



Building a better  
working world

## Permanent establishment in the changing environment

Updating your tax analysis and relevant  
compliance process

The concept of permanent establishment (PE) has been subject to unprecedented change in recent years.

### PE and the BEPS Project

The PE concept, arguably one of the most critical principles underpinning treaty-based international tax law, was a central focus of the initial Base Erosion and Profit Shifting (BEPS) project undertaken by the Organisation for Economic Co-operation and Development (OECD). The work carried out by the OECD under BEPS Action 7 proposed changes to the definition of PE to address strategies used by taxpayers to circumvent having a taxable presence in a jurisdiction under tax treaties.

### Treaty changes and MLI implementation

The OECD recommendations, which predominantly dealt with the concept of Agency PE, Fixed Place of Business PE and Home Office PE, were integrated in the 2017 OECD Model Tax Convention and related guidance, and implemented across the global treaty network via bilateral treaties and also through the Multilateral Instrument (MLI).

### Domestic legislative changes

In parallel with these treaty-related changes, countries have amended their domestic PE definitions and expanded the scope of their general anti-abuse rules (GAAR) and the Principal Purpose Test (PPT). The MLI also introduced targeted anti-avoidance rules to address the fragmentation of a cohesive business operation into several small operations which may result in the accumulation of connected activities, projects and/or legal arrangements to create a PE. Certain countries, such as Australia and the United Kingdom, have taken a further step to introduce additional anti-avoidance rules to target perceived use of PE avoidance strategies.

PE compliance has also been a recent focus area for tax authorities globally, with increased levels of PE related controversy and reviews of transfer pricing profit attribution, coupled with a higher evidentiary requirements for taxpayers.

### BEPS 2.0 and beyond

The current state of play is not the end of the PE related legislative, regulatory and administrative changes. The PE concept is likely to be even more greatly impacted by the OECD's BEPS 2.0 initiative, which is designed to address the tax challenges arising from the globalization and digitalization of the economy.

### Globalization and the digital economy

Globalization and digitalization have driven changes in the PE concept, as countries seek to align the tax law with developments in the global economy and new business operating models. Given the rapid growth of technology and the internet, there may no longer be a physical presence in the place that labor is performed, physical goods are being replaced with digital goods (e-commerce) and service providers and customers are often no longer in the same location. This has led to a re-assessment of the underlying principles of Agency PE and Fixed Place of Business PE, a renewed focus on 'Server PE' and emergence of the 'significant economic presence' concept.

### Impact of COVID-19 pandemic

The COVID-19 pandemic also resulted in unprecedented operational changes which impacted PE positions. As a result, businesses were faced with the immediate need to put in place flexible arrangements to allow employees to work from home or in locations outside the jurisdictions where their employers typically operated or were located. These business and employment-related changes had the potential to trigger an un-envisaged PE or local tax presence. As a result, governments introduced temporary relief measures to manage the PE implications of such arrangements.

### 'Work from anywhere' and remote working policies

While the temporary COVID-19 relief measures are now being withdrawn by many countries, businesses have allowed the flexible work arrangements to continue and, in some cases, are adopting a 'work from anywhere' model to attract talent, reduce costs and increase productivity. Such changes in the way that businesses will operate post-pandemic are adding to the complexity of managing global PE positions.



## EY | Building a better working world

EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via [ey.com/privacy](https://ey.com/privacy). EY member firms do not practice law where prohibited by local laws. For more information about our organization, please visit [ey.com](https://ey.com).

© 2021 EYGM Limited.  
All Rights Reserved.

EYG no. 007171-21Gbl  
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, legal or other professional advice. Please refer to your advisors for specific advice.

[ey.com](https://ey.com)

## Contacts

Ernst & Young LLP  
EY Global Tax Desk, New York

Jose Antonio (Jano) Bustos  
[joseantonio.bustos@ey.com](mailto:joseantonio.bustos@ey.com)

Serge Huysmans  
[serge.huysmans@ey.com](mailto:serge.huysmans@ey.com)

Nadine Redford  
[nadine.k.redford@ey.com](mailto:nadine.k.redford@ey.com)

Ernst & Young Belastingadviseurs LLP

Roberto Aviles Gutierrez  
[roberto.aviles.gutierrez@nl.ey.com](mailto:roberto.aviles.gutierrez@nl.ey.com)