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PAPER

Corporate Taxation Risks Due to International Mobility of Employees

The Impact of OECD BEPS Action Plan on International Employers and Cross-Border Workers' Taxation

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Statement:

With increasing volumes and diversity of international assignments over the past 50 years, Employers' and Employees' tax positions can be unexpectedly and significantly impacted by the "Permanent Establishment" risk.
More than ever before, the past two decades mark an accelerated reshape of the Global Mobility concept based on a consistent switch towards the more flexible assignment types such as short term assignments, cross border commuting, frequent business trips and remote working. International HR specialists face the challenge of finding the fine balance line between the MNEs' international competitiveness and expansion plans on the one hand and the agile set-up of international teams, permanent tracking and activities structuring of the internationally mobile populations on the other hand. Within an increasingly complex context, 140 Nation States reunite under the OECD/G20 Inclusive Framework on BEPS, in a common effort to create a mutual, comprehensive legal frame aimed at the correct identification of tax payers and of the adequate taxation structures with the final purpose to tackle tax avoidance and to ensure a more transparent tax environment. The topic of the "Dependent Agent" 's actions in foreign territories has come under closer scrutiny of tax authorities worldwide as classic scenarios generating Permanent Establishment set-ups for the home country organizations. Under BEPS Action 7 the concept of "Permanent Establishment" is redefined with a broader scope, adding activities largely pursued before as natural share of regular activities, thus requiring International Global Mobility specialists' cautious attention on the globally mobile employees' tracking and management, including on the international assignments structuring. Additionally, unprecedented measures due to the Covid-19 Pandemic and the overall impact on global business operations contribute to an increased complexity and uncertainty with respect to taxation rules, both at the level of the International Employer and Employee.
Where international assignees work and the types of the activities they perform may lead to far reaching fiscal implications. By understanding the risks and their origin the International Global Mobility Specialists may considerably contribute to prevention as part of the overall corporate compliance efforts.

Objective:

Based on the analysis of BEPS Action 7 - Permanent Establishment definition and on the updated OECD Guidance and emergency plan on the creation of Permanent Establishments during Covid-19, the paper attempts to increase awareness of the Global Mobility Specialists regarding the recent global developments on taxation rules impacting international assignments. In the light of the current challenges due to the Covid-19 pandemic, the paper also addresses the future dimension of the Global Mobility function, shifting towards a consultative and strategic role

Motivation:

The past decade describes a substantially changed compliance landscape as a consequence of the intensified efforts of global economic forums and local tax administrations to correctly identify taxable persons and taxable sources of income. Extensive efforts were made and concrete actions were taken both domestically and internationally in the direction of the exchange of information and data, from the mere local exchange of information between local authorities (immigration, labor law, tax and social security authorities) to the inter-jurisdiction automatic exchange of information.
Tax rules addressing tax treatment of cross border workers, be it under long/ short term assignments or business traveler status have been implemented by most administrations.
Failure to comply results in severe administrative procedures, investigations, penalties, prosecution and criminal sanctions.
Understanding the scale of the tax risk and the taxation mechanisms triggering it represents an essential condition for the correct deployment of workforce abroad.

The paper attempts to provide for a comprehensive though non-exhaustive radiography of the international taxation framework addressing the international workforce mobility. It is focused around a number of key questions which are concentric to the topic.

- How will the new BEPS Action 7 PE definitions impact the tax treatment of cross-border assignments?
- Potential solutions addressing the Permanent Establishment risk.
- What are the OECD guidelines on the creation of Permanent Establishments and tax treatment of contributors as a result of "home office" practices during the Covid-19 pandemic period?
- What are Bilateral Cross Border Workers Agreements?
- How will the role of the Global Mobility specialist evolve?

Methodology:

The paper is founded on qualitative and quantitative research based on available literature in the field. The technical legal and taxation related statements are based on available reference papers and on valid studies and reports issued by global organizations. The quantitative research in the field is based on available research and reports issued by global professionals in the industry.
The paper does not claim to offer a global and exhaustive report on the definition/ developments/ effects of the Permanent Establishment principle which eventually depend on the domestic regulations of each jurisdiction nor does it pretend to provide for an exhaustive opinion the topic of the future of the Global Mobility function.

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INTRODUCTION

"Globalization can (…) be defined as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa"

A Giddens, The Consequences of Modernity, Polity Press, 1990

CONTEXT

Trade across nations and cultures has been part of the human civilization for centuries. Intrepid legendary venturers undertaking the challenges of the Silk Road 200 years BCE, Egyptians sending goods across the Red Sea to Assyria testify to the uniqueness of the human spirit always in the search of novelty and exploration of new cultures, ideas and beliefs.

From the basic exchange of goods and resources between two or more nations with evidence dating back as far as the 19th Century BCE to the current business landscape the humankind marks a shift towards a more integrated world economy. The world is "getting smaller" due to new communication and transportation technologies both in physical and virtual sphere.
In his book, "The Consequences of Modernity", Anthony Giddens defines four dimensions of Globalization, starting with the ***world capitalist economy*** as the first dimension, followed by the ***nation-state system*** as the second one, the ***world military order*** and with the fourth dimension of globalization concerning ***industrial development***.

"There has undoubtedly taken place a major expansion of global interdependence in the division of labor since the Second World War. (…) One of the main features of globalizing implications of industrialism id the worldwide diffusion of technologies. The impact of industrialism is plainly not limited to the spheres of production but affects many aspects of day-to-day life as well as influencing the generic character of human interaction with the material environment (..)" *(1)*
Transnational corporations compete with nation-states in economic power simultaneously providing new markets for the developed societies, acting as an economic, social and political stabilization factor in the case of the emerging countries while pursuing their own competitive advantages in terms of access to raw materials, lower cost resources, new markets opportunities. They are simultaneously present in numerous markets, integrating foreign operations structurally, functionally, culturally and psychologically.

In less than 50 years, between 1970-2005 the number of MNCs boomed from 7,000 to 70,000 with the same expected growth rate estimated for the next 30 years. Based on KPMG estimations, in 2008 MNCs counted for approx. 90 million employees with a growing trend and with a tendency of headquarters being relocated from the western countries to non-western emerging regions, raising the question of *different management and inter-cultural skills.* PwC study in 2010 on "Emerging Multinationals" projects the number of new multinationals to arise on a period of 15 years, between 2010-2015 referring to a representative sample of 15 emerging economies. Based on analysis of "Real" GDP, the trend indicates a "dominating" dyad, China and India, with an altogether 42% of the total number of new multinationals emerging by the end of 2024 and with India projected to see 20% more multinationals than China. The next group includes Malaysia, Russia, Singapore and South Korea representing together a 36 % of the total and with the rest totaling below 5%, including the South American countries. *(2).* International assignee population as an inherent consequence joins the transnational business development in an exponentially booming growth rate.

Brookfield Relocation Services Surveys on Mobility Program Demographics indicate clear growth trends:
2012 compared to 2011, 64% companies surveyed by Brookfield reported a 43%increase of the international assignee population; 2015 compared to 2014 – 28% increase; 2016 – 36 % increase - categorically deriving from business growth – 66% reported for the years 2015, 2016.
"International Assignment" concept itself has been reshaped over the past decade and evolved from the initial concept to become the "Global Mobility" notion today, with "repatriation" developing into "reassignment"; "one-off assignment" becoming "Global career employee"; "international assignment as reward for high-potential employees" becoming "Global mobility – essential for employee's career"; "social security and pension – local specific " becoming "pension and retirement schemes harmonized globally under umbrella company", "minimum or no international work-related travel during assignment" becoming ""flexpatriate expatriates", i.e. extensive international work-related travel while on assignment" *(3)*

IN THE SPOTLIGHT

In a global context, for many businesses the *short term business travels* remain an essential resource meant to immediately fulfill business staffing needs while very often un-covered by the corporate assignment policies. Business activities pursued by" Dependent Agents" in foreign territories may generate for the employing company "fixed places of business" in the respective countries, qualifying as local Permanent Establishments and thus triggering fiscal and administrative obligations. As a rule, globally mobile employees may pose PE risks. The key factor refers to the correct assessment of the nature of their activities.

With the recent developments, the matter of international assignments must be placed into the wider frame proposed by the OECD BEPS Project which is built around the central principle which states that profit must be taxed in the territory where the activity generating it is being performed. It is widely recognized that the BEPS Project stands for the most significant international tax development with direct effect on the Global Mobility sphere. The key areas serving the main principle – "Disclosure and Transparency", "Transfer Pricing" and "Permanent Establishment Rules" directly address employee mobility by creating the frame of a transparent employee reporting, with large MNEs being requested to collect and report information on where their employees are employed, addressing at the same time the question of the "substance" of intra-group arrangements and of the correct computation of cross-charge costs on internationally assigned personnel and last bit not least – the Permanent Establishment implications as it may derive from actions of internationally mobile employees in foreign jurisdictions.

BEPS Action 7 amended definition on Permanent Establishment provides for a broader interpretation of the term compared to its initial definition, transcending the mere signing of business contracts in a foreign territory as basic condition for PE creation by also including those situations where *a person takes a principal role leading to the conclusion of contracts.* A simple scenario where a sales manager is negotiating a contract while on a business travel may raise the question of Permanent Establishment for the home country employer. The current dynamic sets the basis for the development of collaborative frameworks within MNEs bringing together Tax and Global Mobility functions in order to commonly agree on processes aimed at the identification, management and prevention of PE risks which may result from the activities of the globally mobile employees.

Within this new framework, it is at the interest of the Global Mobility Specialist to benefit from basic knowledge on tax risks attributable to the internationally mobile employees and contribute at all times with up-to-date input to questions such as "Where your employees are", "what activities they are performing" and "what the implications are for the individual and the organization" as part of business-imperative compliance work aimed at to reducing risks and costs. The lack of formal policies and adequate procedures can cause companies to overlook payroll, tax

and social security obligations, in addition to the creation of permanent establishments, and result in immigration non-compliance.

The present paper attempts to provide for a brief outlook over the Permanent Establishment tax risks niche within the new cross-border work taxation landscape, aimed at acknowledging and outlining the growing role of the Global Mobility Managers in the assessment of the corporate and individual tax risks and the resulting need to develop adequate basic skills in risk management and compliance expertise. Amongst the overall Global Mobility collaborative inter-departmental relationships, it will be demonstrated that the relation with the Finance and Tax Departments is an essential one, with a capacity to prevent and significantly reduce the financial impact of additional unforeseen tax liabilities incurred by travelling employees.

Resources:

(1) A Giddens, "The Consequences of Modernity"

(2) PwC, "Emerging Multinationals", 27 April 2010

(3) Y. McNulty, "Managing Expatriates: A Return on Investment Approach"

PwC – "Annual Global CEO Survey. 2021"

http://globalmobilitytrends.bgrs.com/assets2016/downloads/Full-Report-Brookfield-GRS-2016-Global-Mobility-Trends-Survey.pdf

Chapter 1.

Corporate Income Tax Liability and Avoiding Double Taxation

For the purpose of the Paper it is relevant to provide a brief presentation of the international taxation framework and main governing principles. The correct understanding of basic concepts such as corporate tax residence versus the private persons' tax residence, the categories of income subject to taxation, the treatment of double taxation situations as resulting from the extensive efforts of the international community represent the essential toolbox at hand of International HR and Mobility Specialists which are currently requested to address complex compliance matters deriving from the international relocation of employees. Though at a superficial look corporate taxation seems to be placed outside the scope of interest of HR and Global Mobility, it represents one of the significant risk areas, with potential financial and administrative risks triggered precisely by the internationally mobile employees' activities in foreign jurisdictions, in the shape of potential creation of "permanent places of business" for their employing companies.

