

IFA Congress 2025 (Lisbon, Portugal)

**Subject 1:
Residence for Corporate Income Tax Purposes**

Outline

**General Reporter:
Prof. Dr. João Félix Pinto Nogueira (Portugal)**

July 2023

1. Introduction

1.1 Aim and Scope

This topic aims at studying the meaning, function and role of the concept of residence of legal entities in modern corporate income tax systems.

The following vectors delimit the topic:

- i) residency;
- ii) for corporate income tax purposes;
- iii) of legal entities, understood as any “other-than-individual” that is recognised as a taxpayer for the purposes of corporate income taxation.

The topic is an excellent follow-up of main topic 1 of the 2024 IFA Congress in Cape Town (“*Finding the meaning of the nexus for taxes – past, present and future*”, with general reporters Johann Hatting and Peter Hongler), which will be devoted to finding, in general, which criteria lead to triggering tax sovereignty.

Residence serves as a proxy for delimiting the circle of those taxed on a worldwide income basis (subject to participation exemptions or other limitations). It is also a requirement to access tax treaty benefits and EU law entitlements. Therefore, it is of paramount importance for the proper functioning of tax systems. This topic aims to provide new insights into this concept, particularly in the context of a highly digitalising economy.

Branch reports are asked to start the analysis by providing a comprehensive analysis of the concept of residence, particularly of the criteria that trigger it under the respective domestic tax law. Those criteria often lead to double residency cases, and branch reporters are asked to focus on how the phenomenon is addressed at both domestic, treaty and EU level. Reporters are then asked to focus on the consequences of attributing residency, both at a procedural as at a substantive level. All reports end with an Outlook section.

1.2 Prior Coverage of the Topic (or Similar Topics) at IFA Congresses

The topic has been partly addressed at the following Congresses¹:

- - at the 2014 Congress in Mumbai (“*Qualification of taxable entities and treaty protection*”, general reporters Michael Lang and Claus Staringer);
- at the 2007 Congress in Kyoto (“*Conflicts in the attribution of income to a person*”, general reporter Joanna C. Wheeler);
- at the 2005 Congress in Buenos Aires (“*Source and residence: a new reconfiguration of their principles*”, general reporters Adolfo Atchabahian and Angel Chindel);
- at the 1995 Congress in Cannes (“*International income tax problems of partnerships*”, general reporter Jean-Pierre Le Gall);
- at the 1989 Congress in Rio de Janeiro (“*The disregard of a legal entity for tax purposes*”, general reporter Condorcet Pereira de Rezende)
- at the 1987 Congress in Brussels (“*The fiscal residence of companies*”, general reporter Jean-Marc Rivier);

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Out of these, only the 1987 and the 2005 Congresses addressed the topic directly. Globalisation and digitalisation have completely changed the scene at the normative and factual levels. Moreover, there have been notable normative reforms that have significantly expanded the scope of the concept or of its consequences. This justifies re-addressing the topic in 2025, about 15 years after the topic was last addressed.

2. General Information for PSC Members

2.1 Introduction

This section aims at providing valuable information for PSC members, allowing them to better read and understand the content of this document. It will be deleted before the guidelines are sent to the branch reporters.

PSC members are also invited to carefully read the notes provided to branch reporters in section 3. These notes are essentially aimed at helping to better understand the Outline.

2.2 Ways of Providing Feedback

Feedback from PSC members is welcomed, particularly what concerns the Outline for the branch reporters (that can be found on page 10 et seq. of this document).

Feedback is welcomed both during the PSC meetings and, in advance, via email. The input from the PSC members can be sent at any time to j.nogueira@ibfd.org. The General Reporter will do his best to incorporate them into the Outline, periodically.

2.3 Inclusion of Recommendations in the General Report

The General Report should provide the conclusions (following the tradition of earlier IFA congresses and similar congresses of other disciplines) and include recommendations addressed to the different stakeholders. This has already been addressed in past PSC meetings, but no decision has yet been taken.

2.4 Dimension of the Outline

In drafting this Outline, the general reporter closely followed the model used in previous years. Nevertheless, it is important to note that the Outlines are becoming increasingly extensive, requiring further attention.

One of the reasons is the large number of guidance included. Hence, due consideration is needed before adding additional guidance to the Outline, particularly considering that branch reporters are experts in these areas.

2.4 Binary Questionnaire

In addition to the Outline (reproduced below), a binary questionnaire (allowing only yes/no answers) will be created to simplify the data analysis, allowing its statistical treatment. It is included as the last annex of this document.

2.5 Decisions Taken in Previous PSC Meeting

To serve as an aide-mémoire or for guidance to new PSC members, this section encloses the recommendations and decisions of the PSC in prior meetings.

