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Opinion Statement of the CFE on proposed changes to the Commentary on Art.5 OECD Model Tax Convention (Permanent Establishment)

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Summary

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This is an Opinion Statement prepared by the CFE Fiscal Committee. The CFE is the leading European association of the tax profession with 33 national tax adviser organisations from 24 European countries representing over 180,000 tax advisers.

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1. Introduction

This document provides comments on the public discussion draft on the proposals for additions and changes to the Commentary on Article 5 of the OECD Model Tax Convention ("OECD Model"), published by the OECD in the public discussion draft "*Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention*", 12 October 2011 to 10 February 2012.

The notes below refer to the consolidated version of paragraphs 1 to 35 of the Commentary on Article 5 (as amended by the proposals for changes), under the ANNEX of the above mentioned public discussion draft.

As a foreword, the Confédération Fiscale Européenne, while welcoming the purpose of the proposals to clarify the definition of permanent establishment, notices that, on the one hand, in many cases it is necessary to first read the background to fully understand the reason for the change (examples are to be found sometimes under the description of the issue and other times under the background), and on the other hand, that the recommended additions or changes do not fully answer or reflect the problem addressed.

2. The farm as permanent establishment

According to the proposed new Paragraph 3.1 to the Commentary on Article 5 of the OECD Model, the determination "*of whether or not an enterprise of a Contracting State has a permanent establishment in the other Contracting State must be made independently from the determination of which provisions of the Convention apply to the profits derived by that enterprise*". In particular, the issue was raised as to whether the fact that income from agriculture falls under Article 6 of the OECD Model prevents a farm from being considered a permanent establishment.

The proposed new Paragraph 3.1 clarifies the above mentioned issue by referring to the following example:

> "*(...) a farm or apartment rental office situated in a Contracting State and exploited by a resident of the other Contracting State may constitute a permanent establishment regardless of whether or not the profits attributable to such permanent establishment would constitute income from immovable property covered by Article 6 (...)*".

Provided that all requirements under Paragraph 1 of Article 5 of the OECD Model are met, there is no doubt that a farm could constitute a permanent establishment, even though the income would be covered by Article 6 of the OECD Model. The clarification under the proposed new Paragraph 3.1 has the aim to avoid any negative inference from the fact that some treaties expressly refer to farms in their Article 5.

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We believe, however, that the wording of para. 9 in the consultation paper (Background) reflects much more clearly what the conclusion is.

On the other hand, we would clearly distinguish between a farm and an apartment rental office. Their characteristics are far from being the same.

3. The expression "*location at the disposal of an enterprise*"

Changes to Paragraph 4.2 to the Commentary on Article 5 have the purpose of clarifying the expression "*location at the disposal of an enterprise*"[1]. A location which is not at the disposal of an enterprise does not constitute a permanent establishment of the latter since it may not be considered "*a place of business through which the business of [that] enterprise is wholly or partly carried on*".

According to the proposed new Paragraph 4.2, a key-factor is the "*extent of the presence of an enterprise at that location and the activities that it performs there*". Another key-factor is the "*exclusive legal right to use a particular location*". Where the location is used only for carrying on business activities of the enterprise, it may be considered "*at the disposal of the enterprise*". The requirement at stake is also met "*where an enterprise performs business activities on a continuous and regular basis during an extended period of time at a location that belongs to another enterprise or that is used by a number of enterprises*".

The location may not be considered "*at the disposal of the enterprise*" in particular when:

- the enterprise's presence at a location is intermittent or incidental;
- the enterprise does not have a right to be present at a location and does not, in fact, use that location itself.

The clarification, although opportune, leaves open the issue relating to the concept of "*presence intermittent or incidental*". Any explanation of the concept should take into account the type of business activity actually carried on.

The proposed new Paragraph 4.2 to the Commentary on Article 5 also provides for some clarifications with regard to business restructuring issues.

Business restructurings may lead to assets being held, risks being managed or activities being performed by a converted local entity for the account of a foreign enterprise. Within a business restructurings context, it is important to ascertain whether the premises of the converted local entity in which these activities take place may constitute a fixed place of business of the foreign enterprise. The relevant questions are in particular the following:

- whether those premises are "*at the disposal of*" the foreign enterprise;
- whether it is the business of the foreign enterprise (and not only the business of the local entity) that is wholly or partly carried on in those premises.

