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Unpacking the Home Office Permanent Establishment Guidance under the 2025 Update to the OECD Model

This article critically examines the new guidance on home office permanent establishments under the 2025 update to the OECD Model, identifying both its strengths and weaknesses and assessing its practical implications for existing treaties.

1. Introduction

From an international tax perspective, one of the main challenges arising from individuals working remotely across borders from a home office or another location – such as a second home, a holiday rental or a friend's or relative's house (hereafter collectively referred to as a "home office") – is determining whether such a location may constitute a permanent establishment (PE) under article 5(1) of tax treaties. In other words, the question is whether the individual's home office constitutes a fixed place of business through which the business of a foreign enterprise is wholly or partly carried on ("fixed place PE").

To address this issue, on 19 November 2025, the OECD released the 2025 Update to its Model Tax Convention (OECD Model), which was approved by the OECD Council on 18 November 2025 (2025 Update).[1] Among other things, the 2025 Update introduces revisions to the Commentary on Article 5.1 of the OECD Model to clarify the circumstances under which an individual engaged in cross-border home office work arrangements ("cross-border remote work") may create a fixed place PE of the enterprise in such locations (2025 Commentary).

This article contextualizes and analyses these revisions. Section 2. discusses the specific challenges raised by cross-border remote work to the fixed place PE concept, both before and after the first guidance on this topic included in the Commentary to Article 5.1 under the 2017 Update to the OECD Model (2017 Commentary and 2017 Update, respectively). Section 3. provides a short overview of the new home office PE guidance under the 2025 Update, the examples included therein and countries' specific reservations and positions. Section 4. makes some critical observations about the 2025 Commentary and assesses its implications considering the pre-existing guidance. Section 5. discusses the practical implications of the 2025 Commentary on existing treaties. Finally, section 6. provides an overall conclusion to the article.

The article does not discuss issues related to agency or service PE risks raised by cross-border remote work or to the allocation of profits to PEs, as these topics are not covered by the 2025 Update and deserve separate attention.

2. The Challenges Raised by the "Disposal" Requirement in the Determination of a Home Office PE

2.1. Introductory remarks

Article 5.1 of the OECD Model defines a PE as "a fixed place of business through which the business of an enterprise is wholly or partially carried on". For a fixed place PE to exist, the following three cumulative conditions must be met: (i) there must be a "place of business", which must also be at the enterprise's "disposal";[2] (ii) the place

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1. OECD, *The 2025 Update to the OECD Model Tax Convention* (OECD Publishing, 2025), https://doi.org/10.1787/5798080f-en.

2. The term "place of business" covers any premises, facilities or installations used for carrying on the business of the enterprise, whether or not they are used exclusively for that purpose. Thus, a place of business may also exist where no premises are available but there is a certain amount of space at the enterprise's disposal. In this context, "disposal" is understood as the power (or a certain fraction thereof) to use the place of business directly. No formal legal right to use that place is required and, in general, there are no absolute standards for the modalities and intensity of control required (as the standards depend on the type of business activity at issue). However, the mere presence of an enterprise at a particular location does not necessarily mean that that location is "at the disposal". For disposal to exist, the location must be under the control of the enterprise, and its control should be of a considerable amount (i.e. where the foreign entity can employ the place of business at its discretion). Pursuant to paragraph 12 of the Commentary to Article 5.1 of the OECD Model, whether a location may be considered to be at the disposal of an enterprise will depend on that enterprise having (i) the effective power to use that location, (ii) the extent of the presence of the enterprise at that location and (iii) the activities it performs there. The OECD Commentary provides specific examples to illustrate these requirements mainly related to cases where representatives of one enterprise are present on the premises of another enterprise (Ekkehart Reimer, "Article 5(1) OECD and UN MC," in *Klaus Vogel on Double Taxation Conventions*, 5th ed., ed. Ekkehart Reimer and Alexander Rust (Wolters Kluwer, 2021), 106; Jonathan S. Schwarz, "Permanent Establishment: Geographic and Temporal Issues," in *New Trends in the Definition of Permanent Establishment*, ed. Guglielmo Maisto (IBFD, 2019), chap. 3, https://doi.org/10.59403/2fmgqwn003.

of business must be "fixed", both geographically and temporally;[3] and (iii) the business activity must be conducted wholly or partially "through" that place of business (the "through which" requirement).[4]

In the context of cross-border remote work, the main challenges regarding the assessment of the fixed place PE requirements mentioned in points (i) to (iii) above traditionally arose in relation to the determination of whether there is a place of business that is at the enterprise's "disposal". This is mainly because, as recognized by other scholars,[5] there was usually little doubt that, first, the home office constitutes a place of business, since this concept is interpreted very broadly and encompasses almost any physical location through which an enterprise carries on its business. Second, the specific location (i.e. a home, vacation or shared office) is usually considered "fixed" both geographically and, in most cases, temporally, given that cross-border remote work may easily last longer than six months. Third, in most cases, remote workers carry on the business of the enterprise through that location, at least where the work involves intellectual tasks that can be performed using a laptop, telephone and Internet connection.

Accordingly, the discussion in section 2.2. focuses on what has historically been the most complex and debated element of a PE determination under article 5.1 in cases involving cross-border remote work, namely, the "disposal" requirement. It is important to note that, as discussed in section 3.3., the new OECD guidance introduced in the 2025 Update no longer focuses on the term "disposal", raising uncertainties about whether this element remains a central requirement for PE determination in the context of cross-border remote work.

Given the long-identified and widely discussed difficulties in interpreting and applying the "disposal" requirement under the fixed place PE concept in cross-border remote work cases and the evolution of these discussions over time, the following sections 2.2.- 2.5. address this specific issue by considering the situation both before and after the 2017 Commentary to Article 5.1 introduced specific guidance on this topic.

2.2. The situation before the 2017 Commentary

Prior to the 2017 Update, the Commentaries to the OECD Model provided no specific guidance on the disposal requirement[6] or on how the PE rules applied to cross-border remote work. Nevertheless, at that time, scholars had already emphasized that:

> A home office of a resident employee of a non-resident enterprise may qualify as a fixed place of business. The question will be, however, whether or not the resident employee's home office is at the employer's disposal. Without any evidence to the contrary, the starting point must be that the private home of an employee is not at the disposal of the employer, even if the employee is doing some work at home. This applies even more so if the residence is used only occasionally. An employee's work at home does not meet the right of use test for the employer and does not therefore create a PE, unless specific requirements are met.[7]

Because of this lack of OECD guidance in the Commentaries, before 2017, diverse criteria and indicia were unilaterally developed by jurisdictions to determine the existence of "disposal" over the place of business under article 5.1. The criteria and indicators used by various countries until 2017 ranged from considering the enterprise's permanent and uncontested right over the employee's home office as the decisive factor (e.g. Germany)[8] to focusing on factors such as the degree of permanence and whether the enterprise provided equipment to the employee (e.g. the Netherlands),[9] the enterprise's unrestricted access to the employee's home (e.g. Canada),[10] the mere provision of equipment or a space to the employee (e.g. Norway),[11] the professional use of the location by the employee (e.g. Austria)[12] and whether there was a legal or factual requirement to work from home combined with the absence of an office provided by the employer (e.g. Sweden).[13] As identified by Pistone and Tenore, the pre-2017 case law on this

It must be observed that, pursuant to some scholars, the "disposal" requirement does not arise from the place of business test but follows, in a restrictive sense, from the term "through" of article 5.1, meaning that the taxpayer will not be able to use the place of business as an instrument for the carrying on of a business without controlling the place of business to a considerable extent (Ekkehart Reimer, "Article 5(1) OECD and UN MC," in *Klaus Vogel on Double Taxation Conventions*, 5th ed., ed. Ekkehart Reimer and Alexander Rust (Wolters Kluwer, 2021), 106.

3. This means that, on the one hand, there must be a link between the place of business and a specific and distinctive geographical point that does not need to be actually fixed to the soil (depending the nature of the business, a particular location within which activities are moved may be identified as constituting a coherent whole, commercially and geographically, with respect to that business), and, on the other hand, there must be certain degree of permanence (not of purely temporary nature) that, in general and depending on the nature of the business, is assessed under a six-month threshold (OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD, 2019), Commentary on Article 5(1), paras. 10-11, https://doi.org/10.1787/g2g972ee-en.
4. According to the OECD Commentary, the words "through which" must be given a wide meaning so as to apply to any situation where business activities are carried on at a particular location that is "at the disposal" of the enterprise for that purpose (OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD, 2019), Commentary on Article 5(1), para. 20, https://doi.org/10.1787/g2g972ee-en.
5. Luc De Broe and David Bettens, "Earth to OECD: Exercise Restraint in Marking a Home Office as PE," *Intertax* 52, no. 12 (2024): 762, https://kluwerlawonline.com/journalarticle/Intertax/52.1/TAXI2024080.
6. Paragraph 12 of the 2017 Commentary corresponds to part of the old paragraph 4.2 added on 28 January 2003. The earlier text did not include the clarification on the conditions required for the existence of "disposal".
7. Brian J. Arnold and Jacques Sasseville, *The Definition of Permanent Establishment: Eroding or Evolving?* (International Fiscal Association (Canadian Branch), Travelling Lectureship Program, materials for participants, 2009), 37, https://ifacanada.org/wp-content/uploads/attachments/T%20LectureshipMaterials2010.pdf.
8. Bundesfinanzhof (Germany), 3 February 1993, I R 80-81/91.
9. Hoge Raad der Nederlanden (Supreme Court of the Netherlands), 13 March 1957, BNB 1957/144.
10. Tax Court of Canada, 16 May 2008, *American Income Life Insurance Company*, ITLR 2008, 52; Tax Court of Canada, 16 May 2008, *Knights of Columbus*, ITLR 2008, 827.
11. Supreme Court of Norway, HR-2009-2145-A (Rt. 2009 s. 1400).
12. Verwaltungsgerichtshof (Austria), 12 June 1985, 83/13/0158; Verwaltungsgerichtshof (Austria), 25 February 1987, 84/13/0053; Verwaltungsgerichtshof (Austria), 1 October 1991, 90/14/0257; Bundesministerium für Finanzen (Austria), *Einkommensteuerrichtlinien 2000* (7 May 2018), para. 7926; Bundesministerium für Finanzen (Austria), "Homeoffice als Betriebsstätte," Express Antwort Service, no. 3415 (27 June 2019).
13. Kammarrätten i Stockholm (Sweden), 14 December 2015, *Digital Envoy*, case no. 6856-14.

issue developed along two different lines that have been identified as "opened" and "restrictive" approaches.[14]

2.3. The guidance on home office PE under the 2017 Commentary

The first time that the OECD addressed the issue of whether an employee's home office could constitute a PE for a foreign company was in its 2011-2012 public consultation document titled "The Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention".[15] In this document, the OECD highlighted that this question related to the meaning of "disposal" and acknowledged that it required further analysis and clarification in the Commentary. Furthermore, it proposed specific guidance to address the issue,[16] which was ultimately not incorporated into the 2014 Update of the OECD Model but was later incorporated into paragraphs 18 and 19 of the 2017 Commentary.

Paragraph 18 of the 2017 Commentary first noted that no automatic conclusion can be drawn on this aspect because the answer will depend on the facts and circumstances of the case. Second, it indicated that "disposal" requires a certain degree of continuity of the business activities at the home of an individual (not intermittent or incidental activities) without specifying a specific benchmark for assessing it.

Regarding this specific aspect of continuity under the "disposal" requirement, scholars have adopted different interpretations. On the one hand, authors such as De Broe and Bettens note that:

> This condition should be distinguished from the condition that the business location must be "fixed" in time. Unlike that condition, the non-occasional character refers to the frequency of the performance of the business activity rather than its duration. Nevertheless, there is some connection between the two conditions since a sufficiently repetitive exercise of an inherently short-lived activity over a certain period of time can also lead to the presence of sufficient permanence.[17]

On the other hand, authors such as Baez Moreno argue that, while it is beyond doubt that the occasional provision of services by employees from their homes is unlikely to give rise to a PE, the OECD Commentary makes a significant legal error by confusing two distinct normative elements of the PE concept: the "fixed" and the "disposal" requirements under the "place of business".[18]

In the author's view, in line with De Broe and Bettens, the disposal requirement does contain a temporal requirement of continuity (no intermittent nor incidental activities), which differs from that of duration related to the "fixed" place of business requirement. However, because the "continuity" element of the disposal requirement and the "permanence" element of the "fixed" requirement are evidently interrelated, the inclusion of these two temporal elements under the fixed place PE notion evidently creates difficulties. In any event, since the 2017 Commentary did not specify what "continuity" under the "disposal" requirement meant (i.e. how often or for how long home office work must occur to conclude that there is disposal), divergent views on this element emerged among countries (*see* section 2.4.).

Third, paragraph 18 of the 2017 Commentary stated that, where a home office is used on a continuous basis for carrying on business activities for an enterprise, it is also necessary that the enterprise require the individual (either formally or de facto) to use that location to carry on the enterprise's business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office). The latter example provided by the 2017 Commentary did not seem appropriate for cross-border remote work, for which, usually, an office is not required because the activities of the employee can easily be performed with a laptop and an Internet connection. In any event, scholars have interpreted the guidance included in paragraph 18 as being based on the understanding that, if the enterprise imposes an obligation to work from the home office, it will exercise an influence over the intended use of that space and, therefore, it is more plausible to argue that the former exercises control over such a place and has some authority to use it freely.[19]

14. One the one hand, some countries adopted an open approach according to which a home office may constitute a PE if it is "at the disposal" of the employer on a permanent basis and is furnished for the needs of the employee (e.g. the Netherlands and Norway). On the other hand, other countries followed a restrictive approach limiting the cases of home office PE to strict and exceptional circumstances, such as requiring the working space to be legally at the disposal of the enterprise (e.g. Germany) or requiring both a contractual obligation to use the home office and a reimbursement of the relevant costs (e.g. Switzerland). Pasquale Pistone and Marco Tenore, "General Report," in *Mobility of Work*, ed. Georg Kofler et al. (Amsterdam: IBFD, 2024), 27-34; Leonardo Thomaz Pignatari, "International Mobility of Work and Its Tax Challenges," *Revista Direito Tributário Internacional Atual* (RDTIA) (Num. 14/2025) (2025): 186, https://revista.ibdt.org.br/index.php/RDTIAtual/article/view/2779.
15. OECD, *The Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention* (OECD, 2011), 12-13 (Primary Sources IBFD).
16. In the 2011-2012 document, the OECD already clarified that (i) the mere fact that part of an enterprise's business is carried on at an individual's home office does not automatically mean that such place is at the disposal of the enterprise, (ii) whether a home office constitutes a location at the disposal of the enterprise depends on the facts and circumstances of each case, (iii) in many cases, business activities at an individual's home will be so intermittent or incidental that the home will not be considered at the disposal of the enterprise, (iv) where a home office is used on a regular and continuous basis for carrying on business activities for an enterprise, and it is clear from the facts and circumstances that the enterprise has required the individual to work from home, the home office may be considered to be at the disposal of the enterprise and (v) the OECD provided illustrative examples to clarify these principles (OECD, *The Interpretation and Application of Article 5*, 12-13).
17. De Broe and Bettens, Earth to OECD, 763.
18. Baez Moreno further argues that, although this confusion might appear inconsequential – since the conclusion in such cases will typically be the absence of a PE due to a lack of permanence, fixed nature or availability – it is not a trivial matter. This conflation exacerbates the already considerable uncertainty surrounding the so-called "disposal" requirement for a place of business. The author further notes that, indeed, in the example of a home office PE, the OECD Commentary raises the question of whether it fails to clearly distinguish between the requirement of temporal permanence or fixedness and the requirement that the place be at the disposal of the non-resident taxpayer. Andrés Báez Moreno, "Tomando en serio las palabras y las finalidades de la ley: A propósito del teletrabajo y los establecimientos permanentes," in *Direito Tributário: Estudos em Homenagem ao Professor Luís Eduardo Schoueri* (ed., São Paulo: NSM, 2023), 476-77.
19. De Broe and Bettens, Earth to OECD, 763.

