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Michael Lang (Ed)

The OECD-Model- Convention and its Update 2014

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Entertainers According to Art 17 OECD Model Convention

Pasquale Pistone/Erich Schaffer

- I. **Introduction**
- II. **Scope of Article 17 of the OECD Model**
 - A. Personal scope
 - 1. Entertainers
 - 2. Sportspersons
 - B. Substantive scope
- III. **Changes to the OECD Model**
- IV. **Changes to the Commentary on the OECD Model**
 - A. General remarks
 - B. Personal scope
 - C. Substantive scope
 - 1. Ancillary activities
 - 2. General criteria to define the substantive scope
 - 3. Advertising income
 - 4. Training activities
 - 5. Payments for broadcasting rights and image rights
 - 6. Allocation of income
 - D. Combination of article 17(1) and article 17(2) of the OECD Model
- V. **Conclusion**
- VI. **Annex**
 - A. Nature of consideration
 - B. Clarifications/Changes to the Commentary on the OECD Model

I. Introduction

The treatment of entertainers and sportspersons¹ in international tax law has been subject to ongoing debate at the academic level and has raised a number of practical problems. This stems from the fact that the taxation of international entertainers and sportspersons appears to be a small but very special topic in international taxation.² Article 17 of the OECD Model Convention (OECD Model) generally enables the state of performance to tax the income of a non-resident entertainer or sportsperson from his or her activities as such performed in that country, regardless of whether they are of business or employment nature. Thus, persons deriving their income as an entertainer or sportsperson are taxed in an exceptional way compared to other taxpayers deriving income from articles 7 (business profits) and 15 (income from employment), where income is taxable in the source state only under certain conditions.³ This is why it is of paramount importance to clearly define the personal and substantive scope of article 17 of the OECD Model in order to distinguish this provision from the other distributive rules in the OECD Model.

As a result of the variety of different practical cases and the different circumstances under which these cases arise, it apparently causes many difficulties when developing general criteria for defining the scope of article 17, rather than resolving this issue on mere a case-by-case basis. Although additions of practical examples to the Commentary on the OECD Model may shed light on specific cases, other cases with only slightly different fact patterns remain subject to great ambiguity in interpretation. In this regard, Ledesma poignantly states, "Ironically, the more amendments are introduced to the Commentary on Article 17 the more confusion arises in regard to how taxing rules apply to artistes and sportsmen".⁴

Therefore, this chapter will examine the amendments in the 2014 Update to the OECD Model, in particular the numerous amendments in the 2014 Update to the Commentary on the OECD Model. Topics to be discussed include which of these amendments constitute mere clarifications and which are likely to constitute effective changes to the existing version of the Commentary, as well as whether the additions fit into the structure of article 17 and which practical problems may arise in that context.

1 In this chapter, when speaking of „entertainers and sportspersons“, the terms of the 2014 Update to the OECD Model Tax Convention are used. In the OECD Model Convention (2010), article 17 still had the heading „Artistes and Sportsmen“.

2 See D. Molenaar & H. Grams, *Article 17(3) for Artistes and Sportsmen: Much More Than an Exception*, 40 *Intertax* 4 (2012), at 270.

3 E.g. Permanent establishment or exercise of the activity for at least 183 days within one fiscal year in the source state.

4 A. Juan y Ledesma, *The Taxation of Artistes and Sportsmen's Article (Article 17 of the OECD Model): Has the Time Come to Stop Counting Stars in the Sky?*, 52 *Eur. Taxn.* 2/3 (2012), at 116.

II. Scope of Article 17 of the OECD Model

A. Personal scope

1. Entertainers

The term „entertainer“ is not explicitly defined in the OECD Model. However, the exemplary list in article 17(1) including “[...] a theatre, motion picture, radio or television artist, or a musician”, serves as a starting point for interpretation. From this text, one can determine that there are basically two criteria which must be fulfilled in order to be an entertainer under article 17: (i) the entertainer must perform in public⁵ and (ii) this performance must have an entertaining character.⁶ However, a certain „artistic quality“ of the activity is not required.⁷ This is why, for example, dancers performing during breaks of sports events are likely to fall within the scope of article 17, while for painters, sculptors, writers and composers⁸ – despite the high artistic value of their activities – article 17 is not applicable, as they neither perform in public nor pursue activities of an entertaining nature.⁹

2. Sportspersons

Similar to entertainers, the term „sportsperson“ is not defined in the OECD Model. As the OECD Model does not provide for an exemplary list, an autonomous treaty

5 The terms in the original English version of the 1963 OECD Model („public entertainers“), in the French version of 1963 („*professionnels du spectacle*“), or in the French version of 2010 („*artistes du spectacle*“) highlight even more the importance of the public performance.

6 This interpretation is supported by the OECD when changing the wording of article 17 from „*artiste*“ to „entertainer“ in the 2014 Update. Accordingly, in the French version, the text was changed from „*artistes*“ to „*artistes du spectacle*“. The different nuances in the wording across the two official languages of the Model may have different implications at the level of interpretation. One could, for instance, argue that the English version more closely reflects the variation of the scope and therefore gives stronger weight to it as compared to that of the French version, which would be a mere translation from it. However, as the authors are not speaking of an interpretation of the Commentary, but of the Model, they feel that an actual different nuance is being introduced into article 17 by the 2014 Update. Such difference shows a potential broader scope for treaties adopting the English text, which refers to entertainer, and a narrower scope for treaties adopting the French text, which retains a reference to artistes and characterizes the personal scope by referring to those artistes who are active in the field of spectacle, whereas the previous version referred merely to artistes. For further analysis of linguistic mismatches in tax treaties see P. Arginelli, *Multilingual Tax Treaties: Interpretation, Semantic Analysis and Legal Theory*, IBFD Doctoral Series 32 (forthcoming), chapters „Interpretation of Multilingual Treaties“ and „Interpretation of Multilingual Tax Treaties“.

7 See e.g. X. Oberson, in *Modèle de Convention fiscale OCDE concernant le revenu et la fortune*, Commentaire (R. Danon et al. eds., Edition Francis Lefebvre 2013), Art. 17, para. 53, citing D. Molenaar, *Taxation of International Performing Artistes: The Problems with Article 17 OECD and How to Correct Them* (IBFD 2005), at 91.

8 Taking these examples into account, one may wonder whether in fact an orchestral conductor would fall under article 17. Although various views could be held in this regard, a conductor (unlike a film director) performs in public with the orchestra as an essential part of it, as his performance is the key to allowing a proper harmonious performance.

9 See F. Stockmann, in *Doppelbesteuerungsabkommen (DBA)* (K. Vogel & M. Lehner eds., 5th edition, 2008), Art. 17, para. 22 et seq. (suggesting a narrow interpretation of the term „entertainer“); G. Toifl & P. Vrignaud, *Einkünfte von Künstlern und Sportlern im Internationalen Steuerrecht*, in *Künstler und Sportler im nationalen und internationalen Steuerrecht* (T. Ehrke-Rabel et al. eds., 3rd edition, Linde 2011), at 113.

interpretation may at first glance cause some difficulties.¹⁰ However, as a result of a systematic interpretation of article 17 and the connection to public entertainers, it is a common understanding that article 17 applies only to sportspersons who actually perform in public.¹¹ From the changes to the OECD Model in 1992 and the corresponding inclusions in the Commentary, it is deduced that the term sportsperson must be interpreted in a rather broad manner.¹² The Commentary now specifies that the term sportspersons “[...] is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers). It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers”.¹³ Moreover, it also applies to income deriving from “[...] billiards and snooker, chess and bridge tournaments”.¹⁴

B. Substantive scope

Article 17 applies to “[...] income derived by a resident of a Contracting State [...] from that resident’s personal activities as such exercised in the other contracting state”.¹⁵ In this context, especially the phrase “personal activities as such” has been subject to various interpretation issues.¹⁶ This stems from the fact that often an entertainer or sportsperson receives remuneration not only for his performance, but also for several “ancillary” activities, such as the promotion of the performance, sponsorship agreements, interviews or training activities. As a result of the ongoing debate in this area, the OECD has now proposed numerous additions in the 2014 Update to the Commentary. After briefly describing the changes to the OECD Model itself, this chapter will focus on the systematization and analysis of these various amendments to the Commentary.

