Chapter 9: Employment Income under Tax Treaty Law and the Impact of the COVID-19 Pandemic

Michael Lang [*]

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9.1. Extraordinary times require extraordinary measures?

Guglielmo Maisto is not only one of the leading practitioners in the field of international tax law worldwide, but has also made a great contribution to the world of academia. Students from the LLM programme in International Tax Law at the Vienna University of Economics and Business are among those benefiting from his lectures. He has authored publications of the highest level, always dealing with extremely important issues in international tax law. In addition, he regularly launches numerous academic activities, such as initiating conferences and developing concepts for them. Guglielmo Maisto and the author are bound by a decade-long intensive friendly collaboration, and the author hopes that the highly esteemed jubilarian will be pleased with this chapter.

This chapter deliberately addresses issues of tax treaty law that emerged as a result of the COVID-19 pandemic. On the one hand, this is a highly topical and important subject. [1] On the other hand, several months ago, Guglielmo Maisto and the author exchanged views on the increasingly frequent consultation agreements necessitated by the COVID-19 situation that sometimes override existing double tax treaty rules. They both agreed that this topic required more intensive discussion. Therefore, the author would like to use this chapter as an impetus for more in-depth debate on these issues.

The OECD has already repeatedly dealt with the impact of the COVID-19 pandemic on double tax treaties. [2] It has addressed issues of tax treaty interpretation in connection with the following topics: [3]

- the creation of permanent establishments (PEs) (e.g. a home office as a dependent agent PE) and the interruption of construction sites; [4]
- changes in residence for entities [5] and individuals [6] and the application of tie-breaker rules to dual residents; and
- income from employment, e.g. payments under stimulus packages, stranded workers, cross-border (frontier) workers and teleworking from abroad. [7]

The goal of this chapter is to focus on these aspects and, thus, examine how the situations brought about by the COVID-19 pandemic are impacting the distribution of taxing rights for employment income under double tax treaties.

The OECD suggests that it sees ample room for manoeuvre for the competent authorities of the contracting states of double tax treaties: [8]

> Exceptional circumstances call for an exceptional level of coordination between jurisdictions to mitigate the compliance and administrative costs for employees and employers associated with an involuntary and temporary change of the place where employment is performed. Where relevant, MAP should be applied efficiently and pragmatically to help resolve issues arising out of the COVID-19 pandemic. Jurisdictions have issued useful guidance and administrative relief to mitigate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 pandemic.

The author takes a different position in this regard: the existing legal system must prove itself, especially in difficult times and times of crisis. Therefore, during a pandemic, mutual agreement procedures must be applied as "efficiently and pragmatically" as is required outside of such difficult times. There is no justification for applying different standards or even putting aside applicable law and replacing it with agreements adopted on a mere administrative level.

This, however, does not rule out that the necessity of subsuming new problems under the existing rules can open new perspectives and lead to the realization that the current rules have, so far, been understood too narrowly or too broadly. Such a new understanding of existing rules, however, cannot be limited to the time of the pandemic, but must also set the tone for the interpretation of these rules in the future. It must be clear that the content of unchanged rules does not change as a result of newly emerging circumstances. [9] Against the backdrop of these considerations, the author would like to turn his attention to the issues addressed by the OECD.

9.2. Income of cross-border workers that cannot perform their work due to COVID-19 restrictions (e.g. wage subsidies for employers)

Firstly, the OECD addresses the situation in which an employee is prevented from exercising their employment in the other contracting state but continues to receive remuneration, and it takes the following position: [10]

> In conclusion, where an employee resident in one jurisdiction and who formerly exercised an employment in another jurisdiction receives a COVID-19 related government subsidy from the work jurisdiction to maintain the relationship with the employer, the payment would be attributable to the work jurisdiction under Article 15 of the OECD Model.

In a more detailed explanation, it argues: [11]

> Some stimulus packages adopted or proposed by governments (e.g. wage subsidies to employers) are designed to keep workers on the payroll during the COVID-19 pandemic despite restrictions to the exercise of their employment. To the extent these may be the last payments received in respect of the employment, the payments resemble termination payments. These are discussed in paragraph 2.6 of the Commentary on Article 15 of the OECD Model, which explains that they should be attributable to the place where the employee would otherwise have worked. In most circumstances, this will be the place the person used to work before the COVID-19 pandemic.

