I. THE PURPOSE, SCOPE AND BASIC AIM OF THE BOOK

A dispute has arisen between the domestic tax authorities and foreign taxpayers in respect of the meaning of ‘beneficial ownership’ or ‘beneficial owner’ (hereinafter ‘BO’), in tax law. An independent domestic court is on a mission to resolve this dispute. Recourse is had to the canons of interpretation in the Vienna Convention on the Law of Treaties (hereinafter the ‘VCLT’1) and the autonomous and dynamic interpretation presented by the Organisation for Economic Co-operation and Development (OECD) in its Commentary to the OECD Model Tax Convention on Income and on Capital (hereinafter the ‘Commentary’ and the ‘OECD Model’2 respectively). The Court of Justice of the European Union (hereinafter the ‘CJEU’) has given its own eclectic view on the disputed matter in its ground-breaking rulings on what are known as the Danish BO cases.3

Despite more than 50 years of attempts by the OECD to clarify the concept of BO, its meaning and scope remains ambiguous and unresolved, not only among tax authorities and courts, but also among scholars. All this has been detrimental to the stable and predictable functioning of tax treaties for several decades and also, more recently, for the Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (hereinafter the ‘PSD’), and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (hereinafter the ‘IRD’).

The worldwide spread of its negative impact on the effectiveness of tax treaties and the European Union (hereinafter ‘EU’) directives beg the following questions. Why and how did it initially come about? What legal tools do we have to change it? Where are we today when it comes to understanding and applying the concept of BO? And the most central question for the book – what role in the quest for the meaning of BO is played by law-in-action through judicial decisions when courts interpret and apply that concept to solve disputes between the tax authorities and taxpayers?

The justified criticism of the OECD for the lack of a precise, holistic, principle- and consequence-based approach to the clarification of the meaning of BO does not diminish the practical importance of that concept. It remains regarded as a potent weapon in the arsenal of tax authorities to attack presumably abusive behaviours involving conduit entities. The tax
authorities appear to approach that issue very pragmatically: the appropriate meaning of BO does not matter (if it exists at all) as long as its application allows withholding tax to be levied on foreign taxpayers (investors).

The basic aim of this study is to examine how national judges react to such an approach while exercising their judicial discretion in the search for the meaning of one of the most disputed concepts in international tax law. Do they follow the tax authorities because of the close legal, economic and social connections with them, which encourage them to protect the country’s tax base at the cost of the appropriate application of tax treaties and EU directives (source state protectionism)? Or do they resist ‘nationalism in judging’ and determine the meaning of BO in accordance with the canons of interpretation that lead to the appropriate application of tax treaties and EU directives (the search for the autonomous international meaning)?

This book tries to give answers to the questions first on the basis of an in-depth analysis of the origin and evolution of the international meaning of the concept of BO under tax treaties, which predominantly stems from the Commentaries to the OECD Model. Then attention will be given to selected judgments in seminal cases concerning BO, taking into account the wide time horizon of 50 years and geography, covering common law countries (the United States (hereinafter US), Canada and the United Kingdom (hereinafter UK) and civil law states (France, the Netherlands and Switzerland). The book pays particular attention to the recent judgments of the CJEU in the Danish BO cases, the importance of which cannot be overstated.

Before the central analysis, we will set the scene by introducing the fundamental aspects of the book, such as the relations between foreign investments and withholding taxation, as well as the taxpayer’s right to choose the most tax favourable intermediary jurisdiction for the investment on the one side, and the source country’s right to protect its tax base on the other. The introductory discussion also explains basics terms such as conduits, treaty shopping and directive shopping for the purposes of terminological rigour. Then we strengthen the methodological foundations via the systemic explanation of canons of interpretation relevant for the concept of BO.

The book aims to measure the convergence/divergence of the judicial understanding of BO with its autonomous international meaning developed by the OECD in its reports and Commentaries, and following from the interpretation of that concept pursuant to the canons of interpretation. The analytical structure of the Extended Contents helps to pursue this task with a systemic view of the interpretive solutions advanced by the courts. We closely examine various perspectives of courts by looking at diverging or converging cases, thereby creating a structural global map of evolving judicial trends in the understanding of BO, often influencing the behaviour of notational legislatures and the OECD. This map sometimes leads to the treasure of an autonomous international meaning of BO. Often it simply leaves an interpreter completely lost. Each time it takes us closer to the end of the BO concept.

II. BENEFICIAL OWNERSHIP: DEFINITIONAL CHAMELEON

The meaning of BO is extremely vague and fact sensitive. Both features of BO point to a high plasticity; something that was aptly articulated by Johann Hattingh:
There is probably no perfect, well-described and all-encompassing definition of beneficial ownership waiting to be discovered in a certain case or in an experienced authority. The term beneficial owner is rather like a chameleon, taking colour from the content of the personal property to which it is attached as its label. It is not in the nature of the chameleon to nail its colours to the mast.8

1.010 We may assume, therefore, from the outset that the meaning of BO in international and domestic tax laws is extremely susceptible to different understandings and applications. Depending on who and under what circumstances tries to give meaning to BO, this concept takes on different roles and its application leads to different consequences.

1.011 The tax authorities may rely on the plasticity of BO to give to it a meaning that ultimately permits them to levy withholding tax (hereinafter ‘WHT’), i.e., to dismiss a status of BO in respect of a recipient of an income that could benefit from an exemption or reduced tax rate in WHT if it was the BO of the income. If doing so requires perceiving BO as a kind of anti-abusive clause, the tax authorities will apply BO ‘as if’ it was an anti-abusive clause. If, in turn, a narrow perception of BO, as a rule on the allocation of income to a taxpayer, suffices to trigger WHT according to domestic rates, the tax authorities will be satisfied with identifying a BO with a taxpayer to whom income is allocated. All the roles of BO and scenarios of its application during WHT audits carried out by the tax authorities are possible due to its plasticity. The dominant role of BO will arise from its meaning that best suits the more pro-fiscal interests of the tax authorities.

1.012 Clearly, the chameleon nature of BO is detrimental to legal certainty and has a potentially enormous negative impact upon the smooth application of tax treaties and EU directives. This is why courts have such an important role to play in definitional disputes regarding BO among the tax authorities and taxpayers. Firstly, the chameleon nature of BO does not need to work against taxpayers, because the courts may perceive BO differently than the tax authorities, with the result of granting WHT exemption or a reduced tax rate to the taxpayers. Secondly, the tax jurisprudence has the capability to change the nature of BO towards becoming more definitive and precise. In effect, BO does not have to undermine an appropriate functioning of international and EU tax law within the framework of WHT.

1.013 Equally possible, although less desirable from the perspectives of international and EU tax regimes, is the tax jurisprudence that negatively influences the understanding of BO, generally by sustaining or even strengthening the lack of clarity surrounding that concept. The highest risk to the heterogeneous application of BO, exerting a negative effect on the stability and predictability of functioning of tax treaties and EU directives, stems from the tax jurisprudence that perceives this concept anti-abusively, applying a broad economic approach instead of a precise legal analysis.

1.014 The courts may also take a mixed approach that unravels the dual role of BO: (i) a rule on the allocation of income and (ii) a narrow anti-abusive clause that targets only specific transfers of income. A nuanced variation of that approach comes from perceiving BO solely as a rule

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on allocation of income, the application of which may, in certain circumstances, lead to an anti-abusive effect.9

A highly controversial issue concerning the definitional borders of BO has the potential to lead to diverging lines of tax jurisprudence. A close examination of this jurisprudence aims to identify the dominant judicial approaches and the legal and fact patterns standing behind them. In the process of examining this question, the following additional questions will arise:

(1) Is the concept of BO implicit in every tax treaty and EU directive addressing WHT, regardless of its explicit articulation in their wording?
(2) If the BO status is denied to a direct recipient of payments (income), can a tax treaty or an EU directive be applied to an entity that has the status of BO higher up in the chain of recipients of that payment?
(3) Should the status of an intermediary entity as a BO be assessed exclusively or mainly from the perspective of the source country (hereinafter the ‘SC’) of the income or resident country (hereinafter the ‘RC’) of that entity?
(4) Is BO a necessary and helpful concept in international and EU tax law, or an unnecessary and harmful one?

By providing an in-depth legal analysis concerning disputes surrounding the concept of BO, the book attempts to fill a current gap in the literature by identifying to which functional and structural elements of this concept the jurisprudence pays the most attention and what legal consequences it has for the evolution of the meaning of this concept.

III. THE MOST IMPORTANT AND RELEVANT AREAS CONCERNING THE CONCEPT OF BENEFICIAL OWNERSHIP

Prior to the deep dive into the jurisprudence on BO, and even before introducing the methodology of understanding of this concept, its origin and evolutions, it is important to step back and see the bigger picture, i.e., why is there so much fuss about BO in the first place? To answer this question, we need to look at the connections between foreign investments, in particular returns from their successful performance, which are typically paid in the form of highly mobile income such as dividends, interest and royalties, and WHT. Then, we introduce the taxpayer’s right to the lowest taxation and to choose the most favourable jurisdiction for the investment and the country’s right to protect its tax base. A concise look at those aspects sets the scene for the relevance and importance of the issues related to the interpretation and application of BO.