III. Changes to the OECD Model¹⁷

Generally speaking, the OECD is very tentative in introducing changes into the OECD Model. When certain ambiguities in interpretation are discovered, an at-

10 See D. Sandler, *The Taxation of International Entertainers and Athletes: All the World’s a Stage* (Kluwer Law International 1995), at 180 et seq.

11 Sandler, *The Taxation of International Entertainers and Athletes: All the World’s a Stage*, *supra* n. 10, at 180 et seq.; also Oberson, *supra* n. 7, Art. 17, para. 69; J. Zoubek, *Notion of Sportsmen in Article 17 of the OECD Model*, in *Taxation of Artists and Sportsmen in International Tax Law* (W. Loukota & M. Stefaner eds., Linde 2007), at 50; Stockmann, *supra* n. 9, Art. 17, para. 31.

12 These amendments were the result of the 1987 study by the OECD of the taxation of income derived from entertainment, artistic and sporting activities. For this development, see Sandler, *The Taxation of International Entertainers and Athletes: All the World’s a Stage*, *supra* n. 10, at 179.

13 Para. 5 *OECD Model: Commentary on Article 17* (2012).

14 Para. 6 *OECD Model: Commentary on Article 17* (2012).

15 Art. 17(1) *OECD Model* (after 2014 Update). OECD, *2014 Update to the OECD Model Tax Convention* (15 July 2014), para. 7.

16 See Sandler, *The Taxation of International Entertainers and Athletes: All the World’s a Stage*, *supra* n. 10, at 181.

17 The changes in the new version of the OECD Model and the Commentary will be highlighted in bold characters throughout this chapter.

tempt is often made to resolve these issues by introducing “clarifications” into the Commentary. The 2014 Update to the OECD Model and Commentary completely follows that logic. While there are numerous amendments in the Commentary, there is only one change to the text of the OECD Model.¹⁸ This change concerns the explicit priority rule of article 17 over articles 7 and 15, and reads as follows:

“Notwithstanding the provisions of Articles 7 and 15, income [...] may be taxed in that other State”.¹⁹

However, at the same time, the Commentary clarifies that article 17 still has priority over article 7 by highlighting that “[t]his provision [article 17] is an exception to the rules in Article 7 (over which it prevails by virtue of paragraph 4 of that Article)”.²⁰ Now the question arises as to whether this sole change to the text of the OECD Model influences the interpretation of article 17 at all, although simultaneously the Commentary even highlights that article 17 still prevails over article 7. There are no further indications in the discussion draft regarding the reasons for this change. Nevertheless, this is not a completely new issue, as already before the 2003 Update to the OECD Model, article 17 did not contain any reference to article 7, and in any case it was clear that due to its *lex specialis* character, article 17 prevails over article 7.²¹ Against this background, it is submitted that this new change in the text of the OECD Model was recommended only to avoid redundancies in the wording of the convention. As article 7(4) of the OECD Model already specifies the priority of article 17 over article 7, there is no need for an explicit repetition of this principle in article 17. Conversely, article 15 does not contain any reference to article 17; accordingly the priority over article 15 should not be deleted from the wording of article 17. As a result, it is thus submitted that this change will not have any effect on the interpretation of this provision.

IV. Changes to the Commentary on the OECD Model

A. General remarks

In contrast to the very few changes to article 17 in the OECD Model, the OECD has introduced numerous changes to the Commentary in order to shed further light on the personal and substantive scope of this allocation rule. The OECD has done this basically by expressing its view on the interpretation of several practical

18 As a second change to the OECD Model, gender-neutral wording for article 17 is recommended. Thus, the term „sportsmen“ should be replaced by „sportspersons“ and phrases like „from his personal activities“ should be replaced by „from that resident’s personal activities“. However, it goes without saying that these changes will not influence the interpretation of article 17.

19 Art. 17(1) *OECD Model* (after 2014 Update). OECD, *2014 Update*, *supra* n. 15, para. 7.

20 Para. 1 *OECD Model: Commentary on Article 17* (after 2014 Update).

21 See e.g. K. Daxkober, *Künstler und Sportler in den österreichischen DBA (Art. 17 OECD MA)*, in *Die österreichische DBA-Politik – Das „österreichische Musterabkommen“* (M. Lang, J. Schuch & C. Staringer eds., Linde 2013), at 279; Stockmann, *supra* n. 9, Art. 17, para. 10.

cases which had caused interpretational problems in the past. However, by doing so, the OECD mostly presents “clarifications” on a case-by-case basis, while the general criteria for the interpretation of article 17 are only rudimentarily specified. Below, these amendments to the Commentary brought about by the 2014 Update will be critically analysed with regard to the structure and purpose of article 17 of the OECD Model.

B. Personal scope

In paragraph 3 of the Commentary on Article 17, the OECD addresses several persons whose activities are only to a certain extent of an entertaining character. On the one hand, the activities of administrative and supporting staff (e.g. cameramen, producers, film directors, choreographers and technical staff) do not contain any entertaining element and should not be covered by article 17.²² On the other hand, article 17 may apply to income received from activities of a political, social, religious or charitable nature if an entertainment character is present. This depends on the overall balance of the activities of the person concerned.²³ In the 2014 Update, the following phrase was added to the Commentary:

[Article 17] does not extend to a visiting conference speaker (e.g. a former politician who receives a fee for a speaking engagement), to a model performing as such (e.g. a model presenting clothes during a fashion show or photo session) rather than as an entertainer [...].²⁴

Although these examples – which also represent the prevailing opinion²⁵ on the personal scope of article 17 – may clearly serve as practical guidance for interpretation, it is evident that an undifferentiated implementation of these examples can lead to rather arbitrary results. If, for example, a former politician gives a speech during the opening ceremony or supporting programme of a conference or congress, it cannot be said on a general basis that such speech is less “entertaining” than the performance of a musician during the same supporting programme. In both cases, it is without a doubt that the purpose of this performer is to entertain the conference attendees. Additionally, although by logic some speeches or performances may be more entertaining than others, it goes without saying that it should not depend on the speaking skills or charisma of a specific former politician, whether or not the former politician derives income within the scope of ar-

22 See also Sandler, *The Taxation of International Entertainers and Athletes: All the World's a Stage*, supra n. 10, at 179 et seq.; Stockmann, supra n. 9, Art. 17, para. 23.

23 Para. 3 OECD Model: Commentary on Article 17 (2012).

24 Para. 3 OECD Model: Commentary on Article 17 (after 2014 Update). OECD, 2014 Update, supra n. 15, para. 64.

25 For a comprehensive list distinguishing between „artistes“ and „non-artistes“, see Molenaar, supra n. 7, at 91 et seq.; M. Matijevec, *The Notion of Artistes in Article 17 of the OECD Model Tax Convention*, in *Taxation of Artistes and Sportsmen in International Tax Law*, supra n. 11, at 27 et seq. According to this list, politicians and models are generally allocated to the „non-artistes“ category.

article 17. In this regard it seems to be contrary to the logic of article 17 to interpret the term “entertainer” in an overly narrow sense.