The proposed new paragraph 4.2 to the Commentary on Article 5 clarifies the issue by stating that "*if an enterprise does not have a right to be present at a location and, in fact, does not use that location itself, that location is clearly not at the disposal of the enterprise*". A plant that is owned and used exclusively by a supplier or contract-manufacturer may not be considered at the disposal of an enterprise, which receives the goods produced at that plant, based only on the fact that the goods are used in the business of the same enterprise.

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[1] The issue was raised by BIAC in a note prepared for its meeting with WP1 Delegates in February 2005. BIAC expressed concerns about the uncertainty of the concept of "*at the disposal*" and expressed the view that, at a minimum, a non-exclusive list of criteria should be provided as to what constitutes "*at the disposal*".

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4. Individual's home office and permanent establishment

The proposed new Paragraphs 4.8 and 4.9 to the Commentary on Article 5 deal with the issue of whether an individual's home office[2] constitutes a permanent establishment of the enterprise for which the individual carries on an activity. The issue arises generally in the case of expatriate employees, cross-frontier workers and travelling consultants.

The general rule is that a location may not be automatically considered at the disposal of an enterprise simply because it is used by an individual who works for the enterprise. All facts and circumstances of each case need to be taken into consideration. If the business activities at an individual's home are carried on in an intermittent or incidental way, that home may not be considered at the disposal of the enterprise.

Basically, the home office may be considered to be at the disposal of the enterprise if:

- it is used on a regular and continuous basis for carrying on business activities;
- it is clear from facts and circumstances that the enterprise has required the individual to work from home.

The proposed new Paragraph 4.9 to the Commentary on Article 5 clarifies the issue by referring to the case of a non-resident consultant who is present for an extended period in a certain State. The consultant carries on most of the business activities of the consulting enterprise from an office set up in his/her home in that State. In that case, the home office may be considered at the disposal of the enterprise. However, if a cross-frontier worker performs most of the activities from home situated in one State, instead of from the office made available by the enterprise in the other State, the home should not be considered "*at the disposal of the enterprise*".

The above example could lead to the conclusion that the concept "*at the disposal of the enterprise*" is linked to the place where the activities *should* be carried on, rather than to the place (i.e., cross-frontier worker's home) where the same activities are actually performed.

5. Shops on ships operated in international traffic

The proposed new Paragraph 5.5 to the Commentary on Article 5 clarifies the concept of "*permanent establishment*" with reference to ships or boats.

It provides that a ship or boat that navigates within territorial waters or in inland waterways does not constitute a fixed place of business, since it is not fixed.

We believe, however, that the exception "(unless the operation of the ship or boat is restricted to a particular area that has commercial and geographic coherence") introduces confusion ("depending on the circumstances"). It would be better either to elaborate on the point of "a particular area" or to delete the exception completely. Business activities carried on aboard a ship or a boat[3] must not be considered permanent establishment either.

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[2] An office located at an individual's own home.

[3] Such as a shop or restaurant.

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6. Degree of permanency and permanent establishment

On this specific issue the viewpoint of the CFE fully coincides with that of BIAC and therefore urges the Working Group to amend the proposal accordingly. We believe that the proposal, such as it is, is far from clarifying: an example of the confusion it creates is constituted by point 6.2 (para. 33 in the consultation paper). Also we believe that some of the conclusions of the Working Group are impossible to administer both for the tax administrations and the taxpayers. For example, the proposal that a stand that is rented for a couple of weeks per year over 15 years should constitute a permanent establishment[4] is absurd: in this case the tax administration could only retroactively (after 15 years!) determine that a permanent establishment existed beginning from year one - which means for 15 years retroactively (!) there would be a reallocation of profits from the country of residence to the country of the permanent establishment. The recurrent nature of the activity, which can be appreciated only after a considerable time has passed, cannot be the cause of the existence of a permanent establishment. Juridical certainty requires that the reasons for the existence of a permanent establishment be known before starting the activity.

7. Subcontractors and permanent establishment

The proposed new Paragraph 10.1 to the Commentary on Article 5 deals with the issue whether an enterprise (contractor) that has undertaken the performance of a comprehensive project has a permanent establishment if it subcontracts all aspects of that contract to other enterprises.

Subcontractors may constitute permanent establishment if all requirements under Paragraph 1 of Article 5 are met. Subcontractors may act alone or together with employees of the enterprise. In the context of Paragraph 1 of Article 5, subcontractors have to perform the work of the enterprise at a fixed place of business that is at the disposal of the enterprise "*for reasons other than the mere fact that these subcontractors perform such work at that location*".

