ECONOMIC INTEGRATIONS, COMPETITION AND COOPERATION

INTÉGRATIONS ÉCONOMIQUES, CONCURRENCE ET COOPERATION

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VINKO KANDŽIJA
ANDREJ KUMAR

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University of Rijeka, Faculty of Law, Rijeka, Croatia
Stjepan Gadžo
University of Rijeka, Faculty of Law, Rijeka, Croatia

PROPOSALS FOR REFORM OF THE AGENCY PERMANENT ESTABLISHMENT CONCEPT: EXAMINATION OF BEPS ACTION 7

ABSTRACT

Authors of this paper explore recent proposals to reform the concept of permanent establishment (PE), which underlies the allocation of the rights to tax cross-border income between countries. The focus is on one specific form of PE, the so-called dependent agent PE (DAPE). Main motivation for the reforms of DAPE-related provisions found in tax treaties is the widespread usage of commissionaire arrangements by MNCs, which result in the erosion of the tax base of countries that provide markets to their products and services (destination countries). Paper will explore how OECD aims to tackle this issue, as part of its comprehensive project on base erosion and profit shifting (BEPS). It will be suggested that the reform of DAPE definition is neccesary in the light of new economic realities.

Keywords: international tax law, permanent establishment, dependent agents, BEPS project, tax planning, commissionaire arrangements

JEL classification: H26, K33, K34

1. INTRODUCTION

Recent times have witnessed the unprecedented public interest in the tax planning techniques of multinational companies (MNCs). What not so long ago was thought to be a technical or academic matter now ranks high on the political agenda worldwide. High-level government officials all over the world reiterate with vigour their intention to put an end to

the tax avoidance behaviour of MNCs, making them pay their "fair share" in financing of public services, even if this sought-after ideal often lacks any meaningful content (Stevens, 2014:702). More importantly, the torch is taken up by a number of international organizations and fora. Behind the seemingly recognized necessity for a coordinated approach at an international level lies the inconvenient truth that large-scale MNCs' tax avoidance has been made possible by various misalignments between the elements of national tax systems (OECD, 2013b:13). The most ambitious project in this regard is the project on base erosion and profit shifting (BEPS), carried out by OECD since the beginning of 2013 and backed up by the G20. Since developing countries, which are generally outside of OECD membership, are also involved in the BEPS project, one can truly describe it as a quest for a new consensus on the principles and rules of international taxation.

It should be noted at the outset that the term "international taxation" is effectively a misnomer (Arnold and McIntyre, 2002:2-3), since at the moment – with very few exceptions (e.g. the competences of the European Union in tax matters) – there is neither "world government" nor international organization having competence to impose and collect taxes. Hence, when jurists refer to "international tax law", they actually think of the collection of domestic legal provisions governing the taxation of cross-border economic activity, complemented by the provisions of international treaties, mainly bilateral, that primarily try to avoid undesirable multiple taxation of income and capital by limiting the application of domestic tax law. Provisions of more than 3.000 tax treaties currently in force exhibit a remarkable degree of uniformity that can largely be credited to the influence of the so-called model treaties, drafted by international organizations (e.g. OECD, UN) and "generally regarded as the best available tax treaty practice" (Pistone, 2010:1). Vast majority of the tax treaties follow the provisions laid down in the OECD Model Tax Convention on Income and on Capital (hereinafter: OECD Model). In turn, basic structure of the OECD Model and its substantive provisions mirror the main points of consensus on the allocation of the rights to tax cross-border income and capital achieved in the 1920s, under the auspices of the League of Nations.

The concept of permanent establishment (PE), embodied in various provisions of OECD Model, can be observed in this context. Under Art. 7 of OECD Model active (business) income of a person resident in one

of the contracting states can be taxed by the other contracting state only if he or she has a PE located in the territory of that (other) state. Definition of the PE concept, provided in the Art. 5 of OECD Model, gives significant leeway to MNCs to avoid having taxable presence in countries that provide market for their goods and services (destination countries), thus minimizing the overall tax burden of the group. Most obvious examples include business restructurings which result in the transformation of the associated company resident in the destination country from a full-fledged distributor into a mere commissionaire and artificial fragmentations of MNCs' activities in destination countries with the goal to qualify for "preparatory/auxiliary activities' exemption" under Art. 5(4) of OECD Model.

