

## Insurance Europe response to the OECD consultation on the Attribution of Profits to Permanent Establishments

Our reference:	ECO-TAX-16-103	Date:	30 August 2016
Referring to:	OECD Discussion Draft on Additional Guidance on the Attribution of Profits to Permanent Establishments		
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Pages:	2	EU Transparency Register ID no.:	33213703459-54

### Comments

Insurance Europe welcomes the chance to respond to this consultation by the Organisation for Economic Co-operation and Development (OECD). Although the OECD's discussion draft mentions the fact that paragraphs 19-20 of the final report on Action 7 of the base erosion and profit shifting (BEPS) Action Plan indicate that Action 7 requires additional guidance on how the rules would apply **in particular for permanent establishments (PEs) outside of the financial sector**, Insurance Europe is concerned by the potential impact of certain proposals in the present discussion draft on the insurance sector.

As expressed in previous submissions to the OECD, Insurance Europe's main concern with the proposed PE rules 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.

The discussion draft recognises in paragraph 104 that there will be situations in which the profits attributed to the PE will be nil, but fails to propose a solution which would avoid the disproportionate compliance burden that will be created for insurers in these cases. Insurance Europe considers that this is a disappointing outcome and disagrees with the suggestion that these PEs may nevertheless be justified by the potential existence of "other tax liabilities". At least in an insurance context, this would not be the case.

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 (i.e. underwriting). This is recognised by the 2010 OECD Report on the Attribution of Profits to Permanent Establishments Part IV (Insurance) ("Part IV").

The widened definition of PE (i.e. the new approach in respect to the attribution of profits) as presented in the discussion draft could however potentially generate new tax PEs for insurers with nil or minimal profit attributed to them in the following situations:

- The insurer sells and markets insurance products. Part IV recognises that such activities are unlikely to be KERT.
- An in-house service company performs non-KERT functions, such as back-office processing of applications, administrative support, claims handling and investment management.
- A third party unconnected agent acts exclusively for an insurer who is performing non-KERT functions.
- An agent acts (almost) exclusively for the insurer under a Delegated Underwriting Authority (DUA). If the authority granted under a DUA is strictly limited, the agent would not undertake KERT functions under this authority.
- A connected agent performs regulated non-KERT activities in the same territory as the customer and is rewarded directly, on arm's length terms, by the customer (e.g. a broker distributes insurance products and is rewarded through a fee charged to the customer in addition to any fees charged by the provider of the insurance products.)

In general, Insurance Europe's view is that **insurance distribution networks should not give rise to PEs for tax purposes** because distribution activities are remunerated by commissions and because the profits on these commissions are taxed in the distribution location. There is no reason why there should be further income attributable to a dependent agent PE if the agent's enterprise is remunerated at arm's length, taking into account the risks assumed by the dependent agent enterprise.

Similarly, when a banking network distributes insurance products, the insurer should be considered independent from the banking network, given that a) the banking network distributes products without authority to negotiate insurance contracts and b) the banking network may also distribute similar products from other insurance providers, therefore introducing effective competition.

Insurance Europe believes that the approach in example 1 of the discussion draft would be difficult to apply in an insurance context where there is nothing analogous to "cost of goods sold" (which appears in Example 1 to be payable to Country A to ensure there is no profit in the PE in Country B). If the methodology of Example 1 is applied to an agent undertaking non-KERT functions, for an insurer in Country B it would mean that all the premium from writing the business in Country B would be attributed to the PE in Country B even though the functions in that country would be non-KERT. This would clearly conflict with Part IV.

**Insurance Europe strongly believes that a solution should be found to avoid the useless generation of PEs in the circumstances outlined above, particularly because the OECD recognises that no profit will be attributed to these PEs.** Such a solution would avoid placing a highly disproportionate compliance burden on insurers. A possible way to ensure this would be adding wording to the commentary on Article 5 (e.g. under paragraph 39) to suggest that the facts and circumstances of the business value chain should be taken into account as part of the determination of whether or not a PE is created. Given that Part IV already provides a comprehensive guidance which defines and discusses risks, risk management and allocation of risk in the context of the insurance businesses, referencing Part IV would seem like a sensible solution.

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