Proposed Changes to the Commentary on Art. 15(2) of the OECD Model and their Effect on the Interpretation of “Employer” for Treaty Purposes

Contents
1. Introduction
1.1. Qualification conflicts
1.2. Para. 8 of the Commentary on Art. 15
2. Some General Features of the 2007 Discussion Draft
3. Distinction between Formal and De Facto Employer
   3.1. Formal employer
   3.2. De facto employer
   3.2.1. Two approaches
   3.2.2. First approach - domestic law
   3.2.3. Second approach - object and purpose
   3.2.4. Evaluation of the two approaches
4. Objective Criteria
   4.1. One employer
   4.2. Rationale of the criteria: comparison with Para. 8 of the Commentary on Art. 15
   4.3. Integration text
5. Interpretation Conflicts and Qualification Conflicts
6. “Paid by, or on Behalf of”
7. Conclusion

1. Introduction

On 12 March 2007, OECD Working Party No. 1 released the Discussion Draft entitled Revised Draft Changes to the Commentary on Paragraph 2 of Article 15 (2007 Discussion Draft), which was designed to improve on its predecessor, Proposed Clarification of the Scope of Paragraph 2 of Article 15 of the OECD Model Tax Convention of 5 April 2004 (2004 Discussion Draft). These Discussion Drafts seek to clarify the explanation and interpretation of “employer” for purposes of Art. 15(2)(b) of the OECD Model. The explanation and interpretation of “employer” include, as one of the conditions, that the failure to satisfy Art. 15(2)(b) means that the work state has the right to tax a proportionate part of the employee’s salary. This condition plays an important part in the cross-border secondment of employees.

1.1. Qualification conflicts

The rationale of these Discussion Drafts is that Para. 8 of the Commentary on Art. 15 of the OECD Model, a paragraph that currently deals with the concept of “employer” for treaty purposes, may lead to obscurities and that the Commentary on Art. 23 of the OECD Model only resolves qualification conflicts; it does not resolve interpretation conflicts (the mutual agreement procedure is the last resort), where practical difficulties continue to exist. The Commentary on Art. 23 provides a solution only if these divergent views are a result of differences in the domestic laws of the work state and the residence state. This presupposes that the domestic laws of these states include a definition of “employer” to which Art. 3(2) refers. If the domestic laws of these states do not contain a definition of “employer” (including situations where only “wage tax withholding agent” is defined), divergent opinions on the interpretation of “employer” are not to be regarded as “qualification conflicts” within the meaning of Para. 32.3 of the Commentary on Art. 23, but rather as “interpretation conflicts” within the meaning of Para. 32.5 of the Commentary on Art. 23. The author assumes that such an interpretation conflict is also present if one state has a definition of “employer” in its domestic law, which is affected by the tax treaty, whereas the other state interprets that expression autonomously.² Para. 32.3 of the Commentary on Art. 23 points to differences in the domestic laws of the residence state and the source state.

In order to resolve qualification conflicts, the founders of the theory on the Commentary on the OECD Model (“International Tax Group”) take as a point of departure that the residence state should not interpret the expression “employer” independently, but should address the question under Art. 23 of the OECD Model whether the work state has taxed the remuneration “in accordance with the provisions of the Convention.” This question does not involve the characterization of income or, as in this case, who is an employer. When considering relief from the work state’s tax, the residence state’s only argument for denying relief is that such taxation was not “in

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1. For a critical analysis of the 2004 Discussion Draft, see Pötgens, F., Income from International Private Employment (Amsterdam: IBFD Publications, 2006), Doctoral Series No. 12. The extracts have been adapted to the 2007 Discussion Draft.
2. The Business and Industry Advisory Committee to the OECD commented (30 June 2004) on the 2004 Discussion Draft. The comment was not published on BIAC’s web site, but it was mentioned in Hamner, R.M., “OECD Proposes Restrictions on Article 15 regarding Income from Employment,” 10 Tax Management International Journal 583 (2004).

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accordance with the provisions of the Convention". This implies that the work state has misinterpreted or misapplied the provisions of its domestic law or the treaty.4

This would, in any event, mean that conflicts would also be resolved when the residence state interprets "employer" autonomously and the work state explains "employer" with the aid of its domestic law as a consequence of Art. 3(2). In this case, the residence state would in principle have to follow the work state's characterization of who is to be regarded as the employer. Another possibility is that the work state interprets "employer" autonomously because its domestic law lacks a definition, i.e. Art. 3(2) does not apply. The author assumes that, under this theory, the residence state will still not apply Art. 3(2) or otherwise interpret "employer" autonomously, but will instead consider whether it should grant relief from the work state's tax pursuant to Art. 23 of the OECD Model. Here, the relevant question is whether that taxation is "in accordance with the provisions of the Convention".5 It could be argued that the residence state has a slightly different position when answering this question in this situation since applying Art. 3(2) could demand the residence state to question the work state's application of its domestic law meaning of "employer", which seems to be a difficult position for the residence state.6

This approach would resolve all types of characterization conflicts, i.e. also what the Commentary regards as interpretation conflicts, which would be in accordance with the object and purposes of the tax treaty, namely, to avoid double taxation and double non-taxation;7 and the principle of good faith.8 Therefore, the author endorses this analysis.

1.2. Para. 8 of the Commentary on Art. 15

The 2007 Discussion Draft intends to fill these needs and seeks to respond, at least in part, to the criticism in the legal literature of Para. 8 of the Commentary on Art. 15 of the OECD Model,9 namely:

(a) the Commentary seems to proceed from the theory that there can be only one employer;

(b) the Commentary appears to suggest that the criteria for determining "employer status" should be used only in cases of abuse (known as "international hiring-out of labour"), but it is unclear what the precise meaning of abuse is and why a distinction is made between bona fide and abusive secondments; and

(c) the structure of Para. 8 is unclear because it suggests that, for purposes of the OECD Model, the employer is the person who has the right to the work produced and who bears the responsibility and risks; this does not offer a complete definition of employer, even though the elements on which the competent authorities may mutually agree pursuant to Para. 8 reflect two important characteristics of an employment relationship, i.e. control and integration in the master's business.

This article discusses and analyses the 2007 Discussion Draft against this background.

2. Some General Features of the 2007 Discussion Draft

Contrary to Para. 8 of the Commentary on Art. 15 of the OECD Model, the 2007 Discussion Draft clearly states that the (new) proposed Commentary on Art. 15 should address not only abusive structures but also bona fide cross-border employment relationships in dealing with the issue of "employer" under the OECD Model.10 The wording of the 2007 Discussion Draft is confusing, at least to some extent. The major part focuses on the employment relationship, but the subject of the 2007 Discussion Draft in fact involves an analysis of when a person is to be regarded as the employer for purposes of Art. 15(2) of the OECD Model. In the course of this analysis, the author assumes that the 2007 Discussion Draft indeed focuses mainly on the expression "employer" for treaty purposes. This is based on the following factors and considerations:

(a) the place in the Commentary (the paragraphs of the proposed Commentary are intended to replace Para. 8 of the Commentary on Art. 15, which clearly concerns the determination of "employer");

(b) the relevance and position of "employment" (the 2007 Discussion Draft addresses Art. 15(2) in which "employer" has an important position, whereas "employment" is more relevant to Art. 15(1) of the OECD Model11);

(c) the analysis made in the 2007 Discussion Draft (the examples12 and the objective criteria for determining who the "employer" is for purposes of Art. 15(2) of the OECD Model13); and

(d) the comments in the introduction to the 2004 Discussion Draft, which were revised in the 2007 Discussion Draft, stating:

It has been suggested that the exact scope of the paragraph [Art. 15(2) of the OECD Model] is unclear when services are provided through intermediaries. Paragraph 8 of the Commentary

5. Id at 519.
6. In id at 519 and 520, the authors not only applied this approach under Art. 3(2) of the OECD Model, but also embodied the approach in Arts. 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969 (Vienna Convention).
7. Since January 2003, Para. 7 of the Introduction to the OECD Model has explicitly stated that it is also a purpose of tax treaties to prevent tax avoidance and tax evasion; see Arnold, B.J., "Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model", 58 Bulletin for International Fiscal Documentation 6 (2004), at 244.
9. De Broe et al., supra note 4, at 503 et seq.
10. See Para. 8.1 of the proposed Commentary on Art. 15.
11. This is partly recognized by the proposal to add a sentence to Para. 1 of the Commentary on Art. 15 stating that the issue of whether services are provided in the exercise of an employment may sometimes give rise to difficulties which are discussed in Para. 8.1 et seq.
12. The examples are in Paras. 8.16 to 8.27 of the proposed Commentary on Art. 15. All the examples deal with the question of who the employer is for treaty purposes. The examples are discussed in 4.3. and 6.
13. See Para. 8.14 of the proposed Commentary on Art. 15.

