PE Watch: 2020 in review

Go inside
The permanent establishment (PE) concept is a core element of the global international tax framework. Its relevance has increased in the past year due to globalization, digitalization of the economy, and the ease of carrying on business worldwide. Consequently, tax authorities have placed potential PEs under increased scrutiny.

Over the last several years, EY has carried out Transfer Pricing and International Tax Surveys,1 which make it clear that companies anticipate encountering increased controversy on PE matters. This in turn, translates into companies requiring more resources and time to manage their PE risks.

The international tax landscape continues to change. Tax uncertainty will significantly increase as governments respond to the health, economic and social threats of the COVID-19 pandemic, with new tax measures sparked by a growing need for revenues. Moreover, tax transparency is expected to continue to expand, both by introduction of new reporting requirements and the enhanced exchange and use of reported information by tax administrations. In an era where tax transparency is the norm, new business models and the complexity of tax systems are likely to result in increased controversy, including with respect to the determination of PEs.

A preview of tax priorities for 2021 indicate that the coming year will be crucial for the global international tax system. The BEPS 2.0 project2 that the OECD/G20 Inclusive Framework on BEPS aims to deliver by mid-2021 is expected to represent a major change to the international tax architecture and it may include certain features that diverge from the current PE principles. Moreover, if the inclusive Framework does not reach consensus on this project, it is likely that the proliferation of unilateral measures will continue. Accordingly, more jurisdictions may consider a “Digital PE” concept, while digital services taxes may also be adopted by additional countries. Countries like Nigeria and Indonesia have already introduced “Significant Economic Presence” rules, creating a new type of PE without physical presence.

This publication covers four PE topics and each topic has two sections. The first section provides background information while the second section addresses specific country developments during 2020 with respect to each topic.

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In addition to the OECD guidance, countries started releasing guidance on different international tax issues arising as a consequence of COVID-19, including the application of the PE rules. In general, most of the countries follow a similar approach on the different types of PE (home office, agency PE and construction PE) as included in the OECD analysis. However, some countries differ from the general approach and set forth their own positions. For example, Germany and China differ from the general approach on construction PEs, i.e., days spent on the construction site are not taken into account for calculating the time threshold, as long as certain requirements are met.

Throughout the year in review, some countries reacted to the prolonged pandemic and updated their guidance on PEs to reflect the non-temporary nature of the COVID-19 crisis. For example, Australia, Canada, Singapore, and Germany updated their guidance to extend the application period.

As the crisis continues to unfold in 2021, the OECD Secretariat has updated the earlier guidance considering some additional fact patterns not addressed before, and examines whether the analysis and the conclusions outlined in earlier guidance continue to apply where the circumstances persist for a significant period. In addition, the guidance contains references to country practices and their guidance during the COVID-19 pandemic. Likewise, a number of countries may revisit their guidance and adjust accordingly.

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**Australia**

In March 2020, the Australian Taxation Office (ATO) provided guidance on PEs considering the impact of the COVID-19 crisis. The guidance indicates that the unplanned presence of employees in Australia due to COVID-19 travel restrictions will not give rise to a PE in Australia where: i) the foreign entity did not have a PE in Australia before COVID-19; and ii) the presence of employees in Australia is due to travel restrictions.

In November 2020, the ATO updated its guidance. The updated guidance is largely consistent with the earlier guidance, however, two new conditions have been added and need to be satisfied in order for any unplanned presence of employees in Australia to not give rise to a PE in Australia. The new conditions are: i) the employees staying temporarily in Australia will relocate overseas as soon as possible following the relaxation of travel restrictions; and ii) the foreign company has not recognized those employees as creating a PE in Australia or generating Australian source income for the purposes of the tax laws of another jurisdiction. This guidance applies from March 2020 until 31 January 2021. More details on the guidance are available [here](#). Link to the official guidance [here](#).

Contact: David Burns
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Austria
In May 2020, the Austrian Ministry of Finance provided guidance on home office PEs and construction PEs. This guidance was replaced and updated by new guidance in July 2020, which is largely consistent with the earlier guidance. For a home office PE, the guidance clarifies that employees of nonresident companies will not constitute a PE unless the home office becomes the new norm. For a construction PE, the guidance states that if a construction project is interrupted due to COVID-19, the interruption period should be taken into account for calculating the time threshold. More details on the guidance are available here. Link to the official guidance here.

Contact: Markus Stefaner
In May 2020, the Canada Revenue Agency (CRA) published guidance covering different situations regarding PEs such as: home office PE, agency PE and service PE. For a home office and agency PE, the CRA will not consider the existence of a PE provided that such activities would not have been performed in Canada but for the travel restrictions. For a service PE, the CRA will exclude from the 183-day threshold for any days of physical presence in Canada that are solely the result of travel restrictions.

In June 2020, Canada extended the application period until 31 August 2020. After, in August 2020, Canada again extended the application period until 30 September 2020 but noted that it did not anticipate further extensions of the guidance.

