dividends, in essence because it lacked personnel, had little equity and was fully financially controlled by United States residents. In a secondary argument raised before the Supreme Court, the Luxembourg entity requested an alternative treaty relief on account of the fact that its beneficiaries were located in the United States, a jurisdiction which also benefits from a double taxation convention with Switzerland, albeit less favourable.[107] This argument had not been raised in the

[103] CE, *Société Planet* (n. 61), p. 1, para. 2. See, in Switzerland, article 5 Federal Constitution of the Swiss Confederation of 18 April 1999, RS/SR 101.

[104] See Benjamin Malek, Commentary, in A._ SÀRL v Federal Tax Administration (beneficial ownership). Case 2C_209/2017, 22 International Tax Law Reports (ITLR) 435, p. 441.

[105] Federal Supreme Court, TF/BGer, 22 November 2015, 2C_752/2014.

[106] RS/SR 0.672.951.81.

[107] RS/SR 0.672.933.61. See TF/BGer 2C_752/2014 (n. 105), para. 7: « *Enfin, il n'y a pas lieu d'entrer en matière sur l'argumentation nouvelle de la recourante dans laquelle celle-ci semble se prévaloir d'une éventuelle application de la Convention du 2 octobre 1996 entre la Confédération suisse et les Etats-Unis d'Amérique en vue d'éviter les doubles impositions en matière d'impôts sur le revenu (CDIEU;* RS *0.672.933.61) et de la possibilité pour ses associés d'obtenir le remboursement de l'impôt anticipé sur la base de leur domicile aux Etats-Unis. Dans la mesure où le remboursement de l'impôt anticipé selon la CDI-Lux n'a pas le même objet qu'un remboursement de l'impôt anticipé fondé sur la CDI-EU et ne*

previous proceedings,[108] and the Supreme Court dismissed the claim. The fact that the contention was belated seems to have been the principal reason for the Supreme Court's setting aside of the argument. The Court indeed considered that it constituted a new argument which expanded the scope of the appeal, which is not admissible at the stage of Federal Supreme Court proceedings.[109] From a procedural standpoint this finding is sound. The Federal Supreme Court Act limits the Supreme Court's jurisdiction which may in principle not reassess facts.[110] It is possible that if the Appellant had raised the matter at the level of the Federal Administrative Court, which has a full discretion to review facts and law,[111] the claim would have been admissible.

Other procedural concerns have been raised by commentators in France.[112] In this jurisdiction, appeals pertaining to withholding taxes can either be filed by the debtor of the tax (the payer of the income subject to withholding tax) or the person claiming to be the beneficial owner.[113] Therefore, if the apparent beneficial owner is ultimately determined not to be the real beneficial owner, the question of the standing of the real beneficial owner arises. In practice, if the debtor of the withholding tax is a party to the proceedings, the issue is simpler as the legality of the withholding tax can be examined both with respect to the apparent and real beneficial owner.[114]

The situation is however different in Switzerland, where withholding tax refund requests are generally filed by the presumed taxpayer, i.e the beneficial owner. In principle, this issue could be resolved at the stage of initial proceedings with the Federal Tax Admin-

concerne pas directement la recourante, on ne saurait considérer qu'il s'agit d'une même prétention issue du même contexte de fait dont seul le fondement juridique différerait (cf. arrêt 2C_642/2014 précité, consid. 7). Par conséquent, en évoquant pour la première fois devant le Tribunal fédéral la possibilité d'obtenir un remboursement de l'impôt anticipé sur la base du domicile de ses associés aux Etats-Unis, la recourante élargit l'objet du litige, ce qui n'est pas admissible. Son argumentation n'est donc pas recevable ».

108 See TF/BGer, 2C_752/2014 (n. 105), para. 7.

109 See TF/BGer, 2C_752/2014 (n. 105), para. 7 *in fine*. Also see Danon, Beneficial Ownership (n. 54), at sec. 15.2.7.1.

