Dbriefs Bytes Transcript

7 November 2014

For comments on Action 7, see **the highlighted text below**.

BEPS

1. **BEPS : Action 7 (PE status)**

Well, the big news on BEPS in the last week is the release of the discussion draft on Action 7 - which is called: "preventing the artificial avoidance of PE status".

The discussion draft is 26 pages long, and it consists of various proposals to change Article 5 of the OECD model treaty – which, of course, is the definition of "permanent establishment".

Now, let me just say at the start that, in today's Dbriefs Bytes, I will spend a lot of time taking you through this discussion draft. Some of the analysis is quite detailed – please hit the pause and rewind buttons if you would like to dwell on an issue.

And if you'd like to have a copy of the discussion draft in front of you, you can find it at BEPS Central.

OK, let me start by noting that the OECD emphasizes that the discussion draft does not represent the consensus views of the OECD or any of its bodies. Instead, it contains a range of substantive proposals for analysis and comment.

Those proposals fall within four topics. And within each topic, there is a range of options :

- The **first topic** is called : **"Artificial avoidance of PE status through commissionaire arrangements and similar strategies".** It contains four options, which are labelled A, B, C and D.
- The **second topic** is called : **"Artificial avoidance of PE status through the specific activity exemptions".** It contains six options, which are labelled E, F, G, H, I and J.
- The **third topic** is called : **"Splitting-up of contracts".** It contains two options : K and L.
- And the **fourth topic** is called : **"Insurance".** It contains two options : M and N.

Let's look at each of these four topics in turn.

2. **BEPS : Action 7 – First Topic : "Artificial avoidance of PE status through commissionaire arrangements and similar strategies"**

Let's start with the first topic (the "artificial avoidance of PE status through commissionaire arrangements and similar strategies"). This topic focuses on the dependent agent PE, which is set out in paragraphs 5 and 6 of Article 5.

According to the discussion draft :

> "It is clear that in many cases commissionaire structures and similar arrangements were put in place primarily in order to erode the taxable base of the State where sales took place. Changes are therefore proposed to the wording of paragraphs 5 and/or 6 of Article 5 in order to address such strategies. As a matter of policy, **where the activities that an intermediary exercises in a country are intended to result in the regular conclusion of contracts to be performed by a**

> **foreign enterprise**, that enterprise should be considered to have a sufficient taxable nexus in that country unless the intermediary is performing these activities in the course of an independent business."

This is the current version of paragraph 5 :

> "Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of an independent status to whom paragraph 6 applies – **is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise**, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, ……."
>
> Now, I call that the "positive limb" of paragraph 5.
>
> And the rest of the paragraph, I call the "negative limb" :
>
> "….unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph."

As I said, there are four options (A, B, C, and D) in regard to this first topic. And all of the four options focus on the words which I have shown in bold in the positive limb of paragraph 5: **"is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise".** There are two key issues here :

- Firstly, the requirement is to "conclude contracts" – not "negotiate", not "discuss", but "conclude contracts".
- And secondly, the phrase: "in the name of the enterprise". According to the OECD Commentary, this means: "binding on the enterprise" – although there is currently a debate as to whether this means "legally binding on the enterprise" or merely "commercially binding on the enterprise". The balance of opinion is that it means "legally binding on the enterprise".

The four options also propose changes to paragraph 6 of Article 5.

This is the current version of paragraph 6 :

> "An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business."

It will be useful to test the four options against some of the common ways that sales activities are structured in supply chains. So, before I get to the four options, let me set out some common sales-side structures.

A common structure, particularly in Europe, involves a **commissionaire with indirect representation**, which can look like this :

- We have a principal company in a low tax jurisdiction. Its business is to sell goods, through a distribution channel, to third party customers in various source countries.
- In the source country, there's a related party agent and third party customers.
- The related party agent acts, for the principal, as a civil law commissionaire with indirect representation. This means that the agent, on an undisclosed basis, is authorized to conclude contracts with the customers for the sale of the principal's goods directly to those customers. However, no privity of contract (no direct contractual relationship) exists between the principal and the customers.
- In this structure, the agent definitely "concludes contracts". However, those contracts are not "in the name of the enterprise" (the principal), if that phrase is understood to mean "legally binding on the enterprise", which is the view which has been taken by a number of superior courts in Europe. On that basis, there would be no "dependent agent PE" in this structure.