This becomes even more apparent when thinking back to why article 17 was originally included in the OECD Model. The main reason for the inclusion of this provision was to ensure taxation of people who are characterized by high mobility and who stay for only a very brief period – sometimes even for the duration of only a single performance – in the source state.²⁶ Against this background, it seems rather difficult to explain the different tax treatment of a former politician who briefly speaks at a conference and returns to his home country, compared to a comedian who speaks at a conference and returns to his home country.²⁷ As a result, this example in the Commentary cannot be seen as a mere clarification, as an undifferentiated implementation of this example clearly would narrow the scope of entertaining persons covered by article 17.²⁸

A similar argument can be asserted with regard to the example of the model performing as such.²⁹ Again, this example cannot be seen as a mere clarification as, according to common practice in several states, performances of models are treated in different ways.³⁰ Once again, in the light of the original purpose of article 17, it is questionable as to whether this approach in the 2014 Update should be applied uniformly. This can raise even more practical issues when bearing in mind that under the Commentary, not only should the objective characteristics of the performance itself be relevant, but obviously also the purpose of a specific performance seems to play a role in this context. Apparently, “a model presenting clothes during a fashion show or photo session” is not covered by article 17,

26 See Molenaar, supra n. 7, at 72; Matijevec, supra n. 25, at 24; Sandler, *The Taxation of International Entertainers and Athletes: All the World's a Stage*, supra n. 10, at 149. For the 1959 draft, see OECD, *Recommendation of the Council concerning the avoidance of double taxation*, C (59) 147 (8 July 1959); OECD, *Second Report by the Fiscal Committee to the Council*, C (59) 147 (18 June 1959); OECD Fiscal Committee, *Final Text of Article V to XIV*, TFD/FC/69 (11 June 1959).

27 See also Sandler, *Artistes and Sportsmen (Article 17 of the OECD Model Convention)*, in *Source versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and possible Alternatives* (Lang et al. eds., Wolters Kluwer 2008), at 223.

28 See also Manager Music Forum (MMF), *Comments on the Discussion Draft on the Application of Article 17 (Artistes & Sportsmen) of the OECD Model Tax Convention*, para. 8 et seq. Here, the recommendation of the OECD is criticized, as the expression „former politician“ already indicates that the person concerned is no longer a politician, but rather a „normal“ celebrity who can be equally considered to be an entertainer. Moreover, some ex-politicians are also entertainers and some entertainers are also politicians.

29 See also Oberson, supra n. 7, Art. 17, para. 69 (viewing the tax treatment of models as a rather „delicate“ issue).

30 For example the Austrian tax authorities are of the opinion that performances of models during fashion shows are entertaining and therefore covered by article 17. Nevertheless, if these models are performing only in photo sessions for specific contractors, this should not be interpreted as an entertaining activity. See AT: EAS 108, 26 Mar. 1992, *Ausländische Mannequins*. For comments, see R. Rief, *Künstler und Sportler*, in *Aktuelle Entwicklungen im Internationalen Steuerrecht* (W. Gassner, M. Lang & E. Lechner eds., Linde 1994), at 245. On the other hand, under Belgian case law, fees paid to a model for participating in a photo shoot are held to be fees for independent personal services which are not covered by article 17. See BE: Tribunal de Première Instance Liège, 16 Mar. 2009, Case 05/5497/A.

whereas a model doing a similar presentation (e.g. during the half-time show of a sports event) is likely to be seen as “a model performing [...] as an entertainer” and therefore could be covered by article 17. However, it can also be argued that models performing during a fashion show not only perform “as such” to present some clothes, but rather should be compared to actors who dress up, step into another character and perform as choreographically directed in order to entertain the spectators.³¹

If such additional examples in the Commentary were to not only constitute “clarifications”, but actually lead to “changes in interpretation” of article 17 by narrowing its personal scope, this would not mean that all countries must automatically follow the new version of the Commentary. First, under the prevailing opinion in literature, a static interpretation of the Commentary must be applied, such that changes in the Commentary may not influence already existing tax treaties, but only tax treaties concluded after the changes have been made to the Commentary.³² Second, even for tax treaties concluded subsequent to changes to the Commentary, the Commentary serves only as guidance for interpretation; a systematic and teleological interpretation of the actual provision of the tax treaty, however, may still lead to the conclusion that the changes in the Commentary should not be applied. In this light, against the original purpose of article 17, namely ensuring source state taxation of people with limited physical presence,³³ there are sound reasons that even tax treaties containing the wording of article 17 of the OECD Model which are concluded after 2014 do not necessarily have to follow the new standards in the Commentary,³⁴ but still may apply article 17 to speaking engagements of former politicians or performances of models. Moreover, the OECD itself admits that there is a grey area of interpretation concerning the personal scope of article 17.³⁵ It is therefore submitted that these additional examples in the Commentary should not be over-hastily applied in practice, but article 17 still must be assessed from an overall perspective by means of a grammatical, systematic, teleological and historical interpretation.

31 For similar criticism of the OECD view, see Manager Music Forum (MMF), *Comments on the discussion draft on the application of Article 17 (Artistes & Sportsmen) of the OECD Model Tax Convention*, para. 12; West, *Comments on the public discussion draft on issues relating to Article 17*, at 1.

32 See M. Lang, *Introduction to the Law of Double Taxation Conventions* (IBFD 2010), paras. 92 et seq., citing K. Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation*, 54 Bull. Int'l Taxn. 12 (2000), at 612; K. Vogel, *Probleme der Auslegung von Doppelbesteuerungsabkommen*, SteuU und Wirtschaft International (SWI) (2000), at 109; P.J. Wattel & O. Marres, *The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*, 43 Eur. Taxn. 7 (2000), at 222; D. Ward, *Is There an Obligation in International Law of OECD Member Countries to Follow the Commentaries on the Model?*, in *The Legal Status of the OECD Commentaries* (S. Douma & R. Engelen eds., IBFD 2008), at 86; F. Wassermeyer, in *Kommentierung des OECD-MA (2002)* (H. Döbabin & F. Wassermeyer eds., Beck 2002, Vor Art. I, para. 60).

33 See *supra* n. 26.

34 On the interpretation of new standards in the Commentary, see Lang, *Introduction to the Law of Double Taxation Conventions*, *supra* n. 32, at para. 99.

35 Para. 3 *OECD Model: Commentary on Article 17* (2012).

C. Substantive scope

1. Ancillary activities

Article 17 of the OECD Model states that income of entertainers and sportspersons must derive “[...] from that resident’s personal activities as such”. However, the income of an entertainer or sportsperson typically not only relates to such the income of an entertainer or sportsperson typically not only relates to such the person’s entertaining or athletic activities in public, but also covers activities which are seen as “ancillary” to the public performance. Such activities cover, for example, interviews and press conferences, advertising and sponsorship obligations, training activities and the provision of broadcasting rights stemming from a public performance of the entertainer. Ever since the inclusion of article 17 in the OECD Model, it has been the subject of ongoing debate concerning if and to what extent payments for such ancillary activities are covered by this allocation rule.³⁶ Thus, it is not surprising that this specific issue is the focus in the 2014 Update to the Convention and Commentary.

2. General criteria to define the substantive scope

As mentioned, in the 2014 Update the OECD has attempted to clarify the interpretation issues mainly by adding numerous practical cases to the existing version of the Commentary. However, the total absence of general criteria and the resulting necessity to rely on a case-by-case assessment evidently would lead to high legal uncertainty. Therefore, before analysing some of the practical examples introduced into the Commentary, the general criteria for defining the substantive scope of article 17 will be considered here.

