



## **Comments to the OECD Discussion Draft on “Additional Guidance on the Attribution of Profits to Permanent Establishments”**

ICC welcomes the opportunity to comment on the Discussion Draft. The revisions to the definition of permanent establishment which follow the publication of the Report on Action 7 will potentially result in the recognition of huge numbers of new permanent establishments. In some cases the profit to be attributed will be very small or even de minimis while in others novel questions of the application of the AOA and other relevant principles will arise. While ICC welcomes the additional guidance in cases involving dependent agent permanent establishments and warehouses there is concern that these represent only a small proportion of the circumstances in which uncertainty will arise. Given that this uncertainty will be an impediment to cross-border trade and investment, ICC hopes that this Discussion Draft will be only the beginning of the process and that more comprehensive guidance will be produced as a matter of urgency. This further process should certainly include additional guidance in terms of profit allocation regarding the new fragmentation clause, notably its limitation to those activities which constitute complementary functions and are part of a cohesive business operation. Clear statements should be included to confirm that profit attribution to complementary activities shall only be determined from an activity point of view.

We agree, as noted in paragraph 6, that the basic definition of what is deemed to constitute a permanent establishment has not changed, but what is fundamentally new is that a relatively high threshold has been removed such that disagreement can now arise in connection with very small attributions of profit. In order to avoid administrative burden for both taxpayers and administrations it would be helpful to address small and de minimis cases in the guidance. With this in mind and in response to question 21 raised after paragraph 105, ICC suggests that in cases where any attribution of profit would be small (in either relative or absolute terms) the guidance might provide for an administrative process whereby the permanent establishment would be disregarded for practical purposes.

It is of particular concern, as noted in paragraph 15 et Seq., that the AOA is implemented in very few treaties, that a number of OECD and non-OECD countries have expressly rejected the new Article 7 and that the implementation of the full AOA has been expressly rejected by the UN Committee of Experts on International Cooperation in Tax Matters. From the perspective of the ICC this is an unsatisfactory state of affairs and brings into question whether broader guidance, or at least discussion, would be helpful as the existing and proposed guidance is based solely on the application of the AOA. We need to deal with the full range of approaches actually applied in practice.

It is very likely that the attribution of profits to permanent establishments will develop rapidly in the near future as (i) multinational enterprises adapt their business models to the post-BEPS environment, (ii) business models continue to evolve with the digital economy and (iii) tax administrations reflect on and implement the new practice, not necessarily in consistent ways. It seems appropriate for the development of guidance in this area to be ongoing, at least until the law and practice becomes more settled. The work of the OECD should



therefore be taken forward on a continuing basis rather than terminated on publication of the final report. It should certainly include further alignment of the analyses under Art 9 and Art 7 of the OECD Model Tax Treaty.

We agree with BIAC that some of the key terms and expressions are not sufficiently defined and would benefit from further guidance. This applies, in particular, to the question as to when a party “plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification”; as well as to the precise meaning of “preparatory and auxiliary activities”.

The examples in the Discussion Draft are very helpful and it is particularly useful that computations are included. However, the examples are at the very simplest end of actual business models and it would be very common for there to be many more parties involved in the transactions. The guidance should make it clear that in more complex cases it may be necessary to take a pragmatic approach and a taxpayer’s reasonable practical solution should be acceptable notwithstanding that other approaches might be possible in theory. The questions posed in the Discussion Draft address a somewhat narrow range of circumstances and issues and it will be important, as noted above, to maintain a dialogue with business as practical problems emerge. The examples as well as the terms and expressions seem to include a number of assumptions which are not always clear. Further clarification should include being explicit about what assumptions have been made and that the assumptions in the examples are solely for explanatory purposes, and are not intended to be general rules.

Finally, it would be helpful to reiterate that the lowering of the threshold in relation to the definition of permanent establishment is not intended to have any spillover effect on other taxes. VAT, for example, should be addressed by application of the VAT Guidelines and the fact that an enterprise might have a new permanent establishment as a result of the revised guidance should not, in itself, affect the treatment of any other taxes.



## **The International Chamber of Commerce (ICC) Commission on Taxation**

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

Founded in 1919, and with interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.