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on Article 15, which deals with so-called “hiring-out of labour”; addresses one aspect of that issue. There are questions on the interpretation of the word ‘employer’ (found in subparagraphs 2(b) and (c) of Article 15 of the Model Tax Convention), in particular as regards the domestic law definition of that term. It has also been suggested that the application of paragraph 2 should be discussed in the context of the distinction between employment and self-employment, which is a common issue that tax authorities and taxpayers must confront. It has also been suggested that practical examples should be provided to illustrate the application of the paragraph in various common situations. (emphasis added)

This quote shows that the main focus of the 2004 Discussion Draft was on "employer", where Art. 15(2) should be explained against the background of the distinction between employment and self-employment; this conclusion is still accurate under the 2007 Discussion Draft. The 2007 Discussion Draft suggests amending Para. 1 of the Commentary on Art. 15 to include a reference to proposed Para. 8 et seq. for a discussion of the difficulties pertaining to the issue whether services are provided in the exercise of an employment. It follows from this that the expressions "employer" and "employment" are interrelated (since they have many similarities). Therefore, the above comments on the rationale of the Discussion Draft are not intended to deny relevance to the 2007 Discussion Draft for the explanation of "employment", but to emphasize the primary reasons for the 2007 Discussion Draft. Nevertheless, the author would have preferred the Commentary to include separate criteria for "employment" and to take a certain overlap for granted.

The 2007 Discussion Draft reads "an employer" as "the employer" (see below). As a result, the system of the Discussion Draft is first to define all possible employers and then to show how all these employers, except one, should be disregarded.

3. Distinction between Formal and De Facto Employer

The 2007 Discussion Draft draws a distinction between states adopting a formal approach to "employer" in their domestic tax law (and thus also in their tax treaties) and states taking the view that "employer" should be given a substantive meaning.

3.1. Formal employer

Although its wording is not always entirely accurate, the 2007 Discussion Draft remarks that states using a formal approach to the expression "employer" in Art. 15(2) of the OECD Model may be concerned that the approach could result in granting the benefits of the exception in Art. 15(2) in unintended situations, e.g. in cases of "hiring-out of labour".

It is indeed true that states following a formal explanation of "employer" are most likely to encounter situations involving the international hiring-out of labour. Suppose that an employee resident in State R is hired out by an intermediary, also resident in State R, to perform activities on behalf of a user resident in State W. The employee is present in State W for a period or periods not exceeding 183 days in the reference period. The intermediary does not have a permanent establishment (PE) in State W. The employee concluded a formal employment contract with the intermediary; State W follows a formal explanation of "employer" under its domestic tax law and also under its tax treaties. The user, in State W, controls and instructs the employee in the performance of the activities on its behalf. Nevertheless, State W takes the view that the user cannot be regarded as the employer and, as a consequence, State W does not have the right to tax the employee’s salary that is attributable to the services rendered in State W. According to the 2007 Discussion Draft, these states (following a formal approach to "employer") are free to bilaterally adopt a provision drafted along the lines of Para. 8.3 of the proposed Commentary on Art. 15, which reads:

Paragraph 2 of this Article shall not apply to remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State and paid by, or on behalf of, an employer who is not a resident of that state if:

(a) the recipient renders services in the course of that employment to a person other than the employer and that person, directly or indirectly, supervises, directs or controls the manner in which those services are performed; and

(b) those services constitute an integral part of the business activities carried on by that person.

The 2007 Discussion Draft does not provide an explanation of "international hiring-out of labour" and does not restrict the interpretation of "employer" to abusive cases of hiring-out of labour. The Discussion Draft intends to give an explanation of "employer" that can be used for all cross-border secondments. States using a formal approach could opt to include the above provision in their treaties if they want to ensure that the exception in Art. 15(2) is not granted in abusive cases of international hiring-out of labour. This provision means that Art. 15(2) does not apply if the employee renders his services in the work state (e.g. State W follows a formal approach...
to “employer” and thus regards the intermediary in the employee’s residence state as the employer) on behalf of a user resident in State W who supervises, directs or controls the manner in which the services are performed and if the services constitute an integral part of the user’s business activities. As a result of this exclusion, the work state has the right to tax the employee’s salary attributable to the services rendered in that state, whereas the work state would not otherwise have the right to tax the salary since, given its domestic law approach, it would normally consider the intermediary in the employee’s residence state to be the employer.

The 2007 Discussion Draft, in fact, suggests the exclusion in Art. 15(2) of the OECD Model in these types of situations. The Discussion Draft’s approach is correct in not following Art. 15(3) of the 2000 Austria–Germany tax treaty, in which only Art. 15(2)(b) is excluded and which intends to attribute the taxing rights to the residence state.19 In the author’s opinion, it is appropriate to leave aside the entire provision of Art. 15(2) and to define which situations are to be covered by this exclusion: it covers all situations of hiring-out of labour, both abusive and bona fide. The requirements imposed on the user resident in the work state contain some of the main characteristics of an employer, i.e. control and responsibility. Further, there is no need to investigate who the real employer is. An objection to the suggested provision is that it seems to assume that an employee can have only one employer for treaty purposes despite the fact that the provision refers to “an employer”. Regarding states adopting a formal approach to “employer”, the 2007 Discussion Draft puts decisive weight on both the “control test” and the “integration test”,20 but the Discussion Draft attaches major and particular importance to the integration test for states following a substantive interpretation of “employer” (see below).

3.2. De facto employer

3.2.1. Two approaches

According to the 2007 Discussion Draft, the domestic tax laws of states following a substantive interpretation (substance over form) may, even if a contract for services21 is formally signed, ignore the way in which the services are characterized in the formal contract.22 These states may, in the Discussion Draft’s view, prefer to focus primarily on the nature of the services rendered by the individual and their integration in the business of the enterprise that acquires the services in order to conclude that there is an employment relationship between the individual and that enterprise.23 States following a substantive interpretation of “employer” can do so based on the two approaches to interpretation discussed below.

3.2.2. First approach – domestic law

A state could explain the concept of employment with the aid of its domestic law and conclude that the services should be characterized as employment services, but subject to the limitation that this approach should be applied based on the objective criteria in Paras. 8.13 and 8.14 and unless the context otherwise requires. As a result, the state would apply Art. 15. The state would therefore logically conclude that there is an employment relationship between the enterprise to which the services are rendered and the individual and that the enterprise is the employer for purposes of Art. 15(2)(b). This conclusion is consistent with the object and purpose of Art. 15(2) since the employment services may be said to be rendered to a resident of the state where the services are provided.24

Under this approach, the meaning of “employer” is determined by first interpreting “employment”. After it is concluded that an employment relationship exists, the person to whom the services are rendered is automatically regarded as the employer, i.e. the employee performed his activities in an employment relationship (contract of services) with that enterprise rather than under a contract for the provision of services between two separate enterprises (contract for services).25 The author assumes that this would disregard an affiliate resident in the work state as the employer of an individual who rendered some services on the affiliate’s behalf if the individual has an employment relationship with a company resident in his residence state. To characterize the affiliate as the employer, an employment relationship must exist with the affiliate.

