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TAX RESIDENCE OF COMPANIES: INTERACTION BETWEEN THE NEW DOMESTIC RULES AND THE INTERNATIONAL FRAMEWORK

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Index

Chapter 2: Tax Residence of Companies in the International Framework

2.1. Introductory remarks: Notion of "residence" in international tax law and lack of harmonization in EU Law

2.2. Tax residence of companies under OECD Model Convention and Commentary

2.2.1. Article 4 of the OECD Model Tax Convention

2.2.2. Tie-breaker rules and their evolution: Commentary on article 4 of the OECD Model Tax Convention

2.2.3. Critical issues and legal uncertainty

Chapter 3: Comparative Approaches to Tax Residence of Companies

3.1. United Kingdom

3.1.1. Central management and control test

3.1.2. The role of the central management and control in the international framework

3.1.3. Comparative analysis and key differences with the Italian regime

3.2. United States

3.2.1. Place of incorporation test

3.2.2. The role of the place of incorporation in the international framework

3.2.3. Comparative analysis and key differences with the Italian regime

Introduction

Tax residence of companies is one of the most debated issues in international taxation, with relevant consequences for the allocation of taxing rights among jurisdictions, the implementation of double taxation treaties and the prevention of tax avoidance strategies.

The concept has evolved in both domestic laws and the international legislation, reflecting a constant tension between two fundamental needs. On the one hand, the pursuit of legal certainty, so that taxpayers can rely on clear and predictable rules; on the other hand, the imperative of aligning taxation with effective economic substance, so as to prevent artificial structures designed to shift profits or reduce tax liability.

The present dissertation undertakes a comprehensive analysis of the notion of tax residence of companies, with the aim of exploring its legal foundations, practical implications and unresolved challenges.

The research begins with the examination of the Italian legal system, subsequently delving into the international framework with particular attention to the OECD Model Tax Convention. Finally, it concludes with a comparative assessment of the concept in three foreign jurisdictions: the United Kingdom, the United States and France. Each of these legal systems reflects a different tradition and approach, allowing for a critical evaluation of points of convergence and divergence, and raising broader questions about the possibility of coherence at the international level.

The work is driven by the recent developments in the Italian legal framework. Indeed, Legislative Decree n° 209 of 2023 (which forms part of a wider tax reform) amended article 73 paragraph 3 of the TUIR (*Testo Unico delle Imposte sui Redditi*), introducing the two new connecting factors to determine companies' tax residence: the place of effective management (*sede di direzione effettiva*) and the primary day-to-day management (*gestione ordinaria in via principale*). These criteria have substituted the traditional criteria of the administrative seat (*sede amministrativa*) and main business purpose (*oggetto principale*), with the objectiveof making the Italian system more aligned and consistent with the international framework, particularly with the OECD Model Convention.

This reform, while presented as a step toward alignment with international standards, raises several questions: how do the new criteria interact with each other? The question

of whether they provide clearer guidance in distinguishing between strategic and operational management is also relevant. Furthermore, to what extent are they consistent with international standards?

Chapter 2 focuses on the international framework, examining article 4 of the OECD Model Tax Convention. The analysis addresses how residence is defined for treaty purposes, the evolution of the tie-breaker rule to address conflicts of residence, and the introduction of the mutual agreement procedure (MAP) in the 2017 update.

This chapter also further explores the relationship between the OECD framework and Italian law, highlighting the interpretative challenges that arise when domestic and treaty-based concepts intersect.

The final chapter of the work is dedicated, as previously mentioned, to the comparative analysis of the tax residence of companies in three relevant jurisdictions: the United Kingdom, the United States and France. The comparative perspective is adopted to underscore both the similarities and the divergences with the Italian system, thereby raising broader questions concerning the coexistence of diverse domestic approaches within the international tax framework and their interaction with OECD and EU standards.

The dissertation concludes with a reflection on the broader policy implications of these findings.

In this light, the research calls for a reflection on the broader policy implications of companies' residence rules, both for taxpayers seeking predictability and for States that aim to protect their tax bases. The following analysis tries to lucidate on these dynamics by contextualising the Italian reform within the broader international and comparative debate, whilst also raising the fundamental question of whether greater coherence and certainty in the determination of tax residence of companies can ever be achieved.

Chapter 1: Tax Residence of Companies in Italy

1.1. Legal definition and traditional framework: article 73 of the TUIR (*Testo Unico delle Imposte sui Redditi*)

Tax residence of companies is *"one of the cornerstones of corporate income taxation, both in domestic and international law".*[1] It is a dynamic concept, subject to several evolutions due to diverse causes.

Historically, in domestic law, tax residence of companies has been related, alternatively, to the territorial principle, or to the worldwide principle, as a connecting factor: a proxy to assess corporate tax liability: its scope and its extent.

Based on the territorial principle, a resident company is subject to tax in respect of income realized from sources located in its own country of residence; whereas, following the worldwide principle, a resident company is subject to tax in its residence country on all income realized from sources located in both domestic and foreign countries.

In international law, the main function of tax residence is to allocate, or better, reallocate the power to tax between states, specifically contracting states of the so-called DTT (Double Taxation Treaties), aimed at avoiding or minimizing the international double taxation phenomenon.[2]

As said, tax residence is a concept constantly changing and evolving. There is no specific definition of tax residence within international law. Article 4 of the OECD Model Convention,[3] which is the most important source in the international framework, defines the term "*resident",* referring to the domestic provision of each Contracting State, in order to ascertain whether a person is liable to tax in such Contracting State. Thus, the concept of tax residence for international law is characterized by elasticity and strictly follows the developments in domestic law. As a

[1] TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.3 ff. EALTP Annual Congress Łódź (2017).
[2] *Ibid.*
[3] Article 4, OECD Model Convention paragraph 1, *"For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein."*

consequence, double tax treaties contain just a coordination between the domestic criteria, but there is no a specific definition of the concept within them.

The Italian legal system defines tax residence of companies in article 73, paragraph 3 of the TUIR (*Testo Unico delle Imposte sui Redditi)*, Presidential Decree n° 917 of 22 December 1986. This provision has recently undergone an evolution - which will be largely discussed in the next section - by Law n° 111 of 9 August 2023 and Legislative Decree n° 209 of 27 December 2023.

Article 73 of TUIR is one of the rules underlying this piece of legislation. It is headed "Taxable persons", and it defines the persons subject to pay corporate income tax in Italy on the income generated worldwide (worldwide taxation principle). Accordingly, paragraph 3 of the provision, utilizes the criterion of residence, further defined by the connecting factors (or, as we will see, the relevant criteria) of the legal seat (or registered office), the place of effective management and the primary day-to-day management.

Understanding this legal framework requires a full analysis of the provision, followed by a focus on the connecting factors that establish Italian tax residence.

The residence criterion is used to identify entities subject to IRES (*Imposta sui Redditi delle Società,* Italian corporate income tax). Hence, article 73 of the TUIR, in its first paragraph, utilizes the criterion of residence within the Italian territory. According to this provision, *"public limited companies and limited companies limited by shares, limited liability companies, cooperative societies and mutual insurance companies, European companies (Regulation (EC) No 2157/2001) and European cooperative societies (Regulation (EC) No 1435/2003) resident in Italy"* are liable to pay corporate income tax in Italy.[4]

[4] The provision has a wider scope, which will not be object of this work. The translation of the parts of the provision which will not be analysed is included here:
"*b) public and private entities other than companies, as well as trusts, resident in the territory of the State, whose exclusive or principal object is the exercise of commercial activities;*
c) public and private entities other than companies, trusts whose exclusive or principal object is not the exercise of commercial activities, as well as collective investment schemes, resident in the territory of the State;
d) companies and entities of any kind, including trusts, with or without legal personality, not resident in the territory of the State.

Paragraph 3 of article 73 of the TUIR provides that: *"For income tax purposes, companies and entities are considered resident in the territory of the State if, for the majority of the tax period, they have their registered office, their place of effective management, or their primary day-today management within the territory of the State. For the purposes hereof, the place of effective management means the continuous and coordinated taking of strategic decisions concerning the company or entity as a whole. Primary day-to-day management means the continuous and coordinated performance of day-to-day management acts concerning the company or entity as a whole."*[5]

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2. Among the entities other than companies, referred to in letters b) and c) of paragraph 1, there are included, in addition to legal persons, unrecognized associations, consortia, and other organizations not belonging to other taxable persons, in respect of which the condition for taxation occurs in a unitary and autonomous manner. Among the companies and entities referred to in letter d) of paragraph 1, companies and associations indicated in Article 5 are also included. In cases where the beneficiaries of the trust are identified, the income earned by the trust is in any case attributed to the beneficiaries in proportion to their share of participation identified in the instrument establishing the trust or in other subsequent documents or, failing that, in equal shares.

[...]

4. The exclusive or principal object of the resident entity is determined based on the law, the deed of incorporation or the articles of association, if existing in the form of a public deed or a authenticated or registered private agreement. The principal object means the essential activity to directly achieve the primary purposes indicated by the law, the deed of incorporation, or the articles of association.

In the absence of the deed of incorporation or the articles of association in the aforementioned forms, the principal object of the resident entity is determined based on the activity actually carried out in the territory of the State; this provision applies in any case to non-resident entities.

[...]

5-quater. Unless proven otherwise, companies or entities whose assets are predominantly invested in units or shares of real estate collective investment schemes, and which are directly or indirectly controlled, through nominee companies or intermediaries, by subjects resident in Italy, are considered resident in the territory of the State. Control is determined pursuant to Article 2359, paragraphs one and two, of the Civil Code, also for participations held by subjects other than companies.

5-quinquies. The income of collective investment schemes established in Italy, other than real estate collective investment schemes, and of those based in Luxembourg, already authorized for placement in the territory of the State, referred to in Article 11-bis of Decree-Law No. 512 of September 30, 1983, converted, with amendments, by Law No. 649 of November 25, 1983, and subsequent amendments, is exempt from income taxes provided that the fund or the entity responsible for management is subject to forms of prudential supervision. Withholding taxes applied to capital income are definitive. The withholding taxes provided for in paragraphs 2 and 3 of Article 26 of Presidential Decree No. 600 of September 29, 1973, and subsequent amendments, on interest and other proceeds from current accounts and bank deposits, and the withholding taxes provided for in paragraphs 3-bis and 5 of the same Article 26 and by Article 26-quinquies of the aforementioned decree, as well as by Article 10-ter of Law No. 77 of March 23, 1983, and subsequent amendments, do not apply."

[5] The provision has a wider scope, which will not be object of this work. The translation of the parts of the provision which will not be analysed is included here:

These three criteria have recently had an evolution: the registered office (or legal seat) criterion has remained the same and it is the place indicated in the company's articles of association. We could then say that this one is a purely formal criterion.[6] The second two criteria have been amended: originally the criteria of the administrative seat and of the main business purpose were used. The reform opted to replace the place of administrative seat criterion with the place of effective management criterion and the primary day-to-day management criterion, whilst the main business purpose criterion has been removed.[7] Comparing these two criteria with the one of the legal seat, they were substantial criteria, whilst the legal seat was (and still is) a formal one. The reform has impacted precisely this substantive aspect. Thus, the amendments were intended "*to make it coherent with the best international practice and with the conventions signed by Italy to avoid double taxation, as well as to coordinate it with the discipline of the permanent establishment",* as written in article 3 of Law August 9th, 2023, n° 111. This piece of legislation is an enabling act acknowledged and implemented by the Italian Government with the Legislative Decree n° 209 of 27 December 2023, which defined the two new criteria, within the bigger framework of the Tax Reform.

A fundamental corollary of the three relevant criteria is the temporal criterion, consequently, a company is deemed to be a resident of the State if it alternatively fulfils one of the relevant criteria *"for the majority of the tax period".* To be deemed as resident for tax purposes, it is not sufficient to just satisfy one of the relevant criteria, it is also necessary to do it for at least 183 days, which is the majority of the tax period mentioned by the norm. This criterion is a peculiarity of the Italian system. Indeed, in

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"Collective investment schemes are deemed resident if established in Italy. Furthermore, trusts and institutions with analogous features established in States or territories other than those listed in the Decree of the Minister of Economy and Finance issued pursuant to Article 11, paragraph 4, letter c), of Legislative Decree No. 239 of April 1, 1996, shall be presumed resident in the territory of the State, unless proven otherwise, where at least one of the settlors and at least one of the beneficiaries of the trust are tax resident in the territory of the State. Moreover, trusts established in a State other than those listed in the Decree of the Minister of Economy and Finance issued pursuant to Article 11, paragraph 4, letter c), of Legislative Decree No. 239 of April 1, 1996, shall also be presumed resident in the territory of the State, unless proven otherwise, when, subsequent to their formation, a subject resident in the territory of the State makes a transfer to the trust involving the transfer of ownership of real estate or the creation or transfer of real property rights, including fractional interests, as well as restrictions on the use thereof."

[6] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024, Riflessioni sui temi principali,* p.41, Lefebvre Giuffrè, Milano, (2025).

[7] The entire evolution of the criteria will be discussed in detail in the following sections.

the majority of other countries systems' the split year mechanism is applied. The latter implies the acquisition or loss of the resident status instantaneously with the transfer in the territory of another country, without any need to assess the permanence in that territory for any given period of time. This discrepancy in respect of other systems and of DTT can lead to interpretative and double residence issues.[8]

In the field of company's tax residence, especially from a cross-border perspective, one cannot disregard the analysis of the rebuttable presumption of fictitious foreign residence (esterovestizione). It is embodied in paragraph 5-*bis* and 5-*ter* of article 73 of the TUIR[9] and it has a major relevance within the legal framework.

Beforehand, it is essential to delineate what fictitious foreign residence is and subsequently to analyse the presumption. Part of the case law of the Italian Court of Cassation[10] considers fictitious foreign residence as an abusive phenomenon, consisting in the "*fictitious relocation of the tax residence of a company abroad, particularly to a country with a more advantageous tax treatment than the domestic one, with the obvious purpose of evading the more burdensome national tax regime".*[11]

Therefore, according to this orientation, the aim of fictitious foreign residence's provisions it is only to counteract an elusive practice.

Other part of the case law of the Italian Court of Cassation,[12] on the other hand, with a wider and less restrictive perspective, considers fictitious foreign residence's provisions as disregarding "*the fictitious or abusive nature of the relocation of the*

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[8] See VALENTE G., *La Residenza Fiscale delle Società e degli Enti,* Manuale della Fiscalità Internazionale, Manuali Eutekne, Chapter II, (2020).

[9] Article 73 of the TUIR:

"5-*bis*. *Unless proven otherwise, companies and entities holding controlling participations, pursuant to Article 2359, paragraph one, of the Italian Civil Code, in the subjects referred to in letters a) and b) of paragraph 1, are also deemed to be resident in the territory of the State if, alternatively:*

a) they are controlled, even indirectly pursuant to Article 2359, paragraph one, of the Civil Code, by subjects resident in the territory of the State;

b) they are administered by a board of directors, or other equivalent management body, composed for the majority of its members of director resident in the territory of the State".

5-*ter. For the purposes of verifying the existence of the control referred to in paragraph 5-bis, the situation existing at the closing date of the financial year or management period of the controlled foreign subject shall be relevant. For the same purposes, in the case of natural persons, account shall also be taken of the voting rights attributable to the family members referred to in Article 5, paragraph 5."*

[10] See*: Cass.* 21.12.2018 n.33234, *Cass.* 11.2.2022 n.4463, *Cass.* 8.3.2022 n.7454, *Cass.* 15.3.2022 n.8297.

[11] See*: Cass.* 7.2.2013 n.2869.

[12] See*: Cass. 11.4.2022 n.11709 and 11710, Cass. 25.7.2022 n.23150.*

residence in the foreign State"[13] and as intended to "*be only aimed to grant a correct redistribution of the power to tax between States".*[14]

Having clarified how Italian Court of Cassation defines fictitious foreign residence, it is possible to go into the details of the discipline of the presumption, which strictly follows the principle of substance over form. Pursuant to paragraph 5-*bis* of article 73 of the TUIR, companies are deemed to be resident in the territory of the State if they hold controlling participations[15] in Italian resident companies and are themselves either controlled by an Italian resident mother company or administered by a board of directors (or an equivalent body of management) composed for the majority of directors resident in the territory of the Italian State. Hence, the provision, established that the foreign company controls the Italian resident company, identifies two criteria to fulfil in order for the presumption to be applied.

As said, one of the criteria is control by participations by a company deemed as resident in Italy, which can be fulfilled holding the majority of voting rights exercisable at the ordinary shareholders' meeting (*de jure* control) or holding a sufficient number of votes to exercise a dominant influence at the ordinary shareholders' meeting (*de facto* control). In order to establish if the foreign company, controlling the Italian one, is itself controlled by an Italian company, it is necessary to ascertain if the majority of shares of the former is entirely held by the latter company, without the holding of other shares by the latter's shareholders being relevant.[16]

The presumption of fictitious foreign residence also applies if the company scheme is complex, involving the interposition of foreign sub holdings in the company chain.[17]

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[13] CORSO L. and VALENTE G., *Esterovestizione,* Eutekne Guides (14.1.2025), https://www.eutekne.it/Servizi/GuideEutekne/Default.aspx?IDRecen=556317 .

[14] *Ibid.*

[15] Article 2359 paragraph 1 of Italian Civil Code:

"*The following are considered controlled companies:*

1) *Companies in which another company holds a majority of the voting rights exercisable at the ordinary shareholders' meeting;*
2) *Companies in which another company has a sufficient number of votes to exercise a dominant influence at the ordinary shareholders' meeting;*
3) *Companies that are under the dominant influence of another company by virtue of specific contractual constraints with it".*

[16] See CORSO L. and VALENTE G., *Esterovestizione.*

[17] Circular n°28/E/2006 of the: *"The presumption of Italian tax residence for the foreign company directly controlling an Italian company will, in fact, render the presumption operative also for the*

The other criterion (once established the control of an Italian company by the foreign one) is the residence of the majority of components of the board of directors (or an equivalent body of management), fulfilled if for the majority of the tax period,[18] most of the components of the board of directors are deemed to be resident in Italy, pursuant to article 2 of the TUIR.[19]

Paragraph 5-*ter* of article 73 of the TUIR points out that "*For the purposes of verifying the existence of the control referred to in paragraph 5-bis, the situation existing at the closing date of the financial year or management period of the controlled foreign subject shall be relevant".*

As aforementioned, the presumption of fictitious foreign residence is rebuttable, since paragraph 5-*bis* of the TUIR states: "*unless proven otherwise*". The direct implication of this provision is the reversal of the burden of proof on the taxpayer, implying that "*to rebut the presumption, the taxpayer shall bear the burden of proving, with adequate and convincing arguments, that the place of effective management of the company is not in Italy, but rather abroad. Such arguments and evidence must demonstrate that, notwithstanding the aforementioned conditions for the applicability of the rule, factual elements, situations, or acts exist that are capable of demonstrating a concrete establishment of the effective management in the foreign State".*[20]

1.2. Relevant (Traditional) Criteria:

The Tax Reform provided by Law n°111/2023 and Legislative Decree n°209/2023 edited the relevant criteria (or connecting factors) to assess companies' tax residence. It modified paragraph 3 of article 73 of the TUIR, through the replacement of the administrative seat criterion with the criteria of the place of effective management

foreign company situated in the immediately superior tier of the corporate chain; the latter will, in effect, directly control the foreign sub-holding company deemed resident in Italy."

