1. **Residence in the domestic context and influences**

Luxembourgish law has been heavily influenced by German, French and Belgian laws. In turn, tax law and the definition of a company’s residence has been steadily following company law in an effort to keep aligned the two related areas. Most developments with regard to the company’s residence were first incorporated into company law, for tax law to follow. For these uniformity attempts to be successful, and following the terminology alignments, the interpretation of the relevant terms has also been aligned. In this sense, one could say that – always with regard to corporate residence – company law has been the forefront in the understanding of corporate residence.

Luxembourg company law follows the real seat theory. Hence, the *lex societatis* in Luxembourg is linked to the place of the effective management of a company.

Specifically, the Company law act of 10 August 1915 (as subsequently amended), the main company law for commercial companies in Luxembourg, provides that ‘[a]ny company whose central administration [‘administration centrale’] is in the Grand Duchy shall be subject to Luxembourg law, even though the constitutive instrument may have been executed in a foreign jurisdiction.’

The term ‘central administration’ as the main element in the definition of corporate residence for company law purposes was inserted by the law of 25 August 2006, replacing the original term of the 1915 act of ‘principal establishment’ (“principal établissement”). Full terminological uniformity has not been attained yet, as, for instance, Art. 159 (2) and (3) provide that “In case the domicile of a company is located abroad but this company conducts operations from one or more locations in the Grand-Duchy of Luxembourg, the place of its most important establishment in the Grand-Duchy of Luxembourg […] shall constitute the secondary domicile of this company in Luxembourg.” However, the choice of the
criterion of central administration served to permit Luxembourg to align with the terminology used in EU company law as well as for collective investment vehicles, mutual funds etc.\(^3\)

The notion of the (earlier) ‘principal establishment’ was drawn from the term used for natural persons in the French, Belgian and Luxembourgish civil codes. In all these cases, the civil codes provided that the domicile of a national is the place where he has his \textit{principal establishment}.\(^4\) However, the innate distinction between natural and legal persons led to the distinction of the terms and the use of the criterion of the central administration of companies instead of the one of the principal establishment.

Neither a company’s principal establishment nor its central administration were/are defined in the law, however, presumably, the two notions do not differ much from each other. They both relate to the place of the registered office of the company which usually coincides with the place of its effective management. They should be distinguished from the place of the centre of operations, where the material and tangible activities are taking place. Consequently, in the company law realm, both the central administration and the principal establishment notions refer to the ‘intellectual aspects of the company’s administration and management’, making the place of the central administration the place where the “brain” of the company is located.\(^5\)

According to Conac, the replacement of the ‘principal establishment’ by the ‘central administration’ should be endorsed as the latter is more modern and less apt to confusion than the former one. Accordingly, the principal establishment can be defined as the ‘place where the corporate bodies and the management reside, where the general meetings take place and where the contracts relating to the functioning of the company are discussed and deliberated’. This definition builds upon two main criteria; the place where the corporate bodies meet (the general meeting and the board of directors/management board) and the centre of management of the company.

\(^3\) See travaux préparatoires of the Law of 25 August 2006,
\(^4\) See for instance, the Luxembourg Civil Code, Art. 102: ‘The domicile of every Luxembourgian, with regard to the exercise of his civil rights, is in the place where he has his principal establishment.’ (free translation). Similarly, Art. 102 of the French Civil Code.
In this context, Luxembourgish jurisprudence has held that a company’s place of effective management is designated by the place where the general meetings of the shareholders and the meetings of the board of directors take place, that is, where ‘the most important decisions regarding the life of the company are taken’.6

This approach has been criticized by Conac who points to the fact that the Luxembourgish jurisprudence has placed too much emphasis on the place where the corporate bodies meet as opposed to the place where the company is actually managed from. As he notes, in big corporations not only do the managers enjoy a certain degree of autonomy by reference to the shareholders but also the general meeting of the shareholders might take place in a third place. These elements have, so far, been ignored in the Luxembourgish case law.7

As the main law for commercial companies in Luxembourg is the Company law act of 1915, the references to a company’s residence in the Luxembourgish civil code are very limited.8

With respect to insolvency law, Luxembourg, complying with the Insolvency Regulation 2015/848, and its predecessor Insolvency Regulation 1346/2000, considers that the opening of the insolvency proceedings should take place where the company has its place of effective management.

The growing financial distress companies face across Europe and the increasing number of multinational companies, with many creditors all over the EU, make the applicable insolvency law as well as the place of the opening of insolvency proceedings of paramount importance. In compliance with the EU Regulations, Luxembourg also applies the test of the Centre of Main Interests (COMI) for the definition of the company’s residence and the rebuttable presumption that the COMI of companies is where the place of the (bankrupt’s) registered office is.9