110 Article 97(1) LTF/BGG, RS/SR 173.110.

111 As well as inadequacy (*inopportunité* / *Unangemessenheit*). See article 49 of the Federal Act on Administrative Procedure of 20 December 1968 (PA/VwVG, RS/SR 172.021), which is applicable to such proceedings under article 37 of the Federal Administrative Court Act of 17 June 2005 (LTAF/VGG, RS/SR 173.32).

112 Philippe Martin, The Notion of Beneficial Ownership in EU and French Case Law, in P. Pistone (ed.) Building Global International Law: Essays in Honour of Guglielmo Maisto, IBFD 2022, sec. 19.3.4; Martin, Note (n. 80), p. 7; Valentin/Brasart (n. 92), p. 146, para. 41.

113 Martin, Note (n. 80), p. 7.

114 Ibid.

istration, before a decision is delivered by the latter.[115] A substantial difficulty however arises when the question is raised later in the proceedings, namely before a court, as it is normally not possible to grant standing to a third party not involved in prior proceedings.[116] This problem is further exacerbated in Switzerland as the debtor of the withholding tax is normally not a party to the refund request. Moreover, the short statute of limitations which applies in matters of withholding tax refund proceedings[117] may, in practice, prevent the real beneficial owner from filing a timely withholding tax refund request in reaction to treaty benefits being denied to the apparent beneficial owner.

One foreseeable remedy to such procedural obstacles, contingent on the concerned party anticipating the risk that their beneficial ownership is not recognised, could be to opt to file a joint withholding tax refund request, i.e. both on behalf of the intermediary and the presumptive beneficial owner. It is however uncertain how the Federal Tax Administration would react to such a process, which in any event relies on the applicant's timely realisation of the potential for a beneficial ownership challenge.

3. Substantive Oppositions

A third category of reasoning justifying a denial of treaty benefits in triangular situations, which relies upon substantive motives, appeared in a Federal Administrative Court decision in 2020.[118] The Appellant, an Italian resident, who had filed for a withholding tax refund relating to Swiss dividends, argued that the counterparties to a financial instrument, i.e. potential real beneficial owners, were residents of the United Kingdom, a jurisdiction whose double taxation convention with Switzerland provides equivalent treaty relief to the Italy-Switzerland double taxation convention. Consequently, the Appellant argued that treaty benefits could be granted on that basis. The Court held that the Appellant's claim for «alternative treaty benefits», relying on the double taxation convention between Switzerland and the United Kingdom, was not possible in the absence of an express derivative benefits provision in the Switzerland-Italy double taxation convention.[119,120]

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115 See article 26(1) of the Federal Act on the implementation of double taxation conventions of 18 June 2021 (RS/SR 672.2, LECF/StADG).

116 This is because *locus standi* in Switzerland, i.e. the right to appeal a decision, generally stems from being the recipient of a decision. General principles of Swiss law do however allow for third parties to appeal a decision if they are specifically affected by a decision or have an interest deemed worthy of protection (see e.g. article 48 PA/VwVG, n. 111).

117 A withholding tax refund request must be initiated within a three-year statute of limitations, see article 27(1) LECF/StADG (n. 115).

118 Swiss Federal Administrative Court, TAF/BVGer 29 May 2020, A-2516/2018. The judgment was not appealed to the Federal Supreme Court.

119 Ibid., para. 8.

120 RS/SR 0.672.945.41.

While this finding may have been influenced by the consideration that the counterparties in the United Kingdom were mere brokers, and therefore presumably not real beneficial owners, the argument revolving around the lack of express derivative benefits provision in the double taxation convention is, in the author's opinion, flawed.[121] The mechanism through which a treaty relief is granted, in the situation described above, does not require a derivative benefits clause, as it simply relies on the direct application of the double taxation convention between Switzerland and the state of residence of the real beneficial owner, the initial double taxation convention being excluded. This judgment entered into force without being scrutinized by the Supreme Court. An appeal would have perhaps allowed the Supreme Court to review the foregoing reasoning.

