

Committee of Experts
on International Cooperation in Tax Matters
11th Session: Geneva, 19-23 October 2015

**Agenda Item 3 (a) (ii):
Article 5 (Permanent
establishment): the meaning of
“connected projects”
- Viktoria Wöhrer -**

Purpose of suggested changes to the Commentary on Article 5

Clarify the meaning of “connected projects”

- Is physical presence required?
- Which factors are relevant to determine whether there is a connected project?
- Should the condition ‘for the same or a connected project’ be determined from the perspective of the enterprise or the customer?
- How should the 183-days threshold be calculated in situations where different associated enterprises are involved in the same or a connected project?

Already agreed

- 12.1/12.2: physical presence is required
 - 12.2 Has been redrafted in 10th session
 - **12.1 New:** Minority view that physical presence requirement is obsolete due to digital economy

Task

- review other paras. to clarify the issues raised
 - Simplify language
 - Reduce number of examples

Factors for determining whether there is a connected project

Factors in 12.3

- single master contract
- single contract if no tax planning considerations
- contracts with the same person or related persons
- additional contracts are logical consequence of a previous contract
- nature of the services is the same or similar
- same individuals are performing the services

• Factors are similar to the ones listed in OECD Commentary on Art. 5 para. 42.41 / BEPS Action 7 – Splitting-up of contracts

- Factors focus on the enterprise performing the service
- However: also perspective of the customer is relevant

Possible additional factors

- services provided in the same or different locations
- services provided continuously or at different times
- billed separately or together in the same invoice
- separate bidding and negotiation on the projects
- the results of the projects are independent of each other
- the results of one project separately deliverable?
- uninterrupted periods between contracts
- reasonable to do one project without the other project(s)

Perspective of the enterprise or the customer?

- **Already agreed:** both the perspective of the enterprise and the customer have to be taken into account
- **Clarification:**
 - it is enough if EITHER from the perspective of the customer or the enterprise activities are part of the same or connected projects
 - Subjective perception of the parties should be irrelevant
 - Which conclusions would a reasonable person draw from the relevant circumstances?
- Example 2 has been substantially changed – to show that it is enough that there is a connected project only from the perspective of the customer

183-days threshold - associated enterprises

- Two options
- anti-avoidance rules:
 - now reference to domestic legislative or judicial anti-avoidance rules
 - Additional possibility would be reference to treaty's object and purpose (acknowledged in the Commentary to Art. 1)
- specific provision:
 - similar as Splitting-up of contracts dealt with in BEPS Action 7 – align wording?
 - substantially similar services?
- term „associated enterprises“ might be misleading
 - Same term = same meaning as in Art. 9?
 - However: different definition is provided
- OECD (BEPS Action 7)
 - uses for this purpose “person closely related to an enterprise”
 - Concept is different from Art. 9

Points to be discussed

- 12.3 Factors for determining whether there is a connected project
- 12.5 reference to treaty's object and purpose
- 12.5 term “associated enterprises”
- 12.7 employees kept available for client → count towards the 183-day threshold?