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A. Interplay between foreign investments, withholding tax and tax planning friendly jurisdictions

1.018 The International Monetary Fund (hereinafter the ‘IMF’) presents interesting data on foreign direct investments (hereinafter ‘FDIs’) in its Co-ordinated Direct Investment Survey. The top five countries in the world in respect of outward FDIs are the USA, the Netherlands, Luxembourg, China (Mainland), and the UK, at USD 5.959, 5.582, 4.395, 2.198, and 1.895 trillion, respectively. At the same time, those same countries, in the same order, are the world leaders in the quantum of inward FDIs, at USD 4.458, 4.369, 3.495, 2.938 and 1.974 trillion, respectively. In the vast majority of cases, the returns from such investments fall within the WHT regimes of those countries, and, most importantly, the countries that are originally ‘hosting’ the investments, to use the jargon of international investment law. Such countries are considered SCs in tax law terminology. This raises the question whether or not the Dutch, Luxembourgish, and the British recipients of the mentioned gigantic profits from the investments that typically ‘flow through’ the Netherlands, Luxembourg and the UK to the USA and China are their BOs. If not, then many host countries/SCs across the world may challenge the exemptions or reduced WHT in relation to the payments of profits to entities established in the Netherlands, Luxembourg and the UK, often known as special purpose entities (hereinafter ‘SPEs’), which may be considered conduits. This is so because, in principle, only the BOs of income from dividends, interests and royalties may benefit from the exemptions or reduced WHT on that income under tax treaties and EU directives.

1.019 The stake is huge: instead of WHT exemptions based on EU directives or an application of reduced rates or exemptions based on tax treaties (whichever is more relevant), for instance 5, 10 or 15 per cent, investors may be obliged to pay WHT on their returns, usually in the form of dividends, interest and royalty payments, calculated in accordance with the domestic WHT rates of SCs, which may range from 19 per cent (Poland) through 35 per cent (Chile).
or Switzerland) to 44 per cent (Greenland), to list a few. This follows from the fact that, as stated above, the tax treaties and EU directives provide exemptions or reduced WHT rates only to BOs of income, rather than to their mere recipients.

The preferable tax treatment of gargantuan profits may be challenged particularly by an aggressive pro-fiscal understanding of BO that is embedded within its anti-abusive perception of the tax authorities. This constitutes a sort of problem that is most relevant to the global market players. The following data and observations suggest that the risk associated with this problem is high.

Senior members of the OECD’s Centre for Tax Policy and Administration (hereinafter the ‘CTPA’) have commented on the context of implementing the OECD/G20’s efforts against tax avoidance by multinationals, for which around 80 per cent of global gross income was, as of 2015, generated by 15 per cent of multinational enterprises (MNEs) with large networks of subsidiaries around the world. These subsidiaries are not necessarily SPEs, but it is safe to assume that at least some of them are, since companies within the group of MNEs are actually controlled by an ultimate parent with their income dispersed around the world, including in low tax jurisdictions and tax havens.

Interesting information can also be obtained from the OECD Investment Database on FDI stock positions, which are composed of equity and debt (intercompany loans) and represent the value of the stock of direct investments held at the end of the reference period (year, quarter, or month). Such datasets are especially interesting from the perspective of tax planning. Financial instruments related to equity and debt are often used in cross-border intercompany loans for tax planning purposes via the hybrid qualification of such instruments, whereby the financial instrument is treated by the issuer state as debt and by the holder state as equity, often resulting in a payment of tax deductible interest by the issuer, which is then exempted from taxation in the holder’s state due to the treatment of this payment as dividend (participation

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16 A precise and legally binding definition of an MNE does not exist. For the purposes of the book, the OECD’s open-ended definition is relevant. It says that MNEs: usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.


18 Ibid.

exemption). The data also show that total inward and outward stock investments into and from the Netherlands and Luxembourg were made to a significant extent through SPEs.

1.023 Given that the Netherlands, Luxembourg and the UK are considered in some circles as intermediary jurisdictions facilitating tax treaty and EU directive shopping (as well as investment treaty shopping), the tax authorities may instantly ‘smell’ that direct payments from their countries (SCs) to entities (especially SPEs) from the above jurisdictions deserve special attention during WHT audits. The tax authorities are likely to pay similar attention to payments to other tax planning friendly jurisdictions that are very high in the IMF’s ranking of the world’s top countries in relation to inward and outward FDIs such as Switzerland, Ireland, Singapore, Hong Kong, Cyprus and Malta. All of them have very competitive tax systems and have internationally oriented their economies with a high level of intermediate financial flows. As a result, for decades they have been successfully attracting global businesses and investments.

They also attract the eyes of the tax authorities, which are nowadays more capable than ever to scrutinise the status of entities established in their territories due to the exponential growth in the cross-border exchange of tax information. Of course, one of the most wanted statuses to be verified by the tax authorities from SCs is BO.

1.024 The tax authorities of SCs may appear hot-headed whenever they audit WHT on payments of dividends, interest and royalties to the above-mentioned jurisdictions, in the sense that they hastily jump to the conclusion that the recipients are not BOs. In many cases, such conclusions will follow from a broad, economic and anti-abusive meaning of the concept of BO, rather than from precise, narrow-oriented legal meaning. The current race for new funds to state budgets from taxes under the Covid-19 pandemic, 2021–2022 global energy crisis and soaring...
inflation which is stronger than after the previous 2007–2009 economic crisis, adds fuel to the aggressive approach of the tax authorities to tax audits, including WHT and BOs. The CJEU’s judgments in the Danish BO cases of 2019, as well as subsequent rulings of courts in the EU in 2019–2021, prove that this is indeed the case.

As a result, the predictability and stability of the protection of taxpayers under tax treaties and EU directives is currently significantly compromised in favour of the prevention of abuses of tax law through the use of the concept of BO, which is not necessarily appropriate for that purpose. To use the language of the great German sociologist Max Weber, two out of three conditions necessary for law to be calculable – (1) the legal text must lend itself to prediction and (2) the administration and application of the legal text must not be arbitrary – are undermined because of the way of the concept of BO is applied by the tax authorities of SCs. In other words, one of the vital goals of tax treaties and EU directives, which is, broadly speaking, to increase the calculability of foreign investment transactions between Contracting States (hereinafter ‘CSs’) and Member States (hereinafter ‘MSs’) of the EU is jeopardised by the broad, anti-abusive understanding of the concept of BO. This may, in turn, have a negative spillover effect on economic growth and the tax base of SCs in the long term, by decreasing inward and outward FDIs to those countries.

Still, the absence of or low WHT in SCs may not always be beneficial for the developments of the economies, or be acceptable from their tax policy points of view. Adverse effects may result from an imbalance between the expected budget revenues in corporate income tax (hereinafter ‘CIT’), on the one hand, and economic growth resulting from the inflow of foreign investments and the related revenue from taxes other than CIT, on the other. If CIT revenues to the treasuries of SCs fall as a result of the proper application of exemptions and lower WHT rates, i.e., in line with their content, context and purpose, one may presume that such a phenomenon would be beneficial for the economy and acceptable to the Ministries of Finances of SCs. It is different, however, when an absence of or low WHT results from the abuse of tax treaties or domestic provisions implementing EU directives in order to avoid taxation in SCs. The question arises, therefore, in what situations do payments of profits from SCs to foreign entities without WHT or with a low WHT not raise doubts, and in what situations are doubts raised, and whether or not the concept of BO may be a remedy for this? In order to properly understand the tension between an appropriate and inappropriate approach to BO, it is important


29 See infra Chapter 6.


32 This refers to the concept of abusive treaty and directive shopping that is explained infra in 1.IV.C.
to present the seemingly clashing rights of the taxpayer and the SC: the taxpayer’s right to the possible lowest taxation and to choose the most favourable jurisdiction for its investment, and the country’s right to protect its tax base against abusive arrangements and transactions.

B. The taxpayer’s right to choose the non-abusive tax path most favourable for the investment

1.027 A modern taxpayer has access to a variety of international tax planning methods, including those aimed at the avoidance or reduction of WHT, by conducting their investments indirectly via intermediaries that are usually established in jurisdictions discussed in the preceding subsection. As a result, they benefit from WHT exemptions or reduced rates, as provided by tax treaties or EU directives, applicable between SCs and the RCs of intermediaries, and finally between the latter countries and the RCs of ultimate (principal) investors.

1.028 Tax law does not prohibit the taxpayer a choice between different legal alternatives to reach factual objectives that are identical or very similar, but with different tax consequences. Hence, depending on the legal choice made by the taxpayer, the same factual objective will result in a lower or higher tax burden. For this reason, the practices of using intermediaries to avoid or reduce WHT stem from exercising one of the most fundamental and universally recognised of taxpayer’s rights, namely the right to choose the execution of legal actions in accordance with the law in such a way that it leads to the least possible taxation. Such practices are accepted by the legislatures and courts at a constitutional level. This is because there is no de lege lata legal norm that would consider as unlawful the behaviour of a taxpayer aimed at avoiding or reducing taxation.

