Highlights of the OECD Model Tax Convention on Income and on Capital update

The new update to the OECD Model Tax Convention on Income and on Capital incorporates regulatory adjustments, interpretative clarifications and additional criteria in response to recent developments in international taxation. It addresses relevant issues relating, among other things, cross-border teleworking, the exploration and exploitation of natural resources, transfer pricing aspects of financial transactions or information received through exchange of information.

LUIS CUESTA CUESTA
Partner, Tax Department, Gómez-Acebo & Pombo

PILAR ÁLVAREZ BARBEITO
Professor of Public Finance and Tax Law, University of La Coruña
Academic counsel, Gómez-Acebo & Pombo

On 17 November 2025, the OECD Council approved a new update to the Model Tax Convention on Income and on Capital (Model Convention) - incorporating regulatory adjustments, interpretative clarifications and additional criteria in response to recent developments in international taxation, cross-border work and the BEPS (Base Erosion and Profit Shifting) project - that will be included in the new codified version to be published in 2026 and which could have interpretative effects in certain cases with respect to the global network of double taxation agreements.

Among the changes included in the update, we highlight the following:

1. Cross-border teleworking

Among the aspects affected by the update is the clarification of when teleworking carried out by an individual from his home or other relevant place—a second home, a holiday rental, the home of a friend or

relative, etc.—located in a country other than that in which the employer enterprise is located may constitute a permanent establishment of the enterprise.

Thus, guidelines are provided which, although recognised as not being exhaustive, do offer guidance and clarification in determining whether the enterprise has a permanent establishment in the State from which its employee works, a statement which, as explained below, will require permanence, dedication and commercial reason.

In this regard, it must first be determined whether the location from which the work is carried out has a sufficient degree of permanence, such that it is used on a continuous basis - and not merely incidentally - to carry out activities related to the business of an enterprise (activities that are not merely preparatory or ancillary) and during an extended period of time (twelve months), which, however, allows for temporary interruptions. In the event of such interruptions, it must be assessed whether the place is used to perform the activities of the enterprise on a recurrent basis over several years, each period of time during which the place is used having to be considered in combination with the number of times during which that place is used over a number of years.

Secondly, the employee's dedication to the enterprise's activities must be assessed and quantified. Thus, even if the employee's home in another State could be considered to have a sufficient degree of permanence as indicated in the previous paragraph, that place would not be considered a permanent establishment of the employer if the individual worked from it for less than 50 per cent of his total working time for that enterprise over the course of any twelve-month period commencing or ending in the fiscal year concerned. For these purposes, the actual conduct of the individual will determine the calculation of working time, and formal contractual agreements between the individual and the enterprise (including any relevant enterprise policies) may be of practical assistance in this regard, to the extent that they correspond with the actual conduct of the individual.

Thirdly, in addition to the above, the existence of a permanent establishment will require that there be a "commercial reason" for the performance of an individual's activities related to the business of an enterprise in another State. Evaluating whether there is a commercial reason will require a consideration of the business of the enterprise and how the specific activities of the individual relate to that business. Circumstances such as the need to hold meetings between the individual and the enterprise's clients; the cultivation of a new customer base or the identification of business opportunities; the identification of new suppliers, the management of relationships with suppliers or the undertaking, monitoring or management of contractual agreements with suppliers; real-time or near real-time interaction with customers or suppliers in different time zones (e.g. provision of call centre services, virtual IT support or medical services); access to business-relevant expertise that is used in the conduct of the activities of the enterprise, such as regular meetings with personnel of a university carrying out research relevant to the business of the

enterprise; collaboration with other businesses; the performance of services for customers or clients located in that other State where such services require the physical presence of employees or other personnel of the enterprise in that other State (e.g. training or repair services performed on the premises of the customer); or interaction with employees and other personnel of the enterprise, or of associated enterprises.

Conversely, it is clarified that there would be no such commercial reason and, therefore, no permanent establishment, where an enterprise permits work from home or another relevant place solely to meet that individual's personal needs, obtain or retain the services of that individual, or reduce costs, unless other facts and circumstances indicate otherwise.

Therefore, the update clarifies that cross-border teleworking does not automatically mean the existence of a permanent establishment for the employer, which will require a home or other relevant place with a sufficient degree of permanence, a minimum level of dedication on the part of the employee, and the existence of a commercial reason justifying his presence in the State concerned.

