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**A: Residence for
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General report Subject 1

Residence for corporate income tax purposes

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Residence for corporate income tax purposes

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Summary and conclusions

Residence is one of the most fundamental legal concepts for taxation. This general report aims to provide a better understanding of the function, meaning and role performed by the concept in modern corporate income tax systems.

A comprehensive assessment of the branch reports reveals a complex normative landscape shaped by globalisation and digitalisation and evolving legal concepts under a mist of indeterminacy. Regarding domestic law, there is considerable diversity, with divergent jurisdictional approaches, encompassing the interplay of incorporation, governance and other criteria and with a clear trend of expanding the scope of the concept. At the income tax treaty level, while most treaties still adhere to place of effective management as a tie-breaker, there is a progressive shift to the mutual agreement procedure (hereinafter MAP), which should be regarded with concern. Such a mechanism, as it prevents taxpayers from anticipating the tax consequences of their (often genuine and needed) behaviour, is particularly worrisome, taking into account that residence is often a trigger for worldwide taxation.

The general report underscores the need for enhanced international cooperation and legislative reforms to address the challenges emphasised by globalisation and digitalisation, advocating for a nuanced balance between sovereignty and global tax fairness.

Part One: Introduction

1.1. General introduction

Residence is the cornerstone of any tax system. It was originally conceived as a proxy to delimit the personal scope of worldwide systems, which would be limited to those evidencing a strong personal nexus, link or allegiance with a jurisdiction. An allegiance so strong that it would justify the levy of income taxation, regardless of any other nexus.

Intuitively, residence of entities is often perceived as a “natural kind concept” (using Dworkin’s terminology), *i.e.* a description of something which has a physical or biological structure whose existence is not dependent on the invention, belief or decision of anyone.²

This would be the case for individuals but not for entities. Taking concepts seriously,

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² See R. Dworkin, *Justice in Robes*, p. 154 (OUP, 2006). Or a normative concept, in the terminology of Jori and Pintore. See M. Jori and A. Pintore, *Manuale di Teoria Generale del Diritto*, p. 5 (Giappichelli, 1995).

companies are not more than legal constructs whose existence depends on law.³ The same applies to their residence, which is nothing more than (using Dworkin's terminology) a "critical concept", merely identifying conditions that trigger a certain legal consequence.⁴ The *definiens* does not describe the *definiendum* but rather creates it.⁵

There is no single concept of residence but as many concepts as jurisdictions consider appropriate. Therefore, a company may be legitimately considered as a resident in more than one jurisdiction or even in more than one place within the same jurisdiction.

In the current scenario, the critical concept of residence is characterised by a strong indeterminacy, leading to significant legal uncertainty regarding the concept, its internal criteria and the elements that allow their characterisation

The aim of this general report is to assess the meaning, function and role of the concept of residence for corporate income tax purposes. It also aims to understand whether the concept remains fit for purpose or whether it should be reformed, complemented or even replaced by other concepts.

1.2. Previous coverage of the topic at IFA Congresses

The topic has been partly addressed at the following IFA Congresses:

- at the 2005 Congress in Buenos Aires ("Source and residence: a new reconfiguration of their principles", general reporters Adolfo Atchabahian and Angel Schindel);
- at the 1987 Congress in Brussels ("The fiscal residence of companies", general reporter Jean-Marc Rivier).⁶

However, the intervening period has witnessed profound transformations driven by globalisation and digitalisation, rendering prior analysis partially obsolete. This evolution requires a contemporary re-examination, a decade and a half following the last substantive consideration of this topic.

1.3. Scope

As mentioned, this general report aims to assess the meaning, function and role of the concept of residence in corporate income tax. Such a topic is delimited by the following

³ According to Kelsen a corporation is not more than "a point of imputation" of rights and obligations that, due to its existence, are no longer imputed to the individuals who created it. This understanding was then perpetuated in several judicial decisions. One of the most famous ones is Daily Mail, whose para. 19 reads "unlike natural persons, companies are creatures of law" – Judgment of the Court of Justice of the European Union of 27.09.1988, *The Queen / Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* (81/87, ECR 1988 p. 5483) ECLI:EU:C:1988:456.

⁴ See Dworkin, *supra* n. 2, p. 151.

⁵ See I. Copi, M. Cohen and V. Rodych, *Introduction to Logic*, p. 88 (Routledge, 2020).

⁶ It was also partially addressed at the: i) 2014 Congress in Mumbai ("Qualification of taxable entities and treaty protection", general reporters Michael Lang and Claus Staringer); ii) 2007 Congress in Kyoto ("Conflicts in the attribution of income to a person", general reporter Joanna C. Wheeler); iii) 1995 Congress in Cannes ("International income tax problems of partnerships", general reporter Jean-Pierre Le Gall), and at the; iv) 1989 Congress in Rio de Janeiro ("The disregard of a legal entity for tax purposes", general reporter Condorcet Pereira de Rezende).

three vectors (positive delimitation): i) residence; ii) for corporate income tax purposes, understood as a personal nexus with a jurisdiction; iii) of legal entities, understood as “other-than-individuals” recognised as taxpayers. From a functional perspective, the topic is also delimited in *ratione personae* (subjective scope) and *ratione materiae* (objective scope), as described in the following paragraphs.

From a subjective perspective, it covers only other-than-individuals insofar as they are recognised as taxpayers, without enquiring about the reasons why a specific jurisdiction reaches such qualification.⁷

From an objective perspective, it only considers corporate income taxation, understood as a direct tax levied on profits, typically computed by subtracting permissible deductions from gross revenues and potentially applying allowable tax credits.⁸

Issues related to the interpretation and application of treaty provisions, particularly those that follow the models, were excluded, given the abundance of scholarly literature on such topics.⁹ The same applies to issues related to the interpretation and application of domestic law provisions, which are left to the branch reports. This allows us to focus on the comparative law exercise, identifying the advantages and disadvantages of each normative solution and putting forward options for tax policy reform.

Notwithstanding the connection with various other subject matters, this report maintains a focused approach, thereby excluding certain peripheral domains (negative delimitation). For the sake of clarity, the analysis does not extend to matters concerning the transfer of residence (and associated exit taxation), permanent establishments (and/or their location), the treatment of transparent entities, triangular situations, or issues of avoidance and evasion. Furthermore, given the focus on corporate income tax, the function or impact of the concept of residence in the context of other taxes or levies was deliberately omitted. Finally, this report does not consider any issues raised by primary or secondary EU law. Such issues are addressed by a specific “EU report” published with this report.

The general report considers the normative framework as in force on the 31st of December 2024.¹⁰ Historical references are introduced insofar as needed to better understand the existing norms.

1.4. Nature and methodology

A general report is a specific type of academic literature and should be clearly distinguishable from a monograph, book chapter, scientific essay, or article. A report must provide a

⁷ The general report will normally refer to companies and not to “other than individuals” or “legal entities”. This does not mean that the scope is reduced to companies: insofar as other legal entities are recognised as taxpayers, the regime developed for companies also extends to those other entities, with minor deviations (which are also addressed in this report).

⁸ This delimitation does not exclude the study’s relevance for other taxes or levies. However, narrowing the concept to corporate income taxation was deemed as essential to enable a thorough and rigorous assessment.

⁹ In what concerns the main commentaries, see R. Ismer and E. Reimer, *Article 4: Resident*, in E. Reimer and A. Rust (eds.), *Klaus Vogel on Double Taxation Conventions*, 5th ed. (2022), and B. Obuoforibo, *Article 4: Resident*, *Global Tax Treaty Commentaries* (IBFD, 2025). A comprehensive overview of treaty-related issues can also be found in G. Maisto et al., *Dual Residence of Companies under Tax Treaties*, 1 Intl. Tax Stud. 1, p. 4 et seq. (2018).

¹⁰ Given the different deadline for delivery, branch reporters were asked to consider the normative framework on 1.01.2024.

comprehensive overview of all submitted reports, capturing the essence and significance of the information provided by the reporters. As such, it should inform and educate on the main topic and provide helpful guidance to the scientific discussions at the congress.

Branch reporters were drafted on the basis of a detailed questionnaire. In answering the questionnaire, the reporters were instructed to focus on their own jurisdictions and consider all possible normative sources, including law, case law and administrative guidance. The general reporter is profoundly grateful to the branch reporters for their efforts and the quality of their work.

The analytical framework of contribution is necessarily constrained by several methodological limitations. The following paragraphs address those limitations, which pertain to geographical, extension, linguistic, and quality aspects.

From a geographical perspective, the general report is limited to the jurisdictions covered by the branch reports. Even if some additional research was based on scholarly literature and legal databases, the general report remains faithful to its nature and to such scope.

Due to the limitation of characters, the report made a careful choice of the topics to be addressed, consistent with the aforementioned objectives and with the nature of a general report. Also, for this reason, reference to articles of treaty provisions has been intentionally omitted, provided that their identification within the relevant treaty is clearly discernible to the reader.

Language discrepancies also impacted the research. *Traduttore, traditore*, and not rarely, certain national notions were translated into English concepts and expressions that were arguably not the most adequate. Secondly, given the autonomous development of legal concepts, one often faces different concepts and expressions used for the same notion and vice versa. These discrepancies created additional analytical hurdles.

The accuracy of the general report relies on the accuracy of the data provided by the branch reporters. Such data is expected to be quite accurate since: i) branch reporters are selected based on their competence; ii) branches often implement peer-review mechanisms, such as discussing the draft report in a scientific seminar or having other experts revise the report. Branch reports are also the main source of references to statutory provisions, administrative guidance, and case law. Notwithstanding, and insofar as possible, the report makes a direct reference to the primary source without specifically citing the branch report.

Different methods were considered in the research that preceded the drafting of the general report. Considering its nature, the primary method was empirical legal research, understood as the systematic and comprehensive unearthing, analysis and interpretation of the data gathered in the branch reports, allowing the understanding of the real-world impact and application of the law. In addition to such method, the report also relied on: i) legal research of primary normative sources, as provided by the branch reporters, ii) doctrinal research; iii) historical research, as the historical events are crucial to the understanding of the current situation, and; iv) multidisciplinary research, as the concept of residence as used in tax law, builds on a concept originally developed in the framework of private and commercial law.

Treaties are cited considering their signature date and in chronological order. The version taken into account is the version in force on 31 December 2024, including the changes introduced by the Multilateral Instrument¹¹ insofar as already in force.

¹¹ OECD, Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting (OECD Publishing, 2017).

Although the report encompasses all non-natural persons, the terms “entity”, “legal entities”, and “companies” are employed interchangeably throughout the text. In the absence of specific contextual indicators to the contrary, their terminological variations are to be construed as functionally equivalent.

This general report is structured into seven distinct parts. Following this introductory overview, the second section will undertake a rigorous examination of the concept of tax residence, tracing its historical emergence and analysing its functional roles within contemporary tax systems. The third section will be dedicated to a critical appraisal of the criteria employed to determine residency, encompassing both domestic and treaty-based frameworks. Subsequently, the fourth section will address the complexities inherent in resolving dual residency conflicts. The fifth section will focus on the evidentiary standards and procedures relevant to establishing residency. The sixth section will provide an in-depth assessment of selected salient issues pertaining to tax residence. Finally, the report will conclude with customary concluding remarks.

Part Two: The concept of tax residence

2.1. Introduction

As mentioned, and following Dworkin’s terminology, corporate tax residence is a criterial concept.¹² This part aims to understand the emergence of the concept and the functions it currently performs in corporate income taxation.

2.2. Emergence of the concept in tax law

The conceptual framework of tax law is largely derivative, drawing upon concepts and expressions carved by other areas of law. Deviations are introduced only when compelling tax reasons so require.

This is precisely the case of residence. Confronted with the need to define the personal scope, rather than creating a new concept, emerging (income) tax systems simply borrowed criteria from private law and, more specifically, company law.¹³

This is partly explained by the inextricable link between the recognition of companies

¹² See *supra* n. 2.

¹³ In company law, the concept used to assert prescriptive jurisdiction varies, and may comprise nationality, domicile and residence. P. Behrens, *Chapter 1 General Principles on Residence of Companies: A Comparative Analysis of Connecting Factors Used for the Determination of the Proper Law of Companies* in G. Maisto (ed.) *Residence of Companies under Tax Treaties and EC Law* (IBFD 2009). Similar terminological diversity can be observed in tax law. However, irrespective of the terminology used, the underlying criteria of company were those that initially permeated the tax system. See also L. Brosens, *Het Fiscaal Inwonerschap van vennootschappen in een gemondialiseerde economie. Een analyse in the context van de Belgische inkomstenbelastingen en dubbelbelastingverdragen*, pp. 235, 255-263 and 273-274 (Larcier, 2018). Even if following different routes, this phenomenon is visible in both civil and common law jurisdictions, as further detailed *infra* in sec. 3.2.2.2.2 devoted to central management and control.

as autonomous legal persons and the emergence of modern tax systems.¹⁴ Historically, corporate taxation emerges as of the moment that private law recognises the existence of a new person, autonomous from the individuals that created or governed it, and that such person is capable of earning income. The underlying criteria used for recognising jurisdiction over a company were also to recognise taxing rights over the income of such company.

Under company and private international law, there are essentially two models for the exercise of prescriptive jurisdiction over a company: the *siège statutaire* (incorporation, *Satzungstheorie* or legal seat) and the *siège réel* (*Sitztheorie* or real seat) models. Such models are not more than an expression of the public international law understanding that a State has prescriptive jurisdiction over subjects and objects in its territory and over its nationals, regardless of where they are located.¹⁵

Under the first (legal seat), the law applicable to a legal entity is the one where the entity was created as such (the law of its nationality). The rationale is easy to follow: if legal entities do not exist outside of a legal system, then the legal system giving them existence must have the capacity to exercise jurisdiction and regulate them. As a rule, incorporation can occur in a jurisdiction, even if: i) all shareholders are non-residents; ii) place of management is in a different jurisdiction; iii) the place of (the main) operational activity is in a different jurisdiction. This model is more frequently followed in common law jurisdictions. It allows companies to keep their personality even if moving abroad.

There are essentially four modalities of regulating the place of incorporation or, in other words, four connecting factors that would trigger jurisdiction based on incorporation: i) place of incorporation; ii) place of registration; iii) place of the registered office, and iv) place of the registered statutory seat. A closer inspection of these criteria allows us to conclude that they are essentially variations of the same connecting factor since incorporation normally requires registration, the indication of a registered office and/or of the statutory seat, often in the same jurisdiction. Incorporation is triggered by formal criteria, which are easily and objectively assessable. As we will later observe, these modalities found their way to contemporary corporate tax systems.

Under the “real seat” model, the law applicable to a legal entity is the one of the place where the governance or activities of the company are regardless of the legal system under which the company was created. The underlying rationale for this model is also easy to understand: the company should be regulated by the law of the jurisdiction, which is most closely related to the real existence and activities of the legal entity (the real place where it exists) rather than by the formal attachment to a jurisdiction at the moment of its creation. The model is more frequently present in civil law systems of continental Europe, spreading

¹⁴ In the sense of separate and apart from their constituent natural persons. For common law systems, the landmark decision leading such recognition was *Salomon v A Salomon & Co Ltd* (1897) AC 22. In civil law jurisdictions, the recognition took different routes and was normally justified on the principles of personhood and the ability of a group to act as a single entity. Progressively, the overwhelming majority of tax systems recognised legal entities as distinct legal persons, capable of limited liability, perpetual succession and capacity to sue and to be sued.

¹⁵ See B. Oxman, *Jurisdiction of States*, in R. Wolfrum, *Max Planck Encyclopaedia of Public International Law*, (OUP: Max Planck Institute for Comparative Public Law and International Law, 2007) *apud* P. Pistone, S. van der Vlugt & M. Serafimova, *Public International Law and Tax Law: A Fair and Equitable Nexus in International Taxation*, 16 *World Tax Journal* 4 (2024), sec. 4.

to several jurisdictions that were once under their influence. It does not allow companies to keep their legal personality under domestic law when their “real seat” is abroad.

There are also several modalities of determining the real seat. Such criteria can be grouped into two main categories: i) the governance criteria, attributing relevance to the place where decision-making takes place; ii) the business activity criteria, which look at the location of the operational activities of a company. The criteria part of these two groups requires an analysis of all facts and circumstances, requiring a subjective assessment of elements related to the governance or activities.

The real seat model complements the incorporation model. It stresses the need to also look at the place of the governance or activities, as such connecting factors may express a more genuine connection with the entity. This is particularly the case for certain normative features regarding the protection of the interests of third parties.

These models provided the immediate normative background for the concept of residence, originally carved as a personal nexus with a jurisdiction. Incorporation (reflecting nationality) expresses the political allegiance with the jurisdiction. Governance (reflecting real seat) expresses economic allegiance¹⁶ and the place where the company benefits from the public goods provided by the State.¹⁷

However, from such initial realm, the concept of residence has been called to perform several other functions, which go way beyond ascertaining personal nexus. Accordingly, in addition to its primary role, residence has been assigned new functions. Such expansion leads to added hermeneutic and heuristic difficulties, leading to a continuous re-shaping of the concept, taking into account the specific contexts in which it is applied and the respective underlying interests. And that marked the evolution of the concept over the forthcoming decades until the present moment. Therefore, and even before addressing the criteria leading to residence, it is important to briefly discuss the functions performed by the concept in modern-day corporate income tax systems.

¹⁶ Already considered by the report prepared by the “Four Economists” for personal taxation – League of Nations Economic and Financial Commission, *Report on Double Taxation Submitted by the Committee of Technical Experts on Double Taxation and Tax Evasion*, C.216.M.85.1927.II, (5.4.1923).

¹⁷ This is often described as the benefit principle. In the expressive words of Weber-Fas, already in 1968 “Because taxation is the process by which a nation transfers economic resources from the private to the public sector, economic realities should be considered first when one defines the proper connection between a State and a corporation. The contribution to a government’s expenses should be imposed upon persons who are more than formally tied to its national economic and public finance. Therefore, it seems rational and logical to grant the personal jurisdiction to tax a corporation to that state from which the corporation derives its real economic vitality, not just its legal existence.” Accordingly, “the rule of economic allegiance is in principle superior to the legal-political approach because the latter would be inconsistent with the overall tax policy objectives of a country” – see R. Weber-Fas, *Corporate Residence Rules for International Tax Jurisdiction: A Study of American and German Law*, Harvard Journal on Legislation, Vol. 5 (1968), pp. 226 and 227. This is also recognised in case law. For instance, in Egyptian Land, one can read “The operation of the Income Tax Acts is subject to this territorial limit, that either the person to be taxed (...) or the property from which the taxable income is derived must be situated in the United Kingdom; the underlying principle being that the liability is dependent on the benefit derived by the taxpayer from the laws of this country in respect of his person or property” – See *Egyptian Delta Land and Investment Co Ltd v Todd (Inspector of Taxes)* [1929] AC 1; (1928) 14 TC 119; [1928] UKHL, p. 4.

2.3. Functions performed in corporate income tax systems

Residence performs an evolving number of roles in contemporary corporate tax systems, requiring its assessment at several levels.

In the domestic dimension, residence is crucial both at the substantive and adjective levels.

First and foremost, at the substantive level, it expresses a personal nexus or a genuine link between an entity and a territory, allowing prescriptive jurisdiction or the prescriptive levy of corporate income taxation on a person, regardless of where its business activities are carried on or where its income originates.¹⁸ Residence justifies but does not require worldwide taxation. In fact, several jurisdictions levy corporate income taxes on a territorial basis and, even in the context of such systems, residence is used to module the extension of the subjection to substantive.¹⁹

Second, still at the substantive level, in both worldwide and territorial systems, residence is used as a source concept, as several items of income have their origin in the residency of the payor.²⁰

Third, on the procedural level, the personal nexus captured by residence justifies requiring the highest degree of cooperation, in what concerns not only its own tax-relevant data but also that of third parties and even requesting it to act as a collection agent *in lieu* of the public entity (becoming a withholding agent).²¹ It also justifies mandatory disclosure of worldwide (or non-strictly territorial) data. Even in territorial jurisdictions, residence is used to module the extension of procedural tax obligations.²²

Residence is also crucial for international tax agreements. First, for income tax treaties, it is used to regulate entitlement, allocation and relief. Secondly, in the context of mutual assistance treaties,²³ it determines the scope of those subject to their obligations and allows for the identification of the authority competent for the administration of the rules.

Moreover, in the framework of regional integration, the concept assumes additional functions. For instance, in the European Union, it is decisive for the application of primary and secondary EU law. It delineates the personal scope of the treaties, and directives circumscribe their scope to EU residence entities that do not lose such residence status

¹⁸ The scholarly literature contains several dogmatic constructions providing a normative background to the exercise of such taxing powers, including the benefit principle.

¹⁹ This is the case of Bolivia and Panama, which reduce by 50% the taxable base of some payments to non-residents ("foreign beneficiaries") – see Bolivia, sec. 4.2.3 and Panama, sec. 3.1. Uruguay has a separate code for non-residents – see Uruguay 2.1.1. See also O. Marian, *The Function of Corporate Tax-Residence in Territorial Systems*, 18 *Chap. L. Rev.* 157 (2014).

²⁰ In some cases, considering the residence of the payor and, in others, considering the residence of those exercising the relevant economic activity. For a recent comprehensive review, see J. Hattingh and P. Hongler, *General report*, in J. Hattingh and P. Hongler (eds), *supra* n. 7.

²¹ For instance, the employer's withholding obligation regarding salary, wages and similar payments. Unresolved instances of multiple residence may trigger dual liability not only at the level of the dual resident entity (which may be obliged to act as a withholding agent in more than one jurisdiction) but also of the recipient of income paid by such dual residents since both jurisdictions of residence may (and likely will) consider themselves as having source taxing rights over the income.

²² In Guatemala, no withholding tax is levied on income paid to residents.

²³ See *infra* sec. 3.3.3 of this general report.

under an applicable tax treaty.²⁴

As noted *infra*, the development of the concept is inextricably linked with the function performed. Part three is devoted to the assessment of residence, taking into account the different functions and levels in which residence needs to be recognised and attributed.

Part Three: Recognising residence

3.1. Introduction

Corporate tax residence, understood as a criterial or normative concept,²⁵ is not aimed at describing a preexisting reality but rather to set the conditions that trigger a certain legal consequence.

Therefore, a fundamental inquiry arises concerning the extent of a State's discretion in the delineation of such nexus. The boundaries of the exercise of jurisdiction (in its subdimension of prescriptive jurisdiction), while subject to the constraints of public international law, are quite limited. Drawing upon established jurisprudence, notably *Lotus*, absent an explicit prohibition under international law, States enjoy a wide latitude in the exercise of their jurisdiction.²⁶ Nevertheless, as articulated in *Nottebohm*, such exercise requires a logical connection between the State and the subject of its jurisdiction, thereby demanding a substantive connection with the jurisdiction.²⁷ The precise extent of such a requirement remains vague.²⁸ This wide room to exercise jurisdiction,²⁹ the diversity of legal

²⁴ See, for instance, art. 2(2)(ii) of Council Directive 2011/96/EU of 30.11.2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), OJ L 345, 29.12.2011, pp. 8–16, art. 3(a)(ii) of Council Directive 2009/133/EC of 19.10.2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, 25.11.2009, pp. 34–46 and art. 3(b) of Council Directive 2009/133/EC of 19.10.2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, 25.11.2009, pp. 34–46. On the EU dimension, see the EU topical report, published together with this general report.

²⁵ See *supra* n. 2.

²⁶ See '*Lotus*', *France v Turkey*, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), (1935) 2 Hudson, World Ct Rep 20, 7.09.1927, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ].

²⁷ See *Nottebohm, Liechtenstein v Guatemala*, Preliminary Objection (Second phase), Judgment, [1955] ICJ Rep 4, ICGJ 185 (ICJ 1955), 6.04.1955, International Court of Justice [ICJ].

²⁸ See R. Weber-Fas, *Corporate Residence Rules...*, *supra* n. 17, pp. 185–187 (and scholarly literature cited), R. Martha, *Jurisdiction to Tax in International Law: Theory and Practice of Legislative Fiscal Jurisdiction*, (Kluwer Law International 1989), C. Ryngaert, *Nexus and International Tax Jurisdiction*, in H. Johann and P. Hongler (eds), *Cahiers de Droit Fiscal International*, vol. 108, IFA, 2024 and P. Pistone, S. van der Vlugt & M. Serafimova, *supra* n. 15.

²⁹ Most literature refers to a "genuine connection". However, the adjective "genuine" appears to be strongly linked with the circumstances of this case, and should not be considered a general requirement for the exercise of prescriptive jurisdiction. Already in 1962 Norr acknowledged that "within its own legal and fiscal framework a country is free to adopt whatever rules of tax jurisdiction it chooses. This is true no matter how broad may be the reach of the resulting tax net" – see M. Norr, *Jurisdiction to Tax and International Income*, Tax Lax Review 7 (1961), p. 431.

cultures and the absence of international coordination is likely the best explanation for the great divergence in the understanding of residence.

The exercise of prescriptive jurisdiction is not always precise. When devoid of the necessary determinability, such exercise creates undue burdens for all normative actors and risks infringing the constitutionally prescribed Rule of Law / *Rechtsstaatsprinzip*, in its dimension of legality, subdimension of normative determinability. This deficiency is pervasive, affecting, even if at different degrees, all contexts in which the concept is used.

The following sections address the assessment or attribution of residence at the different levels. Section 3.2 addresses the definition of residence at the domestic level, whereas section 3.3 addresses the adjustments that take place at the level of international tax agreements. As mentioned, the EU law dimension remains outside of this general report, being addressed in the accompanying EU topical report.

3.2. Residence at the domestic level

3.2.1. Introduction

3.2.1.1. Defining personal nexus with a jurisdiction

Several concepts are used to delineate the personal nexus with a jurisdiction. While residence is the predominant term, domicile or nationality³⁰ are also employed. This chapter addresses all these alternatives for defining the personal nexus, treating them under the overarching concept of residence.

While the concept of residence is derivative, originating from other law areas, it is generally regarded as an autonomous tax concept.³¹ Interestingly, the recognition of such autonomy postdates the inception of the concept in modern income tax codes.³²

As an element of tax incidence (specifically, its personal scope), residence requires a statutory prescription.³³ However, in some cases, the statutory prescription is limited to the mere inclusion of the concept of residence³⁴ in the income tax statute, devoid of any substantive characterisation. In most cases, statutory law defines the criteria leading to residence, also without providing substantive characterisation. However, as a normative concept, the meaning of residence is what the law determines so, leading to the already noted indeterminacy.

Case law and administrative guidance often provide further guidance on the

³⁰ See Sweden, sec. 2.1.1

³¹ There are exceptions in which the income tax acts rely on residence or domicile as defined by civil/commercial law. See Chile, sec. 2.1.1

³² This is often the case in territorial systems such as Panama (introducing the concept in 2010) and Guatemala (introducing it in 2012) – see Guatemala and Panama, sec. 2.1.1. However, it can also be observed in worldwide tax systems. Norway introduced a statutory definition only in 2019 and Poland in 2022 – see Norway and Poland, sec. 2.1.1. In many jurisdictions, the successive statutory revisions of the concept are often justified with the need of aligning the domestic system with the international practice. This was explicitly the case in the 2008 tax reform in China – see China, sec. 2.1.

³³ Even in common law jurisdictions, the “central management and control” test is developed for the interpretation of the concept of “residence”, as used in sec. 2 of the Income Tax Act 1853. See para. 17 of *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455, of the United Kingdom House of Lords.

³⁴ Or a functional alternative, such as domicile.

interpretation and application of the concept.³⁵ However, the reliability of such determinations is contingent on the internal system of sources of law.³⁶

As a rule, the autonomous tax concept is valid for all tax purposes. However, this is not always the case, and there are jurisdictions using different concepts for tax purposes or even different concepts or tests within corporate income taxation.³⁷ Within certain civil law jurisdictions, the determination of residence, rather than being specified in the corporate income tax legislation, is introduced to the general tax code, thereby promoting a uniform application of the concept across the diverse taxes to which it applies.³⁸

France (and French-influenced systems to a certain extent)³⁹ is worth a special reference. Residence, as such, is not used to define tax liability, with taxes being levied on “enterprise[s] operating in France”.⁴⁰ This determination is accompanied by a list of entities incorporated under French law to which the tax applies.⁴¹ The concept of seat is not extraneous to the system, but it is not used to define the personal scope or incidence.

The statutory law prescribed criteria for determining tax residence usually align with company law models: first, incorporation (following legal seat theory), and second, governance (following real seat but often confined to decision-making).⁴²

These criteria may be applied singularly or conjunctively, i.e., they can be used in isolation or may be combined. This report will proceed to examine the specific criteria for establishing residence, beginning with systems that rely on a single criterion and then exploring those that employ multiple criteria, with a focus on the interplay leading to these composite determinations. Afterwards, the report will provide an assessment of each of the criteria used at the domestic and conventional levels.

3.2.1.2. *Relying on a single criterion*

There are still several systems that define residence on the basis of a single criterion (i.e. solely on the basis of incorporation or on the basis of governance).

A reduced number of jurisdictions opt for incorporation. This is the case in several

³⁵ See sec. 2.1.1. of the branch reports.

³⁶ In what concerns judicial decisions, whereas common law systems often attribute high value to the precedent, under the *stare decisis* doctrine, civil law countries regard them as persuasive but not binding sources of law. See J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1969).

³⁷ Hong Kong has different criteria for establishing residence, depending on which tax feature is being regulated. Whereas the default criterion is “normally managed and controlled”, tax incentives are only granted to those that have “central management and control” in the jurisdiction. See Hong Kong, sec. 2.1.1.

³⁸ For instance, Portugal refers to corporate “domicile” in art. 18 of the General Tax Act and (without referring to domicile or residence, but repeating the same criteria) to the conditions triggering worldwide liability in arts. 2 and 3 of the Corporate Income Tax Code.

³⁹ See Morocco, sec. 2.1.

⁴⁰ In Morocco, an enterprise will be liable if: i) profits are derived from assets, activities and profitable ventures in the territory; ii) insofar as Morocco is granted taxing rights under an applicable tax treaty. See Morocco, sec. 2.1.

⁴¹ Thus, through that list, incorporation ends up playing some role, despite being more limited.

⁴² See P Behrens, *Chapter 1: General Principles on Residence of Companies: A Comparative Analysis of connecting Factors Used for the Determination of the Proper Law of Companies*, in G. Maisto (ed.), *Residence of Companies under Tax Treaties and EC Law* (IBFD 2009).

American,⁴³ Asian⁴⁴ and African⁴⁵ jurisdictions. This option can also be seen in a minority of European jurisdictions.⁴⁶

The incorporation-only approach has several advantages, namely: i) low compliance and administrative costs; ii) easy application and verification on a purely objective basis; iii) allows election.⁴⁷ However, it is also (highly) criticised for allowing personal nexus to be determined on the basis of a pure formality, being vulnerable to corporate inversions and circumvention.

To prevent tax incidence circumvention, jurisdictions adopt different methodologies such as: i) complementing incorporation with anti-abuse provisions; ii) focusing on source provisions, namely considering that the activity in the jurisdiction creates a Permanent Establishment (hereinafter PE), which is taxed for all business income attributable to it.

Other systems opt for the real seat approach, depriving formalistic considerations of any value when it comes to the determination of the personal nexus.⁴⁸ In 1999, Mexico took a conscious decision to move to a governance-only criterion.⁴⁹ However, even in the framework of such system, incorporation continues to be decisive and still plays a role in determining the residency of certain partnership arrangements, treated as opaque.⁵⁰ The same happens in Belgium. Despite relying solely on the principal establishment, there is a rebuttable presumption of a principal establishment in the place of the statutory seat.⁵¹

Many systems that appear to follow a governance-only approach *de facto* rely on multiple criteria (namely by acknowledging relevance to the incorporation in the assessment of the governance of the entity).⁵² The governance-only approach is not immune to criticism due to the inherent complexities in its determination and the potential for asymmetrical residency elections, wherein only entities of sufficient scale to deploy personnel for test fulfilment would benefit.⁵³

Defining residence on the basis of a single criterion has the advantage of reducing the instances of multiple residence. However, on the other hand, such approach may make the systems more vulnerable to incidence avoidance strategies.

⁴³ The United States of America is likely the most noticeable example of an “incorporation-only” jurisdiction. This is also the case in Brazil where, despite the reference to cumulative criterion, both of them are formal in nature (place of headquarters, as the first and the second being place where the direction and administration is or the registered seat). See also Chile, Panama and Uruguay, sec. 2.1.1.

⁴⁴ See Japan, sec. 2.1.1.

⁴⁵ See Nigeria, sec. 2.1.1.

⁴⁶ See Estonia, and Sweden, sec. 2.1.1 (although in Sweden, the law includes a reference to “other circumstances”, for non-incorporated entities, which may also trigger residence). This will be addressed further in sec. 3.2.3.

⁴⁷ See Japan, sec. 2.1.1. See also D. Shaviro, *The Rising Tax-Electivity of U.S. Tax Residents*, Tax Law Review 64 (2011), pp. 377-418.

⁴⁸ See Mexico, sec. 2.1.1.

⁴⁹ See Mexico, sec. 2.1.1. The criteria are “*sede de dirección efectiva*” and “*administración principal del negocio*”.

⁵⁰ See Mexico, sec. 2.1.2.

⁵¹ See Belgium, sec. 2.1.1.

⁵² For instance, in the Netherlands, in addition to the casuistic exams of all facts and circumstances (which adjudicators narrow to governance), there are presumptions of residence in the place of incorporation. See the Netherlands, sec. 2.1.1. *in fine*.

⁵³ In the expressive words of David Tillinghast, “alternative tests, such as those based on the place of central management and control or place of effective management, carry with them undesirable factual issues, which will undoubtedly be resolved by most major multinationals in their favour, while presenting issues of fairness towards smaller companies or those less flexible in the deployment of their personnel”. See D. R. Tillinghast, *A matter of definition: “Foreign” and “Domestic” Taxpayers*, 2 International Tax and Business Lawyer 239 (1984), p. 272.

3.2.1.3. *Relying on multiple criteria*

3.2.1.3.1. *Introduction*

Contemporary tax systems typically rely on two criteria which are applied disjunctively: incorporation and governance. The presence of either is sufficient to establish residency.⁵⁴

Within the surveyed jurisdictions, this approach is currently followed by Australia, Austria, Canada, the People's Republic of China (hereinafter China), Colombia, Denmark, Finland, Germany, Guatemala, Hong Kong, Hungary, India, Indonesia, Ireland, Italy, Israel, Liechtenstein, Republic of Korea, Luxembourg, Malta, Mauritius, New Zealand, Norway, Poland, Portugal, Serbia, Slovak Republic, South Africa, Spain, Switzerland, and the United Kingdom.⁵⁵ Conjunctive tests may entail more than two criteria. Some jurisdictions adopt triple (Australia)⁵⁶ and even quadruple (New Zealand) alternative tests.⁵⁷

Notwithstanding the absence of an explicit hierarchy, there is a clearly discernible order of priority in the assessment (from a practical perspective). Generally, the place of incorporation serves as the primary criterion, given its relative ease of verification and broad applicability to the majority of entities. Governance is considered secondarily, principally with respect to entities neither incorporated nor (re)domiciled in the jurisdiction. This approach prioritises efficiency and streamlines the process.

The two subsequent subsections will analyse the legal and historical developments that led to the adoption of a conjunctive approach, given the importance of the historical evolution of each criterion. The analysis will begin with those jurisdictions that initially established residence exclusively based on the incorporation criterion and will then proceed to those that relied solely on the governance criterion. Subsequently, this report will focus on an evaluation of the intrinsic elements of each criterion, drawing upon information provided in the branch reports.

3.2.1.3.2. *With incorporation as a starting point*

Most countries that followed an incorporation-only approach have, at a certain point, included governance-based criteria in their residency rules.

Firstly, this took place through interpretation. Adjudicators, aware of the limitations associated with a formal criterion, started to include factual elements extraneous to the concept of incorporation and closer to governance.⁵⁸

Influenced by those developments or regardless of them, statutory provisions have

⁵⁴ Panama follows a different approach and requires both requirements to be cumulatively met to trigger residency. In the context of a territorial jurisdiction, this option was introduced with the aim of restricting access to its network of tax treaties, narrowing it down to companies with an intense personal nexus with a different jurisdiction. See Panama, sec. 2.1.1.

⁵⁵ See sec 2.1.1 of the respective branch reports.

⁵⁶ The three alternative tests (with the last two having cumulative conditions) are: i) incorporation; ii) central management and control and carrying on a business in the territory; iii) voting power controlled by resident shareholders and carrying on a business in the territory. See Australia, sec. 2.1.1.

⁵⁷ The four alternative tests are: i) incorporation; ii) head office; iii) centre of management, or; iv) the company directors, in their capacity as directors, exercise control of the company in the territory, even if the directors' decision-making also occurs abroad. See New Zealand, sec. 2.1.1.

⁵⁸ The best example is Switzerland where, already in 1924, the Supreme Court took a "liberal approach" to the interpretation of "seat". See the decision of the Swiss Supreme Court of 17.05.1924, BGE 50 I 100.

started progressively to include governance criteria. This phenomenon can be seen in several civil law jurisdictions, such as Serbia (1991), Denmark and Switzerland (1995), the Republic of Korea (2006), China (2008), and Finland (2020).⁵⁹ Chinese Taipei and Nigeria have plans to add governance criteria in the near future.⁶⁰

This trend can also be seen in common law jurisdictions or countries formerly under the influence of the UK. This is, for instance, the case of New Zealand in 1988.⁶¹

This addition was also likely aimed at preventing instances of avoidance, geared by the formalism of the incorporation criteria.⁶²

3.2.1.3.3. *With governance as a starting point*

In some common law jurisdictions, the adoption of a governance-only criterion (“central management and control”) allowed for the emergence of dual non-resident entities, entities that were able to avoid triggering residence rules in any jurisdiction.⁶³ The capacity of easy circumvention of the criterion was likely the reason why most of them have added incorporation as a disjunctive criterion of residence.⁶⁴ This was the case in Canada (1965), the UK (1988), Malta (1995) and Ireland (1999).

