



Beneficial Ownership

Corporate Tax Practice
November 23, 2021



**Beneficial ownership
as formal condition vs.
indicator of tax abuse?**

**Physical substance?
Economic substance?**

What is beneficial ownership?

When relevant?

**Legal or economic
ownership?**

Table of content

Setting the scene (what is it about)

Beneficial ownership in a Belgian context

The EU Directives and Danish Cases

Belgian Anti-Abuse Measures and practical experience

BO - EU Spectrum

Double Tax Treaties

Key Takeaways





Setting the scene



EU context
(Directives)

Interest

Dividends

The question of beneficial ownership can pop-up in different scenario's

Domestic law
WHT exemptions (?)

Non-EU context and
double tax treaties (?)

Royalties



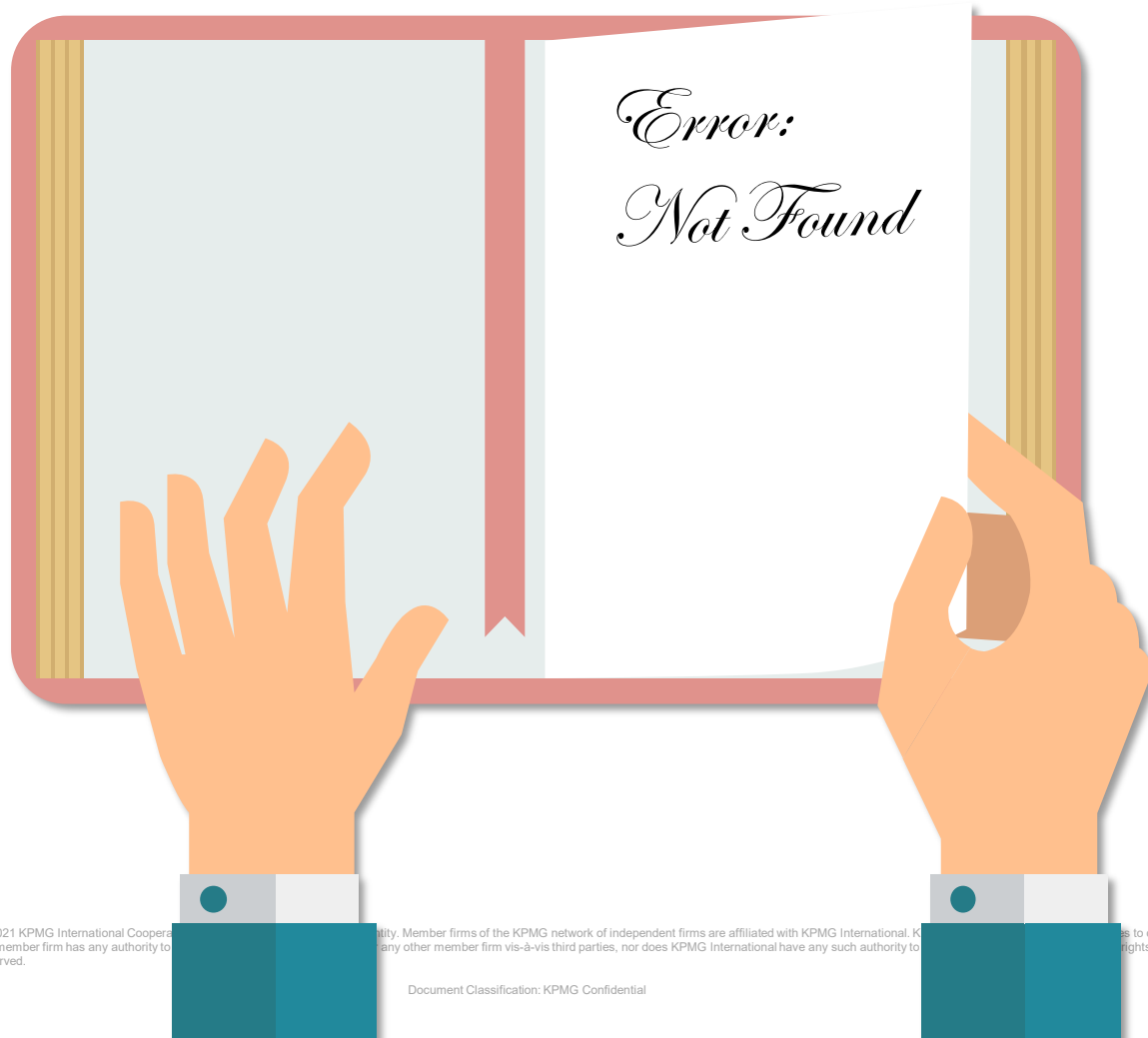
Beneficial ownership in a Belgian context



Where do we find the concept of beneficial ownership in our income tax code and royal decree?



Where do we find the concept of beneficial ownership in our income tax code and royal decree?