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Contact: Rene Fleming
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China

In August 2020, the Chinese State Taxation Administration (STA) published a set of Questions and Answers (Q&A guidance) which provide that a home office and conclusion of contracts in China do not create a PE if the activity is intermittent or occasional during the pandemic. However, the Q&A guidance clarifies that if an agent was already concluding contracts in China before the pandemic for a considerable period of time, an agency PE may arise. Further, the Q&A guidance provides that the STA will disregard the COVID-19 related interruptions of construction projects when calculating the time threshold of construction PEs. More details on the Q&A guidance are available here. Link to the official guidance here.

Contact: Min Fei
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Cyprus

In October 2020, the Tax Department of Cyprus issued guidance providing that persons working remotely from Cyprus and agents concluding contracts in Cyprus due to COVID-19 related travel restrictions will not create a PE in Cyprus. Moreover, the guidance provides that, in cases where persons that would otherwise be in Cyprus but due to travel restrictions are conducting activities abroad, the time spent abroad will not be taken into account to determine whether there is a PE in Cyprus. More details on the guidance are available here. Link to the official guidance here.

Contact: Petros Krasaris
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Denmark

In July 2020, Denmark launched guidance stating that the Danish Tax Authorities follow the OECD Secretariat analysis on PEs released in April 2020. More details on the guidance are available here. Link to the official guidance here.

Contact: Malte Soegaard
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In July 2020, Greece published a circular that provides that employees will not constitute a home office PE during the COVID-19 pandemic and especially during the travel restrictions, unless the home office becomes the new norm. Likewise, the risk of creating an agency PE would be low as long as the agent’s activity is temporary and would not have been performed in Greece but for the travel restrictions. However, the tax authorities may take a different approach if the agent was habitually concluding contracts on behalf of the nonresident enterprise in his home country before (or even, after) COVID-19. Further, if a construction project is interrupted due to COVID-19, the interruption period should be included when calculating time threshold.

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Contact: Constantina Nicolaou

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Ireland

In March 2020, the Irish Revenue Commissioners published guidance covering PE issues and provide that: where an individual is present in Ireland or another jurisdiction (and would otherwise have been present in Ireland) as a result of COVID-19 related travel restrictions, the Irish Revenue Commissioners will be prepared to disregard such presence in Ireland or another jurisdiction (where relevant) for corporation tax purposes in relation to which the individual is an employee, director, service provider or agent. Link to the official guidance here.

Contact: Micheal Bruen
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Malaysia

In May 2020, the Inland Revenue Board of Malaysia (IRB) published guidance providing that the IRB will consider that the temporary presence of employees of a nonresident company does not result in the creation of a PE, if certain conditions are met, such as not having a PE before the travel restrictions and that the economic circumstances of the nonresident company have not changed. In October 2020, the IRB updated its guidance to clarify that it would also apply to companies that are residents in countries which do not have a double tax agreement with Malaysia. The updated guidance also provides that the guidance will only apply from 18 March 2020 to 31 December 2020. More details on the guidance are available here. Link to the official guidance here.

Contact: Anil Kumar Puri
The onset of the COVID-19 pandemic significantly changed the global landscape during 2020. Authorities around the world imposed travel restrictions, implemented strict quarantine measures and encouraged teleworking. In this context, many individuals faced scenarios in which it was not possible to perform their duties in their countries of employment. Furthermore, many companies had to interrupt or adjust their activities.

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Malta

In May 2020, Malta announced that it adheres to the OECD guidance on tax implications due to the COVID-19 crisis.

Contact: Silvio Camilleri
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New Zealand

In April 2020, the Inland Revenue confirmed that COVID-19 will not cause a foreign company to have a PE in New Zealand due to foreign employees being stranded or confined in New Zealand. This is provided that certain conditions are met. Link to the official guidance here.

Contact: Dean Madsen
In August 2020, the Philippine Bureau of Internal Revenue (BIR) published a circular clarifying that temporary interruptions of construction activities due to COVID-19 should be included for calculating the time threshold. The circular also explains that working from home would not create a PE if used on a temporary basis. Further, the circular provides that where an employee, partner or agent of a foreign enterprise continues to be present in the Philippines and that presence in the Philippines is shown to result from travel restrictions related to COVID-19, the BIR will disregard such presence in determining the existence of a PE as long as certain requirements are met.

In April 2020, the OECD Secretariat issued an analysis on certain tax treaty-related issues in the context of the COVID-19 crisis. Among other items, the OECD provided guidance on the dislocation of cross-border workers due to the COVID-19 crisis and its effects on PEs. Additionally, in December 2020, the OECD issued guidance on the transfer pricing implications of the COVID-19 pandemic. The guidance represents the consensus view of the 137 members of the Inclusive Framework on BEPS regarding the application of the arm's-length principle. Although this guidance does not expressly make any reference to PEs, it may be helpful to address cases on the allocation of profits to PEs.

In addition to the OECD guidance, countries started releasing guidance on different international tax issues arising as a consequence of COVID-19, including the application of the PE rules. In general, most of the countries follow a similar approach on the different types of PE (home office, agency PE and construction PE) as included in the OECD analysis. However, some countries differ from the general approach and set forth their own positions. For example, Germany and China differ from the general approach on construction PEs, i.e., days spent on the construction site are not taken into account for calculating the time threshold, as long as certain requirements are met.