An alternative structure uses a **marketing services company**, which can look like this :

- We again have a principal company in a low tax jurisdiction.
- In the source country, there's a related party marketing services company and third party customers.
- The related party marketing services company provides various marketing and sales support services to the principal, and it is generally rewarded on a cost-plus basis for those services. The services could include discussions, and indeed negotiations, with specific customers. However, for this structure to be effective, it is critical that no contracts are concluded by the services company.
- If no such contracts are concluded, then there can be no "dependent agent PE" in this structure. However, it should be noted that the possibility of creating oral contracts, and also the possibility that the services company might be viewed as having "ostensible" or "apparent" authority from the principal, means that these structures sometimes are walking on thin ice.

And another alternative structure uses a **limited risk distributor**, which can look like this :

- Again, there is the principal company in a low tax jurisdiction.
- In the source country, there's a related party limited risk distributor and third party customers.
- The principal enters into sales contracts with the limited risk distributor, which in turn enters into sales contracts with the third party customers.
- So, in this structure, similar to the commissionaire structure, we have a situation where the limited risk distributor definitely concludes contracts, but it does not do so "in the name of the [principal]" – and thus there's no "dependent agent PE".

Sub-divider Slide : Option A

OK, let's now go through the four options, starting with Option A.

Option A would replace the positive limb of paragraph 5 with the following :

> "Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, **habitually engages with specific persons in a way that results in the conclusion of contracts**
>
> **a) in the name of the enterprise, or**
>
> **b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that enterprise has the right to use, or**
>
> **c) for the provision of services by that enterprise,**
>
> that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, …"

Paragraph (a) uses the same phrase, "in the name of the enterprise", which is in the existing provision.

But paragraphs (b) and (c), particularly when you link them up with the introductory words ("engages with specific persons in a way that results in the conclusion of contracts"), go much further.

OK, let's test this proposed new wording against the three examples of sales-side structures :

- The first structure (involving the **commissionaire with indirect representation**) would be caught. The agent would engage with the customers "in a way that results in the conclusion of

contracts…for the transfer of the ownership of…property owned by [the foreign enterprise]". You will notice that this proposed new wording does not specify who the parties to the contract must be. According to the discussion draft, provided that the contracts are "for the transfer of ownership of property owned by the [foreign] enterprise", it doesn't matter that the foreign enterprise is not a party to those contracts.

- The second structure (involving the **marketing services company**) might also be caught. According to the discussion draft :

> "[Option A addresses] situations where contracts are not formally concluded by the intermediary [for example, the marketing services company] who is acting on behalf of the enterprise but where that intermediary's interactions with specific persons result in the conclusion of contracts. This would include not only cases where the contract is concluded by the intermediary but also cases where the intermediary **habitually interacts with identifiable persons in a way that directly results in the conclusion of contracts.** The determination of whether the intermediary's interaction with specific persons results in the conclusion of a contract would require **a direct causal connection** between that interaction and the conclusion of the contract. It would not, however, require that the contract be formally concluded by the intermediary."

- The third structure (involving the **limited risk distributor**) is difficult to fit within the proposed new wording, for a couple of reasons :

  - Firstly, there's the issue of whether a limited risk distributor can be said to be "acting on behalf of" the foreign enterprise.

  - And secondly, there's the issue of whether the contract between the limited risk distributor and the third party customer is "for the transfer of the ownership of … property owned by [the foreign enterprise]" – which, presumably, means "owned by the foreign enterprise at the time the contract is concluded". Unless it's a "flash title" structure, that would generally not be the case.

Apart from amendments to the positive limb of paragraph 5, Option A also proposes a completely new paragraph 6, which would be in this form:

> "Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent acting on behalf of **various persons** and acts for the enterprise in the ordinary course of that business. Where, however, a person acts **exclusively or almost exclusively on behalf of one enterprise or associated enterprises**, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to these enterprises."