The following chapter attempts a brief presentation of the basic corporate taxation principles with the final purpose of outlining the Permanent Establishment concept and the way it may derive from international business activities pursued by employees acting on the international scene.

Depending on the jurisdiction of incorporation, on the form of organization, on the typology of the transactions it runs and the nature of the income, a legal entity is subject to a specific, extremely complex and in many cases multilayered set of taxes.

Corporate income taxation represents an important source of revenue for the governments of most industrialized countries with a significant impact on resource allocation and welfare.

As a rule, m*ost systems tax both domestic and foreign corporations, with domestic companies being taxed on their worldwide income while foreign companies are taxed only on the share of income generated within the jurisdiction.*

1.1 Tax Residence of Corporate Entities. Taxable Income. Source of Income

The tax residence of a company and the exemptions also represent a complex area and it is defined expressly by the domestic legislation of each state. Some jurisdictions define as tax resident those entities that *"are operated" on their national territory whatever their nationality*. As an example, in France, the interpretation of the term "being operated in France" refers to entities carrying on regular business in France via autonomous establishment or in cases where such establishments are not registered – via representatives without independent professional status (dependent agents), as part of regular operations business cycles. Directly deriving from this, a Permanent Establishment in France is always a tax resident in France. (Article 209 (I) of the CGI). Different rules of determination of the tax residence apply in the case of Germany where the main tests triggering tax residency of entities refers to *the place of effective management* (section 10 of the Fiscal Code) ***or*** *to the existence of a registered office* (section 11 of the Fiscal Code) located in Germany. Such entities are subject to unlimited corporation tax liability. The place of management is defined as the pace where senior business management is centered (section 10 of the Fiscal Code) and tax residency does not depend on whether a corporation, association or poo of assets holds legal capacity.

In the case of UK, an entity will be tax resident in the UK *where it is incorporated **or** managed and controlled in the UK.* If an entity is managed and controlled in UK while being incorporated in another state (or vice versa), the residence will be either established by bilateral treaty or the respective entity qualifies as "dual resident".
The USA definition of corporate tax residency represents a very interesting case. Unlike the examples above, the US legislation provides for a "list" of forms of organization of entities ("corporations", "domestic corporations", "partnerships", "trusts", "estates") and the applicable tax rules for each of the categories. The system is very complex and to take just one example, in the case of "corporations", they are treated as "domestic corporations" if they are *created under the laws of the United States or the District of Columbia*. *No other criteria related to place of management will trigger the "domestic" status of a corporation.* The law also provides for certain provisions which define as "domestic" certain foreign corporations. As a rule, *domestic corporations are US tax residents*, irrespective of their potential residency in another foreign jurisdiction. In the case of US dual resident corporations, the determination of the treaty residence according to the included tie-breaker rules will not affect the status of the respective entities as domestic, US corporations.

The above examples offer only a very brief indication of the extremely diverse legal contexts which surround the concept of corporate tax residency. The main principles refer to either determining the residence of an entity based on *the place of incorporation* (formal criterion), or based on the *effective place of management* (the factual criterion), or *based on a combination of the two* aforementioned criteria.

Bilateral Tax Treaties offer a structured definition of the term "Resident" evidencing the different determination rules for "individuals" (natural persons) and "companies" (corporate entities) or "any other body of persons". ***Appendix 1***

The concept of "Residence" requires a special attention as it addresses different legal, administrative, tax and social security chapters. Intention to settle for a certain period of time and take up ***municipal residence*** in various foreign cities trigger the local, municipal registration obligation according to local national legislation. This represents a simple local administrative obligation and it is essentially different from the ***national legislation on tax residence*** which defines the person as resident tax payer and the liability of taxation on global income. Bilateral Tax Conventions establish the prevailing legal frame for the signatory countries and provide for definitions of ***"residents" in cross border situations***.

Tax residence versus Social Security Residence

At a totally different level – the concept of "residence" is relevant for the sphere of national and international social security legislation. The very "social security" tenet is based on completely different grounds. While the "taxation system" refers to the overall rules governing unilateral tax obligations at the level of tax payers, the "social security" system is set on basis of mutual obligation of states and contributors, involving state granted benefits in most cases related to mandatory and/ or voluntary contributions of the persons that are subject to social security obligations. The term of "resident" in the taxation sphere represents as it was described here-above the basic instrument of defining the person – natural or corporate – which is tax liable in national and international circumstances.

In the “social security” environment, at the level of the natural person, an equivalent of the term may be rather defined as “insured person” or “person subject to a country’ s social security system”. The determination rules no longer derive from the “source of income” rules but are based on various levels of evaluation of the person’s nationality, citizenship, political status due to circumstances (refugees, stateless persons, third country nationals), familial circumstances (survivors, family members) as they are defined by national legislation or by international legislation such as the EC Regulation 883/ 2004 or the available Totalization Agreements. (The EC Regulation 883/ 2004 covers the EU member states, EEA and Switzerland area. International Social Security cases outside this territory are subject to potentially available bilateral Totalization Agreements or in their absence – to specific domestic legislations of the involved countries).

Apart from the treatment of employed persons, self-employed persons, international transportation employees, civil servants are subject to specific rules within the Regulation.
The Regulation refers to the coordination of the member states domestic legislations and the determination of the applicable legislation while ensuring the equal treatment of benefits, income, facts or events in a cross border context. In order to appeal the EC Regulation there must be a case of cross-border employment, a temporary and legitimate movement for work or residency purposes from one-member state to another member state. The “residence” concept such as it is defined in the taxation environment becomes relevant for social security purposes within the framework of Art 12 EC Regulation, when defining the mandatory conditions to be satisfied by an assignment in order to qualify as “secondment”/ “posting” under the Regulation, where the employee must be ***citizen*** or ***to have fiscal residence*** in one of the member states (with EEA Denmark, UK and Switzerland only accepting the nationality criterion). Also, in the case of “Multi-State Workers”, where the employee simultaneously work in different member states, the “residence” becomes relevant in the case of the “25% Requirement” – where an employee pursuing substantial working activities defined by at least 25% of working hours and/ or 25% of the salary being generated in the country of fiscal residence, is subject to social security in the respective country of residence (if the 25% threshold is not met, the country of the employer becomes relevant).
The EC Regulation also provides its criteria to be considered in order to assess the “country of residence” in case of divergent definitions between countries, such as: the duration of the employee presence in the concerned countries, family status and ties, the permanence of the housing situation, the place where the employee pursues professional and non-profit activities, the country where he/she resides for taxation purposes.

It becomes obvious that the “residence” concept plays an essential role and that proper interpretation depending on context is mandatory.

In the case of MNEs, establishing the tax residence status of various entities in the group, the various types of income and the specific tax treatment represent a basic compliance need and at the same time one of the key factors in the group strategic structuring.
With residence of corporate entities based on the above mentioned formal (Place of incorporation) and/ or factual (Place of effective management) criteria, the next step in assessing tax residence refers to the analysis of the ***“taxable income”***. Some countries are using the *“worldwide income taxation”* principle, computing income sourced both from the inside and from the outside of the national territory as taxable basis. Collection of data on foreign sourced income has represented one of the biggest challenges of the past 50 years, it has modeled the system of taxation of foreign sourced profits of foreign subsidiaries on a “repatriation”/ “deferral “system, with profits of subsidiaries being taxed upon repatriation and at the same time it has occasioned a very wide array

of "grey areas" which were extensively exploited for tax planning purposes. Other countries are using the "*territorial income taxation*", with resident companies being taxed only on income sourced inside the country.

The determination of ***the source of the income*** *is a key factor.* Definition of "sources" vary from one country to another and in many cases the domestic law "source" concept parallels the definition of the "Permanent Establishment' in the tax treaties.

1.2 Avoiding Double Taxation

In an exponentially booming global economy, internationalized businesses generate income on a regular basis from a large number of foreign territories. Jurisdictions automatically become entitled to claim taxes over the same taxable amounts leading to double taxation with an adverse effect on the international economic relations.

The 1920s mark the first international theoretical and scientific studies aimed at identifying preventive solutions in the field of double taxation under the League of Nations guidance which in 1928 successfully materialized in the first Model of Bilateral Tax Treaty. The process organically determined the first attempts to define a general set of principles as basis of the international tax framework and it set as core criterion the *economic allegiance – the existence and extent of the economic relationships between a specific state and the income and/or the person to be taxed. (4).* Evaluation of the "economic allegiance" was correlated with four fundamental factors (*Origin* of wealth/ income; *Situs* of wealth/ income; *enforcement of the rights* to wealth/ income and *place of residence or domicile of the person* entitled to dispose of the wealth/ income) out of which it was unanimously agreed that "***the origin (source)"*** and "***the place of residence"*** must be given the greatest weight. As a result, tax jurisdiction was allocated between the state of "source" and the state "of residence" based on the nature of the income. With part of the conclusions of the studies considered controversial, they were not fully transcribed in the double tax treaties. Thus, the 1928 League of Nations Tax Treaty Model was based on the "classification and assignment of sources" method, which attached full or limited source taxation to certain classes of income and assign the right to tax other income exclusively to the state of residence.

The current network of Bilateral Double Tax Treaties is built around the models that were developed by OECD and UN around the same "classification and assignment of sources" method. Starting 1957, the OECD member states have constantly revised and improved bilateral treaties based on the OECD Council Recommendations, materialized in the Model Convention. The Model Convention, at its turn subject to constant revision and adaptation represents the reference facilitator in bilateral negotiations between OECD member states and the essential framework that supported harmonization between the bilateral conventions with the ultimate beneficiaries – both tax payers and national administrations. In addition to the Model Convention, The Commentaries on the provisions of the Model Convention became a widely accepted guide to the interpretation and application of the provisions of the existing bilateral conventions.

The Model Treaties define specific *categories of income* and once the income in question qualifies for a certain category, the treaties provide for clear distributive rules: either one of the contracting states is allocated the *exclusive right* to exercise domestic taxation **or** *one of the contracting states is granted priority in exercising its domestic taxing right while the other state is*

entitled to residual taxation. There are cases of incomes that fall under more than one category which are settled by the treaties by ordering rules.

In other words, Treaties formally determine which country will tax an income or taxpayer, if exemptions of income or credits for tax paid will be granted in the other contracting state. Most Treaties explicitly grant the source state the primary right to tax while requiring it *to limit its tax* (rate of withholding tax) on certain categories of income (dividends, interest, royalties). In Double Tax Treaties based on the OECD Model Convention certain types of income are fully exempted from taxation in the source jurisdiction (aircraft, shipping)

Under the Treaties, business profits are ***exclusively taxable in the country of residence*** of the enterprise ***unless the enterprise carries on business activities in the other state through a Permanent Establishment.*** In this latter case, profits attributable to the PE are taxed in the source jurisdiction.

The Permanent Establishment becomes thus an essential factor in determining whether or not a foreign jurisdiction is entitled to exercise its taxing rights over the business profits of non-resident enterprises.

"The PE concept effectively acts as a threshold which, by measuring the level of economic presence of a foreign enterprise in a given State through objective criteria, determines the circumstances in which the foreign enterprise can be considered sufficiently integrated into the economy of a state to justify taxation in that state" *(5).* The *PE threshold* is conditioned by a ***sufficient level of economic presence.***

1.3 Taxation of Income from Employment. OECD MT, Article 15

Directly related to the internationally mobile work force, taxation of income (other than pensions) deriving from activities pursued in a foreign country under employment arrangement is addressed by Article 15 of the OECD Model Treaty. International HR and Global Mobility specialists must be aware of the whole spectrum of tax obligations accessorizing the international assignments which they manage. At the private individual's level taxation is conditioned by a diverse array of aspects which from the Global Mobility function perspective dictate cautious collection of relevant data for the correct framing and planning of international assignments. Such information which needs constant check and update refer (but is not limited to) civil status of the employee, place of residence, potential changes of the above, type of contract relating the employee to the employing entity, duration of assignment, location of foreign assignment etc. Even if adequate tax reporting on personal income and employees' personal income taxation falls within the employees' own responsibility, it is very common for MNE's relocating employees on international assignments to offer assistance in this respect. Collection of such information increases in importance in those cases where the nature of the employees' activities abroad also generates a local Permanent Establishment for the employer and the situation gets even more complex.