A closer look at a quoted passage from the OECD Commentary, however, reveals a more differentiated argument: [12]

> In some cases, the employer is required (by law or by contract) to provide an employee with a period of notice before terminating employment. If the employee is told not to work during the notice period and is simply paid the remuneration for that period, such remuneration is clearly received by virtue of the employment and therefore constitutes remuneration "derived therefrom" for the purposes of paragraph 1. The remuneration received in such a case should be considered to be derived from the State where it is reasonable to assume that the employee would have worked during the period of notice. The determination of where it is reasonable to assume that the employee would have worked during the period of notice should be based on all facts and circumstances. In most cases it will be the last location where the employee worked for a substantial period of time before the employment was terminated; also, it would clearly be inappropriate to take account of a prospective employment period in a State where the employee might have been expected to work but did not, in fact, perform his employment for a substantial period of time.

If one were to subscribe to the point of view that the state in which the employment would probably have been performed should be the one to tax, the above is not very helpful. This is because, in many cases, it cannot be assumed with certainty that the employee would continue to be employed at all if it were not for the government subsidies. If one assumes, however, that the employment would have continued, the respective work – depending on the type of work and the technical equipment in the employee's home – would probably have been performed remotely from the home office. However, had the COVID-19 pandemic not happened, the employment would have been performed at the workplace in the company. Therefore, one can reach completely different conclusions depending on how one interprets the fiction. [13]

The wording of the tax treaties modelled after article 15(1) of the OCED Model Tax Convention (OECD Model) [14] suggests that the exclusive right of taxation remains with the state of residence, since, in the event of inactivity, the work is not performed in the other contracting state. [15] Even if such inactivity is considered a stand-by and is classified as an exercise of the employment, [16] this will result in the exclusive right of taxation of the state of residence in the case that the employee is staying at their place of residence in their state of residence. [17] This is because the employment is performed where the employed person is on stand-by (thus, where they reside). This situation is, in any event, different from that of severance payments or continued payments of salaries after a notice of termination has been

given. According to the opinion of the courts of some states, such payments are based on the employment previously performed in the state of activity. [18] Therefore, they constitute remuneration for the work previously performed. Only this can justify taxation in the previous state of activity (which Germany's Federal Fiscal Court rejects, even in these cases). [19] On the other hand, salary payments during the COVID-19 pandemic for times of inactivity constitute remuneration for the unused stand-by time at the place of residence in the state of residence. Therefore, a lot suggests that the wages attributable to the times of inactivity can only be subject to taxation in the state of residence. [20]

For the reasons described above, another line of argument offered by the OECD also fails to convince: [21]

> Alternatively the payments may resemble those which are routinely received during paid periods of absence the entitlement to which arises in connection with where the work was performed. Examples of such other routine payments include vacation pay, paid sick leave, or paid furlough, none of which have been known to cause difficulties in international taxation.

Vacation pay or paid sick leave form part of the remuneration paid for the work performed. Using the example of vacation pay, the salary continues to be paid during these days or weeks because of the work previously performed. The employer does not pay so that the employee can go on vacation. This is similar in the case of sickness. In the case of the continued payment of salaries due to the COVID-19 pandemic, the payment is made so that the employee remains on stand-by and does not terminate the employment relationship or begin employment with a different employer. The case of "paid furlough", however, seems comparable to the continued payment of salaries due to the COVID-19 pandemic. In this situation, just as with the continued salary payments due to the COVID-19 pandemic, it is highly questionable as to why the state of the previous employment should have the right of taxation.

9.3. Stranded worker: Exceeding days-of-presence threshold due to travel restrictions

In its guidance, the OECD also addresses the following situation: [22] the COVID-19 pandemic has caused individuals who are resident in one jurisdiction and exercised employment in another jurisdiction to become stranded in that other jurisdiction. The OECD's updated guidance on tax treaties comes to the following conclusion, although it also mentions that the authorities in some states may reach other conclusions or may have issued specific guidelines: [23]

> In conclusion where an employee is prevented from travelling because of COVID-19 public health measures of one of the governments involved and remains in a jurisdiction, it would be reasonable for a jurisdiction to disregard the additional days spent in that jurisdiction under such circumstances for the purposes of the 183 day test in Article 15(2)(a) of the OECD Model.