- i) in terms of scope, it should be broad enough to cover all other-than-individuals that are considered taxpayers by a jurisdiction (without enquiring why they are considered taxpayers; that is a prior and unrelated question to the one of residency);
- ii) it should not include non-taxpayers; therefore, qualification issues and their outcome are excluded; those issues are logically and chronologically preceding the discussion at hand (the residency of whoever is considered a taxpayer for the purposes of a specific tax system);
- iii) it is restricted to corporate income taxes;
- iv) it should exclude the transfer of residency issues; the former proposal covered the following elements: a) preliminary remarks; b) issues connected with emigration; c) issues connected with immigration; c) issues emerging from the

- mismatches between two or more systems. In case there are strong views on its re-inclusion, we would propose addressing it in a separate seminar;
- v) use/improper use of the concept of residence is excluded; although recognising the relevance of the issues arising from the improper use of the residency concept, the goal is to focus on non-abuse-related issues; accordingly, this outline will not cover: a) the impact of Art 29 (being it a LOB or a general clause) on the determination of residence; and b) presumptions of residency; one should note that those issues may be addressed in the framework of main topic two and that good communication between the two general reporters is key to avoid overlaps between the two main topics;
 - vi) IIR Pillar II) and CFC issues are excluded, as they do not deal directly with a residency issue

2.6 Note to be transmitted to the Chair of this panel

- In what concerns the selection of panel members:
 - insofar as possible, panel members should be selected from those that have written a branch report, taking into account the relevance granted to the respective country features at the general report level;
 - due consideration should be given to the structural differences between common law and civil law systems; the audience should be properly informed of structural discussions that are referred solely to one of such systems; it would be great to design case studies that highlight the differences between those two blocks of countries;
- the seminar starts with a 15 min intervention by the general reporter, with the main conclusions of the general report; this should be taken into account to avoid repetitions and overlaps with the topics covered in the seminar.

3. General Information for Branch Reporters

3.1 General Reporter Contact Information

The general reporter is Professor João Félix Pinto Nogueira. Branch reporters who wish to contact him are invited to use the following email address: j.nogueira@ibfd.org.

3.2 Substantive indications

3.2.1 Focus on the jurisdiction

When drafting the report, please keep in mind the following guidelines:

- it should focus on your jurisdiction and on the specific approaches it takes to the matters included in the Outline;
- it should be based on all applicable tax treaties, EU law domestic legislation (being it local, infra-statal, statal or supra-statal, including EU and tax treaty law; case law; and administrative guidance, or other “soft law”; please note that, as mentioned further explained infra, the analysis should be focused on your jurisdiction deviations;
- please read the Outline in its entirety before starting to draft the report; this will allow you to understand where to address the different topics covered in the Outline.

3.3.2 Exclusion of common tax treaty and EU law issues: topical reports

Branch reporters should not deal with common issues of tax treaties or EU Law since they will be covered in the following topical reports:

- 1 - Tax treaty law report: *topical reporter tbd*; covering all issues that cannot be attributed to a specific jurisdiction (i.e. structural issues or issues connected with the interpretation or application of the model); in particular, it would cover issues related to Art. 4(1) and 4(3) of the models and provisions of the MLI regarding residence;
- 2 - EU law report: *topical reporter tbd*; it would particularly take into account the subjective requirements to access the directives (“is considered to be a resident of a Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be a resident for tax purposes outside of the Union” clause; CJEU case law;

These topical reports will cover all tax treaty or EU law topics that do not amount to a deviation from a specific jurisdiction. Branch reporters are welcome to provide guidance to the topical reporters by sending a memo to the topical reporter directly, cc’ing the general reporter.

3.3.3 Scope of the Report

- subjective scope: your report should take into account rules for the residence of all legal entities understood as any “other-than-individuals” considered taxpayers for the purposes of your corporate income taxation; the report should not focus on the criteria used by the legislation: i) to recognise personality for tax purposes to an other-than-individual; ii) to delimit which other-than-individuals are qualified taxpayers. From the subjective level, the report will departure from the qualification of taxpayer and will focus on the rules to consider them as residents;
- objective scope: your report should cover only corporate income taxation; other forms of taxation, even if relying on the same concept of residency, should be excluded;
- temporal scope: the report should be focused on the current state of affairs / law in force at the time the report is drafted; whenever relevant to understand the status quo, historical references could be included; if you consider that your answer needs to refer to a specific date, please take into account 1 January 2024 (this is also the date to take into account in answering the questionnaire mentioned in Annex 2); existing proposals (for instance,

proposed legislation, or treaty negotiations) should be referred in the last section of the branch report, regarding the Outlook);

- Exclusions from the scope:

- i) location of permanent establishments, apart from the cases in which a presumption or deemed rule applies, with the consequence of a permanent establishment being treated as a resident taxpayer;
- ii) any other-than-individuals that are not considered as taxpayers (as, in most jurisdictions, partnerships); unincorporated associations and trusts/trustees, insofar as considered as a taxpayer, will be within the scope;
- iii) avoidance and evasion rules, even if related to residency, such as “limitation on benefits” rules;

3.3.4 Digitalisation of the economy

Digitalisation is of fundamental importance to understanding recent changes (and challenges) in the concept of residency. It should be considered under all the headings.

3.3 Formal Indications

3.3.1 General tasks

Each branch reporter should complete three specific tasks when writing the respective report:

- First and most importantly, the report should focus on all relevant material, such as legislation and background materials, in that jurisdiction, as well as any relevant decisions by courts, administrative organs and tax administrations; it should be preceded by a 1,000 words “summary and conclusions” section that will constitute a short “executive summary” of the report.
- Second, as indicated in Annex 1, to provide a copy of the relevant materials, such as extracts from legislation, court decisions and administrative pronouncements, literature, etc., that may be referred to in their branch report; further information is enclosed in the Annex;
- Third, as indicated in Annex 3, to provide answers to the questions presented; all questions should allow a unique and univocal answer; further information is enclosed in the Annex.

