The 100 Group
Taxation Committee

Ms Marlies de Ruiter
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OECD/CTPA

By email: taxtreaties@oecd.org

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Dear Ms de Ruiter

OECD Revised Discussion Draft on BEPS Action 7: Preventing the Artificial Avoidance of PE Status

We welcome the opportunity to comment on the OECD's revised discussion draft on Action 7: Preventing the Artificial Avoidance of PE Status.

Who we are

The 100 Group of Finance Directors represents the views of the finance directors of FTSE 100 and several large UK private companies. Our member companies represent around 90% of the market capitalisation of the UK FTSE 100 Index, and in 2014 paid, or generated, taxes equivalent to 14% of total UK Government receipts. Our aim is to contribute positively to the development of UK and international policy and practice on matters that affect our businesses, including taxation, financial reporting, corporate governance and capital market regulation. Whilst this letter expresses the views of The 100 Group of Finance Directors as a whole, those views are not necessarily those of our individual members or their respective employers.

Our views

We are concerned that a project intended to tackle BEPS has turned into a broader review of the allocation of taxing rights between source and residence countries. This will result in an increased risk of double taxation in non-abusive circumstances unless there is a very clear consensus as to the precise detail of how the new approach will be applied, including objective (rather than subjective) criteria and "bright lines" tests, supported by clarifying examples. The revised proposals are still somewhat subjective in nature and further guidance will be necessary. There is a particular risk that very large numbers of very small PEs will arise which will create administrative difficulties for all.

We welcome the assurance that the attribution of profit to PEs will be examined during 2016 and would be very willing to contribute to that work.

The Discussion Draft seeks to address artificial avoidance of PE status through the use of commissionaire arrangements and similar strategies. Commissionaire arrangements, and other arrangements involving dependent agents, are quite frequently employed in non-abusive cases. We believe that the proposed measures will not only impact commissionaire arrangements, but also a wide range of arrangements used for making direct sales or providing sales support, i.e. limited risk distributor and other principal structures. Furthermore, appropriate weight should be given to the nature of the activities and the functions being performed, outside the territory in which it is argued that the PE exists. In

such instances, where significant substance and activities do take place outside the territory, 'bright line', objective tests or gateways could perhaps be used to exclude the existence of a PE. We suggest that there is a strong case for applying the existing rules where there is no intended abuse and where arrangements, often of long standing nature, represent an efficient way of conducting business. For example, where a genuine representative office is established and operates as a non-taxable presence the existing practice should not be disturbed. We feel that there is still time to develop a test to exclude non-abusive cases.

The new approach to determining whether an activity is preparatory or auxiliary will require very fine judgments on complex questions of fact. The additional guidance is helpful but it would also be useful to outline a review mechanism or other process to build on experience as it develops in a coherent manner rather than to allow potentially conflicting practices to develop in individual countries.

The revised anti-fragmentation rule is clearer than the previous draft. It would be helpful to emphasise, as strongly as possible, that the rule applies only to complementary functions that are part of a cohesive business operation and that a wider "force of attraction" principle is not therefore supported. However, we are concerned that in practice proving the negative statement that a function is not a complementary function that is part of a cohesive business operation is not sufficiently workable to avoid the implication that whenever a multinational entity has a subsidiary in a source state, any additional activity, however minor, carried on by a non-resident will create a PE. This appears to render all the discussions of preparatory and auxiliary activities null and void when there is a subsidiary in the same state, as there will very often be. The inclusion of activities of a resident subsidiary seems to essentially pre-judge the outcome of the test of whether the PE threshold is reached, which is what the anti-fragmentation rule is meant to be.

We strongly recommend that the anti-fragmentation rule only apply to the aggregated activity of non-resident related parties. This would retain the coherence of an anti-fragmentation rule as a threshold test. If the OECD insists on an anti-fragmentation rule that includes the activity of resident, we strongly urge the inclusion of a carve out in situations where the combined activity of the non-residents is minor by comparison to the (taxed) activity of the residents. Such an exception would go some way to preventing the proliferation of low value PEs.

We would be very happy to discuss this in more detail with you. Please do get in touch if you wish to discuss this further with me and the Committee.

Yours sincerely

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