EDITORIAL

The 2025 OECD Model Tax Convention Update: A Mountain in Labour Gives Birth to a Mouse

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The OECD Council approved the latest Update to the OECD Model Tax Conventions (the 'OECD MTC') and its Commentary (the 'OECD Commentary') on 18 November 2025.[1] Almost eight years have passed since the last previous update – an unprecedently long period of time since the publication of the first 'ambulatory version' of the OECD MTC in 1992, more than twice the average time between updates over those thirty-three years. Given this extended period of consideration, it might be expected that the 2025 version would address some of the technical shortcomings of the existing model. Similarly, it could have introduced changes capable of addressing the most important developments arising in international tax law in recent years. However, to observers who have expectantly watched the peak of international tax law expertise that is the OECD and have awaited what it might be creating over this lengthy period, the actual update must seem much like the mouse appearing at the foot of a mountain in Aesop's fable: disappointingly unremarkable.

This editorial aims to provide a snapshot overview and comments on some of the relevant changes introduced by the 2025 OECD Update, although doing so reflects the author's choice of what he considers to be noteworthy inclusions and conspicuous absences from it. The 2025 OECD Update comprises eighty-eight pages and is thus similar in its extent to the earlier updates in 2010 (94 pages) and 2014 (seventy-seven pages), although it is – unsurprisingly – considerably shorter than the first post-BEPS update in 2017 (276 pages). As has been typical for those earlier regular revisions, the vast majority of the changes brought forward in an OECD Update concern its Commentary rather than the text of the OECD MTC itself, including an ever-increasing number of positions added by non-OECD member countries.

The 2025 OECD Update is most notable for the absence of any new provision or discussion in of any of the most important questions that have arisen in recent years. Those concern the compatibility of tax treaties with key innovations such as digital service taxes, digital permanent establishments ('PEs'), diverted profits taxes, and Pillar 2 implementing mechanisms such as the Income Inclusion Rule ('IIR'), the Undertaxed Profits Rule ('UTPR'), and the Subect to Tax Rule ('SSTR').[2] While stability is certainly an important value that the OECD is seeking to uphold, the omission to address the treaty questions that surround the introduction of these new tax instruments in any form gives the impression of a weakening institution at the heart of international tax law. This is arguably even more so in light of the increasingly bold innovations brought forward at the United Nations (UN) level.

1 Working from home, digital nomads and the PE question

The most expansive addition to the 'OECD acquis' from the 2025 OECD Update lies in the new explanations given on the criteria to determine if a PE exists, which span approximately one quarter of the published text. This concerns, first, the impact – or lack thereof – of home-office work by cross-border workers on their employer's taxation. The discussion surrounds the question if – or, more precisely, when – this type of work from a country other than the employer's residence state might create a PE for the latter. The second PE problem addressed at length in the 2025 OECD Update concerns the extractive industry, for which it proposes a special alternative provision with a dedicated commentary for countries with significant natural resources. The latter is motivated by an understanding that such countries have a legitimate interest in a lower threshold for source taxation than the OECD MTC generally provides. As this especially deserves a more in-depth analysis and review than can be provided in the context of an editorial, the following reflections primarily concern the first of these changes.

The 2025 OECD Update includes twenty-one new paragraphs to the Commentary on Article 5 to

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1 OECD, *The 2025 Update to the OECD Model Tax Convention* (OECD Publishing, Paris 2025), https://doi.org/10.1787/5798080f-en (accessed 20 Dec. 2025) ('the 2025 OECD Update').

2 For its STTR, at least, the OECD has provided a separate multilateral instrument to facilitate its inclusion in existing tax treaties. As of late 2025, however, Türkiye is the only OECD member among the merely ten signatories of that instrument. *See* https://www.oecd.org/en/topics/sub-issues/subject-to-tax-rule/multilateral-convention-to-facilitate-the-implementation-of-the-pillar-two-subject-to-tax-rule.html (accessed 20 Dec. 2025).

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comprehensively address that issue, which has become particularly important in the context of the Covid-19 pandemic and its longer-term consequences for home-working. Back in 2021,[3] the OECD addressed the circumstance of employees working from home as a consequence of mandatory public health measures. Then, it concluded that this would normally not give rise to a PE when the home-work was limited in time to the period of those measures and not imposed by the enterprise. It indicated at the same time that working from home could give rise to a PE if it continued after those public health measures ceased. However, this would depend on the concrete facts and circumstances and particularly whether the enterprise required the home to be used as a place of work.