3.2.3. Second approach – object and purpose

A state could consider that, regardless of any domestic law meaning of “employer”, that term, when used in the context of Arts. 15(2)(b) and (c), must be interpreted according to the object and purpose of Art. 15(2). The state would note that it would be contrary to the object and purpose to provide a tax exemption with respect to what is in substance the ordinary workforce of resident enterprises, i.e. from a substantive perspective, the person resident in the work state is regarded as the

19. In this regard, see the Letter of the German Ministry of Finance of 14 September 2006, IV B 6 – S 1300 – 3676/06, Para. 4.3.4, point 85; Tümpel, M., “Dienstnehmerrechtsknechte nach dem neuesten DBA Österreich–Deutschland”, in Gassner, W. M., Lang and F. Lechter (eds.), Das neue Doppelbesteuerungsabkommen Österreich–Deutschland (Vienna: Linde Verlag, 1999), at 123; and Potgens, supra note 1, at 608. Art. 15(3) of the 2000 Austria–Germany treaty provides: “The provisions of sub-paragraph (b) of paragraph 2 shall not apply to remuneration for employment within the framework of hiring out of labour, provided the employee is not present in the other State for a period or periods exceeding in the aggregate 183 days in the calendar year concerned” (unofficial translation by the International Bureau of Fiscal Documentation).
20. The 2004 Discussion Draft did not mention the integration test in this respect.
21. In a contract for services, the services are considered to be rendered under a contract for the provision of services between two separate enterprises. A contract for services must be distinguished from a contract of services, where the services are rendered by an individual to an enterprise and are considered to be rendered in an employment relationship; see Para. 8.4 of the proposed Commentary on Art. 15.
22. See Para. 8.6 of the proposed Commentary on Art. 15.
23. Id.
24. See Para. 8.7 of the proposed Commentary on Art. 15. This view also seems to be defended by R. Prokisch in Klaus Vogel on Double Taxation Conventions (London, Boston and The Hague: Kluwer Law International, 1997), at 999.
25. See Para. 8.11 of the proposed Commentary on Art. 15.
employer.26 This state would therefore conclude that the term "employer" as used in Arts. 15(2)(b) and (c) cannot apply to a person who is a formal employer where the main functions assumed by a de facto employer are exercised by a person resident in the work state or an enterprise carried on by a non-resident which has a PE through which the functions are performed.27

This approach seeks to ensure that the term "employer" is not interpreted in a way that would allow the exception in Art. 15(2) to apply in unintended situations, i.e. where the services rendered by the employee are more integrated into the business activities of an enterprise resident in the work state than into those of the employee's formal employer resident in his residence state.28

The second approach may be illustrated by the example of E, an individual resident in State R, who is formally employed by Company Y, also resident in State R. E is seconded to perform activities in State W on behalf of Company Z, resident in State W. Company Y does not have a PE in State W, and E is not present in State W for more than 183 days in the reference period of Art. 15(2)(a) of the State R-State W tax treaty. If E's activities are more integrated into Company Z's business than into Company Y's business, Company Z must be regarded as the employer within the meaning of Art. 15(2)(b) of the treaty. Hence, Art. 15(2) does not apply, and State W is assigned the taxing rights with respect to E's salary that is attributable to the services rendered in State W.

3.2.4. Evaluation of the two approaches

According to the 2007 Discussion Draft, both approaches should be applied on the basis of objective criteria.29 Under the first approach, a state cannot argue that, under its domestic law, services are deemed to constitute employment services where the relevant facts and circumstances make it clear that the services are rendered under a contract for services concluded between two separate enterprises (i.e. not an employment contract). Similarly, in such a case, the Discussion Draft says that a state cannot rely on the second approach to deny, for purposes of Arts. 15(2)(b) and (c), the status of employer to the enterprise that formally employs an individual through which the services are provided (i.e. based on objective criteria, the formal employer is also the de facto employer). According to the 2007 Discussion Draft, Art. 15 would be rendered meaningless if states were allowed to deem services to constitute employment services in cases where there is clearly no employment relationship or to deny the status of employer to a non-resident enterprise that provides services through its own personnel to a resident enterprise (i.e. resident in the work state). Conversely, if a state may properly regard the services of an individual as rendered in an employment relationship rather than under a contract for services concluded between two enterprises, that state should logically consider that the individual does not carry on the business of the enterprise that constitutes the individual's formal employer.30

One could criticize the method of interpretation followed in both approaches. The first approach uses the domestic law meaning of 'employment' to interpret the expression 'employer'. If the author understands this approach correctly, it was chosen because the domestic law of a state may lack a definition of 'employer', but have a definition of 'employment'. The question arises as to whether the interpretation under the first approach is to be regarded as an (indirect) reference to the domestic law of the state applying the tax treaty or as an autonomous interpretation of 'employer'. The author assumes that the latter is the case because the 2007 Discussion Draft concludes that an employer is an enterprise to which the individual renders his services in an employment relationship, which conclusion is drawn independently of the domestic laws of the contracting states. Unfortunately, the 2007 Discussion Draft is not entirely clear on this point. It does not indicate how this method of interpretation should be considered, nor does it explain this method of interpretation further. In the author's view, it would have been preferable for the 2007 Discussion Draft to refer to the general rules of interpretation in the Vienna Convention31 which are to be used to interpret the expression 'employer'. This is also demonstrated by the case law of the German Federal Tax Court32 and the Netherlands Supreme Court.33

26. See Para. 8.8 of the proposed Commentary on Art. 15.
27. See Para. 8.9 of the proposed Commentary on Art. 15 (quoted in note 50, infra). It is useful to note that Para. 8.9 clarifies that it is possible for a PE to act as a de facto employer because the relevant criteria can also be applied to a PE. Moreover, the ability of a PE to act as a de facto employer is also supported by the 'separate entity fiction' or "independence fiction": see Pötgen, supra note 1, at 584. In its decision of 29 January 1986, BSBl II 1986, at 642, the German Federal Tax Court left open the possibility that a PE can be an employer from a German tax treaty perspective because the PE can bear the salary costs, which is decisive for interpreting 'employer' for treaty purposes (see further below). It should also be noted that Art. 15(2)(b) of the 1970 Belgium–United States tax treaty implies that one can have an employment relationship with a PE ('...an employee of a permanent establishment ...'). In her annotation on the decision of the Netherlands Supreme Court of 23 September 2005, BNB 2006/52, 111, Burge explicitly confirmed that a PE can be an employer for treaty purposes (de facto employer); see also the decision of the Netherlands Supreme Court of 28 February 2003, BNB 2004/138. In addition, according to Burge, the characterization of a PE as an employer is strengthened in a situation involving the European Union because the freedom of establishment (Art. 43 of the EC Treaty) means that a PE should be treated equally by a subsidiary.
28. See Para. 8.9 of the proposed Commentary on Art. 15 (quoted in note 50, infra).
29. See Para. 8.11 of the proposed Commentary on Art. 15.
30. See id. According to the 2007 Discussion Draft, this could be relevant, for example, in determining whether the enterprise has a PE at the place where an individual performs his activities. See also Para. 4.3 of the Commentary on Art. 5 of the OECD Model, regarding when an employee who is assigned by a parent company to render services on behalf of a subsidiary in another state can constitute a PE of his employer because he is allowed to use an office at the subsidiary's headquarters for a long period of time and the activities do not qualify under Art. 5(4) of the OECD Model (ancillary or preparatory activities).
31. The Vienna Convention entered into force on 27 January 1980 after the ratification and accession by the 35th state, i.e. Togo, which deposited the instruments of accession on 28 December 1979.
domestic laws of these states do not have a definition of "employer" (in BNB 2004/138, for instance, the Netherlands Supreme Court did not directly point to the definition in Dutch civil law), but do have a definition of "employment". Nevertheless, the courts of these states attempted to interpret "employer" autonomously, and the Netherlands Supreme Court strongly relied on the authority element, which is also relevant when explaining "employment".34

The 2007 Discussion Draft also neglects the situation where states have a definition of "employer" in their domestic law which is not limited to the withholding tax concept (e.g. the United States and the United Kingdom). In these cases, Art. 3(2) of the OECD Model is to be applied to interpret "employer".35 As a result, reference is made to the domestic law definition that is deemed to be decisive under the relevant tax treaty, unless the context requires another meaning.36

The second approach points only to the object and purpose of Art. 15(2) on which the interpretation of "employer" is based. This can be reduced to a teleological interpretation that is not in conformity with the basic principles of Art. 31 et seq. of the Vienna Convention.