In doing so, the OECD refers to the Commentary on Article 15 of the OECD Model: [24]

> Paragraph 5 of the Commentary on Article 15 explains that all days of presence count (working days or not) – and provides several examples, one of which is 'days of sickness'. But it contains an exception: if those days of sickness 'prevent the individual from leaving and he would have otherwise qualified for the exemption', they do not count towards the days of presence test in Article 15(2)(a).

The OECD attempts to considerably extend this exception, although it also points out the remaining limits: [25]

> This may cover situations where an employee is prevented from travelling because they are in quarantine due to exposure to the COVID-19 virus. In addition, it may cover situations where either government has banned travelling and cases where it is, in practice, impossible to travel due, for example, to cancellation of flights. This may not cover the situation where an individual does not travel based on a mere recommendation by the governments involved to avoid unnecessary travel.

A closer look at paragraph 5 of the OECD Commentary on Article 15 seems worthwhile: [26]

> Although various formulas have been used by member countries to calculate the 183-day period, there is only one way which is consistent with the wording of this paragraph: the "days of physical presence" method. The application of this method is straightforward as the individual is either present in a country or he is not. The presence could also relatively easily be documented by the taxpayer when evidence is required by the tax authorities. Under this method the following days are included in the calculation: part of a day, day of arrival, day of departure and all other days spent inside the State of activity such as Saturdays and Sundays, national holidays, holidays before, during and after the activity, short breaks (training, strikes, lock-out, delays in supplies), days of sickness (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption) and death or sickness in the family. However, days spent in the State of activity in transit in the course of a trip between two points outside the State of activity should be excluded from the computation. It follows from these principles that any entire day spent outside the State of activity, whether for holidays, business trips, or any other reason, should not be taken into account. A day during any part of which, however brief, the taxpayer is present in a State counts as a day of presence in that State for purposes of computing the 183 day period.

The quoted passage from the OECD Commentary is contradictory in itself: the OECD – rightly so – points out that only one method for the calculation of the 183 days is consistent with the wording of article 15(2) of the OECD Model, which is based solely on the days of physical presence in the state of activity, and also stresses that [27] "[t]he application of this method is straightforward as the individual is either present in the country or he is not". If an exception is subsequently made for certain "days of sickness", this is diametrically opposed to the previous statements.

The OECD report titled “The 183 Day Rule: Some Problems of Application and Interpretation”, to which these formulations in the OECD Commentary can be ultimately traced back to, reveals the reasons behind this exception. [28] The report describes how the administrations of the OECD member countries had calculated the 183 days up until that point, and it refers to some particularities in which days spent by the employee outside the state of activity were, nonetheless, included in the calculation of the 183 days, while other days were not included despite the employee’s presence in the state of activity. [29] The OECD was obviously interested in reducing these particularities, and the formulation of paragraph 5 already proposed in the report and subsequently accepted in the Commentary no longer took these particularities into account, but rather emphasized the importance of the physical presence, regardless of the motives for such a presence. The report reads: [30]

> It is admitted that exception could be made in special circumstances (e.g. people in transit or people prevented from leaving because of illness as is practice in the United States).

The following explanation can also be found: [31]

> The adoption of this method to calculate the 183 day period requires that a number of member countries change their practice, but these countries have all indicated a willingness to do so.

Overall, this suggests that the OECD only waived the physical presence rule in cases in which a member country was not willing to change its previous practice. In the case that an employee is prevented from leaving because of illness, the United States, as a powerful member country, gained the upper hand and made sure that the case would find mention in the OECD Commentary.

In essence, however, the phrases used in paragraph 5 are not a suitable reason for not including additional days of presence in the state of activity due to the COVID-19 pandemic in the calculation of the 183 days. On the one hand, paragraph 5 of the OECD Commentary on Article 15 of the OECD Model, like any other statement made in the OECD Commentary, can only be taken into consideration for the interpretation of those tax treaties that were concluded after the inclusion of these explanations in the OECD Commentary. [32] Even then, however, the exception addressed in paragraph 5 has no relevance. As shown above, the formulations in paragraph 5 are contradictory and, thus, of limited value. Insofar as they postulate an exception to the principle of physical presence, they are diametrically opposed to the clear wording of article 15(2) of the OECD Model and must, therefore, be ignored. Even if one were to consider the formulation according to which those days in which the employee is prevented from leaving the state of activity due to sickness should not be included in the calculation, the considerations presented here have shown that this exception is by no means open to an extended interpretation. The declared objective of the authors of this passage from the OECD Commentary and of the underlying OECD report was to take utmost account of the physical presence in the calculation and to reduce exceptions to a minimum. Therefore, there is nothing to suggest an extension of these exceptions on the basis of this particular passage from the OECD Commentary.

