ALLEN & OVERY

Covid-19 update

Covid-19 coronavirus: Implications of current travel restrictions for the tax residency status of companies

1. Introduction

Government responses to the Covid-19 pandemic have included restricting travel and implementing quarantine requirements for those who do travel. As a result, managers and directors who are living in country A but are manager or director of a company in country B can no longer freely travel and phone or video conferences have largely become the norm, which could also have tax residency implications for companies. Several jurisdictions have taken measures to address residency questions in the context of Covid-19.

In this note we discuss such tax residency considerations and relevant official guidance, with reference to certain key jurisdictions, being Australia, Belgium, Czech Republic, France, Germany, Italy, Luxembourg, the Netherlands, Poland, Spain, United Kingdom and the United States.

2. Residency and permanent establishments under tax treaties

2.1 Residency under tax treaties

Many tax treaties provide for a "tie-breaker" rule where a company is considered resident in two states under each jurisdiction's domestic rules.[1] Until the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or **MLI**) was introduced, this tie-breaker rule generally deemed such a dual resident company to be resident in the country where its place of effective management was located (hereinafter: the corporate tie-breaker rule). However, where the MLI's dual-residence provisions have been adopted by the contracting states to a tax treaty, the place of effective management tie-breaker rule is generally replaced by a mutual agreement procedure (**MAP**) to decide where the entity is resident.

2.2 Corporate tie-breaker rule

Where the corporate tie-breaker rule still applies, the decisive criterion for determining the tax residency of a company that would otherwise be deemed resident in two states is generally its place of effective management. Generally, a company's place of effective management rests with the management of the company and the place of effective management is located where the management carries out its management tasks. For these purposes, it is not the day-to-day management that is relevant, but management at the level of senior executives. In general, the effective management rests with the formal management, ie the board of directors, and the place of residence lies where this board of directors exercises its management.

1 Article 4 OECD Model Tax Convention on Income and on Capital.

2.3 Mutual Agreement Procedure (MAP)

Where a MAP applies, there is less guidance as to how states will solve a dual residency issue of an entity. The competent authorities deal with the dual residency issue on a case-by-case basis taking into account all relevant facts and circumstances. Although there is discretion as to how authorities come to an agreement, the relevant factors that authorities are expected to take into account include where the meetings of the 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 relevant entity is carried on, where the entity's headquarters are located, which country's laws govern the legal status of the entity, and where its accounting records are kept.[2]

2.4 Permanent establishment

As well as potential implications for companies' tax residence, another potential consequence of the travel restrictions could be that the relevant company is considered to have a taxable presence in the jurisdiction where its managers reside and (temporarily) exercise their management roles. In this respect, it is relevant that the definition of a permanent establishment as laid down in article 5(2)(a) of the OECD Model Convention includes a specific reference to a "place of management". As a result, tax treaties may allocate the right to levy taxes allocable to this management function exercised by those managers.

3. How countries (could) respond to the Covid-19 crisis

The OECD secretariat in its analysis of 3 April 2020[3] indicated that it is unlikely that the Covid-19 situation will create any changes to an entity's residence status under a tax treaty.[4] In the secretariat's view, a temporary change in location of the chief executive officers and other senior executives is an extraordinary and temporary situation due to the Covid-19 crisis and such change of location should not trigger a change in residency, especially once the tie-breaker rule contained in tax treaties is applied.[5]

Similarly, in the secretariat's view according to the same analysis, it is unlikely that the current situation will create changes to the permanent establishment determination. The exceptional and temporary change of the location where employees exercise their employment because of the Covid-19 crisis, such as working from home, should not create new permanent establishments.

The above does not necessarily mean that countries will be flexible or that the analysis will be clear in all circumstances. In case jurisdictions are not willing to accept that the Covid-19 crisis is an unusual period, companies may wish to re-evaluate the composition of their boards, their board meeting schedules and how they document changes to any of the foregoing in order to address residency-specific concerns. These alternatives are of course highly dependent on the facts and circumstances and may not suit a specific situation from a commercial, financial or organisational perspective.

