

ADDITIONAL GUIDANCE ON THE ATTRIBUTION OF PROFITS TO PERMANENT ESTABLISHMENTS

Business at OECD (BIAC) remains supportive of the OECD/G20's Base Erosion and Profit Shifting (BEPS) project and has provided constructive and detailed input from the international business community throughout.

The final BEPS Action 7 Report (Action 7 Report) recommended changes to Art. 5(5) and 5(6) of the OECD Model Tax Convention (MTC) that substantially lower the threshold for a company to have a taxable presence (permanent establishment, PE) in a country. The Action 7 Report provided a mandate for additional guidance on how the Authorized OECD Approach (AOA) applies to the new forms of PE created by the changes to Art. 5.¹

Additional guidance on how to attribute profits to these new PEs is crucial for tax certainty, and we have constructively contributed to its development. While we welcome the additional certainty that any greater consistency in approach can bring, we retain some concerns that the high-level principles outlined in the [Additional Guidance on the Attribution of Profits to PEs under Action 7 Report](#) ("Final Report") allow a broad range of approaches, which may result in more disputes and negatively impact trade and growth.

The objective of this position paper is to encourage consistent and transparent implementation of these rules, resulting in additional clarity for taxpayers and tax administrations, through four key recommendations.

1. While it is helpful that the Final Report acknowledges that the risk control functions under Art. 9 and the significant people functions under Art. 7 of the MTC are not interchangeable (and should not be counted twice), there is no explicit guidance as to ordering. **BIAC strongly encourages clear domestic implementation guidance on how each country intends to order the application of Articles 7 and 9².** We also encourage explicit commentary on the elimination of double taxation between the source and residence countries. Further, we continue to believe that a single taxpayer approach (with transfer pricing policies in place to ensure that it receives the appropriate remuneration for activities undertaken by a group within its jurisdiction) is preferred to recognising multiple taxpayers with the same overall taxable profits
2. In order to provide clarity regarding applicable comparables and the pricing, **BIAC recommends that clear numeric examples based on business models commonly used in practice be included in local guidance**, and would be further aided by labelling certain, common business models –e.g., confirming that a local entity that is taking title and making sales (i.e., a buy-sell arrangement) should not be entitled to returns in excess of what a third party "distributor" would receive (provided no additional, non-distribution functions are performed).³ Examples confirming VAT status is not impacted by income tax PE status would also be welcomed.
3. The Final Report failed to provide clear guidance as to the application of the 2010 AOA. **We encourage adoption of the 2010 AOA when applying the guidance of the Final Report to provide additional certainty and avoid disputes across jurisdictions. As a minimum, countries should state explicitly whether they apply the 2008 AOA, 2010 AOA, or an alternative methodology.**
4. Lastly, the Final Report did not endorse administrative simplification procedures, but does note that adoption "would not alter the taxing rights of the home country or the host country." All tax administrations face resource constraints, and tax uncertainty often derives from a poor relationship between businesses and tax administrations. **BIAC believes that administrative simplification provides an opportunity to address both of these important issues.** We would welcome a dialogue regarding the operation of such procedures multilaterally, but absent such an approach, we encourage countries to seek to implement such measures optionally and unilaterally (for taxpayers).

¹ BIAC would also welcome additional clarity over the meaning of the terms that apply to the Art. 5(5) exemptions, to confirm how individual countries intend to apply these exemptions in practice.

² BIAC believes that Art. 9 should be applied first, to reduce the likelihood of double remuneration of risk bearing.

³ By encouraging classification of an operating structure, the burden is placed on the taxpayer to label and substantiate the pricing of such model, which should reduce the costs borne by both business and tax administrations and provide additional consistency regarding pricing.