This position is also somewhat incoherent from a Swiss perspective, as the principle of alternative treaty relief is generally granted – albeit restrictively[122] – in cases involving the prohibition of abuse whereas, by contrast, a formal approach is endorsed with respect to the beneficial ownership limitation in conduit cases. A different outcome can therefore arise in conduit cases, depending on whether the fact pattern is construed as pertaining to the implied prohibition of abuse or to the beneficial ownership limitation. Such an approach is incoherent from a systematic perspective and is moreover incompatible with Switzerland's commitments under BEPS Action 6,[123] which have been enshrined both in the Multilateral Instrument (MLI)[124] and through the ongoing bilateral introduction of principal purpose test provisions[125] in the double taxation conventions concluded by Switzerland.

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121 Robert J. Danon/Benjamin Malek, Influence of EU case law on the prohibition of international tax abuse in Swiss practice. Critical remarks on the Federal Supreme Court Judgment, TF/BGer, 2C_354/2018 of 20 April 2020 and on its references to the «Danish cases» decided by the Court of the Justice of the European Union, ASA 89(8) 477–511, p. 503.

122 See, e.g., recent limitations to the old reserves practice (*pratique des anciennes reserves* / *Altreservenpraxis*) which was denied by the Federal Supreme Court in a case involving the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, RO/AS 2005 2571: TF/BGer, 2C_354/2018, para. 4.5.3 and thereupon Danon/Malek (n. 121), pp. 489–490.

123 OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, available at: http://dx.doi.org/10.1787/9789264241695-en.

124 Convention multilatérale pour la mise en œuvre des mesures relatives aux conventions fiscales pour prévenir l'érosion de la base d'imposition et le transfert de bénéfices (RS 0.671.1) / Multilaterales Übereinkommen zur Umsetzung steuerabkommensbezogener Massnahmen zur Verhinderung der Gewinnverkürzung und Gewinnverlagerung (SR 0.671.1).

125 Article 29(9) OECD Model.

4. Relevance of the Planet Case

The application of a double taxation convention and recognition of beneficial ownership in a triangular situation, as confirmed in the *Planet* case, is not ground-breaking given the long-established recognition of this practice in OECD Commentary. This precedent is nonetheless of great relevance given the scarcity of case law on the matter. A major merit of the *Planet* case also rests in the additional findings of the Rapporteure publique and the Conseil d'État on beneficial ownership.

4.1. Ambulatory Interpretation

The Rapporteure publique suggested an ambulatory interpretation of the OECD Commentary by referring to the persuasive value of later in time Commentaries under recent French case law. In its judgment, the Conseil d'État mentioned all the versions of the OECD Commentary which were subsequent to the conclusion of the double taxation convention between France and New Zealand, as well as the version predating the conclusion of the convention. This tends to confirm the Court's agreement that the OECD Commentary is of persuasive relevance.[126]

The approach of the Swiss Federal Supreme Court is similar on this issue. The Supreme Court endorsed an ambulatory interpretation with regards to the OECD Commentary in a landmark case involving exchange of information.[127] In more recent case law, relating specifically to beneficial ownership, the Court held that subsequent OECD Commentaries were relevant because the beneficial ownership limitation was new, at the time of its introduction in the double taxation convention at hand, and that the contracting states therefore had to expect that the meaning of beneficial ownership would be subject to change in the future.[128] The Court based its reasoning[129] on the International Court of Justice's case law, whereby the latter held that «*where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long*

[126] Gutmann/Austry, (n. 62), p. 2.

[127] See Federal Supreme Court, TF/BGer 3 November 2017, 2C_201/2016, reported in BGE/ATF 144 II 130, paras. 8.2.2 and 8.3.3 (referring to an «evolutive interpretation»).