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2 Paragraph 24.1 of the commentary to article 4 of the OECD Model Convention.

3 OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 3 April 2020, https://read.oecd-ilibrary.org/view/?ref=127_127237-vsdagpp2t3&title=OECD-Secretariat-analysis-of-tax-treaties-and-the-impact-of-the-COVID-19-Crisis.

4 What it could of course mean is that the crisis confirms that tax authorities were right in having doubts as to where the place of effective management actually lies.

5 Paragraph 3 of the OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 3 April 2020.

4. Approach of various jurisdictions

In this section we briefly discuss the local rules in certain jurisdictions and, in particular, whether the Covid-19 crisis has already resulted in a new approach towards tax residency.

4.1 Australia

Further administrative relief will be available to foreign entities in Australia to prevent adverse tax residency consequences due to travel restrictions.[6] This approach will relax the current tests applied to determine residency insofar as they are materially impacted by Covid-19.

Foreign entities are ordinarily considered residents of Australia when their central management and control is located in Australia. Where this occurs as a result of Covid-19 travel restrictions (eg where a board of directors is required to convene in Australia due to movement restrictions), the Australian tax authorities will not alter the entity's residency status on this basis alone. Similarly, where travel restrictions have caused the unplanned presence of a foreign entity's employees in Australia, their presence will not amount to a "permanent establishment" of the employer entity in Australia for tax purposes (provided the entity did not have a permanent establishment in Australia prior to the impacts of Covid-19).

Importantly, the Australian tax authorities will continue to make residency determinations on an individual basis and this relief will not be available where factors other than Covid-19 have materially influenced an entity's residency for tax purposes.

4.2 Belgium

The Belgian tax authorities have to date not released any guidance in response to the Covid-19 pandemic on the potential effects of the presence of directors/managers in Belgium on both

[6] Australian Taxation Office, COVID-19 International business frequently asked questions (Central management and control), 17 March 2020, https://www.ato.gov.au/General/COVID-19/COVID-19-frequently-asked-questions/International-business-frequently-asked-questions/#CentralmanagementandcontrolCMC.

company tax residence and the creation of permanent establishments. However, we expect the Belgian tax authorities to follow the position expressed by the OECD secretariat in their aforementioned analysis of 3 April 2020.

As a general rule, pursuant to Belgian domestic law and subject to the relevant double tax treaties, foreign entities are considered residents of Belgium when their place of effective management is located in Belgium. Where this occurs as a result of Covid-19 travel restrictions (eg where the board of directors is required to convene in Belgium due to travel restrictions), the Belgian tax authorities should not alter the entity's residency status on this basis alone. Similarly, where travel restrictions have caused the unplanned presence of a foreign entity's employees in Belgium, their presence should not amount to a new "permanent establishment" of the employer entity in Belgium for tax purposes.

The Belgian tax authorities have already confirmed this approach with respect to cross-border workers: the Belgian tax authorities have, for instance, reached an agreement with the tax authorities of France on 13 March 2020, Luxembourg on 17 March 2020, the Netherlands on 30 April 2020 and Germany on 6 May 2020 in relation to the application of the respective double tax treaties. These agreements specify that working days being remotely carried out in the workers' residence state during the lockdown period will be considered as working days in the country where they are usually carried out in order to determine the days of physical presence of a worker in a state and where and to what extent the worker is taxable.

The Belgian Government has adopted, however, new corporate law measures in response to the issues faced by various companies in organising shareholders' meetings and board meetings in the context of Covid-19. As regards board meetings, Royal Decree n°4 of 9 April 2020 (as amended by a Royal Decree of 28 April 2020) clarifies that they may be held by unanimous written resolutions or through any form of telecommunication allowing for joint deliberation (even if no statutory authorisation exists and notwithstanding any statutory provision to the contrary).

