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Our Ref: JH/AL/RWH AP8

Dear Grace,

Re: Interpretation and application of article 5 (permanent establishment) of the OECD model tax convention

We welcome the opportunity to contribute to the OECD's updates to the Commentary to Article 5 of the model treaty.

We recognise the difficulty in reaching a consensus amongst the members of the OECD Commentary and we appreciate the efforts taken to clarify this area. We note that this is a complex topic in which businesses and tax authorities require a degree of certainty and it is also an area which generates significant disagreement between OECD members. However, we consider that the changes proposed by the consultation document do not go far enough to remove ambiguity, provide a sufficient number of relevant examples (particularly where subtle issues are concerned) nor does the proposed Commentary seek to address concepts which remain undefined within the model treaty. This opportunity to improve and clarify the Commentary should be exploited to the full in the knowledge that another opportunity will not be available for many years, given the OECD's workload and other commitments.

We provide our detailed response to the proposed amendments raised by the consultation document in the appendix to this letter. However, we also set out our general observations below:

- Throughout the consultation document, many examples are considered in order to explain why amendments to the Commentary are required. We consider that the Commentary itself would benefit from the inclusion of more examples in general. In addition, examples should cover one point at a time to provide clarity as to the factor that influenced the outcome. The current

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examples are sometimes too extreme to be of benefit to taxpayers in assessing more difficult 'middle ground' situations.

- It would be helpful if the Working Party were to consider Article 7 at the same time as Article 5. This would go towards providing an understanding of the relative importance of creating a PE in the examples provided.

- Above all, businesses want certainty in determining if a permanent establishment exists or does not exist and certainty is of benefit to tax authorities as well. We would welcome examples that leave little or no room for different interpretations.

Yours sincerely

John Henshall
Partner - Transfer Pricing

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Appendix

1. Can a farm be a permanent establishment

No comments.

2. Meaning of "at the disposal of" (paragraph 4.2 of the Commentary)

The Business and Industry Advisory Committee (BIAC) indicated that the words "at the disposal of" do not appear in the model treaty but are introduced in the Commentary to define "a place of business" whenever no premises are available but the enterprise has an amount of space "at its disposal". Currently paragraphs 4.1- 4.6 give examples of circumstances satisfying the "at the disposal of" condition but this is not formally defined. BIAC suggest a definition and some exclusions for what would be considered "at the disposal of" an enterprise.

We agree with the concerns raised by BIAC that the Commentary should be drafted to give a narrow definition of "at the disposal of". We agree that the proposed update to the Commentary provides more clarity on the factors (legal right, continuity and extent of use) that will constitute a location being at the disposal of an enterprise, specifically excluding situations where use is intermittent and the example of a contract manufacturer.

In the sentence "This will also be the case where an enterprise performs business activities on a continuous and regular basis during an extended period of time at a location that belongs to another enterprise or that is used by a number of enterprises" it is not clear to us the meaning of the phrase "continuous and regular" and "during an extended period of time".

Continuous activity would require no cessation of the activity while regular activity would require activity to recur frequently and therefore there would be periods of cessation between the periods of activity.

If the intention of the updated Commentary was to capture both types of activity we would recommend this wording be changed to "continuous *or* regular". We consider that while continuous activity at a location would constitute a permanent establishment, "regular" activity would only constitute a permanent establishment if it were not sufficiently intermittent or incidental as provided for in the next sentence of the updated Commentary.

The meaning of the phrase "during an extended period of time" seems to introduce a new concept. If this is the intention of the OECD, then the new concept should be defined more clearly. Rather than introduce a new concept, we would recommend that this phrase is updated to "a certain degree of permanency" and specifically cross referenced to paragraph 6 of the Commentary.

3. Can the premises of a (converted) local entity constitute a permanent establishment of a foreign enterprise under paragraph 1? (paragraph 4.2 of the Commentary)

Business restructuring is common amongst multinational companies and additional Commentary on the permanent establishment aspects of restructuring is welcomed. We agree that the example of the supplier or contract manufacturer included in paragraph 4.2 of the updated Commentary provides clarity and certainty.

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4. **Home office as a PE (proposed new paragraphs 4.8 and 4.9)**

The update in paragraph 4.8 provides clarity that whenever an individual uses a home office "continuously and regularly" and this individual is "required" by the enterprise to work from home that this home office would be "at the disposal" of the enterprise and therefore form a PE.