[18] Revenue Agency Circular n°11/E/2007: *"Furthermore, the company shall also be considered tax resident in Italy if, for the majority of the tax period, it is predominantly administered by directors resident in the territory of the State."*

[19] *Ibid.*

[20] Revenue Agency Circular n°28/E/2006.

(PoEM) and of the primary day-to-day management, and through the elimination of the main business purpose criterion.[21] [22]

The tripartite setting and the reference to the administrative seat and to the main business purpose both derive from the Private International Law approach, now crystalized in article 25 of Law n°218 of 1995.[23] The reference is, at first to a formal criterion, the legal seat (better, the place where the company is incorporated), and then to the different places where the administrative seat or the main business purpose are incorporated or conducted. The latter are two substantive criteria. Again, the general principle of substance over form is applied.

Deriving from a definition peculiar to Private International Law and to Civil Law, tax definitions have suffered their influence, even if in article 73 paragraph 3 of the TUIR there is no direct referral to Private Law rules.[24] [25] In this context, a relevant innovation has been made by the Legislative Decree n° 209 of 2023, providing for a tax definition of the two new criteria introduced, making it no longer necessary to resort to definitions from other law branches.[26]

In order to best understand the extent of the reform, and consequently of the individual criteria's changes, it is important to understand each of the previous criteria and the related discipline.

[21] Article 2 of Legislative Decree n°209 of 27 December 2023.

[22] Which has been object of several interpretative issues within the previous years, especially in the context of the coordination with the administrative seat criterion.

[23] Article 25 of Law n°218 of 1995:

"*Companies, associations, foundations, and any other entity, whether public or private and even if lacking an associative nature, are governed by the law of the state in whose territory the incorporation procedure was completed. However, Italian law shall apply if the administrative seat is located in Italy, or if the main business purpose of such entities is situated in Italy*."

[24] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* pp.38-40.

[25] This differs from the rules on natural persons' residence under article 2 paragraph 2 of the TUIR which include a direct referral

[26] *Ibid.*

1.2.1. Legal seat (registered office)

The legal seat of the company, also known as the registered office or place of incorporation, is the first of the three relevant criteria to assess tax residence of companies. This criterion, as already mentioned, has suffered no changes with the Tax Reform of 2023. It is the formal criterion, fulfilled when the company sets in the territory of the State its registered office, that is the place indicated in the memorandum of association or in the articles of association. The legislator did not choose the place of incorporation as the main connecting factor. Instead, by focusing on a company's memorandum of association and articles of association, the intention is to intend companies as evolving networks of relationships rather than merely as contracts. "*Reference to such elements, albeit formal in nature, is therefore consistent with the need to anchor taxation to a criterion of genuine territorial connection with the State, capturing, from time to time, the evolving nature of economically relevant relationships".*[27]

As a consequence, the criterion features two issues: on the one hand, it is only applicable to those companies and entities obligated by law to indicate their legal seat within their memorandum of association or articles of association. Thus, the criterion applies just to companies and entities with legal personality; or, at most, it applies to those companies and entities who indicated that information without any obligation provided by law to do so.

On the other hand, the criterion, being such formal, is easily circumvented, like the Italian Court of Cassation pointed out in its case law: based on this criterion, a company can be deemed to be resident in Italy on the basis of simple findings of documents such the memorandum of association or the articles of association, with no regard to substantive elements, like the place where the activity is effectively carried on.[28] Therefore, the legal seat indicated in the mentioned documents, could be "*a fictitious one and not coincide with the effective one".*[29]

It is now necessary to raise a few remarks regarding the transfer of companies' legal seat to another State during the tax period and its consequences. The legal framework

[27] See SALVINI L. (ed.), *Diritto tributario delle attività economiche,* 2nd ed, Giappichelli, 2022, p.74
[28] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* pp. 40-41.
[29] Cass. 23.2.2012 n°7080; Cass.13.2.2014 n°6995; Cass.4.9.2018 n°39678.

from which to start is article 25 of Law 218 of 1995. The crucial element to take into consideration is the "*legal continuity*".[30] From a civil law point of view, in order to effectively transfer the legal seat to another country, it is necessary to move it in accordance with the laws of both the origin country and the destination country systems. Therefore, "*the legal continuity of the company is conditional upon the admissibility of the transfer in both jurisdictions. In essence, a foreign company that has transferred its registered office to Italy becomes a company governed by Italian law without the need for ex novo incorporation, provided that the transfer of said registered office is permitted by the law of the state in which it was incorporated".*[31] Then, if the legal seat's transfer does not constitute a terminating event in the jurisdiction of origin, the latter's transfer to Italy won't result in the dissolution of the company and it won't prejudice its legal continuity.

From a tax perspective, "*in the event of a transfer of the registered office from Italy abroad with legal continuity, the entity will be considered resident in the territory of the State for the entire fiscal year if the transfer is perfected after a number of days exceeding half of the tax period have elapsed. Conversely, in the case of a transfer of the registered office to Italy under conditions of legal continuity, the tax period is not interrupted, and the entity will be considered resident in the territory of the State for the entire fiscal year if the transfer is perfected before a number of days equal to half of the tax period have elapsed".*[32] In other words, tax treatment depends primarily on two factors: first, it must be established if the company maintains its legal existence following the transfer; then, it must be ascertained the precise timing of the legal seat transfer in relation to the tax period.

[30] See VALENTE G., *La Residenza Fiscale delle Società e degli Enti,* Chapter II.

[31] Revenue Agency Ruling n°9/E/2006. See also: Revenue Agency Ruling n°345/E/2008

[32] See VALENTE G., *La Residenza Fiscale delle Società e degli Enti,* Chapter II.

1.2.2. Administrative seat

The administrative seat criterion, together with the main business purpose criterion, was a substantive criterion. This means that it was not always easy to assess its existence, since the verification was based on factual elements, changing from a case to another, depending on the structure of the company, on the activity carried on by the latter and on many other elements. On one hand this flexibility could be considered as an advantage, but at the same time, it could be considered also as a disadvantage in terms of interpretation of law and legal certainty. These interpretative challenges, in addition to the difficulties in coordinating it with the main business purpose criterion, led to the rewriting of article's 73 paragraph 3 of the TUIR and they constituted its *ratio*.

There was no unanimously accepted definition of the administrative seat. The prevailing scholarly opinion[33] identified the administrative seat at the place where the strategic top management activity is carried on, specifically, the place where the most relevant decisions for the company's management are taken. This place not always coincide with the place where the directors reside.[34] This opinion also emphasized that *"administrative offices must be understood not in a material sense, but in a substantive one, excluding, for example, that such a prerequisite can be established when professional firms or service companies are resorted to, and this not only when they are used for the mere domiciliation of the registered office, but also when they are appointed as directors of the foreign entity: indeed, given that such firms and service companies operate for a plurality of clients and merely replicate decisions taken elsewhere, more correctly, regard should be had to the place where the actual management activity is carried out",*[35] other part of the tax doctrine, on the other hand, pointed out that "*the appointment of local professionals as directors can sometimes be justified by their knowledge and experience concerning the specific circumstances of the country in which the company operates, consequently necessitating an assessment based on other factors as to whether their directorial activity is effective and sufficient*

[33] See MELIS G., *Trasferimento di residenza fiscale e imposizione sui redditi, Milano (2009);* GARBARINO C., *La tassazione del reddito transnazionale, Padova (1990).*

[34] Assonime Circular n°67/2007. See also: MANZITTI A., *Considerazioni in tema di residenza fiscale delle società,* in *Rivista di Diritto Tributario,* 1988,186.

[35] See Assonime Circular n°67/2007.

to establish the place of the administrative seat, taking into account, for this purpose, for example, the independence of the local directors or the conformity of their actions to the objective interest of the company they administer".[36]

Italian courts have generally adopted a balanced approach, favouring an intermediate solution. The latter intermediate solution took into account not only the elements of the strategic top management activity, but also the typical elements of the current (or, day-to-day) management. This approach was straightly connected with the notion of "*effective seat*" provided by the article 46 of the Italian Civil Code.[37] Indeed, the connection with the "effective seat" notion was due to its contraposition with the notion of "l*egal seat*" derived from Civil Law. The former was intended as "*The place where the administrative and management activities of the entity are actually carried out and where the shareholders' meetings are convened, so the place specifically designated and regularly used for the centralisation — in both internal and external relations — of the company's bodies and offices for the purpose of conducting its business and directing its operations".*[38] Moreover, Italian Court of Cassation, with an opinion[39] confirmed by the Court of Justice of the European Union in the *Planzer Luxembourg* case,[40] underlined that the effective seat not necessarily coincided with the place where an address of the legal person was located or with "*a person who, in general terms, looks after the entity's interests or is assigned or appointed to representative offices, branches or business premises*". Thus, what really mattered in the assessment of the effective seat was "*The presence of the company's representative bodies (such as chairpersons or directors) or of employees vested with broad managerial powers".* Hence, administrative seat could be defined as the place where the administrative body took the top management and commercial decisions in order to carry on company's business activities.

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[36] *Ibid.*

[37] Article 46 of Italian Civil Code: "*Where the law makes certain effects dependent upon residence or domicile, with respect to legal persons, regard shall be had to the place where their registered office is established.*

In cases where the registered office established pursuant to Article 16 or the office resulting from the register differs from the effective seat, third parties may also consider the latter as the seat of the legal person".

[38] Cass. 21.6.2019 n.16697.

[39] Cass. 9.6.88 n.3910.

[40] CJEU 28.6.2007, C-73/06.

Court of Justice of the European Union in the mentioned judgment framed this concept, defining the effective seat as the place where "*the functions of its central administration are carried out"*. Furthermore, in determining "*a company's place of business"* it was essential to take into consideration a set of factors, and, primarily: "*its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined",* but also "*the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place".*

This analysis encompassed cases involving the delegation of management powers, specifically those concerning companies where the activities were carried out by a chief executive officer or by an executive committee. Administrative seat could be deemed to be where the delegated powers were materially exercised, provided that such exercise did not merely amount to a non-autonomous implementation of the decisions previously taken by the board of directors.[41] Moreover, the place where the shareholders' meetings were convened could be relevant, provided that one or more of the shareholders held the management power or , "*even the place where one of the shareholders is deemed to be resident, where his degree of interference in the management of the company is particularly evident, to the extent that the entity may be regarded as a mere extension of the aforementioned shareholder".*[42]

In order to assess the effective seat, a relevance could eventually be attributed to the place where the directors had their residence, considering the volatility of their activity, "*essentially based on cognitive and relational processes which, thanks also to modern technologies, can be communicated and enforced in a very short time even in locations far away from each other*".[43]

As stated above, the favoured solution for Italian courts to assess the administrative seat was to be found in the middle, taking into account also "*those significant substantive elements — including, where applicable, the place where the core business*

[41] Italian Research Centre Foundation of the National Union of the Young Chartered Accountants Circular 20.05.2009 n.7.
[42] See CJEU, C-73/06.
[43] *Ibid.*

activity is carried out — which, despite formal data concerning the geographic location of the administrative and management activities, indicate that such functions are in fact attributable to a different territorial context".[44] Over time, the notion has been incorporated into the tax system, evolving from the civil law concept of the effective seat, intended as the place where the company managed and directed towards the more defined notion of the administrative seat. This latter notion has been further refined into two distinct components: "*top strategic management*" and of "*current (or day-to-day) management*". The current management can be identified with the place where the company keeps its accountability, where the bank accounts are available, where employees and offices are located, where relations with third parties and consultants are entertained. All this factors, which fall under the umbrella of the current management, are characterized by their substantive nature, allowing for an effective territorial connection to be established.[45]

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[44] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* p.43.

[45] This opinion of the Italian courts has been used to counteract the phenomenon of fictitious foreign residence.

See: Prov. Tax Court of Florence, 13.7.2007, n.108: the case concerned a San Marino-based company whose sole purpose was the holding of trademarks, and which was controlled via a Luxembourg sub-holding by an Italian parent company operating in the fashion industry. The existence of fictitious foreign residence was deemed proven on the basis of several factors relating both to strategic top-level management and to day-to-day operational management. On the one hand, emphasis was placed on the circumstances regarding the ownership and management of the trademarks, which were handled by the Italian parent company; given that those trademarks were the sole assets held by the San Marino entity, such circumstances revealed that the strategic decisions concerning its activity were, in fact, taken in Italy.

Similarly, the courts stressed that "*even for the day-to-day operational management of the appellant, the latter relied on the support of the Italian parent company, which handled the various relationships maintained by the former with suppliers, banks and insurance companies*."

See also, Cass. 22.4.2015 n.8196: An American company engaged in the wholesale marketing of edible oils and fats, wholly owned by an individual resident in Italy through an Italian holding company. In this case, as regards strategic top-level management, the fictitious foreign residence of the U.S. company was established on the grounds that the individual was the sole signatory of the most significant corporate documents (*i.e.*, minutes of the Board of Directors and minutes of the annual shareholders' meeting), and that all managerial decisions and strategic and operational functions were centralised in Italy. As for day-to-day operational management, it was considered relevant that accounting records of the entity were found at the premises of the sole shareholder in Italy, specifically in Monopoli, and that instructions for recording management transactions, as well as for executing bank transfers and payments, originated from Italy. It was also noted that several other aspects of the company's operations — including consultancy services, insurance arrangements, employment and collaboration relationships, as well as transport and shipping activities — were likewise managed from Italy.

The same perspective has been accepted by the Italian Tax Authorities, which over time has given relevance to both the concepts of the strategic top management and of the current management. Among all, really significant is the Italian Tax Authority Ruling of the 5th of November 2007, n°312/E, where the Italian Tax Authority clarified that to assess the effective location in a foreign country of the administrative seat, it is relevant, *inter alia*, the place where contracts with the company's counterparties are made, as well as the place where financial and banking transactions are actually carried out.[46]

This hybrid approach showed some issues for the taxpayer, who had to assess a range of factors that were heterogeneous and often conflicting, bearing in mind that current management activity follows strategic top management activity and is essentially its executive phase. Given that, it was possible that the places where those activities were carried out did not coincide and then, the determination of the place where the administrative seat was located could be different depending on the activity actually exercised and on the relevance given to the single factors used to determine the administrative seat. The main consequence was the violation of the principle of legal certainty.[47] The administrative seat criterion has been influenced also by the international framework, particularly by the place of effective management (PoEM) criterion, developed by the Organization for Economic Co-operation and Development (OECD). The latter criterion has long represented the tie-breaker rule to solve the issues related to dual residence within the OECD Model Tax Convention to avoid double taxation.

OECD, to define the concept, opted for a solution which intended it as the place "*where the key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made".*[48] Hence, this solution takes

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[46] *"The assessment of the company's actual place of management or of the location of its main business activity involves complex factual issues concerning the company's genuine connection with a given territory. […] The demonstration of rebuttal evidence, based not only on documentary records but also on all concrete elements capable of proving, in particular, the place where strategic decisions, conclusions of contracts, and financial and banking operations are actually carried out, is essential to enable the required case-by-case assessment. Such an assessment is necessary to ensure that the anti-avoidance rule is proportionate to its legitimate aim, to mitigate the general scope of the provision in question, and thus to confirm its compatibility with EU law."*

[47] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* p.52.

[48] Paragraph 24 of the Commentary on Article 4 of the OECD Model Tax Convention.

its cues from the Anglo-Saxon concept of the central management and control, which gives relevance to the decisions deemed crucial for the life of the company.

In 2017 the OECD Model Tax Convention has been modified, and the Mutual Agreement Procedure (MAP) has become the new tie-breaker rule to solve dual residence issues. This has not erased the use of the PoEM criterion, but degraded it as one of the elements that the National Competent Authorities must take into consideration when applying the MAP.[49]

As stated, the PoEM has influenced the domestic case law interpretation of the administrative seat, since: "*The two sets of rules, domestic and treaty-based […] are substantially equivalent, since the latter refers, as a general criterion, to domestic legislation and, in cases of established dual residence, adopts as a subsidiary criterion the company's 'effective seat', which also constitutes the decisive test under domestic law, according to the prevailing interpretation in both legal scholarship and case-law".*[50]

Italian Court of Cassation has recently confirmed this orientation, underlining the significance of the PoEM for the interpretation of the notion of administrative seat, affirming that: "*Treaty law also contributes to guiding the interpretation of the concept of 'administrative seat', particularly through the conventions entered into by States to regulate their respective taxing rights, which are based on commonly accepted models and commentaries that are, at the very least, indicative of a shared understanding of territorial connecting factors within the broader international framework*."[51]

Based on this orientation, one could say that the administrative seat exactly corresponded with the PoEM, but there is another element to take into account: Italy has made an observation to the definition of PoEM in the Commentary on Article 4 of the Model Convention, emphasizing that the assessment of the PoEM, and then, of the administrative seat, had to consider also "*the place where the main and substantial activity of the entity is carried on".* This orientation is related with the other traditional relevant criterion used by the Italian domestic framework, the main business purpose criterion, which will be analysed in the following section. Italian Court of Cassation

[49] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* pp. 55-56.
[50]Cass.7.2.2013 n.2869.
[51] Cass. 25.7.2022 nn. 23225 and 23150.

pointed out that the main business purpose was not a criterion in contrast with the PoEM, but instead, it contributed to identify the latter.[52]

1.2.3. Main business purpose

The main business purpose criterion, together with the administrative seat criterion, had a substantive nature and contributed to determine the place where the company's activity was actually carried out.

In the assessment of such criterion, it was needed to take into consideration, not so much the statutory activity, but rather, the one actually carried out by the company;[53] and further, the features of the specific activity exercised, and the nature of the assets held (not the place where they were located),[54] in order to determine if their use required an *in loco* presence.[55] [56]

The definition of the criterion was provided in paragraph 4 and 5 of article 73 of the TUIR as "*the essential activity to directly achieve the primary purposes set out by law, the articles of association or the by-laws".*[57] The reform has not modified the two mentioned paragraphs; thus, the definition of the main business purpose has remained the same as in the previous discipline. What the reform has changed is that the main business purpose is not used anymore as a criterion to assess tax residence of companies. Instead, it is solely used to determine whether an entity has a commercial or not commercial nature, provided that it is an Italian resident.

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[52] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* p.58.
[53] Italian Tax Authorities Circular n°12/E/2003 and Italian Tax Authorities Circular n° 28/E/2006.
[54] Even though, Italian Tax Authorities, in some document of practice, particularly those concerning real estate companies and shell entities, appeared to have taken a different view, stating that foreign companies owning only real estate in Italy, should be considered tax resident in Italy, as their main business purpose was located there. Similarly, a company whose sole activity was the management of a single property located in Italy, should also be treated as Italian tax resident, for the same reason as above (Italian Tax Authorities Ruling n. 591/2020).
[55] See: Assonime Circular n°67/2007.
[56] ANTONINI M., *Brevi riflessioni in merito alle interrelazioni tra rapporti di controllo, oggetto principale e stabile organizzazione*, in *Rivista di Diritto Tributario*, 2008.
[57] Article 73 paragraph 4 TUIR: "*The exclusive or principal object of the resident entity shall be determined on the basis of the law, the articles of association or the by-laws, provided they exist in the form of a notarial deed or a privately authenticated or registered agreement. The term 'principal object' refers to the core activity directly aimed at achieving the primary purposes set out by law, in the articles of association or in the by-laws*".

