

**IMF COMMITTEE ON BALANCE OF PAYMENTS STATISTICS**

**BALANCE OF PAYMENTS TECHNICAL EXPERT GROUP**

---

**ISSUES PAPER (BOPTG) # 10**

**RESIDENCY OF SPECIAL PURPOSE ENTITIES**

**Prepared by Balance of Payments and Financial Accounts Department,  
De Nederlandsche Bank**

**May 2004**

## **Balance of Payments Technical Expert Group**

### **Issues paper: Residency of Special Purpose Entities**

Special Purpose Entities (SPEs) provide financial services, like financing and asset holding, to their own group companies. Most SPEs are established in economies other than the economy of the parent company<sup>1</sup>. SPEs often have little or no physical presence. Although in recent decades the cross border transactions of SPEs have been increasing to very substantial levels, the concept of SPE is not defined in the IMF's *Balance of Payments Manual* (BPM5). Furthermore the definition of the concept of residency in BPM5 is not always applicable to SPEs involved in cross border transactions with limited or without physical presence in an economy.

In many cases SPEs even do not have personnel in the economy of establishment and are managed and administered in another economy. In other words their activities may have connections to several economies regarding different issues like taxation regime, business laws, location of assets, location of administration and location of management. As a consequence this raises the problem of determination of the residency of these entities.

The present methodology and possible alternative standards for determining the residency of SPEs are subject of this paper. The aim is to formulate clear criteria for the determination of the residency of an institutional unit that will result in:

- a) each institutional unit must be resident of at least one country and no more than one country;
- b) application of the criteria by compilers of different countries leads to the same result with regard to the residency of that institutional unit;
- c) the possibility to use the manual on external accounts as a reference for legal purposes.

<sup>1</sup> Exceptions are so-called Special Purpose Vehicles that are established for e.g. securitisation programmes and financial lease constructions.

## **I. Current international standards for the treatment of the issue**

BPM5 recommends determination of the residency of enterprises based on their center of economic interest (paragraph 73). Because of the absence of a physical presence and/or the existence of connections to several economies, the concept of *centre of economic interest* is not unequivocally applicable to SPEs. The issue of the residency of SPEs is not discussed comprehensively though in BPM5. Consequently the specific recommendations on this issue are scant. The economy in which the offshore enterprises are “located” should, according to the BPM5 paragraphs 79 and 381, be decisive in the determination of the residency. This criterion applies also to financial entities/enterprises like SPEs. This means that the residency of the SPEs should be attributed to the economy in which these entities are “located”.

The *External Debt Statistics; Guide for Compilers and Users*<sup>2</sup> (Guide) and the second edition of the *Coordinated Portfolio Investment Survey Guide*<sup>3</sup> are more specific on the issue of residency of SPEs for the compilation of external debt statistics. The relevant paragraphs refer to the limited physical presence of SPEs “in the economy in which they are legally incorporated or legally domiciled (for example, registered or licensed)”<sup>4</sup>. According to these guidelines, the residency of SPEs should be determined by their legal incorporation, or in the absence of legal incorporation, their legal domicile.

## **II. Shortcomings of the current treatment**

Since the center of economic interest of SPEs can not be determined, BPM5 refers to “the economy in which SPEs are located”. In many cases, however, it is unclear what the “location” of these entities is, because:

- a) there are no explicit criteria, like registration, taxation etc specified in BPM5;
- b) SPEs often have no physical presence or they hardly have any economic tie to the economy in which they are established;

<sup>2</sup> Paragraphs 2.17-2.18.

<sup>3</sup> Paragraphs 3.8-3.9.

<sup>4</sup> Guide, paragraph 2.18.

- c) SPEs are often economically tied to several economies.

The shortcoming of BPM5 becomes more obvious when there are disagreements between the national compilers and the SPEs regarding the determination of residency of the SPEs, and consequently the reporting obligations about cross border transactions and positions of these entities. BPM5 provides no airtight argument for these particular cases, which illustrates the need for a more obvious clarification/explanation of the concept of residency of SPEs. The need for more explanation of the concept of residency of SPEs is also expressed in the IMF's note "*the residence of SPEs and offshore enterprises*" prepared for the Working Party on Financial Statistics of the OECD in 2002. The practical example, presented below, can illustrate the need for such a clarification.