The same trend can be observed in civil law countries. For instance, in 1969, the Netherlands introduced a fiction of residence for entities incorporated in its territory.⁶⁵ In 2009, Belgium adopted a presumption of the existence of a “principal establishment” wherever the statutory seat is.⁶⁶ In the latter case, the rationale was precisely to prevent avoidance through the creation of stateless companies.⁶⁷

Malta provides an interesting example. Having a civil law matrix, it followed the governance-only interpretation of residence typical of common law jurisdictions (CMC). However, this approach lasted only until 1994, the year in which incorporation was adopted as a disjunctive criterion of residence.⁶⁸

Assessment of governance of entities by tax authorities is complex and resource-intensive. For such reasons, and unavoidably, most jurisdictions following a governance-

⁵⁹ See sec. 2.1.1 of the respective branch reports.

⁶⁰ Nigeria has included two additional criteria in its Tax Bill 2024 (not yet adopted): “central place of management and control” and “effective place of management and control”. See Nigeria, sec. 5.1. In 2006, the Chinese Taipei Parliament had already approved the addition of “place of effective management”. However, the executive power has not yet taken the final step needed for this criterion to enter into force – see Chinese Taipei, sec. 1.

⁶¹ See New Zealand, sec. 1 and 2.1.1.

⁶² See, for instance, Finland, sec. 2.1.1.

⁶³ One of the most recent examples is that of the two Apple subsidiaries in Ireland involved in the State Aid decision and procedure brought by the European Commission against Ireland. See Commission Decision of 30.08.2016 on State aid implemented by Ireland to Apple, C(2016) 5605 final, V-N 2017/7.3. See also Judgment of 10.09.2024, Commission / Ireland and others (C-465/20 P) ECLI:EU:C:2024:724.

⁶⁴ See the Republic of Korea, sec. 2.1.1.

⁶⁵ See art. 2(5) of the Corporate Income Tax Act of 1969. Such fiction does not apply to certain tax features such as the participation exemption, the fiscal unity or the rules on corporate reorganisations.

⁶⁶ See art. 2, § 1 5^o, b second indent of the Belgium Internal Tax Code.

⁶⁷ See Belgium, sec. 2.1.1. To rebut the presumption of residency, a company must provide evidence: i) that it has triggered residence under the laws of another jurisdiction, and; ii) demonstrates that residence for tax treaty purposes is not attributed to another jurisdiction, under a treaty with that jurisdiction.

⁶⁸ See Malta, sec. 2.1.1.

only approach decided to adopt incorporation as a disjunctive factor, which, in practice, became the primary rule for residence.

3.2.2. Analysis of each criterion

3.2.2.1. Incorporation

Incorporation systems consider that an entity has a personal nexus in the jurisdiction under whose laws the entity derives its existence.⁶⁹ However, the determination of the nexus does not follow a uniform test, attributing relevance to the place: i) where the incorporation took place;⁷⁰ ii) of registration, of the registered statutory seat or of the registered office;⁷¹ and; iii) of the “head or main office”;⁷² iv) where the directions and administrations operate.⁷³ For the purposes of this general report, these differing forms are considered functional alternatives to incorporation despite the nuances between each of them. Some systems include more than one of these formal tests as alternative requirements.⁷⁴ Alternatively, some jurisdictions prefer to provide a comprehensive list of the recognised corporate forms, considering any entity constituted under those forms as a resident.⁷⁵

Incorporation does not even necessarily require the maintenance of the main office or of a legal seat. Hungary allows maintenance of the legal seat by third-party service providers, which must register themselves as such. However, to mitigate opportunities for avoidance, and in those cases, companies are also required to register their place of management.⁷⁶

The plurality of incorporation-based formal tests may, *per se*, lead to dual residence. Insofar as company law does not prohibit it, a company may be created under the laws of a

⁶⁹ The specific territory or political autonomy in which the incorporation took place is irrelevant, as what matters is incorporation within the encompassing jurisdiction. See, for instance, Nigeria, sec. 2.1.1.

⁷⁰ Mere reference to incorporation is typical in common law (or jurisdictions that were formerly under the influence of the UK), such as Australia, Canada, Ireland, India, Israel and New Zealand. It appears autonomously also in Latin American countries such as Peru and Uruguay. Alternatively, there are also references to the place of execution of the deed of incorporation. Place of incorporation may also appear as a fall-back clause criterion, if the main criterion (also related to incorporation: the registered seat) is not determinable – see Chile and Serbia, sec. 2.1.1.

⁷¹ See Austria, Bolivia, Chile, Denmark (registration), Germany, India, Italy, Liechtenstein (“*sitz*”), Luxembourg, Poland and Portugal (“*sede*”) Slovak Republic, and Sweden (“*platsen för styrelsens säte*”), sec. 2.1.1. Türkiye uses the expression “legal centre” but defines it as the centre shown in the incorporation or establishment act, which allows to reconduct such *nomen juris* to this category. The Slovak Republic requires specifically the indication of the street and house number and a legal title over the property of the office (and, if such legal title is lost, the company can be dissolved through a court decision).

⁷² See Chinese Taipei, Japan and the Republic of Korea sec. 2.1.1. In Chinese Taipei, it is only labelled as “head office” and in the Republic of Korea as “main office”. In call cases, the criterion is linked with incorporation.

⁷³ See Brazil, sec. 3.1.1. Despite the reference to governance bodies, the criterion focuses exclusively on the place where they are to be found, which is understood as a functional alternative to place of the registered seat.

⁷⁴ In Colombia and Spain, residence can result from either incorporation or registered seat, which are set as autonomous criteria. See Colombia and Spain, sec. 1.1.1.2.

⁷⁵ See Estonia, Hungary and Norway, sec. 2.1.1.

⁷⁶ See Hungary, sec. 2.1.3.

jurisdiction and redomicile or have its registered office in a different one.⁷⁷ Thus, multiple residence is possible even within jurisdictions following an incorporation-only approach.

3.2.2.2. Governance

3.2.2.2.1. Introduction

This section synthesises the analysis of diverse criteria, their respective tests and variations, all of which rely on the decision-making processes of entities. All of them are inherently grounded on a facts and circumstances analysis, prioritising the identification of those who *de facto* exercise a decision-making authority over those who statutorily or contractually have such authority.

Governance tests can be categorised into two primary models: central management and control and place of effective management.⁷⁸ The first originated in the United Kingdom and has progressively disseminated through common law countries or countries that were once under the UK influence. The second one, likely of German provenance,⁷⁹ has first permeated continental Europe and, subsequently, extended its influence globally.

The following two subsections will undertake an analysis of each of these models, highlighting the commonalities and differences across jurisdictions in the application of these models. Of course, there is no strict separation between models, and there are even

⁷⁷ This is not that infrequent in cases of re-domiciliation, where the destination jurisdiction does not require reincorporation. See, for instance, Uruguay and the Slovak Republic, sec. 2.1.1.

⁷⁸ The Netherlands has an open-ended provision, requiring assessment “according to the circumstances”, under art. 4(1) of the General Act on State Taxes. Nevertheless, the interpretation and application of the test is normally focused on the place of management, reason why this jurisdiction will be considered within such group.

⁷⁹ Place of management appears as a personal nexus criterion in the first federal-level corporate income tax law: the 1920 Corporate Tax Law of the German *Reich*. It appears as an alternative criterion to the seat test, which had already been used for corporate income taxation at the level of the tax statutes of several federal states (such as Prussia, Bavaria, Saxony, Württemberg and Hesse). Whereas there are no preparatory works explaining the reason for the introduction of place of management, Weber-Fas considers that it may be due to the “general trend of replacement of ‘citizenship’ with ‘residence’ as the basis for personal tax liability” and that such “emphasis on the economic-territorial nexus of a person to a state is not unique under German Transnational Law” as the “*Sitz der Hauptverwaltung*, in private international law (...) is somewhat similar through not identical concept of a corporation’s contact to a state. See R. Weber-Fas, *Corporate Residence Rules...*, *supra* n. 17, p. 218. The concept of corporate residence can be traced back to the Savigny, which considered that non-individuals should also have a “artificial or constructive domicile” and, if the entity does not set it, “the judge must endeavour to discover by construction of the centre of its affairs [*Mittelpunkt der Geschäfte*] – see F. Savigny, *A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time*, vol. 8, translation with notes by W. Guthrie (Edinburgh, T & T Clark 1869), §354 *apud* J. Avery Jones and J. Hattingh, *De Beers Consolidated Mines Ltd V Howe* (1906) *Corporate Residence: An Early Attempt at European Harmonisation*, D. de Cogan and J. Snape (Eds), *Landmark Cases in Revenue Law* (Hart, Oxford, 2019), pp. 67-90.

legislative proposals for the introduction, within the same jurisdictions, of the two models, cumulatively.⁸⁰

3.2.2.2.2. Central management and control

3.2.2.2.2.1. Origin and diffusion

This test has its roots in the *Cesena Sulphur*⁸¹ and *Calcutta Jute Mills* cases.⁸² However, *De Beers Consolidated Mines Ltd v Howe*⁸³ is normally regarded as the landmark decision, stating that a company's real business is where its central management and control is (hereinafter CMC). This line of cases emerges from the need to interpret the statutory expression of "Person residing in the United Kingdom", included in the UK Income Tax Act without any further guidance.⁸⁴

According to *De Beers*, "[w]e ought therefore to see where [the company] really keeps house and does business. An individual may be of a foreign nationality, and yet reside in the UK. So may a company (...) a company resides, for purposes of income tax, where its real business is carried on (...) I regard this as the true rule: that the real business is carried on where the central management and control actually abides."⁸⁵

This decision remains influential for common law jurisdictions or jurisdictions in which, otherwise, the United Kingdom is or was present. This is the case in Australia, Canada,⁸⁶ Hong Kong, and Ireland.⁸⁷

Malta and Israel's domestic law refers solely to "management and control", but courts and tax authorities interpret such expression as an expression of CMC.⁸⁸ New Zealand introduced two statutory tests that were worded differently: i) centre of management, and; ii) directors' control.⁸⁹ However, case law interprets such tests in the light of *De Beers*,⁹⁰

⁸⁰ Nigeria has historically adhered to an incorporation-only approach. However, the proposed 2024 Tax Bill (pending approval at the time of this report's writing) introduced two governance-based tests, supplementing the incorporation criterion. One test aligns with the common law tradition ("central place of management and control"), while the other reflects the civil law tradition ("effective place of management or control"). This proposal is one more expression of the overall trend of expanding the scope of residency, which will be further addressed in this general report. See Nigeria, sec. 5.1.

⁸¹ *Cesena Sulphur Co Ltd v Nicholson* (1876) 1 Ex D 428.

⁸² *Calcutta Jute Mills Co Ltd v Nicholson* (1876) 1 Ex D 428.

⁸³ *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455, *supra* n. 33. A close examination of the judgment reveals that the court's determination rested upon a thorough analysis of the company's governance structure, as defined by its company law framework and internal bylaws (see paras 1-3; 7-17). This observation reinforces our earlier conclusion that the concept of tax residence is grounded on a conceptual framework originally crafted and developed within the realm of company law.

⁸⁴ See s. 2, Sched. D, of the UK Income Tax Act 1853.

⁸⁵ *De Beers*, *supra* n. 33, at [213] and [352]

⁸⁶ See *Bywater Investments Limited v Commissioner of Taxation*; *Hua Wang Bank Berhad v Commissioner of Taxation* [2016] HCA 45, of 16.11.2016.

⁸⁷ The applicability of the principle developed by *De Beers*, *supra* n. 33, to Ireland was confirmed in *WJ Tipping (Inspector of Taxes) v Louis Jeancard*, [1947] 2 ITR 68.

⁸⁸ See Malta, sec. 2.1.1. See Israel, sec. 2.1.1 and the Israelian tax authority's Circular 2002/4, *Guidelines for Determining Management and Control*, of 3.3.2002 which refers to strategic decisions which are normally taken by the board of directors.

⁸⁹ Test also used in New Zealand and considers the persons which *de facto* exercise the functions of directors.

⁹⁰ See *New Zealand Forest Products Finance NV v C of IR* (1995) 17 NZTC 12,073.

and administrative guidance appears to follow CMC.⁹¹ Hong Kong, in addition to CMC,⁹² also applies a variation of this test (“normally management and control”) for transfer pricing purposes. However, according to the Inland Revenue Department, such test is comparable to CMC as established by common law, even if it has a broader scope.⁹³

Central management and control has been further developed autonomously by each jurisdiction through their judiciary or tax authorities, but always in connection with the original concept and seminal case law.⁹⁴ Given that currently, all common law jurisdictions also recognise residence on the basis of incorporation (which is, logically, the primary rule), CMC lost a significant part of its former glory, being relegated to a subsidiary test, applicable only to entities incorporated or otherwise established abroad.

A detailed examination of how adjudicators interpret this test is provided in the branch reports.⁹⁵ This general report focuses exclusively on the commonalities observed in the application of this test across jurisdictions, recognising the evolution as a refinement of the *De Beers* test.

3.2.2.2.2. Elements of the test

Central management and control ascertains where the head and brains of a company are. As Viscount Haldane emphatically stated in *Lennard's Carrying Co.*, “a corporation is an abstraction. It has no mind of its own any more than it has a body of its own. Its active and directing will must consequently be who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation”.⁹⁶ Lord Justice Denning, in *HL Bolton*, recognised that “a company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the company and mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such”.⁹⁷

Drawing upon an anthropomorphic analogy, residence of a company is where its “brain”, i.e. the highest level of decision-making and control of a company, is. This is usually the highest corporate body (such as the board of directors).⁹⁸

⁹¹ See New Zealand Inland Revenue IS16/03, of 21.09.2016. Of course, and regarding all jurisdictions in this cluster, there are always local idiosyncrasies, due to the autonomous development of the test by each jurisdiction's judiciary.

⁹² Which is used in several statutes regarding tax benefits. See Hong Kong, sec. 2.1.1.

⁹³ See Inland Revenue Department of Hong Kong, *Arrangement Between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (DIPN 44), para. 27.

⁹⁴ The branch reports of these jurisdictions provide valuable historical overviews of the tests from which it is possible to conclude that United Kingdom case law, even the most recent one, continues to exert significant influence in most of them.

⁹⁵ See also J. Avery Jones, Chapter 5 *Corporate Residence in Common Law: The Origins and Current Issues* in G. Maisto (ed.) *Residence of Companies under Tax Treaties and EC Law* (IBFD, 2009).

⁹⁶ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705.

⁹⁷ *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* (1957) 1 QB 159.

⁹⁸ See, for instance, Canada Revenue Agency Views 2015-0610791C6 or the Hong Kong Inland Revenue Department DPIN 61, para. 144.

Assessment of central management and control is normally based on relevant judicial precedents, and there are frequent references to UK's case law. Recently, and mostly through the efforts of tax authorities, the intricate network of precedents has been consolidated with the development of additional guidance on the test.

In Ireland, the published guidance highlights that the test requires consideration of the place where: i) the important questions of company policy are decided; ii) major investment decisions are made; iii) major contracts are negotiated; iv) the head office is located, and; v) the majority of directors reside.⁹⁹ Similarly, the Australian tax authorities consider five indicia, namely the place: i) where CMC is exercised; ii) where the governing body of the company meets; iii) where the company declares and pays dividends; iv) where the control and management decisions are taken in practice, taking into account the nature of the business, and; v) where the minutes and other documents regarding the high-level decisions are made.¹⁰⁰ Mauritius tax authorities examine the following requirements: i) at least two resident directors with qualifications allowing them to make decisions independently, who must be present at the board meetings; ii) bank account and accounting records in the territory; iii) preparation of accounting records and statutory audits in Mauritius.¹⁰¹

Alternatively, guidance may be provided regarding one element of the test. For instance, the Israeli tax authorities provide guidance regarding the interpretation of "strategic decisions". According to them, this expression covers decisions: i) with a material financial impact; ii) with a decisive impact on the future; iii) which regard the financing of operations or transactions (particularly when guarantees are involved); iv) regarding material investments (including material investments on new activities).¹⁰²

The focus on higher management, allowing an easy route for moving the residence abroad by shifting the meetings of the higher tier board (and thus creating shell structures abroad) is pointed out as the reason why the Indian legislature decided to move from CMC to a different governance criterion in 2015.¹⁰³

Case law and administrative guidance have explicitly excluded the relevance of certain elements for the purpose of determining CMC, considering irrelevant: i) the place where the decision-making formally takes place (namely the meetings of the board of directors) if, in substance, the decisions are not taken there; ii) place where administrative decisions

⁹⁹ See the Irish Tax Revenue Commissioners, *Company Residence in the State*, Tax and Duty Manual, Part 02-02-03.

¹⁰⁰ See Australia Tax Office, *Income tax: central management and control test of residency* (Taxation Ruling TR 2018/5). This ruling also considers, as indicia of lesser importance, several factors that are not strictly connected with decision making such as the place: i) of residence of those exercising CMC; ii) where the company's books are kept; iii) of the registered office; iv) of the register of the shareholders; v) of the meetings of the shareholders, and; vi) of residence of the shareholders.

¹⁰¹ See Mauritius, sec. 2.1.1.

¹⁰² See Israelian Tax Authorities, *Circular Guidelines for Determining Management and Control*, of 3.3.2002. See Israel, sec. 2.1.1.

¹⁰³ It should be noted that sec. 4A of the Income Tax Act 1922 considered a company resident in India if "the control and management of the company during the year as wholly situated in India" and some courts focused on the last part of the expression. According to Patel and Visharia, "The rationale for the introduction of POEM under Indian tax law appears to bring offshore companies (which could be regarded to have a POEM under tax treaty principles in India) into the Indian Tax Net and also bring consistency in the tax residency rules under the ITA and the tax treaties – see V.T. Patel & K.P. Visharia, *Final Guidance on Place of Effective Management*, 24 Intl. Transfer Pricing J. 5 (2017), p. 377. See also S.P. Govind, *India and Its Tryst with Subjective Rules: An Analysis of the Recent Place of Effective Management Guidance*, 23 Asia-Pac. Tax Bull. 3 (2017).

are taken or executed, and;¹⁰⁴ iii) episodic exercises of management or control abroad.

A comprehensive assessment of case law reveals that, despite the clear origin in *De Beers*,¹⁰⁵ CMC is developed autonomously by each jurisdiction. Moreover, there is a considerable degree of indeterminacy in the identification of CMC, with adjudicators and legal professionals struggling to agree on consistent criteria and apply them uniformly across different factual scenarios. Such indeterminacy is similar to the one observed in the context of the governance test as applied in civil law systems, a reason that advises addressing the topic *infra* in a consolidated manner.

3.2.2.2.3. “Usurpation” of CMC

According to the law or the company’s by-laws, central management and control is entrusted to a specific governing body, and frequently to the board of directors. However, CMC is a facts and circumstances test, focusing on who effectively exercises management and control over the company.¹⁰⁶ The concept of usurpation within common law jurisdictions is developed quite similarly to the *de facto* approach in civil law countries (as addressed in sec. 3.2.2.2.3.8).

Being a factual test, it requires determining who effectively exercises authority and not the governing body to which the authority is entrusted. Such exam may lead to the conclusion that the control is exercised by another governing body or by another person (individual¹⁰⁷ or company), then there is “usurpation”, and the CMC is the place where such person takes the relevant decisions. Mere “rubber stamping” of decisions made by others is never considered as CMC.¹⁰⁸ What matters is not *de jure* control but *de facto* control.¹⁰⁹

The fact that decision-makers receive high-level instructions and advice or are influenced by others (namely the parent company) does not necessarily mean that the CMC was usurped.¹¹⁰ Case law only allows such conclusion if the external control annuls the practical capacity of making the decisions, which is the case where the company decisions are dictated or effectively made by the parent company.¹¹¹ According to Canadian courts, “cogent evidence is required to displace the well-established notion that *de jure* directors hold primary responsibility for the management and control of a company. Such evidence

¹⁰⁴ See *Egyptian Delta Land v Atkinson* [2006] 9 WLUK 61, of the United Kingdom.

¹⁰⁵ *De Beers*, *supra* n. 33.

¹⁰⁶ Already in *De Beers*, *supra* n. 33, at [213] one could read “the test is “a pure question of fact, to be determined not in accordance with the construction of this or that regulation”. Usurpation is autonomously recognised at least since 1959, with *Bullock v Unit Construction Co, Ltd*, 38 TC 712 of the House of Lords and *Development Securities (No 9) Ltd and Ors v HMRC* [2017] UKFTT 565 (TC) decided by the UK Court of Appeals. The concept has then spread to other common law jurisdictions. For instance, in Canada, see *Garron Family Trust (Trustee of) v R*, 2010 FCA 309, decided by the Supreme Court of Canada.

¹⁰⁷ In the UK, see *Wood v Holden* [2006] EWCA Civ 26 and *Laerstate, BV v R C Commrs* [2009] TC 00162. See also the Hong Kong Inland Revenue Department DPIN 61, para 144. In these cases, the CMC lies where the individual effectively exercises its power.

¹⁰⁸ In Ireland, see the decision of the High Court in *Fyffes Plc v DCC Plc, S&L Investments Ltd, James Flavin and Lotus Green Ltd* [2005] IEHC 477.

¹⁰⁹ See Canada, sec. 2.1.1

¹¹⁰ See *Wood v Holden* (2005) STC 789.

¹¹¹ In the UK, see *Unigate Guernsey Ltd and Unigate Overseas Ltd v McGregor*, [1996] STC 1.

must clearly establish that the ‘outsider’ has ‘effective’ or ‘independent’ management and control.¹¹²

3.2.2.2.3. *Place of (effective) management*

3.2.2.2.3.1. *Introduction*

This criterion looks at the place where management is carried on. The original and primary aim of the provision (as in private international law) is to counter cases where companies would escape creating a personal nexus with the jurisdiction merely by incorporating in the other jurisdiction.

This section jointly considers a wide range of civil law criteria that find their roots in the idea of real seat. Despite the domestic idiosyncrasies, all the criteria aim to recognise personal nexus in the jurisdiction where the decision-makers make their decisions. The diversity of *nomen iuris* should not be over-valued. Diversity can even be found within the same jurisdiction, with the expressions being interpreted in a consistent fashion. For instance, Hungary uses “place of management” under its income tax law and “real place of management” in its tax procedure law, with both being defined as “the place where the company is managed”.¹¹³

As proxies of governance, we find the alternative terms and expressions, such as place of: i) of management;¹¹⁴ ii) of effective management;¹¹⁵ iii) of effective management and control;¹¹⁶ iv) real management;¹¹⁷ v) ordinary management;¹¹⁸ vi) of business management;¹¹⁹ vii) of the “principal establishment”;¹²⁰; viii) of the administration¹²¹, central administration,¹²² and principal business administration¹²³ or; ix) “the place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance, made”.¹²⁴

Accurate translation of legal terms is crucial to discerning the precise underlying concept. For instance, German-speaking jurisdictions employ the term “*Verwaltung*”, which,

¹¹² See *Landbouwbewerf Backx BV v The Queen*, 2018 TCC 142, of the Federal Court of Appeal. In Israel, see TA 7678-09-11, *Rosebud Properties (Europe) Ltd v- Assessing Officer for Large Enterprises*.

¹¹³ See Hungary, sec. 2.1.1.

¹¹⁴ See Poland, sec. 2.1.1.

¹¹⁵ See Germany (“*Mittelpunkt der geschäftlichen Oberleitung*”), Hungary (“*üzletvezetés helye*”, in income tax law), Italy (“*sede di direzione effettiva*”), Liechtenstein (“*tatsächlichen Verwaltung*”) and Portugal (“*direção efetiva*”), South Africa (“*place of effective management*” in English or “*plek van effektiewe bestuur*” in Afrikaans) sec. 2.1.1 of the branch reports. See also the Netherlands, where courts focus their assessment of the “facts and circumstances” test laid down in art. 2(1) of the General State Tax Act on the existence of a place of effective management (“*werkelijke leiding*” or “*feitelijke leiding*”). See the Netherlands, sec. 2.1.1.

¹¹⁶ See Serbia, sec. 2.1.1. Despite the reference to “control”, there is no evidence that this test is influenced by common law CMC test.

¹¹⁷ See Norway (“*reel ledelse*”), and Hungary (“*Tényleges üzletvezetés helye*” in tax procedural law), sec. 2.1.1

¹¹⁸ See Italy (“*gestione ordinaria*”) which is used in addition to effective management, sec. 2.1.1.

¹¹⁹ See Germany, sec. 2.1.1.

¹²⁰ See Belgium, sec. 2.1.1.

¹²¹ See Switzerland, sec. 2.1.1.

¹²² See Luxembourg, sec. 2.1.1 or Mexico, sec. 2.1.1.

¹²³ See Mexico, sec. 2.1.1.

¹²⁴ See section 6(3), Explanation 1 of the Indian Income Tax Act.

while susceptible to being translated as administration, conveys the idea of management in this specific context.

Different paths lead to the inclusion of place of management as a proxy of residence. In many jurisdictions, this was considered as a logical extension to the corporate tax area of the criteria followed in company and in private international law (real seat). Others, confronted with the deficiencies of the incorporation-only approach, sought to align their domestic law to international standards, and decided to adopt the tiebreak criteria that had already been included in many of their bilateral treaties and had been recommended by models since 1946.¹²⁵

Determining where the governance takes place requires a rather complex enquiry, going beyond the traditional tax administration functions. Acknowledging such complexity, Colombia decided to incept a special organ devoted to this assessment.¹²⁶ Such assessment is performed on a non-exclusive basis, i.e., any other organ of tax authorities may also assess residence based on the governance criterion. In India, the assessing officer may only consider a non-incorporated company as a resident after seeking prior approval of a collegium of three members by the Principal Chief Commissioner of the respective region.¹²⁷

As a rule, statutory provisions only set the governance criterion (with one of the *nomen iuris* mentioned *supra*) without providing further guidance or explanation.¹²⁸ This means that the governance criterion remains largely indeterminate, forcing the interpreter and the adjudicator to determine what this concretely means.

3.2.2.2.3.2. *Recent legislative reforms*

Over the last decade, several jurisdictions have initiated efforts to elucidate the governance criterion, providing supplementary guidance. This is the case in Norway (2019), the Slovak Republic (2021), and Italy (2023). This may well be the start of a trend that will likely be followed by many other countries.

In Norway, “real management” requires taking into account “the location of the board level and daily management” as well as “other circumstances related to the organisation and business activities of the company”.¹²⁹ These references were drafted to be as broad as the OECD MC tie-break rule.¹³⁰ In case of a split between the two management levels, there can be no automatic assumption that the board level is decisive, and other circumstances should be considered.¹³¹ The same concept has been used in Sweden since 1993 (replacing the concept of place of effective management). However, no further explanation is provided on what the expression may concretely mean or on whether it may extend beyond governance.¹³²

In the Slovak Republic, the place of effective management was redefined from “place

¹²⁵ See the Republic of Korea, Mexico and South Africa, sec. 2.1.1.

¹²⁶ Entitled “audit committee for the determination of the place of effective management”. See Colombia, sec. 1.1.4.1.

¹²⁷ See Indian Central Board of Direct Taxes, Circular 6/2017, *Guiding principles for determination of Place of Effective Management (POEM) of a Company*, 24.01.2017, para. 11.1.

¹²⁸ See, for instance, Luxembourg and Finland, sec. 2.1.1.

¹²⁹ See §2-2(7) (b) of the Norwegian Tax Act.

¹³⁰ See Norway, sec. 2.1.1.

¹³¹ See Norway, sec. 2.1.1.

¹³² See Sweden, sec. 2.1.1.

where the management and business decisions of the statutory bodies and statutory boards of the legal entity are taken” to “the place where key management decisions and business decisions for the legal entity as a whole are made or taken”,¹³³ which is understood as an effort to align the definition with the wording of the OECD commentaries. The Supreme Administrative Court of the Slovak Republic, created by the recent judicial reform in Slovak Republic, as well as the Slovak Constitutional Court, confirmed that the terms ‘resident of the other State’ and “place of management” must be interpreted as meaning the place from which the actual exercise of managerial functions is carried out, with all the actual economic consequences.¹³⁴ This appears to allow consideration of a broad range of managerial functions and levels of governance.

Italy has recently adopted two governance criteria, which are statutorily defined. The first, place of effective management, points to strategic management. The second one, ordinary management, looks at the “continuous and coordinated fulfilment of the day-to-day management of the entity as a whole”. Thus, both levels must be considered, and location of one of them in Italy is enough to trigger Italian residency. This reform aimed at “increasing legal certainty and reducing litigation between tax authorities and taxpayers”.¹³⁵

A comprehensive review of these reforms shows that the most helpful guidance is the reference to the OECD guidelines,¹³⁶ even if such guidance is limited as there is interpretative indeterminacy in guidance provided by the commentaries. Apart from that, the newly promulgated statutory provisions remain equally ambiguous, employing broad references to a spectrum of management activities or encompassing different or all tiers of corporate governance and not significantly alleviating the heuristic and hermeneutical issues that adjudicators continue to face.¹³⁷

The following sections aim to shed light on the interpretation of the expression “place of management” and its variations. Despite the inclusion of attributive adjectives (such as “real”, “effective”, and “actual”), the core legal inquiry remains the determination of the locus of corporate management. The analysis will proceed by examining the four constitutive elements of the criterion, starting with the objective element, followed by the personal, temporal and concluding with the geographical element. As further characterised *infra* (sec. 6.7), such analysis will reveal a significant degree of legal indeterminacy in these tests, which is one of the most critical challenges for corporate tax systems.

3.2.2.2.3.3. *Objective element*

3.2.2.2.3.3.1. *Introduction*

As mentioned, adjudicators face a wide margin of indeterminacy in the identification of the place of management.

¹³³ See Slovak Republic, sec. 2.1.1.

¹³⁴ See Slovak Republic, sec. 5.3.1.

¹³⁵ P. Pistone, *La nuova disciplina della residenza delle persone fisiche e delle persone giuridiche nel sistema di imposizione reddituale*, *Diritto e pratica tributaria internazionale*, 2023, p. 912.

¹³⁶ Several other reporters noted that the legislative concept was explicitly amended to take into account the OECD tie-breaker. This is the case of Finland, and Switzerland, see sec. 2.1.1 of the respective branch reports.

¹³⁷ Colombia appears to be one of the most meaningful exceptions. In 2012, it amended the definition of place of effective management, including an explicit reference to the place “where day-to-day activities of the company” are carried out. See Colombia, sec. 1.1.1.2.1.2.

To overcome this, and absent a rigorous analysis of the criterion alignment with the OECD tie-breaker, adjudicators often refer to the OECD commentaries on the place of effective management in both court decisions¹³⁸ and administrative guidance.¹³⁹ Nevertheless, the interpretation of the commentaries is subject to significant variability, resulting in divergent legal conclusions across and within jurisdictions. Furthermore, the commentaries do not provide guidance on the most important element of the equation: the concept of management.

The following sections assess the constituent elements of the place of management, demonstrating the extent of the legal indeterminacy induced by the current statutory framework.

3.2.2.2.3.3.2. *The concept of management*

Most domestic tests, whether explicitly or implicitly, refer to “management” without providing a formal definition, operating under the assumption of its inherent clarity, which often proves to be misplaced as “wherever human activities are carried out in an organised and co-operative form, there management must be found”.¹⁴⁰

Taylor noted that the “art of management has been defined “as knowing exactly what you want men to do, and then seeing that they do it in the best and cheapest way”.¹⁴¹ Koontz and O’Donnell defined management as “the accomplishment of desired objectives by establishing an environment favourable to performance by people operating in organised groups”.¹⁴²

There is no univocal understanding, even when considering solely business management, which comprises a wide variety of activities. In our view, the only limitation that can be extracted from the overarching rationale of establishing a personal nexus is the restriction of the relevant activities to those referred to the overall company (the “centralised strategic control, in the terminology of Chandler”) ¹⁴³, rather than those that refer to isolated internal processes or functions.¹⁴⁴

3.2.2.2.3.3.3. *Management activities and decision-making*

For our purposes, the most useful definitory attempts are those focused on the dynamics of management. The classic division is proposed by Fayol, according to whom management

¹³⁸ See the UK House of Lords decision in *Ostime (Inspector of Taxes) v Australian Mutual Provident Society*, 1960 AC 459, at para. 480 considering that the test is “part of the international tax language” and the Supreme Court of Appeal of South Africa decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 A11 SA 262 (SCA), at para. 18, acknowledging that the test is derived from the OECD Model.

¹³⁹ See the South African Revenue Service, *Discussion Paper on Interpretation Note 6 Place of Effective Management*, 30.06.2023.

¹⁴⁰ L. Urwick and E.F.L. Brech, *The Making of Scientific Management*, Vol. II (Management Publications Trust, 1949), p. 216.

¹⁴¹ F.W. Taylor, *Shop management*, *Transactions of the American Society of Mechanical Engineers* 24 (1903), pp. 1356–1364.

¹⁴² H. Koontz and C. O’Donnell, *Principles of Management; An Analysis of Managerial Functions* (McGraw-Hill, 1968), p. 1.

¹⁴³ A.D. Chandler Jr., *Strategy and structure: Chapters in the history of the industrial enterprise*, (MIT Press, 1962).

¹⁴⁴ At the tax treaty level, the same understanding appears explicated in para. 24 of the commentaries to art. 4 of the pre-2017 OECD Model, referring to management of the “conduct of the entity’s business as a whole”.

requires to “forecast and to plan, to organise, to command, to coordinate and to control”.¹⁴⁵ A more recent but still influential classification is proposed by Terry, who defines management as “a distinct process consisting of planning, organising, actuating, and controlling, performed to determine and accomplish the objectives by the use of people and resources”.¹⁴⁶

It is true that the OECD commentary refers to “key management and commercial decisions”,¹⁴⁷ narrowing legal scrutiny to a specific moment of the managerial process. However, such delimitation is statutorily absent in the overwhelming majority of the surveyed jurisdictions. Therefore, insofar as it is not possible to link the domestic concept with the OECD tie-breaker, adjudicators may legitimately consider any of the above-mentioned activities as relevant management. This conclusion further emphasises the indeterminacy surrounding the assessment of management and stresses the need to refine the criteria further through statutory provisions. To avoid doubt, the author does not favour any view but simply concludes that the exclusion of activities beyond decision-making may not be grounded on sound legal reasoning.

From a policy perspective, there are advantages and disadvantages to considering activities beyond decision-making.

Decision-making is only one aspect of management. Ignoring all other activities may provide an incomplete and misleading picture of where the company is truly managed, facilitating the emergence of structures which can more easily manoeuvre the personal nexus by moving the decision-makers (or the decision-making board) to the elected jurisdiction, while most management activities take place outside of the jurisdiction.

Notwithstanding, decision-making remains the most important activity in management, and provides effectiveness to all other activities.¹⁴⁸ Limiting assessment to such activity would enhance clarity and certainty, reducing administrative and compliance costs, particularly when the decision-making is well documented in board resolutions.

Narrowing down management to decision-making is tax policy choice, which ultimately depends on a balance between competing policy goals and the political and economic considerations that inform the jurisdictions’ tax policy.

Even if there is a statutory decision restricting management to decision-making, that does not, *per se*, eliminate the indeterminacy of the assessment, which may still be confronted with several layers of ambiguity.

First, concerning the categorization of the managerial decisions according to their nature, an analysis of contemporary corporate decision-making processes reveals a diversity of decision types, namely: i) strategic long-term management, encompassing mergers and acquisitions, market entry, and significant capital investments; ii) governance management, relating to board composition, executive compensation, and compliance matters, as these shape the organization’s overall direction and accountability; iii) financial decisions, such as capital structure, dividend policy, and risk management, which determine the company’s financial health and sustainability; iv) innovation

¹⁴⁵ H. Fayol, *Administration Industrielle et Générale / General and Industrial Management* (translated by C Storrs et al), (Sir Isaac Pitman & Sons, 1949).

¹⁴⁶ G. Terry, *Principles of Management*, 6th edition (R.D. Irwin, 1971), p. 4. A similar classification is proposed by Koontz and O’Donnell in *Principles of Management*, *supra* n. 142.

¹⁴⁷ Para. 24 of the commentaries to art. 4 of the pre-2017 OECD Model.

¹⁴⁸ Without the exercise of decision-making, planning remains theoretical, and there are no operational activities to be controlled.

and technological management, concerning research and development, technology adoption, and intellectual property management, which ensure the company's future competitiveness; v) operational management, focused on resource allocation, production planning, and process optimisation, which impact day-to-day efficiency; and vi) commercial management, including pricing strategies, marketing campaigns, and customer relationship management, which drive immediate market performance. Management of a company necessarily encompasses all enumerated activities. In the absence of statutory limitations, the performance of any of these activities *per se* may be deemed as an exercise of management.

Second, in what concerns the authority to make decisions, company law and the articles of association often mandate collegial approval for specific management decisions. However, not all of them are reserved for the boards, forming part of a continuous operational process, eluding formalisation. Management decisions are interwoven with other management functions, rendering their precise temporal delineation, from both a legal and neurologic standpoint, exceedingly difficult. Thus, while certain decisions are formalised at the board level, a significant part of managerial decisions are undeniably made beyond the board's purview. Again, and in the absence of a statutory delineation, it may be difficult to remove relevance to management decisions made outside of the boards. However, even if one could restrict the relevance of decisions made by the boards, indeterminacy would still subsist.

3.2.2.2.3.4. *Personal element*

To the extent that management is understood broadly, encompassing action beyond mere decision-making, it becomes difficult to circumscribe the relevance of activities undertaken by a wide range of individuals within a corporate entity. However, even where "management" is (statutorily) narrowed down to decision-making and further refined to focus solely on decisions made at the board level, indeterminacy would still persist. This section addresses the personal element, considering not only the identity of the relevant persons but also their hierarchical position within the entity.

It is undeniable that certain management functions, including arguably the most pivotal ones, are executed during formal collegial assemblies. While the latitude for determining a company's governance structure is constrained by mandatory provisions of company law and the company's articles of association, a degree of structural diversity remains permissible.

The diversity can be reconducted into prevailing governance models, which are the one-tier (unitary) and the dual-tier (dual) governance structures, each one expressing different approaches to corporate oversight and management.¹⁴⁹

In the unitary model, executive and non-executive directors constitute a single board. Executive directors are responsible for the day-to-day management of the company, while non-executive directors provide oversight and strategic guidance. This model facilitates an earlier dissemination of information to all board members, potentially expediting and enhancing the quality of decision-making. Company law may permit this body to be constituted by a sole individual.

¹⁴⁹ See Bohinc, R., *Comparative Corporate Governance: An Overview on US and Some EU Countries' Corporate Legislation and Theory*, (University of Primorska, 2010) and C. Azar & A. Grimminger, *Achieving Effective Boards: A Comparative Study of Corporate Governance Frameworks and Board Practices in Argentina, Brazil, Chile, Colombia, Mexico, Panama, and Peru* (World Bank Group, 2017).

