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GFIA Comments on OECD Revised Discussion Draft on BEPS Action 7 (Prevent the Artificial Avoidance of PE Status)

Introduction

The Global Federation of Insurance Associations (GFIA) through its 39 member associations represents insurers that account for around 87% or more than $4 trillion in total insurance premiums worldwide. GFIA is pleased to provide comments on the OECD revised discussion draft on "BEPS Action 7: Preventing the Artificial Avoidance of PE Status" (the "discussion draft"). In general, the GFIA supports the objectives of the OECD BEPS Action Plan to address weaknesses in the international tax environment. Accordingly, we support the broad objectives of the discussion draft in combating aggressive tax planning aimed at preventing the artificial avoidance of Permanent Establishment ("PE") status. However, it is critical that any measures adopted by the OECD are workable, well targeted, and do not result in unintended consequences that negatively impact the efficiency of commercial insurance operations and the availability and cost of insurance coverage for consumers.

General comments

We welcome and fully support the conclusion of Working Party 1 that no specific rule for insurance operations should be introduced.

We welcome the decision to provide additional guidance on the issue of attribution of profits to PEs. The discussion draft notes that follow-up work on attribution of profits issues related to Action 7 will be carried on after September 2015 with a view to providing the necessary guidance before the end of 2016, which is the deadline for the negotiation of the multilateral instrument that will implement the results of the work on Action 7. ***We recommend that such guidance be released in draft form for public comment, with sufficient time (at least 45 days) for public review and consultation. The need for adequate consultation time is critical given the complexity of this subject.***

The revised commentary on interpreting Articles 5(5) and 5(6) to deal with commissionaire arrangements appears to be written in the context of businesses that sell goods. In addition, the commentary does not take into account the relative importance of the functions performed by the business in question − in particular, no recognition is given to where the KERT function (i.e. what drives the profit) is performed. If neither the nature of the business nor the importance of the function are taken into account, the outcome will be numerous PEs being created with nil or little additional profit being attributed. This would result in a disproportionate burden being placed on business. The particular concerns in the insurance context are with respect to:

- sales and marketing of insurance
- non-KERT functions performed by an in-house service company, such as back office processing of applications, claims handling, investment management, and administrative support.

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With respect to the sales and marketing of insurance, the collection of premiums alone does not necessarily create value for the insurer. The 2010 OECD Report on the Attribution of Profits to Permanent Establishments Part IV (Insurance) ("Part IV") notes that sales and marketing is only one of the functions in the insurance value chain. Paragraph 117 of Part IV recognizes that if the person (i.e. agent) collecting the premiums does not make the decision to accept the risks/business associated with the insurance policy, then the collection of premiums does not mean that insured risks/business have been accepted by that person. This is an important point since, as recognised under Part IV, the KERT for insurers is the assumption of insurance risk/business (see for example paragraphs 93[1] and 94). Accordingly, the KERT function rests with the entity which accepts and manages the risk/business (ie. the insurer and not the agent).

Part IV provides comprehensive guidance defining and discussing risks, risk management and the allocation of risk in the context of insurance businesses. Accordingly, given the extensive work that has gone into developing Part IV and the limited time remaining to complete the BEPS action plan, ***we recommend referencing the relevant existing guidance in Part IV for insurers in the commentary on Article 5(5) and 5(6)*** (for example in paragraph 39). ***We also suggest that the commentary be extended to ensure that, when consideration is given to whether a PE exists, the relative importance of the functions performed by the business in question should be taken into account.***

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About the GFIA

Through its 39 member associations, the Global Federation of Insurance Associations (GFIA) represents the interests of insurers and reinsurers in 59 countries. These companies account for around 87% of total insurance premiums worldwide. The GFIA is incorporated in Switzerland and its secretariat is based in Brussels.

[1] Paragraph 93 of Part IV states in unequivocal terms:

> All facts and circumstances need to be considered to determine which function assumes insurance risk for the enterprise, because the assumption of insurance risk is the key entrepreneurial risk-taking function for an insurance enterprise. Other functions performed by an insurance enterprise may be important and valuable functions and should be compensated accordingly, but these other functions are not functions that form part of the key entrepreneurial risk-taking function.