Paragraph 5 provided that, in the absence of the articles of association or of the by-laws in the mentioned forms, the main business purpose was deemed with regard to the "*activity effectively carried out within the territory of the State".*[58]

In cases of holding companies, some distinction must be kept in mind, in order not to confuse the main business purpose of the holding company with the subsidiaries' ones. For a pure holding company, the main business purpose could be deemed considering the activity of direction and coordination, whereas for an operational holding company what mattered was the set of auxiliary activities provided to the subsidiaries. Hence, the main business purpose of a holding company was located in the place where the aforementioned activities were carried out, regardless of the place where the subsidiaries were seated.[59]

Another distinction to bear in mind was the one between the main business purpose and the target market of the company, when the main activity of the company was mostly referred to a specific territory. The fact that a company was offering its goods or services in a targeted market did not necessarily mean that its main business purpose, and then, its effective seat, was located in that territory.[60] Indeed, as legal scholars have noted, the target market was one thing, but the place where the business activity was carried out was another.[61]

To conclude, in the determination of the main business purpose criterion, the reference must be to the negotiating, productive and economic relations with third parties, distinguishing the operational activity of the company from the managerial and strategic one, which was more related with the administrative seat criterion.[62]

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[58] Article 73 paragraph 5 TUIR: "*In the absence of the articles of association or the by-laws in the aforementioned forms, the principal object of the resident entity shall be determined on the basis of the activity actually carried out within the territory of the State; this provision shall in any case apply to non-resident entities."*

[59] For a wider and more exhaustive discussion, see Cass.26.2.1990, n.1439, which also highlighted the distinction between the status of a shareholder and that of a holding company, emphasizing that the latter's activity went beyond merely exercising the rights and powers associated with being a shareholder. Likewise see Cass.9.8.2002 n. 12113, which reasserted the same principles, in a case concerning a personal holding company. The Court pointed out the difference, even in the circumstance of a natural person, between the activity. of a mere shareholder and the activity of a (personal) holding company.

[60]See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* p.61. See also Cass. 17.1.2014 n.1811.

[61] MELIS G., *La residenza fiscale dei soggetti I.R.E.S. e l'inversione dell'onere probatorio di cuinall'art.73, commi 5-bis e 5-ter T.U.I.R.,* in *Diritto e Pratica Tributaria Internazionale,* 2007.

[62] See DELLA VALLE E., *Residenza e stabile organizzazione*, in *Rassegna Tributaria*, 2016.

Thus, it is reasonable to affirm that the main business purpose criterion was overlapping the day-to-day management concept.

1.3. The new rules

1.3.1. The impact of Law n° 111 of 9 August 2023 and Legislative Decree n° 209 of 27 December 2023

This section will analyse more in detail the new Italian framework to determine companies' tax residence, after the Tax Reform of 2023. Thus, the impact of the Reform, particularly the changes in article 73 of the TUIR after the intervention of the Legislative Decree n° 209 of 27 December 2023. First, the general approach of the new discipline, with its *ratio,* will be dealt with, followed by an analysis of each relevant criterion and how they have evolved.

Law n° 111 of 9 August 2023, in its article 3, paragraph 1, lett. c), enabled the Italian Government to revise, *inter alia,* the rules governing the tax residence of companies and entities other than companies, with the aim of "*aligning them with best international practice and with the double taxation treaties signed by Italy".*[63] Italian Government implemented the delegation through the Legislative Decree n° 209/2023, providing in its article 2 the new definition of tax residence of companies. As aforementioned, nothing has changed for the formal criterion of the legal seat, whereas, the administrative seat criterion has been unpacked with the provision of the

[63] Article 3 of Law n° 111/2023 paragraph 1 lett. c):
"*1.*
In exercising the delegation referred to in Article 1, the Government shall comply, in addition to the general guiding principles and criteria set out in Article 2, with the following additional general principles and criteria:
[...]
(c) to revise the rules governing the tax residence of individuals, companies, and entities other than companies, as a personal connecting factor for taxation purposes, in order to make them coherent with best international practice and with the double taxation treaties signed by Italy, as well as to coordinate such rules with the provisions on permanent establishments and the special tax regimes currently applicable to individuals transferring their tax residence to Italy, also considering the possibility of adapting them to remote working arrangements".

two new criteria of the place of effective management and of the primary day-to-day management; whilst the main business purpose criterion has been erased, due to the interpretative issues related to double taxation involved with it.[64] The Explanatory Report on the Decree clarified that the aim of the act was also to ensure greater legal certainty. The two new criteria, on the one hand maintain the reciprocal alternation structure of the previous discipline, on the other hand, present innovative aspects, referring to the substantial elements of the place where the strategic decisions are taken and of the place where the current activities of the company as a whole are effectively carried out.

The underlying *ratio* of the new legislation and of the two new connecting factors (namely, the place of effective management and the primary day-to-day management) is to point out the relevance of factual and substantive indicators of a company's actual connection to the Italian tax jurisdiction. By focusing on where strategic decisions are effectively made and where the company's core business is carried out, the law seeks to prevent formalistic or artificial arrangements aimed at avoiding Italian taxation. This substantive approach broadens the scope of tax residence rules while simultaneously enhancing legal certainty, by anchoring the assessment to verifiable, objective elements of economic and managerial reality. The inclusion of both the criteria has the aim, not only of overlapping the administrative seat criterion and its issues, but also "*of excluding undue extensions to further substantive criteria at source".*[65]

Italian Tax Authorities provided the first clarifications on the new discipline with the Circular n° 20/E of 2024, pointing out that the Decree followed the substance over form principle. Furthermore, it stated that the criterion of the main business purpose retains relevance for the distinction between commercial or non-commercial entities other than companies. It is thus maintained in paragraphs 4 and 5 of article 73 of the TUIR.

A critical issue that the reform could present, internally, is that references to the administrative seat criterion and to the main business purpose criterion remained within the Presidential Decree n° 131/1986 and the Legislative Decree n° 346/1990, concerning, respectively, the registration tax, and the inheritance and gift tax.

[64] Thus, it is more accurate to describe these modifications as a refinement of the existing rules rather than a fundamental reform.

[65] Explanatory Report on Legislative Decree No. 209/2023.

Specifically, according to article 2 paragraph 3 lett. b) of the Legislative Decree n° 346/1990, shares or equity interests in companies, as well as participations in entities other than companies, shall be deemed to be located in the State — and thus, subject to taxation where the deceased or the donor was not resident in Italy — if the company or entity has its legal seat, place of effective management, or principal object within the territory of the State. Based on such coexistence of the traditional criteria with the new ones, there could be an issue if a company is deemed to be non-resident, according with the new rules and it is, conversely, deemed to be resident according to the provisions of the inheritance and gift tax. On the basis of a systematic approach, the issue has no reason to be even put in place, since the new rules have the objective of pointing out the way through which the traditional criteria must be intended, reformulating them in a clearer way, without departing from them.[66]

1.3.2. Analysis of the new wording of Article 73 para.3 of the Consolidated Income Tax Act

1.3.2.1. Legal seat (registered office)

The general definition and legal framework of the legal seat criterion, which has suffered no change with the Tax Reform, has already been addressed in section 1.2.1; reference is therefore made to that section for a detailed analysis of those aspects.
Here, it is sufficient to add that the criterion has been subject to criticism in doctrine for its formalism and inability to reflect the actual economic and administrative connection between the entity and the State. During the implementation of Law n° 111 of 2023 the hypothesis of its downsizing, or even its elimination, had been put forward.[67] Nonetheless, the legislator has opted to retain the legal seat as an

[66] See ALBERTI P., BERNARDI S., CORSO L., DE ROSA F., ODETTO G., SANNA S., *Novità del D.lgs. 209/2023 di riforma della fiscalità internazionale,* Eutekne, 2024.
[67] TOMASSINI A. - CINOTTI C. - SANDALO A., *Principi generali del diritto tributario dell'Unione europea e internazionale*, in Various Authors., *Riforma fiscale*, a cura di Tomassini A., Milano, p.52 2023.

autonomous criterion for the assessment of tax residence, because of its clarity and ease of application.

It should be noted that many legal systems make use of formal criteria to establish a personal connection for tax purposes. Indeed, the legal seat is traditionally adopted in several civil law jurisdictions as a basis for asserting worldwide taxation over resident companies and entities. However, as stated in section 1.2.1, the ease with which this formal element may be manipulated has given rise to abusive practices, in which formal incorporation is not accompanied by any substantial economic presence in the territory of the State. Comparative analysis shows that different jurisdictions have addressed these issues in various ways.[68]

Concerns have also been raised regarding the alignment of the domestic rule with the definition of residence found in international tax treaties. According to article 4(1) of the OECD Model Convention, the determination of residence is based exclusively on substantive criteria such as "*domicile, residence, place of management, or any other criterion of a similar nature*," with no reference to formal criteria like the legal seat.

In this light, the reform's decision to place the legal seat on an equal footing with substantive criteria — such as the *place of effective management* and the *primary day-to-day management* — may appear inconsistent with the declared objective of Law n° 111/2023, which aimed to bring domestic tax law into greater harmony with international treaty standards.[69]

That said, it must be acknowledged that, under article 4(3) of the OECD Model Convention (as revised in 2017), formal criteria such as the legal seat or place of incorporation may still be taken into account during the mutual agreement procedure (MAP) to resolve conflicts of dual residence. While not sufficient alone to determine residence under treaty law, such formal elements can be considered alongside substantive ones (like the place of effective management) to reach an agreed solution between contracting states.

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[68] For an exhaustive comparative analysis of the solutions adopted by each State, see PISTONE P., *La nuova disciplina sulla residenza delle persone fisiche e delle persone giuridiche nel sistema di imposizione reddituale,* in *Dir. prat. trib. intern.,* n. 3/2023.

[69] DORIGO S., *La residenza fiscale delle società e degli enti,* DORIGO S. (ed.), *La riforma fiscale. I diritti e i procedimenti. Vol. I Diritto internazionale e cooperative compliance,* 2024.

In conclusion, although the legal seat does not independently qualify as a residence criterion under treaty law, its retention in the domestic legal framework is not necessarily incompatible with international conventions, but it might have been possible to achieve greater consistency with it by providing, for instance, that the formal criterion of the legal seat should not operate as an autonomous basis for determining tax residence. Instead, it could have been designated as a subsidiary test, to be applied only where the substantive criteria fail to produce an effective assessment (in accordance with the tiered approach consistently adopted in the application of the OECD Model Convention's tie-breaker rules).

1.3.2.2. Place of effective management

The new version of article 73 paragraph 3 of the TUIR defines the place of effective management as "*the continuous and coordinated assumption of strategic decisions concerning the company or entity as a whole.*"

This criterion has innovated in two ways: on the one hand, it replaced the administrative seat criterion, which, as discussed above, led to several critical issues with regard to its interpretation; on the other hand, it has been clearly defined by the legislator in the norm, with the aim of overcoming the previous reference to civil law criteria and categories (due to the lack of normative definition of the criterion in the previous discipline), and of aligning the new definition with the international practice.

The central element of the new criterion and of its definition is the assumption of strategic decisions, meaning that the place of effective management should be identified with the place where the high-level management is carried out, under the initiative of the top management bodies, with the aim of defining the overall course along which the company conducts its activities. In this sense, in the assessment of the residence, relevance has to be given to both strategic commercial decisions and strategic financial and organizational decisions, such as, respectively, the decision regarding market positioning in order to shape the related marketing policies, and the decision to discontinue or renew a production line in order to refocus on the company's

core business, or to finance its operations through internal resources, bank debt, or the issuance of debt securities.[70]

The definition also emphasizes that, to fulfil the criterion, the assumption of the strategic decisions needs to be continuative and coordinated in Italy, which means that it is necessary that the directions along which the company or entity carries out its activities is drawn from the Italian territory through protracted and coherent action.

The third element underlined by this new definition is the fact that the strategic decisions have to concern the company as a whole. Hence, those strategic decisions cannot regard, for example, individual business segments or detailed aspects of the overall business. On the contrary, they must concern the company as a whole, in its entirety. Accordingly, when the location of strategic decision-making differs from that of day-to-day operational decisions , it is the former that determines the company's place of residence for tax purposes.[71] As an example, the location in Italy of a company's commercial department (even where it is entrusted with the formulation and implementation of global distribution strategies) should not, in principle, lead to the conclusion that the company is tax resident in Italy, especially when strategic oversight remains with a senior management team located abroad. In such circumstances, the activity carried out in Italy reflects a functionally limited operational role rather than a central decision-making power over the entity as a whole. Thus, the presence of such a division in the Italian territory may be more appropriately analysed in terms of a potential permanent establishment, rather than an element of the company's place of effective management.[72]

As aforementioned, a key aspect of the criterion is the identification of the management level responsible for strategic decision-making, since this plays a central role in establishing the company's tax residence. Relevance must be recognized to the decisions assumed by the highest-ranking persons, "*to whom the responsibility and authority to define the general strategy and the relevant decisions for the company as a whole is attributed, due to different corporate governance models".*[73] The reference

[70] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* p.67.
[71] Assonime Circular n°15/2024, pp. 7-8.
[72]SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* p.69.
[73] DORIGO S., *La residenza fiscale delle società e degli enti,* DORIGO S. (ed.), *La riforma fiscale. I diritti e i procedimenti. Vol. I Diritto internazionale e cooperative compliance,* 2024.

is to the top-level management decisions, which takes continuatively and co-ordinately the responsibility for the key decisions of the company in its entirety. This level includes the apex level of the executive or non-executive members of the board of directors, the president, the vice president and the chief executive officer. The top-level management does not include, on the contrary, the shareholders (including controlling shareholders) with regard to the decisions taken by them due to their shareholders status and not the ones taken by reason of their specific role as directors or management responsibilities, which can be attributed to them. Accordingly, any shareholder involvement in the company's governance may be taken into account only where it reflects actual managerial functions. The Explanatory Report on Legislative Decree 209/2023 pointed out this orientation, by affirming that the place of effective management criterion "*is incompatible with an interpretation of that requirement which seeks to equate it with the shareholders' will or intent. Therefore, for the purposes of determining the place of effective management, decisions taken by shareholders that do not involve actual managerial content, as well as mere oversight or monitoring activities performed by them, are not to be considered relevant.*"

The irrelevance of shareholders decisions is a positive innovation compared to the previous discipline, since it aims to avoid confusion and misunderstandings about the real management and direction of the company.[74]

However, in practice, it is not always easy to recognize the *discrimen* between the situation in which the board of directors acts upon the proposals and recommendations of shareholders, maintaining its decision-making authority, and the opposite situation in which the board is effectively guided by a shareholder to such an extent that its functions are usurped and its authority is effectively overridden. In the latter scenario, where the role of directors is a mere formalisation of decisions already taken by the controlling shareholder, the place of effective management should be deemed to coincide with the place where such control is actually exercised.[75] In this context, particular attention should be given to multinational groups, specifically to the role played by the parent company in directing and coordinating the activities of its

[74] SAVORANA A., VISMARA F., *Prime considerazioni e spunti sulla nuova residenza fiscale delle società (in una prospettiva anche sovranazionale*), in *Riv. telem. dir. trib.*, n. 1/2024 (online published on April 18th 2024, www.rivistadirittotributario.it).
[75] *Ibid.*

subsidiaries. Part of the doctrine[76] has observed that the broad formulation of the place of effective management concept could, in theory, support the view that managerial oversight by a parent company might influence the tax residence of its subsidiaries. Nonetheless, this interpretation runs the risk of confusing civil law provisions on group governance, such as Articles 2497 *et seq.* of Italian Civil Code, with tax provisions, potentially leading to unintended consequences, as the attribution of residence to the jurisdiction of the parent company on the ground of the group management. As already seen, the cited Explanatory Report explicitly mitigates this issue, by clarifying that supervisory activities or shareholder decisions that do not amount to genuine management do not determine the place of effective management.

Therefore, it becomes essential to distinguish between general strategic coordination (which is part of a group's ordinary governance structure and should not affect residence) and situations where the parent company effectively overrides the decision-making powers of the subsidiaries, assuming direct control over their business conduct. Only in the latter case the parent company's location could potentially be deemed as the place of effective management for tax purposes.

The Reform was also intended to make the domestic substantial criteria to assess tax residence more coherent with the international practice. To do so, the Italian Government, provided for a concept which coincide with the one used in almost all the international double taxation treaties signed by Italy and most of all in the OECD Model Convention. Indeed, article 4 paragraph 3[77] of such Convention uses the place of effective management criterion as a tie-breaker rule to solve cases of dual residence.[78]

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[76]DELLA VALLE E., *Revisione dei criteri di determinazione della residenza fiscale di società*, in *il fisco*, n. 5/2024.

[77] Article 4 paragraph 3 OECD Model Convention:
"Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States."

[78] Actually, before 2017, the place of effective management was the exclusive tie-breaker rule to solve dual residence issues, whereas, from that year onwards, the Convention opted for a case-by-case approach, giving relevance to the place of effective management as one of the criteria to take into account when concluding mutual agreements to solve dual residence cases. The effect of this change is

Even though the concept originates within the international framework, part of the doctrine[79] affirmed that the introduction of a domestic definition of the criterion implies a need to find its features and elements autonomously with respect to the Commentary on the OECD Model Convention, but still consistently with it.

Despite the introduction of the definition, the concept of the place of effective management may give rise to several practical issues and uncertainties.

One critical area involves specific corporate governance structures in respect of which it is not always easy to identify where strategic decisions are taken. It is the case, specifically, of dual-board structures, where the Supervisory Board and the Management Board[80] operate in different jurisdictions, blurring the lines of managerial responsibility. In such cases, to identify the place of effective management, it is necessary to proceed with a functional analysis of the actual powers exercised by each governing body, rather than relying on their formal titles or roles.

Further complications arise for those companies governed by a sole director. In such case there is the risk that the director's personal tax residence may be used as a proxy to assess the company's place of effective management, leading to a potentially misleading representation of the company's actual governance structure; and even more if the sole director performs his duties flexibly across borders or works remotely.

Other two critical scenarios are the ones of a company which delegates operational control to a chief executive officer or to an executive committee: the place where those individuals exercise their authority in practice becomes a central factor in the assessment of tax residence.

All the aforementioned critical scenarios are exacerbated by the spread of digital technologies, through the increasing of remote meetings and cross-border decision-making, which imply a situation where the strategic decisions can be taken from multiple jurisdictions. These circumstances render the place of effective management criterion manipulable. Because of all the above reasons, the Italian legislator

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that now the PoEM has been downgraded, not being the exclusive tie-braker rule to solve dual residence issues anymore.

[79] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* p.67.

[80] See Assonime Circular n°15/2024, p.37; See also E. MARVULLI*, I nuovi criteri di natura sostanziale che radicano in Italia la residenza fiscale delle società e dei trust*, in *La gestione straordinaria delle imprese*, 2024.

introduced the alternative criterion of the primary day-to-day management, which can be useful when the place of effective management fails to produce a clear outcome.