Belgian Withholding Tax Exemptions

BITC	Type of income	Debtor	Receiver	Comments
Art. 264/1 BITC	Dividends	Belgian company	Company in EEA Member State/DTT concluded	Tate & Lyle exemption
Art. 106, §2 and §4 RD/BITC	Dividends	Belgian entity	Non-resident pension funds	
Art. 106, §5 RD/BITC	Dividends	Belgian company	Affiliated companies within meaning of PS-Directive (also if Treaty info exchange)	Parent-Subsidiary Directive (2011/96/EU)
<p>§ 6</p> <p>De verzaking van de inning van de roerende voorheffing ingevolge de artikelen ¹⁶[...], 107, § 2, 5°, b) tot f), en 6°, 110, 4°, b en d, 113, § 2, 2°, b, en § 3, c, en 114, § 2, c, wordt slechts toegestaan indien aan de schuldenaar van de inkomsten een attest wordt overhandigd waarbij is bevestigd dat de verkrijgers:</p> <p>a) eigenaar of vruchtgebruiker zijn van de rentegevende roerende kapitalen;</p> <p>b) niet-inwoners zijn die deze kapitalen niet voor het uitoefenen van een beroepswerkzaamheid in België gebruiken.</p>				
Art. 107, §2, 10° RD/BITC	Interest (nominative bonds)	Belgian entity	Non-resident investors (article 227 BITC)	
Art. 107, §6 RD/BITC	Interest	Belgian company	Affiliated companies within meaning of IR-Directive	Interest and Royalty Directive (2003/49/EU)

Belgian Withholding Tax Exemptions

BITC	Type of income	Debtor	Receiver	Comments
Art. 109 RD/BITC; Art. 265, 4° BITC	Movable income	Distributing FCP's (Belgian mutual investment funds)	Participants/investors of the fund	
Art. 111, c) RD/BITC	Royalties	Belgian company	International or supranational institutions	
Art. 111, d) RD/BITC	Royalties	Belgian company	Affiliated companies within meaning of IR-Directive	Interest and Royalty Directive (2003/49/EU)
Art. 113, §2, 1° RD/BITC	Movable income	Belgian entity	International or supranational institutions	
Art. 115, §1 RD/BITC	Movable income	Belgian entity	Non-resident pension <u>savings</u> fund	
Art. 116 RD/BITC	Movable income	Belgian entity	SICAV, SICAF, SIC or private PRICAF	Except for dividends of a Belgian origin
Art. 116bis RD/BITC; Art. 261, third subparagraph BITC	Fixed-income securities issued via the X/N system of the NBB	Belgian company	Non-resident investors (article 227 BITC)	

Beneficial ownership in a Belgian context

The concept of “beneficial ownership” is **not mentioned** in any of the above listed Belgian withholding tax exemptions.
(there is no definition of the concept in the Income Tax Code)



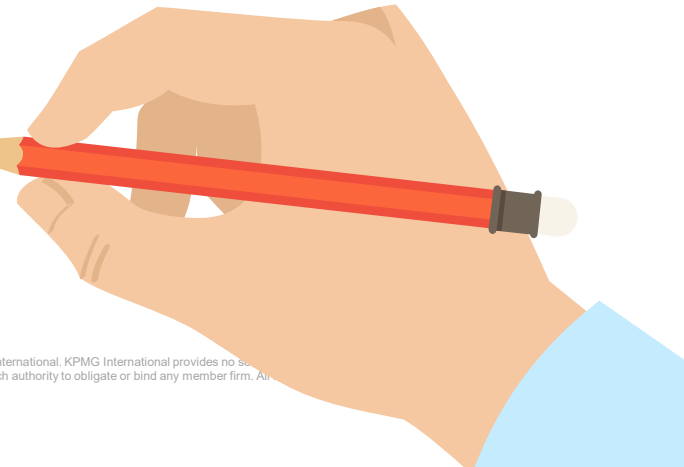
The BE beneficial owner = the **legal owner of the income or income-generating assets.**



Future?



~~Legalistic interpretation~~
vs.
Economic interpretation





The EU Directives and Danish Cases

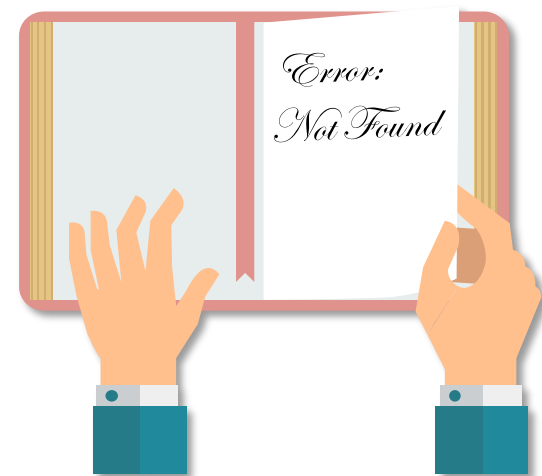
EU Directives - WHT exemptions

I. Interest / royalty directive

- WHT exemption for interest or royalty payments
- “Beneficial ownership” included in article 1 as a precondition