According to proposed Para. 8.10, the solution in Paras. 32.1 to 32.7 of the Commentary on Art. 23 of the OECD Model also applies when the expression "employer" is interpreted according to the object and purpose of Art. 15(2) (Paras. 8.8 and 8.9 of the proposed Commentary on Art. 15).37 Although one can appreciate the attempt of Working Party No. 1 to follow the aforementioned broader view, the issue remains that proposed Para. 8.10 contradicts Paras. 32.1 to 32.7 of the Commentary on Art. 23 - in particular, Para. 32.3 (definition of qualification conflicts which refers to differences in the domestic law) and Para. 32.5 (description of interpretation conflicts, including different interpretation of the provisions of the OECD Model but not of the different provisions of the domestic law). The authority of the Commentary is undermined when it contains such contradictions. If the Commentary intends to express the aforementioned broader view, it should similarly amend Paras. 32.1 to 32.7 of the Commentary on Art. 23. Otherwise, inconsistencies, obscurities and difficulties will continue to exist.

Considering these observations, the author would have preferred that the proposed Commentary not include the paragraphs elaborating the two possible approaches explaining 'employer' because it is questionable whether they reflect the proper interpretation of that term. The same applies to Para. 8.3 of the proposed Commentary (quoted in 3.1.), which includes a suggested text for states following a formal interpretation of 'employer' in order to counter abuse. In the author's view, it would have been preferable to include a set of criteria in the Commentary or in a treaty provision that would be valid for all situations irrespective of whether states follow a formal or substantive interpretation of 'employer' under their domestic law.

4. Objective Criteria

In determining who an individual's employer is for treaty purposes, the 2007 Discussion Draft attaches major importance to the nature of the services rendered by the individual since it is logical to assume that an employee's services are an integral part of the business activities of his employer.38 According to the 2007 Discussion Draft, the nature of an individual's services will therefore determine whether they constitute an integral part of the business of the enterprise to which the services are provided. For this purpose, a key consideration is which enterprise bears the responsibility and risks for the results produced by the individual's work.39 The 2007 Discussion Draft added a sentence to Para. 8.13 of the proposed Commentary (as compared with the 2004 Discussion Draft) which says that this analysis is rele-

34. It should also be mentioned that the German Federal Tax Court adopted a comparable approach under German domestic tax law to interpret "employer"; i.e. the inverse of the meaning given to "employee". Unlike "employer", the German wage tax regulations have a definition of "employee". Further, the outcome of this interpretation does not apply to situations involving thetriangular hiring-out of labour under German domestic law, nor is it relevant to interpreting "employer" for treaty purposes; see the decision of the German Federal Tax Court of 29 March 1999, BStR 2000, No. 3 at 83. 35. In Loubota, H. and W. Loubato, "Kurzfristige internationale Arbeitskräftentsendungen", SW 2006, No. 3 at 110-118, the authors criticized the 2004 Discussion Draft because it could lead to the user being found to be the employer in cases where this would not happen according to the domestic law of the state applying the tax treaty, which domestic law meaning could also be relevant pursuant to Art. 3(2). The authors questioned whether the domestic law meaning can be overruled by the explanation given in the Discussion Draft. Moreover, they think that the EU Member States, when following the example given in the Discussion Draft, could violate the non-discrimination principle of the EC Treaty (Art. 12 in conjunction with Art. 39 et seq.). This could happen if an EU Member State applies an interpretation to a cross-border case (the user is the employer) that differs from a domestic situation (the hirer is the employer). In this respect, the authors also referred to the case law of the European Court of Justice, such as Case C-234/00, Landshorster-Hohorst (12 December 2002).

36. Similar considerations pertain to Belgium. Belgian civil law explicitly provides that an agency, i.e. the person with whom the worker has concluded a formal employment contract, must be regarded as the employer. The combination of an explicit legal provision (considering the agency to be the employer) and the case law of the Belgian Courts of Appeal (also facilitating a formal interpretation of 'employer' under Belgian tax treaties) could support the finding that the agency is the employer from that perspective; see the decisions of the Mons Court of Appeal, 8 March 1984, F.F. 85/3, Brussels Court of Appeal, 2 May 2001, F.F. 2001/12/16, Ghent Court of Appeal, 7 October 1993, A.F. 1994, at 95; and Ghent Court of Appeal, 7 October 1999, F.F. 2000/97. This explanation would prevail over the unilateral explanation given by the Belgian tax authorities; who, in their Circular of 25 May 2005, No. AFZ 2005/0652 (AFF 08/2005), took the view that a substantive explanation of 'employer' must be followed regarding all types of cross-border assignments. In the same sense, see Pöltng, supra note 1, at 622-624: Bellen, K., "Uitzendbureaus: materiaal werkgeversbijeen in Nederland", Fiscolog Internationaald, 2004, No. 245 at 5; De Broe, L., 'Kroniek Internationaal Belastingrecht 2003-2004', Tijdschrift voor Rechtspersoon en Vennootschap, 2004, at 662; and Cools, A., 'Het werkgeversbijeen internationale uitzendarbeid met focus op het nieuwe dubbelbelastingverdrag tussen België en Nederland', Tijdschrift voor fiscaal recht, 2007, No. 322 at 401-404.

37. As mentioned below, the other approach, which refers to the domestic law definition of "employment", leads one to conclude the meaning of "employer" from that definition, which could be regarded as an autonomous interpretation of the term "employer".

38. See Para. 8.13 of the proposed Commentary on Art. 15.

39. In the 2004 Discussion Draft (Para. 8.11), this was one of the alternative criteria that should be taken into account, and it depended mainly on with whose business the employer's activities were in line (this approach is still taken in the examples given in the proposed Commentary). In contrast to the 2007 Discussion Draft, this became a factor in determining into whose business the employer's activities are more integrated.
vant only if the individual’s services are rendered directly to an enterprise. For example, if an individual provides services to a contract manufacturer or to an enterprise to which a business activity is outsourced, the individual’s services are not rendered to an enterprise that will obtain the products or services in question. If the nature of the individual’s services is compared with the business activities of his formal employer and with those of the enterprise to which the services are provided and the comparison points to an employment relationship other than the formal contractual relationship, the following additional factors may be relevant in determining whether the enterprise to which the services are provided is really the employer:

- who has the authority to instruct the individual regarding the manner in which the work has to be performed;
- who controls and has responsibility for the place at which the work is performed;
- whether the individual’s remuneration is directly charged by the formal employer to the enterprise to which the services are provided;
- who puts the tools and materials necessary for the work at the individual’s disposal; and
- who determines the number and qualifications of the individuals performing the work.