This new paragraph 6 would mean that the independent agent exception would not be available in a situation where the agent acts only for companies within the same group.

This new form of paragraph 6 is in all of the four options, A through D.

Sub-divider Slide : Option B

OK, let's now turn to Option B.

Option B would replace the positive limb of paragraph 5 with this :

> "Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, **habitually concludes contracts, or negotiates the material elements of contracts, that are :**
>
> **a) in the name of the enterprise, or**
>
> **b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or**
>
> **c) for the provision of services by that enterprise,**

that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, …"

You can see the similarities with Option A: paragraphs (a), (b) and (c) are identical in the two options.

The difference is in the introductory words:

- Option B says: **"habitually concludes contracts, or negotiates the material elements of contracts".**
- Whereas Option A says: **"habitually engages with specific persons in a way that results in the conclusion of contracts".**

Let's test the Option B wording against the three examples of sales-side structures :

- The first structure (involving the **commissionaire with indirect representation**) would be caught. The agent would conclude contracts with the customers, and those contracts would be "for the transfer of the ownership of…property owned by [the foreign enterprise]". Again, it doesn't matter that the foreign enterprise is not a party to those contracts.
- The second structure (involving the **marketing services company**) might also be caught. If its interactions with customers can be described as "habitually…negotiates the material elements of contracts", it will be caught.
- The third structure (involving the **limited risk distributor**) is difficult to fit within Option B's proposed new wording, for the same reasons as for Option A :
    - The issue of whether the limited risk distributor is "acting on behalf of" the foreign enterprise.
    - And the issue concerning flash title or otherwise.

Sub-divider Slide : Option C

OK, let's now turn to Option C.

Option C would replace the positive limb of paragraph 5 with this :

"Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, **habitually engages with specific persons in a way that results in the conclusion of contracts which, by virtue of the legal relationship between that person and the enterprise, are on the account and risk of the enterprise**, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, …."

According to the discussion draft :

"[Option C] is similar to Option A except that it addresses the difficulties arising from the phrase 'contracts in the name of' by replacing that phrase by 'contracts which, by virtue of the legal relationship between that person and the enterprise, are on the account and risk of'. This formulation refers to contracts that are on the account and risk of the foreign enterprise by virtue of the legal (not economic) relationship between the person and the intermediary (which would cover a relationship created, for example, by an agency contract, a commissionaire contract, an employment contract, a partnership contract or even a trust deed through which a trustee would act on behalf of an enterprise)."

Let's test the Option C wording against the three examples of sales-side structures :

- The first structure (involving the **commissionaire with indirect representation**) would be caught. The agent would conclude contracts with the customers, and those contracts (by virtue of the legal relationship between the agent and the foreign enterprise) would be on the account and

risk of the foreign enterprise.

- The second structure (involving the **marketing services company**) is tricky. You will note that the phrase in Option C, "habitually engages with specific persons in a way that results in the conclusion of contracts", is identical to a phrase used in Option A. And you will remember that the discussion draft says this in regard to that phrase in Option A :

> "The determination of whether the intermediary's interaction with specific persons results in the conclusion of a contract would require a direct causal connection between that interaction and the conclusion of the contract. It would not, however, require that the contract be formally concluded by the intermediary."

  However, the second key phrase in Option C ("which, by virtue of the legal relationship between that person and the enterprise, are on the account and risk of the enterprise") seems to assume that the intermediary is a party to the contract. That's not the case with the marketing services company. Accordingly, there is some doubt as to whether this second structure would be caught under Option C.

- The third structure (involving the **limited risk distributor**) again is difficult to fit within Option C's proposed new wording, for two reasons :

  - Again, we have the issue of whether the limited risk distributor is "acting on behalf of" the foreign enterprise.

  - And secondly, there is the issue of whether the legal (not economic) relationship between the two companies is such that the contracts entered into by the limited risk distributor "are on the account and risk of the [foreign] enterprise".

Sub-divider Slide : Option D

And, finally, Option D, which would replace the positive limb of paragraph 5 with this :

> "Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, **habitually concludes contracts, or negotiates the material elements of contracts, which, by virtue of the legal relationship between that person and the enterprise, are on the account and risk of the enterprise**, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, …"

You will see that Option D incorporates aspects of Options B and C :

- It borrows the phrase, **"habitually concludes contracts, or negotiates the material elements of contracts"**, from Option B.