Throughout the year in review, some countries reacted to the prolonged pandemic and updated their guidance on PEs to reflect the non-temporary nature of the COVID-19 crisis. For example, Australia, Canada, Singapore, and Germany updated their guidance to extend the application period.

As the crisis continues to unfold in 2021, the OECD Secretariat has updated the earlier guidance considering some additional fact patterns not addressed before, and examines whether the analysis and the conclusions outlined in earlier guidance continue to apply where the circumstances persist for a significant period. In addition, the guidance contains references to country practices and their guidance during the COVID-19 pandemic. Likewise, a number of countries may revisit their guidance and adjust accordingly.

Tax authorities may likely focus more on workers or other personnel operating remotely during 2021 due to COVID restrictions.
The onset of the COVID-19 pandemic significantly changed the global landscape during 2020. Authorities around the world imposed travel restrictions, implemented strict quarantine measures and encouraged teleworking. In this context, many individuals faced scenarios in which it was not possible to perform their duties in their countries of employment. Furthermore, many companies had to interrupt or adjust their activities.

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Singapore

In April 2020, the Inland Revenue Authority of Singapore (IRAS) published guidance providing that IRAS will not consider the unplanned presence of employees of a nonresident taxpayer, that may need to stay in Singapore due to travel restrictions relating to COVID-19, as the creation of a PE, provided it meets certain conditions set forth in the guidance.

In October 2020, the IRAS updated its guidance to extend its application period through 31 December 2020. Before the update, the guidance was limited to an unplanned presence not exceeding more than 183 days in the year 2020 from the date of arrival in Singapore.

More details on the guidance are available here. Link to the official guidance here.

Contact: Chester Wee
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United Kingdom (UK)

In April 2020, Her Majesty’s Revenue and Customs (HMRC) updated released guidance providing that HMRC does not consider that a nonresident entity will automatically have a fixed place of business PE after a short period of time as a degree of permanence is required. Further, HMRC acknowledges that while the habitual conclusion of contracts in the UK would also create a dependent agent PE in the UK, it is a matter of fact and degree as to whether that habitual condition is met.

In May 2020, HMRC updated the guidance to note that HMRC believes its guidance is consistent with the OECD Secretariat analysis published in April 2020.

More details on the guidance are available here. Link to the official guidance here.

Contact: Paul Macdonald
In April 2020, the Internal Revenue Service (IRS) published frequently asked questions (FAQs) that provide relief for certain US business activities conducted by a nonresident alien or foreign corporation when the activities were only conducted in the US due to COVID-19-related travel disruptions. In particular, the FAQs provide that activities will not be taken into account for a period of up to 60 consecutive calendar days beginning on or after 1 February 2020, and on or before 1 April 2020 for purposes of determining whether the individual or entity is engaged in a US trade or business or has a US PE. The activities must have been performed by one or more individuals temporarily present in the US who would otherwise not have performed them in the US but for COVID-19-related travel disruptions.

More details on the guidance are available here. Link to the official guidance here.

Contact: Arlene S. Fitzpatrick

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Another recurrent development in 2020 relates to allocation of profits to PEs and remittance of profits. Several countries (e.g., Colombia, Ecuador, and Egypt) updated their domestic law, respectively, to deem the remittance of profits by a PE to its head office as a dividend distribution, and consequently tax such profits through a withholding tax. Moreover, a number of jurisdictions also published guidance or circulars on PEs addressing various key issues concerning the existence of a PE or the allocation of profits to a PE, e.g., Hong Kong provided guidance on e-commerce transactions and digital assets and Belgium provided its positions on the relevance of the transfer pricing guidelines for PEs.
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**Definition of PE**

**Cape Verde**

In April 2020, the Cape Verde Government modified the PE definition to include some of the elements from BEPS Action 7, including: an anti-fragmentation clause, the new wording of agency PE, and the definition of closely-related enterprise. These changes are applicable as from 29 April 2020.

Contact: Antonio Neves
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### Curacao

The updated PE definition became applicable as from 1 January 2020. The updated definition includes the following provisions from the OECD MTC 2017: list of examples of what might constitute a PE, construction PE if it lasts more than 183 days, splitting-up contracts, specific activity exemptions, anti-fragmentation clause, agency PE, and independent agent exception. According to the explanatory notes underlying to the Curacao profit tax legislation, the OECD MTC 2017 and its commentary can be relied upon to interpret Curacao’s domestic PE definition. In addition, activities carried out in the territorial waters or the Exclusive Economic Zone of Curacao are deemed to be carried out through a PE, unless such activities do not exceed a duration of 30 days in a 12-month period or fall within the scope of the specific activity exemptions.

**Contact:** Terrence Melendez
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### Definition of PE

**Denmark**

In December 2020, Denmark amended the definition of PE to align it with the new definition set out in Article 5 of the OECD MTC 2017, inter alia, broadening the agency PE rule and establishing an anti-fragmentation rule. The Law is effective from 1 January 2021.

Contact: Malte Soegaard
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**Domestic law**

**COVID-19**

**BEPS multilateral instrument**

**Controversy**

**Contact**

**Definition of PE**

**Mexico**

As from 1 January 2020, the updated PE definition becomes applicable. The updated PE definition is consistent with the PE definition in the OECD MTC 2017.