8 One example is the reference in Art. 115 of the Luxembourg civil code where it is provided that the articles of association of the company or the company’s constituting act should provide, inter alia, the seat of the company.
9 I think certain elements in the definition of the COMI or additional criteria for the rebuttal of the COMI elucidated by the CJEU in intra-EU insolvencies are noteworthy. In the Interedil case, for instance, the CJEU decided that “greater importance” must be attached to the place of the debtor company’s central
Art. 440 of the Commercial Code of Luxembourg provides that every commercial company that ceases payments shall within a month declare it to the commercial court of its seat. In the Luxembourgish bankruptcy framework, the seat of a company is the place where the debtor/bankrupt has his principal establishment and his centre of activities. As such, it comes as no surprise that the Tribunal d’Arrondissement de Luxembourg has adjudicated that it was for the Luxembourgish court to declare bankrupt a Luxembourgish branch of a non-resident company, on grounds that the ‘siège social’ abroad was fictitious and that the place of the ‘principal establishment’ and the ‘most important centre of activity’ was conducted through the branch in Luxembourg.¹⁰

In the same context, upon a creditor’s petition for opening insolvency proceedings against the debtor company, the defendant argued that Luxembourgish courts were not competent to open insolvency proceedings. In determining the COMI of the company, the national court (in second degree) observed that in the time of the reference, the company had its registered office in Luxembourg. However, the court eventually found that the Luxembourgish company was only a letterbox. To this finding contributed the reports of the French and Luxembourgish tax authorities which provided that the commercial activity of the company was conducted essentially in France and hence, that the ‘effective seat’ of the company was in France. Other factors that pointed towards this direction, were the facts that both the ‘material and intellectual’ infrastructure of the company were located there (in France), that the company managed its business with the vast majority of its creditors and its suppliers in a manner ascertainable by third parties from France.¹¹

administration. This place must be identified by reference to criteria that are both objective and ascertainable by third parties, in particular by the company’s creditors; if the bodies responsible for the company’s management and supervision are in the same place as its registered office, the COMI presumption cannot be rebutted; However, where a company’s central administration is not in the same place as its registered office, the presence of company assets in a different EU member state could be regarded as a sufficient factor to rebut the COMI presumption. In contrast, one would need to conduct a comprehensive assessment of all the facts in order to “establish, in a manner that is ascertainable by third parties, that the company’s actual centre of management” is located elsewhere. Examples of such factors can be the location in another member state of immovable property and the existence in that state of lease agreements and contracts with financial institutions could be regarded as objective factors. According to the court, however, such facts alone would not be sufficient to rebut the COMI presumption unless a comprehensive assessment of all factors led to the same conclusion. See Interedil (C-396/09, EU:C:2011:671).

¹⁰ Free translation, Tribunal d’Arrondissement (com.) de Luxembourg, 14 novembre 1997, n° 47753 du rôle. Note that this judgment was delivered before the entry into force of the EU Insolvency Regulation.

¹¹ Trib. arr. Luxembourg, 9 février 2007, B.I.J., 2007,p. 81 and in second degree Cour d’appel, 4e ch., 12 novembre 2008. The two courts The tribunal took into account the different elements advanced by the defendant, that is, that the customers were essentially French, the company’s activity was exercised in France, management from the private domicile of one of the managers in France etc. In spite of
In light of the different national (company, insolvency, tax, labour etc.) laws, the possibilities for forum shopping are ever increasing. A company’s residence can have large implications not only with regard to the applicable lex societatis but also in many corporate relationships (employer – employee, creditor – debtor etc.). Hence, it is not only the national tax authorities who can challenge for instance a fictitious corporate residence but, as already indicated, such a challenge may appear before the national courts upon a creditor’s initiation and by reason of the commencement of insolvency proceedings. Similarly, on grounds of the Luxembourg company law, a public prosecutor may order a company’s liquidation if it moves its central administration abroad without deregistering in Luxembourg.

1.2. **Tax Residence in the domestic context**

The main influence in the definition of a company’s residence for income tax purposes comes, as already indicated from company law. The most relevant statute for our purposes are the ‘Loi concernant l’impôt sur le revenu’ (henceforth LIR). Of relevance is also the ‘Abgabenordnung’ (henceforth AO).\(^1\)

In general, Luxembourg residents are taxable on their worldwide income, while non-residents are taxable only on their Luxembourg source income. According to the Art. 159 LIR corporate entities and cooperatives that have either their registered office (le siège statutaire) or their central administration in Luxembourg are subject to corporate income tax on their profits there. As the two criteria are alternative rather than cumulative, it suffices that a company has either its registered office or central administration in Luxembourg, in order to be considered as fiscally resident there. Consequently, non-resident companies which do not have their central administration in Luxembourg are subject to corporate income tax on their Luxembourg source income only (passive income or PE profits).

The term of ‘central administration’ was borrowed by company law, and substituted – as in company law – the previous concept of ‘principal establishment’. The concept of the ‘central administration’ is not defined neither in company nor in tax law. As the reasoning behind this substitution was the alignment with Luxembourgish company law terminology, considering these elements, the tribunal ruled that these elements are not sufficient to rebut the presumption of the registered office and the COMI in Luxembourg, which is where, according to the defendant the meetings of the board of directors.