The proposed new paragraph 10.1 to the Commentary on Article 5 provides the following example:

> "*an enterprise, that owns a small hotel and rents out the hotel's rooms through the internet, has subcontracted the on-site operation of the hotel to a company that is remunerated on a cost-plus basis*".

The new provision could leave open the issue relating to the overall responsibility of the contractor on the on-site operation by the subcontractor. In particular, it is not clear whether a contractor's permanent establishment occurs in the case where the latter has the overall responsibility on the activity performed on-site.

8. Definition of "*enterprise*" and permanent establishment

The issue dealt with under the proposed Paragraph 10.3 to the Commentary on Article 5 concerns the application of Article 3 of the OECD Model in the case of a construction site

[4] Proposed Paragraph 6.1

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which lasts for more than twelve months "*but no taxpayer is there for more than twelve months*".

The definition of "*enterprise of a Contracting State*" in Article 3 of the OECD Model refers to any form of enterprise, *i.e.*, a company, a partnership, a sole proprietorship or other legal form. Different enterprises may co-operate on the same project: whether their collaboration constitutes a separate enterprise (i.e., a partnership) depends on the facts and the applicable local legislation.

A distinct enterprise may not be considered to have been set up if different enterprises simply agree to each carry on a separate part of the same project. They will not jointly carry on business activities and will not share the related profits even though they may share the overall output from the project or the remuneration for the activities that will be carried on in the context of that project.

In other words, a joint venture may not be considered an "*enterprise of a Contracting State*" for the purpose of Articles 3 and 5 of the OECD Model.

9. Fiscally transparent partnership and permanent establishment

The proposed new Paragraph 10.4 to the Commentary on Article 5 clarifies the application of the concept of "*permanent establishment*" to enterprises that take the form of a fiscally transparent partnership.

The fiscally transparent partnership is carried on by each partner; it is an enterprise of each Contracting State of which a partner is a resident. If the partnership has a permanent establishment in a Contracting State, each partner's share of the profits attributable to the permanent establishment constitutes, for the purposes of Article 7 of the OECD Model, profits derived by an enterprise of the Contracting State of which that partner is a resident.

The clarification under the proposed new Paragraph 10.4 may be deemed opportune. However, point 10.3 could be shorter for the sake of simplicity: the sentence "*Clearly, if two enterprises carried on by different persons decide to form a company in which these persons are shareholders, the company constitutes a legal person that will carry on what becomes a separate enterprise*" could be shortened: "*Clearly, two or more companies can form a separate company*". Also, a link is missing between paragraph 10.3 and 10.4. Does the term "fiscally transparent partnership" (in 10.4) refer to the joint venture (in 10.3)? If so, it should be clearly stated.

Paragraph 19.2 is also quite confusing. It seems to say that, whenever the building site/construction/installation project is carried out by a fiscally transparent partnership and the whole activity lasts more than twelve months, then the partnership will be deemed to have a permanent establishment in the country where the activity takes places, because the general principle is that a building site is considered to be a permanent establishment if it lasts more than twelve months. However, there is an exception: when one (or more) partner in the partnership is a resident of a country whose double tax convention with the country of the building site sets out a lower threshold for the existence of a permanent establishment (i.e. 8 months). In such a case, with respect to that partner only, there will be a permanent establishment even if the site does not last twelve months. However, the proposed wording does not make it clear.

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We also think that a clear distinction must be drawn between the existence of the permanent establishment and the attribution of income to each of the partners, which the proposed amendments tend to mix.

10. "*Place of management*" and permanent establishment

Changes to Paragraph 12 to the Commentary on Article 5 deal with the issue of whether a company – member of a corporate group – may constitute a "*place of management*" of another group company so as to constitute a permanent establishment[5].

Paragraph 2 of Article 5 of the OECD Model contains a non-exhaustive list of examples "*of places of business*", each of which can be regarded as constituting a permanent establishment under Paragraph 1, provided that it (i.e., the place of business) meets the requirements of that same Paragraph.

The expressions "*place of management*", "*branch*", "*office*", etc. must be interpreted in such a way that they constitute permanent establishment only if they meet the requirements of Paragraph 1 of Article 5.

The clarification according to which no "*place of management*" (or "*branch*" or "*office*") may be automatically considered a permanent establishment seems opportune.