Although a flexible approach is also expected to be taken by the Belgian tax authorities towards substance and tax residency, it would be advisable, as the situation unfolds, to analyse and monitor each situation on a case-by-case and ongoing basis to assess the potential Belgian tax implications of the Covid-19-related travel restrictions and lockdown measures.

4.3 Czech Republic

Under Czech domestic law, a corporate income taxpayer is treated as a Czech tax resident if such taxpayer has either (i) a seat or (ii) an effective place of management in the Czech Republic.

The domestic definition of a permanent establishment is quite broad.[7] In particular, it should be noted that it does not provide for any potential exceptions to the general definition (such as an

[7] Under Czech tax law, a permanent establishment is defined as:

- A place through which a Czech tax non-resident carries out its business in the Czech Republic, such as a workshop, an office, a place of extraction of natural resources, or a place of sale.
- Furnishing of services by a Czech tax non-resident through its employees or other personnel in the territory of the Czech Republic, but only if such activities exceed 6 months within any 12 months period.
- An agent (regardless whether dependent or independent) that is acting on behalf of a Czech tax non-resident in the territory of the Czech Republic and has and habitually exercises an authority to conclude contracts that are binding for the tax non-resident. In such a case, that tax non-resident shall be deemed to have a permanent establishment in the Czech Republic in respect of any activities which that agent undertakes for the tax non-resident.

exception concerning preparatory or auxiliary activities in relation to the applicable OECD-based double tax treaty).

The Czech Ministry of Finance has not issued any official guidance dealing with tax treaty aspects with a view to the Covid-19 situation. However, in Q&As covering various tax-related Covid-19 topics, the Czech Ministry of Finance has indicated that the interpretation of Czech double tax treaties remains unchanged. In other words, the fact that an employee works from his/her home (eg because of travel restrictions) may create a permanent establishment of his/her employer. Moreover, according to unofficial information, the Czech Ministry of Finance is prepared to ignore the application of the OECD Secretariat Analysis of Tax Treaties and the Impact of the Covid-19 Crisis.[8] Therefore, taxpayers should carefully review their cross-border elements if these have changed due to Covid-19.

4.4 France

As a general rule, pursuant to French domestic law and subject to the relevant double tax treaties, a foreign corporation may be considered a French tax resident if its place of effective management is in France, as described in paragraph 2.2 above.

To date, the French Government has not adopted exceptional rules to address the impact of travel restrictions on the taxable presence of foreign corporations in France, notably in relation to an effective management in France. Two orders[9] and one decree[10] issued pursuant to the Emergency Law[11] only facilitate the rules from a corporate law standpoint for holding meetings and governing bodies of legal persons (and entities without legal personality), as well as extend the deadlines for approving the financial statements. The absence of any exceptional measures regarding the tax residency of a foreign corporation may be explained by the highly factual approach (ie on a case-by-case basis) of the effective place of management concept. In other words, a foreign company with an adequate level of substance outside of France would probably not be viewed as managed from France if, for the time period of the Covid-19 crisis, one or two senior people are to stay in France without the possibility to work from the place of incorporation of the company. If that were to be the case, it would probably mean that the foreign tax residency of such company was already at risk before the crisis.

In contrast, there is a specific tax mitigation measure for individuals as a result of travel restrictions due to Covid-19: France, Germany, Belgium and Switzerland have entered into an agreement[12] to amend the number of days that cross-border employees may work from home without being taxed in their home country.

4.5 Germany

In the course of the Covid-19 pandemic, Germany concluded four agreements with its neighbouring countries (Luxembourg on 3 April 2020, the Netherlands on 6 April 2020, Austria on

[8] OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 3 April 2020, https://read.oecd-ilibrary.org/view/?ref=127_127237-vsdagpp2t3&title=OECD-Secretariat-analysis-of-tax-treaties-and-the-impact-of-the-COVID-19-Crisis.
[9] Order No. 2020-321 of 25 March 2020 and Order n° 2020-318 of 25 March 2020.
[10] Decree No. 2020-418 of 10 April 2020.
[11] Emergency Law No. 2020-290 of 23 March 2020 to address the epidemic.
[12] Minefi, Communiqué n° 2081/993, 19 March 2020.

