

**Comments to the OECD Revised Discussion Draft on BEPS Action 7 “Preventing the Artificial Avoidance of PE Status”**

The International Chamber of Commerce (ICC) as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, welcomes the opportunity to provide comments on the Revised Discussion Draft regarding Base Erosion and Profit Shifting (BEPS) Action 7 ‘Preventing the Artificial Avoidance of PE Status’.

ICC remains concerned that a project intended to tackle BEPS is resulting in a wider reconsideration of the allocation of taxing rights between source and residence countries. This will result in an increased risk of double taxation in non-abusive circumstances unless there is a very clear consensus as to the precise detail of how the new approach will be applied, including objective (rather than subjective) criteria and “bright lines” tests, supported by clarifying examples. The revised Proposals are still somewhat subjective in nature and further guidance will be necessary.

ICC welcomes the assurance that the attribution of profit to Permanent Establishments (PEs) will be examined during 2016 and offers its support to contribute to that work.

The Discussion Draft seeks to address artificial avoidance of PE status through the use of commissionaire arrangements and similar strategies. Commissionaire arrangements, and other arrangements involving dependent agents, are quite frequently employed in non-abusive cases. ICC continues to believe that the proposed measures will not only impact commissionaire arrangements, but also a wide range of arrangements used for making direct sales or providing sales support, i.e. limited risk distributor and other principal structures. Furthermore, appropriate weight should be given to the nature of the activities and the functions being performed, outside the territory in which the PE is argued to exist. In such instances, where significant substance and activities do take place outside the territory, ‘bright line’, objective tests or gateways could perhaps be used to exclude the existence of a PE. A concrete example of the need for a bright line test is the proposed sub paragraph (b) of paragraph 6 of Article 5. The first sentence of the sub paragraph provides an adequate definition of the new “connected” concept. However, the second sentence does not provide any clarity with regard to the “control” concept. The introduction of an undefined test based on “control” will create ambiguity in relation to associated enterprise, and is likely to result in double taxation and increased uncertainty. ICC suggests that there is a strong case for applying the existing rules where there is no intended abuse and where arrangements, often of long standing nature, represent an efficient way of conducting business. ICC feels that there is still time to develop a test to exclude non-abusive cases.

ICC is highly concerned about the boundaries of the terms ‘complementary functions’ and ‘cohesive business operations’. The proposed wording – as illustrated in the commentary section 30.3 Example B – disregards any separate entity reporting and introduces a wide force of attraction rule. The only limitation on combining activities is that they must constitute complementary functions where this condition seems to be met already if there is any kind of interaction between the connected companies in the same country. The proposed rule does not recognise that multinational enterprises (MNEs) operate globally in separate lines of businesses to respond efficiently to the commercial challenges of a globalised and specialised market.



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These lines of businesses should be treated separately and be outside the scope of the anti-fragmentation rule. Further guidance should be provided to differentiate between ordinary business arrangements and abusive cases.

The use of the term 'fixed place of business that is used...' suggests that activities outside the scope of Art. 5.4 could become taxable: If, for example, a MNE owns an affiliate R Co. in country R that owns stock in a warehouse of an independent third-party company in S which are delivered from that warehouse to an affiliate S Co. in country S, it would seem, under the proposed rule of using a fixed place of business (here the warehouse of an independent company), the affiliate R Co. in country R would have a PE in country S. It should be clarified – at least in the commentary section – that the application should be limited to activities of R Co. which qualify as Art. 5.4 activities, i.e. the activity must be performed through a fixed place that is at the disposal of R Co..



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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.