In turn, paragraph 19 of the 2017 Commentary provided two examples to illustrate the conditions under the "disposal" requirement (i.e. continuity and a requirement to work from home), which concerned a non-resident consultant[20] and cross-frontier worker.[21] Via the non-resident consultant example, it was clarified that individual entrepreneurs carrying on their own business activities in a location (e.g. a room in a hotel or rented apartment) outside their state of residence will undeniably be considered to have such a location at their disposal and, thus, create a PE. Finally, paragraph 19 noted that, because most employees work in states where their employer has business premises, the status of a home office as an enterprise location "will rarely be a practical issue". Moreover, it noted that the activities carried on at a home office will often be merely preparatory and auxiliary and will therefore fall within the exception of article 5.4.

Following the 2017 Update, and triggered by the COVID-19 pandemic, on 3 April 2020 and 21 January 2021, the OECD issued two ad hoc documents with a second set of guidelines on home office PE cases.[22] These documents reaffirmed the principles set out in the 2017 Commentary and aimed to provide greater legal certainty on the circumstances under which a PE may be deemed to arise. Regarding the fixed-place PE concept (article 5.1), the documents stated that the lack of permanence during the lockdown period may affect the determination of a PE; however, they highlighted that such assessments may change once the lockdown is over.[23]

It should be noted that the guidance on home office PE provided by the OECD in both the 2017 Commentary and the ad hoc COVID-19 guidance has been strongly criticized by the doctrine (*see* section 2.5.).[24]

2.4. Countries' approach after the 2017 Commentary

In the context discussed above, it is not surprising that, as of 2017, the case law and administrative practice on home office PE developed divergently among jurisdictions without necessarily following the two conditions for assessing "disposal" that can be extracted from the 2017 Commentary.

A comparative analysis of national approaches as of 2017 reveals some overlaps but also significant diversity in the interpretation of the "disposal" requirement under article 5.1 of the OECD Model, particularly as it applies to cross-border remote work. This has been recognized by scholars such as De Broe and Bettens, who also acknowledge that such divergent interpretations have led to different country practices in recognizing home office PEs.[25]

For example, in countries such as Sweden, the determining factors for concluding on the disposal and PE qualification of a home office are the explicit or implicit requirement by the employer to work from home, as well as the availability of offices for the employee.[26] Interestingly, in this country, whenever the requirement to work from home is implicit, consideration is given to whether there are advantages for the non-resident employer if the employee works from Sweden.[27] Norway also considers possible advantages of home office work for the employer, as well as both the requirement to work from home and employer-provided compensation.[28] Denmark evaluates the existence of other workspaces, the regularity of home office use and the employer's business interest.[29] Across Europe, further nuances emerge. For instance, Germany requires a legal or de facto right of disposal that is both permanent and undisputed;[30] Austria looks to the effective right of use – including obligation to work from home, cost coverage and external signs – alongside continuity (typically greater than 25%-50% of working time);[31] and

20. The first example provided by paragraph 19 of the 2017 Commentary to Article 5.1 states:

    > a non-resident consultant who is present for an extended period in a given State where she carries on most of the business activities of her own consulting enterprise from an office set up in her home in that State; in that case, that home office constitutes a location at the disposal of the enterprise

    (OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, Commentary on Article 5(1), para. 19, https://doi.org/10.1787/g2g972ee-en).
21. The second example provided by paragraph 19 of the 2017 Commentary to Article 5.1 states:

    > Where, however, a cross-frontier worker performs most of his work from his home situated in one State rather than from the office made available to him in the other State, one should not consider that the home is at the disposal of the enterprise because the enterprise did not require that the home be used for its business activities.

    (OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, Commentary on Article 5(1), para. 19, https://doi.org/10.1787/g2g972ee-en).
22. OECD, *OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis* (OECD Publishing, 3 April 2020), https://www.oecd.org/en/publications/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis_947dcb01-en.html; OECD, *Updated Guidance on Tax Treaties and the Impact of the COVID-19 Pandemic* (OECD Publishing, 21 January 2021), https://www.oecd.org/en/publications/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic_df42be07-en.html.
23. Similarly, in relation to the personal/agency PE concept (article 5.5), the guidance noted that the absence of regularity during the lockdown period suggests that a PE may not be created, though this conclusion may differ after the lockdown ends.
24. The main criticism is that assessing the existence of a PE based on the "at the disposal" criterion is inherently problematic given the absence of this criterion in the text of article 5.1, and the lack of consistent interpretation of this element in the Commentaries, which has led scholars to call the latter "schizophrenic".
    Andrés Báez Moreno, "COVID-19 and Fiscal Policies: Unnecessary and Yet Harmful: Some Critical Remarks to the OECD Note on the Impact of the COVID-19 Crisis on Tax Treaties," *Intertax* 48, no. 8 (2020): 818, https://kluwerlawonline.com/journalarticle/Intertax/48.8%2F9/TAXI2020080.
25. De Broe and Bettens, Earth to OECD, 762-63.
26. Kammarrätten i Stockholm (Sweden), 14 December 2015, *Digital Envoy*, case no. 6856-14, cited in De Broe and Bettens, Earth to OECD, 766.
27. Swedish Tax Agency, "När medför en anställds arbete i hemmet att ett utländskt företag får fast driftställe?," position statement, dnr 8-1677220 (13 May 2022).
28. Stavanger City Court (Norway), in Utv. 2000 at 143 as cited in De Broe and Bettens, Earth to OECD, 766; and Arvid A. Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle*, second ed., Alphen aan den Rijn, Kluwer Law International 2020). 286-87.
29. Anders Endicott Pedersen, "Denmark – Permanent Establishments," Country Tax Guides IBFD, accessed 10 November 2025.
30. De Broe and Bettens, Earth to OECD, 763.
31. Bundesministerium der Finanzen (Germany), "Verkaufsmanager mit Arbeitsplatz in der privaten Wohnung," Express Antwort Service, no. 3323 (8 April 2013); Bundesministerium der Finanzen (Germany), "Vorliegen einer inländischen Betriebsstätte bei inländischem 'Home Office'," Express Antwort Service, no. 3392 (6 November 2017); Bundesministerium der Finanzen (Germany), "Homeoffice als Betriebsstätte," Express Antwort Service, no. 3415 (27 June 2019); Bundesministerium der Finanzen (Germany), *Transfer Pricing Guidelines 2021*, no. 140/2021 (7 October 2021), para. 262; Bundesministerium der Finanzen

Belgium focuses on the mandatory nature of home office work, which must be required at a specific location and established as a contractual obligation.[32]

Spain considers the employer's initiative and cost coverage;[33] Poland focuses on the employer's provision of workplace materials such as laptops;[34] and Switzerland maintains a narrow definition by looking at whether there is a formal right of the employer to use (a part of) the employee's home (and not at whether employees are obliged to work from home or if there are workplace spaces available).[35]

An interesting experience in this regard is the Belgian-Netherlands agreement of 23 November 2023,[36] which – among other things – offers a specific framework (the "Agreement") for assessing when a home office may be considered a PE under the countries' bilateral tax treaty in cross-border teleworking arrangements.

The Agreement establishes a distinction between incidental and structural teleworking. It states that occasional or ad hoc remote work does not create a PE, as it lacks continuity and employer control. By contrast, structural teleworking – regular work performed from home – requires further examination. The Agreement provides that, when home working is chosen by the employee, and the employer maintains an office in the employer's residence state, the home office is generally not a PE because the employer does not have the required "power of disposal" over the workspace. The Agreement further establishes that a factual or contractual obligation to work from home may give the employer such power of disposal, potentially leading to a PE. It identifies relevant indicators, including a contractual requirement to telework, the absence of a suitable office in the employer's residence state or circumstances preventing the employee from unilaterally ending the home office arrangement. It also provides that the PE assessment must be carried out individually for each employee and specifies that financial support or the provision of IT equipment is not decisive.

In addition, the Agreement establishes a practical threshold. A home office should not be regarded as a PE for employees who telework 50% or less of their working time over a 12-month period, as this amount of telework is not considered sufficiently permanent. The Agreement also confirms that the preparatory or auxiliary activity exemption remains applicable, so functions such as HR, IT support, or internal accounting do not give rise to a PE even when performed from a home office.

The overview of countries' approaches described above demonstrates that – both before and after the 2017 Commentary – the assessment of whether the home office constituted a PE under article 5.1. was mainly dependent on whether the home office was deemed to be at the "disposal" of the non-resident enterprise, which, in practice, was determined by a divergent constellation of factors. This diversity in national practices already showed the challenges in applying the fixed-place PE concept to cross-border remote work and highlighted the need for clear, harmonized and more appropriate guidance that can be applied in a consistent and practicable manner.

2.5. Inadequacy of the criteria chosen by the 2017 Commentary and its consequences

The OECD guidance on PE configuration in cross-border remote work cases included in the 2017 Commentary raised significant complexities and divergent interpretations among countries. This guidance has been strongly criticized in the literature for, among other things, lacking normative support (as this element does not arise from the wording of article 5.1. but from its Commentary), being vague,[37] irrationally specified and raising significant problems of practical application.[38]

Pursuant to the 2017 Commentary, if one would assume that both the "fixed" and "through which" requirements under article 5.1. are met, the key conditions that needed to be met to conclude that a home office is at the enterprise's "disposal" and, therefore, constitutes a place of business and a fixed place PE were the existence of:
- continuity (not intermittent or incidental activities), which as mentioned above was not specified in the Commentary, and, therefore, it was unclear what such continuity meant (i.e. how often or for how long home office work must occur to conclude that there is "disposal"); and
- a legal or de facto requirement of the employer to work from home, which – pursuant to the interpretation of some authors[39] and countries[40] – aimed to identify the existence of an "effective power of use" of the individual's home by the non-resident enterprise,

(Germany), "(Keine) Homeoffice-Betriebsstätte einer geschäftsleitenden Holding," Express Antwort Service, no. 3445 (7 July 2023).

32. Ruling, 9 May 2023, no. 2023.0622, cited in De Broe and Bettens, Earth to OECD, 768.
33. Dirección General de Tributos (Spain), Consulta Vinculante V0066-22, 18 January 2022, para. 19; Carolina Puerta Ruiz de Azúa and Tomás Morales Gil, "Taxation of Cross-Border Remote Work in Spain," 63 *European Taxation* 4 (2023): 151.
34. Wojciech Sztuba, "Poland – Permanent Establishments," Country Tax Guides IBFD, accessed 10 November 2025.
35. Jan Kläser, "Home-Office Tätigkeit und die Begründung einer steuerlichen Betriebsstätte–eine Bestandesaufnahme," *zsis* 4 (2022): art. 10, N 5 ff.; Stefan Pfenninger, Francesca Codoni, and Nadir Ezzaini, "*Home-Office und Risiken der Begründung einer steuerlichen Betriebsstätte*," Tax Partner AG, February 22, 2023, https://taxpartner.ch/home-office-und-risiken-der-begruendung-einer-steuerlichen-betriebsstaette/.
36. Agreement 23 Nov. 2023 between the competent authorities of the Netherlands and Belgium on the interpretation of Art. 5 of the tax treaty (permanent establishment) in the case of employees working from home. Government Gazette of the Kingdom of the Netherlands, 08-12-2023, Government Gazette 2023, 33856 | Overheid.nl > Official Announcements.
37. De Broe and Bettens, Earth to OECD, 762-63.
38. De Broe and Bettens, Earth to OECD, 762-63; Báez Moreno, "Tomando en serio las palabras," 477-81.
39. As suggested by Ekkehart Reimer, "Article 5(1) OECD and UN MC," in *Klaus Vogel on Double Taxation Conventions*, 5th ed., ed. Ekkehart Reimer and Alexander Rust (Wolters Kluwer, 2021), m. no. 129; De Broe and Bettens, Earth to OECD, 772.
40. As noted by the doctrine, in Austria, alignment with OECD 2017 guidelines has been sought, and the enterprise "effective right of use" is found to exist when an obligation to work from home is imposed either legally or de facto (De Broe and Bettens, Earth to OECD, 766).

or whether the taxpayer enterprise has a prevailing interest in the home office.[41]

However, in the author's view, the two criteria on which the 2017 Commentary relied to assess "disposal" were neither appropriate nor fit for the purpose of the fixed place PE determination in the context of cross-border remote work.

In the case of the first criterion, this is because the lack of a specific working time threshold to assess "continuity" (such as that foreseen by Austria and the Belgian-Dutch Agreement) left room for unclarities, divergent interpretations and arbitrary conclusions on the verification or not of this aspect. It should be noted that the 2025 Commentary partially addresses this issue by introducing a working time indicator, but one related to the broader place of business concept rather than to the disposal requirement (*see* section 3.4.1.).

Regarding the second criterion, neither the "effective power of use" notion nor its identification in home office cases with a "legal or de facto requirement of the employer to work from home" seem to be – in the author's view – appropriate and functional criteria to trigger the existence of a PE. This is mainly because, in most cross-border remote work, the first element (i.e. "power of use") becomes irrelevant since enterprises usually do not have a legal or a factual "power of use" of the private home of their employees.[42] Furthermore, the second element (i.e. an employer's requirement to work from home) was also flawed because, first, it does not per se imply that the employer has an effective "power of use" over the individual's home office, and, second, because it was not decisive to conclude that there is indeed a place of business of the foreign enterprise in the home office's jurisdiction (one should question the logical connection between the employer's requirement to work from home and the general conditions necessary to create a place of business). Moreover, this second element (i.e. employer's requirement to work from home) led to a sort of "PE à la carte" situation that allowed enterprises to choose whether or not to operate through a PE by focusing on purely formal aspects that are very easy to manipulate and difficult to control by tax authorities (e.g. how the latter can assess whether the cross-border remote work is the result of an agreement between the parties, a free decision of the employee tolerated by the employer or an imposition by the employer beyond the provisions agreed upon contractually, which can all be easily manipulated for convenience).[43] Additionally, this second element was also difficult to apply in practice.[44]

Thus, in the author's view, by not including specific guidance on the "continuity" criterion, and choosing as a second criterion the "employer's requirement to work from home" (which, as expressed above, seemed to be a proxy for the "effective power to use" element of the "disposal" requirement, but more importantly a non-decisive and easy-to-manipulate factor), the 2017 Commentary created more harm than good.

The consequences of the unclear and inconsistent interpretation of the "disposal" requirement and its criteria in the context of cross-border remote work are serious because they can lead to (i) uncertainty and double taxation if states do not agree with each other, (ii) the proliferation of micro-PEs with marginal profit allocations under the arm's-length standards laid down in article 7.2 and increased administrative burdens for enterprises and (iii) the existence of "PE à la carte" situations. Furthermore, as noted by De Broe and Bettens, these unintended outcomes generated by the 2017 Commentary do not seem to align with the underlying objectives of the PE notion or article 7 of tax treaties.[45]

3. The OECD's Guidance on Home Office PE under the 2025 Update

3.1. Introductory remarks

Responding to stakeholders' claims that the guidance on home office PE included in the 2017 Commentary was unclear, inadequate and outdated, the OECD decided to revise this guidance in the 2025 Update. This update is part of the OECD's broader "Global Mobility of Individuals" project launched in April 2025.[46]

In this context, on 19 November 2025, the Committee on Fiscal Affairs of the OECD's Centre for Tax Policy

41. Reimer, "Article 5(1) OECD and UN MC," 131.
42. As noted by other authors:

> The main argument against the existence of a PE is generally that the foreign company does not have any factual or legal right to carry on its activities in the private premises of an employee. This is particularly important when the agreement allows the employee to choose from where to work. Whether this is the case should be assessed, taking into account all of the facts and circumstances of the case at hand (especially the employment agreement).

(Pasquale Pistone & Mario Tenore, General Report in *Mobility of Work*, ed. Georg Kofler et al. (Amsterdam: IBFD, 2024), Books IBFD, https://doi.org/10.59403/9n3h11001).