15 April 2020 and Belgium on 6 May 2020) that clarify the tax status of cross-border workers who currently work from home because of pandemic measures.

In order to prevent any amendments of the tax status of affected individuals due to compulsory home office days during the Covid-19 pandemic, these agreements simplify that working days being remotely carried out in worker's residence state will be considered as working days in the country where they are usually carried out. The simplifications are special provisions that temporarily apply during the crisis.

Neither the German Government nor the German Federal Ministry of Finance has yet commented on the tax status of companies that might change during the pandemic by the creation of a fixed place of business or place of effective management through its directors or employees.

4.6 Italy

As a general rule, pursuant to Italian domestic law and subject to the relevant double tax treaties, a foreign corporation may be considered an Italian tax resident if its place of effective management is in Italy, similar to the approach described in paragraph 2.2 above.

To date, the Italian Government has not adopted exceptional rules to address the impact of travel restrictions on the taxable presence of foreign corporations in Italy. Recent legislation issued to deal with the Covid-19-related emergency situation only provides for rules aimed at granting certain tax benefits, credits and reliefs, rather than coping with tax residency issues.

4.7 Luxembourg

Following the declaration of a state of emergency on 18 March 2020, the Luxembourg Government issued a new regulation on 20 March 2020 facilitating the organisation of board meetings. Given the current circumstances, the regulation brings significant and much needed changes to the shareholder and board meeting holding mechanisms provided for in the Luxembourg law of 10 August 1915 on commercial companies, as amended, by introducing alternative means to adopt decisions. Particularly, as physical meetings are no longer practically possible in Luxembourg (because of travel restrictions), companies are allowed to move to written resolutions or videoconferencing for all board meetings, even where not expressly provided for in the articles of association. Similar rules apply at the level of shareholder and bondholder meetings. By adopting these temporary provisions, the Luxembourg Government has adopted a flexible approach towards the internal organisation of companies. The Luxembourg tax authorities have not adopted an official position on these corporate governance relief measures. However, it is likely that the current exceptional circumstances should not affect the tax residence of Luxembourg entities, although foreign tax considerations would have to be carefully analysed.

4.8 The Netherlands

In relation to corporate taxpayers, no specific rules have been introduced to address the impact of travel restrictions on the tax residency of entities or on having a taxable presence in the form of permanent establishment or substance requirements. The Dutch association of tax advisors (*Nederlandse Orde van Belastingadviseurs*) referred to substance requirements in its letter of 17 March 2020. In this letter, it stresses that the government could consider to be flexible when it comes to substance requirements in relation to Dutch corporate income tax and dividend withholding tax. Due to the travel restrictions, it is currently impossible for board members to travel and therefore to attend board meetings in person. In light thereof, it requests the Dutch government to be flexible in its approach towards substance and residency in case it is temporarily impossible for board members to achieve the required levels of presence or availability in the Netherlands. Nevertheless, so far no specific measures have been announced by the Ministry of Finance in relation to this topic.

In contrast, the Netherlands has entered into agreements with Germany and Belgium that clarify the tax status of cross-border workers who currently work from home because of pandemic measures. These agreements specify that working days being remotely carried out in the workers' residence state during the lockdown period will be considered as working days in the country where they are usually carried out in order to determine the days of physical presence of a worker in a state and where and to what extent the worker is taxable. The agreements apply from 11 March 2020 until 31 May 2020. The agreement with Germany will continue to apply after this date until it is terminated by either the Netherlands or Germany. The agreement with Belgium is renewed on a monthly basis after 31 May 2020 provided that both states agree to it.

4.9 Poland

As a rule, stemming from domestic tax law and subject to the relevant double tax treaties, a corporate entity is considered a Polish resident for taxation purposes if its (i) registered office or (ii) place of management is located in the territory of Poland. Having said that, theoretically, merely possessing a place of management in Poland is sufficient for an entity to be deemed a Polish tax resident, and thus subject to the relevant double tax treaties.