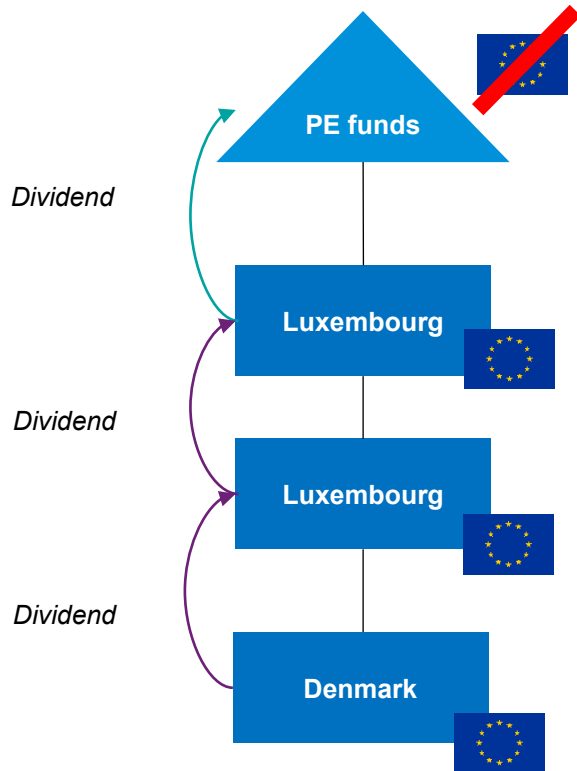
II. Parent-subsidiary directive

- WHT exemption for dividend payments
- No condition of beneficial ownership

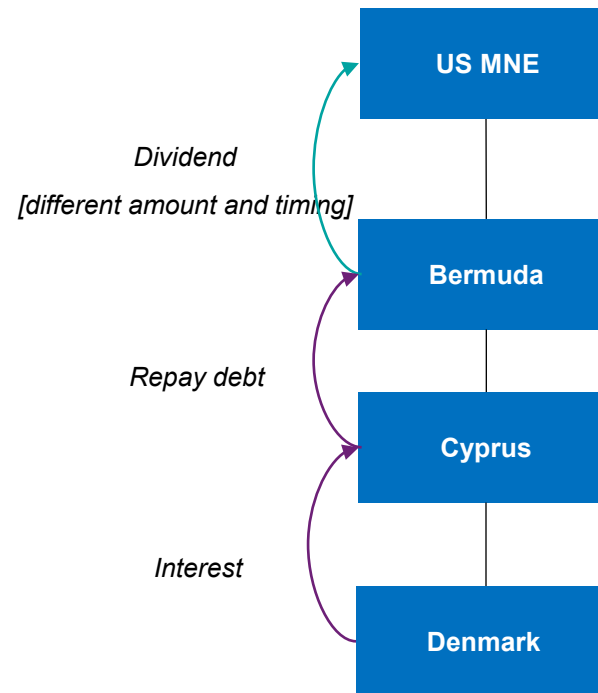


Danish cases - European Court of Justice (26/02/2019)

TDC case, known as C-116/16



NetApp case, known as C-117/16



Danish cases - Conclusions ECJ



Conclusions of the ECJ:

- Article 1 Interest/royalty Directive **and** Parent-Subsidiary Directive: **the WHT exemption is restricted solely to the beneficial owner.**
- The **prohibition of abuse is a general principle of EU law.** In case of abuse, no WHT exemption can be granted, even when there is no (domestic) anti-abuse provision.
- An **abusive practice** consists of objective circumstances **and** a subjective element.
- The national authorities/courts are not required to identify the beneficial owner(s) in order to establish an abuse.

Danish cases - Conclusions ECJ



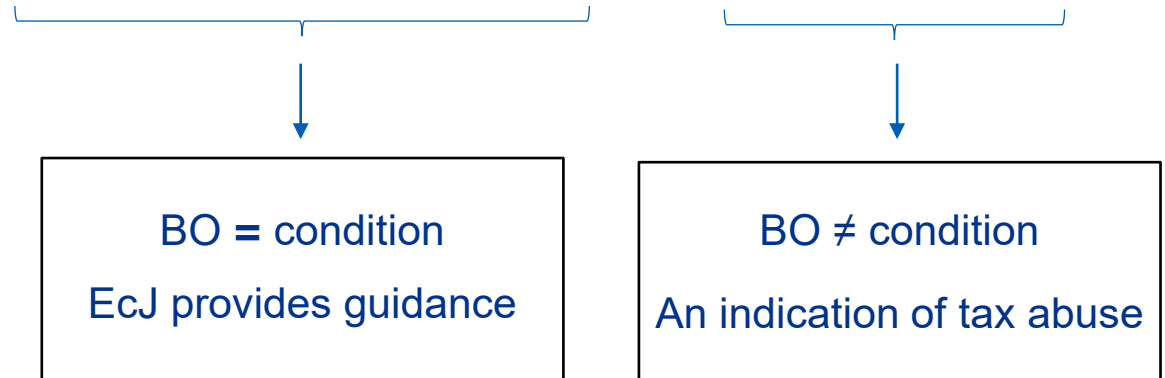
Indications of tax abuse :

- Conduit company
- Transmission of (almost) all of the interest/dividend, very soon after its receipt
- Insignificant taxable profit
- No other activities
- No employee, no premises, no equipment...
- No economic use of the interest/dividend possible based on various contracts

Counterproof : *existence of a favorable double tax treaty ?*

Danish cases - Some key reflections

1) Distinction between IRD (interest and royalties) and PSD (dividends) !



