



CONFEDERATION  
FISCALE  
EUROPEENNE

**Opinion Statement FC 13/2016**

**on the OECD Discussion Draft (BEPS Action 7)**

**Additional guidance on the**

**attribution of profits to permanent establishments**

**Prepared by the CFE Fiscal Committee**  
**Submitted to the OECD in September 2016**

*The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries with more than 200,000 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.*

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

*We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, CFE Tax Policy Manager, at [brusselsoffice@cfe-eutax.org](mailto:brusselsoffice@cfe-eutax.org).*

## **Introduction**

This Opinion Statement relates to the OECD Discussion Draft "*Additional guidance on the attribution of profits to permanent establishments*"<sup>1</sup> released on 4 July 2016 on BEPS Action 7 ("*Preventing the artificial avoidance of permanent establishment status*").

## **Statement**

1. The Confédération Fiscale Européenne welcomes any initiative by the OECD to clarify application of a complex exercise such as the attribution of profits to permanent establishments as a result of the development of Action 7 of the BEPS Action Plan.
2. However, CFE is of the view that the approach of the Discussion Draft is erroneous, as the Draft does not shed light on the fundamental issue, which is, in our view, the coordination of the Authorised OECD Approach –AOA–, (which has not been accepted in its entirety by all countries), with the results of the work on other parts of the BEPS Action Plan dealing with transfer pricing. This is recognised in Paragraph 10 and again in Paragraph 103 of the Discussion Draft. Instead of looking for general principles that could apply to most situations, the document just focuses on two fact-patterns, those of the Dependent agent PE (DAPE) and Warehouses as fixed places of businesses. In the case of DAPE four examples are given, three of which look at a situation where the DAPE is an already related enterprise and one (example 3) where an employee of the company performs selling activities in the country of the associated enterprise. No examples are given of cases where the DAPE is neither an associated enterprise nor an employee (i.e. other representative, as mentioned in Paragraph 7 of the Draft). Only one example of Warehouse, divided into three different scenarios is given but in this case without the extensive quantitative analysis given in the case of DAPE.
3. Even if the Discussion Draft is trying to draw some general conclusions from the commentaries to the examples, the approach seems wrong, as the examples given contain some contradictions, and the questions have been worded to lead in a certain direction.
4. CFE would very much like, however, to participate in the public consultation, as the Permanent Establishment issue and the profits attributed to it are a key issue for almost all businesses with an international activity.

## **Further comments:**

5. The examples do not seem related to the new threshold PE resulting from Action 7 of the BEPS action plan. Most of the cases were already a PE previous to the suggested amendment of Article 5 of the OECD Model Convention. Therefore, they can hardly produce clarification for the new PE situations but, instead, for older pre-existing ones.

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<sup>1</sup> <http://www.oecd.org/tax/transfer-pricing/BEPS-discussion-draft-on-the-attribution-of-profits-to-permanent-establishments.pdf>

6. The examples mainly focus on the impact of Actions 8-10 on the AOA corresponding to the new Article 7 of the OECD Model Convention incorporated in 2010 which, by the way, has had little acceptance in treaty negotiations and has been hardly incorporated in treaty practice. There is a total lack of clarification of the impact of the new Actions 8-10 on the attribution of profits to PEs that result from Article 7 included in the vast majority of tax treaties and in the OECD Model Convention versions prior to 2010.
7. The definition of key concepts is still insufficient (i.e. artificial splitting up of contracts), which affects the analysis on the proposed guidance.
8. The conclusion for example 1 (paragraphs 37,39) is inconsistent by concept. A PE exists to the extent that profits 'can' be attributed and in the example the PE exists and no profits result in attribution to it. If no significant people functions can be identified in a PE situation no PE should arise. If a PE exists, on the contrary, the attribution of profits rules should enable some profit to be attributable.
9. We would welcome any further guidance that ensures clarity and certainty, and does not add further complexity and instability to the current framework, given that the Recommendations on Action 7 already lowered the PE thresholds and we already stressed the risks that we foresee in connection with the latter.