"Work on the Move": Rethinking Taxation of Labour Income under Tax Treaties

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"Work on the Move": Rethinking Taxation of Labour Income under Tax Treaties

Giorgio Beretta*

Labour, in all its dimensions, has been "on the move" in the last few years. Before the pandemic, labour mobility has mostly interested only a fraction of the working population, such as highly skilled and high-net-worth individuals. COVID-19 has, however, expanded the extent of labour mobility and the categories of workers involved. This contribution discusses four major changes in labour patterns: (i) home office work; (ii) non-standard forms of employment; (iii) digital nomadism; and (iv) the decentralization of jobs. In particular, the article illustrates how a "work-from-anywhere" scenario may impact the taxation of labour income under tax treaties. Using mainly the OECD Model as a reference, the article discusses difficulties related to the application of physical presence as a sourcing rule for employment income, the distinction between dependent and self-employment income, and the concepts of home office and fixed base. Based on the analysis provided, the author formulates tentative proposals for reforming the current tax treaty treatment of labour income. Specific recommendations include the introduction of a new article jointly dealing with the taxation of labour income, a reviewed scope of application of the physical presence criterion and tax treaty definitions of home office and fixed base.

1. Preliminary Remarks

With COVID-19 progressively sweeping the world since early 2020, nearly every government has issued "stay-at-home orders", suddenly requiring their fellow citizens to work from home. Not surprisingly, international mobility has declined sharply since then. During the most acute phase of COVID-19 quarantine, buzzing neighbourhoods and thriving business districts have been relatively neglected for weeks or even months, while transportation ventures, such as airlines, trains and buses, have abruptly reduced their activities roughly to a standstill or only a few rides. A colossal remote-work experiment has somehow gone live worldwide. The switch to an online-only work model has equally affected the private and public sector, from retail stores and bank branches to civil courts and schools of every order and degree.

In the context of such a prolonged stalemate, perhaps nothing has been more mobile than labour.[1] Mobility of labour is an expression that encompasses several dimensions. In its basic understanding, labour mobility describes the movement of workers both geographically, i.e. between different locations within the same country or across borders, and occupationally, i.e. between different job patterns or through the acquisition of new skills.[2] These two dimensions of labour mobility are often intertwined: the extent to which workers are willing to move geographically may impact their occupational status and vice versa.[3]

Labour, in all its dimensions of geographical and occupational mobility, has been "on the move" in the last few years. Before the pandemic, labour mobility mostly interested only a fraction of the working population, such as highly skilled and high-net-worth individuals, who are often offered preferential conditions by countries to relocate in their territory, including tax incentives (e.g., in the form of taxes on income at flat or proportional rather than progressive rates).[4] The COVID-19 pandemic reduced the number of international migrants by around two million globally by mid-2020. Still, the number of persons living outside

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1. The term "labour" is used broadly in this article to indicate both physical (in the English language, usually identified as "labour") and intellectual (in the English language, usually identified as "service") work.
2. J. Long & J. Ferrie, *Labour Mobility*, Oxford Encyclopaedia of Economic History (2011).
3. Oxford Reference, *Mobility of Labour*, available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100202885 (accessed 23 Mar. 2022).
4. For a perspective on the various tax policies that a country can adopt to deal with cross-border mobility of individuals, including preferential tax regimes, *see* G. Beretta, *Cross-Border Mobility of Individuals and the Lack of Fiscal Policy Coordination among Jurisdictions (even) after BEPS*, 47 Intertax 1, pp. 91-112 (2019).

their country of origin is estimated to have reached the staggering figure of 281 million in 2020.[5]

Meanwhile, COVID-19 significantly expanded the extent of labour mobility and the categories of workers involved.[6] The pandemic caused an immediate surge in remote work patterns, with people turning their households into home offices plugged 24/7 to the Internet. Massive adoption of remote work also produced new arrangements in daily schedules and stimulated individuals to explore fresh ways to exploit their talent, for instance by carrying out on-demand work via online platforms. As soon as travel restrictions were, at least partially, lifted, several location-independent individuals even moved elsewhere to work and live amid the subsequent pandemic waves. Meanwhile, to help their struggling tourist sector, various countries issued remote work visas or granted temporary residence permits for digital nomads relocating to their territory. Should the "work-from-anywhere" model keep traction after the pandemic, businesses would eventually be able to hire top talents working on a remote basis from anywhere, without territorial constraints.

This article investigates how ongoing changes in labour patterns may impact the taxation of labour income, based on its various classifications under tax treaties. The analysis is conducted primarily using the 2017 OECD Model Tax Convention on Income and on Capital (OECD Model)[7] as a reference. The article is structured as follows. After this introduction, setting the stage and plan of action, section 2. traces more closely the current modifications in labour patterns briefly summarized above. In particular, four major quadrants of labour change are plotted down: (i) home office work; (ii) non-standard forms of employment; (iii) digital nomadism; and (iv) the decentralization of jobs. Sections3., 4. and 5. provide an overview of the rules on the taxation of labour income under tax treaties. Notably, section 3. is dedicated to the taxation of "income from employment" under article 15 of the OECD Model. Section 4. deals with the allocation rules for business and self-employment income under article 7 of the OECD Model. Income from "independent personal services" is also discussed therein since, although article 14 was deleted from the OECD Model in 2000, this provision is still used in several bilateral tax treaties. Section 5. examines the case of a home office and illustrates possible implications as regards the creation of permanent establishments (PEs) for businesses exploiting a remote workforce. Section 6. discusses some challenges that ongoing changes in labour patterns pose in the field of taxation and proposes tentative solutions for rethinking the tax treaty treatment of labour income. Section 7. concludes.

2. Four Quadrants of Labour Change

2.1. Home office work

For most of history, working from home has been the norm. In the pre-industrial era, the bulk of production was home-based. Home-based work did not entirely disappear with industrialization. On the contrary, changes in enterprise structures and the decentralization of production have favoured a resurge in home work in the last decades.[8] A "home work" legal definition is contained in the homonymous International Labour Organization (ILO) convention.[9] Notably, article 1 of the ILO's "Home Work Convention" describes "home work" as "work carried out by a person, to be referred to as a homeworker, (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used". This definition extends to any worker who does not have "the degree of autonomy and of economic independence necessary to be considered an independent worker".[10] Consequently, self-employed workers and entrepreneurs are not included within this legislative framework.[11] In a policy brief issued in August 2020, the ILO considered that the definition of "homeworker" set out

5. United Nations, *International Migration 2020. Highlights*, p. 1 (2021), available at https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesa_pd_2020_international_migration_highlights.pdf (accessed 23 Mar. 2022). Emigration from a single country can indeed reach high figures. For instance, in 2021, Italian nationals living outside Italy account for 9.5 % of the entire population currently resident in Italy (approximately 60 million). *See* Fondazione Migrantes, *Rapporto Italiani nel Mondo. Sintesi* (2021), available at https://www.migrantes.it/wp-content/uploads/sites/50/2021/11/Sintesi_RIM2021.pdf (accessed 23 Mar. 2022).
6. The terms "work" and "workers" are used in this article in their common language meaning, independently of any legal classification, since, for instance, even under EU law, there is no single definition of "work" and "workers", but these terms vary according to each area of law.
7. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017) [hereinafter *OECD Model* (2017)], Treaties & Models IBFD.
8. For an historical perspective on home office work, *see* K. Christensen, *The New Era of Home-based Work: Directions and Policies* (Routledge 2019).
9. International Labour Organization (ILO), *C177 – Home Work Convention*, 1996 (No. 177).
10. *See* M. Wouters, *International Labour Standards and Platform Work* p. 210 (Kluwer Law International 2021), who considers that the specific meaning of "autonomy" for the purpose of excluding independent home-based workers from the ILO Convention's scope has nothing to do with the concept of "autonomy" for the distinction between regular employees and self-employed workers. He further contends that, based on this interpretation, a non-subordinated but non-autonomous crowdworker should be included in the ILO Convention's scope.
11. *See* ILO Committee of Experts on the Application of Conventions and Recommendations, *Promoting Employment and Decent Work in a Changing Landscape* p. 237 (ILO 2020), which stipulates that "[t]he coverage of the Convention is not confined to workers who are clearly in an employment relationship … it applies to all persons carrying out home work".

in the Home Work Convention also applies to employees who perform their work at home on a regular basis, whereas occasional teleworkers remain out of scope.[12]

Teleworking is a narrower concept than home-based work, as it only applies to employees who work remotely from their own premises.[13] Originally described as "telecommuting", telework emerged in California in the 1970s and was commonly practised by workers in the information and communications technology (ICT) industry.[14] Despite the exponential growth in ICT capabilities in the subsequent decades, prior to the COVID-19 pandemic, teleworking was a practice limited to a niche of the working population. Research studies on the EU job market found that telework has increased rather slowly in the last ten years, mainly as an occasional work pattern and unevenly across different occupations and sectors.[15] Various reasons might explain why location and proximity still matter, despite any "death of distance" rhetoric.[16] One of the most interesting theories points to the inherent proneness of the current "knowledge economy"[17] toward geographical aggregation, in the sense of a winner-loser dynamic where cities and communities that attract skilled workers and good jobs tend to attract even more, while other clusters progressively lose ground.[18]

The COVID-19 crisis will likely be remembered as the single event that marked a significant change in their job experience for many workers worldwide, capable of turning their private homes into office spaces.[19] From a low-ranging phenomenon concentrated in a few countries and categories of workers, home-based work suddenly became a widespread practice that ensured workers' safety and relative business continuity during the pandemic.[20] Early surveys show that this massive, involuntary experiment has proven a tremendous success for most employees and employers alike.[21] Indeed, the "work-from-home" shift has also affected many tax authorities' staff.[22] To be sure, individuals' actual ability and frequency to work remotely much depend on job context, tasks and equipment required, rather than occupations.[23] Also, the possibility for only a fraction of the population to work from home might exacerbate existing social inequalities.[24] To balance the claimed advantage of working from home rather than the office, a Deutsche Bank research paper even invited countries to introduce a "work-from-home tax".[25]

As regards the foreseeable future beyond the pandemic, while some companies fretted about declaring their employees at liberty to work from home indefinitely and others instead required their employees to be back at the office desk,[26] most business surveys predict, as the most likely scenario, one with a hybrid workplace

12. ILO, *Policy Brief. Working from Home: Estimating the Worldwide Potential*, available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/briefingnote/wcms_743447.pdf (accessed 23 Mar. 2022).
13. The Cambridge Dictionary defines "teleworking" as "the activity of working at home, while communicating with your office by phone or email or using the Internet". *See also* the *European Framework Agreement on Teleworking (FAT)* (2021), available at https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002_Framework%20Agreement%20-%20EN.pdf (accessed 23 Mar. 2022), which defines "teleworking" as "a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis". The FAT also provides that "teleworkers benefit from the same rights, guaranteed by applicable legislation and collective agreements, as comparable workers at the employers premises".
14. P.L. Mokhtarian, *Defining Telecommuting*, Transportation Research Record 1305, pp. 273-281 (1991).
15. European Commission, *Policy Brief. Telework in the EU before and after the COVID-19: Where We Were, Where We Head to*, available at https://ec.europa.eu/jrc/sites/jrcsh/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf (accessed 23 Mar. 2022).
16. F. Cairncross, *The Death of Distance: How the Communications Revolution Will Change Our Lives* (Harvard Business School Press 1997).
17. The origin of the term "knowledge economy" is usually traced back to P.F. Drucker, *The Age of Discontinuity* (Elsevier 1969), who used this expression as a title of ch. 12 of his book.
18. OECD, *The Metropolitan Century: Understanding Urbanisation and Its Consequences* (OECD 2015). For an analysis of labour mobility dynamics in the United States during the 21st century, *see* E. Moretti, *The New Geography of Jobs* (Houghton Mifflin Harcourt 2012).
19. *Remote-first Work Is Taking Over the Rich World*, The Economist (31 Oct. 2021).
20. E.g., in Italy, according to estimates by the country's largest trade union, teleworkers rose from 0.5 million to 8 million during the COVID-19 pandemic. *See* Cgil/Fondazione di Vittorio, *Quando lavorare da casa è… SMART? 1° Indagine Cgil/Fondazione Di Vittorio sullo Smart Working* (18 May 2020), available at https://img-prod.collettiva.it/images/2020/05/18/123405173-946b698d-e841-4329-9a4c-1561929819ca.pdf (accessed 23 Mar. 2022).
21. PwC, *US Remote Survey* (12 Jan. 2021), available at https://www.pwc.com/us/en/library/covid-19/us-remote-work-survey.html (accessed 23 Mar. 2022).
22. OECD, *Tax Administration: Towards Sustainable Remote Working in a Post-COVID-19 Environment* (OECD 2021). However, teleworking was a practice already known to some countries' tax authorities (e.g., the Finnish tax administration introduced it in 2012).
23. McKinsey Global Institute, *The Future of Work After COVID-19* (18 Feb. 2021), available at https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19 (accessed 23 Mar. 2022), contends that, although the pandemic has shown that some occupations can be successfully performed on a remote basis, activities such as coaching, counselling or teaching and training are much more effective if done in person.
24. McKinsey Global Institute, *supra* n. 23, finds that the potential for remote work is concentrated among highly skilled, highly educated workers in a handful of industries, occupations and geographies, whereas little or no opportunities exist for jobs requiring frequent interaction with others or the use of site-specific machinery.
25. Deutsche Bank Research, *A Work from Home Tax* (Nov. 2020), available at https://www.dbresearch.com/PROD/RPS_EN-PROD/PROD0000000000513736/A_work-from-home_tax.pdf?undefined&realload=hwypIYDWGQglk8adpsFcGD3QDRvBdPV6sj0stFRuuQiWgc9IruxIpZY445yT1/paauQ3NYeY/FDDeKIW7LwSzQ== (accessed 23 Mar. 2022).
26. For some examples of companies' home/office work policies, *see Take Our Return-to Office Survey to Help Us Understand How Employees Feel about Their Companies' Remote Work Policies*, Business Insider (25 Oct. 2021).

where employees have a flexible experience with the office.[27] From this perspective, companies may let employees work from home two or more days per week, for instance three days in the office, two days remote and then two days off – a 3-2-2 week.[28] In such a mixed workplace scenario, employees will mostly continue to work from home; however, offices will not disappear altogether.[29] Rather, traditional offices will be converted into shared spaces, arranged for hot-desking where workers can collaborate and network.[30]

2.2. Non-standard forms of employment

For decades during the 20th century, countries developed their labour legislation on the premise of a "standard employment relationship", based on a type of work that is continuous, full time and involves a subordinate and direct relationship between the employer and the employee. Accordingly, in most legal systems globally, a binary divide exists between those in a standard employment relationship and the self-employed.[31] Changes in the economic structure of most countries' economies due to globalization, technological advances and new entrepreneurial models have all led to a shift from standard employment toward non-standard forms of employment (NSE). NSE is a catch-all expression that encompasses various forms of employment that have some features in common with self-employment. Notably, according to the ILO's classification, NSE includes fixed-term and task-based contracts, part-time and on-call work, agency and multi-party employment relationships, disguised employment relationships and dependent self-employment.[32]

One of the most visible trends towards the destandardization of employment relates to the emergence, in the past few years, of casual work arrangements, where workers are engaged on a short-term or intermittent basis. Casual work arrangements are notably associated with the growth of two forms of employment: "crowdwork" and "work-on-demand via apps".[33] The first term, also described as "labour as a service" or "peer production", includes work activities that require completing a series of tasks through online platforms in the form of intellectual services such as web design, IT services and consultancy.[34] Crowdworking platforms such as Amazon Mechanical Turk, Fiverr, Freelancer.com and Upwork are all cases in point.[35] Instead, work-on-demand via apps, in everyday language referred to as "sharing" or "gig" economy work, involves the execution of activities on the ground, such as transport, cleaning and gardening, channelled through web applications managed by online platforms, whose algorithms help set minimum quality standards of services and manage a large and low-cost workforce.[36] Notable examples of platform work activities are delivery services provided in online marketplaces such as Deliveroo, Foodora, Glovo and UberEats.[37]

27. *See*, e.g., Microsoft, *The Next Great Disruption Is Hybrid Work – Are You Ready?* (23 Mar. 2021), available at https://www.microsoft.com/en-us/worklab/work-trend-index/hybrid-work (accessed 23 Mar. 2022); PwC, *The Future of Remote Work: Global PwC Survey Outputs* (8 Sept. 2020), available at https://www.pwc.com/gx/en/services/people-organisation/publications/assets/pwc-the-future-of-remote-work-global-pwc-survey-outputs.pdf (accessed 23 Mar. 2022); and Upwork, *Economist Report: Remote Workers on the Move* (2020), available at https://www.upwork.com/press/releases/economist-report-remote-workers-on-the-move (accessed 23 Mar. 2022).
28. S. Olster, *24 Big Ideas that Will Change Our World in 2021*, LinkedIn (9 Dec. 2020), available at https://www.linkedin.com/pulse/24-big-ideas-change-our-world-2021-scott-olster/ (accessed 23 Mar. 2022). Based on its employees' feedback, the US-based software company Salesforce has introduced a hybrid workplace model, offering its workers three ways of working: flex (one-three days in the office per week on average), fully remote and office based. *See* S. Spiegel, *The Future of Work at Salesforce: Digital, Human and Connected*, Salesforce (28 Apr. 2021), available at https://www.salesforce.com/news/stories/salesforce-future-of-work/ (accessed 11 February 2022).
29. *See The Rise of Working from Home*, The Economist (10 Apr. 2021), which predicts that, despite that working from home is likely to stay after the pandemic, "remote-only" companies will remain a small minority inside the business community.
30. E. Jacobs, *New Frontiers of Hybrid Work Take Shape*, Financial Times (12 Apr. 2021).
31. ILO, *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* pp. 7-42 (ILO 2016).
32. ILO, *Non-standard Forms of Employment. Report for Discussion at the Meeting of Experts on Non-Standard Forms of Employment* (Geneva, 16-19 February 2015), available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/meetingdocument/wcms_336934.pdf (accessed 23 Mar. 2022).
33. *See* J. Berg & V. De Stefano, *Regulating Work in the 'Gig Economy'* (10 Jul. 2015), available at https://iloblog.org/2015/07/10/regulating-work-in-the-gig-economy (accessed 23 Mar. 2022); and A. Pesole et al., *Platform Workers in Europe* p. 4 (JRC Working Papers, EU Commission 2018).
34. EurWork, *Crowd Employment*, available at https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/crowd-employment, defines "crowd employment" as employment that "uses an online platform to enable organisations or individuals to access an indefinite and unknown group of other organisations or individuals to solve specific problems or to provide specific services or products in exchange for payment".
35. *See* J. Berg, *Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work*, 41 Comparative Labor Law & Policy Journal 1, p. 74 (2019), who considers that "digital labor platforms have permitted the real-time hiring of labor for a myriad of tasks from IT programming, web development, graphic design, copywriting, or routine clerical tasks". *See also* Wouters, *supra* n. 10, at p. 225, who submits that "clickworkers" on micro-task platforms, such as Amazon Mechanical Turk, partake in a "cognitive assembly line" rather than truly intellectual work.
36. V. de Stefano, *The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy*, 37 Comparative Labor Law & Policy Journal 3, pp. 471-504 (2016).
37. For an investigation of platform workers' profile, *see* Eurofound, *Employment and Working Conditions of Selected Types of Platform Work* pp. 17-36 (Publications Office of the European Union 2018).