2) BO is not synonym to substance!

- Though substance plays an important role in assessing tax abuse
- Physical (local) substance + economic substance (both ≠ the same)



Belgian Anti-Abuse Measures & Practical experience



Belgian Anti-Abuse Measures

Art. 344, §1 BITC

GAAR

The general anti-abuse rule

(New) GAAR: implemented as of AY2013

Objective element:

- i. *To avoid the application of a tax-increasing measure in the ITC or the Royal Decree thereto; or*
- ii. *To obtain the application of a tax benefit included in the ITC or the Royal Decree thereto, whereas such result is incompatible with the purpose of these provisions (the so-called “objective component”).*

Subjective element:

The taxpayer should have chosen for said (series of) legal act(s) precisely in view of obtaining a tax benefit.

Art. 203, §1, 7° BITC

SAAR

Specific anti-abuse rule

SAAR: implemented as of 1 January 2017

The SAAR specifically targets abuse of (i) the PSD-based WHT exemption and (ii) the exemption of qualifying dividend income (“dividend received deduction” regime) and qualifying capital gains.

Typical tax investigation discussion

Formalistic (e.g. attestations)

Look through approach?

**Broad applications
(request refund, tax audit, ...)**

Subjective element?

Burden of proof?

Rulings

- [Ruling 2020.1878 dd. 17.11.2020;](#)
- [Ruling 2020.2112 dd. 15.12.2020;](#)
- [Ruling 2021.0099 dd. 16.03.2021:](#)
 - I. BelCo - Lux HoldCo;
 - II. WHT exemption for **dividends** (PSD);
 - III. Reference is made to the **Danish cases** (C-116/16 & C-117/16);
 - IV. Strong case:**
 - **Strong economic reasons** for establishing a HoldCo in Lux;
 - **Sufficient substance** (meetings of the Board of Directors, day-to-day operations, bank accounts);
 - **Power of disposition** over the dividends received, without any obligation to passthrough the dividends;
 - V. Decision:**
 - The facts show that it is not a pure conduit structure;
 - Reference is made to European case law in the **Eqiom & Enka case** (c-6/16) which shows that the presence of a holding structure is not in itself sufficient to conclude that it is a mere conduit.



BO - EU Spectrum



The Danish cases after the Danish cases

Danish High Court held that the Cyprus company was **not the beneficial owner**.



Based on that finding, **neither the Danish-Cyprus tax treaty nor the PSD** were applicable.