By contrast to its earlier guidance, the 2025 OECD Commentary effectively introduces a two-step approach that consists of a 'safe haven' threshold as a first step and an analysis of relevant factors to consider as part of an overall analysis in the event that the threshold is passed. This prima facie threshold for considering an individual's homeworking arrangement as giving rise to a PE for the enterprise is that the individual spends at least 50% of their total working time over the course of a twelve-month period at their home (or another 'relevant place').[4] The key factor elaborated by the OECD in the second step is that of the existence of a 'commercial reason' for using a home office in a jurisdiction other than the enterprise's state.[5]

The 2025 OECD Update provides various detailed explanations for what would be considered as establishing a 'commercial reason'. One concerns the instance when the employee's physical presence in that country 'will itself facilitate the carrying on of the business of the enterprise'[6] because the individual 'directly engages with customers, suppliers, associated enterprises or other persons on behalf of the enterprise'.[7] The Commentary lists two cases that are relevant. The first concerns direct physical contact such as in-person meetings with customers, suppliers, or other stakeholders such as university employees engaged in business-relevant research in that country.[8] The second concerns remote contact such as call centre services provided in the same time zone as the enterprise's customers that would be facilitated by the individual's working from home.[9] For the avoidance of doubt, the OECD Commentary is quick to clarify that the mere presence of customers, suppliers, or associated enterprises in the state where certain employees work from home does not by itself result in the qualification of those homes as PEs. The OECD Commentary adds a number of negative examples or indicators. Notably, it asserts that no commercial reason exists when the enterprise allows an individuals to work from home 'solely to obtain or retain the services of that individual' – what might be labelled the 'digital nomad exception'.[10]

Nevertheless, even in the absence of a commercial reason, the enterprise may be judged to have a PE in an employee's home if 'other facts and circumstances' so indicate.[11] The OECD Commentary lists the example of a non-resident consultant who is present 'for an extended period of time 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'.[12] That example had already been included in the 2017 OECD Commentary in §19 as a 'clear example' for circumstances in which the continuous and required use of a home for business purposes will result in a PE. However, it now serves as an illustration of the 'commercial reason' test that had not yet been formulated at that time. In the 2025 OECD Commentary, that example is linked to the more general case of when an individual working from their home is 'the only person, or the primary person, conducting the business of an enterprise'.[13] It does not elaborate, however, why the case when the 'primary' person conducting business from their home in another state should be any different from one when the person working from home is one of two key employees of such a business or any other number of employees. After all, the criterion being interpreted under the rule of Article 5(1) is whether the business is 'wholly or partly carried on'. It is thus far from obvious that those cases should be treated differently.

Following the description of the criteria it considers relevant, the OECD Commentary adds five examples of

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[3] *See* OECD, *OECD Policy Responses to Coronavirus (COVID-19)* (OECD Publishing, Paris 2021), https://doi.org/10.1787/df42be07-en (accessed 20 Dec. 2025).

[4] This is defined in §44.1 of the 2025 OECD Commentary (2025) on Art. 5 as another place that is not a premises of the entperise itself or another related enterprise. Examples include the individual's second home, a holiday rental, or the home of a friend or relative.

[5] §44.11 OECD Commentary (2025) on Art. 5: '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'.

[6] *Ibid.*

[7] §44.12 OECD Commentary (2025) on Art. 5.

[8] §44.17 OECD Commentary (2025) on Art. 5.

[9] *Ibid.*

[10] §44.15 OECD Commentary (2025) on Art. 5.

[11] §44.19 OECD Commentary (2025) on Art. 5.

[12] §44.20 OECD Commentary (2025) on Art. 5.

[13] *Ibid.*

which four seek to elucidate the concept of 'commercial reasons'.[14] These examples illustrate the position taken by the OECD sufficiently well although it eschews difficult borderline cases under its own criteria. These include when an individual works exclusively from home without this being required by the enterprise or the circumstances or when an individual is working less than 50% of their time from their home, but their doing so is a crucial and required component of that lesser part of their overall contribution to the business.