Against this backdrop, one of the “action items” of the OECD BEPS project is aimed at preventing the “artificial avoidance” of taxable presence in the form of PE (OECD, 2013b:19). Main aim of this paper is to examine the proposals for amendments of Art. 5 of the OECD Model tabled by the special OECD working group in 2014 (OECD, 2014b). Analysis is limited only to the tax treaty provisions governing the status of the so-called “dependant agents” – one form of PE under Art. 5 – and explores whether proposed amendments of OECD Model are suitable for putting an end to MNCs tax planning using commissionaire arrangements. Moreover, the paper will give a broader tax policy perspective, by examining the proposals in the light of the overall aim of the BEPS project, i.e. realignment of the principles and rules of international tax law with the economic substance (OECD, 2013b:13).

The paper is organised as follows. After an introductory chapter, the second chapter lays out the main elements of PE concept under OECD Model in a concise manner. Third chapter provides the description of the commissionaire arrangements, a commonly used technique of MNCs’ tax planning related to the agency PE concept. OECD proposals for amendment of pertinent provisions of the model treaty and its Commentary, drafted as part of BEPS project, are examined in the fourth chapter. Final remarks are given in the fourth chapter.

2. CONCEPT OF PERMANENT ESTABLISHMENT AS DEFINED IN THE OECD MODEL

Whenever the concept of PE is used in the OECD Model, one has to apply Art. 5, providing the definition of the concept (Vogel, 1997:282). Current version of Art. 5 (see OECD, 2014a) is identical to that of the OECD Model of 1977, thus its wording is replicated in most of the tax treaties currently in force. On the other hand, evolution of the PE concept in the past 40 years is reflected through changes to the Commentary on OECD Model (Arnold and MacArthur, 2014:sec. 1.2.3.). While the influence of the Commentary, issued by the OECD Committee on Fiscal Affairs, in the interpretation of tax treaties in general is well-established, even if subject to some debate (Lang, 2010:43-48), for the purposes of this paper it should be highlighted that comparative analyses confirm its significance in the interpretation of PE definition by domestic administrative and judicial bodies (Sasseville and Skaar, 2009:21).

Art. 5 OECD Model exhibits a multi-level structure (Reimer, 2012:30). Firstly, a general definition of the PE is laid out in Art. 5(1), stimulating that it is a fixed place of business through which the business of an enterprise is wholly or partly carried on. Accordingly, the conditions for the existence of PE – expounded in detail by the Commentary on Art. 5 – may be observed in both geographical and temporal terms. PE denotes a place of business linked to a specific geographic point (i.e. fixed), which is at the disposal of an enterprise and has a certain degree of permanency, usually maintained for six months or more.

Secondly, examples of "typical PEs" (e.g. an office, a factory etc.), in the light of the general definition under Art. 5(1), are laid out in Art. 5(2). Conversely, a negative catalogue of places of business not to be treated as PE, notwithstanding the fulfilment of general requirements, is provided in Art. 5(4). Common feature of the facilities excluded from the general definition of PE is that they pertain not to "core business activities" of the enterprise, but rather to activities merely of a preparatory or auxiliary character (Reimer, 2012:84), e.g. a facility used solely for purposes of storage, display and/or delivery of goods of the enterprise.

Special rule on the PE status of building site or construction or installation project (the so-called "construction PE") is provided in Art. 5(3). Under a generally accepted view (Arnold and MacArthur, 2014: sec. 2.3.1.) it sets out an additional condition to the requirements of general definition in Art. 5(1), by specifying a temporal aspect of PE concept. Accordingly, a construction PE will come to existence only if a project is carried on for a minimum period of twelve months.