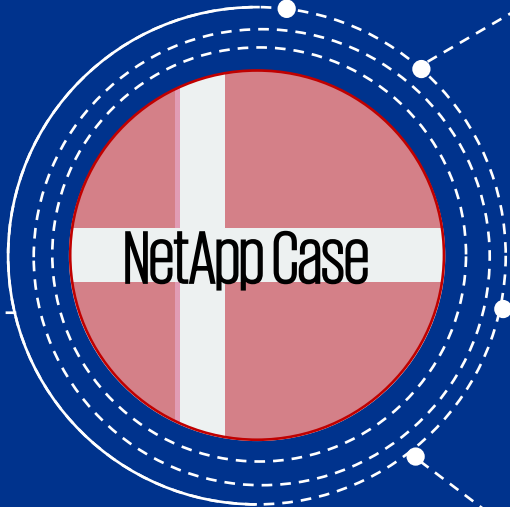
However



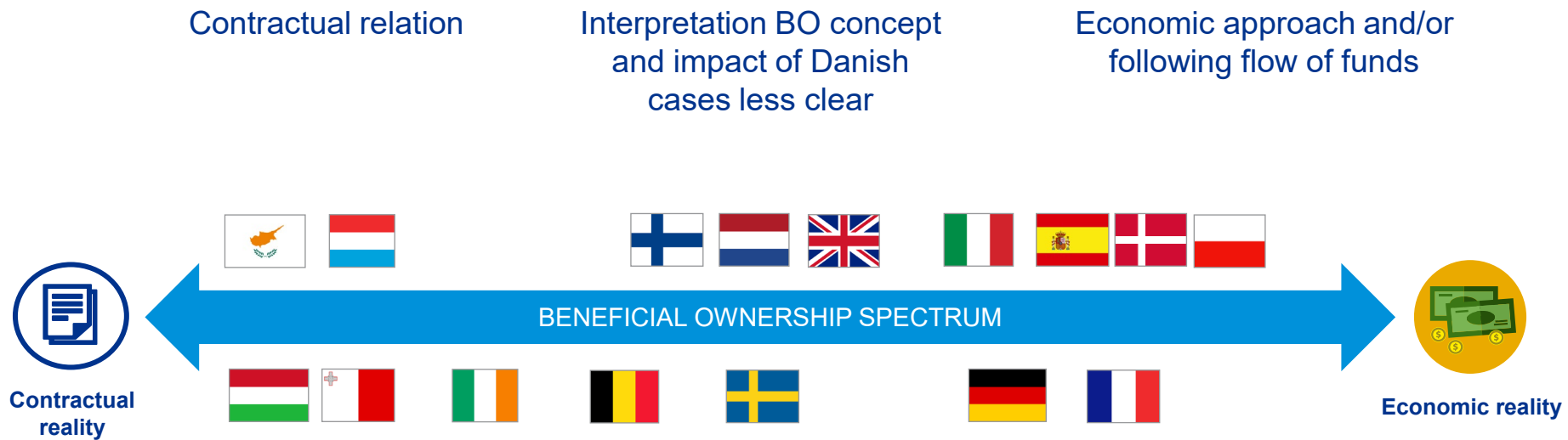
The Court assesses the importance of **treaty eligibility of the beneficial owner**



No tax treaty abuse would exist because it would be possible to pay a dividend from the Danish subsidiary directly to the beneficial owner **without triggering Danish withholding tax**.



Beneficial ownership spectrum



European initiatives against shell Entities (ATAD 3)

What we know so far

The European Commission has published an Inception Impact Assessment to tackle the use of legal entities with no or minimum substance and no real economic activities, by taxpayers operating cross-border to reduce their tax liability.

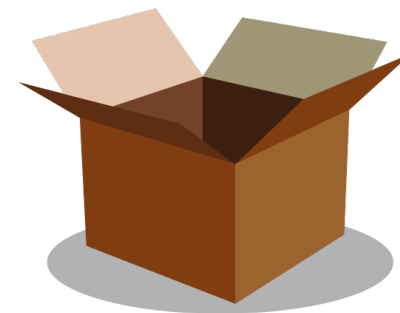
How: various policy options – either soft law or a new legislative initiative (ATAD 3)

Envisaged measures:

- Define common tax related substance requirements for legal entities and arrangements operating in the EU
- Equip tax administrations with new targeted instruments to prevent, identify and penalize abusive practice of shell entities
- Deny tax benefits to legal entities and arrangements which do not meet the tax related substance requirements

Timeline:

- Public consultation (questionnaire): June 2021
- Commission adoption: Q1 2022





Double Tax Treaties



The Belgian Model Double Tax Treaty

Artikel 10 – Dividenden

[...]

2. Deze dividenden mogen echter ook in de overeenkomstsluitende Staat waarvan de vennootschap die de dividenden betaalt inwoner is overeenkomstig de wetgeving van die Staat worden belast, maar indien de **uiteindelijk gerechtigde tot de dividenden** inwoner is van de andere overeenkomstsluitende Staat, mag de aldus geheven belasting niet hoger zijn dan 15 percent van het brutobedrag van de dividenden.

[...]

Artikel 11 – Interest

[...]

5. De bepalingen van de paragrafen 1, 2 en 3 zijn niet van toepassing indien de **uiteindelijk gerechtigde tot de interest**, die inwoner is van een overeenkomstsluitende Staat, in de andere overeenkomstsluitende Staat waaruit de interest afkomstig is, een bedrijf uitoefent met behulp van een aldaar gevestigde vaste inrichting en de schuldvordering uit hoofde waarvan de interest is verschuldigd wezenlijk is verbonden met die vaste inrichting. In dat geval zijn de bepalingen van artikel 7 van toepassing.

[...]

Artikel 12 – Royalty's

1. Royalty's afkomstig uit een overeenkomstsluitende Staat en betaald aan een inwoner van de andere overeenkomstsluitende Staat zijn slechts in die andere Staat belastbaar, indien die inwoner de **uiteindelijk gerechtigde tot de royalty's** is.

[...]

Article 10 – Dividendes

[...]

2. Toutefois, ces dividendes sont aussi imposables dans l'Etat contractant dont la société qui paie les dividendes est un résident, et selon la législation de cet Etat, mais si le **bénéficiaire effectif des dividendes** est un résident de l'autre Etat contractant, l'impôt ainsi établi ne peut excéder 15 pour cent du montant brut des dividendes.

[...]

Article 11 – Intérêts

[...]

5. Les dispositions des paragraphes 1, 2 et 3 ne s'appliquent pas lorsque le **bénéficiaire effectif des intérêts**, résident d'un Etat contractant, exerce dans l'autre Etat contractant d'où proviennent les intérêts, une activité d'entreprise par l'intermédiaire d'un établissement stable qui y est situé, et que la créance génératrice des intérêts s'y rattache effectivement. Dans ce cas, les dispositions de l'article 7 sont applicables.

[...]