3.3.2 Structure and Self-Sufficiency of the Branch Report (or autonomy from the Outline)

Your report must follow the outline’s sections and subsections (levels 1 and 2) as indicated *infra*. Insofar as possible, you should also follow level 3, although this is not mandatory.

You will receive a separate Word file with all the headings that can be used as the backbone of your branch report. We kindly ask you to use that file as a template for your report insofar as possible.

Regarding levels 1 and 2, and even if there is nothing to report, please keep them in and include a short reference to the reasons justifying the absence of reporting. This will facilitate comparison, ensure that all the topics are covered, and help the general reporter better understand your system. You can delete levels higher than 3 (therefore, please keep all headings started with a number or with two numbers separated by a dot), as nothing is to be reported.

Each Branch report should be readable independently, without referencing these directives, which will not be reproduced in the Cahiers. Therefore, even when the

directives formulate questions, please do not just directly reply to them but include an articulated and self-standing answer.

3.3.3 Language

While IFA rules allow the Branch reports to be submitted in English, French or German, it is clear that Branch reports in English will reach a much larger audience as Branch reports in French and German will not be translated. Also, if a report is submitted in either French or German, summaries/conclusions in English will need to be provided by the Branch reporters.

3.3.4 Publication of the Cahiers

Following the decision of the General Council/General Assembly of IFA, the Cahiers have changed in publication format from 2016 onwards.

The printed publication of the Cahiers consists of the General reports of both Subject 1 and Subject 2, together with the EU report and Tax Treaties report, and the summary and conclusions of all branch reports.

The digital publication consists of the General reports, the EU report and the OECD report, if any, as well as all Branch reports, including the biographies, abstracts and directives. The digital publication will be made available through the websites of IFA, and its sister organisation, the IBFD.

The digital publication will contain easy access to all reports making it more available for its audience. It will be featured with a user-friendly search function, and all reports can be downloaded for offline consultation.

3.3.5 Maximum Length

The maximum length for a Branch report is **10,000** words (including footnotes, appendices, and bibliography). This, however, does not include the summary and conclusions section and the text of materials that Branch reporters are also invited to provide (as indicated above and in Annex 1).

Branch reporters should allocate the overall limit based on the available information, in their jurisdiction, on the various topics covered in these directives since it is unlikely that, in any jurisdiction, there will be information on every issue raised in these directives.

In any case, if there is more to cover than the available length, branch reporters should focus on their jurisdiction's more noticeable deviations / idiosyncrasies.

3.3.6 Timetable

The following deadlines should be followed:

- at the moment of the appointment: send the bio note and high-resolution picture to the IFA general secretariat;
- Before 31 January 2024 (non-mandatorily): i) send any questions on the interpretation of the outline or regarding how it applies to specific features of your jurisdiction; ii) send some pointers on the issues you are planning to address in each section;
- Before 31 September 2024 (less than one month before the Cape Town Congress, which will take place between the 27 and 31 of October): provide the close-to-final or final draft of the branch report;
- Before 15 November 2024: final deadline for the submission of branch reports;

Please note that the deadlines must be strictly adhered to in view of publication schedules. In case of delays, your branch report may not be considered for the purposes of drafting the general report and may not be published. The Cahiers are made available in digital

format to all IFA members well before the congress. Furthermore, the deadline is important to allow topical and general sufficient time to write their reports for submission by 15 March 2025.

3.3.7 Addendum

If a Branch reporter expects radical changes in their domestic legislation relating to the subject between the date of submission of the report and the publication date thereof, the reporter may, following prior consultation with the General Secretariat, supply an additional one-page Addendum to the report, for publication in the Cahiers, explaining such changes in legislation, but not after 1 February 2025.

3.3.8 Reporters' Biographies

As soon as they are appointed, the Branch reporters are requested to send a half-page biography with a maximum of 300 words and a colour photo in portrait style and high resolution. Full personal biographies will not be printed and may be shortened at IFA's discretion.

This information may be updated when the final version of the branch report is sent.

Outline

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Please note that, as mentioned, when the questionnaire reaches its final version, a separate Word document will be created to be used by the branch reporters as the backbone of their reports.

B – Extended Outline

0 – Summary and conclusions

The Report should be preceded by a “summary and conclusions” section that will constitute a short “executive summary” of the report. This summary should not exceed 1,000 words and should logically be prepared after completing the report.

1 – Introduction

In this part, the Branch reporters are requested to provide a brief overview of the relevance of the residency concept in their jurisdiction, including:

- conceptual analysis: reference to the concept(s) used by your tax system to describe personal nexus for corporate income tax purposes, i.e. allegiance between a legal entity (understood as an other than an individual considered as a taxpayer) and the territory such as residence, domicile, seat, *inter alia*; what is the role of each one of them; reference to the concept(s) used to trigger worldwide tax liability?
- subjective scope analysis: indication of the (other-than-individuals) entities (*lato sensu*, including cooperation structures between persons treated as a taxable entity) that your tax system considers as residents and/or subject to worldwide liability; please indicate separately the taxpayers that are considered residents, albeit not constituting persons for civil law purposes.

