

Response to OECD discussion draft on BEPS Action 7 - Additional guidance on attribution of profits to permanent establishments

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Comments

Insurance Europe welcomes the opportunity to respond to this revised discussion draft and continues to support the aims of the Organisation for Economic Co-operation and Development's (OECD) base erosion and profit shifting (BEPS) action plan to address weaknesses in the international tax environment. Insurance Europe believes that the revised discussion draft is an improvement compared to the one released for consultation last year.

As noted in previous submissions to the OECD, Insurance Europe's main concern about proposed rules on the attribution of profits to permanent establishments (PEs) is that, for some insurance business models, PEs would be recognised for tax but not for regulatory purposes with nil or minimal additional profit being attributed to them. This would represent a disproportionate compliance burden for insurers, as well as for tax authorities.

Insurance Europe maintains its view that only the presence of key entrepreneurial risk-taking (KERT) functions in a jurisdiction should create a PE for tax purposes and be relevant for the attribution of profits. The main KERT function of insurers is the assumption and management of insurance risk/business (ie, underwriting). This is recognised by the 2010 OECD Report on the Attribution of Profits to Permanent Establishments Part IV (Insurance) ("Part IV").

With this in mind, Insurance Europe has the following comments on the discussion draft:

- Insurance Europe welcomes the OECD's explanation in paragraph 18 of how double taxation can be avoided when both Article 7 and Article 9 of the Model Tax Convention apply (ie, when both the intermediary and the non-resident enterprise are associated enterprises).
- As pointed out in previous submissions, Insurance Europe believes that Part IV should be referenced in the final guidance on Article 5(5) and 5(6). This is because Part IV includes comprehensive guidance which defines and discusses risks, risk management and allocation of risk in the context of the insurance businesses. Indeed, risk assumption is the essential component of insurance business models and therefore profits should be attributed to insurers' PEs only if this KERT function is present

there. This is clearly set out in Part IV. Given that paragraph 18 of the OECD discussion draft refers to risk control functions in its analysis of risk allocation when both Article 7 and Article 9 are applicable, making a specific reference to Part IV here seems particularly relevant and important.

- The OECD's discussion draft references Part I of the 2010 report in paragraph 16, which states that the notion of "significant people functions" is used for attributing risk assumption and economic ownership of assets to a PE. If an additional reference to Part IV is not added in paragraph 18, Insurance Europe would suggest that the full 2010 report be referenced in the discussion draft, instead of just Part I.
- Insurance Europe believes that a definition of PE widened to include intermediaries would result in the creation of a potentially large number of insurance PEs with nil or minimal additional profit being attributed to them. This is because, by applying Part IV of the 2010 report and the reasoning in paragraph 18 of the current discussion draft, the functions performed by the intermediary will be non-KERT. Insurance Europe therefore welcomes:
 - The OECD's recognition in paragraph 19 that "depending on the facts and circumstances of a given case, the net amount of profits attributable to the PE may be either positive, nil or negative (ie, a loss)".
 - The OECD's reference in paragraph 20 to the 2010 report and to "administratively convenient ways of recognising the existence of a PE under Article 5(5) and collecting the appropriate amount of tax resulting from the activity of the intermediaries".
- However, Insurance Europe is concerned that the creation of many such PEs with no or minimal profit attributed would create an entirely unnecessary administrative burden for insurers and tax authorities. Therefore, Insurance Europe strongly believes that the final OECD guidance on Article 5(5) and 5(6) must include an explicit recommendation that jurisdictions should, in these circumstances have administratively convenient ways of collecting the appropriate amount of tax to reduce the compliance burden for both business and tax authorities. A good example of how this can be achieved is provided in paragraph 21 of the OECD's discussion draft.

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