1.029 The actions undertaken by the taxpayer remain valid, therefore, not only from the point of view of civil law, but their legality and validity may, more broadly, be stated as being of a systemic nature, including tax law. This is also what the CJEU has been saying for decades in the context of EU law: it is permissible for a taxpayer to seek the most favourable tax regime and the least-taxed business or investment route for him, insofar as it does not constitute an abuse of rights and is a manifestation of the application of the EU freedoms underlying the EU Treaties for the proper functioning of the single market in the EU.
CHAPTER 1 – INTRODUCTION TO BENEFICIAL OWNERSHIP IN INTERNATIONAL TAXATION

C. The country’s right to protect its tax base before abusive arrangements and transactions of foreign investors

It follows from the above subsection that, as a starting point, *every taxpayer* who invests in an SC has the right to choose the most favourable jurisdiction for making the investment, indirectly resulting in the least WHT. However, this right finds its limit where the abuse of it begins.

The legislator prevents actions that constitute an abuse of that right by implementing legal measures against abusive transactions and arrangements. The key questions are, therefore, what is abusive when avoiding or reducing taxation, and what is not. The answers to these questions are painstakingly difficult. This was neatly explained by Advocate General (hereinafter ‘AG’) at the CJEU, Juliane Kokott, in her opinion on one of the Danish BO cases:

> The above questions ultimately apply to the fundamental conflict between the taxable person’s freedom to arrange his affairs under civil law and the need to prevent arrangements that are valid under civil law, but nonetheless abusive under certain circumstances. Even though this problem has existed since the invention of modern tax legislation, it is hard to draw a dividing line between admissible and inadmissible tax-reduction measures. A driver who sells his car following an increase in road tax obviously acts in order to avoid road tax. However, that cannot be construed as an abuse of law, even if his sole reason was to save tax.39

The point to be made is that anti-abusive measures must meet certain criteria arising from the Constitution, EU and international law. Notably, they should target abusive practices exclusively and in a precise way. This shows that every country certainly has the right to protect its tax base, but that this right is not absolute. Considering the constitutional, EU and international legal frameworks, it finds its limit beyond the abuse of the taxpayer’s right to choose the most favourable jurisdiction for making the investment indirectly resulting in the least taxation. That is to say, in principle, SCs have the right to protect their tax bases only against abusive arrangements and transactions of foreign investors. In the context of questions relevant to this book, this pertains to abusive treaty and directive shopping. Their definitions will be explained *infra* in subsection 1.IV.C.

An important question at the heart of this book is whether the concept of BO may be deemed an anti-abusive legal measure in WHT or not, and why? The tax jurisprudence may shed a lot of light on that issue. A foundational guidance to the courts can be found in the canons of interpretation relevant to the concept of BO and the origin and evolution of that concept, *infra* in Chapters 2 and 3.

In addition to the constitutional, EU and international normative reality, while designing anti-abusive legal measures in WHT, SCs must be conscious of the desires and needs of foreign investors, as well as the legal and financial mechanisms of other jurisdictions that constitute

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global or regional business and investment hubs. The same observation is valid for an application of the concept of BO to foreign recipients of income from SCs. With this in mind, it is worth looking at two jurisdictions that, according to the global statistics of the IMF and the OECD, apart from the USA and China, are homes to the largest volumes of inward and outward investments in the world, i.e., the Netherlands, Luxembourg and the UK.

1.035 The question arises whether the choice of these jurisdictions by foreign investors principally stems from their legitimate right to the least taxation, and therefore does not constitute abusive treaty and directive shopping. Of utmost assistance in answering that question is the identification of non-tax commercial reasons for the choice of these jurisdictions. Such reasons will be weighed by the tax authorities and the courts against the tax reasons of making investments using intermediary entities in these jurisdictions. The more non-tax business and investment advantages the Netherlands, Luxembourg and the UK have to offer to foreign investors, the less accurate and justified it is for the tax authorities of SCs to assume that intermediaries are established in these jurisdictions principally out of abusive treaty and directive shopping.

1.036 Data show that foreign investors usually choose the Netherlands, Luxembourg and the UK as the registered office of funds or holding companies and intermediary entities because these jurisdictions offer a very reliable and comprehensive regulatory and legal framework when it comes to investment funds and performing investments using intermediaries. According to investors, the Netherlands, Luxembourg and the UK are the three most favourable financial centres in Europe. Luxembourg is currently considered the largest market for investment funds in Europe, with assets of EUR 4.6 trillion. In turn, the Netherlands is also one of the largest with assets of EUR 874 billion, while London and the UK remain Europe’s leading destination for investment in financial services and remain the world’s leading foreign exchange trading centre. In addition, there has been an increase in financial resources invested by Luxembourg funds in excess of EUR 500 million in recent years. Nine of the ten largest funds are located in Luxembourg, with the country also ‘hosting’ some 500 fund servicing companies such as central administrators, domiciliary agents, law firms, auditors, consultants, depositaries, management companies and a host of fintech players, creating a very dynamic business environment. These financial sector players create a hub that offers a full range of services required by private equity funds, including fund structuring, Value Added Tax (VAT) services, global fund distribution, human resource services, transfer pricing, investor reporting, capital market accounting advisory services, risk management, responsible and ethical investment, and banking services.

1.037 Furthermore, from the information obtained in the course of strategic tax advice to foreign investors in certain SCs, it appears that foreign investment funds, holding companies and

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40 See supra 1.III.A.
41 See infra 1.IV.C.
intermediary entities from the Netherlands, Luxembourg and the UK assist in achieving several essential, non-tax purposes, such as:

- **Risk mitigation**: the protection of investment funds/holding structures and their investors from liabilities and potential claims against the fund’s property assets, in particular when the funds are financed with external debt, their assets need to be ring-fenced because of the potential liabilities relating to the external financing arrangements;

- **Risk diversification for investors**: various SPEs are established the Netherlands, Luxembourg and the UK to diversify risks connected with foreign investments (per classes/types of assets or from a geographical point of view);

- **Facilitating debt financing**: debts provided by third-party lenders often require the introduction of SPEs in the fund/holding structure, since it is essential for the banks to provide financing necessary to acquire a targeted asset; in addition, the banks often require additional levels of sub-holding companies to provide pledges as means of security;

- **Facilitating the entrance of new co-investors**: adding new SPEs or new sub-holding companies in the fund's corporate structure creates an opportunity for new investors to provide additional investment capital and spreads risks;

- **Consolidation aspects**: having one master holding company serving as an investment platform for multiple investments (held under different SPEs) allows for a simpler and more effective management and oversight of the entire portfolio, which, in turn, contributes to a better corporate governance of the fund/holding structure.

The above structuring of important large-scale foreign investments is a standard business and investment process. Indeed, the structuring of significant cross-border investments in SCs, e.g., in real estate, is characterised by high leverage and a concentrated network of different entities that can be considered SPEs, but not necessarily conduits. In the vast majority of cases, the failure of investors to comply with the request of potential lenders (often banks) to set up separate companies to carry out separate investments results in the refusal of financing, or in higher rates of interest on loans. The first situation completely rules out the possibility of watering down the investment. The second is economically irrational as it increases the costs of investments (interest rates on the loans needed for the investments are too high).

If SPEs from the Netherlands, Luxembourg and the UK are established primarily for the effective and efficient performance of investments in SCs, this means that any tax benefits arising from the SPE’s transactions, e.g., the elimination or reduction of WHT, are secondary to their primary business and investment objectives. Due to the specific conditions of receiving external financing for foreign investments, global investors may not have an economically rational alternative way of making investments in SCs other than by the use of SPEs in the Netherlands, Luxembourg or the UK. This observation clearly shows that the establishment of an SPE in the Netherlands, Luxembourg or the UK may be dictated mainly by investment rather than tax purposes.

If the primary purpose of the SPEs is other than to avoid or reduce WHT in SCs, they cannot be considered conduits for abusive treaty and directive shopping. This is because taxpayers, including foreign investors subject to WHT in SCs, have the right to choose the most favourable jurisdiction in which to make investments, which might well be in SCs with the least taxation on returns from the investments and other payments related to them, including interest from loans provided for the investments. This right may be denied to them, according to the
applicable standards in the constitutional, EU and international law, only in cases of abusive treaty and directive shopping. Therefore, it is so important to properly understand what these terms mean. The same applies to the terms heavily associated to abusive treaty and directive shopping, such as SPEs and conduits. It is only with a proper understanding of these terms that the suitability of the concept of BO to target abusive treaty and directive shopping can be evaluated.

IV. SENSITIVE FUNCTIONAL TERMINOLOGY

A. Special purpose entities

1.041 According to the OECD nomenclature, an enterprise is usually considered an SPE if it meets the following criteria:

(i) the enterprise is a legal entity,
   (a) formally registered with a national authority; and
   (b) subject to fiscal and other legal obligations of the economy in which it is resident.
(ii) The enterprise is ultimately controlled by a non-resident parent, directly or indirectly.
(iii) The enterprise has no or few employees, little or no production in the host economy and little or no physical presence.
(iv) Almost all the assets and liabilities of the enterprise represent investments in or from other countries.
(v) The core business of the enterprise consists of group financing or holding activities, that is – viewed from the perspective of the compiler in a given country – the channelling of funds from non-residents to other non-residents. However, in its daily activities, managing and directing local operations plays only a minor role. an entity (company) that fulfils the following five criteria can be considered to be an SPE.44

1.042 An SPE, in the OECD’s nomenclature, can therefore be equated with an intermediary entity most often used for treaty or directive shopping.45 Before discussing these concepts in more detail, we would like to point out that the OECD unquestionably presents SPEs in a pejorative way. For the OECD, SPEs are entities whose use, in principle, is not consistent with the investment policies of OECD member countries. Indeed, the OECD indicates that SPEs serve to channel funds from non-residents to other non-residents, and that their activities do not reflect real investments. Therefore, the OECD has expressed the view that it is worth considering geographically excluding the allocation of FDIs to SPEs, and treating FDI flows through SPEs as a separate category of FDIs.46

1.043 Moreover, the OECD includes financing subsidiaries, conduits, holding companies, shell companies, shelf companies and brassplate companies in the category of SPEs.47 Although

none of these types of entities are explicitly coined by the OECD as sham, artificial and thus abusive, it is quite clear that conduit/shell/shelf/brassplate companies are, as a matter of fact, often labelled as entities that are usually used for abusive tax avoidance purposes, including abusive treaty and directive shopping.\textsuperscript{48} Still, for the purpose of demarcating between proper (non-abusive) and improper (abusive) use of WHT exemptions and reductions in SCs based on tax treaties and EU directives, one should primarily take a closer look at conduits.