In contrast, the dual model segregates supervisory and operational functions. A management board is responsible for day-to-day operations, while a separate supervisory board oversees the management board. This structure is prevalent in many European jurisdictions, including Germany and the Netherlands, and is sometimes mandatory for listed companies. The separation of responsibilities is intended to enhance board engagement, efficiency, and objectivity in decision-making, as the supervisory board is able to analyse and assess the decisions of the management board independently. Within the dual model, a distinction is drawn between supervisory and operational management, both of which are integral components of a company's overall governance.¹⁵⁰

Supervisory management refers to the oversight and strategic management decision-making of the company, as well as to the strategic advice and guidance to the operational level (C-suite executives), ensuring that the latter act in the best interests of the shareholders and that they are accountable for their performance. This is normally performed by the “board of directors” or “supervisory board”, a group of persons appointed by the shareholders meeting on a periodical basis. They may include independent directors (no other function in the company besides being part of the board members; they are also called the non-executive directors) and directors who also belong to the Executive Board (the C-level suite executives). The supervisory level is accountable to the shareholders.

Executive management refers to the decisions needed for the daily operations of the company and comprises a wide range of actions, which includes: i) implementing the strategic decisions and advice as defined by the board of directors; ii) supervising all operations of the company (which includes planning, production, sales, marketing, finance and HR); iii) taking the most important operational decisions (including those regarding the allocation of resources), and; iv) managing and guiding senior managers. These functions are normally performed by the “executive board”, which includes a wide range of professionals.¹⁵¹

In both the unitary and dual model, under the governance level (management of the company as a whole), several management functions are performed below such levels, namely the middle management¹⁵² and the lower management.¹⁵³ However, insofar as they

¹⁵⁰ On the diversity of governance models, see F.P.G. Pötgens et al., *The Impact of a Corporate Governance System on the Place of Effective Management Concept in Spain, France, the United Kingdom, the Netherlands, Germany and Italy – Part 1*, 54 Eur. Taxn. 9 (2014).

¹⁵¹ Such as the: i) CEO – Chief Executive Officer; ii) CFO – Chief Financial Officer; iii) COO – Chief Operating Officer; iv) CMO – Chief Marketing Officer; v) CTO – Chief Technology Officer; vi) CHRO – Chief Human Resources Officer. They are accountable to the “board of directors”.

¹⁵² This level is responsible for converting the executive management decisions into operational plans, which includes: i) creating action plans for the departments or units, ensuring that there are no overlaps; ii) supervising and guiding lower-level management; iii) ensuring proper communication between executive management and lower-management. Middle management is performed by a wider range of professionals, such as departmental/division/regional/ product/project managers or heads. They are accountable to the “executive board” or to a specific C-level executive.

¹⁵³ This last level is responsible for supervising the work of the individual employees, normally organised in units (i.e. people reporting to the same person), which includes: i) recruiting, supervising and providing guidance to the individual employees; ii) ensuring that the daily operations of a company are effectively and efficiently carried on; iii) providing accurate feedback to the middle-management on the daily activities of the unit and its coordination with other units. Sometimes, this is designated as “first-line” management. It is normally performed by team or unit leaders and supervisors, who are accountable to the respective managers.

do not manage the company as a whole, they should not be considered relevant in this context.

Above or next to the supervisory and executive boards (or single board), one can often also find the audit committee, whose functions are normally limited to the oversight of the financial process, internal controls and external audits, ensuring the integrity and reliability of the financial information and managing the relations with external auditors. Next to it, one can find other boards or committees that are normally subsections of one of the boards, such as: i) the compensation or remuneration committee; ii) the nomination committee; iii) the risk management committee; iv) the compliance committee; v) the strategy committee, and (most recently); vi) the sustainability (or ESG) committee. Absent any statutory limitation, as the functions refer to the company as a whole, it is not possible to exclude the relevance of the decision-making taken at such level.

The vast majority of statutory provisions, including the OECD Model Tax Convention, fail to account for this diversity in governance structures and do not specify a preferred tier in dual-board systems.¹⁵⁴

3.2.2.2.3.5. *Temporal element*

Management is part of a continuum process. Thus, it may not be easy to understand when a certain management activity was performed. If management is understood as a continuum: i) either it is possible to individualise the moment in which the decisions are taken (for instance, decision-making is limited to a period or certain specific periods and only takes place when the individual is present at a certain office and liaises with the people reporting the individual);¹⁵⁵ ii) or one should conclude that any relevant temporal framework may be relevant apart from holidays or other absences to work.

Even if there is a statutory restriction of management decision-making, that does not exclude indeterminacy. Decision-making is a process comprised of sequential neurological stages.¹⁵⁶ Of course, legal analysis should not be concerned with the inner processes but with the respective exteriorisation as, from a procedural perspective, it is impossible (and rather unpractical) to attribute relevance to the neurological process. However, that may not necessarily take place during meetings or other formal moments, opening assessment of different forms of exteriorisation, such as formal correspondence, recorded communications, email exchanges, internal memos or observable implementation of decisions. Even decisions that, under company law or articles of association, are reserved to boards may be considered as taken outside of the boards, namely, the decisions submitted to the board for mere ratification. For instance, strategic acquisitions or demergers, which

¹⁵⁴ In the same sense, I.J.J. Burgers, *Some Thoughts on Further Refinement of the Concept of Place of Effective Management for Tax Treaty Purposes*, 35 *Intertax* 6/7 (2007), pp. 385-286.

¹⁵⁵ With the progressive fragmentation of the business activities into several group companies, it may be possible to reconstitute management of a single-company to a series of isolated activities throughout the year.

¹⁵⁶ From a neurologic perspective see M. S. Gazzaniga, *The social brain: Discovering the networks of the mind* (Basic Books, 1985). There are several works within the interdisciplinary field of neuroeconomics about the process, such as A. R. Damasio, *Descartes' error: Emotion, reason, and the human brain* (G. P. Putnam's Sons, 1994) and P. W. Glimcher, *Decisions, uncertainty, and the brain: The science of neuroeconomics* (MIT Press, 2003). From a business management perspective see H. A. Simon, *A behavioral model of rational choice*, 69 *The Quarterly Journal of Economics* 1 (1955), pp. 99–118 or R. P. Rumelt, *Good strategy bad strategy: The difference and why it matters* (Crown Business, 2011).

are negotiated by corporate executives who reach informal or “handshake deals”, greatly limiting the board’s power.

It is arguable that the exclusion of “episodic” or “incidental” management activities, as frequently done by adjudicators, is a reasonable limitation. Nevertheless, absence of a defined standard for the duration of “episodic” management leads to a certain indeterminacy. This absence of a temporal standard is particularly perplexing, as various jurisdictions commonly employ a six-month threshold to delineate permanent establishment,¹⁵⁷ a concept that normally results in less stringent substantive tax liabilities. Of course, the type of business needs to be considered, and in the case of special purposes vehicles, the period for the exercise of management may be quite reduced.

A notable exception is Italy, whose recent legislative amendments stipulated that residency is only triggered if any of the three prescribed criteria are satisfied for most of the taxable year.¹⁵⁸ This stands in marked contrast to the regime introduced for implementing Pillar Two. In jurisdictions following the Model Rules, in the event of an entity’s relocation during the relevant year, “it shall be considered located in the jurisdiction where it was located at the beginning of the year”.¹⁵⁹ This opens the possibility of asymmetries, with a company being compelled to apply Pillar Two rules within a jurisdiction where it is not considered a resident (and, accordingly, neither incurs residency-based taxation or residency-based reporting requirements).

3.2.2.3.6. *Geographical element*

Personal nexus requires a geographical connection with the jurisdictions which, in this context, consists of the performance of the relevant management activities in its territory. However, the absence of statutory guidance concerning the degree of presence opens the door to considering that tenuous presences are sufficient, which is particularly concerning in a world where digitalisation allows management activities to take place from anywhere in the world.

When management activities are performed by individuals, then their physical presence becomes relevant, even in cases of remote performance.¹⁶⁰ Conversely, in the context of collegial decision-making, the place where the meeting takes place becomes relevant. Special difficulties may arise in special circumstances such as: i) meetings in different jurisdictions;¹⁶¹ ii) decision-making processes that rely solely on one or a limited

¹⁵⁷ This is recognised in para 6 of the OECD MC Commentaries on Art. 5, which states “experience has shown that permanent establishments normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months”.

¹⁵⁸ Art. 73(3) of the Italian TUIR.

¹⁵⁹ See art. 10.3.6 of the Pillar Two Model Rules – OECD, *Tax Challenges Arising from Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)*, (OECD Publishing, 2021).

¹⁶⁰ This should not be misunderstood as the residence of the individual but the physical location of the individual when performing management activities. German case law emphasises the relevance of the office of the managing director as the place where management is performed. See Germany, sec. 2.1.1.

¹⁶¹ The Belgium Ruling Commission considers that, in such cases, residence will be in the jurisdiction where the majority of meetings take place – see Ruling n. 2022.0641, of 21.09.2022. In the same vein, see rulings SKM2022.557.SR and SKM2023.277SR of the Danish Tax Board.

number of board members;¹⁶² iii) members attending the meetings remotely (online);¹⁶³ iv) fully online meetings. It remains unclear whether the mere presence of a single member or a minority thereof is sufficient to substantiate a tax authorities' claim that a place of management arises in the jurisdiction.¹⁶⁴

Statutory concretisation of management as 'main' or 'principal' mitigates indeterminacy, as the criterion is then only triggered when a preponderance of management activities occurs within the jurisdiction. However, even under such circumstances, it remains arguable whether the relevant individual or individuals physically present exert the most influential or decisive control, notwithstanding their numerical minority. Similarly, it is arguable that meetings conducted within the jurisdiction, even if not constituting a majority, were the locus of pivotal or primary decision-making.

3.2.2.2.3.7. *Adjudicatory narrowing of the criterion*

3.2.2.2.3.7.1. *Introduction*

As previously noted, a careful examination of branch reports reveals that statutory provisions rarely provide further guidance on the governance criterion, which broadly refers to management.¹⁶⁵ Over the years, adjudicators have sought to circumscribe such ambiguity. However, its action is not sufficient to solve the underlying indeterminacy. In fact, in civil law systems, neither administrative guidance nor judicial decisions are (primary) sources of law, allowing subsequent adjudicators to retain the discretion and depart from prior interpretations.¹⁶⁶ As the Hungarian reporters correctly stress, "the question arises to what extent a government position represented before an international organisation – without explicit legislative backing – can serve as a basis for interpreting domestic rules".¹⁶⁷

Adjudicatory guidance is still scarce, limited to a select few jurisdictions, and primarily addresses the material or personal dimensions of the concept. The ensuing sections will endeavour to synthesise the diverse landscape of adjudicatory restrictions, assessing them into distinct clusters founded upon shared characteristics across legal systems.

¹⁶² There are Belgium court decisions granting relevance only to the location of the relevant decision-makers. See Belgium, sec. 2.1.1.

¹⁶³ Case in which the relevant location may be the place where the individuals are during the meetings or, in the absence of further indication, where they reside.

¹⁶⁴ In Denmark, tax authorities would not trigger governance-based residence if a minority of management is in Denmark. See Ruling of the Danish Tax Authorities, SKM2015.53SR. The Singapore Inland Revenue Authority (IRAS), via a website update published on 29.11.2023, clarified that, in instances of virtual board meetings, corporate residency within Singaporean territory may be established by demonstrating either the physical presence of a majority of directors vested with strategic decision-making powers in Singapore, or the physical presence of the Chairperson in Singapore during the meetings. See K.P.Chua & J. Yap, *Corporate Tax Residency in Singapore*, 31 *Intl. Transfer Pricing J.* 2 (2024), sec. 5.

¹⁶⁵ A notable exception is the statutory definition introduced in Italy in 2023.

¹⁶⁶ A careful analysis of the branch reports confirms this, particularly regarding administrative guidance, where circulars and orders have been repealed and replaced, introducing different criteria.

¹⁶⁷ See Hungary, sec. 2.1.1.

3.2.2.2.3.7.2. *Regarding the levels of management*

3.2.2.2.3.7.2.1. *Highest level of management*

Some adjudicators prefer to rely solely on the highest level of management. This option simplifies the assessment, as one merely has to look at the highest governance body, regardless of whether there is a single or dual board structure, the frequency of the meetings, and the type of decisions taken during those meetings.

This approach presents merits and demerits. On the one hand, it simplifies the assessment. On the other hand (and absent avoidance considerations), it allows some manipulation, as it facilitates the “fly-in-fly-out management”, whereby the governance criterion is satisfied with meetings attended by directors who enter the jurisdiction solely to attend board meetings (which can be reduced in number and make decisions which are strongly influenced by preparatory analysis taking place elsewhere).

Even within this broad preference, one can find several nuances worth noting.

For instance, the Argentinian tax authorities consider that main and effective management means “the place where the highest, executive or managerial administration is exercised”.¹⁶⁸ Relevance is given not only to decision-making but also to the “exercise” of administration, which may include the implementation and control of the decisions.

Spain provides another interesting example. “Effective management” is statutorily defined as “the direction and control of its activities”.¹⁶⁹ As the statutory provision replaces a prior rule connected with day-to-day management, adjudicators understand that the new rule emphasises the higher tier of management and board meetings.¹⁷⁰

India’s CBDT expresses a preference for the head office of the company, stating that in case the senior management operates from different locations, “the head office would normally be the location, if any, where the highest level of management (for example, the Managing Director and Financial Director) and their direct support staff are located”.¹⁷¹

Belgian courts consistently prefer to look at strategic management instead of day-to-day (senior) management.¹⁷² Even if there is no statutory indication on which board should prevail, the focus is placed on the board of directors.¹⁷³ Subsidiarily, if there is no evidence of the board meetings or if management is performed by an individual, the place of the day-to-day management becomes relevant.¹⁷⁴

¹⁶⁸ See art. 3(1) of the Argentinian tax authorities’ General Resolution 21/09/2006. This definition appears to be applicable at a subsidiary level and for the determination of domicile in cases where it does not match with the “main and effective management and administration” as mentioned in the statutory provisions. See Argentina, sec. 2.1.1

¹⁶⁹ See art. 8(1)(c) of the Spanish corporate income tax act. See Spain, sec. 2.1.1.

¹⁷⁰ See Spain, sec. 2.1.1.

¹⁷¹ Indian Central Board of Direct Taxes, Circular 6/2017, *supra* n. 127, para 8.2. fourth indent.

¹⁷² Even if there are courts that have looked at daily management. See Belgium, sec. 2.1.1. Besides judicial decisions, this can also be observed in several rulings of the Belgium Ruling Commission. See, for instance, Ruling n. 2022.0641, of 20.09.2022.

¹⁷³ See Belgium, sec. 2.1.1.

¹⁷⁴ See, for instance, the decision of the Court of Antwerp 2023/AR/397 of 1.10.2024.

3.2.2.2.3.7.2.2. *Day-to-day management*

A subset of jurisdictions' adjudicators prefer to look at where the day-to-day management is exercised. This approach arguably provides a more veridical representation of a company's core management activities, thereby capturing its genuine operational centre. Focusing on daily operations reduces the susceptibility of artificial arrangements, such as the "fly-in, fly-out management". Moreover, it provides greater evidentiary certainty, as daily operations are normally more easily documented and substantiated. However, this approach also has its drawbacks. It increases the potential for dual residency cases. However, it may lead authorities to extend their assessment beyond corporate governance boards, taking into account activities performed by middle and lower management, which are increasingly dispersed across multiple jurisdictions.¹⁷⁵ Accordingly, companies may be deterred from hiring staff performing functions that may be regarded as management from abroad. Finally, disregarding the place of strategic management overlooks the critical level at which fundamental decisions are made. It also facilitates the emergence of shell companies, whose purported residence is ensured by managers with limited decisional authority.

German-speaking jurisdiction adjudicators have a clear preference for day-to-day management. This is the case with Austria,¹⁷⁶ Germany¹⁷⁷ and Switzerland.¹⁷⁸ This is also the case in Denmark¹⁷⁹ and Finland.¹⁸⁰ In Austria and Germany, if there is a discrepancy between technical and commercial daily management, the latter should be considered.¹⁸¹

As mentioned, this criterion (day-to-day management) also appears in statutory provisions, both in Colombia and in Italy ("*gestione ordinaria*"),¹⁸² even if in the latter case, the day-to-day management criterion is used in addition to another governance criterion.

3.2.2.2.3.7.2.3. *Absence of (clear) guidance*

In the overwhelming majority of jurisdictions, the adjudicator does not provide unequivocal guidance regarding the level of management that ought to be considered. This appears to be the case in Hungary,¹⁸³ Indonesia, the Republic of Korea, Luxembourg, the Netherlands,¹⁸⁴

¹⁷⁵ Which can be the result of having operational activities on several jurisdictions or of having managers (or people effectively responsible for day-to-day management) resident or exercising their functions remotely.

¹⁷⁶ Place of management is defined by law as the location where the central business leadership is exercised.

¹⁷⁷ Germany follows the "business management" test, which courts interpret as the place where the managing director carries out the management duties. See Germany, sec. 2.1.1.

¹⁷⁸ See Switzerland, sec. 2.1.1.

¹⁷⁹ See decision of the Danish Supreme Court in TFS 1998.607 H – UfR 1998.1534 H – *California Kleindienst*. The Court concluded, also considering corporate law, that day-to-day management is normally exercised by the executive board. The same can be extracted from the preparatory works of the legislation. See Denmark, sec. 2.1.1.

¹⁸⁰ Namely, according to the examples provided by Finland's tax authority in the instruction VH/990/00.01/2023.

¹⁸¹ See Austria and Germany, sec. 2.1.1

¹⁸² See Colombia and Italy, sec. 2.1.1.

¹⁸³ See Hungary, sec. 2.1.1. Between 2008 and 2017, Hungary included a reservation which required to consider "the place where the executive officer and other senior executives usually carry on their activities as well as the place where the senior day-to-day management of the enterprise is usually carried on" – See para. 29 of the 2008 OECD Model Convention Commentary.

¹⁸⁴ The Dutch Supreme Court considers that "place of residence corresponds to the place where the board performs its management functions" but there is no explicit indication of what level of management should be considered. See decision of the Dutch Supreme Court of 23.09.1992, n.° 27 293, BNB 1993/193.

Mexico, Serbia and South Africa.¹⁸⁵ In France, there are even inconsistent references throughout the judiciary, with lower courts following interpretative standards that differ from those adopted by the highest court.¹⁸⁶

3.2.2.2.3.7.3. *Negative delimitation*

Given the broad range of activities covered by management, adjudicators try to limit the scope by identifying elements that ought not to be considered for the assessment.

Some adjudicators provide upper- and lower-band exclusions. In the upper level, it is possible to find exclusion of the place: i) of residence or nationality of the shareholders; ii) where the shareholders meet and decide, insofar as such decisions do not amount to strategic or key management decisions of the entity;¹⁸⁷ iii) where executives discharge their responsibilities (which normally coincides with the annual shareholders meeting); iv) where the supervisory boards meet (when the adjudicator has a preference for day-to-day management).¹⁸⁸ Regarding the lower level exclusions, one can find the place where: i) middle and lower management perform their duties;¹⁸⁹ ii) management decisions are implemented or executed;¹⁹⁰ iii) administrative decisions are made;¹⁹¹ iv) management decisions have an impact or effects;¹⁹² v) business activities or operations are carried on;¹⁹³ vi) the company has an office or a PE;¹⁹⁴ vii) staff meetings take place or where management decisions are informed to the staff; viii) accounting books or records are maintained or kept; vii) the bank account is located, or; ix) the company has a letter box.¹⁹⁵

This delimitation is not consistently observed, and numerous adjudicators, invoking a “facts and circumstances” assessment, increasingly consider factual elements that are not demonstrably connected to a company’s decision-making processes.

¹⁸⁵ See sec. 2.1.1 of the branch reports.

¹⁸⁶ See France, sec. 3.2.2.1.

¹⁸⁷ This will be the case of decisions related to matters that the law reserves to the shareholders or that relate to the rights of the shareholders or the existence of the company (creation, dissolution, alienation of shares, modifying the rights attached to the shares). See India, sec. 2.1.1. Or those that refer to the fundamentals of a company or general principles of its policy. See the German BFH 7.12.1994 K 1/93 BStBl. II 1995 S. 175 and BFH 23.03.2022, III R 35/20, Ubg 2022, 556.

¹⁸⁸ See BFH 23.01.1991 I R 22/90, BStBl. II 1991.

¹⁸⁹ Even if the concept of middle and lower management is never precisely defined.

¹⁹⁰ See the decision of Western Cape High Court of South Africa in *Oceanic Trust Co Ltd NO v The Commissioner for South African Revenue Service* [2011] 74 SATC 127 and Indian Central Board of Direct Taxes, Circular 6/2017, *supra* n. 127, para. 8.2.g.

¹⁹¹ See Swiss VGer ZH, 4.10.2023, 2023.00048.

¹⁹² See, for instance, Liechtenstein, sec. 2.1.1.

¹⁹³ See the Dutch Supreme Court decision of 23.09.1992, n.° 27 293, BNB 1993/193.

¹⁹⁴ and See Indian Central Board of Direct Taxes, Circular 6/2017, *supra* n. 127, para. 9.

¹⁹⁵ See New Zealand, sec. 2.1.1, even if this jurisdiction does not follow the POEM test.

The intentional element, understood as the motivation for being in a given location, is often excluded.¹⁹⁶ In the author's view, the intentional element may only be considered if the adjudicators' decision takes into account not only residence but also abuse.¹⁹⁷

3.2.2.2.3.8. *Delegation and de facto management*

Identifying the individual(s) or collective that ensures governance is further complexified as the exam needs to take into account all facts and circumstances. Accordingly, the adjudicator may (and will) disregard a certain body or level whenever it concludes that the decisions are, in substance, made at a different level.¹⁹⁸ These are the cases of: i) delegation, and; ii) *de facto* management.

If the relevant board delegates (formally or informally) their powers to a committee, merely ratifying its decisions, then the relevant place is where such committee makes its decisions.

Moreover, even if not formally delegated, management will be located where the person or persons are *de facto* exercising it. The way adjudicators assess *de facto* management is quite similar to the way how usurpation is assessed in the context of CMC.

De facto management may be exercised by an individual or by a collective body (of the entity or of a different entity), namely by: i) shareholders; ii) one of the parent companies;¹⁹⁹ or; iii) one of the directors or managers of the entity or of its parent entity.²⁰⁰

Within multinationals, the dividing line between group management and *de facto* management is not easy to draw, conceptually. On the one hand, decisions related to the management of the group as a whole should not amount to *de facto* management, even if they impact the subsidiary. This is the case of: i) decisions regarding the global tax policies of the group (namely on payroll, accounting, HR, IT, supply chain and routing banking);²⁰¹ ii) the exercise of influence by the (parent) directors over the company directors;²⁰² iii) the group's influence in designing the structure of a company or of a group of companies;²⁰³ iv)

¹⁹⁶ In this sense, see the German BFH decision of 3.4.2008 I B 77/07, BFH/NV 2008, 1445. The element of intent was given relevance in administrative guidance issued by certain tax authorities during the COVID-19 crisis, which stipulated that board meeting attendance within their jurisdictions would be disregarded if travel restrictions were the reason forcing the board members to attend the meetings remotely, from their territory. See OECD Secretariat, *Analysis of tax treaties and the impact of the COVID-19 crisis*, version of 3.04.2020 (para. 14-20) and version of 21.01.2021 (para. 28-36).

¹⁹⁷ And instances of abuse are excluded from this general report. On this, see the Republic of Korea, sec. 2.1.1.

¹⁹⁸ See the decision of the Dutch Supreme Court of 23.09.1992, n.° 27 293, BNB 1993/193. This legal approach coincides with the business management approaches of authors such as Mintzberg, which asserted that managers, in the real world, and regardless of their level, perform a set of common roles clustered into interpersonal roles (figurehead, leader and liaison), informational roles (monitor, disseminator and spokesperson) and decisional roles (entrepreneur, disturbance handler, resource allocator and negotiator). H. Mintzberg *The nature of managerial work* (Harper & Row, 1973). This new understanding paved the way for a less formalistic analysis of who performs management within a company.

¹⁹⁹ French *Conseil D'État* decision on *D'Espous*, n.° 449723, of 15.03.2023 and the Korean (Rep.) Supreme Court decision 2014Do3411, of 18.02.18.

²⁰⁰ This is the case if one of the directors or managers plays the leading role in making the decisions, which are circulated for ratification or "round robin voting". See India, sec. 2.1.1.

²⁰¹ See Indian CBDT circular n.° 25/2017, of 23.10.2017.

²⁰² See the German BFH decision of 16.01.1976 III R 92/74, BStBl. II 1976, 401.

²⁰³ See the decisions of the Dutch Supreme Court of 17.12.2004, n. 39719, BNB 2005/102 and n. 39720, BNB 2005/106.

supervision by parent representatives.²⁰⁴ The participation of parent representatives in the board meetings²⁰⁵ or even the coincidence between the individuals composing the boards of the different group companies²⁰⁶ may be considered not enough or even irrelevant to the assessment.

However, there will be *de facto* management whenever the decisions made by the parent company effectively deprive the relevant management board of the subsidiary of the exercise of its overall autonomy or core functions. In such case, the parent will *de facto* manage the entity. Case law provides interesting insights, considering relevant a wide range of facts such as: i) low remuneration of the manager;²⁰⁷ ii) restricted access to bank accounts by the management of the subsidiary;²⁰⁸ iii) exercise of management by a third party on the basis of a power of attorney; iv) limitation of directors' liabilities through contractually subscribed discharge clauses.

One of the most controversial issues refers to low-substance companies. The ongoing trend of segmenting the business activity of a group into several legal entities, each of them with narrowly defined corporate goals, leads to the emergence of companies with limited assets, premises and staff, in which management may be restricted to a limited number of actions per year or be severely constricted by group policies. Insofar as the creation or existence of the entity as a separate taxpayer is not abusive (something that logically and chronologically precedes residence), the determination of residence shall take into account the narrowly defined social object and the degree of autonomy required to pursue such a narrow goal. In most cases, the central concerns pertain not to the determination of corporate residence but rather to the potential tax avoidance at the low-substance entity level, particularly in cases where the entity lacks the organisation of means required to be considered as such autonomously from the parent).

Hardships also arise in cases where management is ensured by third parties. This may happen in two scenarios: i) when the managers are not staff members of the company but merely provide services as directors of the company; ii) when the management of the company relies on the management guidance provided by a third party, carrying on its own business of provision of management services (for which management fees may be paid). Concerning the first, the Luxembourg judiciary considers it admissible to ensure management through non-staff members. Accordingly, resourcing to "trust directors" is possible.²⁰⁹ The fact that the directors are not staff members should not be relevant for these purposes insofar as management is a function performed within the entity. Concerning the second group of situations, the above-mentioned general guidance continues to apply. Insofar as those services enable a decision to be made but do not preclude it, the external service provider should not be considered the manager. The fact that the relevant body almost always follows the guidance of third parties is not, per se, sufficient to conclude that there is *de facto* management. Nor the complete or partial coincidence of directors with the directors of the parent. The examination needs to go further and enquire whether the relevant body has autonomy to make its decisions independently.

Most jurisdictions require tax authorities to face a higher evidence threshold in what

²⁰⁴ See the Italian Revenue Agency Circular n.° 20/E, of 2.11.2024.

²⁰⁵ See the decision of the Brussels Court of Appeal of 23.11.2017, 2014/AF/271.

²⁰⁶ See the decision of the US Tax Court in *Hospital Corporation of America v. Commissioner*, 1986, 87 T.C., 660.

²⁰⁷ See FG Munich 5.11.2020 10 V 1479/20, EFG 21, 429 (final).

²⁰⁸ See FG Hessen 20.10.1997 4 K 1420/93 EFG 1998, 518 (final).

²⁰⁹ See Luxembourg, sec. 2.1.3.

concerns any claim of *de facto* management.²¹⁰ And, in the author's view, it is quite important that such high threshold is kept high (and even formally included in statutory provisions) to ensure that the test is not converted into a sociological or even psychological examination of dominance and control. The starting point for the assessment must be the body (collective or individual) empowered to manage the company as a whole. The relationship between residence and avoidance will be further addressed *infra*, in sec. 6.6.2.

3.2.2.2.3.9. *Safe harbour tests*

Some jurisdictions have included full-fledged safe harbour regimes, excluding from the governance criterion some entities that would fall within its purview. Branch reports revealed the existence of such safe harbours in two cases: i) companies with a significant presence abroad and; ii) foreign investment entities.

As an example of the first, India excludes from the governance criterion all foreign incorporated companies, even if their place of management is in its territory, if: i) their active business outside of India,²¹¹ or; ii) their revenue does not exceed a certain threshold.²¹² The overall rationale appears to be decreasing the compliance costs for entities with a low risk of avoidance of Indian tax. In Colombia, the governance test is not applicable to companies that earn more than 80% of their income abroad, according to generally accepted accounting principles.²¹³

Foreign-incorporated investment entities are also exempted from the governance-criterion in a reduced number of jurisdictions.²¹⁴ Such exclusion aims at allowing foreign investment funds to rely freely on the expertise provided by resident managers without exposing them to the risks of being considered residents.

3.2.2.2.3.10. *Place of Management and Central Management and Control*

The governance criterion used in common and civil law jurisdictions overlaps in many of its internal elements and, given its indeterminacy, it is not always easy to ascertain where they would lead to different results.²¹⁵

²¹⁰ See Germany, sec. 2.1.1. See also the decision of the Brussels Court of Appeal of 23.11.2017, 2014/AF/271. The Court considered that tax authorities had the burden of providing evidence that the Board of Directors (meeting outside of Belgium) had a "puppet role", merely ratifying the decisions taken by two individual directors who were resident in Belgium.

²¹¹ The safe harbour requires cumulative satisfaction of four criteria: i) active business operations outside India, ii) a majority of board of directors' meetings held outside India; iii) effective exercise of powers by the board of directors, and; iv) demonstration that a majority of income is active, a majority of assets are located outside India, a majority of employees are located or resident outside India, and a majority of payroll expenses are attributable to these employees. See India, sec. 2.1. See also V.T. Patel & K.P. Visharia, *Final Guidance....*, *supra* n. 103, p. 378.

²¹² See India, sec. 2.1.2.

²¹³ See Colombia, sec. 1.2.2.1.

²¹⁴ See South Africa and the UK (the latter, in what concerns Offshore UCIT'a and Alternative Investment Funds), sec. 2.1.2. In Norway, this was considered by the legislator but expressly rejected. See Norway, sec. 2.1.2, referring to Prop. 1 LS (2018-2019) sec. 8.5.2, considering that the fund management in Norway should be considered a financial service and not the real management of the fund.

²¹⁵ One of the few administrative references to such differences can be found in the HMRC Internal Manual, International Tax Manual, *Company residence: proposed new test: place/effective management*, Guidance ITH348.

This similarity is acknowledged by courts. For instance, for the Dutch Supreme Court, “the expression ‘managed and controlled’ in article 3(4) of the [Netherlands Singapore tax treaty] does not differ from the term ‘effective management’ in article 4(3) of the OECD Model Convention”.²¹⁶ Between 1977 and 1992, the UK included an observation in the OECD Model commentaries, considering that the two tests would mean the same thing.²¹⁷

There are several common law court decisions in which both criteria had to be dealt with, such as *Smallwood* in the UK²¹⁸ and *Bywater Investments* in Australia.²¹⁹ The same can be found in civil law jurisdictions.²²⁰

The crucial distinction appears to lie in the concept of control and the relevant board for assessment. Central management and control tends to look at the highest management level, whereas place of management may be interpreted as referring to daily operational or executive management. Of course, either criterion requires an examination of all facts and circumstances that may require a deviation from such initial preference. For instance, in a dual board scenario, if it is demonstrated that the executive board exercises full control over the company, that may be enough to trigger residence under the CMC test.²²¹

3.2.3. *Beyond incorporation and governance*

The need for a contextual factual examination of the governance criterion often leads to considering facts that go beyond governance itself, thereby exceeding the scope of the criterion. The dividing line between facts pertaining to governance and those going beyond governance is not easy to draw, despite the existence of several administrative guidance and judicial decisions on the matter.²²²

However, in certain jurisdictions, statutory criteria have explicitly adopted criteria going beyond both incorporation and governance. As previously indicated, public international law does not impose stringent limitations on the definition of personal nexus, rendering these extensions likely compliant with international norms.

A careful assessment of the branch reports allowed the identification of the following

²¹⁶ See decision of the Dutch Supreme Court of 2.07.2021, n.º 20/01212, BNB 2021/156. The same is acknowledged by Canadian Courts. See Canada, sec. 3.2.2.1.

²¹⁷ OECD Model Convention on Double Taxation on Income and on Capital: Commentary on art. 4, para 23 (11.04.1977).

²¹⁸ *Smallwood v Revenue and Customs Commissioners* [2008] UKSPC SPC 669.

²¹⁹ *Bywater Investments Limited v Commissioner of Taxation; Hua Wang Bank Berhad v Commissioner of Taxation* [2016] HCA 45, of 16.11.2016. The Australian High Court started by ascertaining whether the entity was resident of Australia, under the treaty provision equivalent to art. 4(3) OECD MC, which required examination of CMC. The Court concluded that the formal organs of the company were bypassed and that an individual, resident in Australia, was the person who controlled the company (para 158-160). Next, it moved to ascertain the tie-breaker, which under the applicable treaty was the POEM. After a careful exam of public international law and of the OECD commentaries, it concluded that the POEM was also in Australia, as “the key management and commercial decisions were made by [the individual] in Australia” as such individual “was the person who controlled, and ultimately owned” the company (para 170). It is worth noting that, despite its best efforts to distinguish the test, the Court ends up resorting to control and ownership in the determination of the POEM.

²²⁰ See the decision of the Dutch Supreme Court of 19.01.2018, n.º 16/03321, BNB 2018/68.

²²¹ See the UK, sec. 3.2.2.1.

²²² This takes place in civil law and common law jurisdictions. Regarding the latter, and in the context of the CMC test, see the decision in *Egyptian Delta Land v Atkinson* [2006] 9 WLUK 61, of the United Kingdom.

criteria, requiring consideration of the place: i) of control;²²³ ii) of the business centre;²²⁴ iii) where the decisions are implemented;²²⁵ iv) where decisions are materially or in substance made;²²⁶ v) of the main activity;²²⁷ vi) “headquarters”²²⁸ or “headquarters of the main exploitation”;²²⁹ vii) where business is carried on;²³⁰ viii) where the current activities of the entity are conducted in an organised and continuous manner;²³¹ ix) of the main purpose;²³² x) place where income generation took place;²³³ xi) where the taxable event took place;²³⁴ and xii) “other circumstances related to the organisation and business activities of the company”²³⁵ or any other circumstances.²³⁶ Only looking at these criteria, it is possible to anticipate the emergence of “super-residents”, i.e. of companies that, while having their incorporation and formal governance elsewhere (including both supervisory board and executive board), would also easily qualify as residents in each one of these jurisdictions. It is easily conceivable that a single company, operating *bona fide*, would trigger personal nexus in more than a dozen jurisdictions.

²²³ See Australia, sec. 2.1.1. where a company will be considered resident if its voting power is controlled by shareholders who are residents in Australia. However, this is just one element of the third limb of the residency test which also requires that the business is carried on in Australia and the CMC is outside of Australia. This test comes close to the controlled foreign companies' rule, even if there is no consideration of amount of taxes paid abroad or of the passive nature of the income.

²²⁴ Used in Türkiye, refers to the place “where business transactions are actually collected and managed”. It requires an examination of both the decision-making and operational levels of a company, precluding its exclusive classification as a governance criterion. See Türkiye, sec. 2.1.1.

²²⁵ In Mexico, place of effective management is defined as the place where the person or persons “make or execute the decisions regarding control, management, operation and administration of the legal entity and of the activities that it conducts”. See art. 6 of the Regulations to the Mexican Tax Code.

²²⁶ See Colombia, sec. 1.1.1.2.1.2.

²²⁷ See Bolivia, sec. 2 for cases of non-existing or invalid residence.

²²⁸ See Argentina, sec. 2.1.1. referring to art. 124 of the Argentinian Corporate Law.

²²⁹ In Chile, for companies that have more than one exploitation, the governance is presumed to take place “at the headquarters of the main exploitation”. See Chile, sec. 2.1.

²³⁰ See Australia, sec. 2.1 even if the 2004 ruling of tax authorities requires a quite low threshold regarding the criteria, appearing to remove most of its weight.

²³¹ See Poland, sec. 2.1.1. This new statutory definition of residence was introduced in 2022 and aimed at aligning the domestic concept with the OECD MC tie-breaker. However, a careful analysis of the definition leads to conclude that it goes beyond governance and requires consideration of the place where the business activities are performed.

²³² See Argentina, sec. 2.1.1 referring to art. 124 of the Argentinian Corporate Law.

²³³ Also in Bolivia, and also for cases of non-existent or invalid residence. See Bolivia, sec. 2.1.1.

²³⁴ In Bolivia, this is one of four criteria that can be used to establish residency in case domiciled in non-existent. In the context of a purely territorial regime, it allows tax authorities to interact with the most visible presence in the jurisdiction, which is precisely the one where a taxable event takes place. See Bolivia, sec. 2.1.1.

²³⁵ See Norway, sec. 2.1.1.

²³⁶ See Sweden, sec. 2.1.1. The preparatory works leading to the adoption of this criterion indicated that the inclusion of “other circumstances” was required since not all entities would have a registered office, or would indicate the location for the board of directors in the articles of association, and it would not be feasible to indicate all other circumstances that would trigger residence. However, this criterion is considered as applicable only to non-incorporated entities located in Sweden. See Sweden, sec. 2.1.1. In any case, the wording used in the legislation does not prevent it from being interpreted, by adjudicators, beyond such scope. The same expression is used in Norway, but the express reference to the OECD criterion leads to understanding it as a governance-related criterion.

Within the US, at the federal-state level, it is also possible to extend the personal nexus on the basis of two tests: i) the “commercial domicile test”, which takes into account the place where the company “maintains its general business offices, (...) keeps its books and accounting records, (...) [and] its directors hold their meetings and its officers conduct the affairs of the corporation”;²³⁷ ii) the business situs test, which looks at the place where property is being used for a business. Both tests consider elements that go beyond governance.