The current fragmentation of labour into a myriad of temporary jobs or micro tasks reflects macro trends in the labour market, such as the increased flexibility of employment relationships, the decentralization of production structures and the reliance on dispersed networks.[38] Crowdwork fits well into this scenario. It consists of a large, distributed pool of workers carrying out types of jobs that can be done remotely, potentially from anywhere. Crowdworkers find themselves in a global labour market, competing with colleagues from other countries on an equal footing. A dispersed workforce may also accelerate the polarization of businesses.[39] On the one hand, global and creative professionals submit bids for specific pieces of work on the web. On the other hand, local professionals act as service providers, executing the work, implementing the design and ensuring the relationship with local authorities.[40]

As regards on-demand work via apps, the main issue relates to the potential misclassification of workers as "independent contractors" rather than "employees".[41] The acquisition of employee status is important because such a status is a gateway to many substantive legal rights. Notably, in the field of tax law, employment status determines the application of different tax rules on deduction and income thresholds for workers, besides triggering tax withholding obligations for employers.[42] In the past few years, the classification of "gig economy" workers by platforms has gathered the attention of many courts in various countries.[43] A landmark decision in this regard was released in February 2021, when the UK Supreme Court held that Uber drivers are workers for that country's employment legislation purposes.[44] A broad definition of "platform worker" is also used in the European Commission's proposal for a directive on improving working conditions in platform work published in December 2021.[45]

All types of work arrangements described above signal the emergence of new forms of employment located in the grey and often uncharted territory between employment contracts and freelance work. As such, those new forms of work are a difficult fit for the existing binary categories of dependent labour and self-employment used under most countries' labour and tax legislation.[46] These difficulties might even be exacerbated if remote work takes hold. In fact, telework affects not only employees but also the self-employed. If telework sets itself as the "new normal", it might be quite problematic to determine whether crowdsourcing work takes place within or outside the boundaries of a firm, namely whether "the crowd" comprises a company's internal local workforce or rather the company simply relies on many geographically dispersed self-employed individuals connected via the Internet.[47]

2.3. Digital nomadism

In 1997, before the turn of the millennium and at a time when the Internet was just entering into the average person's everyday life, a book actually called *Digital Nomad* predicted that the development of technology would enable people to work from remote places and constantly be on the move across the globe, transforming large swaths of the population from

38. A. Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of on-Demand/Gig Economy Platforms*, 37 Comparative Labor Law & Policy Journal 3, p. 653 (2016). *See also* A. Gilbert et al., *The Amazonian Era: How Algorithmic Systems are Eroding Good Work* p. 3 (Institute for the Future of Work 2021), who submit that "[j]ust as the organisational design developed by Henry Ford came to characterise society more broadly, … the techniques and tools of the platform economy have spread far beyond gig work, resulting in widespread 'gigification' and restructuring of workplace behaviours and relationships, jobs and communities".
39. V. de Stefano & A. Aloisi, *European Legal Framework for 'Digital Labour Platforms'* p. 38 (European Commission 2018).
40. Aloisi, *supra* n. 38, at p. 661.
41. The delimitation of the areas of "contract for services" and "contract of service" has regularly posed practical difficulties and still represents a debatable subject. On-demand workers, in fact, display some characteristics that are proper to independent contractors (e.g., flexibility in the time schedule and ownership of equipment) and others that are reminiscent of employees (e.g. lack of supervision and control power and subjection to others' direction power). In this regard, it must be observed that the qualification of the legal relationship does not necessarily follow the designation under contractual arrangements. On the contrary, based on the "primacy-of-facts doctrine", contractual arrangements may be overturned in order to give value to the actual day-by-day contract implementation.
42. OECD/G20, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS* pp. 196-197 (OECD 2018), Primary Sources IBFD.
43. For an overview, *see* M.A. Cherry & A. Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 American University Law Review 3, pp. 635-689 (2016). *See also* V. De Stefano et al., *Platform Work and the Employment Relationship*, ILO Working Paper 27 (2021).
44. UK: SC, 21 Feb. 2021, *Uber BV and others (Appellants) v. Aslam and others (Respondents)*, [2021] UKSC 5. The UK Supreme Court based its findings on the fact that Uber dictates the contract terms and determines the way in which drivers accept requests for rides and deliver transport services to passengers.
45. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, COM(2021) 762 final, which, at art. 2(3), defines a "person performing platform work" as "any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved".
46. For a discussion, *see* A. Adams, J. Freedman & J. Prassl, *Rethinking Legal Taxonomies for the Gig Economy*, 34 Oxford Review of Economic Policy 3, pp. 475-494 (2018). *See also* B. Balaram, J. Warden & F. Wallace-Stephens, *Good Gigs. A Fairer Future for the UK's Gig Economy* (Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA) Action and Research Centre 2017).
47. In a sense, while a traditional firm organizes labour and other physical or immaterial resources minimizing transaction cost internally, as famously theorized by Roland Coase (R.H. Coase, *The Nature of the Firm*, 16 Economica 4, pp. 386-405 (1937)), multi-sided platforms generate value by simplifying and supporting the interplay between independent service providers and consumers.

home office-bound settlers to location-independent nomads.[48] No longer compelled within a fixed commuting distance between the habitual abode and the familiar workplace, this book-manifesto envisioned an empowering utopia where workers could be dispersed around the globe and choose the best location to work and live. This phenomenon, fuelled by the advent of ICT, was popularized under the name "digital nomadism".[49]

Digital nomadism quickly grew from a backpacking movement to become mainstream in the second decade of the 21st century, when dedicated online communities emerged (e.g. Nomad List), various co-working spaces opened (e.g. WeWork), budget flight companies took off (e.g. Ryanair), new accommodation opportunities arose (e.g. Airbnb) and miniaturized mobile devices popped up (e.g. smartphones).[50] During the last decade, digital nomadism also obtained some legal recognition. In 2014, Estonia launched its e-residency programme, which allows people worldwide to run a business and access Estonian government services entirely online, without relocating to the Baltic republic.[51] The programme appeals especially to entrepreneurs and freelancers, but it is also advertised for "digital nomads seeking a minimalist lifestyle and true freedom from a fixed location".[52] In a sense, by involving relocation in a country where living costs are lower while receiving income higher than the average in that country, digital nomadism realizes a form of "geo-arbitrage".[53]

Although gaining some popularity during the last years, the phenomenon of digital nomadism has so far remained confined to the avant-garde of the population who have a job that enables them to work fully online, in location-independent settings, with sufficient personal and financial means to embrace a highly mobile lifestyle. In short, individuals who possess sought-after skills.[54] For the "average Joe", who has regular employment and a traditional life-work schedule, digital nomadism accompanied by its cliché of "laptop-on-the-beach" photos is hardly accessible.[55]

The COVID-19 crisis has the potential to overturn this state of play. The pandemic outbreak in late February 2020 has left many workers stranded in locations outside their residence and/or work state. Those people – most of which had a regular life-work balance and used to work on their employers' premises – began teleworking from various locations, not necessarily from where they had fixed their habitual abode. In a second phase of the pandemic, when remote working ceased to be a temporary condition due to unpredictable circumstances and settled as the "new normal", many people have purposely moved to places other than their domestic household, doing their activities on a remote basis from a different location.[56] Digital nomad communities have rapidly spread both virtually, on social media (e.g. Facebook groups),[57] as well as physically, all around the world (e.g. the "nomad village" in Ponta do Sol in the Portuguese island of Madeira).[58] Other than selecting one or more countries to live, digital nomads even have the option of embarking on a cruise ship and working from the deck chairs of a boat turned into a floating office.[59]

Countries have closely tracked this phenomenon, and various governments are offering dedicated programmes that allow digital workers to relocate and live in their territory, although only for a while. In August 2020, Estonia launched a new "Digital Nomad Visa" that enables digital migrants to live in the Baltic

48. T. Makimoto & D. Manners, *Digital Nomad* (Wiley 1997). It can also be recalled a science fiction book by M. McLuahn, *The Gutemberg Galaxy: The Making of Typographic Man* (University of Toronto Press 1962), which pictured nomads zipping around at great speed, using facilities on the road to the point they could almost dispense with their home.
49. *See*, e.g., R.A. Woldoff & R.C. Litchfield, *Digital Nomads: In Search of Freedom, Community, and Meaningful Work in the New Economy* (Oxford University Press 2021). Among academic works, *see* D. Schlagwein, *Escaping the Rat Race: Justifications in Digital Nomadism* (ECIS 2018).
50. B.Y. Thompson, *Digital Nomadism: Mobility, Millennials and the Future of Work in the Online Gig Economy* in *The Future of Creative Work* pp. 156-171 (G. Hearn ed., Edward Elgar Publishing 2020).
51. The Estonian government e-residency initiative, officially launched on 1 December 2014, was built around the idea discussed by three people in a seminal paper. *See* T. Kotka, S. Sikkut & R. Annus, *10 Million "e-Estonians" by 2025!*., available at https://taavikotka.wordpress.com/2014/05/04/10-million-e-estonians-by-2025/ (accessed 23 Mar. 2022).
52. Republic of Estonia, *Become an e-Resident*, available at https://e-resident.gov.ee/become-an-e-resident/ (accessed 23 Mar. 2022).
53. The term "geo-arbitrage" was coined by T. Ferriss, *The 4-Hour Workweek* (Harmony 2009).
54. *See* C. Bonneau & J. Aroles, *Digital Nomads: A New Form of Leisure Class?*, in *Experiencing the New World of Work* pp. 157-178 (J. Aroles, F-X. de Vaujany & K. Dale eds., Cambridge University Press 2021), discussing digital nomadism's promise of a leisure-driven lifestyle.
55. Eurofound & ILO, *Working Anytime, Anywhere: The Effects on the World of Work* (Publications Office of the European Union 2017). *See also* O. Hannonen, *In Search of a Digital Nomad: Defining the Phenomenon*, 22 Information Technology & Tourism 3, pp. 335-353 (2020), who points to the difficulty of measuring digital nomadism since this phenomenon "spans several categories and types of employees, including both traditional and independent workers".
56. *How Hotels Are Trying to Attract Remote Workers*, The Economist (29 Oct. 2020).
57. *See*, e.g., *Tenerife Remote Workers and Digital Nomads*, available at https://www.facebook.com/groups/507332689404652 (accessed 23 Mar. 2022); *Canary Islands Digital Nomads & Remote Workers*, available at https://www.facebook.com/groups/1618624795083333 (accessed 23 Mar. 2022); *Digital Nomads in Madeira*, available at https://www.facebook.com/groups/1063428834091068 (accessed 23 Mar. 2022); and *Algarve Digital Nomads*, available at https://www.facebook.com/groups/110559502949826 (accessed 23 Mar. 2022).
58. *Digital Nomads. Madeira Islands*, available at https://digitalnomads.startupmadeira.eu/ (accessed 23 Mar. 2022).
59. K. Canales, *An Unused Carnival Cruise Ship Could Soon Become a Floating Office Where Techies, YouTube Influencers, and 'Digital Nomads' Can Live and Work Remotely*, Business Insider (19 Oct. 2020).

country and legally work for their employer or their own company registered abroad for up to a year.[60] In 2020 and 2021, Caribbean countries like Antigua and Barbuda, Barbados, Bermuda, and Dominica all issued visa certificates called, respectively, "Nomad Digital Residence",[61] "Working Stamp",[62] "Work from Bermuda"[63] and "Work In Nature",[64] which grant executives and students permission to work or study remotely from these Pacific islands, after completing fast-track and flat-fee application procedures. Other countries worldwide, such as Brazil,[65] Cabo Verde,[66] Cayman Islands,[67] Costa Rica,[68] Georgia,[69] Hungary,[70] Iceland,[71] Malta,[72] Mauritius,[73] Mexico,[74] Monserrat,[75] Panama,[76] Romania,[77] Saint Lucia,[78] Seychelles[79] and the city of Dubai in the United Arab Emirates,[80] have designed similar programmes for digital nomads.[81] Aside from a new life-work experience, some short-term visa programmes also promise to free digital nomads from any tax-filing obligations. For instance, Croatia's new "temporary stay of digital nomads" grants a tax holiday to digital workers moving to that country's shores for up to one year.[82] In 2021, Greece revamped its tax regime for incoming workers, offering EU and non-EU nationals who transfer their tax residence to its territory a 50% rebate on their Greek-source income tax for up to seven years.[83]

2.4. Decentralization of jobs

While digital nomads may decide to "carry their life in a suitcase" and travel the world, other people might be content just to experience the comforts of working from home, without commuting to the office on a

60. Republic of Estonia, *Estonia Is Launching a New Digital Nomad Visa for Remote Workers*, available at https://e-resident.gov.ee/nomadvisa/ (accessed 23 Mar. 2022).
61. Government of Antigua and Barbuda, *Live. Work. Play. Apply for Nomad Residence in Antigua & Barbuda*, available at https://antiguanomadresidence.com/ (accessed 23 Mar. 2022).
62. Government of Barbados, *Working Remotely from Barbados*, available at https://barbadoswelcomestamp.bb/ (accessed 23 Mar. 2022).
63. Government of Bermuda, *Work from Bermuda*, available at https://forms.gov.bm/work-from-bermuda/ (accessed 23 Mar. 2022).
64. Government of Dominica, *Work In Nature (WIN) Extended Stay Visa*, available at https://windominica.gov.dm (accessed 23 Mar. 2022).
65. Government of Brazil, *Resolução CNIg 45 de 9 de Setembro de 2021,* available at https://www.in.gov.br/en/web/dou/-/resolucao-cnig-mjsp-n-45-de-9-de-setembro-de-2021-375554693 (accessed 23 Mar. 2022).
66. Government of Cabo Verde, *Work Remote in Paradise*, available at https://www.remoteworkingcaboverde.com/en (accessed 23 Mar. 2022).
67. Government of the Cayman Islands, *Work Far from Home*, available at https://www.visitcaymanislands.com/en-gb/global-citizen-concierge (accessed 23 Mar. 2022).
68. Government of Costa Rica, *Residencia Temporal. Rentista y Suis Dependientes*, available at https://www.migracion.go.cr/Documentos%20compartidos/Categor%C3%ADa%20Migratorias%20(Extranjer%C3%ADa)/Categor%C3%ADas%20Especiales/Residencias%20Temporales/Rentista%20y%20Dependientes.pdf (accessed 23 Mar. 2022).
69. Government of Georgia, *Remotely from Georgia*, available at https://georgia.travel/en_US/article/remotely-from-georgia (accessed 23 Mar. 2022).
70. Government of Hungary, *White Card*, available at http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=1714&Itemid=2100&lang=en (accessed 23 Mar. 2022).
71. Government of Iceland, *Long-term Visa for Remote Workers and Their Family Members*, available at https://utl.is/index.php/en/long-term-visa-for-remote-workers-and-their-family-members (accessed 15 Dec. 2015).
72. Government of Malta, *Nomad Residence Permit*, available at https://residencymalta.gov.mt/overview/ (accessed 23 Mar. 2022).
73. Government of Mauritius, *Mauritius Premium Visa*, available at https://www.edbmauritius.org/premium-visa (accessed 23 Mar. 2022).
74. Government of Mexico, Temporary Resident Visa, available at https://consulmex.sre.gob.mx/leamington/index.php/non-mexicans/visas/115-temporary-resident-visa (accessed 23 Mar. 2022).
75. Government of Monserrat, *The Monserrat Remote Work Stamp*, available at https://montserratremoteworker.com (accessed 23 Mar. 2022).
76. Panama Executive Decree 198 of 7 May 2021, published in the electronic Official Gazette on 20 May 2021, available at https://www.presidencia.gob.pa/tmp/file/990/DECRETO-198.pdf (accessed 23 Mar. 2022).
77. Law 22 of 14 January 2022, published in the Official Gazette of 14 January 2022, available at https://www.senat.ro/Legis/Lista.aspx?cod=23635 (accessed 23 Mar. 2022).
78. Government of Saint Lucia, *Apply for Saint Lucia Non-Immigrant Visa*, available at http://www.govt.lc/services/apply-for-saint-lucia-non-immigrant-visa (accessed 23 Mar. 2022).
79. Government of the Seychelles, *Workcation Retreat*, available at https://workcation.seychelles.travel (accessed 23 Mar. 2022).
80. VisitDubai, *Work Remotely from Dubai*, available at https://www.visitdubai.com/en/business-in-dubai/dubai-for-business/work-remotely-from-dubai (accessed 23 Mar. 2022).
81. Other countries such as Belize, Cyprus, Grenada, Latvia, Montenegro, North Macedonia, Serbia, Spain, and Thailand are all expected to launch special short-term visas for digital nomads in the near future.
82. Republic of Croatia, *Temporary Stay of Digital Nomads*, available at https://mup.gov.hr/aliens-281621/stay-and-work/temporary-stay-of-digital-nomads/286833 (accessed 23 Mar. 2022). Under the new Croatian residence visa, the term "digital nomad" is defined as "a third-country national who is employed or performs work through communication technology for a company or his own company that is not registered in the Republic of Croatia and does not perform work or provide services to employers in the Republic of Croatia". The tax exemption is laid down in the text of the law passed on 11 December 2020 [Croatian text of the law available at https://www.zakon.hr/z/85/Zakon-o-porezu-na-dohodak (accessed 23 Mar. 2022)]. For a discussion, *see* S. Gadžo, *Croatia: A New (Tax Free) Promised Land for Digital Nomads? (Part I)*, Kluwer International Tax Blog (24 Feb. 2022), available at http://kluwertaxblog.com/2022/02/24/croatia-a-new-tax-free-promised-land-for-digital-nomads-part-i/ (accessed 23 Mar. 2022); and S. Gadžo, *Croatia: A New (Tax Free) Promised Land for Digital Nomads? (Part II)*, Kluwer International Tax Blog (28 Feb. 2022), available at http://kluwertaxblog.com/2022/02/28/croatia-a-new-tax-free-promised-land-for-digital-nomads-part-ii/ (accessed 23 Mar. 2022).
83. GR: Law 4738/2020 (Greek Government Gazette A' 207/27.10.2020, art. 11 [unofficial translation available at https://www.workfromcrete.gr/wp-content/uploads/2021/09/WorkfromCrete_Greek-National-DN-Visa-Law-4825.2021-Article-11-not-official-translation.pdf (accessed 23 Mar. 2022)].