2. Exploration and exploitation of natural resources

Another relevant issue in the update under analysis concerns the permanent establishments referred to in Article 5(2)(f) of the Model Convention, relating to mines, oil or gas wells, quarries or any other place of extraction of natural resources. In relation to this subparagraph, it is clarified that the term "any other place of extraction of natural resources" should be interpreted broadly, including, for example, all places of extraction of hydrocarbons, whether onshore or offshore, and noting also that not only the extraction but also the exploration of such resources may give rise to the existence of a permanent establishment.

On the other hand, in relation to such activities involving the exploitation and exploration of extractible natural resources, the most relevant update involves adding an alternative provision (optional for States to use) to regulate the taxation of enterprises in the sector. The centrepiece of the provision is a lower permanent establishment threshold than that which would result from the provisions of Article 5 of the Model Convention, which would be crossed after a non-resident enterprise had carried out relevant activities in a State for more than a bilaterally agreed period. The aim is to enlarge the taxing right of the source State over profits from the exploitation of its extractible natural resources by non-resident enterprises, even if they do not have a fixed place of business.

This provision defines the term *'relevant activity'* in two ways: one for States that wish to confine the scope of the article to offshore activities, including all activities related to the exploration and exploitation of the seabed, its subsoil and its natural resources, and one for States that wish to include the onshore activities, including specialised activities related thereto, such as the assembly, installation and maintenance of specialised mining infrastructure and equipment, the performance of engineering and consultancy services relating

to the onshore exploration and exploitation activities, and the carrying out of seismic surveys.

In both cases, through the use of the formulation *'in connection with'*, the term *'relevant activity'* covers not only exploration and exploitation activities themselves, but equivalent activities at every stage of the process of extracting natural resources: exploration (when preliminary surveys take place, exploratory rights are acquired and the exploration itself happens); development (when the necessary infrastructure is built); production (when the resources are extracted, processed, transported, marketed and sold — processes that could together be described as "exploitation"); and decommissioning (when infrastructure is removed and sites are rehabilitated).

3. Transfer pricing aspects of financial transactions

Thirdly, amendments are made to the Commentary on Article 9, clarifying the relationship between the arm's length principle and domestic rules that may limit the deduction of interest, determining — contrary to usual practice — that the documentation of an intra-group loan at arm's length prices does not necessarily mean the automatic deduction of interest expenses in the borrower's country. This is because Article 9 applies only for the purposes of allocating profits to associated enterprises in accordance with the arm's length principle; however, once the profits of such enterprises have been allocated in accordance with that principle, it is for the domestic law of each Contracting State to determine whether and how such profits should be taxed, specifying in particular for these purposes that the conditions for the deductibility of expenses are a matter to be determined by domestic law, subject to the provisions of the Model Convention and, in particular, paragraph 4 of Article 24, since each jurisdiction retains the right to apply its own restrictions in this regard, even if the transaction has been correctly computed at arm's length prices.

4. Dispute resolution mechanisms for jurisdictions that do not adopt 'amount B'

Amendments are also made to the Commentary on Article 25 of the Model Convention related to Amount B, which are intended to ensure optionality is preserved in all dispute resolution mechanisms for jurisdictions that do not adopt this simplified transfer pricing mechanism — Amount B. To this end, the guidelines and essential aspects of the mutual agreement procedure and the arbitration procedure are addressed.

5. Aspects relating to the exchange of information

Changes are made to the Commentary on Article 26 of the Model Convention with two objectives: first, to expressly indicate that information received through exchange of information can be used for tax matters concerning persons other than those in respect of which the information was initially received; and second, to reflect agreed interpretative guidance on taxpayer access to exchanged information and the disclosure of reflective nontaxpayer specific information about or generated on the basis of exchanged information.

It is thus established, on the basis that reciprocal assistance between tax administrations takes place in a context of confidentiality, that this confidentiality applies to reflective non-taxpayer specific information (i.e. information about or generated on the basis of the information that was received by a Contracting State through the exchange of information such as, statistical data, as well as non-taxpayer specific notes, summaries, and memoranda incorporating exchanged information). However, such reflective non-taxpayer specific information may be disclosed to third parties if the information does not, directly or indirectly, reveal the identity of one or more taxpayers and the sending and receiving States have consulted with each other and it is concluded that the disclosure and use of such information would not impair tax administration in either the sending or the receiving State.

Furthermore, it is clarified that the information (whether obtained with respect to one or more taxpayers) may also be communicated to the taxpayer (or his proxy) to the extent that such information has a bearing on the outcome of a tax matter concerning such taxpayer, or to the witnesses. This means that such information may also be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses.

Furthermore, it is determined that these authorities may not only use the information received for the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes and in respect of the person or persons for which the information was received, but also includes the use for such purposes in respect of any other person, without the receiving State being required to inform or request authorisation from the sending State regarding such use.