As a general rule, Paragraph 1 establishes that income from employment is subject to taxation in the jurisdiction where the employment is exercised by physical presence of the respective employee.

Taxable income refers to salaries, wages and other similar remuneration paid to an individual as part of an employment relationship and they also include salary bonuses during or after termination of employment, payments for unused holidays/ sick days, remuneration corresponding to notice period upon termination, severance payments etc

Naturally, it must be determined which activities performed by an individual in another state qualify for "employment activities" and who qualifies for the position of employing entity. Depending on the specific of domestic law of each state, there are cases where the existence of a formal employment agreement prevails while in other cases it is the nature of the activities and the conditions under which they are performed. In practice, many states have established jurisprudential rules to distinguish between situations where services rendered by individuals to enterprises should be qualified as "employment relationship" and those where such services should be considered as being rendered under a service contract between two separate enterprises. Cross-border outsourcing of services, temporary cross-border staffing arrangements, cross-border delivery of consultancy, training, engineering services represent practical business scenarios where the interpretation of nature of the activities and of the contractual arrangements raise the question of appropriate qualifying criteria.

Commonly known as the "183-days-rule", Paragraph 2 provides for the exception to the main taxation principle as stated by Paragraph 1, by defining the 3 conditions to be met cumulatively in order for the income from employment to be taxed in the country of residence of the assignee:

"a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

c) ***the remuneration is not borne by a permanent establishment*** which the employer has in the other State"

According to this, when the remuneration of an employee is borne by a permanent establishment of the employer in the Host Country, the employee is tax liable in the Host Country without exception.

To conclude with, an unintended PE may generate income tax filing and payment obligations for both the employer and employee in the Host Country. It can further entail VAT registration and filing obligations, social security implications, undesired exposure to employment and immigration laws.

1.4 Exchange of Information. Preventing Aggressive Tax Planning via Profit Shifting

Extending back to a global scale, the increased complexity of the global business environment, the digitalization phenomenon, relocating economic activity into a virtual, borderless world, the extensive use of "tax havens "during the past 50 years led to new joint actions of the international community that intensified over the past decade with dedicated chapter regarding the adjustment of the Permanent Establishment definition with direct effect on international assignments.

The origin lays with the escalating profit shifting practice of MNEs. Corporate tax levels vary widely based on the specific national economic, social and political interests. In contrast with most developed economies which practice a consistent level of taxation, the so called "tax havens" have attracted international corporations for more than 50 years with a very low level of taxation, doubled by a wide variety of deductions, government subsidies / tax reductions and tax loopholes aimed at reducing the impact of the effective corporate tax rates. Such practices have generated over the years an uneven distribution of welfare, with MNCs active on many markets and practicing

profit shifts between countries in order to take advantage of the most favorable tax treatment, under the umbrella of bank secrecy and the international trusts legislation.

The reply at the level of national authorities worldwide materialized in the same Double Tax Treaties, whose objectives also include the prevention of tax avoidance and evasion as it is stated in the dedicated chapters on administrative assistance and exchange of tax information (*Article 26, Exchange of Information* and *Article 27, Assistance in the collection of taxes*). Further actions involved conclusion of Tax Information Exchange Agreements and participation in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

The past decade marks an intensified action plan, with 162 member states under the Global Forum on Transparency and Exchange of Information for Tax Purposes joining in a common effort to implement global transparency and exchange of information standards around the world. G20 declares in 2009 the end of bank secrecy.

In 2013 the G20 Finance Ministers and Central Bank Governors endorsed automatic exchange as the expected new standard. OECD is appointed to report on progress in developing a new multilateral standard on automatic exchange of information, taking into account country-specific characteristics. The basis for a comprehensive automatic exchange with strict safeguards takes firm shape by the means of the Convention on Mutual Administrative Assistance in Tax Matters, doubled by specific provisions included in the Bilateral Tax Treaties and the European Union Directives concerning the automatic exchange of information on interest and on certain other types of income. At the same time, 2013 marks the initial steps towards the definition of the Action Plan on Base Erosion and Profit Shifting, defining new methods of identifying taxable persons and taxable sources of income with a dedicated chapter on the "Permanent Establishment" concept, with direct implications on the international assignments and the tax risks they can potentially trigger, which will be presented in the following chapters.

Resources:

(4) *OECD, Fundamental Principles of Taxation*

(5) *Holmes, 2007; Rohatgi, 2005, Fundamental Principles of Taxation, OECD*

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Chapter 2.

Overview - Art 5. OECD Model Convention. Permanent Establishment Classic Definition;

2.1 The "Permanent Establishment" Classic Definition

Debates over the PE threshold have a long history. The increasing volume and complexity of the international economic relations permanently diversified the nature of the activities of international business players resulting in permanent adjustments of the "PE threshold concept".

Back in history, developed nations perceived and delimited activities of intermediaries pursuing economic activities in one State on behalf of an enterprise located in another State, where the latest even if not performing direct business activities in the first State still benefitted from the ones carried on there by its agents. Thus, in 1899 the Bilateral Treaty between Prusia and Austria/ Hungary defined for the first time the concept of "standiger Vertreter", "permanent representatives".

Three decades later mark the moment of the first multilateral consistent attempt to formalize the concept and define it, under the League of Nations auspices. The League of Nations Report to the Council, on Oct 26th, 1929 mentions:" When a foreign enterprise regularly has business relations in another country through an agent established there, who is authorized to act on its behalf, it shall be deemed to have a permanent establishment". The "Agency PE" paragraph was finally included in the 1963 OEDC Model Convention and it remains unchanged in all following Model Conventions until today *(6)*

The initial definition was built around two criteria which both involved a certain level of physical presence in the "source "country – either via direct operation of business *or by actions of a dependent agent.* Additionally, many bilateral treaties *indicate a new threshold derived from the performance of services by employees or other dependent persons* (receiving instructions) once the duration of such services exceed a certain period of time, independently from the existence of a permanent place of business.

It was the case of the first "acknowledged international assignments" in the modern economy and the international reaction to their profit generating effect in a foreign territory for the benefit of the Home Country Enterprise by "dependent agents", authorized to act on its behalf.

It becomes obvious why today, the role of the Global Mobility Specialist encompasses amongst the whole array of immigration and legal-related aspects the ones referring to taxation and social security. While he/ she is not expected to deliver qualified advice or solutions, it is expected of them to prove knowledge in the field of taxation at such level as to substantially mediate and advise the relevant stakeholders within the organization, collecting and delivering relevant data in order to prevent corporate tax risks.

In the light of Article 5 of the OECD Model Convention, 2014, the "Permanent Establishment" concept is presented as follows *(7), APPENDIX 2:*

- Activities which qualify for **"permanent establishment"**
  - A "fixed place of business" through which the business of an enterprise is wholly or partly carried on: a place of management, a branch, an office, a factory, a workshop, a mine, oil/ gas well, (Paragraph 2)

- quarry and a construction site/ installation project if it lasts more than 12 months; (Paragraph 3)
- a person, other than an independent agent as defined by paragraph 6, acting on behalf of an enterprise, and has, and habitually exercises an authority to conclude contracts in the name of the enterprise, unless the activities are limited to the exceptions provided for by Paragraph 4 (Paragraph 5)

- **Exceptions** - Activities which **do not** qualify as permanent establishment:

- Facilities used only for storage, display or delivery of goods belonging to the enterprise; (Paragraph 4)
- Maintenance of stock of goods/ merchandise of the enterprise - solely for the purpose of storage, display or delivery **or** for the purpose of processing by another enterprise; (Paragraph 4)
- A fixed place of business solely for the purpose of purchasing goods or of collecting information for the enterprise, **or** for carrying on for the enterprise any other activity, **or** any combinations of the above – *on the condition that the overall activity of the fixed place of business is of a preparatory and auxiliary nature*
- A broker, a general commission agent, or any other agent of an independent status provided that such agents are acting in the ordinary course of their business (Paragraph 6)
- Companies resident of one of the Contracting States which are controlled or control companies which are residents of the other Contracting State (Paragraph 7)

In addition to the definition of the "permanent establishment" concept and its exceptions, Article 7 – "Business Profits" clarifies that only the profits attributable to the PE are taxable in the jurisdiction where the PE is located. It refers to profits that the PE would have generated if it were a distinct, independent enterprise. Yet, the Bilateral Treaties provide for separate and *prevailing* distributive rules, outlining specific types of income which may be taxable in the source jurisdiction even though none of the PE thresholds are met in the respective country: income derived from immovable property (and capital gains derived from such sale) - subject to taxation in the country where the immovable property is located; business profits such as dividends, interest, royalties, technical fees – in which case the source country is allowed to levy a limited withholding tax. The Bilateral Treaties also specify the maximum applicable rates, with the residual right to tax belonging to the country of residence.

It is important to outline the importance of a case by case approach. While the OECD Model Convention sets out the general recommendations, there are more than 3000 Bilateral Tax Treaties and in reality every treaty is different. That may allow circumstances that might not generate a PE. It is interesting to mention the interpretation of the term "habitually" within the following context: "Where a person… is acting on behalf of an enterprise and habitually exercises in a Contracting State an authority to conclude contracts in the name of the enterprise". If the activity of the assigned employee proves to be "occasional" and not as "on regular and continuous basis", it should not generate a PE.

If the above presentation of the PE is delivering sufficient information in order to understand the tax implications at the level of an assignee's sending Home Country employer, it is also important to pay attention to the potential personal tax liability a PE could trigger for the assignee himself, as it was detailed upon in Section 1.3, here-above.

Prevention by pre-departure planning and constant monitoring of international projects may result in considerable savings, in avoidance of travel restrictions and in preservation of the enterprise brand and financial stability. Better prevent than cure!

2.2 The Fixed Place of Business;

The OECD Commentary on the Model Convention further clarifies that a "Fixed Place of Business" has three components:

The term ***"Fixed"*** possesses a degree of *permanence* and a *direct link between a place of business and a specific geographic location.*

"Permanency" means that the business is not of a temporary nature. At the same time, it is clarified that a place of business existing for only a limited, short period of time may still generate a PE situation if the business is of such nature as to be carried on only for the respective short period of time. Experience deriving from the practices of OECD member countries indicate however a "tie breaker" at 6 months – generally accepting that PE's are not normally considered to exist in such cases where the business had been carried on through a place of business maintained for less than 6 months. In addition to the above, temporary interruptions of activity do not determine cessation of existence of the PE.

A PE derives from a *"distinct situs"*, a facility such as premises or machinery/ equipment (under certain conditions) which are used for the pursuit of the regular business activities of the enterprise whether or not they are exclusively used for that purpose. In the absence of a dedicated premises, a simple certain amount of space at the disposal of the enterprise may qualify for a PE occupied either in the base of a legal right or illegally. The Commentaries offer practical examples for the ease of the interpretation:

It would be interesting to mention the case of a painter who for 2 years spends 3 days/ weekly in the office building of his client, performing his regular business, i.e. painting and thus generating a PE. On the contrary, if the same painter is working in the same office building, on *multiple unrelated contracts*, for *multiple unrelated beneficiaries*, the building will not be regarded as a single place of business and the case will not fall under the PE provisions.