43. Báez Moreno, "Tomando en serio las palabras," 480-81.
44. These practical challenges are discussed by Baez Moreno, who notes that the OECD Commentary (which frames the HO disposal for PE purposes in binary terms: either the employer requires remote work, or not) follows a rigid approach and introduces unpredictability in assessing PE status. Pursuant to this author, the OECD Commentaries' oversimplification of this issue fails to address intermediate cases (e.g. temporary office inaccessibility or partial expense reimbursement) that complicate practical application of the Commentaries. Furthermore, he notes that some scholars and case law suggest that employer-provided housing or cost coverage implies disposal and, thus a PE, even if no obligation to work from home exists. (Báez Moreno, "Tomando en serio las palabras," 479-80).
45. The PE notion pursues three core objectives: (i) granting taxing rights to the source state to the extent that a non-resident enterprise participates in its local economy in a significant and sustainable manner, benefiting from that state's infrastructure and services (benefit principle), (ii) determining the profit to which the taxing rights of the source state relate and (iii) limiting the enforcement and compliance costs of tax authorities and taxpayers by allowing taxation at source only when the business activity of the non-resident in the state has a certain minimum and sustainable scale (De Broe and Bettens, Earth to OECD, 761).
46. Statement by the OECD/G20 Inclusive Framework on BEPS, point 4 (April 2025), https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/statement-oecd-g20-inclusive-framework-on-beps-april-2025.pdf; OECD, "Global Mobility of Individuals: Public Consultation," OECD, accessed 12 December 2025, https://www.oecd.org/en/events/public-consultations/2025/11/global-mobility-of-individuals.html.

and Administration published the 2025 Update,[47] which, among other things, introduced revisions to the Commentary on Article 5.1 to clarify when an individual's home office can be considered a fixed place PE for the enterprise for which they work. The 2025 Update does not include any guidance on the application of article 5.5. of the OECD Model (agency PE) nor the service PE in the context of cross-border remote work. Such omission has been strongly criticized by other scholars.[48]

According to the OECD, the changes introduced by the 2025 Update are an evolution of existing principles and ensure that the commentaries reflect modern working arrangements, providing additional certainty as to when a fixed place PE will, and will not, be created by an individual working from a home or other relevant place.[49] As argued in sections 4.2.6. and 5.3. of this article, the "revisions" to the Commentary made by the 2025 Update represent a manifest policy change in the interpretation of the fixed place PE concept in cross-border remote work and go beyond mere clarifications.

Specifically, the 2025 Update deletes paragraphs 18 and 19 of the 2017 Commentary and introduces 21 new paragraphs (numbered 44.1 to 44.21) under the title "Cross-border working from a home or other relevant place". While the first 20 paragraphs (i.e. 44.1-44.20) provide general guidance on how article 5.1 applies to cross-border remote work, the final paragraph (i.e. 44.21) includes five examples (A-E) to help illustrate its application. Furthermore, the 2025 Update adds 7 new paragraphs to the Commentary on Article 5.1. (i.e. paragraphs 220-226) where specific countries' reservations and positions are included.

3.2. The context in which the OECD guidance applies

To start with, the 2025 Commentary offers some background information to clarify the context in which the specific guidance on home office PE should be interpreted.[50] Paragraph 44.1 first acknowledges that, increasingly, some individuals have the possibility and choose "for personal reasons" to carry out all or part of their work for an enterprise under cross-border working from home or other relevant places arrangements (cross-border remote work). In this regard, it notes that such arrangements imply cross-border work (i) carried out at either the individual's home or "other relevant place" such as a second home, a holiday rental, the home of a friend or relative and so on and (ii) performed from a place that is not the premises of the enterprise or the premises of another enterprise with contractual or other connections to the former (e.g. a customer, supplier or associated enterprise). Second, it recognizes that cross-border remote work poses specific challenges for article 5.1 in general. Surprisingly, no specific reference is made to the more controversial "disposal" requirement.

Furthermore, paragraph 44.2 recognizes the challenges associated with applying article 5.1 to the cross-border remote work by emphasizing certain distinguishing features relevant to these types of arrangements (e.g. that most homes or other relevant places are not accessible by the enterprise and have a closer connection to and greater control by the individual). As discussed in section 4.2.6., this clarification seems to support the OECD's shift from the "disposal requirement" to the broader place of business concept in the 2025 Commentary.

Moreover, paragraph 44.2 notes that "the considerations below are relevant, but not exhaustive" for determining whether a home or other relevant place qualifies as a PE under article 5.1., implying that other considerations can also be relevant for such purposes.

3.3. Restating existing guidance without referencing it to "disposal"

After providing this background, the 2025 Commentary restates considerations already included in the deleted paragraphs 18 and 19 of the 2017 Commentary (which were previously about "disposal" but are now in relation to the broader place of business requirement).

First, paragraph 44.3 refers to paragraph 8 of the Commentary to Article 5.1, noting that the determination of a PE should be based on present facts and circumstances (i.e. those applicable during a given period) rather than those from past or future periods in which the way the business of the enterprise is carried on was or will be different. Second, paragraph 44.4 reiterates that the "fixed" requirement under article 5.1. requires a certain degree of permanency and notes that this should be determined in accordance with existing paragraphs 28 to 34 of the Commentary. Third, paragraph 44.5 highlights the importance of considering the exclusion of preparatory or auxiliary activities under article 5.4 in the context of cross-border remote work. Unfortunately, the 2025 Commentary does not explain in detail how this exclusion should be applied in the context of cross-border remote work. Fourth, paragraph 44.6 underscores the place of business requirement under article 5.1, highlighting that "no automatic conclusion" should be drawn solely from the fact that an individual – such as an employee – uses a home or other relevant location for activities related to the enterprise's business, as this determination depends on the specific facts and circumstances of each case. Again, it should be recalled that this statement was specifically made in relation to the "disposal" requirement in the deleted paragraph 18 of the 2017 Commentary. Fifth, the first sentence of paragraph 44.7 repeats that, in many cases, cross-border remote work will be so intermittent or incidental that the place will not constitute a place of business, making a specific ref-

47. The 2015 Update was approved by Working Party 1 under the written procedure on 19 September 2025, by the Committee on Fiscal Affairs on 13 October 2025 and by the OECD Council on 18 November 2025. Following this approval by the OECD Council, the contents of the 2025 Update will be incorporated into a new version of the OECD Model Tax Convention to be released in 2026.
48. Madalina Cotruț, "Are Micro Home Office PEs Tackled under the 2025 Update to the Commentary on the OECD Model?", 66 Eur. Taxn. 2/3 (2026), Journal Articles & Opinion Pieces IBFD, https://doi.org/10.59403/13vj1k4., 125; T. Wustenberghs & H. Begian, "New OECD Commentary Regarding Home Offices: Recognizing a PE That Should Not Be One?", 80 Bull. Intl. Taxn. 3 (2026), Journal Articles & Opinion Pieces IBFD, https://doi.org/10.59403/1t3wmrj., 131.
49. OECD, *The 2025 Update to the OECD Model Tax Convention*, 5.
50. OECD, *The 2025 Update to the OECD Model Tax Convention*, paras. 44.1-44.2.

erence to paragraph 12 of the Commentary to Article 5.1 (i.e. general guidance on "disposal"). As noted in section 4.2.6., the implications of this reference are unclear.

Up to this point – and except for the OECD's renewed emphasis on the wider place of business requirement under article 5.1 rather than on "disposal" – the 2025 Commentary seems to mainly repeat and reinforce earlier guidance on cross-border remote work found in the deleted paragraphs 18 and 19 of the 2017 Commentary.

3.4. New criteria introduced to facilitate the place of business determination

The main novelties brought by the 2025 Commentary are noticeable as of the second sentence of paragraph 44.7, which reads:

> Where, however, a home, or another relevant place, is used on a continuous basis during an extended period of time for carrying on activities related to the business of an enterprise, *this and other facts* (such as those considered further below) *may* indicate that that place should be considered a place of business of the enterprise. [Emphasis added.]

From the sentence above, it can be extracted that the existence of a place of business in the context of cross-border remote work requires not only "continuity" but also other factors that are further explained in the remaining paragraphs of the 2025 Commentary and are evidently different from the "employer's requirement to work from home" foreseen in the 2017 Commentary.

3.4.1. The 50% working time indicator

Paragraph 44.8 of the 2025 Commentary notes that, in the specific context of cross-border remote work, the home or other relevant place would generally not be considered a place of business of the enterprise if the individual worked[51] from there[52] for less than 50% of their total working time for that enterprise over the course of any 12-month period. It then states that exceptions to the approach in the prior sentence are not anticipated to occur.

Regarding the calculation of the working time, paragraph 44.9 notes that this will be determined by the individual's actual conduct and that contractual terms and company policies may be of practical assistance only insofar as they align with that conduct.

As explained by an OECD representative, this time base indicator "is intended as a first step, a relatively simple first step that deals with the most commonly observed situations. If an individual works from their home for less than 50% of their working time, that is the end of the story. Generally speaking, no further analysis is needed."[53]

However, as further argued below, this 50% working time indicator does not work as a safe harbour, as the OECD representative seems to claim. This is because a home office PE could still exist in cases in which the time base indicator is not crossed. This interpretation is shared by other scholars.[54]

Paragraph 44.10 of the 2025 Commentary notes that, whenever the 50% threshold is crossed, whether the enterprise has a place of business will be determined by the "facts and circumstances".

3.4.2. The existence of a "commercial reason" and its indicators

Right after the reference made to the "fact and circumstances", paragraph 44.11 notes that "A prominent consideration is whether there is *a commercial reason* for the activities to be undertaken by that individual in the Contracting State where the home or other relevant place is located" [emphasis added]. The remainder of paragraphs 44.11 to 44.19 of the 2025 Commentary provide guidance regarding this newly introduced "commercial reason" consideration.

First, paragraph 44.11. notes that "a commercial reason" will be considered to exist where the physical presence of the individual in that state will "itself facilitate the carrying on of the business of the enterprise", such as where there are people or resources in that state to which the enterprise needs access for the performance of its business activities.[55] In paragraph 44.12, the Commentary further notes that "a commercial reason will be present where the individual directly engages with customers, suppliers, associated enterprises or other persons on behalf of the enterprise and that engagement is facilitated by the individual being located in that State".[56]

Second, with reference to paragraph 7 of the Commentary, paragraph 44.13 notes that determining whether arrangements have a "commercial reason" does not

51. This means that time spent at home for reasons unrelated to work (eating, sleeping, leisure, etc.) does not count for the calculation of the working time indicator (T. Wustenberghs & H. Begian, New OECD Commentary Regarding Home Offices: Recognizing a PE That Should Not Be One?, 80 Bull. Intl. Taxn. 3 (2026), Journal Articles & Opinion Pieces IBFD, https://doi.org/10.59403/1t3wmrj., 138).
52. This means that time spent by the employee in the source state at the premises of clients, suppliers, etc. does not qualify for the calculation of the working time indicator (T. Wustenberghs & H. Begian, New OECD Commentary Regarding Home Offices: Recognizing a PE That Should Not Be One?, 80 Bull. Intl. Taxn. 3 (2026), Journal Articles & Opinion Pieces IBFD, https://doi.org/10.59403/1t3wmrj., 138).
53. John Stoke, "Unpacking the 2025 Update to the OECD Model Tax Convention" (video), YouTube, 11 December 2025, https://www.youtube.com/watch?v=L8Iuq2pg6Q8.
54. Russo et al. consider that 'the 50 percent working-time threshold is more of a guideline than a binding rule, which may be a source of controversy and uncertainty in the future'. Wustenberghs & H. Begian raise similar concerns (Raffaele Russo, Umberto Lorenzi, and Nicola Vernola, "Global Workforce Mobility: Key Issues and a Path Toward Tax Certainty," *Tax Notes International* 122 (May 11, 2026): 888; T. Wustenberghs & H. Begian, New OECD Commentary Regarding Home Offices: Recognizing a PE That Should Not Be One?, 80 Bull. Intl. Taxn. 3 (2026), Journal Articles & Opinion Pieces IBFD, https://doi.org/10.59403/1t3wmrj., 134, 136).
55. According to paragraph 44.12 of the Commentary, this would generally be the case if the enterprise has a reason to have an individual (e.g. an employee) physically present therein for the conduct of the activities of the enterprise and the use of that home or other relevant place facilitates the conduct of such activities. The 2025 Commentary further notes that, for example, it might be that, if the home or other relevant place were not available, then the enterprise would make use of other premises in the other State (such as an office rented by the enterprise). OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.12.
56. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.12.

require a consideration of whether an individual's use of a home or other relevant location possesses a "productive character". This is because, according to the OECD, it is axiomatic to assume that each part of an enterprise contributes to the productivity of the whole. Furthermore, it is expressly acknowledged that "There may be several reasons for using a home or other relevant place to carry out activities related to the business of an enterprise; if one of those reasons is a commercial reason, then this indicator will be satisfied."[57]

Third, paragraph 44.14 of the 2025 Commentary provides that a commercial reason would not be considered present if that engagement is on an "intermittent or incidental" basis (e.g. short occasional visits to the premises of a customer, or engagement that is minor in the context of the overall business relationship with that customer, would not be sufficient). The only specification on what such "intermittent or incidental" engagement might be arises from Example D of the new guidance (*see* section 3.2.2.), which notes that once-a-quarter visits to clients within a year qualify as intermittent. Furthermore, the new guidance notes that assessing the existence of a commercial reason will require a consideration of the enterprise's business and how the specific activities of the individual relate to it.[58]

Fourth, the 2025 Commentary states that the existence of a commercial reason requires a link between the individual's presence at a home or other relevant place in that state and the carrying on of the business of the enterprise. It further clarifies that this would not be the case where the cross-border remote work is enabled by the enterprise solely to (i) obtain or retain the services of the individual[59] or (ii) reduce costs (e.g. expenditure on office space).[60]

Fifth, to assist with the factual assessment of whether a commercial reason exists, paragraph 44.17 introduced by the 2025 Commentary sets out a non-exhaustive list of eight activities that indicate that a commercial reason "may" exist.[61] This list includes, among other activities, activities that facilitate real-time, or near real-time, interaction with customers or suppliers in different time zone(s) (e.g. providing call centre services, or virtual IT support or medical services).

Last, but not least, paragraph 44.19 of the 2025 Commentary, notes that:

> Where there is no commercial reason for undertaking the activities related to the business of the enterprise of a Contracting State from a home or other relevant place located in the other Contracting State, that place would not be a place of business of the enterprise *unless other facts and circumstances indicated otherwise.* [Emphasis added]

The caveat included in the final and underlined part of this paragraph is relevant, as it implies that, even when the second and prominent indicator introduced by the 2025 Commentary is not verified (because no commercial reason exists), cross-border remote work could still trigger a place of business PE if the facts and circumstances indicate otherwise.[62] As further discussed in section 4.2.4., this caveat raises concerns.

3.5. The case of a sole or principal individual conducting the enterprise's business

The new paragraph 44.20 introduced by the 2025 Commentary expressly recognizes that different considerations from those described above are presented in circumstances where an individual is the only person, or the primary person, conducting the business of an enterprise. To illustrate these types of cases, the 2025 Commentary relies on the non-resident consultant example[63] that was already included in the deleted paragraph 19 of the 2017 Commentary. In particular, it notes that, in such cases, the home office is considered a place of business of the enterprise (instead of "a location at the disposal of the enterprise"). As noted by Galéa, this is consistent with long-standing doctrine and case law treating a professional's main office abroad as a PE, even in the absence of formal premises.[64]

3.6. Examples provided by the 2025 Commentary

To illustrate the application of the new guidance described above, paragraph 44.21 of the 2025 Commentary includes five illustrative examples (i.e. Examples A-E). While Example A addresses the verification of the "fixed" requirement in cross-border remote work contexts (i.e. whether a place of business is "fixed"), Examples B to E refer to the place of business requirement (i.e. whether a home or other relevant place is a place of business of an enterprise).

57. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.13.
58. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.14.
59. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.15.
60. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.16.
61. In this regard, paragraph 44.17 notes that such a commercial reason "may" exist if, for example, "any" of the following take place and are facilitated (e.g. because they require physical interaction in that state or in the same geographic region as that state) by an individual engaged in cross-border remote work in that other state: (i) meetings with the enterprise's customers, (ii) cultivating new customers or identifying business opportunities, (iii) managing supplier relationships or contracts, (iv) real-time, or near real-time, interaction with customers or suppliers in different time zone(s) (e.g. providing call centre services, or virtual IT support or medical services), (v) accessing business-relevant expertise, such as meetings with university personnel conducting relevant research, (vi) collaborating with other businesses, (vii) providing services to clients requiring physical presence in the other state (e.g. on-site training or repairs) and (viii) interacting with employees or personnel of the enterprise or associated enterprises. Regarding the activities above, Paragraph 44.18 clarifies that they apply in the same way irrespective of whether the person is a third party or an associated enterprise. Furthermore, it provides that the mere presence of the enterprise's customers, suppliers, other persons or of a related party in the home office state, or the fact that the home or other place is in a different time zone than that in which the enterprise is located, does not automatically mean there is a commercial reason for using that place for business activities. OECD, *The 2025 Update to the OECD Model Tax Convention*, paras. 44.17-44.18.
62. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.19.
63. The 2025 Commentary provides the example of a non-resident consultant who is present for an extended period in a given state where she carries on most of the business activities of her own consulting enterprise from an office set up in her home in that state.
64. Geoffroy Galéa, "*Remote Work and Permanent Establishment after the 2025 Update*," *LinkedIn Pulse*, 2025, accessed 25 March 2026, https://www.linkedin.com/pulse/remote-work-permanent-establishment-after-2025-update-ku%C5%BAniacki-xsene/.