\(^1\) Abgabenordnung Vom 22. Mai 1931. (Loi générale des impôts du 22 mai 1931)
it would only seem reasonably to apply the same interpretation *mutandis mutandis* in the two areas. Under Luxembourg law, the term is to be narrowly interpreted. A company can have only one central administration and, as case law provides, the locus of the central administration is difficult to assess and is judged on an *ad hoc* basis. For instance, the maintenance of accounting records in Luxembourg for a company with a registered office there, would not normally suffice to consider that the company has its central administration in Luxembourg.13

**1.2.1. The evolution of the notion of the fiscal residence in Luxembourg**

Before the entry into force of LIR in 1967, par. 1 of law of 16 December 1934 (sur l'impôt sur les collectivités) enumerated the companies subject to income tax on condition that they had their seat (‘Sitz’) or their place of management (‘lieu de direction d'affaires’ and in the original text language: ‘Ort der Geschäftsleitung’) in Luxembourg. The same criteria applied under the Law on Capital Tax (wealth tax), ‘Loi sur l'impôt sur la fortune du 16 octobre 1934’, as subsequently amended (henceforth LIF). Similarly, in the earlier general tax law of 1931 (Abgabenordnung - Loi générale des impôts du 22 mai 1931), a company was fiscally resident in Luxembourg if its *Geschäftsleitung*, as defined in par. 15 (1) AO and understood as the ‘place of management’ was in Luxembourg.

The notions of ‘seat’ and ‘place of management’ were defined in par. 15 of the Loi d’adaptation fiscale du 16 octobre 1934 (Steueranpassungsgesetz, ‘Tax adaptation law’). These criteria were considered on an *ad hoc* basis, after having taken into account the particularities of each case. One, however, should consider, where the management of the company is genuinely and in fact exercised, regardless of potential statutory conflicts. In general, the place of the management of the company (‘direction des affaires’) was understood to be where the ‘highest’ centre of management was located (‘centre de la direction supérieure des affaires’),14 which in turn was to be found where the important decisions with regard to the management of the company were made and not where they were implemented.15 This criterion raises the question of which are considered to be the most important decisions apt to justify the attribution of the place of the direction des affaires. Although this is a factual

14 „Mittelpunkt der geschäftlichen Oberleitung”
question, Luxembourg seemed to follow the German doctrine which would place emphasis on the operational management of the company as opposed to considering only where the strategic decisions were taken.\textsuperscript{16}

In order to align with company law, in 1967 upon the entry into force of the LIR, a company would be considered to be fiscally resident in Luxembourg if its registered office or ‘principal establishment’ was located in Luxembourg. This change was the source of two problems; First, was the –until then used – term of the (siege) de ‘direction d’affaires’, as provided in par. 15 AO still in use?\textsuperscript{17} If yes, what was the relationship of this criterion to the newly established ‘principal establishment’? Second, did the two terms clash or were effectively identical?

One view suggests that the multiple terms used should not create any confusion. As Steichen provides, the ‘Geschaftsleitung’ as provided in par. 15 AO complies with the ‘principal establishment’ term of the company law.\textsuperscript{18} The same applies in the case of the more recent substitution of the term by the term ‘central administration’ (see below). This terminology change, premised on company law and intended to uniform the concepts between company law and financial law does not correspond to a substantial change.\textsuperscript{19}

Another view, however, suggests that while subsequent jurisprudence appeared to attribute to the term ‘principal etablissement’ the meaning of the (siege) de ‘direction d’affaires’, the two terms should be distinguished.\textsuperscript{20} In the opposite scenario, that is, if par. 15 AO continued to apply to the LIR, the interpretation of the criterion should draw from the German doctrine and jurisprudence. According to Mischo, the two notions, though similar

\textsuperscript{16} For a thorough analysis see P. Mischo, ‘Réflexions sur la notion de domicile fiscal – La Résidence Fiscale des Sociétés de Capitaux’ in Annales de droit Luxembourgois (2003), 334, 337. In cases of decentralized management, ‘la direction superieure’ is considered to be where the ‘most important managerial decisions’ are taken from an economic and organizational point of view.

\textsuperscript{17} This problem arises from the fact that despite the entry into force of the LIR in 1967, par. 15 (1) AO was never formally repealed. It is, however, suggested that par. 15 was implicitly annulled by the entry into force of Art. 159 LIR which is premised on a different notion than the one used in par. 15 (1) AO.

\textsuperscript{18} A. Steichen, ‘Le siège social au regard du droit fiscal’, in in Journal des tribunaux Luxembourg, No. 1, 5 février 2009, p. 7. Concurrent with this view is also the footnote referring to Art. 159 LIR in the fiscal code vol. 2 B.


\textsuperscript{20} P. Mischo, ‘Réflexions sur la notion de domicile fiscal – La Résidence Fiscale des Sociétés de Capitaux’ in Annales de droit Luxembourgois (2003), 334, 337.
are not identical. The notion of the ‘Geschäftsleitung’ corresponds to the ‘centre de la direction superieure des affaires’ of the company, that is, pursuant to the German jurisprudence, it suffices to find the relevant corporate body that maintains the ultimate power to manage the company’s affairs. In contrast, the Luxembourghish doctrine is more flexible in establishing the locus of the ‘principal establishment’. In this assessment it allows company and the locus of the strategic decision making. Consequently, the concept of the principal establishment, as opposed to the notion of the ‘direction d’ affaires’, is a malleable and encompassing concept, more suitable for an ad hoc assessment, that can refer either to the daily management of the company or the place where strategic decisions are made. By contrast, the notion of the ‘direction d’ affaires’ is a much narrower concept that is based on the operational management of the company.

