

# Permanent Establishment

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# Investment Management Exemption – Recent Developments

Raul-Angelo Papotti (Italy), *Chiomenti*



# Italy - Investment Management Exemption

- The 2023 Budget Law has introduced the Investment Management Exemption (“IME”) provisions.
- The actual entry into force of the IME regime is subject to the enactment of a Ministerial Decree and of a Regulation on transfer pricing by the Italian Tax Authorities.
- A draft Decree, with explanatory notes, was published on 16 October 2023, open to comments until 27 October 2023.
- A draft Regulation on transfer pricing matters connected to IME was published on 20 October 2023, open to comments until 3 November 2023.
- Final implementing provisions expected in the next few days.



# IME at a glance

An asset/investment manager who habitually, and possibly with discretionary powers, in the name and/or on behalf of a non-resident investment vehicle or of its controlled entities:

- enters into contracts for purchasing, selling or negotiating financial instruments, such as derivatives and equity/capital participations, and receivables; or
- contributes, including with preliminary and ancillary activities, to the conclusion of the above transactions,

is considered to be independent, and therefore no PE exists of the investment vehicle/its non-resident controlled entities, if certain conditions are met. Also, IME operates as a safe harbour. The above-mentioned conditions are the following:

- the non-resident investment vehicle and its controlled entities are established in a “white-list” jurisdiction for exchange of tax information purposes;
- the non-resident investment vehicle meets the independence requirements;
- the investment manager, its employees or directors do not hold directorship or supervising offices and are not entitled to more than 25% of the profits of the non-resident investment vehicle and of its controlled entities;
- the investment manager receives a remuneration supported by adequate transfer pricing documentation.



# IME - Key Issues

## > The definition of investment vehicle

The draft Ministerial Decree does not expressly include Mancos and Advisory companies in the «investment vehicle» definition. ManCos' status as institutional investor may be derived from Circular Letter No. 23/E/2002 on interest on listed and treasury bonds and similar securities.

The draft Ministerial Decree seems to confirm that investment funds compliant with Directive 2009/65/EC (“UCITS”) and alternative investment funds according to Directive 2011/61/EU cannot create a PE (“AIFs”).

## > The independence of the investment vehicle

The draft Decree does not provide any guidance for the assessment of what is meant for «regulations substantially equivalent» to UCITS and AIFM under the EU Directives.

Whether multi-family offices may qualify for the IME.

The definitions provided to identify independent investment vehicles seem to exclude unregulated structures.

## > The investment manager's profit entitlements

Relevance of carried interest entitlements for the purposes of the 25% threshold

# Threshold for PE getting lower in real life cases (*e.g.*, working from home)

Anders Oreby-Hansen (Denmark), *Beierholm*



# Establishment of a PE

! Consequences:

“Fixed place of business”

vs.

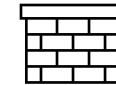
“Seat of management”

When is there a permanent establishment?

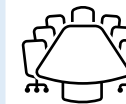
There must be a place of business



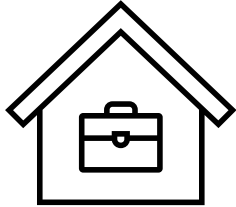
The place must be fixed



Core activity must, in whole or in part, be carried out through the place of business



# Home offices



- Home office may establish a PE
- Always a case-by-case assessment of what's going on
- Are other permanent workspaces available?
- Does the employer facilitate/agree?
- Regular basis/irregular basis/random?
- Does the employer have an interest in the work being carried out in (Denmark)?



# Case law



## 2021 ruling

- Denmark/Sweden
- Would the Swedish company obtain a commercial advantage when the employee worked from home?



## Denmark/Germany

- Commercial advantage test
- Does the placement of the employee have an independent value for the employer?



## German case (7th June 2023)

- Sufficient to establish a PE that an entrepreneur is provided with a locker or a space where an employee is able to leave work equipment in a certain part of the premises of the workplace, even if he or she does not use this option.