11. Construction site

Changes made to Paragraph 19.1 to the Commentary on Article 5 have the purpose of clarifying issues relating to the existence of a building site, which constitutes a permanent establishment only if it lasts more than twelve months.

Generally, a site continues to exist until the work is completed or definitely abandoned. The period for tests made by the contractor or subcontractor should be taken into consideration for twelve-month period purpose.

The new Paragraph 19.1 states that the delivery of the building or facilities to the client represents the end of the period of work, unless the contractor and subcontractors continue to carry on activity on the site after its delivery. The period of work that is undertaken after completion of the construction work[6] is not normally included in the original construction period.

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[5] The reference is to the example in Subparagraph 2a) of Article 5. To this purpose, the following case was outlined:
"*ACO, a company resident of State S, owns all the shares of BCO, a company resident of State R. Both companies are part of the ACO multinational group.*
A part of the administrative functions of the multinational group have been centralised in the headquarters of ACO located in State S. The accounting, legal services, and most of the human resources functions of BCO are provided through ACO employees working at these headquarters.
The tax authorities of State S argue that since the headquarters of ACO constitute a place of management for BCO, BCO has a permanent establishment in State S under Paragraph 5(1) and Subparagraph 5(2)a)".

[6] Pursuant to a guarantee that requires an enterprise to perform repairs activities.

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12. Activities of a preparatory or auxiliary nature

Changes to Paragraphs 21 and 23 to the Commentary on Article 5 aim at dealing with the issue of whether the activities that are mentioned in Subparagraphs a) to e) of Paragraph 4[7] of Article 5 are automatic exceptions or whether they depend on the activities being of a preparatory or auxiliary nature.

The new Paragraph 21 clarifies that where each of the activities listed in Subparagraphs a) to d) is the only activity carried on at a fixed place of business, this is deemed not to constitute a permanent establishment. Those activities are generally preparatory or auxiliary.

Subparagraph e) provides that a fixed place of business through which the enterprise exercises solely an activity which has for the enterprise a preparatory or auxiliary character, is deemed not to be a permanent establishment[8].

The new Paragraph 23 to the Commentary on Article 5 clarifies that the general definition of "*permanent establishment*"[9] excludes from its scope a number of forms of business organisations which, although they are carried on through a fixed place of business, and may contribute to the productivity of the enterprise, involve activities which are so "*remote from the actual realisation of profits*" by the enterprise that they should not be treated as permanent establishments.

13. Sale of goods and permanent establishment

Clarifications regarding Subparagraphs a) and b) of Paragraph 4 of Article 5 of the OECD Model are provided in the new Paragraph 22 to the Commentary on Article 5.

Changes made to the above mentioned Paragraph have the objective to clarify the issue as to whether the exception under Subparagraphs a) and b) applies to goods or merchandise to be sold from abroad. To this purpose, it is stated that Subparagraphs a) and b) apply regardless of whether the storage or delivery takes place before or after the goods or merchandise have been sold, provided that the latter belong to the enterprise whilst they are at the relevant location.

The exception also covers situations where a facility is used, or a stock of goods or merchandise is maintained, for any combination of storage, display and delivery. Facilities used for the delivery of goods are generally used for the storage of these goods, although for

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[7] "*4. Notwithstanding the preceding provisions of this Article, the term «permanent establishment» shall be deemed not to include:*

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(...)".

[8] The production of an exhaustive list of exceptions has not been considered necessary.

[9] Provided by Paragraph 1 of Article 5 of the OECD Model.

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a short period. Paragraph 22 states that the word "goods" and "merchandise" would not cover, for example, immovable property and data.

For CFE the word "data" is not descriptive enough. "Digital products" may be narrower than data but would be much clearer.

14. Negotiation of contracts

The new Paragraph 24.2 to the Commentary on Article 5 clarifies the concept of "*activities which constitute an essential part of the business operation*".

According to Paragraph 24.1, a fixed place of business with the function of managing an enterprise cannot be regarded as doing a preparatory or auxiliary activity[10]. The function of managing an enterprise, although covering a certain area of operations, constitutes an essential part of the business operations of the enterprise. Thus, it cannot be regarded as an activity which has a preparatory or auxiliary character.