daily basis. In the past, locational mismatches between workers and jobs could be remedied only in two ways: move workers to where the jobs are or move jobs to where the workers are.[84] Broadband Internet infrastructures, powered by Zoom and other videoconferencing tools, have opened a wealth of new possibilities for many people during the pandemic. Although promptly setting out for the new "work-from-anywhere" reality, most employees still remain located in the near proximity and the same jurisdiction of their employers.[85]

This state of play may, however, change quite soon. Notably, increasing openness by employees to remote-based work enables employers to hire people from everywhere, not necessarily in the near proximity of their headquarters or branch offices. Empirical evidence suggests that a growing number of companies are prepared to hire and manage remote teams.[86] Many recruitment offers no longer impose territorial constraints on new hires, often indicating only a large geographical area as required workplace location (e.g. EU-27 or North America).[87] International remote employment underpinned by a massive adoption of teleworking may eventually become a suitable strategy for businesses, allowing employers to tap into a talent pool not geographically predefined, without having to pay people to relocate or build a physical presence in any foreign country.[88] Overall, these new possibilities might rewrite the paradigm according to which "talent is everywhere but opportunity is not".[89]

Workers may equally discover the benefits of a foreign job without having to relocate since, in some cases, foreign employers will offer applicants a job without requiring them to be physically present in any of the company's offices.[90] New forms of "contractual distancing" could, in particular, appeal to a large fraction of the population who, although finding their current jobs unsatisfactory, do not want to or simply cannot leave their home country for a foreign work assignment, even after travel restrictions due to the pandemic are lifted entirely.[91] Recent surveys found that younger generations such as Millennials and Gen Z are more prone to "job hopping", a key feature of what has been termed the "YOLO economy", i.e. the willingness of younger generations to quit stable jobs and start a new career as freelancers.[92] The phenomenon of the so-called Great Resignation, with many people quitting their jobs in record numbers in 2021, might also be ascribed to individuals' new attitudes towards work.[93]

A surge in adoption of teleworking could also contribute to some decentralization of jobs away from major metropolitan areas to the outer edges, especially if workers decided to locate to where the costs of living are lower or quality of life is higher, pursuing a type of "amenity migration".[94] Early empirical findings suggest that, in the United States, the pandemic accelerated an outward migration of knowledge workers from more expensive urban areas such as New York and California to less-expensive locales.[95] In Italy, during the pandemic, many workers of the wealthier northern regions relocated to the poorest south from where they had previously departed or their parents emigrated.[96] Eventually, the decentralization of jobs due to the embracement of teleworking on a mass

84. G. Sitaraman, M. Ricks & C. Serki, *Regulation and the Geography of Inequality*, 70 Duke Law Journal 1, p. 1778 (2021).
85. R. Baldwin, *The Great Convergence. Information Technology and the New Globalization* pp. 283-300 (Harvard University Press 2016) predicted that the cost plunge in coordination costs and technological developments such as tele-presence or tele-robotics would allow an increasing number of "brain services" to be performed cross-border, resulting in phenomena such as "virtual immigration" or "international telecommuting". *See* also Zoom, *Enable the "Work-from-Anywhere" Revolution*, available at https://zoom.us/hybrid-workforce (accessed 23 Mar. 2022), which advertises technological solutions (e.g., for meetings, chat, phone, webinar and rooms) to create a "work-from-anywhere" environment.
86. LinkedIn has even drafted "*A Guide to Hiring and Managing Remote Teams*", available at https://business.linkedin.com/talent-solutions/resources/talent-management/hiring-and-managing-remote-teams (accessed 23 Mar. 2022).
87. *See* Microsoft, *supra* n. 27, noting that "remote job postings on LinkedIn increased more than five times during the pandemic, and people are taking notice".
88. *See* ILO, *Social Protection of Homeworkers*, Documents of the Meeting of Experts on the Social Protection of Homeworkers (ILO 1991), which, as early as in 1991, envisaged that "telework" provides "[t]he most spectacular advantage to the employer", i.e. "the organizational technique of geographical dispersal of the workforce on a global scale".
89. N. Baliga, *Talent Is Everywhere. Opportunity Is Not*, Medium (9 Jan. 2019), available at https://medium.com/div-ersity/talent-is-everywhere-opportunity-is-not-e53f2fa42c97 (accessed 23 Mar. 2022).
90. *See* BCG The Network, *Decoding Global Talent, Onsite and Virtual* (Mar. 2021), available at https://web-assets.bcg.com/cf/76/00bdede345b09397d1269119e6f1/bcg-decoding-global-talent-onsite-and-virtual-mar-2021-rr.pdf (accessed 23 Mar. 2022), which found that 57% of the survey's respondents were willing to work remotely for an employer that does not have a physical presence in their home country.
91. N. Countouris & V. de Stefano, *The 'Long Covid' of Work Relations and the Future of Remote Work*, Social Europe (14 Apr. 2021), available at https://www.socialeurope.eu/the-long-covid-of-work-relations-and-the-future-of-remote-work (accessed 23 Mar. 2022).
92. K. Roose, *Welcome to the YOLO Economy*, The New York Times (21 Apr. 2021).
93. A. Chugh, *What is 'The Great Resignation'? An Expert Explains*, World Economic Forum (29 Nov. 2021), available at https://www.weforum.org/agenda/2021/11/what-is-the-great-resignation-and-what-can-we-learn-from-it/ (accessed 23 Mar. 2022).
94. H. Gosnell & J. Abrams, *Amenity Migration: Diverse Conceptualizations of Drivers, Socioeconomic Dimensions, and Emerging Challenges*, 76 GeoJournal 4, pp. 303-322 (2011).
95. PwC, *supra* n. 21. Some US cities also offer cash incentives to remote workers who relocate in their territory. *See* L. Razavi, *U.S. Cities and Regions Offer Cash Incentives to Skilled Remote Workers to Relocate*, Digiday (19 Apr. 2021).
96. Svimez, *Ricerca Svimez sul numero dei South Workers*, available at http://lnx.svimez.info/svimez/wp-content/uploads/2020/11/2020_11_16_south_working_com.pdf (accessed 23 Mar. 2022).

scale may be used as a policy tool to combat widening geographical inequality inside or across countries.[97] In particular, the accelerated adoption of videoconferencing and work-from-home policies could reduce economic and social imbalances between the best and worst-performing communities.[98]

Countries and employers with stronger reputations and offering greater opportunities to job applicants will likely benefit the most from this phenomenon of – so to speak – "virtual immigration".[99] Virtual immigration is a form of "international remote working". However, differently from the case of virtual assignments, where the employer specifically requests that the employee works in a different country, in the case of virtual immigration, it is the employee that requests the employer to work from a country other than the one in which his job role is located or the results of his work are exploited.[100] While some companies may eventually decide to adjust staff salaries to align with employees' costs of living in their chosen location,[101] certainly, the ability to promote massive use of teleworking will equally be part of the future ability of employees to improve their work-life balance, employers to retain talent and countries and regions to attract quality jobs.[102]

3. Taxation of Employment Income under Tax Treaties

3.1. Article 15 of the OECD Model

Under the OECD Model, income from private employment is dealt with in article 15, unless the income thereof qualifies for any more specific distributive rule under articles 16-19 of the OECD Model.[103] Tax experts generally agree that article 15 contains three rules for allocating taxing rights between two contracting states on private employment income earned by individuals.[104]

The first rule, which is contained in the first part of the first sentence of article 15(1), reads as follows:

> Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State […].

This rule allocates taxing rights on income from private employment exclusively to the employee's residence state. Therefore, determining the employee's residence state is crucial when applying article 15 of the OECD Model.

However, the first rule applies – and this is the second rule spelt out in the second part of the first sentence of article 15(1):[105]

> […] unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

Given the wording of article 15(1), this second rule is de facto the general rule for the taxation of private employment income under the OECD Model.[106] It provides that income from private employment is taxable in the country where the employment is exercised, i.e. the work state assumed mainly as the source country under article 15 of the OECD Model.[107] Whether the employment is effectively exercised in its territory

97. Sitaraman, Ricks & Serkin, *supra* n. 84, at pp. 1763-1836, who make the case for incorporating geographic considerations into regulatory policymaking.
98. OECD, *Exploring Policy Options on Teleworking: Steering Local Economic and Employment Development in the Time of Remote Work* (OECD 2020). *See* also OECD, *Capacity for Remote Working Can Affect Lockdown Costs Differently Across Places* (2 June 2020), available at https://www.oecd.org/coronavirus/policy-responses/capacity-for-remote-working-can-affect-lockdown-costs-differently-across-places-0e85740e/ (accessed 23 Mar. 2022).
99. M. Wolf, *Five Forces that Will Define Our Post-Covid Future*, Financial Times (16 Dec. 2020). Discussing opportunities and challenges of the massive adoption of remote work attitudes, *see* T. Neeley, *Remote Work Revolution: Succeeding from Anywhere* (Harper Business 2021).
100. M. Harrison, *What Is International Remote Working?*, ECA (1 Apr. 2021), available at https://www.eca-international.com/insights/blog/april-2021/what-is-international-remote-working (accessed 15 Dec. 2021).
101. D. Kaye, *Pay Cut: Google Employees Who Work from Home Could Lose Money*, Reuters (10 Aug. 2021); and J. Conboye, *Will Facebook's Salary-by-location Move Set Precedent for Tech?*, Financial Times (8 July 2020).
102. OECD, *supra* n. 98.
103. Art. 15 OECD Model forms a closed system from a geographical (i.e. the origin of the income is irrelevant) and temporal (i.e. when compensation is paid or received is irrelevant) perspective. *See* F.P.G. Pötgens, *The "Closed System" of the Provisions on Income from Employment in the OECD Model*, 41 Eur. Taxn. 7, pp. 252-263 (2001), Journal Articles & Opinion Pieces IBFD; and F.P.G. Pötgens,*Income from International Private Employment* ch. IX, sec. 3.2. (IBFD 2007), Books IBFD. Income qualification under a more specific distributive rule of arts. 16-19 OECD Model may depend on the nature of the payment (art. 18), the status of the recipient of the income (art. 17), and/or the capacity of the payor (art. 19). *See* L. de Broe, Income from Employment, in Klaus Vogel on Tax Conventions para. 32 (4th ed., E. Reimer & A. Rust eds., Kluwer Law International 2015).
104. *See* L. Hinnekens, *The Salary Split and the 183-Day Exception in the OECD Model and Belgian Treaties (Part I)*, 16 Intertax 8/9, pp. 231-232 (1988); and Pötgens (2007), *supra* n. 103, at ch. V, sec. 1.1. Note that, although art. 15 OECD Model is generally addressed at the employee, the provision may have repercussions for the employer too, e.g., as regards tax withholding obligations on wages and salaries. *See* Pötgens (2007), *supra* n. 103, at ch. V, sec. 1.2.
105. The Commentary on Article 15 of the OECD Model does not draw a neat distinction between the first and the second rule, but it seems to regard the entire art. 15(1) as one rule. *See OECD Model Tax Convention on Income and on Capital: Commentary on Article 15* paras. 1-2 (2017), Treaties & Models IBFD [hereinafter *OECD Model: Commentary on Article 15*]. Along the same lines, *see* P. Pistone, *Article 15: Income from Employment – Global Tax Treaty Commentaries* sec. 1.1.1.2., Global Topics IBFD.
106. Paras. 1-2 *OECD Model: Commentary on Article 15* (2017) also describes this rule as "the general rule".
107. Id., at para. 1. *See also* OECD, *The 183 Day Rule: Some Problems of Application and Interpretation* paras. 2-6 (OECD 1992), Primary Sources IBFD.

is for the competent authorities of the work state to prove.[108]

The jurisdictional boundaries of the main rule under article 15(1) of the OECD Model also require the work state to apportion the remuneration over which that state can exert its taxing rights.[109] In the case of multiple places of employment, the income is sourced in the territory of each country where the activity is exercised, thereby providing the legal basis for salary splitting between different work states.[110]

The work state cannot exert taxing rights over employment income from activities carried out outside its territory, i.e. in the employee's residence state or a third country.[111] In such an event, the so-called *lex loci laboris*[112] or place-of-work principle[113] does not apply, and taxing rights are allocated only to the residence state.[114]

Physical exercise of employment in the work state is, by itself, insufficient to assign the primary right to tax to the work state. A further set of three conditions must be jointly verified.[115] These conditions are spelt out in article 15(2) of the OECD Model, which constitutes the third rule and reads as follows:

> Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
>
> 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.

This third rule with its three-pronged, cumulative and negatively formulated test is an exception to the second rule, i.e. the general rule for attributing taxing rights over cross-border income from private employment. Should all the three negative tests be fulfilled, the residence state would have exclusive taxing rights over private employment income. In contrast, the work state would be prevented from taxing private employment income.[116] Thus, the third rule of article 15(2) can be seen as a *de minimis* rule, which (re)assigns taxing rights over remuneration paid in respect of private employment exclusively to the residence state if the connection with the work state is not sufficiently strict.[117]

3.2. Physical presence

Both the second and the third rule use the employee's physical presence in the territory of a country as a proxy for allocating taxing rights between the two contracting states.[118] However, "physical presence" has slightly different connotations under the second and the third rule described in section 3.1.

The second part of the first sentence of article 15(1) (i.e. the second rule) uses the expression "exercise of employment", however, without providing a definition.[119] Article 15(2)(a) (i.e. the first of the three-

108. De Broe, *supra* n. 103, at para. 6.
109. Pistone, *supra* n. 105, at sec. 3.1.2.
110. De Broe, *supra* n. 103, at para. 5. Some countries allocate employment income based on a fraction in which the working days made in that country's territory are at the numerator and the overall contractually agreed working days are placed at the denominator. As an example, *see* IT: Revenue Agency, Circular Letter 17/E of 23 May 2017.
111. De Broe, *supra* n. 103, at para. 159.
112. Hinnekens, *supra* n. 104, at p. 229.
113. L.E. Schoueri, *The Residence of the Employer in the '183-Day Rule' (Article 15 of the OECD's Model Double Tax Convention)*, 23 Intertax 1, p. 21 (1993).
114. *See* Pistone, *supra* n. 105, at secs 2.1.1. and 3.1.1., who considers that the residence state is granted "worldwide" or "global taxing rights".
115. The requirement of the three conditions to be jointly fulfilled is not explicit in the wording of art. 15(2) OECD Model. However, both the *OECD Model: Commentary on Article 15* and scholars agree on these three conditions being cumulative. *See* para. 4, first sentence *OECD Model: Commentary on Article 15* (2017); Hinnekens, *supra* n. 104, at p. 238; Pötgens (2007), *supra* n. 103, at ch. VII, sec. 1.1.; De Broe, *supra* n. 103, at para. 5; and Pistone, *supra* n. 105, at sec. 3.2.1.1.1.
116. Pötgens (2007), *supra* n. 103, at ch. V, sec. 1.1.
117. Id., at ch. V, secs 1.1. and 1.2.2. *See also* Schoueri, *supra* n. 113, at p. 28, who considers that "[a] short-term activity does not imply the application of the Place-of-Work Principle, since no straight connection to the State of Employment may be affirmed".
118. As explained by the *OECD Model: Commentary on Article 15*, reference to the employers not being resident or the income not being borne by a permanent establishment of the employer in the work state under letters (b) and (c) of art. 15(2) OECD Model relates to the need "to avoid the source taxation of short-term employments to the extent that the employment income is not allowed as a deductible expense in the State of source because the employer is not taxable in that State as it neither is a resident nor has a permanent establishment therein. These subparagraphs can also be justified by the fact that imposing source deduction requirements with respect to short-term employments in a given State may be considered to constitute an excessive administrative burden where the employer neither resides nor has a permanent establishment in that State". *See* para. 6.2., first and second sentences *OECD Model: Commentary on Article 15* (2017). Pötgens (2007), *supra* n. 103, at ch. IX, sec. 5.4., considers that "the expression PE … also comprises fictious PEs", such as the case of "an assignment of an employee by a parent company/employer to render services on behalf of a subsidiary residing in another State".
119. De Broe, *supra* n. 103, at paras. 159-160, stipulates that the relevant criterion for the second rule of art. 15(1) OECD Model "should be where the employee is physically present when performing the services for which he is remunerated". However, differently from the 183-day rule under art. 15(2)(a) OECD Model, for purposes of the second rule, De Broe maintains that "everything functionally connected with the activity exercised at the place of work should be included in that activity". *See also* Pötgens (2007), *supra* n. 103, at ch. IX, sec. 4.2.1., who observes that "the expression 'exercised' should be considered in connection with 'the employment' and interpreted with the aid of Art. 3(2), whereby reference should be made to the domestic law of the States applying the

pronged test under the third rule) instead refers to the employee being present in the work state, where "presence" is unequivocally understood as "physically present".[120] The different wording of the two expressions relates to the fact that, under the 183-day rule, days spent in the work state besides the period of actual work are also included in the calculation.[121] This means that one must count the days of physical presence and not the days when the employment is actually exercised. However, to apply article 15(2), employment has to be exercised at some point during the reference period. Thus, presence solely for private reasons exceeding 183 days would not suffice for the rule of article 15(2)(a) to apply.[122]

The main reason for using physical presence as a criterion is explained, although only for the rule under article 15(1)(a), by the Commentary on Article 15 of the OECD Model, which stipulates that

> [t]he application of this method ["days of physical presence" method] is straightforward as the individual is either present in a country or he is not. The presence could also relatively easily be documented by the taxpayer when evidence is required by the tax authorities.[123]

As regards the rationale underpinning the 183-days physical presence test, the 1991 OECD Report entitled The 183 Day Rule: Some Problems of Application and Interpretation states the following:

> […] it is important, for practical reasons, to maintain this rule since, even though domestic legislation allows a number of member countries to tax any activities, however short, exercised on their territory, in practice it may not be possible to tax people working for a short duration, either because of lack of information or because the costs of collection would be exorbitant compared to the return. It is also important for the taxpayer who finds it easier to deal with only one tax system, i.e. that of his State of residence with which he is familiar. The State of residence should, nonetheless, be in a position to exercise its taxing right when the State of activity abandons its own right.[124]

Consequently, the employee's physical presence is decisive in determining whether the employment is exercised in the work state.[125] In particular, according to the rule under article 15(1)(a) of the OECD Model, private employment income is sourced in a country

tax treaty in the first instance. An overview of the domestic law of some selected States shows that often a connection is sought with the physical presence of the employee when rendering his services".

