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# Committee of Experts on International Cooperation in Tax Matters
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**Update of the UN Model Double Taxation Convention between Developed and Developing Countries -Beneficial Ownership**

***Summary***

The concept of beneficial ownership has been included in the passive income articles of the OECD Model since 1977 and the UN Model since 1980. Its inclusion prevented the granting of the benefit of the source tax limitation on passive income in a treaty where such income was paid to a nominee or agent with merely a legal right to the income.

In 2014, the OECD undertook a project to clarify the meaning of the concept in its model. During the 17th Session of the United Nations Committee of Experts on International Cooperation in Tax Matters it was agreed that the topic should be covered as part of the Subcommittee on the UN Model Update's work programme. Members considered it important to identify areas in which the Committee agreed or disagreed with the guidance produced by the OECD on the topic to avoid unintended differences in interpretation.

As a result, E/C.18/2019/CRP.10 was produced and discussed at the April 2019 meeting of the Subcommittee. The Subcommittee agreed that the clarifications made by the OECD are consistent with a UN interpretation of beneficial ownership. Therefore, the Subcommittee proposes that the latest OECD Model commentaries on the concept of beneficial ownership be incorporated into the UN Model as presented in this paper.

Also note this paper seeks the Committee's view on amending paragraphs 2 of Article 10, 11 and 12 to clarify that income paid to an intermediary in a third state does not prevent the beneficial owner of that income from claiming relief from taxation under these provisions. This issue is addressed after the section on the proposed changes to the commentaries on Articles 10, 11 and 12 relating to the interpretation of beneficial ownership.

***BENEFICIAL OWNERSHIP CLARIFICATIONS***

***Comment***

The Committee is asked to consider the adoption of the 2014 OECD clarification language on beneficial ownership. Doing so would clarify in the UN Model that:

- The concept of beneficial ownership does not take its meaning from domestic law or other OECD instrument, but rather has an autonomous treaty meaning;
- The intention of the beneficial ownership concept was to clarify the use of the words *"paid to…a resident"* in the Model and so should be read in that context;
- Beneficial owners are those that have the right to use and enjoy the payment unconstrained by contractual or legal obligations to pass the payment on. Essentially meaning that persons acting as fiduciaries, agents and nominees are not beneficial owners;
- Use and enjoyment of property that derives the income is distinguished from the legal ownership of the property; and
- An obligation to pass payments on can be contractual or can be found to exist on the basis of facts and circumstances.

To support the adoption of the revised OECD text, a UN Model headnote has been drafted for inclusion before the relevant quoted passages on beneficial ownership. This headnote makes clear that, in accordance with Article 3(2), the concept of beneficial ownership is to be given a contextual meaning and is not intended to be interpreted with reference to domestic law.

**PROPOSED CHANGES TO THE COMMENTARY ON THE ARTICLES OF THE UN MODEL CONVENTION**

Proposed changes are shown as ***bold italics*** for additions and ~~strikethrough~~ for deletions.

**COMMENTARY ON ARTICLE 10**

***13. In its 2014 update the OECD made it clear, following paragraph 2 of Article 3, that the concept of beneficial ownership was intended to be interpreted in the context it appears and not with reference to the domestic law of the Contracting States. The current Committee of Experts agreed with this application of paragraph 2 of Article 3 to the concept of beneficial ownership and in 20xx adopted the revised OECD Model Commentary.*** *The Commentary on the ~~2010~~**2017** OECD Model Convention contains the following relevant passages**:***

> 12. The requirement of beneficial ownership was introduced in paragraph 2 of Article 10 to clarify the meaning of the words "paid ... to a resident" as they are used in paragraph 1 of the Article. It makes plain that the State of source is not obliged to give

up taxing rights over dividend income merely because that income was ~~immediately received by~~ ***paid direct to*** a resident of a State with which the State of source had concluded a convention. *[the rest of the paragraph has been moved to new paragraph 12.1]*

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

> ***[1] For example, where the trustees of a discretionary trust do not distribute dividends earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognised as a separate taxpayer), could constitute the beneficial owners of such income for the purposes of Article 10 even if they are not the beneficial owners under the relevant trust law.***

12.~~1~~***2*** Where an item of income is ~~received by~~ ***paid to*** a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the ~~immediate~~ ***direct*** recipient of the income as a resident of the other Contracting State. The ~~immediate~~ ***direct*** recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence. *[the rest of the paragraph has been moved to new paragraph 12.3]*

***12.3*** It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies"[1] concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

[1] Reproduced in Volume II of the full version of the OECD Model Tax Convention at page R(6)-1.