1.3.2.3. Primary day-to-day management

Together with the place of effective management criterion, the primary day-to-day management criterion is the second innovation of the Tax Reform. It is the third alternative criterion to assess company's tax residence, with the effect that if the legal seat is located abroad and the company results to be effectively directed abroad, but the primary day-to-day management is carried out in Italy, then, company's residence can be deemed to be in Italy.[81]

Like the place of effective management, it is a substantive criterion, introduced to substitute the previous criterion of the administrative seat. The *ratio* that led to its introduction are the same mentioned in the previous section, which led to the introduction of the place of effective management criterion.

The primary day-to-day management is defined in article 73 paragraph 3 of the TUIR as "*the continuous and coordinated conduct of day-to-day operations concerning the company or entity as a whole*". The definition is constructed symmetrically with regard to the definition of the place of effective management. Also, for the primary day-to-day management reference has been made to the elements of continuity and coordination of the conduct of the day-to-day operations. This means that the conduct of occasional activities or of individual business segments it is not sufficient itself to fulfil the criterion and determine residence.

The definition underlines that the relevant activity to take into account is the conduct of the company's regular operational functions, provided that such functions are the company's main activities and are not merely ancillary. This orientation is confirmed by the Explanatory Report on the Legislative Decree n°209/2023, which stated that "*What matters for the purpose of the criterion under consideration is that the acts*

[81] See Explanatory Report on Legislative Decree No. 209/2023.

relate to ordinary management, concerning the normal functioning of the company or entity as a whole."

The distinction from the place of effective management criterion is that the primary day-to-day management attributes relevance to the decisions taken at the senior day-to-day management level, which includes figures such as executives responsible for planning and supervising teams or functions, monitoring performance, and implementing the strategic decisions taken by top management. The reference here is to non-top management levels, which implement the top-management level directives and strategic decisions. On this matter, *Assonime* Circular n°15/2024 clarified that such decisional level is to be found in between the top management level and the operational management level, where the latter conducts the day-to-day activities.

The primary day-to-day management usually coincide with invoicing, customer and supplier relations, financial dealings with banks and credit institutions, which are all activities that need a structured organisational presence. On this ground the Italian legislator gives relevance to this criterion as an autonomous one in the determination of residence, considering also that all the mentioned activities link the company to the territory where they are carried out, with the consequence of justifying taxation therein. This structured organisational presence has the function of tangible evidence of the company's integration into the legal and economic framework of the State, which allow to avoid cases of abusive relocation of residence when the company is in practice functionally and economically rooted in Italy, regardless of its strategic oversight from abroad.[82]

Therefore, the primary day-to-day management presents a lower risk of manipulation than the place of effective management, since the continuous and coordinated performance of day-to-day activities usually requires a stable and visible organisational setup. Such a structure creates a clear and enduring connection between the entity and the State where it operates.

Another essential element in the definition is expressed by the use of the adjective "primary" to describe the day-to-day activity that is conducted. Its *ratio* is to avoid the

[82] See DORIGO S., *La residenza fiscale delle società e degli enti,* DORIGO S. (ed.), *La riforma fiscale. I diritti e i procedimenti. Vol. I Diritto internazionale e cooperative compliance,* 2024, p.35.

manipulation of the criterion, as the Explanatory Report on Legislative Decree n°209/2023 clarified, affirming that the use of the cited adjective *"serves to prevent unduly extension of the personal nexus for taxation purposes in cases where only part of the relevant activities is carried out within the territory of the State, in which case the presence of a permanent establishment may be more appropriate. Similarly, the day-to-day management of a branch of business may give rise to a permanent establishment"*.

A specific aspect of this criterion is that the provision does not use the term "place" or the term "seat", like it does for the other two criteria (legal seat and place of effective management). Thus, there is no specific reference to a precise location. On this matter, part of the doctrine[83] stated that what is relevant for the purposes of this criterion is just that the underlying activity takes place within the Italian territory. Furthermore, day-to-day management can be identified not only by examining the formal characteristics of acts carried out by the company, but also through substantive indicators that reveal a structure deployment of the enterprise's productive resources, reflecting an organisational footprint that exceeds the threshold of a permanent establishment and pertains to the company as a whole.

In the determination of residence, the primary day-to-day management can be fulfilled not only in a quantitative way, but also in a qualitative one. This means that is not itself sufficient that the majority of the day-to-day activities are conducted in Italy, but for those activities to be "primary", it is also necessary to be the most relevant for the company as a whole. Hence, a company could be deemed to be resident in Italy even if the majority of minor day-to-day activities are carried out abroad and just the most relevant are conducted in Italy.[84]

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[83] See PISTONE P., *La nuova disciplina sulla residenza delle persone fisiche e delle persone giuridiche nel sistema di imposizione reddituale,* in *Dir. prat. trib. intern.,* n. 3/2023.

[84] For a wider analysis see SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024*, p.73, where the matter is developed with regard of a joint venture case. The case concerns a joint venture incorporated in a foreign country for the purpose of managing and commercialising economically significant patents. Although the board of directors (composed entirely of non-Italian tax residents) convenes in the country of incorporation, the day-to-day management of the company is entrusted to a general manager who is tax resident in Italy. This individual also holds a directorship in an Italian group company that owns the majority stake in the joint venture and supervises a small team of employees based abroad. In such a configuration, assuming that the general manager exercises ongoing and centralised managerial functions from within Italy, the location of the primary day-to-day management may reasonably be regarded as falling within the Italian territory. Even where routine administrative tasks are carried out abroad by subordinate personnel, the fact that operational control is effectively

Similarly to the analysis of the place of effective management, the assessment of the primary day-to-day management also requires considering the peculiarities of multinational groups structures. Specifically, complexities may arise when the parent company centralizes administrative functions (such as legal, accounting, tax, marketing and R&D services) and allocates them to foreign subsidiaries on a cost-sharing basis. This raises the question as to whether the centralization of such functions in Italy could lead to the presumption that the subsidiaries receiving them are themselves tax resident in Italy. Part of the doctrine[85] stated that the decisive element should be the local operational structure of the subsidiary, that is a presence effectively engaged in promoting and distributing products or services, equipped with resources adequate to pursue its own business purpose, and demonstrating a real economic and legal establishment in the jurisdiction concerned.

Other part of the doctrine has clarified that what matters is the existence of properly formalised service arrangements (such as cost-sharing agreements) that clearly document the underlying relationships and reciprocal obligations. Only in the absence of such formalisation could one reasonably argue that the centralised functions carried out by the parent company constitute the primary exercise of administrative management on behalf of the subsidiary, thereby justifying the attribution of tax residence in Italy to the latter.[86]

exercised from Italy would support the conclusion that the entity's tax residence lies in Italy, subject, of course, to the provisions of any applicable double taxation treaty.

[85] SAVORANA A., VISMARA F., *Prime considerazioni e spunti sulla nuova residenza fiscale delle società (in una prospettiva anche sovranazionale*), in *Riv. telem. dir. trib.*, n. 1/2024 (online published on April 18th 2024, www.rivistadirittotributario.it).

[86] DORIGO S., *La residenza fiscale delle società e degli enti,* DORIGO S. (ed.), *La riforma fiscale. I diritti e i procedimenti. Vol. I Diritto internazionale e cooperative compliance,* 2024, pp.34-35.

1.4. Critical issues and compatibility with EU and international law

1.4.1. Risk of conflicts of residence and double taxation

The introduction of the two new substantive criteria, which unpacked the previous criterion of the administrative seat, continues to present some critical issues.

First of all, both the place of effective management and the primary day-to-day management are defined with reference to a territorial dimension. This spatial focus proves inadequate when applied to those companies operating through modern, decentralised structures (especially in the digital economy) where decision-making and operational functions are spread across multiple jurisdictions. These entities often operate as integrated networks composed of semi-autonomous units, which may make it difficult to identify a single location where strategic decisions are made or where day-to-day business activities are primarily conducted. The consequence is that such cases increase the risk of dual residence issues, then, of double taxation and jurisdictional conflicts between tax administrations.

Secondly and most importantly, the simultaneous use of two substantive residence tests, one relating to strategic control, the other to operational execution, may create interpretive uncertainty. From a theoretical point of view, these two criteria capture distinct phases of the company's decision-making process. Indeed, the primary day-to-day management reflects the implementation level, whilst the place of effective management identifies the level at which company's general strategy is determined. The concurrent application of the criteria, without any hierarchy or interpretative guidance,[87] may generate uncertainty or even inconsistent results for taxpayers.[88]

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[87] Part of the doctrine has argued the residual nature of the primary day-to-day management with respect to the legal seat and to the place of effective management, on the basis of the Explanatory Report on Legislative Decree n°209/2023. On this matter see ARGINELLI P., RONCO S.M., *Cenni di inquadramento sulla riforma della residenza di società ed enti,* in *Diritto e pratica tributaria internazionale, 2/2024, p.548.*

[88] For a wider analysis, see SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024*, p.75, which provides the example of an Italian industrial group that owns a foreign subsidiary operating a large manufacturing facility staffed by hundreds of employees abroad. While the operational management clearly takes place in the subsidiary's country of incorporation, its board of directors, which is composed entirely of Italian tax residents, meets in Italy and retains decision-making authority. In such a scenario, the Italian tax authorities may find sufficient grounds to state that the place of effective management is in Italy, thereby subjecting the foreign company to full Italian tax liability, despite the clear operational presence abroad.

Both criteria are treated as equally valid and applicable, even in cases where they point in opposite directions. Instead of enhancing legal certainty, this legislative approach may unintentionally expand the circumstances under which Italian tax residence can be claimed in marginal or ambiguous cases, with the effect of undermining the reform's objective of ensuring predictability and clarity, as provided in the Explanatory Report on Legislative Decree n°209/2023.

Part of the doctrine[89] stated that it would arguably have been more coherent to designate a single substantive criterion, alternative to the legal seat, to provide taxpayers with a more predictable framework for structuring their activities. This would have been particularly beneficial in the context of multinational groups, where strategic direction and local execution are often interdependent. In such settings, foreign subsidiaries may operate with a degree of autonomy while still acting in coordination with the parent company and the broader group structure, making a unified and clear residence test all the more essential.

1.4.2. Compatibility with International principles and OECD standards

At this point, it is necessary to deal with the interaction between the new domestic criteria and the international framework contained in double taxation treaties and in the OECD Model Convention.

In general, the notion of place of effective management should coincide in the domestic framework and in the international one, considering that both refer to the place where the strategic decisions concerning the company as a whole are taken. Furthermore, the Italian legislator adopted this criterion primarily because it is commonly employed as a tie-breaker rule in the majority of Italy's double taxation treaties, aimed at resolving dual residence conflicts.

It also provides the opposite case, where the group is a foreign one with a subsidiary in Italy, whose board of directors is composed exclusively by non-residents and meets outside the country, but the general manager operates from Italy and handles most of the company's day-to-day affairs. In this case, Italian Tax Authorities could assess tax residence in Italy by relying on the criterion of primary day-to-day management, even though the strategic decisions are taken abroad.
The two cases, which are one the opposite of the other, may lead to the paradoxical same outcome: the attribution of tax residence (thus liability) in Italy.

[89] See SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024,* p.76.

Nonetheless, Italy has formally entered a reservation to the definition of place of effective management as set out in the 2000 update of the OECD Commentary, where it stated that: *"the place where the main and substantial activity of the entity is carried on is also to be taken into account when determining the [PoEM] of a person other than an individual."*[90]

Italian Tax Authorities clarified the implication of the reservation and pointed out that it reflects a broader interpretative approach, under which the identification of a company's place of effective management cannot be confined to the place where the top-management strategic decisions are assumed, but it must also take into account the place where the core business operations of the company are carried out.[91] Therefore, to determine a company's tax residence, any other factual indicators, circumstances or operational elements that give rise to an effective link between the management of the company and the territory of the State, must be taken into consideration. This leads to the consequence that a case-by-case analysis has to be done.

Another interpretative issue has arisen with regard to the primary day-to-day management criterion, specifically about whether it is applicable as a relevant factor to determine the place of effective management in double taxation treaties, thus, if the aforementioned reservation made by Italy remains applicable in light of the domestic reform. As already said, the place of effective management criterion has been downgraded in 2017: from being the exclusive tie-breaker rule to become one of the elements to take into consideration when applying the mutual agreement procedure mechanism. Even though it suffered modifications within the years, interpretative guidance on the criterion previously set out should remain pertinent and applicable in both treaties that still use the place of effective management as the exclusive tie-breaker rule and treaties that apply the mutual agreement procedure mechanism. This implies that the cited reservation made by Italy remains significant, considering that both the reservation and the administrative practice refer to the place where the ordinary management is actually carried out. Consequently, the primary day-to-day management criterion may reasonably be regarded as a relevant factual element in

[90] Paragraph 25 of the Commentary on Article 4 of OECD Model Convention.
[91] Revenue Agency Ruling n°312/E/2007.

identifying the place of effective management in cases involving Italy and a treaty partner that applies the traditional tie-breaker rule.

This situation leads to the consequence where taxpayers still face the problem of assessing residence on the basis of multiple, overlapping, and sometimes not reciprocally consistent criteria. Depending on where the various functions are actually performed, company's tax residence may be deemed to be in different countries, undermining one of the objectives of the Tax Reform, which is the legal certainty. [92]

[92] For a wider and more exhaustive analysis of the matter, see SILVESTRI A., GREGORI C. (ed.), *La Riforma Fiscale 2024.*

Chapter 2: Tax Residence of Companies in the International Framework

2.1. Introductory remarks: Notion of "residence" in international tax law and lack of harmonization in EU Law

The notion of tax residence of companies, already introduced in section 1.1 of Chapter 1 of this work, will be examined in greater depth herein, considering both its development and related challenges in the international framework, and its treatment under EU law, where a clear lack of harmonisation persists.

There is no specific definition neither in the international framework nor in EU law of tax residence.

In international tax law, residence of a company is a key factor in determining the entitlement to the benefits of double taxation treaties. It is used as a connecting factor to determine the applicability of the provisions of a double taxation treaty to taxpayers who are deemed to be liable to tax.[93] As mentioned in Chapter 1 section 1.1, the continued reliance on domestic law, to define tax residence of companies means that divergent criteria applied by different States, may give rise to cases of dual residence.

Residence also plays a crucial role in establishing how taxing rights are allocated between the contracting States of double taxation treaties, with the aim of preventing the same income from being taxed in more than one jurisdiction. The risk of double taxation arises from the distinctive nature of taxation law, which differs from most other areas of law. In non-tax matters, a company is ordinarily subject to the legal system of a single State, and international agreements typically identify one State whose domestic law governs the company.

In the taxation field, the allocation of taxing rights over corporate income does not rely on a single connecting factor. Instead, it is based on multiple criteria, which vary according to the specific type of income involved.[94] Practical examples of this peculiar framework can be found in the OECD Model Tax Convention, which identifies, as a

[93] See R. VANN, *"Liable to Tax" and Company Residence under Tax Treaties,* in Maisto, *Residence of Companies under Tax Treaties and EC Law* (Amsterdam, IBFD 2009).

[94] See TRAVERSA E., *Corporate Tax Residence and Mobility,* p.10 EALTP Annual Congress Łódź (2017).

general rule, in its article 7,[95] the taxing right of the country of residence on company's business income, unless there is a permanent establishment in the other country. The same rule is applied to passive income, except for dividends, interest and royalties (respectively regulated by articles 10 to 12) where the power to tax may be shared. Furthermore, article 21[96] provides a residual clause which attributes exclusive right to tax to the residence country on all items of income not defined by the convention.

The OECD Model Tax Convention also allocates taxing rights to States other than the State of residence, for example to the State where a permanent establishment is situated or where the immovable property is located. Nonetheless, residence remains highly relevant, since in many cases the source jurisdiction is determined by reference to the country of residence of the payer of the income.[97]

The central role of the residence criterion within double taxation treaties serves as a driver for companies to establish or re-establish themselves in jurisdictions with more favourable tax regimes. This leads to the phenomenon of tax competition, even though certain scholars[98] argue that the residence criterion also operates as a safeguard, allowing States to maintain taxing rights even when the source country waives its power to tax. This, in some cases, may reduce companies' intention to relocate.

Again, as previously noted in Chapter 1, tax residence of companies is a constantly changing and evolving notion, lacking a universally fixed definition. Over time, its interpretation has developed within the international framework: initially, it was determined through a single-step approach, but it has since transitioned to the more complex two-tier approach which is currently in use.[99]

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[95] Article 7 paragraph 1 OECD Model Tax Convention:
"Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State".

[96] Article 21 paragraph 1 OECD Model Tax Convention:
"Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State."

[97] This is the case of interest. Indeed article 11 paragraph 5 of the OECD Model Tax Convention says:
"Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State."

[98] See Brosens L., *Het fiscaal inwonerschap van vennootschappen in een gemondialiseerde economie*, Ph. Thesis, University of Antwerp (2018).

[99] See ISMER R. in TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.56-57 EALTP Annual Congress Łódź (2017).

The 1923 Report by the Four Economists did not define tax residence (*rectius* tax domicile, as it was called then), whilst all the subsequent documents of the League of Nations, choosing an explicit definition of the term for treaty purposes, opted for the mentioned single-step approach. The League of Nations Report on Double Taxation and Tax Evasion 1925, for instance, defined it as the place where either the head office is located or where the centre of management and control is located. This is symptomatic of the adoption of a substantive approach by the League of Nations.[100]

The turning point of the evolution of tax residence of companies' notion is the 1958 OEEC[101] Report. The latter opted for a substantive approach too, but without defining residence (*rectius* domicile), unlike the League of Nations previous Reports. The 1958 Report adopted the two-tier approach first it referred to domestic rules on tax residence, illustrated by a non-exhaustive list of connecting factors; second, it introduced a tie-breaker mechanism to solve issues of dual residence.

Hence, under the OEEC Report, a company qualified as a resident if, according to the law of a State, it was liable to tax therein by reason of its domicile, residence, place of management or any similar criterion.

Dual residence issues must be solved with the substantive tie-breaker rule of the place of effective management (POEM).

The two-tier approach was adopted by the 1963 edition of the OECD Model Tax Convention and has generally suffered no changes since then. A relevant amendment, though, has been made in 2017, when the POEM has been downgraded from being the exclusive tie-breaker rule to solve dual residence problems, to be one of the elements to take into account within the mutual agreement procedure,[102] when solving those dual residence issues.

In the EU law system, residence must be analysed with regard to its lack of harmonization.[103] Unlike the international framework with its two-tier approach, the

[100] For a wider and more exhaustive diachronic analysis see ISMER R. in TRAVERSA E., *Corporate Tax Residence and Mobility,* pp. 57-60 EALTP Annual Congress Łódź (2017).
[101] The predecessor of OECD.
[102] Article 25 OECD Model Tax Convention.
[103] For a complete analysis on the related problem of the transfer of residence between Member States see TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.13-16 EALTP Annual Congress Łódź (2017).

presence of the different directives in the EU law legal system shows a heterogeneous approach to the notion of company's tax residence.

The main function of residence in EU law is to give access to the legal protection granted to companies by the treaties and secondary law. Generally, as well as in the international framework, residence is not specifically defined, but it is determined with reference to the domestic law of Member States.