120. Para. 5, first sentence *OECD Model: Commentary on Article 15* (2017). Explicit reference to the physical presence test in the *OECD Model: Commentary on Article 15* clarifies that the method based on the actual duration of the employment activity (i.e., a method counting the number of days that the individual has performed the activity without regard to short breaks in the taxpayer's stay which are spent at home or in a third country) cannot be used as a valid methodology for allocating taxing rights. *See* OECD (1992), *supra* n. 107, at para. 9.
121. *See* para. 5, fourth, fifth, sixth and seventh sentences *OECD Model: Commentary on Article 15* (2017), which explains that under the 183-day rule "the following days are included in the calculation: part of a day, day of arrival, day of departure and all other days spent inside the State of activity such as Saturdays and Sundays, national holidays, holidays before, during and after the activity, short breaks due to events such as training, strikes, lock-out, delays in supplies, days of sickness and death or sickness in the family)". However, "days spent in the State of activity in transit in the course of a trip between two points outside the State of activity should be excluded from the computation. It follows from these principles that any entire day spent outside the State of activity, whether for holidays, business trips, or any other reason, should not be taken into account". Nevertheless, "[a] day during any part of which, however brief, the taxpayer is present in a State counts as a day of presence in that State for purposes of computing the 183 days period". In this regard, L. Hinnekens, *The Salary Split and the 183-Day Exception in the OECD Model and Belgian Treaties (Part II)*, 16 Intertax 10, p. 333 (1988), observes that "the simplicity of the wording of the 183-day rule is misleading", since "a normal break or interruption of presence may still be considered 'a day of work or of presence".
122. De Broe, *supra* n. 103, at para. 184. Pötgens (2007), *supra* n. 103, at ch. VII, sec. 2.2.2., points out that "this could mean that if the employee stays in the Work State solely for private reasons, e.g. a stay in the other State because of a sabbatical lasting more than 183 days, he could be present for the purposes of Art. 15(2) of the OECD Model. However, it must first be established whether the employment is exercised in the Work State when an individual is only present because he took a sabbatical. If he did not exercise his employment in the Work State, his presence lasting more than 183 days is irrelevant".
123. Para. 5, second and third sentences *OECD Model: Commentary on Article 15* (2017). According to S.V. Kostić, *In Search of the Digital Nomad – Rethinking the Taxation of Employment Income under Tax Treaties*, 11 World Tax J. 2, sec. 2.2. (2019), Journal Articles & Opinion Pieces IBFD, the *OECD Model: Commentary on Article 15* offers a "vague instruction on the rationale behind the 183-day rule in Article 15(2)(a)". K. Dziurdź, *Article 15 of the OECD Model: The 183-Day Rule and the Meaning of "Borne by a Permanent Establishment"*, 67 Bull. Intl. Taxn. 3, pp. 123-124 (2013), Journal Articles & Opinion Pieces IBFD, points out that "[i]t is not exactly clear when provisions similar to the 183-day rule in article 15(2) first emerged", but historical legislative materials suggest that "[t]he object and purpose of the 183-day rule is … to facilitate the international movement of personnel and the operations of enterprises engaged in international trade". Potgens (2007), *supra* n. 103, at ch. II, sec. 3.3., recalls that the adoption of the 183-rule followed a study conducted by Mitchell B. Carroll, who, in order to facilitate the assignment of works across national borders, proposed introducing a certain threshold during which the employee had to be present in the work state in order to assign taxing rights to that state.
124. OECD (1992), *supra* n. 107, at para. 6. This rationale is also reflected in tax treaty history, which used to disregard merely temporary stays of individuals outside the residence country under the so-called *monteur* rule. *See* OEEC (Fiscal Committee WP 10), Report on the Taxation of Profits or Remuneration in Respect of Dependent and Independent Personal Services, Paris (doc. FC/WP10(57)1), p. 2 (11 Sept. 1957), available at www.taxtreatieshistory.org/data/html/FC-WP10(57)1E.html (accessed 23 Mar. 2022).
125. *See*, however, Pistone, *supra* n. 105, at sec. 3.3.2.2.1 (fn. 220), who recalls a decision of the Tax Court of South Africa (ZA: TCSA (Western Cape Division, Cape Town), 9 May 2018, X v. Commissioner for the South African Revenue Service, Case 14218, Case Law IBFD), which considered an US employee's private employment income sourced in South Africa, based on a contract of employment concluded in that country, although actual working activities were performed for 62 days outside of South Africa.

other than the employee's residence state only if the employee is physically present and exercises work activities in that other country. Any other income sourcing rule is irrelevant. Notably, the Commentary on Article 15 of the OECD Model stipulates that

> […] a resident of a Contracting State who derived remuneration in respect of an employment from sources in the other State could not be taxed in that other State in respect of that remuneration merely because the results of this work were exploited in that other State.[126]

Arguably, the irrelevance of any criteria for sourcing private employment income other than the employee's physical presence relates to the need to avoid conflicts of taxing rights between the contracting states and therefore diminish the likelihood of double taxation.[127]

126. Para. 1, last sentence *OECD Model: Commentary on Article 15* (2017). As a concrete application of this sourcing rule, *see* art. 15(4) *Belg.-UK Income Tax Treaty* (1 Jun. 1987), Treaties & Models IBFD, which stipulates that "[t]he activity is effectively carried on in a Contracting State when the employee is physically present in that State for carrying on the activity, irrespective of the place in which the contract of employment was made, the residence of the employer or of the person paying the remuneration, the place or time of payment of the remuneration, or the place where the results of the employee's work are exploited". *See also* Pötgens (2007), *supra* n. 103, at ch. VI, sec. 2.3.4., who reports the case of Germany as a relevant exception since, in addition to the exercising of work activities, it also regards the exploitation of work activities as the relevant factor. Whether the employee is physically present in a country only enables that country to tax the employment income thereof under a double tax treaty. It does not necessarily imply that the country in question will indeed exercise its taxing rights based on its domestic sourcing rules, for instance, if the worker's activity in that country is only instrumental to that individual's broader job activity that takes place outside that country. This appears to be the case of Italy's sourcing rule for dependent employment carried out by a non-resident individual in its territory (art. 23(1)(c) Italian Tax Income Act). In this regard, *see* F. Crovato, *Il lavoro dipendente transnazionale (dall'emigrante al manager) e la tassazione in base al luogo di svolgimento dell'attività*, in *Il diritto tributario nei rapporti internazionali* p. 174 (L. Carpentieri, R. Lupi & D. Stevanato, Il Sole 24 Ore 2003).

127. *See* Doernberg et al., *Electronic Commerce and Multijurisdictional Taxation* p. 260 (Kluwer Law International 2001), who point out that "[t]he likelihood of double taxation would substantially increase if services are considered to be performed where exploited. Both the State where the services are performed and the State where the services are exploited might claim primary taxation authority. Where the source rule is the location of the person rendering services, disputes between countries is [sic] limited to the relatively concrete concept of physical location. But if exploitation becomes a touchstone for a taxing authority, there will be more room for inconsistent treaty application". Similar situations of double taxation due to conflicting taxing rights have recently emerged among US states. Although applying the criterion of physical presence to allocate income at the inter-state level, during COVID-19 many US states enacted emergency regulations declaring, by means of a legal fiction, that employment income received for services performed outside their territory would still be subject to their income tax if the employee worked in their territory before the pandemic while that employee worked from his home in another US state during the pandemic. *See* US: SC, 28 Jun. 2021, *New Hampshire v. Massachusetts*, 141 S. Ct. 1262 (2021).

3.3. Employees on the move

Linking the place of employment with the employee's physical presence is problematic in the case of an internationally mobile workforce.[128] Indeed, cross-border short-term employment relationships, as a result of international hiring-out of labour (IHOL) and intra-group secondments, have already highlighted many issues related to the international mobility of workers.[129]

In the post-pandemic scenario unfolding in the labour market, workers' international mobility will increase. Notably, a company might allow its employees to work from anywhere, with few or no geographical constraints.[130] Employees could work remotely from their residence state or a country other than where the employer is resident or has a PE that pays the employee's salary.[131] Workers might also change location frequently, living as digital nomads who stay in a country for a few months or less than a year.[132]

Ultimately, the current physical presence criterion of article 15(1) and (2) of the OECD Model is difficult to reconcile with the post-pandemic "work-from-anywhere" reality.[133] Both the second and the third rule were conceived at a time when the physical presence of the employee was, arguably, the most reliable sourcing criterion to establish a strict connection with the work state. This assumption is no longer tenable in an age where international mobility of workers and remote

128. *See* Pötgens (2007), *supra* n. 103, at ch. IX, sec. 4.2.3., with specific reference to internationally operative truck drivers or individuals working in international rail transport, such as conductors, train drivers, etc.

129. A first discussion on IHOL can be found in a report issued by the OECD in 1984. *See* OECD, *Taxation Issues Relating to International Hiring-Out of Labour* (OECD 1984). G. Baranyai, *Issues related to Cross-Border Short-Term Employment*, 42 Intertax 6&7, p. 470 (2014), defines "cross-border short-term employment" as contractual arrangements involving "structures between affiliated entities in which an employee of one of the group companies temporarily completes assignments at the premises of another group company". To counter abusive practices connected with IHOL, changes were introduced into the 1992 and 2010 updates to the Commentary on Article 15 of the OECD Model. Further on this, *see* L.T. Pignatari, *Article 15(2) of the OECD Model and the International Hiring-Out of Labour: New Criteria Required?*, 74 Bull. Intl. Taxn. 8, pp. 487-496 (2020), Journal Articles & Opinion Pieces IBFD; and W. Andreoni, *Updates to the Commentary on Article 15 OECD Model – Thoughts on the Interpretation of the Term "Employer" for Treaty Purposes,* in *The 2010 OECD Updates: Model Tax Conventions and Transfer Pricing Guidelines – A Critical Review* p. 116 et seq. (D. Weber & S. van Weeghel eds., Kluwer Law International 2011).

130. *See* sec. 2.4.

131. *See* sec. 2.1.

132. *See* sec. 2.3.

133. *See* H. Niesten, *Revising the Fiscal and Social Security Landscape of International Teleworkers in the Digital Age*, 49 Intertax 2, p. 120 (2021), who observes that "'[t]eleworking' (or telecommuting) allows people to substitute their physical presence with a virtual presence in another state while primarily situated behind the screen of their home PC".

work have taken hold.[134] Indeed, in the early 2000s already, Pötgens noted that

> e-commerce, the Internet and other technical developments have expanded the opportunities for the cross-border performance of services, without the need of travel. It will in time become increasingly easy to transmit and process the output of qualified professionals and knowledge workers over greater distances, while improved communications will allow them to perform their work from any location.[135]

The 183-days rule under article 15(2)(a) is also problematic since activity from short-term employment is not taxed in the country where the employee is physically present only on a temporary basis, i.e. for less than 183 days in any 12-month period.[136] By taking advantage of telework, a person might decide to commute to his employer's office in the other contracting state for less than 183 days in any 12 months. Due to the limited duration of the employment activity in its territory, the work state will be outright prevented from taxing private employment income. Taxing rights will be attributed only to the employee's residence state.

A similar scenario might entail an employee working from home as well as from various locations in different countries, where the employer is neither resident nor has a PE paying the salary, for less than 183 days in each country. Only the employee's residence state will tax employment income in such an event, even if no work activity is exercised therein.[137]

On the contrary, if the employee works half a day in the office and the other half from home or another location for more than 183 days in a 12-month period, both the work and residence state will be entitled to tax the employment income since each half-day will be counted as a full day of physical presence in both countries. The result is the employee doubling his place of employment for the same activity.[138]

Difficulties might also arise if the company's personnel in a country amounts to creating a PE for the employer in that country, although it is unlikely that any PEs will bear the employees' remuneration.[139]

Potential administrative problems should equally be taken into account, given the need for both the employer and the employee to keep an appropriate record of the days spent in each country in any 12 months.[140] On the other hand, national tax authorities might have difficulty verifying the proof of physical presence provided to them by taxpayers or whether an individual's physical presence in a country is actually connected with the exercise of work or not.[141]

4. Taxation of Business and Self-Employment Income under Tax Treaties

4.1. Articles 7 and 14 of the OECD Model

Work does not necessarily have to be done on behalf of or dependent on another person. An individual can also work independently, either carrying on a business or being a self-employed professional.[142]

Under the 2017 OECD Model, income from business or self-employment activities is dealt with in article 7. Article 7 allocates taxing rights over business profits, including self-employed income, to the residence state, unless the business or self-employed person carries on his activity in the other contracting state through a PE situated therein. In such an event, the source state may tax the income attributable to that PE, whereas the residence state shall provide double tax relief.

Besides article 7, it is also relevant to consider article 14 of the OECD Model. Although deleted from the OECD Model in 2000, many tax treaties in force still rely on this provision for the taxation of self-employed income.[143] Notably, article 14 of the OECD Model,

134. Pistone, *supra* n. 105, at secs. 3.3.2.1. and 3.3.2.2.2.
135. Pötgens (2007), *supra* n. 103, at ch. VI, sec. 2.9.
136. Niesten, *supra* n. 133, at p. 124.
137. Indeed, this scenario is not inconceivable, especially in the case of top managers or executives who operate on various companies' premises located in different geographical regions. For a discussion, *see* Hinnekens, *supra* n. 104, at p. 234.
138. Id.
139. On home office as PEs, *see* sec. 5.
140. Pistone, *supra* n. 105, at secs. 3.3.2.2.2. and 3.3.2.4.
141. *See*, however, Pötgens (2007), *supra* n. 103, at ch. VII, sec. 2.1.3., who finds it unnecessary to distinguish between whether a person is present in the territory of a country in the capacity of an employee or a director.
142. *See* G. Coulombe, *General Report*, in *Taxation of Payments to Non-residents for Independent Personal Services* p. 42 (IFA Cahiers vol. 67b, 1982), Books IBFD, who observes that "a person carrying on an independent activity may also receive other types of remuneration than the one directly derived from his activity".
143. *See* A.A. Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle* p. 380 (2nd ed., Kluwer Law International 2020); J.D.B. Oliver, *The Future Relevance of Article 14*, 29 Intertax 6&7, p. 294 (2001); E. van der Bruggen, *Developing Countries and the Removal of Article 14 from the OECD Model*, 55 Bull. Intl. Taxn. 12, pp. 601-602 (2001), Journal Articles & Opinion Pieces IBFD; K. Han, *The Mistaken Removal of Article 14 from the OECD Model Tax Convention*, 16 Auckland University Law Review 1, pp. 199-200 (2010). In a 2013 study conducted by IBFD (*see* W.F.G. Wijnen & J.J.P. de Goede, *The UN Model in Practice 1997-2013*, 68 Bull. Intl. Taxn. 3, sec. 2.16.2.2 (2014), Journal Articles & Opinion Pieces IBFD), involving 1,811 tax treaties, it was found that 1,402 treaties (77%) include a provision for professional services. Worth mentioning, some countries (i.e., Italy, Portugal and Turkey) have filed a specific reservation to the 2017 OECD Model that preserves their right to tax persons performing independent personal services under a separate article that corresponds to article 14 as it stood before its elimination from the OECD Model in 2000 (*see OECD Model Tax Convention on Income and on Capital: Commentary on Article 7* para. 88 (21 Nov. 2017), Treaties & Models IBFD). A similar provision is still included in art. 14 (Independent Personal Services) of the *United Nations Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2017), Treaties & Models IBFD (hereinafter *UN Model*]. Differently than art. 14 OECD Model before its deletion in 2000, art. 14 UN Model contains two distinct thresholds, one threshold considering the existence of an FB in the

until its deletion on 29 April 2000 and its absorption into article 7,[144] under the heading "independent personal services",[145] read as follows:

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State unless he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other State but only so much of it as is attributable to that fixed base.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

One of the main differences between article 7 and the former article 14 of the OECD Model relates to the fact that, in the latter provision, the concept of "fixed base" instead of "permanent establishment" is used to establish a connection between the taxpayer and the source state.

The concept of "permanent establishment" is defined in article 5 of the OECD Model. This definition has been significantly amended in the 2017 update of the OECD Model to incorporate changes proposed in the final report on BEPS Action 7.[146] Instead, a definition of "fixed base" has never been included in the OECD Model.[147] In its reading before 2000, the OECD Commentary only mentioned, by way of example of a fixed base (FB), "a physician's consulting room or the office of an architect or a lawyer".[148] The OECD Commentary mostly assumed that a self-employed person would typically carry out his activity within the national borders, so that that person "would probably not as a rule have premises of this kind in any other State than of his residence".[149]

The deliberate vagueness in the conceptualization of the term "fixed base" and the uncertain scope of article 14 has, over time, led to controversies.[150] In a document titled *Issues Related to Article 14 of the OECD Model Tax Convention*, released by the OECD before article 14's deletion from the OECD Model, no policy justification can be retrieved for having a provision for professional income distinct from business income.[151] In that document, the OECD concluded that, notwithstanding any theoretical differences between the two terms, it "could not, in practice, find examples of fixed bases that would not be permanent establishments or vice-versa".[152]

However, arguably, the two terms are not identical.[153] The same OECD document of 2000 considered that, since article 14 required the FB to be "regularly available", there might be "cases where income is attributable to a fixed place that is sometimes, but not regularly, available for performing the services and that this income therefore escapes source taxation under

source state and the other threshold based on whether the service provider is physically present for at least 183 days in a 12-month period in the source state. However, the two thresholds do not necessarily translate into similar tax liabilities for a non-residence service provider, in terms of gross or net source state's taxation.