The idea of a "coherent single whole commercially and geographically "falls into place as sensible differentiator between situations which superficially may look similar.

"Place" of business differentiates between one single place and multiple places, which represent premises at the disposal of the enterprise for carrying out its business. The respective premises need not to be the exclusive location nor need they be used exclusively by the respective enterprise for its business.

An "office hotel" in which a consulting company regularly rents different offices, despite the successive change of multiple locations, will generate a PE via the "single place of business" interpretation, as the building geographically represents a whole.

In the case of consultant training the employees of a bank at different branches, in separate locations as part of a unitary training project each branch should be considered individually. In this case, the interpretations of the Commentaries indicate that the activities are carried out as part of a single project, which in itself represents a coherent commercial whole and may lack the necessary "geographical coherence" to be considered a single place of business.

The third aspect refers to the ***"Business"*** of the enterprise. The enterprise must carry on its business wholly or partially through it. The respective activities need *not be of a productive* character and it is sufficient to be carried on regularly, even if occasionally interrupted. As the Commentaries clarify, within the framework of a well-run business organization it is "axiomatic to presume that each part contributes to the productivity of the whole".

A special attention must be paid to the ***"preparatory and auxiliary"*** nature of the activities. It represents one of the turning points under the recent BEPS developments. According to the OECD Model Convention, Paragraph 4, Subparagraph e) determines that a fixed place of business through which an enterprise only exercises activities with a preparatory and auxiliary character will not generate a PE. Examples of such activities refer to advertising activities, supply of information, scientific research, in cases where they only present preparatory and auxiliary feature. It is ultimately decided by the weight of the respective activity in overall business of the enterprise, its contribution to the whole. In practice, with the growing complexity of the activities carried on by enterprises it becomes more and more difficult to distinguish which activities are of preparatory and auxiliary nature and which are not.

Under the new BEPS developments concerning the attribution of profits to permanent establishments, changes to Article 5(4) are proposed within the Report on Action 7: ""Depending on the circumstances, activities previously considered to be merely preparatory or auxiliary in nature may nowadays correspond to core business activities." A more detailed presentation will make the object of the following chapter of the paper.

2.3 Article 5 - The Agent PE

One of the most relevant chapters for the potentially unintended PE generated by the international relocation of employees refers to the "Agents'" regime. Within the context of global mobility, it means that activities of employees acting abroad on behalf of the employer may create a PE in the Host Country. In such case, the revenue at the level of the employer which is connected with the respective activities of the employee become subject to corporate income tax in the Host Country. The situation may become even more severe in such jurisdictions which practice a so called "force of attraction" principle according to which all of a company's income generated in the Host Country may be allocated and taxed at the level of such PE, even if in reality the PE only relates to a small part of the company's activities in the Host Country.

In the context of short-term assignments, the employees remain connected to the Home Country employer by valid labor contracts. In the light of the International Tax Treaties they are defined as "dependent agents" of the Home Country employer. A deep analysis of the bilateral treaty in place in each case is crucial as the PE article may present particularities which may allow

occasional and irregular business activities to take place in the Home Country without generating a PE.

The paper attempts to provide for a brief discrimination between the two concepts of "dependent" and "independent" agent and the tax treatment their activities may become subject to, with a special attention to the interpretation of the concept of "agency" according to civil and common laws and their implications with respect to the generation of permanent establishments.

Civil law and common law treat differently the concept of "representation" by intermediaries. "In whose name" is the intermediary acting? "What authority" is governing the intermediary's activity? These are decisive determinants of the legal rights and obligations deriving from an agency relationship.

Civil law clearly differentiates between direct (dependent) and indirect (independent) representation. Direct representation indicates situations where the intermediary acts in the name of the foreign enterprise thus triggering direct responsibility and obligation at the level of the represented party in front of third parties. Rights and obligations deriving from contracts concluded with third parties by the dependent agent in the name of the foreign enterprise are binding upon the latter and not upon the intermediary. Conversely, indirect representation indicates an intermediary that acts in its own name, the foreign enterprise is not bound by the contracts signed with the third parties. The foreign enterprise is liable to the extent and within the frame of the provisions of its commercial contract with the intermediary.

Common law does not distinct between direct and indirect representation. Actions of the intermediary on behalf of the foreign enterprise generally induce the latter's direct responsibility in front of third parties, including in situations where the details of the foreign enterprise may not be disclosed by the contracts concluded by the intermediary and where the third party does not even know about the existence of the foreign enterprise. The decisive factor in such systems is the fact that *the foreign enterprises authorizes the intermediary to act on its behalf*. This difference in the approach of "representation" may cause serious issues when the two legal systems interact, with agents appointed under one system and the contracts being subject to the other. The OECD Model Conventions are structured more on the civil law concept of representation and this may generate difficulty in practice for the common law countries.

The paper will further analyze the Agency PE from the perspective of the OECD Model Convention and its Commentaries.

Paragraph 5, Art 5, sets out the conditions which need to be met in order for the activities carried on by a person in a foreign state in order to generate a PE. The exception to the rules set by Paragraph 5 are reflected by Paragraph 6, which refers to activities of the independent agent.

The relevant elements must be analyzed individually.

"Person" – as defined by Art 3, Paragraph 1, the term covers "individuals, companies and any other bodies of persons". The Commentaries to the Model Convention indicate that persons whose activities may create permanent establishments for the enterprise are so called "dependent agents" whether or not employees of the enterprise. The persons do not need to be residents or to maintain a place of business in the State where they act. They can either be individuals or companies

having the authority to involve, to bind the enterprise in business activities on the territory of the foreign State.

The Person must have an ***"Authority to conclude contracts".*** It is generally agreed between practitioners that the expression is rather vague, neither the Model Convention nor the Commentaries having further detailed on the content of the term "authority". Distinction is not being made between the "internal authority" and "external authority", granted to an external intermediary. *The way the authority is being exercised*, *the extent to which it is exercised* are decisive for the generation of a permanent establishment. The Commentaries on the OECD Model Convention indicates that a lack of active involvement by the foreign enterprise in the actions of the intermediary represent a grant of authority to the intermediary. The intermediary actively negotiates the conditions of contracts with third parties and the foreign enterprise only formally intervene at the end of the whole process, just by signing the contract which is the result of all intermediary's efforts. Interpretations of the term "authority" also refer to the extent to which it is granted to the intermediary by the foreign enterprise. Is it a limited one, with the intermediary receiving detailed instructions from the enterprise? Is it an extended authority, with the intermediary performing broad activities, encompassing the whole commercial process from prospecting for clients, drafting of offers, negotiations of contract terms and conditions and eventually concluding the contract on behalf of the foreign enterprise? In this second case it becomes obvious that the creation of the PE is fully justified. The opposite of it is reflected by situations where the instructions of the foreign enterprise are so detailed and restrictive, that the intermediary only acts as a messenger which is deprived from any right to exercise its own business judgement, being placed under full supervision and control by the foreign enterprise.

The contracts are concluded in ***"the name of the enterprise"***. This condition is obviously subject to interpretation form the previously mentioned perspectives, "civil law" and "common law" systems. The Commentaries on Article 5 also specify that the paragraph not only refers to agents who literally enter into contracts in the name of the enterprise but it applies equally to an agent who concludes contracts which *are binding on the enterprise even if those contracts are not actually in the name of the enterprise.* The interpretation of the term "bind" will obviously depend on the legal system it will be subject to – with civil law interpretation discriminating between direct and indirect representation and common law allocating the ties to the contract to the enterprise.

The person "***habitually concludes contracts (…)***" in the foreign State. The intermediary must perform its activity with a clear *degree of permanency,* a requirement which is also characteristic to the fixed nature of the place of business, the basic definition of the PE. According to the Commentaries, "the presence which an enterprise maintains in a Contracting State should be more than merely transitory if the enterprise is to be regarded as maintaining a permanent establishment, and thus a taxable presence in that State". It is also indicated that the nature of the contracts correlated with the extent and the frequency of the activities are the determinant factors in the interpretation of the level of permanency, of the "habitual exercise" of the intermediary activity.

Paragraph 6 refers to the activities pursued by brokers, general commissioning agents and any other types of agents of an independent status which are acting in the ordinary course of their business and who by nature represent a separate enterprise, thus not generating a permanent establishment of the foreign enterprise to which they relate by the means of independent lucrative

agreements. Such cases are beyond the scope and are not relevant for the purpose of the present paper.

2.4 Branch versus Subsidiary

While the basic definition of the permanent establishment counts the "branch" as one of the fixed places of business at the disposal of an enterprise leading to the creation of a PE, paragraph 7 states that in the case of related companies, none of the parent company or the subsidiary may constitute a permanent establishment of the other.

The difference of treatment of the two types of legal entities which at a superficial may look similar lays within their very definitions. A Subsidiary represents a self-standing legal entity which is owned and controlled by a "Parent Company" based on a participation of minimum 50%. The Subsidiary is allowed to maintain own processes and separate accounts from those of the Parent and it is subject to local reporting requirements in the country of registration. The Branch does not have a separate legal standing. It is *an extension of the holding company*, performing the same activities and operations with the parent company, *from which it is not legally separated*. Liability in case of Branches is extended at the level of the Parent company while Subsidiaries have individualized liability. It is only natural, as deriving from the nature of their legal status, subsidiaries keep own bank accounts, own assets and financial records.

In the light of paragraph 7, the existence of a Subsidiary does not constitute reason to generate a permanent establishment for its parent company. For the purpose of taxation, the Subsidiary *already* constitutes an independent legal entity. On the contrary, a Parent company may generate a permanent establishment in a State where a Subsidiary has a place of business. Premises belonging to the Subsidiary at the disposal of the Parent company, through which the Parent company carries on its own business, will constitute a fixed place of business for the Parent company and generate a permanent establishment of it. Same result is obtained in cases where the Subsidiary acts as an agent of the Parent company, habitually exercising the authority to conclude contracts in the name of the Parent (unless the activities represents the exceptions indicated at the paragraph 4 or unless the Subsidiary acts as an independent agent in the course of its business).

For the global mobility context, the provisions of paragraph 7 corroborated with those of paragraph 5 require a special attention. The practice of cross border activities within multinational groups may easily cause situations where a company of the group may constitute a PE in a State where *it has at its disposal and uses premises belonging to another company from the group*. Another type of frequently met situations – as it is also mentioned in the Commentaries – refer to management services rendered by a member of the group to another company of the group. The creation of a PE is avoided where the management services provider is rendering the service as part of its own business, through its own personnel and in premises that *are not at the disposal and do not belong* to the beneficiary.

Resources:

(6) David Feuerstein, "The Agency Permanent Establishment"

(7) OECD (2014), Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION,

Chapter 3. The BEPS Project

3.1 OECD/G20 Inclusive Framework on BEPS. Purpose of 15 Actions Plan

As mentioned in the previous chapters, the international community has constantly focused over the past 50 years on solutions meant to discourage aggressive tax planning, tax avoidance and evasion. Articles 26 and 27 from the OECD based Bilateral Tax Conventions laid the initial international legislative basis in the field of the exchange of information and assistance on the collection of taxes between the Contracting States, CFC rulings, followed by Tax Information Exchange Agreements and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

2009 marks a profound shift in the approach of non-taxation. It had proved obvious that individual countries lack the resources to remedy the situation. G20 appoints OECD to create the frame of a more effective multilateral standard on automatic exchange of information, taking into account country-specific characteristics, which materialized into the BEPS project. *BEPS* stands for the abbreviation of ***"Base Erosion and Profit Shifting".*** It generically refers to strategies used by MNC's for the purpose of tax avoidance by reducing their tax basis and expatriation of profits to tax free or low-tax jurisdictions. According to the OECD statistics, BEPS practices cost countries USD 100-240 billion annually, in lost revenue, which is an equivalent to 4-10% of the global corporate income tax revenue. I reply, the ***BEPS Project*** attempts to provide for a stricter environment, a globally revised basis of international taxation, founded on three central pillars: *coherence*, *restoration of the principles of international framework* and *transparency.* One of the main challenges the Project addresses refers the new economic framework due to the unprecedented development of the digital economy. Businesses are called to a higher involvement, being required to explain the operational purpose of their business arrangements, including potential tax advantages. Business information become accessible via inter-State automatic exchange of information, based on transparent availability at the level of tax authorities in all States where an enterprise holds presence.