The author welcomes the Discussion Draft’s attempt to formulate objective criteria to explain “employer” for treaty purposes. Nevertheless, in his view, the following (critical) comments can be made on the criteria in the Discussion Draft.

4.1. One employer

Irrespective of the criticism of De Broe et al. of current Para. 8 of the Commentary on Art. 15 of the OECD Model, the Discussion Draft still seems to take the view that an employee can have only one employer for treaty purposes. This follows from how a finding should be made with the help of the objective criteria as to who the employer is for purposes of Arts. 15(2)(b) and (c). If the integration test points to an employer other than the formal one, the criteria listed above should be used to determine who the employer is within the meaning of Arts. 15(2)(b) and (c). It is clear that when there is more than one contractual relationship, applying these criteria may lead to the conclusion that there is more than one employer. This rests on two possibilities: either (a) the formal employer is the employer for treaty purposes because the objective criteria point to him as the employer, or (b) certain objective criteria point, not to the formal employer, but to a de facto employer resident in the work state, who is then the employer for treaty purposes. The 2007 Discussion Draft denies the possibility that both the formal and de facto employers may be regarded as the employer for treaty purposes (which could be the case if e.g. both constitute the employer using the above criteria).

This picture is confirmed by the analysis of the examples given in the 2007 Discussion Draft (discussed in 4.3, and 6.). In this respect, Example 3 is striking. The facts of this example, in Para. 8.20 of the proposed Commentary on Art. 15, are:

A multinational owns and operates hotels worldwide through a number of subsidiaries. Eco, one of these subsidiaries, is a resident of State E where it owns and operates a hotel. X is an employee of Eco who works in this hotel. Eco, another subsidiary of the group, owns and operates a hotel in State F where there is a shortage of employees with foreign language skills. For that reason, X is sent to work for 5 months at the reception desk of Eco’s hotel. Eco pays the travel expenses of X, who remains formally employed and paid by Eco, and pays Eco a management fee based on X’s remuneration, social contributions and other employment benefits for the relevant period.

The 2007 Discussion Draft analysed Example 3 as follows in Para. 8.21 of the proposed Commentary on Art. 15:

In that case, working at the reception desk of the hotel in State F, when examined in light of the factors in paragraphs 8.13 and 8.14, may be viewed as forming an integral part of Fco’s business of operating that hotel rather than of Eco’s business. Under the approach described in paragraphs 8.4 to 8.7 above, if, under the domestic law of State F, the services of X are considered to have been rendered to Eco in an employment relationship, State F should then logically consider that Fco is the employer of X and the exception of paragraph 2 of Article 15 would not apply. Also, under the other approach described in paragraphs 8.8 and 8.9, State F could consider that the employer, for purposes of the exception of paragraph 2 of Article 15, is not Eco and that the exception therefore does not apply. (emphasis added)

In the author’s view, it is incomprehensible that the Commentary did not take the previously formulated criticism into account and that the Commentary again follows a “one employer” concept in Art. 15(2)(b) of the OECD Model. The wording of Art. 15(2)(b) is clear in this respect: “an employer”. Consequently, there can be more than one employer for purposes of Art. 15(2)(b). Using “the employer” is not justified because Art. 15(2)(c) uses the same wording, and the Discussion Draft also intends to explain “employer” for purposes of that provision. Example 3, quoted above, is also valid for the other examples in the Discussion Draft and concerns Art. 15(2)(b), whose text refers to “an employer”. The Dis-

40. See Example 6, described in note 49, infra, of the proposed Commentary on Art. 15.
41. See Para. 8.14 of the proposed Commentary on Art. 15.
42. See the suggested provision (Para. 8.3 of the proposed Commentary on Art. 15, quoted in 3.1.), which may be included in the tax treaties of states following a formal explanation of employer in order to counter unintended situations, e.g. international hiring out of labour. Para. 8.3 contains a negative definition of ‘employer’ resulting in the inapplicability of Art. 15(3).
43. See also Example 1 (Para. 8.17 of the proposed Commentary on Art. 15); “In that case, State B could not argue that X is in an employment relationship with Eco or that Aco is not the employer of X for purposes of the convention between States A and B. X is formally an employee of Eco whose own services, when viewed in light of the factors in paragraphs 8.13 and 8.14, form an integral part of the business activities of Eco”. For the facts of Example 1, see note 49, infra.
44. This is the first approach mentioned above. See 3.2.2.
45. This is the second approach mentioned above. See 3.2.3.
46. The Netherlands Supreme Court subscribed to this statement; see the decisions of 28 February 2003, BvB 2004/138; 12 October 2001, BvB 2001/65; and 1 December 2006, BSN 2006/679. See also the decision of the Brussels Court of Appeal of 18 May 1995, A.F.T. 1995 at 805, and the decision of the German Federal Tax Court of 21 August 1985, StBfl II 1986 at 4.
discussion Draft should have respected this text. Example 3 demonstrates that the Discussion Draft excludes certain employers (i.e. Eco) from the application of Art. 15(2)(b), which clearly contravenes the text of that provision.

4.2. Rationale of the criteria: comparison with Para. 8 of the Commentary on Art. 15

The objective criteria that must be applied to determine who an employer is for purposes of Art. 15(2)(b) when the integration test points to an employer other than the formal one are, to a large extent, identical to those in Para. 8 of the Commentary on Art. 15 of the OECD Model, which criteria could be included in a mutual agreement between the competent authorities of the contracting states in question. The criteria in the 2004 Discussion Draft were a copy of those in Para. 8 of the Commentary. The 2007 Discussion Draft made some changes to these criteria, and they were further amended to express that they are intended to cover all cross-border secondments, i.e. they are not limited to cases of international hiring-out of labour. As a result, the references to "hirer" and "user" have been eliminated. The criterion "the remuneration to the hirer is calculated on the basis of the time utilised, or there is in other ways a connection between this remuneration and wages received by the employee" has been changed to "the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided". One could argue that the framework and context of Art. 15(2)(b) mean that this type of criterion should not be used separately to define "employer" because it is already included in the phrase "paid by, or on behalf of" and in the explanation of that phrase.

Moreover, it is remarkable that the 2007 Discussion Draft does not directly address what are considered to be the main features of "employer" in Para. 8 of the Commentary on Art. 15, i.e. the person who has the rights to the work produced and bears the responsibility and risks. The Discussion Draft mentions bearing the responsibility and risks for the results produced by the individuals work only as one of the key considerations to determine whether the employee's activities are sufficiently integrated into the business of the enterprise to which he was assigned to render services. Apparently, the 2007 Discussion Draft attempts to overcome in part the criticism that these two main features provoked. The criticism was reduced mainly to the issue of the absence of two important characteristics of "employer", i.e. the control and integration tests. They are, to a large extent, set forth in Paras. 8.13 and 8.14 of the proposed Commentary on Art. 15. The 2007 Discussion Draft does not provide the reason for these changes. The reason would be welcome because, while the integration test takes a prominent place in the Discussion Draft's approach (of which bearing the responsibility and risks for the results of the work produced by the individual is one of the essential elements), this test is not even mentioned in current Para. 8 of the Commentary on Art. 15. On the other hand, the above-mentioned main features of employer in current Para. 8 are either not (separately) mentioned (the person having the right to the work produced) in the 2007 Discussion Draft or have an indirect role (bearing the responsibility and risks) therein.

The purpose of the criteria in current Para. 8 is to identify the actual employer in cases of international hiring-out of labour, which differs from the rationale of Paras. 8 to 8.28 of the proposed Commentary on Art. 15. One would have expected the 2007 Discussion Draft to reformulate and refine the relevant criteria since it intends to expand the scope of that part of the Commentary to cross-border secondments which are outside the area of international hiring-out of labour. In the author's view, it would have been preferable for the reformulation and refinement to have occurred along the lines suggested, with particular emphasis on the control test rather than the integration test (for the last aspect, see the comments below).