Figure 1. Decision tree on home office PE determination under the 2025 Commentary

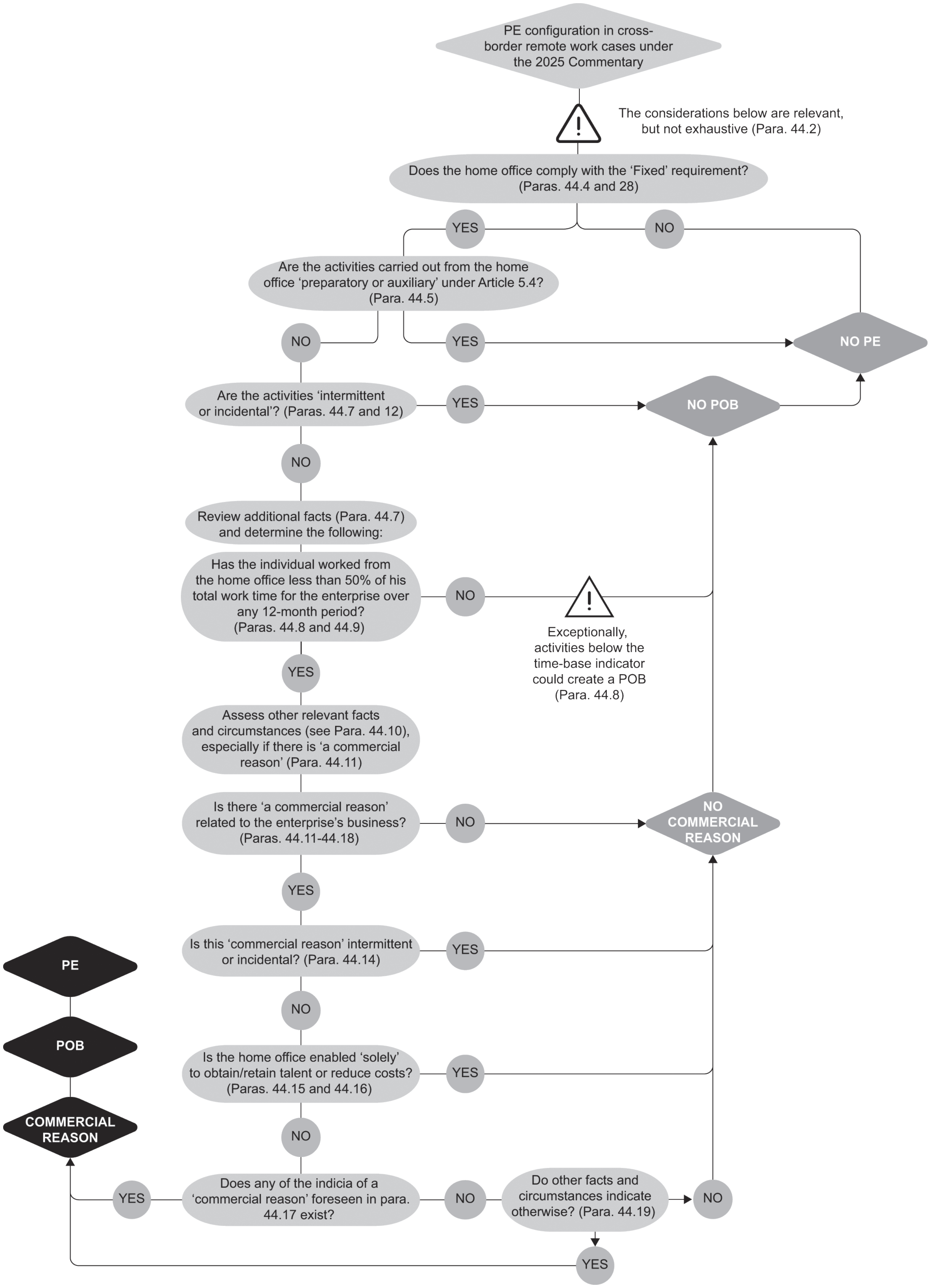
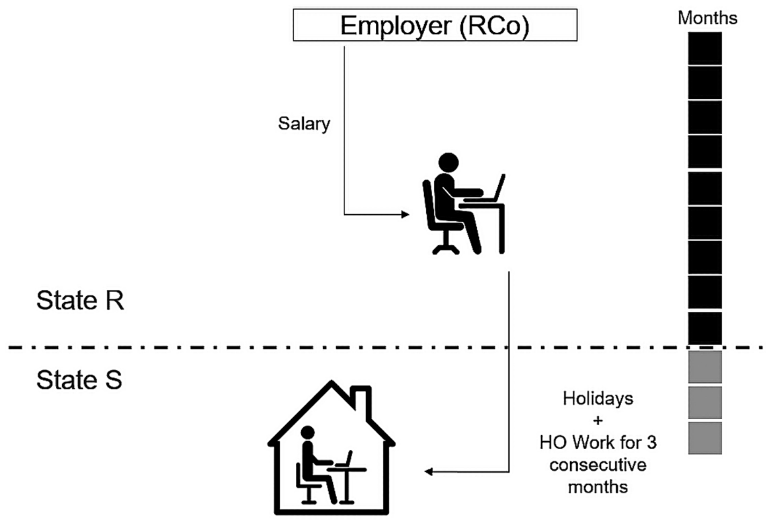


Figure 2. Facts of example A



3.6.1. Example A: The "fixed" requirement

The facts of Example A are the following: an employee of RCo, an enterprise in State R, works from State R as part of her regular working pattern. During a 12-month period, she rents and works from a place in State S for a period of three consecutive months following a holiday stay in State S.[65]

In the situation depicted in Figure 2., the 2025 Commentary considers that the place of work should not be considered "fixed" because it lacks permanence as the business of the enterprise is carried on there only for three months during a 12-month period.[66] Furthermore, it notes that the same conclusion would arise where the facts were the same as above but (i) the time worked in State S resulted from some other personal reason (e.g. taking care of a sick relative) or (ii) the person did not work from where she stayed, but from a different location.[67]

Additionally, two important clarifications are provided by the 2025 Commentary in the context of Example A and the "fixed" requirement. First, it is noted that, if a place is used to perform the activities of the enterprise repeatedly over several years, both the duration and frequency of use should be considered in combination.[68] Second, and most importantly, it is clarified that the key factor in determining whether a place is considered "fixed" under article 5.1 is the amount of time spent carrying out the enterprise's business activities at that location, not whether the individual retains a place (such as a holiday home) or pays for its upkeep, which are irrelevant.[69]

3.6.2. Examples B, C, D, and E: The "place of business" requirement

The facts of Example B are the following: an employee of RCo, an enterprise in State R, works from her home in State S for one or two days per week throughout a 12-month period, which totals 30% of her working time during that 12-month period.[70]

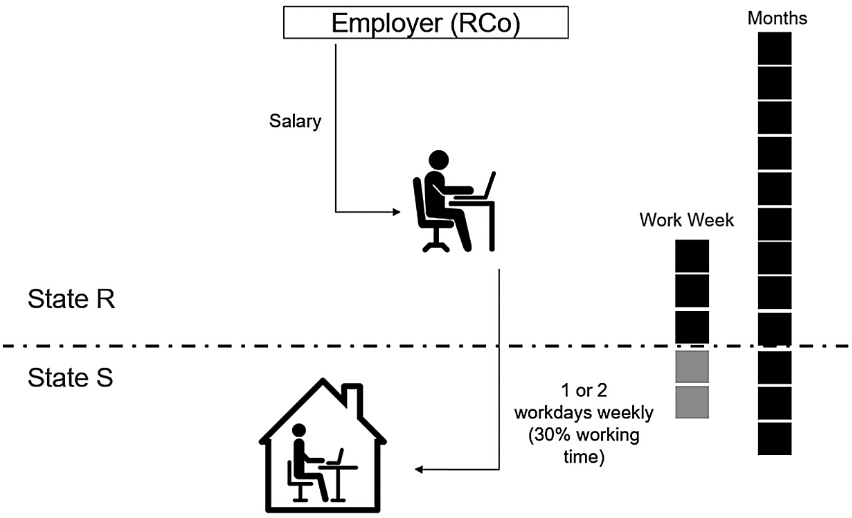
In the circumstances depicted in Figure 3., the 2025 Commentary considers that the "fixed" requirement is complied with because the home in State S has been used to undertake activities related to the business of RCo throughout the 12-month period and therefore has a sufficient degree of permanence.[71] However, because the individual spends less than 50% of her working time working from her home in State S, the Commentary notes that, "in the absence of other facts and circumstances showing otherwise", the home would not be a place of business of RCo and, therefore, no fixed place PE of RCo would exist in State S.[72]

In the case of Example C, the facts are the following: an employee of RCo, an enterprise in State R, works from his home in State S for 80% of his working time in any 12-month period. He regularly visits clients of RCo in State S in order to provide services to those clients.[73]

In the situation depicted in Figure 4., the 2025 Commentary considers that, first, the "fixed" requirement is met because there is a sufficient degree of permanence.[74] Furthermore, it finds that, in the absence of other facts and circumstances showing otherwise, a place of business and fixed place PE

65. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example A(1).
66. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example A(2).
67. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example A(3).
68. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example A(4).
69. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example A(5).
70. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example B(1).
71. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example B(2).
72. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example B(3).
73. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example C(1).
74. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example C(2).

Figure 3. Facts of example B



also exist because, first, the 50% working time threshold is crossed and, second, there is a commercial reason for the individual's presence in State S (because the individual facilitates the provision of services by RCo to customers in State S, where the individual's home is located).[75]

Example D outlines the following facts: an employee of RCo, an enterprise in State R, works from his home in State S for 60% of his working time in a 12-month period. He has an exclusively client-facing role and provides services to clients of RCo in State R, in State S and in a third state. He provides those services remotely and does so without physically meeting those clients. Once a quarter, he visits the premises of a client in State S to spend a day reviewing performance against the terms of the contract with RCo.[76]

As with the previous examples, in the situation depicted in Figure 5., the "fixed" requirement is deemed satisfied because the location used for RCo's business activities has a sufficient degree of permanence.[77] However, even when the individual exceeds the 50% working time threshold, the 2025 Commentary notes that "other facts and circumstances" (including the reason for the individual's presence in State S) must also be considered. In this regard, the 2025 Commentary concludes that, in this case, there is no commercial reason for the individual to perform RCo business activities at his home in State S. This is because (i) the mere presence of RCo clients in State S does not establish a commercial reason for his presence and (ii) his visits to a client are intermittent and incidental.[78] On this basis, the Commentary concludes that, in the absence of other facts and circumstances showing otherwise, the home would not be a place of business of RCo and, therefore, no fixed place of business of RCo would exist in State S.[79]

Finally, the facts of Example E are the following: an employee of RCo, an enterprise in State R, works almost exclusively from her home located in State S. The employee provides services virtually to customers in State R and/or in other jurisdictions located in time zones that differ from that in State S. The performance of those activities in State S enables the employee to be fully available (e.g. offering real-time or near real-time services around the clock) to customers of RCo in the time zones where those customers are located.

In the situation depicted in Figure 6., the 2025 Commentary notes that the "fixed" requirement is complied with because there is a sufficient degree of permanence. Regarding the place of business requirement, it notes that the 50% working time threshold is passed and, different from the previous example, it finds that there is indeed a commercial reason for the individual's presence in State S because it facilitates the provision of services by RCo (through the individual) to customers in State R (and to those located in other time zones that differ to that of State S). On this basis, the 2025 Commentary concludes that, in the absence of other facts and circumstances showing otherwise, there is a place of business and a fixed place PE of RCo in State S.

3.7. Countries' reservations and positions

Several OECD member countries have expressed reservations regarding the guidance on home office PE included in the 2025 Commentary. One of them is Israel, which has expressed multiple reservations. First, concerning paragraph 44.8, Israel reserves the right to determine the 50% time indicator by applying the greater of two comparisons: (i) full or partial working days present in the home jurisdiction vis-à-vis days spent outside it or (ii) full or partial days worked from the home jurisdiction vis-à-vis full days

75. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example C(3).
76. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example D(1).
77. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example D(2).
78. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example D(3).
79. 2025 Update, Paragraph 44.21, Example D, paragraph 4.

Figure 4. Facts of example C

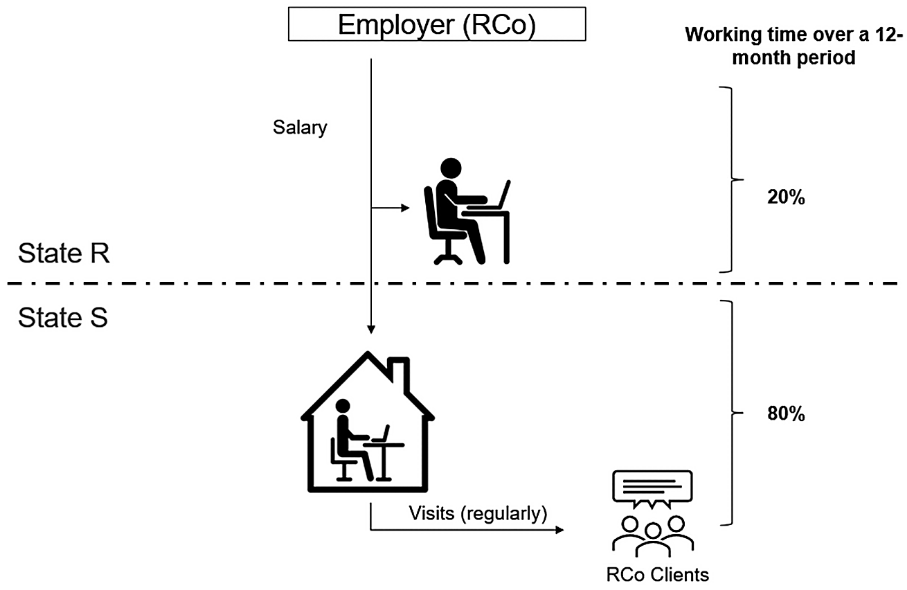
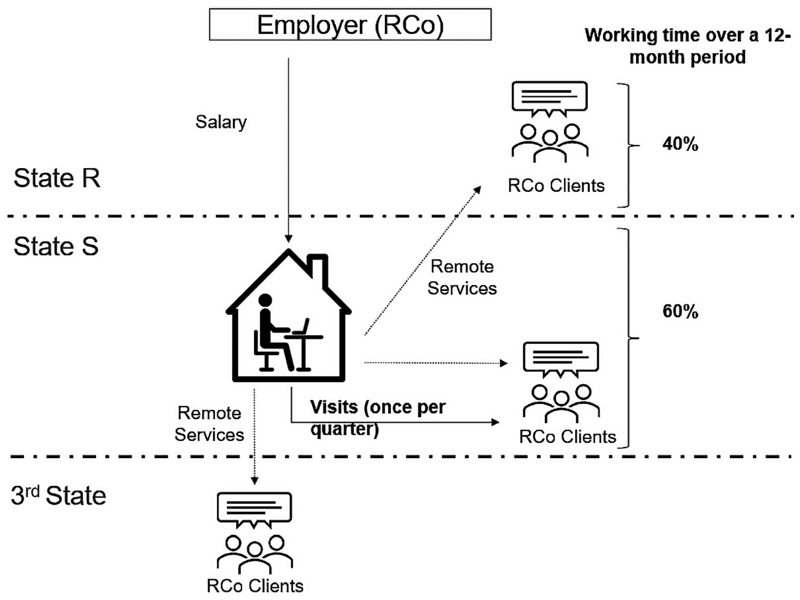


Figure 5. Facts of example D

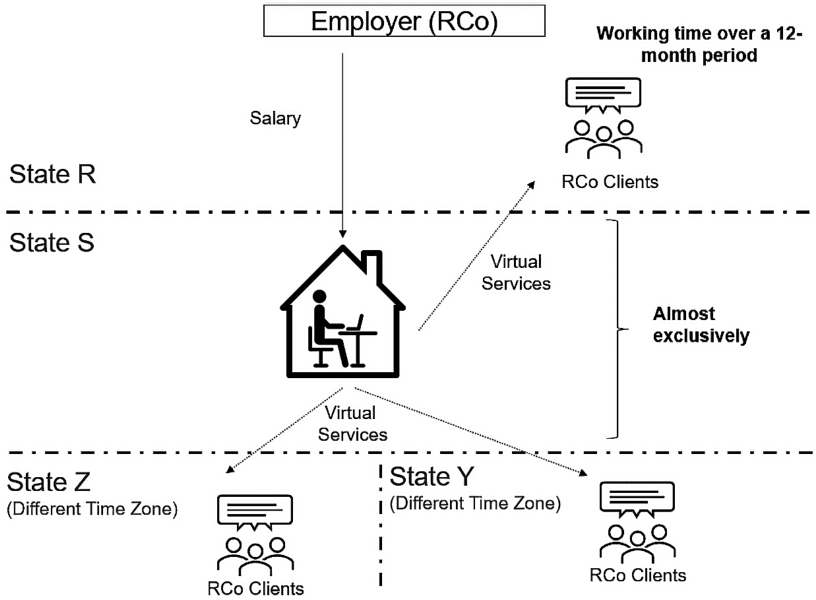


worked elsewhere.[80] Regarding paragraph 44.18, Israel considers a "commercial reason" to exist where a meaningful group of employees is located in the home jurisdiction relative to their business unit.[81] For paragraph 44.19, Israel clarifies that, absent a commercial reason, it will make the PE assessment based on whether the individual performs core activities or activities that significantly contribute to value creation.[82] Under paragraph 44.20, Israel reserves the right to treat a home office used by a founder, partner or senior executive as a PE.[83] Finally, Israel notes that the facts in Example D could indicate that an employee's presence facilitates client visits in the same region or service provision across time zones.[84]

Other OECD member countries that expressed reservations about the 2025 Commentary are the Czech Republic and Chile. In relation to paragraphs 44.1-44.21, the former country reserves its position regarding the application of the additional specific criteria described therein because it does not agree with the determinative role of the category of premises involved, arguing that this approach unduly limits recognition of a fixed place PE in cross-border remote work scenarios.[85] In turn, Chile does not adhere

80. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 220.
81. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 221.
82. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 222.
83. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 223.
84. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 224.
85. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 225.