Contact: Enrique Perez Grovas
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### Definition of PE

**Portugal**

In December 2020, Portugal updated its PE definition to include, among others, the following:

1. Introduction of a Service PE clause;
2. Agency PE (similar to the OECD MTC 2017);
3. Introduction of an anti-fragmentation rule;
4. Removal from the list of preparatory and auxiliary "the use of facilities for the purpose of delivering goods or merchandise of the enterprise. The Law is effective from 1 January 2021.

Contact: Antonio Neves

More details are available [here](#).
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**Egypt**

In September 2020, Egypt amended its Income Tax Law to increase the withholding tax rate on net profits realized by a nonresident company through a PE in Egypt from 5% to 10%. The net profits are deemed to be distributed, and subject to tax, within 60 days from the PE’s financial year end. The law is effective from 30 September 2020.

Contact: Vuk Vuksanovic
While businesses may act globally, the right to tax resides in domestic law. The OECD has updated the definition of PE as a result of the BEPS project and the updated definition has been included in the 2017 OECD Model Tax Convention (OECD MTC 2017). The work from the OECD on PEs has significantly motivated a large number of jurisdictions to implement a similar definition for PEs as well as domestic rules on attribution of profits to a PE. In particular, Denmark and Portugal updated their PE definition, respectively. However, it is important to note that the PE definition still varies from country to country.

During the next year, COVID-19 may prompt some countries to update their PE definition to capture situations that are currently not covered or are unclear (e.g., home office PE and service PE).

An interesting fact to highlight during the year in review is that some OECD member countries, such as Hungary and Portugal, implemented certain elements from the PE definition included in the United Nations (UN) Model Tax Convention (UN MTC) into their domestic law. Hungary included a service PE clause in its domestic definition of place of business. Portugal went further and also updated its list of preparatory and auxiliary activities in line with the UN MTC. This means that Portugal removed the exception for use of facilities for the purpose of delivering goods or merchandise of the enterprise and broadened the agency PE definition to include an agent that maintains a deposit of goods in Portugal for their delivery on behalf of the company, even though it does not usually conclude contracts in relation to those goods nor has any intervention in the conclusion of such contracts.

Another recurrent development in 2020 relates to allocation of profits to PEs and remittance of profits. Several countries (e.g., Colombia, Ecuador, and Egypt) updated their domestic law, respectively, to deem the remittance of profits by a PE to its head office as a dividend distribution, and consequently tax such profits through a withholding tax. Moreover, a number of jurisdictions also published guidance or circulars on PEs addressing various key issues concerning the existence of a PE or the allocation of profits to a PE, e.g., Hong Kong provided guidance on e-commerce transactions and digital assets and Belgium provided its positions on the relevance of the transfer pricing guidelines for PEs.

### Taxation of PEs

#### Colombia

In July 2020, Colombia issued a Decree that, among other items, clarifies that profits attributable to a PE and distributed to its head office are subject to dividend tax. Further, the Decree amends a number of regulations to adjust the taxation of PEs to not only cover Colombian source income attributable to the PE but also foreign source income.

**Contact:** Luis Sanchez
While businesses may act globally, the right to tax resides in domestic law. The OECD has updated the definition of PE as a result of the BEPS project and the updated definition has been included in the 2017 OECD Model Tax Convention (OECD MTC 2017). The work from the OECD on PEs has significantly motivated a large number of jurisdictions to implement a similar definition for PEs as well as domestic rules on attribution of profits to a PE. In particular, Denmark and Portugal updated their PE definition, respectively. However, it is important to note that the PE definition still varies from country to country.

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Another recurrent development in 2020 relates to allocation of profits to PEs and remittance of profits. Several countries (e.g., Colombia, Ecuador, and Egypt) updated their domestic law, respectively, to deem the remittance of profits by a PE to its head office as a dividend distribution, and consequently such profits are subject to withholding tax at a 10% rate and 14% when the reporting of the ownership structure of the group is not fulfilled. The deemed dividend distributions from PEs to their head offices occur at the time the corporate income tax return of the PE is due (i.e., every year in April).

**Contact:** Carlos Cazar

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**Taxation of PEs**

**Ecuador**

In July 2020, Ecuador published a Decree which, inter alia, deems the remittance of profits by a PE in Ecuador to its head office as a dividend distribution, and consequently such profits are subject to withholding tax at a 10% rate and 14% when the reporting of the ownership structure of the group is not fulfilled. The deemed dividend distributions from PEs to their head offices occur at the time the corporate income tax return of the PE is due (i.e., every year in April).

**Contact:** Carlos Cazar
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### Taxation of PEs

**Portugal**

In December 2020, Portugal extended the PE "force of attraction" by including income earned by a nonresident entity from the sale of goods to Portuguese residents identical or similar to those sold through a PE in Portugal in the calculation of the profit attributable to the PE of the nonresident entity. The Law is effective from 1 January 2021.