***12.4 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the dividend is not the "beneficial owner" because that recipient's right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 22 to 48 of the Commentary on Article 1. Where the recipient of a dividend does have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the "beneficial owner" of that dividend. It should also be noted that Article 10 refers to the beneficial owner of a dividend as opposed to the owner of the shares, which may be different in some cases.***

***12.5 The fact that the recipient of a dividend is considered to be the beneficial owner of that dividend does not mean, however, that the limitation of tax provided for by paragraph 2 must automatically be granted. This limitation of tax should not be granted in cases of abuse of this provision (see also paragraph 22 below). The provisions of Article 29 and the principles put forward in the section on "Improper use of the Convention" in the Commentary on Article 1 will apply to prevent abuses, including treaty shopping situations where the recipient is the beneficial owner of the dividends. Whilst the concept of "beneficial owner" deals with some forms of tax avoidance (i.e. those involving the interposition of a recipient who is obliged to pass on the dividend to someone else), it does not deal with other cases of abuses, such as certain forms of treaty shopping, that are addressed by these provisions and principles and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.***

***12.6 The above explanations concerning the meaning of "beneficial owner" make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments[1] that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets. That different***

***meaning of "beneficial owner" cannot be applied in the context of the Article. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a), which refers to the situation where a company is the beneficial owner of a dividend. In the context of Article 10, the term "beneficial owner" is intended to address difficulties arising from the use of the words "paid to" in relation to dividends rather than difficulties related to the ownership of the shares of the company paying these dividends. For that reason, it would be inappropriate, in the context of that Article, to consider a meaning developed in order to refer to the individuals who exercise "ultimate effective control over a legal person or arrangement."[2]***

[1] ***See, for example, Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (OECD-FATF, Paris, 2012), which sets forth in detail the international anti-money laundering standard and which includes the following definition of beneficial owner (at page 110): "the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement." Similarly, the 2001 report of the OECD Steering Group on Corporate Governance, "Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes" (OECD, Paris, 2001), defines beneficial ownership as follows (at page 14):***

> ***In this Report, "beneficial ownership" refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary entities and/or individuals until the true owner who is a natural person is found. With respect to corporations, ownership is held by shareholders or members. In partnerships, interests are held by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder.***

[2] ***See the Financial Action Task Force's definition quoted in the previous note.***

**COMMENTARY ON ARTICLE 11**

18. ***In its 2014 update the OECD made it clear, following paragraph 2 of Article 3, that the concept of beneficial ownership was intended to be interpreted in the context it appears and not with reference to the domestic law of the Contracting States. The current Committee***

***of Experts agreed with this application of paragraph 2 of Article 3 to the concept of beneficial ownership and in 20xx adopted the revised OECD Model Commentary.*** The Commentary on the ~~2010~~***2017*** OECD Model Convention contains the following passages:

> 9. The requirement of beneficial owner~~ship~~ was introduced in paragraph 2 of Article 11 to clarify the meaning of the words "paid to a resident" as they are used in paragraph 1 of the Article. It makes plain that the State of source is not obliged to give up taxing rights over interest income merely because that income was ~~immediately received~~ ***paid direct to*** a resident of a State with which the State of source had concluded a convention. *[the rest of the paragraph has been moved to new paragraph 9.1]*
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> ***9.1 Since the term "beneficial owner" was added to address potential difficulties arising from the use of the words "paid to a resident" in paragraph 1, it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries).*** The term "beneficial owner" is ***therefore*** not used in a narrow technical ***sense (such as the meaning that it has under the trust law of many common law countries[1])***, rather, it should be understood in its context***, in particular in relation to the words "paid to a resident",*** and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.
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> > ***[1] For example, where the trustees of a discretionary trust do not distribute interest earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognised as a separate taxpayer) could constitute the beneficial owners of such income for the purposes of Article 11 even if they are not the beneficial owners under the relevant trust law.***
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> 10. Relief or exemption in respect of an item of income is granted by the State of source to a resident of the other Contracting State to avoid in whole or in part the double taxation that would otherwise arise from the concurrent taxation of that income by the State of residence. Where an item of income is ~~received by~~***paid to*** a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the ~~immediate~~ ***direct*** recipient of the income as a resident of the other Contracting State. The ~~immediate~~ ***direct*** recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence. *[the rest of the paragraph has been moved to new paragraph 10.1]*
>
> ***10.1*** It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a

conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies"[1] concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

1 Reproduced in Volume II of the full version of the OECD Model Tax Convention at page R(6)-1.

***10.2 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the interest is not the "beneficial owner" because that recipient's right to use and enjoy the interest is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 22 to 48 of the Commentary on Article 1. Where the recipient of interest does have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the "beneficial owner" of that interest. It should also be noted that Article 11 refers to the beneficial owner of interest as opposed to the owner of the debt-claim with respect to which the interest is paid, which may be different in some cases.***

***10.3 The fact that the recipient of an interest payment is considered to be the beneficial owner of that interest does not mean, however, that the limitation of tax provided for by paragraph 2 must automatically be granted. This limitation of tax should not be granted in cases of abuse of this provision (see also paragraph 8 above). The provisions of Article 29 and the principles put forward in the section on "Improper use of the Convention" in the Commentary on Article 1 will apply to prevent abuses, including treaty shopping situations where the recipient is the beneficial owner of interest. Whilst the concept of "beneficial owner" deals with some forms of tax avoidance (i.e. those involving the interposition of a recipient who is obliged to pass on the interest to someone else), it does not deal with other cases of abuses, such as certain forms of treaty shopping, that are addressed by these***

***provisions and principles and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.***

***10.4 The above explanations concerning the meaning of "beneficial owner" make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments[1] that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets. That different meaning of "beneficial owner" cannot be applied in the context of the Convention. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a) of Article 10, which refers to the situation where a company is the beneficial owner of a dividend. In the context of Articles 10 and 11, the term "beneficial owner" is intended to address difficulties arising from the use of the words "paid to" in relation to dividends and interest rather than difficulties related to the ownership of the shares or debt-claims on which dividends or interest are paid. For that reason, it would be inappropriate, in the context of these articles, to consider a meaning developed in order to refer to the individuals who exercise "ultimate effective control over a legal person or arrangement".[2]***

> ***1 See, for example, Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (OECD-FATF, Paris, 2012), which sets forth in detail the international anti-money laundering standard and which includes the following definition of beneficial owner (at page 110): "the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement." Similarly, the 2001 report of the OECD Steering Group on Corporate Governance, "Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes" (OECD, Paris, 2001), defines beneficial ownership as follows (at page 14):***
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> > ***In this Report, "beneficial ownership" refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary entities and/or individuals until the true owner who is a natural person is found. With respect to corporations, ownership is held by shareholders or members. In partnerships, interests are held by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder.***

***2. See the Financial Action Task Force's definition quoted in the previous note.***

**COMMENTARY ON ARTICLE 12**

5. ***In its 2014 update the OECD made it clear, following paragraph 2 of Article 3, that the concept of beneficial ownership was intended to be interpreted in the context it appears and not with reference to the domestic law of the Contracting States. The current Committee of Experts agreed with this application of paragraph 2 of Article 3 to the concept of beneficial ownership and in 20xx adopted the revised OECD Model Commentary.*** The Commentary on the ~~2010~~***2017*** OECD Model Convention contains the following relevant passages:

> 4. The requirement of beneficial ownership was introduced in paragraph 1 of Article 12 to clarify how the Article applies in relation to payments made to intermediaries. It makes plain that the State of source is not obliged to give up taxing rights over royalty income merely because that income was ~~immediately received by~~***paid direct to*** a resident of a State with which the State of source had concluded a convention. The term "beneficial owner" is ***therefore*** not used in a narrow technical sense ***(such as the meaning that it has under the trust law of many common law countries[1])***, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.
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> > ***[1] For example, where the trustees of a discretionary trust do not distribute royalties earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognised as a separate taxpayer) could constitute the beneficial owners of such income for the purposes of Article 12 even if they are not the beneficial owners under the relevant trust law.***
>
> 4.1 Relief or exemption in respect of an item of income is granted by the State of source to a resident of the other Contracting State to avoid in whole or in part the double taxation that would otherwise arise from the concurrent taxation of that income by the State of residence. Where an item of income is ~~received by~~***paid to*** a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the ~~immediate~~ ***direct*** recipient of the income as a resident of the other Contracting State. The ~~immediate~~ ***direct*** recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence. *[the rest of the paragraph has been moved to new paragraph 4.2]*

*4.2* It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies"[1] concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

[1] *Reproduced in Volume II of the full version of the OECD Model Tax Convention at page R(6)-1.*

***4.3 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the royalties is not the "beneficial owner" because that recipient's right to use and enjoy the royalties is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the royalties unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or as a party to financial transactions or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 22 to 48 of the Commentary on Article 1. Where the recipient of royalties does have the right to use and enjoy the royalties unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the "beneficial owner" of these royalties. It should also be noted that Article 12 refers to the beneficial owner of royalties as opposed to the owner of the right or property in respect of which the royalties are paid, which may be different in some cases.***

***4.4 The fact that the recipient of royalties is considered to be the beneficial owner of these royalties does not mean, however, that the provisions of paragraph 1 must automatically be applied. The benefit of these provisions should not be granted in cases of abuse (see also paragraph 7 below). The provisions of Article 29 and the principles put forward in the section on "Improper use of the Convention" in the Commentary on Article 1 will apply to prevent abuses, including treaty shopping situations where the recipient is the beneficial owner of royalties. Whilst the concept of "beneficial owner" deals with some forms of tax avoidance (i.e. those involving***

***the interposition of a recipient who is obliged to pass on the royalties to someone else), it does not deal with other cases of abuses, such as certain forms of treaty shopping, that are addressed by these provisions and principles and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.***

***4.5 The above explanations concerning the meaning of "beneficial owner" make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments[1] that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets. That different meaning of "beneficial owner" cannot be applied in the context of the Convention. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a) of Article 10, which refers to the situation where a company is the beneficial owner of a dividend. The term beneficial owner was intended to address difficulties arising from the use of the words "paid to", which are found in paragraph 1 of Articles 10 and 11 and were similarly used in paragraph 1 of Article 12 of the 1977 Model Double Taxation Convention, in relation to dividends, interest and royalties rather than difficulties related to the ownership of the shares, debt-claims, property or rights with respect these dividends, interest or royalties are paid. For that reason, it would be inappropriate, in the context of these articles, to consider a meaning developed in order to refer to the individuals who exercise "ultimate effective control over a legal person or arrangement".[2]***

> ***[1] See, for example, Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (OECD-FATF, Paris, 2012), which sets forth in detail the international anti-money laundering standard and which includes the following definition of beneficial owner (at page 110): "the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement." Similarly, the 2001 report of the OECD Steering Group on Corporate Governance, "Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes" (OECD, Paris, 2001), defines beneficial ownership as follows (at page 14):***
>
> > ***In this Report, "beneficial ownership" refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary entities and/or individuals until the true owner who is a natural person is found. With respect to corporations, ownership is held by shareholders or members. In partnerships, interests are held***

***by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder.***

[2] ***See the Financial Action Task Force's definition quoted in the previous note.***

## *INTERMEDIARIES IN THIRD STATES*

***Comment***

In 2014 the OECD amended the texts of Articles 10 and 11 to address concerns that a literal interpretation of the words "such dividends" and "such interest" in 10(2) and 11(2) respectively could lead to the conclusion that the income must be paid direct to a resident of a Contracting State. This is problematic where the direct recipient and the beneficial owner are residents of two different states.