Apart from the US, the practical application of criteria for incorporation and governance is quite reduced if, at all, existing. However, nothing prevents tax authorities from starting audits on the basis of such criteria at any moment.

In certain cases, even provided with a wide margin of discretion, adjudicators have reduced such margin, reconvertng the criterion into a governance one. This is the case in the Netherlands. The statutory provision states that “the place of residence of an individual or an entity is determined according to circumstances” (the so-called “facts-and-circumstances test”).²³⁸ The preparatory works reveal that the legislator considered that an open norm was considered the most appropriate as it would allow a casuistic assessment of residence.²³⁹ However, despite such a wide margin, courts have focused their analysis on the existence of a place of effective management, which has, in practice, narrowed down this criterion to a governance criterion.²⁴⁰

In addition to cases where law (statutory provisions or common law) extends residence beyond incorporation or governance, it is also possible to identify cases where such facts are taken into account by adjudicators when assessing incorporation or governance. For instance, the Chinese tax authorities explicitly consider that examination of their governance criterion must take into account, and on an equal footing, the following facts: i) premises where the senior management performs their functions; ii) the place where the financial decisions of the company are made; iii) place of the main properties, accounting books, company seals are located or stored; iv) residence of more than half of the senior management or directors.²⁴¹ In the Republic of Korea, the Supreme Court considered it relevant to assess governance, the place where the accounting records are kept.²⁴²

The inclusion of non-governance criteria is also observed when residence is assessed in avoidance cases. In such assessment, adjudicators end up combining, without a clear distinction, indicia that are related to decision-making with indicia that are related to avoidance.²⁴³ As a result, and not infrequently, the guidance provided by tax authorities as a follow-up of such assessments often refers to facts that are closer to an anti-abuse inspection than to a personal nexus assessment.

In Israel, there were several cases that addressed jointly residence and avoidance. In the aftermath of those cases, the Israeli tax authorities released a schedule to their circular

²³⁷ See the decision of the US Supreme Court in *Wheeling Steel Corp v Fox*, 298 U.S. 193, 211 (1936). See the US, sec. 3.1.

²³⁸ See art. 4(1) of the General State Tax Act.

²³⁹ See the Dutch Parliamentary Papers II, 1957-1958, 4080, n.º 7.

²⁴⁰ See the decision of the Dutch Supreme Court n.º 27 293, of 23.09.1992, BNB 1993/193.

²⁴¹ See China, sec. 2.1.1

²⁴² See the Korean (Rep.) Supreme Court decision, 2014Du8896, of 14.01.2026.

²⁴³ See the German BHB 3.07.1997 IV R 58/95 BStBl. II 1998, 86, which considered: i) the location of the bank account; ii) the location where the financial statements are prepared and accounting books are kept; iii) the location of logos and banners; iv) the domain, and; v) the currency used.

on residence.²⁴⁴ Such schedule listed, as additional criteria to assess “management and control”, the place where it is possible to find: i) the effective shareholders with controlling interest; ii) the effective decision makers (particularly, if those are of parent companies); iii) anyone having veto power regarding significant decisions; iv) managers (also considering the process leading to its selection, and their experience and knowledge in the company’s activities); iv) of the connecting factor between directors from different countries, and; v) an office abroad. Assessment should also consider whether directors and managers have competencies in the language used for business operations.

3.2.4. *Criteria and substance requirements*

For the purposes of this report, substance requirements are understood as supplementary criteria, laid down in addition to incorporation and governance (and other criteria explicitly adopted for ascertaining the nexus between a person and a jurisdiction).²⁴⁵ In general, they refer to physical indicators regarding the activity of the entity.

Taking into account the ongoing discussions on substance, one would expect jurisdictions to have already strengthened their residence rules with a plethora of substance requirements. This is definitely not the case.

However, several adjudicators end up making references to physical requirements, such as premises or equipment, in their assessment of residence, particularly in cases where residence and avoidance are concurrently assessed.²⁴⁶ This is not a generalised trend, as numerous judicial decisions refuse such considerations and explicitly affirm that residency determinations do not necessitate substance, encompassing activities, assets, or liabilities.²⁴⁷

In a limited number of jurisdictions, substance requirements are, indeed, introduced by statutory provisions. This is normally restricted to instances of: i) the entitlement to certain preferential regimes, and; ii) the recognition of entities engaged in low-substance activities.

Within the first group, we mostly find requirements for acknowledging residence in a special tax zone²⁴⁸ and for accessing certain tax benefits.²⁴⁹ However, and even in such cases, requirements should not be understood as facts pertaining to the connection between the entity and the territory, but as conditions required for the fruition of the benefits of those

²⁴⁴ See CA, 12/3102, *Rachel Niago and Estate of the Decedent Yitzchak Niago Z”L v. Kfar Saba Assessing Officer*, of 14.07.2014 and TA 1090/06 *Yanko Weiss Holdings 1996 Ltd. V. Holon Assessing Officer*, of 18.12.2013.

²⁴⁵ Governance criteria refer to management exercised by persons, which already refers to “socioeconomic substance in the corporate form” – R. Weber-Fas, *Corporate Residence Rules...*, *supra* n. 17, p. 226. However, for the purposes of this report, substance refers to criteria other than those used for the definition of the criteria (governance and decision-making). The same view is expressed by Kostikidis when considering (in the context of tax treaties) that “substance requirements in the DTC context are requirements distinguishable from formal requirements of that system” – see S. Kostikidis, *Residence and Economic Substance of Subsidiary Corporations in International and European Tax Law*, p. 21 (Wolters Kluwer Law International, 2024) even if that is justified by the different research question selected by the author.

²⁴⁶ See Spain, sec. 2.1.3.

²⁴⁷ For instance, see the Dutch Supreme Court decision of 12.05.2006, n. 40451, NTFR 2006/809.

²⁴⁸ See Morocco, sec. 2.1.2, Spain, sec. 3.1 and Uruguay, sec. 2.1.3. These substance requirements relate to the special regime that is made available.

²⁴⁹ See Mauritius, sec. 2.1.3. In Austria, access to the treaty reduced withholding rate for fees and dividends requires providing evidence that the taxpayer carries out business activities beyond the mere enjoyment of assets, employs its own staff and has its own premises. See Austria, sec. 2.1.3.

zones. In fact, absent those substance requirements, the person would still be considered a resident of the territory covered by the special tax zone, even if deprived of accessing tax benefits.

Within the second group, we find additional requirements for certain types of entities which, due to the nature of the business they operate, do not require significant physical elements. The best examples are the Dutch rules for financial service entities²⁵⁰ or the Luxembourgish rules for companies engaged in intragroup financial activity.²⁵¹

In both instances, these supplementary criteria do not pertain to the assessment of residency *per se*, but rather to the eligibility for specific tax privileges, such as access to tax treaties. Consequently, even in these scenarios, substance requirements should not be construed as intrinsic elements of corporate residency.

3.2.5. *Special cases of residency*

3.2.5.1. *Introduction*

There are instances in which the aforementioned criteria, or their constituent elements, necessitate or are adjusted. The following sections address these specific scenarios in the determination of residency, commencing with cases involving the residence of non-incorporated persons, followed by instances of optional residence and ending in the split-year residence regimes.

3.2.5.2. *Non-incorporated persons*

Incorporation serves as a suitable criterion for entities whose legal existence derives from a deed of incorporation, such as companies. However, there are many other persons, distinct from natural persons, who do not owe their legal existence to such an act.

While all surveyed jurisdictions acknowledge taxpayers beyond incorporated legal entities, not all branch reports explicitly detailed criteria complementing incorporation. This omission raises potential concerns regarding legal certainty. However, a considerable number of them complement incorporation with criteria specifically applicable to such cases, namely as: i) institution by law (namely for public entities);²⁵² ii) constitution; iii)

²⁵⁰ For instance: i) board decisions must take place in the territory and at least half of the board members need to reside in the territory; ii) overall cost with wages must exceed 100.000 EUR; iii) office space is available for at least 24 months. See the Dutch Decree on rulings with an international character of 19.06.2109, n.º 2019-13003 Stcrt. 2019/35519 as amended by Decree of 10.12.2023, n.º 2003-000020007, Stcrt. 2023/25745.

²⁵¹ See the Luxembourg tax authorities circular letter L.I.R. n.º 56/1 – 56bis/1, of 27.12.2016.

²⁵² See Brazil, sec. 2.1.2.

establishment or formation,²⁵³ iv) registration or recognition,²⁵⁴ and; v) execution of the contract.²⁵⁵

Among the non-incorporated entities for which such special criteria apply, one can find the State (or the Crown),²⁵⁶ sovereign funds,²⁵⁷ public law entities, sole proprietorships, partnerships, trusts,²⁵⁸ associations, foundations, institutions, branches, collective investment vehicles (including funds), *de facto* companies, irregular companies,²⁵⁹ organised communities.²⁶⁰

Domestic law following OECD Pillar II rules also includes deviations regarding special types of entities. For instance, in the determination of the qualified imputation tax, consideration is limited to refunds payable or credits insofar as provided by non-profit organisations or pension funds “created and managed” in the jurisdiction, investment entities “created and regulated” in the jurisdiction, life insurance companies “located” in the jurisdiction.²⁶¹

The approach of the model rules is not always consistent. In fact, and in another instance, the rules refer directly to the “residence” of governmental entities, international organisations and not-for-profit organisations.²⁶² In that case, the commentaries clarify that “is not the same as ‘tax residence’ as used in Tax Treaties” but rather means the jurisdiction where the entities were created and are managed or, in the case of governmental entities, of the government which owns it. It finalises with a puzzling note: “Whether an Entity is resident in a jurisdiction is determined based on all facts and circumstances”.²⁶³ This introduces further ambiguity, as it remains unclear whether the ‘facts and circumstances’ to be considered are limited to those pertaining to the specified criteria (‘established and administered’) or extend beyond them.

3.2.5.3. Possibility of opting

In a reduced number of systems, an entity that is not otherwise a resident is able to opt for the residency status.

The US has adopted a set of regulations that, in effect, provide for elective residence. This is namely the case of the: i) check-the-box rules allowing a foreign incorporated subsidiary

²⁵³ See South Africa, sec. 2.1.1. See also Luxembourg, sec. 2.2 in what concerns undertakings for collective investment and corporate investment funds. The domestic laws following OECD Pillar II model rules use “established and operated” as the nexus for non-profit organisations. OECD, Global Anti-Base Erosion Model Rules (Pillar Two), *supra* n. 159.

²⁵⁴ See Malta, sec. 2.1.2 for foundations.

²⁵⁵ For an overview of the different modalities, see Argentina, secs. 2.1.1 and 2.1.2.

²⁵⁶ See New Zealand, sec. 2.1.2.

²⁵⁷ See New Zealand’s Superannuation Fund, sec. 2.1.2

²⁵⁸ See, for instance, the UK, sec. 2.1.2.

²⁵⁹ See Nigeria, sec. 2.1.1.

²⁶⁰ For an overview of the diversity that can be found, see Colombia, sec. 1.1.2.2, and Türkiye, sec. 2.1.2.

²⁶¹ See OECD, Global Anti-Base Erosion Model Rules (Pillar Two), *supra* n. 159.

²⁶² See art. 7.1.1.(c) and 7.2.1.(c) of the Global Anti-Base Erosion Model Rules (Pillar Two), *supra* n. 159.

²⁶³ See para. 20 sec. 7 of the Commentaries to the model rules – OECD, Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules (OECD Publishing 2023).

to be taxed together with the US parent and, as such, being taxed as a resident,²⁶⁴ ii) election for foreign subsidiaries that had to be incorporated in the other jurisdiction to comply with domestic law (for instance, for regulatory purposes),²⁶⁵ iii) foreign insurance companies.²⁶⁶

Exceptions for life insurance companies may be found in Canada and New Zealand, but only regarding the business carried out in that jurisdiction.²⁶⁷

From a conceptual perspective, it is difficult to accept election in the determination of the personal nexus, particularly for cases that would fall outside of the scope of the nexus rules. Of course, and up to a certain degree, residence itself involves an element of elective determination, as taxpayers may strategically locate the criteria that trigger it. In each of these scenarios, the underlying rationale for granting such an elective option to the taxpayer is discernible and defensible.

3.2.5.4. *Split-year regime*

As a rule, assessment of residence takes into account the full year. This is emphasised in Italy, whose new statutory provisions stress that residence is triggered if any of the three criteria are met during most of the taxable year.²⁶⁸

There are, however, residual cases in which a split year is allowed, and companies are only taxed for the exact period in which they hold their residence in the jurisdiction.²⁶⁹ Some jurisdictions also allow this for cases of re-domiciliation, allowing the outgoing or incoming company to be taxed merely on the exact period of residence in the jurisdiction.²⁷⁰

As the pace of business evolves rapidly, it would be important to revise domestic systems allowing for the split-year regime in cases where company law allows for its legal personality to be kept, even if conditioning it to a clear de-registration in the former residence state and a clear registration.²⁷¹

3.2.6. *Anti-abuse rules*

The concept of tax residence is currently being stretched beyond its initial scope of personal nexus through the inclusion of presumptions or fictions which do not assess (or do not primarily assess) a personal connection with the jurisdiction.

²⁶⁴ See US treasury Regulation § 301.7701.

²⁶⁵ See sec. 1504(d) of the US Internal Revenue Code.

²⁶⁶ See sec. 953(d) of the US Internal Revenue Code.

²⁶⁷ See New Zealand, sec. 2.1.2.2. This option ends up having a similar effect to the insurance PE (which, regarding allocation of taxing rights at the treaty level, is foreseen by the UN Model). Likely, this resident would not be granted treaty access: i) as it would systematically be a dual-resident, and likely New Zealand would lose in the tie-breaker; ii) it would be liable to tax solely for income sourced in the jurisdiction.

²⁶⁸ Art. 73/3) of the Italian TUIR. According to Pistone "Perhaps the most significant missed opportunity in the context of individual and corporate tax residence is the absence of a split-year regime" – see Pistone, P., *La nuova disciplina...*, *supra* n. 135, p. 940.

²⁶⁹ Since *de Beers*, *supra* n. 33, the CMC is interpreted as allowing partial residence of companies as it refers to the place where a company "abides". See UK, sec. 2.1.1.

²⁷⁰ See Uruguay, sec. 2.1.2.

²⁷¹ See G.L. Courinha, *A residência no Direito Internacional Fiscal – Do abuso subjetivo de convenções* (Almedina, 2022), pp. 98-106 which was likely the reason leading to the adoption of the split year regime in Portugal.

Over the years, the US system has introduced a complex set of provisions aimed at preventing circumvention of the incorporation criterion. These include: i) anti-inversion rules for cases of expatriation without substantial business activity in the other jurisdiction, and; ii) deemed residency for foreign incorporated companies whose shares are stapled to those of a US corporation.²⁷²

In case of corporate migrations, some jurisdictions treat the former resident as a still-resident (often taxing the worldwide income) if: i) it is not able to provide evidence of residence in the new jurisdiction;²⁷³ ii) it moves to a non-cooperative jurisdiction or a jurisdiction where the nominal or effective tax rate is below a certain threshold.²⁷⁴

Finally, we can also find cases of presumptions of residence to streamline the determination of residency where such an assessment poses significant challenges. For example, Canada presumes shipping companies to be resident in their jurisdiction of incorporation.²⁷⁵ Switzerland considers collective investment vehicles as residents in the jurisdiction in which the respective fund management company has its seat.²⁷⁶

3.3. International agreements on tax matters

3.3.1. Introduction

At the treaty level, residence assessment is crucial for determining the personal scope of conventional instruments. Section 3.3.2 focuses on income tax treaties, whereas the following deals with mutual assistance instruments.²⁷⁷

3.3.2. Income tax treaties

3.3.2.1. Introduction

Residence is crucial for income tax treaties in terms of entitlement, allocation, and relief.

First, treaties also require a strong personal nexus to be applicable, which is expressed by the concept of residence.²⁷⁸ Second, in the allocation stage, residence is often used: i) to determine the source of the income, identifying if a jurisdiction can operate as the “other

²⁷² See the US, sec. 2.1.1.

²⁷³ See Mexico, sec. 2.1.2.

²⁷⁴ See Mexico and Spain, sec. 2.1.2. In case of Mexico, this presumption does not apply if there is an instrument with a broad exchange of information clause. Spain only applies this rebuttable presumption when company's “main holdings are, directly or indirectly, assets located or rights that ought to be fulfilled or exercised in the Spanish territory or when its main activity is carried out in the Spanish territory”. The presumption does not apply if the company provides evidence that “the effective management takes place abroad and that the constitution and operation of the entity is justified by valid economic reasons and substantive business reasons other than the mere management of securities or other assets”. See art. 8 (1)(c) of the Spanish corporate income tax code.

²⁷⁵ See Canada, sec. 2.1.2.

²⁷⁶ See decision of the Swiss BGER/TF, 28.01.2020, 2C_216/2019, para. 7.1.

²⁷⁷ The EU dimension is covered in the topical report.

²⁷⁸ Apart from certain entitlements derived from the non-discrimination clause.

Contracting State” (which mirrors the source function of residence at the domestic level);²⁷⁹ ii) to allocate several items of income.²⁸⁰ Third, the (final) relief must be performed by the State having the strongest personal nexus with the person (in the assumption that this person will be taxed on a worldwide basis and will be able to adjust the tax to the overall ability to pay). Other provisions also require the definition of the State acting as residence.²⁸¹

As of the 1963 Model,²⁸² residence is not autonomously defined, and currently, its delineation requires *renvoi* to domestic law,²⁸³ which is complemented by a series of restrictions and clarifications. The ensuing paragraphs focus on such deviations. However, rather than engaging in a detailed exegesis of each provision, which is the subject of numerous commentaries and scholarly works, the analysis will concentrate on the policy choices implemented by Contracting States.²⁸⁴ The initial section addresses deviations concerning the applicable criteria. The subsequent section examines deviations pertaining to tax liability. The third section explores further deviations. The concluding section provides an overall reflection on the divergence between domestic residence criteria and tax treaty personal scope.

3.3.2.2. *Relevant domestic law criteria for income tax treaties*

3.3.2.2.1. *Introduction*

For the OECD Model, a resident of a Contracting State for tax treaty purposes is someone who “under the laws of that State, is liable to tax therein by reason of his domicile, place of management or any other criterion of similar nature”.²⁸⁵ This first sentence of the model is adopted in the overwhelming majority of treaties. However, there are quite relevant deviations, which are the main object of analysis in the following sections.

First of all, some treaties completely deviate from the pattern by including a full-fledged *renvoi* to domestic law without any of the restrictions mentioned in the model.²⁸⁶ Other treaties remove a reference to “any criterion of similar nature”, precluding any enquiry on

²⁷⁹ The residence of the payor is relevant, namely for dividends, interest, royalties and even employment income when the payor is outside of the jurisdiction where employment is exercised.

²⁸⁰ In the OECD Model, residence is granted concurrent and even exclusive taxing rights (for instance, in what concerns royalties) which reflects the importance of the personal nexus also for the purposes of allocation. See K. Vogel, “*State of Residence*” may as well be the “*State of Source*”, 59 *Bulletin for International Taxation* 10 (2005), p. 422.

²⁸¹ For instance, the non-discrimination provision.

²⁸² Which followed the approach taken in the 1958 OEEC report.

²⁸³ Colombia tax authorities issued Tax Ruling n.º 525, of 2023 to address and clarify this specific point.

²⁸⁴ This analysis does not consider as an “option” the non-inclusion of one of the restrictions prior to its inclusion in the models.

²⁸⁵ Art. 4(1) of the OECD MC.

²⁸⁶ This is visible in the Mexico treaty network, namely in the treaties with Singapore (1996), Australia (2002), and New Zealand (2006). See also the Chinese Taipei Singapore tax treaty (1981). The France Belgium tax treaty (1964) circumvents a reference to residence by merely stating that “The aim of this Convention is to protect the residents of each of the Contracting States against double taxation which could result from the simultaneous application of the tax laws of those States.” This is likely related to the absence of a domestic definition of residence in France, as already mentioned.

the equivalence of the criteria foreseen by domestic law with those mentioned in the treaty.²⁸⁷

Second, a reduced number of treaties opts for an asymmetrical or hybrid approach to residence, listing autonomously the criteria considered relevant for considering a taxpayer residence in each of the Contracting States.²⁸⁸

Third, the *renvoi* to domestic law may be overridden by requiring residence to be recognised based on more than one criterion.²⁸⁹ Furthermore, there are even cases in which treaty entitlement requires a cumulative triple requirement, namely incorporation, management and control in the jurisdiction.²⁹⁰

Fourth, a residual number of treaties incorporate negative delimitations, explicitly enumerating instances where treaty entitlement is precluded. This is, for instance, the case of residence due to the stapling of shares,²⁹¹ or residence in a special tax zone.²⁹²

Fifth and last, a considerable number of treaties deviate in what concerns the list of criteria considered relevant. The following sections address each of those deviations. The first focuses on the deviations regarding formal criteria, whereas the second focuses on deviations regarding governance criteria.

3.3.2.2.2. *Deviations in what concerns formal criteria*

Even if the OECD Model accepts “any criterion of similar nature” to those explicitly listed, the UN Model and several treaties prefer to add “place of incorporation” as one of the criteria.²⁹³ This inclusion seeks to preclude debate regarding whether ‘incorporation’ constitutes a criterion of comparable character.²⁹⁴

²⁸⁷ See, for instance, the Ireland Kuwait tax treaty (2010) regarding Kuwait.

²⁸⁸ This is more frequent in the treaties with the Gulf league countries, namely Qatar, Kuwait and the United Arab Emirates. Outside this region, and merely as an example, see the Japan New Zealand tax treaty (2012).

²⁸⁹ See the Argentina United Arab Emirates tax treaty (2016), stating that residence in the UAE requires, besides incorporation, that the entity “is owned or controlled directly or indirectly by that State or any political subdivision or local government or local authority thereof”. See the Germany Mauritius tax treaty (2012) in what concerns residence in Mauritius. This treaty also subjects entitlement to liability to “general Mauritius tax”.

²⁹⁰ This is the case of the Brazil United Arab Emirates tax treaty (2018), only considering resident in the UAE an entity if it “is incorporated in the United Arab Emirates and has its place of effective management there, provided that the company can give evidence that its capital is beneficially owned, directly or indirectly, exclusively by the United Arab Emirates and/or by a government institution of the United Arab Emirates and/or a political subdivision or local government thereof and/or by individuals being residents of the United Arab Emirates and the company is controlled by the aforementioned residents”.

²⁹¹ See *HMRC v GE Financial Investments* [2024] EWCA Civ 797. In this case, the US authorities considered as resident a UK incorporated company as its shares were stapled to those of a US company and could only be transferred together with those of the US company. The Court of Appeal found that such criteria could not be considered of a similar nature to those mentioned in art. 4(1) of the applicable treaty.

²⁹² See protocol (2009) to the Spain Uruguay tax treaty (2009) and the protocol (2006) to the Indonesia Malaysia tax treaty (1991).

²⁹³ For instance, most of the Indonesia, UK and the US treaty network.

²⁹⁴ German case law and scholarship consider that only “location related criteria” should be considered. For instance, Ismer and Reimer express preference for a territorial interpretation, which requires “both unlimited liability to tax and a territorial connection between the taxpayer and the State concerned”. This leads to the exclusion of residence based on deeming provisions or on incorporation. See R. Ismer and E. Reimer, in E. Reimer and A. Rust (eds.), *Klaus Vogel on Double Taxation Conventions*, *supra* n. 9, art. 4, m.ns. 60 et seq. The opposite view is sustained in the Dutch Ministry of Finance 1988 Memorandum on tax treaty policy – see The Netherlands, sec. 2.2. Spanish literature appears divided between the two positions – see Spain, sec. 2.2.

Explicit reference to incorporation is particularly visible in the treaty network of jurisdictions defining residence solely by reference to incorporation²⁹⁵ but can also be found in the exact opposite case.²⁹⁶

There is a plethora of variations concerning the inclusion of incorporation. As functional alternatives, treaties include references such as: i) “incorporated or otherwise recognised”,²⁹⁷ ii) “created under the laws”,²⁹⁸ iii) “statutory seat”,²⁹⁹ iv) “registered office”,³⁰⁰ v) “legal centre”,³⁰¹ vi) “legal head office”,³⁰² vii) “place of the head or main office”,³⁰³ viii) “place of head office or effective management”,³⁰⁴ ix) “headquarters”,³⁰⁵ x) “place of registration”.³⁰⁶

Some of the deviations solely aim to clarify that entities beyond those whose legal existence relies on incorporation are also encompassed. Indeed, a literal interpretation of “incorporation” would likely exclude entities whose existence does not formally stem from an act of “incorporation”.

3.3.2.2.3. *Deviations in what concerns governance criteria*

The OECD Model employs the expression “place of management”, which remains the expression used in most treaties. However, certain treaties explicitly utilise the “place of effective management”, aligning the criterion with the tie-breaker. This addition may generate an asymmetry between domestic and tax treaty law, excluding some residents from treaty entitlement, a suboptimal outcome as discussed *infra*.

²⁹⁵ See Chinese Taipei (apart from the treaty with Sweden), Nigeria, Peru and the United States, sec. 2.2.

²⁹⁶ See Belgium, which includes incorporation in a significant number of treaties even if, and until 2019, incorporation was not foreseen as a domestic law criterion. See Belgium, sec. 2.2.

²⁹⁷ See the Bangladesh United Arab Emirates tax treaty (2011) or the Barbados United Arab Emirates tax treaty (2014).

²⁹⁸ See Austria-United Arab Emirates tax treaty (2021). As an alternative, see the Malta Pakistan tax treaty (1975).

²⁹⁹ See, in the Portuguese treaty network, the treaties with Bulgaria (1995), Tunisia (1999), Chile (2005), Japan (2011), Türkiye (2005) and Angola (2018). Such deviation aims at aligning the treaty wording with the terminology adopted in domestic law (in fact, in the Portuguese versions, the terms coincide). This is an option and not merely a translation divergence, as several other treaties refer to “place of incorporation”, following art. 4(1) of the UN Model.

³⁰⁰ This is used in tax treaties between France and States formerly under French influence. See France, sec. 2.2.1.

³⁰¹ This appears in the Turkish tax treaty network as it matches with the expression used under domestic law and refers to the registered office. See Türkiye, sec. 2.2.

³⁰² This is frequent in the Turkish treaty network. See, for instance, the Cambodia Türkiye tax treaty (2022)

³⁰³ This appears almost exclusively in the Japanese and in the Korean (Rep.) treaty networks, to ensure that the criterion followed domestically is considered. See, merely for illustration, the Japan Uruguay tax treaty (2019) or the Korea (Rep.) – Saudi Arabia tax treaty (2007).

³⁰⁴ See China Hungary tax treaty (1992).

³⁰⁵ See Bulgaria Malta tax treaty (1986), solely in what concerns residents of Bulgaria.

³⁰⁶ See Bulgaria United Arab Emirates tax treaty (2007), Peru Switzerland tax treaty (2012), or the Bermuda United Arab Emirates tax treaty (2015).

Other governance criteria used are: i) “normally managed or controlled”,³⁰⁷ ii) “management and control”, and,³⁰⁸ v) “place of head office”.³⁰⁹

There is hardly any administrative guidance or case law on these alternative criteria. In most cases, the deviations aim to align the treaty provision with the governance criterion used under domestic law, and, as the context will hardly require proceeding otherwise, such expression should be interpreted in accordance with domestic law.³¹⁰

3.3.2.3. *Exclusion of persons not liable to tax*

The OECD MC excludes those that are not liable to tax in the jurisdiction. Such provision is included in the overwhelming majority of treaties. However, there is no unanimous understanding of what the provision concretely entails.

The phrase “liable to tax” is generally interpreted as requiring liability to the most comprehensive tax obligation within the jurisdiction,³¹¹ as jurisdiction to tax,³¹² or as falling within the ambit of a charging provision.³¹³ Accordingly, and for most jurisdictions, residence in territorial jurisdictions does not prevent treaty entitlement.³¹⁴ To obviate any ambiguity,³¹⁵ certain tax treaties incorporate specific provisions explicitly affirming that residents subject to remittance tax systems are entitled, recognising that the deferral of taxation does not negate liability to tax and merely postpones the moment in which the tax is levied.³¹⁶

Tax treaties are also concluded with jurisdictions whose domestic tax system does not generate any direct tax liability. This includes: i) territorial tax systems, where residency is not the determinative nexus for corporate taxation, and;³¹⁷ ii) jurisdictions that, at least at the time of treaty signature, lacked a corporate income tax regime.³¹⁸ In either case, the benefit to be provided by the other Contracting State under the treaty is not accompanied by the parallel domestic exercise of taxing powers over the cross-border income. Contracting

³⁰⁷ This expression is used in the majority of Hong Kong’s treaty network – see Hong Kong, sec. 2.2 and, merely as illustration, the Hong Kong India tax treaty (2018).

³⁰⁸ For instance, the Hong Kong Malaysia tax treaty (2012).

³⁰⁹ In the Chinese treaty network, reference to “place of head office” is frequent as this was also the domestic law criterion for residence, prior to 2008. One can find treaties that equate “place of head office” with “place of effective management” as the China Croatia tax treaty (1995) or the China-Tunisia tax treaty (2002). See China, sec. 2.2. For instance, art. 4(1) of the treaty with Croatia states: “For the purposes of this Agreement, the term ‘resident of a Contracting State’ means any person who, under the law of that Contracting State, is liable to tax therein by reason of this domicile, residence, place of head office (i.e. place of effective management) or any other criterion of similar nature.

³¹⁰ According to art. 3(2) of the 2017 OECD MC.

³¹¹ See Belgium, sec. 2.2.

³¹² See Malta, sec. 2.2.

³¹³ See India, sec. 2.2.

³¹⁴ See, for instance, Belgium, sec. 2.2. In what concerns territorial systems see, for instance, the Canadian Revenue Authorities document 2021 0912111C6, of 25.11.2021 regarding the Canada Singapore tax treaty (1976), even if this treaty does not include the final sentence of art. 4(1) of the 2017 OECD Model.

³¹⁵ In the absence of a treaty provision, higher courts have decided for the non-entitlement of tax-exempted entities. See D. Gutmann, Chapter 6: France: Tax-Exempt Entities Are Not Eligible for Tax Treaty Benefits in Tax Treaty Case Law around the Globe 2016 (E. Kemmeren et al. eds., IBFD 2017).

³¹⁶ See France, sec. 2.2.2.

³¹⁷ This is still the case in many Latin American countries such as Panama, Bolivia or Uruguay.

³¹⁸ See Japan United Arab Emirates Treaty (2013).

states opting to limit entitlement to instances of actual taxation can do so through one of two mechanisms: (i) the inclusion of a “subject to tax” clause, or (ii) the insertion of a provision restricting access to treaty benefits to the portion of income that is effectively remitted or taxed within the remittance tax jurisdiction.³¹⁹

Sometimes, subsection to alternative, lump-sum or minimum taxes *in lieu* of the general corporate income tax leads to exclusion from treaty entitlement.³²⁰

3.3.2.4. *Other restrictions and limitations*

The OECD MC includes other exclusions and limitations.

First, the model proposes excluding treaty entitlement for those taxed only on income sourced in residency.³²¹ This limitation is also not construed as preventing entitlement of residents in territorial regimes. It is likely interesting to note that German courts consider this sentence of a mere clarificatory nature, reason why unlimited tax liability is always a condition for treaty entitlement, regardless of the inclusion of this provision.³²²

Furthermore, the model explicitly addresses entitlement of political autonomies.³²³ A significant number of treaties, even if signed after the inclusion of the provision in the model, omit such reference even if their system counts with political autonomies with competencies for income or capital taxation. The rationale for such omission is not clear, even if it appears the logical consequence of considering that such autonomies remain entitled to treaties even in the absence of such provision.

Finally, the model explicitly includes “pension funds recognised by the state” in the delimitation of those that may be entitled to the treaty.³²⁴ Again, a significant number of treaties, counting those concluded after such inclusion, do not include the treaty provision. However, it is possible to find such clauses in treaties concluded prior to the inclusion of the clause in the model.³²⁵

Even if outside the “residence” article, limitation on benefits clauses³²⁶ perform a role similar to the aforementioned limitations, as they restrict treaty benefits to “qualified persons”, being those that meet a series of requirements of tests.³²⁷ However, two critical distinctions exist: i) firstly, Limitation on Benefits (LoB) clauses do not address characteristics related to the personal nexus, as they serve distinct policy objectives; ii) secondly, they operate at a subsequent stage, restricting the application of treaty benefits rather than the fundamental entitlement to treaty residency.

³¹⁹ See art. 24 of the India Singapore tax treaty (1994).

³²⁰ See the Protocol ad art. 4 of the Liechtenstein Switzerland tax treaty (2015) excluding from the scope of the treaty foundations if they are merely subject to the minimum corporate tax (“*Mindestertragssteuer*”).

³²¹ This exclusion was added to the model on 11.04.1977.

³²² See Germany, sec. 2.2.4.

³²³ Added to the OECD MC on 21.09.1995.

³²⁴ Added to the OECD MC on 21.11.2017.

³²⁵ See the UK, sec. 2.2.

³²⁶ See art. 29 of the OECD MC and art. 22 of the US MC 2016.

³²⁷ On the specific tests, see the US, sec. 2.2.

3.3.2.5. *Asymmetries between residence for domestic and tax treaty purposes*

The aforementioned limitations, but particularly the one derived from the expression “criterion of a similar nature” and the exclusion of incorporation or other non-location criteria from treaty entitlement, create a disparity between domestic and tax treaty residency status, a divergence for which the underlying rationale is often opaque.

Residency, fundamentally, should reflect a robust personal nexus, equally sufficient to substantiate both domestic tax liability and treaty entitlement. The basis of legitimacy remains consistent across both contexts. While residency conflicts may arise, they constitute a distinct issue. Ideally, if the objective is to mitigate dual taxation without fostering double non-taxation, treaty access should be extended to all entities possessing a demonstrable personal nexus, irrespective of the specific domestic criterion upon which residency is predicated. Critically, the greater the divergence between the domestic criterion and the treaty tie-breaker, the lower the probability of prevailing under the latter.

The separation of domestic and treaty entitlement criteria on the basis of the “criterion of similar nature”, besides not aligning with the history of the provision,³²⁸ can lead to undesirable outcomes.

From the perspective of the residency State, this separation permits the taxation of a resident’s global income while simultaneously denying that resident access to treaty relief for income genuinely sourced in the other Contracting State. Most likely, for tax purposes, this person will be in a comparable situation with another who has access to the treaty.

Conversely, from the perspective of the other Contracting State, this may preclude access to the benefits which the treaty requires. For treaty purposes, the person considered as resident under a non-qualifiable treaty criterion will not be considered resident for tax treaty purposes and, as a consequence, the income will not be considered as sourced in that jurisdiction. This is particularly problematic in situations where, following the view that incorporation is not a “similar criterion”, dividends paid by companies that are incorporated in the jurisdiction³²⁹ are denied (source) treaty benefits.

In the author’s view, it would be important if treaties were carefully revisited, allowing all domestic law criteria triggering domestic residence to trigger treaty residence. This, of course, would not preclude the application of limitations provided by provisions beyond article 4(1) of the OECD Model Convention (2017).³³⁰

3.3.3. *Mutual assistance treaties*

3.3.3.1. *The Mutual Assistance Convention*

Residence is also crucial for the application of mutual assistance instruments. However, the indeterminacy in its delimitation is as significant, if not greater, than that observed in other contexts.

The mutual assistance convention clarifies that its personal scope is not affected by the

³²⁸ F. Sepúlveda, *Residence in Tax Treaties*, Doctoral Dissertation (2016), p. 221.

³²⁹ And where they have either no governance in the territory or there is no available evidence of governance in the territory.

³³⁰ Such as limitation on benefits provisions.

residency (or nationality)³³¹ status of the person,³³² appearing to indicate the irrelevance of the concept.³³³

However, residence (and nationality) is pertinent for delineating: i) those who may be informed prior to an exchange of information, and;³³⁴ ii) those who may be subject to recovery within the period in which the tax claim may be contested.³³⁵

While the Convention lacks an explicit definition of residency, its general interpretative rules appear to endorse a full-fledged renvoi to domestic law.³³⁶ This may lead to paradoxical outcomes.

By way of illustration, article 11(2) of the Convention permits one State (the Applicant State) to pursue the recovery of tax claims originating from another State (the requested State). Nevertheless, the operative rules are contingent upon the taxpayer's residency. Specifically, for residents of the Applicant State, recovery is permissible in instances where the debt remains uncontested. Conversely, for non-residents of the Applicant State, recovery is only allowed if the claim is final and can no longer be challenged. A paradoxical scenario emerges in dual residency situations, wherein a tax treaty assigns residency (for tax treaty purposes) to the Requested State. If the Applicant State does not deprive domestic residency status as a consequence of the treaty tiebreak defeat, it may still claim that the person is a resident for recovery purposes. This forces the Requested State, which is the State with the strongest personal nexus with the person, to collect a debt from its own resident, even if the debt may still be contested.

3.3.3.2. *The Agreements on Exchange of Information in Tax Matters*

Residence is also relevant for the purposes of the Agreements on exchange of information in tax matters, normally patterned in accordance with the model provided by the OECD.³³⁷

As with the previous instrument, residence is not relevant for determining the personal scope,³³⁸ and the concept of residence is not used, at all, in the conventional text.

However, the commentary clarifies its relevance for applying the nationality non-discrimination provision in the context of the grounds for refusal of assistance.³³⁹ According to such provision, the requested State may refuse to cooperate if the provision for which assistance is requested discriminates on the basis of nationality. However, as the commentary clarifies, the prohibition “does not apply to cases where tax rules differ only

³³¹ See art. 3(1)(e) of the Convention. Annex C further clarifies the positions of Azerbaijan, Iceland, the Netherlands and the United Kingdom in what concerns the concept of national.

³³² Art. 1(3) of the Mutual Administrative Assistance Convention – OECD & Council of Europe, *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (OECD Publishing, 2011).

³³³ This reading is confirmed by para. 17 of the explanatory report to the Mutual Administrative Assistance Convention, *supra* n. 332.

³³⁴ See art. 4(3) of the Mutual Administrative Assistance Convention – *supra* n. 332.

³³⁵ See art. 11(2) of the Mutual Administrative Assistance Convention – *supra* n. 332.

