BUSINESSEUROPE

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11 June 2015

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Comments on the OECD Revised Discussion Draft entitled "BEPS Action 7: Preventing the Artificial Avoidance of PE Status 15 May 2015 to 12 June 2015"

Through its members, BUSINESSEUROPE represents small, medium and large European companies. BUSINESSEUROPE's members are 40 leading industrial and employers' federations from 34 European countries, working together since 1958 to achieve growth and competitiveness in Europe.

BUSINESSEUROPE is pleased to provide comments prepared by the members of its Tax Policy Group, chaired by Krister Andersson, on the OECD Revised Discussion Draft regarding the prevention of artificial avoidance of PE status (hereinafter referred to as the Draft).

In the revised Draft the OECD has moved from a series of alternative options to specific proposal under each PE issue and added some additional guidance to various concepts. BUSINESSEUROPE welcomes every effort to provide additional clarity to the OECD Model Tax Convention. However, we are still concerned that the proposals in the Draft will result in a lowering of the PE threshold that goes beyond the specific problems related to BEPS in general and the digital economy in particular.

There is still not enough distinction in the revised Draft between BEPS and the allocation of taxing rights between the source state and the residence state. As stated in our previous comments, any new standards should, in our opinion, be limited to addressing only the former topic. The proposals, as they stand, are likely to result in a dramatic increase in PEs with allocation disputes and double taxation as the end result. We urge the OECD to develop a test that would exclude bona fide business from being

hit by an increasing number of PEs when already an arm's length profit is declared for its local activities.

A. Artificial avoidance of PE status through *commissionaire* arrangements and similar strategies

We appreciate the efforts to narrow the concept of "associated enterprises" and also to provide additional guidance as to the interpretation of paragraphs 5 and 6. However, we are still concerned that the proposals will affect not only commissionaire arrangements but also other principal sales structures.

The proposals are based on the presumption that a restructuring of a sales company to a commissionaire structure will substantially reduce the taxable profits in the country of the commissionaire. We believe this to be a transfer pricing issue rather than a PE issue which should be addressed through a proper functional analysis and a discussion about appropriate remuneration.

Extending the PE-concept will most likely give rise to a significant increase in disputes and administrative problems. The notion of a subsidiary as a taxable person should be upheld to the largest extent possible.

B. Artificial avoidance of PE status through the specific activity exemptions

The Draft proposes changes to paragraph 4 of Article 5 by making all the exceptions in the paragraph subject to a preparatory or auxiliary condition.

Although the activities listed in 5.4 in many cases are of a preparatory or auxiliary character, it is acknowledged in para 21 in the Commentary to Article 5 that this is not always the case. There seems to be a lack of consensus between Member States as to the original purpose of the paragraph, i.e. whether it should cover only preparatory or auxiliary activities. Regardless of the original purpose, the Draft clarifies that Working Party 1 has concluded that situations that give rise to BEPS concerns need to be addressed.

To do so, the measure in question has to be sufficiently targeted. Our concern, however, is that the proposed measure and also the specific examples mentioned will not only target BEPS concerns but will also affect traditional businesses with a dramatic increase in PEs as a result. Again, the measure seems to go beyond the intended objective and indeed change the international standards on the allocation of taxing rights on cross-border income.

C. Splitting-up of contracts

To deal with the splitting-up of contracts the Draft proposes two alternatives; the use of a PPT rule (option L) or of an automatic rule (option K).

Although a principal purpose test (would, in principle, give companies a possibility to show that no abuse was intended it would undoubtedly open up for wide application by tax authorities and induce additional uncertainty into the PE test. The example provided in the Draft (Example E) does not give much guidance or assurance as to the application of the PPT rule since it is a fairly clear cut case. In addition, we consider that leaving the decision to tax authorities to determine what is "reasonable to conclude" does not provide much certainty for taxpayers.

The "automatic" approach in option K has its flaws due to the fact that it applies indiscriminately and would also capture situations where there is no BEPS concern. In addition the minimum presence of 30 days is too short and would for many companies result in a PE on every major construction site. Many construction projects run for several years where a company may need to have specialists on the site a couple of days a month during the entire project. In addition, such a threshold could be very difficult to monitor since all parts of an MNE may not be fully aware of all the activities of the group as a whole.

E. Profit attribution to PEs and interaction with Action Points on Transfer Pricing

Since the kind of activities mentioned under paragraph 4 of Article 5 have been recognized not to generate any or very little income, the question of profit attribution to PEs is of utmost importance. Countries are often motivated to create PEs in order to attribute profits to those PEs. We welcome the OECD initiative to provide further guidance in this important area before the end of 2016.

On behalf of the BUSINESSEUROPE Tax Policy Group

Yours sincerely,

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