Article 17 of the OECD Model refers to income derived “[...] from that resident’s personal activities as such”. Although this phrase is formulated in a rather general way, it already implies that a certain connection to the public activity of the entertainer or sportsperson must be present in order to fall under the scope of article 17. The new version of the Commentary offers additional guidance on this issue by stating: “[Article 17] applies to income derived directly and indirectly **from a performance** by an individual **entertainer or sportsperson**”.³⁷

Thus, the addition of the new phrase “from a performance” clearly highlights that article 17 will apply only insofar as a close connection between the remuneration and the public performance is apparent. A similar addition can be found in the subsequent sentence of the Commentary which reads as follows: “In some cases

36 See Sandler, *The Taxation of International Entertainers and Athletes: All the World’s a Stage*, *supra* n. 10, at 95 et seq.; Kalteis, *Die Besteuerung internationaler Künstler und Künstlerbetriebe* (Lexis Nexis 1998), at 329 et seq.; Stockmann, *supra* n. 9, Art. 17, para. 25 et seq.; Oberson, *supra* n. 7, Art. 17, para. 113 et seq.; H. Loukota & H. Jirousek, *Internationales Steuerrecht* (36th edition, Manz 2013), para. 33 et seq.

37 Para. 8, 1st sentence *OECD Model: Commentary on Article 17* (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

the income will not be paid ~~directly~~³⁸⁾ to the individual, or his impresario agent **directly with respect to a specific performance**".³⁹

Consequently, also in the additions to the second sentence, the necessity of a connection between the remuneration and the specific performance is highlighted. What may seem to be surprising at first glance is that the first sentence refers to "income derived *directly and indirectly* from a performance", whereas the second sentence only speaks of "income [...] paid to the individual [...] *directly with respect to a specific performance*".⁴⁰ However, this does not mean that different standards apply with regard to these two sentences.⁴¹ This stems from the fact that the first sentence refers to the connection between payment and performance, while the second sentence focuses on whether the payment is made "directly" to the individual, or rather to, for example, a team, troupe or orchestra employing the individual. Thus, taking into account both sentences, one can conclude that already an indirect link between the remuneration and the performance of the entertainer or sportsperson is sufficient for the application of article 17.⁴²

Still, after the 2014 Update, not only paragraph 8, but also paragraph 9 of the Commentary may serve as a basis to determine general criteria to define the substantive scope of article 17 of the OECD Model. In this paragraph, the Commentary states as follows:

In general, other Articles would apply whenever there ~~was is no direct link close connection~~ between the income and ~~the performance of activities a public exhibition by the performer~~ in the country connected. **Such a close connection will generally be found to exist where it cannot reasonably be considered that the income would have been derived in the absence of the performance of these activities. This connection may be related to the timing of the income-generating event (e.g. a payment received by a professional golfer for an interview given during a tournament in which she participates) or to the nature of the consideration for the payment of the income (e.g. a payment made to a star tennis player for the use of his picture on posters advertising a tournament in which he will participate).**⁴³

Two issues stand out with regard to this paragraph. First, the deletion of the phrase "direct link" clearly supports the argument mentioned above that an indirect link to the personal performance is already sufficient to fall within the scope

38 Deleted in paragraph 8 of the Commentary on Article 17 of the OECD Model (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

39 Para. 8, 2nd sentence OECD Model: Commentary on Article 17 (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

40 Emphasis added.

41 See Oberson, *supra* n. 7, Art. 17, para. 114; with reference to the 1987 OECD report, N 82.

42 Here, Oberson shares a different view („In our opinion, to avoid the risk of double taxation, article 17 must be interpreted restrictively. Thus, only income having a **direct link** to the performance can be taken into account")(authors' translation from French). See Oberson, *supra* n. 7, Art. 17, para. 115.

43 Para. 9 OECD Model: Commentary on Article 17 (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

of article 17. Second, a seemingly new criterion, namely the criterion of a "close connection" has been introduced and subsequently clarified. Such "close connection" of ancillary activities to the core activity of the taxpayer should be deemed to exist only if these ancillary activities are obligatory for the person concerned. For example in spite of perfectly doing the main performance, if the entertainer or sportsperson had not performed these ancillary activities as well, she would not have received any remuneration at all. In this regard, the timing of the income-generating event, as well as the nature of consideration for the payment, should be relevant. In short, this again means that an overall assessment must be made by taking into account all facts and circumstances of the specific case. The focus is placed on the nature of the consideration or, in other words, the causal nexus between the performance and the payment. In determining this causal nexus, apparently also the time connection between performance and remuneration must be taken into account. However, in this regard, timing alone cannot be such an important factor as perhaps indicated in the Commentary, but merely a single criterion in the context of this overall (causal) assessment.⁴⁴

Nevertheless, when discussing the scope of article 17 of the OECD Model, it is submitted that not too much focus should be placed on the question as to whether a direct or indirect link to the public performance must exist. Even if one were to follow the indications in the Commentary that an indirect link is already sufficient, this does not equally mean that the term "indirect link" cannot be interpreted in a narrow way. In this light, it very well seems to be the current tendency to interpret the substantive scope of article 17 in a rather narrow way.⁴⁵ This also seems to be supported by the new version of the Commentary, which repeatedly highlights that the connection to the public performance indeed must be "close" in order to apply article 17. Moreover, this is also in line with the original purpose of article 17 of the OECD Model, which was set up as a provision for taxpayers with high mobility.⁴⁶

To sum up, when looking for general criteria to define the substantive scope of article 17, the wording of the OECD Model itself already indicates that there must be a certain connection between the activity of the entertainer or sportsperson and the remuneration. From the Commentary, one can ascertain that an indirect link between performance and remuneration already seems to be sufficient for the application of article 17, while, at the same time, there must be a "close connection" to the public performance. Therefore, when going further into detail, one must assess for which types of "ancillary income" these criteria are met.

44 For a brief overview of the causal nexus between the remuneration and the performance (i.e. the nature of consideration), see the table in Annex VI.A.

45 See e.g. Oberson, *supra* n. 7, Art. 17, para. 115; Stockmann, *supra* n. 9, Art. 17, para. 22; D. Molenaar, M. Tenore & R. Vann, *Red Card Article 17?*, 66 Bull. Intl. Taxn. 3 (2012), at 137; K. Tetlak, *Tax Treatment of Team Performances under Art. 17 of the OECD Model Convention*, 2 World Tax J. 3 (2010), at 266.

46 See *supra* n. 26.

3. Advertising income

Prominent entertainers and sportspersons derive a considerable part of their income from advertising and sponsorship activities.⁴⁷ Such activities can include wearing certain equipment of a sponsor on several occasions, giving interviews, holding press conferences, being present at autograph sessions and participating in commercials.⁴⁸ Again, it needs to be ascertained whether the remuneration for such activities is in close connection with an entertaining or athletic performance. Paragraph 9 of the Commentary elaborates as follows on this issue after the 2014 Update:

Article 17 will apply to advertising or sponsorship income, etc. which is related directly or indirectly to has a close connection with a performances or appearances in a given State (e.g. payments made to a tennis player for wearing a sponsor's logo, trade mark or trade name on his tennis shirt during a match). Such a close connection may be evident from contractual arrangements which relate to participation in named events or a number of unspecified events; in the latter case, a Contracting State in which one or more of these events take place may tax a proportion of the relevant advertising or sponsorship income (as it would do, for example, in the case of remuneration covering a number of unspecified performances).⁴⁹

Several conclusions can be drawn from this paragraph of the Commentary. First, the replacement of the phrase "related directly or indirectly" with the phrase "close connection" does not necessarily reflect a new interpretation standard of the OECD, as an indirect connection still could be sufficient when determining whether there is a close connection between a performance and the consideration. Second, it is clarified that if one public activity is exercised for different purposes⁵⁰ (e.g. a tennis player receives prize money for winning a match, as well as remuneration for wearing a specific shirt during the match), then evidently both payments are in close connection with the performance.⁵¹ Third, the Commentary highlights the importance of the contractual terms, namely i.e. whether they relate to participation in named events (which then will all usually be covered by article 17) or whether they refer to a number of unspecified events.