- And it borrows the phrase, **"which, by virtue of the legal relationship between that person and the enterprise, are on the account and risk of the enterprise"**, from Option C.

And turning to the three examples of sales-side structures :

- The first structure (involving the **commissionaire with indirect representation**) would be caught.

- The second structure (involving the **marketing services company**) is again tricky to analyse. As I said with Option C, the key phrase ("which, by virtue of the legal relationship between that person and the enterprise, are on the account and risk of the enterprise"), seems to assume that the intermediary is a party to the contract – and that's not the case with the marketing services company.

- And the third structure (involving the **limited risk distributor**) again is difficult to fit within Option D's proposed new wording, for the same reasons as I gave for Option C.

3. BEPS : Action 7 – Second topic : "Artificial avoidance of PE status through the specific

activity exemptions"

The second topic in the Action 7 discussion draft (the "artificial avoidance of PE status through the specific activity exemptions"), focuses on the exceptions to PE status in paragraph 4 of Article 5.

This is the current version of paragraph 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**;
>
> 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**."

This second topic contains six options. However, the six options deal with only two issues :

- The first issue is that the phrase, "preparatory or auxiliary character", is included in only subparagraphs e) and f). The discussion draft says that there is a strong view that all of the subparagraphs should include that condition. Options E, F, G, and H deal with this issue.
- And the second issue concerns "fragmentation of activities between related parties". Options I and J deal with this issue.

Sub-divider Slide : First issue : "preparatory or auxiliary character"

[To camera]

Let's start with the first issue, concerning the phrase, "preparatory or auxiliary character".

Option E would comprehensively deal with this issue, by applying that condition to all subparagraphs.

This is how the proposed new paragraph 4 would look. You will see that the references to "preparatory or auxiliary character" have been moved from subparagraphs e) and f), to the bottom of the paragraph, with the effect that they would now apply to all subparagraphs in paragraph 4.

The discussion draft then goes on to provide three alternative options, if Option E is not implemented. In other words : if Option E is implemented, the discussion draft indicates that these three alternative options would be unnecessary.

The first of these alternative options is **Option F**, which deals with the references to "delivery" in subparagraphs a) and b).

Option F would delete the word, "delivery", in both of these subparagraphs. Therefore, the relevant phrase would be : "solely for the purpose of storage or display".

Which, I'm sure you know, is exactly what the UN model does in these two subparagraphs.

The second of the alternative options is **Option G**, which deals with the reference to "purchasing goods or merchandise" in subparagraph d).

Subparagraph d) is one part of what I call the **buy-side bias**. It says that you won't have a PE if your fixed place of business is maintained solely for the purpose of purchasing goods or merchandise for the enterprise. I call it a buy-side bias, because it certainly does not apply on the sale side – if you maintain a fixed place of business solely for the purpose of selling goods or merchandise for the enterprise, that will definitely be a PE.

Subparagraph d) is limited by the fact that the word, "solely", is used. That means that if the fixed place of business is used for both purchasing activities and other activities, you will fail the exception in paragraph d).

But that's when the second part of the buy-side bias comes in. Article 7(5) of the OECD model, in its form up to the 2008 edition, says this :

> "No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise."

This would mean that even if you do have a PE (because you're doing other things in your fixed place of business, apart from the purchasing activity), the purchasing activity will not cause you to have a tax liability in the source country, after you apply Article 7(5).

Well, unfortunately, this buy-side bias will be no more, if the OECD has their way.

Firstly, Article 7(5) was deleted in the 2010 edition of the OECD model treaty. That sounds more dramatic than it really is, at least up until now. Relatively few of the bilateral treaties which have been signed since 2010 follow the 2010 version of Article 7 – so, Article 7(5) is still very common in the world of real treaties.

But this Option G proposes to delete, from subparagraph d), the reference to "purchasing goods or merchandise".

And the third of these three alternatives is Option H which would go one step further than Option G, and delete the whole of subparagraph d) – and thus, remove the exception for "collecting information". That would hurt the banks (with their so-called rep offices) and media companies (with their news bureaus).