The law of 21 December 2007 replaced the term ‘principal establishment’ with the one of the ‘central administration’ in Art. 159 (1) of the LIR. Once again, this change should be seen as a follow up to the changes that took place in the area of company law. The question that arises naturally is whether the novel term carries the same meaning it carries in the realm of company law and whether it should be differentiated at all from the earlier term of the ‘principal establishment’.

The ‘projet de loi’ of 21 December 2007 provides that ‘this modification [from ‘principal establishment’ to ‘central administration’] should be considered as having no practical consequences, as, on the one hand, among the resident (commercial) companies, it is extremely rare that such a company is not already considered as resident subject to tax by reason of its registered office and, on the other hand, the administration has linked the notion of the ‘principal establishment’ to the notion of „Geschäftsleitung“ (par. 15, alinéa 1er de la loi d’adaptation fiscale (StAnpG). Similar, with regard to property tax, it is again the „Geschäftsleitung“ which aims to determine, together with the registered office,
whether a commercial company is to be considered as resident fully taxable (in Luxembourg).  

This continuation allows us to interpret the term under the prism of our previous interpretation of the ‘principal establishment’. Consequently, the term ‘central administration’ refers to the place where the management of the company makes the most important decisions with regard to the ‘life of the company’. In this sense, in order to identify the place of the principal establishment (and under the current law ‘the central administration’), the ‘control’ criterion, i.e. the residence of the controlling shareholders (and the majority of voting rights) should not be of relevance. Rather, what is considered more important under Luxembourg law is the place where the meetings of shareholders take place in order to appreciate together the situation. In case the decisions of the management body of the company regarding the establishment of general guidelines as to the functioning of the company are taken at a place different than the place where the shareholders convene, the principal establishment and/or the central administration will be at the first place. In a 2012 Deloitte survey, Luxembourg indicated that sometimes premises, staff and equipment were required to determine whether the place of effective management was in Luxembourg.

This interpretation complies with the company law interpretation. Nevertheless, one has to identify the lack of a tie-breaker rule which would apply in case the two sub-criteria did not coincide (place of the general meeting of the shareholders and place of the regular meetings of the management). This lacuna becomes all the more evident in view of the increasing use of new technologies that might compartmentalize the decision making loci even more. So far, no case has, to my knowledge, reached the national court whereby the two criteria (or other criteria) were not coinciding or were discussed in order to find a hierarchy between the two criteria.

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In 2005 the Luxembourgish administrative court considered a case where a company with a registered office in Luxembourg, held its general meetings in Germany and whereby the managers of the company were resident in Germany (and in the USA) and the Chairman of the Board of Directors had assumed the management of the company from his German domicile, as evidenced from the mailing of his bank statements and invoices to his German domicile. In light of this straightforward evidence and in considering the DTC between the two states, the court concluded that the company’s ‘affaires sociales’ were concentrated in Germany for the time period in question, and hence, the company was to be considered as fiscally resident there.

When a company is considered to be a Luxembourg tax resident, the Luxembourg tax authorities will provide it with a residence certificate. In absence of having a registered office in Luxembourg, the only way for a company resident abroad to become a tax resident in Luxembourg, would be to move its central administration there. By having its central administration in Luxembourg, the company will also be subject to the Luxembourgish lex societatis. In the opposite scenario, i.e. where the company does not meet either of the two criteria in Art. 159 LIR, then the company will not be a resident in Luxembourg for tax purposes. If the company has a PE in Luxembourg, the latter will be subject to Luxembourg tax on the majority of its profits. In the scenario that the company has its registered office in Luxembourg but its centre of administration abroad, the company will be considered by Luxembourg to be a tax resident, subject to tax there.

In the case of groups of companies, par. 15 (2) AO provides that an independent company, in legal terms, has its place of effective management where the parent company is when it behaves economically as a mere division or branch of the parent company. However, the mere residence of a parent company for tax purposes in Luxembourg does not suffice to automatically attribute the ‘Luxembourg tax resident’ status to its subsidiary. In this case, it has to be established that the parent company goes beyond the mere exercise

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28 Case of the tribunal administrative 9 mars 2005, n° 18164.
29 Note however in this case the involvement of a DTC that applied between the two states.
30 See previous section, Art. 159 of the Luxembourg company law act of 1915.
31 With regard to that see Art. 16 StAnpG (‘Tax Adaptation Law’) and M. Schmitz, Ph. Warner, Luxembourg in International Tax, (IBFD 2015), p. 56.
of its supervisory and monitoring role company law recognizes to all shareholders. In other words, the parent company has to actually intervene to the everyday life of the subsidiary by taking itself all important decisions relating to the functioning and the operations of the company, in order for the subsidiary to be also considered a tax resident in Luxembourg. In contrast, as long as the parent company respects the legal autonomy of its subsidiary and its choices with regard to investment, production and marketing, the subsidiary will not be considered to be *economically integrated* in the parent company and, hence, the tax residence of the subsidiary cannot be Luxembourg. Conversely, in the scenario of a subsidiary governed by Luxembourg law (on the basis of the criterion of the place of central administration) with a non-resident parent company, the former would remain a Luxembourg resident for tax purposes if the parent’s role was limited to the regular acts of shareholders, such as approval of the accounts, appointment and dismissal of the management bodies, amendment of the articles of association, etc.

