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Comments on the OECD Revised Discussion Draft entitled “BEPS Action 6: Prevent Treaty Abuse” 22 May 2015 – 17 June 2015

Through its members, BUSINESSEUROPE represents 20 million European small, medium and large companies. BUSINESSEUROPE’s members are 41 leading industrial and employers’ federations from 35 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 entitled “BEPS Action 6: Prevent Treaty Abuse” (hereinafter referred to as the Draft).

General Comments

The initial and prime objective with tax treaties is and should continue to be to facilitate cross-border trade through the allocation of taxing rights between countries and to provide for mechanisms to eliminate double-taxation.

It is of utmost importance that anti-abuse rules are designed so that they have a minimum impact on genuine business operations. Consequently, we believe that perceived inappropriate behaviour is best addressed with specific and targeted anti-abuse provisions. In our view, both the proposed LOB provision and the PPT fail in this respect, since they are too general in nature and not limited to abusive situations.

We acknowledge that some improvements have been made since the last Draft, with some useful examples added. However, considering the added complexity and

unpredictability that will follow if these proposals are implemented, we are concerned that, despite requests from numerous commentators, there is still not sufficient guidance in the Draft. In addition, several issues have been postponed by the Working Party until its June meeting and new, and potentially far reaching, proposals such as the “special tax regime” have been introduced at a very late stage in the process.

The Principal Purpose Test (PPT) is too wide and vague. This would allow tax authorities a very broad discretion to challenge the availability of treaty benefits and be therefore open to ambiguity and misinterpretation.

In addition we fail to see how there could be more than one principal purpose. In our view, the test should naturally focus on the principal purpose of the arrangement or transaction.

Also, the various technical examples provided on the working of the PPT rule effectively show the difficulty that taxpayers will have in proving the requisite facts to prevent denial of treaty benefits.

The LOB is still, despite numerous comments, overly restrictive and in some respects potentially in violation with EU law.

To provide the necessary legal certainty to taxpayers regarding the tax treatment of their investments, it is crucial that (1) taxpayers have the possibility to get pre-clearance regarding the access to treaty benefits, (2) the proposals and proposed changes to the Commentary provide ample guidance on the application of both the proposed LOB and PPT rules, and finally (3) there should be unobstructed access to a mutual agreement procedure (MAP) and mandatory binding arbitration.

If these three conditions are not met – which they are not presently – it will be virtually impossible for most arm’s length parties to determine whether reduced withholding rates may apply under a certain treaty.

Although the discretionary relief provisions under both the PPT and the LOB now both contain a requirement to consult the other contracting state before deciding, there is still no requirement for contracting states to consult each other before invoking the LOB or the PPT. A small improvement is made in that it is now recommended that senior level approval is obtained before making an adjustment. However, this still falls short compared to a requirement to consult – and preferably agree – before either contracting state invokes the LOB or PPT.

The new Discussion Draft proposes in paragraph 32 that as long as a competent authority has properly exercised the discretion granted by the discretionary relief provision of the LOB rule, that provision has been complied with and it cannot, therefore, be argued that taxation is not in accordance with the provisions of the Convention. We are concerned about this since the intention seems to be to deny a taxpayer the possibility to invoke the mutual agreement procedure (MAP) regarding this

decision.

We have limited our specific comments to some of the issues in the Draft.

Part 1 – Alternative “Simplified” LOB rule and presentation of the LOB rule in the OECD Model

BUSINESSEUROPE objects to the combined approach of having both a LOB and a PPT in a tax treaty. Although the Draft suggests a simplified LOB, which naturally is preferable compared to the extensive one as suggested in previous Drafts, it would still leave companies with a lot of uncertainty as to the outcome, since after having passed the simplified LOB, they would be confronted with a very subjective PPT.

Part 2 – Issues identified in the November 2014 Discussion Draft

3. Commentary on the discretionary relief provision of the LOB rule

BUSINESSEUROPE welcomes the proposal in paragraph 32 of the Draft that the competent authority should process a request for discretionary relief expeditiously.