# PE / TP, OTS report & UK Consulting Paper

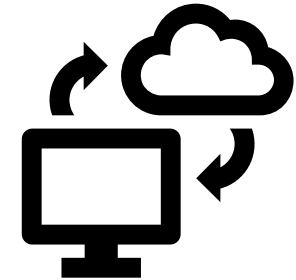
Jessica Kemp (UK), *White and Case*



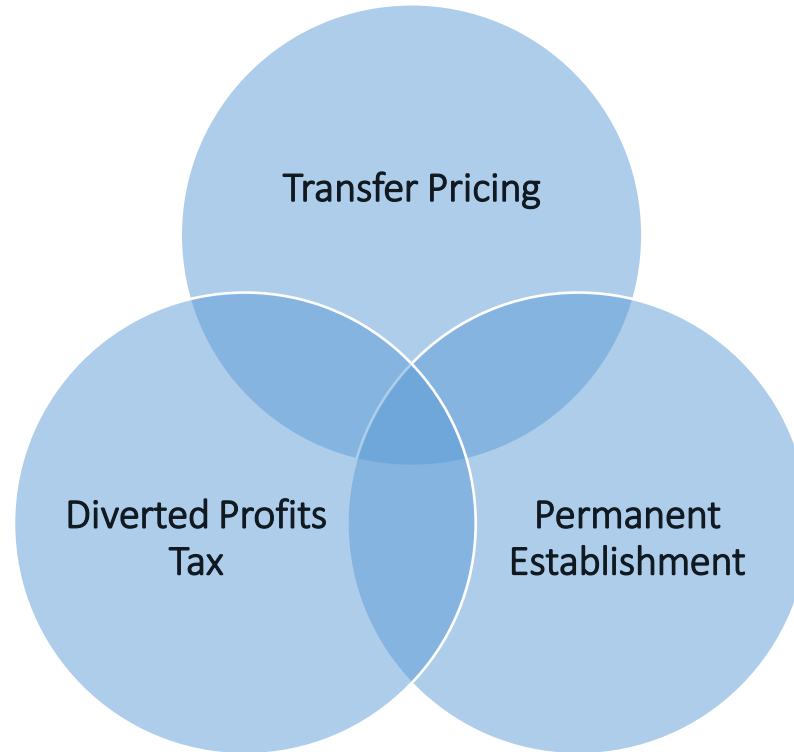
# 12 Months Ago, in a galaxy not so far away

## The OTS Report on hybrid and distance working

- Hybrid and distance working is growing and is a key factor for business
- Current rules and guidance have shortcomings
- The UK could take a leading international role in the new world of cross-border working



# And Now?



# The proposals

## Permanent Establishment

- Closer alignment with articles 5 and 7 of MTC
- Article 5: changes to deemed dependent agent under action 7 of BEPS project
- Article 7: changes governing attribution of profits to Pes

## Transfer Pricing:

- Framework
- Financial Transactions
- Interaction with other areas

## Diverted Profits Tax:

- Abolish separate tax and introduce diverted profits assessment
- No reliance on avoided PE limb

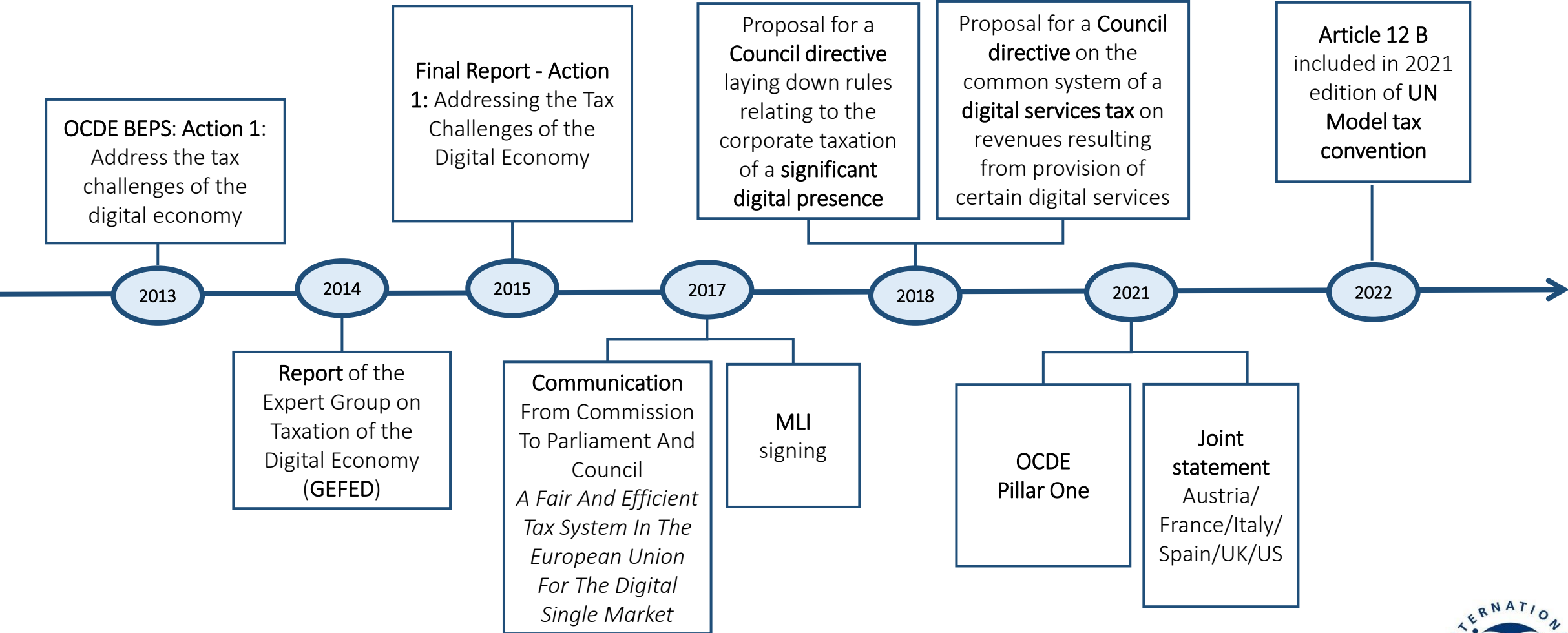
# Permanent Establishment in the digital world