### **III. A Dutch case on the unclear residency of a SPE**

Considering the residency of a SPE in the Netherlands for Balance of Payments and International Investment Position purposes, there was a disagreement between De Nederlandsche Bank (DNB) and a SPE engaged in cross border transactions and activities with its own group companies. The SPE was of the opinion that it was not a resident of the Netherlands and consequently was not obliged to report its cross border transactions or positions to DNB. The actual situation in this case can be summarised as follows:

- a) The SPE's principal place of business are the offices of the group partners outside the Netherlands, where also administration, bookkeeping and other compliance work is done;
- b) The entity itself has neither physical presence, nor personnel in the Netherlands;
- c) The entity only has a mailing address in the Netherlands with a trust company;
- d) The SPE is registered at the Chamber of Commerce in the Netherlands as an unincorporated entity, called 'dormant or silent partnership' according to Dutch law (a kind of limited liability partnership<sup>5</sup>);

<sup>5</sup> The Dutch legal term for a limited liability partnership is "Commanditaire Vennootschap".

- e) Despite the registration at the Chamber of Commerce, the tax authorities have decided that the entity is not obliged to pay taxes, although it was legally subject to taxes in the Netherlands.

Considering the above presented facts and from a legal point of view, it is not obvious where the “center of economic interest” or what the “location” of the SPE is. Leaving the registration at the Chamber of Commerce aside, this SPE has more economic connections with other economies than with the Netherlands.

#### **IV. Possible alternative treatment**

A general principle in the determination of the residency of enterprises is that a “unit should be a resident of one and only one territory” (paragraph 4.33 of the Annotated Outline). Naturally, this general principle applies also to SPEs. Furthermore in the Annotated Outline, two main changes are proposed regarding the issue of the residency of SPEs with connections to several economies or SPEs without physical presence.

- a) In paragraph 4.45 the center of economic interest is more specifically identified by adding the criterion of *predominance* or the “strongest link”. This may serve as a solution for the entities, which have economic connections with more than one economy. In such a situation the residence of a SPE should be based on the principle of the *predominant* center of economic interest.
- b) When the SPEs are not physically present in an economy, the territory of incorporation or registration should be decisive in the determination of the residency (paragraph 4.45 b). This means that the place of incorporation/ registration or (in absence of incorporation or registration) legal domicile, which is the jurisdiction of the laws the SPE is subject to, determines the residency of SPEs.

Paragraphs 4.33 and 4.45 of the Annotated Outline, when taken in combination, may clarify the issue of the residence of SPEs. This means that, for statistical purposes, SPEs should be resident of *at least one and only one* economy. Furthermore their residency

should be attributed to the economy of their *predominant center of economic interest*; and in case of difficulties with the identification of the predominant center of economic interest the place of *incorporation, registration or legal domicile* should be considered as the residency of the SPE. Despite these clarifications, there are still some issues that should be discussed.

## **V. Points for discussion**

The concepts of place of incorporation, registration and legal domicile are not always clear and should be defined more precisely.

- a) Country of incorporation: Is this equal to the country under which laws the Articles of Association of the entity are drawn up?
- b) What exactly is meant by legal domicile? Is this the same as the statutory seat of the entity or the seat of the administration of the entity?
- c) In case of migration of the entity the legal form of the entity needs not always (in all countries) be adapted immediately to the laws of the country to which the entity migrates. What should be the decisive factor in this case for determining the residency of the entity?
- d) Country of registration: Is this equal to the registration at the Chamber of Commerce and/or registration with the tax authorities? Are there other criteria for the country of registration?
- e) Could registration in more than one country occur at the same time (for a long period)? If yes, how to determine the residency? Or is multiple registration restricted to branches only?
- f) Does the “Societas Europaea” with which a legal company form is organized under supra-national European law create additional problems for national compilers in determining the residency of entities? If yes, how should the problems be dealt with?

## **VI. References**

*Annotated Outline for the Revision of BPM5*  
Paragraphs 4.44-4.48.

*Balance of Payment Manual*, fifth edition  
Paragraphs 73, 79 and 381.

*Coordinated Portfolio Investment Survey Guide*  
Paragraphs 3.8-3.9.

*External Debt Statistics; Guide for Compilers and Users*  
Paragraphs 2.17-2.18.

*The residence of SPEs and offshore enterprises*, note by IMF for Working Party on Financial Statistics of the OECD (DAFFE/MC/STAT (2002) 18).