The new Paragraph 24.2 clarifies the above mentioned concept with reference to the negotiation of important contracts. If an enterprise – that sells goods worldwide – establishes an office in one State, and the employees working at that office take an active part in the negotiation of important parts of contracts for the sale of goods[11], that negotiation activity constitutes an essential part of the business operations of the enterprise and should not be regarded as having a preparatory or auxiliary character. This applies even if the employees do not exercise an authority to conclude contracts in the name of their employer.

The office above constitutes a permanent establishment provided that the requirements set forth in Paragraph 1 of Article 5 are met.

The clarification leaves open the issue as to whether the negotiation of important contracts is to be considered an essential part of the business operations even when those contracts are not for the sale of goods (i.e., when financing contracts are concerned).

15. Fragmentation of activities

Changes to Paragraph 27.1 to the Commentary on Article 5 concern the issue as to whether and to what extent the language in Paragraph 27.1 of the Commentary on Article 5 on the fragmentation of activities may be relevant in dealing with the situation in which a non-resident is carrying on, through a converted ("*stripped*") local enterprise, the activities previously carried out as a full-fledged entity.

According to the current version of Paragraph 27.1:

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[10] If enterprises with international ramifications establish a so-called "*management office*" in States in which they maintain subsidiaries, permanent establishments, agents or licensees, having supervisory and co-ordinating functions for all departments of the enterprise located within the region concerned, a permanent establishment will normally be deemed to exist, since the management office may be regarded as an office within the meaning of Paragraph 2 of Article 5.

[11] By participating in decisions related to the type, quality or quantity of products covered by the contracts.

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"Subparagraph f)[12] is of no importance in a case where an enterprise maintains several fixed places of business within the meaning of subparagraphs a) to e) provided that they are separated from each other locally and organisationally, as in such a case each place of business has to be viewed separately and in isolation for deciding whether a permanent establishment exists. (...) An enterprise cannot fragment a cohesive operating business into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity".

Changes to Paragraph 27.1 clarify that the same approach (*i.e.*, a cohesive operating business may not be fragmented into small operations) applies where an enterprise that maintains in a Contracting State one or more fixed places of business is also deemed, pursuant to Paragraph 5 of Article 5, to have a permanent establishment in the same State.

If the activities "*are not separated organisationally from these fixed places of business*", the enterprise may not be considered to be engaged in a preparatory or auxiliary activity.

16. The conclusion of contracts in the name of the enterprise

Changes to Paragraph 32.1 to the Commentary on Article 5 aim at clarifying the concept "*to conclude contracts in the name of the enterprise*". The issue dealt with, pertains to the question whether the above expression only refers to cases where the principal is legally bound *vis-à-vis* the third party, under agency law, by reason of the contract concluded by the agent, or whether it is sufficient, for permanent establishment purposes, that the foreign principal is economically bound by the contracts concluded by the person acting on its behalf.

Paragraph 32.1 states that the expression "*authority to conclude contracts in the name of the enterprise*" does not only refer to an agent who enters into contracts "*literally*" in the name of the enterprise. It also refers to an agent who concludes contracts which bind the enterprise even if those contracts are not actually in the name of the latter. Depending on the applicable agent law, an enterprise would be bound by a contract concluded with a third party by a person acting on behalf of the enterprise even if that person did not formally disclose that it was acting for the enterprise and the name of the enterprise was not referred to in the contract.

This conclusion leaves open the issue as to whether evidence – of the underlying arrangement between the person and the enterprise – should be given.

17. The conclusion of sales contracts

Changes to Paragraph 33 to the Commentary on Article 5 clarify that the expression "*authority to conclude contracts in the name of the enterprise*" is not restricted to situations where sales contracts are concluded.

The underlying issue is whether the application of Paragraph 5 of Article 5 of the OECD Model to business restructurings is restricted to situations in which a full-fledged distributor is

[12] "*f) the maintenance of a fixed place of business solely for any combination of activities mentioned in Subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character*".

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converted into a *commissionaire* or other sales agent[13]. Where a local manufacturer is converted into a contract or toll manufacturer or where a full-fledged research operation is converted into contract research, the converted local entity, in general, does not have an authority to conclude contracts with third parties.

The new Paragraph 33 to the Commentary on Article 5 specifies that the types of contracts referred to in Paragraph 5 of Article 5 are not restricted to contracts for the sale of goods. The provision also covers those situations in which a person has and habitually exercises an authority to conclude leasing contracts or contracts for services.

The clarification under the proposed new Paragraph 33 may be deemed opportune.

[13] That has and habitually exercises an authority to conclude contracts.

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