

Hong Kong Tax Newsflash

OECD model tax treaty update: new guidance on remote working permanent establishments

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On 19 November 2025, the OECD [published](#) approved [updates](#) to the *OECD Model Tax Convention on Income and on Capital* (“the OECD model tax treaty”).

The updates include changes to the OECD model tax treaty’s commentary on the definition of a “fixed place of business” permanent establishment in situations of cross-border remote working. This article provides an overview of these changes and other key amendments.

Permanent establishment changes (article 5)

Cross-border working from home

The commentary on the definition of a “fixed place of business” permanent establishment has been expanded with over 20 paragraphs of new guidance on how it should be applied to situations involving cross-border remote work. The OECD notes the **increasing prevalence of cross-border remote working** by individuals from their **home** or “**other relevant place**” (e.g., a holiday rental, a second home, or the home of a friend/relative) and that there are particular features associated with such locations such as that they are normally not accessible by other persons working for the business.

The new guidance sets out non-exhaustive factors that should be considered when assessing a “home or other relevant place.” The commentary emphasizes that, as with other permanent establishments, the determination must be made based on the specific facts and circumstances **during a given period**, rather than those in past or future periods.

Existing commentary on the meaning of “**fixed**” in article 5 will apply, including that on a required degree of permanence and whether the activities undertaken are of a **preparatory or auxiliary character**.

A home or other relevant place will generally not be considered a fixed place of business if the individual **works from that location for less than 50% of their total working time**. The 50% test should be assessed **over the course of any 12-month period** commencing or ending in the fiscal year concerned, and will be based on the **actual conduct** of the individual rather than formal contractual arrangements.

If an individual spends **50% or more of their working time** at home or another relevant place, the facts and circumstances will determine whether a “fixed place of business” exists. The prominent consideration is whether the business has a **commercial reason** for the activities to be undertaken by the individual in the jurisdiction. There may be several reasons for using a home or other relevant place to carry out activities related to the business; this

indicator will be satisfied if only one of those reasons is a commercial reason. Where there is no commercial reason, the location would not be a “place of business” unless other facts and circumstances indicated otherwise.

A commercial reason will generally be considered to exist where the **physical presence of the individual in the jurisdiction** (or in the same geographic region of the jurisdiction) facilitates the carrying out of the business, for example by facilitating:

- Meetings between the individual and customers of the business;
- Cultivation of a new customer base, or identification of business opportunities;
- Identification of new suppliers, managing relationships with suppliers, or undertaking, monitoring, or managing contractual arrangements with suppliers;
- The real-time, or near real-time, interaction with customers or suppliers in different time zone(s) (e.g., providing call center services, virtual IT support, or medical services);
- Access to business-relevant expertise;
- Collaboration with other businesses;
- Performance of services for customers where such services require the physical presence of personnel (e.g., training or repair services performed on the premises of the customer); and
- Interaction with employees and other personnel of the business (or of associated enterprises).

The mere presence of customers, suppliers, etc. in the jurisdiction, or the fact that the jurisdiction is in a different time zone, should not lead to the automatic conclusion that there is a commercial reason. Similarly, a commercial reason would not be considered present if engagements occurred only on an intermittent or incidental basis (e.g., short occasional visits to the premises of a customer).

Importantly, where a business enables an individual to work from home or another place solely to obtain or retain the individual’s services, this would not constitute a commercial reason. Similarly, permitting working from home solely to reduce costs (e.g., to reduce expenditure on office space) would not constitute a commercial reason.

The commentary notes that different considerations will apply to scenarios where the individual is the **only or primary person conducting the business** of the nonresident entity. For example, the home office of a self-employed consultant working in a jurisdiction for an extended period and carrying out most of their business activities from there would constitute a fixed place of business.

The updated commentary includes examples to demonstrate the application of these principles:

- **Example A:** An employee works from a rented location in another jurisdiction for three months following a holiday. The place is not considered “fixed” due to the lack of permanence.
- **Example B:** An employee works from their home in another jurisdiction for 30% of their total working time over a 12-month period. The home is not considered a fixed place of business as it is used for less than 50% of the individual’s working time.
- **Example C:** An employee works from their home in another jurisdiction for 80% of their total working time and regularly visits customers in that jurisdiction. As the individual spends at least 50% of their working time there, and as there is a commercial reason for the individual’s presence in the jurisdiction, there is a fixed place of business permanent establishment.
- **Example D:** An employee works from their home in another jurisdiction for 60% of their total working time. The employee provides their services remotely and does not physically meet customers in that jurisdiction other than visiting their premises once a quarter for a performance review. The mere presence of customers in the jurisdiction does not automatically mean there is a commercial reason for their presence, and the intermittent and incidental nature of the physical interactions means it is not considered a fixed place of business.

