



Paris, 9 February 2012

Ms. Grace Perez-Navarro
Deputy Director, CTPA
Organisation for Economic Co-operation and Development (OECD)
2, rue André-Pascal
75775 Paris cedex 16

Dear Ms. Navarro,

The French Banking Federation (FBF) – a professional organisation encompassing all of the credit institutions in France – welcomes this opportunity to offer comments in conjunction with the consultation being carried out by the Organisation for Economic Co-operation and Development (OECD) with regard to proposed changes to the Commentary on Article 5 of the OECD Model Tax Convention.

In the attached annex, please find our comments on the proposals made by Working Party No. 1 on Tax Conventions.

Please do not hesitate to contact us for any additional information you require. You may reach me by telephone on 01 48 00 50 75, or my assistant, Tania Saulnier, on 01 48 00 50 74.

Yours faithfully,

s/

Pierre Reynier

ANNEX

FBF POSITION ON PROPOSED CHANGES TO THE COMMENTARY ON ARTICLE 5

It is our understanding that the purpose of the changes proposed by Working Party No. 1 on Tax Conventions is to clarify the concept of “permanent establishment” as it is used in Article 5 of the Model Tax Convention.

Our comments below relate to certain issues raised in the consultation document. As a general remark, we welcome the efforts reflected in the proposed changes to clarify and spell out concepts – with regard, for example, to Issue 6 (“Time requirement”), Issue 7 (“Presence of foreign enterprise’s personnel in the host country”) and Issue 10 (“Meaning of ‘place of management’”). These changes would be welcome insofar as they bolster the legal security of business enterprises.

We do regret, however, that there has been no elaboration on certain concepts whose interpretation and practical application by countries are not uniform, such as the definition of “independent agent” or the situation of investment fund managers.

Our more specific comments are as follows:

Issue 19: Meaning of “to conclude contracts in the name of the enterprise”

We note that this issue has been approached from the standpoint of *commissionnaires* and regret that a far broader approach was not taken.

Working Party No. 1 explains that there is no consensus among countries as to the implications of the court decisions handed down in certain countries (such as the one in France in respect of the Zimmer Ltd. case). In order to circumvent that obstacle and cover the cases addressed in those rulings, it has been proposed to add the following example: *For example, in some countries an enterprise would be bound, 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.*

The FBF deems that to add this example in the absence of a consensus among the countries would not clarify taxpayers’ situation and would even be detrimental to their legal security.

This change should therefore not be adopted.

We also note that the Working Party referred in paragraph 109 to a case in which *a dependent agent permanent establishment could be deemed to exist if it were established that the arrangements entered into in a particular case did not make commercial sense and were primarily structured in such a way as to avoid the creation of a permanent establishment.*

This notion of “mak[ing] commercial sense” was neither defined nor discussed by Working Party No. 1. Although no proposal has been made on this basis, we would like to draw attention to the

consequences of using such concepts, which could constitute an abuse of law. ***Indeed, it is crucial to the legal security of business enterprises that such concepts be discussed in detail and in a concerted manner.***

Issue 23: Activities of fund managers

In this area, Working Party No. 1 has decided not to add any further commentary on the issues involved, which are described as being extremely factual.

Given the ramifications involved, however, the FBF deems that it could be useful to resume specific work in this area, in tandem with the financial sector, and with the fund industry in particular.