What still remains unclear in this regard is how to treat the latter type of contracts, namely contracts where the payments relate to the exercise of different unspecified activities. For example contracts of sportspersons will often provide for three different types of payments: (i) a base amount, (ii) tournament bonuses and

47 See G. Zadek, *Treatment of Advertising Income of Artistes and Sportsmen according to the OECD Model*, in *Taxation of Artistes and Sportsmen in International Tax Law*, *supra* n. 11, at 161; G. Hahn-Joelck, *Zur Problematik der Besteuerung ausländischer Künstler und Sportler* (Nomos 1999), at 84.

48 See Molenaar, Tenore & Vann, *supra* n. 45, at 136.

49 Para. 9 OECD Model: *Commentary on Article 17* (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

50 Regarding the distinction between exercising different activities and exercising an activity for different purposes, see Zadek, *supra* n. 47, at 163 et seq.

51 See Molenaar, Tenore & Vann, *supra* n. 45, at 130 (with reference to UK: HL 17.05.2006, *Agassi v. Robinson* (2006) UKHL 23; and US: TC 09.06.2011, *Goosen v. Commissioner*, 136 T.C. No. 27).

(iii) ranking bonuses paid at the end of the year based on the individual's standing in a specified ranking system.⁵² Here, only regarding the tournament bonuses, it will be relatively easy to determine a close connection to a public performance in a specific country. The base amount and any ranking bonuses would likely have to be allocated amongst the countries where tournaments are played.⁵³ However, in this context, an issue arises not only with regard to the establishment of a "close connection", but also with regard to the establishment of concrete and practical allocation formulas in order to allocate income amongst the different countries.⁵⁴

In addition, the new version of the Commentary also contains several statements about merchandising income:

Various payments may be made as regards merchandising; whilst the payment to an entertainer or sportsperson of a share of the merchandising income closely connected with a public performance but not constituting royalties would normally fall under Article 17, merchandising payments derived from sales in a country that are not closely connected with performances in that country and that do not constitute royalties would normally be covered by Article 7 (or Article 15, in the case of an employee receiving such income).⁵⁵

These statements can be seen as mere clarifications highlighting once again the importance of the "close connection" with a public performance. Regarding the interpretation of the term "close connection", similar arguments can be asserted like before concerning advertising income. However, as regards such merchandising income, it will often be very difficult to establish such close connection to the main performance of the entertainer or sportsperson. This is why, when applying these standards, merchandising income often will not be covered by article 17, but rather by article 12 or article 7 of the OECD Model.⁵⁶ Similar interpretation issues concerning the delineation between article 17 and other distributive rules also arise with regard to broadcasting rights of a performance (which will be discussed later⁵⁷ in this chapter).⁵⁸

52 See IFA, *Taxation of Non-Resident Entertainers*, in *Cahier de droit fiscal international*, Vol. 20d (1995), at 8; Zadek, *supra* n. 47, at 167.

53 See Molenaar, Tenore & Vann, *supra* n. 45, at 132. Some tax treaties even contain specific provisions dealing with certain types of bonuses. For example the Canada-United States income tax treaty has a special provision providing for a 15% source state taxation of signing bonuses (also known as „inducement bonuses“).

54 Regarding the issue of allocation of income, see section IV.C.6.

55 Para. 9 OECD Model: *Commentary on Article 17* (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

56 See Molenaar, Tenore & Vann, *supra* n. 45, at 133 (with further examples).

57 See section IV.C.5.

58 OECD, 2014 Update, *supra* n. 15, para. 64. Paragraph 9.1 of the Commentary on Article 17 of the OECD Model (after 2014 Update) contains several other examples, which can be briefly summarized as follows:

Para. 9.1, line 1: Article 17 also applies to anyone who acts as such, even for a single event (e.g. an amateur sportsperson or actor who receives a fee for a once-in-a-lifetime appearance in a television commercial or movie).

4. Training activities

An issue which has been repeatedly subject to debate in literature is the tax treatment of training activities.⁵⁹ The 2014 Update provides for a very broad and far-reaching interpretation of article 17 with regard to such training activities:

Preparation, such as rehearsal and training, is part of the normal activities of entertainers and sportspersons. If an entertainer or sportsperson is remunerated for time spent on rehearsal, training or similar preparation in a State (which would be fairly common for employed entertainers and sportspersons but could also happen for a self-employed individual, such as an opera singer whose contract would require participation in a certain number of rehearsals), the relevant remuneration, as well as remuneration for time spent travelling in that State for the purposes of performances, rehearsal and training (or similar preparation), would be covered by the Article. This would apply regardless of whether or not such rehearsal, training or similar preparation is related to specific public performances taking place in that State (e.g. remuneration that would be paid with respect to the participation in a pre-season training camp would be covered).⁶⁰

While in the other examples the OECD has placed the focus on the criterion of “close connection” between a performance and the remuneration, regarding training activities suddenly a substantially different position is taken. Under the new version of the Commentary, training activities should be covered by article 17 regardless of whether such training is related in any way to a specific public performance. However, this interpretation is not in line with the structure of article 17, where it is clearly indicated in the OECD Model and the Commentary that a connection between the personal activity and the income is required. As stated to establish such a “close connection” an indirect link to the public performance

Para. 9.1, line 3: Merely reporting or commenting on an entertainment or sports event in which the reporter does not himself or herself participate is not an activity covered by article 17. This was already addressed in 2002 by the Tax Court of Canada in *Cheek v. The Queen*, 2002 DTC1283.

Line 2 covers advertising activities (which have already been discussed in more detail in this section); line 4 covers training activities which will be discussed in the subsequent section.

However, the Commentary on Article 17 of the OECD Model (after the 2014) does not contain any new clarifications of the treatment of payments received in the event of cancellation of a performance. Here, the Commentary still states in paragraph 9: „Payments received in the event of cancellation of a performance are also outside the scope of Article 17 and fall under Articles 7 or 15, as the case may be“. This interpretation is in line with the structure of article 17 requiring a „close connection“ to the performance – which cannot be established if there is no performance at all and thus no nexus to the source state. The fact that this can lead to unsatisfying results if the organizer of an event (or the respective insurance company) must remunerate the entertainer even in the event of such cancellation (e.g. due to bad weather, a sports event or concert cannot take place) reveals the problematic nature of the general concept of article 17 vis-à-vis Articles 7 and 15. See Molenaar, *supra* n. 7, at 103; Oberson, *supra* n. 7, Art. 17, para. 124.

59 See Oberson, *supra* n. 7, Art. 17, para. 119 et seq.; Stockmann, *supra* n. 9, Art. 17, para. 55; Loukota & Jirousek, *supra* n. 36, para. 53; J. Bláha, *Treatment of „Training Activities“ for Artistes and Sportsmen according to the OECD Model*, in *Taxation of Artistes and Sportsmen in International Tax Law*, *supra* n. 11, at 117 et seq.; Molenaar, Tenore & Vann, *supra* n. 45, at 132.