- **Example E:** An employee works almost exclusively from their home in another jurisdiction. Their presence in a different time zone facilitates the business in providing “real-time” services to customers in different time zones around the clock. The home is considered a fixed place of business due to the greater than 50% use, and the commercial reason for the individual’s presence.

Exploration and exploitation of extractible natural resources

The commentary has been updated to include new alternative additional OECD model tax treaty rules, previously consulted upon in 2024, which jurisdictions could use in relation to taxation rights over the **exploration and exploitation of extractible natural resources**. The commentary sets out a **lower permanent establishment threshold** for such activities, drafted as an **optional** freestanding model article which could be adopted in bilateral tax treaties.

A permanent establishment would arise in cases where activities, including related services, have been carried on **offshore “in connection with the exploration or exploitation of the seabed and its subsoil and their natural resources.”** This would include activities that, by virtue of, for example, being of a short duration or not geographically fixed, may not otherwise fall within the normal “fixed place of business” definition in article 5. Jurisdictions can agree to also include **activities related to the exploration or exploitation of onshore finite natural resources**, and other connected specialized activities.

Relevant activities would not include the operation of ships or aircraft for the primary purpose of transporting supplies or personnel, or the operation of vessels with an auxiliary function.

Similar rules are found in a number of existing bilateral tax treaties and the updated commentary aims to bring greater consistency and certainty of interpretation for jurisdictions adopting this approach. Jurisdictions using the model article are to bilaterally agree a time threshold, but existing treaties with similar provisions use a range of thresholds that include 30, 90, and 183 days. The commentary also includes a further optional rule to expand the employment income taxing rights of the jurisdiction where the relevant activities are undertaken.

Other changes

The update includes changes in relation to other articles of the OECD model tax treaty including:

- **Changes to the commentary on associated enterprises (article 9)** that follow work in recent years on the transfer pricing aspects of financial transactions (i.e., the new chapter X of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*) and that clarify the application of article 9 especially as it relates to domestic laws on interest deductibility (such as BEPS action 4 corporate interest restrictions). The OECD consulted on these changes in 2021, alongside **changes to the commentary on business profits (article 7)**, clarifying compensating adjustment requirements in respect of permanent establishment profit adjustments, and the **commentary on nondiscrimination (article 24)**, in relation to information requirements on nonresidents.
- **Changes to the mutual agreement procedure article (article 25) and its commentary** that include confirmation of the role of competent authorities in determining whether a matter falls within the scope of a tax treaty for purposes of the dispute resolution mechanisms provided under the General Agreement on Trade in Services (GATS).
- The commentary to article 25 has also been updated to refer to specific language relating to tax certainty and the elimination of double taxation included in the OECD/G20 Inclusive Framework on BEPS’ 2025 consolidated report on **Amount B of Pillar One** (the simplified and streamlined approach for baseline marketing and distribution activities).

Next steps

The updates will be incorporated into a revised version of the OECD model tax treaty that will be published “in the next few months.”

The OECD will be holding a [webinar](#) on the 2025 updates from 4 p.m. CET (11 p.m. HKT) on 10 December 2025.