Guadalupe Díaz-Súnico (Spain), *Gomez Acebo & Pombo*

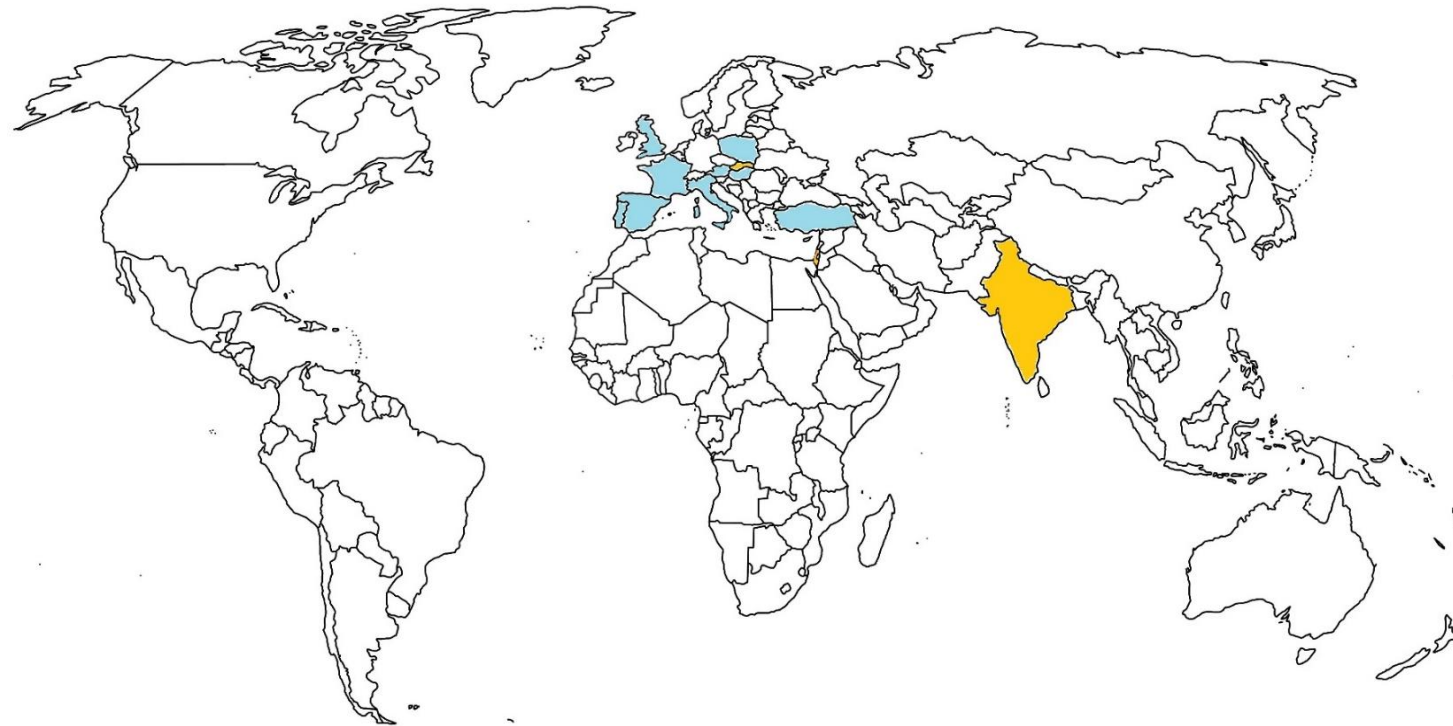
Annabelle Bailleul-Mirabaud (France), *CMS Francis Lefebvre*