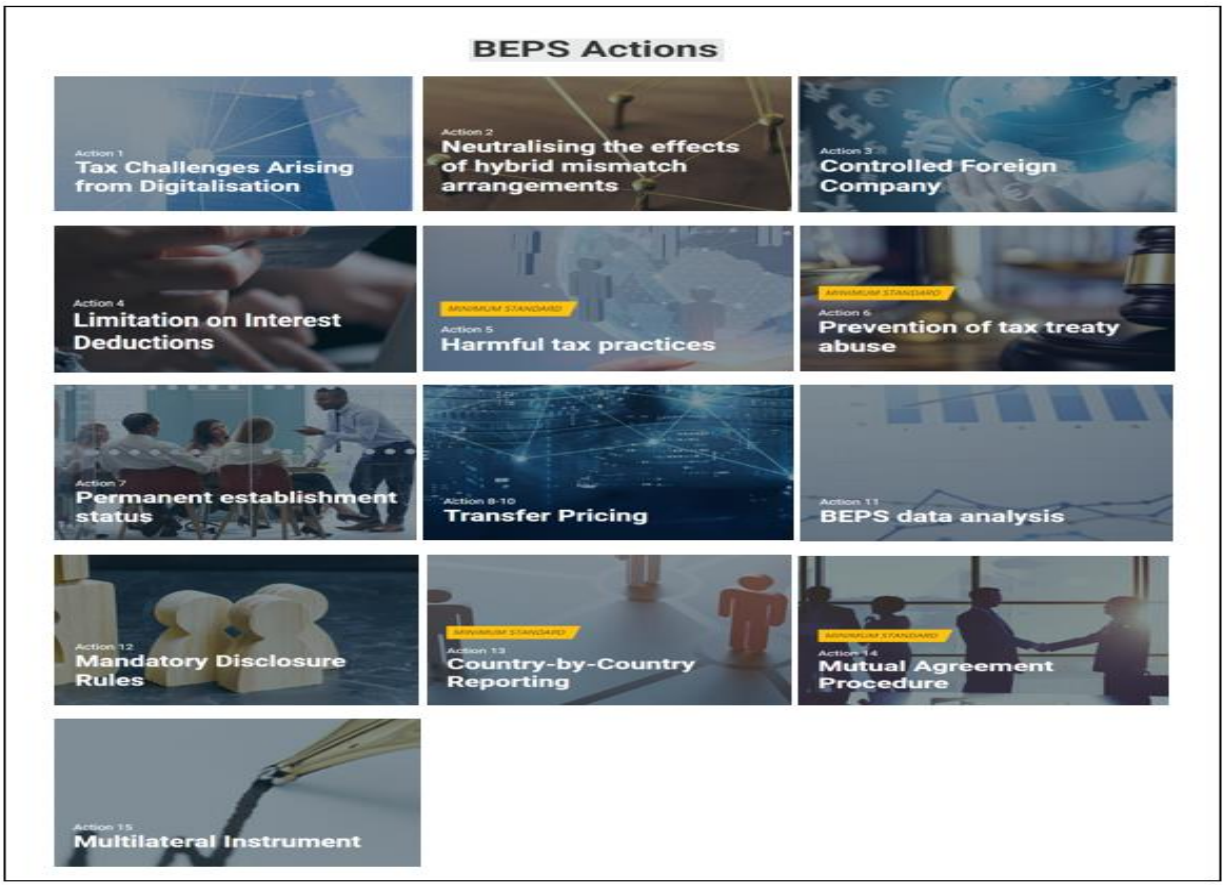
As previously mentioned, it is widely accepted that the BEPS Project represents the most significant international tax development with direct impact on Global Mobility. Section 3.1 of the Paper will briefly introduce the general framework of the BEPS Project while sections 3.2 and 3.3 will detail on two of the most impacting Actions which address directly the globally mobile populations. Section 3.4 will detail on the ways the proposed changes to the Permanent Establishment tenet will affect Global Mobility and cross-border assignments.

The BEPS Action Plan is already reshaping the behavioral pattern of businesses. One of the main turning points refers to the *"substance" test* of a business with the intention to reduce aggressive "treaty shopping". Access to Tax Treaty benefits are more and more conditioned by the proof of a real commercial purpose and of business substance defined as the extent to which an enterprise carries on operational and economic activity in a country. New reporting obligations (Country-by-Country Reporting, CbCR) resulting from the enhanced transparency policy will result in additional transfer pricing challenges. Last but not least, under BEPS plan implementation, businesses have to keep pace with the changing environment, to adjust to new rules in the spheres

of transfer pricing practices, domestic laws and Bilateral Tax Treaties by allocating additional resources to tax and adjacent functions.

At practical level, OECD publishes in October 2015 recommendations which include minimum standards on certain parts of the international tax system as agreed under BEPS Action Plan. According to the last updates, in August 2021, 140 countries collaborate on the implementation of the BEPS 15 Actions reunited under the *OECD/ G20 Inclusive Framework on BEPS.* Out of these, more than 90 countries and jurisdictions have signed the Multilateral Instrument on BEPS.

The Action Plan proposes 15 measures (of which 4 represent minimum standards) aimed at offering governments rules and instruments both at domestic and international level in their efforts to prevent tax avoidance and to localize taxation of profits in the countries where the value is being created.



Source: https://www.oecd.org/tax/beps/beps-actions/

Action 1: Address the ***tax challenges of the digital economy***. 134 countries and jurisdictions joined a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of Economy covering both direct and indirect tax matters;

Action 2: Focused on the development of model treaty provisions and recommendations for the design of domestic legislation targeting mismatches from differences in tax treatment of

financial instruments, entities and the most recent – the use of branch structures - resulting in the 2015 and 2017 OECD reports on ***Neutralizing the Effects of Hybrid Mismatch Arrangements***

Action 3: ***Designing Effective Controlled Foreign Company Rules*** as a response to the profit shifting and tax avoidance practice, whereby tax payers artificially reduced tax base in the country of residence by the use of offshore companies they controlled.

Action 4: ***Limitations on Interest Deductions*** refers to measures to limit base erosion by use of excessive interest deductions or by financing of the production of exempt or deferred income. The IF Members indicated three basic scenarios used by MNC's in order to achieve favorable tax results: Placing of higher levels of third party debt in high tax countries; the use of intragroup loans for the purpose of excessive interest deductions, the use of third party/ intragroup financing to fund the generation of tax exempt income.

Action 5: ***Harmful Tax Practices*** – represents one of the 4 minimum standards to which all IF Members mandatorily commit. It is one of the key points of the BEPS agenda based on the OECD Forum on Harmful Tax Practices addressing 3 key areas: Assessment of *preferential tax regimes* facilitating base erosion and profit shifting practices; Peer review and monitoring of the transparency framework via spontaneous and mandatory exchange of information; *Substantial activities requirements* in low tax jurisdictions

Action 6: ***Prevention of Tax Treaty Abuse***, the second of the 4 minimum standards addresses treaty shopping and other forms of treaty abuse

Action 7: ***Permanent Establishment Status*** introducing changes to the PE definition in the OECD Model Convention as a reply to strategies of avoidance of taxable presence in a jurisdiction based on tax treaties.

Action 8 to 10: ***Transfer Pricing***. Actions 8-10 are meant at strengthening existing standards and ruling on MNE's transfer pricing practices, including guidance on the application of the "arm's length" principle and an approach for appropriate pricing of hard-to-value-intangibles within the principle.

Action 11: ***BEPS Data Analysis*** on methodologies to collect and analyze data on the economic and fiscal effects of tax avoidance behaviors and also on the impact of the BEPS proposed measures

Action 12: ***Mandatory Disclosure Rules*** includes recommendations for the design of rules to require taxpayers and advisors to disclose aggressive tax planning arrangements

Action 13: ***Country-by-Country Reporting*****,** the third of the 4 minimum standard – requiring all large MNE's to prepare CbC reports with aggregate data on the global allocation of income, profit, taxes paid and economic activity covering all tax jurisdictions where they operate. The purpose of the report is the assessment of risks of high level transfer pricing and BEPS, by local tax administrations, of the involved countries

Action 14: ***Mutual Agreement Procedure,*** the last minimum standard, whereby the IF Members committed to have their compliance with the minimum standard reviewed and monitored

by its peers with the ultimate purpose to improve resolution of tax related disputes between jurisdictions

Action 15: ***Multilateral Instrument*** – The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, (MLI) – creates the frame which allows governments to *multilaterally* modify existing bilateral tax treaties in the direction of the measures developed during the BEPS project, without the need of individual renegotiation of bilateral treaties.

According to the EY 2017 Study "Out of the dark: how efforts to stop BEPS are driving tax risk", the international business community is manifesting an overall feeling of uncertainty regarding BEPS practical implementation while the overall conclusion of the study indicates clear increased scrutiny by tax authorities. 901 tax and finance executives from 69 jurisdictions participated in the survey with a share of the participants representing very large MNE's with USD 3+ billion in annual revenue. The study indicates that 64% of all respondents (with 88 % from the large MNE's) have evaluated their structures in advance of the BEPS measures being implemented while only 19% of the total (and 30% form the large MNE's category) confirmed having made any changes. Increased scrutiny from tax authorities on cross-border transactions was confirmed by 58% of the participants, 55% indicated increased requirements on disclosure and transparency while a significant 41% confirmed increased aggressiveness of tax audits. The Survey also includes a Top 10 ranking of activities or issues that represent the highest tax risks for companies. PE related concerns ranked unsurprisingly on the 3rd position, while two other issues directly relating to teams' global mobility are part of the top: Position 6 – Group charges/ allocation of head office expenses and Position 8 – Global workforce related issues, including employment tax risk and social security risk.

3.2 BEPS Action 7 – Developments on Article 5, OECD Model Convention, PE Definition

The previous chapter of the paper presented the Permanent Establishment concept from the perspective of the OECD Model Tax Convention and the supportive guidance offered by the OECD Commentaries. It was agreed that cross-border assignments of employees easily generate risks of creation of undesired PE for the employer followed by additional local tax and administrative obligations.

The Model Convention PE definition indicated a number of "Bricks and Mortar" activities deeply relating to a "distinct situs" at the disposal of the foreign enterprise with a certain degree of permanency and also the case of the dependent agents "habitually" concluding contracts on behalf of the foreign enterprise and/ or carrying on activities leading to the conclusion of contracts on behalf of the foreign enterprise.

Three elements are of high relevance for the subject: *the permanency* in the use of the location or in the pursuit of activities by the agent; the *habitual disposal* of the location by the foreign entity and the specification on certain activities of *"preparatory and auxiliary"* nature, which under recent developments may be classified as part of current business activities. Forced interpretation of the above and the abusive use of the PE exceptions such as arrangements through which tax payers structure their business abroad by replacing local subsidiaries, carrying on substantial distribution activities in a foreign State, with the whole array of local obligations by "Commissionaire" arrangements laid the foundation for the Action 7 of the BEPS Plan.

