

# Problems with permanent establishments

## Author Details

Name: Cormac Kelleher  
Practice: HLB Nathans, Ulysses House, Foley Street, Dublin 1, Ireland  
Email: [Cormac.kelleher@hlbnathans.com](mailto:Cormac.kelleher@hlbnathans.com)

## Summary

The concept of permanent establishment is fundamental and intrinsic to international taxation. Essentially, it determines the right of a country to tax the profits of an enterprise tax resident in another jurisdiction.

The OECD and UN have developed frameworks which can be used by countries in negotiating treaties. While this framework is useful to taxpayers it is not without its flaws. It is argued that the definition of permanent establishment is antiquated and hankers to an era comprising of manufacturing and retailing businesses. It is not up to date and reflective of the modern business environment. In an endeavour to address this, the OECD has issued guidance in relation to the e-commerce sector.

Given the basis for establishing if a PE exists or not in the model treaties, it is possible for entities to have multiple permanent establishments. This creates its own raft of problems for the taxpayer. This commentary also addresses issues facing organisations in the construction sector and the additional factors they have to consider in determining if they have a permanent establishment. Consideration is given to the outsourcing of back office activities and the role which foreign agents play.

Despite the above mentioned problems and others which are addressed in the commentary, it is considered that a permanent establishment is a keystone concept. It is vital in helping tax payers worldwide to determine if they will have a taxable presence. Without it, taxpayers would be operating in the dark. However, if the concept is to continue to be used it is necessary that it is a “working” definition. As the business environment in which we operate evolves so too should the concept of PE.