Contact: Antonio Neves
While businesses may act globally, the right to tax resides in domestic law. The OECD has updated the definition of PE as a result of the BEPS project and the updated definition has been included in the 2017 OECD Model Tax Convention (OECD MTC 2017). The work from the OECD on PEs has significantly motivated a large number of jurisdictions to implement a similar definition for PEs as well as domestic rules on attribution of profits to a PE. In particular, Denmark and Portugal updated their PE definition, respectively. However, it is important to note that the PE definition still varies from country to country.

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**Belgium**

In February 2020, the Belgian Tax Authorities (“BTA”) issued a circular (Circular 2020/C/35) with guidance on transfer pricing matters, generally applicable to transactions as of 1 January 2018. Among other items, the circular provides confirmation that the BTA follows the Authorized OECD Approach (AOA) for the attribution of profits between the head office and its PE(s). For the attribution of free capital to a PE, the BTA expresses its preference for the use of the “capital allocation approach” from the several methods suggested by the OECD. In addition, the circular also highlights some key differences in the treatment of interest and royalty payments between the head office and PE. More details are available [here](#).

Contact: Peter Moreau
While businesses may act globally, the right to tax resides in domestic law. The OECD has updated the definition of PE as a result of the BEPS project and the updated definition has been included in the 2017 OECD Model Tax Convention (OECD MTC 2017). The work from the OECD on PEs has significantly motivated a large number of jurisdictions to implement a similar definition for PEs as well as domestic rules on attribution of profits to a PE. In particular, Denmark and Portugal updated their PE definition, respectively. However, it is important to note that the PE definition still varies from country to country.

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Guidance on PEs

Hong Kong

In March 2020, Hong Kong issued guidance on e-commerce PEs and the attribution of profits to those PEs. The Practice Note provides that a server or datacenter in Hong Kong, at the disposal of a nonresident enterprise, may constitute a PE if such equipment is capable of concluding contracts, processing payments or delivering digital goods in Hong Kong even without the involvement of human activities in Hong Kong. More details are available here.

Contact: Rex Lo
While businesses may act globally, the right to tax resides in domestic law. The OECD has updated the definition of PE as a result of the BEPS project and the updated definition has been included in the 2017 OECD Model Tax Convention (OECD MTC 2017). The work from the OECD on PEs has significantly motivated a large number of jurisdictions to implement a similar definition for PEs as well as domestic rules on attribution of profits to a PE. In particular, Denmark and Portugal updated their PE definition, respectively. However, it is important to note that the PE definition still varies from country to country.

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**Domestic law**

Guidance on PEs

**Malaysia**

In May 2020, Malaysia published Guidelines on determining the “place of business” (permanent establishment in Malaysia) of a person in Malaysia. The Guidelines provide guidance and examples on the determination of a place of business in the following categories: (a) a physical place of business; (b) preparatory or auxiliary activities; (c) a building site, construction, installation, assembly and supervisory activities; and, (d) an agent as place of business. More details are available here.

Contact: Anil Kumar Puri
While businesses may act globally, the right to tax resides in domestic law. The OECD has updated the definition of PE as a result of the BEPS project and the updated definition has been included in the 2017 OECD Model Tax Convention (OECD MTC 2017). The work from the OECD on PEs has significantly motivated a large number of jurisdictions to implement a similar definition for PEs as well as domestic rules on attribution of profits to a PE. In particular, Denmark and Portugal updated their PE definition, respectively. However, it is important to note that the PE definition still varies from country to country.

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Indonesia

In March 2020, the Indonesian Government introduced a new concept of digital permanent establishment. International sellers, international service providers, or international e-commerce platform providers meeting the significant economic presence criteria can be deemed to have a PE and subject to income tax in Indonesia. If the permanent establishment definition under a treaty overrides this domestic law, an electronic transaction tax (ETT) is imposed to tax income sourced from Indonesia. Implementing regulations in respect of the types of transactions, significant economic presence criteria, rate of ETT and other administrative arrangements have not been issued yet. More details are available [here](#).

Contact: Puspitasari Sahal
While businesses may act globally, the right to tax resides in domestic law. The OECD has updated the definition of PE as a result of the BEPS project and the updated definition has been included in the 2017 OECD Model Tax Convention (OECD MTC 2017). The work from the OECD on PEs has significantly motivated a large number of jurisdictions to implement a similar definition for PEs as well as domestic rules on attribution of profits to a PE. In particular, Denmark and Portugal updated their PE definition, respectively. However, it is important to note that the PE definition still varies from country to country. During the next year, COVID-19 may prompt some countries to update their PE definition to capture situations that are currently not covered or are unclear (e.g., home office PE and service PE).

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**Digital PE**

**Nigeria**

In May 2020, Nigeria issued an Order to introduce the concept of “Significant Economic Presence” (SEP). The Order provides guidance on how to determine whether a foreign entity has a SEP, i.e., the scope of activities and the threshold revenue to exceed.

In December 2020, the Finance Act was signed into law with an effective date of 1 January 2021. The Finance Act extends the application of SEP provisions to nonresident individuals, executors or trustees deriving profit from trade or businesses, such as provision of technical, management, consultancy or professional services to individual’s resident in Nigeria. However, the Ministry of Finance is yet to issue further regulations on the SEP provisions, including what constitutes a SEP of a nonresident individual, executor or trustee to nonresident individuals. More details are available here.