9.4. Special provisions in some bilateral treaties that deal with the situation of cross-border workers

The OECD also addresses rules for employment that are not contained in the OECD Model but can, nevertheless, be found in numerous tax treaties of neighbouring states: [33]

> Some jurisdictions have agreed special treaty provisions with neighbouring jurisdictions to which employees frequently commute for work. These provisions allocate the taxing rights in a different way to Article 15 of the Model Convention. For example, under some of those provisions employees commuting to a neighbouring jurisdiction are taxable on their employment income only in the home jurisdiction provided any employment activity carried on elsewhere is limited to a maximum stated period (typically ranging from 4 to 6 working weeks). Some of those treaties include provisions according to which teleworking days are considered working days within the work jurisdiction. Some jurisdictions have agreed to treat the COVID-19 pandemic as force majeure or an exceptional circumstance and, accordingly, the time spent by the employee teleworking in their home jurisdiction will not be included in the calculation of the maximum work days outside the work jurisdiction limitation for the purposes of the treaty.

Where the formulation “some jurisdictions have agreed” is used here, one should distinguish more specifically which agreements are implied. If some states use the COVID-19 pandemic as an opportunity to change their tax treaty rules for a certain period or permanently and do so in compliance with the procedure provided in their states for this purpose (as a rule, through approval by the legislative bodies), there are no objections to that. [34] It becomes problematic, however, when the governments or finance ministers alone agree to understand a certain tax treaty rule in a different manner or to refrain from applying it. [35] Some of the agreements cited as examples by the OECD were actually concluded only at the level of the administrations. [36]

The agreements used as examples in the OECD paper include one concluded in connection with the Austria-Italy Income and Capital Tax Treaty (1981): [37]

> A competent authority agreement concerning the COVID-19 pandemic was concluded between Austria and Italy with regard to the application of Art 15(4) of the respective double tax treaty (special provision on cross-border workers). Accordingly, ‘taxpayers who usually commute to their place of work but work from home to curb the spread of COVID-19 continue to work as cross-border commuters within the meaning of Art 15(4)’.

The wording of article 15(4) of the Austria-Italy Income and Capital Tax Treaty (1981) actually seems to allow the assumption that, despite intermittent phases of home office work in the state of residence, a person usually travels to their workplace for work. Such a broad interpretation of the wording, however, must consequently apply to other future cases as well. If, in the future – that is, after the pandemic has been overcome – an individual permanently spends 1 or 2 days per week in the home office and travels to their workplace 3 or 4 days per week, one should be able to assume that they usually travel to their workplace for work. However, in cases in which an employee does not commute to their workplace for

several months, due to a pandemic or for other reasons, but works exclusively from the home office during this time, this individual no longer usually commutes to their workplace in the state of activity. Moreover, an individual who will have their workplace in another state in the future but spends the first months of employment in the home office, again due to a pandemic or for other reasons, will also fail to meet the application requirements of article 15(4) of the tax treaty, as this individual still does not usually commute to their workplace across the border.

Another example cited by the OECD is the frontier worker regulation in the Austria-Germany Income and Capital Tax Treaty (2000): [38]

> A competent authority agreement concerning COVID-19 was concluded between Austria and Germany with regard to the application of Art 15(6) of the respective double tax treaty (special provision on cross-border workers). Accordingly, working days for which wages are paid and on which cross-border commuters only exercise work in the home office due to the measures to combat the COVID-19 pandemic will not be included in the calculation of the 45-day limitation.