Article 12 – Redevances

1. Les redevances provenant d'un Etat contractant et payées à un résident de l'autre Etat contractant ne sont imposables que dans cet autre Etat si ce résident en est le **bénéficiaire effectif**.

[...]

Com. OV/Com Conv.

Com.Ov. 10/204

Om aanspraak te hebben op vermindering van belasting in de bronstaat, dient de uiteindelijk gerechtigde tot de dividenden (**eigenaar of vruchtgebruiker van de aandelen of delen**) in de eerste plaats een inwoner (natuurlijke persoon of rechtspersoon) van het partnerland te zijn in de zin van de overeenkomst met dat land (zie hst. 1 en 4), d.w.z.:

[...]

Com.Ov. 11/204

De voorwaarden, waaraan de uiteindelijk gerechtigde moet voldoen om in de bronstaat aanspraak te hebben op vermindering of vrijstelling van de belasting op interest, zijn **dezelfde als die welke ter zake van dividenden gesteld zijn**.

[...]

Com.Ov. 11/231

De uiteindelijk gerechtigde tot de interest (**eigenaar of vruchtgebruiker van de effecten, schuldeiser, lener of deponent**) die de vermindering of vrijstelling van de R.V. ingevolge de overeenkomst met het land van zijn fiscale woonplaats wenst te verkrijgen en aan de daartoe gestelde voorwaarden (zie 11/204 e.v.) voldoet, moet daartoe een formulier 276 Int.-Aut gebruiken.

[...]

Com.Ov. 12/203

De voorwaarden, waaraan de uiteindelijk gerechtigde moet voldoen om in de bronstaat aanspraak te hebben op de vrijstelling of vermindering van de belasting op royalty's, zijn **dezelfde als die welke ter zake van dividenden en interest gesteld zijn**.

[...]

Com. Conv. 10/204

Pour pouvoir prétendre à la réduction d'impôt dans l'Etat de la source, le bénéficiaire effectif des dividendes (**propriétaire ou usufruitier des actions ou parts**) doit, en premier lieu, être un résident (personne physique ou personne morale) du pays partenaire au sens de la convention avec ce pays (voir chap. 1 et 4), c.-à-d.:

[...]

Com. Conv. 11/204

Les conditions, auxquelles doit satisfaire le bénéficiaire effectif pour pouvoir prétendre dans l'Etat de la source à la réduction ou à l'exemption d'impôt sur les intérêts, sont **les mêmes que celles requises en ce qui concerne les dividendes**.

[...]

Com. Conv. 11/231

Le bénéficiaire effectif des intérêts (**propriétaire ou usufruitier des titres, créancier, prêteur ou déposant**), qui souhaite bénéficier de la réduction ou de la l'exonération du Pr.M. conformément à la convention conclue avec le pays de son domicile fiscal et qui satisfait aux conditions auxquelles cette réduction ou cette exonération est subordonnée (voir 11/204 et suiv.), doit utiliser à cet effet une formule 276 Int.-Aut.

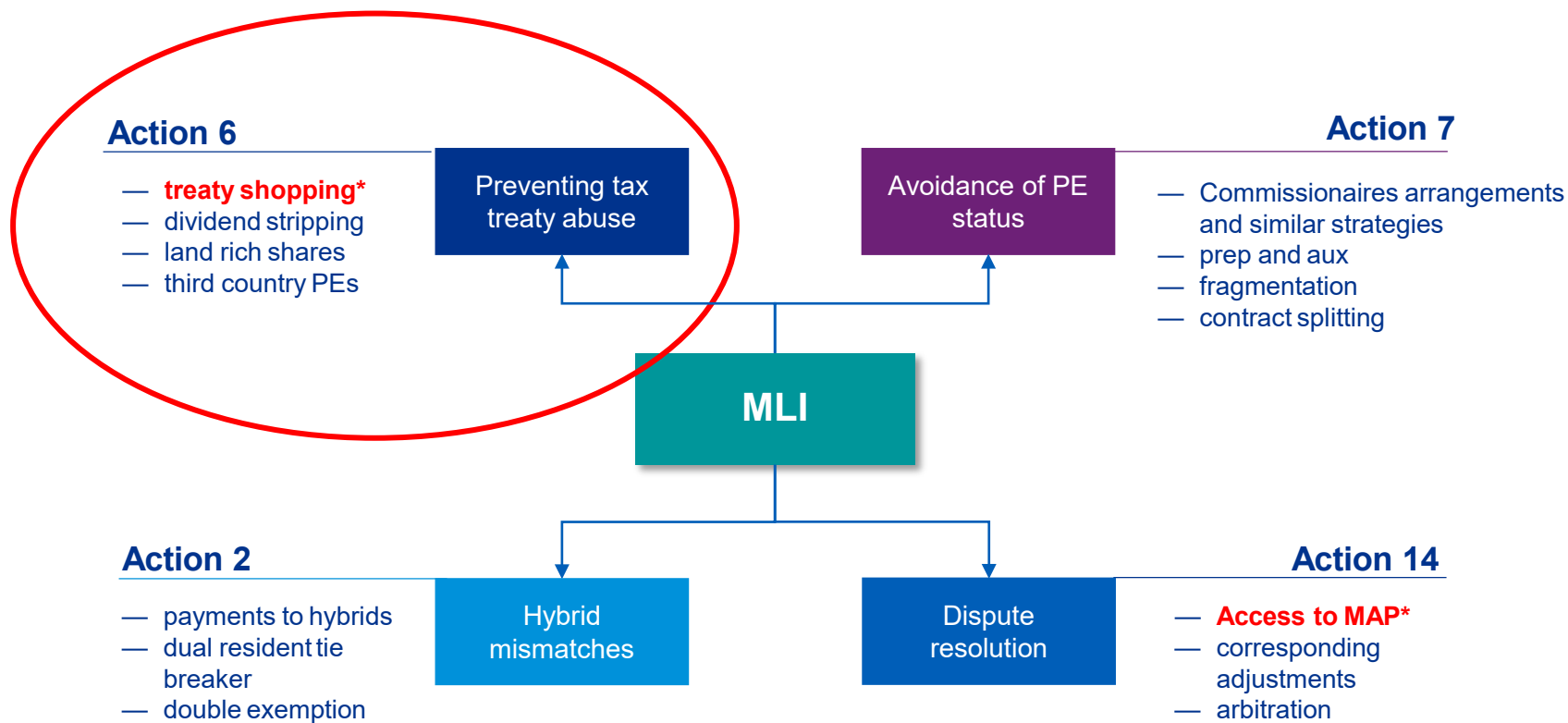
[...]

