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Opinion Statement FC 5/2014 of the CFE

on the OECD Discussion Draft: Preventing the granting of treaty benefits in inappropriate circumstances (BEPS Action 6)

Prepared by the CFE Fiscal Committee

Submitted to the OECD

in April 2014

CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 32 professional organisations from 25 European countries (21 EU member states) with 180,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

CFE is registered in the EU Transparency Register (no. 3543183647-05).

We will be pleased to answer any questions you may have concerning CFE's comments outlined below. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

Sincerely yours,

Confédération Fiscale Européenne

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1. We are concerned that Action 6 seems to mix, and assimilate, many different issues: the existing rules for the allocation of taxing rights under domestic laws (apparently aimed to restore source taxation as if tax in the country of residence were tantamount to abuse), treaty abuse and double non taxation. Such confusion does not help to make the content of this discussion draft easy to follow.

2. If OECD is concerned that the existing rules on allocation of taxing powers are no longer adequate, it should consider a more fundamental reform of the Treaty Model rather than attempt to change the existing principles through restrictions on the use of the treaty.

3. The three areas, A B and C, identified by Action 6 do not correspond to the issues mentioned above. On the one hand, treaty provisions aimed at preventing treaty abuse should be dealt with separately from recommendations regarding the design of domestic rules. On the other hand, to clarify that tax treaties are not intended to be used to generate double non-taxation should also reflect the fact that double non-taxation is sometimes sought by the two contracting states in order to make investments more attractive. And lastly, the draft suggests that some countries may have been signing double tax treaties without a proper understanding of the tax consequences.

4. While CFE understands the wish to prevent treaty abuse, it is nevertheless concerned that too much effort may be being put on restricting the entitlement to the benefits of double tax treaties instead of addressing the many cases of double taxation that still arise. Many of the cases of alleged treaty abuse described in paragraphs 57-70 are no more than the consequence of the existence of an applicable treaty.

5. CFE believes that Limitation Of Benefit (LOB) provisions based on the US Model are exceedingly complex and very difficult to administer which should be avoided in a tax treaty. We would like to recall the principles set out by the OECD Committee of Fiscal Affairs in the Electronic Commerce study of 1998, principles that should also apply to the tax treaty rules: neutrality, efficiency, certainty and simplicity, effectiveness and fairness and flexibility.

6. The proposed LOB is inspired by the US model, which reflects a specific legal framework. It is doubtful that it would be useful in negotiations between countries whose legal systems do not resemble those of the US.

7. While LOB clauses ensure that treaty benefits are granted only to listed categories of residents ("qualifying persons"), they might deny benefits where non-qualifying persons are engaged in wholly commercial transactions. For example, LOB provisions could result in situations which are *per se* not abusive and might make the treaty inapplicable in situations involving Pension Funds.

8. CFE is of the view that taxpayers should be able to enjoy the benefits of tax treaties when they perform 'genuine economic activities' in the relevant Contracting State(s).

9. Consequently, CFE favours a purpose based approach that provides a more flexible approach to treaty abuse than LOB clauses.

10. It is also our belief that it is redundant to have at the same time a LOB provision and an anti-abuse general rule. A very well drafted anti-abuse general rule should encompass practically all situations that would be covered by the LOB provision.

11. In order to prevent treaty shopping one could consider the introduction of a 'most favored nation' clause in the OECD Model. Thus allowing residents of one contracting state to obtain benefits granted by the other contracting state to residents of third states.
    As a consequence, residents of a contracting state would not be inclined to establish e.g. intermediary structures in another state solely because this state has a more beneficial tax treaty with the other contracting state.

12. We would like to stress that EU member states are obliged to render full effectiveness to the Treaty on the Functioning of the European Union and its fundamental freedoms as interpreted by the European Court of Justice, in particular the freedom of establishment (Art.49). As a result of this, any recommendation contrary to the principles of EU law may not be followed by EU member states (21 of 34 OECD countries), with regard to intra-community dealings. We have doubts as to the compatibility of the proposed LOB clause with EU law and are concerned that EU member states will lose sight of their citizens´ and businesses´ fundamental freedoms, in search of a coherent implementation of any proposed OECD solutions.

13. Whatever the solutions adopted by the OECD, it will be crucial, in the CFE's view, that they are adopted simultaneously by all OECD Member States, to avoid the competitive disadvantages that arise when countries operate incompatible provisions.