The 45-day limitation mentioned above is not included in the tax treaty itself. By using this tolerance limit, the authorities of the two states attempt to give meaning to the provision of article 15(6) of the tax treaty, despite the unfortunate formulations contained therein: the wording of the provision actually requires that the individual “returns daily from the place of employment to the place of residence”. If understood literally, the employee would have to commute on all 365 days. [39] However, even if one were to apply the term “daily” only to working days, the provision would be left almost without any meaning, since an activity carried out elsewhere on one day would already render the provision inapplicable for the entire assessment period. [40] Therefore, administrations overcome this difficulty with a tolerance limit of 45 days, during which the non-return to the place of residence is considered irrelevant, and the frontier worker regulation can still be applied. [41]

In this specific case, however, the application of the (anything but stable) [42] 45-day limit is not required at all. [43] The provision of article 15(6) of the tax treaty can also be understood as meaning that “daily” refers to the days on which the employee commutes to their place of employment located in the other state. [44] After all, one can only expect them to return from “the place of employment to the place of residence” on these days. [45] Days on which the employee performs their work from the home office in the state of residence are, therefore, irrelevant. [46] The application of article 15(6) of the tax treaty is only at risk if the employee does not return from the place of employment in the other state on the days on which they travel there because, e.g. they spend the night in the other state. [47] Essentially, one must agree with the opinion expressed in the consultation agreement on article 15(6) of the tax treaty from the year 2020, but for a different reason. [48]

9.5. Teleworking from abroad, i.e. working remotely from one jurisdiction for an employer in another jurisdiction

Last but not least, the OECD paper also deals with the consequences resulting from the general rules of article 15 of the OECD Model for when an individual no longer exercises their employment at the location of the enterprise, but in a different state. In this respect, the OECD paper reads: [49]

> In conclusion, changes in the jurisdiction where an employee exercises their employment can impact where their employment income is taxed: new taxing rights over the employee's income may arise in other jurisdictions and those new taxing rights may displace existing taxing rights. As payroll taxes are often withheld at source, addressing the change will result in compliance and administrative costs for the employer and employee. Some jurisdictions have issued guidance and administrative relief to mitigate the additional burden.

The OECD thus ostensibly creates the impression that it accepts the fact that the exercise of employment in a different state also causes the taxation rights of the states to change. The phrase quoted at the end of the paragraph, however, should be seen in a more critical light. Here, the OECD points out measures taken by the states "to mitigate the additional burden". The examples then cited by the OECD, however, make it clear that they again involve mutual agreements entered into at a mere administrative level, which override the content of the treaty provisions. The OECD refers to these measures in a favourable tone, without pointing out or even criticizing the fact that these rules are in contradiction with the tax treaties. [50]

The OECD cites the German practice as an example: [51]

> Germany's Federal Ministry of Finance has concluded consultation agreements with the competent authorities of Austria, Belgium, France, Luxembourg, the Netherlands, Poland and Switzerland that contain a mutual agreement on a temporary and factual fiction. For the period of time during which the health authorities continue to advise to work from home due to a high risk of infection, days on which cross-border workers work remotely can be considered as being spent in the state where the work would have been carried out without the COVID-19 related measures. However, this fiction does not apply to working days that would have been spent at home or in a third State independently from these measures. The fiction is optional, i.e. a cross-border worker for whom the fiction would be disadvantageous has the right to apply the rules of the tax treaty as they stand.

This is an admission that the taxation is not based on the actual circumstances, but on fictitious circumstances. As a result, it essentially ignores the treaty. [52] The fact that the taxpayers are not forced to submit to this fiction but can opt for it instead does not make things easier. Tax law is binding law, and double tax treaties determine the distribution of taxation rights. When tax treaty provisions deprive a state of its taxation right, this must be accepted. The possibility to voluntarily pay taxes so as to relieve oneself from the obligation to pay taxes in the other state is not one that can be created by an administration. This would require an amendment of the tax treaties by way of ratification procedures foreseen for this purpose.

9.6. Concluding summary

For the most part, the special rules described by the OECD on the application of treaty provisions modelled after article 15 of the OECD Model, as well as the special provisions for frontier workers often included in these rules, must be seen in a critical light. In times of crisis, the existing legal system must not be pushed aside, but it must prove itself instead. In many states of which the finance ministers were

compelled to agree on special rules, the legislators were perfectly capable of quickly taking measures at a legislative level in those legal areas that are far more important for the fight against the pandemic than tax law. One must question – already on its merits – whether the pandemic requires particular measures in the field of double taxation. If, due to the pandemic, a taxpayer resides or exercises their employment in a different state than originally planned and the distribution of taxation rights changes as a result, this does not have any life-threatening consequences. If states are worried that individuals engage in mobility that is considered undesirable by the state so as to avoid personal tax disadvantages and, thus, wish to amend the distribution of taxation rights for a certain period or permanently, they must apply the procedures foreseen for this purpose, i.e. with the involvement of the parliaments. Even – and especially – in times of a pandemic, the rule of law must not be abandoned.