144. At the time of the 2000 update, art. 3(1)(h) OECD Model was also amended as to include a definition of "business" which encompasses "the performance of professional services and of other activities of an independent character". According to F. Souza de Man, *Taxation of Services in Treaties between Developed and Developing Countries – A Proposal for New Guidelines* sec. 3.3.1.3. (IBFD 2017), Books IBFD, "the removal of Article 14 demonstrates the increasing conformity of the OECD Model Convention to residence taxation".

145. Until the 2000 update, the OECD Model distinguished between "dependent personal services" (as art. 15 was originally titled) and "independent personal services" (as art. 14 was titled).

146. OECD/G20, *Preventing the Artificial Avoidance of Permanent Establishment Status – Action 7: 2015 Final Report* (OECD 2015), Primary Sources IBFD.

147. The lack of a definition of a "fixed base", arguably, makes applicable the general clause of art. 3(2) OECD Model, which refers to the domestic law meaning for undefined tax treaty terms, unless the context requires otherwise. Notwithstanding this, F.P.G. Pötgens, *Independent Professional Diver Residing in the Netherlands Did Not Have a Fixed Base in India: Decision of the Netherlands Supreme Court of 15 January 2016, BNB 2016/114*, 56 Eur. Taxn. 10, p. 439 (2016), Journal Articles & Opinion Pieces IBFD, reports that the Dutch Supreme Court did not apply art. 3(2) OECD Model in a decision concerning the existence (or not) of an FB, presumably because a definition of FB was lacking in Dutch tax legislation.

148. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 14* para. 4 (1998), Treaties & Models IBFD [hereinafter *OECD Model: Commentary on Article 14* (1998)].

149. Id.

150. For an historical background and various interpretation under national tax laws of the term "fixed base", *see* D.P. Sengupta, *Article 14: Independent Personal Services – Global Tax Treaty Commentaries* sec. 3.1.1.1., Global Topics IBFD.

151. OECD, *Issues Related to Article 14 of the OECD Model Tax Convention* p. 8 (para. 4) (OECD 2000), Primary Sources IBFD. This report is the outcome of a study conducted by a working group set up by the OECD Committee on Fiscal Affairs (CFA) in 1996. For an analysis of the 2000 OECD document, *see* T. Xu, *Observations on Former Article 14 of OECD MC and the Ramifications of Its Deletion* in *Permanent Establishments in International Tax Law* pp. 203-226 (H.J. Aigner & M. Züger eds., Linde 2003).

152. OECD (2000), *supra* n. 151, at p. 13 (para. 28). Even historically, the terms "permanent establishment" and "fixed base" appeared to have the same meaning. *See* J.F. Avery Jones, *The Origins of Concepts and Expressions Used in the OECD Model and Their Adoption by States*, 60 Bull. Intl. Taxn. 6, p. 250 (sec. 3.11.3) (2006), Journal Articles & Opinion Pieces IBFD.

153. *See* K. Vogel, Klaus Vogel on Double Taxation Conventions p. 861 (3rd ed., Kluwer Law International 1997), who considered that differences between the two terms exist, thereby the position that differentiation should be abandoned cannot be accepted. *See also* E. Michaux, *An Analysis of the Notion 'Fixed Base' and Its Relation to the Notion 'Permanent Establishment' in the OECD Model*, 15 Intertax 3, p. 70 (1987), who argues that even if the concepts of PE and FB essentially rest on the same principles, "one may not conclude from this that the two terms are interchangeable". Notably, art. 24(3) OECD Model providing protection against cross-border discrimination applies literally only to PEs and not to FBs. *See* also IT: Revenue Agency, Resolution 154/E of 11 June 2009, which concludes that different withholding obligations derive from whether a PE or FB exists in Italy.

Article 14".[154] Arguing from a different perspective, some scholars suggested that the definition of "permanent establishment" requires that a business is actually carried on in a fixed place of business. In contrast, there is no such requirement for an FB, which needs only to be "regularly available", an expression also not explained in the OECD Model or its Commentary.[155] No minimum period (e.g. six months) is used as regards the activity in respect of which a fixed place must be "regularly available".[156] Moreover, the concept of "fixed base" does not employ the same commercial and geographical coherence test of article 5 of the OECD Model.[157] Lastly, the activity performed by the self-employed person through the FB might be merely preparatory or auxiliary since no requirement exists as similarly provided for a PE under article 5(4) of the OECD Model as of its 2017 update.[158]

Compared to a business activity carried on through a PE, the degree of permanency of the activity exercised through the FB is less stringent.[159] In reality, the location from which the liberal profession is performed does not have to be particularly equipped for the performance of the professional activity.[160] Professional services rely heavily on individual efforts instead of intense capital outlay as it occurs with business activities. Depending on the independent activity performed, an office might not be needed but only a sufficient structure to effectively carry out the self-employed activity.[161] Given the ease with which a professional can install himself in another country compared to an enterprise, the threshold for an FB to exist seems lower than that for a PE.[162]

Article 14 of the OECD Model was originally meant to cover only income from liberal professions (e.g. physicians, architects or lawyers).[163] However, the service sector has experienced dramatic growth since the 1970s, leading to significant changes in how professional labour is deployed in a global economy.[164] Indeed, the labour shift towards the service sector has extended the types of independent personal services far beyond traditional liberal professions,[165] mainly without the need for the professional individual to have a physical presence where his client is located.[166]

154. OECD (2000), *supra* n. 151, at p. 13 (para. 27).
155. A. Arnold, *Possible Revisions to Articles 14 of the United Nations Model Convention*, in Committee of Experts on International Cooperation in Tax Matters, *Issues Relating to Article 14 of the United Nations Model Convention (Note by the Secretariat)*, E/C18/2010/4, p. 7. *See also* Michaux, *supra* n. 153, at p. 71, who observes: "[t]his difference in required permanence of the activities is in line with the distinction in nature between professional activities and business operations. Whereas a profession is characterised by flexibility and is often exercised with a large degree of mobility, a business will typically involve more repetitive operations or similar transactions resulting in a greater permanence of the activity".
156. *See* OECD (2000), *supra* n. 151, at p. 14 (para. 32), which submits that it cannot be ruled out that an FE would exist when engineers or architects maintain an office on a particular construction site for a period shorter than 12 months.
157. *See* Michaux, *supra* n. 153, at pp. 70-71, who submits that "an independent expert who appraises antiques in clients' homes in various countries, does not meet this condition because he performs his activities only temporarily in a particular location".
158. According to Michaux, *supra* n. 153, at p. 72, art. 5 and the exclusions set forth in para. 4 are generally irrelevant for the purposes of applying art. 14, but the exclusion for preparatory and auxiliary activities applies equally to the notion of fixed base. *Contra* Arnold (2010), *supra* n. 155, at pp. 8-9, contending that, on the basis of the supposed equivalence between the two terms, "it might be possible to read the exemptions for preparatory and auxiliary activities in article 5(4) into article 14".
159. *See* Michaux, *supra* n. 153, at p. 71, who submits that "it suffices that the activities undertaken at a fixed base only take place at certain intervals".
160. *See* Michaux, *supra* n. 153, at p. 73. *See also* J. Huston, *The Case Against 'Fixed Base'*, 16 Intertax 10, p. 286 (1988), who considers critically: "[h]ow different is the equipment in the office of an insurance agent (who under a number of treaties generates 'industrial or commercial profits') from that of a professional accountant? Will a desk and a phone and the name on the door constitute a fixed base for one but not a permanent establishment for the other?". J.W.J. de Kort, *Why Article 14 (Independent Personal Services) Was Deleted from the OECD Model Tax Convention*, 29 Intertax 3, p. 75 (2001), observes that "[a]n industrial complex cannot be moved as easily as the portable computer used by lawyer".
161. *See*, e.g., IT: Supreme Court, 30 Jan. 2006, Decision 1978, where a money changer was found to have an FB in a casino simply by being regularly present there.
162. *See* Han, *supra* n. 143, at pp. 215-216.
163. On the concept of "liberal professions", *see* M. Castelon, *International Taxation of Income from Services Under Double Taxation Conventions: Development, Practice and Policy* pp. 42-47 (Kluwer Law International 2018), who lists the following characteristics as central to liberal professions: (i) high level of specialization; (ii) personality; (iii) close connection to public weal; (iv) no profit orientation as opposed to trade; (v) lack of economic, technical, disciplinary and legal subordination as opposed to employees; and (vi) strong regulation of the access to and exercise of the profession by the state and by professional organizations.
164. *See* A. Báez Moreno, *Taxation of Cross-Border Services*, in *Research Handbook on International Taxation* p. 78 (Y. Brauner ed., Edward Elgar 2020), who underlines, in this respect, "the very importance of certain services (advertising and intermediation) while at the same time converting traditional goods into services (*servitization*)" [emphasis in original]. *See also* T. Liao, *Taxation of Cross-Border Trade in Service: A Review of the Current International Tax Landscape and the Possible Future Policy Options*, in Committee of Experts on International Cooperation in Tax Matters, *Taxation of Services – Including Provision on Taxation of Fees for Technical Services*, E/C.18/2013/CRP.16, pp. 8-12, who illustrates up to four different modes of cross-border supply of services, in terms of geographical presence of either the supplier or the recipient (i.e., "cross-border supply", "consumption abroad", "commercial presence", and "presence of natural persons"), based on the corresponding classification under art. 1 *General Agreement on Trade in Services* (GATS).
165. *See* Coulombe, *supra* n. 142, at p. 39, who, already in 1982, observed that "many persons perform services of every kind from those of the specialized financial intermediary to those of the computer programmer, and no corner of the earth, however remote, is out of reach for them". Concurring Arnold (2010), *supra* n. 155, at p. 10, who points out that "there is no relevant distinction between professional and other services in the modern economy".
166. Castelon, *supra* n. 163, at p. 1. *See also* M. Kirsch, *The Role of Physical Presence in the Taxation of Cross-Border Personal Services*, 51 Boston College Law Review 4, p. 994 (2010), who submits that "[r]ecent technological developments have

The increased importance of cross-border services also helps explain the introduction of article 12A (Fees for Technical Services) in the UN Model, which allows a more generous source state taxation on income from "technical services", notwithstanding that the service provider may have no physical presence in that country.[167] It remains that neither the OECD nor the UN Model provides a single article concerning the cross-border supply of services, considering instead the tax treatment of the proceeds thereof under different categories of income.[168]

4.2. Dependent employment versus business and self-employed activity

Articles 7 and 14 of the OECD Model require the business or professional activity to be performed independently.[169] Activities carried on in an employment relationship are instead covered only by article 15.[170] Thus, the application of one provision or the other of the OECD Model is essentially based on whether an activity is carried out by an individual independently or not.[171]

As the OECD document of 2000 acknowledges, it is sometimes difficult to distinguish between activities carried out in an employment relationship (contract of service) and those carried out independently (contract for services).[172] By itself, the nature of the activity performed is not decisive. In this regard, the Commentary on Article 14 of the OECD Model (1998) considered that a physician serving as a medical officer in a factory would fall under article 15, notwithstanding that his activities are comparable, if not identical, to those made by an independent physician under article 14.[173]

The decisive factor is determining what constitutes "employment".[174] The OECD does not define the term.[175] For the interpretation of the concept of

placed a strain on the jurisdictional rules that … were developed in the early and mid-20th century, a world 'in which you earned income where you were physically present'".

167. The UN Model (2017) was released on 18 May 2018. For an historical perspective on the introduction of art. 12A in the 2018 update to the UN Model, *see* A. Báez Moreno, *The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – Yet Appropriate – Proposal for (Developing) Countries?*, 7 World Tax J. 3 (2015), Journal Articles & Opinion Pieces IBFD. Professional services do not instead seem to fall under the scope of new art. 12B UN Model (Income from Automated Digital Services), whose final version was released in April 2021, since such services are not generally automated but require more than minimal human intervention on behalf of the professional individual or firm. *See* Committee of Experts on International Cooperation in Tax Matters, *Editorial Changes to the Approved Text for Article 12B and Its Commentary*, E/C.18/2021/CRP.17 Rev.1, pp. 14 and 21 (paras. 38 and 60). Critical on this understanding, in the light of a growing automation of professional tasks, *see* A. Báez Moreno, *Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services*, 13 World Tax J. 4, p. 120 (2021), Journal Articles & Opinion Pieces IBFD.
168. Liao, *supra* n. 164, at p. 13. Castelon, *supra* n. 163, at p. 22, observes that "a large number of articles dealing with income from services increases complexity, compliance and administrative costs, the risk of conflicts of categorization and interpretation and, accordingly, the risk of double or multiple international taxation of income from the provision of services". Indeed, this state of affairs was called "a mess" by one of the greatest specialists in the taxation of services. *See* B.J. Arnold, *The Taxation of Income from Services under Tax Treaties: Cleaning Up the Mess – Expanded Version*, 65 Bull. Intl. Taxn. 2 (2011), Journal Articles & Opinion Pieces IBFD.
169. *See* para. 1, first sentence *OECD Model: Commentary on Article 14* (1998), who explains that "[t]he Article is concerned with what are commonly known as professional services and with other activities of an independent character. This excludes industrial and commercial activities and also professional services performed in employment …". Noting that, however, such a distinction "is increasingly irrelevant in the light of modern ways of conducting both the professions and business generally", *see* Committee of Experts on International Cooperation in Tax Matters, *Proposal for Amendments to Article 5 of the United Nations Model Double Taxation Convention Between Developed and Developing Countries: Further Issues Relating to Permanent Establishment*, E/C.18/2007/CRP.4, p. 10. According to J. Schwarz, *Schwarz on Tax Treaties* p. 285 (6th ed., Kluwer International Law 2021), the distinction between business and professional activity "is about fact and degree. The essential question is the degree of intellectual skill involved".
170. *See* para. 3 *OECD Model: Commentary on Article 15* (2017), which mentions sales representatives, construction workers and engineers as examples of activities rendered in the course of a dependent employment. As stated, art. 15 OECD Model constitutes a "closed system", in the sense that act as an "umbrella provision" with respect to other relevant provisions, i.e., arts. 16, 17, 18, 19 and 20 OECD Model. *See* Pötgens (2007), *supra* n. 103, at ch. V, sec. 2.1.1.
171. Pistone, *supra* n. 105, at sec. 5.1.3.1.3. *See also* Arnold (2011), *supra* n. 168, at sec. 2.2.3, who finds that different provisions in the OECD and UN Models (e.g., arts. 7, 14, 15, 16 and 17) may apply to the income from services depending on the legal capacity of the service provider. Historically, before the OECD Model of 1963, the London Model Tax Convention of 1946 contained a single provision dealing jointly with "remuneration for labour or personal services" (art. 6 London Model). From the context, however, it is possible to conclude that "personal services" meant services provided in an independent capacity to the exclusion of liberal professions.
172. OECD (2000), *supra* n. 151, at p. 9 (para. 12), which considers that "[i]t is, however, sometimes difficult to distinguish between particular activities carried out in an employment relationship and those carried out in an independent capacity (e.g. university professors and teachers being asked to perform research or give a few lectures in another country)". *See also* para. 8.4. *OECD Model: Commentary on Article 15* (2017), who draws a distinction between services rendered in an employment relationship (contract of service) and services rendered under a contract for the provision of services (contract for services).
173. Para. 1, first sentence *OECD Model: Commentary on Article 14* (1998).
174. For a perspective on the interpretation by various countries as regards the concept of "employment", *see* Coulombe, *supra* n. 142, at pp. 40-43.
175. E. Burgstaller, *'Employer' Issues in Article 15(2) of the OECD Model Convention – Proposals to Amend the OECD Commentary,* 33 Intertax 3, p. 130 (2005). Kostić, *supra* n. 123, at secs. 7.1.-7.2, argues that "the drafters of the OECD Model had assumed the existence of a common international understanding of the term employment (and thus employer)", which is striking given that other terms used in the OECD Model such as dividends, interest and royalties "are all more closely defined" in the OECD Model. He also submits there are three "common features without which an employment relationship cannot exist: dependency, subordination and remuneration". *See also* OECD, *Revised Draft Changes to*

"employment", reference therefore shall be made to article 3(2) of the OECD Model, i.e. the general rule of interpretation that requires undefined tax treaty terms to be solved on the basis of the state applying the convention's domestic law. Despite the OECD Commentary's confusing wording in the case of article 15, this state is understood as the country in whose territory the activities are performed, i.e. the "work state".[176] The question is still being debated, but it seems that the expression "unless the context requires otherwise" – which sets out the so-called "tax treaty" or "autonomous interpretation" approach,[177] contained in the last part of article 3(2) of the OECD Model – should have a narrow scope of application.[178] Under article 3(2) of the OECD Model, any domestic law, not only tax law, should be considered when defining the term. Still, the term's meaning for tax purposes would prevail over the expression's meaning under other laws in case of a conflict.[179] Unfortunately, article 3(2) does not avoid possible qualification conflicts between the contracting states, resulting in potential double taxation or non-taxation situations.[180]

Since its 2010 update,[181] the Commentary on Article 15 of the OECD Model provides some guidance for determining whether there is a dependent employment relationship or the activity thereof instead relates to independent services.[182] It recognizes that some countries follow a "formal contractual relationship" and others resort to a "substance-over-form rules" approach.[183] However, no clear interpretative pattern regarding these two approaches is established under the OECD Commentary. Moreover, the OECD Commentary addresses IHOL only, i.e. situations when a worker becomes an employee of the person for whom he is sent to work (i.e., the "real employer") while being formally employed by another person (i.e. the "formal employer"). Instead, the OECD Commentary does not answer whether the individual is an employee at the first step.[184]

Given this background, the Commentary on Article 15 of the OECD Model stipulates that if a state follows a formal approach under domestic legislation, the "formal contractual relationship would not be questioned for tax purposes",[185] unless there is some evidence of manipulation and the tax treaty includes an alternative provision covering "unintended situations",[186] i.e. other than bona fide arrangements.[187]

Other countries follow a substance-over-form approach, based on a two-step test. The first test looks at "the nature of the services". This test consists of the following sub-tests: (i) an "integration test", which looks at whether the employee's services constitute an integral part of the employer's business activity;[188] and (ii) an "entrepreneurial risk test", which considers whether the employer bears the risk for the results of the employee's activities.[189] The second test is referred

the Commentary on Paragraph 2 of Article 15 – Discussion Draft (OECD 2007), Primary Sources IBFD, which points out that employment involves the exercise of activities under the direction, control and instruction of the employer, who bears all risk and makes structures available to the employee.