Figure 6. Facts of example E



to all interpretations contained in paragraphs 44.6-44.21 of the 2025 Commentary.[86]

In addition, several countries that are not members of the OECD have also taken specific positions in relation to the 2025 Commentary. India rejects the conditions, including time-based and commercial reason indicators for treating an individual's home as a place of business.[87] It considers that such a home can be "at the disposal" of the enterprise and, thus, constitute a place of business under article 5. Nigeria disagrees with the interpretations in paragraphs 44.14-44.15 of the 2025 Commentary, asserting that intermittent or short visits to customers' premises for activities lasting more than six months indicate a commercial reason.[88] It also contests paragraph 44.16, arguing that office cost reduction constitutes a valid commercial reason.[89] Furthermore, it rejects the conclusion in Example D, maintaining that quarterly client visits combined with home-based work establish a fixed place PE.[90] Finally, Malaysia takes a position on paragraph 44.8, reserving the right to bilaterally agree on the percentage of total working time below which a home office would generally not constitute a place of business.[91]

4. Observations on the OECD Guidance

4.1. Introductory remarks

The first general observation on the home office PE guidance included in the 2025 Commentary is that, overall, it represents a positive step forward in addressing the practical challenges of determining the existence of a PE in cross-border remote work situations. In general, when compared to the pre-existing guidance, the 2025 Commentary offers more detailed, objective and practical criteria for the PE determination, which in principle should bring more clarity and support a more consistent interpretation of article 5.1. Nevertheless, like any other policy measures, the new OECD guidance included in the 2025 Commentary also raises certain issues and questions, which are identified and discussed in this article.

Second, the substantial expansion of the guidance in the Commentary (from 2 to 21 paragraphs in the 2025 Update) demonstrates the growing relevance that the OECD now correctly gives to the PE risks arising from cross-border remote work. It should be remembered that the 2017 Commentary considered this matter one that would "rarely be a practical issue".[92] The expansion of the new guidance highlights the considerable legal and practical complexities in this area, which are now more thoroughly addressed in the 2025 Commentaries. This responds to scholars' criticism that the 2017 Commentary downplayed teleworking issues, showing a clear bias against recognizing home office PEs.[93]

Third, in contrast to previous practices,[94] the OECD adopted the new home office PE guidance in the 2025 Commentary without first seeking public input via an *ex ante* public consultation. This omission is notable given the major shift to cross-border remote work since 2020-2021 due to COVID-19. The absence of prior public consultation on the 2025 Update raises concerns about inclusiveness and transparency, which are not fully resolved by targeted consultations via the Business Industry Advisory

86. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 226.
87. OECD, *Positions on Article 5 and its 2025 Commentary*, para. 55.
88. OECD, *Positions on Article 5 and its 2025 Commentary*, para. 58.
89. OECD, *Positions on Article 5 and its 2025 Commentary*, para. 59.
90. OECD, *Positions on Article 5 and its 2025 Commentary*, para. 60.
91. OECD, *Positions on Article 5 and its 2025 Commentary*, para. 61.
92. OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, Commentary on Article 5(1), para. 19, https://doi.org/10.1787/g2g972ee-en.
93. Báez Moreno, "Tomando en serio las palabras," 472.
94. For the adoption of the home office PE guidance included in the 2017 Commentary, the OECD relied on input provided by stakeholders during a 2011-2012 public consultation.

Committee[95] or the general public consultation on "Global Mobility" launched shortly after the Update's publication.

Fourth, a noteworthy point to make about the 2025 Commentary is that it tacitly seems to differentiate between cases in which individuals engage in cross-border remote work for personal reasons, vis-à-vis cases in which this work modality responds to commercial reasons related to the business of an enterprise. In the author's view, this differentiation seems central to assessing the existence of a PE under the new guidance. This is because, the clearer it becomes that the cross-border remote work responds to personal preferences or reasons, the lower the PE risks are, and vice versa. Even when it could be argued that this differentiation was already (implicitly) included in the second element for assessing "disposal" under the 2017 Commentary (i.e. "employer's requirement to work from home"), the 2025 Commentary makes it clearer.

Fifth, it is important to note that the new guidance included in the 2025 Commentary seems to be limited to cases of cross-border work carried out at "private" places, either the individual's home or "other relevant place" (such as a second home, a holiday rental, the home of a friend or relative and so on). As explained by the OECD, "these types of places have some unique features [...] they are generally not accessible to other individuals working for the same enterprise, and the individual has a certain level of control over and a connection to those types of places."[96]

Conversely, the new guidance is not applicable to (i) cases involving work carried out at "work-related" places such as the premises of the enterprise or those of a connected third party (e.g. a customer, supplier or an associated enterprise)[97] and (ii) cases in which remote work is carried out from locations rented by the enterprise for the individual (e.g. co-working space or office). What becomes less clear is whether the guidance applies to cases in which remote work is (also or partially) performed from "shared" and/or "public" places used and/or rented by an individual (not the enterprise), such as a space within a café, a mall, a shared co-working space and so on. Furthermore, it is not entirely clear whether the new guidance solely applies to situations in which the individual uses the same location for both private and business purposes (as it seems to arise from Paragraphs 44.1. and 44.8), or whether it also applies to situations in which the individual uses one location for private purposes and a different place for business purposes (as it seems to arise from the clarifications made by Example A).[98]

The latter unclarities are not minor because, as is known, the flexibility afforded to remote workers enables them to perform their duties (either wholly or partially) from a diverse range of alternative locations that go beyond privately held venues or spaces rented by an enterprise.[99] The PE consequences of cross-border work being carried out also from these alternative locations is not expressly addressed by the OECD in the 2025 Commentary.[100]

Sixth, as previously mentioned, the 2025 Commentary consistently refrains from referencing the "disposal" requirement, which was a focal point in the 2017 Commentary. Instead, the new guidance generally refers to the "fixed" and the broader "place of business" requirements under article 5.1. The OECD has not expressly acknowledged or explained this change of focus or whether the general conditions of disposal (effective power to use) foreseen under paragraph 12 of the Commentary continue to be relevant and should be factored into the PE assessment of cross-border remote work. As further argued in section 4.2.6., this is one of the main criticisms to be raised in relation to the new home office PE guidance.

Seventh, aside from the examples, the 2025 Commentary generally avoids mentioning whether an employment relationship should exist between the enterprise and the individual engaged in cross-border remote work for the new guidance to apply (e.g. it merely refers to an individual who carries out all or part of their work for an enterprise). In any event, the references made to "employer" in Examples A-E, along with the guidance about sole entrepreneurs in paragraph 44.20, indicate that, except for the latter case, the new guidance generally applies to both formal and de facto employment relationships. However, given the growing prevalence of employers of record (EOR) arrangements[101] among enterprises employing remote workers, it would have been advantageous for the 2025 Commentary

95. Business at OECD (BIAC).
96. Yves Van Brussel, "Unpacking the 2025 Update to the OECD Model Tax Convention" (video), YouTube, 11 December 2025, https://www.youtube.com/watch?v=L8Iuq2pg6Q8.
97. It is important to remember that "other relevant places" does not include premises of the enterprise for which the individual works or those of another enterprise with contractual relationships or connections to the former (e.g. customer, supplier or associated enterprise).
98. As identified by Maisto, 'Example A creates an ambiguity over an employee working in a state for three consecutive months after a holiday period. The commentary says that the place from which the employee works is not fixed (because it lacks permanence) and that the same conclusion would arise if "the place from which she [the employee] worked was not a place where she was staying but was some other place" (emphasis added). Example A could therefore be interpreted as considering situations in which the employee uses a location for private purposes and a different location for business purposes as within the scope of the home office guidance.' Guglielmo Maisto, "Exploring the 2025 OECD Update on Home Office and Permanent Establishment," *Tax Notes International* 121 (16 March 2026), 1928.
99. These may include co-working spaces that provide professional amenities and opportunities for networking, cafés and coffee shops offering a casual atmosphere and reliable Wi-Fi, libraries valued for their quiet environment and access to resources, hotels and business centres that furnish dedicated work areas for employees traveling on business, airport or train station lounges suitable for brief work sessions while in transit, public or community centres that offer designated work-friendly areas, specialized remote work hubs located in scenic or rural regions for so-called "workations" and even outdoor venues such as parks or terraces equipped with connectivity that provide a creative change of scenery.
100. Evidently, if the specific guidance provided by the 2025 Commentary is not applicable, the PE determination should be made under the general PE guidance.
101. An EOR is a third-party organization that hires and pays employees on behalf of another company, managing payroll, social security, and labour law compliance in a specific country. While the employment contract is between the EOR and the employee, the EOR operates under a service agreement with the company, which retains control over the employee's work and pays their salary via the EOR, including a service fee. This arrangement, common for roles such as community managers and software engineers, enables companies to quickly scale teams or reduce resources without the complications of local termination regulations. EORs may operate through local entities or online platforms to handle the complexities of cross-border remote work. Payslip, "What Is an EOR, an Employer of Record?," Payslip, 17 August 2022, https://payslip.com/resources/blog/what-is-an-eor-an-employer-of-record/.

to address this issue in greater detail. This is because, even in cases in which an EOR is the formal employer of an individual, a PE may be triggered if the EOR's client exercises substantive direction or employer-like control over the workforce, or the EOR operates merely as an administrative service provider with no real autonomy, while its client directs the individual's activities and decisions.[102] While the Commentary to Article 15.2 on "economic employer" may offer useful criteria to address this question, such guidance has also presented difficulties that result in different interpretations across countries.[103]

Eighth, another deficiency of the home office PE guidance introduced by the 2025 Commentary is the lack of object-and-purpose-related (teleological) references for the interpretation of fixed place PE requirements under article 5.1, which was also present in the 2017 Commentary.[104] It should be noted that article 31.1 of the Vienna Convention on the Law of Treaties (VCLT) assigns a significant role to the teleological method of interpretation, which has been consistently emphasized in both Commentaries to the OECD Model and case law. This omission raises concerns about the 2025 Commentary's consistency with the VCLT framework and the OECD's legitimacy for shaping international tax norms.

Finally, it should be noted that the 2025 Commentary unfortunately does not address several specific aspects of PE determination in cross-border remote work, allowing for divergent interpretation among countries. These omitted aspects refer, among other things, to whether the activities of several individuals working for the same enterprise in a jurisdiction should only be considered individually (separately) or can be aggregated, how article 5.4 applies and which activities would typically qualify as preparatory or auxiliary in the context of cross-border remote work, how the new guidance interacts with the PE anti-fragmentation rules of article 5.4.1 and the service PE provision and so on. Other scholars have also criticized these (and other) omissions of the guidance included in the 2025 Commentary.[105]

4.2. Specific observations

4.2.1. Interpretative uncertainties in the application of the "fixed" requirement

The brief clarifications provided by paragraph 44.4 of the 2025 Commentary regarding the verification of the "fixed" requirement in cross-border remote work are evidently helpful, as they serve to confirm that (i) the permanency needed under such requirement should be determined in accordance with existing paragraphs 28 to 34 of the Commentary and (ii) the time spent performing activities related to the business of the enterprise from that place is the determinative consideration in evaluating such requirement.[106]

However, the clarification provided in the context of Example A regarding activities carried out "on a recurrent basis over several years" raises some unclarities. This is because, in such cases, the 2025 Commentary merely states that "each period of time during which the place is used needs to be considered in combination with the number of times during which that place is used over a number of years". Evidently, the absence of detailed and/or clear-cut guidance and examples regarding when a combination of work activities performed over several periods from a home office meets the "fixed" requirement creates opportunities for inconsistent and subjective interpretation by tax authorities. This critique has also been expressed by other authors.[107]

Further unclarities arise when considering how the "fixed" requirement applies in situations where individuals engage in cross-border remote work from different places in the same country. In this regard, authors have noted that:

> It makes no difference when the employees exercise the activity from different places in the same State, such as, for instance, partly from their home office and partly from (also flex) office spaces made available to them by the employer. They argue that, from a conceptual perspective, what matters is that the business is partly conducted from the territory of that State.[108]

However, this interpretation seems to contradict the explicit "fixed" requirement under article 5.1. In fact, other scholars have considered that:

> In order for a place of business to be fixed, the activity must be performed at a place located at a certain address (…) Thus, where employees work in different coffee places or co-working spaces that are changed frequently, these places will not qualify as fixed places of business from a geographical and temporal perspective. Of course, exceptions may exist if the facts and circumstances indicate otherwise.[109]

The contradiction mentioned above has been expressly identified by other authors who have also recognized that the strict (restrictive) interpretation of the term "fixed" appears inappropriate in situations such as the one above, where the taxpayer roams through the source state and, in so doing, shows equally strong (or even stronger) ties to this state (as compared to the carrying-on of business through only one, but non-roaming fixed place PE). However, they note that these aspects cannot overrule the wording of article 5.1. Thus, to overcome this hurdle, they argue in favour of an object-and-purpose-related interpretation of the "fixed" requirement (article 31.1 of the

102. Federico Pacelli, Luigi Purpura, and Juan Pablo Osman Moreno, "New OECD Risks and Opportunities in Employer of Record Arrangements," Tax Notes International 121 (Volume 121) (5 January 2026), 121.
103. Some jurisdictions follow a legal-employer approach focused on contracts and payroll registration, while others apply a functional control and economic-integration test, along with detailed rules on the application of article 15.2.
104. This lack of teleological references was already identified by Baez Moreno and other scholars in relation the existing Commentaries to Article 5.1. of the OECD Model Treaty (2017). See Báez Moreno, "Tomando en serio las palabras," 402.
105. Cotruț, "Are Micro Home Office PEs Tackled," 124-126; Wustenberghs and Begian, "New OECD Commentary Regarding Home Offices," 138.
106. This means that time spent on personal or private activities or even professional activities that are not related to the business of the enterprise should not be considered for this purpose.
107. Cotruț, "Are Micro Home Office PEs Tackled," 122.
108. Pasquale Pistone and Mario Tenore, "General Report," in *Mobility of Work*, ed. Georg Kofler et al. (Amsterdam: IBFD, 2024), https://doi.org/10.59403/9n3h11001.
109. Cotruț, "Are Micro Home Office PEs Tackled," 122;

VCLT) to adapt its standards to the characteristics and particularities of the enterprise concerned.[110]

In the author's view, even when the latter alternative seems reasonable, this interpretation could also be questioned for not being sustainable under the current wording of article 5.1. Thus, it would have been desirable for the OECD to address this specific issue in the 2025 Commentary.