Contact: Akinbiyi A Abudu
In 2020, neither the OECD nor the UN published an updated version of their respective MTCs. However, the UN Committee of Experts on International Cooperation in Tax Matters, during the 21st session in October 2020, approved a number of changes to the UN MTC, including a clarification that registration for Value Added Tax/ Goods and Services Tax purposes is not relevant for determining a PE for corporate income tax purposes under a tax treaty, as well as the suggestions for future work on the UN MTC, e.g., insurance activities.

There were also developments with respect to the BEPS Multilateral Instrument (MLI). The MLI includes rules to prevent the avoidance of PEs, such as: i) commissionaire arrangements; ii) exploitation of the specific activity exceptions to the PE definition; and iii) abuse of splitting-up contracts. The MLI will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.

For the MLI to apply to a tax treaty, a number of matches or combinations are required. For example, both tax treaty parties must have signed the MLI, deposited the instrument of ratification and listed the respective treaty as a covered tax agreement (CTA). Further, there needs to be a match between the positions of both countries with respect to the relevant MLI provision and at the level of the notification.

As of the end of 2020, the MLI has been signed by 95 jurisdictions and has entered into force for 49 jurisdictions. In relation to the PE positions made by the countries signing the MLI, 31 jurisdictions chose to apply all of the PE articles of the MLI, 30 jurisdictions chose some of the PE articles of the MLI and 34 jurisdictions made a reservation on all the PE articles of the MLI. A closer look at the PE positions shows that only 49% of jurisdictions chose to apply Article 12 (agency PE), 58% of jurisdictions chose to apply Article 13 (specific activity exemptions) and only 36% of jurisdictions chose to apply Article 14 (splitting-up of contracts).

During the next year, it is anticipated that more jurisdictions will sign the MLI and also will be depositing their instrument of ratification of the MLI with the OECD. This will significantly increase the number of CTAs that the MLI may apply to.
Countries that have deposited their instrument of ratification of the MLI in 2020

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Date of deposit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>22 September 2020</td>
</tr>
<tr>
<td>Barbados</td>
<td>21 December 2020</td>
</tr>
<tr>
<td>Bosnia and Herzegovina</td>
<td>16 September 2020</td>
</tr>
<tr>
<td>Burkina Faso</td>
<td>30 October 2020</td>
</tr>
<tr>
<td>Chile</td>
<td>26 November 2020</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>22 September 2020</td>
</tr>
<tr>
<td>Cyprus</td>
<td>23 January 2020</td>
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<tr>
<td>Czech Republic</td>
<td>13 May 2020</td>
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<tr>
<td>Egypt</td>
<td>30 September 2020</td>
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<tr>
<td>Germany</td>
<td>18 December 2020</td>
</tr>
<tr>
<td>Indonesia</td>
<td>28 April 2020</td>
</tr>
<tr>
<td>Jordan</td>
<td>29 September 2020</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>24 June 2020</td>
</tr>
<tr>
<td>Korea</td>
<td>13 May 2020</td>
</tr>
<tr>
<td>Oman</td>
<td>7 July 2020</td>
</tr>
<tr>
<td>Pakistan</td>
<td>18 December 2020</td>
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<tr>
<td>Panama</td>
<td>5 November 2020</td>
</tr>
<tr>
<td>Portugal</td>
<td>28 February 2020</td>
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<tr>
<td>San Marino</td>
<td>11 March 2020</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>23 January 2020</td>
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<tr>
<td>Uruguay</td>
<td>6 February 2020</td>
</tr>
</tbody>
</table>
As of 31 December 2020, the MLI has entered into force for 49 jurisdictions.
Highlighted Jurisdictions
- Argentina
- Armenia
- Burkina Faso
- Cameroon
- Colombia
- Cote d’Ivoire
- Denmark
- Egypt
- Fiji
- Gabon
- India
- Indonesia
- Israel
- Jordan
- Kazakhstan
- Kenya

Highlighted Jurisdictions
- Lithuania
- New Zealand
- Nigeria
- Norway
- Pakistan
- Papua New Guinea
- Romania
- Russia
- Saudi Arabia
- Senegal
- Serbia
- Slovakia
- Tunisia
- Ukraine
- Uruguay

General overview
PE positions of the MLI

Does not want any of the PE article
Wants all PE Articles
Wants some of PE articles

As of 31 December 2020
General overview

Highlighted Jurisdictions
- Albania
- Australia
- Austria
- Belgium
- Bosnia and Herzegovina
- Chile
- Costa Rica
- Croatia
- Curacao
- France
- Germany
- Ireland
- Italy
- Jamaica
- Japan

Highlighted Jurisdictions
- Kuwait
- Luxembourg
- Macedonia
- Malaysia
- Mexico
- Netherlands
- Peru
- Portugal
- San Marino
- Singapore
- Slovenia
- South Africa
- Spain

PE positions of the MLI

- Article 12 (agency PE)
- Article 13 (specific activity exemptions)
- Article 14 (contract splitting rule)

As of 31 December 2020

Does not want any of the PE article
Wants all PE Articles
Wants some of PE articles
**Article 13 (specific activity exemptions)**