2 – The Concept of Residency

2.1 At the Domestic Level

2.1.1 Criteria Used to Define Residency of Legal Entities

- full characterisation of the criteria (different from concepts, as used supra) used by your jurisdiction for ascertaining residency, which may include: i) place of effective management; ii) place of management (or place of administrative management); iii) place of central management and control; iv) place where the entity’s head or main office is located; v) place of the main activity or of the major operations; vi) principal place of business; vii) place of incorporation; viii) place of registration; ix) place of the legal seat; x) place where the accounting records are kept; xi) place of the (main) estate’s location; xii) place where any other form of permanent representation is located; xiii) place where the residency is declared by governmental decree;
- characterisation of distinctive criteria for assessing the residence of the multinationals and of its subsidiaries: relevance of the management made at the top level for the assessment of the residence of companies (e.g. in common law systems, explicit reference is made to the criteria emerging from *United Construction Co Ltd vs Bullock (1969) AC 351*).

When characterising the criteria, please consider the following:

Note 1: please also describe carefully all facts and circumstances that are taken into account and how relevant they are in the assessment of each one of the criteria;

Note 2: please include a reference to how the criteria are interpreted and applied in your jurisdiction, including references to administrative praxis and case law;

Note 3: are there predominant factual elements in the assessment made by tax authorities and Courts? Among others, please consider the following (if applicable):

- i) shareholders meetings;
- ii) board meetings: a) relevance of the corporate structure for the assessment; b) is there an enquiry on the content of the meetings, understanding what type of decisions are taken per meeting? c) is physical presence or attendance at the meetings relevant? d) is there a scrutiny regarding the location of each board member (when attending remotely) at the time of the meeting? e) which type of boards are considered (only executive? all boards, also including supervisory and audit boards?);
- iii) Where the CEO and/or other higher executives carry on their activities; is the (tax) residency of these key individuals considered? Is there any consideration of period of remote working?
- iv) where middle management carries on their activities: is relevance provided solely to the meetings with the staff reporting to them or also with other staff members?
- v) staff meetings: which type of meetings are considered;
- vi) company's directors' individual residence;
- vii) place where a company's general policy is developed;
- viii) place where the dividends are declared;
- ix) place where the bank account is located; where the company's books are located; where the balance sheet, the profits and loss account and the annual report are drawn up;
- x) currency in which the accounts are kept;
- xi) place of registration;
- xii) law governing the entity;
- xiii) statutory seat;
- xiv) domain of websites or emails;
- xv) existence of office plants ("*Kamerplant*" doctrine);
- xvi) presence of logos or banners outside of the main building;
- xvii) location of service centres, particularly when they are responsible for providing management services;
- xviii) place where the decisions are taken, identifying which decisions are taken into account for the identification;
- xix) all facts and circumstances test.

Note 5: whenever possible, please indicate whether the criteria are expressions/manifestations of the "theory of incorporation" or the "theory of the seat" (or of different theorisations);

Note 6: in case your system refers to multiple tests: i) are they alternative (i.e. meeting one of the tests is enough to establish residence) or cumulative (i.e. all tests need to be met)?; ii) is there a hierarchy? iii) is there a specific order for the (self-)assessment?

Note 7: does your jurisdiction attribute relevance to both objective and subjective elements (in the case of the latter, the *animus manendi*)? If so, who bears the burden of providing evidence of the subjective element?

Note 8: can you highlight the challenges (and reactions) to digitalisation when assessing the criteria? Are there specific considerations for online meetings or remote work?

Note 9: if possible, please distinguish between: i) criteria aimed at assessing the economic allegiance with the territory and; ii) criteria aimed at preventing avoidance, acting as presumptions of residency.

Note 10: is there a specific or autonomous consideration for deemed residency? The presumptions of residency are rebuttable or irrebuttable? In what concerns rebuttable: what is the evidence required to rebut the presumption? In any case, could you explain the rationale of each one of the presumptions/deemed residency rules? Are they effective means to ensure that the rationale (of residency) is pursued? Do they improve the protection and functioning of your tax system? Are there other presumptions (such as the presumption of being a person or the presumption of being incorporated) that, in the end, function as a presumption of residency?

Note 11: timing issues: the assessment of the residency in a given (tax) year may take into account facts and circumstances occurred outside of that (tax) year?