Action 7 provides for a reviewed approach of the PE in an attempt to prevent tax avoidance strategies deriving from the interpretation of the classic PE Model Convention definition with a special attention to such interpretation in the context of the digitalized businesses.

The Report on Preventing the Artificial Avoidance of Permanent Establishment Status (Action 7 Report, OECD 2015) proposed changes to prevent arrangements through which non-resident enterprises conclude sales in other jurisdictions through commissionaires or a dependent agent that ***formally DO NOT*** conclude contracts in the respective jurisdictions, thus avoiding taxation in situations that present all features of a taxable presence.

The proposed changes aim at:

- Ensuring that where the activities which are exercised by an intermediary in a foreign *jurisdiction are intended to result in regular conclusion of contracts* to be performed by the foreign enterprise, the respective enterprise will be deemed to have a taxable presence in that jurisdiction, unless the intermediary is performing such activities in the course of his independent business;
- Restricting applicability of a number of exceptions under the PE Model Convention definition to activities of "preparatory and auxiliary" nature while ensuring against the abusive use of such exceptions by fragmentation of cohesive operating business into several smaller operations;
- Addressing situations concerning construction sites and the splitting of contracts between related enterprises

The proposed changes to the PE definition were integrated in the ***2017 OECD Model Tax Convention*** and ***in Part IV of the MLI (Articles 12 to 15).*** The MLI was signed by more than 90 jurisdictions with about half of the signatories having adopted the MLI articles which implement the PE changes.

Highly relevant for the new Permanent Establishment paradigm is the Executive Summary of the Report on Action 7 (at p. 10): *"Depending on the circumstances,* ***activities previously considered to be merely preparatory or auxiliary in nature may nowadays correspond to core business activities****. In order to ensure that profits derived from core activities performed in a country can be taxed in that country, Article 5(4) is modified to ensure that each of the exceptions included therein is restricted to activities that are otherwise of a 'preparatory or auxiliary' character. … "BEPS concerns related to Art. 5(4) also arise from what is typically referred to as the 'fragmentation of activities'. Given the ease with which multinational enterprises (MNEs) may alter their structures to obtain tax advantages,* ***it is important to clarify that it is not possible to avoid PE status by fragmenting a cohesive operating business into several small operations*** *in order to argue that each part is merely engaged in preparatory or auxiliary activities that benefit from the exceptions of Art. 5(4). The anti-fragmentation rule proposed in [this report] will address these BEPS concerns."*

Thus, within the frame of *the* ***2017 OECD Model Convention***, the following paragraphs of **Article 5** – **Permanent Establishment** have been adjusted, *APPENDIX 3*:

- **Paragraph 4**, referring to the PE exceptions adds Subparagraph ***f)*** indicating that in those cases where the overall activity of a fixed place of business, is mainly of a preparatory or auxiliary character it will not constitute a PE. An exception to the exception is added through Subparagraph ***4.***1 – indicating that the PE exception will not be applicable to a fixed place of business being used

or maintained by an enterprise if the respective enterprise already conducts business activities in the same Contracting State, whereas the first place of business constitutes a permanent establishment for the enterprise or where the overall activity resulting from the combination of the activities of the two enterprises constitute complementary functions that are part of a cohesive business operation.

- **Paragraph 5**, on the "Agent PE", represents one of the key changes impacting Mobility. It lowers the threshold of what defines a "dependent agent", including those persons which on behalf of the enterprise habitually conclude contracts, ***or habitually play the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise.***
- **Paragraph 6**, on the "Independent Agent", refers to the reconsideration of the nature of the dependence relationship between an agent and an enterprise, clarifying that in cases where ***a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent;***
- **Paragraph 8** – newly added, states that a subsidiary may not be deemed to qualify as PE for the parent company and vice versa***.***

Further guidance was proposed on the allocation of profits to permanent establishment (Article 7, OECD Model Convention) as resulting from the changes to Article 5. The additional guidance refers to Paragraph 5 PE's, including practical examples of commissionaire structure for the sale of goods, an online advertising sales structure, and a procurement structure.

It also provides an example on the attribution of profits to permanent establishments arising from the anti-fragmentation rule included in Paragraph 4.1.

From the International Human Resource and Global Mobility perspective, the reshape of the sphere of "risk-generating" activities still represent a significant challenge. As resulting from the PWC "Managing Mobility World Reshaped by BEPS" 2016 Study based on participation of 224 respondents from global companies, worldwide, 58% of the MNEs participating in the survey were aware of the BEPS recommendations, with only 9% performing real adjustments to the new requirements and a 49% intending to address the matter. The survey also indicates a dramatic difference in the perception of the phenomenon within same organizations – with 100% awareness amongst the tax & finance professionals and less than half (47%) of the HR and mobility function. Analyzing the nature, the duration and the place of the activities pursued by the internationally mobile employees is becoming a stringent necessity within the context of the new BEPS PE developments. Artificial "commissionaire schemes" are under close scrutiny of national tax authorities and avoiding contract signing on behalf of the employing company within the borders of a foreign state no longer offers sufficient protection against the occurrence of tax and reporting liability in the respective states.

The chart below describes the extent to which various types of activities of internationally mobile employees may trigger PE risks for their employing organizations. It is also offering a very practical example regarding the required depth of awareness and understanding of the purpose and daily routine of the mobile workforce in order to anticipate and manage the potential risks.

Source: *PWC, 2016, "Managing mobility in a world reshaped by BEPS"*

Adding to the above mentioned realities requiring precautionary immediate action, the past decade indicates aggravating trends towards more flexible set-ups of international secondments, with a constant increase of the short term international business travel, "informal mobility" became a regular habit, making it many times very difficult for the organizations to track where their employees are actually working. According to the same Study, in 2016 more than half participants confirmed that "informal mobility" accounted for more than 10% from their mobile populations while 31% from the respondents were not capable of providing the exact number of employees working internationally. It is also relevant to point out the fact that only one third of the participants confirmed having short term business trips policies in place.

3.3 BEPS Action 13 – Country-by-Country Reporting Obligations;

As one of the four minimum standards, the Country-by-Country Report represents one of the main tools at the service of the *transparency* pillar of BEPS Project. It creates a standardized frame in the form of a template, for the use of MNE's to report on annual basis and for each jurisdiction where they hold presence data on where profit, tax and economic activity occur. Similarly, the Transfer Pricing Documentation template collects data for the purpose of assessing the transfer pricing risk at the level of the Group.

Implementation of the CbC Reporting standards supported by a *CbC Reporting Implementation Package*, consisting of *model legislation* which may be used by countries to request the ultimate parent entity of MNE Groups to file the CbC Report in their country of residence and *three model Competent Authority Agreements* – to facilitate implementation of the exchange of CbC Reports.

The positive response at the level of the Inclusive Framework Member States is reflected by the OECD statistics, indicating in 2021 a number of 100 countries which have introduced the CbC Reporting filing obligation, with 132 countries covered in the fourth annual peer review process and over 2900 active bilateral relationships for the purpose of the exchange of CbC Reports. In parallel, EU has addressed a similar tool for the use of Member States.

The CbC Reporting addresses MNE's registered in the participating countries with *consolidated group revenues of EUR 750 + million*, registered in the previous fiscal year. Starting

January 1st, 2016 they are required to *submit CbC Report to the Tax Authority of the country of residence of the parent company which will automatically share the Report with the equivalent authorities of the countries where the Group operates.* Local companies belonging to the MNE Group which are located in participating IF countries may be required to report to their local tax authorities instead of the parent company, especially in those cases where the parent company jurisdiction does not require filing of reports. Similar requirements apply to EU headquartered companies or to MNE's carrying on business in the EU headquartered in non-reporting jurisdictions.

The immediate effect of BEPS Action 13 is evidenced by the already available Anonymized and Aggregated Country-by-Country Report Statistics published via the official OECD. *Stat* portal starting 2016. The presented data refer to MNE employees, related and unrelated party revenues, profits and taxes, with domestic and foreign activities being separately identified. Other interactive tools such as EU Tax Observatory Country-by-Country Explorer offer detailed information on global activities and taxation of MNE's. Accuracy of data is still arguable, with a number of jurisdictions investigating the potential impact of various limitations in their country data.

It is expected that the CbCR will impact HR and employees' mobility. CbCR templates provide for specific fields which refer to reporting of *"number of employees on a full time equivalent basis"*. HR and mobility may impact the template reporting of revenues and functions with far reaching effects. Thus it becomes obvious that HR teams' members join the legal and tax teams' members in a common effort to ensure consistent, accurate data collection and reporting. At the convergence with the BEPS Action 7 developments on permanent establishments, the CbC reporting on employees sets the status of seconded employees, short-term travelers, independent agents and global employment companies into a new light. Allocation of reporting to the "right jurisdiction", requires a high degree of cautiousness, with a higher need of detailed tracking and reporting of relocated employees.

It is relevant to mention that the CbCR documentation does not provide for a unified definition of part of the relevant terms included in the reporting templates which on a global basis will generate interpretation issues, due to country-by-country approaches. The term "employee" lacks such definition and along with it, special attention must be granted to the treatment of seconded employees, short-term travelers, employees on long-term leave; the basis of "Full time equivalent standard" – to be set either globally or on a country-by-country basis, possibility to report same employee/s in more than one country in the same reporting year.

From the Global Mobility perspective, studies indicate that even if the CbCR makes it crucial for organizations to gather information on where their people are employed, more than half of the HR and Global Mobility specialists are not aware of their organizations taking any steps in this direction. Collection of data on mobile populations at the level of the national authorities doubled by interstate exchange of information may sooner or later lead to conclusions involving Permanent Establishment risks in the other state, accessorized by the whole array of reporting and administrative requirements, social security implications, personal income taxation, potential VAT registration and reporting etc.

Maybe one of the most delicate situations arising from the HR reporting included in the CbCR refers to the status of the "independent contractors". The guidance on the reporting indicates that MNE's may *report* but are *not obliged to* independent contractors who participate "in the

ordinary operating activities of a constituent entity". Interpretation of the level and extent of involvement from leased employees, outsourced employees, contingent workers and the decision to involve such categories in their reporting is left at the decision of the MNE's and at the same time may generate effects. The same situation is encountered in the case of the number of full time equivalent employees – whose evaluation is also left at the discretion of the MNE's, on rather relatively loose and disunite criteria – either as of the end of the accounting period, or on basis of average employment levels during the accounting period or based on "any other basis consistently applied" which in practice may cause shifting in reporting responsibility between group entities.

3.4 BEPS Action 7 effect on cross-border assignments. Potential Solutions: Temporary Employment on Local Subsidiary versus Employer of Record

With five of the 15 Actions directly addressing the international movement of employees, the impact of the BEPS Project on globally mobile population and the employing MNE's raises the question of immediate effective compliance response. Action 7 requires a particular attention from the global mobility perspective. It resizes the elements defining the "permanent establishment" with the purpose of reducing the artificial avoidance of the PE status. Its main scope consists of the identification of the objective relationship between the business activities of an enterprise and the creation of added value in a foreign territory. Business-related activities, intendedly or unintendedly structured before so as to qualify for "exceptions" under the classic PE definitions come under the magnifying glass of BEPS, shifting from "preparatory and auxiliary" status to "core business activity". Commercial representation and sales activities on foreign territories benefit under BEPS from a new, more extensive definition, preventing artificial arrangements triggering avoidance of PE. A special attention is granted to the artificial fragmentation of business operations between entities of MNE groups, also practiced with the purpose to avoid creation of local PE's.