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Head of the Institute for Austrian and International Tax Law at WU (Vienna University of Economics and Business), academic director of the LLM programme in International Tax Law and speaker of the FWF-funded "Doctoral Program in International Business Taxation" at this university. The author wants to thank Valentin Bendlinger and Jürgen Romstorfer for their extremely valuable support.

1.
This is also underlined by the large body of literature on COVID-19 and tax treaty-related issues, to which reference can only be made here by way of example. *See*, inter alia, A. Báez Moreno, *Unnecessary and Yet Harmful: Some Critical Remarks to the OECD Note on the Impact of the COVID-19 Crisis on Tax Treaties*, 48 Intertax 8/9 (2020); K. Cejie, *Taxes and Contributions on Cross-Border Employment Income – Before and During the COVID-19 Pandemic*, 74 Bull. Intl. Taxn. 12, pp. 729-741 (2020), Journal Articles & Opinion Pieces IBFD; and K. Cejie, *New Problems Caused by the COVID-19 Pandemic – Income Taxes and Social Security Contributions (An Overview)*, 61 Eur. Taxn. 5, pp. 185-194 (2021), Journal Articles & Opinion Pieces IBFD. Only in Austria, *see*, inter alia, S. Bendlinger, *Ergebnisabgrenzung bei Betriebsstätten in der Krise*, 4 TPI 3, pp. 130-137 (2020); I. Kerschner & S. Schmidjell-Dommes, *Konsultationsvereinbarung zum DBA Deutschland anlässlich der COVID-19-Pandemie*, 30 SWI 6, pp. 266-273 (2020); S. Bendlinger, *Steuerlicher Nexus durch „digitale Nomaden" und der Unsinn der Homeoffice-Betriebsstätte*, 31 SWI 9, pp. 450-463 (2021); and K. Reichl & C. Stauber, *DBA-rechtliche Aspekte der COVID-19-Maßnahmen*, in *Einkommensteuer 2021* p. 51 et seq. (K. Hirschler et al. eds., Linde 2021)

2.

See, initially, OECD, *OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis* (3 Apr. 2020), available at https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/ (accessed 3 Apr. 2021); and the corresponding update, OECD, *Updated guidance on tax treaties and the impact of the Covid-19 pandemic* (21 Jan. 2021), available at https://read.oecd-ilibrary.org/view/?ref=1060_1060114-o54bvc1ga2&title=Updated-guidance-on-tax-treaties-and-the-impact-of-the-COVID-19-pandemic (accessed 7 Jan. 2022).

3.
For a critical overview of all the issues addressed in the OECD's COVID-19 tax treaty guidance, *see* Báez Moreno, *supra* n. 1, at pp. 815-830.

4.
OECD (2021), *supra* n. 2, at sec. 2.

5.
Id., at sec. 3.

6.
Id., at paras. 37-45.

7.
Id., at sec. 4.

8.
Id., at para. 62.

9.
In a similar vein, on the OECD Notes on the Impact of COVID-19 on tax treaties, *see* Báez Moreno, *supra* n. 1, at pp. 829-830.

10.
Id., at para. 52.

11.

Id., at para. 50.

12.
OECD Model Tax Convention on Income and on Capital: Commentary on Article 15 para. 2.6 (21 Nov. 2017), Treaties & Models IBFD [hereinafter *OECD Model: Commentary on Article 15* (2017)]. *See also*, critically, Báez Moreno, *supra* n. 1, at pp. 826-827. In the same vein, *see also* Cejie, *supra* n. 1, at p. 192.