The PE concept is significantly expanded by Art. 5(5), providing that an enterprise will be deemed to have a PE in the other treaty partner country if, not with standing the requirements of Art. 5(1), a person (the so-called dependent agent or DAPE) acts on its behalf in that country and has, and habitually exercises the authority to conclude contracts in the name of the represented enterprise. Two exceptions to this general "agency PE deeming rule" apply. One is related to preparatory and auxiliary activities, in line with the clause contained in Art. 5(4). The other pertains to the activities of a person that is, according to the Art. 5(6), considered to be an agent of independent status, i.e. a person independent both legally and economically from the enterprise, acting in the ordinary course of his/her business when representing the enterprise (see Commentary to Art. 5 OECD Model, para. 37.). Finally, Art. 5(7) clarifies that the fact that a control relationship exists between two companies resident in different treaty partner countries does not in itself mean that one company is deemed to be a PE of the other.

3. AVOIDING THE AGENCY PETHRESHOLD: MNC'S TAX PLANNING USING THE COMMISSION AIRE ARRANGEMENTS

If an enterprise has a PE – as defined in Art. 5 OECD Model (see above, chapter 2) – in the other (non-resident) country partner to the tax treaty, that country can exercise its taxing right in respect of the net income attributable to the business activities conducted through the PE. Conversely, if there is no PE in the country in question, it has a treaty obligation to refrain from taxation of the pertinent income, notwithstanding its domestic tax provisions. This "cliff-edge" consequence of the application of PE test (Collier, 2013:638) follows from the Art. 7 OECD Model, which governs the allocation of taxing rights in relation to business (active) income of an enterprise. Accordingly, the PE concept is used in the OECD Model as a "minimum

threshold that must be satisfied before a country can tax residents of other treaty countries on most types of business profits derived from the country" (Arnold, 2003:55).

At least three important phenomena closely linked to the wider notion of globalization – increase in the volume of cross-border trade in services, the advent and expansion of electronic commerce and the development of new business models based on fragmentation of value added chains – have made it possible for a modern enterprise to be heavily involved in the economy of destination country without having taxable presence there, i.e. to avoid the PE threshold. The inappropriateness of the PE concept as a taxing threshold in the new economy was exposed in a comprehensive study almost 25 years ago (Skaar, 1991), well before the true implications of the internet revolution have been felt on a global scale. Embedded in the concept of PE – regardless of whether it takes the form of fixed place of business or the form of a DAPE– is the requirement of physical presence in a country. The aptness of this requirement to capture the new economic realities is seriously questioned, mainly from an academic level (Escribano López, 2015).

Having in mind the limited scope of this paper, we will further focus on one particular tax planning technique commonly used by modern MNCs – the so-called commissionaire arrangements (or structures). This particular technique relies on the ambiguities of the agency part of the PE definition found in tax treaties. Commissionaire arrangement usually involves two associated enterprises, e.g. a parent company resident of state A and a subsidiary company resident of state B. Parent company, wishing to supply the market of state B with its products, enters into an agreement with the subsidiary, under which subsidiary will sell the parent's products to third parties (customers) in the local market in its own name, but without owing the inventory. The parent will deliver the goods, the title to which is not transferred to the subsidiary at any point of the arrangement, to the customers and give a remuneration to the subsidiary for its services in arranging the sales. This kind of arrangement is found in legal systems of civil law countries (e.g. Germany, Italy, Croatia), having no direct counterpart in common law countries (e.g. UK, USA, India) (Parada, 2013:62). It entails three parties and two separate contractual relationships (Parada: 2013:62): 1) one between the principal (parent company in the example described) and the commissionaire (the subsidiary company in the example

described), i.e. the commissionaire arrangement *stricto sensu* and 2) one between the commissionaire and a third party (customer).