B. Conduits

‘Conduits’ constitute a category of SPEs of supreme importance when addressing the issue of abuses of tax treaties and EU directives for the purposes of WHT avoidance. The report ‘Double taxation conventions and the use of conduit companies’ (hereinafter the ‘Conduits Report’)\textsuperscript{49} issued by the OECD’s Committee on Fiscal Affairs (hereinafter the ‘CFA’) is the authoritative source dealing with conduits.

As the CFA says, the Conduits Report deals with the \textit{improper use}\textsuperscript{50} of tax treaties by a person (whether or not a resident of a CS), acting through a legal entity created in a state with \textit{the main or sole purpose of obtaining treaty benefits} that would not be available directly to that person.\textsuperscript{51} The CFA’s statement indicates that the most important situations of the improper use of tax treaties are those in which a company established in a tax treaty country is \textit{acting as a conduit} for channelling income economically accruing to a person in another state, who is thereby able to take advantage ‘improperly’ of the benefits provided by a tax treaty. The CFA also points out that such a situation is often referred to as ‘treaty shopping’, a phenomenon that is a disadvantage for the SC, since it leads to no or lower WHT in that country in comparison to its domestic taxation.\textsuperscript{52}

The glossary of the International Bureau of Fiscal Documentation (hereinafter ‘IBFD’) aptly points out that the \textit{channelling income economically} via a conduit is typically achieved by: (i) the conduit lending income to entities from SCs (original host states), (ii) reinvesting income for


\textsuperscript{50} Although it was not clearly stated by the CFA, the context and purpose of the Conduits Report shows that the term ‘improper use of tax treaties’ can be used interchangeably with ‘abuse of tax treaties’, including ‘abusive treaty shopping’. Cf. Van Weeghel, Stef, \textit{The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States}, (1998) Kluwer Law International, 120–124.


their ultimate benefit, or distribution by way of a (tax-exempt) dividend.\textsuperscript{53} A typical example of the use of conduits is a back-to-back loan, i.e., a chain of loans with the same maturity date is taken among two or more entities in different countries so that the amounts of loans are offset from one another.\textsuperscript{54} In general, conduits are also subject to no or minimal taxation under the domestic laws of the state where they are incorporated, or due to the income being paid in a tax-deductible form such as interest or royalties, usually leaving only a small taxable 'spread' in the conduit.\textsuperscript{55}

1.047 The use of conduit companies is very different to the use of base companies, which are predominantly established in low tax jurisdictions for the purposes of sheltering income there. In effect, the use of base companies is detrimental to RCs of the taxpayers that control these companies, as they lead to taxation in those states being avoided or reduced, including through what are known as long-term tax deferrals.\textsuperscript{56} The CFA deals with this practice in a different report – ‘Double Taxation Conventions and the Use of Base Companies’ (hereinafter ‘Base Companies Report’).\textsuperscript{57} Although these reports address two conceptually distinctive phenomena, one harmful to SCs, the other for RCs, the CFA rightly observed that often the same structure is designed to avoid or reduce taxation in both SCs and RCs. In such combined cases, the problems can be regarded as different sides of the same coin of the improper use of tax treaties.\textsuperscript{58} Indeed, SPEs can function as base companies\textsuperscript{59} and conduit companies,\textsuperscript{60} depending on the functions attributed to them; the combined effects of both will yield tax benefits to their participants.\textsuperscript{61} Base companies are typically located in jurisdictions where the effective taxation of the income of companies or other entities is effectively very low or zero (‘classical tax havens’), or other jurisdictions that offer particular tax incentives or benefits that may sometimes be exploited for a particular international tax advantage, including long-term tax deferrals.\textsuperscript{62} The
natural habitat for conduits, in turn, are usually jurisdictions with conventional tax systems and
a large network of tax treaties, but which levy no or little tax on receipts of foreign-source or
passive investment income (e.g., dividends, interest and royalties).  

The CFA further explains that conduit entities are most often companies with legal personality,
but they may also be partnerships, trusts or other forms. It is not so much the legal form of
the conduit that is important, but rather the fact that the entity has a tax resident status in the
RC for the purposes of applying a tax treaty with the SC. Otherwise, conduit entities would not
be entitled to benefit from this tax treaty. The conduits in all cases therefore enter the ambit of
definition of an entity liable to tax in RC in accordance with the domestic law of that country,
thereby meeting the conditions under Articles 1, 3(a) and 4(1). The most important part of the
definition of conduits is functional – obtaining tax treaty benefits on an account of an entity
that is not entitled to obtain such benefits directly.

The CFA notes that legal entities are sometimes established in an intermediary country for
non-tax purposes, such as access to capital markets, currency regulations, political situations or
the need to be present in the country of investment under the ‘flag’ of the intermediary country.
The preferable tax consequences of such intermediary entities are not covered by the Conduits
Report.

This shows that the OECD defines conduits exclusively in a pejorative way as entities that
solely or mainly aim to obtain benefits under tax treaties for the benefit of non-residents of CSs
at the expense of the SC. By contrast, an entity that intermediates and facilitates an investment
between the SC (originally hosting the investments) and the RC of the ultimate investor
primarily for reasons other than to obtain benefits from tax treaties does not fall within the
OECD’s meaning of conduit.

The OECD’s definition of conduits is a bit confusing, as it clearly links conduits with the
improper use of tax treaties, but relies only on the tax intention as the decisive premise to distin-
guish between conduits and non-conduit intermediaries. The contradiction in the use of con-
duits with relevant tax treaty provisions is not articulated by the CFA in the Conduits Report
as part of its definition, although a contradiction of an arrangement or transaction with relevant
treaty provisions is one of the fundamental premises of the improper use of tax treaties in gen-
eral. This is explicitly expressed by the OECD via ‘a guiding principle’ in the Commentary
to Article 1 since 2003. The contradiction is also included in the principal purposes test

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Patrick, ‘General Report Limits on the Use of Low-Tax Regimes by Multinational Businesses: Current Measures and

University Press, 134–135.

Conduits Report, para. 2.

Conduits Report, para. 3.

Van Weeghel, Stef, The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States,
Evasion’, in: Papers on Selected Topics in Administration of Tax Treaties for Developing Countries, (2013) Paper No. 9-A,

Then in para. 9.5 and now in para. 61 of the Commentary to Art. 1. Van Weeghel, Stef, ‘A Deconstruction of the
(hereinafter the ‘PPT’) in Article 29(9) and Article 7(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (hereinafter ‘MLI’). More broadly, the premise of the contradiction of an arrangement or transaction with relevant tax provisions is generally recognised as an abusive tax avoidance premise in international and EU case law and legislation. Consequently, limiting the definition of conduits only to entities created by a person (whether or not a resident of a CS) in a state with the main or sole purpose of obtaining treaty benefits that would not be available directly to the person would be at odds with the internationally recognised standard of improper use of tax treaties, i.e., their abuse. Had this definition excluded the improper use of tax treaties, it would not be problematic. But it clearly refers to the improper use of tax treaties and therefore the premise of contradiction of an arrangement or transaction conducted by a conduit must be read into its definition, in addition to the premise of the sole or main tax intention, as described above. Still, the lack of an explicit articulation of that premise in the definition of conduits by the CFA in the Conduits Report may lead to many disputes between taxpayers and tax authorities.

1.052 For the purposes of further analysis, the term ‘conduit’ means, unless otherwise indicated, an entity (usually a company):

(i) that has its tax residence in a CS of a tax treaty with an SC and/or EU MS if the SC is an EU MS – there may also be conduits in non-tax treaty/EU MSs higher in the chain of ownership, i.e., further away from the SC;
(ii) whose sole or main role is to avoid or reduce WHT in the SC by abusing the tax treaties and/or EU directives (abusive treaty or directive shopping) to the benefit of entities/persons from a jurisdiction other than the conduit entity’s country of residence (the entities that benefit from the use of conduits may also come from the SC (‘round tripping’).
This understanding of a conduit means that the conduit is always both an SPE and an intermediary entity, but not every SPE and not every intermediary entity is a conduit. A proper distinction between an intermediary entity and a conduit is very important. Only a conduit entity is involved in abusive treaty or directive shopping, which should always be assessed on a case-by-case basis in light of the specific circumstances and applicable law. Due to the fact that companies and other entities that are not individuals are most relevant for abusive treaty shopping and directive shopping, the book focuses on the above-mentioned phenomena from the perspective of the CIT of SCs exclusively.

