

# **European Business Initiative on Taxation - EBIT**

Comments – draft changes to the Commentary on Articles 10, 11 and 12 of  
the OECD Model Tax Convention concerning the meaning of the term  
“beneficial owner”

Mr. Jeffrey Owens  
Director  
OECD Centre for Tax Policy and Administration (CTPA)  
2, rue André Pascal  
75016 Paris  
FRANCE

Brussels, 8 July 2011

Dear Mr Owens,

Re: Draft changes to the Commentary on Articles 10, 11 and 12 of the OECD Model Tax Convention concerning the meaning of the term “beneficial owner”

This letter sets out the comments of the European Business Initiative on Taxation (EBIT)<sup>1</sup> on the OECD’s draft changes to the Commentary on Articles 10, 11 and 12 of the OECD Model Tax Convention concerning the meaning of the term “beneficial owner”.

- EBIT generally welcomes the opportunity to give comments on the clarification proposed by the OECD regarding the meaning of the term “beneficial ownership”.
- Whilst we acknowledge the desirability to make reference to known domestic law beneficial ownership tests, we doubt whether the formulation as proposed in the last sentence of Paragraph 12.1 on Article 10 regarding dividends, which is repeated in Paragraph 9.1 on Article 11 regarding interest, and Paragraph 4 on Article 12 regarding royalties, is appropriate:

*“This does not mean, however, that the domestic law meaning of “beneficial owner” is automatically irrelevant for the interpretation of that term in the context of the Article: that domestic law meaning is applicable to the extent that it is consistent with the general guidance included in this Commentary.”*

- EBIT notes that very similar formulations are used by the OECD throughout its draft regarding the making of references to known domestic law beneficial ownership tests, and in particular in Paragraphs 12.5 on Article 10 regarding dividends, paragraphs 10.2, 10.3 and 10.4 on Article 11 regarding interest, and, lastly, paragraphs 4.3, 4.4 and 4.5 on Article 12 regarding Royalties. In view of the aim of giving maximum clarity by the OECD-Commentary we are concerned these sentences might in fact increase the element of subjectivity as regards how to evaluate consistency with the guidelines and open the door for new undesired national definitions. We believe the existing Commentary already guarantees appropriate results for tax practitioners.
- Regarding the scope of the beneficial ownership concept, it is EBIT’s view that this should not be extended to encompass domestic abuse rules. The proposed

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<sup>1</sup> At the time of writing this submission, members of EBIT included: AIRBUS, CATERPILLAR, EADS, GE, DEUTSCHE LUFTHANSA, INFORMA GROUP, METRO GROUP, MTU AERO ENGINES, NUTRECO, ROLLS-ROYCE, ROMPETROL GROUP, SANOFI-AVENTIS, SES GLOBAL and TUPPERWARE.

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amendments to the Commentary on Articles 10, 11 and 12 lead to legal uncertainty. We believe anti-abuse guidance is not the main task of the OECD, but primarily that of the national governments of the OECD’s member states, who have indeed already fulfilled this task by implementing their own national regulations.

- The proposal arguably could add to uncertainty by treating beneficial ownership as tied to the "paid to" language of the Articles on dividends, interest, and royalties. Whether an item of income is within the scope of the treaty should in our opinion be viewed as a three-part test:
  1. Is the income paid to a treaty resident?
  2. Is the person to whom the income is paid the beneficial owner of the income? and
  3. Are there domestic anti-abuse law principles that deny the treaty benefit?
- Once it is determined who the recipient of the income is, it is then appropriate to determine whether that recipient is the beneficial owner of the income or is acting as a nominee or agent for another party. Lastly, once the beneficial owner is determined, domestic anti-abuse law concepts can be applied to limit the application of the treaty benefit.
- Regarding Paragraph 12.5, EBIT believes the proposal may have important implications for the Financial Services industry and the hedging of long positions, as it pinpoints the misapplication of the concept of “beneficial ownership” in the Financial Services industry. There can be situations where some OECD tax authorities seek to collapse hedging transactions i.e. long positions with short hedges. In this regard, the proposed draft changes will have resonance in the Financial Services industry in supporting the rebuttal of any such misuse of the beneficial ownership concept to collapse hedges.

In developing this submission, EBIT has relied on the practical and daily experience of its members, who are experienced tax directors of multinational enterprises rather than on a theoretical analysis.

EBIT would like to encourage the OECD in its further consultation and hopes that the above comments are helpful and will be taken into account in finalising your Commentary on Articles 10, 11 and 12 of the OECD Model Tax Convention concerning the meaning of the term “beneficial owner”.

Yours sincerely,

**The European Business Initiative on Taxation – July 2011**

Bob van der Made

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