# Evolution of the Digital PE



# Digital PE concept / Digital Service Tax



● Countries with a Digital Service Tax:

- Spain
- Austria
- France
- Hungary
- Italy
- Poland
- United Kingdom
- Portugal
- Turkey

● Countries with a Digital PE:

- India
- Israel
- Slovakia



# Digital Significant Presence: Implementation by countries

## > Proposal for a Council directive (2018): “Significant digital presence”

- the **proportion of total revenues** obtained in that tax period and resulting from the supply of those digital services to users located in that Member State in that tax period exceeds EUR 7 000 000;
- the **number of users** of one or more of those digital services who are located in that Member State in that tax period exceeds EUR 100 000;
- the **number of business contracts** for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds EUR 3 000.

## > Slovakia “Digital Platform Permanent Establishment”

- “a hardware or software platform required for the creation of applications and their management”
- “innovative technological business model that allows the exchange of information between several groups of users...”

# Digital Significant Presence: Implementation by countries

## > India “Significant Economic Presence” through:

- **A threshold based on local revenue:** “any transaction in respect of any goods, services, or property carried out by a non-resident in India, including the provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds the amount as may be prescribed”, and
- **A threshold based on number of local users:** “systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India, through digital means”.

## > Israel “Significant Economic Presence” through circumstances like:

- Online contract conclusion
- Use of digital products and services
- Localised web site
- Multi-sided business model

# Application of traditional PE to digital world: the French approach

## > France

- Google case and settlement with the French tax authorities
- “Substance over form” interpretation of the traditional PE in the Value Click/Conversant case law (2020 and 2021):
  - The fact, for an Irish company, to have recourse to a non-independent person, having usually in France powers allowing this person to engage the company in a business relationship concerning the company’s activity characterizes a dependent agent PE.
  - A French company which, on a usual basis, even if it does not formally conclude contracts in the name of the Irish company, decides transactions that the Irish company is merely endorsing and that, so endorsed, engage the Irish company, should be regarded as exercising such powers. It ruled that “should be regarded as exercising such powers.
  - The 80% penalty and extended statute of limitations (10 years instead of 3) for undisclosed activity were ruled as not applicable given that it was only after the years at issue that the case-law adapted the traditional concept of permanent establishment to the digital economy.

# Application of traditional PE to digital world: the Spanish approach

## > Spain

- Broad PE concept even before BEPS/MLI. Dynamic interpretation of Tax Treaties.
- Agents who **conclude contracts binding the company even if not actually in its name.**
- Also when the company **routinely approves the transactions negotiated and coordinated by such agent.**
- **“Complex Operational Setting”** anti-fragmentation rules against practices to avoid PE status.
- Some relevant cases: *Roche* (Supreme Court, 2012); *Borax* (2014); *Dell* (2016).

Dell, TEAC 2012: *“The existence of a virtual PE in Spain for all the on-line sales in the Spanish market can derive, without the need of a server operated by the company, of its significant and substantial presence and of the intensity and operational settlement in Spain”* (PE status confirmed by Supreme Court in 2016).

