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**Confederation of Swedish Enterprise – Comments on the OECD Revised Discussion Draft entitled “BEPS Action 7: Preventing the Artificial Avoidance of PE Status 15 May 2015 to 12 June 2015”**

Dear Marlies,

The Confederation of Swedish Enterprise is Sweden’s largest business federation representing 49 member organizations and 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Revised Discussion Draft regarding the prevention of artificial avoidance of PE status (hereinafter referred to as the Draft).

In the new Draft the OECD has moved from a series of alternative options to specific proposal under each PE issue. Some additional guidance has been added in order to increase predictability as to the interpretation of various concepts. Every effort to provide additional clarity to the OECD Model Tax Convention is naturally positive and of interest to business. However, our main concern from the previous Draft remains, namely that the proposals in the Draft will result in a lowering of the PE threshold that goes beyond the specific problems related to BEPS in general and the digital economy in particular.

In our view, there is still not enough distinction in the Draft between BEPS and the allocation of taxing rights between the source state and the residence state. As previously stated, we believe that any new standards should be limited to addressing only the former topic. The proposals, as they stand, are likely to result in a dramatic increase in PEs with allocation disputes and double taxation as the end

result. We urge the OECD to develop a test that would exclude bona fide business from being hit by an increasing number of PEs.

#### **A. Artificial avoidance of PE status through *commissionaire* arrangements and similar strategies**

Proposal 1: The Draft proposes changes to paragraphs 5 and 6 of Article 5 by the following amendments:

*(Para 5.5): Add a reference to contracts for the provision of property or services by the enterprise; replace “conclude contracts” by “concludes contracts, or negotiates the material elements of contracts”;*

*(Para 5.6): strengthen the requirement of “independence”*

We appreciate the efforts to narrow the concept of “associated enterprises” and also to provide additional guidance as to the interpretation of paragraphs 5 and 6. However, we are still concerned that the proposals will affect not only *commissionaire* arrangements but also other principal sales structures.

The proposals are based on the presumption that a restructuring of a sales company to a *commissionaire* structure will substantially reduce the taxable profits in the country of the *commissionaire*. As we have stated in our previous comments, we believe this to be a transfer pricing issue rather than a PE issue which should be addressed through a proper functional analysis.

Extending the PE-concept will most likely give rise to a significant increase in disputes and administrative problems. The notion of a subsidiary as a taxable person should be upheld to the largest extent possible.

#### **B. Artificial avoidance of PE status through the specific activity exemptions**

Proposal 2: The Draft proposes changes to paragraph 4 of Article 5 by making all the exceptions in the paragraph subject to a preparatory or auxiliary condition.

Although the activities listed in 5.4 in many cases are of a preparatory or auxiliary character, it is acknowledged in para 21 in the Commentary to Article 5 that this is not always the case. There seems to be a lack of consensus between Member States as to the original purpose of the paragraph, i.e. whether it should cover only preparatory or auxiliary activities. Regardless of the original purpose, the Draft clarifies that Working Party 1 has concluded that situations that give rise to BEPS concerns need to be addressed.

To do so, the measure in question has to be sufficiently targeted. Our concern, however, is that the proposed measure will not only target BEPS concerns but will also affect traditional businesses with a dramatic increase in PEs as a result. Again, the measure seems to go beyond the intended objective and indeed change the international standards on the allocation of taxing rights on cross-border income.

### **C. Splitting-up of contracts**

Proposal 4: To deal with the splitting-up of contracts the Draft proposes two alternatives; the use of a PPT rule (option L) or of an automatic rule (option K).

Although a principal purpose test would, in principle, give companies a possibility to show that no abuse was intended it would undoubtedly open up for wide application by tax authorities and induce additional uncertainty into the PE test. The example provided in the Draft (Example E) does not give much guidance or assurance as to the application of the PPT rule since it is a fairly clear cut case.

The “automatic” approach in option K has its flaws due to the fact that it applies indiscriminately and would also capture situations where there is no BEPS concern. In addition the minimum presence of 30 days is too short and would for many companies result in a PE on every major construction site. Many construction projects run for several years where a company may need to have specialists on the site a couple of days a month during the entire project. In addition, such a threshold could be very difficult to monitor since all parts of an MNE may not be fully aware of all the activities of the group as a whole.

### **E. Profit attribution to PEs and interaction with Action Points on Transfer Pricing**

Since the kind of activities mentioned under paragraph 4 of Article 5 have been recognized not to generate any or very little income, the question of profit attribution to PEs is of utmost importance. Countries are often motivated to create PEs in order to attribute profits to those PEs. We welcome the OECD initiative to provide further guidance in this important area before the end of 2016.

On behalf of the Confederation of Swedish Enterprise

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Head of the Tax Policy Department