### 1.2.2. Abuse and substance

In Luxembourg general anti-abuse law, a legal structure may be considered abusive if it cannot be justified by sound economic or non-tax reasons and it is inadequate to achieve the intended business purpose. Luxembourg tax law considers two possibilities of abuse of law: ‘simulation’ and the abuse of legal form, or differently put a ‘substance over form provision’. The former would be triggered in cases where the agreement in question is fraudulent or fictitious or artificial in order to act as a ‘cover up’ for a transaction. The abuse of legal form is wider than the ‘simulation’ concept. If the national court finds abuse of legal form, then tax will be levied as if the transaction at issue had reflected the real legal form.

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34 A. Steichen, *ibid.*
37 See Art. 5 and 6 Steueranpassungsgesetz (*Tax Adaptation Law*) respectively.
39 For a transaction to fall under the abuse of legal form doctrine it must fulfil four criteria as those were established by the Administrative court of Luxembourg (Cour administrative, 7 fevrier 2013, 31320C); i) use of a deed or a contract of private law; ii) circumvention or reduction of the tax burden due to the legal structure the taxpayer has put in place; iii) use of an inappropriate legal structure; iv) the legal structure must not be chosen only on the basis of tax reasons.
In absence of CFC rules or specific substance requirements, and in view of the commitments Luxembourg has undertaken to comply with the EU and OECD/BEPS rules, it is worth drawing an analogy from the circulars on intra-group financing activities, properly adjusted, which could serve as a useful example of what criteria would indicate presence in Luxembourg:

- The majority of the board members, directors, or managers that have the capacity to bind the company must either be Luxembourg residents, or non-residents exercising a professional activity in Luxembourg (that generates income falling within one of the first four categories of art. 10 LIR) and must be liable for tax in Luxembourg on at least 50% of such income;

- The key decisions with regard to the management of the company must be made in Luxembourg and for the companies that are required to hold annual shareholders’ meetings, at least one of those meetings must be held once a year at the place provided in the company’s articles of association. The new circular further provides that with regard to the financing activities, the financing company should be able to demonstrate that it has the ability to take the decision to enter into financing and if some functions are outsourced as regards the financing the company must have the abilities to monitor the outsourcing.

- The company must have at least one bank account in its own name with a bank established in Luxembourg or a Luxembourg branch of a foreign bank;

- The company should be up to date with its direct tax filing requirements;

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40 With the exception of the substance rules for intra-group financing activities.
43 M. Schmitz, Ph. Warner, *ibid*.
44 Circular L.I.R. 56/1 - 56bis/1 of 27 December 2016.
45 M. Schmitz, Ph. Warner, *ibid*.
46 M. Schmitz, Ph. Warner, *ibid*.
- The company may not be considered tax resident in a state other than Luxembourg; 47

- The company needs to be adequately capitalized considering its assets used and the risks assumed. 48

Luxembourg transposed the latest amendments to the Parent – Subsidiary Directive with the recent law Law of 18 December 2015 on corporate income tax (the Corporate Income Tax law). 49 The new law introduced a general anti-abuse rule and an anti-hybrid rule into the Luxembourg domestic participation exemption regime. 50

The GAAR, in line with the Directive, provides that profit distributions falling within the scope of the PSD will no longer be tax exempt in Luxembourg if the transaction is found to be abusive. In specific, the participation exemption for income from qualifying EU subsidiaries, and the exemption from Luxembourg dividend withholding tax to distributions to qualifying EU parent companies of a Luxembourg company, are not applicable if the income is allocated in the context of “an arrangement or a series of arrangements which, having been put into place for the main purpose, or one of the main purposes, of obtaining a tax advantage that defeats the object or purpose of the PSD, are not genuine having regard to all relevant facts and circumstances. An arrangement, which may comprise more than one step or part, or a series of arrangements, shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.” 51

If the Luxembourg company is considered to be an artificial arrangement by the tax authorities of another state, the latter can challenge its residence and ‘ignore’ it for tax purposes on grounds of their domestic anti-abuse provisions or on grounds of DTCs or

47 M. Schmitz, Ph. Warner, ibid.
48 M. Schmitz, Ph. Warner, ibid.
49 Loi du 18 décembre 2015.
50 See Article 166 LIR.
51 Translation from EY, Global Tax Alert, Luxembourg Parliament approves 2016 tax measures, 12 January 2016. The original text provides ‘Sont exclus du bénéfice des lettres […] si ces revenus sont alloués dans le cadre d’un montage ou d’une série de montages qui, ayant été mis en place pour obtenir, à titre d’objectif principal ou au titre d’un des objectifs principaux, un avantage fiscal allant à l’encontre de l’objet ou de la finalité de cette directive, n’est pas authentique compte tenu de l’ensemble des faits et circonstances pertinents. Au sens de la présente disposition, un montage, qui peut comprendre plusieurs étapes ou parties, ou une série de montages est considéré comme non authentique dans la mesure où ce montage ou cette série de montages n’est pas mis en place pour des motifs commerciaux valables qui reflètent la réalité économique;’
EU secondary law. In case Luxembourg and the other involved state have concluded a DTC, then the latter can refuse providing the benefits of the DTC to the ‘Luxembourghish’ company with no substance there.52