Before moving to a definition of treaty shopping and directive shopping in the following subsection, it is noteworthy that, although the Conduits Report refers to the concept of BO for the purposes of dealing with conduits, this reference is somewhat unclear and problematic. We will come back to this and discuss it in more detail infra in Chapter 3. Here it is enough to mention that the Conduits Report addresses the improper use by conduits of the following five approaches that should be included in the treaty provisions in order to be applicable against conduits: (1) the look-through approach; (2) the subject-to-tax approach; (3) the channel approach; (4) the bona fide safeguard clauses; and (5) the limitation-of-benefits approach. The OECD's discussion of these approaches rehearses the most obvious methods for dealing with treaty shopping, cataloguing the pros and cons of each of them. Moreover, the examples chosen for discussion are simple, the analysis is not rigorous and the proposed solutions seem rudimentary, even at the time of adopting this report. Although these approaches were added to paragraphs 13–20 of the Commentary to Article 1 in 1992, they were deleted from the current version of the Commentary in 2017, due to the inclusion of PPT and the limitation of benefits clause (hereinafter the ‘LOB clause’) to Article 29, which comprehensively and exhaustively deals with improper use of tax treaties. Hence, even though some scholars have observed that the courts often applied the anti-treaty abuse approaches mentioned above conflated with the concept of BO, this approach does not hold currently with the content of the Commentary.

C. Treaty shopping and directive shopping

Treaty shopping was already implicitly defined by the CFA in the Conduits Report as the:  

74 Conduits Report, paras 21–42.
78 See infra Chapters 3–6 for an in-depth analysis of the understanding of the concept of BO under the OECD materials and the global case law.
79 The name ‘treaty shopping’ comes from the way of obtaining treaty benefits directly unavailable to a taxpayer; namely, the taxpayer ‘shops’ into the treaty benefits by establishing an entity (typically a company) in a country that has ratified
improper use of tax conventions (see paragraph 9) by a person (whether or not a resident of a Contracting State), acting through a legal entity created in a state with the main or sole purpose of obtaining treaty benefits that would not be available directly to that person.\textsuperscript{80}

1.056 The same definition, just by replacing a tax treaty with an EU directive and a CS with an MS, may apply to directive shopping.\textsuperscript{81} More precisely, directive shopping is indirectly obtaining benefits under the IRD or the PSD (in fact, the EU MSs’ legislation that implements these directives) by a person who is not resident in any of the countries covered by the territorial scope of these directives (i.e., is not resident in any of MSs). In practical terms, directive shopping takes place when a person from outside the scope of the IRD or the PSD receives dividends, interest or royalties from an entity in an EU MS (the SC of the income) indirectly via a company established in another EU MS (the RC of the intermediary company). To make these financial flows fully tax efficient, directive shopping is usually combined with treaty shopping through the ‘stepping stone’ technique, under which the intermediary company is from an EU MS that has a preferable tax treaty with the RC of the ultimate investor from a third country.\textsuperscript{82}

1.057 The CFA depicts two main forms of treaty shopping using conduits: (i) direct conduits and (ii) stepping-stone conduits.\textsuperscript{83}

1.058 The essence of the form of treaty shopping qualified as ‘direct conduit’ is presented by the CFA as follows:

A company resident of State A receives dividends, interest or royalties from State B. Under the tax treaty between States A and B, the company claims that it is fully or partially exempted from the withholding taxes of State B. The company is wholly owned by a resident of a third State not entitled to the benefit of the treaty between States A and B. It has been created with a view to taking advantage of this treaty’s benefits and for this purpose the assets and rights giving rise to the dividends, interest or royalties were transferred to it. The income is tax-exempt in State A, e.g. in the case of dividends, by virtue of a parent-subsidiary regime provided for under the domestic laws of State A, or in the convention between States A and B.\textsuperscript{84}

1.059 Stepping-stone conduits, in turn, are structurally the same as direct conduits.

However, the company resident of State A is fully subject to tax in that country. It pays high interest, commissions, service fees and similar expenses to a second related ‘conduit company’ set up in State

\textsuperscript{80} Conduits Report, para. 1.
\textsuperscript{84} Conduits Report, para. 4.
D. These payments are deductible in State A and tax-exempt in State D where the company enjoys a special tax regime.85

The problems with these definitions of conduits, as discussed in the previous subsection, also apply to the CFA’s definition of treaty shopping, and thus by analogy to directive shopping. In particular, it is unclear whether these phenomena should be always automatically associated with abusive practices, or rather it should be carefully evaluated on a case-by-case basis by following appropriate interpretative guidance. Moreover, officially, legally binding and universally valid definitions of treaty shopping and directive shopping do not exist. These are not even legal terms.86

Given the political sensitivity of the topic, the OECD constructed the term of treaty shopping in a very pragmatic and vague way by identifying the lowest common international denominator of a very complex phenomenon. This approach seemingly helped to avoid a backlash from some of the OECD MSs, more or less enhancing the use of their jurisdictions for treaty shopping purposes, as well as the MSs that economically benefit from treaty shopping as RCs of ultimate investors.87

This all means that there is a need for a more nuanced and precise approach in defining treaty and directive shopping. Otherwise the answer to the question about the suitability of the concept of BO for the prevention of treaty and directive shopping would miss the point. Likewise, the evaluation of the jurisprudence on the concept of BO would be flawed. For these reasons, we make an attempt to answer the questions of just what treaty and directive shopping are, what characteristics they have, and why these practices exist in the area of WHT. We first look at the most likely perspective of the tax authorities, then compare that with a holistic perspective, including differences among tax systems and the various needs of the jurisdictions. Finally, we present the perspective of this book and justify it. For the sake of clarity and simplicity, we mainly refer to treaty shopping, as this phenomenon is more richly debated than directive shopping. In any case, as mentioned a few paragraphs above, directive shopping may be identified as applying with treaty shopping.

1. The perspective of the tax authorities

In view of the CFA’s definition of treaty shopping, the tax authorities in SCs88 will most likely a priori identify treaty shopping and directive shopping with the abuse of tax treaties and EU
directives. Accordingly, the payments of dividends, interest and royalties from SCs to SPEs in the Netherlands, Luxembourg, the UK and similar jurisdictions are in fact doomed to a high risk of being regarded by the tax authorities in SCs as an element of abuse in the form of treaty shopping and directive shopping. The OECD’s definition of SPEs exacerbates this perspective of the tax authorities in SCs, insofar as it classifies conduit/shell/shelf/brassplate companies as SPEs. The situation is similar with the data of IMF and OECD on the global FDIIs flowing through the Netherlands, Luxembourg, the UK and similar jurisdictions.

These observations may prompt not only the tax authorities but also some courts in SCs to presume an abuse of tax treaties and EU directives in respect of payments of dividends, interest and royalties to SPEs established in the Netherlands, Luxembourg, the UK and similar jurisdictions, without properly investigating the existence of these phenomena. Certainly, such assumptions work in favour of SCs levying WHT, and thus are aligned with the naturally pro-fiscal inclinations of the tax authorities.

Furthermore, the taxpayer’s intention to achieve a tax advantage is often not distinguished by the tax authorities from the taxpayer’s intention to avoid taxation, even though these are two conceptually and legally distinct categories. The former belongs to neutral (tax minimisation) and the latter comes close to an abusive action by the taxpayer (tax avoidance). This is well illustrated by the case law of CJEU. For instance, in paragraphs 49–51 in Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd, v. Commissioners of Inland Revenue (hereinafter ‘Cadbury Schweppes’) of the most important judgments of the CJEU in tax avoidance cases, we can read that:

In that respect, it is settled case-law that any advantage resulting from the low taxation to which a subsidiary established in a Member State other than the one in which the parent company was incorporated is subject cannot by itself authorize that Member State to offset that advantage by less favourable tax treatment of the parent company (see, to that effect, Case 270/83 Commission v France [1986] ECR 273, paragraph 21; see also, by analogy, Case C-294/97 Eurowings Luftverkehr [1999] ECR I-7447, paragraph 44, and Case C-422/01 Skandia and Ramstedt [2003] ECR I-6817, paragraph 52). The need to prevent the reduction of tax revenue is not one of the grounds listed in Article 46(1) EC or

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90 See supra 1.IV.A.

91 See supra 1.III.A.

a matter of overriding general interest which would justify a restriction on a freedom introduced by the Treaty (see, to that effect, Case C-136/00 Danner [2002] ECR I-8147, paragraph 56, and Skandia and Ramstedt, paragraph 53).

50 It is also apparent from case-law that the mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, to that effect, ICI, paragraph 26; Case C-478/98 Commission v Belgium [2000] ECR I-7587, paragraph 45; X and Y, paragraph 62; and Case C-334/02 Commission v France [2004] ECR I-2229, paragraph 27).

51 On the other hand, a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned (see to that effect ICI, paragraph 26; Case C-324/00 Lankhorst–Hochoest [2002] ECR I-11779, paragraph 37; De Lasteyrie du Saillant, paragraph 50; and Marks & Spencer, paragraph 57). (emphasis added)

In other words, there are no grounds, according to the CJEU, to consider that the pursuit of tax advantages by establishing companies in the most tax favourable MSs is in itself a negative phenomenon justifying its recognition abusive tax avoidance. The equivalent argument is that MSs, through enacting anti-abusive legislation and its interpretation and application by their tax authorities and courts, cannot justify a restriction of EU freedoms, including the freedom of establishment regulated in Articles 49 et seq. of The Treaty on the Functioning of the European Union (hereinafter “TFEU”93), in order to prevent a reduction in budget revenue. This means, e.g., that the sole prevention of losing the collection of taxes from WHT does not constitute a justification for SCs to deny benefits arising out of EU law, and by analogy under tax treaties.