13.
M. Lang, *Homeoffice nach der Konsultationsvereinbarung zum DBA Deutschland – Österreich*, 30 SWI 7, p. 336 (2020).

14.
OECD Model Tax Convention on Income and on Capital (21 Nov. 2017), Treaties & Models IBFD.

15.
See M. Lang, S. Siller & S. Zolles, *Austria: Termination Payments*, in *Tax Treaty Case Law around the Globe* p. 331 (E. Kemmeren et al. eds., Linde 2017), criticizing a decision of the Austrian Supreme Administrative Court (Verwaltungsgerichtshof, VwGH); *see* AT: VwGH [Supreme Administrative Court], 26 Feb. 2015, 2012/15/0128.

16.
See R. Prokisch, *Artikel 15. Einkünfte aus unselbständiger Arbeit*, in *Doppelbesteuerungsabkommen* paras. 4a and 35 (K. Vogel & M. Lehner eds., C.H. Beck 2015).

17.
Also on this argument, *see* Cejie, *supra* n. 1, at p. 193.

18.
AT: VwGH, 26 Feb. 2015, 2012/15/0128; and AT: VwGH, 23 Feb. 2017, Ro 2014/15/0050.

19.
DE: Federal Fiscal Court (*Bundesfinanzhof*, BFH), 24 Feb. 1988, I R 143/84; DE: BFH, 27 Aug. 2008, I R 81/07; DE: BFH, 10 July 1996, I R 83/95; DE: BFH, 12 Sept. 2006, I B 27/06; and DE: BFH 2 Sept. 2009, I R 111/08.

20.

See Lang, *supra* n. 13, at p. 337. Taking the opposite view, however, *see* Cejie, *supra* n. 1, at p. 193.

21.
OECD (2021), *supra* n. 2, at para. 50.

22.
Id., at paras. 53-56.

23.
Id., at para. 56.

24.
Id., at para. 54.

25.
Id., at para. 55. *See also* Cejie, *supra* n. 1, at p. 191.

26.
Para. 5 *OECD Model: Commentary on Article 15* (2017).

27.
Id., at para. 5, second sentence.

28.
OECD, *The 183 Day Rule: Some Problems of Application and Interpretation* (24 Oct. 1991), available at https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/r-9-the-183-day-rule-some-problems-of-application-and-interpretation_9789264239081-102-en#page1 (accessed 7 Jan. 2022).

29.
Id., at sec. 2.

30.

Id., at para. 14.

31.
Id., at para. 18.

32.
Comprehensively, *see*, inter alia, M. Lang & F. Brugger, *The role of the OECD Commentary in tax treaty interpretation*, 23 Australian Tax Forum 2, p. 101 et seq. (2008).

33.
OECD (2021), *supra* n. 2, at para. 58.

34.
An example for such an amendment is the amending Protocol to the *Italy-Switzerland Income and Capital Tax Treaty* (9 Mar. 1976), Treaties & Models IBFD, signed on 23 December 2020, relating to frontier workers. Extensively, *see* P. Salvatore & R. Rossi, *Italy and Switzerland Sign New Agreement on Income Taxation of Frontier Workers: Initial Comments from an Italian Perspective*, 61 Eur. Taxn. 4, pp. 170-173 (2021), Journal Articles & Opinion Pieces IBFD.

35.
Also critical of the reinterpretation of existing tax treaty rules and principles in the OECD's note, *see* Báez Moreno, *supra* n. 1, at pp. 829-830.

36.
The OECD refers, inter alia, to the competent authority agreements concluded between Austria and Germany. The agreement has not been approved by any legislative bodies of Austria or Germany, but has only been concluded among the tax administrations of Austria and Germany. *See*, initially, AT: Ministry of Finance, *Konsultationsvereinbarung zum Abkommen vom 24. 8. 2000 zwischen der Bundesrepublik Deutschland und der Republik Österreich zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen betreffend die steuerliche Behandlung des Arbeitslohns von Arbeitnehmern im Homeoffice sowie Kurzarbeitergeld und Kurzarbeitsunterstützung* [Consultation Agreement on the Convention of 24 Aug. 2000 between the Federal Republic of Germany and the Republic of Austria for the Avoidance of Double Taxation in the Field of Taxes on Income and on Capital concerning the Tax Treatment of the Wages of Employees in Home Offices as well as Short-Time Workers' Allowances and Short-Time Workers' Benefits], 2020-0.239.636, BMF-AV 2020/55 (15 Apr. 2020). In the meantime, the Consultation Agreement has been extended and updated several times. For the currently valid version, *see* AT: Ministry of Finance, *Verlängerung der*

Konsultationsvereinbarung zum DBA-Deutschland iZm der COVID-19-Pandemie [Extension of the Consultation Agreement on the DTC-Germany in relation to the COVID-19 pandemic] (21 Dec. 2021), available at https://findok.bmf.gv.at/findok?execution=e7s1 (accessed 7 Jan. 2021).