4.2.2. The 50% working time indicator: Increased certainty, persistent ambiguity and administrability challenges

The introduction of a working time base indicator in Paragraph 44.8 of the 2025 Commentary to facilitate the assessment of the existence of a place of business is clearly a positive and much-welcomed feature. This indicator seems to be based on, inter alia, provisions included in the Belgian-Dutch Agreement of November 2023[111] and approaches adopted in countries such as Austria.[112] The specific percentage might have been set at 50% to align it with a similar threshold established within the European Union for social security purposes.[113]

However, when reading the 2025 Commentary, it is not entirely clear whether the 50% indicator is (i) a practical tool to assess the requirement for "continuity" (i.e. not intermittent or incidental) mentioned in the preceding paragraph 44.7 (which, in turn, refers to paragraph 12 of the Commentary that deals with the "disposal" requirement) or (ii) one of the "other facts" (also mentioned in paragraph 44.7) that may indicate that a place should be considered a place of business of the enterprise. Based on the examples included in the 2025 Commentary and the explanations provided by the OECD representatives, it seems that the former reflects the OECD's understanding, which – in the authors' view – appears to be the most reasonable interpretation. However, clearer guidance in the Commentary would have been preferable. This is especially because of the importance of this time base indicator and the unclarities that exist regarding whether this indicator should be understood as an independent element or one within the umbrella of the "disposal" requirement.[114]

In practice, and vis-à-vis the 2017 Commentary, this more objective time-based indicator contributes to providing greater certainty for assessing PE risks. This is in part achieved thanks to the clarification included in paragraph 44.8 that "exceptions to the approach in the prior sentence are not anticipated to occur", which has led scholars to call this indicator a "de facto safe harbor".[115] However, the author strongly disagrees with such a view because, based on the wording of the Commentary, the time-based indicator is not a conclusive test or binding rule for PE creation. On the contrary, a PE could still exist if, in certain circumstances, an individual works from a home office for less than 50% of their total working time over the course of any 12-month period. Other scholars share this view, noting that the time-based indicator is at best a mere suggestion for tax authorities.[116]

Furthermore, the 2025 Commentary does not provide guidance on what constitutes "working time" and, for example, whether such time includes partial working days, weekends, holidays, personal leave and so on. Moreover, as identified by stakeholders, the reference to "any twelve-month period commencing or ending in the fiscal year concerned" included in paragraph 44.8 may generate application difficulties when the continuation of the cross-border remote work in the following tax period was not planned in advance.[117] This because, by nature, this time base indicator would have to be applied retrospectively, while decisions regarding the existence (and consequent set-up) of a PE have to be made up front.

In addition, further issues arise from the lack of guidance included in the 2025 Commentary on cases where, although an individual is below the working time indicator over the course of a rolling 12-month period, he or she continues to engage in cross-border remote work in a recurrent and permanent way beyond this period,

110. Ekkehart Reimer, "Article 5(1) OECD and UN MC," in *Klaus Vogel on Double Taxation Conventions*, 5th ed., ed. Ekkehart Reimer and Alexander Rust (Wolters Kluwer, 2021), 61-62.

111. Agreement 23 Nov. 2023 between the competent authorities of the Netherlands and Belgium on the interpretation of Art. 5 of the tax treaty (permanent establishment) in the case of employees working from home. Government Gazette of the Kingdom of the Netherlands, 08-12-2023, Government Gazette 2023, 33856 | Overheid.nl > Official Announcements.

112. Bundesministerium der Finanzen. (2013, April 8). *Verkaufsmanager mit Arbeitsplatz in der privaten Wohnung*, *Express Antwort Service*, Nr. 3323; (2017, November 6). *Vorliegen einer inländischen Betriebsstätte bei inländischem "home office"*, *Express Antwort Service*, Nr. 3392; (2019, June 27). *Homeoffice als Betriebsstätte*, *Express Antwort Service*, Nr. 3415; (2021, October 7). *Transfer Pricing Guidelines 2021*, Nr. 140/2021, para. 262; (2023, July 7). *(Keine) Homeoffice-Betriebsstätte einer geschäftsleitenden Holding*, *Express Antwort Service*, Nr. 3445.

113. Under the EU Multilateral Framework Agreement on Cross-Border Telework, effective 1 July 2023, employees who live in one EU country and work for an employer in another can telework from their country of residence for up to 50% of their total working time without changing their social security affiliation. They remain covered by the employer's country's social security system, provided both countries have signed the agreement and other formalities are met. This rule replaces the previous 25% threshold under Regulation (EC) No 883/2004 (Framework Agreement on the application of Article 16(1) of Regulation (EC) No 883/2004 in cases of habitual cross-border telework, Administrative Commission for the Coordination of Social Security Systems, entered into force 1 July 2023).

114. By referring to paragraph 12 (which deals with the disposal requirement), paragraph 44.7 raises doubts about whether this "continuity" to be assessed under the new time base indicator should be understood as an independent element or one within the umbrella of the disposal requirement. Pursuant to some authors, the time-based indicator is an independent element because the OECD does not relate the 50% working time threshold to the criterion that the place of business should be considered to be "at the disposal" of the foreign employer (Cotruț, "Are Micro Home Office PEs Tackled," 120).

115. Geoffroy Galéa, "Remote Work and Permanent Establishment after the 2025 Update," LinkedIn Pulse, accessed 20 December 2025, https://www.linkedin.com/pulse/remote-work-permanent-establishment-after-2025-update-ku%C5%BAniacki-xsene/.

116. Lucas de Lima Carvalho, "Caveats and Appeasement in the OECD Model Update," *Tax Notes International* 121 (Volume 121) 12 January 2026: 204-5, accessed 20 January 2026; Russo, Lorenzi, and Vernola, "Global Workforce Mobility,", 888; Maisto, "Exploring the 2025 OECD Update,", 1931.

117. Chiomenti, "Comments Submitted to the OECD Public Consultation Document: Global Mobility of Individuals (2025)," accessed 15 January 2026, https://www.oecd.org/content/dam/oecd/en/events/public-consultations/2025/11/global-mobility-of-individuals/oecd-public-consultation-comments-global-mobility-january-2026.zip.

with potential commercial ties being developed as a consequence of their personal presence in the home office country and not because of an enterprise-driven decision.

Finally, an important clarification provided by the 2025 Commentary is related to the calculation of the working time, which must be mainly determined by the individual's actual conduct (with contractual terms and company policies being considered only insofar as they align with that conduct). This "substance over form" criterion seems correct because it follows the approach applied in other regulatory areas[118] and prevents cases of abuse. However, in practice, it can lead to practical challenges because enterprises will have to closely monitor their employees' behaviour beyond contractual arrangements. Calculating an individual's total working time presents significant complexities, particularly in scenarios involving enterprises with global teams, employees transitioning between roles, newly hired individuals without a complete annual record and those taking unexpected leave periods. The absence of specific guidance within the 2025 Commentary and countries' divergent administrative practices for measuring annual workdays can result in the different treatment of comparable situations.

4.2.3. *The "commercial reason" as a prominent consideration: A conceptual shift with significant interpretative and policy challenges*

With respect to the prominence accorded to the existence of a "commercial reason" once the time-based indicator has been exceeded (thereby requiring consideration of other "facts and circumstances"), the author considers that the 2025 Commentary has gone in the right direction. This conclusion holds notwithstanding the specific criticisms the author makes of this indicator in this article.

The author's favourable assessment of the "commercial reason" indicator is based on the view that, with the approach adopted in the 2025 Commentary, the OECD's guidance on home office PE appropriately shifts the analytical focus for the PE determination in cross-border remote work. Rather than focusing on the "disposal" requirement and relying on indirect, often problematic and ultimately non-determinative indicators of an enterprise's intention to engage meaningfully and sustainably in a country's local economy (such as an employer's requirement to work from home, the provision of an expense allowance or the supply of office equipment), the guidance included in the 2025 Commentary now centres on a more objective and readily assessable criterion: the existence of a commercial reason.

Furthermore, in general, the specific guidance provided by the OECD to assess this prominent criterion also helps in assessing its verification in practice. In this regard, it is interesting to note that the new guidance adds another "temporal" element in this "business reason" indicator, as it states that "a commercial reason would not be considered present if that engagement is on an intermittent or incidental basis".[119] From Example D of the Commentary, it can be extracted that an individual having quarterly meetings (i.e. four per year) with clients or suppliers would be too intermittent and incidental to configure a "business reason". Whether this would also be the case if meetings are held every two months (i.e. six per year) or more is not clear. In the author's view, this new temporal element introduced in the "business reason" indicator will raise similar practical challenges to those historically raised by the "continuity" element under the "disposal" requirement. This seems ironic when considering that such practical challenges were indeed the main aspect that the OECD aimed to clarify via the introduction of a new 50% time-based indicator in the 2025 Commentary.

Additionally, the inclusion of "time zone" considerations as relevant indicia to conclude on the existence of a "commercial reason" raises some questions. First, how "near real time" is "near" enough? (e.g. plus or minus one, two or three hours?).[120] Evidently, the assessment of this element is subjective and creates opportunities for divergent interpretations.

Second, and more fundamentally, a crucial consideration is whether the provision of (near) real-time or 24/7 services constitutes a sufficient "commercial reason" to trigger a PE (taxable nexus) in the home office jurisdiction. According to the 2025 Commentary, even a modest commercial advantage resulting from a cross-border remote work that enables such real-time interactions with customers in a third country (i.e. a country other than that where the enterprise and home office are located) may be regarded as a "commercial reason" and, thus, trigger the creation of a PE in the home office state. Nevertheless, in the author's view, this criterion raises fundamental concerns. This because the OECD has not provided adequate justifications for why these time-zone advantages should per se be decisive to ultimately create a taxable nexus in a country where (i) there is potentially one individual working remotely from home with minimal equipment (e.g. a laptop) and (ii) the enterprise may potentially have no further physical presence, clients, customers, suppliers or other business interests. In the author's view, a justification for this approach was necessary since such time-zone advantages arising from an individual's physical presence in the home office jurisdiction do not necessarily create a sufficient economic footprint nor imply the significant or sustained participation of a foreign enterprise in the local economy of the home office country. Consequently, treating this type of situation as a PE in the home office juris-

118. *See*, for example, the CJEU's recent ruling on the concept of "habitual place of work", which underscores the importance of looking beyond the formal terms of an employment contract, such as the applicable law chosen by the parties, and instead focusing on the actual circumstances of the employment relationship (CJEU, 11 December 2025, *Locatrans Sarl v. ES*, C-485/24,ECLI:EU:C:2025:955).

119. It is important to highlight that this new temporal requirement in the "commercial reason" indicator does not overlap with the "continuity" requirement already foreseen in the Commentary (and assessed via the 50% working time threshold). This is because the latter focuses on the continuity of the activities of the individual, whereas the former focuses on the continuity of the "business reason" connected with such activities.

120. Lucas de Lima Carvalho, "Remote Work, PEs and the OECD," Latin American Tax Policy Forum, accessed 21 November 2025, https://latpf.org/remote-work-pes-and-the-oecd/.

diction seems prima facie inconsistent with the underlying policy goals of the PE notion[121] and other criteria included in the 2025 Commentary.[122]

Third, when considering this indicator of a "commercial reason" one should consider the following: Is the individual's physical presence at a foreign location really that important and/or necessary for an enterprise to offer around-the-clock coverage or real-time services considering that this could also be achieved without such physical presence (e.g. the individual could also work from the enterprise's jurisdiction outside 9 a.m. to 5 p.m. schedules)? Other authors have also expressed concerns about time-zone being a sufficient "commercial reason" to trigger the existence of a PE.[123]

Fourth, even if time-zone factors are considered relevant enough and, therefore, justified and appropriate to create a "commercial reason" and trigger a PE, the wording used by Example E still raises questions.[124] The guidance offered under this example appears straightforward in situations where, for instance, cross-border remote work allows an Australian enterprise to provide 24/7 services to its Australian customers by employing Europe-based remote workers who can deliver such services during their normal daytime. This is confirmed by the specific example offered by the OECD during its webinar.[125] However, the guidance included under Example E[126] does not address cases in which the home office jurisdiction is in the same time zone as the third country where the enterprise has customers/clients, and a different time-zone exists, not between the home office country and that of the customers/clients, but between the latter and the country where the enterprise is located (e.g. a Dutch company that, to engage in real time with customers in Toronto, Canada, employs an individual based in Lima, Peru, because the latter cities share the same time zone).

Although the latter type of cases is not expressly addressed or covered by Example E (which expressly refers to "time zones which differ from that in State S", which is the home office jurisdiction), the author considers that, in such cases, there would also exist "a commercial reason" under the general guidance of paragraphs 44.11-44.19. This because, in such cases, there is no doubt that the performance of the individual's activities (in Lima) enables the employee to be fully available to the (Canadian) customers of the (Dutch) company, and thus "facilitates the provision of services by the enterprise".

It is interesting to consider what would happen with cases in which, despite a time zone difference, real-time or near-real-time services are provided by individuals from a less favourable time zone in relation to that where the enterprise is located (e.g. a Dutch company hiring remote workers in Mumbai, India, to provide services to customers in Lima, Peru, which has a greater time zone difference from Mumbai vis-à-vis the Netherlands). In such cases, it cannot be argued that the home office "facilitates the provision of services by the enterprise as the time zone differences are in fact detrimental to the enterprise". In the author's view, if one would accept that time-zone factors should be considered in the "business reason" determination, such factors should exclude situations such as the latter and only cover cases in which a demonstrable, logical and uncontested benefit is present for an enterprise because of time-zone differences. This opinion seems to be shared by other authors.[127]

Regarding the guidance included in paragraph 44.7 (i.e. eight illustrative activities that might demonstrate "a commercial reason"), it is unclear whether the interactions that are relevant under the "business reason" element are mainly those that involve a physical presence (e.g. in-person client visits) or also those of a virtual nature (e.g. video calls) in the home office country. This is because all the illustrative activities listed in these paragraphs except for one (i.e. the one that referred to interaction with parties in different time zones) involve physical interaction between

121. The PE notion pursues three core objectives: (i) granting taxing rights to the source state to the extent that a non-resident enterprise participates in its local economy in a significant and sustainable manner, benefiting from that state's infrastructure and services (benefit principle), (ii) determining the profit to which the taxing rights of the source state relate and (iii) limiting the enforcement and compliance costs of tax authorities and taxpayers by allowing taxation at source only when the business activity of the non-resident in such a state has a certain minimum and sustainable scale. De Broe and Bettens, "Earth to OECD", 761.
122. For example, by considering that engagements with clients on an "intermittent or incidental" basis would not be sufficient to create a "business reason" and therefore a PE, paragraph 44.14 of the 2025 Commentary recognizes that such an outcome is limited to cases in which there is indeed a significant or sustained participation of a foreign enterprise in the local economy of the home office country. OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.14.
123. Maisto, "Exploring the 2025 OECD Update," 1932.
124. This example finds a "commercial reason" to exist in the case of an individual's doing a home office from State S because it facilitates the virtual provision of services by RCo to customers in State R and/or to "those located in other time zones which differ from that in State S". In the example, this is based on the understanding that "The performance of those activities in State S enables the employee to be fully available (e.g. offering real-time or near real-time services around the clock) to customers of RCo in the time zones where those customers are located".
125. To exemplify these cases, during the OECD Webinar, the following example was given:

> So consider that we have an enterprise that wishes to provide 24/7 medical services to its customers and let's assume that this business is located in Oceania. Now, if it is to provide those services around the clock to its customers who are in Oceania, it would need to require its employees to work through the night. Some of those employees would have to work during the nighttime to provide those services to customers in Oceania. To avoid that, the enterprise says, "Aha, I know what I can do. I can use employees located in Europe to provide those services from their home in Europe remotely. And when they provide those services, it will be daytime for those individuals. We won't require anybody to be up at 3:00 in the morning in order to provide our services to customers." And so what that enterprise does is it moves to a model whereby services provided by employees located in their homes in Europe. That gives us an example of an enterprise that is making use of differing time zones between where customers are located and where the home office is located in order to facilitate the delivering of its business activities. The commentary tells us that kind of arrangement would result in a commercial reason for the use of a home or other relevant place.