In paragraph 63 of this judgment, the CJEU further stated that:

the fact that none of the exceptions provided for by the legislation on CFCs applies, and that the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement intended solely to escape that tax.

The existence of a tax advantage should therefore not be equated by tax authorities with tax avoidance.

Not every reduction of budget revenues, including through the reduction of WHT using intermediary entities, involves abusive tax avoidance. Only in certain cases can this practice be regarded as an abuse of tax law. In each case, an abuse of tax law must first be identified by the tax authorities based on objective factors, which should be ascertainable by third parties rather than irrefutably presumed by the tax authorities.94 Accordingly, the tax authorities and


courts in SCs should resist the temptation of presuming that payments of dividends, interest and royalties to SPEs from the Netherlands, Luxembourg, the UK and similar jurisdictions amount to abusive treaty or directive shopping. An appropriate investigation, coupled with a reasonable interpretation of tax treaties and EU directives is needed to identify the existence of abusive practices.

2. Holistic perspective, including differences among tax systems and the various needs of jurisdictions

In practice, not all intermediary entities that can be used for treaty shopping and directive shopping will necessarily meet all the OECD’s criteria of an SPE, let alone a conduit. In some cases, an entity with its own substantial personal and financial resources assumes the role of an intermediary for a single abusive transaction or series of transactions. In this example, we are dealing functionally with a conduit entity that does not meet the definition of an SPE because it owns substantial personal and financial resources. By contrast, an entity with marginal personal and financial resources on its own, which fully or almost fully meets all of the OECD’s criteria of an SPE, may not necessarily be recognised as a conduit for the purpose of abusive treaty shopping and directive shopping. This is often the case of holding or sub-holding companies.

This shows that automatically linking an SPE and an intermediary entity with the abuses of treaty shopping and directive shopping via conduits is precipitate and incorrect. The starting point in the practice and science of tax law should be a neutral and nuanced perception of the phenomena of treaty shopping and directive shopping, in a way that is detached from the unevenly distributed emphases in global tax policy, imposed mainly by the OECD. Attributing a pejorative meaning to these phenomena in the form of the improper use of tax treaties and EU directives is only appropriate after a legal and factual analysis of each specific case. Otherwise, we are dealing not so much with the application of international and EU law as with the articulation of a particular tax policy geared towards protecting the tax base in the SCs at the expense of cross-border investments. Such an approach would be at odds with the general purposes of tax treaties and EU directives. This follows from several fundamental reasons.

First of all, as mentioned above, the meaning of treaty shopping (and by analogy directive shopping) is mainly shaped by the rigorously weak, rather unbalanced and pro-fiscal views of the OECD. In addition to obscuring the definitions of these terms, the OECD has, in many instances, provided not entirely valid tax policy reasons for the unsatisfactory effects of treaty shopping.

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95 For example, a bank, as it was the case in Société Bank of Scotland, decided by Conseil d’État, No. 283314, 9 International Tax Law Reports (hereinafter ‘ITLR’) 683 et seq., 29 December 2006. See infra 5.IV.
96 See, e.g., the sub-holding company analysed in the case Italy vs Stiga s.p.a. by the Supreme Court of Italy (Corte di cassazione) in judgment of 10 July 2020, Case no. 14756/2020.
97 See supra 1.IV.C.
Although the CFA may be right in most cases when saying that the principle of reciprocity is breached at the costs of SCs, this finding is not correct in all cases. It often happens that practices resulting in minimising WHT by means of treaty shopping actually contribute to the economies and taxable bases of both SCs and the RCs of the investors. Benefits in the form of low or zero WHT flows from the SCs to the RCs of investors encourage them to invest more in those SCs, thereby advancing their economies and increasing their taxable bases in ways other than WHT. The RCs of investors do not need to provide tax credits, or provide lower tax credits, against WHT paid in the SCs, which benefits the taxable bases of the RCs too.

Second, the CFA correctly states that income flowing internationally under treaty shopping structures may be exempted from taxation altogether, or be subject to low effective taxation in a way unintended by the CS. However, this statement also has a number of exceptions, about which the OECD says nothing.

Third, the CFA indicates that treaty shopping disincentivises the RCs of investors from entering into tax treaties with SCs, because the residents of the RCs can indirectly receive treaty benefits from the SCs without the need for the RCs to provide reciprocal benefits. This consideration fails to recognise that countries enter into tax treaties not only for the purposes of eliminating double taxation by the most favourable allocation of taxation rights, but also for other purposes such as the exchange of tax information in order to prevent tax evasion.

Taking a general overview of the CFA’s tax policy considerations, it is clear that they only very loosely fit the improper use of tax treaties, i.e., their abuse. Indeed, only the premise of the sole intention to avoid taxation is presumed by the CFA, whereby the premise of a contradiction of an arrangement or transaction with relevant tax treaty provisions is not voiced at all. Just as in the CFA’s description of conduits, such an approach is neither compatible with the understanding of treaty abuse, nor with the internationally recognised standards of abusive tax avoidance. Paradoxically, the vague and methodologically doubtful approach of the CFA to treaty shopping is itself dangerous to the stable and uniform application of tax treaties.

In isolation from the tax policy shaped by the OECD, the development of treaty shopping and directive shopping is in line with the intentions of many legislators and tax administrations. The benefits under tax treaties and EU directives in the form of exemptions from WHT or lower rates are still relatively easy to obtain. The main criterion is tax residence in a CS or an

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100 Ibid, para. 7.a).
102 Conduits Report, para.7.b).
104 Conduits Report, para. 7.c).
106 See supra 1.IV.B.
MS. As a rule, this criterion is met by establishing a company in that state in accordance with its company law. Moreover, under the EU directives, companies cannot be fully exempt from taxation and must have appropriate capital ties (10 per cent under the PSD and 25 per cent under the IRD), though these criteria are still easy to meet. Thus, a taxpayer may take advantage of contractual and business freedoms to structure their activities entirely in accordance with the intention of legislatures and purposes of tax laws in order to obtain tax benefits from tax treaties and EU directives. In principle, there is no legal requirement to do so directly by a taxpayer. Indeed, the most tax favourable route in cross-border investments often does not lead directly from one country to another, but indirectly through intermediary entities in one or more countries between the RC of the principal investor or entrepreneur and the SC of the targeted investment or business. It is entirely economically reasonable and legally compliant to set up intermediary entities in jurisdictions where domestic law, in combination with the application of tax treaties and EU directives, leads to the least onerous tax consequences of an investment or conducting business in the targeted jurisdiction.

1.078 Of course, the degree of tolerance, or even encouragement, of such intermediary structures varies across legal cultures and jurisdictions. This tolerance is lower in countries with high effective levels of taxation, burdened with high social costs, e.g., Scandinavian countries, Germany or Poland. The main purpose of the tax system in such countries is to ensure budget revenues directly from taxes. For the purpose of further considerations, such countries belong to ‘the conservative category of the tax systems’. A higher degree of tolerance and encouragement of treaty and directive shopping is found in countries and jurisdictions characterised by low effective taxation of mobile and passive income, whose tax systems offer taxpayers (especially investment vehicles) many legal solutions in terms of tax planning, e.g., Cyprus, Hong Kong, Ireland, Liechtenstein, Luxembourg, Malta, Mauritius, the Netherlands, Singapore, Switzerland and the UK. The main goal, or at least an important goal, of their tax systems is to increase state budgets (often in long term) by attracting foreign investment. We place such jurisdictions in ‘the liberal category of the tax systems’. Finally, a very high degree of tolerance and encouraging of treaty and directive shopping, seen as tax avoidance from the perspective of the vast majority of other countries, is found in tax havens, such as American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu. The primary purpose of their tax systems is to increase state budgets by attracting foreign capital and

108 Art. 1(1) of the PSD and the IRD and of Arts 1, 3 and 4 of the OECD MC.
109 Art. 3(1) of the PSD and Art 3(a)–(b) of the IRD.
investment, even if they are financed from activities that balance on the verge of legality, and sometimes seem to slip over the edge.112 For the further discussion, they are deemed to be ‘the risky category of tax systems’.