³³⁶ Art. 3(2) of the Convention which states that “any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the laws of that Party concerning the taxes covered by the Convention”.

³³⁷ OECD, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002).

³³⁸ See art. 2 of the model agreement, *supra* n. 337.

³³⁹ Art. 7(6) of the model agreement, *supra* n. 337.

on the basis of residence”.³⁴⁰ Thus, even if not mentioned, residence ends up functioning as a negative delimitation of the operative scope of the non-discrimination provision.

3.3.3.3. *Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information*

In contrast to preceding instruments, residency assumes a determinative function within the framework of Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information.³⁴¹ Residence is decisive in determining the jurisdiction to which the Reporting Financial Institution is obliged to provide the required information³⁴² and for determining the recipient jurisdiction of the financial information concerning the Reportable Person.

The wording of the agreement employs the term “residence” without the qualified “for tax purposes”. Supplementary guidance can only be found in the Model Rules, more precisely in the definition of “Reportable Jurisdiction Person”, which requires a full renvoi to domestic tax law for the determination of the residence of the reportable person.³⁴³

The entire system hinges upon information disclosed to the reporting institution through due diligence processes, which encompass know-your-customer and anti-money laundering documentation, or through self-certification by the relevant person.³⁴⁴ There are several interesting aspects of the regime in what concerns residence: i) if the entity self-certifies that it has no residence for tax purposes, then “the Reporting Financial Institution” may rely on the address of the principal office of the entity to determine the residence of the Account Holder”; ii) if the entity has no residence for tax purposes (such as partnerships, limited liability partnerships or similar legal arrangements), it will be deemed to be resident where their place of effective management is located (apparently allowing the system to function also in what concerns entities that are not taxpayers);³⁴⁵ iii) in addition to the residence certificate, it is also admitted as “documentary evidence”, any official document bearing the name and the address of the “principal office” or the “jurisdiction in which the Entity was incorporated or organized” or, even, any audited financial statement;³⁴⁶ iv)

³⁴⁰ Para. 93 of the Commentary to the Agreement on Exchange of Information in Tax Matters (OECD Publishing 2002).

³⁴¹ OECD, Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (OECD Publishing, 2017) and OECD, International Standard for Automatic Exchange of Information in Tax Matters: Crypto Asset Reporting Framework and 2023 update to the Common Reporting Standard (OECD Publishing 2023).

³⁴² See sec. 1(c) of the Multilateral Agreement on Financial Account Information, *supra* n. 337.

³⁴³ Sec. IV D(8) of the Model Rules, *supra* n. 341.

³⁴⁴ See para. 21 of the Introduction to the Model Competent Authority Agreement and sections V and VI of the “Common reporting standard”, part B of OECD, Standard for Automatic Exchange of Financial Account Information, *supra* n. 341. The reporting institution must only question such residence if it “reasonably determines, based on information in its possession or that is publicly available, that the Account Holder is not a Reportable Person with respect to such Reportable Jurisdiction” – See sec. VI(f) (b) of the Common Reporting Standard.

³⁴⁵ See sec. VIII(D)(3) of the Common Reporting Standard, *supra* n. 341.

³⁴⁶ See sec. VIII(E)(6) of the Common Reporting Standard, *supra* n. 341.

the regime explicitly acknowledges instances of multiple residence, allowing exchange of information to more than one “jurisdiction of residence”.³⁴⁷

The 2003 Amendments to the Common Reporting Standard³⁴⁸ provide interesting insights on what concerns residence: i) account holders may no longer rely on income tax treaty tie-breakers and must report all jurisdictions that consider them as residents for tax purposes;³⁴⁹ ii) reporting institutions may rely on “government Verification Services” (if available) to obtain information on the jurisdiction of residence of the account holder.³⁵⁰

In conclusion, the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information presents a nuanced and multifaceted approach to residency determination, departing significantly from traditional tax treaty frameworks. While ostensibly relying on a straightforward concept of “residence”, which relies on domestic law, the acceptance of evidentiary forms other than the residence and the reliance on self-certification, while efficient, may present challenges in ensuring accuracy and preventing abuse. Ultimately, the effective operation of this automatic exchange regime hinges on a delicate balance between administrative expediency and the robust application of residency principles, requiring ongoing scrutiny and refinement to maintain its integrity and efficacy.

3.3.3.4. *Crypto-Asset Reporting Framework*

The Crypto-Asset Reporting Framework (hereinafter CARF) aims to introduce an automatic exchange of tax information to the jurisdictions of taxpayers’ residences (insofar as they are crypto-users).³⁵¹ Even if the concept is not used in the multilateral convention, it is relevant for its underlying (model) rules and commentary in determining both the reporting jurisdiction for the crypto-asset service provider and the recipient jurisdiction for the exchanged information pertaining to: i) of each reportable user; ii) of any controlling persons.³⁵² As a rule, residence determination relies entirely on domestic law provisions.³⁵³

Notwithstanding, the establishment of residency does not depend upon residency certificates furnished by the reportable user and person, even if such certificates are obtainable. Instead, it relies on information documented by the service providers through

³⁴⁷ See para. 5 of the Commentary to sec. I and para 18 of the Commentary to Sec. III, concerning General Reporting Requirements, *supra* n. 341.

³⁴⁸ Part II of the OECD, International Standard for Automatic Exchange of Information in Tax Matters, *supra* n. 341.

³⁴⁹ See para. 24-26 of the Introduction to the Amendments to the Common Reporting Standard and para 4 of the Commentary to the Amended CRS, *supra* n. 341.

³⁵⁰ Para. 27 et seq. of the Introduction to the Amendments to the Common Reporting Standard, Sec VIII(7) of the Amended CRS, and para. 148 and 168-167 of the Commentary to the Amended CRS, *supra* n. 341.

³⁵¹ See OECD, International Standard for Automatic Exchange of Information in Tax Matters: Crypto Asset Reporting Framework and 2023 update to the Common Reporting Standard (OECD Publishing, 2023). The CARF Multilateral instrument is not yet in force.

³⁵² Sec. 2(3) of the Multilateral Competent Authority Agreement on Automatic Exchange of Information Pursuant to the Crypto-Asset Reporting Framework. published in OECD, International Standard for Automatic Exchange, *supra* n. 351. It is interesting to note that the executive summary refers not to the “residence for tax purposes” but to the “jurisdictions of residence of taxpayers”.

³⁵³ This is made through the definition of “Reportable Jurisdiction Person”, under sec. IV(D)(8) of the Rules, *supra* n. 351.

a data collection process.³⁵⁴ Such a data-gathering process is based on a self-certification of the residence, coupled with a due diligence procedure to verify the reasonableness of such self-certification.³⁵⁵ In such certification, the user is allowed to declare more than one jurisdiction of residence,³⁵⁶ or even no tax residence at all.³⁵⁷ In the first case, all declared jurisdictions will receive the information.³⁵⁸ In the latter case, the service provider “may rely on the place of effective management or on the address of the principal office to determine the residence of the Entity Crypto-Asset user”.³⁵⁹ The place of effective management, removed from its role as a tie-break rule in the OECD MC, makes it come back to the CARF as a subsidiary nexus rule.

Residency determination is also imperative for service providers, as it dictates the jurisdiction within which they are obligated to fulfil their reporting requirements. Reflecting the observed trend of expanding domestic nexus criteria, the Crypto-Asset Reporting Framework extends its personal scope to encompass service providers that are: i) tax resident; ii) both incorporated in, or organised under the laws of, and have legal personality or are subject to tax reporting requirements in; iii) managed from, iv) have a regular place of business in, or v) make relevant transactions through a branch based in, a jurisdiction adopting the rules.³⁶⁰ Each one of these nexus creates, autonomously, an obligation to report. Given the multiple nexus it creates, the system introduces a “hierarchy of nexus rules”, waiving the need to report in a jurisdiction “in instances where there is a stronger link with another jurisdiction”.³⁶¹

In contrast to the OECD Model Convention, this instrument not only relies entirely on tax residency but also supplements it with a range of additional nexus criteria that significantly exceed those typically established under domestic law. Consequently, a legal entity lacking a nexus for domestic tax purposes may, nevertheless, possess one under the Crypto-Asset Reporting Framework and vice versa.

Notwithstanding the common institutional origin of both the OECD MC and the CARF rules, the design of the personal nexus and the solution for conflicts of nexus are notably divergent. This discrepancy further evidences that, absent explicit prohibitions under public international law, policymakers are inclined to formulate personal nexus rules with a view to maximising the specific policy objective inherent to the rules.

³⁵⁴ Sec. II(A)(1) of the “Rules” of the Crypto-Asset Reporting Framework, published in OECD, International Standard for Automatic Exchange, *supra* n. 351.

³⁵⁵ Sec. III(B)(1) of the “Rules” of the CARF, *supra* n. 351.

³⁵⁶ Sec. III(B)(2)(c) of the “Rules” of the CARF, *supra* n. 351.

³⁵⁷ Sec. III(B)(1)(a) of the “Rules” of the CARF, *supra* n. 351.

³⁵⁸ See para. 2 of the Commentary on Sec. II of the rules, *supra* n. 351.

³⁵⁹ Sec. III(B)(1)(a) of the “Rules” of the CARF, *supra* n. 351. Place of management appears defined as the “place where key management and commercial decisions that are necessary for the conduct of the Entity’s business as a whole are in substance made.

All relevant facts and circumstances must be examined to determine the place of effective management” – see para. 47 of the Commentary on sec. IV of the rules, *supra* n. 351.

³⁶⁰ Sec. I(A) of the “Rules” of the CARF, *supra* n. 351.

³⁶¹ See para. 17 of the Introduction to the Crypto-Asset Reporting Framework (Part I) and para. 4 of the Commentary to the Rules (Part 3), *supra* n. 351.

3.3.3.5. *Some concluding remarks on the mutual assistance conventions*

In conclusion, while sharing the objective of fostering transparency and mutual assistance, the examined normative frameworks exhibit divergent methodologies in delineating their personal scope. Although domestic law serves as the initial point of reference, the practical application of these frameworks results in a substantial expansion of personal scope, often without a readily discernible rationale.

Within both the Common Reporting Standard (CRS) and the Crypto-Asset Reporting Framework (CARF), the inherent conceptual ambiguity, coupled with the acceptance of documentary evidence beyond residency certificates, introduces a systemic vulnerability. Specifically, this may lead to precluding the transmission of information: i) to some of the jurisdictions with a personal nexus to the individual, or; ii) to the Contracting State winning the income tax treaty tie-breaker, insofar as the provided documentary evidence indicates an alternative (tax) residency. The increasing digitalisation and simplification of the tax residency certificate issuance may advise a full revision of these instruments, potentially limiting admissible evidence to certificates, except in instances where the individual substantiates the impossibility or disproportionate difficulty of obtaining such a certificate.

Furthermore, the CARF exemplifies the broader trend observed in domestic legislation, wherein recent reforms tend to proliferate nexus criteria, thereby expanding the potential pool of jurisdictions qualifying as residency States.

In the absence of enhanced international coordination, this trend is likely to intensify, resulting in an escalating number of jurisdictions being designated as residency States for mutual assistance purposes, potentially undermining the coherence and efficacy of the system.

Part Four: Solving dual or multiple residence

4.1. Introduction

Insofar as there are no unified criteria for residence (and a consistent interpretative framework for its application), dual residency will persist. The observed trend of expansion of the governance criteria will even likely lead to an increase of cases, in *bona fide* situations, having their roots in higher geographical dispersion of corporate management activities. Dual residence cases arise not only across jurisdictions but also within the same domestic legal system.

The present Part focuses on the resolution of dual residency, seeking to understand its causes, the mechanisms used for its resolution and their respective shortcomings. Given the extensive scholarly literature on the topic, namely in what concerns the OECD tie-breaker, this report will focus on the different normative profiles adopted in practice for solving instances of multiple taxation, drawing upon the information provided by the branch reports.

4.2. At the domestic level

4.2.1. Introduction

Dual residence conflict can arise within a single jurisdiction.³⁶² The resolution of such conflicts may be required for: i) assigning a taxpayer to a specific territorial tax jurisdiction, irrespective of a concurrent tax claim;³⁶³ ii) solving a dual residence claim arising from the parallel exercise of taxing rights by distinct political autonomies within the jurisdiction.³⁶⁴ The subsequent sections will address each of these scenarios.

The first issue concerns the determination of the taxpayer's *situs* within a jurisdiction. This determination may be relevant when the tax system adopts provisions for distinct territorial circumscriptions.³⁶⁵ It may also be relevant for the political autonomies when tax revenue allocation is contingent upon the taxpayer's location.³⁶⁶

The second scenario may arise from: i) unified rules that encompass multiple and overlapping nexus criteria (such as incorporation and place of effective management); ii) unified rules that are not consistently interpreted; iii) the attribution of discretion to political autonomies in establishing the nexus criteria.³⁶⁷

For both cases, the normative profiles employed to address these issues are as follows: i) deeming the existence of a branch / permanent establishment / economic unit in each of the areas autonomies where the taxpayer has economic activity, attributing income to each one of those units;³⁶⁸ ii) apportioning the income between the different locations;³⁶⁹ iii) combining the two previous approaches, by deeming PEs and having central rules apportioning the income between PEs;³⁷⁰ iv) including a tie-breaker rule, and taxing the income of the taxpayer solely in the autonomy that wins the tie-breaker;³⁷¹ v) considering the legal seat up until a certain revenue threshold and, as of such moment, considering

³⁶² This will not be the case if registration and administration of corporate income tax takes place at the central level. See Nigeria, sec. 3.1.

³⁶³ For instance, for determining which autonomy is competent for CIT assessment. See Poland, sec. 3.1.

³⁶⁴ See Canada and France (regarding the *collectivité territoriale*, which have an autonomous tax system), sec. 3.1.

³⁶⁵ These can be, namely, special tax zones, underdeveloped areas (such as rural, isolated, insular), areas affected by natural disasters (such as earthquakes or flooding).

³⁶⁶ See Germany, sec. 3.1.

³⁶⁷ See the US, in what concerns federal taxation, insofar as the criteria do not infringe the "minimum contacts" and the "substantive economic nexus" doctrines of the US Supreme Court. See US, sec. 2.1.1.

³⁶⁸ See Brazil, sec. 3.1.

³⁶⁹ In Japan, CIT revenue is split among the regions taking into account the area of the offices and the number of employees – see Japan, sec. 3.4. Italy sets a succession of criteria to determine the prevailing residence – see Italy, sec. 3.1. In the US, at the federal state level, each state is able to levy income tax on a formulaary apportionment basis. Despite the coincidence between the formulas adopted in several states, this is not coordinated centrally, reason why double taxation may still occur – see the US, sec. 2.1.1.

³⁷⁰ See Canada, sec. 3.1. Canada includes a domestic MAP, if the rules are not sufficient to avoid double taxation.

³⁷¹ France acknowledges certain territories as *collectivité territoriale*, which are allowed to have an autonomous tax system. With some of them (French Polynesia, New Caledonia, Saint Martin, and Saint Pierre and Miquelon), the French Central State and the local authorities have concluded agreements along the lines of the pre-2017 OECD Model which include POEM as a tie-breaker. In case no agreement is applicable (for instance, with Saint Barthélemy), dual resident situations may only be through an agreement between competent authorities. In Switzerland, the Supreme Court decided that dual residence conflicts should be decided in favour of the place of administration. See BGer/TF, 1.2.2019, 2C_627/2017.

the place where significant activities are carried out;³⁷² vi) requiring legal and real seat to qualify as resident of a special part of the territory;³⁷³ vii) through a sort of mutual agreement procedure.³⁷⁴

Each of the mechanisms must be assessed carefully as, not rarely, the criterion effectively applied to solve the dual residence issue is not the one that appears at face value. An excellent example is provided by the Portuguese municipal surtax, allocating income “on the proportion of the income generated in its geographical area.”³⁷⁵ As such, this would point to an apportionment approach. However, the mechanisms effectively introduced consist of a tie-breaker as the rule specifies that “if the same entity has its seat in one municipality and place of effective management in another, the entity should be considered resident in the municipality of its effective management.”³⁷⁶

Domestic mechanisms are normally the outcome of political compromises with and between political autonomies and, in some cases, are not precisely drafted. Even when a provision is adopted, it may not always ensure that dual taxation is relieved. In this context, it is important to make a reference to Switzerland. A domestic constitutional provision requiring the federal parliament to adopt legislation to avoid inter-cantonal taxation has been interpreted as providing a constitutional right to eliminate such dual taxation.³⁷⁷ In our view, the same outcome could be reached in the framework of other constitutional systems. Not under a similar provision, which likely does not exist, but following the understanding that any dual income tax claim within the same systems caused by the lack of coordination of political autonomies subject to the same constitution could be construed as a lack of equality in its subdimension of ability to pay.

4.2.2. Pillar Two

Traditionally, domestic law only solved domestic residency conflicts.³⁷⁸ However, jurisdictions adopting the OECD Pillar Two model rules have implemented novel domestic law mechanisms for resolving dual residency conflicts across jurisdictions, also in the absence of an income tax treaty.³⁷⁹

Where an income tax treaty applies and includes a substantive tie-breaker provision, the prevailing jurisdiction under that tie-breaker shall be the relevant jurisdiction for Pillar Two purposes.³⁸⁰ In the absence of an applicable treaty, a hierarchical framework of tests is

³⁷² See Spain, sec. 3.1.

³⁷³ See Norway, in what concerns Svalbard, sec. 2.1.2 and 3.1.

³⁷⁴ See Germany, sec. 3.1. In France, in case there is no agreement between the French Central State and a *collectivité territoriale*, it might be possible to resort to a mutual agreement procedure. See France, sec. 3.1.

³⁷⁵ Art. 18(1) of Law 73/2013, of 3.09.

³⁷⁶ Art. 18(13) of Law 73/2013, of 3.09.

³⁷⁷ See the Swiss BGer/TF, 27.06.1919, BGE 45 I 190.

³⁷⁸ Apart from domestic rules that cease to treat a taxpayer as a resident when residency status is lost under a treaty tie-breaker adopted by that jurisdiction. Such rules will be addressed *infra*, in sec. 4.3.3.

³⁷⁹ See art. 10.3.4. of the Pillar Two Model Rules – OECD, Global Anti-Base Erosion Model Rules (Pillar Two), *supra* n. 159 and para. 202 et seq. of the Commentary to the Model Rules – see OECD, Consolidated Commentary to the Global Anti-Base Erosion Model Rules, see *supra* n. 263. Pillar Two is treated under this section as, at the end, it is implemented through domestic law.

³⁸⁰ Thus, the rule does not apply in case the treaty denies treaty benefits or requires mutual agreement for solving dual residency conflicts.

prescribed, assigning residency to the jurisdiction: i) wherein the greatest amount of Pillar Two covered taxes is paid;³⁸¹ ii) wherein the entity has the highest amount of substance-based income exclusion; iii) where the entity was created. The hierarchy is interesting as it emphasises the entity’s economic activity (taxes paid and substance indicators), therefore diverging from the traditional jurisdictional preferences based on incorporation and governance (apart from the last criterion).

These rules are not immune to criticism, particularly in the context of triangular cases, which may precipitate instances of an “infinite loop”. Consider, for example, Company 1, recognised as resident in jurisdiction A due to its incorporation, and recognised as resident in jurisdictions B and C by virtue of having places of management therein. Co1 bears the same amount of covered taxes in A and B, but more in C. The company has the most substance-based income exclusion in B, having less in A and almost negligible in C. There is only a treaty between A and C, whose tie-breaker is incorporation.

In the bilateral relations between A and B, B is the winner: i) no treaty applies; ii) the covered taxes are equivalent; iii) most substance-based income exclusion is in B. In the relationship between jurisdictions B and C, jurisdiction C prevails: i) no treaty applies; ii) the company pays more taxes in C. Finally, in the relationship between jurisdictions C and A, A is the winner: i) a treaty applies, and the tie-breaker provision is incorporation. This scenario illustrates the potential for a cyclical conflict, undermining the intended clarity of the residency conflict rules.

Pillar II model rules also require the “loser jurisdiction” under a treaty tie-breaker to implement the income inclusion regime in the event that “the winner jurisdiction” fails to do so.³⁸² This leads to the paradoxical scenario wherein a jurisdiction, applying its own domestic rules: i) acknowledges the insufficiency of its domestic nexus rule and, consequent to its defeat in the tie-breaker, no longer recognises the company as a resident (thereby foregoing both worldwide taxation and residence-based reporting),³⁸³ and yet, simultaneously; ii) compels the company to comply with Pillar Two rules (and to pay the top-up tax). Consequently, an entity that does not have the status of resident taxpayer remains obliged to apply Pillar Two rules, notwithstanding its non-residency status and the absence of any residence-based tax liability in that jurisdiction. This scenario presents particular challenges for entities incorporated in the United States, especially when they have “some” management functions or some economic activities conducted extra-territorially. Insofar as those indicators are deemed sufficient to trigger the domestic residency rules of the other jurisdiction – rules that, it bears emphasising, often exhibit a disconcerting degree of indeterminacy – the company may be compelled to apply and to pay top-up taxes in a Pillar Two applying jurisdiction, despite having a tenuous personal nexus with the jurisdiction. One could argue that jurisdictions could exercise self-restraint and not apply the rules in such cases. However, it is unclear whether omission of action by the Pillar II applying jurisdiction, in such scenarios, will not be considered by the European Commission as an instance of prohibited selective advantage in the context of the EU State Aid rules.³⁸⁴

The Pillar II framework further accentuates the inherent risks associated with the indeterminacy and progressive expansion of domestic residency criteria, particularly

³⁸¹ Excluding taxes paid under controlled foreign company rules.

³⁸² See art. 10.3.6. of the Pillar Two Model Rules – OECD, Global Anti-Base Erosion Model Rules (Pillar Two), *supra* n. 159.

³⁸³ These rules are further addressed in sec. 4.3.3.

³⁸⁴ See art. 107 of the Treaty on the Functioning of the European Union – TFEU.

in jurisdictions employing outlier criteria. Corporate groups that have structured their operations in reliance on tax treaty tie-breaker provisions may now be confronted with the obligation to present returns and pay top-up taxes in jurisdictions where they have a tenuous personal nexus which, even not surviving a tax treaty, remains relevant for Pillar II purposes.

4.3. At the income tax treaty level

4.3.1. Introduction

The expansion of the domestic residence criteria leads to an increase in potential instances of dual taxation in *bona fide* situations. Notwithstanding, the number of reported cases and case law is quite reduced.

The following factors may explain such limitation: i) assessment of residency for non-incorporated taxpayers is not perceived by tax authorities as a priority; ii) preference for employing source rules for taxing activities connected with the territory; iii) resolution of dual conflict issues mainly at the administrative stage, never reaching the Courts nor receiving publicity.

Among the fact patterns leading to dual residence conflicts, some of the most prevalent ones are those related to: i) cross-border corporate reorganisations, particularly when the management of the absorbed entity continues its former functions;³⁸⁵ ii) migration of companies, with the transfer of the place of management from one jurisdiction to another; iii) cross-border operations with PEs, insofar as the PE is perceived as a place of management of the whole company; iv) decentralised management, with management activities scattered in more than one jurisdiction; v) use of technologies for management;³⁸⁶ vi) low-substance holdings with shareholder(s) located in another jurisdiction, often with management performed mainly by the non-resident shareholder or by a set of third-party service providers, often providing management services to more than one company and often not assuming liability over the decisions taken as managers.³⁸⁷

In any case, and considering ongoing globalisation and digitalisation and the progressive expansion of the nexus scope, it is easy to predict an exponential increase in dual residency conflicts. Consequently, it is important to proceed with a careful examination of the rules adopted to solve such conflicts.

Despite the OECD's recommendation, since 2017, for the adoption of the MAP, many treaties, including those signed subsequently, continue to favour substantive criteria. As mentioned, this general report will focus on the identification of the normative profiles used to solve dual residency issues and not on their respective interpretation. Such analysis is structured in two main parts: i) resolution of dual residency by reference to a substantive criterion, and; ii) resolution of dual residency through mutual agreement (with or without a supplementary substantive criterion).

³⁸⁵ E. Burgstaller and K Haslinger, *Place of Effective Management as a Tie-Breaker-Rule – Concept, Developments and Prospects*, 32 *Intertax* 8/9 (2004), p. 381.

³⁸⁶ Already alerting for these issues in 2003 see L. Hinnekens, *Revised OECD-TAG Definition of Place of Effective Management in Treaty Tie-Breaker Rule*, 31 *Intertax* 10 (2003), pp. 314-315.

³⁸⁷ Also reporting on this, see France, sec. 3.2.1.

4.3.2. Solving instances of dual or multiple residences

4.3.2.1. Through a substantive criterion

4.3.2.1.1. Introduction

It might be presumed that dual residence tie-breakers are congruent with the criteria employed in domestic law. However, such assumptions do not always hold true. There are instances where jurisdictions, following incorporation-only or governance-only approaches, end up accepting alternative solutions for the treaty tie-breaker.³⁸⁸

Most countries still prefer to solve dual residency by reference to substantive criteria, and, within that option, through a governance criterion.³⁸⁹ It is true that, as of 2017, the OECD MC recommends solving dual residence through mutual agreement. The MLI includes a provision that automatically replaces the existing tie-breaker with a mutual agreement provision in all covered treaties insofar as there is no reservation.³⁹⁰ However, a significant number of jurisdictions have made a reservation and/or continue to conclude treaties, including a substantive criterion.³⁹¹ The drawbacks associated with mutual agreement, as detailed *infra*, may explain such preference.

A careful assessment of the reports allows the extraction of two trends. Incorporation-only jurisdictions prefer to resort to MAP (with or without reference to substantive criteria).³⁹² Jurisdictions that include governance criteria in the determination of their residence prefer substantive criteria, and the leading one is the place of effective management.

There are treaty networks with a clear preference for one of the outcomes.³⁹³ Others, likely following the preferences of the other Contracting State, include a wide range of variants in their tie-breaker.³⁹⁴ The following subsections address each of the options and reflect on the reasons behind the adoption of one or another approach.

³⁸⁸ For instance, the Korea (Rep.) Peru Tax treaty (2012) adopts POEM as the tiebreaker, even if Peru is an incorporation-only jurisdiction.

³⁸⁹ For an historical overview of the treaty tie-breaker, see R. Weber-Fas, *Corporate Residence Rules...*, *supra* n. 17, p. 233-237, L. Hinnekens, *Revised OECD-TAG definition of Place of Effective Management in Treaty Tie-Breaker Rule*, 31 Intertax 10 (2003), S. van Weeghel, *The Tie-Breaker Revisited: Towards a Formal Criterion?*, in L. Hinnekens and P. Hinnekens (eds), *A Vision of Taxes Within and Outside European Borders* (Kluwer, 2008), J.F. Avery Jones, 2008 OECD Model: *place of effective management – what one can learn from the history*, 63 Bull. Intl. Taxn. 5 (2009), sec. 2-5, Y. Plakhin, *The Place of Effective Management as a Tie-Breaker Criterion*, in M. Hofstätter & P. Plinsky (eds), *Dual Residence in Tax Treaty Law and EC Law* (Linde, 2009), Gooijers, J., *Tax Treaty Residence of Entities*, Wolters Kluwer, 2019, Part II sec. II, and G. Galdino, *A Residência das Pessoas Jurídicas nos Acordos para Evitar a Dupla Tributação* (IBDT, 2022), pp. 191-220.

³⁹⁰ This reservation is normally addressed in sec. 3.2.2.2 of the branch reports.

³⁹¹ See France and Morocco, sec. 3.2.2.1 and 3.2.2.2.

³⁹² See Peru, sec. 3.2.2.1.

³⁹³ See France, sec. 3.2.2.1.

³⁹⁴ See, for instance, Argentina, sec. 2.2 and 3.2.2.

4.3.2.1.2. Formal (substantive) criteria

As mentioned, several treaties opt for a formal substantive tie-breaker, in line with the tie-breaker recommended by the 1943 Mexico Model.³⁹⁵ This option is prevalent when one or both Contracting States follow an incorporation-only approach.³⁹⁶ Within those rules, dual residency is solved by considering the incorporation jurisdiction as the only one acting as the residence State for the purposes of the treaty.³⁹⁷

Existing treaties adopt alternative formal criteria. Some of them appear as surrogates to incorporation, such as place of the: i) “law it derives its status”³⁹⁸ or “laws of which it was created”;³⁹⁹ ii) registration⁴⁰⁰ or of the “registered office”;⁴⁰¹ iii) seat,⁴⁰² and; iv) nationality.⁴⁰³

It is also possible to find formal tie-breakers that reflect the different negotiating powers of the Contracting States. For instance, in the UK treaty network, certain treaties solve dual residence conflicts by consistently attributing tax treaty residency to the United Kingdom, regardless of the facts.⁴⁰⁴

Sometimes, the formal tie-breaker is a subsidiary or a special tie-breaker with a scope limited to the listed cases. For instance, some treaties exempt dual-listed entities⁴⁰⁵ from the MAP and consider them always as residents in the State of incorporation (insofar as such companies have their primary stock exchange listing in such State).⁴⁰⁶

Deeming provisions can convert what would otherwise be a governance criterion into a formal criterion. For instance, deeming POEM to be located in the Contracting State: i) under whose laws a legal person derives its status;⁴⁰⁷ ii) in the place of the “head office registered under the relevant laws”.⁴⁰⁸

³⁹⁵ League of Nations Fiscal Committee, *Model Bilateral Conventions for the Prevention of Double Taxation and Fiscal Evasion: Mexico Model*, League of Nations Document (July 1943).

³⁹⁶ As the Estonia, Nigeria and the United States. As an example of a treaty adopting incorporation as the tie-breaker, see Nigeria Romania tax treaty (1992).

³⁹⁷ This is still the prevailing criteria in the US tax treaty network. It can also be seen: i) Chinese Taipei treaty network, and namely in its treaties with Australia (1996), Indonesia (1996), Vietnam (1998), Sweden (2004), Hungary (2010), Kiribati (2014), Austria (2014), and Japan (2016). This also appears in the Estonia treaty network, and namely in its treaties with Bulgaria (2008) and Thailand (2012).

³⁹⁸ See the Malta Pakistan tax treaty (1975), the Estonia Poland tax treaty (1994) and the Estonia Ukraine tax treaty (1996).

³⁹⁹ See the Bulgaria Estonia tax treaty (2008).

⁴⁰⁰ See the Australia Finland tax treaty (2006). At the time of the signature of the latter treaty, Finland's domestic residence was solely based on incorporation. However, this criterion does not appear in any other Finnish treaty. The Armenia Poland tax treaty (1999), before the MLI, also followed registration.

⁴⁰¹ See the France Madagascar tax treaty (1983). In French, “*siège social statutaire*”.

⁴⁰² See Austria Hungary tax treaty (1975).

⁴⁰³ See Egypt Syria tax treaty (1991) and Chile Poland tax treaty (2000).

⁴⁰⁴ See the Cayman Islands UK tax treaty (2009).

⁴⁰⁵ Entities that, despite being legally independent and being resident for tax purposes in different jurisdictions, have a shared strategy, shareholders and board members.

⁴⁰⁶ See the Australian United Kingdom tax treaty (2003), Netherlands United Kingdom tax treaty (2008), and the Australia New Zealand tax treaty (2009).

⁴⁰⁷ See the Albania Poland tax treaty (1993).

⁴⁰⁸ See the Iran Serbia tax treaty (2004).

Formal criteria are also adopted with a subsidiary nature to solve interpretative issues at the level of the primary (governance-based) criteria,⁴⁰⁹ as addressed later.

The option for the formal tie-breaker rules underscores a pragmatic approach to resolving dual residency conflicts. It prioritises legal certainty and administrative efficiency. However, it may prevent the jurisdiction with closer economic nexus with a company from acting as the residency State, facilitating election of residency, also for treaty purposes.⁴¹⁰

4.3.2.1.3. *Governance criteria*

4.3.2.1.3.1. *Introduction*

Introduced in the models by the London 1946,⁴¹¹ *centre réel de direction* (place of effective management) remains the leading criterion for solving dual residency issues at the treaty level, despite the 2017 change in the OECD Model.⁴¹² This provision is naturally adopted in treaties from jurisdictions which include a governance criterion for recognising residence under their domestic law. However, it is also adopted by jurisdictions that do not include such expression under domestic law,⁴¹³ by incorporation-only jurisdictions,⁴¹⁴ and even by common law jurisdictions whose domestic residence is determined on the basis of CMC or a similar concept.⁴¹⁵

The second most prevalent governance criterion is (central) management and control, predominantly found in treaties between common law jurisdictions, and subsequently disseminated to treaties involving jurisdictions unfamiliar with this criterion.⁴¹⁶ Sometimes, this criterion is adopted with some linguistic variations.⁴¹⁷ CMC is normally interpreted in close alignment with the domestic law expression and even in alignment with the POEM.⁴¹⁸

A residual number of treaties include deviations or alternative governance criteria to CMC and POEM. Among those variations, one can find: i) the “place of effective management

⁴⁰⁹ In the Austrian Spain tax treaty, if the place of effective management cannot be determined, then residence should be attributed to the State where the “statutory seat” is.

⁴¹⁰ And was rejected by the OECD as a suitable tie-breaker. According to para. 22 of the Commentaries to art. 4 of the OECD Model (from 1977-2005) “it would not be an adequate solution to attach importance to a purely formal criterion like registration”.

⁴¹¹ League of Nations Fiscal Committee, *Model Bilateral Conventions for the Prevention of the Double Taxation of Income and Property*, League of Nations Document (March 1946).

⁴¹² See Belgium, Finland, Germany, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Serbia, Slovak Republic, South Africa, Spain and Switzerland, sec. 3.2.2.1. Para. 24.5 of the 2017 OECD Model commentaries maintains the pre-2017 POEM tie-breaker, for States wishing to adopt it in their treaties.

⁴¹³ See Türkiye, sec. 3.2.2.1.

⁴¹⁴ This is the case of Nigeria which adopts POEM as a tie-breaker, namely in its tax treaty with Spain (2009) Singapore (2017).

⁴¹⁵ See Australia, Israel and the UK, sec. 3.2.2.1. In the UK treaty network, references to management and control are limited to treaties with common law jurisdictions, jurisdictions which were under its influence and dependent territories, and are particularly visible in older treaties.

⁴¹⁶ See, for instance the Netherlands Singapore tax treaty (1971).

⁴¹⁷ See the Chinese Taipei Singapore Tax treaty (1981) which refers to “control and management of its business”.

⁴¹⁸ See the UK decision of the Court of Appeal (Civil Division) of England and Wales of 26.01.200 in *Wood and another v Holden* (Inspector of Taxes) [2006] EWCA Civ 26.

and policy-making”,⁴¹⁹ ii) the “place of the head office”,⁴²⁰ iii) the place of management,⁴²¹ iv) the “centre of its administrative or practical management”,⁴²² and; v) the “centre of its practical management”.⁴²³ Notwithstanding these variations, administrative guidance and case law tend to interpret such expressions consistently, frequently aligning with the pre-2017 OECD MC tie-breaker and respective commentaries.

In a limited number of treaties, Contracting States clarify whether the adjudicator should follow a static approach⁴²⁴ or a dynamic approach to the OECD Model concept of POEM.⁴²⁵

Several reasons explain the predominance of the place of effective management contemporarily: i) its inclusion in the OECD MC as the sole tiebreak criterion until 2017; ii) its familiarity and resemblance with the real seat criterion used under commercial and international private law; iii) the prevailing consensus that, in instances of conflict between form and substance, the governance-based criterion, reflecting substance, provides a more accurate representation of a corporation’s personal nexus with a jurisdiction.

The commentary has evolved in its guidance regarding the interpretation of this expression. In 2000, it added that “the place of effective management is the place where the key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are in substance made”.⁴²⁶ It further stated that it would be the “place where the most senior person or group of persons (for example, a board of directors) makes its decisions”. However, in 2008, this paragraph was deleted, leaving only a reference to “key management and commercial decisions”. Interestingly, neither case law nor administrative guidance clarifies whether a static approach should be taken to such commentaries for treaties concluded between 2000 and 2008. This may be aimed at preventing further flexibility in applying the rule, avoiding the circumvention that a narrow interpretation of the post-2008 wording may lead to.

⁴¹⁹ See the Hungary Israel tax treaty (1991).

⁴²⁰ This is more frequent in the Chinese treaty network, as “place of the head office” was the governance domestic law criterion in force until 2008. Some treaties go as far as to clarify that this criterion equates with “place of effective management”. See art. 4(3) of the Chinese treaties with Kuwait (1989), Brazil (1991), Luxembourg (1994), and Croatia (1995). For instance, the treaty with Brazil states: “a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of head office (i.e. effective management) is situated”. Also illustrative of this common approach to the expressions is the pre-MLI version of the Austria China treaty, whose tie-breaker was “place of head office or of effective management is situated”, an expression that was not provided with any further explanation.

⁴²¹ See Norway Türkiye tax treaty (2010).

⁴²² See Malaysia New Zealand tax treaty (1976).

⁴²³ See Fiji New Zealand tax treaty (1986).

⁴²⁴ See, for instance, the Protocol (2009) to the Finland Switzerland tax treaty (1991), stating that “in determining by mutual agreement the status of a person other than an individual which is a resident of both Contracting States, consideration shall, inter alia, be given to the rule contained in paragraph 3 of Article 4 of the OECD Model double taxation convention on income and on capital, adopted in 1977”.

⁴²⁵ See, for instance, the Finland Malta tax treaty (2000) stating that “consideration shall be given to the rules contained in paragraph 3 of Article 4 of the OECD Model Tax Convention, adopted in 1992 (as amended from time to time), especially to the reference concerning the place of effective management”. A similar expression is used in the Finland Israel tax treaty (1992).

⁴²⁶ Para. 24 of the pre-2017 OECD MC Commentary on art. 4. It further adds “[a]ll relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management”.

4.3.2.1.3.2. *Understanding POEM*

As mentioned, this general report excludes the interpretation of treaty provisions and commentaries, focusing on country practice.