While the advice given in the Commentary is helpful it may be considered to be contrary to the natural definition of "at the disposal of the enterprise" because it would only be at the disposal of one employee of the enterprise and not any employee of the enterprise or the enterprise itself.

We also have the same reservations as those described in our response at section 2 with the phrase "continuous and regularly".

Notwithstanding these reservations, we agree with the conclusion that a place of business would exist due to being "at the disposal of the enterprise" in the circumstances described in paragraph 4.8. Conversely, where it is clear that the enterprise does not require the individual to work from home and the arrangement is at the request of the employee, the home office would not be at the disposal of the enterprise unless certain other factors are in place, such as the enterprise contributing to the running of the office costs.

If the enterprise is contributing to the costs of running a home office, such as telephone line rental this would contribute to the conclusion that the office would be considered to be at the disposal of the enterprise.

The proposed Commentary in paragraph 4.9 provides confirmation that the requirement by the employer for an individual to work from home is still a necessary factor in determining whether a home office is a PE even when the individual works from home in another State. This Commentary provides a clear example of a common situation which may have previously caused taxpayers uncertainty as to their permanent establishment status.

The examples could go further to include the example of partial home working, which is becoming more common. The 4-day office working and 1day home rotation may be imposed by businesses on employees for reasons of, for example, space constraint or elected by the employee for personal reasons, such as to reduce commuting time. Where the employee resides in a State different to that in which the business is based, under the principles outlined above this arrangement should lead to the creation of a PE of the business in that other State whenever imposed by an employer. The proposed examples in paragraph 4.9 reflect that a PE of the business would not be created in that other State if partial home working is elected by the employee rather than imposed by the employer.

We recognise that there is an administrative burden for companies identifying and monitoring the additional potential permanent establishments due to home working such as in the 4-day 1-day rotation model outlined above. It would be helpful if the Working Party were to consider Article 5 and Article 7 at the same time, as this would go towards helping businesses and tax authorities understand the practical relevance and consequences for assessing existence of a PE and the attribution of profits to that PE. For example, it is likely to be the case in many situations where a PE would be created under required 1 day a week home working would be either exempt as preparatory or auxiliary or attributed a low level of profit under Article 7 principles.

5. **Shops on ships operated in international traffic (proposed paragraph 5.5 of the Commentary)**

No comments.

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6. **Time requirement for the existence of a permanent establishment (paragraph 6 of the Commentary)**

We share the concerns expressed by business about the uncertainty concerning the period of time required for a location to be considered a permanent establishment. We recommend that this update to the Commentary provides clear guidance on a minimum period required to create a permanent establishment. The existing paragraph 6 indicates that, with two exceptions, a permanent establishment would not normally be created within a period of 6 months.

In our view, the exceptions of recurrent activities over a number of years and short duration activities with a strong connection to a country provide unnecessary complexity and uncertainty and are contrary to the permanency of establishment.

The wording in the second half of the existing paragraph 6 which has been extended and formalised in proposed paragraphs 6.1 and 6.2 provides complexity for taxpayers and tax authorities. There will be situations in which a taxpayer knows in advance that they will be present, or that they intend to be present, in another State in a manner that creates a PE in line with the example in paragraph 6.1. However, it is more likely that this will not be the case but, as written, the example in paragraph 6.1 requires individuals to monitor historical activity for many years in order to determine whether these activities will create a permanent establishment in a country. This is not only impractical for the tax payer but it is difficult for the tax authority to audit and enforce. It is also possible that the taxpayer "knows" that he intends to be present in another State in a manner that creates a PE by, say, renting a pitch at a commercial fair in a State every year going forwards. On that basis he may file a return in the State of the fair in year 1 and subsequently find the fair is cancelled such that the first year's presence would not have created a PE.

In the event that a permanent establishment is considered to have been created through analysis of the historical activities over a number of years, the permanent establishment is deemed to have arisen from the date of first presence, using future events to apply hindsight. It is conceivable that many years' worth of taxes and penalties may be due at a time when relief for double taxation in the State of residence is unavailable, and penalties would be unfair in this instance as the tax liability could not be seen except through the application of hindsight. We consider that this situation is desirable for neither tax payers nor tax authorities and should be removed.

The example in the proposed paragraph 6.2 also introduces additional complexity and in our view is artificial as it creates taxing rights in a jurisdiction due to a very short presence in that country.