The countries and jurisdictions belonging to the liberal and risky categories of tax systems tend to be small (liberal: e.g., the Netherlands, Luxembourg, the UK and Ireland) and micro (risky: e.g., Panama, Fiji and Vanuatu). The jurisdictions in the risky category are usually insular, often with an out-of-the-way location (very remote from large economies and financial centres, e.g., Samoa, Fiji and Guam). They are characterised by a lack of natural resources and territory sufficient for the development of a so-called classical economy. Moreover, their population is small or very small, which entails an insufficient labour force. Their features clearly hinder the international exchange of goods and services. The risky jurisdictions often have no access to drinking water. Consequently, the policies, including fiscal policy, of such jurisdictions have to be sophisticated, with the aim of compensating for the geo-economic deficiencies mentioned above. Their aim is to create an ideal environment for the development of global and regional centres of investment, management, legal and insurance services, as well as the creation of foundations and trusts to protect assets from creditors, including tax creditors.113

The operation of liberal and risky tax systems can be seen as a significant source of international tax planning and, in some cases, tax avoidance, including through treaty shopping and directive shopping. The liberal tax systems, in particular the UK (‘City of London’), Switzerland, Mauritius, Singapore and Hong Kong mainly contribute to treaty shopping, and the Netherlands, Ireland, Luxembourg, Cyprus and Malta to both treaty shopping and directive shopping.114 In this regard, intermediaries play a massively important role, among which, depending on the circumstances, some may be conduits. The risky tax systems, in turn, tend to predominantly attract base companies to which sources of income are usually allocated via intermediaries or conduits located in the jurisdictions categorised as liberal tax systems.115 Such jurisdictions sometimes also domicile conduits.

This reveals that there is great diversification in the design and enforcement of tax systems around the world, as a natural consequence of the fundamental attributes of sovereignty. Sovereignty entitles each state, among other things, to exercise tax jurisdiction in the manner

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115 As the book focuses on controversies directly related to the concept of BO, and thus benefits under WHT regimes, we will not explore issues concerning base companies, as they do not concern BO and WHT as such. For the use of base companies for tax planning and tax avoidance purposes, and the countermeasures to such practices (CFC rules) see: Kuźniacki, Blażej, Controlled Foreign Companies and Tax Avoidance. International and Comparative Perspectives with Specific Reference to Polish Tax and Constitutional Law, EU Law and Tax Treaties, (2020) C.H. Beck.
most appropriate to its needs and circumstances. The different normative realities of taxation, coupled with the low threshold for acquiring tax residence in a particular country, is the source of the flourishing of intermediaries and treaty shopping. However, it would be wrong to view this phenomenon as ‘evil incarnate’ attacking the global tax system that must be fought by all means. Each country can negotiate and ratify the content of tax treaties in order to eliminate, or at least significantly reduce, treaty shopping in accordance with their individual tax policy. Since the 1980s, the OECD has promoted tax policies aimed at eliminating treaty shopping, mainly representing the fiscal and economic interests of highly developed countries that are RCs of the largest MNEs. The tax systems of such countries have as their primary goal the protection of their own tax bases, including WHT and the foreign interests of their MNEs, often at the expense of the tax bases of other countries, mainly the SCs of the MNEs’ foreign sourced income.

A balanced and holistic approach with regard to the perception of treaty shopping – something missing in the OECD’s documentation – was articulated by the Supreme Court of India in its judgment of 7 October 2003 in the _Azadi Bachao Andolan_ case. In view of the rich message, it is worth quoting a larger passage from this judgment:

> Many developed countries tolerate or encourage treaty shopping, even if it is unintended, improper or unjustified, for other non-tax reasons, unless it leads to a significant loss of tax revenues. Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities. Some of them favour treaty shopping for outbound investment to reduce the foreign taxes of their tax residents but dislike their own loss of tax revenues on inbound investment or trade of non-residents. In developing countries, treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology. They are able to grant tax concessions exclusively to foreign investors over and above the domestic tax law provisions. In this respect, it does not differ much from other similar tax incentives given by them, such as tax holidays, grants, etc. Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. The

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117 This was especially visible in the first 30 years of the OECD. OECD, ‘Where: Global reach’, https://www.oecd.org/about/members-and-partners.

118 A good example in this context is the implementation of US tax policy through, among other things, the so-called check-the-box rules, which allow US multinationals to choose the tax status of their foreign companies (taxable or transparent) from the point of view of the US tax authorities. This, in turn, enables these corporations to engage in far-reaching (aggressive) tax planning, often leaving SCs with no way of effectively taxing the income of the US MNEs. It is also worth noting that the OECD MC is structured in such a way that it leaves more taxing rights to the RCs of MNEs than to the SCs of their income. Cf. Avi-Yonah, Reuven S., _Advanced Introduction to International Tax Law_, (2015) Edward Elgar Publishing, Chapters 3 and 10.
use of Cyprus as a treaty haven has helped capital inflows into Eastern Europe. Madeira (Portugal) is attractive for investments into the European Union. Singapore is developing itself as a base for investments in South East Asia and China. Mauritius today provides a suitable treaty conduit for South Asia and South Africa. In recent years, India has been the beneficiary of significant foreign funds through the ‘Mauritius conduit’. Although the Indian economic reforms since 1991 permitted such capital transfers, the amount would have been much lower without the India-Mauritius tax treaty. This court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy. (emphasis added)

The Supreme Court of India makes it clear that treaty shopping has the ability to promote real investments in the SCs, and thus cannot be seen as a condemnable phenomenon in all cases. Indeed, treaty shopping often promotes a significant increase in foreign investment in various jurisdictions through intermediary entities. That is to say:

- Cyprus allows for capital flows to Eastern Europe in a tax favourable way,
- Madeira facilitates investments in the EU by South American investors,
- Singapore fosters global expansion into Southeast Asian and Chinese markets,
- Mauritius accelerates flows of global investments to India.

Following this provocative, albeit rational and geo-politically empathetic line of reasoning, one may conclude that intermediaries from the Netherlands, Luxembourg and the UK (and other liberal tax systems) favour the inflow of foreign investments into many SCs across the globe. The Ministries of Finance and the tax administrations in many SCs should consider the above nuanced approach to treaty shopping and, accordingly, to directive shopping. This may be prompted by a frank dialogue with tax advisors and investor representatives based on trust. A further increase of foreign investments into many of SCs, and all the related economic and reputational benefits, may significantly outweigh the reduction of WHT revenues in total. Taking a long-term perspective often pays off.

3. This book’s perspective: a neutral perception of treaty shopping and directive shopping in aristoto and the need for examination of abuse ad casum

Contrary to the views of the CFA in the Conduits Report, leading tax scholars have a much more balanced and nuanced approach to defining treaty shopping (by analogy: directive shopping). David Rosenbloom says that treaty shopping ‘connotes a premediated effort to take advantage of the international tax treaty network, and careful selection of the most favourable treaty for a specific purpose’. He adds that ‘[t]he terms thus focus on a state of mind – namely, a deliberate choice among treaty jurisdictions’. Klaus Vogel, in turn, links treaty shopping with conducting transactions or establishing arrangements in other states ‘solely for the purpose of enjoying the benefit of particular treaty rules existing between the State involved and a third State that otherwise would not be applicable, e.g., because the person claiming the benefit is not a resident of one of the contracting States’. Finally, Stef van Weeghel denotes treaty

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shopping as ‘a situation in which a person who is not entitled to the benefits of a tax treaty makes use – in the widest meaning of the word – of an individual or legal person in order to obtain those treaty benefits that are not available directly’.122

1.086 Despite some differences, all the scholars quoted above perceive treaty shopping neutrally, as a thoughtful practice of indirectly obtaining access to tax treaty benefits. In the same vein, and by endorsing the perception of treaty shopping presented by van Weeghel, a neutral approach to treaty shopping is expressed by scholars in the contemporary research on international tax avoidance.123 Consequently, treaty shopping in the science of tax law is a holistically neutral concept. It turns into an abusive practice only if a careful assessment of the facts and the law on a case-by-case basis leads to such conclusions.

1.087 A similar approach to understanding treaty shopping has been taken by the Ad Hoc Group of Experts on International Cooperation in Tax Matters (hereinafter the ‘Group of Experts’) of the United Nations (hereinafter the ‘UN’) under the chairmanship of Garcia Prats. In particular, they distinguished the concept of ‘treaty abuse’ from that of ‘treaty shopping’ by stating that:

the term ‘treaty shopping’ — in other words, searching for a more favourable treaty — should not be equated with treaty abuse. The conclusion that a situation is abusive — or that an individual is benefiting from the application of a double taxation treaty in an abusive fashion — requires and implies verification of the occurrence of an indirect, rather than a direct, breach of a provision through a violation of its object, spirit or purpose, something that is difficult to determine a priori.124

1.088 The above view, whereby the concept of treaty abuse should not be mixed with that of treaty shopping, and that the qualification of treaty shopping as treaty abuse requires ad casum assessment rather than a priori presumption, has been endorsed by the UN Economic and Social Council.125 This is clearly in line with the presented views of the leading scholarship and the above cited landmark judgment of the Indian Supreme Court.126

1.089 In BEPS Action 6, the OECD begins by describing treaty shopping in very general and illustrative terms as ‘a number of arrangements through which a person who is not a resident of a Contracting State may attempt to obtain benefits that a tax treaty grants to a resident of that State’.127 No link is made between treaty shopping and treaty abuse. The OECD’s considerations take treaty shopping closer to treaty abuse only in the informal summary of the BEPS on the OECD’s website in the form of short answers to the ‘frequently asked questions’. There, the OECD first quotes the above-mentioned definition of treaty shopping by stating that:

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127 BEPS Action 6, para. 17, 17.
and illustrative way, and then indicates that treaty shopping ‘strategies are often implemented by establishing companies in States with desirable tax treaties that are often qualified as “letterboxes” “shell companies” or “conduits”, because these companies exist on paper, but have no or hardly any substance in reality’. In the context of BEPS Action 6, such treaty shopping ‘can be addressed through changes to bilateral tax treaties in line with the minimum standard agreed’.