176. *See* De Broe, *supra* n. 103, at para. 91, who observes that "the terms used in Article 15 OECD and UN MC are 'residence State' (explicitly) and 'State of work' (implicitly). The reference in the Comm. to the 'source State' is therefore inappropriate".
177. A.P. Dourado et al., *General Definitions*, in *Klaus Vogel on Tax Conventions* para. 109 (4th ed., E. Reimer & A. Rust eds., Kluwer Law International 2015).
178. De Broe, *supra* n. 103, at paras. 102-107. *See also* Potgens (2007), *supra* n. 103, at ch. V, sec. 4.3.1., who observes that "it is very difficult to establish that the context requires a meaning other than the one following from domestic interpretation given to the authority element since this interpretation may depend on the approach under the various domestic laws". In general, against domestic interpretation and in favour of a broader scope of contextual interpretation, *see* M. Lang, *Introduction to the Law of Double Taxation Conventions* sec. 4.2.2. (points 76-77) (3rd ed., IBFD 2021), Books IBFD, who considers that "domestic law is taken into account for the interpretation of a DTC when nothing more can be derived from the treaty itself. One must first, however, try to find a solution in the DTC by means of all methodological possibilities". It follows that, in the context of interpreting the notion of "employment", a mere lack of such a definition in the OECD Model does not mean that "each state is free to use its own domestic definition for treaty purposes" but a common understanding, exclusively obtained from the treaty, of the undefined expression must be sought by means of all methodological possibilities.
179. *See* De Broe, *supra* n. 103, at para. 100, who observes that "when looking at the laws of the EU Member States, one must also consider the definition of 'employment' under EU tax, labour and social security law, which the Member States might be required to implement in their domestic laws".
180. The employer could also be subject to double reporting and withholding obligations. *See* G. Pezzato, *The Meaning of the Term "Employment" Under Article 15 of the OECD Model Convention*, in *Taxation of Employment Income in International Tax Law* p. 52 (D. Hohenwarter-Mayr & V. Metzler eds., Linde 2009).
181. In 2004 and in 2007, the OECD published two reports on, respectively, *Proposed Clarification of the Scope of Paragraph 2 of Article 15 of the Model Tax Convention* and *Revised Draft Changes to the Commentary on Paragraph 2 of Article 15*.
182. Paras. 8-8.28 *OECD Model: Commentary on Article 15* (2017). Noteworthy, since the 2010 update, paras. 8-8.28 no longer focus on the term "employer", but rather consider whether an "employment relationship" exists or not.
183. Paras. 8.2 and 8.4. *OECD Model: Commentary on Article 15* (2017).
184. Kostić, *supra* n. 123, at sec. 7.2.
185. Pistone, *supra* n. 105, at sec. 5.1.3.2.1., notes that "Article 15 of the OECD Model explicitly refers to employment but is silent as to whether or not the dependent personal activity is to be exercised within the framework of a formal legal relationship".
186. Burgstaller, *supra* n. 175, at p. 127, observes that "it is questionable what could constitute 'unintended situations'", besides IHOL. *See* also Kostić, *supra* n. 123, at sec. 7.2., who argues that "the reference to questioning for tax purposes of formal contractual relationships in the case of the existence of some evidence of manipulation tends to blur the *criterium divisionis* between the two offered approach, at least from a tax perspective".
187. Para. 8.2 *OECD Model: Commentary on Article 15* (2017).
188. Id., at paras 8.6. *See* Burgstaller, *supra* n. 175, at p. 132, who considers that "being integrated into an organization predominately involves a certain time element".
189. Para. 8.13. *OECD Model: Commentary on Article 15* (2017).

to as the "control test". This test is informed by a series of relevant factors laid down in an eight-point list, which includes, inter alia, the employer's authority to instruct the worker regarding how the work is to be performed, controls and responsibility for the workplace, determination powers over holidays and work schedule, and the right to impose disciplinary sanctions.[190] However, this second step applies only if the first test, based on the nature of the service, would suggest that the actual employment relationship is different from the formal contractual relationship.[191] Moreover, a formal contractual relationship could be disregarded only "on the basis of objective criteria".[192]

Whether there is an employment relationship depends on the responsibilities, risks and functions of the employer vis-à-vis the employee.[193] Ultimately, both approaches rely on the "principle of the primacy of fact", enshrined in the labour legislation of most countries.[194] However, the actual limits of the power of a contracting state to reclassify a particular relationship as one of employment are not explained. On this point, Kostić argues that

> in circumstances where primary labour legislation denies beyond any doubt the ability for certain contractual forms to create an employment relationship, tax legislation, for tax treaty purposes, cannot do so independently, as this would imply the existence not of a substance-over-form approach, but of a separate international tax labour law.[195]

The potential threat is apparent of relying on a labour law concept such as "employment", which, under the labour laws of nearly all countries, is currently undergoing several developments. Moreover, the binary divide between a standard employment relationship and the self-employed is, at present, blurred. The rise of NSEs, in the form of either "crowdwork" or "work-on-demand via apps", is a case in point.[196] To base the treatment of income from working activities under tax treaties on the "paper-thin" distinction between dependent and independent personal services no longer seems feasible.[197]

4.3. Self-employed individuals and fixed base

In line with the majority of tax experts' opinion, the existence (or not) of an FB should be assessed having regard to the self-employed activity in question.[198] Based on this understanding, the decisive factor for the existence of an FB is whether the self-employed individual has a place available in a foreign country to conduct his professional activity therein. In the case of a self-employed individual working remotely, such a threshold might be pretty low. Indeed, the equipment that the FB is endowed with can be limited to only a desk (even shared with other professionals), a laptop (even belonging to a third party), and a broadband Internet connection (even provided by a hotel or a restaurant). As such, the concept of "fixed base" can almost be equated to an individual's physical presence in the work state, i.e. the test used for taxation of private employment income under article 15 of the OECD Model. Given these premises, the two tests used for the taxation of dependent and independent activities seem largely overlapping in the current scenario of workers' international mobility.

Arguably, the FB concept might involve a threshold even lower than the one used in the "physical presence" test. Article 14(1) of the OECD Model only demands the self-employed individual to have "a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities", without also requiring the self-employed to be physically present therein. On this basis, one might wonder whether, for instance, an e-resident independent consultant, who does not or only occasionally visits Estonia, shall be regarded as having an FB in the Baltic country. As mentioned in section 2.3., the Estonian e-residency programme enables individuals to conduct business or professional activities remotely. Under the programme, an individual can access Estonian government services from a distance and choose among local service providers (e.g. tax accountants, legal consultants, payment providers and other business services) that offer solutions for remote business administration. The question is whether these Estonian-located resources create an FB for that individual in Estonia.[199]

190. Id., at para. 8.14.
191. Pignatari, *supra* n. 129, at p. 491. In this regard, De Broe, *supra* n. 103, at para. 138, notes that "the Commentary does not clearly follow the two-prong approach set out in paragraphs 8.13 and 8.14, and seems to consider both in mixed order: integration test (part of the 'nature of services' test), direct supervision and control (part of control test), responsibility for work (part of the 'nature of services' test) and who bears the costs (part of control test)".
192. Para. 8.11. *OECD Model: Commentary on Article 15* (2017), which stipulates that "[f]or instance, a State could not argue that services are deemed, under its domestic law, to constitute employment services where, under the relevant facts and circumstances, it clearly appears that these services are rendered under a contract for the provision of services concluded between two separate enterprises".
193. Pignatari, *supra* n. 129, at p. 491.
194. For a discussion of this principle, *see* ILO, *The Employment Relationship* pp. 7-8 and 24-26 (International Labour Conference, 95th Session, 2006), available at https://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf (accessed 23 Mar. 2022).
195. Kostić, *supra* n. 123, at sec. 7.2.
196. For a critical discussion of the concept of "employment" under tax laws in light of the recent labour market developments, *see* J. Freedman, *Employment Status, Tax and the Gig Economy – Improving the Fit or Making the Break*, 31 King's Law Journal 2, pp. 194-214 (2020).
197. Pistone, *supra* n. 105, at sec. 5.1.3.1.1.
198. *See* Huston, *supra* n. 160, at p. 286, who, based on the "fluidity of the fixed base concept", maintains that this concept "was conceived as being operative within relative narrow perimeters". In the same vein, *see also* Michaux, *supra* n. 153, at p. 71; Han, *supra* n. 143, at p. 216.
199. *See* M.S. Kirsch, *Tax Treaties and the Taxation of Services in the Absence of Physical Presence*, 41 Brooklyn Journal of

If the FB is equated to the concept of a PE and, thus, perceived as a test with a higher consistency threshold than the "physical presence" test, the answer to this query should be negative. However, since the FB concept is not defined, a different conclusion cannot be excluded.

National case law can provide some guidance on the minimum consistency for an FB to exist. On this matter, it is worth taking note of a private letter ruling issued by the Danish tax authorities in 2017.[200] The verdict concerns an independent self-employed lawyer, who decided to emigrate from Denmark with his spouse to a country with which Denmark has a tax treaty. Upon departure, he planned to sell or rent his house in Denmark and return to that country only for short stays of a maximum of 14 days. He also intended to use his Danish law office address as a postal address, use the website and e-mail address of his former lawyer's office, and be assisted by secretaries there for sending invoices. The Danish tax authorities excluded the possibility that the emigrating individual would have an FB at his disposal in Denmark, since the individual has no fixed office space available in Denmark.[201] This conclusion might suggest that pinpointing a physical location for an FB is still needed, a requirement that an Estonian e-resident would hardly fulfil.

Not only a minimum consistency is required, but the FB also needs to be "regularly available" to the self-employed. Even though it is clear enough that the notion of "availability" prescinds from any legal title over the location used as an FB, it is not always straightforward to determine when such a requirement is met. For instance, it might be doubtful whether a desk and other facilities in a co-working space, which can only be booked in advance, on a day-to-day basis, can amount to an FB. Still, national case law might provide some guidance in this regard. In *Dudney*, the Tax Court of Canada found that a computer consultant did not have an FB at a Canadian company's premises where he was assigned an office. Despite the consultant spending 300 days there in one year, he could use the office only during regular business hours, and the office changed from time to time at the company's sole discretion.[202] In an Italian lower-tier tax court decision, a TV columnist and commentator did not have an FB in Italy since he needed prior approval from a local TV company to access its studios.[203] On the other hand, the Italian Supreme Court held that an unauthorized money changer offering his services near a casino had an FB at the casino's place.[204]

The temporal requirement associated with the FB concept is also unclear. Use of the term "regularly" does not entail a minimum period of duration (e.g. six months) of the activity performed by the self-employed.[205] An activity carried out via the Internet by a freelancer and completed in a few minutes, when the individual is occasionally present in a foreign country for a few days or even hours (e.g. in a hotel room during a holiday trip), could be enough to trigger a FB therein.[206] However, in a German Federal Tax Court decision, a period of only six weeks was not considered sufficient to meet the temporal requirement inherent to the FB concept.[207] Similarly, when a professor earning income as a mediator in France and the Netherlands spent only ten days therein, another German lower court held that no FB was available in those countries.[208] On the other hand, the Austrian Supreme Administrative Court considered immaterial, to exclude the existence of an FB, the circumstance that an individual used an office in another country for less than six months per calendar year.[209]

International Law 1134, p. 1146 (2016), who, as a possible "physically remote service", makes the case of a surgeon exerting tele-medicine that is entitled to use, on a remote basis and whenever he desires, robotic equipment for surgery treatment on a patient located in a country other than the one where the physician is a resident.

200. DK: National Tax Board, 5 Dec. 2017, Ruling 17/1349247 (SKM 2017.691.SR).

201. *See* also BE: Ghent Court of Appeal, 6 Dec. 2016, Case 2015/AR.2208, Case Law IBFD, concluding that, by itself, a letter box in Belgium was not sufficient for the existence of an FB. On the contrary, an Italian lower-tier tax court (*see* IT: Regional Court of Tuscany, 8 Apr. 2011, Decision 44) ruled that the fact that a foreign taxpayer has an Italian VAT identification number or files an income tax declaration for activities carried out in Italy can be used as an indication that the individual has an FB in Italy.

202. CA: Federal Court of Appeal, 24 Feb. 2000, Case A-707/98, *Dudney v. Her Majesty the Queen*, Case Law IBFD. *See also* BE: Court of First Instance, 27 Feb. 2019, Case 17/498/A, Case Law IBFD, considering that the taxpayer must have the right to use the necessary infrastructure at any time for the execution of the activity. In particular, the following factors were considered by the Belgian court: (i) the actual use made of the premises that were alleged to be the person's fixed base; (ii) whether and by what legal right the person exercise, control over the premises; and (iii) the degree to which the premises were objectively identified with the person's business.

203. IT: Regional Court of Lombardy, 3 May 2019, Decision 1946.

204. IT: Supreme Court, 30 Jan. 2006, Decision 1978.

205. *See* BE: Court of First-Instance Brussels, 22 Apr. 2005, Case 2003/9098/A, Case Law IBFD, where an Italian trainee lawyer was found to have an FB at the premises of a Belgian's law firm, despite the cooperation with the Belgian law firm being merely of a temporary nature.

206. *See* Han, *supra* n. 143, at p. 215, who, in terms of the duration of the self-employed activity, suggests referring to "the intentions of the professional in using the location, and the eventual actual usage of the location". *See also* IT: Supreme Court, 5 Dec. 2018, Decision 31447, according to which an FB is created simply when a taxpayer makes use of a location that is permanently equipped for that activity.

207. DE: Federal Tax Court, 2 Dec. 1992, Decision I R 77/91, Case Law IBFD.

208. DE: Tax Court of Nordrhein-Westfalen (Cologne), 19 Sept. 2002, Decision 10 K 6755/00, Case Law IBFD.

209. AT: Supreme Administrative Court, 18 Mar. 2004, Decision 2000/15/0118, Case Law IBFD.

5. Home Office as a Permanent Establishment

5.1. Home office

The digitalization of the economy increasingly allows individuals to carry out work activities from their homes without being physically present in an office or at the employer's other premises. In the context of a dependent employment relationship, a question arises on whether a home office can lead to a PE for a foreign employer. In the case of a self-employed individual, a home at his disposal located in a foreign country might constitute a PE/FB for that person.[210] Conceivably, both situations may occur, and a home office might be, simultaneously, a PE for a foreign employer for whom the individual works and a PE/FB for that individual concerning his self-employed activity. Moreover, a home office can constitute a PE for two enterprises at the same time, in the case of a double-employed individual.[211]

The issue of "home office" was dealt with by the OECD in its 2011-2012 discussion draft on *The Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention*.[212] In that document, the OECD Working Party discussed the use by an employee of his home in lieu of an office and when a private dwelling can be considered "at the disposal" of the employer of the individual who lives there. The proposals resulting from the discussions at the OECD level were later included in the Commentary on Article 5 of the OECD Model (2017).[213]

Both the 2011-2012 OECD Discussion Draft and 2017 Commentary on Article 5 of the OECD Model rule out any automatism on whether an employee's home office constitutes a foreign employer's PE.[214] The rationale is that an individual's home office is not automatically at the disposal of a foreign enterprise simply because that location is used by an individual who works for the enterprise.[215] On the contrary, "whether or not a home office constitutes a location at the disposal of the enterprise will depend on the facts and circumstances of each case".[216]

Although ultimately left to factual determination, the OECD Commentary advises when a home office constitutes a PE for a foreign enterprise.[217] Notably, the OECD Commentary points out that a home office does not amount to a PE when "the carrying on of business activities at the home of an individual (e.g. an employee) will be so intermittent or incidental that the home will not be considered to be a location at the disposal of the enterprise".[218] From the various indications contained in the OECD Commentary, it appears that a PE in the form of a home office exists when the business activity made at home is carried out "on a regular and continuous basis",[219] or if that activity is part of the core business of the foreign enterprise.[220]

210. *See* Skaar, *supra* n. 143, at pp. 292-293, who also mentions (at p. 383) a German lower tax court's decision (DE: Finanzgericht Köln, 18 Dec. 1996, EFG 1997, at 725) where a second home in another country (Switzerland) was considered an FB for the taxpayer (a professor), provided he either directly conducted his advisory activities or the main part of the preparations for these activities from there.
211. Nowadays, it is no longer unthinkable, for instance, that a resident of Amsterdam works part-time for a French employer that holds office in Brussels while working two days from home per week next to having his own professional activity.
212. OECD, *The Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention* pp. 12-13 (OECD 2011), Primary Sources IBFD.
213. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 5* paras. 18-19 (21 Nov. 2017), Treaties & Models IBFD. Note that, in the initially proposed draft, reference was made to the home office as a "location at the disposal of an individual (e.g. an employee)", rather than a "location ... used by an individual (e.g. an employee)". No explanation can, however, be found for this rephrasing. In any event, this change does not appear to imply a different meaning or understanding of the two expressions.
214. Naturally, in the context of a tax treaty, the potential existence of a home office is relevant only in the case of a cross-border scenario, i.e., where the employer and the employee are located in different jurisdictions. In this regard, para. 19, third sentence *OECD Model: Commentary on Article 5* (2017), stipulates that "since the vast majority of employees reside in a State where their employer has at its disposal one or more places of business to which these employees report, the question or not a home office constitutes a location at the disposal of an enterprise will rarely be a practical issue".
215. *See* E. Reimer, *Permanent Establishment*, in *Klaus Vogel on Tax Conventions* para. 128 (4th ed., E. Reimer & A. Rust eds., Kluwer Law International 2015), who considers that "as far as the employee uses certain space or rooms only for non-job-related purposes, these parts of her private dwelling will never constitute, or belong to, a PE of the employer".
216. Para. 18, second sentence *OECD Model: Commentary on Article 5* (2017).
217. *See* J. Schaffner, *How Fixed Is a Permanent Establishment* p. 139 (Kluwer International Law 2013), who considers that "[t]he OECD's explanations are, however … too vague, and do not provide sufficient added value and precise guidelines".
218. Para. 18, second sentence *OECD Model: Commentary on Article 5* (2017). F.A. García Prats, *Article 5: Permanent Establishment – Global Tax Treaty Commentaries* sec. 3.1.2., Global Topics IBFD, summarizes this criterion as the fact that there must be "the actual use of the home office" by the employer.
219. Para. 18, last sentence *OECD Model: Commentary on Article 5* (2017). *See also* para. 19, first sentence *OECD Model: Commentary on Article 5* (2017), which refers to "a consultant who is present for an *extended* period in a given State" [emphasis added].
220. *See* paras. 18, second sentence, and 19, last sentence *OECD Model: Commentary on Article 5* (2017), referring to "incidental" and "merely auxiliary" activities. In this regard, Reimer, *supra* n. 215, at para. 133, considers that "even where a home office meets the … standards of Article 5(1) OECD… MC, it might still disqualify under Article 5(4) OECD … MC", i.e., the provision setting a carve-out for business activities of an only preparatory or auxiliary character. *See*, further, W. Hellerstein et al., *Displaced Employees and COVID-19: The New Tax Obligations*, Tax Notes International (28 Sept. 2020), who mention a US court decision (US: Tax Court of New Jersey, 2 Mar. 2012, *Telebright Corp. v. Director, New Jersey Division of Taxation*, 25 N.J. Tax 333 (N.J. Tax 2010), where it was concluded that a Maryland-based corporation had a tax nexus with New Jersey based on the presence of a single employee who telecommuted full-time from his New Jersey residence, where he developed and wrote software code from a laptop computer, mainly due to the relevance of such an activity for the company in question.