7. **Presence of foreign enterprise's personnel in the host country (paragraphs 10 of the Commentary).**

The addition to the Commentary in paragraph 10 is helpful in clarifying the PE issues of seconded employees. Employees of one company in a multinational group, the formal employer, seconded to another company, the host company, would not be considered to create a PE of the first company merely because the employee is still on the payroll of the first company provided the employee is performing business activities of the second company. However, this update to the Commentary does not go far enough to remove uncertainty and clarify the relationship between Article 5 and Article 15 where the formal employer recharges the cost to the host company.

The comments in paragraph 44 of the consultation document (which do not feed into the proposed update to the Commentary) suggest that a cost plus recharge to the host company for the payroll costs

could indicate that the activities of the employee were actually conducted for the benefit of the employing company and would create a PE exposure. We do not believe that this interpretation follows, and consider that the wording of the updated Commentary was intended to support the view that no PE would be created merely by reason of a cost-plus recharge. In particular, we note that the Commentary to Article 15 is helpful in understanding whether the services rendered by the seconded individual constitute an integral part of the business of the host company to which the services are provided, and that charging the remuneration costs with a percentage mark-up would be one factor (of many to be taken into account) that would indicate that the secondee should be treated as having an employment relationship with the host company. It seems to us that it would be illogical to have a secondee treated as having an employment relationship with the host company but yet creating a PE of the non-resident company. We would therefore recommend expanding the example in paragraph 10 which we consider would provide clarity to a very common situation.

10 [...]As explained in paragraph 8.11 of the Commentary on Article 15, however, there may be cases where individuals who are formally employed by an enterprise will actually be carrying on the business of another enterprise and where, therefore, the first enterprise should not be considered to be carrying on its own business at the location where these individuals will perform that work. Within a multinational group, it is relatively frequent for employees of one company to be temporarily seconded to another company of the group and to perform business activities that clearly belong to the business of the other company. In such cases, administrative reasons (e.g. the need to preserve seniority or pension rights) often prevent a change in the employment contract. The analysis described in paragraph 8.13 to 8.15 of the Commentary on Article 15 will be relevant for the purposes of distinguishing these cases from other cases where employees of a foreign enterprise perform that enterprise's own business activities. *Whenever the employment contract is maintained by the foreign enterprise, a cost plus recharge of the employment costs of the secondee to the host company would not, of itself, be considered to be evidence that the seconded individuals are performing the work of the foreign enterprise such that a PE is created.*

In our view it will be rare that a 'secondment', in the ordinary sense of the word, would create a PE of the foreign enterprise.

8. **Main contractor who subcontracts all aspects of a contract (paragraphs 10 and 19 of the Commentary)**

We consider the changes proposed to paragraphs 10.1 and 19 separately as they will have separate implications when considering businesses which are not construction related.

Paragraph 10.1
The amendments to the Commentary at paragraph 10.1 create a new interpretation of carrying on the business of an enterprise. This interpretation provides that an enterprise employing subcontractors would be carrying on its business through those subcontractors.

This extension of the concept of carrying on business without a definition of 'subcontractor' is problematic. Many businesses engage third parties to supply goods or services related to the conduct of their business. Without clear commentary on the situations which the OECD would envisage creating permanent establishments, the scope of Article 5 would be broadened considerably by the introduction of this "clarification" of the definition of carrying on a business.

We specifically envisage difficulties whenever an enterprise subcontracts to a manufacturer in another State and employees of the enterprise have a contractual entitlement to periodically visit the factory to,

for instance, perform quality assurance checks on the processes employed there. This situation is very common and, under the existing Commentary, we consider this would not create a PE of the enterprise in the other State as the legal right to visit the factory for the purposes of inspection would not cause the factory to be considered to be at the disposal of the foreign enterprise. The interpretation would be different if the inspectors had an office or other fixed place within the factory at their disposal.

However, the updated Commentary could be interpreted to create a PE of the enterprise by virtue of the fact that there is a fixed place of business, through which the business of the enterprise is carried on (through subcontractors) and the enterprise may be considered to have the factory at its disposal by virtue of the fact that it has a legal right to visit. We would therefore oppose this extension to the concept of carrying on a business or request that a definition of a subcontractor for these purposes and some clear examples are included.

Provided the issue of what constitutes a subcontractor relationship may be settled, a permanent establishment would be created whenever the business of an enterprise is carried on through subcontractors and the other conditions of paragraph 1 of the treaty are satisfied.