2.1.2 Special cases of residency

In many jurisdictions, there are special rules applicable in certain circumstances,

- i) Anti-lapse rules (i.e. rules for cases where the entity is considered resident in another jurisdiction merely for a short period of time);
- ii) Elective residency (i.e. the taxpayer is allowed to be treated as a resident even if the traditional criteria are not met and/or whether there are doubts on whether they are met)?
- iii) Low substance: are there any rules or procedures for assessing residency for entities with low substance indicators (namely, low or no equipment, premises and/or staff);
- iv) Special entities: do you have special domestic rules for (assuming that the following are considered as taxpayers in your jurisdiction): i) state, infra-statal or other territory-based public entities; ii) sovereign wealth funds; iii) pension funds; iv) estates and trusts, including real estate investment trusts; v) collective investment vehicles; vi) insurance and financial entities; viii) religious and spiritual care entities; ix) groups or the ultimate parent entity of a group (regardless of whether income is consolidated or not); x) charities; xi) controlled foreign companies; xii) other entities (non-individuals)?
- v) Statutory non-residency: are there any domestic safe harbours rules allowing an entity to be considered non-resident even if meeting the traditional residency criteria?
- vi) Double non-residency (besides the anti-hybrid rules);

2.1.3 Substance Requirements as a Proxy for Residency

- are there any requirements that, despite being labelled as “substance requirements”, concern mainly or predominantly the personal nexus between a legal entity and the territory of the jurisdiction?

- In addition to criteria to assess residence, is access to (some/all) tax features related to the taxation of residents made dependent on meeting substance requirements? If so: i) do they also apply to non-residents or solely to residents?; ii) what type of criteria and analysis is made? iii) are they used solely at the domestic, EU or tax treaty levels? iv) is there a specific procedure? v) what type of evidence is required, and who has the burden of proof? vi) are there specific filing requirements/specific deadlines?

- do substance requirements include a reference / attribute relevance to the following facts: i) residency of directors, administrators or shareholders (even if individuals)? ii) residency of middle management? iii) residency of employees (or a specific subset of employees)? iv) education or (professional) qualification of directors, managers or employees (particularly those performing specialised functions)? v) bank account: ownership of a bank account and its location; vi) place where the accounting books are kept; vii) economic thresholds such as minimum amount of wages, costs about a certain amount or loans exceeding a certain percentage of the capital; viii) (exclusive) right to use premises in the jurisdictions (regardless of the legal title under which that right emerges); ix) proportionality between the reported activity and a specific production factor; x) existence of income-generating activities in the jurisdiction;

2.1.4 Procedural rules

Could you address any specific procedural rules related to residency, namely regarding:

- i) any registration or similar requirement;
- ii) rule regarding the burden of proof;
- iii) rules for obtaining a certificate of residency and its validity;

2.1.5 Assessment of Residency in Other Jurisdictions

Does your jurisdiction assess whether a resident in the other (Contracting) State is effectively resident there? If so: i) what type of evidence is required; ii) who has the burden of proof (and is it considered a legal or a factual issue); iii) does it take into account domestic law of the other jurisdiction or the law of your jurisdiction? iv) what type of examination is performed by tax authorities and courts (leaning towards form or substance?).

2.2 At the Treaty Level

This section focuses on the bilateral tax treaty provisions equivalent to Art. 4(1) of the OECD and UN MC (including amendments by means of protocols):

- Indication of administrative praxis or court's case law interpreting Art. 4(1) and, in particular, whether there is a full-fledge *renvoi* to the domestic law of the other Contracting State or if additional considerations are made based on the purpose and object of the treaty or an autonomous definition of concepts;

- Indication and mapping of deviations in what concerns the wording of Art. 4(1) of the OECD/UN models; identification of the deviations that are part of your jurisdiction tax policy and an indication of the reasons; in particular: identification of treaties that do not include the expression "as well as a recognised pension funds of that State" and reasons for that; mapping of deviations regarding concepts or expressions such as: i) seat; ii) seat of management; iii) place of the head or main office; iv) legal head office; v) place of management and control; vi) place of registration; vii) place of incorporation; viii) place where the leading decisions are made or enforced; ix) place where day-to-day decisions are taken or enforced;

- is there any guidance on what is considered to fall within the expression "any other criterion of a similar nature"; does it refer to: i) any other criteria leading to worldwide

liability? ii) criteria that require both worldwide liability and a territorial connection with the jurisdiction (and, if so, what is the minimum territorial connection required)?

- is there any guidance on what is considered liable to tax (in French, “assujettie a l’impôt”)? Would a withholding obligation (of tax due by others) suffice? Is there an exclusion of those that are subsequently (subjectively) exempted from tax?

- identification of instances that may fall under the last sentence of Art. 4(1), i.e. of a “person liable to tax in that State in respect only of income from sources in that State or capital situated therein”; what limitations on the liability to tax in the other Contracting State would lead your jurisdiction to exclude an entity from tax treaty benefits? Are there any known treaty cases? What type of exclusion of foreign income would lead to an exclusion?

i) cases of preferential regimes in the Other Contracting State (such as special tax zones) leads to an automatic exclusion of entitlement or, in any case, there is a scrutiny of the regime applicable to those entitled to preferential regimes? What are the features of preferential regimes that lead to the exclusion of treaty entitlement?

ii) cases of territorial systems?

iii) cases of taxation on a remittance basis?

- do you include the wording suggested by the US Model Convention in its Art. 4(2) besides in your bilateral treaty with the US? If so, what are the reasons for its inclusion?

3. Solving Instances of Double or Multiple Taxation

3.1 At the Domestic Level

- indication of whether it is possible to be considered resident in more than one sub-system of the domestic tax system (for instance, state, region, autonomy, municipality); this may be a consequence of overlapping criteria adopted at the central level or by the infra-statal entities

- indication of the rules or mechanisms adopted to solve those instances of multiple domestic taxation; is there a preference for a real seat approach or for a more formalistic approach (registration/incorporation)?