5.2. At the disposal

From reading the Commentary on Article 5 of the OECD Commentary, it is clear enough that an employee's home office can constitute a PE for a foreign employer only when it is at the latter's disposal.[221] To be at the enterprise's disposal, a right of use over an employee's home for the employer must be established. The OECD Commentary mentions that it may be so if the employer does not want to set up an office for the employee but requires the employee to maintain an office in his home, based on an explicit or implicit agreement.[222] On the contrary, the mere presence of the enterprise at a particular location, such as the employee's home, does not suffice to conclude that the place is at the enterprise's disposal.[223]

Based on the examples included in the 2011 OECD document's discussion, the requirement that the home office is "at a disposal of" the employer relates to whether the employer pays rent or somehow covers the costs for that location. For instance, the employer can rent a room from the employee and/or pay specific remuneration for using some of the employee's home office facilities, such as office furniture and computer equipment.[224]

A similar arrangement will generally qualify for the "right to use test", proving that the employer has effective powers over the employee's living quarters even if it does not have a key to the apartment.[225] For a home office to qualify as a PE, it only matters that the employer, instead of providing the employee with an office, relies on a home or other private dwelling belonging to that individual.[226] Skaar criticizes the OECD Commentary's approach, arguing that "the solution should rather be found in how important the home office is for the employee's work for the employer, and the time spent there (the employer's indirect influence over the home office)".[227] Based on this reasoning, the home office may constitute a PE for the employer even if the employer had made an office available to the employee across the borders, but the employee decides to work from home. The OECD Commentary itself apparently upholds this view as it stipulates that a home office exists in the case of "a non-resident consultant who is present for an extended period in a given State where she carries on most of the business activities of her own consulting enterprise from an office set up in her home in that State".[228]

Based on various countries' case law, Skaar compiles a list of "other possible evidence of a right of use to a place of business". Notably, he mentions whether the home office carries external signs of the foreign enterprise's business activity (e.g., stationery, letterheads, firm signs and bank accounts).[229] Among the compiled list of cases, a Belgian case decided in 2011 excluded that a home office could constitute a PE simply because a company's manager carried out part of his work at home, mainly because the individual was not obliged under the employment contract to do so.[230] In a Norwegian case decided in 1999, a home office of a salesperson amounted to a PE of the foreign employer since that person performed various pre-sale activities from his home.[231] A Swedish Supreme Administrative Court's ruling found that if a taxpayer's business is conducted at the home of the sole shareholder in another state, and the company does not have another place of its own there, the shareholder's house where the business is conducted should be considered a place of business at the disposal of the company.[232] For its part, in a note issued in 2017, the Austrian Ministry of Finance considered that for a home office to be a PE it is decisive whether the employee must use his office at home to perform the work for his employer and whether expenses for the home office are deducted in the tax return of the employee or in that of the employer.[233]

5.3. Home office of remote working employees

In the case of a large-scale "work-from-home" scenario, the question arises as to whether a teleworker's activities performed from a location in a country other than where the employer is established can create a PE for a foreign enterprise, either in the form of a material

221. OECD (2011), *supra* n. 212, at p. 13 (para. 24).
222. Para. 18, last sentence *OECD Model: Commentary on Article 5* (2017).
223. Id., at para. 12, first sentence.
224. Reimer, *supra* n. 215, at para. 128.
225. Id., at para. 129, considers that "the mere fact that nobody else than the taxpayer enters the home office does not prevent the existence of a PE. Again, the employee can exercise day-to-day control of the location on behalf of the employer".
226. Para. 18, last sentence *OECD Model: Commentary on Article 5* (2017). In this regard, García Prats, *supra* n. 218, at sec. 3.1.2., refers to the employee's "obligation to use the home office".
227. Skaar, *supra* n. 143, at p. 293. *See also* CFE Fiscal Committee, *Opinion Statement of the CFE on Proposed Changes to the Commentary on Art. 5 of the OECD Model Tax Convention (Permanent Establishment): Submitted to the OECD in February 2012*, 52 Eur. Taxn. 5, sec. 4 (2012), Journal Articles & Opinion Pieces IBFD, submitting that "the concept 'at the disposal of the enterprise' is linked to the place where the activities should be carried on, rather than to the place (i.e., cross-frontier worker's home) where the same activities are actually performed" [emphases in the original].
228. Para. 19, first sentence *OECD Model: Commentary on Article 5* (2017).
229. Skaar, *supra* n. 143, at pp. 296-299.
230. BE: Belgian Ruling Commission, 15 Oct. 2011, Ruling 2011.432. Along these lines, *see* US: NY Court of Appeal, 24 Nov. 2003, *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 843 (N.Y. 2003), where it was found that work activities, such as research, writing, exam development and lesson preparation, carried out by a university professor (Prof. Edward A. Zelinsky) at his home rather than at the university in another US state, were the result of that individual's voluntary choice and therefore could not transform him into an interstate actor.
231. NO: District Court Stavanger, 19 Nov. 1999, *Universal Furniture Ind. AB v. Government of Norway*, Case Law IBFD.
232. SE: Supreme Administrative Court, 25 Nov. 2009, Case RÅ 2009:91.
233. AT: Ministry of Finance, 6 Nov. 2017, Ruling EAS 3392.

or personal PE, which might trigger new tax obligations for that business.

In April 2020 and January 2021, the OECD issued two documents providing guidance on the impact of the COVID-19 pandemic on tax treaties.[234] The OECD considered whether employees working from home in a country other than the one they normally worked in could create a PE for their employer in that jurisdiction.[235] The two OECD documents essentially conclude that the exceptional and temporary switch of location where employees exercise their employment because of the COVID-19 pandemic should not create new PEs for the employer.[236]

Arguably, with government orders on public health measures and travel restrictions being phased out as the pandemic progressively approaches its end, work location changes will no longer be considered "exceptional and temporary". Instead, importance should be attached to whether the employee's private dwelling is at the disposal of the foreign employer or not.[237]

This element implies checking all facts and circumstances. Of importance will be whether the employer requires the employee to use his home as a location for carrying on its business.[238] It must also be verified whether the business activity is conducted through the home office continuously, i.e. not intermittingly or occasionally.[239] However, a certain degree of permanence is, by itself, not sufficient. As the OECD pointed out in its 2021 document, "[a] further examination of the facts and circumstances will be required to determine whether the home office is now at the disposal of the enterprise following this permanent change to the individual's working arrangements".[240] Similarly, regarding the existence of a personal PE, the decisive criterion is whether the employee concludes contracts on behalf of the enterprise from his home office on a regular basis.[241] Of note, both of the OECD documents mentioned above do not refer to the nature of the activity performed by an employee at his home as being auxiliary or central to the enterprise's business.

It seems fair to conclude that a home office amounts to a PE for a foreign enterprise if the employee works from home continuously, and the employer requires the individual to use his home in lieu of the office, especially if the employer provides the employee with office equipment. It is also crucial that the activities carried out by the employee at his home are related to the employer's core business, rather than being of a mere preparatory or auxiliary nature.[242] The critical point is determining the actual level of engagement and equipment that the employer must provide or compensate the employee for. In today's digitalized economy, this might ultimately amount to providing anything as trivial as a phone or a laptop. Similar difficulties to those referred to on the "fixed base" concept can be found in this respect.[243] Moreover, the element of habituality inherent to the idea of carrying on a business continuously might not be easy to assess given the current fragmentation of labour into a myriad of temporary jobs or micro tasks.[244] Also, distinguishing between core and auxiliary activities becomes problematic when a business exploits a large base of individuals working remotely, each performing only a fraction of the employer's overall activity.[245]

6. Rethinking Taxation of Labour Income under Tax Treaties

6.1. Changes in labour patterns and their impact on PIT

The ongoing changes to labour patterns discussed in section 2. – i.e. (i) home office work; (ii) non-standard forms of employment; (iii) digital nomadism; and (iv) the decentralization of jobs – challenge many foundational premises on which most countries' tax systems are based, prompting a consideration of the adequacy

234. OECD, *Updated Guidance on Tax Treaties and the Impact of the COVID-19 Pandemic* (21 Jan. 2021), available at https://doi.org/10.1787/df42be07-en (accessed 23 Mar. 2022); and OECD, *OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis* (3 Apr. 2020), available at https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/ (accessed 23 Mar. 2022).
235. OECD (2021), *supra* n. 234, at pp. 3-9; and OECD (2020), *supra* n. 234, at pp. 2-3.
236. OECD (2021), *supra* n. 234, at p. 3; and OECD (2020), *supra* n. 234, at pp. 2-3.
237. *See* OECD (2021), *supra* n. 234, at p. 1, stating that "[t]he guidance is relevant only to circumstances arising during the COVID-19 pandemic when public health measures are in effect". *See also* A. Báez Moreno, *Unnecessary and Yet Harmful: Some Critical Remarks to the OECD Note on the Impact of the COVID-19 Crisis on Tax Treaties*, 48 Intertax 8&9, pp. 817-818 (2020), who points out that "[a]ny decision on the existence of a PE that depends on the requirement that it be 'at the disposal' of the employer is always going to be problematic considering that neither the requirement is contained in the literal wording of Article 5(1) of the model nor has the approach to it even been uniform in the comments".
238. OECD (2021), *supra* n. 234, at p. 7 (para. 15).
239. *See* OECD (2021), *supra* n. 234, at p. 7 (para. 14), noting that "a place must have a certain degree of permanency and be at the disposal of an enterprise in order for that place to be considered a fixed place of business through which the business of that enterprise is wholly or partly carried on".
240. OECD (2021), *supra* n. 234, at p. 7 (para. 17).
241. OECD (2021), *supra* n. 234, at p. 8 (para. 23).
242. Niesten, *supra* n. 133, at p. 132. Along these lines, with regard to intra-state US income taxation, *see* US: NY Court of Appeal, 24 Nov. 2003, *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 843 (N.Y. 2003), considering that at-home research, writing, exam development and lesson preparation activities of an US university professor are merely ancillary to his main teaching activity done at the university's location.
243. *See* sec. 4.3.
244. *See* sec. 2.2.
245. *See* Skaar, *supra* n. 143, at p. 293, who notes that "the indirect influence over the home of the employee is less evident in the case where support functions are performed, such as payroll-related paperwork, time sheets, some kind of reporting back to the employer on certain finding and forwarding orders".

of the current tax laws in the face of the new geographical and occupational dimensions of labour.[246]

A first challenge relates to the traditional assumption that labour is not mobile as capital. Most countries' tax systems rest on the premise of a relatively immobile personal income tax (PIT) base.[247] Scholars have already criticized this capital versus labour dichotomy on the basis that, at closer inspection, presently "labour can be mobile as capital".[248] However, the criticism was mainly grounded on the ability of a narrow fraction of the population, composed of highly skilled and high-net-worth individuals, to move across countries. The idea was that only highly skilled and high-net-worth individuals have the means and convenience to relocate from one country to another. Only for these categories of individuals, many countries worldwide were willing to lessen their immigration constraints or, to some extent, even to offer tax incentives to compete for this form of capital – i.e. "human capital".[249] For other categories of expatriates, countries' immigration policies have remained much less welcoming.[250] The increasing ability of many individuals to "work from anywhere", coupled with a larger propensity of employers to hire people located distantly from their headquarters, may extend labour mobility opportunities to other categories of individuals. Should the "work-from-anywhere" model keep traction after the pandemic, the cross-border mobility of workers, in its various dimensions, could no longer be seen as a niche phenomenon that affects a limited number of individuals and thus also a small portion of the PIT base.

A second challenge relates to the baseline scenario of the employer and the employee located in the same jurisdiction. Traditionally, businesses have hired employees and required their staff to work in the country where they were established through a head office or a branch. Such a jurisdictional matching was also favoured by labour being primarily carried out in person rather than through virtual assignments. As a result, the country where a business was established and its employees carried out their work in person had taxing rights over both the corporate income tax (CIT) and PIT base.[251] Exceptions to this alignment of taxing rights mainly related to situations in which employees were temporarily seconded to another country or frontier workers. However, these occurrences were quite limited in time and/or numbers.[252] The spread of remote working resulting from the COVID-19 crisis has modified this static paradigm, creating potential jurisdictional mismatches between CIT and PIT bases. Indeed, international remote employment underpinned by massive adoption of teleworking opens up the possibility that the jurisdiction in which the employee resides and pays PIT, on the one hand, and the jurisdiction in which the employer is established and pays CIT, on the other hand, are no longer one and the same. This jurisdictional mismatch might also create problems for the employee's country in requiring a foreign employer to act as withholding agent of the PIT due by a resident employee under the pay-as-you-earn (PAYE) system.

A third challenge relates to the long-standing binary divide existing under most legal systems between dependent and self-employed activities. Countries have developed their labour legislation based on a type of employment that is continuous, full time and involving a subordinate and direct relationship between the employer and the employee. On the contrary, self-employment rests on the premise of individuals carrying out their work activities independently and in a personal capacity, either as professionals or entrepreneurs. This binary divide underpinning labour legislation also leads to opposite systems of tax filing and payment for the two categories of workers. Employees are subject to the PAYE system, under which employers are required to act as withholding agents and deduct the PIT due from the wages paid to their employees. Instead, PAYE does not apply to self-employed individuals, who must calculate their own tax liabilities and remit the PIT due to the com-

246. Proposals for tax reforms due to increased mobility of individuals and the post-COVID-19 reality of work have been floated in the United States. *See*, in particular, Tax Foundation, *Eight Tax Reform for Mobility and Modernization* (5 Jan. 2022), available at https://files.taxfoundation.org/20220104173933/Eight-Tax-Reforms-for-Mobility-and-Modernization.pdf (accessed 23 Mar. 2022).
247. R. de la Feria & G. Maffini, *The Impact of Digitalisation on Personal Income Taxes*, British Tax Review 2, p. 163 (2021).
248. R.S. Avi-Yonah, *And Yet It Moves: Taxation and Labor Mobility in the 21st Century* in *Taxation and Migration* pp. 45-56 (R.S. Avi-Yonah & J. Slemrod eds, Kluwer Law International 2015).
249. Although the origins of the expression can be traced back to Adam Smith (1723-1790), the modern usage of the term "human capital" is generally attributed to Gary S. Becker (1930-2014) and his influential book *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education*, first published in 1964. OECD, *Human Capital: How What You Know Shapes Your Life* p. 29 (OECD 2007), defines "human capital" as "the knowledge, skills, competencies and attributes embodied in individuals that facilitate the creation of personal, social and economic well-being". *See also* Beretta, *supra* n. 5, who juxtaposes emigration and immigration country's strategies to attract and retain "human capital".
250. Countries' immigration policies could also entail different requisites for citizenship acquisition by inward expatriates, including citizenship-by-investment (CIP) programme. *See* G. Beretta, *Citizenship and Tax*, 11 World Tax J. 2, pp. 227-260 (2019), Journal Articles & Opinion Pieces IBFD.
251. De la Feria & Maffini, *supra* n. 247, at p. 155.
252. For specific bilateral arrangements dealing with the taxation of cross-border workers, *see* M. Dahlberg & A.S. Önder, *Taxation of Cross-Border Employment Income and Tax Revenue Sharing in the Öresund Region*, 69 Bull. Intl. Taxn. 1 (2015), Journal Articles & Opinion Pieces IBFD, discussing taxation of cross-border commuters in the Öresund Region (i.e. the border region across the countries of Denmark and Sweden).

petent authorities on a periodical basis.[253] However, the rise of NSEs, in the form of either "crowdwork" or "work-on-demand via apps", blurs the binary divide between dependent and self-employment activities.[254] Therefore, a question arises on the feasibility to maintain different tax systems for the two categories of workers, especially given a prospective scenario in which both dependent and self-employed individuals can work and live anywhere in the world.[255]

6.2. Changes in labour patterns and their impact on tax treaties

The four major changes in labour patterns described in the article – i.e., (i) home office work; (ii) non-standard forms of employment; (iii) digital nomadism; and (iv) the decentralization of jobs – also lead to problems in the application and interpretation of labour income categories under tax treaties, in addition to the challenges under countries' tax systems discussed in section 6.1.