Similar to domestic law, treaty provisions typically only enunciate the substantive criteria, without providing any further direction. In the rare instances where guidance is provided, one can find provisions defining POEM as the place: i) where the decision-making at the highest level takes place;⁴²⁷ ii) the place of day-to-day management performed by a “group of senior officers” or “the most senior person or group of persons”;⁴²⁸ iii) where “the chief executive officer and other senior executives of the enterprise usually carry on their activities governing the day-by-day work of the whole enterprise”;⁴²⁹ iv) where day-to-day governing activity is carried out, insofar as the “place of management” and the place where the day-to-day governing activity is carried out differs;⁴³⁰ v) where “higher policies, key management and commercial decisions are normally and regularly made”;⁴³¹ vi) “where key management, commercial decisions and operations that are necessary for the conduct of the entity’s business are, in substance, undertaken, under consideration of all relevant facts and circumstances”;⁴³² or vii) where the “actual managing body” is located.⁴³³

As an alternative, and instead of including a definition, some treaties provide a list of factual circumstances that should be considered when breaking the tie.⁴³⁴

There are other variations that are not directly related to the definition. Among them, one can find: i) clarification that the intentional element is not relevant (i.e. the reason for selecting the POEM);⁴³⁵ ii) clarification that the decisive is where decisions are “mainly made”

⁴²⁷ See the Belarus Israel tax treaty (2000) defining place of effective management as “the place where the decision making at the highest level on the important policies essential for the management of the company takes place, [and] the place that plays a leading part in the management of a company from an economic point of view”.

⁴²⁸ See the Protocol (2008) to the Germany Mexico tax treaty (2008).

⁴²⁹ See the Procol (2009) to the Hungary-San Marino tax treaty (2009).

⁴³⁰ See the Protocol (2011) to the Denmark Hungary tax treaty (2011) and the Protocol (2012) to the Georgia Hungary tax treaty (2012).

⁴³¹ See Protocol (2014) to the Hungary Saudi Arabia tax treaty (2014).

⁴³² See the Protocol (2002) to the Mexico Switzerland tax treaty (1993) and the Protocol (2012) to the Peru Switzerland tax treaty (2012).

⁴³³ See Kyrgyzstan Poland tax treaty (1998).

⁴³⁴ The Protocol of the Belgium Armenia tax treaty (2011) instead of a definition, lists criteria to be considered for the determination: “the place where the general meetings of the shareholders take place; the place where the board of directors meets; the place where the center of the general day-to-day management of such person is situated; items such as the place where the directorate, the commercial department, the central accountancy, the records are situated shall be taken into account.” In practical terms, day-to-day management assumes greater significance, as it is the prevailing criterion when discrepancies arise. See also, in the Russian treaty network the treaties with Belgium (not yet in force) and the treaty with Luxembourg (2000), the latter requiring to take into account the places: i) “where the meetings of the board of directors or equivalent body are usually held”; ii) where senior day-to-day management of the person is carried on”; iii) where the managers usually exercise their functions”.

⁴³⁵ See § IV of the Mexico Netherlands tax treaty (1993), determining that “[t]he reason for the choice of the place of effective management is in this respect not taken into account”. This normative profile will have an interesting heuristic interaction with a “principal purpose test” clause insofar as it may be interpreted as an override, as *lex specialis* of the intentional element of such clause.

as opposed to where they are formalised;⁴³⁶ iii) excluding significance to the residence of the shareholder or of those making decisions that affect the group as a whole (and not the individual company);⁴³⁷ iv) noting that Contracting States losing the tie-breaker is allowed to tax the worldwide income of a taxpayer insofar as it provides proper credit for the tax paid in the other Contracting State.⁴³⁸

The relevance of the OECD MC commentaries in interpreting the treaty provisions is sometimes expressly acknowledged in the text of the treaty, often through a literal reproduction of its text, “*hardening*” soft law.⁴³⁹ A particularly illustrative example is the Protocol to the Germany-Hungary treaty, which defines place of effective management as “the place where key management and commercial decisions that are necessary for the conduct of the entity’s business are in substance made. The place of the effective management will ordinarily be the place where the most senior person or group of persons makes its decisions, and the day-to-day management is conducted, the place where the actions to be taken by the entity as a whole are determined.”⁴⁴⁰ A reduced number of treaties include a reference to a specific version of the commentaries, ensuring a static approach to them.⁴⁴¹

The commentaries are also incorporated in administrative guidance. Interestingly, and despite the subsequent amendments, there are still instances where administrative guidance continues to attribute relevance to prior versions of the commentaries.⁴⁴²

The observations and reservations in the OECD MC commentaries provide further insights into the Contracting States’ approach. For instance, until 2017, France had an observation noting that POEM should be understood as “the place where the person or group of persons who exercises the most senior functions (for example, a board of directors or management board) makes its decisions. It is the place where the organs of direction, management and control of the entity are, in fact, mainly located.”⁴⁴³

Apart from a few exceptions, treaties normally do not provide any guidance regarding the type of activities or collegial body that ought to be taken into account, compelling the domestic adjudicator to make such a choice. In the latter context, it is not easy to find clear references. It is possible that, in the context of the same jurisdiction, relevance is granted to different levels of governance in the tie-breaker interpretation. For instance, France’s higher judiciary explicitly grants relevance to the place where the most senior group of people (or functions) which make the strategic decisions that impact the company as a whole,⁴⁴⁴ focusing on who *de facto* manages the company.⁴⁴⁵ However, lower French courts tend to give more relevance to day-to-day management.⁴⁴⁶ This may lead to greater legal uncertainty as, even if provided with a statutory substantive criterion, the taxpayer won’t

⁴³⁶ See § IV of the Mexico Netherlands tax treaty (1993).

⁴³⁷ See art. 4(8) of the Germany Switzerland tax treaty (1971).

⁴³⁸ See art. 4(9) of the Germany Switzerland tax treaty (1971).

⁴³⁹ Using the terminology of Craig West. See C. West, *References to the OECD Commentaries in Tax Treaties: A Steady March from “Soft” Law to “Hard” Law?*, 9 World Tax J. 1 (2017).

⁴⁴⁰ See the Protocol (2011) to the Germany Hungary tax treaty (2011).

⁴⁴¹ See, for instance, the Protocol (1993) to the Mexico Netherlands tax treaty (1993) and Protocol (2008) to the Germany Mexico tax treaty (2008).

⁴⁴² See para. 150 of BOI-INT-CVB-LUX, of 23.02.2021.

⁴⁴³ See para 24.3 of the Commentary to art. 4 of the OECD Model (2014).

⁴⁴⁴ See the French *Conseil D’État* decision on *Paupardin*, n.° 323592, of 16.4.2012.

⁴⁴⁵ See the French *Conseil D’État* decision, n.° 421627, of 27.03.2020.

⁴⁴⁶ See France, sec. 3.2.2.1 in what concerns decisions of lower courts.

be able to understand exactly how such criterion is going to be applied. The case law of several countries also takes into account elements extraneous to governance, even when the interpreted tie-breaker is POEM.

Concerns with *de facto* management by parent companies resurface in treaties. Some clarify that parent companies' "wide management decisions" should not be taken into account.⁴⁴⁷ Neither should the concession of a guarantee by a parent to a subsidiary in the context of loans between the subsidiary and third parties.⁴⁴⁸ But such references are quite rare.

Further explanations may also be found in domestic law⁴⁴⁹ or in administrative guidance.⁴⁵⁰ This methodology for clarification should be assessed with care, as there is a potential for treaty override insofar as Contracting States include factual elements beyond what the interpretation of the treaty would allow.⁴⁵¹

Surprisingly, the number of reported judicial decisions applying the tie-breaker is quite low. Most decisions recognise that POEM as a treaty tie-breaker has an autonomous meaning, even when the same or a similar expression is used to recognise residence under domestic law. However, in the interpretation and application of the two concepts, adjudicators tend to interpret the domestic and the tax treaty criteria alike, regardless of the domestic law wording or interpretation.⁴⁵² Despite the recognised autonomy, there is a visible trend of using the approaches developed by domestic adjudicatory bodies for the assessment of the domestic governance criterion in the interpretation of place of effective management or of its variations, leading to a heterogeneous interpretation of what constitutes an autonomous treaty concept.⁴⁵³ In most cases, this takes place by attributing relevance to the pre-2017 OECD Model commentaries to the interpretation of domestic law. One can find several court decisions citing directly the OECD commentaries.⁴⁵⁴

Despite numerous proposals for the reform⁴⁵⁵ of the POEM criterion, a universally accepted solution has not been reached. Notably, however, the detailed version of the Limitation of Benefits (LOB) provision has achieved consensus on the term "primary place

⁴⁴⁷ Art. 4(5) of the Austria-Switzerland tax treaty. The Dutch Supreme Court has held the same in its decision of 14.10.2005, BNB 2006/79.

⁴⁴⁸ See Brazil, sec. 3.2.2.1.

⁴⁴⁹ See Chinese Taipei, sec. 2.2.

⁴⁵⁰ See Ruling 2023.0699, of 24.10.2023 of the Belgium Ruling Commission, reiterating the guidance enshrined in the pre-2017 OECD MC Commentary.

⁴⁵¹ For instance, in Chinese Taipei (sec. 2.2) the domestic regulation requires consideration of elements that are not connected with decision-making, such as the place where the corporate books and accounting records are kept and the location of the major business activities.

⁴⁵² See the decision of the German BFH 4.11.2014 I R 19/13, BeckRS 2015, 94130 or the Austrian BFG decision of 24.05.2016, RV/1100184/2014. See also the Swiss Dispatch of the Federal Council, 25.05.1983 on the FITC and the FHTC, Federal Gazette 1983 III 1, 108.

⁴⁵³ See J.F. Avery Jones, 2008 *OECD Model...*, *supra* n. 389, sec. 6.

⁴⁵⁴ See the decisions of the Luxembourg Court of Appeal of 24.05.2022, n.° 47281C to 47286C and of the Danish Supreme Administrative Court KHO 2011:101 (considering that the OECD commentaries should be followed even if the other Contracting State is not an OECD member). In the same vein, see the ruling of the Spanish Directorate General of Taxes V0011-022, of 7.5.2002.

⁴⁵⁵ See, for instance, OECD Technical Advisory Group (TAAG), *The Impact of the Communications Revolution on the Application of "Place of Effective Management" as a Tie-Breaker Rule – Draft For Public Comment*, (OECD Publishing, 2021).

of management and control".⁴⁵⁶ This expression, representing a potential refinement of POEM, offers a robust framework that Contracting States could adopt, *mutatis mutandis*, to strengthen their substantive treaty tie-breaker rules.⁴⁵⁷

4.3.2.2. *The procedural or MAP test (namely the post-2017 two-tiered MAP approach)*

4.3.2.2.1. *Introduction*

Since 2008, the OECD Model Convention commentaries have included mutual agreement as an optional mechanism for Contracting States preferring to resolve dual residency issues on a casuistic basis.⁴⁵⁸ Such an alternative provision was considered preferable by the final report of BEPS Action 6⁴⁵⁹ and was finally introduced in the OECD MC in 2017, replacing POEM as the tie-breaker. The inclusion of this provision in the MLI⁴⁶⁰ explains the recent rapid spread of this provision, which can now be found in a considerable number of treaties.⁴⁶¹ There is also a clear trend towards the inclusion of MAP as the tie-breaker.⁴⁶²

Several reasons explain the preference for mutual agreement as a policy option: i) understanding of dual residence as an avoidance issue, which should be dealt with

⁴⁵⁶ Fifteen treaties (one of them outside of the US network) adopt this expression but always in the framework of an LOB provision.

⁴⁵⁷ See para. 148 of the Commentaries to art. 29 of the 2017 OECD Model, defining "primary place of management as the place where "a) the executive officers and senior management employees of the company or entity exercise day-to-day responsibility for more of the strategic, financial and operational policy decision making for the company or entity and its direct and indirect subsidiaries, and the staff of such persons conduct more of the day-to-day activities necessary for preparing and making those decisions in that Contracting State than in any other State; and b) such executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial and operational policy decision-making for the company or entity and its direct and indirect subsidiaries, and the staff of such persons conduct more of the day-to-day activities necessary for preparing and making those decisions, than the officers or employees of any other company or entity".

⁴⁵⁸ See para. 24.1 of the commentary on art. 4 of the 2008 version OECD Model, stating that "some countries also consider that such a case-by-case approach is the best way to deal with the difficulties in determining the place of effective management of a legal person that may arise from the use of new communication technologies". Following this, a considerable number of treaties started to include such a provision. In Japan, 20 out of the 57 treaties that were in force in 2017 required a MAP. The percentage is even higher in Nigeria, a jurisdiction where most current treaties were signed before 2017. See Japan, Mexico and Nigeria, sec. 3.2.2.2.

⁴⁵⁹ OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6—2015: Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 72.

⁴⁶⁰ This provision will be included in covered treaties insofar as neither jurisdiction had a reservation on art. 4 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (7.06.2017).

⁴⁶¹ For instance, in most of Türkiye's treaty network, sec. 3.2.2.2.

⁴⁶² For empirical evidence, see B. Obuoforibo, *Article 4: Resident...*, *supra* n. 9, sec. 5.2.3.

casuistically and with care;⁴⁶³ ii) the need to solve dual residence considering a wider range of elements that can be considered in the framework of the POEM (and, more specifically, through an examination of all facts and circumstances); iii) preference for a casuistic approach; iv) preference for a bilateral approach, and for an agreement with the competent authority of the other Contracting State, binding it to a common solution.

The MAP is utilised not only as the primary tie-breaker but also as a subsidiary mechanism when the initial substantive criterion, whether formal or governance-based, cannot be ascertained or is not located within either of the Contracting States.⁴⁶⁴

The subsequent analysis consists of two sections: a review of treaty practice and of the different variations of the provision, and a concluding policy evaluation.

4.3.2.2.2. *Treaty practice*

An examination of treaty practice reveals a considerable range of deviations from the OECD Model provision.

The most prevalent deviation concerns the criteria to be considered during the MAP. The deviating criteria are not always helpful as, in many cases: i) they merely repeat (partially) the list provided in the treaty provision following article 4(1) of the OECD MC, as currently included in the OECD Model Convention;⁴⁶⁵ ii) they add several criteria whose analysis may be quite burdensome and, still, do not point to a prevailing criteria,⁴⁶⁶ or; iii) refer cumulatively to different notions of governance.⁴⁶⁷

Another deviation consists in an intermediate position between the pre- and post-2017 tie-breakers, and stipulates MAP but only for cases where residency cannot be established on the basis of a primary substantive criterion, which can be either a formal criterion,⁴⁶⁸ a governance criterion⁴⁶⁹ or a succession of both.⁴⁷⁰ It may also be reserved for instances where the jurisdictions of incorporation and governance do not coincide.⁴⁷¹

⁴⁶³ This is recognised in para. 47 of the BEPS Action 6 final report, see *supra*. n. 460 and on para. 23 of commentary on art. 3 OECD Model (2017). See also the Swiss Dispatch of the Federal Council on a protocol to amend the Switzerland UK tax treaty, of 27.08.2008, Federal Gazette 2008, 7655, 7658. In the same direction, see New Zealand and the US, sec. 3.2.2.3. According to the expressive words of Obuoforibo, considering the context “the inescapable conclusion is that the OECD views instances of dual residence (among persons other than individuals) as prima facie evidence of tax avoidance, and is therefore fairly relaxed about the potential uncertainty awaiting a dual-resident taxpayer under the mutual agreement provisions” – see B. Obuoforibo, *Article 4: Resident...*, *supra* n. 9, sec. 5.2.1.3.

⁴⁶⁴ See the Australia Germany tax treaty (2015).

⁴⁶⁵ This can be seen in treaties prior to 2017. For instance, in the Peru Portugal tax treaty (2012) or in the Peru Switzerland tax treaty (2012)

⁴⁶⁶ For instance, the Protocol to the Luxembourg United Kingdom tax treaty (2022) which requires taking into account: i) senior management; ii) meetings of the board of directors or equivalent body; iii) headquarters; iv) extent and nature economic nexus with each State; v) risk of improper use of the domestic law of the Contracting States. Despite being a long list, it is not considered as exhaustive.

⁴⁶⁷ For instance, the Germany Japan tax treaty includes among the criteria for MAP, both the place of effective management and the place of the day-to-day management.

⁴⁶⁸ For instance, art. 4(3) Canada Peru tax treaty (2001) establishes nationality as the main tie-breaker for companies. However, if a company is resident in both or neither of the States, dual residence shall be solved through mutual agreement.

⁴⁶⁹ See the Korea (Rep.) Peru tax treaty (2012) or the Panama Singapore tax treaty (2010).

⁴⁷⁰ See the Andean Community Multilateral Treaty (2004).

⁴⁷¹ See the Norway Türkiye tax treaty (2010).

A limited number of treaties require competent authorities to reach an agreement.⁴⁷² However, these treaties fail to establish a defined timeframe for decision-making or to specify the consequences for non-compliance with this obligation. Consequently, the normative value of such mandate remains unclear. A domestic court, even upon request, would lack the authority to issue an injunction capable of rectifying the absence of an agreement. Thus, in practical terms, this mandate appears to offer no discernible advantage to the dual resident compared to provisions merely requiring competent authorities to endeavour to reach an agreement.

Some treaties predetermine the treaty provisions applicable in the event of a non-agreement⁴⁷³ by: i) listing treaty benefits that will still be applicable;⁴⁷⁴ ii) listing other treaty provisions that will still be applicable, such as the exchange of information clause.⁴⁷⁵

Nothing prevents tax authorities from adopting simplified proceedings in the context or outside the MAP. For instance, the Australian and New Zealand tax authorities adopted a joint administrative approach to residence under which the self-assessment of the taxpayer is not challenged insofar as: i) there is a minimum level of support in documentation and information; ii) there are no avoidance concerns; iii) the taxpayer meets certain thresholds and is not within certain risk indicators.⁴⁷⁶

Finally, we can find treaties that remove any reference to the criteria to be followed,⁴⁷⁷ sometimes even stressing that authorities “shall take into account all relevant factors” without further guidance on what should be considered “relevant”.⁴⁷⁸ Since the listed criteria are usually not binding, omission of criteria may not lead, in practice, to a significantly different outcome. However, the absence of guidance indicates that competent authorities will have full discretion in assessing the case, and the chances of a possible judicial review are even further reduced if, at all, possible.

Notwithstanding the provision of guidance and the varying extent of substantive criteria listed, MAPs vest competent authorities with significant discretionary power. There are hardly any statutory provisions, administrative guidance, or case law on the application of the mutual agreement to solve dual residence issues. The UK tax authorities are among the few that provide a list of criteria that they decided to be relevant within the MAP, and it is interesting to note that some of them are not even remotely connected with the substantive criteria used at the domestic or at the tax treaty level.⁴⁷⁹ This should be read as an alert for the deficiencies of granting discretion to authorities deprived of any substantive guidance.

Even in jurisdictions where judicial review is admitted,⁴⁸⁰ the absence of normative criteria effectively prevents the judicial power from exercising such review or, when

⁴⁷² This is particularly visible in the Belgium tax treaty network. See, for instance, the Belgium Singapore tax treaty (2006), the Belgium China tax treaty (2009) and the Belgium Korea (Rep.) tax treaty of 2017.

⁴⁷³ This matches with normative option outlined in art. 4(3)(d) of the MLI, *supra* n. 11.

⁴⁷⁴ See the Mexico Netherlands tax treaty (1993) and the Liechtenstein-United Kingdom tax treaty (2012).

⁴⁷⁵ See the Brazil Mexico tax treaty (2003).

⁴⁷⁶ See Australia, sec. 3.2.2.2.

⁴⁷⁷ See the Japan Italy tax treaty (1969) or the Brazil Peru tax treaty (2006). See also the treaties between Finland and the Baltic States.

⁴⁷⁸ See the Switzerland Zambia tax treaty (2017).

⁴⁷⁹ The list is made available in HMRC Guidance INTM 12005. Among those criteria, one can find: i) place of the business activities and where business is carried on; ii) economic links to each State; iii) existence of a factory, office or shop in the State; iv) where the employees are based; v) where customers contact the company; vi) actual burden of double taxation; vii) the simplest administrative route for the company.

⁴⁸⁰ See Canada, sec. 3.2.2.2.

exercising it, refusing to enter into the actual content of the discussions between competent authorities.⁴⁸¹

4.3.2.2.3. *Challenges and criticisms*

The adoption of a MAP for resolving dual residence conflicts is far from consensual. A considerable number of jurisdictions have registered reservations to the MLI and continue to adhere to the POEM as the tie-breaker.⁴⁸² MAP is criticised, both by scholars and practitioners, due to several key factors, which are summarised and delineated in the next paragraphs.

For tax authorities, MAP introduced a complex and lengthy procedure, increasing administrative costs and absorbing human resources that could be used for other functions.

For the taxpayer it presents a multitude of concerns: i) it is perceived as an infringement of legality, as it precludes taxpayers from anticipating the (tax) consequences of their actions, rendering them unable to assess their treaty residency status; ii) it is also perceived as an infringement of equality, as it allows disparate treatment of comparable taxpayers;⁴⁸³ iii) infringes the Rule of Law by granting an excessive degree of discretion to competent authorities, who are not obliged to reach an agreement and may find a mutual incentive to avoid agreement, thereby⁴⁸⁴ enabling both jurisdictions to exercise domestic taxing rights without any treaty limitations; iv) fails to provide adequate procedural safeguards for taxpayers, including the right to be heard; v) it usually takes considerable time before any decision; vi) the outcome is not public disclosed; vii) it does not ensure consistency in the treatment of the situations, as prior MAP outcomes do not establish a binding legal precedent; viii) it may prevent access to treaty arbitration, as failure by competent authorities to determine treaty residence by competent authorities may not be considered as “taxation not in accordance with the provisions of this Convention”⁴⁸⁵ and; ix) it may not obviate the need of determining the place of effective management of a company, namely for companies engaged in international shipping and air transport, under tax treaties⁴⁸⁶ and under the domestic regime implementing Pillar II model rules,⁴⁸⁷ or as an

⁴⁸¹ See the decision of the Upper Tribunal (Tax and Chancery Chamber) of 21.09.2020 in *McCabe v HMRC* [2020] UKUT 266 (TCC). The court considered that “a degree of confidentiality is important for the proper functioning of the MAP (both between the UK and Belgium and other tax authorities) and, without that confidentiality, future co-operation between tax authorities might suffer”.

⁴⁸² See, for instance, Hungary, sec. 3.2.2.1.

⁴⁸³ See Luxembourg, sec. 3.2.2.2.

⁴⁸⁴ C. Staringer & K. Moldaschl, *Chapter 4: The Role of Competent Authorities under Article 4(3) of the OECD Model Tax Convention*, in M. Lang et al. eds., *Tax Treaties and Procedural Law* (IBFD 2020), Sec. 4.3.2.2.

⁴⁸⁵ As required by art. 25(3)(2) of the OECD Model (2017) for treaty arbitration. In this sense, see also para. 58 of the OECD, *Explanatory Statement: Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting*, (OECD Publishing, 2017). Furthermore, some jurisdictions have explicitly excluded dual residence from the scope of the mandatory arbitration.

⁴⁸⁶ The MLI, *supra* n. 11, does not contain a provision adjusting art. 8 OECD Model (2017) for cases in which dual residence is solved through mutual agreement. Accordingly, nothing prevents the competent authorities from considering the company resident for tax treaty purposes in one Contracting State and the company from considering that it has place of effective management in the other Contracting State.

⁴⁸⁷ See art. 3.3.6. of the Pillar Two Model Rules—OECD, *Global Anti-Base Erosion Model Rules (Pillar Two)*, *supra* n. 159 and para. 180-185 of the Commentary to the Model Rules—OECD, *Consolidated Commentary to the Global Anti-Base Erosion Model Rules*, see *supra* n. 263.

“assessment criterion” for the MAP; x) it offers no guarantees that an agreement (if reached) will be effectively implemented by both tax authorities, and precludes recourse to judicial enforcement of the agreements’ outcome;⁴⁸⁸ xi) it allows determining the winning state on the basis of criteria that are not part of the statutory provisions for the determination of residence in that jurisdiction; xii) it conflates dual residence and avoidance, treating “all dual resident non-individuals as potential tax evaders and tentatively sanctions them, whether or not their dual residence is caused by economic or commercial (non-tax) reasons”.⁴⁸⁹ While judicial review of discretion appears admissible in some jurisdictions, it is not clear what the standard for review would be or what the grounds for successfully challenging a negative outcome would be.⁴⁹⁰

Furthermore, it can also be argued that MAP amounts to an infringement of legality, in its subdimensions of legal certainty and determinability. However, even admitting that judicial review of the MAP (under *ius cogens* or constitutional law),⁴⁹¹ the likely outcome would not favour the taxpayer. If the MAP or its outcome is considered unlawful, no alternative rule would be available under the treaty, and the dual residency conflict would remain unsolved.⁴⁹²

4.3.2.3. Denial of tax treaty benefits for dual-resident companies

Treaty practice shows that there is an alternative way of addressing dual residency, besides what is or was proposed by the OECD MC (and respective variations): the outright denial of treaty benefits for dual residents.

Tax treaties may either immediately deny those benefits⁴⁹³ or deny them merely when: i) agreement in the framework of the MAP is not possible;⁴⁹⁴ ii) cases with an increased risk of avoidance, for instance, dual listed entities, i.e. entities that, despite being legally independent and being resident for tax purposes in different jurisdictions, have a shared strategy, shareholders and board members.⁴⁹⁵

⁴⁸⁸ See Uruguay, sec. 3.2.2.2.

⁴⁸⁹ P. Bräumann, *Dual Residence for Non-Individuals*, in M. Lang et al (eds.), *Tax Treaty Entitlement*, (IBFD, 2019).

⁴⁹⁰ In Canada, the Tax Court accepted to review the outcome of a MAP between competent authorities, in *TD Securities (USA) LLC v R*, 2010 TCC 186. The Court determined that the taxpayer did not provide evidence of a reviewable error, that the denial of relief fell within the permissible range of MAP outcomes, and that the tax authorities acted reasonably. See also A.J. Martín Jiménez, *Chapter 5: Acceptance and Denial of MAP Requests and Related Remedies* in: (G. Maisto ed.) *Dispute Resolution under Tax Treaties and Beyond* (IBFD, 2023).

⁴⁹¹ Namely, for dualist systems or systems considering that treaties have priority over ordinary domestic law but not over constitutional law.

⁴⁹² See Chile, sec. 3.2.2.2.

⁴⁹³ This can be seen in the United Arab Emirates tax treaty network. See the tax treaty with Colombia (2017, but not yet in force), and the tax treaty with Brazil (2018).

⁴⁹⁴ This is the normative solution proposed by the 2016 US model and adopted in most of its treaty network. It is also the default position of Australia and Switzerland, sec. 3.2.2.3 and the option outlined in the reservation included in art. 4(3)(e) of the MLI, *supra* n. 11.

⁴⁹⁵ See art. 4(5) and (6) of the Netherlands United Kingdom tax treaty (2008).

4.3.2.4. *Absence of a tie-breaker*

Some treaties simply do not include a tie-breaker, sometimes with an explicit reference to the consequence (no access to treaty benefits) and, in other cases, without any further indication. This occurs in quite a limited number of treaties and, usually, older ones.⁴⁹⁶ The United Kingdom still has a significant number of treaties without a tie-breaker.⁴⁹⁷

The generic MAP⁴⁹⁸ may not be made available insofar as taxation by both Contracting States as residence states would not be taxation in accordance with the Convention (as normally required by the mutual agreement provision).

4.3.3. *Impact on domestic law*

As a rule, treaty tie-breaker provisions resolve dual residency conflicts solely for the purposes of the treaty. Consequently, both Contracting States may continue to apply their respective domestic residency laws for all other purposes.⁴⁹⁹

However, a subset of jurisdictions extends the effect of the treaty tie-breaker to domestic law, wherein the Contracting State losing the tie-breaker also ceases to treat the entity as a domestic resident.⁵⁰⁰

Such domestic law option is a logical consequence of concluding that such a company has a stronger personal nexus with another jurisdiction, which should be the only one acting as residence State. Nonetheless, this linkage between treaty and domestic law may engender unintended consequences, potentially leading to double non-residency, due to the following factors: i) variations in treaty tie-breakers, even those employing substantive criteria and within the same treaty network; ii) the discretionary nature of MAPs, wherein competent authorities are not bound to adhere to uniform criteria. Consequently, a Contracting State may prevail in a treaty tie-breaker under one treaty but subsequently lose a similar tie-breaker under another treaty. This undermines the underlying assumption

⁴⁹⁶ See, for instance, the Austria Liechtenstein tax treaty (1969), the Norway United States tax treaty (1980) or the Italy Ireland tax treaty (1971). Within the latter, and under rt. 3(1)(d) and (e) a company will only be considered a resident if it is “managed and controlled” in the respective territory. Thus, and despite the absence of a treaty tie-breaker, a company resident in both States under domestic law will only be considered as tax treaty resident in the territory where it is managed and controlled.

⁴⁹⁷ In the revised HMRC guidance for these cases, if the dual residence is a result of an incorporation-governance conflict, the governance country should act as the residence State for treaty purposes. If the dual conflict is a result of dual governance, then “it will remain outside of the scope of the DTA” – See HMRC Policy Paper, Change of view on the interpretation of the residence articles in sixteen Double Taxation Agreements (06.2022). This policy paper was issued in the aftermath of an agreement with the tax authorities of Jersey and is apparently applicable to sixteen other treaties. Of course, one could wonder whether it falls within the discretion of tax authorities to provide relief in case the treaty has not provided any tie-breaker for dual residency conflicts.

⁴⁹⁸ As foreseen in the treaty, in the provision similar to art. 25 of the OECD Model (2017).

⁴⁹⁹ See Finland, Liechtenstein and Malta, which expressly reject any impact of the treaty tie-breaker on domestic law, sec. 2.2.

⁵⁰⁰ See Ireland and Norway, sec. 2.1.1, South Africa, sec. 2.1.2, the Netherlands and Luxembourg, sec. 2.2. Norway, sec. 3.2.2.3, and Canada and the United Kingdom, sec. 3.2.4. If the tie-breaker requires MAP, the preclusion effect only takes place once the MAP is concluded – D.G. Duff, Chapter 3: Canada: Corporate Residence and the Treaty Tie-Breaker Rule – Landbouwbedrijf Backx B.V. v. The Queen in Tax Treaty Case Law around the Globe 2020 (P.H.J. Essers et al. eds., IBFD 2021), sec. 3.5.

of this rule – namely that the other Contracting State will effectively act as Residency State.

It is noteworthy that, in the majority of jurisdictions, the outcome of a tax treaty tie-breaker has no explicitly stated impact on domestic law beyond the requirements for treaty application.

4.3.4. *Other treaty issues regarding residency*

Some jurisdictions have special tax zones with low – or no-income taxation. As a rule, entities resident in those areas are not, at least as a sole consequence of such residence, excluded from treaty benefits.⁵⁰¹ Exclusion may occur if one reaches the conclusion that such entities are not “liable to tax” or through the adoption of specific clauses (either within the limitation on benefits provision or the territorial scope provision), expressly excluding residents of these territorial circumscriptions.⁵⁰²

Part Five: Evidence of residence

5.1. Introduction

Satisfaction of residency criteria does not automatically confer resident status upon an entity. This chapter examines the procedural formalities associated with the establishment and verification of residency.

Initially, the focus will be on the jurisdiction of residence, exploring the mechanisms employed by tax authorities to gather residency information and the evidentiary standards required to contest a taxpayer’s self-asserted residency status.

Subsequently, attention will turn to the jurisdiction of non-residence, analysing the probative value accorded to tax residency certificates as instruments for substantiating residency status.

5.2. In the residence country

5.2.1. *Acquiring information on residence*

In an era of intensifying economic globalisation, the acquisition of exhaustive information pertaining to the existence and fiscal attributes of legal entities has attained paramount significance. However, a comparative jurisprudential analysis reveals substantial disparities in the methodologies employed by tax authorities to access such data.

Broadly speaking, two distinct models can be discerned: i) entity or corporate registration, and; ii) specialised tax registration. The subsequent paragraphs examine each of these models.

Under the first model, the taxpayer is merely required to register next to the civil/

⁵⁰¹ See Panama, sec. 2.1.2.

⁵⁰² See Mexico, sec. 3.2.5.

commercial registry, which is followed by an automatic notice to the tax authorities.⁵⁰³ This model is adopted not only when tax residence relies solely on incorporation⁵⁰⁴ but also when company law requires foreign-incorporated companies to register as a condition to conduct business activities in the jurisdiction.⁵⁰⁵ In most countries, tax authorities rely on commercial registration to assess tax residence of companies incorporated in the jurisdiction.⁵⁰⁶

Under the second model (regardless of the civil/commercial registry), the entity must inform tax authorities, sometimes in addition to the registration mentioned in the previous paragraph. Such information may be requested from all entities or only from those that are either not incorporated at all (see section *supra* on non-incorporated entities) or that are incorporated in a different jurisdiction.⁵⁰⁷ Many systems opt for redundancy, and, in addition to the civil/commercial registration, taxpayers must also register next to tax authorities.⁵⁰⁸ Others prefer to prioritise registration next to tax authorities, depriving relevance to commercial law registration.⁵⁰⁹

Not all systems require registration or communication upon satisfaction of residence criteria (particularly those beyond incorporation). In the author's view, this is a deficiency that may hamper identifying taxpayers with a personal nexus with the jurisdiction. In the author's view, systems should be reviewed, ensuring mandatory disclosure of residence whenever a relevant criterion is met, regardless of the nature of such criterion.⁵¹⁰

Generally, as soon as tax authorities receive notice of a new taxpayer, they assign the taxpayer identification number (TIN), which can be the same number used for civil/commercial or a specific one for tax purposes.⁵¹¹

Whereas commercial registries typically operate under the principles of public access, tax registries are normally subject to stringent privacy regulations.⁵¹² Consequently, even in exceptional circumstances in which the data can be disclosed, the core tax attributes of an entity, such as its residence, are either not disclosed⁵¹³ or disclosed with major restrictions.⁵¹⁴ Notable exceptions exist in Switzerland and Denmark. In five Swiss Cantons, it is possible to get access to the taxable income and capital upon request.⁵¹⁵ Since 2012, Denmark has

⁵⁰³ See, for instance, Liechtenstein, sec. 2.1.4.

⁵⁰⁴ See, for instance, Bolivia, sec. 2.1.4.

⁵⁰⁵ See Malta and Hong Kong, sec. 2.1.4.

⁵⁰⁶ See Denmark, Hungary, Liechtenstein, Norway and Sweden, sec. 2.1.4.

⁵⁰⁷ See Indonesia, Ireland, Mexico, the Slovak Republic, the United Kingdom and Uruguay, sec. 2.1.4. China requires communication to tax authorities of all entities incorporated abroad meeting the residence criteria – see sec. 2.1.3.

⁵⁰⁸ See Chile, Germany, Israel, Japan, Morocco, New Zealand, Nigeria, Türkiye and Uruguay, sec. 2.1.1 and sec. 2.1.4.

⁵⁰⁹ See the Republic of Korea, sec. 2.1.4. See also Mexico, sec. 4.1.2 where this option can be better understood considering that incorporation is not a residence criterion for this jurisdiction.

⁵¹⁰ A different issue is whether the taxpayer is in a position to understand whether it fulfils the statutorily prescribed criteria. Such issue is specifically addressed in sec. 6.7 of this general report.

⁵¹¹ See for instance, Estonia, Indonesia and the UK, sec. 2.1.4.

⁵¹² See, for instance, Austria and Indonesia. As an exception, in Argentina anyone can ask for a registration certificate – see Argentina sec. 4.1.2.

⁵¹³ See Uruguay and Chile, sec. 4.1.1.2.

⁵¹⁴ See Guatemala (even if the publicly available information is limited). See Japan, sec. 4.1.2 which limits disclosure to the denomination, registered address and tax identification number.

⁵¹⁵ Insofar as taxpayers do not file a request to keep their data as confidential. See Switzerland, sec. 4.1.1.1.

published extensive tax-related data online, including taxable income and taxes due to any entity.⁵¹⁶

Accordingly, other taxpayers and tax authorities may ascertain whether an entity was incorporated or has its registered office in a certain jurisdiction, but it may be impossible to understand if that corresponds to residence for domestic law purposes (or, obviously, under a bilateral tax treaty). Such information is also relevant for third parties interacting with such entity, namely those receiving or paying income to such entity.

Given the increased importance of tax attributes, and particularly of residence, for the functioning of contemporary tax systems, a re-evaluation of the equilibrium between privacy concerns and the need to ensure the correct functioning of the system (and of combating tax fraud and evasion) is needed. The outcome of such re-evaluation will likely lead to considering that attributes such as the tax residency of any entity should be made publicly available. The VIES (VAT Information Exchange System) offers a potential model for the establishment of publicly accessible databases containing critical tax attributes, such as residency or liability to tax. Given the overarching importance of information in ensuring the integrity of tax systems and the global fight against tax evasion and avoidance, such a system could be incepted under the auspices of an international organisation such as the OECD or the UN.

The situation is already different for taxpayers covered by Public Country by Country regulations, which mandates the disclosure of tax residency information of all constituent entities on a public website.⁵¹⁷ However, this only covers a reduced number of taxpayers.

5.2.2. *Burden of proof and standards of evidence*

Some systems do not require mandatory communication of residence upon satisfaction of a relevant criterion, which may require an additional effort by tax authorities to identify all resident taxpayers. Procedural law is quite diverse in what concerns: i) the degree of evidence that must be provided; ii) the primary allocation of the burden of proof, and,⁵¹⁸ iii) the type of evidence admitted in court.

Concerning the degree of evidence, jurisdictions have different requirements, ranging from “evidence beyond doubt” to standards closer to reasonableness. A discernible trend is the attenuation of the evidentiary burden that would otherwise encumber tax authorities. For instance, in the United Kingdom, if a company fails to notify its residence, HMRC may make a “discovery assessment” if this is a demonstrably reasonable conclusion on the basis of available information.⁵¹⁹ In Switzerland, the Supreme Court has recently moved from evidence “beyond reasonable doubt” to “balance of probabilities”.⁵²⁰

In what concerns the person who bears the burden, the general rule is that the

⁵¹⁶ According to art. 17 of the Danish Tax Administration Act.

⁵¹⁷ See Directive (EU) 2021/2101 of the European Parliament and of the Council of 24.11.2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (Text with EEA relevance), PE/74/2021/INIT, OJ L 429, 1.12.2021, p. 1–14. See also Australia, sec. 4.1.2.

⁵¹⁸ An overview of differences in nuances see G. Maisto et al., *Dual Residence of Companies under Tax Treaties*, *supra* n. 9, p. 4 et seq.