- does your jurisdiction include any procedural mechanism, such as the one provided by Art. 4(3) of the OECD MC, allowing (tax) authorities to allocate residency, namely for solving (internal) dual-residency issues? Was there any discussion on whether such quasi-discretionary power of tax authorities would be in line with the rule of law? Does your jurisdiction have any substantive regime for dual-residency issues?

- indication of whether domestic law allows denying residence (or features associated with residence) in case of multiple (domestic) residency;

3.2 At the Tax Treaty Level

3.2.1 Instances of Multiple Residency

- Paragraph 21 of the OECD MC commentaries states: “It may be rare in practice for a company etc., to be subject to tax as a resident in more than one State.”

i) do you agree that dual-residence of legal entities is rare in practice?

ii) is it possible to identify more than ten disputes over the last five years (i.e. between 2019 and 2023)? Please note that this time frame aims at allowing an objective and direct comparison between jurisdictions.

- characterisation of the most frequent situations leading to double or multiple taxation and, whenever possible, within the following categories: i) use of multiple overlapping criteria; ii) different interpretation of the same criterion;

3.2.2 Solving Instances of Dual or Multiple Residency

3.2.2.1 The Substantive Criterion (namely following the Pre-2017 OECD MC approach)

- indication of instances where the dual-residence is solved by reference to a (material or substantive) criterion, susceptible of judicial scrutiny and independent of any agreement between competent authorities;
- identification of the criteria used;
- characterisation (following administrative praxis or case law) of the criterion or criteria used for the tie-break (for instance, “place of effective management”, “place where it is incorporated”, “place where it is constituted” or others) – in case it is differently characterised from the way how it is under domestic law, as referred to previously; is there any order of priority within the facts that are taken into account (i.e. do tax authorities or courts place more weight on certain facts?); what is considered “management” (namely what is the relevant level: shareholders, directors, managers, day to day decisors)? are there cases regarding key management decisions taking place in multiple jurisdictions, and, if so, how were the cases decided? Do authorities and courts always conclude that there can only be one place of effective management?
- do treaties refer to “other relevant factors”, and what has been considered in this respect?
- are there post-2017 bilateral tax treaties following the prior version of Art. 4(3) of the OECD MC (or the alternative wording mentioned in paragraph 24.5 of the OECD MC Commentaries)? What are the reasons for such option(s)?

3.2.2.2 The Procedural or MAP Test (namely the post-2017 two-tiered MAP Approach)

- this subsection focus on art. 4(3) of 2017 OECD MC and on art. 4 of the MLI;
- description of cases in which the MAP is (already) used to settle residency; are the final decisions published, and, if so, in which cases?
- regarding the mutual agreement procedure:
 - i) do you have any evidence of the application of the first tier of the mutual agreement procedure (i.e. in accordance with the first sentence of Art. 4[3] OECD MC? Which facts were considered relevant by competent authorities? What is the average length?
 - ii) do you have any evidence of the application of the second tier of the mutual agreement procedure (i.e. in accordance with the first sentence of Art. 4[3] OECD MC? What is the average length?
- discussion of the advantages and disadvantages of this solution, introduced in Art. 4(3) OECD Model in 2017; from a factual perspective, is it possible to establish a connection between dual residency and avoidance (i.e. most cases of dual residency emerge in the context of avoidance strategies), and does that link ensure the legitimacy of a solution relying on a mutual agreement procedure?
- in case you have adopted a provision similar to Art. 4(5) of the US model convention, which persons “other than an individual or a company” have been covered, and what were the criteria followed by competent authorities to solve the dual-residency issues?
- is the (two-tier) MAP solution compliant with the rule of law or your constitution? Is there any (doctrinal) discussion on whether the procedural mechanism infringes legality as it allows authorities to agree on criteria that are not pre-defined by law and cannot be sufficiently anticipated by the taxpayer? Or regarding the fact that the same competent authorities can agree on different criteria to solve cases with a similar factual pattern

without providing reasons for a different outcome? Under your constitutional system, what would be the consequences of finding that the mechanism is unconstitutional?

Specifically, in what concerns the denial of tax treaty benefits:

- do all your treaties include the second sentence of Art. 4(3) OECD MC?
- for reporters of EU/EEA jurisdictions:
 - i) was there any discussion on whether the denial of treaty benefits is incompatible with the EU's fundamental freedoms, particularly the freedom of establishment?

3.2.2.3 Denial of Tax Treaty Benefits for Dual-resident Companies

- do you have tax treaties (other than those with the US) in which the consequence of a dual residency for companies is the denial of tax treaty benefits, such as Art. 4(4) of the US model convention? What are the policy reasons explaining such a denial?

3.2.3 Triangular Situations and Application of Bilateral Tax Treaties

- indication of the criteria used to solve cases of multiple taxation in the presence of bilateral tax treaties with all involved jurisdictions; indicate if there are domestic rules for triangular situations in which there is no treaty with one of the involved jurisdictions;

3.2.4 Solving Double-Residency in Dualist Systems

[reporters from monist countries should ignore this heading]

- if you are reporting on a dualistic jurisdiction, and in case of conflict between tax treaties and domestic law, does the domestic assessment of residence prevail (or, in the alternative, whether it prevails solely if the domestic definition is more recent than the signature of the treaty);
- is there a specific approach in what concerns residence/treaty entitlement?

