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IS THERE A NEED TO REVIEW THE CONCEPT OF ARTIST AND ATHLETE IN ARTICLE 17 OF THE OECD MODEL CONVENTION?

CONSIDERATIONS FROM THE PERSPECTIVE OF THE SPANISH TAX LAW

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Abstract

Fino a pochissimo tempo fa, i grandi eventi artistici e sportivi non potevano essere concepiti senza che un buon numero di spettatori si spostasse nella sede dell'evento e pagasse il relativo biglietto d'ingresso per accedervi; tuttavia, ora sembra che, grazie alle molteplici possibilità offerte dai media digitali, non sia più necessaria la fruizione in loco dello spettacolo affinché gli eventi artistici o sportivi siano redditizi e portino significativi benefici economici ai loro protagonisti. In un contesto come questo, è inevitabile chiedersi se abbia senso mantenere nei termini attuali l'art. 17 della Convenzione OCSE, o se lo stesso dovrebbe essere ridefinito per includere un nuovo gruppo di individui che svolgono anche attività artistiche o sportive anche in un ambiente esclusivamente digitale come influencer*,* streamer*,* podcaster*, giocatori, nonché qualsiasi altro gruppo la cui attività principale consiste nello svolgimento di performance personali che vengono condivise attraverso i social network e altri media digitali.*

Parole chiave: Fiscalità, Spettacolo sportivo, Convenzione fiscale modello OCSE

Abstract

Until very recently, major artistic and sporting events could not be understood without a good number of spectators moving to the venue and paying the corresponding entrance fee to access; however, it now seems that, thanks to the multiple possibilities offered by digital media, the latter is no longer necessary for artistic or sporting events to be profitable and bring significant economic benefits to their protagonists. In a context like this, it is inevitable that we question whether it makes sense to maintain Article 17 of the OECD Model Tax Convention in its current terms and, in any case, whether its subjective scope of application, i.e. the current concept of entertainers and sportsperson, should not be redefined to include a new group of individuals who also carry out artistic or

sporting activities but in an exclusively digital environment: *influencers, streamers, podcasters, gamers*, as well as any other group whose main activity consists of carrying out personal performances that are shared through social networks and other digital media.

Keywords: Taxation, Entertainers, Sportsperson, OECD Model Tax Convention

1. The evolution of the scope of application of article 17 from its origin to the present day and the challenges posed by the digitalisation of entertainment

Talking about the international taxation of entertainers and sportsperson involves, first of all, talking about article 17 of the OECD Model Tax Convention on Income and on Capital, since this is the provision that regulates the distribution of taxing rights on income derived from artistic and sporting performances that take place abroad and, at the same time, which has served as inspiration for practically all countries to adopt in their bilateral conventions the principle of taxation at source for artistic or sporting incomes.

Thus, this rule was incorporated by the OECD in its first Model Tax Convention, published in 1963 under the official name of *Draft Double Taxation Convention on Income and Capital*, it has remained essentially unchanged, since then its purpose has been to confirm that income derived by artists and athletes from their personal performances as such abroad can be taxed without limitation in the country where the performance takes place (which will mean that the country of residence will have to recognise the taxpayer's right to apply some method of avoiding double taxation on such income).

On that basic of taxation at source (proclaimed, as we have said, from the first version of the Model about the personal income of entertainers and sportsperson), what the OECD has done subsequently has been to extend the scope of application of the precept to cover other income which, at first, did not fall within its scope. On the one hand, in the Model published in 1977, a second paragraph was added to Article 17 which extended its scope of application to income derived from a personal performance in that capacity and attributed not to the artist or sportsperson himself or herself but to a third party. This new provision was intended to remedy the avoidance practices that were becoming frequent in the sector, so that even if the income was attributed to another person or entity (normally a company that did not have a permanent establishment in the country of source and therefore whose business profits could not be taxed in that country in accordance with Article 7 of the OECD Model Tax Convention on Income and on Capital), the country where the artistic or sporting performance took place could safeguard its power to tax the income derived from that performance.

On the other hand, after the incorporation of this second paragraph to the provision, the scope of application of Article 17 has also been extended in terms of its objective scope, although in this second plane not because the literal wording of the provision has been modified or completed, but because this has been inferred from the interpretation of its scope made by the Official Commentaries to the OECD Model Tax Convention. Thereby, through the inclusion of new Commentaries or the revision of existing ones, the OECD has come to consider that the income of entertainers and sportsperson that can be taxed in the country of source must include not only that which derives directly from their personal performance in that country, but also that which derives indirectly from the same (provided, however, that there is a close connection between such income and the performance). Similarly, while the Commentaries originally required that for Article 17 to come into play, the existence of a public performance by the artists or sportspersons in the country of source had to be verified, the Commentaries have been amended to remove this requirement and now expressly contemplate income derived from performances that are carried out without the presence of an audience or spectators (such as rehearsal, preparation or training performances).

As we can see, the scope of application of Article 17 of the OECD Model Tax Convention on Income and on Capital was gradually extended in order to adapt, more or less correctly, to the socio-economic reality that was emerging as the 20th century progressed. However, the profound changes that we have been observing in recent times with respect to new forms of entertainment and, more

specifically, in those that are manifested through strictly digital media, make us question whether a new adaptation of the meaning and scope of application of Article 17 is not necessary. Whereas until very recently, for an actor, presenter or comedian to achieve a certain level of fame, they had to ensure that their performances were attended by a large audience or that their appearances were broadcast through traditional media such as cinema, television or radio, nowadays anyone can reach millions of views by broadcasting all kinds of audiovisual content from their own home. And similarly, if until now sport was only understood as an activity that required the physical presence of the athlete in a specific sports ground, today e-sports allow a gamer to compete against another gamer from any corner of the planet while the event is broadcast all over the world.

In other words, until very recently, major artistic and sporting events could not be understood without a good number of spectators travelling to the venue and paying the corresponding entrance fee to access the event; however, it now seems that, thanks to the multiple possibilities offered by digital media, the latter is no longer necessary for artistic or sporting events to be profitable and bring significant economic benefits to their protagonists.