[128] Federal Supreme Court, TF/BGer 19 May 2020, 2C_880/2018, para. 4.1. The Federal Supreme Court justified its position on precedent in public international law and the OECD Model: Commentary on Article 10 (1977), para. 12 (referred to as para. 13 in the judgment) which stated: «*Under paragraph 2, the limitation of tax in the State of source is not available when an intermediary, such as an agent or nominee, is interposed between the beneficiary and the payer, unless the beneficial owner is a resident of the other Contracting State.* ***States which wish to make this more explicit are free to do so during bilateral negotiations***» (emphasis added).

[129] TF/BGer (n. 128), 2C_880/2018, para. 4.1.

period or is «of continuing duration», the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.»[130]

While most commentators tend to disfavour an ambulatory approach, the Federal Supreme Court's finding corresponds to the dominant trend in current international case law.[131] However, the French Conseil d'État's position is more general, i.e. subsequent OECD Commentaries are in principle considered to be of persuasive relevance, whereas it is unclear if the Swiss Supreme Court will generalise this approach for all treaty terms.[132] In any event, Swiss and French case law converge, albeit on different grounds, with regards to the relevance they grant to subsequent OECD Commentaries pertaining to the beneficial ownership limitation.

4.2. Beneficial Ownership's Use

While the decision does not expand on the notion of beneficial ownership itself – an analysis of the beneficial ownership of the New Zealand company was precisely lacking in the appellate court's judgment – it does provide clarification on the potential use of this limitation. It indeed follows from the decision that the corollary of the application of the beneficial ownership limitation in a triangular situation, is that it may be relied upon by taxpayers and is thus not solely a tool for tax authorities to deny treaty benefits.[133]

4.3. Identification of Beneficial Owners

The absence of a requirement to identify the beneficial owner for the tax administration was incidentally raised by the Rapporteure publique in her conclusions, although the matter was not examined by the Conseil d'État itself. Commentators opine that a friction exists because the Conseil d'État ruled that the granting of treaty benefits in triangular configurations was not only lawful but had to be granted ex officio,[134] i.e. automatically, without a specific request from the concerned parties, which may be difficult in the absence of an identified beneficial owner. Consequently, an alleged practice of the French tax authorities, whereby treaty benefits were not granted to real beneficial owners when

130 International Court of Justice, 13 July 2009, *Dispute Regarding Navigational and Related Rights (Costa Rica)*, ICJ Reports 2009, p. 213, para. 66.

131 Moritz Seiler/Michael Beusch, Switzerland: Beneficial Ownership and Dynamic Interpretation of Tax Treaties in G. Kofler et al. (eds), Tax Treaty Case Law around the Globe 2021, IBFD 2022, section IV.

132 Ibid. Also see Stefan Oesterhelt, Aus der Rechtsprechung in den Jahren 2019/2020 (Teil 2), FStR 2021/1 42–69, p. 52.

133 Valentin/Brasart (n. 92), p. 145, paras. 35–36.

134 This finding stems from previous case law which states that double taxation conventions must be applied *ex officio* by courts and the tax administration because they impact the scope of French tax law, see thereupon Gutmann/Austry (n. 62), p. 3, citing Conseil d'État, 28 June 2022, no. 232276, *Sté Schneider Electric*, reported in 4 ITLR 1077 and Martin, Note (n. 80), pp. 6–7.

an apparent beneficial owner had unsuccessfully requested treaty benefits may now be defunct.[135] Procedural issues may nonetheless remain.[136]

The finding concerning the ex officio application of the double taxation convention may be relevant for other jurisdictions, as it is based on the fact that double taxation conventions determine the taxable object under domestic tax law, and thereby pertains to the rule of law principle. Furthermore, from an international law perspective, the ex officio granting of a treaty relief in a triangular configuration is conducive to a good faith application and interpretation of the double taxation convention in light of its object and purpose, which is, first and foremost, the elimination of double taxation.[137]

4.4. Coherence of Anti-Avoidance Practices

In Switzerland, the approach described above would further create a coherent system between the recharacterization which applies in abusive restructuring cases and the application of the beneficial ownership limitation to conduit structures. Such a recharacterization is also provided by the newly introduced principal purpose test and would therefore prevent conflicting applications of the principal purpose test and the beneficial ownership limitation, which would be at odds with both Switzerland's policy commitments under the BEPS Project[138] and its ratification of the Multilateral Instrument, as well as the principle of good faith governing the interpretation[139] of double taxation conventions which incorporate the principal purpose test.