The concept of "registered office" does not give rise to much controversy and in the vast majority of cases is equated with the location disclosed in the articles of association of a company, as provided by the relevant provisions of civil law. That being said, the provisions of Polish tax law do not provide for a definition or objective criteria of the "place of management", thus it is subject to the case-by-case interpretation of the tax authorities, which should analyse all the facts related to the conduct of affairs of a given company. The majority of tax rulings and case law of the Polish administrative courts are in favour of a broad interpretation of the place of management as a place where decisions about a given entity are actually made.

However, in our experience, the tax authorities prioritise the place of a company's registered seat and rarely investigate the place of management if they are presented with a certificate of tax residency issued by a country of registration of the taxpayer.

Further to Covid-19, for corporate tax purposes, Poland relaxed provisions on management board meetings introducing remote participation (via telecommunication means) or casting votes using another management board member as a proxy. However, the Polish parliament has not introduced any specific statutory measures in connection with Covid-19 as far as the issue of tax residency and the creation of a permanent establishment is concerned, nor have representatives of the Ministry of Finance commented on this in any way.

Therefore, at this time it remains unclear whether managing a foreign registered company from Poland could trigger Polish tax residency or a Polish permanent establishment. We would expect that the OECD's proposed approach should prevail: if the management from Poland is only a temporary situation forced by Covid-19 travel restrictions, it should not result in triggering Polish tax residency. If such management is permanent, the risk would be higher.

4.10 Spain

As a general rule, according to Spanish domestic legislation and subject to the relevant double tax treaties, a foreign corporation may be considered tax resident in Spain if: (i) it had been incorporated in accordance with Spanish law; (ii) its registered office is located in Spanish territory; or (iii) its effective management headquarters are located in Spanish territory. For these purposes, it will be understood that an entity has its effective management headquarters in Spanish territory when the direction and control of all its activities are located therein.

On the other hand, the definition of the permanent establishment foreseen in Spanish legislation follows the provisions of the OECD Model Convention.

To date, neither the Spanish Government nor the Spanish tax authorities have introduced exceptional rules to address the impact of travel restrictions on the taxable presence of foreign corporations in Spain, in particular related to an effective management in Spain.

Notwithstanding the above, the Spanish Government has adopted new measures to relax certain legal obligations and formalities applicable to Spanish companies, such as certain obligations of the boards of directors or the deadline for approving the financial statements, among others.[13] In particular, these new measures state that the sessions of the government bodies of the companies will be understood to be held at the domicile of the legal entity. Therefore, the effective place of management of the companies should not be affected.

Taking into account the lack of guidance, situations should be analysed on a case-by-case basis in order to determine the Spanish tax implications that could arise as a consequence of the restrictions on travelling and quarantine requirements. This matter should be carefully managed and monitored at all times, and close attention should be paid to determine whether any new rules are passed that would apply to this new situation.

4.11 United Kingdom

HM Revenue & Customs (**HMRC**), the UK tax authority, has published guidance in response to the Covid-19 pandemic on the potential effects of the presence of directors/managers in the UK on both company tax residence and the creation of permanent establishments.[14] This guidance, which HMRC considers to be consistent with the guidance published by the OECD Secretariat on 3 April 2020, is prefaced by the statement that "*HMRC is very sympathetic to the disruption that is being endured*".

Special rules and practices to deal with Covid-19-related situations are *not* being introduced. HMRC's stance is instead that the existing UK legislation, treaties and guidance in relation to company residence and permanent establishments already provide the flexibility needed to deal with the relevant changes in business activities. Under the existing rules and guidance, HMRC views both company residence and the existence of a permanent establishment as questions of fact, to which it applies a "holistic" approach. Because of this approach, HMRC is unwilling to offer definitive guidance on Covid-19-related scenarios. Instead, the latest guidance identifies various ways in which HMRC might apply existing rules and guidance so as to avoid harsh results. In particular, in HMRC's view:

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[13] Royal Decree-Law 8/2020, of March 17, on extraordinary urgent measures to face the economic and social impact of COVID-19.
[14] HMRC International Manual, pp. 120185 and 261010.