The key question arising from all of this lengthy explanation is the following: Are the two main criteria applied in the analysis proposed by the OECD, i.e., first, the default threshold of 50% of working time and, second, the criterion of 'commercial reasons', sufficiently supported by both the wording and the existing doctrine on the interpretation of Article 5(1) OECD MTC? The answer in both cases is a resounding no. For one, the criteria are inconsistent insofar as the first is related exclusively to an individual's circumstances and without any consideration given to the business functions exercised by the individual. Admittedly, the OECD Commentary does not stipulate the 50% threshold as a fixed rule but merely explains that below that threshold a 'home or other relevant place *would generally not be considered* a place of business of the enterprise'.[15] Yet, it backs up this suggestion with the much more authoritative statement, 'Exceptions to the approach in the prior sentence are not anticipated to occur in most situations given the context and understanding of cross-border working arrangements described in paragraph 44.1 above'.[16] The OECD's conceptualization of the 50% threshold as something of a precise rule is revealed by the introductory paragraph to its discussion of the 'commercial reason' element of its analysis. It specifies in §44.10, that '*if* an individual [passes the 50% threshold] *then* whether the enterprise has a place of business at such a place will be determined by the facts and circumstances'.[17] The surprising part of this statement is that it implies that, when the threshold is not passed, no inquiry into the concrete facts and circumstances would even be required to deny the existence of a PE.

Regarding the second criterion of the 'commercial reasons' test, while the examples are illustrative and undoubtedly useful as part of an overall assessment of facts and circumstances, the reference to commercial reasons is nevertheless unduly restrictive. Article 5(1) certainly does not generally require the existence of commercial reasons (and definitely not commercial *rationality*) of a business establishing a physical presence in a country for it to give rise to a tax charge there. The commercial reasons criterion may be understood as an important element for discerning whether the individual is truly conducting business in their home or other relevant place. However, this mixes up distinct elements of Article 5(1): the exercise of any work on behalf of the enterprise is part of the enterprise's business carried on in the state. The key question is whether the home office can be considered to be at the enterprise's disposal. Yet, that does not in any way depend on the rationality or usefulness of allowing the employee to dispense with a significant part of their work obligations from there.

It is easy to understand that both enterprises and individuals have an interest in limiting the creation of accidental PEs, as will many states, if only for reasons of certainty and ease of administrative burden. It would be more appropriate, however, to address this issue, which arises from applying an old paradigm to new economic realities, by creating an explicit rule in a tax treaty. The 'fix' by way of an expansive Commentary that establishes new and untested criteria that bear no relation to the treaty text or existing doctrine risks achieving the opposite of the intended outcome, resulting in uncertainty.

2 WHAT THE GATS?

The one and only change to the OECD MTC itself from the 2025 OECD Update comes in the form of an additional paragraph added to Article 25, which reads as follows:

> 6. For purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting states agree that –
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> a) a measure 'falls within the scope of this Convention' only if it is a measure to which the provisions of Article 24 apply; and:
> b) notwithstanding paragraph 3 of Article XXII of the General Agreement on Trade in Services, any dispute between them as to whether a measure falls within the scope of this Convention shall be resolved under paragraph 3 of Article 25 or, failing agreement under that procedure, any other procedure agreed to by both Contracting States.

What is the meaning and relevance of this inserted provision? Its objective is to ensure that disputes over the correct interpretation of a bilateral tax treaty is not

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[14] §44.21 OECD Commentary (2025) on Art. 5.

[15] §44.8 OECD Commentary (2025) on Art. 5 (emphasis added by the author).

[16] *Ibid.*

[17] §44.10 OECD Commentary (2025) on Art. 5 (emphasis added by the author).

eligible for submission to the WTO dispute settlement mechanism. It effectively seeks to complement the exclusion rule contained in Article XXII (3) of the General Agreement on Trade in Services in three respects. First, it extends the exclusion under the GATS provision, which covers such disputes only insofar as they arise under tax treaties concluded before 1995, to all tax treaties including the new paragraph 6. Second, it ensures that the exclusion concerns all taxes covered by Article 24, which typically applies to all taxes and not only those included in Article 2. Third, it provides the competent (tax) authorities with the power to resolve among themselves the question of whether a tax measure should be considered to fall within the scope of the tax treaty for purposes of applying the GATS, thus avoiding a scenario in which a disagreement of whether the WTO dispute resolution mechanism should apply could only be resolved through that mechanism itself.