> ***In the context of paragraph 1, that will require that these subcontractors perform the work of the enterprise at a fixed place of business that is at the disposal of the enterprise for reasons other than the mere fact that theses subcontractors perform such work at that location (see paragraph 4.2 above).***

We agree that this prevents a company from avoiding the creation of a permanent establishment in a jurisdiction simply by subcontracting all of its business to a subcontractor in that jurisdiction where the other conditions of paragraph 1 would be satisfied.

The reference to paragraph 4.2 requires that the enterprise either has an exclusive legal right to use the location or the enterprise is present "during an extended period of time" and performs the business activities on a "continuous and regular" basis. Our comments above regarding these two phrases apply here.

The value of the example in the final sentence of the proposed paragraph 10.1 is unclear - it seems to be the case that a hotel would constitute a fixed place of business PE by virtue of the fact that the business of a hotel is carried on through the hotel regardless of who performs the day to day duties. As such, we would recommend that the example be modified to be specifically tailored to address the situation where sub-contractors create a permanent establishment of the enterprise where this would not otherwise be the case.

Paragraph 19

In the context of the example in paragraph 47, we agree that KCO, the general contractor, would have a permanent establishment in State S in respect of the catering services provided by the subcontractor as per paragraph 10.1 (provided the subcontractor's presence at that location was of sufficient duration to be considered permanent).

The changes to paragraph 19 State that, in the example of a construction contract, ***"the site should be considered to be at the disposal of the general contractor during the time spent on that site by any subcontractor where the general contractor has overall responsibility for the site and the site is made available to that general contractor for the purposes of carrying on its construction business".***

We consider that the update to the Commentary in paragraph 19 is not applicable to the example in paragraph 47 because KCO only has a fixed place of business in respect of its catering business which

is distinct from the engineering services provided by KCO. To be precise the site is available to the general contractor and the general contractor has overall responsibility for the site but the site is made available to the general contractor for the purpose of providing catering services and not for the purposes of carrying on its engineering services business. If, however, the subcontractors were undertaking preparatory work relating to engineering then paragraph 19 would be interpreted as creating a PE for KCO in respect of its construction business in State S from the date the subcontractors arrived on site.

9. **Application of paragraph 3 to joint venture and partnership activities (paragraphs 10 and 19 Commentary)**

No comments.

10. **Meaning of "place of management" (paragraph 12 of the Commentary)**

No comments.

11. **Additional work on a construction site (proposed new paragraph 19.1 of the Commentary)**

No comments.

12. **Must the activities referred to in paragraph 4 be of a preparatory or auxiliary nature? (paragraphs 21 and 23 of the Commentary)**

We agree with the updates to paragraph 21 and 23 as these serve to remove uncertainty as to the application of paragraph 4 a)-d). However, we had expected additional Commentary on the meaning of 'preparatory or auxiliary' which is an important and difficult aspect of this paragraph of Article 5. One can infer from part f) that the combination, for example, of having goods processed, stored and delivered must be capable of being preparatory or auxiliary. However, for a typical manufacturing business, e.g. of consumer goods or industrial products, it is reasonable that these activities could be asserted not to be preparatory or auxiliary. In many modern business structures involving contract or toll manufacturing of goods and centralised management of inventory and distribution, this combination of activities does occur. We therefore consider that an example would aid the interpretation of this paragraph and we would propose the inclusion of the following example: "An enterprise resident in State A has goods manufactured for them by a contract manufacturer in State B which are then stored in the enterprise's warehouse in State B for onward delivery. The enterprise manages the inventory in its warehouse located in State B centrally before goods are distributed to customers. In this example, the combination of activities conducted by the enterprise would not constitute a permanent establishment in State B."

Paragraph 4 of the Commentary may sometimes be misinterpreted when determining whether a permanent establishment exists at a location which undertakes 2 or more of the activities in paragraph 4 a)-d) where these combined activities are not preparatory and auxiliary. The misinterpretation is that this location would constitute a permanent establishment of the enterprise regardless of the factors in paragraph 1. We consider that it would be helpful to point out in the Commentary that, for instance, if goods were stored and processed by another enterprise in a third party warehouse, this would not constitute a permanent establishment as there is no fixed place of business at the disposal of the enterprise. As one may deem activities of a preparatory or auxiliary nature to not be a PE, it must have been a PE without the exception.