Highlighted Jurisdictions:
- Andorra
- Albania
- Bahrain
- Barbados
- Belize
- Bosnia and Herzegovina
- Bulgaria
- Canada
- China
- Cyprus
- Czech Republic
- Estonia
- Finland
- Georgia
- Greece
- Guernsey
- Hong Kong
- Hungary
- Iceland
- Isle of Man
- Jersey
- Korea
- Latvia
- Liechtenstein
- Malta
- Mauritius
- Monaco
- Morocco
- Oman
- Pakistan
- Panama
- Poland
- Qatar
- Seychelles
- Sweden
- Switzerland
- United Arab Emirates

**Does not want MLI Article**

**Want MLI Article**
- Article 13-No Option
- Article 13-Option A
- Article 13-Option B

**As of 31 December 2020**
Article 13 (specific activity exemptions)

Highlighted Jurisdictions
- Chile
- Portugal
- United Kingdom

As of 31 December 2020

Deposits
Entry into force
General overview PE positions
Article 12 (agency PE)
Article 13 (specific activity exemptions)
Article 14 (contract splitting rule)

Does not want MLI Article
Want MLI Article 13-No Option
Want MLI Article 13-Option A
Want MLI Article 13-Option B

Want MLI Article
Want MLI Article 13-No Option
Want MLI Article 13-Option A
Want MLI Article 13-Option B
As of 31 December 2020

Option A: The list of activities, or the combination thereof, is restricted to activities of a preparatory or auxiliary character.

Highlighted Jurisdictions
- Argentina
- Armenia
- Australia
- Austria
- Burkina Faso
- Cameroon
- Colombia
- Costa Rica
- Côte d’Ivoire
- Croatia
- Curacao
- Denmark
- Egypt
- Fiji
- Gabon
- Germany
- India
- Indonesia
- Israel
- Italy
- Jamaica
- Japan
- Jordan
- Kazakhstan
- Kenya
- Kuwait
- Macedonia
- Malaysia
- Mexico
- Netherlands
- New Zealand
- Nigeria
- Norway
- Papua New Guinea
- Peru
- Romania
- Russia
- Saudi Arabia
- Senegal
- Serbia
- Slovakia
- Slovenia
- South Africa
- Spain
- Tunisia
- Turkey
- Ukraine
- Uruguay

Jurisdictions that chose not to apply an anti-fragmentation clause: Austria and Germany

Does not want MLI Article 13-No Option
Want MLI Article 13-Option A
Want MLI Article 13-Option B
Want MLI Article 13-Option B

Want MLI Article 13-No Option
Does not want MLI Article 13-No Option
Want MLI Article 13-Option A
Want MLI Article 13-Option B
Option B: The list of activities are considered intrinsically preparatory or auxiliary.
Over the past years, there has been an increase in the number of tax audits, tax assessments and court cases for cross-border transactions. This increase in controversy has also impacted the concept of PE.

Multiple court cases have provided precedence not only to the country in dispute but potentially also to foreign courts or tax authorities that may use the precedence as support for similar cases.

With respect to case law, cases have been highly focused on the existence of a PE, in particular with respect to cases dealing with the conclusion of contracts on behalf of the nonresident company. Some of these cases may have significant implications and set new precedence. For example, in a French case, the Supreme Administrative Court decided in favor of the tax authorities as if the tax treaty followed the new language from agency PE included the OECD MTC 2017. However, the tax treaty in dispute does not include the new agency PE provision. Therefore, the outcome of this case is a very important development in the interpretation and application of tax treaties from a French perspective, in particular tax treaties that do not follow the language from the MLI or the OECD MTC 2017.

In the coming years, companies may encounter more controversy on PE as a result of both the initial BEPS project that recommended a number of changes to the PE definition included in the OECD MTC as well as the MLI. Consequently, these changes may impact how tax authorities assess taxing rights and the existence of a PE. Also, as mentioned in the latest Transfer Pricing and International Tax Survey from EY, the attribution of profits to a PE is predicted to be the most important area of PE controversy through 2021. Finally, the new OECD project (BEPS 2.0) aims at addressing situations where the traditional PE definition would not create a nexus for the nonresident, which may lead to changes in the domestic and international rules.
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**India**

In October 2020, the Income Tax Appellate Tribunal (ITAT) of India rendered its decision in a case where a nonresident entity was engaged in the business of selling advertisement time from Mauritius. An entity in India entered into agreement with the nonresident entity to purchase ad time and subsequently allot it to various Indian advertisers or agencies in India. Further, the transaction between the nonresident entity taxpayer and entity in India was at arm’s length and the nonresident entity had no other office or operations in India. The Assessment Officer contended that the entity in India exclusively worked as an agent for the nonresident entity and therefore the nonresident entity had a dependent agent PE (DAPE) and sought to attribute 30% of gross revenue to the deemed DAPE. The ITAT, without determining whether the taxpayer created a DAPE in India, held that if the entity in India is remunerated at arm’s length, then no further attribution of profits can be made in the hands of the taxpayer, even where a PE is created. More details are available here.