- A company will not necessarily become UK tax resident because a few, or occasional, board meetings are held in the UK (or participated in from the UK), or because some decisions are taken in the UK over a short period of time.
- Even if a company were to become UK tax resident under the UK's domestic "central and management and control" test, the company could still be treated as non-UK resident if that is the outcome of a corporate tie-breaker or a MAP under an applicable double tax treaty.
- Conversely, a company will not necessarily become non-UK tax resident simply because a few board meetings are held, or some decisions are taken, outside the UK for a short period of time.
- A non-resident company will not automatically have a taxable presence by way of a permanent establishment after a short period of time.
- It is a matter of fact and degree whether a company could acquire a permanent establishment through the habitual conclusion of contracts in the UK.
- The existence of a UK permanent establishment does not in itself mean that a significant element of the profits of the non-resident company would be taxable in the UK.

As much as this guidance is no doubt intended to be helpful, it is implicit that HMRC considers that the presence of individuals in the UK due to Covid-19-related disruption *could* in some scenarios cause a company to become UK tax resident or to acquire a UK permanent establishment. In particular, prolonged and/or repeated activity in the UK would appear to present a risk, which would appear to become more severe the longer Covid-19-related restrictions remain in place. It would therefore be advisable for non-UK companies with directors or employees operating in the UK while Covid-19 restrictions are in place to assess whether their operating procedures present a UK tax exposure, both currently and on an ongoing basis as the situation unfolds.

4.12 United States

The US Internal Revenue Service (**IRS**) addressed tax residency considerations for individuals in the context of Covid-19 in Revenue Procedure 2020-20 issued on 21 April 2020 (the **Revenue Procedure**), and published on its website a corresponding frequently-asked-questions (**FAQ**) page[15] for entities. The FAQs incorporate the Revenue Procedure to the extent that the analysis for entities involves the question of whether an individual is a US tax resident. The difference in format likely relates to the need to disseminate information quickly, and also to the type of existing authority on tax residency for individuals (which generally is fairly formulaic) versus authority for entities (which often involves a facts and circumstances analysis). It should be noted, however, that from a technical perspective, revenue procedures are official interpretations that can be relied on by taxpayers. By contrast, FAQs on the IRS website are generally considered an efficient way for the IRS to communicate information, but are not official guidance on which taxpayers can formally rely and are subject to change without formal procedure.

In the Revenue Procedure and the FAQs, the IRS notes that the Covid-19 emergency may have affected non-US travellers who intended to leave the United States but were unable to do so due to infection or restricted travel options, whether because of cancelled flights or other disruptions in other forms of transportation, shelter-in-place and quarantine orders, or border closures, or because of individuals "feeling unsafe" to travel due to recommendations regarding

15 https://www.irs.gov/newsroom/information-for-nonresident-aliens-and-foreign-businesses-impacted-by-covid-19-travel-disruptions.

social distancing and avoiding public spaces (collectively referred to as the **Emergency Travel Disruptions**).

Generally, a non-US corporation is not treated as tax resident in the United States unless such corporation is treated as engaged in the conduct of a trade or business within the United States. For these purposes, the question of whether a company conducts trade or business is a facts and circumstances determination for which there is not a bright line rule, though there are certain safe harbours (eg a safe harbour for trading in stocks and securities) and certain key sources of authority (eg for origination of loans). The presence of individuals conducting activities or making decisions on behalf of a company from within the United States is often relevant to the trade or business analysis. Additionally, a non-US corporation may qualify for tax treaty benefits in respect of business profits to the extent such non-US corporation does not have permanent establishment within the United States. For these purposes, a permanent establishment will be defined in the relevant treaty and generally relates to an office or fixed place of business or dependent agent, the determination of which also often involves taking into account the presence of individuals.