3.2.5 Other Treaty issues regarding Residence

- identification of other issues regarding residency, namely:
 - a) exclusion of entities of a certain part of the territory (as an alternative to restricting the geographic scope of the treaty);
 - b) subjective exclusion of entities benefiting from a specific tax regime (which can be a special tax zone or a special tax status).

3.3 At the EU Level

3.3.1 Residency, Dual Residency and EU Directives

Are there instances of applying the residency requirement of the directives (“is considered to be a resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third country, is not considered to be a resident for tax purposes outside of the Community”) in treaties including a clause such as the post-2017 version of the OECD MC? In that case, is the last segment of the requirement only considered met after the competent authority decision considering that the company's residency is outside of the EU?

Are there instances of solving residency/dual residency issues through the mutual agreement directive?

3.3.2 Dispute Resolution Directive

Are there instances of applying the dispute resolution directive to solve dual or multiple residency issues?

In case the directive was applicable taking into account the post-2017 OECD MC, what were the facts taken into account? The applicability of the dispute resolution directive has the practical effect of transforming the “shall endeavour” into “shall solve”?

3.4 Mismatches between the Different Levels

- are there mismatches between the concept of residency between domestic and tax treaty law (in cases of deviations to Art. 4/1 of the Models)? What are the consequences of being considered a resident under domestic law but not qualifying as residents under tax treaty law (besides those covered by the last segment of Art. 4(1) of the Models)?

- for EU member states only: Are there cases of mismatches between the definition of resident between domestic and (implemented) secondary EU law? What are the consequences of being considered a resident under domestic but not qualifying as residents under (implemented) EU law?

4 – The Consequences of Attributing Residency

4.1 At a Procedural Level

4.1.1 The Residence Certificate

4.1.1.1. Certificate of Residence for Residents

Does your jurisdiction issue a certificate of tax residency? How does it identify the subject? How does it characterise the extension of the liability to tax? Are there any limitations in issuing residence certificates (for instance, regarding entities resident in a specific region or benefiting from a specific regime)? What type of check is made /what kind of evidence needs to be provided before issuing the certificate? What is the minimum period, after incorporation or after transfer of residence to your jurisdiction, that you need to wait until the residence certificate is issued?

Is there a general residence certificate, or are there multiple ones, depending on the purposes of its use (for instance, one for a specific tax treaty and a different one for a specific directive)? Do you need to describe the transaction and/or its (foreseeable amount) before obtaining the certificate of residence?

Are the certificates issued already in digital form and with a commonly used digital signature system? Are there any specific requirements to accept them when submitted in a digital format?

Is there any indication on whether they are seen as an ad probationem or ad substantiam requirement, in what concerns providing evidence of the residency? What other means of evidence are admitted by tax authorities and courts?

4.1.2 Other Procedural Rules

Is there a publicly available register of residents for tax purposes, for instance, similar to VIES (VAT Information Exchange System)?

Is it possible to include references to other-than-residency criteria, such as substance requirements eventually adopted or to be adopted?

Are there other obligations that other-than-individuals have to fulfil merely because they are residents, and absent of any income reception? Under the applicable corporate or tax law, are those rules applicable to all residents, regardless of whether they are considered persons?

4.2 Substantive Consequences of Residency

4.2.1 Type of Tax System: Worldwide vs Territorial

- indication of the tax consequences of being considered a resident and whether your tax systems can be described as worldwide/universal or territorial?
- extension of the scope: are there rules designed to apply to residents that are also extended to some non-residents (besides those regarding non-discrimination)? In your view, what is the rationale justifying said extension? What are the practical issues emerging from such an extension? Is there an alternative way of tackling the issue that is now being tackled with the extension of worldwide taxation to non-residents?
- are all resident entities considered as (fully) liable to tax (regardless of whether they are subject to any taxation)?

4.2.2 From Worldwide to Territorial Taxation: the Case of Residents

(this section aims to understand whether your jurisdiction, despite being characterised as following the worldwide taxation principle, is actually moving towards a territoriality-based regime, in what concerns other-than-individuals);

- description of tax features according to which:
 - a) subjective-based: a certain entity is solely taxed for sources located on the same territory (before the application of the domestic relief rule);
 - b) objective-based: a certain item of income is solely taxed if sourced in the territory (before the application of the domestic relief rule);
- assessment of the impact of the default relief method in delimiting the extension of the geographic scope of the resident's tax base;
- an indication of which one of the features, of the mechanism, that is used to achieve territorial taxation (i.e. exemption, credit, etc); and of whether the limitation is the result of a regional, domestic or tax treaty provision;
- identification of whether these territorial features lead to the exploitation of the advantages of being resident in more than one jurisdiction (such as avoiding source state anti-avoidance rules, group regimes and offset of losses);

4.2.3 From Territorial to Worldwide Taxation: the Case of Non-Residents and availability of Options to be Treated as Resident

- description of tax features according to which an entity that would otherwise be considered as a resident is obliged/can opt to be treated as a non-resident? What is the scope of that extension (i.e. does it cover a certain item of income or all worldwide income of that entity)? Are there instances where the non-resident is taxed on a net basis? If so, how is this calculated? Could you explain why the "residence regime" was extended? Are the relief methods also made available?