This challenge could be premised either on specific anti-abuse provisions or on the (other state’s) general anti-abuse doctrine. Examples with regard to the latter can be drawn from decisions of the French Conseil d’ État. In its assessment whether in the case at issue the ‘abus du droit’ with regard to the fiscal residence was fulfilled, the Conseil d’ État considered that the holding companies subject to Luxembourg law were – throughout the whole period of their existence – entirely dependent upon the Banque Internationale du Luxembourg [...] both with regard to their management as well as their investments, that all of their assets were made up of transferable securities, that they had no technical competence (know-how) in the field of financial investments, that their shareholders did not participate in the (statutory) shareholders’ meetings and that, thus, those companies where deprived of any substance.53

2.1. Residence in Tax Treaties

Luxembourg has a big network of Double Tax Conventions (DTCs). The DTCs prevail over Luxembourg domestic tax law, in the sense that in case of conflict between the two, the DTC provisions will prevail. Most of DTCs Luxembourg has concluded follow the OECD MC.

The majority of the DTCs Luxembourg has concluded, following the OECD MC, do not provide for a separate rule to determine the residence status of a taxpayer, but rely to the relevant domestic rules. Hence, Luxembourg’s DTCs generally provide that persons who are residents of a contracting state and are liable to tax in at least one of the contracting

52 For more details on the DTCs see next section.
53 Free translation, Conseil d’ État 27 July 2009, no 295358 (ECLI:FR:CESSR:2009:295358:20090727). Similarly, in previous cases, the Conseil considered that the Luxembourgish company at issue was created ad hoc, was deprived of any substance and did not have any technical competence with regard to investment issues. On these grounds the Conseil d’État concluded that the participation of the S.A. La Moderne in the Luxembourgish holding constituted an abuse of law. For a ‘piercing of the corporate veil’ case by the Belgian tax authorities by reference to a Luxembourgish holding company see Tribunal de Namur, 27 mars 2002, no 2002/158 whereby the court of Namur ruled that the Luxembourgish company had been used in order to hide from the Belgian tax authorities the income realized by the company’s associates and make it seem attributable to the company. The Luxembourg company was not considered by the Belgian court as fictitious but rather as a proxy of the Belgian partners, which allowed the Belgian authorities to pierce the corporate veil and impose the relevant tax to the partners themselves.
states, by reason of their domicile, residence, place of management or any other criterion of a similar nature, shall be entitled to the tax treaty benefits. Hence, if an entity is qualified as a taxpayer under Luxembourg law and is subject to tax on its worldwide income, it also qualifies as a resident for DTCs between Luxembourg and the other contracting party purposes. The determining criterion, however, for the residence qualification remains the entity’s tax liability.

This tax liability does not have necessarily have to lead to effective/actual taxation. It suffices if the taxpayer falls under the scope of the tax at issue. There is no need to be subject to all taxes levied in the source state. Hence, the actual income tax liability of a taxpayer on a certain item of income is generally not relevant to determine whether such taxpayer is to be considered a tax resident of Luxembourg. Similarly, a taxpayer company that benefits from an ‘objective’ tax exemption, is considered to be resident in Luxembourg for tax purposes. With regard to subjective exemptions, one can take the example of a Luxembourgish holding company governed by the law of 31 July 1929, which has to pay income tax but benefits from a subjective exemption. It is suggested that, art. 4(1) OECD MC should be interpreted so as to allow this company to benefit from the tax treaty in absence of an express exclusion. However, there is no standard approach of the Luxembourg tax authorities with regard to corporate bodies entitled to subjective exemptions, such as collective investment vehicles (CIVs). With regard to this, Luxembourg tax authorities seem to issue residence certificates following an implicit or explicit agreement, if any, with the other contracting state.

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54 See P. Mischo and M. Junius, ‘Résidence fiscal et substance’ in Droit fiscal luxembourgeois - Livre Jubilaire de l’IFA Luxembourg (2008), 421, 431 and Chiara Bardini, Sandra Fernandes ‘The notion of tax and the elimination of international double taxation or double non-taxation’, Luxembourg national report, IFA 2016 Madrid Congress, p. 9. As Bardini and Fernandes mention an exception to this rule is provided in the protocol to the DTC with Mexico requires that the residence state specifically states that certain items of income are subject to tax in the residence state in order to benefit from reduced tax rates in the source state.


56 In line with the Commentary to Art. 4 OECD MC, CIVs are considered residents in Luxembourg on grounds of their subjection to CIT despite the exemptions they might benefit from if certain conditions are met. This approach is however not shared by all treaty partners. Certain DTCs recognize treaty benefits to CIVs that are not organized as corporate bodies.

Most of the DTCs concluded by Luxembourg provide that a company covered by Luxembourgish tax law, receiving income in the form of dividends or interest from another state, must, not only be considered as a resident for the purposes of the DTC, but must also qualify as the beneficial owner of this income in order to be entitled to the relevant tax treaty benefit. The source state could deny the benefit of the DTC to the Luxembourg company by arguing that the latter does not qualify as a beneficial owner under the DTC. Although the notion of the beneficial owner does not correspond to the one of the resident, the question of the substance of the company in Luxembourg, becomes determining in the assessment of the foreign tax authorities as to whether the (Luxembourgish) company qualifies as a resident or a beneficial owner.