This being the case, in a context such as the current one, it is inevitable, on the one hand, that we question whether it makes sense to maintain Article 17 of the OECD Model Tax Convention in its current terms and, on the other hand, that we ask ourselves whether its subjective scope of application, i.e. the current concept of entertainers and sportsperson, should not be redefined to include a new group of subjects who also carry out artistic or sporting activities but in an exclusively digital environment. We are referring to *influencers, streamers, podcasters, gamers*, as well as any other group whose main activity consists of carrying out personal performances that are shared through social networks and other digital media and which, consequently, are necessarily aimed at a specific audience.

2. What factors influence the international taxation of entertainers and sportspersons?

As is well known, if there is one group that has traditionally been linked to travelling abroad for professional reasons, it is that of entertainers and sportspersons, which explains why international taxation issues have always had a major impact in this area and, at the same time, why we are dealing with a group that has historically attracted the attention of the tax authorities.

Based on the above, it should be borne in mind that when a subject obtains income in a country in which he is not considered a tax resident, the taxation of such income will depend on the one hand, on whether that country has signed a Double Taxation Avoidance Agreement with his country of residence and, on the other hand, on the provisions of that country's domestic regulations on the taxation of non-residents individuals.

If we focus on the case of Spain, it should come as no surprise that the cases in which there is an applicable double taxation agreement will predominate, as there are currently almost 100 agreements that Spain has signed with other countries, and which are in force. The same is true of the rest of the countries around us, with the exception of the increasingly smaller group of non-cooperative jurisdictions and some countries that are still in the process of development, this is the usual practice at a general level in the international community. This is why we wanted to start our work by emphasising the great importance that Article 17 of the OECD Model Tax Convention on Income and on Capital (or, more specifically, the provisions of the bilateral Conventions which, like Article 17 of the Model, deal with artistic and sporting income) will have in this area, since in most cases in which an entertainers and sportspersons resident in Spain travels abroad to perform in that capacity (and, conversely, artists or sportspersons resident in third countries who travel to Spanish territory for that purpose), the agreement signed between the two countries involved will come into play and, where appropriate, the article dedicated to income derived from artistic or sporting performances.

We say "where appropriate" because a first idea that should be clear is that for the treaty provision dedicated to the income of entertainers and sportsperson to be applicable, the different subjective and objective requirements that the rule requests for this purpose must be met. Otherwise, a different Article of the Convention will apply to income obtained in the country of source, and there may be various solutions depending on the circumstances of each case: the article on business profits will be applied if the person who moves abroad does so in the exercise of a business or professional activity on his own account (Article 7 of the OECD Model Tax Convention); the article on royalties will come into play when the income obtained in the country of source is to be classified as such (Article 12 of the OECD Model Tax Convention); we will apply the provision dealing with income from dependent work in the case of a worker who is posted by his employer to carry out a certain activity abroad (Article 15 of the OECD Model Tax Convention); or, finally, we would have to resort to the article dedicated to other income if the profits in question does not fit into any of the above-mentioned cases (Article 21 of the OECD Model Tax Convention).

The importance of Article 17 is confirmed by the fact that of all the above-mentioned provisions, it is the only one that recognises the principle of unconditional and unlimited taxation at source. Thus, in contrast to the categorical nature of Article 17, Article 7 only recognises taxation in the country of source when business profits are obtained through a permanent establishment located in its territory; Article 12 provides in most cases (at least this is the case in the network of Conventions signed by Spain) for a maximum limit of taxation in the country of source for royalties; Article 15 requires that the worker's stay in the country of source exceeds 183 days or that his remuneration is paid by a person resident in that country for the earned income to be taxable in that jurisdiction;[1] and Article 21 does not generally allow taxation at source of income that is not covered by the other provisions of the Convention.

Based on the above, it is understandable that we should take a closer look at the requirements that must be met for a given income to fall within the scope of application of the provision on artistic or sporting income, since in many cases this will determine whether the country of source can deploy its right to tax such income.

In this regard, we must first refer to the need to meet a double subjective requirement. On the one hand, we must be dealing with a person who can be classified as an entertainer or sportsperson and, secondly, this person must carry out a personal activity in the country of the source in that capacity. It is therefore required that there be a certain condition in the individual, but also a specific quality in his or her performance. This will imply that not just any activity in the country of source will be valid for these purposes. The mere fact of being an entertainer or an sportsperson does not qualify all the activities that he or she may carry out in the source State for Article 17 to apply to them. It is therefore necessary for the entertainers and sportsperson concerned to be personally involved in an activity or performance of an artistic or sporting nature for the income derived therefrom to be subject to taxation at source under this provision.

From the point of view of the subjective scope of application of the precept, therefore, it will be essential that we know how to define as precisely as possible what is understood by artist and what is understood by sportsperson, a question on which we are going to focus on this paper.

However, in addition to this subjective requirement, Article 17 of the OECD Model Tax Convention also requires an objective condition to be verified in the income to be taxable. Specifically, what the rule requires is that the income derives, directly or indirectly, from the personal performance of the subject in his capacity as an entertainers and sportsperson. In this sense, if the

[1] Unless we are dealing with cross-border workers, in which case certain bilateral Conventions provide for specific rules for the income obtained by this type of subject. This is what happens in the case of Spain with the Conventions signed with France and Portugal, but not with Morocco and Andorra. On the problems posed by the taxation of these workers, see the work of I. Merino Jara, *El régimen fiscal de los trabajadores transfronterizos: problemas actuales en la legislación interna y los CDIs españoles*, in *Documentos de Trabajo del Instituto de Estudios Fiscales*, 7, 2018, pp. 95-108.

subjective definition of the provision depends on the status held by the person acting in the country of source, its objective or material scope will depend on the relationship between the income received and the performance carried out in that capacity, as the provision is specifically aimed at income arising from a specific artistic or sporting performance in the country of source. Consequently, without an artistic or sporting performance, Article 17 cannot be applied. If such a performance takes place, by contrast, the provision would apply to all income deriving, directly or indirectly, from the performance of the artist or sportsperson in that capacity, regardless of where the payer of the income resides or from where it is paid.

Notwithstanding, referring to income derived *directly or indirectly* from such a performance, the Commentaries to the OECD Model Tax Convention are some vagueness, which can lead to a significant lack of legal certainty, especially when it comes to deciding what income can be accepted as indirectly derived from the performance. It is for this reason that the Commentaries to the Model also attempt to delimit the objective scope of the rule by pointing out that, for article 17 to be applicable by way of the indirect relationship, we must be faced with a qualified indirect relationship, in the sense that there must be a close connection between the income received and the artistic or sporting performance that takes place in the country of the source. The basic rule for determining whether such a close connection exists would be to analyse what income would not have been earned if the artistic or sporting performance in the country of source had not taken place.