The relevance of this change to the OECD MTC will be quite limited. First, it is notable that this is new only insofar as it has been promoted from a proposed alternative provision already found in the OECD Commentary before the 2025 OECD Update. Second, the practical impact is likely minor even when included in a newly concluded tax treaty, since the number of tax treaty based disputes submitted to the WTO dispute settlement mechanism is quite small. The new provision does not address what must be considered the practically more relevant concern of international treaty obligations with a potential for overlap with tax treaties, namely those arising from bilateral investment treaties. Recent years have seen increased interest by taxpayers to leverage their substantive tax treaty rights with their procedural investment treaty rights. This is evidenced by them submitting claims of tax discrimination to independent arbitral tribunals under the investor-state arbitration mechanism provided by most investment treaties. While the UN, in the latest draft of its imminent update, explicitly excludes that possibility in the model treaty text via what is known as the 'extended provision' that applies the logic of Article 25(6) OECD MTC (2025) to also cover investment treaties, the OECD continues merely to mention the possibility of such an extension in its Commentary. Additionally, its newly added wording in the relevant §94 of the Commentary on Article 25 appears to caution its members not to be overly restrictive but to 'keep in mind the formulation of the tax provisions, if any, already included in the relevant [… treaty …] as well as the extent to which the particular trade or investment agreement already provides for a satisfactory coordination'.

3 Pillars, anyone? transfer pricing and Amount B

The 2025 OECD Model Update has taken only one step to respond to the most prominent developments in international tax law since 2017. Its Commentary contains several references[18] to the Transfer Pricing Guidelines as they have been updated to include the 2024 agreement on Amount B,[19] which is intended to simplify and streamline the application of the arm's-length principle to baseline marketing and distribution activities.

In principle, this may seem a mere technicality and minor point included to ensure consistency among the OECD's work, particularly as guidance for applying a Mutual Agreement Procedure ('MAP') and possible arbitration relating to transfer pricing. However, the wording chosen in the 2025 OECD Commentary is striking. It states that, when deciding on a taxpayer's request to resolve an issue arising under Article 9 via a MAP, 'both States *must* have regard to paragraphs 6 and 72, and *should also* consider paragraph 79, of the Annex to Chapter IV of the Transfer Pricing Guidelines adopted on 16 February 2024'.[20] The choice of the strong term 'must' is surprising given the Commentary's status, which cannot be claimed to be a source of law but is, at most, relevant at the level of interpretation of applicable treaty rules. It is even more surprising considering that the paragraphs seemingly seek to enshrine sections of the Transfer Pricing Guidelines as binding which – as a matter of law – they are clearly not. The surprise at this formulation is not tempered by the different choice of modal verb concerning paragraph 79 of the Consolidated Report on Amount B.

4 Can the OECD keep up with the UN?

As the UN Model continues evolving at a much more rapid pace, it appears to be better placed to address the key issues faced by tax jurisdictions around the world in a landscape that is changing in two key dimensions: economics and geopolitics. For the former, the UN Model is set to approve yet another change aimed at responding to the concerns arising from the rising share of (remote) service provision among global profit with the adoption of Article 12AA. As ever more income is generated from such activities, the effectiveness of existing source rules in tax treaties is undermined from source countries' perspective as they experience a gradual erosion of their tax base in the absence of treaty revisions. Regarding the latter, there has been a drift

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[18] *See* §§12.1, 38, and 63 of the OECD Commentary (2025) on Art. 25.

[19] OECD, *Consolidated Report on Amount B: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, Paris 2025), https://doi.org/10.1787/182b47ad-en ('Consolidated Report on Amount B') (accessed 20 Dec. 2025).

[20] *See* §§12.1, 38, and 63 of the OECD Commentary (2025) on Art. 25 (emphasis added by the author).

from multilateralism and respect for the international legal order that has been obvious in recent years in the actions of several powerful actors at the global stage. In the environment created by those actions, less powerful jurisdictions have an additional reason to be sceptical about the benefits of signing up for a global standard that does not serve their interests. Although the UN Model has not yet achieved the status of being an equal rival to the OECD MTC in the competition for becoming the global standard for tax treaties, its greater responsiveness to changing circumstances may give it the edge in future.