Com. Conv. 12/203

Les conditions, auxquelles le bénéficiaire effectif doit satisfaire pour pouvoir prétendre dans l'Etat de la source à l'exemption ou à la réduction de l'impôt sur les redevances sont **les mêmes que celles requises en ce qui concerne les dividendes et les intérêts**.

[...]

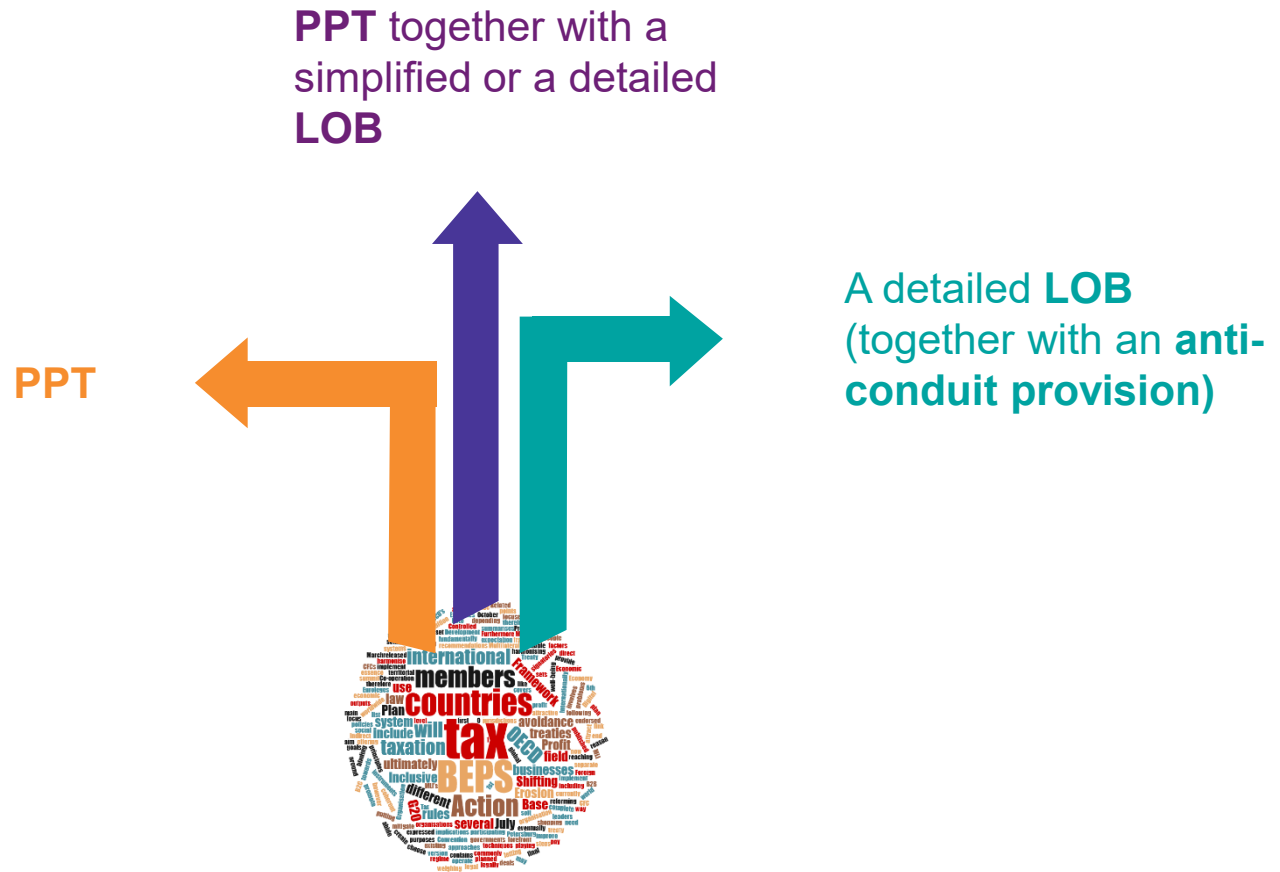
Implementation of BEPS through MLI - Action 15