4.3. Integration test

The integration test occupies a prominent position in the interpretation of "employer" for purposes of Art. 15(2)(b) of the OECD Model. This test is presented in the 2007 Discussion Draft as a kind of pre-selection. When the integration test points to an employer other than the formal employer, the criteria in the Discussion Draft are to be used to determine the ultimate employer for treaty purposes. Nevertheless, the examples given in the 2007 Discussion Draft demonstrate that this test may be decisive in quite a few situations where no attention is paid to the other criteria. This is the case in five of the six examples in the Discussion Draft. Only in Example 5 (discussed in 6.) are the other criteria used to determine who is to be regarded as the employer for purposes of Art. 15(2)(b).

In Examples 1, 2, 3, 4 and 6, the activities of the seconded employee are described and consideration is

46. Para. 8.15 of the proposed Commentary on Art. 15 provides that where an individual who is formally an employee of one enterprise renders services to another enterprise, the financial arrangements between the two enterprises will clearly be relevant, but not necessarily conclusive, for purposes of determining whether the individuals remuneration is directly charged by the formal employer to the enterprise to which the services are rendered.

47. See Para. 8.13 of the proposed Commentary on Art. 15. It is noteworthy that, in the 2004 Discussion Draft, bearing the responsibility and risks for the results produced by the individuals work was one of the criteria for determining who the employer was for treaty purposes when the integration test did not lead to a sufficiently clear outcome; see Para. 8.11 of the 2004 Discussion Draft.

48. See Paras. 8.6, 8.13 and 8.14 of the proposed Commentary on Art. 15.

49. In Example 1, X is an employee of Aco (X and Aco are both resident in State A); X and Aco are involved in providing computer training services. X is seconded to Eco, resident in State B, that wants to train its personnel. Aco is X's employer since X's activities (computer training) form an integral part of Aco's business activities (computer training).

In Example 2, X is an employee ofeco. X and Eco are both resident in State C, develop marketing strategies. X is seconded to a group company Dco, resident in State D, that sells the group's products. X's activities, advising Dco on marketing strategy, are an integral part of Eco's business activities rather than those of Dco.

The facts and analysis of Example 3 are quoted above (in 4.1.). In analysing Example 3, the Discussion Draft states that it examined the case in light of the factors in Paras. 8.13 and 8.14 which concern the criteria mentioned above. Example 3 suggests that these criteria can be used to determine
given only to the question of which company they constitute an integral part. This is deemed to be decisive in the examples, and the primary focus is on the relation between the individual's activities and those of the companies involved; if the individual's activities are more in line with the business of one of the companies, that company is the employer for treaty purposes. One could argue, however, that this is one of the elements that is deemed to be less relevant than the control test in determining who the employer is for treaty purposes.

The 2007 Discussion Draft clearly refers to the integration of the seconded employee's activities into the business of the sending or receiving company. In the author's opinion, the integration test comprises more elements than just investigating whether the employee's services are in line with the business of the seconding company or with that of the receiving company. Even though the 2007 Discussion Draft recognizes the factor of bearing the responsibility and risks for the results produced by the individual's work as one of the key factors, the examples mentioned above demonstrate that the focus is mainly on whether the seconded employee's activities are in line with those of the receiving enterprise. Another important aspect of the integration of the employee's activities into the business of the receiving or seconding company is the manner in which his activities are organized. In this respect, it could also be relevant whether the seconded employee, when performing his activities, is part of a team consisting of various employees and managers of the receiving company, being a member of a team could shed light on the integration of his activities into the business of the receiving company. Most enterprises employ personnel whose activities are different from the business of the enterprise (e.g., bookkeepers, training teachers, cleaners and IT staff).

The examples in the Discussion Draft pay attention only to the core business of the companies involved, e.g., the seconded individual and the seconding company are involved in developing marketing strategies, whereas the receiving company sells products. Nonetheless, there could be many situations where the services rendered by an individual are outside the core business of the receiving company, but the services can still be integrated into that company's activities. This may be the case if the employee renders certain support services, e.g., IT or accounting services, and is seconded from a department of the seconding company to a department of the receiving company, while the core business of these companies differs from the activities of the employee and of the departments providing the support services. If the seconded employee becomes a member of the team (department) of the receiving company that provides the support services, it could be argued that the employee's activities are integrated into those of the receiving company.

Moreover, it is not always possible to determine unequivocally whether the seconded employee's activities are more integrated into the business of the receiving company or that of the seconding company, as illustrated by Example 3 in the 2007 Discussion Draft (see 4.1). This will affect especially companies engaged in providing services. Another disadvantage of how the 2007 Discussion Draft styles the integration test is that it may quickly lead to regarding the receiving company as the employer when the activities of the employee and the company are in line with each other.

According to the author, it is questionable whether it is entirely balanced to put the emphasis so strongly on the integration test. The control test seems to be more important. It can be argued that the integration test is particularly relevant in determining to which company the salary costs are to be allocated or which company bears them. The structure of the OECD Model means that this matter should be covered by Art. 9 of the OECD Model, by the phrase "paid by, or on behalf of" in Art. 15(2)(b), or by both. In addition, the integration test could also contain elements that shed light on the question whether the employee works under the control or authority of a certain person. If the employee's activities are integrated into that person's business, the employee will normally perform his activities under the authority of the person's activities form an integral part of which business. The author assumes that the question whether the activities constitute an integral part of the enterprise of the possible employer reflects the integration test (see also Paras. 8.6 and 8.9 of the proposed Commentary on Art. 15). The criteria to which the Discussion Draft subsequently refers are mainly of importance to investigate under whose control the employee renders his services. The correctness of this assumption is strengthened because a similar reference is made in the other examples.

In Example 6, X, an engineer, is recruited by Gco (both X and Gco are resident in State G) that hired him out to render engineering services in State H on behalf of Hco. Hco is an engineering firm resident in State H which provides engineering services on building sites. X renders engineering services, while Gco is in the business of filling short-term business needs. By their nature, the services rendered by X are not an integral part of the business activities of his formal employer, but the services are an integral part of the business activities of Hco.

In Example 6, X is a senior manager in charge of supervising human resources functions within a multinational group. X is employed by Kco, which acts as a cost centre for the groups' human resources. He spent three months in State L in order to deal with human resources issues at Lco. The work performed by X is an integral part of the activities that Kco performs for its multinational group. X's activities are in line with those of Kco (human resources activities) rather than those of Lco. Example 6 was added to the proposed Commentary (Paras. 8.26 and 8.27) on Art. 15 by the 2007 Discussion Draft. The example attempts to pay attention to activities that are centralized within a group of companies, which is often the case for human resources, corporate communications, strategy, finance and tax, treasury, information management and legal support.

This is demonstrated in particular by the explanation in Para. 8.9 of the proposed Commentary on Art. 15: "It seeks to ensure that the term employer is not interpreted in a way that would allow the exception provided for in paragraph 2 to apply in unintended situations, i.e. where the services rendered by the employee are more integrated into the business activities of a resident enterprise than into those of his formal employer." This is also demonstrated by Example 3 discussed in 4.1.

Example 6, described in note 49, supra, touches on this issue from a different angle.

52. Pötgens, supra note 1, at 662.
and control of that person. In any event, that person is at least capable of exercising that authority.56

In addition, the integration test may lead the tax authorities to take an approach whereby they, for instance, apply the test in a specific time period. An example of this is the holding of the UK tax authorities that a business visitor spending less than 60 days in the UK in a tax year, where that period was not part of a longer presence in the UK, is insufficiently integrated into the business of a UK company to regard the company as the visitor’s employer.57 The German tax authorities followed a similar approach in the transfer pricing area: from an arm’s length perspective, the costs of a seconded employee are to be allocated to the German receiving company if the employee worked for more than 90 days on behalf of that company in Germany (or if the employee worked for less than 90 days but the activities were repeated several times).58 The 90-day threshold determines whether the employee’s activities are sufficiently integrated into the business of the German company. It is questionable whether these threshold periods and applying them to Art. 15(2)(b) are entirely in conformity with the framework of Art. 15 since Art. 15(2)(a) already includes a threshold period (183 days).