To what extent can a non-resident subsidiary be considered part of a domestic resident group? What tax features (in terms of both profits and losses) are extended to that foreign subsidiary? In case you are an EU jurisdiction, please do not refer to EU case law since this will be covered by the EU Topical report.

5 – Outlook and Overall Assessment

5.1 Function of the Concept of Residence

- 5.4.1 Currently: Is there a *crisis* in the concept of residence? What are the evidences of that crisis? Is the crisis linked to a progressive territorialisation of some tax systems?

5.4.2 In the future: Do you consider that this is a resilient concept fit for purpose? What role should residence play in the future? Or should tax systems move to a different “nexus” for worldwide taxation?

5.2 Residence and Digitalization

- could you provide examples of cases where globalisation or digitalisation led to a crisis of the residency concept (i.e. making it very difficult to apply rules that were not thought for this “new reality” namely cases of: i) companies holding meetings remotely; ii) companies without a – registered – physical headquarter; iii) companies with directors, middle management and workers operating remotely from non-registered locations)? What are the new challenges posed by the highly mobile and digitalised environments?

5.3 Residence and Avoidance

Should the conceptualisation of residency support the fight against tax avoidance and evasion, or should that fight be left to other concepts/criteria/rules?

Do you consider that the progressive inclusion of substance requirements is a recognition of the failure/limitation of the concept? What is the rationale for its inclusion, and why legal personality is/should not be enough for tax purposes?

At the tax treaty level, should the residency concept be supplemented by anti-avoidance rules to ensure that: i) for an otherwise resident or domiciled entity being treated as a tax resident in your jurisdiction? ii) for a non-resident to be considered a resident of another jurisdiction (be it a Contracting State, an EU MS state or any other state whose residence provides access to a certain benefit)?

5.5 Concluding Remarks

Please include any final remarks or statements that summarise or allow a better understanding of the gist of the report.

ANNEX 1
DOCUMENTS TO BE PROVIDED AS ANNEX TO THE BRANCH REPORT

Branch reporters are invited to provide the general reporter with copies of any of the following documents in their branch report:

- a) Key provisions found in a primary tax law found in a statute, regulation or decree, as well as any official explanation such as in a memoranda or any other instrument prepared in connection with the primary law;
- b) Court decisions;
- c) Tax policy documentation;
- d) Publicly available decisions by any administrative review board that may be part of or independent from a tax administration (e.g. assessment board or appeal board that would not constitute a court);
- e) Circulars, rulings or other official administrative pronouncements by the tax authorities;
- f) Any other similar document that can be considered to be an official statement with respect to the subject of this report originating from that jurisdiction.

Additionally, Branch reporters are requested to provide references or copies of relevant domestic case law or literature from their jurisdictions.

- Besides relevant legislation, case law or administrative praxis, could you submit an anonymised example of one or the different types of residency certificates as issued by your jurisdictions (in Word or pdf)?

Whenever possible, please:

- a) send all materials in an editable format, preferably in MS Word (.docx);
- b) limit them to 200 pages; if materials exceed this number: i) please select the most relevant (such as the most recent, the most impactful or the decisions of higher Courts); ii) in case they are also available online, please provide us only the link, together with a short paragraph describing the content of the material;
- c) please inform us if any material is copyright protected and, if so, the extent of the protection (preferably by reference to a creative commons license);
- d) send the materials in English (if the information is not available in English, it should be provided in its original language instead of being translated whenever the document is edited and can be automatically translated).

ANNEX 2
QUESTIONS FOR THE BINARY QUESTIONNAIRE

This section is included mostly as a placeholder for the binary questionnaire to be provided at a subsequent stage (namely, once there is a preliminary agreement on the outline for branch reporters).

To ensure that the data can be treated statistically, all replies should be provided, considering the same temporal moment: 1 January 2024.

When referring to tax treaties, the answers should also take into account provisions in protocols and other public law instruments amending the treaties if in force on 1 January.

Type of questions to be asked:

1. Characterisation of the tax treaty network

1.1 How many treaties do you have in force?

2. Domestic law criteria for residence of other-than-individuals

2.1 Does your domestic law include the following criteria?

[list of the criteria]

3. Tax treaty law

[mapping of deviations, asking for the number of treaties including the deviations. For instance:

3.x	Solving dual residency issues	#
3.x.1	How many tax treaties include a substantive provision (for instance, reference to the place of effective management without including mutual agreement)	
3.x.2	How many tax treaties include a procedural provision? Out of these tax treaties: [xxx]	
3.x.2.1	How many tax treaties require competent authorities to effectively reach a solution to the double residency issue?	
3.x.2.2	How many tax treaties require competent authorities to endeavour to reach a solution?	
3.x.2.3	How many tax treaties require competent authorities to take any action?	

Etc.]

Any input on the type of questions to be asked is welcomed!