Deloitte comments

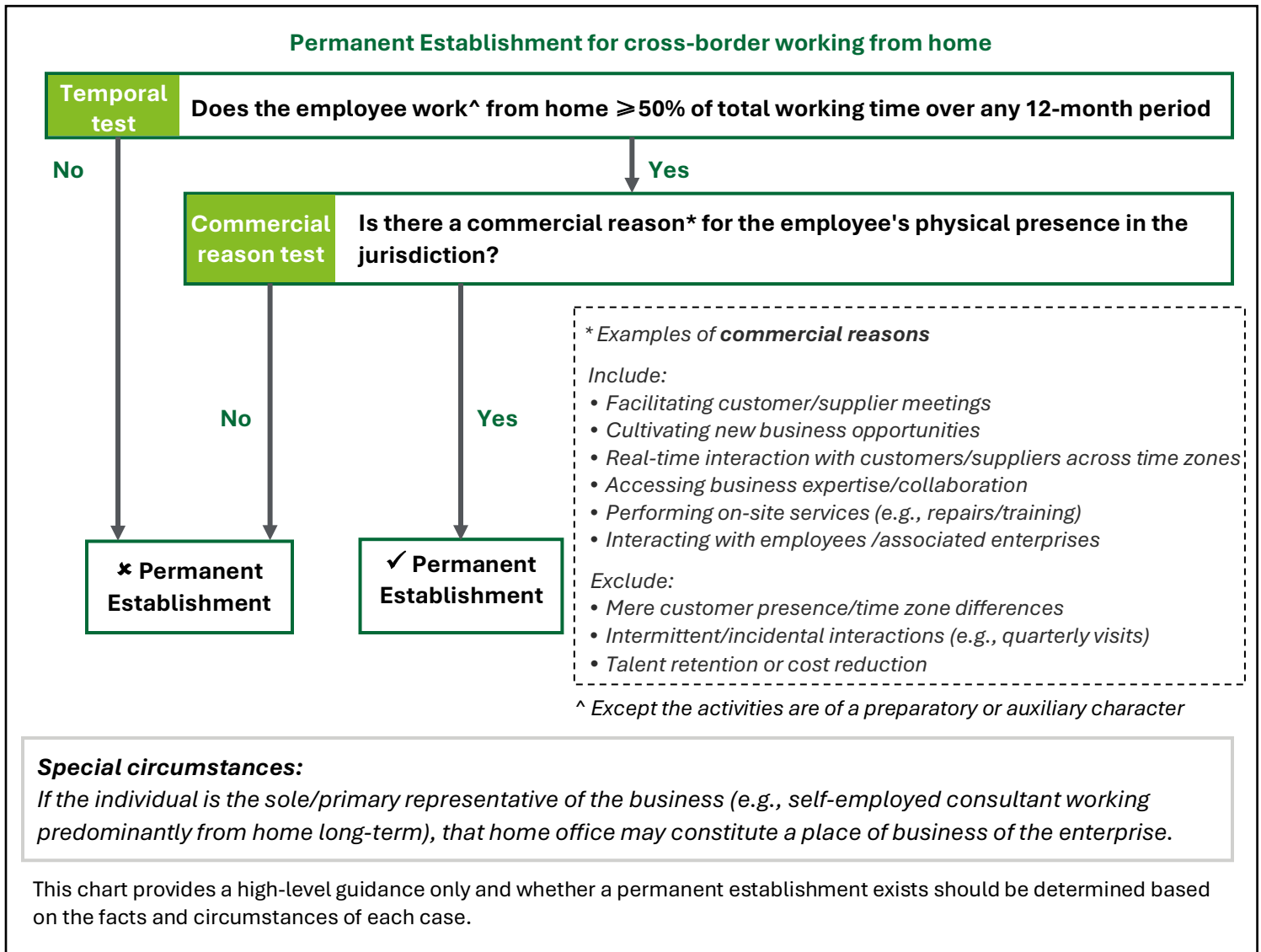
The OECD’s work on permanent establishments and remote working provides welcome clarity and helpful guidance on when remote workers may create a permanent establishment for their employer overseas. This has been called for by the business community and Business at OECD (formerly BIAC), recognizing the lack of clarity in the existing rules and the distortive effect this was having on business decisions such as hiring and staff retention. The updated commentary to article 5 of the OECD model tax treaty sets out five pages of guidance, including examples, replacing the limited two paragraphs that had existed since the last update on home working from a project in 2012. Essentially, the guidance sets out a two-part test: a temporal test that, if passed, means there will be no permanent establishment based solely on the time the employee spends remote working in another jurisdiction, and, if the temporal test is failed, a commercial reason test that looks at various factors to conclude whether the business has a commercial reason to be operating in the remote location. If it does not, there will be no permanent establishment. It is clear that the OECD has worked hard to limit or negate there being permanent establishments in situations where only small amounts of profit would be attributed, recognizing that this creates increased compliance burdens for businesses and increased administration burdens for tax authorities.

Businesses will need to track and record their employees working remotely to assess the temporal test. While modern technology is available to help with some aspects and some groups already use tracking tools to help with payroll or immigration obligations in different jurisdictions, processes will need to be put in place to review and assess the data.

In the absence of specific guidance from the OECD or individual jurisdictions on a date from which to apply the new guidance on remote working (no such guidance yet being available), it is likely to be considered best practice to consider the temporal and business reason tests in relation to existing bilateral tax treaties where they follow the OECD model tax treaty.

Other questions on remote working issues, including corporate residence, more permanent establishment considerations, attribution of profits, and transfer pricing, as well as employment tax obligations and personal tax and residence questions, are expected to be dealt with in future projects of the OECD/G20 Inclusive Framework on BEPS. The scope of this work is anticipated to be agreed in the first few months of 2026.

The OECD document has also updated several positions that Hong Kong has taken on specific articles. For example, Hong Kong reserves the right to use certain wordings to reflect that it is not a sovereign state, the right to include trusts and partnerships in the definition of “person”, and the right to include a separate paragraph provide for the source jurisdictions’ exclusive right to tax pensions. It has also removed Hong Kong’s previous reservations regarding the definition of construction and service permanent establishments, both of which were previously deemed to arise after a six-month threshold, now aligning with the OECD’s standard 12-month rule. Some of these positions have already been incorporated into Hong Kong’s bilateral tax treaties concluded in recent years.



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