Nevertheless, if the activities performed on behalf of the receiving company are substantial in nature, i.e. not incidental, they could play a part when considering whether the receiving company is an employer. This “substantiality” element is illustrated in the case law of the Netherlands Supreme Court regarding internationally active soccer players representing the national team (see BNB 1993/329 and BNB 1998/118).59 Depending on the circumstances of the case, the incidental nature of an activity performed on behalf of a person may influence whether the person is viewed as an employer. In some situations, however, it is difficult to determine whether an activity performed on behalf of a person is sufficiently substantial to characterize him as an employer.60

In the author’s view, it would have been preferable to include a more extended set of criteria in the Commentary in the part that establishes the control test as the most crucial criterion in this respect61 and to amend the examples accordingly. Furthermore, Example 3 (all the parties are involved in hotel activities; see 4.1.) and Para. 8.9 of the proposed Commentary on Art. 1562 demonstrate that the 2007 Discussion Draft intends to investigate to what degree the individual’s activities are integrated into the business of the companies involved. This may be difficult to determine in certain cases, as illustrated by Example 5 in the Discussion Draft, discussed in detail in 6. In Example 5, the Discussion Draft does not establish into which enterprise the activities of the seconded engineer are more integrated, but instead refers to the criteria mentioned above to determine which company is the employer. In these relevant criteria (of which the control test is the most crucial), the factor that the employee’s activities are in line with the business of one or both of the companies involved could be used to determine (together with the other factors) who is to be viewed as an employer. In this respect, it is entirely possible that both the seconding and receiving companies may be regarded as the employer for purposes of Art. 15(2)(b).

5. Interpretation Conflicts and Qualification Conflicts

As mentioned above, the interpretation of “employer” in Art. 15(2)(b) followed in the 2007 Discussion Draft is striking (see 3.2.4.). The Discussion Draft notes that this expression, at least if the contracting states interpret “employer” substantively, is to be interpreted either (a) by determining to which person the employment services are rendered (“employment” must be explained according to the domestic law of the state applying the tax treaty)63 or (b) by virtue of the object and purpose of Art. 15(2) of the OECD Model.

The 2007 Discussion Draft attempts to overcome the criticism made of the 2004 Discussion Draft, i.e. that it did not directly address Paras. 32.1 to 32.7 of the Commentary on Art. 23 of the OECD Model.64 Para. 8.10 of the proposed Commentary refers to these paragraphs and concludes that the residence state should provide relief under both interpretation approaches mentioned above (domestic law regarding the term “employment” or according to the object and purpose of Art. 15(2)), provided the residence state acknowledges that the work state has taxed the individual’s employment income in accordance with the applicable tax treaty. As indicated above, Para. 8.10 intends, according to the approach adopted by De Broe et al., to reach the situation where the residence state is obliged to follow the work state’s characterization in cases that go beyond what Paras. 32.3 and 32.5 of the Commentary on Art. 23 would regard as qualification conflicts. The inclusion of Para. 8.10 would contradict Paras. 32.3 and 32.5 of the Commentary on

56. Two lower courts in the Netherlands attached importance to the question whether the seconded employee’s activities were in line with the business of the seconding company or with that of the receiving company in order to determine under whose authority the employee performed his activities: see the decision of the lower court that led to the decision of the Netherlands Supreme Court of 28 February 2003, BNB 2004/138 (on appeal: the Supreme Court did not revise the lower court’s decision because its determination had a factual nature); and the decision of the Lower Court of Amsterdam of 27 May 2003, FED 2003/583, leading to the decision of the Netherlands Supreme Court of 1 December 2006, V-N 2006/659. See also: Witt, T., ‘Der Arbeitgeberbegriff im Doppelbesteuerungsrecht’, IStR 2003, No. 12 at 412.
57. 60-day rule only applies to employees who were paid via a non-resident employer’s payroll, but whose economic employer may be in the UK. See Tax Bulletin, 2003, Issue 68 at 1070.
59. BNB 1993/329 was referred for further investigation to The Hague Court of Appeal, which rendered its decision on 1 October 1994, V-N 1995/726. In the United States, a similar element was mentioned in Revenue Rulings 74-330 and 74-331.
60. It is striking that, in his letter of 9 May 2007, V-N 2007/329, the Netherlands Under-Minister of Finance did not pay any attention to the nature of the activities (substantial or incidental) when determining whether the receiving company can be regarded as the employer for purposes of Art. 15(2)(b) of the Dutch tax treaties styled on the OECD Model.
61. Pötgens, supra note 1, at 670 and 671.
62. Para. 8.9 is quoted in note 50 supra.
63. It can be assumed that the Discussion Draft here alludes to the application of Art. 3(2) of the OECD Model.
64. Pötgens, supra note 1, at 664 and 665.
Art. 23, and this could undermine the status of the Commentary. Therefore, it seems that at least Paras. 32.1 to 32.7 of the Commentary on Art. 23 should be amended to make them consistent with proposed Para. 8.10. This paragraph applies the solution for qualification conflicts to interpretation conflicts, whereas Para. 32.5 takes the view that interpretation conflicts must be resolved under the mutual agreement procedure.

6. "Paid by, or on Behalf of"

When the 2007 Discussion Draft is incorporated into the Commentary on Art. 15 of the OECD Model, the Commentary will, at least implicitly and contrary to its current version, devote attention to the meaning of the phrase "paid by, or on behalf of" in Art. 15(2)(b). The Commentary will then accept that "paid by" and "paid on behalf of" cover two separate situations (and will respect the ordinary meaning of "or", i.e. "or" should not be read as "and"), and the focus will therefore be on the employer resident in the work state who bears the salary costs relating to the services rendered by the employee in that state. This explanation may be deduced from Example 5 (Paras. 8.24 and 8.25 of the proposed Commentary):

Ico is a company resident of State I specialised in providing engineering services. Ico employs a number of engineers on a full-time basis. Ico, a smaller engineering firm resident in State I, needs the temporary services of an engineer to complete a contract on a construction site in State J. Ico agrees with Ico that one of Ico's engineers, who is a resident of State I, momentarily not assigned to any contract concluded by Ico, will work for 4 months on Ico's contract under the direct supervision and control of one of Ico's senior engineers. Ico will pay Ico an amount equal to the remuneration, social contributions, travel expenses and other employment benefits of that engineer for the relevant period, together with a 5% commission. Ico also agrees to indemnify Ico for any potential claims related to the engineer's work during that period of time.

In that case, even if Ico is in the business of providing engineering services, it is clear that the work performed by the engineer on the construction site in State J is performed on behalf of Ico rather than Ico. The direct supervision and control exercised by Ico over the work of the engineer, the fact that Ico takes over the responsibility for that work and that it bears the cost of the remuneration of the engineer for the relevant period are factors that could support the conclusion that the engineer is in an employment relationship with Ico. Under the two approaches described in paragraphs 8.4 to 8.9 above, State J could therefore consider that the exception of paragraph 2 of Article 15 would not apply with respect to the remuneration for the services of the engineer that will be rendered in that State.