4. Alternative LOB provisions for EU countries

As stated in our previous comments, BUSINESSEUROPE believes that the LOB rule needs to be adapted to reflect EU law requirements. We therefore would like to repeat our concerns in relation to the prohibition of non-resident intermediaries in the ownership tests.

5. Requirement that each intermediate owner be a resident of either Contracting State

We refer to our previous comments that the LOB rule should focus on the ultimate beneficial owner and not intermediate companies.

6. Issues related to the derivative benefit provision

We strongly support a derivative benefit provision in the LOB. The derivative benefit provision would extend the granting of treaty benefits to entities that are controlled by entities that are resident of a third country and that would enjoy the same treaty benefits with the contracting state in question. In such situations, there is no incentive for treaty shopping.



At this late stage in the process, we object, however, to the proposal to introduce a new treaty provision on “special tax regimes”. Whilst this proposal is included in the discussion on derivative benefits, it potentially represents a more fundamental change to the application of treaties which warrants proper consultation not afforded by the current process. This is an issue which should be addressed through the project on harmful tax practices.

7. clarification of the ‘active business’ provision

We agree with the Working Party that there should be clarification on the active business provision, but note that the Discussion Draft – specifically paragraph 71 – does not provide such.

B. Issues related to the PPT rule

12. Inclusion in the Commentary of the suggestion that countries consider establishing some form of administrative process ensuring that the PPT is only applied after approval at a senior level

BUSINESSEUROPE is in favour of such a requirement in order to prevent excessive use of the PPT and welcomes the proposal in paragraph 79 of the Draft.

13. Whether the application of the PPT rule should be excluded from the issues with respect to which the arbitration provision of paragraph 5 of Article 25 is applicable

BUSINESSEUROPE strongly recommends that the application of the PPT should be under mandatory arbitration. Introducing a substantive provision such as the PPT without the possibility of mutual agreement procedures or arbitration is not acceptable. Consequently, we are pleased that the OECD has decided not to endorse the minority view according to which the application of the PPT rule should be excluded from the arbitration mechanism.

15. Whether some form of discretionary relief should be provided under the PPT rule

BUSINESSEUROPE is supportive of having a discretionary relief provision under the PPT rule and welcomes the proposal in paragraph 90 of the Draft.



16. Drafting of the alternative “conduit-PPT rule”

We appreciate the fact that the OECD has adhered to the criticism regarding the definition of the term “conduit arrangement” and we are positive to the proposed examples in paragraph 94 regarding the interpretation of such arrangements.

C. Other issues

19. The design and drafting of the rule applicable to permanent establishments located in third States

As stated in our previous comments, we question the necessity of a provision like this in the Model Treaty. This topic may be of interest in relation to some countries and should naturally be carefully considered before entering into a treaty with such a country. At any rate, those situations could be solved bilaterally.

Concluding Remarks

The introduction of provisions like the proposed LOB and PPT will undoubtedly induce further uncertainty into the Model Treaty and make treaty application even more difficult. The LOB still seems overly restrictive and runs the risk of having a very negative impact on genuine business operations.

Whereas the LOB provision may be considered technically complex, it leaves less room for subjective and arbitrary assessments. The PPT on the other hand takes the opposite approach and does not provide much guidance with respect to when the treaty benefits will be granted. The subjective nature of the PPT opens a door for tax administrations to disqualify taxpayers from treaty benefits where that tax administration finds it appropriate.

In view of the implications of introducing these new provisions in the Model Treaty, and considering the extensive input from commentators, we are disappointed that many issues have not been addressed properly and that the Draft still lacks sufficient guidance in a number of areas. As currently drafted, BUSINESSEUROPE believes that the provisions could seriously undermine the certainty and predictability needed for investment decisions and also lead to an increase of double taxation cases. The effect would be very negative on investments, jobs and growth.

On behalf of the BUSINESSEUROPE Tax Policy Group

Yours sincerely,



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