On the other hand, it should be borne in mind that both the subjective and objective requirements must also be met for Article 17.2 of the Model Tax Convention on Income and on Capital to come into play. In other words, for this second paragraph to be applicable, it is still necessary for an artistic or sporting performance to take place in the country of source and for the income to be taxed to derive, directly or indirectly, from the performance in question. The only change with respect to Article 17.1. is that the income in question need no longer be received by the entertainers and sportsperson performing in that capacity, since the second paragraph allows the country of source (the country where the entertainers and sportsperson personally performs) to retain its power to tax even if the income is attributed to a third party and irrespective of the country in which that third party is considered to be a tax resident.

Having pointed out the decisive factors affecting the international taxation of entertainers and sportsperson, it is time to examine one of the main conflicting issues that arise in the current context. A context in which geographical barriers have long since been completely blurred and in which the drastic digitalisation of the leisure and entertainment industry threatens to turn the world of entertainment into a borderless scenario, which means that more and more subjects can obtain income from performances of a certain artistic or sporting nature, but without it being clear whether we are dealing with true entertainers and sportsperson in accordance with the current rules of interpretation established in the Official Commentaries to the OECD Model Tax Convention on Income and on Capital.

3. The concept of entertainer and sportsperson in the OECD model convention and its official commentaries: is an adaptation to the new socio-economic realities necessary?

In the first version of the OECD Model Tax Convention on Income and on Capital, published in 1963, Article 17 referred to income generated by *public entertainers* and *athletes*, terms which, in the French version of the Model, appeared from the outset translated as “artistes du spectacle and sportifs” and, in the case of the version translated into Spanish, as “artistas del espectáculo y deportistas”.[2]

[2] Although the text of Article 17 did refer to *entertainers* in its first versions, the title of the provision referred to the term artistes (the same happened in the French and Spanish translations, because while the text of the provision referred to “artiste du spectacle” or “artistas del espectáculo”, its title in both cases was “artistes et sportifs” and “artistas y

Since then, the original wording of the provision has undergone only slight modifications as far as its subjective scope of application is concerned: on the one hand, the qualifier *public* was removed to refer only to *entertainers* and, on the other hand, the term *athletes* was initially replaced by *sportsmen* and, later, by *sportsperson*.

These modifications had never had any impact on the version of the Model translated into Spanish, since, as we pointed out, the precept had always referred to "artistas del espectáculo" and "deportistas". However, in the latest version published in Spanish, the text of article 17 has been modified in a surprising way, as it no longer refers to *artistas del espectáculo*, but simply to *artistas*.[3] We say that we are surprised by this recent modification because it has come at a time when the wording of Article 17 of the Model Tax Convention on Income and on Capital has not undergone any change in its official English and French versions, which continue to use the term *enterteiners*, in the case of the former, and *artistes du spectacle*, in the latter. Therefore, we believe that the new wording of the Spanish version should not be interpreted as an attempt to give a new subjective approach to the precept, but rather as an error or a license in the translation, in which case the interpretation resulting from the original text should always prevail.[4]

Apart from the above, the official Commentaries to the OECD Model have been gradually expanded to include new and increasingly modern forms of entertainers and sportspersons. Thus, paragraph 3 of the Commentary to Article 17 begins by acknowledging that it is not possible to give a precise definition of the term *entertainer* and points out that, but paragraph includes examples of persons who would be regarded as such (specifically the text of the provision alludes to theatre, motion picture, radio or television artistes and to the musicians), these examples should not be considered as exhaustive. On the one hand, the term entertainer clearly includes the stage performer, film actor or actor (including for instance a former sportsperson in a television commercial), but the article may also apply to income received from activities which involve a political, social, religious or charitable nature, if an entertainment character is present.[5] On the other hand, according to the Commentary on Article 17, the article does not extend to a visiting conference speaker (e.g. a former politician who receives a fee for a speaking engagement) nor to a model performing as such (e.g. model presenting clothes during a fashion show or photo session)

Also, it does not extend to administrative or support staff (e.g. cameramen for a film, producers, film directors, choreographers, technical staff, road crew for a pop group, etc.), recognising, however, that in between there is a grey area where it is necessary to review the overall balance of the activities in the country of source by the person concerned.

The Paragraph 4 of the Commentary covers the situation where an individual may both direct a show and act in it or may direct and produce a television program or film and take a role in it. In such cases it is necessary to look at what the individual actually does in the State where the performance

deportistas". It was in the version published in 2014 that it was finally modified to adopt the title that is now in force: *Article 17. Entertainers and sportspersons.*

[3] We refer to the Spanish translation of the version of the OECD Model Convention of 21 November 2017 made by the Instituto de Estudios Fiscales and published in 2019. The translation can be accessed at the following link (last accessed in November 2022): https://read.oecd-ilibrary.org/taxation/modelo-de-convenio-tributario-sobre-la-renta-y-sobre-el-patrimonio-version-abreviada-2017_765324dd-es#page1

[4] The presentation of this Spanish version expressly warns that "This is not an official OECD translation. The quality of the Spanish translation is the sole responsibility of the author of the translation. In case of discrepancies between the original text and the translation, only the original text will be considered valid".

[5] On this point, the Spanish version of the Commentary to Article 17 has also been altered in the latest edition published, as it now only mentions the element of spectacle when previously it referred to "an element of entertainment or spectacle", a translation which, in our opinion, was more faithful to the official English version, which only refers to the presence of an "entertainment character". In this sense, we believe that it is not correct to identify the concept of entertainment or diversion with that of spectacle, as the latter would be closer to what in English is known as *show* or *performance*, terms which are usually used to refer to those public intervention characterized by a more striking or eye-catching staging.

takes place. If his activities in that State are predominantly of a performing nature, the Article will apply to all the resulting income he derives in that State. If, however, the performing element is a negligible part of what he does in that State, the whole of the income will fall outside the Article. In other cases, an apportionment should be necessary.

In relation to the term sportsperson, it is paragraphs 5 and 6 that point out, firstly, whilst no precise definition is given of the term sportsperson it is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers). It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers. Secondly, it is clarified that the article also applies to income from other activities which are usually regarded as of an entertainment character, such as those deriving from billiards and snooker, chess and bridge tournaments.