In Example 5, Ico, the seconding company, continues to pay the engineer's salary, while Ico, the receiving company, is charged specifically for the engineer's remuneration, social contributions, travel expenses and other employment benefits for the relevant period, together with a 5% commission. The Discussion Draft and the proposed Commentary conclude that the condition of Art. 15(2)(b) of the State I–State J tax treaty is not met. In so doing, the Discussion Draft and the proposed Commentary seem to distinguish between different situations covered by the phrases "paid by" and "paid on behalf of", which is shown by the following facts: (a) Ico pays the salary without bearing the costs, and (b) Ico recharges the costs to Ico with the consequence that Ico ultimately bears the costs. Hence, Ico paid the salary on behalf of Ico, which is an employer of the engineer residing in the work state. Ico ultimately assumed the analogous salary costs.

The 2007 Discussion Draft mentions, as one of the alternative factors in determining who the employer is within the meaning of Art. 15(2)(b), that "the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided". In the author's opinion, this factor is more relevant to explaining the phrase "paid by, or on behalf of" than the term "employer". From this perspective, it is striking that the 2007 Discussion Draft and Para. 8.14 of the proposed Commentary regard the direct charge of the employee's remuneration as one of the objective criteria for determining "employer", but they remain silent on the explanation of "paid by, or on behalf of". Taking these considerations into account, the fact that the Discussion Draft and Para. 8.14 of the proposed Commentary refer to a direct charge of the remuneration may also shed light on how "paid by, or on behalf of" should be explained. The 2007 Discussion Draft and Para. 8.15 of the proposed Commentary on Art. 15 state that an indication of such a direct charge is, for instance, that the fees represent the individual's remuneration, employment benefits and other employment costs for the services he provided to the enterprise to which he was seconded by his formal employer with no profit element or with a profit element that is computed as a percentage of that remuneration, benefits and other employment costs. This is not the case if, for example, the fees charged for the services bear no relation to the individual's remuneration or if the remuneration is only one of many factors taken into account in the fees charged for what is really a contract for services (e.g. where a consulting firm charges a client on the basis of an hourly fee for the time spent by one of its employees to perform a particular contract and the fee encompasses the various costs of the enterprise), provided this is in conformity with the arm's length principle if the two enterprises are associated.

Although the author welcomes the step taken in the 2007 Discussion Draft to clarify implicitly the meaning of "paid by, or on behalf of", it would have been preferable to include a paragraph in the Commentary setting out the above interpretation. From this perspective, it is incomprehensible that the Commentary devotes much attention to the phrase "borne by" in Art. 15(2)(c) of the OECD Model,66 but does not explain the phrase "paid by, or on behalf of" clearly and explicitly. Nor does the

65. Some authors regard Examples 3 and 4 in the 2007 Discussion Draft, which were also included in the 2004 Discussion Draft, as an implicit statement that the phrase "paid by, or on behalf of" does not require a specific and explicit recharge; see Baeten, I. "Mobilité internationale: nouveau commentaire bégue de l'article 15 des conventions préventives de la double imposition", RGF 2005, No. 11 at 8.

66. See Para. 7 of the Commentary on Art. 15. See also Püggen, supra note 1, at 705.
7. Conclusion

The 2007 Discussion Draft resolves some of the issues regarding current Para. 8 of the Commentary on Art. 15 of the OECD Model. After the Discussion Draft has been incorporated into the Commentary, it will be clear that the explanation of the term "employer" in Paras. 8 to 8.28 of the proposed Commentary on Art. 15 will apply irrespective of the nature of the secondment, i.e. the Commentary will not be restricted to abusive cases of international hiring-out of labour, but will instead pertain to all cross-border secondments, assuming that the two other conditions of Art. 15(2) of the OECD Model are satisfied.

The 2007 Discussion Draft distinguishes between states following a formal approach to "employer" and states using a substantive interpretation of the term. States adopting the first approach may include a special provision to counter unintended situations, while states using the second approach should use objective criteria in interpreting the term "employer" in their tax treaties. Although it does not follow directly from the Discussion Draft, the author assumes that states interpreting the term "employer" formally in their tax treaties may not be able to change the outcome of that interpretation by virtue of the objective criteria developed in the Discussion Draft. This seems to be confirmed by the fact that the Discussion Draft notes that these states are free to bilaterally adopt a special provision (see 3.1) enabling them to prevent unintended situations, such as the international hiring-out of labour. As a result of the special provision, Art. 15(2) of the OECD Model is excluded in these types of cases, and the work state has the right to tax the employee's salary. This suggests that a state would be allowed to follow its formal approach under which the context, i.e. objective criteria, would not require another meaning. If the context should require a meaning that deviates from the domestic law meaning, there would be no need to suggest a specific provision giving the work state the right to tax the employee's salary in unintended situations when that state applies a formal interpretation.

In that case, a derogation from the domestic law meaning by virtue of objective criteria would only occur with regard to states using a substantive explanation of employer. This assumption may be questioned, at least to some extent. In respect of states applying a formal interpretation of employer, the context of a tax treaty may require a meaning other than that stemming from the domestic law of the state applying the treaty, in which case strong emphasis would be placed on the control test.

According to the author, the distinction between states applying a formal interpretation of employer and states applying a substantive interpretation for treaty purposes should be abolished. For states using a formal interpretation, the objective criteria should also result in the formal employer not being regarded as the employer for treaty purposes. In the author's view, there should be a uniform approach in this respect, preferably laid down in a tax treaty provision or, as a last resort, in the Commentary on the OECD Model.

The 2007 Discussion Draft distinguishes between two approaches within the category of states following a substantive interpretation: (a) the employer is the person to whom the employee renders his services in an employment relationship ("employment" is interpreted by reference to the domestic laws of the states applying the treaty), and (b) "employer" is interpreted according to the object and purpose of Art. 15(2) of the OECD Model. It would seem preferable to delete the paragraphs describing the substantive interpretation of employer from the proposed Commentary because of the inconsistencies in the above approaches. Little substantiation has been provided for these approaches in interpreting "employer". Nor was any reference made to states applying Art. 3(2) of the OECD Model when interpreting "employer". By contrast, the solution for the qualification conflicts that may result from Art. 3(2) — i.e. proposed Para. 8.10 refers to Paras. 32.1 to 32.7 of the Commentary on Art. 23 of the OECD Model to resolve all conflicts stemming from these two approaches — does not seem to be consistent with the definition of interpretation and qualification conflicts in Paras. 32.1 to 32.7.

Hence, in the author's view, it would have been preferable to include a description of "employer" in the Commentary or in a treaty provision (or alternatively in the OECD Model) which would remove the distinction between a formal and substantive interpretation of "employer" and within the substantive category to which the two approaches refer.

The 2007 Discussion Draft provides objective criteria for determining who the employer is for purposes of Art. 15(2)(b) of the OECD Model. Unfortunately, the Discussion Draft seems to take as a point of departure that an individual can only have one employer within the meaning of Art. 15(2)(b). This does not conform to the wording of that provision, and it is also rejected by tax court decisions in various countries. The author thinks that the Commentary should respect the wording of Art. 15(2)(b).

It is striking that the 2007 Discussion Draft assigns a prominent role to the integration test in establishing the objective criteria for determining who the employer is within the meaning of Art. 15(2)(b). In the author's view, this prominent role is unjustified. In addition, the integration is explained mainly, at least according to most of the examples given in the 2007 Discussion Draft, by

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67. This conclusion is not changed by Para. 8.14 of the proposed Commentary, which provides that the objective criteria should be applied to determine who an employer is when the integration test points to an employment relationship other than the formal contractual relationship.

68. The control test is included in the specific provision (see 3.1) that states adopting a formal interpretation of employer may include in their tax treaties.
investigating whether the individual's activities are in line with the business activities of the companies involved. One key consideration, for example, is which enterprise bears the responsibility and risks for the results produced by the individual's work. According to the author, the factor of determining under whose control the individual performs his activities, which is supported by Dutch case law, could also be relevant. Therefore, the integration test could be regarded as one of the important criteria for interpreting "employer", but not decisive.