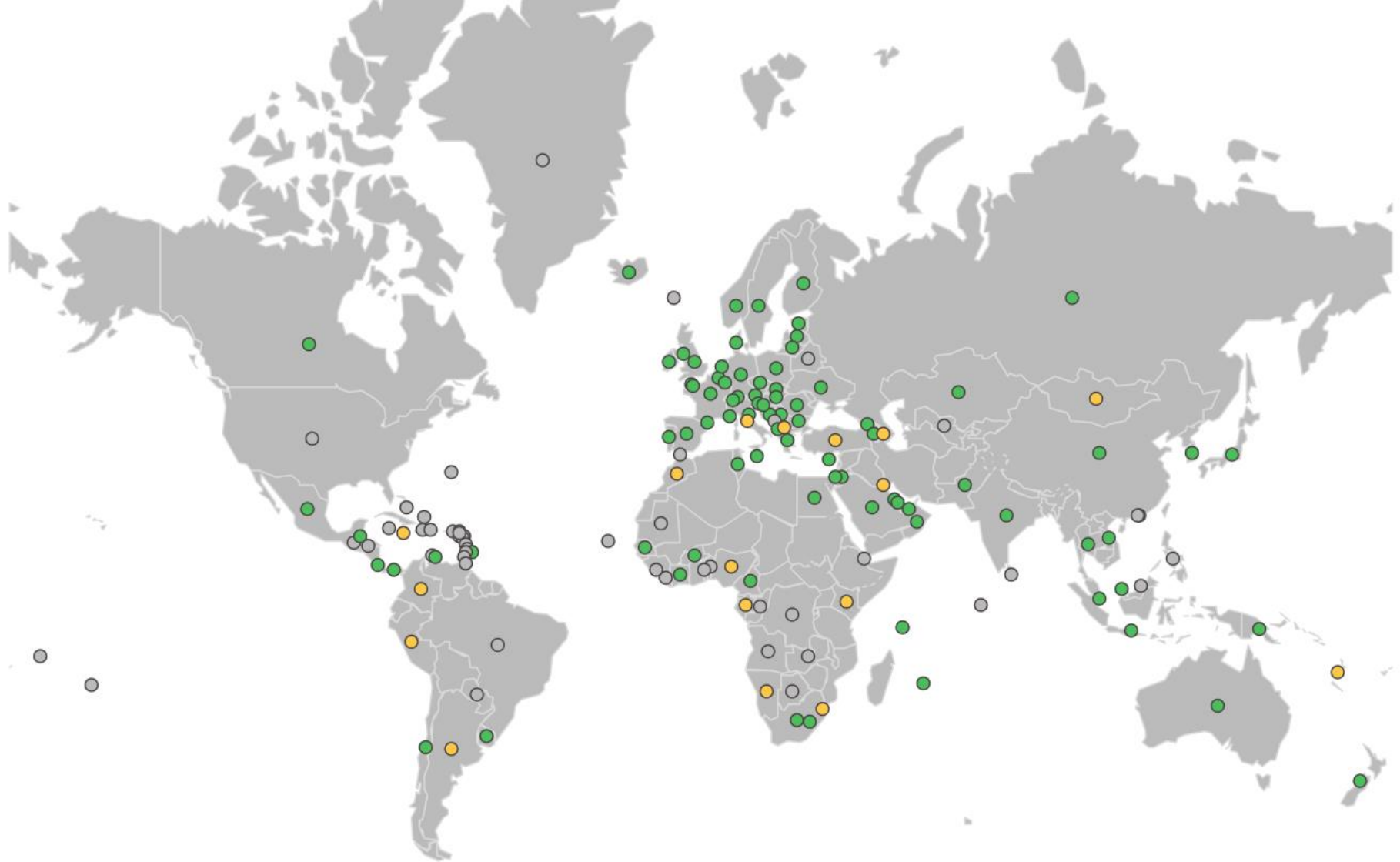


## Evolution of the PE concept following the MLI : reference to the predominant role in contract conclusion

### > Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS signed on 7 June 2017



- Broadening of the PE concept:
  - To a person acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise and, in doing so, **habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise**, and these contracts are: a) in the name of the enterprise; or b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or c) for the provision of services by that enterprise
  - To a person who acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related.
  - A Party may reserve the right for the entirety of this Article not to apply to its Covered Tax Agreements
  - Restriction on the specific activities' exemption
- Allows tax authorities to characterize more easily PEs in "marketing services" subsidiaries of foreign digital groups.





**Multilateral Instrument (Action 15), Current status **

 = in force     = ratified/accepted/approved

 = signed     = not applicable

[click on a jurisdiction to access a detailed summary](#)

*Questions?*

*Thank you for your time and attention*