Another point which we would like to see addressed in this update to the Commentary is in relation to

preparatory or auxiliary activities in service businesses. The exemptions set out in paragraph 4 only apply to activities involving goods, and there are no specific exemptions for preparatory or auxiliary activities in the provision of services. It would be helpful if the Commentary were to clarify whether there are any types of preparatory or auxiliary activities in respect of services which may be exempt. Potential examples would relate to back office activities performed by employees outside of the State of residence of the enterprise.

13. **Relationship between delivery and the sale of goods in paragraph 4 a) (paragraphs 22 and 27.1 of the Commentary)**

The updated Commentary makes it clear that goods may be stored in a warehouse before or after the contract for the sale is concluded without creating a permanent establishment provided the goods are owned by the enterprise while they are held in the warehouse. In addition, it is not possible to separate an activity which is preparatory or auxiliary from a permanent establishment at the same location. We agree with the updates to the Commentary on these points.

14. **Does a development constitute a PE? (paragraph 22 of the Commentary)**

No comments.

15. **Do "goods or merchandise" cover digital products or data? (paragraph 22 of the Commentary)**

This issue, raised by the working group, concerns the application of the treaty to electronic commerce, and we note that there are no proposed changes to paragraphs 42.1-42.10 of the existing Commentary. However, these paragraphs were developed some years ago, and there have been considerable developments in the way that business may be conducted electronically since then. Servers may be situated in specific locations that may be separate from the people functions of the business for commercial reasons. For example, servers may be located near a secure or cost-efficient power source (e.g. hydro-electric power) to guarantee uninterrupted supply, or near to Exchanges to ensure speed of data transfer. Such business demands mean that questions of whether or not a particular server operating automatically creates a PE become more pertinent. We would welcome examples in this area.

16. **Carrying on various activities listed alternatively in subparagraphs 4 a) and b) (paragraph 22 of the Commentary)**

We agree with this interpretation of the model treaty and the changes made provide clarity that paragraphs 4 a) and b) should be read as if the "or" were actually "and/or".

17. **Negotiation of import contracts as an activity of a preparatory or auxiliary activity (paragraphs 24 and 25 of the Commentary)**

This section of the proposals deals with two separate but related issues: the Czech and Slovak view that the negotiation of import contracts should constitute the conduct of the business and, secondly, that negotiating important parts of a sales contract constitutes an activity which is not preparatory or auxiliary.

We have no comment on the deletion of paragraph 44 detailing the Czech and Slovak observation regarding paragraph 25 of the Commentary.

The amendment to paragraph 24.2 includes the negotiation of important parts of a sales contract as an activity which would not be preparatory or auxiliary whenever the business of the enterprise is the worldwide sale of goods. It is noted that whenever the other conditions of paragraph 1 are met, such an office would constitute a permanent establishment.

These additions provide helpful Commentary in considering whether activities are of a preparatory or auxiliary nature and highlight that this assessment must be based on the facts and circumstances of each case. We note that a full assessment of whether the negotiation of sales contracts is preparatory or auxiliary would require consideration of the organisation as a whole.

For instance, it is increasingly common for groups to have a centralised sales entity and to have local subsidiaries that provide local sales and marketing support. All sales are made by a centralised sales company which pays a fee to the local affiliates for their sales support functions (which fall short of giving rise to a dependent agent PE). The local sales support companies may conduct activities of the type referred to in proposed paragraph 24.2. If they are subcontractors, and if the sales company otherwise meets the requirements of paragraph 1these changes, taken together, put pressure on the factual question of whether the enterprise has local premises which are at its disposal. We consider that the changes made to paragraph 24.2 and those made in 10.1 together can significantly increase the scope to classify foreign operations as PEs. It is not clear from the proposed Commentary whether this was the intention of the changes and we would be grateful for the inclusion of some examples, of the type mentioned above, to clarify the position.

18. **Fragmentation of activities (paragraph 27.1 of the Commentary)**

The current wording of paragraph 27.1 of the Commentary contains the phrase "an enterprise maintains several fixed places of business within the meaning of subparagraphs a) to e)". We consider that this is a drafting error as subparagraphs a) to e) are exceptions to a permanent establishment where one exists under paragraph 1 and are not themselves a definition of a permanent establishment. Instead, we would recommend the Commentary should refer to "fixed places of business that fall within the conditions of subparagraphs a) to e)".