The Commentaries to Article 17 have thus evolved to accommodate both new forms of art and entertainment and new forms of sport that have emerged or have been consolidated in more recent times. It is precisely this evolutionary and adaptive character that the Commentaries show on this point that makes us wonder whether it would not be advisable to carry out a new adaptation of the Commentaries to expressly contemplate these new activities that have arisen thanks to the exponential growth that digital entertainment has experienced in recent years (we are referring to the activities carried out by *influencers, streamers, podcasters, gamers*, etc.) or even whether they should not already be understood to be included in the scope of application of the precept without the need to carry out such a modification.

In order to answer the question posed, we must first recognise that, as can be seen from the above-mentioned Comments, the terms entertainer and sportsperson allow for a certain flexibility in their interpretation. However, even recognising this flexibility, what Article 17 does require is, on the one hand, that the activities in question should have a significant show or entertainment component and, on the other hand, that the intervention of the subject in these activities should be predominantly scenic. These two, therefore, could be defined as the fundamental elements for a given subject to fall within the subjective sphere of Article 17.

Taking these reflections to the particular area of digital entertainment and, more specifically, to that of the creators of multimedia content, the truth is that it is such a broad sector, covering so many subjects and of such a different nature, that it is impossible to affirm *a priori* and in a generic manner the presence of the entertainment or spectacle component and the scenic factor in the activity that these subjects habitually carry out on networks, platforms and other digital communication channels. Therefore, we consider that it would be too adventurous to offer a categorical answer in one sense or the other, as some authors referred to below have done, but we believe that the answer will necessarily be conditioned in each case to the specific characteristics of the audiovisual content that the *influencer* shares on the internet and to his or her degree of stage intervention in it.[6]

As we have pointed out, regarding the applicability of Article 17 of the OECD Model Tax Convention, in its current wording, to the income that influencers usually receive for their activity on social networks, we find some authors, such as Molenaar and Grams, who have positioned themselves against its application, considering that the element of spectacle or entertainment in their activity is secondary to the purpose of promoting goods and services, taking as an example for this purpose the exclusion that the Comments make of models who obtain income for exhibiting clothes during a fashion show or photo shoot.[7]

[6] A similar conclusion is reached by Íñigo Egea Pérez-Carasa, *Tributación de los influencers: normas tradicionales para nuevos y rentables modelos de negocio de las nuevas generaciones*, in *Cuadernos de Derecho y Comercio*, 75, 2021, pp. 15-112, which proposes differentiating between non-native influencers ho have a previously acquired status as an entertainer or sportsperson, in which case it would be easier to classify the income obtained from their status as influencer as artistic or sporting income, and native influencers, for whom this classification would not be so obvious.

[7] D. Molenaar, H. Grams, *Influencer Income and Tax Treaties: A Response*, in *Bulletin for International Taxation*, vol. 74, 9, 2020, pp. 550-555.

Other authors, instead, do consider article 17 applicable to the main income typically received by influencers, as is the case of Kostikidis,[8] who emphasises the "undeniable public nature" of their activity, the "fun or entertainment" component of their creations and the fact that influencers "act" in the multimedia content they upload to social networks.

Faced with the polarisation of these doctrinal positions, we believe that the answer should not be so categorical. Therefore, in the case of creations in which the individual directly takes action and with a clear desire to entertain their audience, we consider that there is no obstacle for these subjects to be assimilated to any other more traditional artist. By contrast, when the creator limits himself to editing the audiovisual content without appearing in it or when the subject matter of the content is rather aimed at disseminating, teaching or informing a certain audience, we believe that the activity in question would be difficult to reconduct to the scope of article 17, as the scenic and entertainment aspects that we have catalogued as essential would not be present.

We are aware, however, that this criterion may cause some legal uncertainty, because given the wide range of cases that we find in practice and considering how subjective the concept of entertainment or diversion can be, there will be cases in which it will not be easy to determine whether a certain content creator is acting as an artist or entertainer or, in turn, as a mere disseminator or informer. Hence, as we have already suggested above, it may be advisable to reconfigure the subjective scope of application of Article 17 of the OECD Model Tax Convention so that its practical application does not depend so decisively on an element that is certainly subjective and even imprecise, such as that of amusement or entertainment.[9]

In any case, what cannot be overlooked is that the Official Commentaries to the OECD Model Convention are merely a sort of interpretative guide which (the so-called *soft law*), as such, should not prevail over the domestic rules of the States that intend to apply the rules of a given bilateral Convention at a given time, especially when it is a question of interpreting terms or concepts that are not defined in the Convention itself. In this regard, it should be remembered that Article 3.2 of the OECD Model Tax Convention on Income and on Capital contains an interpretative rule whereby any term or expression not defined therein shall, unless a different interpretation is inferred from its context, have the meaning attributed to it at that time by the legislation of that State, with the meaning attributed by that tax legislation prevailing over that which would result from other laws of that State.[10]

Therefore, bearing in mind that the Commentaries to Article 17 themselves recognise that neither the term artist nor the term athlete is defined in the Convention, the interpretation of these terms will ultimately depend on the domestic legislation of the State that intends to apply them. Therefore, in the following section we will analyse the concept of entertainer and sportsperson in the Spanish legal system and the possible inclusion in it of the new professions derived from the digitalisation of entertainment.

A) The concepts of entertainers and sportspersons under Spanish law: Are influencers, content creators, gamers and other native professions of the digitalized age included?

As we have just commented, when it comes to interpreting terms or concepts that are not defined in the Convention itself, they must be interpreted by virtue of the rule established in Article 3.2 of the OECD Model Tax Convention, a rule according to which any term or expression not defined therein

[8] S. Kostikidis, *Influencer Income and Tax Treaties*, in *Bulletin for International Taxation*, vol. 74, 6, 2020, pp. 359-376.

[9] To that effect, we refer to what we have already commented in our previous work Luis Toribio Bernárdez, *La fiscalidad de los ingresos que surgen por el uso de redes sociales y páginas web gratuitas (en un contexto de revisión de los impuestos sobre las grandes empresas de la economía digital)*, in *Carta tributaria. Revista de opinión*, 52, 2019.

