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# PERMANENT ESTABLISHMENT : AN EVOLVING INTERPRETATION

A BELGIAN PERSPECTIVE



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## PRESENTATION STRUCTURE

Following up on the recent OECD update on its Model Tax Convention concerning the concept of permanent establishment, members of the Belgian Federal Public Service (FPS) Finance will deliver their insights on evolving perspectives on issues such as Home Office Permanent Establishments and the notion of commercial reason. The presentation will also evaluate the effect of this doctrinal change on the application of existing DTAs.



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# PERMANENT ESTABLISHMENTS AS THEY STOOD

TELEWORKING : 2017 OECD COMMENTARY AND BELGIAN-DUTCH AGREEMENT

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## PERMANENT ESTABLISHMENTS (1)

- Teleworking may lead to the creation of a permanent establishment (PE) of the employer in the worker's home.
- Despite analyzes in the 2017 version of the OECD Commentary of the Model Tax Convention, there remained uncertainty as to the circumstances that could lead to the creation of a PE
- Belgium had taken several steps to resolve the uncertainty and provide clarifications:
  - Conclusion of an agreement between Belgium and the Netherlands on this topic
  - During the Belgian presidency of the European Union, Belgium has led a Task Force regarding cross-border workers and teleworking, one of the main topics being the creation of PE in such situations



## PERMANENT ESTABLISHMENTS (2)

- Art. 5 § 1 OECD Model Tax Convention : « the term « permanent establishment » means a fixed place of business through which the business of an enterprise is wholly or partly carried on. »
- 3 conditions :
  - The existence of a « place of business »
  - The place of business must be fixed (certain degree of permanence)
  - The carrying on of the business of the enterprise through this fixed place of business
- A home office has normally a fixed nature and is used to carry on the business of the enterprise, but it will be a « place of business » only if it is « at the disposal » of the enterprise



## PERMANENT ESTABLISHMENTS (3)

- A location will be considered a « place of business » if it is « at the disposal » of the enterprise
- To be « at the disposal » of the enterprise, the enterprise must use the location through its workers for an extended period of time
- It is a factual test depending on all facts and circumstances of the case
- To determine if a home office constitute a PE, it was the most important and determining factor



## PERMANENT ESTABLISHMENTS (4)

- 2 conditions were used for a home office to constitute a PE :
  - The home must be used on a continuous basis
  - The employee is « required » to work at home by the enterprise
- The « requirement » condition leads to more questions :
  - For employers who decide to no longer provide sufficient office space to accommodate all their workers (e.g. desk sharing), are the employees « required » to work at home ?
  - For workers who live so far from the employer's premises that they cannot use regularly the office made available to them by the employer, does it amount to a « requirement » to work from home ?
- During the Task Force discussions, there were considerable differences between the members in their approaches to this condition



## PERMANENT ESTABLISHMENTS (5)

- Activities of a preparatory or auxiliary character do not constitute a permanent establishment, even when carried on through fixed places of business
- A home office which would be « at the disposal » of the enterprise did thus not constitute a PE if it was only used for such activities of a preparatory or auxiliary character
- The OECD Commentary (2017) mentioned that the activities performed at a home office will « often » have a preparatory or auxiliary character, but was it still valid with the growing importance of teleworking ?



## BELGIAN-DUTCH AGREEMENT AND ITS PROPOSED SOLUTION

- Signed 23.11.2023 => aims to clarify for Dutch and Belgian employers the particularly relevant elements to determine whether employee's home working in their country of residence leads to the creation of a PE
- The agreement is based on the OECD Commentary (2017) :
  - Importance of the « disposal » test
  - Activities of a preparatory or auxiliary character do not create a PE
  - All facts and circumstances are taken into account



## BELGIAN-DUTCH AGREEMENT AND ITS PROPOSED SOLUTION (2)

- Main features of the agreement :
  - **50 % threshold** : a worker who teleworks less than 50 % of his working time does never lead to the creation of a material PE
  - 3 types of teleworking
    - Occasional teleworking (no PE creation)
    - Structural teleworking with the possibility of working on site (no PE creation)
    - Structural and compulsory teleworking : constitutes a PE (use of the home office on a continuous basis + the employee is required to work from home)



## BELGIAN-DUTCH AGREEMENT AND ITS PROPOSED SOLUTION (3)

- The category « structural and compulsory teleworking » includes also *de facto* compulsory teleworking, such as when :
  - no workplace is made available to the employee by the enterprise
  - the worker cannot carry out his work adequately or in accordance with the employment contract if he doesn't work from home
- The agreement also gives some examples of activities which could (depending of circumstances) be considered as having an auxiliary character, such as secretarial activities, internal accounting, human resources or ICT support



## SUMMARY

The 2017 version of the commentary of the **OECD Tax Convention Model** recognised the possibility of teleworking leading to the creation of permanent establishment on the following criteria: **place of business at the disposal of the enterprise (disposal test), extended use of the home office, and requirement condition.**

The **Belgian-Dutch agreement** proposed a solution to some of the interpretational difficulties of these modalities by further defining what extended use meant (50% threshold) and seeking to categorise teleworking types (structural teleworking vs occasional teleworking).