37.
AT: Ministry of Finance, *Konsultationsvereinbarung zu den Auswirkungen der COVID-19-Pandemie auf die Grenzgängerregelung iSd Art. 15 Abs. 4 DBA-Italien* [Consultation Agreement on the cross-border commuter provision of Art. 15(4) of the DTC between Austria and Italy], 2020-0.394.761, BMF-AV Nr. 96/2020 (27 June 2020). *See also* OECD (2021), *supra* n. 2, at p. 19, para. 63, Box 4.

38.
See OECD (2021), *supra* n. 2, at p. 19, para. 63, Box 4.

39.
A. Bayer, quoted in L. Ramharter, *SWI-Konsultationsvereinbarung zur Auslegung der Grenzgängerregelung im DBA Deutschland*, 30 SWI 4, p. 168 (2020).

40.
M. Lang & S. Schmidjell-Dommes, quoted in V. Drummer, T. Fink & A. Miladinovic, *DBA-Auslegungsfragen bei der Vergütung von Arbeitnehmern und ähnlichen Einkünften in Deutschland, Liechtenstein, Österreich und der Schweiz*, 27 SWI 5, p. 236 (2017).

41.
H. Jirousek, quoted in P. Geißler, M. Lehner & M. Sunde, *D-A-CH Steuer-Kongress 2013: Probleme aus der aktuellen DBA-Praxis*, 22 IStR 17, p. 649 (2013).

42.
Compare the legitimate concerns of V. Daurer, *Die Grenzgängereigenschaft bei Drittstaatsentsendungen*, 20 SWI 11, pp. 513-520 (2010); Bayer, *supra* n. 39; and Lang quoted in Ramharter, *supra* n. 39, at p. 170.

43.
See Lang, *supra* n. 13, at p. 339.

44.
D. Höppner & E. Steinhauser, *Homeoffice-Tätigkeiten im grenzüberschreitenden Kontext zwischen Österreich und Deutschland*, 30 SWI 4, pp. 163-166 (2020); and Lang, *supra* n. 42, at p. 170. For this interpretation with regard to art. 13(5)(b) of the *France-Germany Income and Capital Tax*

Treaty (21 July 1959), Treaties & Models IBFD, *see also* DE: BFH, 9 Oct. 2014, I R 34/13 ISR 2015, p. 176.

45.
In the same vein, *see* AT: VwGH, 23 Feb. 2010, 2008/15/0148 with regard to the former art. 15(4) of the *Austria-Switzerland Income and Capital Tax Treaty* (30 Jan. 1974), Treaties & Models IBFD. Further considerations, in particular, to apply the statements of this ruling also to art. 15(6) of the *Austria-Germany Income and Capital Tax Treaty* (24 Aug. 2000), Treaties & Models IBFD, *see* V. Daurer, *Neues zur Grenzgängereigenschaft*, 21 ecolex 5, p. 493 (2010); and Höppner & Steinhauser, id., at p. 164. In the same direction on art. 15(6) of the *Austria-Germany Income and Capital Tax Treaty* (2000), *see* Wichmann & Duss quoted in Drummer, Fink & Miladinovic, *supra* n. 40, at pp. 238-239.

46.
See Lang, *supra* n. 42.

47.
Höppner & Steinhauser, *supra* n. 44, at p. 164.

48.
See Lang, *supra* n. 13, at p. 339.

49.
OECD (2021), *supra* n. 2, at para. 58.

50.
See also Báez Moreno, *supra* n. 1, at pp. 829-830, who convincingly and correctly notes that the OECD "first defines the result to be achieved and then tries to bend the rules to achieve the intended effect".

51.
See OECD (2021), *supra* n. 2, at pp. 19-20, para. 63, Box 4.

52.
See Lang, *supra* n. 13, at pp. 341-343.