⁵¹⁹ See the UK, sec. 2.1.4.

⁵²⁰ See the Swiss BGer/TF 2.04.2024, BGE 150 II 321.

burden lies with the party claiming a fact,⁵²¹ even if some jurisdictions require evidence to be provided by the party that may more easily gain access to the evidence.⁵²² Regarding residence, this means that tax authorities normally bear the burden of proof, as they will be in a position to challenge the taxpayers' initial representation, which may also vary in terms of intensity. In Canada, taxpayers are only required to provide *prima facie* evidence of residence (or non-residence), with the burden of proof shifting to tax authorities.⁵²³ In New Zealand, the taxpayer must show that it is more likely than not that its statement on residency is correct.⁵²⁴

Regarding the type of evidence, in common law jurisdictions, there is an emphasis on oral testimony and cross-examination, whereas in civil law jurisdictions, there is greater reliance on written evidence (even if, in recent years, an increased reliance on oral evidence is noticeable). That may have an impact on providing evidence on the governance of a company.

Certain situations are subject to an effective higher level of scrutiny. This is the case of foreign residency of companies whose managers are resident in the jurisdiction, as it will normally be incumbent on the resident to provide evidence that the relevant management actions are (normally) performed outside of the jurisdiction.⁵²⁵

The burden of proof may shift with the adoption of presumptions or legal fictions. For example, in Luxembourg, the central administration (the governance criterion) is deemed to be located in the registered office.⁵²⁶ Thus, taxpayers will bear the burden of providing evidence that management is in a different jurisdiction whenever that is the case.⁵²⁷

In an overall assessment, the current paradigm governing the burden of proof presents a worrisome asymmetry. While taxpayers possess exclusive knowledge of the most pertinent facts (e.g., the dynamics of managerial decision-making, the degree of managerial autonomy exercised, and the location of individuals involved in decision-making processes),⁵²⁸ tax authorities primarily bear the burden of proof.

It would be important to introduce legislative reforms to address such asymmetry, ensuring a fundamental normative shift towards greater transparency and taxpayer cooperation in determining corporate residency. Such reforms could entail several measures.

First, taxpayers could be required to detail further, in the meeting minutes, several facts pertaining to residence, namely: i) the identity of attendees; ii) the meeting location; iii) the modality of attendance (in-person or remote, through electronic means); iv) the geographical location of electronically participating attendees. Furthermore, and particularly in cases where a decision is influenced by a third party (or a meeting is attended by non-board members), minutes could map the decision-making process, explicitly

⁵²¹ See, for instance, Spain, South Africa or Switzerland, sec. 2.1.4.

⁵²² See Sweden, 2.1.4.

⁵²³ See Canada, sec. 2.1.4. See also *Hickman Motors Ltd v the Queen* [1997] 2 SCR 336 (SCC).

⁵²⁴ See New Zealand, sec. 2.1.4.

⁵²⁵ See Israel, sec. 2.1.3.

⁵²⁶ See Art. 100(2) of Luxembourg's law on commercial companies, of 10.08.1915.

⁵²⁷ See Luxembourg, sec. 2.1.5.

⁵²⁸ For instance, and in what concerns the governance criteria, the taxpayer is the one knowing all the dynamics of managerial decision-making, and whether the required degree of managerial autonomy is met or the location of all people involved in decision-making when decisions are made.

articulating the independent reasons considered to reach a particular decision.⁵²⁹

Second, multinational groups could be required to disclose residency-related facts further. This could be achieved through both private and public country-by-country reporting, expanded to include not only residence but also information on the relevant facts triggering residency criteria. Similar disclosure requirements could be imposed on transfer pricing documentation whenever the place of residence differs from the place of incorporation.

While imposing additional compliance obligations on taxpayers, these reforms would alleviate the current asymmetry, thereby reducing administrative costs and the current legal uncertainty in determining corporate residence.

5.3. Outside of the country of residence: certificates of residence

5.3.1. Introduction

In addition to determining residency within their jurisdictions, adjudicators may be required to assess residency in specific foreign jurisdictions. This necessity arises from provisions within domestic law, EU law, and tax treaty law that limit their application to residency within designated jurisdictions.

This is namely the case: i) of tax incentives that are extended to non-residents in the context of the EU or cooperation treaties; ii) of provisions that exclude from certain entitlements residents in non-cooperative jurisdictions or preferential regimes;⁵³⁰ iii) provisions such as controlled foreign company rules, which are triggered if the (effective) tax rate applicable at residence is under a certain threshold; iv) linking rules such as hybrids, insofar as the taxpayer needs to provide evidence of the tax treatment at residence. Residence is also relevant in determining the applicable income tax treaty. In all these cases, assessment of residence in a foreign jurisdiction is required.

The assessment follows the substantive rules of the foreign jurisdiction and varies significantly.⁵³¹ In instances where these rules are contested, the evidentiary rules pertaining to foreign law apply. Notably, when confronted with these complexities and likely acknowledging the inherent limitations, Dutch courts have permitted reliance on information provided by the International Bureau of Fiscal Documentation (IBFD) or consulting firms.⁵³²

The fundamental piece of evidence is the foreign-issued tax residency certificates.⁵³³ There are mainly two exceptions to the relevance of foreign-issued certificates. First, some jurisdictions do not even require them, deeming sufficient either: i) self-certification by the non-resident taxpayer which, like any other representation, may be subject to subsequent

⁵²⁹ Part of this information may already be requested under commercial law.

⁵³⁰ See Portugal, for instance Art. 14 of the Portuguese CITC and Serbia, sec. 2.1.2.

⁵³¹ See C. Maisto et al., *Dual Residence of Companies under Tax Treaties*, *supra* n. 9, sec. 2.1 (2018).

⁵³² See, for instance, the decision of the Dutch Supreme Court of 8.12.2023, n. ° 21/02864 or of 16.01.2009, n. 42.218, BNB 2009/92.

⁵³³ This subsection only covers foreign-issued certificates. All issues connected with the issuance of these certificates by the residency state are addressed later, as this is a logical outcome of being considered as a resident in a jurisdiction.

verification by tax authorities,⁵³⁴ or; ii) the production and maintenance of adequate records regarding foreign residency.⁵³⁵ Second, some jurisdictions consider foreign-issued certificates as insufficient, requiring certification of residence to be provided on their own prescribed forms,⁵³⁶ sometimes even rejecting the admissibility of the foreign forms altogether.⁵³⁷

Beyond these narrowly defined exceptions, and provided that they encompass the relevant taxable period and are expressly issued for tax purposes⁵³⁸, residency certificates are generally deemed sufficient evidence, precluding further scrutiny of residency status.⁵³⁹

The following sections are dedicated to a comprehensive examination of residency certificates, given their paramount importance in providing evidence of meeting residence criteria in foreign jurisdictions.

5.3.2. *The issuance of the certificate*

In the absence of publicly available tax residency information, evidence of residency for tax purposes relies on certifications issued by tax authorities of the claimed jurisdiction. This certification typically takes the form of a document commonly known as a residency certificate.

The issuance of tax residency certificates appears to be a universal practice. However, significant variations exist in both the procedural requisites and the substantive content of these certificates. The following paragraphs address such diversity. Following this analysis, the report will address potential areas for improvement.

There is a notable diversity in what concerns procedural requirements. There is no international guidance on the issuance, and most jurisdictions lack statutory provisions regulating this process.⁵⁴⁰

The following paragraphs aim to provide a structured comparative legal analysis of the diverse variations in residency certificate issuance, facilitating an assessment of these practices and the formulation of policy options to address identified deficiencies.

Diversity starts immediately with the determination of the competent issuing authority. While central tax authorities are typically responsible, certain jurisdictions defer this authority to political autonomies.⁵⁴¹

In recent years, several jurisdictions have automated and digitised the procedure for

⁵³⁴ See Ireland, sec. 2.1.5 regarding domestic exemption for dividend withholding tax. See Canada, sec. 2.1.5 where there is no formal requirement of a certificate. In certain cases, tax authorities may require filing a domestic form, providing details on the non-resident's identification and of the transaction.

⁵³⁵ See Canada, sec. 2.1.5 regarding residence of subsidiaries in the context of the exempt surplus regime.

⁵³⁶ See Indonesia, Serbia and Portugal, sec. 2.1.5.

⁵³⁷ See Nigeria and Austria, sec. 2.1.5. In Israel, despite the inclusion of a field for signature by the foreign tax authority, the form is accepted without such signature, provided that it is accompanied by a residence certificate issued by such authority. See Israel, sec. 2.1.5. Since 2013, Serbia allows a certified translation of the foreign-issued certificate of residency. See Serbia, sec. 2.1.5.

⁵³⁸ For instance, an extract of registration for commercial law purposes was considered insufficient evidence of tax residence. See decision of the Court of Appeal of Ghent, of 18.03.2014, n.° 2007/AR/2729.

⁵³⁹ See, for instance, the decision of the Norwegian District Court in *Arcade Drilling*, Uvt 2013.1050 or of the Hungarian Supreme Court of 23.08.2023, Kfv.V.35.407/2022/7.

⁵⁴⁰ See Chile and France, sec. 4.1.1.1.

⁵⁴¹ As in Switzerland, where the Cantons are responsible for the certificates of residence (even if based on a template). See Switzerland, sec. 4.1.1.

the issuance of certificates.⁵⁴² Regarding the format, certificates may be issued: i) exclusively online; ii) exclusively in a physical format,⁵⁴³ or; iii) in most cases, in either format at the taxpayer's discretion. Certification generally occurs using a pre-approved form, although tax authorities may, upon request from a foreign jurisdiction, certify residency using the foreign jurisdiction's form.⁵⁴⁴

Jurisdictional practices vary regarding prior assessment. While many jurisdictions conduct a case-by-case evaluation, others issue certificates mechanically upon request, without prior assessment. Estonia, an incorporation-only jurisdiction, issues certificates immediately upon incorporation without any further checks.⁵⁴⁵ To mitigate a potential improper use of certificates, some jurisdictions issue certificates only for past periods⁵⁴⁶ or require filing of the first tax return before issuance.⁵⁴⁷ Furthermore, they may condition issuance on the provision of additional information⁵⁴⁸ or evidence demonstrating that the income is covered under a specific treaty.⁵⁴⁹

The timeframe for issuance also exhibits significant variation, ranging from: i) immediate issuance (typical for online requests);⁵⁵⁰ ii) issuance within hours;⁵⁵¹ iii) issuance within one week;⁵⁵² iv) issuance within one month,⁵⁵³ and; v) issuance over one month.⁵⁵⁴

Authorities from territorial tax systems also issue residence certificates, as they may be necessary for residents deriving income in other Contracting States.⁵⁵⁵

Finally, some jurisdictions establish grounds for refusal beyond non-compliance with residency criteria, including: i) artificiality or lack of proper evidence of meeting the requirements,⁵⁵⁶ and; ii) outstanding tax liabilities.⁵⁵⁷

⁵⁴² See Bolivia (as of 2019), Indonesia and Panama (as of 2021).

⁵⁴³ See Liechtenstein, sec. 4.1.1.1.

⁵⁴⁴ This is not always the case, and some authorities may refuse to certify residence using foreign forms, particularly when such forms include data points that authorities are not able to validate. See Japan and Canada, sec. 4.1.1.1.

⁵⁴⁵ See Estonia, sec. 4.1.1.1.

⁵⁴⁶ See Colombia, Mexico, Hong Kong, and Uruguay, sec. 4.1.1.1. In Colombia and Australia, it is only possible to ask for the past 5 years.

⁵⁴⁷ See Austria, where companies are requested to indicate whether its place of effective management is in Austria, during the first two years.

⁵⁴⁸ For instance, Germany requires the requiring entity to state whether the place of management is in its territory. See China, sec. 4.1.1.1 where authorities request for documents evidencing the income to be treated under the treaty such as agreements and decisions (resolutions of the board of directors or shareholders meetings) regarding the payment.

⁵⁴⁹ See Portugal, sec. 4.1.1.1.

⁵⁵⁰ Up to 72 hours in Argentina, same day in Belgium, sec. 4.1.1.1.

⁵⁵¹ See Hungary, sec. 4.1.1.1.

⁵⁵² In China, Spain and Uruguay, sec. 4.1.1.1. up to 10 working days. Within four weeks in Norway, see sec. 4.1.1.1.

⁵⁵³ In Panama, it takes around 3 months for non-digitalised certificates, see sec. 4.1.1.

⁵⁵⁴ See Bolivia, Guatemala, Panama and Uruguay, sec. 4.1.1.1.

⁵⁵⁵ See Panama, sec. 2.1.1 and decisions TAT-RF-072, of 31.07.2019 and TAT-RF-101, of 11.12.2020 of the Administrative Tax Tribunal.

⁵⁵⁶ See Portugal, sec. 4.1.1.1.

5.3.3. Representations

Beyond the procedural differences observed in the issuance process, the certificates' content is also quite heterogeneous. The assessment will be structured according to its main elements: i) purpose, and; ii) content.

The primary purpose of residency certificates is to provide evidence of residency. Accordingly, some jurisdictions issue general-purpose certificates.⁵⁵⁸ However, most jurisdictions issue certificates specifically for applying income tax treaties (and, within the EU, for applying the EU directives). A smaller subset of jurisdictions issues certificates limited to a specific treaty, a specific foreign jurisdiction, a particular tax year, or even a designated item of income.⁵⁵⁹ This case-specific approach forces taxpayers to obtain multiple certificates (which can amount to a significant number), increasing the direct and indirect (compliance) costs associated with internationalisation.

The content of the certificate also varies considerably. Representations may include: i) taxpayer identification; ii) payor identification (and financial intermediary identification, if applicable); iii) detailed transaction particulars, such as income classification, amount and currency, or; iv) taxpayer self-declaration of beneficial ownership of the income.

Modern certificates often incorporate an online authentication verification. In these instances, acceptance may be contingent upon the receiving tax authority verifying the certificate's online authenticity.⁵⁶⁰ Depending on domestic law, consular apostille by consular authorities may be required.⁵⁶¹

A limited number of jurisdictions include administrative guidance for certificates of special entities, given the added challenges they bring to applying tax treaties. This is the case of Luxembourg's specific rules for investment funds and private wealth companies.⁵⁶²

In summary, the content of the certificates is quite heterogeneous among the assessed jurisdictions, reflecting the contexts where they can be used. This variability hampers an easy assessment of the certificates (and may even lead to their rejection due to omission of one element that is immaterial for one tax authority but considered essential for another). The following sections will assess some of the shortcomings of the residence certificates.

5.3.4. Value of the certificates as a means of evidence

Jurisdictions have different approaches regarding the need for a specific tax certificate to prove residence. In some, certificates are considered *ad substantiam* requirements, constituting the sole permissible means of evidence.⁵⁶³ Conversely, others treat them as *ad probationem* requirements, allowing alternative means of evidence.⁵⁶⁴ Portuguese and

⁵⁵⁸ See Chinese Taipei, Spain and Liechtenstein, sec. 4.1.1.1.

⁵⁵⁹ See Belgium, sec. 4.1.1.1.

⁵⁶⁰ This is, for instance, the case of Peru, sec. 4.1.1.1.

⁵⁶¹ According to the Hague Convention abolishing the requirement of legalisation for foreign public documents, concluded in 5.10.1961. See Panama, sec. 5.2.

⁵⁶² See Luxembourg, sec. 4.1.1.1.

⁵⁶³ See Panama and India, sec. 2.1.5. In Spain, while acknowledging the freedom to provide evidence, administrative guidance and case law treat foreign certificates as either indispensable or of higher evidentiary weight. See Spain, sec. 2.1.5.

⁵⁶⁴ See Belgium, sec. 2.1.5; Switzerland (BGer/TF, 6.02.2020, 2C_510/2018) and Türkiye, sec. 4.1.1.1.

Swedish courts have determined that residency certificates are merely *ad probationem*, allowing taxpayers the opportunity to provide alternative evidence, particularly when certificate acquisition is impracticable or unduly burdensome.⁵⁶⁵

Notwithstanding the formal validity of the certificate, receiving tax authorities retain the prerogative to challenge the information contained therein.⁵⁶⁶ Furthermore, several jurisdictions require, for specific fact patterns, the submission of additional documentation and information.⁵⁶⁷ However, such additional requirements must be scrutinised carefully, as they may contravene *Pacta Sunt Servanda*, which often enjoys constitutional protection.⁵⁶⁸ For instance, the requirement of a foreign-submitted tax return may not be admissible if the application of the domestic tax regime is not contingent upon effective taxation in the other jurisdiction.

Certain jurisdictions grant certificates a heightened evidentiary value, thus imposing a more rigorous standard of proof to tax authorities seeking to dispute them.⁵⁶⁹

Certificates should not be requirements *ad substantiam* requirements, for the reasons summarised in the following paragraphs.

First, refusal may be a consequence of non-compliant behaviour (both in what concerns substantive or adjective tax obligations), and thus, certificates may be refused to residents. In such cases, certificates are only issued once the taxpayer fulfils its (late) obligations.⁵⁷⁰ In the author's view, this may not be the best solution, even for the issuer jurisdiction. In fact, it may exclude the resident from a (source) treaty benefit that it may otherwise be entitled to in the other jurisdiction and lead to applying a domestic relief method for an amount higher than the one it would have to apply if the taxpayer had been issued the certificate.

Second, refusal may be grounded on the “winner takes all” approach. Accordingly, once the jurisdiction loses any treaty tie-breaker, it no longer provides any certificate of residence in the framework of any other treaty.⁵⁷¹ This approach may be detrimental if domestic law does not incorporate a ‘winner takes all’ principle. The effects of a tie-breaker are confined to the relevant tax treaty, and taxpayers should not be precluded from obtaining residency-based entitlements under other treaties, EU law, or domestic law.⁵⁷²

5.3.5. *Link between certification and residence criteria*

As apodictic as it may be, a certificate of residence serves as a means of providing evidence of residence. Notwithstanding, a comprehensive assessment of the different jurisdictions shows that this is not always the case. This subsection aims to explore the link between

⁵⁶⁵ See Portugal and Sweden, sec. 4.1.1.1. See also A. Ribes Ribes, *La problemática de los certificados fiscales de residencia en el Impuesto sobre la Renta de no Residentes*, Quincena Fiscal, 2018, pp. 11-23.

⁵⁶⁶ That is explicitly the case under the Faster Directive – see art. 4(5) of Council Directive (EU) 2025/50 of 10.12.2024 on faster and safer relief of excess withholding taxes, ST/10058/2024/INIT, OJ L, 2025/50, 10.1.2025.

⁵⁶⁷ See Austria and Türkiye, sec. 2.1.5. In Austria, as mentioned earlier, the foreign resident must also provide a “substance declaration”.

⁵⁶⁸ See decision of 9.06.2023 of the Supreme Court of Peru, n. 8380-2021-LIMA.

⁵⁶⁹ This is the case of Belgium, Spain and India, sec. 2.1.5. See also the decision of the Supreme Court of India in *Union of India vs Azadi Bachair Andolan* [2003] 263 ITR 3 706.

⁵⁷⁰ Portugal, sect. 4.1.1.

⁵⁷¹ See Austria, sec. 4.1.1.

⁵⁷² This would be the case of domestic provisions restricting certain benefits for residents in EU/EEA countries.

certificates and the underlying residency status and to explore possible pathways for reform.

Firstly, certificates merely attest an attribute at the moment of their issuance. However, most jurisdictions maintain their validity for a certain period after their issuance.⁵⁷³ However, the residency status may change during such a period, allowing its use as evidence of residency even if the issuing jurisdiction is aware of the entity's non-residency.

Secondly, certificates only attest to the factual basis that allows for their determination. If residence is recognised under a formal criterion, that might be uncontroversial, but the same cannot be said about what concerns recognising residence on the basis of a governance criterion. In either case, residence determination normally follows a system of either self-assessment or self-registration, which is normally not scrutinised further before the issuance of the certificate.⁵⁷⁴ To mitigate improper certificate acquisition, Hong Kong mandates supplementary information and documentation for entities incorporated or established abroad, which is potentially a best practice in this area.⁵⁷⁵

Consequently, tax authorities may encounter valid residency certificates for entities that are not, or are no longer, residents of the issuing jurisdiction. This poses particular challenges in jurisdictions where certificates are considered a presumption of residence or require higher counter-evidentiary efforts by tax authorities.⁵⁷⁶

In cases of elective residence, tax authorities will issue residence certificates to those who have opted for residence treatment, even if they do not meet traditional residency criteria.⁵⁷⁷ The classification of such elective residence as a "similar criterion" to residence is debatable. However, provided with such a certificate, the company may obtain access to the treaty network of the elective residency state.

These shortcomings can be resolved through different options: i) the transition from certificates to public registries, or; ii) the inclusion of a QR code or other digital marker enabling real-time verification of residency status via a secure issuer portal. The latter approach would allow for longer certificate validity, as the document would function as a gateway to dynamic residency information.

Furthermore, instead of merely stating the residency outcome, issuing jurisdictions should articulate the factual basis for residency determination under domestic law and the data-gathering process employed (e.g., taxpayer self-declaration or objective tax authority verification).

5.3.6. *Link between certification and liability to tax*

There is an underlying assumption that certificates are also evidence that the entity is liable to tax⁵⁷⁸ or even subject to tax.⁵⁷⁹

However, this is not the case and many jurisdictions issue certificates without any indication of such tax attributes.⁵⁸⁰ An entity may be liable to tax and then benefit from

⁵⁷³ Normally for one year.

⁵⁷⁴ This is explicitly recognised in the branch reports of Chile, Estonia and Mexico, sec. 4.1.1.

⁵⁷⁵ See Hong Kong, sec. 4.1.1.1.

⁵⁷⁶ This is the case in Spain, as Courts consider that certificates entail a presumption of residency.

⁵⁷⁷ See the US, sec. 4.1.1.

⁵⁷⁸ Under the provisions following art. 4(1) of the OECD model (2017).

⁵⁷⁹ This would be relevant for treaties including a subject to tax provision.

⁵⁸⁰ Luxembourg issues certificates even for entities that are not subject to income tax. See Luxembourg, sec. 4.1.1.

an objective exemption on most or all of its income. As already noted, residency within a special tax zone, which may preclude tax liability or subjection to tax, is not consistently regarded as a barrier to residency certificate issuance.⁵⁸¹

To mitigate unintended consequences in other jurisdictions, it is advisable that residency certificates consistently articulate the extent to which a resident is liable and subject to tax within the issuing jurisdiction.

Part Six: Assessment and recommended approaches

6.1. Introduction

A growing number of scholars criticise the concept of residence, considering that it is in crisis, is outdated, is no longer fit for purpose or is inherently dysfunctional.⁵⁸² The next sections are aimed at assessing whether residence remains fit for purpose.

This Part will start with a critical analysis of the evolving role of tax residence, commencing with an examination of its expanded functional scope within contemporary tax systems. Subsequently, it will focus on the substantive tax consequences attached to the residency status, highlighting the discernible convergence between the tax positions of residents and non-residents. The analysis will then proceed to assess the challenges posed by digitalisation and globalisation to the determination of residency, followed by an exploration of instances where residence is improperly employed to address issues more appropriately resolved through alternative legal constructs. Finally, it will briefly consider potential alternatives to residency as a jurisdictional nexus and conclude with a discussion of the ramifications arising from the inherent indeterminacy in the application of residency criteria.

6.2. From personal nexus to a multipurpose concept

The concept of residency was introduced into income taxation to delimit those with a genuine personal nexus with a jurisdiction, thereby delineating the scope of prescriptive jurisdiction. In both common and civil law systems, the criteria were transplanted from commercial to tax law without substantial critical analysis.⁵⁸³

As with any other imported concept, this led to progressive adjustments taking into account the specific primary purpose of the concept within tax law. First, through judicial decisions that further carved the concept, promoting a corrective or teleological interpretation of statutory provisions. Second, through progressive codification of those decisions in statutory provisions or administrative guidance.

However, the concept has since expanded beyond its initial remit, now serving several other functions. Such expansion, again, occurred without adequate deliberation. Residence has become a “*Hercules-concept*” as it is also used to determine income source, treaty benefits

⁵⁸¹ See Brazil, sec. 4.1 and Israel, sec. 2.1.

⁵⁸² See S. Elkins, *The myth of corporate tax residence*, 9 Columbia Journal of Tax Law 1 (2017).

⁵⁸³ In common law jurisdictions, the case law discussion is focused on the concept of residency, as already included in the United Kingdom Income Tax Act.

entitlement, income allocation between jurisdictions and destination of automatically exchanged information. This multiplicity of roles renders the concept systematically flawed, as adjustments at one level may create unintended consequences at another. Furthermore, the concept progressively loses its consistency, being fragmented into different realities depending on the normative framework in which it is applied.

A deeper reflection is needed to understand whether residence is the appropriate concept for all these applications or whether the relevant feature triggering a certain regime is an attribute associated with, but not necessarily synonymous with, residency.

The tax treaty level provides an excellent example of such diversity. Residence is used as: i) an entitlement concept, determining access to the treaty based on a domestic personal tax nexus; ii) a conflict of law concept, establishing the state with the strongest personal nexus claim; iii) a residency-allocation criterion, identifying items of income that may be taxed by the jurisdiction acting as residency for tax treaty purposes; iv) a source allocation criterion, determining the country that, having a territorial nexus with the income, may continue to tax under such nexus; v) a relief concept, coinciding with residence for conflict of law purposes; vi) a tainted criterion for discrimination analysis (even for stateless persons); vii) a concept used for MAPs, coinciding with the concept of residency as entitlement.

For EU corporate directives, as already noted,⁵⁸⁴ access to the benefits should not rely on residency but on underlying subjection to tax, to reflect the directives' purpose of providing relief for concurrent personal nexus and territorial nexus claims. This approach would extend benefits to companies with at least one EU residence up until the person is considered a resident solely outside of the Union. Within the Directives, residence is also used as a source concept,⁵⁸⁵ allowing entitlement to EU benefits on the basis of residence, often without addressing the issues created by multiple residencies.

In the context of mutual assistance (within the treaties or outside), if the purpose is merely increasing transparency while combating tax evasion and avoidance, residence as a personal nexus is and should not be relevant. This is namely the case of: i) exchange of information upon request or spontaneously; ii) simultaneous controls or joint audits; iii) notification requests, or; iv) presence in administrative offices and participation in administrative enquiries. In all these cases, the focus should be on data access and administrative cooperation, which is relevant for several other jurisdictions beyond the jurisdiction of residency. This is particularly the case with the TIEAs,⁵⁸⁶ or the EU directives on

⁵⁸⁴ See J.F.P. Nogueira, "Dual-residency of companies and EU law: Accessing corporate tax directives' benefits after the 2017 OECD Model Tax Convention changes", in: *The dual-residency tie-breaker for companies, in Liber Amicorum Luc de Broe*, (F. Debelva ed.), pp. 493-514 (Kluwer Law International, 2024).

⁵⁸⁵ See art. 3(1)(28) of the Faster directive. See *supra* n.566.

⁵⁸⁶ This is already the case of the Tax Information Exchange Agreements that follow the OECD Model for such agreements, since neither art. 1 ("Object and Scope of the Agreement") and 2 ("jurisdiction") refer to residence. Para. 7 of the commentary to art. 2 states that "The requested Party's obligation to provide information is not, however, restricted by the residence or the nationality of the person to whom the information relates or by the residence or the nationality of the person in control or possession of the information requested". See OECD, *Agreement on Exchange of Information in Tax Matters*, (OECD Publishing, 2002).

mutual assistance,⁵⁸⁷ and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.⁵⁸⁸

Mutual assistance may also be an enabler for the exercise of states' taxing rights. In such a context, it is important to consider which type of taxation is to be enabled. If taxation is levied on personal nexus, information should be made available to all jurisdictions with nexus and not only to those eventually winning an income tax treaty tiebreak rule. In fact, the "loser" jurisdictions may remain competent to exercise any taxing rights that remain unaffected by the applicable treaty. This should apply to instances of automatic exchange of information, both in the context of instruments developed by the EU⁵⁸⁹ and those developed by the OECD.⁵⁹⁰ Thus, and in the author's view, automatic information mechanisms should be improved to ensure that information is shared with all jurisdictions having a personal tax nexus with the person.⁵⁹¹

In conclusion, tax law has been an area of "assembly by design", with concepts often imported from other legal domains. That is particularly true for corporate tax residence.⁵⁹² However, the progressive refinements of the concept of residence have fragmented it and led to its use in situations beyond those for which it was developed and refined. In the author's view, redefining residency for each one of these new functions endangers conceptual consistency, which is crucial for legal interpretation. Therefore, new normative instruments should progressively abandon residency-based renvoi and directly link to the tax or non-tax attribute legitimising legislative intervention in such context.

At the domestic level, residence stands fit for purpose within its original aim: ascertaining a personal nexus with a jurisdiction, allowing the exercise of taxing rights on that nexus alone. The pressure on the concept would be alleviated if other roles were assigned to different concepts or if residence was accompanied by additional requirements.

Residency determination remains essential for corporate income taxation in non-territorial systems. From a substantive tax perspective, at least one jurisdiction must assess the worldwide income of the entity and eventually take into account the specific

⁵⁸⁷ EU Mutual Assistance Directive (Council Directive 2011/16/EU of 15.02.2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC) and the tax recovery directive (Council Directive 2010/24/EU of 16.03.2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures). In the latter, there is a minor reference to the term "resident" in the context of art. 6 ("Exchange of information without prior request") as an example of a State that could be the recipient of the information.

⁵⁸⁸ Mutual Administrative Assistance Convention – *supra* n. 332.

⁵⁸⁹ EU Council Directive 2011/16/EU of 15.02.2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

⁵⁹⁰ OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, (OECD Publishing, 2014) also known as the OECD Common Reporting Standard (CRS) and OECD, *International Standards for Automatic Exchange of Information in Tax Matters: Crypto-Asset Reporting Framework and 2023 update to the Common Reporting Standard*, (OECD Publishing, 2023).

⁵⁹¹ In this vein, see the commentary on sec. IV(4), of the 2023 update to the Common Reporting Standard, *supra* n. 590, which no longer allows taxpayers to rely on tax treaties to solve dual-residency issues and requires reporting to all of their jurisdictions of residence.

⁵⁹² See R. Weber-Fas, *Corporate Residence Rules...*, *supra* n. 17, p. 180.

circumstances of the taxpayer.⁵⁹³ From a procedural perspective, one jurisdiction must centralise income and informational tax returns, exchange information, and act as the primary stakeholder in combating tax evasion.

In conclusion, while residence as a concept stands firm, the same cannot be said about the definition, interpretation, and application of the concept and its use beyond its primary goal of setting a personal nexus with a jurisdiction.

6.3. Residence, globalisation and digitalisation

As evidenced throughout the report, globalisation and the digitalisation of the economy add challenges to residency assessment. This appears to be the case both for jurisdictions relying solely on formal criteria and for those relying (also) on non-formal criteria, requiring consideration of all facts and circumstances.

Jurisdictions that adhere strictly to formal criteria benefit from a relatively straightforward and resilient assessment process, less susceptible to the complexities of digitalisation and globalisation. However, this approach may preclude the taxation of non-incorporated entities with a substantial economic nexus to the jurisdiction, potentially leading to inequitable tax burden distribution. For entities lacking a formal nexus, taxation is contingent upon a territorial income link. In the context of highly digitalised businesses, individuals may exploit this by incorporating in jurisdictions distinct from their management and operational locations, thereby reducing or avoiding domestic taxation as digital activities may never trigger the PE threshold. In the absence of special domestic and tax treaty source rules, often not adopted,⁵⁹⁴ and given the gentrification of the PE concept (still physically anchored), business income as such may escape taxation altogether, even when all management and operational activities are conducted within the territory. The prospect of virtual residency, characterised by flexible management arrangements and email-based notifications, further complicates this scenario.

Firstly, the ascertainment of the locus of effective management becomes increasingly complex in scenarios involving: i) geographically dispersed meetings, where decision-making occurs across multiple jurisdictions, and; ii) virtual meetings, attended by managers situated in diverse locations. Secondly, digitalisation and globalisation facilitate a progressive divorce between the exercise of management and operational activities, and a corresponding detachment of the jurisdiction or residence, allowing the triggering of a personal nexus with a jurisdiction other than the one providing most of the public goods to a company, thus undermining the practical implementation of benefit principle. Such

⁵⁹³ This may comprise: i) taxing all the income, even if the source is not determinable; ii) converting the worldwide income into net income; iii) concluding tax treaties and other conventions, ensuring relief from double taxation; iv) recognising losses, and (eventually) allowing its carry-backwards and forward. Some jurisdictions consider that ability to pay also applies to companies. On the ability to pay of legal entities see Xavier Oberson (2017), *Taxing Robots? From the Emergence of an Electronic Ability to Pay to a Tax on Robots or the Use of Robots*, 9 World Tax Journal 2, p. 253. See also CJEU judgment of 12.06.2018, *Bevola and Jens W. Trock* (C-650/16, Publié au Recueil numérique) ECLI:EU:C:2018:424. When deemed applicable, ability to pay can be interpreted as requiring personalisation of the tax burden to the specific circumstances of the entity.

⁵⁹⁴ Such as the services permanent establishment (art. 5(3)(b) of the UN MC), the fees for technical services, (art. 12A of the UN MC), income from automated digital services (art. 12B of the UN MC) or the taxation of all services (under the new art. 12AA UN MC).

divorce would unlikely occur in the brick-and-mortar economy and poses an additional challenge to equitable tax allocation.

6.4. Expansion of the personal nexus and the residency paradox

Even if the exam is restricted to residence as a personal nexus, the situation remains problematic.

Absent public international law restrictions,⁵⁹⁵ jurisdictions have progressively broadened the factual basis that triggers residency, mainly through the governance criterion. This expansion took place through both legislative reforms and adjudicatory outcomes, the latter legitimising such expansion on the basis of statutory indeterminacy and the need for a “facts and circumstances” examination.

Historically, such appetite for expansive jurisdictional claims was tempered by the practical limitation on the exercise of the jurisdiction of prescription. However, the substantial increase of the mutual assistance network has rendered the enforcement of these broadened prescriptive jurisdictions not only feasible but also mandatory for all signatory jurisdictions. This obligation extends even to taxpayers deemed residents by the requested state, even if the latter has a stronger personal nexus with such taxpayer.

Globality and digitalisation require progressively corporate presence in an increasingly higher number of jurisdictions, thereby increasing the number of *bona fide* dual residency. Yet, the sole recourse offered to companies caught by such conflict is the MAP, which leads to a selective ‘hand-picking’ of corporate survivors through discretionary tie-breaker application. Survivors, since this “hand-picking” determines which companies escape the economic impact of dual worldwide taxation, which may be considered equivalent to a “corporate death penalty”.

A stark paradox arises from the current *status quo*. Jurisdictions aggressively broaden the scope of residency, drawing more companies into *bona fide* dual residency conflicts. Yet, they simultaneously operate under the assumption that dual residence primarily stems from avoidance, limiting its resolution to the restrictive MAP procedure. This situation is paradoxical because the proliferation of these conflicts is largely self-inflicted, resulting from states’ own expansive and conflicting residency rules. Ironically, it is the taxpayers who directly bear the burden of this contradictory system. This inherent injustice, where states create the problem and then offer inadequate legal remedies, demands urgent and comprehensive reconsideration.

⁵⁹⁵ For the avoidance of doubt, the claim is not that there is no limitation but that the governance criterion, while based on territoriality, is grounded on one of the admissible criteria to exercise jurisdiction which has been effectively exercised without diplomatic protests, that, according to Akehurst, constitutes the “acid test of the limits of jurisdiction in international law”. See M. Akehurst, *Jurisdiction in International Law*, British Yearbook of International Law, Vol. 46 (1972-1973), p. 176 apud C. Ryngaert, *Nexus and International Tax Jurisdiction*, in: J. Hattigh and P. Hongler (eds.), *Finding the meaning of nexus for taxes – past, present and future*, Cahiers de Droit Fiscal International, Vol 108 (IFA, 2024).

6.5. The progressive mitigation of the divide between residence and non-residence

6.5.1. Introduction

Residence as an expression of the nexus with a jurisdiction allows, but does not require, worldwide taxation. Residence *per se* does not necessarily trigger taxation.

In territorial systems, the extraterritorial dimension of residence holds diminished relevance, decreasing the pressure on residency definition and recognition.⁵⁹⁶ Residents and non-residents bear, *prima facie*, equivalent substantive and procedural tax burdens.

That contrasts with worldwide systems, where residents and non-residents were traditionally treated differently. However, and lately, the divide between those two statuses has been narrowed. This is achieved, firstly, by granting residents access to more favourable relief methods for non-source income, and secondly, by extending certain tax features, traditionally reserved for residents, to non-residents. The substantive and procedural tax burdens of residents and non-residents approximate. The subsequent sections will delve into these two scenarios, culminating in a reflection on the impact of these trends on residency assessment.

6.5.2. Worldwide taxation and relief of foreign-sourced income

As noted by several branch reporters, worldwide tax systems are increasingly incorporating territorial features.⁵⁹⁷ This is primarily achieved through domestic law mechanisms designed to eliminate economic and juridical double taxation.⁵⁹⁸

Participation regimes have been widespread and were incorporated in most worldwide systems, allowing for the exemption of profits distributed by subsidiaries. This alone exempts a substantial portion of foreign-sourced income for many businesses.⁵⁹⁹ In some instances, this regime is extended to capital gains derived from shareholdings.⁶⁰⁰

Furthermore, exemptions (sometimes elective)⁶⁰¹ are available for: i) capital gains from the disposal of shares and other non-tangible assets;⁶⁰² ii) capital gains arising from the alienation of a foreign PE;⁶⁰³ iii) income attributable to a foreign PE;⁶⁰⁴ iv) income from

⁵⁹⁶ Even if not all systems considered as territorial restrict taxation strictly to domestic-sourced income. As an example of the exceptions, see Panama, sec. 4.2.1.

⁵⁹⁷ See New Zealand, sec. 4.2.1, the US and Spain, sec. 4.2.2. and the UK, sec. 4.2.3.

⁵⁹⁸ Tax treaties may also lead to a similar result, but merely in the relations with the Other Contracting state and in a limited manner. Even when Contracting States opt for a provision similar to art. 23A of the OECD Model (2017), exemption would still not be applicable to cases where the other Contracting State has limited tax liability over the income (such as with dividends and interest).

⁵⁹⁹ Even if the system is also available for domestic distributions, its application on the cross-border scenario will be decisive for ensuring territorialisation of the tax.