The ensuing question is how to apply the DAPE tax treaty provisions on an arrangement construed in such a fashion. Or, in other words, could a commissionaire constitute a DAPE of its principal? Obviously, answering this question calls for the interpretation of Art. 5(5) OECD Model. One has to note that there are many interpretative ambiguities surrounding the application of this rule, mainly due to the differing concepts used in the agency law of civil law countries from those used in agency law of common law countries. Most notably, the phrase "*in the name of*" – used in Art. 5(5) OECD Model to specify the main condition under which a person will be considered as a PE of another person (see above, chapter 2) – is usually considered to be devoid of any meaning when applied by a common law country (Skaar and Sasseville, 2009:51). For example, UK tax authorities traditionally interpret this phrase as having the same meaning as "*on behalf of*"; accordingly even an agent that concludes the contracts with the third parties in his own name is considered to form a PE of its principal (Sheppard, 2010:20-21), which is consistent with the so-called "undisclosed principal doctrine" of common law of agency (Verhagen, 2006:48-50). On the other hand, "in the name of" has a specific meaning under the agency law of civil law countries (Skaar and Sasseville, 2009:51), referring to the difference between concepts of direct representation (representation on behalf of and in the name of the principal) and indirect representation (representation on behalf of the principal but not in his name) (Collier, 2013:641-642). Consequently, if one takes these concepts as a firm starting point in the application of Art. 5(5) of OECD Model, only a direct representation relationship would create a DAPE in a civil law country.

Since the relationship between a commissionaire and his principal constitutes a classic case of indirect representation (Verhagen, 2006:47-48), it is no wonder that in the majority of civil law countries this relationship will not bring about a DAPE (Oyama, 2014:1165). Commentary on Art. 5 of the OECD Model (para. 32.1.) provides some interpretative guidance in clarifying that DAPE does not need to formally conclude contracts in the name of its principal; what is considered decisive in examining its status is that the contracts it enters into with third parties are binding upon the principal. As it is clear from

the above that commissionaire arrangements do not create any legal obligations of the principal vis-à-vis the third party (Baker, 2014:28), it is hard for tax authorities of a civil law country to argue that a commissionaire is a DAPE of its principal.

Some (in) famous court decisions issued in the last couple of years confirm this analysis, thus giving the green light to widespread tax planning with commissionaire arrangements. The French case *Zimmer* involved a UK company restructuring its operations on the French market. Prior to 1995 the UK company sold its products (orthopaedic devices) in France using the distribution agreement with its French subsidiary. In the following period legal relationship between the parent and the subsidiary was converted into a commissionaire arrangement (Gupta, 2014:577). In its 2010 decision French Supreme Court (*Conseil d'État*) rejected the argument pursued by the French tax authorities – subsequently affirmed by the Administrative Court of Paris – that the subsidiary was acting as a DAPE of its UK parent. Decision was based on a literal interpretation of Art. 5(5) of the UK-France tax treaty, in the light of French commercial law: since the subsidiary was acting in its own name, the contracts it entered with the customers were not binding on the UK parent (Sheppard, 2011:267). In a rather similar set of facts the same path was followed by the Norwegian Supreme Court (*Høyesterett*) in its 2011 *Dell Norway* decision (Zimmer, 2011:991-993) and by the Italian Supreme Court (*Corte di Cassazione*) in its 2012 *Boston Scientific* case (Pizzitola, 2012:339-341). These decisions led many commentators to conclude that MNCs can avoid or reduce tax liability in civil law destination countries by a relatively simple business restructuring (Arnold and MacArthur, 2014:sec. 3.6.2.4.).

In fact, a common feature in most of the disputes over DAPE status of a commissionaire is that a business restructuring within the MNC group took place with tax aspects apparently being prominent in the motivation for such an operation. Typically this involves a conversion of a subsidiary resident in the destination country from a full-fledged distributor into a mere commissionaire. As a result, destination country could only tax the remuneration of the commissionaire. Net profits from the sales will be attributed directly to another company of the group (the principal) and taxed in its state of residence. This provides an opportunity for significant "profit shifting" within the group, which in turn leads to erosion of the tax base of destination countries. While

commissionaire arrangements have been used in MNCs tax planning since the 1990s (Oyama, 2014:1164), they were placed at the centre of policy discussions only in the last ten years or so (Skaar and Sasseville, 2009:54). More aggressive positions of destination countries' tax authorities in recent years towards this type of business restructuring can be understood if one analyses it from an economic perspective: the converted subsidiary in most cases retains most of its functions it had prior to the restructuring; conversely, its taxable profits are being stripped down in favour of other group members resident in other countries (Carmona Fernández, 2013: sec. 3).