19. **Meaning of "to conclude contracts in the name of the enterprise" (paragraph 32.1 of the Commentary)**

The update to paragraph 32.1 is intended to provide that an enterprise is not excluded from creating a PE in a country where it is legally bound by contracts entered into by agents merely by virtue of the fact that the agent did not disclose it was acting for the principal enterprise (as is the case in some common law countries).

However, the update to the Commentary is not clear as to whether the principal is required to be legally or only economically bound by the contract. The potential to create a PE in this way was included in the Model Treaty in response to the English Common Law principle known as "the doctrine of the undisclosed principal" in which, through the actions of an undisclosed Agent, in some circumstances the Principal can be legally bound to the ultimate customer. Although it is a much older concept the doctrine is most clearly explained in the UK Court decision in *Rolls-Royce Power Engineering plc and another v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC). We consider that the intention of the update was to clarify that whenever an enterprise is *legally* bound to the customer that the undisclosed agent would be concluding contracts in the name of the enterprise.

The recent decisions in the *Dell* and *Zimmer* cases in Norway and France respectively found that only legal binding is relevant in determining whether a PE is created when the business of the enterprise is

conducted through a commissionaire. We would propose that the updated Commentary reflects this interpretation and provides clarity by changing "bound" to the phrase "legally bound in the sense that the ultimate customer is able to look through the agent and take legal action against the principal, if necessary" in paragraph 32.1

The updated Commentary may be interpreted such that the agent may be considered to bind the enterprise even if there is no legal binding. This would represent a significant extension to the current interpretation of the treaty. As such, we would suggest that the wording of the Commentary be updated as follows:

> 32.1 Also, the phrase "authority to conclude contracts in the name of the enterprise" does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise. ***For example, in some countries an enterprise would be*** legally bound in the sense that the ultimate customer is able to look through the agent and take legal action against the principal, if necessary***, in certain cases, by a contract concluded with a third party by a person acting on behalf of the enterprise even if the person did not formally disclose that it was acting for the enterprise and the name of the enterprise was not referred to in the contract. In this case, should the ultimate customer be dissatisfied with performance under the contract they have legal redress against the Principal directly and would not be limited to seek redress only from the undisclosed Agent with whom they have contracted.***

20. **Is paragraph 5 restricted to situations where sales are concluded? (paragraph 33 of the Commentary)**

We agree with the amendment to the Commentary which indicates that an agency PE would be created whenever the person acting on behalf of the enterprise concludes contracts for the business proper of the enterprise even when that business is not the business of sales. The examples given of leasing and services make it clear that the power and habitual exercise of the ability to conclude all core business contracts would constitute a PE.

21. **Does paragraph 6 apply only to agents who do not conclude contracts in the name of their principal?**

No further comments.

22. **Assumption of entrepreneurial risk as a factor indicating independence**

No further comments.

23. **Activities of fund managers**

The issues raised by the European Venture Capital Association (EVCA) are specific to venture capitalists.

We note that "the Group did not consider more specific Commentary could be provided to the venture capital industry" but that the analysis of the concepts of "enterprise of a Contracting State" and "permanent establishment" with respect to a limited partnership could provide useful Commentary. The recommendation does not highlight any changes to the Commentary.

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We agree that the example put forward by the EVCA is highly factual and that further comment on such an industry specific example may not be appropriate but we consider that the concepts of enterprise and permanent establishment in the case of a partnership would be useful for many businesses. We would support including additional Commentary as to whether an enterprise is a business activity or a business organisation.

24. **Clarification of paragraph 8 of the Commentary on Article 5**

No further comments.

25. **Activities of insurance agents**

We agree with the findings of the Working Group which states that there is no need to insert into the model treaty a special provision regarding insurance agents based on the example discussed in paragraph 136. This example covers many separate areas of the permanent establishment definition including, "independent agents", "working from home", "preparatory or auxiliary" and concluding contracts "in the name of the enterprise". Whilst no separate provision need be included in the model treaty, we consider that a full discussion of this example would be useful if discussed in the Commentary. We would in general recommend that more examples are included in the Commentary and this example should be split to consider each issue independently of the others.

However, we consider that some further definition of the term "independent agent" would be beneficial as in many cases (not just insurance) there is difficulty, despite paragraphs 37-38.8, in determining when an agent is independent.