Activities carried on abroad by seconded employees need careful consideration when falling under one of the four proposed changes:

Paragraph 4 – on **exemptions due to specific activities** which characterize the early phases of MNE's expansion on new markets. Under the classic definition, activities such as collection of information, storage, maintenance of stocks for storage, display, delivery and processing were not considered to have sufficient substance as to generate a PE. The new definition provides for further analysis of the nature and weight of these activities in the overall economy of a business. The character of an exemption will be applicable only if they are limited in time (preparatory) and supportive (auxiliary). Storage and delivery of goods as part of an online business sales chain prove to represent an essential part of the business and thus automatically qualify for permanent establishment. Additionally, potential schemes distributing operations amongst related entities belonging to the group attempting to qualify them for exemptions will be discouraged by the newly proposed anti-fragmentation rules.

Paragraph 5 – on the **"Dependent Agent" activities –** significantly extends the array of activities of dependent agents from the "habitual conclusion of contracts" to "habitually playing the principal role leading to the conclusion of contracts" without material alteration, which in practice

characterize the commercial approach either by senior staff or by sales representatives deployed in foreign territories.

Closely related to Paragraph 5**, Paragraph 6** narrows down the definition of the "independent agent", thus reducing again the chances to invoke exception, indicating that in those cases where the agent is exclusively or almost exclusively acting on behalf of one single "client" to which it is closely related, the independent status is reconsidered and redefined as "dependent". The target group refers to enterprises artificially hiring sales staff on independent contractor basis while actually exercising authority and control which are attributable to a dependent relation.

Starting 2017, which marks the year of the MLI and the integration of the new definition of the PE by a significant part of signatory jurisdictions, multinational corporations need to acknowledge the new risks associated with the PE status, to develop internal processes and procedures centered on activity tracking of internationally mobile employees and to prepare for the additional reporting requirements. The need for corporate compliance action plans is more often "checked" on the priorities list of international companies deploying globally mobile employees as part of their regular business.

From the practical point of view such action plans are based on five main pillars:

I. **Diagnose.** As an essential starting point, the correct preliminary evaluation of a company's standing is essential for the development of concrete plans addressing the risk exposure. Focal points:
   - Evaluation of the Group's overall structure with clear business operations split amongst subsidiaries and other related parties. Performance of similar activities in the same foreign countries may lead to PE exposure;
   - Evaluation of the Group's corporate tax structure versus planned movements of employees that could affect the respective structure according to the new BEPS developments, such as senior executives, or other employees falling under the redefined dependent and independent agent's conditions;
   - Evaluation of the existing activities of the Group's mobile population;
   - Evaluation of all commissionaire arrangements and ensuring that all such activities are allocated to arms-length independent agents for jurisdictions with PE exposure;

II. **Plan.** Focal points:
   - Set up of tracking and monitoring processes and procedures concerning the internationally mobile employees;
   - Paralleled by development of coherent interdepartmental collaboration procedures at the level of mobility and tax teams; - while
   - ensuring intra-company consistency and compliance via change management and educational plans for the implementation of the new processes;
   - establish consistent and permanent communication with the globally mobile employees, creating awareness on the potential results of their involvement in certain types of activities, outlining what they can and cannot work while traveling

III. **Set-up of country-by-country specific rules,** adapted to specific reporting requirements in each location.

IV. **Document.** One of the most challenging tasks, requiring very strong and structured collaboration between the mobility, tax, HR, payroll teams with the purpose of ensuring preventive and consistent assignment and inter-company documentation opposable to tax authorities so as to minimize corporate risk and potential penalties. Focal points:

- Set up of essential documentation check lists consisting of all information concerning internationally mobile employees; set –up of internal procedures on documents flow, documents storage and levels of responsibility within mobility teams;
- Collection of details regarding the duration of the trips abroad, understanding the clear purpose of assignments and the responsibilities of the employees during such trips for an appropriate structuring of assignments and mitigation of risks deriving from all compliance areas – immigration, income tax, social security, transfer pricing and permanent establishment;
- Implementation of stricter guidelines for the management of cross-border sales teams indicating responsibilities of employees under a centralized model, guidelines on the exercise of authority to decide on pricing, discounts or changes to terms and conditions of business – all relevant from the PE perspective;
- Focus on obtaining and periodically refreshing employees' documentation, preferably before travel via pre-trip questionnaires;
- Ensuring that appropriate documentation on cost recharge agreements and commissionaire agreements are in place

V. **Transfer Pricing Compliance.** Directly relating to transfer pricing area, cost recharge arrangements on internationally mobile employees may generate corporate tax effects in the foreign jurisdiction where they work. Are the seconded employees creating added value while working abroad? Cost recharges must be implemented and documented so as to comply with transfer pricing guidelines and eliminate corporate tax risks.

Whenever possible, a sixth preventive action may be added in extension to the above. For this purpose, a closer analysis of the wider context of international employee mobility and of the mechanisms leading to international assignments structuring is needed. It results that certain types of assignments present a higher risk of tax and social security non-compliance compared to others. While in the case of LTA employees with solid expatriate arrangements the situation is generally clear, the assignments falling within the STA category present a higher risk. International Business Travelers, International Commuters, "Flexpatriate" arrangements mark the top of employers' preferences for the past decade due to their higher efficiency and cost effectiveness. Under such constructs, employing companies do not have to take the financial burden of assignees' families relocation. Immigration procedures and costs get significantly simplified. Housing & schooling costs are being avoided. Culture shock and disruption of employees and their families' lives are being considerably reduced. While financially such set-ups are undeniably beneficial, in the field of compliance they rise a good amount of challenges with respect to applicable labor legislation, tax exposure including the one referring to the creation of permanent establishments, social security and pension funds. The common denominator of these constructs refers precisely to the short length and *the repetitive nature* of the trips which represent the basic elements inducing PE exposure.

Depending on the nature of the activities, their frequency, duration and their place within the core business activities of the enterprise, the PE risk may be avoided by either temporary employment of assignees on local subsidiaries or by the use of "Employer of Record" professional services. As indicated before, it is advised not to perform similar parallel activities by globally mobile employees in the jurisdictions where the enterprise already holds subsidiaries. Instead, full compliance with the host country regulations is ensured by temporary employment of the assignees by a local subsidiary. In cases where local subsidiaries are already in place, it is only a matter of adequate structuring, yet, creation of subsidiaries in the countries of operations for the purpose of local compliance may prove an expensive and time consuming commitment. Alternatively, the possibility to locally hire the services of Global Employment Companies may be checked. Employers of Record are independent professional services providers which facilitate MNE's outsourcing of international talent without the need to create a legal entity in the country where the employees' work activities are being performed. A closely related structure, yet essentially different refers to the "PEO", Professional Employer Organization. The difference between the two structures derives from the fact that while PEO's are based on *a co-employment approach*, where both the enterprise and the professional services provider *must have a registered presence in the host country*, with the enterprise in charge of the employees 'day-to-day activities and the PEO in charge with the HR and payroll activities, in an EoR arrangement, the EoR acts as *sole employer* and the enterprise saving the effort of a local presence. It is worth mentioning that while PEO's are widely met in the US, they are not present in other jurisdictions and even considered illegal in countries such as France and Switzerland.

The advantages of using EoR's are numerous and it only depends on the availability of such services in the host countries of interest.

	Local Subsidiary *(High Exposure)*	**Employer of Record** *(Low Exposure)*
Set-up costs	Based on: - legal, tax, financial initial professional service; -mandatory legal address/ office space, depending on jurisdiction; - mandatory resident directors, depending of jurisdiction	Based on: - average set-up fee per employee; - advantageous invoicing of costs – one invoice/ country; (no local office space, no local residents involved)
Timeline	-Set-up of local companies may take *up to 6-9 months,* depending on complexity of local procedural requirements; -Additional employees' hiring and on-boarding time	- 2-4 weeks, employees' on-boarding time; - formalized by on-boarding arrangements with the provider
Labor Investment	High labor costs resulting from: -Legal perspective, compliance driven; -HR, covering all employment and on-boarding processes; -Payroll management; -Finance – locally compliant computation and remittance of taxes	EoR Provider takes over the whole array of functions and duties related to personnel financial, HR & Payroll, tax compliance and reporting

International Banking	High compliance requirements deriving from: -Minimum share capital, as per jurisdiction; -Banking Institutions compliance and reporting, long "KYC" procedures	No local banking institutions exposure
Tax Liability	Direct full corporate tax liability deriving from permanent establishment	No tax presence
Labour Law	High degree of responsibility and non-compliance risks involved by the management of local employment contracts	Locally compliant employment contracts as part of HR support package
Exit Strategy	Time consuming and costly dissolution and strike-off procedures	Simple termination of service agreement

**Source: www.safeguardglobal.com*

International surveys over the past 5 years indicate an increased attention of MNE's regarding the adoption of EoR solutions. Participants in the PwC's 2016 "Managing Mobility in a Changing Landscape Survey" indicate use of EoR solutions in 16 different locations with the most popular being USA, UK, UAE and Singapore. According to another survey by PwC in 2016 – "Survey on Global Mobility Policies and Practices", about 13% of the participating companies were currently using a EoR solution, out of which 25% represented companies in the Energy/ E&C Sector, 21% represented companies from the "Fortune 100" cross-industry tier and 16% from the Diversified Businesses category.

Resources:

EY 2017, "Out of the dark: how efforts to stop BEPS are driving tax risk"
PwC's 2016 "Managing Mobility in a Changing Landscape Survey"
OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing
COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION
https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/09/gms-beps-brochure.pdf
https://www.oecd.org/ctp/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf
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https://www.pwc.com/gx/en/services/tax/tax-policy-administration/beps.html
https://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf
https://www.pwc.lu/en/people-organisation/docs/pwc-managing-mobility-world-reshaped-by-beps.pdf

Chapter 4.

OECD Guidance and emergency plan on the creation of Permanent Establishments during Covid-19. Bilateral Cross Border Commuters Agreements

Starting 2020 the international human mobility has been marked by unprecedented challenges due to the Covid 19 crisis. Severe disruptions of business operations and international travel have raised the question of immediate remedial actions which translated into a new "work from anywhere" model, allowing employees to work remotely, from their home base, whenever possible.

In a wider context, over the past decade, the accelerated digitalization, the pragmatic and the tech-centric features of the new generations Y and Z have already introduced "remote working" and "hybrid working" as an alternative to the classic office-based model. Contact centers, customer service, computer programming, data management represent only a part of the job categories that had already been enabled remotely. As an example, in US over the last 30 years remote working has grown by 7% on a yearly basis according to St Louis Federal Reserve Bank statistics. Yet, the unexpected and high magnitude of the Covid 19 crisis caused a global shift towards remote working as an immediate solution to ensure business continuity. Theoreticians estimate that at global scale, there are four waves promoting remote working. The first wave started a decade ago deriving from MNE's cost savings policies. The second wave, over the past few years resulted from the employers' need for competitiveness, striving to attract and retain talent and to enhance employee engagement. The Covid 19 crisis is perceived as the third wave, centered on the acute necessity of a business continuity tool. In the post-Covid 19 period, the fourth wave belongs to organizations wishing to drive sustainable competitive advantages by deployments across key industry verticals, introducing new technologies to create a user friendly and functional working environment. In a common voice, the international community acknowledge that the post-Covid new normal will be different, with flexible work arrangements being increasingly the new norm.

From a tax perspective, the Covid 19 pandemic "work from anywhere" experience has automatically triggered cross-border tax issues. Employees working outside their countries of employment increased the PE exposure for their employing organizations. In an attempt to address these issues, in April 2020 OECD published an initial set of guidelines, revised in January 2021, in the need to extend the extraordinary measures for a longer period than the one initially estimated. The guidance addresses three major concerns, related to the creation of permanent establishments, to the change of residence and to treatment of income from employment. It offers corporate tax payers and tax administrations a set of non-binding recommendations on the interpretation of the OECD Model Convention in circumstances arising from the Covid 19 pandemic and from the associated public health measures. Both the guidance and the commentaries reflect the general approach of the member states and provide examples of how certain jurisdictions addressed the matter. Temporary remote working and the use of home offices due to large scale lockdowns and other mobility restrictions represent the core theme of the guidance. At the same time, it also introduces an approach of the post –Covid, "new normal" where remote working is highly likely to become more permanent.