As already noted above, commissionaire arrangement would not produce the desired tax benefits if the destination country employs a common law system, even though same result could be achieved via the so-called "synthetic commissionaire structures", created by utilizing the freedom of contract (Baker, 2014:28). Moreover, in some civil law countries tax authorities could make successful claims in deeming a commissionaire as a DAPE of another member of MNC group. Their argument is usually based on an alternative reading of the requirement of Art. 5(5) OECD Model that actions of an agent must be binding on the principal. The argument apparently finds support in the para. 32.1 of the Commentary on Art. 5 OECD Model, which provides more flexibility to the concept of agency PE. Accordingly, a DAPE can be found when his actions bind the principal vis-à-vis the third parties not only legally, but also economically (Collier, 2013:642), i.e. when the financial consequences of the transaction accrue to the principal (Pijl, 2013:6). Along the similar vein, Reimer (2012:99-100) proposes a "substance-over-form approach", suggesting that "it is sufficient that the principal accepts and acknowledges the results of the actions taken, and contracts negotiated by the agent". Such approach is clearly followed by Swiss tax authorities (Skaar and Sasseville, 2009:55). One should also take note on the interesting developments in Spanish administrative and judicial practice. Spanish Supreme Court (*Tribunal Supremo*) showed a remarkable degree of creativity in finding a DAPE in its 2012 *Roche* decision. It found that the combination of different contracts between a Spanish subsidiary and its Swiss parent produced a result of parent having a taxable presence in Spain, in the form of a dependent agent. In its 2012 *Dell Spain* decision the same court opted for an interpretation of DAPE provisions totally opposite than the one of its Norwegian counterpart in an almost identical set of facts. The mixed fortunes of Dell group in

DAPE disputes (Obuoforibo, 2013:sec. 3.4.2) illustrate the varying degrees of success of business restructuring using commissionaire structures in different civil law countries and a high degree of legal uncertainty surrounding the application of Art. 5(5) OECD Model.

4. BEPS ACTION 7: PROPOSALS FOR THE REFORM OF AGENCY PE THRESHOLD

In July 2013 OECD published its "Action plan" that addressed seemingly intolerable behaviour of taxpayers, giving rise to base erosion and profit shifting (OECD, 2013b). Among 15 action items put together by the OECD, one (Action 7) is specifically devoted to issues related to the tax treaty definition of PE. As stated by the OECD (2013b:19), BEPS Action 7 aims at developing changes to the definition of PE, thus preventing the "artificial avoidance of PE status", through the use of commissionaire arrangements (see above, chapter 3) and specific activity exemptions (see the reference to Art. 5(4) OECD Model above in chapter 2). Expected output of Action 7, in the form of update to the PE definition and a reconsideration of profit attribution rules under OECD Model, is due by September 2015 at the latest (OECD, 2013b:32). The most significant development until now is the issuance of a public discussion draft on relevant issues in 2014 (OECD, 2014b; hereinafter: Discussion Draft). The document includes preliminary results of the work on BEPS Action 7 and invites all the stakeholders to provide comments.

This chapter examines the proposals for amendments of DAPE-related provisions of OECD Model included in the Discussion Draft, with particular focus on the BEPS issues associated with commissionaire arrangements. We do not examine in detail the issues related to the attribution of profits to a (DA)PE. Even though profit attribution is a concern for BEPS Action 7 (OECD, 2014b:26), main work on this area is performed under other action items. Since it is clear that changes to the definition of PE cannot be examined in isolation from the principles and rules on attribution of profits to PE, Jimenez (2014:8) makes a valid point in describing Action 7 as a “cocktail that is difficult to handle or mix appropriately”. One should take note that the preliminary work of the OECD on the profit attribution issues has not identified substantial changes that would need to be made to the existing rules and guidance concerning the attribution of profits to a PE (OECD, 2014b:26).