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# EVOLVING INTERPRETATION

## THE 2025 MODIFICATIONS OF THE COMMENTARY OF THE OECD MODEL TAX CONVENTION

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## UPDATE OECD COMMENTARY : GENERALITIES (1)

The 2025 Update to the OECD Model Tax Convention directly reckons with the growing relevance of teleworking and the lack of clarity of prior commentary on Article 5. Paragraphs 18 & 19 of the aforementioned commentary are now deleted and cross-border working from a home is addressed in paragraph 44.

Paragraph 44 extends the problematic beyond homes and towards « **other relevant places** » exemplified in « the individual's home or another place such as a second home, a holiday rental, the home of a friend or relative etc.)" [44.1] and considering such other relevant places may constitute fixed places of business.



## UPDATE OECD COMMENTARY: GENERALITIES (2)

Naturally, a home (or other relevant place) is distinguishable from other company locations by certain unique features: for instance, they are normally not accessible by other persons working for the enterprise and have a greater degree of connection to the individual (44.2).

Hence, to define whether they may be considered as places of business (and then, potentially, permanent establishments), a number of factors need be considered:

- The mere fact that business is conducted in a place does not lead to the automatic qualification of a place of business (44.6);
- Homes and other relevant places often enjoy mixed (private and business) use. Intermittent or incidental business use should disqualify it from being a place of business (44.7).
- Continued presence for more than 50% of an employee's total working time beginning or ending in the fiscal year concerned should be the main criterion for determining that a place is used for an extended period of time (44.8). IF that criteria is met, then other considerations should be taken into account to determine if the place should be considered a place of business (44.10)



## UPDATE OECD COMMENTARY: COMMERCIAL REASON (1)

First amongst other considerations to qualify the existence of a place of business is the existence of a **commercial reason** assessed to exist when « *the physical presence of the individual in that State will itself facilitate the carrying on of the business of the enterprise*” (44.11).

Such a condition should be considered as met when the physical presence of an employee in the Other State facilitates the conduct of business activities in that Other State in direct relationship with customers, suppliers, associated enterprises and other persons on behalf of their enterprise (44.12). The use of a home need not have a “**productive character**” in itself, so long there is a commercial reason for the use of that home or relevant place (44.13)

Paragraph 44.17 lists a number of situations in which a commercial reason can be considered to exist.



## UPDATE OECD COMMENTARY: COMMERCIAL REASON (2)

Per the OECD comments, a commercial reason does not exist when :

- The engagement with customers or suppliers only occur on an incidental basis (44.14)
- A direct link between the individual's presence at home or at any other relevant place and the carrying on of the business of the enterprise does not exist (44.15)
- If the enterprise allows teleworking solely to reduce costs (reduced expenditures on office space) (44.16)

It should also be noted the mere presence of customers and suppliers in that other State does not constitute, by itself, a commercial reason (44.18).

In the absence of commercial reasons, the individual's home or any other relevant place will not – in general – be considered places of business (44.19)



## UPDATE OECD COMMENTARY: COMMERCIAL REASON (3)

As a matter of exception to this reasoning, individuals conducting the business for an enterprise as the **primary** or **only** person for that company through their individual homes will have these homes considered as places of business for the said enterprise (44.20)



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# A BELGIAN ASSESSMENT

UPDATE OF THE OECD COMMENTARY : EVALUATION AND PERSPECTIVES

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## ASSESSMENT AND PERSPECTIVES

- Belgium's position has always been that this issue should preferably be clarified at the OECD level, in order to have a common approach at the international level.
- We welcome then the updated Commentary on this matter and will follow its guidance for the creation of a PE in the context of teleworking.
- As of now, due to the recent character of the OECD update, there has been a very limited number of situations where the updated guidance may have had an impact.
- Belgium is negotiating an adaptation of its agreement with the Netherlands to be in line with this new Commentary.



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