This implies that the more recent approach of the OECD is to perceive treaty shopping as a neutral phenomenon, which often becomes treaty abusive. Treaty shopping abuses may exist – following the OECD’s threat – when a taxpayer establishes companies that ‘exist only on paper’ (letterbox/shell/conduits) in order to indirectly obtain benefits under a tax treaty. Plainly, the identification of such companies in a cross-border arrangement, and their abusive role under tax treaties, always requires close examination.

Moreover, the last sentence of the OECD text quoted above indicates that the best suited to target abusive treaty shopping are changes to tax treaties in line with the minimum standard under BEPS Action 6, i.e., the new preamble and the PPT or/and a comprehensive LOB clause. The preamble has only a limited interpretative role, while the real anti-abusive role is played by the PPT and/or the LOB clause. This important guidance from the OECD in respect of the current approach to combating abusive treaty shopping will be further examined in the final sections of Chapter 3 below. Here, it is enough to say that the concept of BO is not mentioned by the OECD in BEPS Action 6 as a principal tool to prevent abusive treaty shopping. Rather, the OECD recognised the very limited role of the concept of BO in addressing abusive treaty shopping, not going beyond ‘simple treaty shopping situations where income is paid to an intermediary resident of a treaty country who is not treated as the owner of that income for tax purposes (such as an agent or nominee)’.

To see the whole picture, it is worth noting that treaty shopping effect is granted explicitly in many tax treaties worldwide through the most favoured nation clause (hereinafter ‘MFN’) with respect to dividend, interest or royalty payments. MFN clauses are most often added to tax treaties via the protocols. For an impressive list of such clauses applicable in tax treaties see Haslehner, Werner, ‘Art. 10’, para. 83, 832 and ‘Art. 11’, para. 79, 922 and Valta, Matthias, ‘Art. 12’, para. 62, 991, in: Rust, Alexander, Reimer, Ekkehart (eds), Klaus Vogel on Double Taxation Conventions, Fourth Edition, Vol. 1, (2015) Wolters Kluwer Law & Business.

129 Ibid.
130 BEPS Action 6, para. 22.
131 Schwarz, Jonathan ‘The Impact of the New Preamble on the Interpretation of Old and New Treaties and on the Policy of Abuse Prevention’ (2020) 74 Bulletin for International Taxation, sec. 5.3 and Chapter 6. Michael Lang went so far to say that the PPT ‘does not represent a legal basis for denying treaty benefits. The provision merely emphasizes the necessity for an interpretation based on object and purpose in those cases in which one of the principal purposes of a transaction was to obtain a benefit.’ Lang, Michael, The Signalling Function of Article 29(9) of the OECD Model - The “Principal Purpose Test” (2020) 74 Bulletin for International Taxation, Chapter 5.
132 BEPS Action 6, para. 18.
treaties in areas covered by the MFN clause. As a result, the CSs deliberately open up access to benefits under its single tax treaty with the MFN clause to non-residents of the CSs of that treaty. To the extent of application of the MFN clauses, this creates a kind of multilateral tax treaty. A similar outcome stems from a taxpayer’s self-help via treaty shopping. Therefore, a predetermined recognition of treaty shopping as an abusive practice under tax treaties would be contrary not only to the above-mentioned views of the doctrine and practice of tax law, but also with the tax treaty policy of many countries across the world, as expressed in their treaties via MFN clauses.

1.093 In addition to achieving tax benefits (a neutral perception), including through abusive tax avoidance (a pejorative perception), treaty shopping is a term associated with benefits for investors under international investment treaties. It concerns obtaining the best possible legal protection for foreign investments on the basis of bilateral (BITs) and multilateral agreements on the promotion and mutual protection of investments. For this purpose, foreign investors typically set up intermediary entities in the jurisdictions that have concluded the most favourable international investments agreements (usually BITs) with the host states of the investment (the equivalent of the SCs in tax law). The leading scholars in international investment law do not attribute value judgment to the term treaty shopping. Instead they use that term interchangeably with the terms ‘nationality planning’ or ‘strategic use or change of nationality’. To use an apt classification offered by Jorun Baumgartner, treaty shopping includes ‘all legal operations aimed at invoking or creating a qualifying nationality and/or a qualifying investment, for example by structuring or restructuring an investment or by otherwise conferring an entitlement or property right to an investment, with a view to benefiting from a particular


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international investment agreement'. Thus, just as in international tax law, treaty shopping in international investment law has a neutral meaning, unless an analysis of the relevant law and facts of a particular case leads to a finding of abuse.

The considerations demonstrate an aptness in a neutral understanding of treaty shopping and directive shopping on many levels – legal, economic and policy. Only after a close examination of the relevant legal provisions and facts one may attribute a negative value judgment to these terms, if that examination finds evidence of abuse in a particular case. This holistic and neutral approach to understanding treaty shopping and directive shopping appears to contribute to balance the interests of the SCs of income (host states) and the RCs of foreign investors, thereby benefiting the international community as a whole, including the acquis of international and EU law and the need for the sustainable development of states and societies. Such an approach is taken in this book for the purposes of further analysis, thereby giving treaty shopping and directive shopping the following meaning: ‘a situation in which an entity that is not entitled to the benefits of a tax treaty or EU directive makes use – in the widest meaning of the word – of a legal entity in order to obtain those benefits that are not available directly’.

V. OUTLINE OF THE BOOK

The book consists of seven chapters (1–7), each of which is sub-divided into sections (I, II, III, etc.) and as many as two levels of subsections (the first level: A, B, C and the second level A.1., B.2. and C.3., etc.). The deep analytical structure of the book is illustrated by the Extended Contents, providing a systemic outlook on all the issues analysed in the book.

This Chapter 1 sets out the purpose and the scope of the book, indicating the significance of the problem concerning the concept of BO in a multifaceted way. This chapter pays particular attention to various interests and perspectives that arise around the concept of BO and the terminological issues. The lack of terminological rigour regarding the indirect access to benefits under tax treaties and EU directives would incapacitate an appropriate division between the

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138 Ibid., 13.
139 Ibid., Chapter 2.
140 To use Bräutigam’s words:

without the ability to raise revenues effectively, states are limited in the extent to which they provide security, meet basic needs or foster economic development. Yet the political importance of taxation extends beyond the raising of revenue (...) [, as] taxation may play the central role in building and sustaining the power of states, and shaping their ties to society (...) by enhancing accountability between states and their citizens.


141 Clearly, this definition is heavily inspired by the definition of treaty shopping provided more than 20 years ago by Stef van Weeghel and cited at the beginning of this subsection. Van Weeghel, Stef, The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States, (1998) Kluwer Law International, 117.
practices that the concept of BO is suitable to address and the practices targeted by other legal measures. This discussion constitutes the starting point of the analyses to follow.

1.097 Chapter 2 presents and discusses the canons of interpretation that are relevant to an appropriate understanding of the concept of BO. It introduces the further methodological order accompanying the analysis in Chapter 3 and the subsequent chapters. The interpretative guidance in Chapter 2 consists of fundamental principles of interpretation that every professional-interpreter (a person with a certain level of legal communicative competence who does not select arguments supporting a preconceived thesis, but strives to determine the proper meaning of the law), in particular judge-interpreter should know and be guided by. Despite its fundamental importance, unfortunately, the proper methodology of understanding and applying the concept of BO is often omitted or neglected by tax authorities, and even some courts. Therefore, Chapter 2, apart from its theoretical and legal value, is of significant practical importance. It will constitute the methodological interpretative background against which the appropriateness and persuasiveness of case law on BO in Chapters 5 and 6 will be assessed.

1.098 Chapter 3, in turn, takes an in-depth analysis of the origin and evolution of the concept of BO in international tax law from the 1960s to the present day. This chapter mainly analyses the OECD's views on BO, as set out in the Commentaries on the OECD MC and the OECD reports. Chapter 3 also refers to the work of the UN Expert Committees.

1.099 Chapter 4 presents the general themes of tax jurisprudence on the concept of BO, before taking a deep dive into the analysis of that jurisprudence in Chapters 5 and 6.

1.100 Chapter 5 discusses in detail and offers critical analysis of the key international jurisprudence on the concept of BO in a long period of 1971–2019, i.e., pre-CJEU Danish BO era of the origin and evolution of BO.

1.101 Chapter 6 continues the discussion and the analysis from Chapter 5, but with a major difference. The CJEU Danish BO judgments are analysed first in order to discover the meaning of the concept of BO under EU law and its usefulness in conduit cases. Afterwards, selected cases in the EU MSs are analysed for the purposes of reaching conclusions about the influence of the CJEU’s approach to the concept of BO. In other words, Chapter 5 is more about international matters, while Chapter 6 is more about the EU tax jurisprudence on the concept of BO.

1.102 Summaries and conclusions are appended to each of these chapters. The conclusions of the book as a whole, however, are provided in the final Chapter 7. This chapter ties up the various methodological strands and conclusions, and undertakes a final evaluation of the concept of BO under the tax jurisprudence. Chapter 7 answers the main research question and a number of accompanying questions, including not only an understanding of the concept of BO as of today, but also an attempt to anticipate the future fate of this concept. Finally, Chapter 7 touches upon biosemantics as a source of behavioural explanation for the perception of the concept of BO by the tax authorities and the role of the courts in changing that perception.