John Stoke, "Unpacking the 2025 Update to the OECD Model Tax Convention" (video), YouTube, 11 December 2025, https://www.youtube.com/watch?v=L8Iuq2pg6Q8.
126. Which expressly foresees that to "those located in other time zones which differ from that in State S". OECD, *The 2025 Update to the OECD Model Tax Convention*, para. 44.21, Example E(1).
127. Wustenberghs and Begian, "New OECD Commentary Regarding Home Offices," 136; Maisto, "Exploring the 2025 OECD Update," 1932.

the individual and the enterprise's clients, suppliers and so on. Although some scholars consider that both physical and virtual interactions are relevant,[128] clarification is needed as to how the "business reason" indicator should be assessed where the individual's activities are performed online (e.g. Is this assessment limited to time-zones considerations?).

Moreover, the understanding that an enterprise's willingness to obtain/retain the services of the individual and/or reduce office costs would not constitute a sufficient "commercial reason" is, in the author's view, another positive and welcome clarification of the 2025 Commentary. This is because, if such elements would have been considered sufficient "commercial reasons", then any cross-border remote work would in principle be based on a commercial reason that would trigger a PE. Regarding the first situation, it is worth highlighting that the new OECD guidance does not align with the position taken by the tax authorities of certain countries, such as Denmark.[129]

Additionally, the second clarification, on cost reduction, contributes to policies that aim to ensure the more efficient use of resources and office spaces.[130] However, since the example provided by the Commentary in relation to cost reduction refers to reducing expenditure on office space, it is not entirely clear whether other types of cost reductions (e.g. labour costs) would also fall under this carve-out. In any event, it should be noted that the OECD clarifications about cost reduction and talent obtention/retention as not constituting "a commercial reason" is conditioned to cases in which the cross-border remote work is enabled "solely" (in other words, exclusively) for such purposes. Considering that other minor and ancillary reasons could also influence cross-border remote work (and, therefore, trigger the existence of "a business reason" and a PE), the limitation included in paragraphs 44.15 and 44.16 of the 2025 Commentary could end up being unreasonably applied by tax authorities.

Finally, although being helpful in many cases, it is probable that the eight illustrative activities mentioned in paragraph 44.17 of the 2025 Commentary will lead to differing interpretations in borderline situations, with countries disagreeing about what constitutes "a commercial reason".[131] Because of the decisive character of the existence of "a business reason", the author agrees with scholars who have already noted that this term will be the linchpin of PE-related litigation in cross-border remote work cases for years to come.[132]

4.2.4. *Relevant but non-decisive criteria for PE determination: Residual discretion and interpretative uncertainty*

Another important criticism that may be levelled against the guidance included in the 2025 Commentary is that, although the criteria set out therein are relevant, they are ultimately not decisive in determining the existence of a PE in cross-border remote work situations.

First, the two newly introduced indicators to determine the existence of a place of business were not designed or drafted as binding tests or safe harbours, but rather as indicative criteria or a mere suggestion. This view, which is shared by other authors,[133] arises not only from the clarification made in paragraph 44.2 (which states that the considerations in the Commentary are relevant but not exhaustive), but also specifically from (i) the wording used in relation to the time-based indicator in paragraph 44.8. (i.e. "would generally not be considered a place of business" and "exceptions … are not expected to occur", which imply that exceptions are still possible) and (ii) the caveat made in paragraph 44.19 (which states that, when there is no commercial reason, there would be no place of business "unless other facts and circumstances indicated otherwise").

Regarding specifically the latter caveat, it should be noted that no explanation or example is included in the 2025 Commentary to clarify its application (e.g. What does "otherwise" mean? What other elements than those foreseen explicitly in article 5.1. and its Commentary could otherwise indicate the existence of a PE in cross-border remote work context?). Therefore, in the author's view, this caveat represents a clear "safety or escape valve" that, because of its openness, vagueness and lack of clarification create uncertainties and is prone to arbitrary interpretations.[134] It should be noted, though, that this criticism is not shared by other authors who consider such wording a positive feature.[135]

128. Wustenberghs and Begian, "New OECD Commentary Regarding Home Offices," 135.
129. In Denmark, a home office PE was found to exist based on the benefit that implied retaining the services of an individual who had a decisive influence over the company's management and wanted (for personal reasons) to work partly from Denmark (despite the fact that there was no business or market interest of the non-resident enterprise in the Danish market); Danish Tax Council, SKM2024.432.SR, cited in Kromann Reumert, "New Binding Ruling Confirms that CEOs Working from Home in Denmark Establish a PE," Kromann Reumert, 2 September 2024, https://kromannreumert.com/en/news/new-binding-ruling-confirms-that-ceos-working-from-home-in-denmark-establish-a-pe.
130. Interestingly, Wustenberghs and Begian note that this clarification on cost reduction not being a commercial reason constitutes a notable shift of the 2025 Commentary, as under the 2017 Commentary, cost reduction may have been interpreted as an indicator of an implicit right of disposal by the foreign enterprise/employer over the private workplace. (Wustenberghs and Begian, "New OECD Commentary Regarding Home Offices", 136).
131. Geoffroy Galéa, "Remote Work and Permanent Establishment after the 2025 Update".
132. Lucas de Lima Carvalho, "Remote Work, PEs and the OECD," Latin American Tax Policy Forum, accessed 21 November 2025, https://latpf.org/remote-work-pes-and-the-oecd/.
133. Lucas de Lima Carvalho, "Caveats and Appeasement in the OECD Model Update," 204-5; Wustenberghs and Begian, "New OECD Commentary Regarding Home Offices", 136.
134. This is because, even when none of the explicit criteria for verifying a place of business are met, tax authorities could still use caveat to arbitrarily construct an argument that – pursuant to the facts and circumstances of the case – a place of business exists in the source state.
135. Ouro notes that:

> The reference to the importance of facts and circumstances does not detract from the relevance of the two indicators expressly mentioned in the 2025 Comments. Instead, this reference serves to prevent these criteria from being applied unthinkingly; they are merely indicators and guidelines. At the same time, these facts and circumstances must have sufficient probative force to override the relevance of these indicators. They should not be mere doubts. This reasoning

4.2.5. *The lack of materiality of de minimis threshold to avoid the creation of micro-PEs*

Another aspect that can be criticized regarding the new home office PE guidance included in the 2025 Update refers to the non-inclusion of a materiality or *de minimis* revenue threshold to fully prevent the emergence of micro-PEs with marginal profit allocations. This because, in the author's view, none of the new indicators foreseen in the 2025 Commentary seem to prevent such outcome (see below).

As noted in section 2.5., the creation of micro-PEs (as well as the assessment of whether one exists) creates disproportionate administrative burdens for both tax authorities and enterprises considering the revenue to be potentially collected. As noted by other authors, administrative and compliance costs associated with the potential rise in home office PEs seem disproportionately large, particularly having in mind that the attribution of profits to such PEs – most involving only one employee – would be a hellish exercise.[136]

Since representatives of the OECD expressly[137] recognized that one of the goals of the new guidance was to avoid the creation of these micro-PEs, the absence of specific provisions in the Commentary to address this situation is relevant. This is especially because the introduction of a PE *de minimis* revenue threshold had already been suggested by some authors[138] to ensure that a home office would only constitute a PE when, for example, the revenue attributable to the potential PE is greater than a specified amount.[139] Alternatively, the OECD could have also considered the introduction of remuneration-based thresholds below which an individual engaged in cross-border remote work would never trigger a PE.

It should be noted though that, according to other scholars, the two key indicators for assessing the existence of a place of business under the 2025 Commentary (i.e. time base indicator and existence of "a commercial reason") would prevent the proliferation of micro-PEs.[140] Other authors who consider that the new criteria added in the 2025 Commentary could help reduce the creation of micro-PEs still emphasize the need for safe harbours to truly prevent this from happening.[141] In the author's view, without a materiality or *de minimis* threshold and/or safe harbour, the two indicators foreseen in the 2025 Commentary per se do not overcome the micro-PE challenge and could still give rise to PE with negligible attributable profits. In fact, many of the activities listed in paragraph 44.17 as examples of "a commercial reason" would likely result in minimal profit attribution.

4.2.6. *A tacit shift from "disposal" to new indicators: Uncertainty as to the continued role of "disposal" in cross-border remote work cases*

The most fundamental point of criticism that, in the author's view, can be made of the home office PE guidance in the 2025 Commentary relates to its tacit but manifest shift in focus from the traditional "disposal" requirement to the broader place of business requirement and its two new indicators (i.e. the time-based indicator and the existence of a "commercial reason").

One cannot deny that, because of the unclarities and divergent interpretations that arose from the 2017 Commentary, a change of the pre-existing approach was evidently necessary to facilitate the PE determination in cross-border remote work cases. However, when introducing such a new approach, the 2025 Update made – in the author's view – some mistakes.

> has the advantage of facilitating tax administrations' analysis of specific situations while providing legal certainty to taxpayers. Thus, for example, if an enterprise proves that a given employee is working from home in another State for less than 50% of their working time and that there is no commercial reason for them to be working in that State, then it is up to the tax administration to prove, by gathering concrete evidence, that these indicators should be disregarded because the facts and circumstances reveal that there is a permanent establishment.

Marisa Ouro, "Times Change, Desires Change: Home Office and the 2025 Amendments to the Commentary on Article 5(1) of the OECD Model Convention," SSRN, 19 November 2025, 11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5855842.

136. Stjepan Gadžo, "Rethinking the Allocation of the Rights to Tax Business Income in the Digital Age: Remote Work as a Further Challenge to the Permanent Establishment Concept?," in *Mobility of Individuals and Workforces: Tax Challenges Raised by Digitalization*, ed. Svetislav V. Kostić et al. (Amsterdam: IBFD, 2024), https://doi.org/10.59403/2j0zh11012.
137. During the International Tax Conference Munich, organized by Business Europe, Business at OECD, and the International Chamber of Commerce on 11 July 2025, Achim Pross, deputy director of the OECD Centre for Tax Policy and Administration, stated:

> I think, in terms of directional guidance here, there is a consensus not to create micro-PEs, these situations where there's a lot of compliance work that would result with little profit allocated, and then all sorts of bleeding into VAT, social security, and everything else that can happen once you find a [PE].

Sarah Paez, "OECD Clarifies 'Home-Office' Permanent Establishment in Global-Mobility Guidance," *Tax Notes International*, 14 July 2025, https://www.taxnotes.com/tax-notes-today-international/permanent-establishment/oecd-clarify-home-office-pe-global-mobility-guidance/2025/07/14/7srkc.

138. Katia Cejie, "Let's End the Fuss about Home Offices as Permanent Establishments for Cross-Border Teleworking," *Bulletin for International Taxation* 78, no. 11 (2024), https://doi.org/10.59403/cwhw0t.
139. However, it is also recognized that the introduction of such a threshold requires making an ex-ante allocation of profits to the potential PE, which could be more difficult than determining whether a PE exists and raise income allocation disputes with the tax authorities. Svitlana Buriak, "Mobility of Workers and Remote Work after the COVID-19 Pandemic: Is There Still the Need to Stay at Arm's Length?," in *Mobility of Individuals and Workforces: Tax Challenges Raised by Digitalization*, ed. Svetislav V. Kostić et al. (Amsterdam: IBFD, 2024), https://doi.org/10.59403/2j0zh11013. Laura Visscher, "Beyond Borders: Practical Frameworks to Navigate Permanent Establishments and Profit Allocations in a Home Office Setting," *International Transfer Pricing Journal* 32, no. 3 (2025), https://doi.org/10.59403/yr48xw.
140. While Ouro argues that "the objective indicators selected in the Commentary for assessing the situation have the potential to prevent the proliferation of micro-establishments", Galéa expressly states that "the 50% threshold and commercial-reason test operate as a calibration mechanism, avoiding an automatic proliferation of low-value PEs while preserving source-State taxation where a home office functions as a genuine business presence." Knotzer and Schmidjell-Dommes have the same opinion (Marisa Ouro, "Times Change, Desires Change"; Geoffroy Galéa, "Remote Work and Permanent Establishment after the 2025 Update". Christian Knotzer and Sabine Schmidjell-Dommes, "Homeoffice Betriebsstätte–Neuerungen im OECD MK zu Art 5 OECD MA durch das Update 2025," *SWI* 1 (2026): 18 ff.
141. Cotruț, "Are Micro Home Office PEs Tackled," 125.

First, by not expressly acknowledging the substantial shift in focus from the traditional "disposal" requirement to the broader place of business requirement and its two new prominent indicators, the new guidance not only minimized the importance of such a change but also created great uncertainty regarding this aspect.[142] The main question that arises in this regard is whether the disposal requirement has been fully abandoned,[143] or whether it still applies (and if so, in what way) for the PE determination in cases of cross-border remote work.

It is worth noting that the OECD has not confirmed that the "disposal requirement" is no longer relevant for the PE determination in cross-border remote work cases, nor has it recognized that this requirement still applies under the 2025 Commentary. On the one hand, the abandonment of the disposal requirement can be construed from the obvious need to overcome (via a pragmatic approach) the practical challenges raised by the application of this concept in cross-border remote work. This understanding seems to tacitly emerge from the text of the 2025 Commentary and, particularly, from the explanation included in paragraph 44.2,[144] the general reference to place of business in lieu of "disposal" across the guidance and the positions taken by certain countries (e.g. India).

Nevertheless, there are two aspects of the 2025 Commentary that cast doubt on this conclusion. The first aspect is the reference made by the new paragraph 44.7 to paragraph 12 of the Commentary, which deals with the continuity element under the disposal requirement. The second aspect is the explanation provided by the OECD's representative about the nature of the changes introduced by the 2025 Update, who noted that "This new guidance builds upon the existing principles that are found in article 5 and that were also already reflected in paragraphs 18 and 19."[145]

Considering that the disposal requirement was a key principle reflected in paragraphs 18 and 19 of the 2017 Commentary, and one that undoubtedly continues to apply to the fixed place PE concept in cases beyond cross-border remote work, the OECD explanation above raises questions regarding whether such "disposal" is still relevant for the home office PE determination. Without an expressed clarification stating otherwise, the two aspects of the 2025 Commentary mentioned above leave room for the understanding that the "disposal requirement" could continue to play a role in the PE determination in cross-border remote work contexts.[146]

Given this possibility, the author questions why the OECD omitted clarifying this important issue and its potential implications. This is because, if one should understand that the "disposal" requirement continues to be relevant in this context, key questions would arise such as (i) whether this is a separate requirement that needs to be assessed before applying the new guidance under the 2025 Commentaries or, if that is not the case, (ii) what role the constitutive sub-elements under the disposal requirement play and how they relate to the two new indicators introduced by the 2025 Update (i.e. the time-based indicator and the presence of a "commercial reason"). While the time base indicator could easily be presented as a specification of the "continuity" required under "disposal", the "commercial reason" element does not seem to fit with the other requirement of "effective power to use".

Conversely, if one should consider that the 2025 Commentary has effectively and fully abandoned the disposal requirement for home office PE cases, questions can still be raised regarding why the OECD has not sufficiently clarified and justified this important policy change and has, instead, presented them as a mere evolution of existing principles that are found in article 5 and that were also already reflected in paragraphs 18 and 19. If one should confirm that, under the 2025 Commentary, "disposal" is no longer relevant in the context of cross-border remote work, the changes introduced by the 2025 Update would clearly amount to a significant departure from pre-existent criteria and requirements included in the 2017 Commentary that would require a clearer and more elaborate policy justification. As discussed in section 5.2., this has significant practical implications for the application of the new guidance under existing tax treaties.