A first challenge relates to using "physical presence" as a sourcing criterion for the taxation of private employment income under article 15 of the OECD Model. As stated, both the second and third rule contained in article 15 of the OECD Model adopt the employee's physical presence in the territory of a country as a proxy for allocating taxing rights between the two contracting states. These two rules were conceived on the premise of an employee's physical presence in a country as a reliable indication of a strict connection between that employee and the work state. However, this assumption is no longer tenable in a large-scale "work-from-anywhere" scenario, with individuals working remotely from their home or another place, not necessarily situated in the same country where their employer is established. Digitalization and advances in ICT are making the cross-border performance of work activities much easier than before. Individuals can now be hired by a foreign employer without physically relocating or travelling to another country. Moreover, the post-pandemic trend towards telework could render the 183 days per year threshold almost meaningless for an employee's minimum stay in another country. Also, the 183-day threshold would not be triggered if the employee decided to live as a digital nomad and frequently moves from one country. Finally, in the case of the short-term mobility of workers, a counting-day test such as the 183-days rule would likely cause administrative and compliance headaches, requiring tax administrations and taxpayers alike to keep track of the days spent in each country in any 12 months. Therefore, the theoretical basis underpinning the physical presence rule is losing touch with reality.[256]

A second challenge relates to possible jurisdictional mismatches between the country where the employee works and the state where the employer is established. This challenge has various dimensions, which revolve around the PE concept. A first issue is that, under the three-pronged test of article 15(2) of the OECD Model, the work state has taxing rights over private employment income not only if the employee is physically present in its territory for at least 183 days (in aggregate) in any 12 months, but also if the employer has a head office or a PE paying the employee's salary in that country. In a scenario of international remote employment, it becomes more likely that a foreign employer would not have a PE whatsoever in the work state. In such an event, the work state could be prevented from taxing private employment income for activities carried out in its territory if the 183-day physical presence test is not met. The employee's residence state would have exclusive taxing rights over employment income. On the other hand – and this is the second issue – telework performed at home or in another location by an employee could create a home office PE for a foreign employer in the jurisdiction where the employee lives, without the employee necessarily being a resident of that country. Under this baseline scenario, the work state will have taxing rights over the private employment income since one of the three conditions laid down in article 15(2) of the OECD Model is fulfilled. The employee's residence state might tax private employment income as well, but it would have to provide double tax relief.

A third challenge relates to the binary divide between dependent employment on the one hand and business and self-employment activity on the other hand. As stated, the application of article 15 of the OECD Model rests on the assumption of an employment relationship between the business and the individual carrying out the work activities. When the individual carries out his work activities independently, article 7 or former article 14 of the OECD Model applies. However, the OECD Commentary itself acknowledges that it is not always straightforward distinguishing between activities carried out under an employment relationship (contract of service) and those carried out by an individual inde-

253. For a general discussion on the main features and functioning of the PAYE system, *see* K. van der Heeden, *The Pay-As-You-Earn Tax on Wages* in *Tax Law Design and Drafting*, vol. 2, pp. 564-596 (V. Thuronyi ed., International Monetary Fund 1998).

254. In this regard, Kostić, *supra* n. 123, at para. 5, observes that "the concepts of employee and independent entrepreneur are becoming increasingly blurred in the digital economy, and … the very nature of employment is currently in flux".

255. *See* Kostić, *supra* n. 123, at sec. 5, who provocatively asks: "if we fail to find an evident differentiation point between employment and independent service provision, what is then our justification for treating the income generated from these activities differently?".

256. As already observed a while ago by some scholars. *See*, e.g., W. Schön, *International Tax Coordination for a Second-Best World (Part I)*, 1 World Tax J. 1, sec. 4.2.3.2 (2009), Journal Articles & Opinion Pieces IBFD.

pendently (contract for services). Defining what constitutes "employment" has become even more tricky at present, given the rise of NSEs that blurs the binary divide between dependent and self-employed work. A large-scale "work-from-anywhere" scenario could bring dependent and self-employed a step closer to one another. Indeed, it seems problematic to determine whether an individual working remotely, on a flexible schedule basis, for a foreign business carries out his activities under a contract of service or for services, especially in the case of short-term work arrangements such as those of "crowdwork" and "work-on-demand via apps". Moreover, even if the worker's independence is not questioned, determining whether the self-employed individual has a PE/FB in a country other than his residence state could be problematic. As mentioned in section 4.1., the FB definition is not explained in the OECD Model and Commentaries, nor is it clear what the requirements are for a "home office" PE. Indeed, at present, the equipment with which a PE/FB must be endowed for an individual to carry out his work can be fairly limited to no more than a desk, a laptop, and a broadband Internet connection.

6.3. Proposals for reforming taxation of labour income under tax treaties

The author submits that the issues highlighted in the article point in favour of finding solutions to the application and interpretation of the rules for the taxation of labour income under tax treaties. Based on the analysis made in the article, the author considers that the proposed solutions should have at least the following three goals in mind:

- Physical presence as a sourcing criterion for taxing labour income should be removed; alternatively, its relevance for allocating taxing rights among the two contracting states should be reduced.[257]
- Reference to the PE concept for the taxation of private employment income under article 15 of the OECD Model should be deleted; alternatively, the cases in which a PE in the form of a home office can be created should be clarified.
- The binary divide between dependent employment on the one hand, and business and self-employment activity on the other hand, should be removed; alternatively, the scope of the terms "employment" and "fixed base" should be clarified.

Each of the three propositions above contains two sub-statements. The first sub-statement sets the most ambitious goals, whereas the second sub-statement embraces less radical solutions. Naturally, it will be more difficult to build a consensus and implement solutions under the first sub-statements compared to those under the second sub-statements.

At this juncture, bearing in mind the three goals laid down above, the author would advance some concrete proposals for reforming the tax treaty treatment of labour income. The proposals are only an early attempt to address the challenges of the ongoing changes in labour patterns highlighted in the article. The author acknowledges that a diligent reader might find these solutions not (entirely) convincing. Other scholars might favour other solutions, such as introducing a new category of mobile workers to which the text of article 15(3) of the OECD Model,[258] providing for exclusive taxing rights of the employee's residence state, would apply.[259] More targeted solutions, notably affecting only the category of teleworkers, might equally be conceived.[260] The author also admits that the actual implementation of any change to allocation rules under income tax treaties, given that more than 3,000 tax treaties are concluded, might be unfeasi-

257. The author considers that, even in today's digitalized economy, natural persons have a physical presence. Therefore, differently from the case of companies or other legal entities, it seems reasonable to still refer to physical presence as an income-sourcing rule. Along the same lines, *see* Y.R (Christine) Kim, *Taxing Teleworkers*, 55 UC Davis Law Review 1149, p. 1159 (2021), who submits that "[t]he importance of physical presence would be diminished for business entities, while still being important for individuals. This is perhaps even more meaningful in the digitalized economy where only natural persons can have physical presence". *See also* BE: ECJ, 27 Sept. 2012, Case C-137/11, *Partena*, para. 57, which, for social security purposes, considers that "the concept of the 'location' of an activity must be understood … as referring to the place where, in practical terms, the person concerned carries out the actions connected with that activity".

258. Art. 15(3) OECD Model reads as follows: "[n]otwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment, as a member of the regular complement of a ship or aircraft, that is exercised aboard a ship or aircraft operated in international traffic, other than aboard a ship or aircraft operated solely within the other Contracting State, shall be taxable only in the first-mentioned State". The rationale underlying the allocation rule contained in art. 15(3) of the OECD Model relates to the fact that the "place-of-work" principle is difficult to apply in case of employees working aboard a ship or aircraft that is operated across several jurisdictions. Until the 2017 update of the OECD Model, the remuneration of employees working aboard ships or aircraft operating in international traffic (and boats engaged in inland waterway transport) may have been taken in the contracting state in which the place of effective management of the enterprise operating those ships, boats and aircraft was situated (POEM), in addition to the residence state of the employee.

259. Pistone, *supra* n. 105, at sec. 3.3.2.4. Indeed, some tax treaties already extend this provision to railway and road transportation workers (*see*, e.g., art. 15(3) *Belg.-Lux. Income and Capital Tax Treaty* (17 Sept. 1970), Treaties & Models IBFD). Although teleologically acceptable as a proposal, as Pistone also acknowledges, the definition of "mobile worker" appears quite problematic, especially considering a large-scale "work-from-anywhere" scenario in which potentially a high number of workers can move across different countries.

260. *See* Niesten, *supra* n. 133, at pp. 134-142, who advances two alternative proposals for allocating taxing rights on tele-employment income between the two contracting states under art. 15 OECD Model.

ble unless a multilateral agreement in light of the Multilateral Instrument (MLI) is adopted. Irrespective of any positive or negative evaluation on the merits of the following proposals, the author however expects that the reader at least agrees that the four major quadrants of labour change described in the article – i.e. (i) home office work; (ii) non-standard forms of employment; (iii) digital nomadism; and (iv) the decentralization of jobs – would require some rethinking of the current tax treaty treatment of labour income.[261]

That being said, in the author's view, it is recommended that:

- The taxation of labour income earned by dependent and self-employed individuals shall be dealt with in one and the same article.[262] Therefore, the provisions of articles 7, 14 and 15 of the OECD Model should be reinstated and dealt with jointly in a single article. A provisional title of the new article might be "Labour Income". While this reform implies the deletion of articles 14 and 15, article 7 would be maintained, but its scope of application will be restricted to companies and legal entities other than individuals.
- The new article on labour income shall assign primary taxing rights to the worker's residence state.[263] The source state should also have the right to tax labour income if the individual is physically present in its territory for a period aggregating at least 90 days in any 12-month period commencing or ending in the fiscal year concerned.[264] This rule would essentially reformulate and unify the physical presence tests contained, respectively, in article 15(2)(a) of the OECD Model and article 14(1)(b) of the UN Model.[265] The two other conditions contained in article 15(2)(b) and (c) of the OECD Model, which require the employer to be a resident or have a PE in the source country that bears the costs of the employee's salary, should no longer be included in the text of the new article on labour income.[266]

261. De la Feria & Maffini, *supra* n. 247, at p. 165, predict that, in the first instance, countries will likely focus on a redefinition of employment income, also as structured under tax treaties, withholding mechanisms and the possible introduction of anti-avoidance rules to prevent erosion of their PIT base. However, the two authors submit that "as countries continue to struggle to keep their PIT base – or decide to use the opportunity that increased mobility offers to expand it – it is likely there will be a pressure to apply average *and* top PIT rates that are not too high, primarily when compared to other countries in the same region" [emphasis in the original].
262. *See* Arnold (2011), *supra* n. 168, at sec. 3.1.2., who submits that "income from different types of services should be treated in the same way for treaty purposes unless there are convincing reasons for different treatment". Along the same lines, *see* Castelon, *supra* n. 163, at p. 165, who also observes (at p. 439) that "[t]he existence of various articles dealing with the taxation of income from the provision of services rests partially upon a tradition going back as far as 1869, when the Double Tax Convention (DTC) between Prussia and Saxony was concluded. This is the case for the distinction between entrepreneurial services, liberal professions and employment income".
263. Determination of a residence state of highly mobile individuals, such as digital nomads, may be challenging. However, the author assumes that, even in the economic and societal landscape of the 21st century, "it is still quite rare to find individuals who do not have a permanent home or, perhaps more poetically, no place where there is always a bed waiting for them" (quotation from Kostić, *supra* n. 123, at sec. 5).
264. Based on the proposed rule, workers' income earned by remote work will be taxed only in the worker's residence state, whereas income earned by (physical and not just virtual) commute will be taxed by the work state (and, also, by the residence state) provided that the number of days working in the work state exceeds certain thresholds. Indeed, even in the context of a corporate tax such as the digital services tax (DST), physical location matters. *See* IT: Revenue Agency, Circular Letter 3/E of 22 March 2021, p. 54, which, regarding the Italian DST, attributes relevance to the location of the user at the time of purchasing the digital service. According to B.J. Arnold, *Threshold Requirements for Taxing Business Profits under Tax Treaties*, 57 Bull. Intl. Taxn. 10, p. 485 (2003), Journal Articles & Opinion Pieces IBFD, a physical presence threshold is more appropriate for businesses involving personal services than a fixed place of business threshold. On the proposed number of days for a physical presence test (i.e. 90 days), *see* A. Pickering, *General Report*, in *Enterprise Services* p. 46 (IFA Cahiers vol. 97a, 2012), Books IBFD, who reports of some tax treaties' provisions using a shorter presence test than 183 days, such as 90 days or 30 days. In this regard, Arnold (2011), *supra* n. 168, at sec. 2.3.2., argues that "there is no clear justification for any particular number of days" and "the period should be based on a balancing of the source country's right to tax income arising in or having its source in its territory and the compliance and administrative difficulties in collecting the tax". As regards the practical determination of the physical presence of an individual in the territory of a state, the test might take advantage of the most recent advances in ICT and, in particular, geo-localization and location-based applications. For a tentative proposal to that effect, *see* Beretta, *supra* n. 5, at p. 111. Taking a more radical approach, one may consider not making any recourse to a physical presence test and instead rely on a source of payment rule, which could include withholding tax applied by the resident payer. Discussing the merits of source withholding taxation of cross-border services, *see* Báez Moreno (2015), *supra* n. 167, at sec. 3.2.1.2.3. *See also* Arnold (2011), *supra* n. 168, at para. 3.1.3., who, although in principle against any source country's taxation for outbound payments, being payments for services performed different than payments as a return on capital (e.g., dividends, interest and royalties), submits that "[i]f it is concluded that source countries should have expanded taxing rights under the Models, the expansion should apply to all forms of income from services (not just technical, managerial and similar services) provided in a source country".
265. Art. 14(1)(b) UN Model provides source country taxation of cross-border services performed by an individual independently "[i]f his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State".
266. The author submits that the deletion of art. 15(2)(b) and (c) OECD Model would not have a significant impact in terms of combating abusive strategies (e.g. IHOL). The physical presence test, especially if the tax authorities monitor the worker's movements through IT technologies like geo-localization and location-based applications (*see supra* n. 264), is sufficiently straightforward to administer. Possible abusive practices (e.g. utilization by an employer of different individuals to carry out a single job in a country, with each individual physically staying in that country for less than 90 days in any 12-month period) could be addressed through the application of the

– The source country shall also have the right to tax labour income if the individual performs his work activities through a PE, also in the form of a "home office", or an FB in that country. To that effect, definitions of "home office" and "fixed base" should be introduced in article 3 of the OECD Model (General definitions). In particular, a suggested definition of "home office" should clarify that a home office is at the disposal of an enterprise or entrepreneur only if the enterprise or entrepreneur pays the housing rent or covers other costs for exploiting some of the worker's home office facilities, on a non-purely temporary basis, for business purposes. To be regarded as an FB, a location should be at an ascertainable space and be used for the partial or whole performance of the individual's work activities on a non-purely temporary basis. To better clarify the degree of permanence required for a location to be regarded as an FB or home office PE, a counting-day test should be introduced, providing that an FB or home office PE is available to an individual only if he is physically present in the location for a minimum number of days per year (e.g. for a period not exceeding 30 days per annum).[267]

7. Concluding Remarks

The article has discussed how ongoing changes in work arrangements may impact the taxation of labour income, based on its various classifications under tax treaties. In particular, the article has analysed four major quadrants of labour change: (i) home office work; (ii) non-standard forms of employment; (iii) digital nomadism; and (iv) the decentralisation of jobs. Using mainly the OECD Model as a reference, the article has attempted to show that the rules for the taxation of labour income under tax treaties no longer reflect the current reality of the labour market and therefore should be reviewed. The author has identified three main goals on which envisaged solutions could be built, which might entail changes to (i) the physical presence criterion; (ii) the concepts of home office and fixed base; and (iii) the binary divide between dependent and self-employed activities. Bearing these three goals in mind, the author has formulated some tentative proposals for reforming the current tax treaty treatment of labour income. Notably, it has been suggested to deal with labour income earned by dependent and self-employed individuals jointly in a new article, provisionally entitled "Labour Income". Under the new article, it is proposed that primary taxing rights be assigned to the residence state. The source state will also have the right to tax the worker's income but only (i) if the individual is physically present in its territory for a period aggregating at least 90 days in any 12-month period commencing or ending in the fiscal year concerned; or (ii) if the individual performs his work activities through a PE, also in the form of a "home office", or a FB in that country, and, in any case, he is physically present for a minimum number of days per annum (e.g. 30 days). To that effect, the author has pleaded for a clarification of the concepts of "home office" and "fixed base" in article 3 of the OECD Model (General definitions).

principal purpose test (PPT) or limitation on benefits (LOB) clauses, being fall-back provisions to counter various forms of tax treaty abuse. Moreover, abusive arrangements could be opposed through domestic general anti-avoidance rules (GAARs) or specific anti-avoidance rules (SAARs). *See*, however, OECD/G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: Final Report* p. 69 (OECD 2015), Primary Sources IBFD, which considered general anti-abuse tax treaty provisions such as the LOB or PPT unnecessary to counter IHOL practices since "the guidance already found in these paragraphs [paragraphs 8.1. – to 8.28 of the OECD Commentary on Article 15(2)], and in particular the alternative provision found in paragraph 8.3 of that Commentary, dealt adequately with this type of treaty abuse". A detailed analysis of the implications of anti-abuse provisions concerning the proposed tax treaty changes lies beyond the scope of this article.

267. In this regard, *see* Sengupta, *supra* n. 150, at sec. 3.1.2.2., who reports that, in some tax treaties (particularly, those concluded by Thailand), a counting-day test applies both to the length of stay and the fixed base criteria laid down in art. 14 UN Model. Instead, a threshold that refers to a minimum percentage of working time or remuneration in the work state does not appear feasible since it is difficult for tax authorities to assess an activity on a quantitative basis, so that this test could be prone to tax planning by taxpayers. Proposing a new threshold for determining a significant economic presence in the source state, based on a series of factors (e.g. the existence of a local domain name, the language in which the website is written, the possibility of payment in the local currency, the number of active users within a given period of time, the number of contracts concluded within a given period of time, the amount of data collected from users and customers within a given period of time, the existence of advertising directed specifically to customers in the host state, the use of the service provider's platform to advertise other firms acting remotely or physically in the host state, etc.); Castelon, *supra* n. 163, at p. 433.

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