⁶⁰⁰ See Luxembourg, sec. 4.2.2.

⁶⁰¹ See the UK, sec. 4.2.3.

⁶⁰² See Hungary, sec. 4.2.1.

⁶⁰³ See Malta and Spain, sec. 4.2.2.

⁶⁰⁴ See Denmark, Spain, and Switzerland, sec. 4.2.2.

foreign immovable property;⁶⁰⁵ v) any other income of foreign-sourced income, insofar as effectively repatriated and reinvested within the jurisdiction.⁶⁰⁶

While fundamentally a worldwide taxation system, it exhibits territorial characteristics in cases of: i) a discrepancy between incorporation and management, and; ii) absence of profit remission to the territory.⁶⁰⁷

The rationale behind this progressive territorialisation remains multifaceted. Firstly, it reflects the longstanding debate between source and residence-based taxation, with some jurisdictions favouring source-based systems. Secondly, for worldwide systems, the primary motivations are: i) the mitigation of economic and juridical double taxation, and; ii) the pursuit of tax competitiveness.

6.5.3. *From territorial to worldwide taxation: non-residents and the availability of options to be treated as resident*

Contemporary tax systems are increasingly incorporating features that approximate the treatment of non-residents to that of residents. The following paragraphs elaborate on this trend.

Firstly, domestic law normally allows non-residents with a permanent establishment to be taxed on a net basis.⁶⁰⁸ While differences remain between the taxation of residents and of PEs,⁶⁰⁹ some jurisdictions extend domestic group regimes to PEs of non-residents insofar as located within their borders. This domestic trend is reinforced by international obligations. Income tax treaties mandate the extension of certain residence-based taxation features to PEs,⁶¹⁰ and the Court of Justice of the European Union (CJEU) jurisprudence requires near-equivalence in the treatment of residents and comparable non-resident PEs.⁶¹¹

Secondly, some systems allow non-residents without a PE to be taxed on a net (or semi-net) basis concerning certain items of income, including immovable property,⁶¹² business income,⁶¹³ capital gains,⁶¹⁴ service provision income,⁶¹⁵ and other income categories.⁶¹⁶

⁶⁰⁵ See Denmark, sec. 4.2.2.

⁶⁰⁶ See Indonesia, sec. 4.2.2.

⁶⁰⁷ See Malta sec. 4.2.1.

⁶⁰⁸ In the US, in the absence of a treaty, net basis taxation will be levied on the “United States Trade or Business”, regarding all effectively connected income. See the US, sec. 1.

⁶⁰⁹ See sec. 6.6.3 of this general report.

⁶¹⁰ The treaty provisions following art. 24(3) of the OECD Model (2017).

⁶¹¹ See CJEU judgment of 28.01.1986, *Commission / France* (270/83, ECR 1986 p. 273) (SVVIII/00389 FIVIII/00407) ECLI:EU:C:1986:37, and of 21.09.1999, *Saint-Gobain ZN* (C-307/97, ECR 1999 p. I-6161) ECLI:EU:C:1999:438, with the limitations recognised in the judgment of 15 May 1997, *Futura Participations and Singer / Administration des contributions* (C-250/95, ECR 1997 p. I-2471) ECLI:EU:C:1997:239.

⁶¹² Canada, sec. 4.2.3 and Switzerland, sec. 4.2.1.

⁶¹³ In Spain, this is the case regarding income from non-resident income derived from “local economic activities” and from services, installation or assembly works or with any other economic activity carried out in the territory – see Spain, sec. 4.2.3.

⁶¹⁴ In Portugal, capital gains derived from alienation of immovable property located in Portugal are only taxed if there is a positive balance between those gains and losses. As the branch reporter notes: “the very nature of capital gains entails the taxation of a net amount, resulting from a difference between the acquisition value and the sales value” – see Portugal, sec. 4.2.3. See also Argentina, 4.2.3 and Australia, 4.2.2.

⁶¹⁵ See Spain, sec. 4.2.3.

⁶¹⁶ See also New Zealand, in what concerns non-resident life insurance companies, sec. 4.2.3.

Thirdly, and when applicable, tax treaties require the residency State to relieve double taxation, including through exempting income sourced in the other Contracting State.

Fourthly, unlike individuals, non-residents can incorporate or establish a physical management location within a jurisdiction, effectively segmenting their activities and accessing resident-like benefits. However, this scenario effectively reclassifies the entity, strictly speaking, from a non-resident to a resident.

Fifthly, to mitigate the advantages of the aforementioned option, most jurisdictions have implemented controlled foreign company (CFC) rules, enabling taxation of the worldwide income of non-resident subsidiaries, provided specific criteria are met. Consequently, taxing a foreign company under a CFC regime may prove more efficient than a residency-based audit.

Sixthly, some systems (particularly in Latin America) “personify” the permanent establishment in some cases, treating them as legal persons.⁶¹⁷ However, in reality, as of the moment that PEs are granted legal personality, they lose their non-resident status, becoming non-incorporated residents.

Jurisdiction-specific features also illustrate this trend. Brazil’s CFC taxation system is not contingent on the normal requirements: passive income, low – or no-taxation, and abuse, and applies to all income of controlled companies for the “variation in value of the investment equivalent to the profits earned,” which raises questions of compatibility with Brazilian treaties.⁶¹⁸ The US “check-the-box rules,”⁶¹⁹ while primarily entity classification tools, allow non-incorporated companies to be taxed jointly with their US parent, effectively treating them as resident taxpayers.

6.5.4. *Assessment*

The observed convergence of resident and non-resident statuses, coupled with the ongoing territorialisation of tax systems, fundamentally alters the traditional role and significance of the residency concept. In order to mitigate the negative effects associated with the expansion of the residence scope, some countries have mitigated the differences between residents and non-residents, leading to the apparently paradoxical “residence-based territorial taxation”.

Specifically, the increasing availability of territorial taxation-like exemptions and reliefs to resident companies effectively limits the scope of residency taxation. This change raises critical questions regarding the continued utility of residency as a primary nexus for taxation, especially in light of the diminishing practical distinction between resident and non-resident treatment in some jurisdictions.

In conclusion, the progressive alignment of resident and non-resident tax treatments, driven by the territorialisation of certain tax systems, significantly challenges the traditional conceptual and practical foundations of residency taxation. This transformation demands a comprehensive reassessment of existing tax frameworks and a proactive approach to developing innovative solutions that ensure fairness, efficiency, and sustainability in the evolving landscape of international taxation.

⁶¹⁷ See Argentina, sec. 2.1.2 Guatemala, sec. 4.2.3.

⁶¹⁸ See Brazil, sec. 4.2.1.

⁶¹⁹ US Treasury Regulation sec. 301.770.

6.6. Improper use of the residency concept

6.6.1. Introduction

Residence, as a criterial concept, expresses the personal nexus between an entity and a jurisdiction. It has a specific place in the tax system and should not be conflated with, or misused to perform other (legitimate) functions within tax systems.

A systematic assessment of the branch reports reveals three main areas of improper use of residence, i.e. three main areas wherein residence is used to address tax concerns that are extrinsic to its inherent rationale and that should be solved through alternative tax mechanisms. Those areas of concern are: i) the prevention of artificial access to (treaty) benefits; ii) the prevention of tax avoidance concerning activities conducted in the jurisdictions, and; iii) the prevention of tax avoidance concerning value creation within the jurisdiction. The following sections elaborate on each of those concerns.

6.6.2. Residence and avoidance

The jurisprudential development of the governance criteria has resulted in a contextual shaping of its content, compelling adjudicators to examine residence in conjunction with other case-specific issues. Judicial scrutiny of residency (and of dual residence resolution), and particularly of the governance criterion, frequently arises in tax avoidance scenarios, where structures and arrangements are designed to obscure the determination of corporate decision-making.⁶²⁰ The absence or ineffective application of general anti-abuse rules has compelled adjudicators to progressively incorporate avoidance-related elements into their residency assessments, diverging from a pure governance analysis. Furthermore, the governance criterion, as the real seat theory in company law, requires a departure from formalistic considerations in favour of an analysis centred on the actual management of a company.⁶²¹

Notwithstanding, the normative context that fostered these judicial decisions has radically changed. Currently, both domestic and conventional legal frameworks incorporate general anti-avoidance rules.

De lege ferenda, and insofar as tax systems incorporate a general anti-abuse rule, avoidance concerns should be strictly confined to the application of anti-avoidance provisions, which offers a more effective framework for a comprehensive evaluation of the pertinent facts and circumstances. Such a clear demarcation would allow all stakeholders to better understand the differences between assessing the personal nexus and assessing avoidance of such personal nexus, potentially reversing the current trend of expanding personal nexus criteria. Should more specific avoidance-related conditions be deemed necessary, their inclusion within an autonomous limitation on benefits provision would constitute a better alternative.

Addressing avoidance through rules and methodologies designed for these cases, namely specific, targeted and general anti-avoidance rules, allows for a more focused

⁶²⁰ This is particularly visible in Israel, sec. 2.1.1.

⁶²¹ The autonomous definition of residence in the 1925 League of Nations report already pointed to a need of a facts and circumstances analysis.

and rationale-aligned application of residency criteria. This approach also enables policymakers to refine the criteria further, namely explicating the preferred management type (e.g. supervisory or executive) or corporate body (e.g. supervisory or executive). Of course, this would facilitate planning, as taxpayers would more easily understand what the relevant management is. However, insofar as planning becomes avoidance, anti-abuse provisions would apply. This separation would provide a more balanced approach to the delicate equilibrium between legal certainty and fairness, reducing indeterminacy in the delineation of tax incidence.

6.6.3. *Residence and taxation of activities in the jurisdiction*

A systematic review of all branch reports reveals that the location of a company's operational activities is normally not relevant for the purposes of determining residence.⁶²² While the benefit theory justifies and indeed encourages taxation of value generated by such activities, their mere presence does not establish a personal nexus with a jurisdiction.

Insofar as residence is understood as a personal nexus, the fracture between residence and material activity should not be seen as pathological.

Jurisdictions seeking to tax business activities conducted within their territories by non-residents must rely on source-based nexus rules, ensuring their effective application, even in the presence of tax treaties.⁶²³ This can be achieved by either strengthening or expanding the definition of a permanent establishment or by introducing source rules that operate independently of the permanent establishment concept and independently of physical presence in the jurisdiction.⁶²⁴

There is an undeniable dialectic tension between residence and source. As the scope of one expands, the pressure over the other decreases. However, it is crucial to recognise that these concepts embody distinct rationales of intervention. Residence should reflect a personal connection to a territory. Conversely, the source should express an objective nexus between an income-generating economic activity and the territory.⁶²⁵ From a principle-based approach, neither concept should be instrumentalised to compensate for the deficiencies of the other.

This leads to the inexorable conclusion that residence should not be primarily concerned with the economic activities in the territory but should focus on the taxpayer and whether (regardless of its economic activity) it evidences a strong connection with the territory.

However, management is a crucial concept for both residence⁶²⁶ and source,⁶²⁷ which

⁶²² Italy was one of the few countries statutorily attributing relevance to the place of the main business purpose ("*oggetto principale*"), but has recently dropped this criterion.

⁶²³ And this is equally important for incorporation-based and governance-based jurisdictions.

⁶²⁴ Such as rules similar to those recommended by the UN MC in art. 12A, 12B and in the new art. 12AA.

⁶²⁵ Musgrave, P., *International Tax Base Division and the Multinational Corporation*, 27 Public Finance/Finances Publiques (1972), p. 397.

⁶²⁶ At the tax treaty level, it is mentioned in both art. 4(1) and 4(3) of the 2017 OECD Model.

⁶²⁷ Being mentioned in art. 5(2)(a) of the 2017 OECD Model.

leads to a certain conceptual confusion.⁶²⁸ This has led branch reporters to question the role played by governance-triggered residence, arguing that permanent establishment could adequately capture business profits attributable to management activities in the jurisdiction.⁶²⁹ Accordingly, PEs of non-resident companies would offer viable alternatives for safeguarding a jurisdiction's taxing rights. Such apparent equivalence between residence and PE-based taxation may provide one of the best explanations for the limited number of residency-based audits based on governance criteria. Such a claim requires further scrutiny.

Assuming domestic tax rules align with the OECD Model Convention, place of management, *ex vi* article 5(2)(a) of the OECD MC is listed as an example of a PE, which could be considered as an alternative to tax the non-resident which has corporate governance in the territory. However, OECD MC commentaries strictly clarify that "place of management" (as well as any other example listed under the same number) "must be interpreted in such a way that such places of business constitute permanent establishments only if they meet the requirements of paragraph 1 and are not places of business to which paragraph 4 applies".⁶³⁰ Consequently, under OECD Model-compliant domestic law or treaties, a place of management becomes a PE only if a physical place is at the enterprise's disposal for a specified duration and the activity is conducted through such physical place.⁶³¹ Of course, domestic law may allow source taxing rights beyond what is foreseen in the OECD Model, but such rights would not be applicable in a treaty context if the applicable treaty follows the model.

Digitalisation introduces further complexities. Assuming again an alignment with the OECD Model, management conducted purely online, from locations neither owned nor "at the disposal" of the company (e.g., rotating shared offices or remote work), would not constitute a PE.⁶³² This will be the case of management provided from rotating shared office spaces, which are used by each manager in an "intermittent or incidental" fashion. Similarly, a manager working remotely, outside a designated office, without company control over their work location, would not establish an agency PE,⁶³³ insofar as the manager does not conclude contracts or play the principal role leading to the conclusion of contracts that are routinely concluded by the company.⁶³⁴

Domestic law and treaties may deviate from the Model, allowing taxation absent physical presence, such as in the cases of the insurance⁶³⁵ and the services PE.⁶³⁶ The

⁶²⁸ It is important to highlight that, from a historical perspective, "real centre of management" was first used in model conventions for the determination of permanent establishments. See art. 5 of the League of Nations, *Model Bilateral Conventions for the Prevention of Double Taxation and Fiscal Evasion*. League of Nations Document C.562.M.178.1928.II. (1928).

⁶²⁹ This is visible in some Latin American and also in the Estonia, Hungary and Korea (Rep.) reports.

⁶³⁰ Para. 45 of the commentaries to art. 5 of the 2017 OECD Model (2017).

⁶³¹ There are also several domestic case law decisions in this matter. For instance, the Dutch Supreme Court considered that a home office, even if furnished by the employee to operate as an office for the enterprise, would not be a PE insofar as not made at the disposal of the enterprise. See decision of the Dutch Supreme Court of 13.03.1957, *BNB 1957/144*.

⁶³² See para. 10 to 12 of the commentaries to art. 5 of the OECD Model (2017).

⁶³³ Reference is made to para. 12 of the commentaries to art. 5 of the OECD Model (2017).

⁶³⁴ See para. 82-89 and 98 of the commentaries to art. 5 of the OECD Model (2017) and para. 20-24 of the OECD, *Updated guidance on tax treaties and the impact of the COVID-19 pandemic*, OECD Policy Responses to Coronavirus (COVID-19), (OECD Publishing, 2021).

⁶³⁵ See art. 5(6) of the UN Model (2021).

⁶³⁶ See art. 5(3)(b) of the UN Model (2021) and para. 144 of the Commentaries to art. 5 of the OECD Model (2017).

insurance PE cannot really be seen as a feasible alternative as it is sector-specific and covers only income connected with the jurisdiction (derived from or related to risks within the territory). The services PE would allow the recognition of a PE insofar as the manager spends more than the threshold of days and actively provides services to third parties. However, in the former case of managers working remotely from home, this would not be the equivalent of residence as it would create multiple PEs (one for each manager), with income to be attributed autonomously to each of the PEs.

Differences between resident companies and PEs of non-resident companies can also be seen in the level of recognition and income attributed to them. The following paragraphs address those differences.

Furthermore, resident companies and non-resident PEs differ in recognition and profit attribution. Companies will be levied as of the moment they meet residency criteria, regardless of business activity. PEs, however, will only exist (and taxes will only be levied) if a business activity (beyond what could be considered as ancillary or preparatory)⁶³⁷ is carried on.⁶³⁸ Management, while central to residency, is only indirectly relevant to PE recognition.⁶³⁹

Profit computation also varies,⁶⁴⁰ more notoriously in jurisdictions that do not adhere to the OECD-authorised approach⁶⁴¹ or the DEMPE approach (also applicable to PEs).⁶⁴² It is worth noting that a significant number of countries still allow for simplified approaches to the attribution of profits to PEs.

Differences also exist in “profit repatriation”, even if the generalised exemption at source for outbound dividends nuances those differences. In the absence of a branch profit tax,⁶⁴³ profit “repatriated” to the headquarters shall not be subject to any tax at the moment of the “repatriation”. Treaty entitlement of companies and PEs of the same jurisdiction is also different.

The proliferation of automatic exchange of information instruments, primarily focused on residence, may inadvertently exacerbate the information asymmetries between residents and PEs, with tax authorities having added difficulties in detecting instances of avoidance and evasion of income connected with PEs.

In summary, due to the differences in recognition, profit computation, treaty entitlement, repatriation and mutual assistance, PEs are not functional equivalent or suitable substitutes for governance-based residency. They represent a middle ground between resident and non-resident status, which is justifiable under the benefits theory, reflecting the varying levels of public goods and services received.

⁶³⁷ See art. 5(4) of the OECD Model (2017).

⁶³⁸ See art. 5(1) when it refers to “business” and para. 7 of the commentaries to art. 5 of the OECD Model (2017).

⁶³⁹ In the sense that one does not require management in the jurisdiction to recognise a PE of a non-resident in the jurisdiction. It is true that a “place of management” in a physical location will constitute a PE. However, management in the jurisdiction is not a constitutive element of the PE definition.

⁶⁴⁰ Even considering the PE-non discrimination provision in art. 24(3) of the OECD Model (2017) and the case law of the CJEU, the latter impacting only the EU area.

⁶⁴¹ See the post-2010 version of art. 7(2) of the OECD Model (2017) and OECD, 2010 *Report on the Attribution of Profits to Permanent Establishments*, (OECD Publishing, 2010).

⁶⁴² See ch. VI, sec. B of OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, (OECD Publishing, 2022).

⁶⁴³ US Treasury Regulations, 1.884-1.

6.6.4. Residence and transfer pricing

Within the framework of increasingly integrated multinational groups, determining the residency, delineating and valuing transactions of each constituent entity becomes increasingly complex. However, from a principle-based standpoint, one should distinguish residency and transfer pricing issues, even if acknowledging a dialectic tension between them.

If a jurisdiction wants to ensure related parties pay taxes in accordance with the value created in each jurisdiction, the adequate normative tool for that is transfer pricing.

Reassessment of residence of a company should not be used as an alternative to the right application of transfer pricing rules. In this context, it should be confined to instances of avoidance, where *de facto* management is exercised by the related party. One should also note that even when reassessment of residence takes place, transfer pricing rules may still allow the former residency state to exercise source-taxing rights over the former resident, namely on the income allocated to a PE.

Given the realm of action of transfer pricing regulations, reassessment of residence should be considered as the *ultima ratio* of the tax system, reserved for cases of real and objectively verifiable usurpation and should not be considered as an alternative to the proper application of transfer pricing rules.

6.7. Residence, indeterminacy and legal certainty

6.7.1. Introduction

A comprehensive reading of branch reports reveals a significant amount of legal indeterminacy concerning the delineation of the constituent elements within the governance criterion.⁶⁴⁴ Such indeterminacy is not new. As already acknowledged in 1984 by David Tillinghast, “management functions of large corporations are, moreover, often shared by the Board and its committees which may, of course, meet at different places or by different means. Even if this process is correctly stage-managed, companies are always at risk that a different finding will be made”.⁶⁴⁵ However, the profound influence of globalisation and digitalisation on corporate management and the geographical distribution of managerial personnel has significantly amplified this indeterminacy, necessitating further legal appraisal.

Legal uncertainty is not necessarily negative, and sometimes, it is required to ensure the system’s fairness. The deliberate introduction of elements of uncertainty is normally the result of normative balancing (*Güterabwägung*), wherein competing values, such as legality and equity (or fairness), are weighted against one another. And indeterminacy is

⁶⁴⁴ Even if not the object of the current assessment, the same applies to governance used as a tie-breaker as, in the expressive words Avery Jones “The history demonstrates that there has never been any certainty about the meaning of ‘place of effective management (...) Perhaps the time has come to abandon the expression’ – see J.F. Avery Jones, 2008 *OECD Model ...*, *supra* n. 389, p. 186.

⁶⁴⁵ See D. R. Tillinghast, *A matter of definition...supra* n. 53, p. 262. The cited text referred to the common law “central management and control” but appears to be applicable also to the civilistic “place of management” tests.

justifiable up to the extent it results from constitutional balancing⁶⁴⁶ and is less frequent than portrayed.⁶⁴⁷

This is not the case with the residence governance criterion. In most jurisdictions, governance is defined by generic reference to “place of management” or a functional alternative, not allowing to delineate with the required precision of the subjective, objective, temporal and geographical coordinates of such management. The definitional lacunae and ambiguity engender unpredictable *ex-post* adjudication,⁶⁴⁸ which is not only inconvenient but also a clear infringement of core principles of the Rule of Law. The ensuing paragraphs address firstly issues related to the pragmatic challenges arising from this uncertainty and, subsequently, the more profound infringement of core tenets of the Rule of Law.

6.7.2. Shortcomings arising from legal indeterminacy

Setting aside the forthcoming constitutional debate, indeterminacy in the definition of the personal scope gives rise to a number of adverse legal consequences.

Firstly, it exacerbates the democratic deficit. The power to levy represents a profound constraint on individual liberties and property rights, reason why it is vested in elected legislatures. Indeterminacy shifts this power to the hands of unelected adjudicators, undermining democratic principles. Unlike legislators, such adjudicators are not directly accountable to the electorate, potentially leading to decisions that diverge from prevailing public preferences or values.

Indeterminacy also adversely affects the adjudicatory process. It compels adjudicators to engage in policy-making, a function for which they are often ill-equipped and which unduly burdens them, infringing the necessary separation of powers between the legislative, executive, and judicial branches. Furthermore, it amplifies the potential for arbitrary decisions and for decisional bias, influenced by subjective interpretations of the public interest (which, in some cases, may be understood as the maximisation of tax revenue collection). It opens the potential for inconsistent adjudications and unequal treatment of comparable taxpayers.

From the perspective of the taxpayer, it leads to legal uncertainty and reduced predictability of tax consequences associated with its actions, limiting its freedom.⁶⁴⁹ It leads to higher compliance costs, with the need to seek legal advice and monitor corporate officers’ behaviour and location. It can distort economic activity and discourage investment in a jurisdiction due to fear of inadvertently triggering personal nexus (either at the moment of the investment or in the future, should adjudicative interpretations evolve).

At the international level, indeterminacy can create opportunities for avoidance and evasion and, conversely, lead to unresolved instances of double taxation.

⁶⁴⁶ This is normally the case of domestic general anti-abuse provisions.

⁶⁴⁷ As Dourado notes, “indeterminacy, in legal systems with a certain maturity, is not as frequent as sceptics fear as, among all cases of indeterminacy (...) normally only in hard cases one can find laws whose arguments do not justify a unique answer”. See A. P. Dourado, *O Princípio da Legalidade Fiscal. Tipicidade, conceitos jurídicos indeterminados e margem de livre apreciação* (Almedina, 2007), p. 767.

⁶⁴⁸ Leading to a strong interpretative discretion, in a situation where it should be weak. See R. Dworkin, *Is law a system of rules?*, in R. Dworkin (ed.), *The Philosophy of Law*, p. 53 (OUP, 1977)

⁶⁴⁹ See A. Marmor, *Varieties of Vagueness in the Law*, in G. Bongiovanni, G. Postema, A. Rotolo, G. Sartor, C. Valentini, D. Walton (eds.) *Handbook of Legal Reasoning and Argumentation*, p. 574 (Springer 2018).

Finally, the human cost must be properly acknowledged. When companies struggle to decipher the ambiguous governance criterion, it leads to forced relocations of their professionals, compelling individuals to uproot their lives and sever ties with their families and communities, all to satisfy requirements that no one can effectively grasp. This is an unjust outcome of imprecise legal drafting that should worry us all.

6.7.3. Indeterminacy, incidence and the rule of law

Rule of law requires taxation, understood as one of the most stringent intrusions upon a taxpayer's right to property, to be set by law. In the vast majority of constitutional orders, the principle of legality (or of lawfulness) requires that the *essentialia* of a tax are to be defined by *lex praevia, stricta, scripta et certa* and that "interpreters have clarity on what is covered by [tax statutes] and what falls outside".⁶⁵⁰ Tax incidence, comprising the delineation of the personal nexus, constitutes one such essential element.

Thus far, the analysis has been centred on the drawbacks of indeterminacy. However, it is equally arguable that indeterminacy in the imposition of a substantial tax burden on a company, unexpectedly deemed as a tax resident due to a vague governance criterion, may constitute an intolerable infringement of legality.

Given the diversity in methodologies employed for constitutional law protection, a comprehensive global examination would be impractical. In the absence of a universal system of fundamental rights protection, assessment will focus on the framework introduced by the European Convention on Human Rights, in the understanding that such exam, *mutatis mutandis*, would also be valid under most constitutional law systems.

Under the Charter, the identified indeterminacy can be construed as an infringement of the principle of legality as required by the methodology of protection of the right to property,⁶⁵¹ a right which is also invocable by legal entities.⁶⁵² The European Court of Human Rights (ECtHR) has consistently held that measures restricting property rights must be lawful, pursue a legitimate aim and be proportionate. As the Protocol states, interferences to the right of property must be based on the public interest and "subject to the conditions provided for by law".⁶⁵³ According to the Court, "an essential condition for an interference to be deemed compatible with Article 1 of Protocol No. 1 is that it should be lawful",⁶⁵⁴ which "presupposes that the applicable provisions of domestic law⁶⁵⁵ be sufficiently accessible,

⁶⁵⁰ J. Kokott and P. Pistone, *Taxpayers in International Law* (Becks/Nomos, 2022), p. 84.

⁶⁵¹ Art. 1 of Protocol to the European Convention on Human Rights (ECHR) which is reflected in art. 17 of the EU Charter of Fundamental Rights (EU Charter).

⁶⁵² See decision of 6.04.2000 of the European Court of Human Rights (hereinafter ECtHR) in *Comingersoll S.A. v. Portugal* [GC], no. 35314/97, ECHR 2000-IV and of 1.07.2004 in *Radio France v. France* [GC], no. 53984/99, ECHR 2004-VII.

⁶⁵³ Art. 1 of Protocol no 1 to the ECHR.

⁶⁵⁴ See the ECtHR judgment of 5.01.2000, *Beyeler v. Italy* [GC], no. 33202/96, ECHR 2000-I, para. 108.

⁶⁵⁵ Which "covers not only statute but also unwritten law" thus covering cases in which the norm "is a creature of the common law and not of legislation". See para 47 of the decision of the ECHR in *Sunday Times v. United Kingdom* (No. 1), 26.04.1979, Application no. 6538/74, Series A no. 30.

precise and foreseeable”.⁶⁵⁶ Furthermore, “a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.⁶⁵⁷

This requirement extends to taxation, as exemplified by *Schchokin v Ukraine*,⁶⁵⁸ a case which underscores the importance of foreseeability. Taxpayers must be able to understand how the law applies to them. If the governance elements remain too vague, companies are unable to foresee how they will be applied by tax authorities, leading to potential arbitrary tax liabilities and fines. *A fortiori*, this is even more the case when the adjudicators⁶⁵⁹ and experts in the field⁶⁶⁰ struggle to apply the law.

The same idea is conveyed by the Court of Justice of the European Union for cases covered by EU law.⁶⁶¹ The Court acknowledges the “principle of fiscal legality” as a “general principle of law”, as “is apparent from the constitutional traditions common to the Member States”. According to the Court, even if the principle requires that “all the essential elements defining the substantive features thereof must be provided for by law, that principle, it does not require every technical aspect of taxation to be regulated exhaustively, as long as the rules established by law enable a taxable person to foresee and calculate the amount of tax due and determine the point at which it becomes payable”.⁶⁶²

The core issue is to understand whether the governance criterion, as currently defined by statutory law, allows sufficient predictability (in the sense of “*Berechenbarkeit*”), *i.e.* allows the taxpayer to understand the consequences of its actions and, consequently, to identify the limits for a governmental intrusion on its property.⁶⁶³

⁶⁵⁶ See *Beyeler v. Italy*, *supra* n. 654, para. 109. The same requirement appears in the case law of the Court of Justice of the European Union for cases covered by EU law. According to the Court, “Community legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them – see para. 18 of CJEU judgment of 15.12.1987, *Ireland / Commission* (325/85, ECR 1987 p. 5041) ECLI:EU:C:1987:546. Furthermore, it “requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them” – see para 80 of CJEU Judgment of 7.06.2005, *VEMW and others* (C-17/03, ECR 2005 p. I-4983) ECLI:EU:C:2005:362. See also para 66 of the Opinion of Advocate General Kokott of 16.05.2024 in *UP CAFFE*, C-171/23, EU:C:2024:417.

⁶⁵⁷ See *Sunday Times v. United Kingdom*, *supra* n. 655, para. 49. Of course, as mentioned in the same paragraph “Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”

⁶⁵⁸ See ECtHR Judgment of 14.10.2010 in *Schchokin v. Ukraine*, no. 23759/03 and 37943/06.

⁶⁵⁹ As evidenced by the reading of the branch reports.

⁶⁶⁰ Illustrative of this are the examples dissected in in F.P.G. Pötgens et al., *The Impact of a Corporate Governance System...*, *supra* n. 150 and F.P.G. Pötgens et al., *The Impact of a Corporate Governance System on the Place of Effective Management Concept in Spain, France, the United Kingdom, the Netherlands, Germany and Italy* – Part 2, 54 Eur. Taxn. 10 (2014).

⁶⁶¹ Although this is not the case at hand, the reasoning of the Court appears to be fully transposable to this discussion, since it builds on the common constitutional tradition of the Member States, which has influenced the constitutional normative framework of many jurisdictions across the globe.

⁶⁶² CJEU Judgment of 8 May 2019, *Związek Gmin Zagłębia Miedziowego* (C-566/17) ECLI:EU:C:2019:390, para 39.

⁶⁶³ C. Moser, *Recht und Berechenbarkeit* in A. Allerkamp, A. Bartl, A. Fleig, B. Gribnitz, H.L. Lund, and M. Rousset (eds) *Kleist-Jahrbuch 2021* (J.B. Metzler, 2021), pp. 119-155.

Restricting the analysis to the statutory provision (as it should, as tax incidence must not be left to the adjudicatory level), it remains impossible to ascertain *ex-ante* the conduct that triggers its application.⁶⁶⁴ *In extremis*, and recalling the foundational definition of Urwick and Brecht, “wherever human activities are carried out in an organised and co-operative form, there management must be found”.⁶⁶⁵ A maximalist (but still legally admissible) interpretation could construe virtually any action undertaken by the taxpayer within the jurisdiction as sufficient to trigger a personal nexus. Even assuming that the statutory provision allowed for a *de minimis* exclusion (or required some intensity for the action to become relevant), it remains impossible to ascertain discernible metrics to understand the incremental units of “permanence” that would be required to trigger the governance criterion.

Such indeterminacy inexorably leads to the conclusion that a manifest infringement of the principle of legality, and consequently, the Rule of Law, exists. In the wise words of Ávila, “legal rules of taxation whose hypotheses and/or consequences are undefined, ambiguous, generic and vague, to a large extent and in relation to elements whose access, knowledge and understanding are considered essential for the autonomy and independence of the action that the taxpayer may take based on the Law, such rules must be legally qualified as indeterminate and, ipso facto, declared null and void for violating not only the substantive tax legality but also the fundamental rights of dignity, freedom and equality and the fundamental principles of democracy, the Rule of Law, Legal certainty and the Separation of Powers”.⁶⁶⁶

Given the adverse effects deriving from uncertainty, there is a compelling case for pleading legislative reforms of the governance criterion. There needs to be a shift from reliance on subjective interpretation to a framework grounded in clear and objective standards, ensuring that residency determinations are both predictable and justifiable. Such reforms should prioritise the specification of the criteria to their utmost level of precision anchored, insofar as practicable, in objective and easily verifiable criteria.

Part Seven: Concluding remarks

Residence is an essential concept for the proper functioning of contemporary corporate tax systems. It expresses a genuine nexus between an entity and a jurisdiction which, *per se*, justifies the levy of income taxes regardless of any other factor (such as the location of the entity’s operations or the source of its income).

Residence constitutes but one facet of the tax sovereignty equation, operating in conjunction and concurrently with the source principle in the delimitation of tax jurisdiction. A dynamic equilibrium exists between these two foundational concepts, wherein the emphasis accorded to either element by various jurisdictions fluctuates across geographical and temporal contexts.

Focusing on residence only, the evolving landscape shaped by globalisation and digitalisation has introduced and emphasised significant challenges. A comprehensive

⁶⁶⁴ Given the objective, subjective, temporal and geographical indeterminacy, as addressed in section 3.2.2.2.3.

⁶⁶⁵ L. Urwick and E.F.L. Brecht, *The Making of Scientific Management*, *supra* n. 140, p. 216.

⁶⁶⁶ H. Ávila, *Legalidade Tributária Material* (Editora JusPodium / Malheiros Editores, 2023), p. 40.

exam of branch reports reveals a diverse normative landscape, characterised by statutory indeterminacy and divergent adjudicatory approaches, with a progressive expansion of the scope of the concept. One could argue that current methodologies for assessing residence are completely inadequate⁶⁶⁷ or that the concept and respective criteria are flawed, urging radical reforms that ultimately would remove the concept or that the concept should be excluded. This is not the author's view.

From an evolutionary legal standpoint, tax systems may be construed as organisms.⁶⁶⁸ Analogous to organic entities, these systems have undergone decades of development and adaptation centred around the existing methodologies of assessing residence. Despite inherent flaws, numerous features of contemporary tax systems have been shaped around the concept, thereby establishing a homeostatic equilibrium which, supported by adjudicators, is capable of self-regulation in response to exogenous stimuli. This is particularly evident in the interplay between residency, source, transfer pricing and anti-avoidance rules (where one feature of the tax system is called to adjust flaws by another).

A radical change of the system, either by moving away from residence or from its traditional tests, would require a radical reform of the corporate system, disrupting the functionality of organically developed features. Therefore, despite its shortcomings, residence remains essential for the proper functioning of our tax systems. This, however, does not preclude the necessity for reform and of the eventual decoupling of the nexus functions from other functions performed by the concept.

At the domestic level, residence assessment should prioritise simple and easy-to-administer criteria. In the current normative scenario, with strengthened anti-avoidance and source rules, residence criteria (and respective tests) should more accurately reflect the personal nexus with the jurisdiction. Governance-based statutory provisions should include clear statutory guidance on the relevant types and levels of management and the evidentiary requirements.

At the treaty level, there should be closer adherence to domestic residency tests, as personal nexus remains an expression of tax sovereignty, and treaty entitlement should be closely linked with such expression. Dual residency conflicts, particularly those arising in *bona fide* cases, should be resolved through clear, objective tie-breaker rules, subject to judicial review, with a definitive binary fallback rule, such as incorporation.

It is not within the purview of a general report to express tax policy preferences on what could be equally legitimate policy options (namely, in which criteria express personal nexus

⁶⁶⁷ E. Traversa, *Corporate Tax Residence at the Crossroads between International Competition and Convergence: Outlining the Debate*, in: E. Traversa (ed.), *Corporate Tax Residence and Mobility*, EATLP International Tax Series (IBFD, 2018), p. 19.

⁶⁶⁸ M. B. W. Sinclair, *The Use of Evolution Theory in Law* (1987). Maurer Faculty Articles 2271.

or how the governance tests should be densified).⁶⁶⁹ However, as Tillinghast concluded, “the emphasis should be on clarity and predictability, with recognition that, in many cases, parties may freely elect to make an entity domestic or foreign, but must bear the consequences of the initial choice”.⁶⁷⁰ Besides statutory clarifications, legislators should prioritise enhanced cooperation between jurisdictions to address contemporary challenges posed by globalisation and digitalisation. This includes information sharing and best practices for residency determination and dispute resolution, such as joint working groups within international organisations for the development of common standards.

In the ever-evolving landscape of taxation, corporate residence stands as a testament to the intricate balance between legal certainty and fairness, as well as between sovereignty and global tax fairness. The indeterminacy surrounding corporate residence is not merely a technical challenge but a profound reflection of a dynamic trend of maximisation of a tax concept in an attempt to achieve tax policy goals that are beyond the purview of the personal nexus idea. The path forward requires domestic and conventional rule review, guided by the ideas of legality (particularly in its subdimension of legal certainty) and fairness. It is through this convergence that we can aspire to a tax system that not only upholds the integrity of national jurisdictions but also fosters a spirit of global cooperation and equity, allowing taxpayers to enjoy the advantages of modernity without fearing tax consequences. Let us, therefore, draw upon our collective experience to craft a legal framework that transcends the limitations of the present and paves the way for a more just and equitable future. This endeavour should not be seen as a mere scholarly pursuit but a moral duty: when deficiencies are identified, improving tax law, like all law, becomes imperative as it serves as an instrument for the advancement of human dignity and the common good.

⁶⁶⁹ In this vein, Weber-Fas concluded that “Since personal jurisdictional rules do not exist in a vacuum and are no end in themselves, the policy planner has to take into consideration a country’s general tax policy goals when he attempts to develop adequate principles for distinguishing between domestic (taxed on world-wide income) and foreign corporations (taxed on domestic source income only)”. Furthermore “the variety of rules in effect and the difference in the underlying philosophical and traditional notions render it difficult to find a definitive answer on the multiple problems of desirable uniformity of formulation and application of adequate residence standards for internationally operated corporations. A healthy skepticism of any ‘ideal,’ ‘absolute’ and ‘universal’ solution is this basic tax policy issue seems to be appropriate. The conditions vary from country to country, the problems presented change from time to time and questions of international tax jurisdiction involve significant aspects of legal, fiscal, economic, administrative, social, moral and foreign policy. The policy planner must not only be skilled in the technical questions but should also be aware of the political, economic and social forces which confine in the law making process” – R. Weber-Fas, *Corporate Residence Rules...*, *supra* n. 17, p. 227 and 239.

⁶⁷⁰ D. R. Tillinghast, *A matter of definition...*, *supra* n. 53, p. 239.



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