[10] For their part, the Commentary to Article 3 clarifies that "The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to the principle of reciprocity on which the Convention is based)".

shall, unless a different interpretation is inferred from its context, have the meaning attributed to it at that time by the legislation of that State, with the meaning attributed by its tax legislation prevailing over that which would result from other laws of that State.

Consequently, recalling once again that the Commentaries to Article 17 recognise that terms entertainer and sportsperson are not defined in the Convention (the text of Article 17.1 merely cites some examples of persons who may be considered artists, such as theatre, film, radio or television actors or musicians), in order to integrate the material content of these concepts we need to stop to analyse what meaning is attributed to them in current Spanish legislation.

Focusing on our tax law, the fact is that, despite referring to the terms artist and sportsperson in several of its articles, neither the IRPF nor the IRNR regulations offer a definition of these terms.[11] Thus, the only approximation we can find to these concepts in our tax system is that which can be found in *Real Decreto Legislativo 1175/1990*, of 28 September, approving the rates and instructions for the Tax on Economic Activities, which includes in its third section a wide range of artistic activities, related to cinema, theatre and circus (in group 01), dance (in group 02) or music (in group 03), but also activities related to sport, including a series of professionals dedicated to the practice of different sports modalities (group 04). However, as this is a merely exemplary list rather than a definition as such (since the last of the groups in each of the groupings refers, generically, to "Other activities related" to the grouping in question, which shows the open nature of each of these groupings), we consider that it cannot be considered valid for the intended interpretative purposes.

In the absence of a clear definition in our tax legislation, some authors have turned to labour law as a possible option to fill this conceptual gap. Thus, with regard to the figure of the sportsperson, we find references to the definition established in *Real Decreto 1006/1985*, of 26 June, which regulates the special employment relationship of professional sportspersons, Article 1.2 of which states that professional sportspersons are "those who, by virtue of a regularly established relationship, voluntarily dedicate themselves to the practice of sport on behalf of and within the scope of the organisation and management of a club or sports entity in exchange for remuneration. Excluded from the scope of this rule are those persons who engage in sport within the scope of a club and who receive from the club only compensation for the costs of their sporting activities".[12]

In our view, however, this definition should not be considered valid for the purposes of integrating the interpretation of Article 17 of the OECD Model Convention either, as it is limited to a very specific subjective scope, that of professional sportsperson who act as employees, which would mean excluding, on one side, all sportsperson who exercise their profession individually or independently, and on the other side, sportsperson who do not have a professional connection with the club or sporting entity to which they belong, which is not the intention of Article 17 according to its official Commentary.[13]

About the term artist, we must bear in mind that in Spain work has been underway since 2018 on the drafting of the so-called *Estatuto del Artista* with the aim of updating *Real Decreto 1435/1985*, of 1 August, which regulates the special employment relationship of artists in public performances in

[11] While IRPF is the income tax what applies to the individuals who has the status of habitual residents, IRNR is the one what applies to the non-resident persons.

[12] In this sense, we can refer to Alfredo García Prats, *Artículo 17. La tributación de los artistas y deportistas*, in J.M. Calderón Carrero, J.R. Ruiz García (Coord.), *Comentarios a los Convenios para evitar la Doble Imposición y prevenir la evasión fiscal concluidos por España*, Fundación Pedro Barrie de la Maza, 2004, p. 846; Javier Hernández Galante, *Fiscalidad de artistas y deportistas. Aspectos internacionales*, in Fernando Serrano Antón (Dir.), *Fiscalidad Internacional*, Madrid, Centro de Estudios Financieros, 2010, pp. 903; or Manuel De Los Santos Poveda, Felipe Rubio Cuadrado, *La fiscalidad de los no residentes en España (X): la tributación de las rentas de artistas y deportistas en los Convenios para evitar la Doble Imposición*, in FERNANDO SERRANO ANTÓN (Dir.), *Manual de Fiscalidad Internacional*, Centro de Estudios Financieros, 2016, pp. 705-706.

[13] This is made clear in paragraph 9.1 of the Commentary to Article 17 by the example of an *amateur* athlete who wins a prize money award for participation in a single sporting event.

order to improve the working conditions of Spanish artists and creators. As a result, in March 2022, the first package of measures was approved through *Real Decreto-Ley* 5/2022, of 22 March, which adapts the regime of the special employment relationship of persons dedicated to artistic activities, as well as to the technical and auxiliary activities necessary for their development and improves the working conditions of the sector.

We would like to highlight two aspects of the regulation that have a significant impact on its subjective scope of application. In first place, it recognises the need to broaden the definition of public performance, in order to equate related professional activities that do not involve materially performing on stage, such as those of technical and auxiliary staffs, with those of the performers themselves and other subjects who participate directly in the performance. In second place, the recommendation to modify the *Real Decreto 1435/1985* to adapt it to the new reality of "the means of fixation of cultural work, so as to include the web environment and the new formulas of dissemination beyond the place of performance and the national territory" (as would be the case, and is expressly recognised in the regulation, of *streaming*).

About the first of these questions, *Real Decreto-Ley* 5/2022 amends the Spanish Workers' Statute to include among the special employment relationships that of "artists who carry out their activity in the performing, audiovisual and musical arts, as well as those who carry out technical or auxiliary activities necessary for the development of this activity".

Likewise, the title of *Real Decreto 1435/1985* is modified, the new wording of which makes clear the equality: "Real Decreto 1435/1985, of 1 August, which regulates the special employment relationship of artists who carry out their activity in the performing, audiovisual and musical arts, as well as of persons who carry out technical or auxiliary activities necessary for the development of that activity". Article 1, which establishes the scope of application of the decree, is modified in the same sense, specifying that, for these purposes, technical and auxiliary personnel are understood to be those who provide services directly linked to the artistic activity and which are essential for its execution, such as the preparation, assembly and technical assistance of the event, or any work necessary for the complete execution of it, as well as tailoring, hairdressing and make-up and other activities understood to be auxiliary.