60 Para. 9.1, line 4 OECD Model: *Commentary on Article 17* (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

is already sufficient. However, if there is no link at all to the public performance, such income cannot be covered by article 17. Therefore, it is submitted that, contrary to the view of the OECD, one should follow the general structure and purpose of article 17. By doing so, not all training activities would be covered by article 17, but they rather should be divided into three different categories, namely (i) training activities having a close connection to a subsequent public performance, (ii) training activities which themselves are seen as public performance and (iii) other training or preparatory activities. Whereas activities from categories (i) and (ii) are within the scope of article 17, activities from category (iii) will be covered by other allocation rules.⁶¹

Concerning category (i), it clearly follows the general purpose of article 17 that training activities having a close connection to a subsequent competition are within the scope of this provision. Following the principle “*accessorium sequitur principali*”, only those training activities that are instrumental to the main public performance will share the same fate as the main performance and, thus, will be covered by article 17. If, for example, a skier participates in a downhill run, evidently the training runs on the same slope in the week before the competition have a direct link to the competition. Consequently, these training runs are instrumental to the preparation of the skier and have a direct link to the remuneration this skier receives for participating in this competition, as well.⁶² If the athlete now decides to skip one training run and instead prepares privately for the specifics of that downhill slope (perhaps even in another country), it will be very difficult to argue that suddenly no such direct link – or at least an indirect link – to the competition should be regarded present. Even though the athlete may train in a country where no competition takes place, this training will still be closely connected to the subsequent competition. Due to the high mobility of entertainers or sportspersons – which concerns even non-professionals – such a situation quite often might be the case. However, this is contrary to the situation of pre-season training camps, where it is most likely that there is neither a direct nor indirect link to any particular performance. Therefore, it is submitted that, concerning general pre-season training camps (e.g. ski training sessions in New Zealand or Chile) where no race ever takes place, there are sound reasons to allocate these activities to category (iii) and exclude them from the scope of article 17.

Even if certain training activities are excluded from category (i), it is possible that a training activity itself could be deemed to be a public performance and thus within the scope of article 17. If the public is generally excluded from trainings, the prevailing opinion – contrary to the view of the OECD indicated in the 2014

⁶¹ A similar view is taken by Oberson, *supra* n. 7, Art. 17, para. 122.

⁶² The following examples focus on the treatment of sportspersons. Nevertheless, similar argumentation can also be used, for example, regarding the preparation of musicians.

garding live performances. Thus, for repeated broadcasting of performances, it must be determined whether the connection to the provision of personal copy rights or image rights (article 12 of the OECD Model) or to the public performance (article 17 of the OECD Model) is predominant.⁷⁶

This interpretation – under which, regarding the delineation between article 12 and article 17, the criterion of a “close connection” should primarily be relevant is also supported by the statements in the Commentary concerning image rights.⁷⁷ Here again, the Commentary clarifies that the use of image rights must be “closely connected with the entertainer’s or sportsperson’s performance”; otherwise the corresponding payment is not covered by article 17.⁷⁸ Whether or not article 17 will apply in a specific case will again depend on the particular facts and circumstances of the case.⁷⁹

6. Allocation of income

After having established which types of income are covered by article 17, another issue arises in the next step, namely the allocation of the income between all the states where the entertainer or sportsperson has performed. This normally does not cause severe problems for self-employed individuals who regularly are paid only for their performance. In these cases, no income earned for the performance need be allocated to any training sessions.⁸⁰ This is also clarified by the 2014 Update, as follows:

76 See e.g. para. 18 *OECD Model: Commentary on Article 12* (2012); R. Kreisl, *Öffentliche Mediennutzungen von Künstlern und Sportlern nach Art. 17 OECD-Musterabkommen*, SWI (2007), at 249; R. Kreisl, *Treatment of Artistic Income Where There Is No Public Performance*, in *Taxation of Artists and Sportsmen in International Tax Law*, *supra* n. 11, at 149; Daxkobler, *supra* n. 21, at 280.

77 Regarding image rights, paragraph 9.5 of the Commentary on Article 17 of the OECD Model (after the 2014 Update) reads as follows: „It is frequent for entertainers and sportspersons to derive directly or indirectly (e.g. through a payment made to the star-company of the entertainer or sportsperson), a substantial part of their income in the form of payments for the use of, or the right to use, their „image rights“, e.g. the use of their name, signature or personal image. Where such uses of the entertainer’s or sportsperson’s image rights are not closely connected with the entertainer’s or sportsperson’s performance in a given State, the relevant payments would generally not be covered by Article 17 (see paragraph 9 above). There are cases, however, where payments made to an entertainer or sportsperson who is a resident of a Contracting State, or to another person, for the use of, or right to use, that entertainer’s or sportsperson’s image rights constitute in substance remuneration for activities of the entertainer or sportsperson that are covered by Article 17 and that take place in the other Contracting State. In such cases, the provisions of paragraph 1 or 2, depending on the circumstances, will be applicable“. OECD, *2014 Update*, *supra* n. 15, para. 64.

78 See *Oberson*, *supra* n. 7, Art. 17, para. 145 et seq.

79 The Spanish Supreme Court tends to apply article 17 with regard to image rights of entertainers and sportspersons. ES: SC, 13 Apr. 2011, Case 456/2006, sec. 2, RJ 2011/3210; ES: SC, 11 June 2008, Case RJ 2008/4568. In contrast, the US Tax Court recently ruled that for a Spanish golfer, article 12 – and not article 17 – predominantly is applicable to the income of image rights, even if the image rights are partially linked to the number of golf tournaments held in the United States. US: Tax Court, 14 Mar. 2013, *Sergio Garcia v. Commissioner of Internal Revenue*, 140 T.C. No. 6.

80 See Bláha, *supra* n. 59, at 129.

An element of income that is closely connected with specific activities exercised by the entertainer or sportsperson in a State (e.g. a prize paid to the winner of a sports competition taking place in that State; a daily allowance paid with respect to participation in a tournament or training stage taking place in that State; a payment made to a musician for a concert given in a State) will be considered to be derived from the activities exercised in that State.⁸¹

More complexity arises with regard to employed entertainers or sportspersons. Under their employment contracts, they regularly will receive remuneration covering (i) public performances, (ii) training sessions and (iii) other activities such as sponsorship obligations and press conferences.⁸² As a practical solution, the OECD suggests in the Update to allocate such a salary on the basis of the working days spent in each specific state:

As indicated in paragraph 1 of the Commentary on Article 15, employment is exercised where the employee is physically present when performing the activities for which the employment remuneration is paid. Where the remuneration received by an entertainer or sportsperson employed by a team, troupe or orchestra covers various activities to be performed during a period of time (e.g. an annual salary covering various activities such as training or rehearsing; travelling with the team, troupe or orchestra; participating in a match or public performance, etc.), it will therefore be appropriate, absent any indication that the remuneration or part thereof should be allocated differently, to allocate that salary or remuneration on the basis of the working days spent in each State in which the entertainer or sportsperson has been required, under his or her employment contract, to perform these activities.⁸³

Although this allocation may seem logical at first glance, from both a practical and conceptual perspective, such allocation on the basis of the number of working days could be rather arbitrary. At first, such an interpretation is not supported in any way by the wording of the OECD Model. Contrary to article 15 – which explicitly takes into account the criterion of the number of days spent in the source state, article 17 lacks of any such reference. This would not be in line with the gen-

81 Para. 9.2 *OECD Model: Commentary on Article 17* (after 2014 Update); in para. 9.3 this statement is supported by the following example: „Example 1: a self-employed singer is paid a fixed amount for a number of concerts to be performed in different states plus 5 per cent of the ticket sales for each concert. In that case, it would be appropriate to allocate the fixed amount on the basis of the number of concerts performed in each state but to allocate the payments based on ticket sales on the basis of where the concerts that generated each such payment took place“. OECD, *2014 Update*, *supra* n. 15, para. 64.