In July 2020, the Supreme Court of India rendered a decision where a company incorporated in South Korea, set up a project office (PO) in India to act as a “communication channel” between the company in South Korea and its customer. The activities undertaken by the PO comprised coordinating and executing the delivery of documents in connection with the construction of an offshore platform modification. The PO was not involved in the coordination or execution of the entire project itself and had just two employees, neither of whom was qualified to perform any core activities of the taxpayer. The Supreme Court ruled in favor of the taxpayer that the activities performed by the PO did not give rise to a fixed place PE and were of a preparatory or auxiliary character. The Supreme Court reasoned that the PO was not a fixed place of business through which the core business of the taxpayer was wholly or partly carried on; the PO was an auxiliary office meant to act as a liaison office between the taxpayer and its customer. More details are available here.

Contact: Aastha Jain
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### Korea

In June 2020, the Supreme Court of South Korea rendered a decision addressing the attribution of profits to a PE in South Korea. In this case, a nonresident entity operating as a junket operator, was engaged by a South Korea casino operator to bring in overseas high rollers to play at the casino. Some employees of the Philippines company provided guidance to the high rollers and exchanged casino tokens in an office forming part of the casino.

The Supreme Court ruled in favor of the taxpayer and upheld that although the business activities of the Philippines company can constitute a PE in South Korea, the amount of profits attributable to the PE should be assessed under a functional analysis. The Korean tax authorities failed to prove through an objective analysis that the main activities performed by the Philippines company, were performed in South Korea. Therefore, the Supreme Court ordered annulment of the tax authorities' assessment in its entirety. More details are available here.

Contact: Nam Wun Jang
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Case Law

United Kingdom

In August 2020, the UK Court of Appeal held that HMRC could use a Capital Attribution Tax Adjustment (CATA) to determine the profits of two British branches of Irish banks. According to the Court, the use of a CATA was consistent with the provisions of the tax treaty between Ireland and the UK. The taxpayers failed to demonstrate that the provisions of the tax treaty prevented the use of a CATA. More details are available here.

Contact: Paul Macdonald
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**Chile**

In August 2020, the Chilean Internal Revenue Service (IRS) published a tax ruling analyzing the tax treatment of the termination of a PE in Chile. In this ruling, a nonresident company carries out activities in Chile through a PE and decided to incorporate a new company in Chile via its PE, after which, the PE would cease to exist.

The Chilean IRS indicated that after the termination of a PE, the nonresident company should consider the following: i) any accumulated profits of the PE will be subject to corporate income tax; ii) notwithstanding that the tax authority understands that there is no transfer upon the assignment of shares, since the head office and the PE configure the same legal entity, the assessment faculty by the Chilean IRS if the assignment is substantially lower than fair market value would still apply; and iii) upon termination of the PE, a withholding tax will apply on the distribution of profits made by the new incorporated company to the nonresident company.

Contact: Mariela Gonzalez

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**Tax rulings**

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### Tax rulings

#### Denmark

In September 2020, the Danish Tax Board (DTB) published a binding tax ruling analyzing whether a data center in Denmark, owned and operated by a Danish company, constitutes a PE in Denmark for a nonresident company. In this tax ruling, the Danish company owns, leases and operates servers and other equipment. The servers and other equipment will be used by the nonresident company for hosting the website and related activity. Moreover, the Danish company’s employees are responsible for installation, operation, maintenance under the instructions of the Danish company and do not conclude contracts on behalf of the nonresident company. The DTB indicated that the nonresident company would not create a PE in Denmark under the fixed place of business or agency PE provision. More details are available here.

In October 2020, the DTB published a binding tax ruling analyzing whether an employee of a UK company working once a week from his home office in Denmark constitutes a PE for the UK company. As per the tax ruling, the UK company allowed the employee to work from his home office in Denmark on Fridays, whereas he would continue to work from the office in the UK for four days a week. The employee's move to Denmark is not required by the UK company and the employee will still be working from UK most of his time. Moreover, the UK company does not have any business interest in the employee performing part of his work in Denmark, since the sole purpose of working from there is due to the employee's personal reasons. Therefore, the DTB found that the UK company does not have a PE in Denmark. More details are available here.

Contact: Malte Soegaard
Controversy

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Tax rulings

Peru

In October 2020, the Peruvian tax authorities published a tax ruling addressing the tax consequences of a merger between two nonresident entities in which the absorbed entity has a PE in Peru. The ruling concludes that: (i) The PE will not have to obtain a new tax ID; (ii) The merger of the two nonresident entities will not have tax effects for the PE in Peru; and (iii) The absorbed entity will be taxed in Peru on the income from the transfer of the PE because the income qualifies as Peruvian-sourced income. More details are available here.

Contact: Ramon Bueno-Tizon
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### Tax rulings

**Turkey**

In April 2020, the Turkish Revenue Administration (TRA) published a tax Ruling to determine if an individual would have a taxable presence in Turkey for the provision of digital services to his Turkish customers. The TRA responded that the activities carried out on a continuous basis by the individual may potentially earn income, and therefore, the individual would be considered to be engaged in commercial activities in Turkey. Further, the TRA clarified that the domestic definition of a place of business is not exhaustive and a website could also be a place for the purposes of performing commercial activities. In light of this, the TRA concluded that the individual has a taxable presence in Turkey and would be subject to tax in Turkey. More details are available [here](#).

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