In cases of a legal person’s dual residence in both contracting states, the tie-breaker rule in the DTCs Luxembourg has concluded follows Art. 4 (3) OECD MC and provides that the company at issue shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.58 The DTC between Luxembourg and the USA deviates from Art. 4 (3) OECD MC and stipulates that when a company has dual residence, the competent authorities ‘shall endeavor to settle the question by mutual agreement, having regard to the person’s place of effective management, the place where it is incorporated or constituted, and any other relevant factors. In the absence of such agreement, such person shall not be considered to be a resident of either Contracting State for purposes of enjoying benefits under this Convention.’59 Such a rule aims to encourage taxpayers ‘to organize their affairs so as to minimize the possibility of dual residence.’60

The interpretation of the place of effective management in DTCs where Luxembourg is a party generally comply with domestic law. Some DTCs provide for a mutual agreement procedure in case the place of effective management of a company cannot be determined.61 For instance in the DTC between Luxembourg and Russia, par. 4 was added to Article 4 of the DTC (by Protocol in 2013, with effect from 01.01.2014) providing that

58 See for instance the DTC between Luxembourg and the UK (1966), Article IV, par. 3.
60 See Treasury Department Technical Explanation of the Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes and capital signed at Luxembourg, April 3, 1996.
61 See also, for instance, the DTC between Luxembourg and Sri Lanka (2013).
in order to determine the place of effective management, which is the key to decide over the tax residency of the company, the following facts are, *inter alia*, relevant:

- Where the meetings of the board of directors or equivalent body are usually held;
- Where the senior day-to-day management of the person is carried on;
- Where the managers usually exercise their functions.

In terms of anti-avoidance provisions, some DTCs between Luxembourg and other contracting non-EU parties contain Limitation of Benefits clauses (LoB) some of which contain a principal purpose test\(^\text{62}\) while some others provide that the domestic anti-abuse rules may apply in a DTC context.\(^\text{63}\) Interestingly, the amending protocol of 2012 in the DTC signed between Luxembourg and Poland in 1995 provides that treaty benefits should be denied if income is paid or received in connection with an ‘artificial arrangement’.

Under the Luxembourg – USA DTC the benefits of the Treaty are only available to ‘qualified residents’. ‘Non-qualified residents’ can only benefit from certain provisions of the Treaty whereas ‘others’ cannot benefit from the Treaty as they are caught by the LoB provision and do not satisfy the treaty residence test under Article 4 of the DTC.\(^\text{64}\)

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\(^\text{62}\) See DTCs between Luxembourg and the USA (1996), Luxembourg and Singapore (1993), Luxembourg and Trinidad and Tobago (2010), Luxembourg and Russia where since 2014 and the new general LoB, a resident of a Contracting State shall not be entitled to a reduction of or exemption from tax under the Treaty in respect of income arising in the other Contracting State if it is established *that the main purpose or one of the main purposes of the creation or existence of such resident was to obtain the benefits of this Convention which would otherwise not be granted*. This conclusion should be a result of consultations between the competent authorities of both states. Similarly, in the DTC between Luxembourg and Taiwan (2014) providing that ‘a resident of a territory shall not receive the benefit of any reduction in or exemption from tax provided for in the Agreement by the other territory if as a result of consultations between the competent authorities of both territories it is established that the conduct of operations by such resident had for the main purpose or one of the main purposes to obtain the benefits of this Agreement. (Article 27).

\(^\text{63}\) See DTCs between Luxembourg and Hong Kong (2007 and as amended in 2010) and Luxembourg and Germany (2012).

\(^\text{64}\) See Art. 24 DTC USA – Luxembourg. Space prevents me from analysing the distinction between “qualified” and “non-qualified” residents and the repercussions of this distinction as to the benefits’ entitlements. For an analysis see M. Schmitz, Ph. Warner, *Luxembourg in International Tax*, (IBFD 2015), p. p. 443 – 447.
2.2. Tax implications of the cross-border change of residence

2.2.1. Immigrating companies

For a company to benefit from the Luxembourg tax rules, it should transfer its registered office and central administration to Luxembourg. In the case of the transfer of a registered office to Luxembourg Article 35 LIR applies (création d’ une entreprise). Consequently, a company’s transfer of tax residence to Luxembourg, is considered as a (re-) creation/constitution of the company.

Article 35 provides, in principle, that the immigrating company may opt to re-value its assets at their fair market value as at the date of migration instead of continuing with their book value as recorded in its accounting records prior to migration. The re-valued fair market values will be treated as the assets' acquisition prices, constituting the basis for any future capital gains computation under Luxembourg Law and mutatis mutandis, the acquisition date of the assets will be the date of migration to Luxembourg. Where necessary, a tax balance sheet must be prepared at the time of the transfer (including the assets at their current going concern value), in order to ensure that only profits genuinely relating to Luxembourg are subject to tax in Luxembourg.