Regarding this comparison between artists themselves (in the sense of stage artists) with the technical and auxiliary personnel, we understand that it cannot extend its effects to the scope of the agreements to avoid double taxation, since this comparison clashes head-on with the interpretation inferred from its context and from the official Commentaries on the OECD Model Convention. In the latter, as we have already had occasion to indicate, administrative or support staff are expressly excluded from the concept of artist, giving the example of camera operators in the shooting of a film, producers, film directors, choreographers, technical crew, technicians travelling with a group of musicians, etc. Therefore, given that from the context in which Spain has been signing its bilateral Conventions (a context that would be represented by the intention of the Spanish legislator at the time of signing the Convention) it was not possible to infer, at least until *Real Decreto 1435/1985* was amended in the aforementioned terms, that the term artist should also be extended to technical or administrative personnel, we understand that the interpretation that is applicable according to the provisions of the official Comments to the OECD Model Convention should prevail. Likewise, if the Spanish State intends to extend the subjective scope of application of the provision dedicated to entertainers and sportspersons in the Conventions it signs from now on, it should state this in the bilateral negotiations so that, by means of its incorporation through the corresponding protocol or memorandum of understanding, this interpretation may prevail over the one inferred from the context.

However, with regard to the second of the issues that we highlighted, that is, the express inclusion in its scope of application of the new realities of the means of fixation of cultural work, such as the web environment and *streaming*, we believe that this inclusion can indeed play a relevant role when interpreting the current concept of performing artist, in the sense that this would not be limited either

to traditional forms of entertainment or to the classic means of dissemination, but should be interpreted in accordance with the new modalities of artistic content creation and digital consumption, which would lead us to include the so-called *influencers* or creators of digital content within the concept of artist.[14]

In any case, although this regulatory amendment helps us to recognise the potential nature of artists in such subjects, the problem we will continue to encounter is that within their specific field of action, the creation of digital content in the web environment, there is a huge variety of themes and purposes, so that not all content creators carry out an artistic activity in which a certain level of cultural creativity or a clear desire to entertain can be appreciated. Not surprisingly, we observe many *influencers* whose popularity comes from sharing merely informative, promotional or educational content, an activity that in no way should be classified as artistic for the purposes of article 17 of the OECD Model Convention.[15]

In this sense, we believe that the new exemplary list which, following the modification made by *Real Decreto-Ley* 5/2022, now includes Article 1 of *Real Decreto 1435/1985* may also be useful to clarify what should be understood by artistic activities. To this end, the aforementioned list refers to dramatic activities, dubbing, choreography, variety shows, musicals, singing, dancing, acting, specialists, artistic direction, cinema, orchestra, musical adaptation, stage, production, choreography, audiovisual works; circus performers, puppeteers, magic performers, scriptwriters and, in any case, any other person whose activity is recognised as that of an artist, performer or performer by the collective agreements applicable to the performing arts, audiovisual and musical activities.

B) Taxation of non-residents on income derived from artistic or sporting performances that take place in Spain. A review of the most recent judicial and administrative rulings

As we have seen so far, the taxation of non-resident entertainers and sportspersons, as it depends on several factors whose presence is not always easy to verify in practice, is a matter of a certain technical complexity. For this reason, we are going to devote this section to the latest decisions handed down in Spain by both the courts and administrative doctrine that affect various issues related to the taxation of non-resident entertainers and sportspersons, highlighting in each case those grounds that seem to be most useful in helping us to understand how the requirements referred to in the preceding sections are being interpreted.

Regarding judicial pronouncements, we are going to comment on three recent rulings handed down by different High Courts of Justice that directly affect the interpretation of the scope of application of Article 17 of the OECD Model Convention.

Starting with the most recent of the three, the judgement of the High Court of Justice of the Balearic Islands of 11 January 2022, rec. 407/2019, which confirms that the activity carried out in Spain by a non-resident disc jockey must be classified as artistic for the purposes of Article 17. In order to draw such a conclusion, the Court reasoned that an artist must be understood, for such purposes, as a person who has acquired public notoriety for his or her special qualities to provide entertainment, amusement or spectacle

[14] This legislative opening to new forms of digital communication is not only observed in labour regulations. In the recently approved *Ley 13/2022*, of 7 July, General Audiovisual Communication, we also see how it expressly refers to "video exchange services through a platform" which now fall within its objective scope of application. Specifically, the Preamble of the regulation explains that "these services which, in many areas, are grouped under the concept of *vloggers*, *influencers* or opinion leaders, enjoy relevance in the audiovisual market from the point of view of advertising investment and consumption, especially among younger audiences".

[15] A clear example of this phenomenon can be seen in influencers who advertise or recommend financial or investment services, which has led the CNMV to intervene to remind them that they risk being sanctioned for failing to comply with European regulations on investment recommendations and market abuse in the financial sphere. The press release issued by the Spanish regulator can be accessed on its website at (last access in November 2022): https://www.cnmv.es/portal/verDoc.axd?t=%7Bd6e36d88-f319-4671-98ca-fa8f1cecc112%7D

to the public that gathers to follow his or her performances, considering that this interpretation is in line with that defended in the OECD Model Convention for the avoidance of double taxation and, furthermore, making reference to the Consultation of the General Directorate of Taxes V1077-10, of 20 May 2010, which states that "the activity carried out by the DJ is an artistic activity and includes as constituent elements both the technical knowledge necessary for the handling of electronic and acoustic instruments, as well as musical talent and composition skills and, likewise, prestige and the ability to attract audiences".

The second of these deals with the analysis of how income derived from the production, organisation and promotion of musical concerts held in Spanish territory by non-resident entities should be taxed in Spain. This is the ruling of the High Court of Justice of the Valencian Community of 25 February 2020, rec. 1535/2017 and it follows a criterion diametrically opposed to that which the General Directorate of Taxes has been upholding in recent years, as we will see below. Thus, while this Directing Centre understands that, in general, income derived from the production, organisation and promotion of musical events should be excluded from article 17 of the OECD Model Convention, the High Court of Justice of the Valencian Community, following the doctrine established by the Supreme Court in the judgment of 7 December 2012 (referring to the case of the musical group U2), considers that such income does have its origin in the artistic performance and that, therefore, it may be subject to taxation in the country of the source by virtue of the aforementioned precept.

To support its assessment, the Court refers, as we said, to the reasoning given by the Supreme Court in its judgment of 7 December 2012, considering that it "summarises, teaches and reasons on these unfulfilled tax obligations". Thus, for the High Court of Justice of the Valencian Community, article 45 of the Corporate Income Tax Law then in force (it should be recalled that it was a similar provision to the current article 13.1. b of the IRNR Law, both of which state that income derived, directly or indirectly, from the personal performance in Spanish territory of entertainers and sportsperson, or from any other activity related to such performance, even when received by a person or entity other than the entertainers and sportsperson, shall be deemed to be obtained in Spain) "reveals the intention to contribute income received by third parties from entertainers and sportsperson, provided that it is derived from that performance or professional activity".