Permanent Establishment due to use of home office

Addressing the "fixed place of business" test, the guidance stresses out the exceptional and temporary nature of the events. It concludes that employees temporary working from their home offices as a consequence of Covid restrictions should not generate a PE for the employers as such activities *lack the sufficient degree of permanency and continuity.* In the same light, Paragraph 18 of the Commentary on Article 5 of the OECD Model Convention indicate that intermittent performance of part of the business of an enterprise at an employee's home *office does not place the location at the disposal of the enterprise.* Paragraph 19 directly addresses the case of cross-border workers performing work form their home based in a different country than the country of employment, indicating that in such cases the home of the employee is not at the disposal of the enterprise, and thus not creating a PE for the employer. The Commentary also clarifies the circumstances that may lead to qualification of a home office as a PE for the employing enterprise – in cases where such location is used on a continuous basis and at the request of the enterprise.

Agent PE

Similarly, the situation of dependent agents "habitually "exercising authority to conclude contracts on behalf of the enterprise is approached on basis of interpretation of the term "habitually" placed in the context of the use of home office as deriving from the temporary public health measures imposed by governments. The interpretation of the "habitual" feature of the dependent agent's activity needs to be considered carefully and placed in a wider context, assessing the nature of the contracts, the duration of the activities carried on in the other state and whether the employee was habitually concluding contracts on behalf on the enterprise in the home jurisdiction before the Covid-19 pandemic.

Construction Sites PE

The time threshold which conditions the creation of construction sites PE's according to the OECD Model Convention and the domestic legal interpretations in various jurisdictions made it more difficult to provide for a uniform set of recommendations on this chapter. The Commentaries on the OECD Model Convention mention that construction sites do not cease to exist due to temporary interruptions. It also provides examples of temporary interruptions which are included when determining the duration of a site: bad weather, shortage of resources. As an exception, under the circumstances of the Covid-19 pandemic it was advised to exclude from the calculation of the constructions sites PE time threshold the periods where the operations were interrupted as a result of the imposed public health measures. The jurisdictions may consider "stopping the clock" to assess whether the PE threshold has been satisfied. In practice, the interpretations of the recommendations in the light of domestic legislations has led to very different approaches, with examples such as Germany opting for the suspension and at the other end – Greece, still including the interruptions in the calculation of the constructions PE's time threshold.

Change of residence

With top management executives being subject to the same restrictions and board meetings moved to the virtual environment, the place of the "effective management" becomes arguable and difficult to track. The OECD guidelines present a set of sample guidance issued by various

jurisdictions regarding the temporary changes in management practices due to the pandemic and the fact that given their exceptional nature it will not affect the residence of companies. Yet, in a post-Covid world the matter will be addressed by applying the tie-breaker rules as resulting from the Bilateral Tax Treaties in place, which are not uniform as part of the Treaties already adopted the 2017 OECD Model and which provide for a more elaborate set of considerations, including but not limited to the place where the board of directors' meetings are usually held, where senior executives usually carry on their activities, where daily senior management of the company is taking place, where the company headquarters are located etc. For the ones based on the pre-2017 Model Treaty the place of effective management will be the only criterion used to determine the residence of a dual-resident company, which is defined as the place where the key management and commercial decisions are made.

The OECD Guidelines further approach the potential change to the residence status of individuals and taxation of income from employment distinguishing between three scenarios: cross border workers that cannot perform their work due to restrictions, stranded workers – in jurisdictions where they are not resident but previously exercised employment and employees working remotely from a jurisdiction for an employer which is resident of another jurisdiction. Due to the exceptional circumstances it was recommended to governments to exclude periods with imposed public health measures from the assessment of a person's residence status. In the case of the government subsidies granted by work jurisdictions to maintain the relationship with the employer, under the Article 15 of the OECD Model Convention the payment is attributable to the work jurisdiction. For employees prevented from travelling back home who remain stranded in a foreign jurisdiction, the guidelines recommend that such additional days should not be computed for the purpose of the "183 days" rule. While the personal income taxation is outside the scope of the present paper, it would be still interesting to mention the special place of the "cross border commuters" taxation especially where over the past decades the model is increasingly used.

Cross-border commuter regulations

At European level, many of the countries experiencing high volumes of cross-border work activities, rendered by persons working in one state as an employee while habitually living in another state (usually a neighboring one) have addressed the employment income taxation matter by instating special sets of rules. Depending on the case, they consist of special clauses included in the Bilateral Tax Agreements or became the subject of distinct protocols. Italy has entered such agreements in 1978 with Switzerland and during the following years, new ones have followed, with Austria, France and San Marino. In the case of Germany, cross-border regulations are stipulated in the bilateral treaties with France, Austria and Switzerland. Belgium's agreements with France, Germany, Luxembourg and The Netherlands also include such provisions. At its turn, Switzerland concluded specific frontier work agreements with Germany, France, Italy and the Principality of Liechtenstein, but not with Austria. The taxation rules and criteria are not uniform. They vary from one agreement to another as proven by the specific France-Belgium Double Tax Treaty, providing that frontier workers are taxed in the State of residence, while the Netherlands-Germany Double Tax Treaty indicate the State where the work activities are carried on, or the Treaty between Switzerland and Germany, with both States simultaneously entitled to taxation. Generally, the specific provisions regarding cross-border work provide for time thresholds and geographical delimitations. Many of the agreements specifically refer to "frontier workers" by indicating that persons subject to such

provisions must live in the frontier region of one state and work in the frontier region of the other state, provided that the person concerned returns home regularly. The "time threshold" is variable, depending on the agreement and provides for a certain number of days which allow exceptional rules of taxation. These differentiators represent the basis of an exceptional taxation rule concerning cross border work, as in such cases the most Bilateral Treaties grant the right of taxation to the State of residence of the person and not to the State where the work is actually being performed. If the "frontier zone" condition is not satisfied the income from employment is taxed as usual, at source, in the country of work.

Regarding the "time threshold", for instance, the "24-days-rule" in the Belgian-Luxembourg Double Tax Treaty, allows Belgian residents working in Luxembourg for Luxembourg employer to work up to 24 days during the year outside the work state (Luxembourg) while remaining taxable in the work state. The vice-versa, concerning Luxembourg residents, is equally applicable. Recently it has been agreed that starting 2022 the 24 days will be extended to 34 days, and the extension will be applicable for a 10 years' period.

In the case of the Swiss-German Double Tax Treaty, the "time threshold" refers to a number of "60-*non-return" days* in a calendar year permitted to regular frontier workers (regularly returning home) so as not to affect the "frontier worker" status. The specific frontier worker provisions in the Swiss Double Tax Agreements restrict taxation at the place of work. In the case of the Swiss-German agreement, income from employment for frontier workers is taxed in Germany, while Switzerland may practice a 4.5% withholding tax on the gross amount.

Further on, as a reaction to the Covid-19 pandemic restrictions most of the countries that were already part of cross-border commuter agreements have drafted temporary mutual agreements with neighboring countries. In some cases, the "Covid-19 Mutual Agreements" have also extended towards other neighboring countries, with whom initially there were no cross-border clauses in place. Such an example is offered by the Mutual Agreement between Poland and Germany, covering the period between March 11th to December 31st, 2020, (automatically extended by one month until terminated by one of the parties). As a general rule of these agreements, remuneration derived from "home working days" as a result of public health restrictions is mainly deemed to be taxed in those states where the cross-border worker would have normally worked. As a difference, the relieving measures address all cross-border employees, not only those commuting on a day-to-day basis. They have been issued for strictly delimited periods of time and they were subject to extensions depending on the evolution of the imposed restrictions while some of the agreements are automatically extended each month until the end of the next month if not terminated by one of the parties.

While the temporary nature of the global pandemic "Force Majeure" justified the exceptional taxation measures, concerns are being expressed around the consolidation of remote working in the future, with home office generating PE risks for the foreign employers. With more and more MNE's striving to attract and retain talent, remote working in an international context became a serious challenge raising tax compliance concerns.

Resources:

https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/

CONCLUSION

The international relocation of employees under various types of employment arrangements can easily and unperceivably trigger the "sufficient level of economic presence "of a foreign corporate entity in a host jurisdiction, thus triggering the so-called permanent establishment risk. In order to avoid or to limit the creation of a taxable presence in the foreign jurisdiction for the home country employer, international companies running mobility programs must cautiously analyze and plan international assignments, to establish and enforce prudent guidelines and mobility policies. Ideally, a "tax compliance check list" should be one of the main tools of the Global Mobility specialists as strategic advisers of business stakeholders: How many employees are deployed and work in a certain location? What is the nature of their activities? What is the long term plan of the project and what is the duration of the assignments? These details are essential for tax departments in order to evaluate the tax risk to which an enterprise is exposed while seconding employees to a foreign jurisdiction and to formulate a prudent policy, tax-efficient employment structures, to evaluate the correct tax filing requirements in both home and host countries, to evaluate and properly manage the tax implication at the level of the assignees etc.

The BEPS Actions set new dimensions for the role of the global mobility specialist offering the function the unique opportunity to reassert its value and contribution amidst the rest of the compliance-related units. Obtaining the right people with the right skills ensuring consistent adherence to the new policies and rules represents one of the main concerns of MNE's worldwide, as indicated by 24% of the overall participants (and 29% of the large MNE's) in the 2017 EY Tax Risk and Controversy Survey. The leading concern reunites 42% from the total number of participants (and 57% of the large MNE's) and it refers to data availability and quality for the purpose of CbC filing, master and local file reporting – an area where incontestably the multifaceted, compliance-experienced and well-structured profile of the mobility professional may play an essential role.

Presently, the representation of the Global Mobility function within the strategic decision-making circle of international companies still proves to be very low. Statistics indicate that less than one company in six allocate a strategic seat within the senior decision committees. (RES Forum Research Papers, 2020-2021). At the same time, the unprecedented challenges during the Covid-19 pandemic years, rightfully pinpoint the essential role of the GM function which is organically linked to the global workforce management, acting as "solution finders", being responsible for a wide array of sensitive compliance matters which precede all risk management strategies and thus actively participating in the imperative organizational resilience plans.

The practical shift to the advisory and strategic dimension is already undeniable. The foundation of the "New normal" is currently being laid by the direct contribution of the GM specialists, redesigning mobility strategies adjusted to the new work arrangement trends and proactively managing risks.

APPENDIX 1

Definition of "Residence" according to Model Tax Convention on Income and on Capital: Condensed Version 2017

ARTICLE 4

RESIDENT

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

   a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

   b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

   c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

   d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.

APPENDIX 2

Definition of "Permanent Establishment" according to Model Tax Convention on Income and on Capital: Condensed Version 2014

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

a) a place of management;

b) a branch;

c) an office;

d) a factory;

e) a workshop, and

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs *a)* to *e)*, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

APPENDIX 3

Definition of "Permanent Establishment" according to Model Tax Convention on Income and on Capital: Condensed Version 2017

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

a) a place of management;

b) a branch;

c) an office;

d) a factory;

e) a workshop, and

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs *a)* to *e)*,

provided that such activity or, in the case of subparagraph *f)*, the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and

a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or

b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are

a) in the name of the enterprise, or

b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or

c) for the provision of services by that enterprise,

that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

8. For the purposes of this Article, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the two enterprises.

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