2.2.2. Emigrating companies

Art. 172 LIR provides the general framework in case of a transfer of the registered office from Luxembourg abroad. It complies with the Merger Directive and it stipulates, in essence, that when a resident company transfers its registered office and administration abroad, and hence, it loses the status of the tax resident, Art. 169 LIR (applicable in the cases of liquidation, merger, transformation and transfer of seat) shall apply. The estimated going concern value of the total of the assets and liabilities at the time of the transfer shall be used in place of the net amount available for distribution.

Consequently, the transfer of the residence of a company (or the transfer of the ownership of a PE away from Luxembourg) shall be treated as a liquidation and the hidden

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65 See with regard to this the Art. 35 (4) LIR exception to the general valuation rules. See also, D. Richards, ‘Luxembourg Corporate - International corporate migration’, published online on 26/01/2015, available here: http://www.ogier.com/publications/luxembourg-corporate-international-corporate-migration
reserves or unrealized profits are taxed. Until May 2014 Luxembourg did not provide for a possibility of tax deferral on latent capital gains which were deemed realised upon migration. In May 2014, however, the Luxembourg Parliament approved the ‘Bill n. 6556’ on exit taxation which introduced changes to the LIR in an effort to comply with EU rules, and, the case law of the CJEU, in specific, the National Grid Indus case.\footnote{National Grid Indus (C-371/10, EU:C:2011:785)} They key changes the new law introduced allowed the emigrating taxpayer company to defer, upon request, the tax liabilities arising upon emigration.\footnote{The new Law amended par. 127 AO.} Following this change, the deferral is granted as long as the emigrating company is the owner of the assets transferred and is a tax resident in an EEA country.\footnote{The new law also introduced the “Roll-over” relief on capital gains upon reinvestment of the sale proceeds in an EEA Member State} Consequently, the taxpayer has to provide evidence to the Luxembourg tax authorities, on an annual basis, that he is still the owner of these assets. The exit tax would become due once one of the two criteria stops being fulfilled, i.e. upon the disposal of the transferred assets or upon transfer of the tax residence outside the EEA.

Following the entry into force of the corporate income tax law of 18 December 2015, the benefit of the aforementioned tax deferral is extended in case of a company’s emigration to any country which is not within the EEA, provided that this third country has concluded a DTC with Luxembourg containing a clause allowing the exchange of information in line with the OECD principles.

It is noteworthy that for a company to cease being resident in Luxembourg, and hence exit taxation to be triggered, both its registered office and central administration have to move outside Luxembourg. If, therefore, a company transfers its central administration abroad but keeps its registered office in Luxembourg, it would remain resident in Luxembourg and Article 172 LIR might not apply.\footnote{M. Schmitz, Ph. Warner, Luxembourg in International Tax, (IBFD 2015), p. 376 – 377.} This scenario could, of course, trigger company law problems depending on the theory the (entering) State adopts, or might be caught by the ‘substance’ rules of that State or might set off the possibility Luxembourg company law gives to the public prosecutor to have a company liquidated if it moves its central administration abroad without deregistering in Luxembourg. Conversely, if the company transferred its registered office abroad while keeping its ‘central administration’
in Luxembourg, it would bear the burden of proof to show that the central administration is still located there.

3. Conclusions

In the aftermath of the Luxleaks scandal, Luxembourg is in the eye of the storm for having in place a questionable tax system, often characterized as bearing many of the characteristics of a tax haven.70 The recent state aid Commission’s decisions with regard to Luxembourg’s tax rulings has side-lined the issue of corporate fiscal residence in the political, public and academic debate. Yet, academic debate on the topic is far from being absent as the references in this report provide.

Luxembourg recently underwent a tax reform (December 2016) which could be summed up to the maintenance of the competitive and business friendly tax environment. Issues of corporate tax residence were not discussed or included in the 2017 tax reform.

In light of the many recent development both in the international and EU tax law spheres that need to be transposed into national law, it is justifiable that Luxembourg does not deem the issue of corporate tax residence a top priority at the moment. Yet, in my view, there is room for improvement.

The main problem, in my opinion, is the lack of a specific definition of the ‘central administration’ place. As already discussed, the concept is quite broad and malleable, in a way that could potentially endanger legal certainty for the taxpayer. This broad understanding of the concept allows for an ad hoc assessment of the cases, however, national case law has attempted to establish (inconclusive) criteria mostly in cases that fall in the ‘company law’ scope.

The definition of ‘substance’ is of a great value for the establishment of tax residence and beneficial ownership in the context of DTCs. The general anti-abuse doctrine of Luxembourg (‘simulation’ and ‘abuse of legal form’) does not, in my opinion, suffice to catch artificial arrangements neither is it suitable to define substance. The absence of specific substance requirements can create problems with regard to Luxembourg’s definition of ‘substance’ and ‘presence’ that will, in turn, have repercussions in the DTCs context. To the overall uncertainty can contribute the lack of a standard approach with

70 See for instance Oxfam’s report, ‘Tax Battles the dangerous global race to the bottom on corporate tax’ (12 December 2016), placing Luxembourg among ‘the world’s 15 worst corporate tax havens’. 
regard to the ‘residence status’ of corporate bodies entitled to subjective exemptions in the framework of DTCs, as well as the absence of specific substance requirements in Luxembourg law.