4.5. Procedural Considerations

Construed widely, the Swiss withholding tax refund request made by a taxpayer, specifically in a judicial context, is limited to requiring the court to order the refund of a certain amount in the prayers for relief (*Rechtsbegehren / conclusions*). Such a request may rest on alternative legal grounds, e.g. different double taxation conventions, with their respective beneficial owners. Moreover, when applying public law, courts apply the law ex officio and are therefore not bound by the legal justification brought forward by taxpayers, appellants or respondents in public law matters. Courts may thus grant a requested withholding tax refund on legal grounds not raised by either party, for instance on the basis of another double taxation convention. Such an approach would ensure that a lack of standing and issues pertaining to the statute of limitations do not preclude real beneficial owners from availing themselves of treaty benefits to which they are entitled.

135 Gutmann/Austry (n. 62), p. 2.
136 Martin, Note (n. 80), p. 7.
137 See Preamble of the OECD Model.
138 See namely OECD, Action 6 (n. 123).
139 Article 31(1) VCLT.

Finally, as explained above (section 2.3 *in fine*), the limitation of withholding tax refund requests to persons to whom the income is allocated, as opposed to beneficial owners who do not necessarily meet this requirement, is at odds with the current policy of the OECD.

4.6. Purpose of Beneficial Ownership

The beneficial ownership limitation's origins, which are linked to a context of treaty shopping with the use of conduit companies, contradict the rule's application in situations which do not amount to abuse. The body of case law whereby abuse of rights and beneficial ownership have been construed together demonstrates that a judicial consensus now exists whereby the application of beneficial ownership is confined to situations of treaty abuse. This trend is also well established in the administrative practice of several jurisdictions.

Such an intrinsic link between beneficial ownership and treaty abuse may also be drawn from OECD materials. The origins of the beneficial ownership limitation in the OECD Model and Commentary, contextualise the limitation with concerns on the improper use of double taxation conventions through conduit structures. The origin of beneficial ownership remains nonetheless somewhat controversial.[140]

In situations where an abuse of right is found to exist, several senior courts have requalified the fact pattern by granting treaty benefits, partially or in full, to the real beneficial owner. In other words, this body of case law amounts to a cumulative application of the abuse of rights doctrine or anti-avoidance provisions, followed by an application of the beneficial ownership limitation.

Moreover, an interpretation in light of the object and purpose of the treaty, as prescribed, inter alia, by French and Italian case law, which do not directly address the question of abuse of rights, also excludes beneficial ownership's sole application in lieu of an abuse of rights doctrine, insofar as it would preclude the taxpayer from benefiting from a recharacterization of the facts of the case. This flows from the fact that a non-contextual application of the beneficial ownership limitation, i.e. with no consideration for the presence of abuse, makes little sense.[141] The purpose of applying the beneficial ownership limitation is indeed rather obscure in situations where a conduit or intermediary does not provide a treaty benefit to the concerned parties.

[140] See Robert J. Danon, Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups, Bulletin for International Taxation, 72 (1) 31–55 (2018), p. 32.

[141] Daniel Gutmann, Contre la théorie du bénéficiaire effectif en droit fiscal européen et international, 2019(2) Fiscalité Internationale 1–3, p. 3, qualifying situations wherein beneficial ownership would be denied to a conduit entity which provides no tax benefit as absurd.