Article 54 of the Treaty on the Functioning of the European Union (TFEU) expressly confers the right of establishment on "*companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union".*[104] The provision gives Member States the possibility to freely decide which connecting factors to apply in the determination of tax residence.[105]

Within EU legal system Corporate Tax Directives also deal with the notion of residence to determine their scope of application, by reference to domestic law of the Member States. An example is the Parent-Subsidiary Directive[106] which applies to those companies that, under the tax system of a Member State, are regarded as tax residents of that Member State and, pursuant to the provisions of a double taxation agreement concluded with a third country, are not treated as tax residents outside the European Union.[107]

The problem of harmonisation (not only in the definition of corporate tax residence, but also in the determination of corporate seat in EU company law) is still present, even if it has been partly addressed with the adoption of two directives.

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[104] Article 54 TFEU: *"Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.*
'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

[105] This principle has been also affirmed by the Court of Justice of the European Union in CJEU 29.11.2011, C-371/10.

[106] Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

[107] Article 2 letter (a)(ii) of the Parent-Subsidiary Directive:
"according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Union".

The first one is the directive on dispute resolution mechanisms in cases of double taxation,[108] which represents a significant step towards mitigating the adverse consequences for taxpayers arising from divergences among Member State's tax regimes, including differences in residence criteria.

The second one is the Anti-Tax Avoidance Directive (ATAD),[109] which has tackled situations involving dual residence that result in double non-taxation. The ATAD contains specific provisions aimed at addressing tax residence mismatches, which refer to the applicable bilateral treaties. One of the mentioned provisions is contained in article 9b of the Directive:

"To the extent that a deduction for payment, expenses or losses of a taxpayer who is resident for tax purposes in two or more jurisdictions is deductible from the tax base in both jurisdictions, the Member State of the taxpayer shall deny the deduction to the extent that the other jurisdiction allows the duplicate deduction to be set off against income that is not dual-inclusion income. If both jurisdictions are Member States, the Member State where the taxpayer is not deemed to be a resident according to the double taxation treaty between the two Member States concerned shall deny the deduction."

The heterogeneous approach can be understood looking to the multiple directives that deal with the notion of residence. Another relevant directive for this matter is the Interest and Royalties Directive,[110] which provides, as well as the Parent-Subsidiary Directive, the same two requirements in the framework of the definition of company. Firstly, the company must be regarded as a tax resident under the national tax legislation of a Member State. Secondly, it must not be treated as a tax resident outside the European Union under the terms of a double taxation agreement concluded with a third country.

Another important example is the VAT Directive,[111] which does not expressly define the concept of corporate residence. Article 44 of the Directive refers instead to the

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[108] Council Directive 2017/1852/EU of 10 October 2017 on tax dispute resolution mechanisms in the European Union, which is applicable to *"any person, including an individual, that is a resident of a Member State for tax purposes, and whose taxation is directly affected by a question in dispute"*.

[109] Council Directive 2016/1164/EU of 12 July 2016, as amended by Council Directive 2017/952/EU of 29 May 2017 amending Directive 2017/1164/EU as regards hybrid mismatches with third countries.

[110] Council Directive 2003/49/EC of June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

[111] Council Directive 2006/112/EC of 28 November on the common system of value added tax.

place "*where that person has established his business"*. In the *Planzer* case[112] CJEU opted for a multi-factorial approach, without choosing any single decisive criterion, considering a variety of elements to assess the effective seat of the company. These elements include: the registered office, the place of central administration, the place where the directors meet (which often coincides with the place where the company's overall policy is formulated), the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's principal financial activities, particularly banking transactions, are conducted. According to the Court perspective, this substantive approach ensures that companies engaging solely in fictitious presence and activities (so called "*letter box*" or "*brass plate*" companies) cannot be deemed to have established a genuine place of business.[113]

A possible significant step forward in the definition of residence at the EU level is represented by the Common Consolidated Corporate Tax Base (CCCTB) Directive Proposal. Unlike the existing directives on direct taxation, it introduces a unified definition of corporate tax residence at the EU level. However, it should be kept in mind that under this proposal, the concept of residence plays a more limited role in determining the allocation of income between Member States, compared to the OECD Model Tax Convention.[114] It is used more to establish which tax authority will be responsible for administering the tax affairs of corporate groups. The aim is to enable corporate groups to interact with just one tax administration (so called: "Principal tax authority"), which is determined by reference to the tax residence of the group's parent company (so called: "principal taxpayer").

Article 4 of the proposed Directive[115] is the main provision, setting out broad alternative connecting factors such as the registered office, the place of incorporation

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[112] CJEU 28.6.2007, C-73/06.

[113] CJEU 28.6.2007, C-73/06: "*Thus, a fictitious presence, such as that of a letter box' or 'brass plate' company, cannot be described as a place of business for the purposes of Article 1(1) of the Thirteenth Directive*"

[114] See Cerioni L., *"The 'Place of Effective Management' as a Connecting Factor for Companies' Tax Residence Within the EU vs. the Freedom of Establishment: The Need for a Rethinking?* in *German Law Journal*, pp.1095-1097 (2012).

[115] The proposed provision reads:
"Article 4
Tax residence

and the place of effective management. Furthermore, it addresses situations of dual residence, distinguishing between two scenarios: companies which are simultaneously resident in a third country and companies which are resident in more than one Member State. in the first scenario, a company is considered resident in the EU under the Directive only if the tie-breaker rule in the relevant double taxation treaty does not assign residence to the third country. In the second scenario, where dual residence arises within the EU, article 4(2) establishes that the place of effective management (POEM) tie-braker rule applies.

2.2. Tax residence of companies under OECD Model Convention and Commentary

At this point of the analysis, it is necessary to go through the discipline provided by the international system, especially the OECD Model Tax Convention. The dissertation will start from the provisions contained in article 4 of the Convention and it will then focus on dual residence issues, the tie-breaker rules to avoid those issues and their evolution within the Commentary on article 4 of the Convention.

2.2.1. Article 4 of the OECD Model Tax Convention

Article 4[116] is the key provision governing the concept of residence in the international framework established by the OECD Model Tax Convention.

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1. A company that has its registered office, place of incorporation or place of effective management in a Member State and is not, under the terms of an agreement concluded by that Member State with a third country, regarded as tax resident in that third country shall be considered resident in that Member State for tax purposes.
2. A company that is resident in more than one Member State for tax purposes shall be considered to be resident in the Member State in which it has its place of effective management.
3. Where the place of effective management of a group member engaged in shipping or in inland waterways transport is aboard a ship or boat, the group member shall be considered to be resident for tax purposes in the Member State of the home harbour of the ship or boat, or, where there is no such home harbour, in the Member State of residence for tax purposes of the operator of the ship or boat.
4. A resident taxpayer shall be subject to corporate tax on all income derived from any source, whether inside or outside the Member State where it is resident for tax purposes.
5. A non-resident taxpayer shall be subject to corporate tax on all income from an activity carried on through a permanent establishment in a Member State."

[116] Article 4 OECD Model Tax Convention:
"1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political

Historically, article 4 has evolved in line with the development of the notion in the international context. Its first version reflected the two-tier approach[117] introduced by the 1958 OEEC Report, defining residence by reference to the domestic law of the Contracting States (illustrated by a non-exhaustive list of connecting factors) and providing a tie-breaker rule to solve dual residence issues.

From its 1963 first version article 4 has suffered no relevant modification[118] until the 2017 OECD Update, which, following BEPS Action 6 (Preventing Tax Treaty Abuse), replaced the POEM tie-breaker rule with the Mutual Agreement Procedure (MAP). Article 4 provides the definition of residence for the purposes of the Convention, and it serves as a cornerstone in its overall application. The norm has four principal functions.[119]

First, it establishes the general eligibility for treaty benefits. Indeed, according to article 1 of the OECD Model Tax Convention, the scope of the Convention is limited to individuals or entities that qualify as resident of one or both Contracting States, unless a specific provision states otherwise. Article 4(1), in turn, defines the term "resident", thereby outlining the personal scope of the Convention.

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subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

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

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

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

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

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

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

[117] See Section 2.1, pp.42-43.

[118] In 1977 its original title *"Fiscal Domicile"* became *"Resident"*.

[119] See ISMER R. & BLANK K. in *Klaus Vogel on Double Taxation Conventions,* Fifth Edition – Reimer & Rust, eds. 5th edition (2021).

Second, the allocation of taxing rights under the Convention (with the exception of article 8),[120] as well as the provisions on the elimination of double taxation, generally presuppose a single State of residence. Accordingly, article 4 plays a crucial role in preventing double taxation, whether it results from dual residence or from the concurrent taxation exercised by both the State of residence and the State of source.

Third, residence is in some cases decisive in the determination of the source country, especially with regard to some allocation rules, such as articles 10, 11(5), 15(2)(b) and 16[121] of the OECD Model Tax Convention. Those rules, indeed, link the source of income to the residence of the paying entity.

Fourth and finally, the concept of residence is also relevant and plays a role in the context of the non-discrimination clause and the mutual agreement procedure: article 24(2) of the OECD Model Tax Convention extends protection to stateless persons who are residents of one of the Contracting States.

As stated above, article 4 of the Convention does not autonomously define residence, but it makes a reference to the notion provided by the domestic systems of each Contracting State. Hence, in order to qualify as a resident for the purposes of the Convention, an entity must be subject to full tax liability under the law of one of the Contracting States.

However, sentence 2 of paragraph 1 of the article states that *"This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein"*: this means that the source of income or the capital within the State are not themselves sufficient to establish treaty residence. On the contrary, treaty residence and tax liability must be assessed on a broader basis, which is determined by a genuine personal or economic *nexus* with the State. This *nexus* is the reason why the Convention provided specific connecting factors, that are listed in the article: domicile, residence, place of management, any other criterion of a similar nature. These criteria underline the requirement of a substantial link between the taxpayer and the taxing jurisdiction.

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[120] Article 8 OECD Model Tax Convention:
"1. Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.
2. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency."

[121] They regulate, respectively: dividends, interest, income from employment and director's fees.

Article 4 paragraphs 2 and 3 identify the mechanisms, commonly referred to as tie-breaker rules, to establish residence for the purposes of the Convention when the subject is resident of both Contracting States, according to their respective domestic laws. Dual residence can be due to several reasons: either the concurrent application of the same connecting factor by both the States (e.g.: both jurisdictions considering the existence of the legal seat or of the place of effective management), or the simultaneous application of multiple alternatives connecting factors by each State to establish full tax liability (e.g.: combination of physical presence by one State and place of incorporation by the other one).

Paragraph 2 is referred solely to individuals, and it provides a hierarchical list of connecting factors (such as permanent home, centre of vital interests, habitual abode, nationality) whose fulfilment functions as a tie-breaker rule, allocating residence to one of the States.

Paragraph 3 instead, governs only dual residence cases involving persons other than individuals and it does not contain a tie-breaker criterion anymore. Indeed, in 2017 the POEM criterion, which has been used to solve dual residence issues until then, has been replaced with the MAP. The reason of this amendment must be found mainly in the interpretation issues related to the concept of the POEM that has arisen within the years between States.[122]

The MAP addresses the problem of dual residence on a case-by-case basis, through a two-tier procedural mechanism. However, the MAP, while conceptually cooperative, is procedurally limited and presents significant drawbacks for companies and entities. The first step of the MAP consists in an attempt by the competent authorities to resolve dual residence issues by mutual agreement. Thus, the competent authorities of the two States are encouraged, but not legally required to reach an agreement. Unlike the tie-breaker rule for individuals in paragraph 2 letter d) of the provision, there is no obligation to arrive at a conclusion, and the MAP may ultimately fail if consensus is not reached. This lack of obligation creates serious legal and practical uncertainty for companies. In the absence of an agreement, the taxpayer is involved in a tax limbo: the company may be treated as resident in both States and may be taxed in both States,

[122] The entire evolution of the notion will be specifically analysed in the next section; reference is therefore made there.

but still not be recognized as a resident in either for the purposes of accessing treaty benefits. This effectively denies access to relief mechanisms such as tax exemptions or reductions on dividends, interest, royalties or capital gains, that would otherwise be available under the Convention. Additionally, this exacerbates companies' difficulties, since they may also face problems in fulfilling conditions such as the "*qualified person*"[123] requirement, further compounding their inability to rely on treaty benefits.
The second step of the MAP consists in an exceptional outcome: even in the absence of an agreement on residence, the competent authorities may still agree to grant treaty benefits to the taxpayer. However, this remains entirely at their discretion, with no guaranteed outcome. The highly discretionary and non-binding nature of the mechanism significantly weakens legal certainty for multinational enterprises operating across borders.
Moreover, the open-ended timeline, administrative burdens, and lack of enforceability of MAP outcomes may further discourage taxpayers from initiating or relying on this procedure. From a policy perspective, the replacement of an objective (even though discussed in its definition) and relatively predictable rule (POEM) with a bilateral negotiation procedure (MAP) risk to introduce both inefficiency and inconsistency into international tax practice. In sum, while the MAP intends to offer a flexible solution to complex cross-border residence disputes, for corporate taxpayers it often introduces more uncertainty than it resolves. Even more when no agreement is reached and the company is left without access to the very benefits the treaty was designed to guarantee.[124]

[123] Which will be analysed in the next section.
[124] For a complete analysis of the very issues put in place by the MAP see CHEN S., *The Map Tie-Breaker Rule for Dual Residence in Art.4(3) of the 2017 OECD MC,* in *Intertax,* Vol.45, n°3, pp.202-210, (2017); PISTONE P., *General Report,* in PISTONE P. (ed.), *Residence of Companies under Tax Treaties and EC Law,* IBFD, Amsterdam, pp9-63, (2005); OWENS J., *Tax Treaties and the Need for Reform: Reflecting Changes in the Global Economy,* in *Bullettin for International Taxation,* IBFD, pp.125-134, (2005); ENGLISCH J., *General Report on Tax Treaty Residence of Legal Entities,* in *IFA Cahiers de Droit Fiscal International,* Vol. 103a, pp.17-42, (2018).

2.2.2. Tie-breaker rules and their evolution: Commentary on article 4 of the OECD Model Tax Convention

The reference to the domestic laws of the Contracting States to identify residence, as aforementioned, can lead to dual residence conflicts: a situation where a taxpayer is resident in both Contracting States, according to the legislation of each State, as a consequence of, for instance, the assessment of the presence of the legal seat in one State and of the POEM in the other one. As a result, the taxpayer would normally be subject to double taxation under the domestic laws of the two Contracting States. That is the reason why the OECD Model Tax Convention and the majority of double taxation treaties (which are written on the basis of the OECD Model) provided tie-breaker rules to solve those issues and to grant relief or exemption to the taxpayer in one of the Contracting States. Tie-breaker rules determine which of the Contracting States is the one of residence for the purposes of the Convention (or treaty) and thus, which of the Contracting States has the taxing rights.

As anticipated, this section will focus on the evolution of the tie-breaker rule set out by the OECD Model Convention and contained in article 4 of the latter. The provision has been subject, within the years, to plenty debates, mostly due to the uncertainty on the meaning of the notion of POEM, which finally led to its replacement with the MAP mechanism.

To better understand this entire evolution, it is necessary to analyse the provision contained in article 4 paragraph 3 and the various editions of its Commentary that have been published within the years[125] and, with them, the many interpretations given to the notion of the POEM.

Article 4 paragraph 3 in its previous version[126] stated:

"Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated."

In this version, as said, the exclusive tie-breaker rule was the POEM criterion. Hence, for the purposes of the Convention, a company was deemed to be resident in the Contracting State where its place of effective management was located.

[125] Specifically, Commentary's editions from 2000 to 2017

[126] OECD Model Tax Convention as it read on 15 July 2014.

Article 4 paragraph 3 in its actual version[127] states:

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

As already mentioned, with respect to the previous versions of the norm, the reference to the POEM as the exclusive criterion to determine residence has been erased and replaced by the two-tier case by case approach of the MAP mechanism.

Nonetheless, the POEM still has a relevance as a connecting factor to verify an effective link between the taxpayer and the territory. It has been downgraded to one of the elements that the competent authorities of the Contracting States must keep in mind while reaching a mutual agreement.

Even in this final version, the provision does not give any definition of the POEM, as a reflection of the historical difficulties in finding a common and unique interpretation of the notion.

In general, it is possible to distinguish two historically different interpretative approaches to the POEM's notion, essentially attributable to the tradition of common law countries on the one hand, and to the tradition of civil law countries on the other hand.

In common law jurisdictions (such as the United Kingdom,[128] Australia, India, South Africa, with the exception of the United States)[129] the POEM notion is generally aligned with the principle of central management and control. Under this approach, POEM is associated with the place where the highest-level strategic decisions are taken by the top level of management. The prevailing view in common law countries[130] is

[127] OECD Model Tax Convention as it read on 21 November 2017.
[128] Whose discipline of central management and control test criterion will be dealt with in Chapter 3.
[129] Whose discipline of the incorporation-based test criterion will be dealt with in Chapter 3.
[130] See Assonime Circular n°15/2024.

that decisive weight should be attached to the role and location of the board of directors, as this body represents the highest authority within the corporate governance structure. Moreover, even in cases where operational decision-making is delegated, the board retains ultimate oversight, including the power to supervise, intervene, or revoke previously conferred authority. The same allocation of powers is applicable to group of companies, identifying the POEM with the place where the board of the parent company convenes, especially when that body exercises strategic control over the direction of the group as a whole. In such scenarios, the board's authority may extend beyond its own entity, functioning as the central point of governance even in relation to the boards of subsidiary companies.

On the contrary, in civil law jurisdictions (such as Switzerland, Germany and Netherlands) there is a more operational approach: the POEM is associated with the place where the business is actually conducted and managed on a day-to-day basis.[131] This approach is more aligned with the one adopted by Italy with the primary day-to-day management criterion introduced with the Reform.[132]

In this view, the determination of POEM does not focus exclusively on the top-tier governance body but may extend to various levels of corporate management. A typical example is the place where the managing director or sole administrator exercises executive powers, which can be crucial, especially in cases where the board has delegated such authority and retained only supervisory and revocatory functions.

Moreover, in highly integrated corporate groups, the individual boards of the subsidiaries may still retain central importance for the POEM assessment, regardless of any overarching coordination or control exerted by the parent company. This reflects a broader and more functionally grounded understanding of where effective management is truly carried out.

Furthermore, these conceptual divergencies are also due to the structural differences in the corporate governance frameworks of common law countries on one hand and of civil law countries on the other hand.

Consistently with the two main interpretative approaches cited above, a first relevant evolution of the concept can be found in the 2000 edition of the Commentary on article

[131] See Assonime Circular n°15/2024, for a wider analysis of the so-called "management tests".
[132] See Chapter 1 section 1.3.2.3.

4 and in Italy's observations on it, as well as in the OECD Discussion Papers of 2001 and 2003.[133]

Indeed, this edition of the Commentary added an explanation in paragraph 24 of the Commentary,[134] reflecting the common law jurisdictions' approach. Italy made an observation[135] on this new paragraph, affirming that the interpretation contained thereby, especially the reference to the *"most senior person or group of persons"* as the solely criterion to assess the POEM was not sufficient, since there was also needed to take into account the place where the main and substantial activity of the company was carried out.

