European Banking Federation

Chief Executive

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Ms Marlies de RUITER
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Subject: *EBF Comments on the OECD Revised Discussion Draft on BEPS Action 6: Preventing Treaty Abuse*

Dear Mrs de Ruiter,

We welcome the opportunity to respond to the OECD's revised discussion draft regarding BEPS action 6: prevent treaty abuse dated 22 May 2015 (the "Revised Discussion Draft"). In this context, we would like to reiterate our commitment to contribute constructively to the BEPS action plan, in the expectation that the final outcome will deliver fair, certain, sustainable and principled rules.

The present submission follows on from our precedent submission lodged in January 2015 in relation to the discussion draft regarding Action 6 released by the OECD on 21 November 2014.

We have previously highlighted our serious concerns that Action 6, when seen as a whole, potentially conflicts with the principles of the EU Internal Market enshrined in EU treaties, which are binding for a large number of the member countries of the OECD. These concerns arise because a significant proportion of entities carrying out legitimate cross-border activities within the European Union – the world's largest single market, with transparent rules and regulations – would be denied the benefits, either partially or entirely, from tax treaties on the basis of the ownership of their shares. As indicated in our preceding submission and by reference to a consistent record of decisions from the Court of Justice of the European Union, the prohibition of non-resident intermediaries in the ownership tests set forth in the contemplated Limitation On Benefits (LOB) provisions would trigger in many cases undue discriminations under EU law. In this context, we acknowledge the proposals made in the Revised Discussion Draft pertaining to alternative LOB provisions for EU countries. We are, however, very disappointed that the said proposals are limited to the publicly-listed entity and pension fund exceptions of the contemplated LOB rule, thus leaving similar concerns raised in respect of other entities unaddressed.

Predictable and manageable rules are essential when it comes to determine whether treaty relief is available. Overly prescriptive requirements or provisions based on subjective assessments would indeed risk undermining the usefulness of tax treaty networks. In this respect, we acknowledge the proposal for an alternative "simplified" LOB rule in the Revised Discussion Draft, which provides additional clarity vis-à-vis the LOB provisions foreseen in the preceding discussion draft. In the meantime, we are concerned that the revised wording on both LOB and Principal Purpose Test (PPT) at Article X(5) and X(7) respectively would still grant very broad discretion to competent tax authorities, an outcome that is at risk of paving the way to subjective, and therefore unpredictable, interpretations on the part of tax authorities. In this respect, we reiterate the concerns raised in our preceding submission and evoke consistent case law of the Court of Justice of the European Union according to which anti-abuse measures that are too vague or unspecific in their terms do not meet the proportionality requirement under EU law[1].

In addition to greater uncertainty with respect to ordinary commercial transactions, we are concerned that the contemplated LOB and PPT provisions might exacerbate a tendency in the approach of tax authorities globally towards the application of more onerous information and evidential requirements

[1] SIAT case (C-318/10, para. 58) and ITELCAR case (C-282/12, para. 44).

at the time of the claim for treaty relief. One consequence is that this may result in a significant decrease in the ability of investors to receive treaty relief at source, since the only way in which banks acting on the customer's behalf to satisfy the information requested would be via a reclaim process. Proposals leading to a reduced relief at source system contradict to our view the objectives of the Treaty Relief and Compliance Enhancement (TRACE) system, another tax-related project undertaken by the OECD, which is aimed at moving towards a "relief at source system". Whilst TRACE and BEPS projects have different objectives, we are disappointed that presently there has not been greater consideration of how TRACE might allow tax authorities to mitigate some of the concerns around potential treaty abuse whilst providing business with increased certainty in relation to cross border investment.

In the light of the above considerations and with reference to our prior comments regarding Action 6, we formulate the following recommendations:

- We urge the European Union and the OECD Member States that are also Member States of the European Union to ensure that Action 6 will be implemented among EU Member States in conformity with EU law. Uncertainty risks undermining the usefulness of tax treaty networks in the context of the EU internal market would significantly impede cross-border trade and investment among EU Member states and might at the end of the day seriously interfere with the objectives of a Capital Markets Union. In this context, a good starting point would be the revised, simplified LOB clause set forth in the Revised Discussion Draft, subject to our additional recommendations below.

- The prohibition of non-resident intermediaries in the ownership tests currently foreseen in the LOB provisions of the Revised Discussion Draft would certainly conflict with EU law. Still in the context of the European Union, we therefore suggest expanding the list of shareholders to include shareholders of the Member States of the European Union and the European Economic Area.

- Where there is no treaty abuse, swift administrative clearance should be granted. In this context, we recommend to consider a pre-clearance process under which treaty benefits would be granted if the Competent Authority does not affirmatively deny them within a given (relatively short) time frame.

- We encourage the OECD to take greater consideration of how TRACE might allow tax authorities to mitigate some of the concerns around potential treaty abuse whilst providing business with increased certainty in relation to cross border investment. A transparent and predictable relief at source mechanism is certainly in the interest of tax authorities, cross border investors and businesses alike as it provides greater certainty around the granting of treaty benefits and reduces operational costs associated with reclaim processes for all parties.

- All in all, the application of LOB provisions based on objective characteristics of the party seeking treaty benefits should be privileged for the purpose of implementing Action 6. A combined application of LOB and PPT provisions on a general basis bears the risk of a multiplication of uncertainties and disproportionate burden of proof on the part of taxpayers. In this context, we recommend to make clear that the application of the PTT test, should its recourse be envisaged, is not intended to undercut the LOB provisions but is directed to clearly artificial and tax abusive arrangements.

Yours sincerely,

Wim Mijs