On the basis of that premise, the High Court of Justice of the Valencian Community concludes that "both the Law on Corporation Tax and the Double Taxation Convention with Ireland and with many other countries with which agreements of the same nature have been concluded have introduced, following the guidelines laid down by the OECD, an anti-avoidance clause which seeks to prevent the income from that performance being left untaxed in the State of source, that is to say, in the territory in which the artist performs, merely because it is not taxed in the State in which the artist performs, an anti-tax avoidance clause which aims to prevent the income from that performance being left untaxed in the State of the source, i.e. in the territory in which the artist performs, simply because it appears, not as direct income from that performance, but as profits which we could call indirect and therefore not attributed to the artist himself but to another person". However, in the grounds of this ruling, the Court does not explain why the income obtained by the promoter and organiser of the concert should be considered as indirect profits from the performance itself and, consequently, should be subject to taxation in Spain in accordance with the double taxation treaties. Likewise, no reference is made to the current Commentaries to the provision in which, after the latest amendments, it is ruled out that this type of income can be considered as indirect income derived from the personal performances of the artists.[16]

[16] Specifically, paragraph 7 of the Commentary states that "income received by impresarios, etc. for arranging the appearance of an entertainer or sportsperson is outside the scope of the Article" but any income they receive on behalf of the entertainer or sportsperson is of course covered by it. Paragraph 11. 4 of the Comments indicates that article 17 "it clearly does not cover the income of all enterprises that are involved in the production of entertainment or sports events", and in this sense, by way of example, it excludes from the scope of application of paragraph 2 "the income derived by the independent promoter of a concert from the sale of tickets and allocation of advertising space", which applied to the case

For its part, the judgment of the High Court of Justice of Madrid of 7 July 2016, rec. 1075/2014, is of interest in that while the taxpayer denied the status of artists of non-resident individuals who had travelled to Spain to participate in a music, arts and dance festival (the so-called *World Festival of Music, Arts and Dance*), as it considered that their participation in certain training workshops deprived them of such status, the tax administration understood that they should be considered artists because their participation in certain concerts should prevail, and so it expressed it in the tax assessment: "The workshops organised constitute an element of entertainment, insofar as they make it possible for those attending the event to take part. Their participation cannot be qualified as compulsory, which would distort the action of 'having fun' which implies taking part in the workshop. Even if it were only a pastime, it must be understood that the organisation of the workshops incorporates an element of fun and the income paid to the participants must be considered artistic in nature. Furthermore, it should be noted that the participants in the workshops are, for the most part, the same singers/musicians/musical groups who perform at the events and that the payments made to them are paid both for their performance and for their participation in the workshops. Finally, it should be recalled that Article 13 of the TRLIRNR includes among the income obtained in Spanish territory that derived from "any other activity related to such performance".

The Madrid High Court of Justice ended up aligning itself with the Administration's position since, after assessing the only evidence in this regard in the proceedings, such as the Festival program, the contracts with the artists and the site plan, it concluded that the artists undertook to perform both concerts and workshops, and that the amounts stated in the settlement were those paid for these two items in relation to the said artists, so that both items should be taxed in Spain in accordance with Article 17 of the applicable Convention.

We are also interested in highlighting the basis for the artists travel and subsistence expenses, which had been borne by the organiser of the event itself. Thus, while the latter denied that there was any evidence to suggest that the artists received any amount in respect of travel expenses (since it was the organisers themselves who were responsible for those expenses by arranging flights and accommodation), the Court held that in any event, given that the costs for those items were in fact borne by the artists themselves, they had been paid by the organisers of the event, given that the costs for these items were borne by the organiser in accordance with the contracts signed with the artists, it should be understood that these were expenses directly related to the service provided by the artists and, as such, should be counted as higher remuneration for their artistic activities.

Turning to the administrative level, we will focus on the latest binding consultations issued by the General Directorate of Taxes in which the possible taxation in Spain of income obtained by certain entities or individuals related to several artistic or sporting performances that take place in Spanish territory has been analysed.

In Binding Consultation V0222-21, dated 10 February 2021, the General Directorate of Taxes considers that the taxpayer, an individual resident in Germany who personally, habitually and directly participates in poker games held in Spain, should be classified as a sportsperson for the purposes of the Spanish-German double taxation agreement. For the Directorate, the key point is that Article 17 of the OECD Model Convention requires the existence of an element of entertainment or spectacle before the public, i.e. that the activity is carried out or intended for the public and, in accordance with the above, it is concluded that the participation of the taxpayer in poker events held in Spain is assimilated to what is considered an artistic or sporting performance and, therefore, the possible income derived from these performances must be considered as income of entertainers and sportspersons.

The Binding Consultation V2965-21, of 22 November 2021, sets out the criteria that the General Directorate of Taxes has repeatedly maintained on the taxation of income derived from the

at hand should have led to the exclusion from the scope of application of the provision of income paid for production services such as sound, light, stage, laser and video, and organisation and consultancy services.

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organisation and staging of artistic performances (criteria which, as noted above, clashes with the ruling of the High Court of Justice of the Valencian Community of 25 February 2020). Specifically, in the consultation, the interested party asked whether the income received from French and Portuguese companies or associations that invoice performances by musical groups, which include, in addition to the artist's performance itself, other elements such as scenery, transport, lights, sound, etc., are subject to withholding tax in Spain.

In order to determine the taxation of income in cases such as the one in question, the General Directorate of Taxes considers that a distinction must be made between the amounts that remunerate the artist's performance and those that correspond to other elements of production, so that the amounts that remunerate the artist's performance will be subject to taxation in Spain in accordance with Article 17 of the double taxation treaties.

In terms of the amounts that remunerate production elements such as stage, transport of equipment and technical personnel, lighting, sound equipment and technicians, and other production and support activities, reference should be made to paragraph 3 of the Commentary to Article 17, according to which, in principle, such income does not derive from the artist's performance, but corresponds to the remuneration of services that make the artist's performance possible. Paragraph 7 of the Commentary states in the same sense that "income derived by agents, etc., from the organisation of the performances of an entertainers and sportsperson falls outside the scope of the article, although the income they receive on behalf of the entertainers and sportsperson is, of course, covered by the article".