The Discussion Paper of 2001[136] analysed how technological progress challenged the traditional notion of POEM, which was largely based on physical presence and (in accordance with the common law jurisdictions approach) on the location of board meetings. The report underlined that the increasing mobility of decision-making processes could have led to circumstances where the place of effective management could have been simultaneously exercised across multiple jurisdictions. This could have affected the POEM notion, making it inadequate to solve dual residence conflicts.[137] The POEM test could have also failed due to the fragmentation of

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[133] See Assonime Circular n°15/2024, pp. 21-25

[134] Paragraph 24 in 2000 edition of the Commentary stated as follows:

"As a result of these considerations, the "place of effective management" has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made. The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time"

[135] Italy's observation stated as follows:

"*Italy does not adhere to the interpretation given in paragraph 24 above concerning the most senior or group of persons (for example a board of directors) as a sole criterion to identify the place of effective management of an entity. In its opinion the place where the main and substantial activity of the entity is carried on is also to be taken into account when determining the place of effective management"*

[136] Tax Advisory Group (TAG), *"The Impact of the Communications Revolution on the Apllication of 'Place of Effective Management' as a tie breaker rule". A Discussion Paper from the Technical Advisory Group on monitoring the application of existing treaty norms for the taxation of business profits,* February (2001).

[137] TAG Discussion Paper of 2001:

"*the characteristics of effective management may exist in a number of jurisdictions and it may be said to exist simultaneously in more than one jurisdiction without a specific single jurisdiction being dominant. Thus to the extent that the place of effective management test fails to provide a clear allocation of residence to one country, albeit in a limited number of cases, it may be seen to be an ineffective rule*".

multinational enterprises, since operational control and day-to-day management could have been spread across multiple States.

As a consequence, the Discussion Paper of 2003[138] proposed to either redefine or replace the POEM criterion or to introduce a hierarchical set of criteria, as well as for individuals, which would have been applied in cases where it was impossible to determine the POEM.

The first proposal focused on amending paragraph 24 of the Commentary, in order to establish a shared interpretation of the concept, that could be consistent with all the previous interpretations of each jurisdiction. According to this proposal, POEM referred to the place where key strategic decisions were substantively made, which typically coincided with the place where the board of directors met and exercised its decision-making functions. It further stressed that the decisive factor was the place where substantive decisions were actually made, rather than the possibly different location where they were formally ratified. If a controlling shareholder independently made strategic decisions that went beyond routine management or coordination typical of a parent company, the POEM should have been located where such decisions were taken.

In general, the analysis should have distinguished between places of substantive deliberation and places of mere endorsement, assessing where key options and advice were reviewed and final decisions were adopted.[139]

On the other hand, the second proposal focused on amending article 4 paragraph 3 of the Convention, through the adoption of a hierarchical structure of tie-breaker rules, similar to the one provided in article 4 paragraph 2 for individuals. The first tie-breaker rule would have been the POEM, followed by the jurisdiction where the entity had either the closer economic relations or the principal business activities were carried out or the most senior executives principally took decisions. Then, the third tie-breaker rule would have been the jurisdiction under whose law the company was incorporated or legally formed. In the end, the fourth rule would have been the MAP mechanism.

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[138] Tax Advisory Group (TAG), *"Place of Effective Management Concept: Suggestions for Changes to the OECD Model Tax Convention: Discussion Draft*, (2003).

[139] See Assonime Circular n°15/2024, pp. 23-24.

The differences between the mentioned criteria underlines the difficulties to find a common approach and a common definition, which could not be resolved and then led to the 2008 edition of the Commentary.[140]

The 2008 edition of the Commentary edited its paragraph 24 and added paragraph 24.1, providing a primary and an alternative version of it.

The primary version maintained POEM as the exclusive tie-breaker rule, but amended its definition, by eliminating the reference to the board of directors.[141] Thus, in line with Italy's observation to the 2001 edition of the Commentary, the reference to the place where *"the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined"* was erased. Hence, the most mobile (and problematic) element of the POEM was removed, whereas the fact that only a single and identifiable place of effective management can be determined was reaffirmed.

The alternative version instead, opted for a case by case approach, replacing the tie-breaker rule system and basing on a mutual agreement procedure to be reached by the Contracting States, taking into account a (non-hierarchical) series of factors, such as: the place where the meetings of the board of directors (or equivalent body) were held, the place where the chief executive officer and other senior executives carried on their activities, the place where the day-to-day management was carried on, the place where the headquarters were located etc..[142] The list of factors provided was illustrative rather

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[140] See Assonime Circular n°15/2024, pp. 24-25.

[141] Paragraph 24 in 2008 edition of the Commentary:

"As a result of these considerations, the "place of effective management" has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time."

[142] Paragraph 24.1 in 2008 edition of the Commentary:

"Some countries, however, consider that cases of dual residence of persons who are not individuals are relatively rare and should be dealt with on a case-by-case basis. Some countries also consider that such a case-by-case approach is the best way to deal with the difficulties in determining the place of effective management of a legal person that may arise from the use of new communication technologies. These countries are free to leave the question of the residence of these persons to be settled by the competent authorities, which can be done by replacing the paragraph by the following provision:

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

than exhaustive, with the relevance of each element to be assessed on a case-by-case basis within the MAP, through the discretion and the agreement of the competent authorities of each State. This evaluation had the aim to encompass a comprehensive review of the key elements underpinning both the common law jurisdictions approach, with the notion of central management and control test and the civil law jurisdictions approach, with the various management tests.

Following the results of Action 6 of the BEPS Project[143] the case-by-case approach through the MAP prevailed on the POEM tie-breaker rule within the OECD debates. The shift was based on the recognition of the fact that cases of dual residence of companies could be deliberately structured to exploit mismatches between jurisdictions, enabling abusive practices, such as double deductions of losses or other negative income components. Thus, dual residence could be the result of artificial planning strategies.

Such developments led to the 2017 edition of the Commentary and to the new version of article 4 paragraph 3 of the Convention. Indeed, paragraph 23 of the Commentary stated that *"the Committee on Fiscal Affairs recognised that although situations of double residence of entities other than individuals were relatively rare, there had been a number of tax-avoidance cases involving dual resident companies. It therefore concluded that a better solution to the issue of dual residence of entities other than individuals was to deal with such situations on a case-by-case basis."*

Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States."

Competent authorities having to apply such a provision to determine the residence of a legal person for purposes of the Convention would be expected to take account of various factors, such as where the meetings of its board of directors or equivalent body are usually held, where the chief executive officer and other senior executives usually carry on their activities, where the senior day-to-day management of the person is carried on, where the person's headquarters are located, which country's laws govern the legal status of the person, where its accounting records are kept, whether determining that the legal person is a resident of one of the Contracting States but not of the other for the purpose of the Convention would carry the risk of an improper use of the provisions of the Convention etc. Countries that consider that the competent authorities should not be given the discretion to solve such cases of dual residence without an indication of the factors to be used for that purpose may want to supplement the provision to refer to these or other factors that they consider relevant. Also, since the application of the provision would normally be requested by the person concerned through the mechanism provided for under paragraph 1 of Article 25, the request should be made within three years from the first notification to that person that its taxation is not in accordance with the Convention since it is considered to be a resident of both Contracting States. Since the facts on which a decision will be based may change over time, the competent authorities that reach a decision under that provision should clarify which period of time is covered by that decision."

[143] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances,* Action 6 – 2015 *Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).

Thus, the new article 4 paragraph 3 of the Convention suffered the switch from the POEM tie-breaker rule to the two-tier approach of the MAP.
While the list of relevant factors to be considered in the MAP remained unchanged, an additional provision has been introduced, allowing Contracting States to specify in their bilateral conventions the relevant factors to be taken into account, thereby limiting the discretion of the competent authorities.
Hence, the POEM tie-breaker rule has been downgraded, becoming an alternative rule in paragraph 24.5 of the Commentary, which provides that:

"Some States, however, consider that it is preferable to deal with cases of dual residence of entities through the rule based on the "place of effective management" that was included in the Convention before 2017. These States also consider that this rule can be interpreted in a way that prevents it from being abused. States that share that view and that agree on how the concept of "place of effective management" should be interpreted are free to include in their bilateral treaty the following version of paragraph 3:

> *Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated."*

2.2.3. Critical issues and legal uncertainty

The absence of a clear hierarchy between the factors to be considered in the MAP, together with the lack of agreement on a uniform interpretation of the POEM, which plays a significant role in resolving dual residence issues of legal persons under treaty law, has led to growing legal uncertainty at the international level. This uncertainty hinders the effective operation of companies and entities engaged in cross-border activities. It has also been noted[144] that, allowing States the discretion to consider factors beyond those explicitly enumerated in treaty provisions, may open the door to arbitrary decision-making and, in the worst-case scenario, to serious obstacles in

[144] MARINO G., *La residenza delle società*, in AA. VV., *Riforma fiscale,* a cura di Tomassini A., Milano, 2023.

reaching mutual agreement. For instance, such discretion may enable each State to apply the criterion it deems most effective in asserting tax residence within its territory, with the ultimate aim of securing taxing rights over the entity in question.

This is the reason why the 2017 edition of the OECD Model Tax Convention introduced strengthened safeguards to prevent the improper use of domestic criteria to determine residence with the aim of accessing treaty benefits. Under the updated framework, in order to generally qualify for treaty relief, a company (or better, an entity other than an individual) must, not only be deemed as a resident of one of the Contracting States, but also satisfy the requirements to be a "qualified person", thus, a "qualified resident". These requirements are represented by the three anti-abuse clauses drawn up within BEPS Action 6 and referred to in paragraphs 148 and 149 of the Commentary on article 29 of the OECD Model Tax Convention: the Principal Purpose Test (PPT) and the Limitation on Benefit (LOB), in its limited or detailed version.[145]

Ultimately, the complexity of the current legal framework significantly increases the level of uncertainty faced by companies both in terms of the risk of being simultaneously regarded as tax residents in multiple jurisdictions and the risk of being denied access to treaty benefits. This dual exposure underscores the increasing difficulty of navigating international tax rules in the absence of clear and consistent residence standards.

For this reason, it is important that the domestic rules to determine tax residence of companies are still able to hold up when compared with international standards, especially those commonly applied in other jurisdictions. This requires moving beyond strictly civil law-based concepts, as the Italian legislator has done by introducing in article 73 of the TUIR the two new criteria of the place of effective management and of the primary day-to-day management.[146] Indeed, this approach, encompasses both the two traditional dimensions of the POEM, helping to ensure that different types of companies can be properly identified for tax residence purposes, including pure

[145] For an exhaustive analysis of the three anti-abuse clauses see OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances,* Action 6 – 2015 *Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015). See also, Assonime Circular n°15/2024, p.31.

[146] For the complete analysis of the two criteria see Chapter 1 sections 1.3.2.2 and 1.3.2.3.

holding companies, which may engage in legal or strategic decisions without conducting daily business operations (thus, the sole use of the day-to-day management dimension would be inadequate).[147]

The *ratio* of the explained modification of article 4 paragraph 3 of the Convention and of its Commentary is then to be found also in an anti-tax-avoidance perspective, aimed at limiting tax arbitrage and the double deduction of losses and other negative income items, so, in general, abusive conducts from companies.

All the aforementioned elements (notably, the lack of a hierarchy between the relevant factors to use within the MAP and the lack of a precise definition of the POEM) implied a continued degree of disbelief among States toward the MAP.

Indeed, many States, like Italy, still prefer to rely on the POEM tie-breaker rule in their bilateral double taxation treaties even though its uncertainty of interpretation. Consequently, Italy has chosen the MAP instead of the POEM only in the most recent Conventions, such as the ones with China, Uruguay, Colombia, Jamaica, Chile, Romania, Hong Kong, and Panama; whilst it continued to apply the POEM criterion in the Convention signed with Barbados and Gabon.

[147] See Assonime Circular n°15/2024.

Chapter 3: Comparative Approaches to Tax Residence of Companies

This chapter of the work will be dedicated to the examination of selected foreign legal systems, to provide a deeper understanding of their approaches to corporate tax residence and to compare them with the Italian framework. The objective is not merely to describe the foreign models, but to identify both their distinctive features and the common elements they share with the Italian system.

The comparative analysis will begin with the United Kingdom, a jurisdiction that has historically played a pivotal role in shaping the international interpretation of the PoEM.[148] The UK's contribution is particularly significant, as its case law has provided the foundation for the concept of "central management and control", a principle that has influenced the development of residence criteria in both domestic and treaty contexts. Special attention will be devoted to the body of case law through which this test has evolved, with emphasis on its substantive and fact-driven application, as well as on its flexibility in addressing complex, real-world corporate structures.

The analysis will then turn to the United States, another prominent common law jurisdiction, whose approach differs significantly from that one of the United Kingdom. In contrast to the British reliance on the central management and control doctrine, the United States legal framework adopts a formal incorporation test as the primary criterion for determining corporate tax residence. This structural divergence offers a valuable counterpoint in the comparative focus, as it reflects a fundamentally different legal and administrative orientation in addressing cross-border tax issues.

Finally, the chapter will examine the French legal system, which, as a civil law jurisdiction, exhibits certain structural and conceptual similarities to the Italian system. Despite the similarities due to the civil law tradition, French system is characterized by the principle of territoriality and by an approach focused on economic substance. The aim of this final section is to explore the extent to which France and Italy align in their treatment of corporate tax residence, while also analysing key differences in the legal definitions, interpretative approaches and practical enforcement of residence rules. Through this comparative analysis, the dissertation aims to develop a critical and refined understanding of the various models of corporate tax residence, ultimately

[148] See Chapter 2 section 2.2.2.

offering insights that may contribute both to the interpretation of the newly reformed Italian framework and to the assessment of its coherence with international and comparative models.

3.1. United Kingdom

In areas of law other than taxation, the primary connecting factor for determining the legal system governing a company is its domicile. Conversely, the notion of residence has little relevance outside the tax context, having been developed mainly through judicial interpretation for tax purposes. Its marginal role in corporate law is further confirmed by case law, aside from its limited use in civil procedural matters.[149]

The determination of a company's domicile under UK law is based on the incorporation principle. According to the latter, a company is subject to UK private law by virtue of being incorporated in the United Kingdom and having its registered office located therein. Legal personality is conferred to the company at the moment it is issued a certificate of incorporation.

Pursuant to the Companies Act 2006, the company's application for registration must specify the UK jurisdiction where its registered office is to be located. The UK jurisdiction can be England and Wales, Scotland or Northern Ireland. The choice of the registered office not only establishes company's domicile within the respective legal system, but also attributes UK nationality to it.[150] However, in the UK context, nationality is generally regarded as a concept of limited legal consequence. In fact, certain judicial decisions tend to use domicile and nationality interchangeably to indicate the legal system under which the company is constituted and governed.[151]

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[149] CERIONI L. and EDEN S., in in TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.667-668 EALTP Annual Congress Łódź (2017).

[150] For a wider and more exhaustive analysis of the domicile and nationality criteria see *ibid.*, pp.667-670.

[151] See *Gasque v. Inland Revenue Commissioners* [1918] A.C. 260, where the Court confirmed that a company can have a domicile, determined by its place of incorporation and remains unchanged throughout its existence, even if substantial managerial functions or board meetings occur elsewhere. This underscored the role of domicile as a static legal criterion, distinct from tax residence, and reinforced its relevance in areas such as company law and private international law.

3.1.1. Central management and control test

As already mentioned, the central management and control test is the main and most relevant criterion to assess companies' tax residence in the UK legal framework. This concept has evolved over the years through the case law of UK's courts and through the approach to the test taken by the tax authorities.

Thus, this section will analyse the general definition of the test, its development through the case law and its relation with the international framework, specifically with the PoEM criterion.

Generally, according to UK tax law, a company is considered as a resident therein if it is incorporated[152] in its territory, or, if it is incorporated outside UK, its central management and control (CMC) is exercised within the United Kingdom.

Prior to 1988, the determination of company's tax residence relied solely on the CMC test. The incorporation criterion was introduced by a reform, due to an attempt by a British newspaper company to relocate its CMC to the Netherlands, in order to avoid capital gain taxation in the UK. This abusive issue gave rise to the *Daily Mail and General Trust plc* case in front of the Court of Justice of the European Union (CJEU), on the ground that the measure could constitute an infringement on the freedom of establishment as protected by articles 49 (52 EEC Treaty) and 54 (58 EEC Treaty) of the Treaty on the Functioning of the European Union (TFEU).[153]

Since the Daily Mail case, the UK tax system has adopted a two-tier approach to identify company's tax residence: the place of incorporation (like the legal seat in the Italian system) serves as the initial criterion to assess tax residence; in cases involving non-UK incorporated companies, the analysis then turns to whether their CMC is effectively exercised within the UK, hence establishing tax residence through substantive managerial control.

[152] UK: Finance Act 1988, sec. 66(1).

[153] CJEU 27.09.1988, C-81/87: the Court ruled that articles 52 and 58 of the EEC Treaty did not confer upon a company the right to transfer its central management and control to another Member State while retaining its legal personality under the law of incorporation. The judgement arose in response to the UK's refusal to authorise a company's (*Daily Mail*) relocation of its CMC to the Netherlands for tax purposes. Following this case, the UK tax system introduced the incorporation test into its domestic legislation, supplementing the traditional central management and control test, thereby establishing a dual framework for determining corporate tax residence.

The central management and control can be described as the place where the final decisions, binding the company, are ultimately made. To assess the existence of the CMC a series of factors with a substantial nature must be taken into consideration. These factors include the residence of the majority of the directors, the jurisdiction where board meetings are ordinarily held, and whether such meetings are properly convened with sufficient notice, supported by the circulation of agendas and relevant documentation. It is also crucial to consider whether directors actively perform their function within the UK, whether they act personally or through proxies, and where the company's official records, minute books and statutory documents are maintained. Ultimately, what matters is whether substantive decisions on corporate policy and management are taken during full board meetings and whether those meetings are genuinely the forum for directing company's business.[154]

As anticipated, the definition above has developed over the years, through the case law of the UK tribunals. The concept originated over a century ago from the *De Beers Consolidated Mines Ltd. v. Howe* case,[155] where the House of Lords held that a company resides *"where its real business is carried on"* or better *"where the central management and control actually abides"*. This principle marked the departure from a purely formal approach and laid the groundwork for a substantive, fact-based test, focused on where the company's key strategic decisions are made.

Over the 20th and 21st centuries, UK courts refined the CMC test through a series of decisions. In *New Zealand Shipping Co. Ltd. v. Thew*[156] a company incorporated in New Zealand but effectively managed from London was found to be UK-resident, underscoring the significance of where real authority is exercised.

Similarly, in the *Bullock v. Unit Construction Co. Ltd.*[157] case UK residence was attributed to Kenyan subsidiaries because their parent company in London exercised full control.

The test also evolved to protect genuine decentralised decision-making. In the *Unterlab Ltd. v. McGregor*[158] case, the Court found that the board of the offshore

[154] See UK HMRC, INTM120060; UK HMRC, INTM120185; see also GILLILAND P. & PEVSNER S., *COVID-19: UK Tax Residence for Companies and Individuals* in *Proskauer, Tax Talks*, (2020).
[155] *De Beers Consolidated Mines Ltd v. Howe* [1906] AC 455, Tax Treaty Case Law, IBFD.
[156] *New Zealand Shipping Co. Ltd v. Thew* [1922], Tax Treaty Case Law, IBFD.
[157] *Bullock v. Unit Construction Co. Ltd* [1959], Tax Treaty Case Law, IBFD.
[158] *Unterlab Ltd v. McGregor* [1995], Tax Trety Case Law, IBFD.

subsidiary exercised independent judgement, despite the policy influence from a UK parent company: the company was then not resident in the UK. This case highlighted that CMC lies with those who truly deliberate and decide and not with those who merely execute instructions.