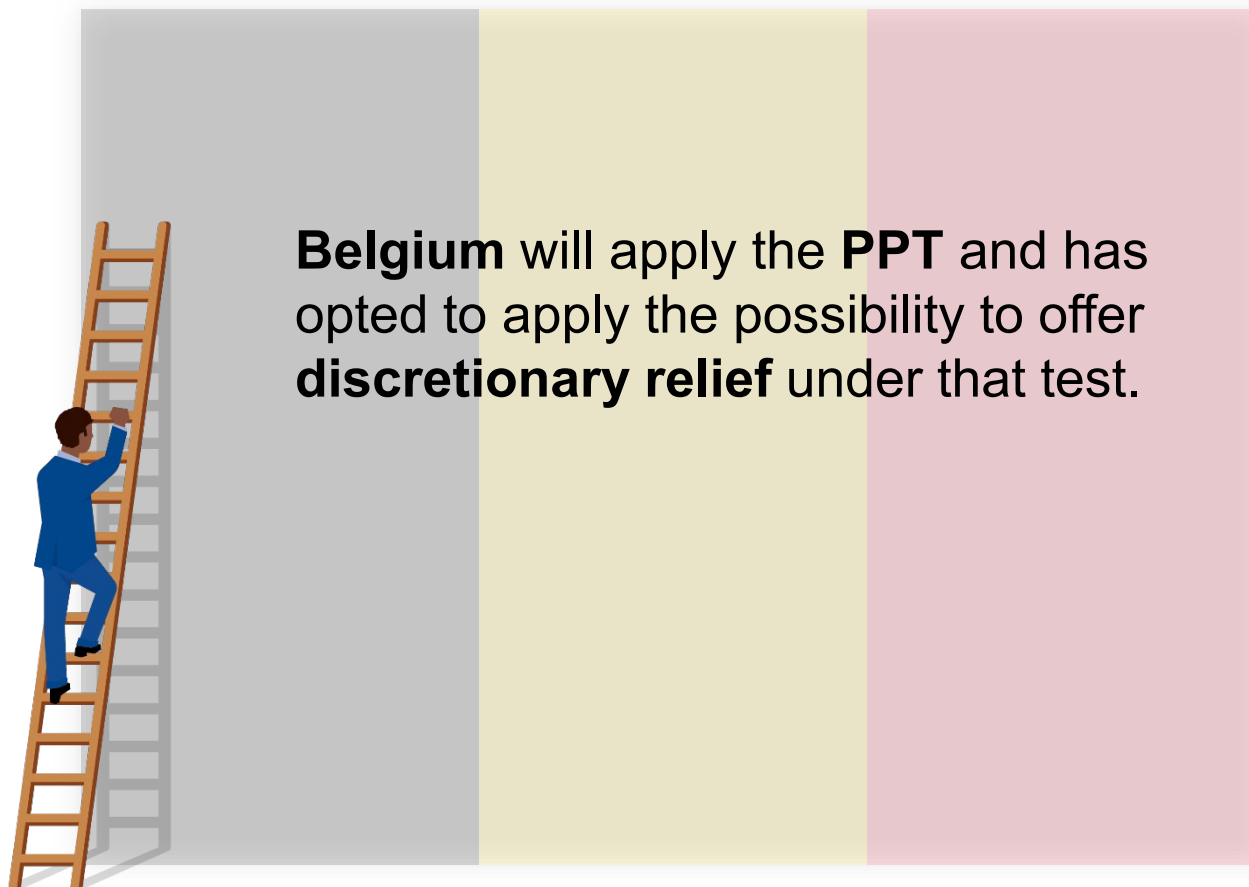
***minimum standards**

Article 7 MLI - Principal Purpose Test & beyond

Art. 7 of the MLI on the prevention of treaty abuse requires that **one of the following** measures is adopted:



Article 7 MLI - Principal Purpose Test (PPT) & beyond



Belgium will apply the **PPT** and has opted to apply the possibility to offer **discretionary relief** under that test.



Key Takeaways



More than ever we have to be mindful with multi-layered group structures, the use of FinCo's, intermediate holding companies and back-to-back financing structures (WHT returns, tax advise, M&A structuring,...).

In addition to respecting the legal situation, the economic rationale and substance have become key in light of sound structuring advice.



Thank you!