82 See Bláha, *supra* n. 59, at 129.

83 Para. 9.2 *OECD Model: Commentary on Article 17* (after 2014 Update). OECD, *2014 Update*, *supra* n. 15, para. 64. In paragraph 9.3, this statement is supported by the following example: „Example 2: a cyclist is employed by a team. Under his employment contract, he is required to travel with the team, appear in some public press conferences organised by the team and participate in training activities and races that take place in different countries. He is paid a fixed annual salary plus bonuses based on his results in particular races. In that case, it would be reasonable to allocate the salary on the basis of the number of working days during which he is present in each State where his employment-related activities (e.g. travel, training, races, public appearances) are performed and to allocate the bonuses to where the relevant races took place“.

eral concept of article 17 which must apply irrespective of the number of days an entertainer or sports person spends in the source state. Furthermore, an allocation based solely on the number of days takes into account only quantitative, and not qualitative aspects.

Coming back to the example of the skier employed by a team, it seems difficult to argue that the 14 days this skier stayed in Sochi for the 2014 Olympic Winter Games – where he even won two gold medals, should have the same value as 14 days that this skier stays in another country where he does a few training runs, partakes of some relaxation and finally competes in two competitions, where he does not earn any World Cup points at all. Consequently, although this allocation criterion based on the number of days seems sound at first glance, the conceptual feasibility must be questioned. More likely, for the allocation of income, not only quantitative aspects, but also qualitative criteria should be taken into account. Such an approach would even be supported by the new version of the Commentary, which explicitly states that an allocation on the basis of the number of working days should apply only “absent any indication that the remuneration or part thereof should be allocated differently”. In this regard, as alternative allocation criteria, the number of performances, the ranking points achieved in one state or an allocation pro rata to the quantum of activities performed in each state have been suggested.⁸⁴ Evidently, these approaches could give rise to several practical complexities, as well. However, in the end this is an inevitable result of the special framework of Article 17 which – contrary to the adjoining provisions of the OECD Model – stipulates unlimited taxing rights for the source state.

D. Combination of article 17(1) and article 17(2) of the OECD Model

In addition, the new version of the Commentary includes several recommendations concerning the application of article 17(2) of the OECD Model. This provision applies if the income of an entertainer or sports person does not accrue to this person himself or herself, but to another person. It is beyond the scope of this chapter to elaborate in detail on the scope of article 17(2).⁸⁵ Therefore, this chapter will focus exclusively on the new paragraph 11.5 of the Commentary on the

⁸⁴ See Tetlak, *supra* n. 45, at 267; A. Malin, *Employed Artistes and Sportsmen according to the OECD Model*, in *Taxation of Artistes and Sportsmen in International Tax Law*, *supra* n. 11, at 232.

⁸⁵ In this regard, see para. 11 *OECD Model: Commentary on Article 17* (2012); Oberson, *supra* n. 7, Art. 17, para. 200 et seq.; Stockmann, *supra* n. 9, Art. 17, para. 106 et seq.; Loukota & Jirousek, *supra* n. 36, para. 71 et seq.; Tetlak, *supra* n. 45, at 262; J. Juárez, *Limitations to the Cross-Border Taxation of Artistes and Sportsmen under the Look-Through Approach in Article 17(1) of the OECD Model Convention (Part I)*, 43 *Eur. Taxn.* 11 (2003), at 409; Daxkobler, *supra* n. 21, at 282; Molenaar, Tenore & Vann, *supra* n. 45, at 133 et seq.; D. Felderer, *Taxation of Artistic and Athletic Performance under Art. 17(2) OECD Model*, in *Taxation of Artistes and Sportsmen in International Tax Law*, *supra* n. 11, at 271 et seq.

OECD Model after the 2014 Update, dealing with the combined application of article 17(1) and article 17(2).⁸⁶ This newly added paragraph states as follows:

Whilst the Article does not provide how the income covered by paragraphs 1 and 2 is to be computed and leaves it to the domestic law of a Contracting State to determine the extent of any deductions (see paragraph 10 above), the income derived in respect of the personal activities of a sports person or entertainer should not be taxed twice through the application of these two paragraphs. This will be an important consideration where, for example, paragraph 2 allows a Contracting State to tax the star-company of an entertainer on a payment received by that company with respect to activities performed by the entertainer in that State and paragraph 1 also allows that State to tax the part of the remuneration paid by that company to the entertainer that can reasonably be attributed to these activities. In that case, the Contracting State may, depending on its domestic law, either tax only the company or the entertainer on the whole income attributable to these activities or tax each of them on part of the income, e.g. by taxing the income received by the company but allowing a deduction for the relevant part of the remuneration paid to the entertainer and taxing that part in the hands of the entertainer.⁸⁷

What is particularly remarkable about this statement is that it explicitly addresses the problem of double taxation. Such double taxation could arise if, first, the “other person” is taxed under article 17(2) and, second, the entertainer or sports person himself or herself is taxed also under article 17(1). An example of this would be a musician employed by an orchestra. When at first the income is attributed to the orchestra, such income is taxed under article 17(2) on behalf of the orchestra. If, in the next step, the orchestra pays a salary to the musician, again a tax will be levied on income which has already been taxed at the level of the company.⁸⁸ However, when a tax is levied twice on the same income but on behalf of two different persons, this is an issue of economic double taxation. As a generally accepted principle, the purpose of a tax treaty is to prevent only juridical, but not economic, double taxation.⁸⁹ In this case, it seems that the OECD wishes to digress from this principle by basically stating that even such economic double taxation should be prevented to the extent possible.⁹⁰

⁸⁶ For the sake of completeness, the new version of the Commentary on the OECD Model also contains two statements regarding the scope of article 17(2) clarifying that only income which is closely connected to an entertaining and public performance is covered by this provision. First, para. 11.2 (new version) states that article 17(2) does not apply to prize money that the owner of a horse or the team to which a race car belongs derives from the result of the horse or car during a race or during races taking place in a certain period. Second, para. 11.4 clarifies that article 17(2) does not cover the income of all enterprises that are involved in the production of entertainment or sports events (such as an independent promoter of a concert from the sale of tickets and allocation of advertising space). This is clearly in line with the structure of article 17, as in both cases no entertaining or sportive public performance takes place.

⁸⁷ Para. 11.5 *OECD Model: Commentary on Article 17* (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

⁸⁸ See Daxkobler, *supra* n. 21, at 287.

⁸⁹ See e.g. para. 2 *OECD Model: Commentary on Article 23* (2012); para. 42 *OECD Model: Commentary on Article 10* (2012); M. Lang, *Die Abkommensrechtliche Behandlung von Personengesellschaften mit Steuersubjektivität im Ausland*, in *Unternehmenspolitik und Internationale Besteuerung: Festschrift für Lutz Fischer* (L. Fischer & H.-J. Kleineidam eds., E. Schmidt 1999), at 713 et seq.

⁹⁰ See also Oberson, *supra* n. 7, Art. 17, para. 218.

Nevertheless, one must bear in mind that not all forms of economic double taxation necessarily are to be treated equally, and the term “economic double taxation” should not be used synonymously with unmethodical or illegitimate double taxation.⁹¹ A form of economic double taxation where, for example, two states treat a certain type of income differently and thus attribute income to two different taxpayers, is not necessarily to be equated with a situation where one single state levies a tax twice on the exact same income by applying two different provisions (or two different paragraphs of the same provision). Consequently, the situation at hand could be one of the exceptions, where the OECD affirms that a tax treaty is to avoid also economic double taxation.⁹²

After discussing in general the objective of avoiding economic double taxation subsequently, the means of achieving this objective as suggested by the OECD must be analysed in more detail. Surprisingly, to resolve the issue of economic double taxation, the Commentary refers to the domestic law of the source state. Under the Commentary, this is to be done “[...] depending on its domestic law [...], e.g. by taxing the income received by the company, but allowing a deduction for the relevant part of the remuneration paid to the entertainer”.⁹³ However, taxpayers must rely on the domestic law of the source state and that domestic law simply does not provide for such deduction or similar means of avoiding double taxation, one cannot simply “invent” such a possibility in an international context. As a result, double taxation is likely to occur in such cases.