In the *Wood v. Holden* case[159] the Court of Appeal rejected the argument of HMRC (His Majesty's Revenue and Customs), which affirmed that UK advisers directing a tax strategy had control, stating instead that CMC lies with the directors if they retain discretion and authority.

Similarly, in *Laerstate BV v. HMRC,*[160] where the tribunal assessed UK residence on the ground of a single shareholder-director effective control, even though formal meetings occurred abroad, reinforcing the principle that formal structures may be disregarded where they do not reflect the true place of decision-making.

Overall, the UK approach to CMC remains highly factual, focusing on the place where decisions are actually made and on the people who made them rather than the place where they ought to be made. This reflects the tendency to the adoption of the substance over form approach of the UK system, just as in the Italian one, notwithstanding the differences in the way the approach is developed and expressed.

3.1.2. The role of the central management and control in the international framework

The United Kingdom has signed about 137[161] double taxation treaties. Generally, in those treaties, UK adhered to the provision of article 4 paragraph 1 of the OECD Model Tax Convention to define residence for the purposes of the conventions.

However, several older treaties do not include the final sentence of that provision, which states that the term resident *"does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein"*.

[159] *Wood v. Holden* [2006], Tax Treaty Case Law, IBFD.
[160] *Laerstate BV v. HMRC* [2009], Tax Treaty Case Law, IBFD.
[161] CERIONI L. and EDEN S., in TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.682-683 EALTP Annual Congress Łódź (2017).

Treaties signed before 1960 normally contain a simplified formulation, stating merely that a company is deemed resident where its business is *"managed and controlled"*. While this language seems to function as a tie-breaker rule, in fact, it is not expressly designated as such, and these early treaties typically do not include any provision to solve dual residence issues through mutual agreements between the States.[162]

In most of UK treaties, to face dual residence issues, the tie-breaker rule of the place of effective management (PoEM) has been adopted.

Accordingly, when a company is deemed to be resident in both Contracting States under their respective domestic laws, it is treated as resident, for the purposes of the convention, in the State (either the UK or the other Contracting State) where its PoEM is located. Hence, the majority of double taxation treaties concluded by the UK relied on the scheme provided by article 4 paragraph 3 of the OECD Model before its 2017 amendment.[163] An example is article 4 paragraph 3 of the UK/Italy Double Taxation Convention.[164]

With respect to the application of the PoEM as a tie-breaker, two notable deviations from the provision of article 4 paragraph 3 of the OECD Model (prior 2017) can be identified.

First, 16 of the double taxation treaties[165] signed by the UK has been written before the drafting of the OECD Model Tax Convention, hence, they do not have any express tie-breaker rule to deal with dual residence. As aforementioned, they refer to the place where the company's business is managed and controlled.

For instance, UK/Belize Double Taxation Arrangement and UK/Sierra Leone Double Taxation Arrangement, in their paragraph 2 provide that: *"a company shall be regarded as resident in the United Kingdom if its business is managed and controlled*

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[162] See CERIONI L. and EDEN S., in in TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.682-683 EALTP Annual Congress Łódź (2017).

[163] See Chapter 2 section 2.2.2 for the complete evolution of the provision contained in article 4(3) of the OECD Model Tax Convention.

[164] Article 4(3) of the UK/Italy Double Taxation Convention, signed October 21 1988, entered into force 31 December 1990: *"Where by reason of the provisions of paragraph (1) of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated."*

[165] Double taxation treaties with: Antigua (1947), Belize (1947), Monserrat (1947), St. Kitts & Nevis (1947), Sierra Leone (1947), Grenada (1949), Solomon Islands (1950), Brunei (1950), Burma (1950), Kiribati (1950), Tuvalu (1950), Guernsey (1952), Jersey (1952), Greece (1953), Isle of Man (1955), Malawi (1955).

in the United Kingdom and as resident in Belize [or Sierra Leone] if its business is managed and controlled in Belize [or Sierra Leone]".

As a consequence, until 2015, HMRC interpreted these treaties as excluding dual-resident companies from their scope. In that year HMRC changed its perspective for the interpretation of such conventions, affirming that a company which is resident in one of the Contracting States by reason of its incorporation and in the other Contracting States by reason of the CMC, it is deemed resident in the latter State for the purposes of the treaty. In cases of CMC in both Contracting States, the company cannot get the treaty benefits.[166] This interpretation of the treaties has overlooked subsequent developments in the international framework, including the initial reliance on the PoEM tie-breaker rule and, more recently the preference for the MAP mechanism.

Second, UK has gradually moved away from using the PoEM as the exclusive tie-breaker rule, and instead, it started to adopt the MAP mechanism even before its recommendation by the BEPS Action 6 Final Report. Indeed, it signed new treaties or renegotiated existent ones, such as those with Canada, Japan and the United States, providing for the MAP.

As well as analysed in the previous chapter, the PoEM criterion has not been erased, but it has been downgraded to one of the elements that the competent authorities must consider when concluding a mutual agreement.

Hence, UK's competent authorities, when determining company's tax residence, especially within the MAP, shall consider: the place of incorporation, the CMC or the PoEM (depending on the treaty in question) and any other relevant factors.

Again, it is useful to analyse the case law to understand also the distinction between the CMC notion and the PoEM notion.

Indeed, while both tests rely on the company's decision-making structure, case law clarified that the two criteria diverge in terms of the level of decision-making they refer to. *Swedish Central Rly Co Ltd. v. Thompson* case[167] stated that CMC may be, in practice, exercised in more than one jurisdiction. The case showed that a company could be resident in multiple States if it *"keeps house and does business"* in more than

[166] HMRC, *Policy Paper, Change of view on the interpretation of the residence articles in sixteen double taxation agreements*, (2015).

[167] *Swedish Central Rly Co Ltd. v. Thompson* [1925], Tax Treaty Case Law, IBFD.

one territory, since the keeping of house and the doing of business are the prerequisites of the CMC, which determines residence.

On the contrary, the PoEM must be located in a single jurisdiction, and it refers specifically to the place where top-level strategic decisions are effectively made.

This distinction was reinforced in *Smallwood v. Revenue and Customs Commissioners,*[168] where, even though the case involved a trust and not a company, the PoEM was applied, consistently with corporate residence principles. The court held that, despite lower-level managerial actions occurring abroad, the real top-level management resided in the UK, reflecting the place where key strategic decisions were taken. The term "effective" of the PoEM was interpreted as synonymous with "real" or "ultimate" management, indicating a higher threshold than routine operational control.

Although earlier judgements such as News Datacom[169] used the expression "controlling brain" when identifying the CMC, while *Smallwood* case referred to "real top-level management" when determining the PoEM, a reconciliation of these cases suggests a layered interpretation.

Under this reading, the "controlling brain" may encompass both strategic and operational levels of management, meaning that CMC could, in principle, be exercised across more than one jurisdiction. In contrast, PoEM is confined to the place where the highest-level strategic decisions, which determine the direction of the company as a whole, are effectively taken.

Hence, in cases of dual CMC, the PoEM must be identified by determining which jurisdiction hosts the company's ultimate decision-making authority.

Finally, if such assessment leads to the conclusion that a company is non-resident in the UK for the purposes of a treaty to avoid double taxation, that determination will apply also for the purposes of UK domestic law.

[168] *Smallwood v. Revenue and Customs Commissioners* [2010], Tax Treaty Case Law, IBFD.
[169] *News Datacom Ltd and Another v. Atkinson* [2006], Tax Treaty Case Law, IBFD.

3.1.3. Comparative analysis and key differences with the Italian regime

Making a comparison between Italian and UK framework, it can be affirmed that both systems adopt a substance over form approach, aiming at locating tax residence of companies where the actual decision-making of the entity as a whole is exercised.
The main difference is that Italy's framework expressly incorporates both the strategic and the operational level through its criteria for determining tax residence. The UK legal system instead, relies primarily on the factual location of strategic control, which is often the place where the board of directors meets, or the dominant shareholders reside.
Consequently, on the one hand, Italy now accepts both the top-level strategic direction (the new Italian place of effective management criterion)[170] and the principal day-to-day administration (the new Italian primary day-to-day management criterion), which reflect the two souls of the PoEM concept within the OECD framework,[171] as separate triggers for residence; on the other hand UK continues to emphasise the top-tier, centralised control function.
Moreover, with regard to bilateral treaties, after BEPS Action 6, in both jurisdiction a shift away from mechanical tie-breaker rules, such as the PoEM, in favour of MAP mechanism has been registered.
In conclusion, despite operating within distinct legal traditions (Italy's codified system and UK's case law framework) both countries show a common feature in prioritising effective control and factual substance when determining companies' residence.
Italy's tax reform mirrors the OECD standards and strengthens the ability of tax authorities to capture artificial arrangements.
The UK continues to apply a factual CMC test, which is still sensitive to actual decision-making authority.
While diverging in the articulation of tests, both systems now increasingly rely on MAP to solve dual residence conflicts and ensure alignment with evolving international tax law.

[170] See article 73 paragraph 3 TUIR.
[171] See Chapter 2.

3.2. United States

The United States' approach to tax residence of companies differs markedly from that one of the United Kingdom and Italy, both in the definition of "corporations" and in the method to determine residence for tax purposes. Until 1996, the classification of entities was based on the so-called "resemblance test", developed in *Morrissey v. Commissioner*.[172] Under this test, the Internal Revenue Service (IRS) assessed whether an entity possessed certain corporate characteristics (such as centralized management, continuity of life and limited liability). This case-by-case analysis created considerable administrative burdens and uncertainty for both taxpayers and the IRS.

To address these problems, the U.S. Department of the Treasury introduced the Check-the-box (CTB) regulations[173] in 1996. Under this regime, certain entities are mandatorily classified as corporations for tax purposes (the so-called *per se corporations*), including companies incorporated under the laws of one of the 50 States and a specified list of entities created under foreign law. All other "*eligible entities*" may choose their tax classification by filing the appropriate election with the IRS. These entities can elect to be treated either as corporations or as pass-through entities; if no election is made within 75 days from their creation, default classification rules apply.[174]

The elective nature of this regime has created significant opportunities for tax planning, particularly through the use of hybrid entities, which may be regarded as fiscally transparent in one jurisdiction but as opaque in another.

[172] U.S. Supreme Court, *Morrissey v. Commissioner*, 296 U.S. 344, (1935).
[173] U.S. Department of the Treasury Regulation §§ 301.7701-1 to 301.7701-3.
[174] See MARIAN O. in TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.702-703 EALTP Annual Congress Łódź (2017).

3.2.1. Place of incorporation test

The U.S. tax system adheres to a formalistic "form over substance" approach when determining companies' residence. Under the Internal Revenue Code (IRC), a corporation is treated as resident if it has been created or organized in the territory of the United States or under the laws of any U.S. State. If a company is created or organized anywhere else or under any other law, it is classified as foreign.

Then, the main criterion to assess companies' tax residence in the U.S. is the place of incorporation (POI) test. This test has been the cornerstone of the system since the Tariff Act of 1909, which implicitly introduced residence-based taxing jurisdiction, even though it did not expressly define domestic and foreign companies. Companies constituted under U.S. law were taxed based on the worldwide income principle, while foreign companies were taxed only on the basis of the territorial principle, on their U.S.-source income.[175]

This approach was appropriate within the 19th century, when corporate activities were territorially limited and closely tied to the incorporating country. Indeed, during that time, there was a geographical convergence of the places where corporate operations and management were conducted and where shareholders resided, all of them typically coinciding with the place of incorporation. Consequently, the POI test aligned well with diverse *ratio* for corporate taxation.[176]

However, this functional coherence has diminished due to the modern context of globally mobile and decentralized corporate structures. Notwithstanding this evolution, the statutory definition of corporate residence has not evolved ever since.

Indeed, unlike most jurisdictions, the U.S. does not utilize substantive criteria to determine companies' tax residence, such as the PoEM, the administrative seat, the primary day-to-day management and so on.

The POI criterion is the exclusive one. This rigid formal approach results in what can be described as a *de facto* elective residence regime,[177] whereby multinational companies are able to choose their country of tax residence by selecting their place of

[175] BEALE J.H., *The Law of Foreign Corporations and Taxation of Corporations both Foreign and Domestic*, (1904).

[176] See MARIAN O. in TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.704-705 EALTP Annual Congress Łódź (2017).

[177] See SHAVIRO D., *The David R. Tillinghast Lecture: The Rising Tax Electivity of U.S. Corporate Residence*, 64 Tax L. Rev. 377, (2011).

incorporation. The consequence of this scenario is an open-door to significant tax planning and arbitrage opportunities, especially in cross-border structures.
In response to these abusive structures and choices, the U.S. system has adopted indirect substance-based considerations, without affecting the definition of residence itself, but through the introduction of anti-abuse provisions. Between these provisions, the most relevant are the ones that introduce limitation on benefits (LOB)[178] clauses within the tax treaties, with the objective to restrict treaty access to entities with sufficient economic nexus to the treaty country.

3.2.2. The role of the place of incorporation in the international framework

Even though U.S. tax treaties are generally consistent with the OECD Model Tax Convention, they reflect several distinctive policy choices, specifically in the field of companies' tax residence.[179] Indeed, since 1976, United States has published its own Model Tax Convention, which has suffered multiple amendments, with the most recent and substantial one in 2016. Although the 2016 edition sets the current standard for U.S. treaty negotiations, many treaties that are in force continue to apply the provisions of the 2006 edition of the U.S. Model.
According to what stated in the section above, under 2006 version of the U.S. Model Convention and in most of the treaties signed by the U.S., the POI served as the primary tie-breaker rule to solve dual residence issues. If a company was incorporated in both Contracting States, the competent authorities might have endeavoured to solve the conflict with a mutual agreement, without any obligation to reach it.[180] In case of

[178] The limitation on benefits clauses and the related phenomenon of treaty shopping will be discussed more in detail in the next section.
[179] See MARIAN O. and BRAUNER Y., *United States* in *Departures from The OECD Model Convention and Commentaries: Reservations, Observations and Positions in EU Law and Tax Treaties* (G. Maisto, ed., IBFD) (2014).
[180] Article 4 paragraph 4 of United States Model Income Tax Convention, 2006:
"Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then if it is created or organized under the laws of one of the Contracting States or a political subdivision thereof, but not under the laws of the other Contracting State or a political subdivision thereof, such company shall be deemed to be a resident of the first-mentioned Contracting State. In all other cases involving dual resident companies, the competent authorities of the Contracting States shall endeavor to determine the mode of application of the Convention to such company. If the competent authorities do not reach such an agreement, that company will not be treated as a resident of either Contracting State for purposes of its claiming any benefits provided by the Convention."

a failure in reaching such agreement, the company would have been denied benefits deriving from the treaty.

In contrast, the 2016 version of the U.S. Model Convention (now in force) adopted a more restrictive approach. It entirely removed the POI tie-breaker rule and the MAP mechanism. Instead, it introduced a really severe rule for companies: a company that qualifies as a resident under the laws of both Contracting States is not considered a resident of either State for the purposes of the Convention, therefore, it is excluded from the benefits deriving from it.[181]

This approach, while seemingly innovative, actually aligned with the direction of recent U.S. treaty practice[182] and reflected policy concerns emerged from the Action 6 of the BEPS, which warned of the abuse potential inherent in dual resident structures.[183] By eliminating automatic access to treaty benefits, the U.S. promoted a more selective, substance-driven assessment of eligibility.

As mentioned in the previous section, the POI test to determine companies' tax residence, being very much elective, leaves U.S. revenue vulnerable to residence-related tax avoidance. Consequently, several anti-abuse provisions have been introduced to the system, and within them, the most relevant for U.S. double taxation treaties is the limitation on benefits (LOB) clause. This clause is strictly related to the treaty shopping phenomenon,[184] which emerged during the early 1970s,[185] notably

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[181] Article 4 paragraph 4 of United States Model Income Tax Convention, 2016:
"Where by reason of the provisions of paragraph 1 of this Article a company is a resident of both Contracting States, such company shall not be treated as a resident of either Contracting State for purposes of its claiming the benefits provided by this Convention."

[182] Treaties such as the *Bulgaria – United States Income Tax Treaty* (2007) and the *Iceland – United States Income Tax Treaty* (2007) eliminated tie-breaker rules and only included MAP mechanisms to deal with dual residence issues.

[183] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances,* Action 6 – 2015 *Final Report,* p.72:
"The 2008 Update to the OECD Model Tax Convention introduced an alternative version of Article 4(3) (see paragraphs 24 and 24.1 of the Commentary on Article 4) according to which the competent authorities of the Contracting States shall, having regard to a number of relevant factors, endeavour to determine by mutual agreement the State of which the person is a resident for the purposes of the Convention. When that alternative was discussed, the view of many countries was that cases where a company is a dualresident often involve tax avoidance arrangements. For that reason, the current rule found in Article 4(3) should be replaced by the alternative found in the Commentary, which allows a case-by-case solution of these cases."

[184] Treaty shopping is the use of treaty benefits by residents of third countries with no genuine economic nexus to either Contracting State.

[185] See FLEMING J.C., JR., *Searching for the Uncertain Rationale Underlying the US Treasury's Anti-treaty Shopping Policy*, 40 Intertax 4, p. 245 (2012).

with the *Aiken Industries* case,[186] where payments were routed through a treaty jurisdiction to exploit reduced withholding rates. Although the IRS prevailed in that case, subsequent taxpayer strategies adapted themselves to be compliant while achieving the same abusive outcomes, inducing the U.S. system to adopt anti-abuse measures with a broader objective.

The LOB clauses impose a clear nexus as a requirement to access the treaty benefits. As provided in 2006 version of the U.S. Model Convention, these nexus can be expressed by various elements, such as: the public trading of the company on an exchange in one of the Contracting States (or being a subsidiary of such publicly traded company), the satisfaction of ownership and base erosion tests, the conduct of an active business or trade in the residence country, the qualification as a headquarters company under specific criteria, and the achievement of discretionary relief from the source country where no principal tax-avoidance purpose exists.

The 2016 version of the U.S. Model strengthened these safeguards. The active trade or business test now requires a direct and factual link between the trade or business in the residence State and the income for which the benefits are claimed, with an explicit exclusion of certain holding, group administration, financing, or investment activities unless performed by regulated financial institutions. The qualified headquarters test has been narrowed, requiring genuine primary management and control in the residence State and restricting treaty benefits under this category to provisions on dividends and interest.

Moreover, the 2016 edition added a derivative benefits clause, enabling companies to qualify under the LOB test if *"at least 95 percent of the aggregate vote and value of its shares (and at least 50 percent of any disproportionate class of shares) is owned, directly or indirectly, by seven or fewer persons that are equivalent beneficiaries";*[187] where an equivalent beneficiary is intended as a resident of any State *"entitled to all the benefits of a comprehensive convention for the avoidance of double taxation between that state and the Contracting State from which the benefits of this Convention are sought".*[188] This provision aligned U.S. treaty policy more closely with certain

[186] U.S. Tax Court, *Aiken Industries, Inc. v. Commissioner of Internal Revenue*, 56 T.C. 925.
[187] Article 22 paragraph 4 of the U.S. Model Convention.
[188] Article 22 paragraph 7 of the U.S. Model Convention.

treaties concluded with EU Member States, while maintaining the central anti-abuse objective.