In any event, if the OECD's intention was to build on the "disposal" requirement and integrate the pre-existent guidance and the country's practices into a new, more decisive, and easier-to-assess factor for PE determination, the author believes that a different approach was possible and preferable. Instead of deleting pre-existing criteria under the 2017 Commentary and replacing it (without a clear explanation) with new indicators, the author considers that the OECD could have specified that, in the context of cross-border remote work, (i) the time base indicator is a practical tool for assessing the "continuity" required under "disposal" and (ii) other pre-existing and diverse criteria and/or factors to assess "effective power to use" should be deemed merely non-exhaustive, non-decisive

142. Wustenberghs and Begian share this view noting that "the 2025 Update remains totally silent regarding one of the fundamental conditions that the home office should be at the disposal of the foreign enterprise to create a fixed place of business PE. The criteria developed by the OECD (viz. the 50% threshold and the commercial-reason test) appear, in the authors' view, to fit more naturally within the assessment of this disposal test. How should this condition be dealt with in the future? The authors feel that the OECD has created a vacuum unfortunately leading to more uncertainty." (Wustenberghs and Begian, "New OECD Commentary Regarding Home Offices," 138).
143. This is the view of certain authors, like Cotrut, who note that "in the event of cross-border working, the 2025 Update to the Commentary derogates from the criterion that the place of business should be at the disposal of the foreign employer' and "in the 2025 Update to the Commentary there is no requirement that the home or other relevant place be at the disposal of the foreign employer" (Cotruț, "Are Micro Home Office PEs Tackled," 119, 123).
144. Such view is shared by other scholars (*see* Wustenberghs and Begian, "New OECD Commentary Regarding Home Offices," 133)
145. Yves Van Brussel, "Unpacking the 2025 Update …" (video), YouTube, 11 December 2025, https://www.youtube.com/watch?v=L8Iuq2pg6Q8.
146. In fact, authors like Maisto, seem to consider that "disposal" still plays a role in the PE determination in cross-border remote work contexts. This because he notes that "if work from home is performed for more than 50 percent of working time, then whether the foreign enterprise has a "fixed place of business" *at its disposal* is determined by facts and circumstances" [emphasis added] and "working less than 50 percent does not exclude altogether the existence of a place of business *at the disposal* of the enterprise" [emphasis added]. (Maisto, "Exploring the 2025 OECD Update," 1928, 1931).

and secondary indicators (indicia) to assess the verification of a unique, common, decisive and easier-to-assess underlying factor (e.g. whether the enterprise indeed has a prevailing "benefit or commercial reason" to have an employee working from home at a foreign jurisdiction and, by doing so, participates in this jurisdiction's local economy in a significant and sustainable manner).

With this alternative approach, the OECD would still need to explain why this new decisive factor ("benefit or commercial reason" indicator) takes precedence over the "effective power to use" requirement for the determination of a PE in cross-border remote work. In the author's view, this could potentially be substantiated on the interpretation that, ultimately, the "effective power to use" the location under the disposal requirement aimed to identify situations in which the non-resident enterprise had a commercial reason, interest and/or benefit from having an individual engaged in cross-border remote work. This is because it can be reasonably assumed that a company would only exercise an "effective power to use" an individual's home office (or require them to work from there) if the company has an underlying commercial interest or benefit in doing so.

Even when other justifications for discarding the "disposal requirement" could have been put forward,[147] in the author's opinion, the alternative approach suggested above would have better aligned the new OECD guidance with the pre-existing criteria on "disposal" arising from the 2017 Commentary and national interpretations. Furthermore, it would have better integrated the latter with the two new indicators introduced by the 2025 Commentary.

5. What Comes Next? Practical Implications of the 2025 Commentary for Existing Treaties

5.1. Introductory remarks

After making several observations about the new OECD guidance, the main questions to be addressed concern what comes next and how the 2025 Commentary will influence countries' interpretation of article 5.1 in treaties entered into before its adoption.

To answer these questions, it is important to briefly discuss the general role of the Commentaries to the OECD Model in existing treaties' interpretations and determine whether such interpretations should consider the version of the Commentaries that existed at the time of the treaties' conclusion (static) or at the time of their application, which includes the latest updates (dynamic).

5.2. The value of the OECD Commentaries for treaty interpretation

It is widely recognized that the OECD Model and its Commentaries are very important for the interpretation of tax treaties that follow such a model because they provide a source from which the courts of different states can seek a common interpretation.[148]

In general, when interpreting tax treaties between OECD countries, the approach depends on how closely the treaty text aligns with the OECD Model. If the treaty adopts the Model's wording unchanged, it is presumed that the contracting states intended to follow the OECD Council's recommendation, so its Commentaries[149] should be considered, except where reservations or observations indicate otherwise. Similarly, if the treaty does not adopt the Model literally but (i) uses wording that allows an interpretation consistent with it or (ii) if a provision is adopted literally but other related provisions suggest a different meaning, there is still a presumption that the interpretation should align with the Model (and its Commentaries). Only when both conditions occur (i.e. non-literal adoption and contextual indications of a divergent interpretation) may the Model and its Commentaries be disregarded.

By contrast, for treaties involving non-OECD members, the OECD Model and its Commentaries carry less weight. An intention to adopt an OECD Model provision can only be presumed when the treaty text matches the Model and its context does not suggest a different interpretation. The relevance of the Commentaries depends on the specific circumstances of each case. For recent treaties with developing countries, the UN Model and its official Commentaries should also be considered; however, since both models largely coincide, the OECD Model and Commentary can still provide useful guidance.[150]

Against this backdrop, the relevance of the guidance included in the 2025 Commentary will largely depend on the specific treaty and parties in question. In the author's view, the guidance will be of low relevance and/or inapplicable in treaties following the UN[151] or other models. In the case of treaties following the OECD Model and entered into as of 19 November 2025 (i.e. date of publi-

147. For example, Pistone and Tenore have argued that:

> what matters is whether the place is used by the employee for the exercise of employment rather than whether such a place is at the employer's disposal in strict terms. As long as the place can be effectively used for the exercise of employment, its exclusive destination to such a function is of secondary relevance unless expressly required by the applicable administrative and legislative measures.

However, in the author's view, this approach is not the best because it completely relegates the disposal requirement (which continues to be a general condition under the Commentary) without sufficient substantiation.' (Pasquale Pistone and Mario Tenore, "General Report," in *Mobility of Work*, ed. Georg Kofler et al. (Amsterdam: IBFD, 2024), https://doi.org/10.59403/9n3h11001.

148. More controversial, however, is whether this practice of considering the OECD Model and its Commentaries when interpreting tax treaties is in accordance with the rules of the VCLT. Werner Haslehner, "Interpretation of Double Tax Treaties," in *Klaus Vogel on Double Taxation Conventions*, 5th ed., ed. Ekkehart Reimer and Alexander Rust (Wolters Kluwer, 2021), 54-58.

149. Particularly referring to the Commentaries. Schwarz notes that:

> the Commentary is supplementary material within Article 32 of the VCLT. Its use is therefore discretionary and may be used to confirm the ordinary meaning resulting from the application of Article 31, or to determine the meaning when the Article 31 interpretation leaves the meaning ambiguous or obscure, or if that leads to a result which is manifestly absurd or unreasonable.

Jonathan Schwarz, "Permanent Establishment: Geographic and Temporal Issues," in *New Trends in the Definition of Permanent Establishment*, ed. Guglielmo Maisto (IBFD, 2019), https://doi.org/10.59403/2fmgqwn003.

150. Werner Haslehner, "Interpretation of Double Tax Treaties," 54-58.

151. It should be noted that, unlike the Commentaries to Article 5.1 of the OECD Model, those of the UN Model do not contain specific and dedicated guidance on home office PE configuration.

cation of the 2025 Update), the new guidance will evidently be relevant and in principle will apply, unless the parties to the treaty stipulate otherwise. What is less clear is whether the new guidance is relevant and applicable for treaties that follow the OECD Model, but which have been entered before 19 November 2025. Such a question is addressed in the following section.

5.3. Static versus dynamic interpretation of the Commentaries: The 2025 Commentary as a substantive policy change and its limited relevance for existing treaties

Generally, when interpreting treaties concluded by OECD member countries, only the edition of the Commentaries that was applicable at the time of a treaty's completion should be considered. However, many changes and supplements made by the OECD to its Model and Commentaries are usually presented as mere "clarifications" of an interpretation of the treaty text that already applied under the earlier edition of the Model. While in some cases the changes introduced do entail minor clarifications,[152] in many other cases, these changes are new subsequent comments that were not included in the earlier treaty and, therefore, cannot be considered for treaty interpretation. It is therefore for the parties to the treaty to determine to what extent the new version only clarified what already had been the correctly understood meaning of the earlier Model and to what extent it in fact attempts to alter its interpretation.

In principle, the same happens when there is an explicit treaty provision obliging the parties to interpret the treaty according to the standards of the OECD Model's Commentaries. In these cases as well, this provision should only be understood to refer to the edition of the Model and Commentaries available on the date of the agreement. In situations where a treaty expressly stipulates that the current version of the Model and its Commentaries, as they exist at the time of treaty application, should prevail, the result will be determined by the extent to which the constitutional laws of the contracting states allow for such a dynamic reference.[153]

When confronting the home office PE guidance included in the 2025 Commentary with the general framework above, it is evident that the former goes beyond mere "clarifications" of an existing interpretation of the wording of article 5.1 and constitutes a material and significant change to the interpretation of such provision. This is especially the case if one should conclude that the 2025 Commentary has effectively and fully abandoned the "disposal" requirement for home office PE cases (*see* section 4.2.6.). Even in the opposite case, the manifest differences that exist between the 2017 and 2025 Commentaries on home office PE and its indicators are sufficient to conclude that a material and significant change to the Commentary has been introduced. This view has been generally shared by other authors.[154]

The consequence of this is that the guidance included in the 2025 Commentary should, in the author's view, not be considered for the interpretation of existing treaties, even if a treaty contains a specific provision obliging the parties to rely on the OECD Model Commentaries. A similar conclusion was found by other authors some years ago regarding the possible application of the home office PE guidance under the 2017 Commentary to tax treaties entered before 2017.[155] As mentioned above, this is not the position taken by the OECD, which has expressly highlighted that "the new guidance can be applied immediately to existing tax treaties that are based on the OECD Model. There is no need to change the text of a tax treaty in order to apply this agreed interpretation of paragraph one of article 5".[156]

However, if the treaty expressly stipulates that the "current version" of the Model and its Commentaries should be considered, the guidance under the 2025 Commentary would in principle become applicable, unless the constitutional rules of the countries in question reject such a dynamic interpretation. In the author's view, a dynamic application of the 2025 Commentary would imply a de facto authorization of the OECD's Council on Fiscal Affairs to change and expand the interpretation of article 5 under existing bilateral treaties, which, absent an express bilateral agreement, would most likely not be allowed under the constitutional regimes of most countries.

Despite the legal limitations to relying on the new guidance included in the 2025 Update discussed above, in practice, under a dynamic interpretation, such guidance may already affect how tax authorities worldwide attempt to apply existing treaty provisions. In this context, it will be important to observe how the guidance is received by jurisdictions with existing judicial and administrative precedents on home office PEs, as well as those without such precedents. For countries with established case law, an assessment will be required to determine which aspects are reinforced, expanded or potentially contested by the new OECD guidance.[157] While scholars are starting to speculate on this aspect,[158] it is still unclear whether tax authorities and courts will follow the new OECD guidance or choose to uphold and further develop their own national approaches. Countries' individual reservations and positions contained in the 2025 Commentary offer perspectives on how they might approach the new OECD

152. A typical example of clarification is changes introduced to the treaty that improve the language of the text or to make the English and the French texts more alike.
153. Werner Haslehner, "Interpretation of Double Tax Treaties," 54-58.
154. Wustenberghs and Begian, "New OECD Commentary Regarding Home Offices," 138; Cotruț, "Are Micro Home Office PEs Tackled," 124; Maisto, "Exploring the 2025 OECD Update," 1933.
155. Frank P. G. Potgens and Anne I. Harteveld, "Interpretatie van de vaste-inrichtingsdefinitie in een tijdperk van grensoverschrijdend thuiswerken," *Weekblad voor fiscaal recht* 154, no. 7582 (23 June 2025): 6-17, https://www.inview.nl/document/idafc9fdf72bd14a8f828c2bdde8c954fa.
156. Yves Van Brussel, "Unpacking the 2025 Update …" (video), YouTube, 11 December 2025, https://www.youtube.com/watch?v=L8Iuq2pg6Q8.
157. Lucas de Lima Carvalho, "Remote Work, PEs and the OECD," Latin American Tax Policy Forum, accessed 21 November 2025, https://latpf.org/remote-work-pes-and-the-oecd/.
158. Christian Knotzer and Sabine Schmidjell-Dommes, "Homeoffice Betriebsstätte," *SWI* 1 (2026): 18 ff.

guidance. However, the latter do not bind national courts, which will ultimately rely or not on said guidance based on its alignment with their domestic legal order.[159] Moreover, it is worth remembering that certain jurisdictions have their own domestic PE definitions which, in some cases, are broader (or narrower) than that of article 5.1, leading to situations in which a PE might arise under domestic law but not under the treaty.[160]

6. Conclusions

Throughout this article, it has been shown that, vis-à-vis the 2017 Commentary, the new guidance on home office PE under the 2025 Commentary provides more practical and easier-to-apply criteria that overcome some of the pre-existing unclarities that arose when having to determine the existence of a fixed place PE in cross-border remote work cases.

However, it has also been found that the new home office PE guidance under the 2025 Commentary raises several issues and unclarities that create room for an inconsistent and arbitrary application of article 5.1 across jurisdictions. Thus, a further refinement of this guidance seems necessary to ensure a coherent and harmonized application of article 5.1 that closely aligns with the objectives and purpose of the PE concept and integrates both the pre-existing OECD criteria and a country's divergent approaches.

Moreover, it was found that the 2025 Commentary introduced substantial changes to the interpretation of article 5.1 and its 2017 Commentary rather than offering mere clarifications. Given the clear differences between the 2017 and 2025 Commentaries on home office PE and its indicators, it is argued that the 2025 Commentary should generally not be used to interpret tax treaties entered before 19 November 12025, contrary to the OECD's position.

When thinking about possible improvements to the 2025 Commentary and/or long-term solutions to the PE risks raised by cross-border remote work, it is important to consider the particularities of this phenomenon. Similar to other phenomena, cross-border remote work challenges some of the basic policy assumptions underlying the PE concept (such as the assumption that the operation of a physical facility, equipped with enough workers, is a clear indicator of significant economic presence in a jurisdiction).[161] Therefore, when assessing how the traditional PE notion from 19th-century German law applies to today's remote work reality, it may often feel that the effort is being made to fit a flexible, mobile and divergent phenomenon into the rigid requirements historically relied on for the PE determination.[162]

Interestingly, this same feeling is also prevalent when trying to address the PE challenges raised by the digital economy, which allowed for the possibility of carrying out a business in a foreign market without a physical presence. As noted by other scholars,

> our new digital economy has not only enabled enterprises to generate profits in market jurisdictions without having any physical presence in them. Currently, they are capable of creating and providing their products/services without having a permanent place of business within the states where these products/services have been created or maintained.[163]

In this context, the author wonders whether the solution to addressing the PE risks raised by cross-border remote work should perhaps not be addressed together with those raised by digital business models. This is because, as noted by Baker, it might be time to accept that "the corollary to the recognition of a significant digital presence is that an insignificant physical presence at a home office should not constitute a permanent establishment and a sufficient nexus for taxing profits in a country."[164]

159. For example, on 24 December 2025, the German Ministry of Finance updated its stance on the application of the OECD's Commentaries to align it with national case law, and noted that – within the limits of the wording of the respective treaty – the version of the Commentaries existent at the time of application can be used for interpretation insofar as it contains mere clarifications and refinements compared to the earlier versions). Andreas Maywald, "Updated Guidance Issued on Use of OECD Model Commentary in Tax Treaty Interpretation," tax@hand, accessed [Day Month Year], https://www.taxathand.com/article/40797/Germany/2026/Updated-guidance-issued-on-use-of-OECD-model-commentary-in-tax-treaty-interpretation.
160. Gilles Franssens and Dennis Matthijs, "2025 OECD Update Reshapes Home Office Permanent Establishment Strategy," *Tax Notes International* 121 (Issue 5) (2 February 2026), 807.
161. Stjepan Gadžo, "Rethinking the Allocation of the Rights to Tax Business Income in the Digital Age," in *Mobility of Individuals and Workforces*, https://doi.org/10.59403/2j0zh11012. (Svetislav V. Kostić et al. eds., IBFD 2024), Books IBFD, https://doi.org/10.59403/2j0zh11012.
162. A similar argument is raised by other authors, such as Lucas de Lima Carvalho, "Remote Work, PEs and the OECD," Latin American Tax Policy Forum, accessed 21 November 2025, https://latpf.org/remote-work-pes-and-the-oecd/.
163. Svetislav Kostić, "A Plea for a Workforce Presence PE Concept in a Post-Covid Digitalized World," *Intertax* 49, no. 10 (2021): 767.
164. Philip Baker, "International Tax in the Time of COVID-19," *Intertax* 48, no. 8 (2020): 812.