At its April 2019 meeting, the Subcommittee on the Model Update discussed the OECD modifications in the context of the UN Model. While the Subcommittee agreed on the substance of the OECD modification it could not agree that amending the text of the articles is the best method of addressing the third state payee issue.

*Subcommittee discussion*

One member expressed some disagreement with the approach taken by the OECD to amend the texts of the relevant articles and commentaries and therefore did not consider that these changes should be made to the UN Model. The member's main concern was that changing the text would create an adverse inference issue for treaties not amended in line with any revised wording. For this reason, their view was that the appropriate course of action would be to further clarify the point in the commentaries.

Other members of the Subcommittee did not consider amending the commentaries to be a satisfactory solution. The reasons given by members included:

- As drafted, the relevant provisions cannot be interpreted by some states to allow the beneficial owner to obtain the treaty benefit in a scenario where the income is paid to an intermediary in a third state. The linkage of paragraphs 1 and 2 of these Articles through the use of the word "such" means the beneficial owner has to be in the same state as the payee despite what the commentary might say on the matter.
- The OECD and UN Model commentaries on Articles 10, 11 and 12 already clearly state that the limitation on source tax remains available when a third state intermediary is interposed between the payer and the beneficial owner.
- Some members considered that courts have shown little regard for commentaries when deciding treaty cases therefore amending the commentary cannot be relied on to fix deficiencies in the text of the treaty itself.

*Subcommittee proposals*

As a result of the discussion at the Subcommittee level, the Committee is asked to consider two options:

1. Amendment of paragraphs 2 of Articles 10, 11 and 12 and their relevant commentaries as presented in this paper.
2. A minority member proposal that the issue should be further clarified in the commentaries only.

***PROPOSED CHANGES TO ARTICLES OF THE UN MODEL CONVENTION***

**ARTICLE 10**

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

(a) ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividend);

(b) ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

**ARTICLE 11**

2. However, ~~such~~ interest ***arising in a Contracting State*** may also be taxed in ***that State*** ~~the Contracting State in which it arises and~~ according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed __ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

**ARTICLE 12**

2. However, ~~such~~ royalties ***arising in a Contracting State*** may also be taxed in ***that State*** ~~the Contracting State in which they arise and~~ according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

***PROPOSED CHANGES TO THE COMMENTARIES OF THE UN MODEL CONVENTION***

Paragraphs are 2010 OECD Commentary text updated to the 2017 OECD Model.

**COMMENTARY ON ARTICLE 10**

12.~~2~~**7** Subject to other conditions imposed by the Article ***and the other provisions of the Convention***, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State ***(the text of the Model was amended in 1995 and in 2014 to clarify this point, which has been the consistent position of all member countries)***.

**COMMENTARY ON ARTICLE 11**

11. Subject to other conditions imposed by the Article ***and the other provisions of the Convention***, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State (the text of the Model was amended in 1995 ***and in 2014*** to clarify this point, which has been the consistent position of all member countries). ~~States which wish to make this more explicit are free to do so during bilateral negotiations.~~

**COMMENTARY ON ARTICLE 12**

*4.~~2~~**6** Subject to other conditions imposed by the Article* ***and the other provisions of the Convention***, ~~the limitation of tax~~ ***exemption from taxation*** in the State of source remains available when an intermediary, such as an agent or nominee ***located in a Contracting State or in a third State***, is interposed between the beneficiary and the payer, in those cases where the beneficial owner is a resident of the other Contracting State (the text of the Model was amended in ~~1995~~ ***1997*** to clarify this point, which has been the consistent position of all member countries). ~~States which wish to make this more explicit are free to do so during bilateral negotiations.~~

***NB:*** The "exemption from taxation" modification in paragraph 4.6 of the Commentary on Article 12 is inconsistent with the UN Model. The UN Model does provide for source taxation of royalties and so the Committee may wish to consider retaining the "limitation of tax" wording in square brackets while omitting the phrase "exemption from taxation".