Therefore, contrary to the suggestions in the 2014 Update, article 17(1) and (2) of the OECD Model must be interpreted autonomously, without taking into account the source state’s domestic law. From such autonomous interpretation, especially when taking into account the system and the original purpose of article 17(2) to counteract abusive constructions – it is likely that in many cases the ob-

91 This stems from the fact that the term „economic double taxation“ has given rise to great ambiguity. Regarding dividends, the OECD explicitly states in paragraph 14 of the 2012 Commentary on Article 10: „In contrast to the notion of juridical double taxation, which has, generally, a quite precise meaning, the concept of economic double taxation is less certain. [...] Consequently, as the concept of economic double taxation was not sufficiently well defined to serve as a basis for the analysis, it seemed appropriate to study the problem from a more general economic standpoint“.

92 The fact that the OECD is willing to digress from the principle that economic double taxation should not be resolved at an international level can already be inferred from the Commentary. While in paragraph 2 of the Commentary on Article 23, this general principle is set forth, in paragraph 68 regarding a thin capitalization situation, where the state of the borrower treats an interest payment as a dividend distribution, the Commentary digresses from that principle by stating that the „State of residence of the lender would be obliged to give relief for any juridical or economic double taxation of the interest as if the payment was in fact a dividend“ (emphasis added). Additionally, under paragraph 9 of the Commentary on Article 9, it is exactly the purpose of the corresponding adjustment to relieve economic double taxation. Finally, perhaps the most prominent example in this regard is Example 13 of the Partnership Report (*The Application of the OECD Model Tax Convention to Partnerships*, para. 139) explicitly addressing the issue of economic double taxation which must be resolved in that case according to the OECD.

93 Para. 11.5 *OECD Model: Commentary on Article 17* (after 2014 Update). OECD, 2014 Update, *supra* n. 15, para. 64.

preferred by the OECD would be achieved and economic double taxation would be avoided. However, even though it is the main purpose of a tax treaty to avoid double taxation, this does not automatically mean that, as an ultimate interpretational principle, double taxation must be avoided in all cases, but only as long as all the requirements stipulated in the treaty are met.⁹⁴ Moreover, if excessive taxation stems only from the fact that the source state – under its domestic law – imposes a withholding tax on a gross basis without granting either any possibility for a deduction of expenses or a tax refund to the taxpayer, such obligation cannot be imposed on a state by a tax treaty. If the OECD seeks to impose on the states an obligation of net instead of gross taxation, this can be done only by changing the wording of article 17 of the OECD Model. Nevertheless, even pursuant to the current wording of article 17 of the OECD Model, an autonomous interpretation of article 17(1) and (2) is likely to lead to the result that in many cases income from the personal activities of an entertainer or sports person is taxed only once, either on behalf of the individual or on behalf of the “other person”.

Finally, two solutions to avoid economic double taxation under an autonomous interpretation of article 17 of the OECD Model should be mentioned. First, several scholars assert that article 17(1) should apply only to income of entertainers and sports persons which has not already been taxed at the level of the “other person” under article 17(2) of the OECD Model.⁹⁵ Second, according to another opinion, it is the application of article 17(2) which should be restricted. In this regard, for example, the Austrian Ministry of Finance⁹⁶ and the Finnish Supreme Court⁹⁷ have stated that article 17(2) should apply only when income is actually forwarded from the “other person” to the individual entertainer or sports person. However, both of these narrow interpretations of the combined application of article 17(1) and (2) of the OECD Model have already been subject to critical discussion in literature.⁹⁸

W. Conclusion

The exceptional status of article 17 in international tax law, providing for full taxation of income in the source state, causes several complex interpretational problems. The OECD generally attempts to react to these numerous problems by adding several practical examples and cases to the Commentary. This has also been

⁹⁴ See M. Lang, *Die Vermeidung der Doppelbesteuerung und der doppelten Nichtbesteuerung als DBA-Auslegungsmaxime?*, Internationales Steuerrecht (IStR) (2002), at 609 et seq.

⁹⁵ See e.g. H. Krabbe, *Beschränkte Steuerpflicht bei künstlerischen, sportlichen, artistischen und ähnlichen Darbietungen*, Finanzrundschau (FR) (1986), at 425 et seq.; D. Felderer, *DBA-Schutz für ausländische Künstler-/Sportlergesellschaften?*, SWI (2007), at 456 et seq.; *contra* Daxkobler, *supra* n. 21, at 287.

⁹⁶ See AT: Ministry of Finance, 21 May 2002, E 12/9-IV/4/02 (EAS 2053).

⁹⁷ See FI: Supreme Administrative Court, 29 Jan. 2001, Case 139/2001; R. Rytöhonka, *Taxation of Non-Resident Artist's Income*, 41 Eur. Taxn. 9 (2001), at 344 (commentary on Case 139/2001).

⁹⁸ See Daxkobler, *supra* n. 21, at 284, 287 (with additional references).

done in the 2014 Update to the Commentary. However, it has been shown that it still is highly questionable whether these additions will really shed further light on the problems in the context of the interpretation of article 17. Although there is now useful guidance on many specific cases, ultimately two cases are never exactly the same and it must be doubted whether interpretation standards from one case can be transferred to another. In the end, practical experience will show how the principles established in article 17 of the OECD Model and the Commentary can effectively be applied in the future.

VI. Annex

A. Nature of consideration

The following table expresses the authors' opinion on the nature of consideration, i.e. the primary reason why an organizer or company actually pays money to performing entertainer or sportsperson. This can serve as a first basis for interpretation when establishing whether – against the original background of this provision – these payments fall within the scope of article 17.⁹⁹

	Nature of consideration
Personal scope (section IV.B.)	Payment for a public performance of an entertainer or sportsperson who stays for only a very short time in the performance state
Ancillary activities: general criteria (section IV.C.2.)	Payments with a close connection to the public performance, as long as no income would be derived without performing these ancillary activities
Advertising income (section IV.C.3.)	Payments for marketing purposes: the entertainer or sportsperson primarily is not remunerated for the public performance itself, but more for being famous and effective in advertising
Training activities (section IV.C.4.)	Payment not for the training itself, but rather for being well-prepared for competitions
Broadcasting rights and image rights (section IV.C.5.)	Live broadcasting: Payment primarily for the performance itself Repeated broadcasting: Payment primarily for the use of image rights

⁹⁹ However, the findings in the table are presented in a very condensed form and should serve as only a brief overview of the legal issues which are to be analysed. For more detailed elaborations on the conclusions in this table, reference is made to the respective sections of this chapter.

B. Clarifications/Changes to the Commentary on the OECD Model

The following table reflects the authors' opinion regarding which of the additions in the Commentary could be considered as mere clarifications and which of them would change the interpretation of article 17.¹⁰⁰

	Mere clarification	Change in interpretation
New wording of the OECD Model (section III.)	X	
Personal scope (section IV.B.)		X
Ancillary activities: general criteria (section IV.C.2.)	X	
Advertising income (section IV.C.3.)	X	
Training activities (section IV.C.4.)		X
Broadcasting rights and image rights (section IV.C.5.)	X	
Allocation of income (section IV.C.6.)		X
Combination of article 17(1) and 17(2) (section IV.D.)	X	

¹⁰⁰ Again, if parts of the Update to the Commentary were to constitute not merely „clarifications“, but rather „changes in interpretation“, this does not mean that all countries automatically are obliged to follow the new version of the Commentary. For detail, see section IV.B.