

ACTION 7: PREVENTING THE ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT (PE) STATUS

Background Documents:

[OECD 1st Discussion Draft](#): October 31st, 2014

[BIAC 1st Response](#): January 9th, 2015

[OECD 2nd Discussion Draft](#): May 15th, 2015

[BIAC 2nd Response](#): June 12th, 2015

[OECD Report](#): October 5th, 2015

Last updated: 30 November 2015

TOPIC	BIAC COMMENTS	OECD RESPONSE
General	1. Clarity is required over specific arrangements or structures that are being targeted.	Comment not acknowledged.
	2. Proposals should address potential interaction with the UN Model limited force of attraction principle.	Comment not acknowledged – no reference to UN Model/force of attraction in the RDD.
	3. Interaction between PE and VAT should be clarified.	Comment not acknowledged. No references to interaction between PE and VAT in Action 7 final report.
	4. Should Include explicit language to cut the common link between PE determinations and VAT registrations, a PE as used in the OECD Model is a distinct concept from the “VAT establishment” term used in VAT/GST guidelines.	Comment not acknowledged. No references to common link between PE and VAT registration in Action 7. However, Action 1 mentions that VAT registration does not necessarily trigger a PE.
Section A Commissionnaire	5. Examples should be provided to objectively identify the “ <i>similar arrangements</i> ” that the OECD is targeting.	Comment not acknowledged.
	6. A clear articulation is required that sets out what abusive transactions or structures are being targeted.	Comment not acknowledged.
	7. OECD should clarify whether limited risk distributors are intended to be in-scope.	Para. 9 of Final Report clarifies that changes to art. 5(5) and 5(6) are not intended to address BEPS concerns related to the transfer of risk between related parties through low-risk distributor arrangements.
	8. “Performed by a foreign enterprise” is ambiguous. Further clarity should be provided as to what this means.	Comment not acknowledged. The final report does not provide clarity on the meaning, in spite of the reference in para. 32.5 of the commentary.
	9. A mere online offer should not automatically be considered as an activity that results in the conclusion of contracts.	Comment not acknowledged – no reference to online offers.
	10. Options A and C: Too vague and are not preferred by BIAC.	Final Reports follow Option B, although with some changes. It does

		not refer to the material elements of a contract, but to playing the principal role leading the conclusion of contracts. However, the accompanying Commentary broadens the scope of application to the extent that it moves towards the scope of ‘Option A’.
	11. Options B and D: Clear definition of the “ <i>material elements</i> ” of a contract required.	The term “material elements” of a contract is not included in the Final Report.
	12. Options B and D: mere participation in negotiations, without exercising decision making authority, or negotiating a small number of material elements should not trigger a PE.	A contract may be concluded without active negotiation of the terms. Para. 32.6 states that convincing a person to accept standard terms is a crucial element leading to the conclusion of the contracts, and therefore the person convincing the other plays the principal role.
	13. Options B and D: Not clear what is necessary to be considered to have concluded/negotiated material elements of a contract?	The term “material elements” is deleted in the Final Report and the added term “concluding contracts” has some guidance in para. 32.4, 32.5 and 32.6.
	14. Options A and B: DD does not limit the article to the conclusion of contracts for the sale of goods, including services too.	Changes to art. 5(5) and 5(6) apply to the provision of goods and services.
	15. Options C and D: not desirable because these proposals will add excessive complexity and subjectivity to the PE test.	Final Report opts for Option B.
	16. Automatic denial of independent agent status where agent works exclusively/almost exclusively for associated enterprises disregards the concept of independence of legal entities.	Final Report maintains the automatic denial of independent agent status where an enterprise works exclusively/almost exclusively for closely related enterprises.
	17. Least damaging proposal is likely Option B.	Final Report follows Option B, although the wording is changed. The Final Report does not allude to the negotiation of material elements, but to the principal role test.
	18. In determining whether <i>independent status</i> exists, BIAc supports the ‘ <i>all facts and circumstances</i> ’ test (Para 38.6 of the Commentary to the OECD Model).	Although the RDD proposed to delete current para. 38.6. The Final Report did not delete it. Thus, the ‘ <i>all facts and circumstances</i> ’ test is part of the analysis of determining independency of an agent.
Section B Specific Activity Exemptions	19. Option E: Essential for all countries to clearly accept and state that all of the activities on the list are still capable of being preparatory or auxiliary in nature.	Some countries consider that the activities listed in Art. 5(4) are intrinsically preparatory or auxiliary. Thus, these countries will not subject the activities on the list to the requirement of being preparatory or auxiliary in nature. Countries following this view should, however, include an anti-fragmentation rule.
	20. Option E: Detailed practical guidance and examples required.	The Final Report includes examples illustrating specific cases of

		preparatory and auxiliary activities; para. 21.1 states that it is often difficult to know what is and is not preparatory or auxiliary. Limited clarity.
	21. Option I & J: BIAC opposed both, but option I less objectionable.	An anti-fragmentation clause is not required if the new text of Art. 5(4) is adopted. However, if this amend is not introduced, an anti-fragmentation clause (in line with the one in Option J) should be included.
	22. Option J: Detailed guidance needed on “ <i>complementary functions that are part of a cohesive business operation</i> ”.	Comment not acknowledged. No concrete guidance on the meaning of the term “cohesive business”. Two new examples were added in the commentary to article 5, but further guidance would be desirable.
Section C Splitting-up of contracts	23. Option K and L: BIAC does not support either.	Final report opts for option L (PPT rule), with an ‘automatic’ test (Option K) where countries do not have a PPT rule.
	24. Option K: A minimum presence of 30 days would be too short.	Final Report keeps the 30-day threshold (Comm. para 18.1).
	25. Option K: Should be clarified in para. (b), which “activities” would trigger a PE. Should only be substantially similar activities related to the construction site, and not any other activities.	It is not clarified which activities are intended to trigger a PE. Para 18.2 says that facts and circumstances need to be considered when determining if two activities are connected.
	26. Work is required to explain how the two proposed approaches should be practically applied in a variety of circumstances.	Comment not acknowledged. No guidance on how the two proposed approaches should be practically applied.
	27. Regarding alternative provision, clarification required to ensure that multiple time periods are only combined in cases of abuse.	Comment not acknowledged.
	28. Detailed guidance & definitions of terms needed (for example “logical consequence”)	Comment not acknowledged. The Final Draft does not provide a detailed guidance and does not define key terms.
	29. Strongly advise against application of such a rule to service PEs.	Final Report does not mention the possibility to extend this rule to service PE.
Section D Insurance	30. Option N should be preferred over Option M as it would place the insurance industry on the same footing as other sectors.	The Final Report concludes that it would be inappropriate to treat insurance differently from other types of businesses.
Section E Profit attribution and interaction with TP	31. Encourage exploration of whether a rule or exception could be developed so that a PE would not be created if such a PE would not lead to an increase in overall attributable profits.	Comment not acknowledged. Further details may be forthcoming – follow-up work on profit attribution will be carried out in 2016.
	32. Require clarification to understand the factors that lead to profit attribution to a PE in excess of the arm's length payment	Comment not acknowledged. Further details may be forthcoming – follow-up work on profit attribution will be carried out in 2016.