Commissionaire arrangements, put in place primarily with the goal to erode the tax base of destination countries, lie at the heart of BEPS Action 7. This tax planning technique is explicitly referred to as an example of artificial avoidance of PE status in the BEPS Action plan (OECD, 2013b:19) and a significant part of the Discussion Draft aims to putting it at bay. Interestingly, the example used in the document is based on the facts of the *Zimmer* case (see above, chapter 3), making perfectly clear that notable judicial decisions in civil law countries gave impetus for the OECD work (Gupta, 2014:577). Discussion Draft tackles the problem by proposing changes to the wording of Art. 5(5) and 5(6) OECD Model. Policy underlying the proposals is made abundantly clear: "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" (OECD, 2014b:11). This explicitly calls a move away from the legal form towards economic substance in defining DAPE, which may be observed as a continuity of the latest additions to the Commentary to Art. 5(5) OECD Model (see para. 32.1.).

Discussion Draft lays out four alternative options (labelled as options A to D) that would amend the wording of Art. 5(5) and 5(6) OECD Model, in the line of the policy goal mentioned above. All options exhibit some common features. Most notably, they would amend the wording of "independent agent" provision of Art. 5(6) in an identical way: requirements for legal and economic independence of agents excluded from the definition of a DAPE are strengthened by clarifying that a person shall not be considered to be an independent agent where he acts exclusively or almost exclusively on behalf of one enterprise or associated enterprises (as defined in Art. 9 OECD Model). Moreover, all of the four options would cause a commissionaire to be considered as a DAPE, due to the proposed changes to the wording of Art. 5(5) OECD Model. The requirement that an agent must act "in the name" of the principal would be effectively eliminated, as long as there is a direct causal link between his activities and the contracts that bind the principal (Gupta, 2014:577). The proposals are briefly summarized below.

Under option A (OECD, 2014b:11-12), the condition stipulated by Art. 5(5) that a DAPE must have, and habitually exercise, the authority to "conclude contracts" in the name of the principal would be amended. It would be enough that an agent habitually engages with specific persons in a way that results in the conclusion of contracts. Contracts would not necessarily need to be concluded in the name of the principal. A DAPE would be also constituted if the contracts are concluded for the transfer of the ownership of, or for the granting of the right to use, property owned by the principal or that the principal has the right to use, or for the provision of principal's services. Hence, option A requires the formal conclusion of contracts – although not necessarily by the agent himself – for the existence of a DAPE, but shifts focus from the issue of who is bound by the contract to the object of the contract. The specific case of a contract concluded by a commissionnaire is tackled by the reference to a contract "*for the transfer of ownership (...) of property owned by the principal*".
Option B (OECD, 2014b:13) would amend the above-mentioned condition of Art. 5(5) by requiring that a DAPE must not necessarily conclude contracts. It would be enough that he negotiates material elements of contracts, which seems to be perfectly in line with the current OECD Commentary (para. 32.1. and 33.). Which contracts are relevant is defined in a way identical to option A.

Option C (OECD, 2014b:13-14) partially relies on the condition proposed under option A, in that it is enough for a DAPE to "habitually engage with specific persons in a way that results in the conclusion of contracts". What is different is the definition of relevant contracts. Difficulties arising from the phrase "*contracts in the name of*" are engaged by replacing it by referring to the contracts which, by virtue of the legal relationship between an agent and the principal, are on the account and risk of the principal. Examples of such legal (not economic) relationship are found in 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.

Option D (OECD, 2014b:14) is effectively a combination of conditions stipulated under options B and C, thus avoiding the apparently troublesome wording used in option A. It refers to the role of a DAPE in the negotiation of material elements of contract (see option B) and defines contracts in a way identical to the option C.