IV. Conclusion

Beneficial ownership's usefulness has been questioned by several commentators in recent literature.[142] Yet, nothing indicates that this limitation will be removed from double taxation conventions in the future. The problem of beneficial ownership in triangular configurations, which thus remains current, may be considered under two perspectives.

The first view follows from the amendments made to the OECD Commentary in 1995 and 2014. This guidance establishes that beneficial owners are entitled to treaty benefits even if they are not direct recipients. The autonomous application of articles 10(2) and 11(2) by the state of source has indeed set aside the requirement for the income to be allocated to the beneficial owner.

Hence, tax authorities and courts may opt for an application of the beneficial ownership limitation which departs from the formalistic approach which has prevailed until recently in some jurisdictions. Under this approach, the beneficial ownership limitation must be applied contextually and both against and in favour of the concerned parties. This view is unambiguously supported by the OECD Commentary and has been adopted by several jurisdictions, now followed by the French Conseil d'État. Furthermore, such an application of the beneficial ownership limitation is in accordance with the object and purpose of double taxation conventions.

Against this background, it is the author's opinion that while tax administrations and judicial bodies do not have an obligation to identify the beneficial owner, they must ex officio grant treaty benefits if the facts brought forward by the taxpayer demonstrate that the real beneficial owner resides in a state with which the state of source has concluded a double taxation convention. Such benefits would flow, as described by the OECD Commentary, from the direct application of the double taxation convention between the state of source and the state of residence of the real beneficial owner.

A second view is that the coordination of the beneficial ownership limitation with other anti-avoidance mechanisms, namely the prohibition of abuse of rights found in international law[143] and the principal purpose test must be resolved. Courts and tax authorities may in this regard consider the systematic construal of conduit situations under the scope of both the prohibition of abuse of rights principle (or the principal purpose test where applicable) and the beneficial ownership limitation. This would prevent the

142 See Danon, Beneficial Ownership (n. 54), pp. 660–661, sec. 15.4; Danon et al. (n. 7), pp. 514–515; Gutmann (n. 141), p. 3; Philippe Martin, La notion de bénéficiaire effectif, 2022(3) Fiscalité Internationale 31–37, p. 33, para. 7; Valentin/Brasart (n. 92), p. 147, para. 44.

143 As recognised by the Federal Supreme Court, TF/BGer, 28 November 2005, 2A.239/2005, reported in 8 ITLR 536.

sole application of the beneficial ownership limitation from overriding the application of general anti-avoidance mechanisms which lead to a recharacterization of the facts of the case. The tendency to disregard such a recharacterization in situations purely construed through the lens of the beneficial ownership limitation are indeed incompatible with the good faith principle enshrined in the VCLT, and therefore undesirable. This position is moreover contradictory in the sense that a conduit outcome is construed strictly under the beneficial ownership limitation but that approaching the fact pattern under the prohibition of abuse, and thus recharacterizing the facts or granting the benefits under the double taxation convention with the state of residence of the beneficial owner, is denied.

Interestingly, both approaches described above would achieve the same result: the granting of treaty benefits, partially or in full, to beneficial owners residing in states with which the state of source has concluded a double taxation convention, irrespective of their lack of income receipt.

The recent shift in the Federal Supreme Court's case law on beneficial ownership,[144] as well as the Court's openness towards an ambulatory approach[145] with regards to the OECD Commentary, may pave the way for further adaptation and clarification of Swiss case law on the beneficial ownership limitation. Such a clarification, which could also result from guidelines of the Federal Tax Administration, would be in line with international case law, the OECD Commentary and the commitments of Switzerland at the international level. Finally, an adaptation of the Swiss practice on beneficial ownership would allow for a coherent construal of future cases involving conduit situations covered by double taxation conventions including a principal purpose test.

144 TF/BGer, 2C_880/2018 (n. 128), para. 4.4. et seq. Also see Seiler/Beusch (n. 131), sec. IV.
145 See *supra* section IV. 4.1.