Hence, the development of LOB provisions reflects a policy choice of the U.S. system: to safeguard the integrity of its tax treaties by counterbalancing the structural vulnerabilities of the POI residence test with targeted, substance-oriented eligibility criteria, consistent with the international standards promoted by Action 6 of the BEPS.

3.2.3. Comparative analysis and key differences with the Italian regime

The determination of companies' tax residence in Italy and in the U.S. is based on greatly different legal traditions, which reflect divergent approaches to the balance between formal criteria (such as the POI and the legal seat) and substantive ones (such as the PoEM and the primary day-to-day management).

Indeed, as analysed in the previous sections, Italian system, as well as most countries' systems, opted for the substance over form principle, whereas U.S. system relied almost exclusively and for a long time on the form over substance principle.

The divergence is particularly visible in the treatment of dual-resident companies. In the Italian framework conflicts of residence are typically solved applying double taxation treaties either with the PoEM tie-breaker rule or with the MAP case-by-case mechanism.

Conversely, in the U.S. framework, the 2016 version of the U.S. Model Tax Convention has erased both the PoEM and the MAP, providing that dual resident companies cannot benefit from the treaty relief and exemption.

Common features between the two legal frameworks are a few. Both jurisdictions, from a treaty policy perspective, have shifted away from rigid tie-breaker rules towards mutual agreement procedures, as a reflection of the BEPS' concerns related to the treaty abuse. Both systems also recognize the potential for manipulation of residence status and provide anti-abuse rules.

On the other hand, a fundamental difference lies in the domestic approach: Italian regime is a hybrid, combining formal and substantive criteria to capture both legal and operational links between companies and its territory; whilst U.S. relies exclusively on the formal criterion of the place of incorporation, dealing with abusive practices just

indirectly via the LOB clauses. As a result, Italy more readily addresses the economic reality of companies' decision-making, whereas United States prioritize certainty and administrability at the expense of substantive nexus assessment.

3.3. France

From a tax perspective, French domestic law presents a series of peculiarities shared by only a few other jurisdictions. Notably, these peculiarities extend into French international tax law, which is based on two fundamental features: the principle of territoriality and the economic approach.

Then, legal system focuses on where economic activity is actually carried out and not on where the company has its registered seat. Herein, in contrast with the approach adopted by the U.S. and in line with countries such as UK and Italy, the substance over form approach prevails over a purely formal one.

As a consequence, French tax law opts for a specific terminology to identify the taxpayer, using the wording "enterprises as economic entities" instead of "corporations/companies as legal entities".[189]

This approach allows the existence of tax liability without a corresponding legal personality, consistently with the outcomes reached under international tax treaties signed by Fance, especially with provisions such as the ones on permanent establishments (PEs).

Outside the tax field, French domestic law primarily determines a company's link with France through the place where its head office (*siege social*) is located.[190] As the *Cour de cassation* affirmed in the *Roval* case,[191] a company's nationality is, in principle linked to its real seat, understood as the place where effective management is exercised, typically coinciding with the registered office.

[189] See MAITROT DE LA MOTTE A. in TRAVERSA E., *Corporate Tax Residence and Mobility,* p.279 EALTP Annual Congress Łódź (2017).

[190] Article 1837paragraph 1 of the *Code civil* states as follows:
"Any company whose registered office is located in France is subject to the provisions of French law".

[191] Cass. Ass. Plén., 21 Dec. 1990, no. 88-15.744, *Société Roval*.

3.3.1. Principle of territoriality and the three criteria to identify an "enterprise operated in France"

In contrast to the approach common in many OECD Member States, based on the worldwide principle, French tax law applies the principle of territoriality, under which corporate income tax is levied solely on profits derived by "*enterprises operated in France*", as provided by article 209 of the *Code général des impôts*. The provision limits the tax base to income generated within France territory, irrespective of the entity's legal form or whether it possesses legal personality in France. Conversely, profits generated abroad by companies with their legal seat in France fall outside the scope of France taxing power.[192]

The wording chosen by the French system focuses on the concept of "*enterprises"*, which differs from the notion of company, reflecting the emphasis of this system on economic reality over formal attributes.

Factors such as place of incorporation, place of the registered office, nationality or residence of the shareholders are not, themselves, decisive. The focus is on whether, in practical and economic terms, there is an enterprise conducting business in France. This kind of assessment is made through the use of three alternative criteria, which serve as the operational test for determining liability to French corporate income tax.

This economic and territorial approach aligns with the broader French legal tendency, outlined above, to connect legal and tax obligations to the substantive place of decision-making and business activity rather than purely formal or legal constructs.

The aforementioned concept of *"enterprise operated in France"* has been developed through administrative practice and judicial interpretation: it denotes the regular conduct of an economic activity in France, which may arise, as anticipated, under three alternative (and potentially overlapping) criteria.

The first one is the existence of an autonomous establishment, understood as a production unit or a trading unit that operates as a coherent whole, possesses degree of

[192] See article 209 of the *Code général des impôts*; see also *French Tax Law Brochure*, 2024, p.6, which states as follows:
"In France, only profits made by enterprises operated in France are liable to corporation tax, whatever their nationality. This means that profits made by a French company in enterprises operated in countries other than France are not liable to French corporation tax; likewise, a foreign company is liable to French corporation tax only on the profit made from enterprises it operates in France".

permanence and stability, and enjoys organisational independence.[193] This notion closely parallels the permanent establishment concept contained in article 5 paragraph 1 of the OECD Model Convention. Furthermore, due to legal certainty needs, French law provides a ruling procedure, called permanent establishment tax ruling, that enables foreign companies to ask in advance to the French tax authorities if they have such a presence therein.

The second criterion is the conduct of business through a representative without the independent professional status. When a person acts in France on behalf of a company and does not operate with genuine autonomy, that person's activities are attributed to the company, in the sense of an enterprise operated in France, thus, attributing to the French jurisdiction the right to levy corporate income tax. This criterion is similar to the one provided by article 5 paragraph 5 of the OECD Model Convention.[194]

The third criterion is more atypical and concerns the performance of a complete commercial cycle in France. This refers to a coherent series of commercial, industrial, or artisanal operations (such as purchasing goods for resale) that are habitual rather than occasional. Even in the absence of an establishment or dependant representative, a foreign enterprise will be deemed to operate in France if such a full commercial cycle is carried out therein, unless it is demonstrably inseparable from activities conducted abroad. Conversely, French companies remain taxable in France on profits from foreign operations where those activities are not detachable from their French operations.

Taken together, these three alternative criteria underscore the French system's reliance on economic substance and the localisation of actual business activity, in keeping with the territorial approach outlined above.

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[193] For a wider an exhaustive analysis on the notion see MAITROT DE LA MOTTE A. in TRAVERSA E., *Corporate Tax Residence and Mobility,* pp.285-286, EALTP Annual Congress Łódź (2017); for an analysis on the concrete factors through which French tax authorities assess the existence of an establishment therein, see CASSAN C., "*L'exercice d'une activité occulte par un établissement stable: les éclairages de la jurisprudence récente*", Revue de Droit Fiscal (2015), no. 46, comm. 678 (2015).

[194] For a wider an exhaustive analysis on the notion, see MAITROT DE LA MOTTE A. in TRAVERSA E., *Corporate Tax Residence and Mobility,* p.285, EALTP Annual Congress Łódź (2017).

3.3.2. Interaction with the international framework

In treaty practice, France adheres closely to article 4 paragraph 1 of the OECD Model Convention, which defines a resident as "*any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature*".

In cases of dual residence, France adopts the tie-breaker rule of the PoEM. A peculiarity of the system is due to the wording used by the French translators and to the wording used by the OECD Model: indeed, the notion of enterprise used by the French domestic law is stricter than the notion of company used by the OECD Model, and so it is the notion of *"installation d'affaires",* which is the French translation of the place of business notion of the OECD Model. The French wording (installation) implies a physical presence and an operational activity. The consequence is that, in practice, residence determinations often overlap with the concept of a permanent establishment.

Hence, the concept of enterprise in French law must be read together with the definition of resident in tax treaties, since they do not exclude each other.

French treaty policy also provides relevant anti-abuse provisions, which include limitation on benefits (LOB) clauses, special exclusions for entities benefiting from preferential regimes (e.g.: under treaties with Switzerland, Malta or Hong Kong), targeted anti-treaty shopping provisions (such as those found in treaties with China and Panama), which refuse the granting of an exemption or reduction to companies when their main purpose is to benefit from the advantages of the treaty. French tax authorities may additionally invoke the abuse of law doctrine (*abuse de droit*) in order to deny treaty benefits where LOB clauses are absent, placing the burden of proof on the authorities to demonstrate the abuse.[195]

The notion of PoEM under French tax law aligns closely with the domestic concept of *siège reel,* which is the place where the principal management and commercial decisions, essential to the entity's operations are substantively taken. This

[195] Pursuant to Article L.64 of the French Tax Procedure Code, the tax authorities are empowered to set aside any arrangement made between the parties and to assess tax based on the true substance and economic reality of the transaction.

interpretation is followed by the administrative practice and by the case law.[196] However, in practice, the French tax authorities apply the PoEM test infrequently, typically limiting its use to cases where the company's core activities are conducted in France and its foreign operations are merely ancillary. French administrative courts also have further clarified that the *siège de direction* (defined as the place where the highest-ranking individual or governing body makes decisions) bears similarities to the OECD's PoEM concept, as reflected in the *Paupardin* case. Despite the apparent overlap, the two definitions are not identical and do not create practical inconsistencies.

3.3.3. Comparative analysis and key differences with the Italian regime

The determination of companies' tax residence in France and Italy reflects two distinct conceptual frameworks, rooted in their respective legal traditions and influenced by international standards, (especially the OECD Model Convention) yet leading to markedly different outcomes in certain cases.

As discussed in the previous sections, French domestic corporate taxation is founded on the principle of territoriality, whereby liability to tax arises only on profits attributable to *enterprises exploitées en France* (enterprises operated in France), regardless of the place of incorporation or formal seat.

On the contrary, the Italian system is based on the worldwide principle, whereby tax liability arises, for a company which is deemed resident, on profits generated both in Italy and abroad.

The French approach is clearly economic, focusing on whether a business activity is carried out in France through the three alternative criteria analysed above.[197]

With regard to the PoEM, Italy, with the recent reform, has generally aligned to the definition provided by the OECD Model, still opting for a hybrid focus on the two souls of the notion, intended as the governance and the operational substance, with the

[196] For the administrative practice see BOI-INT-CVB-DZA-10, para. 70, *Convention fiscale entre la France et l'Algérie*; For the case law, *see* Conseil d'Etat, 10e et 9e s.-s., 16 April 2012, no. 323592, *Paupardin; see also Conseil d'Etat, 7 Mar. 2016, no. 371435, Sté Cie internationale des wagons-lits et du tourisme: Revue de Droit Fiscal (2016), no. 46, comm. 591, concl. A. Bretonneau, note E. Meier, R. Torlet & A. Tailfer.*

[197] See section 3.3.1.

two new criteria of the place of effective management and of the primary day-to-day management.

French law employs a similar notion in the international context, aligning the treaty-based PoEM with the domestic concept of *siège reel*, which is the place where strategic and commercial decisions are substantively made. However, as already argued, this criterion is in practice rarely decisive domestically, while it finds its relevance mostly under tax treaties with the aim to resolve dual residence conflicts.

Both countries are OECD members and adopt the residence definition provided by article 4 of the Convention in their bilateral treaties. The key difference is that Italy now addresses dual residence mainly through the MAP mechanism (although some treaties still rely on PoEM), whereas France continues to apply the PoEM tie-breaker, but maintains a domestic framework largely untouched by BEPS-driven reforms, reflecting its emphasis on territoriality.

Nonetheless, French treaties often incorporate LOB clauses or specific exclusions targeting preferential regimes.

In conclusion, both systems adopt a substance over form approach, giving priority to effective management rather than purely formal connecting factors.

They also converge in aligning their treaty practice with the OECD Model and in implementing anti-abuse standards consistent with BEPS Action 6.

The main differences, however, reflect their structural approaches. Italy integrates residence tests directly into domestic law, combining formal and substantive criteria and applying the principle of worldwide taxation to resident companies.

By contrast, France relies on the principle of territoriality, taxing only profits from enterprises operated in France, and distinguishing between the concept of an enterprise operated in France (relevant for domestic taxation) and that of a resident company (relevant mainly in treaty contexts).

Conclusions

The analysis undertaken in this work shows that determining the tax residence of companies, though often presented as a technical issue of connecting factors, is in fact a pivotal feature of international tax law. Indeed, it accomplishes diverse functions, such as the allocation of taxing rights between jurisdictions, the prevention of double taxation and the safeguarding of tax base integrity.

The evolution of domestic laws, treaty provisions and international standards highlights the complex interaction between the need for legal certainty and the imperative of aligning taxation with economic substance.

From the Italian perspective, the recent reform represents a relevant breakthrough. Indeed, the introduction of the two new criteria (the place of effective management and the primary day-to-day management) brings Italian law closer to international standards, especially the OECD concept of PoEM.

These changes strenghten the ability of Italian domestic tax law to capture the real place of decision-making and operational control, thereby countering the phenomenon of fictitious foreign establishment and reinforcing Italy's anti-abuse framework.

Nevertheless, the application of the two new criteria requires careful interpretation, with the guidance of tax authorities, to avoid overlaps and to distinguish clearly between strategic and operational management.

The comparison between the traditional and the new criteria shows that the Italian reform seeks to preserve a dual dimension of the PoEM concept: both strategic and operational. In doing so, it provides a more nuanced tool for identifying the actual nexus between the Italian territory and companies conducting activities across multiple jurisdictions. By separating the criterion of strategic decision-making from that one of the place of daily management, the legislator has created a framework more suitable to address complex corporate structures, such as multinational groups, which might not be adequately captured by a purely operational test.

At the same time, the persistence of presumptions against the fictitious foreign establishment[198] confirms Italy's strong anti-abuse stance. Nevertheless, the reform actual effectiveness will depend on the interpretative guidance and administrative

[198] Under article 73 paragraph 5 of the TUIR.

practice that will accompany its application, since ambiguity in defining and evidencing each criterion may lead to litigation and inconsistent outcomes.[199]

At the international level, this thesis has examined article 4 of the OECD Model, tracing the historical evolution of the PoEM from its role as the exclusive tie-breaker rule for dual residence conflicts to its gradual displacement by the MAP mechanism. The shift, inspired in part by BEPS Action 6 recommendations, reflects a deliberate policy choice to address abuse risks linked to dual resident structures, such as double loss deductions and treaty-shopping schemes.

Yet, the MAP brings its own challenges: since competent authorities are under no obligation to reach an agreement, unresolved cases can result in companies being denied treaty benefits altogether, which is an outcome particularly problematic for cross-border businesses.

Furthermore, the thesis has underlined how the PoEM continues to offer conceptual clarity as a single factual connecting factor, while its practical application has been affected by divergent interpretation between jurisdictions.

In contrast, the MAP, although more flexible and better equipped to prevent abuse, risks undermining legal certainty and predictability for taxpayers.[200] This tension between certainty and anti-abuse safeguards remains at the centre of international debates.

The comparative analysis of the United Kingdom, United States and France further lightened the diversity of approaches adopted by each jurisdiction in the assessment of tax residence of companies.

The UK, like Italy, emphasises substance over form, relying on the jurisprudentially developed test of central management and control (CMC), focused predominantly on strategic decision-making at the highest level.

The U.S., by contrast, adopts an exclusive formal approach, based on the place of incorporation (POI) criterion provided by the Internal Revenue Code, thereby creating *de facto* electivity of residence but counterbalancing this vulnerability through strict limitation on benefits (LOB) clauses in all its tax treaties.

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[199] G. Maisto, "La riforma dei criteri di residenza fiscale delle società", in *Rivista di diritto tributario*, 2024, n. 3.

[200] M. Lang, *Introduction to the Law of Double Taxation Conventions*, 4th ed., IBFD, Amsterdam, 2020, pp. 50-54.

France is characterized by a territorial approach, taxing only profits from enterprises operated in France, which captures economic presence regardless of legal form, supplemented by the domestic notion of *siège reel,* that aligns with the PoEM in treaty contexts.

From the comparison, several points of convergence and divergence emerged. All jurisdictions recognize the need for anti-abuse measures within the rules to determine tax residence of companies, but they realize them in different ways, as analysed.

On the other hand, the treatment of dual residence stays heterogeneous, with UK and Italy following the MAP approach, while France retains the PoEM tie-breaker and the U.S., in its 2016 Model, forecloses treaty benefits entirely.

The results of this work indicate that the recent Italian reform places the domestic framework more firmly in line with the prevailing international standards, particularly with OECD treaty practice.

However, challenges remain in ensuring interpretative consistency, considering that the MAP, while internationally endorsed, does not eliminate the risk of unresolved residence disputes. Moreover, Italy's dual-criterion approach will require careful coordination with treaty definitions and with the evidentiary standards applied in competent authority negotiations.

Looking ahead, several developments may shape the future discipline of corporate tax residence both domestically and internationally.

In the Italian context, these initial years of application of the new criteria in the amended article 73 paragraph 3 of the TUIR are crucial to define the boundaries and the elements of *discrimen* between the place of effective management criterion and the primary day-to-day management. Administrative guidance of the Italian Tax Authorities is hopeful, possibly through a more detailed circular than the one already published.[201] The Italian Tax Authorities will be essential in standardizing evidentiary thresholds and in minimizing litigation.

At the international level, the OECD is expected to continue refining MAP best practices, as reflected in the 2023 MAP Statistics and the ongoing peer review process under BEPS Action 14, with a focus on reducing resolution times and increasing

[201] Italian Tax Authorities Circular n°20/E/2024.

transparency in competent authority interactions.[202] The recommendations under BEPS Action 6, advocating for a case-by-case approach to dual residence and for the integration of anti-treaty-shopping clauses, are likely to further influence treaty negotiations and domestic legislative reforms.[203]

Additionally, growing pressure for global tax certainty, especially in light of Pillar Two's implementation, may prompt a reconsideration of whether a hybrid model, combining the clarity of a factual tie-breaker with the flexibility of MAP, could provide a more balanced solution for both the taxpayers and the administrations.[204]

In conclusion, the determination of tax residence of companies will remain at the intersection of legal certainty and anti-abuse policy. Italy's reform represents a significant step forward in the alignment of domestic law with international standards, with the preservation of its own legal and economic priorities. Its success, however, will depend on the effective implementation of the new system, on a robust administrative practice and continued participation in multilateral forums to address persistent tensions inherent in decisions on cross-border residence.

[202] OECD, *MAP Statistics 2023*, OECD Publishing, Paris, 2023, pp. 4-7.
[203] OECD/G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: 2015 Final Report*, cit., pp. 17-22.
[204] OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD Publishing, Paris, https://doi.org/10.1787/782bac33-en.

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