

Insurance Europe comments on the OECD's revised discussion draft: Preventing the artificial avoidance of the permanent establishment (PE) status (BEPS action point 7)

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Insurance Europe supports the aims of the Organisation for Economic Co-operation and Development (OECD) base erosion and profit shifting (BEPS) action plan to address weaknesses in the international tax environment and welcomes the opportunity to provide comments on the revised discussion draft on preventing the artificial avoidance of the permanent establishment (PE) status (BEPS action point 7).

Specific comments

Insurance Europe welcomes the OECD's recognition that an insurance-specific option (option M) is not required in this discussion draft. Similarly, Insurance Europe agrees with and supports the OECD's choice of option B as opposed to options A, C or D.

Insurance Europe believes that the extended commentary provided in view of interpreting articles 5(5) and 5(6) is a useful addition. However, Insurance Europe would point out that the meaning of "material elements" of contracts and "dependent agent" must be further refined, as otherwise, there may be a risk that for some insurance business models, PEs would be created for tax but not for regulatory purposes with nil or minimal additional profit being attributed. This would therefore represent a disproportionate compliance burden for insurers given that no or minimal profit would be attributed to those PEs.

In order to avoid this, only the presence of key entrepreneurial risk-taking (KERT) functions in a jurisdiction should create a PE for tax purposes. The main KERT function of insurers is generally the assumption and management of insurance risk/business (i.e. underwriting). This is recognised by the 2010 OECD report on the attribution of profits to permanent establishments part IV (Insurance) ("part IV"), even though part IV does not apply when ascertaining whether a PE exists.

In contrast, functions such as sales and marketing of insurance, back-office processing of applications, administrative support, claims handling and investment management are not KERT functions and would have nil or minimal additional profit being attributed. Creating tax PEs for such functions, even if they are remunerated at an appropriate level for the duties undertaken and are not high value, would result in a



disproportionate compliance burden; as such, Insurance Europe believes that tax PEs in such circumstances should not be created.

Insurance Europe would welcome the clear recognition that in an insurance context:

- "Material elements" of contracts should be clearly linked to the assumption and management of insurance risk/business and;
- An appropriately compensated agent performing non-KERT functions (such as sales) is not considered "dependent agent" even if he acts exclusively for one insurer.

In Insurance Europe's opinion, the fastest and most straightforward way to achieve this recognition is by referencing part IV in the commentary to articles 5(5) and 5(6).

Finally, the discussion draft notes that follow-up work on issues related to action 7 will be done after September 2015 "with a view to providing guidance before the end of 2016". In this context, Insurance Europe recommends that such guidance be released in draft form for public comments, with sufficient time (at least 45 days) for review and consultation.

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