Therefore, in the opinion of the General Directorate of Taxes, such income does not fall within the scope of Article 17 of the applicable Conventions, and consequently, by virtue of Article 7 of the said Conventions, it cannot be taxed in Spain unless the companies carry out their activity in Spain through a permanent establishment located there. However, the ruling concludes by warning that if it is observed that there is no proportionality in the amount of income paid as remuneration for production and support activities in relation to the total income generated by the artists' performance, it could be considered that part of this income corresponds to the artist's performance and, therefore, would be subject to taxation in Spain within the scope of Article 17 of the Conventions.

In Binding Consultation V0572-19 of 18 March 2019, the General Directorate of Taxes resolved a query raised by a Spanish foundation that had entered a contract for the provision of services with a musician and orchestra conductor resident in Latvia to conduct an orchestra that would take place in the premises of the interested party in Spanish territory.

For the General Directorate of Taxes, the fundamental element to support the classification of such income as artistic income is that the musician-conductor was to be hired as the main artist (since his name is highlighted in the advertising, as indicated in the consultation letter) of a single show, the concert to be held in Spain, which means that the scenic aspect of the activity to be carried out in Spain predominates and that there is a direct link between all the income received for his services and the aforementioned performance in Spain. Therefore, it is considered that the income obtained by the orchestra conductor on the concert that would take place in Spanish territory should be understood to fall within the subjective scope of Article 17.

Lastly, in the Binding Consultation V2182-18 of 23 July 2018, the General Directorate of Taxes, faced with a case very similar to the previous one, once again highlights the need to distinguish between the different concepts that are subject to remuneration when an artistic performance takes place in Spain. In this case, the foundation that had contracted the services of a natural person resident in Estonia, as "Artistic and Principal Conductor" of the philharmonic orchestra of that country, had undertaken to pay him, among others, the following amounts: 30,000 euros "for the artistic direction and programming of each season"; 11,000 euros "for each subscription concert"; 4,500 euros "for conducting institutional concerts"; and 8,000 euros "in the event that a record recording is made".

According to the Directing Centre, in accordance with the interpretation of the Commentaries to Article 17 of the OECD Model Convention, the provisions of Article 17 of the Spanish-Estonian Convention would apply, in the first place, to the income obtained for the performance of concerts on Spanish territory, as well as for the rehearsals corresponding to those concerts, that is to say, to the remuneration paid for subscription concerts (EUR 11 000 euros) and for other institutional concerts (EUR 4 500 euros).

Likewise, considering the provisions of the contract attached to the consultation, the General Directorate of Taxes understands that the 8,000 euros that would be paid to him in the event that a recording was made would correspond to the hired conductor's cache. Thus, referring to the definition of the term "*cache"* by The Spanish Royal Academy ("fee of a show business artist or of certain professionals who perform in public"), the General Directorate of Taxes considers that such remuneration in the amount of 8,000 euros would also fall within the scope of the article in cases where it corresponds to the direction of a concert in Spanish territory.

Finally, as regards the remuneration of 30,000 euros corresponding to "the artistic direction and programming of each season", the Centre considers that that income does not represent remuneration for the individual's performance as conductor of a given concert on Spanish territory, but for the artistic direction and programming of each season. Consequently, such income would not fall within the scope of application of Article 17 of the Spanish-Estonian Agreement, but within the scope of application of Article 14 of that Agreement, and would be exempt in Spain, unless the artist had a fixed base in Spain for carrying out his activities.

4. Conclusions

As we have seen throughout this paper, the concept of artist and athlete in Article 17 of the OECD Model Convention has evolved over time. Thus, although in the versions translated into French and Spanish this evolution has not been so evident (as the translation of these terms in these languages hardly varies from one to the other), in the original English version it can be seen more clearly: on the one hand, if at the beginning Article 17 referred to *public enterteiners*, later the qualifier *public* was deleted, to refer only to *enterteiners*, a change that hinted at what the official Commentaries to the Model Convention would eventually confirm, i.e. that the public nature of artistic performances would no longer be a *sine qua non* condition for the provision to come into play; On the other hand, the term *athletes* was initially replaced by the term *sportsmen*, with the intention of also including people who practised sports modalities that were far removed from those activities classically linked to athletic activities, and later by the term *sportsperson*, in order to embrace a term that would be more inclusive.

This evolution is also perceived if we analyse the modifications and extensions that the official Commentaries to the precept have undergone, so that now it seems to be clear that all those subjects who carry out activities of a scenic nature aimed at the spectacle and entertainment of a certain audience should fall within its subjective scope of application, it being irrelevant whether the activity in question can be included in any of the traditional forms of art or sport and regardless of whether the activity is carried out directly before the public or is going to be broadcast by some communication method.

The foregoing leads us to maintain that there is currently no obstacle preventing the inclusion among the potential addressees of Article 17 of the OECD Model Convention of those subjects (such as influencers, streamers, e-gamers, etc.) whose main occupation consists of creating digital content based on their own personal performance, with the stage factor prevailing in their intervention and with the aim of sharing this content through different digital channels to entertain a specific audience.

However, although we consider that the aforementioned activity is likely to fit in with the current interpretation of the term entertainer (and, where appropriate, sportsperson) that emerges from the Official Comments to the Model Convention, we are also aware that social networks accommodate an

infinite number of different profiles and themes, which makes it really difficult to distinguish when the element of entertainment and spectacle required by Article 17 is present or, by contrast, when the informative, educative or even promotional nature that characterises the activity of many of these professionals should prevail.

Thus, we believe that there are several reasons that make it advisable to update the Commentaries to include certain interpretative guidelines or parameters that help to solve these problems of qualification. Firstly, because these are occupations that are here to stay and which, until now, have received hardly any attention either from the domestic legislator (at least as far as the tax system is concerned) or from the rules of international tax law. Secondly, because it seems clear that these new occupations share certain features with the more classical representations of entertainers and sportsperson, features which at the time justified the appearance of Article 17 of the Model Convention: namely, the ability to obtain large sums of money for performances that take place in short periods of time and a high degree of geographical mobility. Thirdly and lastly, because if we want to avoid the proliferation of situations of double taxation (or, where appropriate, of non-taxation), it is necessary to have a common guiding criterion so that the different States interpret in a uniform manner these new realities which, as we have said, have not yet received specific treatment in most domestic legislations.

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