Sub-divider Slide : Second issue : "fragmentation of activities between related parties"

The second issue concerns "fragmentation of activities between related parties".

Let me give you a little background.

The OECD Commentary on paragraph 4 indicates that the paragraph should not apply to provide an exception from PE status, if the enterprise has fragmented its business activities amongst different locations in the source country, with the objective that each location, looked at in isolation, would satisfy paragraph 4.

The Commentary says this:

> "Subparagraph f) 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 organizationally, as in such a case each place of business has to be viewed separately and in isolation for deciding whether a permanent establishment exists. **Places of business are not 'separated organizationally' where they each perform in a Contracting State complementary functions such as receiving and storing goods in one place, distributing those goods through another etc. 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."**

The discussion draft says this :

> "It has been suggested that the logic of the last sentence ('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') should not be restricted to cases where the same company maintains different places of business in a country but should be extended to cases where these places of business belong to related parties."

In order to achieve this objective, the discussion draft gives us two options, I and J.

Both options involve inserting a statement into paragraph 4 that the paragraph is "subject to paragraph 4.1". The two options give a slightly different version of this proposed new paragraph 4.1.

Let's start with **Option I**. Paragraph 4.1 would say this:

> "Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or an associated enterprise carries on business activities at the same place or at another place in the same Contracting State and
>
> a) that place or other place constitutes a permanent establishment for the enterprise or the associated enterprise under the provisions of this Article, and
>
> b) the business activities carried on by the two enterprises at the same place, or by the same enterprise or associated enterprises at the two places, **constitute complementary functions that are part of a cohesive business operation**".

Option J is very similar.

Effectively, the only difference between the two options is that Option J includes an additional condition – namely, that the overall activity "is not of a preparatory or auxiliary character".

Sub-divider Slide : Comments

At this point, let me make one comment on these various options to amend paragraph 4.

The proposed amendments are important, but we need to remember that paragraph 4 is an exception to PE status under paragraph 1 and paragraph 5 of Article 5.

A PE is not created by merely failing an exception. To have a PE, you must first satisfy the conditions in paragraph 1 (fixed place of business PE) or paragraph 5 (dependent agent PE).

This is particularly relevant in regard to Options I and J, concerning "fragmentation of activities between related parties". Although the two options involve, to some degree, the disregarding of the separation of legal entities, that is done only for the purpose of limiting the exception in paragraph 4. For those proposed changes to be relevant, there first must be a fixed place of business PE under paragraph 1, or a dependent agent PE under paragraph 5.

And it's important to note that the discussion draft contains no proposed changes to paragraph 1 of Article 5, and certainly does not involve any disregarding of the separation of legal entities for the purposes of paragraph 1.

4. BEPS : Action 7 – Third topic : "Splitting-up of contracts"

The third topic in the Action 7 discussion draft ("splitting-up of contracts") focuses on paragraph 3 of Article 5, in regard to "building sites and construction and installation projects".

This is the current version of paragraph 3:

> "A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months."

The OECD Commentary on paragraph 3 says this:

> "The twelve month threshold has given rise to abuses; it has sometimes been found that enterprises….divided their contracts up into several parts, each covering a period less than twelve months and attributed to a different company which was, however, owned by the same group."

The discussion draft proposes two alternative options to deal with such planning.

The first option is **Option K**, which would insert the following new paragraph into Article 5:

> "**For the sole purpose of determining whether the twelve month period referred to in**

paragraph 3 has been exceeded,

a) where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during periods of time that do not last more than twelve months, and

b) activities are carried on at the same building site or construction or installation project during **different periods of time** by one or more enterprises associated with the first-mentioned enterprise,

these different periods of time shall be added to the period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project."

There are a few points which should be noted in regard to this proposed new paragraph:

- Firstly, the paragraph applies regardless of where the associated enterprise is resident.
- Secondly, the paragraph is relevant only to the question of whether the twelve month threshold in paragraph 3 has been satisfied. It does not affect the attribution of profits. The discussion draft puts it this way :

  "The time periods spent by associated enterprises are merely aggregated for the purpose of deciding whether the 12 month period has been exceeded, not for the purpose of attributing the activities of one enterprise to the other."