It is clear that all of the options for the amendment of DAPE-related provisions of OECD Model follow the general idea that the threshold for taxation in the destination country (or host country) needs to be lowered. Accordingly, formalistic view of the requirements for a DAPE gives way to the examination of the commercial/economic substance of the arrangements between the principal and the agent and between agent and third parties (customers). Nuanced differences in the proposed wording of the new Art. 5(5) under options A-D suggest that option A would be the least permissive and option D the most permissive in finding a DAPE from a host country perspective (Gupta, 2014:577-578). Unsurprisingly, proposals of the Discussion Draft encouraged heavy criticism of the business community (Gupta, 2015), similarly to private sector reactions to the previous OECD work on the update of PE definition (Collier, 2013:640-641). Big businesses understandably oppose the widening of the DAPE definition, pointing out to the absence of bright-line tests and potentially larger subjectivity in determining whether a PE exists. In their view the Discussion Draft goes far further than attacking only commissionaire structures and could have impact on the wide range of arrangements for making direct sales or providing sales support (PWC, 2014:2). At the same time, option B is pointed out as probably being the most business-friendly, or "the least harmful one" (Gupta, 2015:304).

In order to assess the OECD proposals from the perspective of the overall aim of BEPS project – realigning the principles and rules of international tax law with the economic substance – one has to start by acknowledging the economic reality of MNCs, i.e. the reality of a globally integrated business – a firm. Against this backdrop, PE provisions have a function of defining the boundaries of the firm (Vann, 2005:359). What is important is to find a point where, due to the economic reasons, the internal transaction of the firm give way to the external, market transactions. Inherent to this idea is the emphasis on independence, both legal and economic (Vann, 2005:360). Only a truly independent subject should be determined to be outside of the firm boundaries, or – in the terminology of OECD Model – be labelled as an independent agent.

When observed in this context, amendments to Art. 5(6) OECD Model as sketched in the Discussion Draft are to be endorsed. An agent acting exclusively on behalf of one principal or on behalf of several principals

that all belong to the same MNC group cannot be deemed to be independent. At the same time, one needs to take note that the controversial Art. 5(7) – specifically regulating PE consequences of intra-group relationships of MNCs – is left untouched. It is submitted here that the nature of the firm demands that the presumption of the status of an associated company in the light of PE provisions should be turned upside down (Gupta, 2014:578). On the other hand, this would openly violate one of the dogmas of international taxation – the separate entity approach, which OECD persistently defends.

A more problematic issue is how to capture the economic reality of MNCs by the wording of Art. 5(5). Oyama (2014:1167-1168) makes a valid point in suggesting that the question of who does the contract bind should be unimportant in determining a DAPE; what should matter is the level of economic integration of agent activities with the business of the principal. Moreover, Baker (2014:32) points out to the necessity for re-examination of what constitutes a substantial business involvement of the principal via agent, in the destination country. It could be argued that all of the proposed options pursue this logic, even if differing in the all-important details.

5. CONCLUSION

Application of the existing DAPE definition under OECD Model has been extensively debated over recent years in academic and political arena, particularly in the wake of widespread usage of commissionaire arrangements by MNCs. The debates have primarily focused on the legal interpretation of the phrase "*authority to conclude contracts in the name of*", a main requirement for the existence of a DAPE under Art. 5(5) OECD Model. They were also heavily fuelled by often conflicting judicial decisions in different countries.

OECD/G20 BEPS project tackles DAPE-related issues, pointing out that it cannot be viewed in isolation from other BEPS areas of work, e.g. the work on transfer pricing. But from a purely conceptual perspective, the issue of whether there is a taxable nexus in a state is separated from the issue how much profits are to be attributed to the pertinent subject. Proposals advanced in a preliminary 2014 report on BEPS Action 7 should be analysed from a broader perspective, acknowledging the economic reality of MNCs. This is in line with the overall aim of the

BEPS project. Four alternative proposals lower the threshold for DAPE existence, focusing on economic substance, rather than on legal form. While this could generally be supported, few caveats apply.

First, there is the issue of legal certainty, which should not be underestimated. Interpretative ambiguities surrounding current DAPE rules send a warning message to drafters of the new Art. 5(5) OECD Model. Without a broad consensus of the states on how to interpret new DAPE requirements, new rules may indeed have a harmful effect on cross-border business. Second, update of DAPE definition alone would produce very limited effect if OECD remains traditionally defensive about other "dogmas" of international taxation which fail to take notice of the new economic realities. Of particular importance is to acknowledge the need to rewrite the transfer pricing rules, moving away from the strict separate entity approach.

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