Under the FAQs, a non-resident alien, foreign corporation, or a partnership in which either is a partner (**Affected Person**) may choose an uninterrupted period of up to 60 calendar days, beginning on or after 1 February 2020, and on or before 1 April 2020 (the **Covid-19 Emergency Period**), during which services or other activities conducted in the United States will not be taken into account in determining whether the non-resident alien, foreign corporation or partnership is engaged in a US trade or business, provided that such activities were performed by one or more individuals temporarily present in the United States and would not have been performed in the United States but for Covid-19 Emergency Travel Disruptions. It is important to note that for purposes of these FAQs, an "individual temporarily present in the United States" means an individual who is present in the United States on or after 1 February 2020, and on or before 1 April 2020, and is a non-resident alien, or a US citizen or lawful permanent resident who had a "tax home" (as defined under US Treasury regulations) outside the United States in 2019, and reasonably expects to have a tax home outside the United States in 2020.

In addition, during an Affected Person's Covid-19 Emergency Period, services or other activities performed by one or more individuals temporarily present in the United States will not be taken into account to determine whether a non-US corporation has a permanent establishment, provided that the services or other activities of these individuals would not have occurred in the United States but for Covid-19 Emergency Travel Disruptions.

In light of the "but for" nature of the relief, and given that it allows for activities of individuals who would not otherwise be US tax residents, non-US entities will need to continue to take care in managing the activities that are conducted within the United States on their behalf by individuals, particularly those who are otherwise US tax residents.

The FAQs therefore refer back to the Revenue Procedure to modify existing tests for individual tax residence that would apply absent Covid-19 relief. Similar to the FAQs, the Revenue Procedure provides for a 60-day Emergency Period as a single period of up to 60 consecutive calendar days selected by the Eligible Individual starting on or after 1 February 2020 and on or before 1 April 2020 during which the individual is physically present in the United States on each day. An Eligible Individual who intended to leave the United States during the individual's selected Covid-19 Emergency Period, but was unable to do so due to Covid-19 Emergency Travel Disruptions, may exclude that period for purposes of applying the substantial presence test or testing for treaty eligibility. For these purposes, an Eligible Individual is any individual who was a non-resident at the close of the 2019 tax year, who is not a lawful permanent resident at any point in 2020, who is present in the United States (without regard to the relief provided in the Revenue Procedure) during the selected Covid-19 Emergency Period and who does not become a US resident in 2020 due to days of presence in the United States outside of the Covid-19 Emergency Period.

In each of the Revenue Procedure and the FAQs, taxpayers are advised to retain contemporaneous documentation to establish the chosen Covid-19 Emergency Period and other relevant facts. In particular, documentation by entities should establish that the relevant business activities conducted by individuals temporarily present in the United States during the Covid-19 Emergency Period would not have been undertaken in the United States but for Covid-19 Emergency Travel Disruptions.

5. Conclusion

Although the OECD secretariat expressed that in its view it is unlikely that the Covid-19 pandemic creates changes to tax residency under tax treaties, only a few countries have actually issued specific guidance (eg Australia and the US). Some jurisdictions have indicated or are expected to take a flexible approach (eg Belgium and Luxembourg) while others may even be taking a rather strict approach (eg the Czech Republic). However, the bulk of the jurisdictions discussed in this note have not (yet) introduced specific guidance, often only stressing that tax residency and the existence of a permanent establishment are highly factual matters and need to be considered on a case-by-case basis.

This leads to legal uncertainty. It is remarkable that many jurisdictions did provide for provisions in relation to individuals, but ignored the impact of Covid-19 on corporate tax residency. As a result, as long as the Covid-19 pandemic impacts international travel, it seems prudent to actively monitor the local situation. Going forward, this may result in companies re-evaluating the composition of their boards, their board meeting schedules and how they document changes to any of the foregoing in order to address residency-specific concerns.

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