- And thirdly, the reference to "different periods of time" means that any day where the two enterprises are carrying on activities at the place that constitutes the building site or construction or installation project will not be counted twice.

The second option, **Option L**, is to simply rely on the proposed "principal purpose test" provision, which was discussed in the Action 6 deliverable released in September.

Thus, if it is reasonable to conclude, having regard to all relevant facts and circumstances, that the splitting of the contracts was done for the principal purpose of avoiding PE status, and thus obtaining the benefit of exemption under the business profits article, that benefit would not be available.

5. BEPS : Action 7 – Fourth topic : "Insurance"

And the fourth and final topic in the discussion draft concerns "insurance".

The discussion draft proposes two options, M and N, to deal with "insurance".

Option M would be to insert into Article 5 the "insurance paragraph" from the UN model :

"Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies."

And **Option N** is to not include any such specific "insurance provision", but instead merely rely on the proposed changes to paragraphs 5 and 6.

6. BEPS : Action 7 – Other issues

There are some other points to note in regard to this Action 7 discussion draft :

- First and foremost, there are no proposed changes to paragraph 1 of Article 5 (the fixed place of business PE). Despite some speculation that we might see some amendments which would disregard the separation of legal entities in certain situations (for example, where one company is acting as a non-contract concluding dependent agent for another), there are no such proposals in

the discussion draft. This should benefit many "limited risk distributor" structures.

- Secondly, the discussion draft ends with a brief reference to the attribution of profits to PEs, under Article 7. The OECD says that it is conscious of the interaction between expansion of the PE concept and the existing rules for attribution of profits to PEs. The discussion draft states this:

> "Whilst [the OECD's] preliminary work has identified a few areas where additions / clarifications would be useful, it has not identified substantial changes that would need to be made to the existing rules and guidance concerning the attribution of profits to a permanent establishment if the proposals included in this note were adopted. It was acknowledged, however, that the work on other parts of the BEPS Action Plan, in particular Action 9 (Risks and capital), might involve a reconsideration of some aspects of the existing rules and guidance."

As I mentioned earlier, if you would like to obtain a copy of the Action 7 discussion draft, please go to BEPS Central. Also on BEPS Central, you can obtain a copy of our Tax Alert on this topic.

And the final point I would note is that the OECD has asked for public comments on the discussion draft by 9 January 2015. A public consultation meeting will be held in Paris on 21 January.

7. BEPS: Other news

Yes, there's even more BEPS news this week – but let me go through it quickly :

Firstly, the OECD has released **a discussion draft on the transfer pricing aspects of low value-adding intra-group services**. This discussion draft was issued under BEPS Action 10. I will discuss it in greater length in next week's Dbriefs Bytes – but I would note now that I was dismayed to see that one of the examples of low value-adding services is tax advice.

If you would like to obtain a copy of this Action 10 discussion draft, please go to BEPS Central.

It's been reported that **Germany** is considering the introduction of anti-hybrid mismatch rules, which apparently will be wider than the current BEPS proposals under Action 2.

Following the recent budget in **Ireland**, the government has published the 2014 Finance Bill. This contains the proposed legislative rules to end the so-called "double Irish structure".

Two aspects caught my eye:

- The grandfathering rule, which will maintain the existing residence definition up to 2020, will apply to all companies which are incorporated in Ireland on or before 31 December 2014. Expressed in this way, I can foresee a spike in demand for Irish shelf companies incorporated in the next 7 weeks.

- Secondly, the existing residence definition will continue to apply, even beyond 2020, if you have a company which is incorporated in Ireland, but which has its central management and control in another jurisdiction with which Ireland has a treaty, and the company is treated as a resident of that other jurisdiction under the residence tie-breaker rule in the treaty.

If you would like to obtain a copy of the 2014 Finance Bill and its explanatory notes, please go to BEPS Central.

And finally, many newspapers around the world have carried stories this week concerning the apparent leaking of some 25,000 pages of confidential documents regarding tax rulings in **Luxembourg.**

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