



## ***Comments to the OECD Discussion Draft on Action 2 “Neutralise the Effects of Hybrid Mismatch Arrangements”***

The International Chamber of Commerce (ICC) welcomes the opportunity to provide comments on the Discussion Draft regarding BEPS Action 2 to neutralise the effects of hybrid mismatch arrangements. ICC acknowledges that certain hybrid mismatches relating to instruments and entities can cause BEPS related concerns, and ICC supports the OECD in promoting coordinated action to address those concerns whilst at the same time ensuring that cross-border trade and investment is not discouraged.

ICC has identified below a number of high-level concerns in relation to the Discussion Draft:

- ***Interaction with other Action Items:*** As the BEPS project continues, it becomes clearer that there is significant interaction across many of the 15 Actions. ICC believes that further work is required to understand those interactions, and how the full spectrum of BEPS proposals may address government concerns when considered together. This is particularly important for all of the September 2014 Actions, to ensure that proposals that might be adopted by various governments in the near-term do not result in negative consequences when future BEPS proposals are developed.

In relation to Action 2, there is a risk that acting on hybrid mismatches without acting in coordination with other BEPS Actions would result in an unlevelled playing field. We encourage the OECD to articulate the policy rationale for distinguishing between hybrid arrangements and other types of mismatches, as this would help inform decisions about the adoption and shape of the proposed rules.

In addition, hybrid mismatches are a symptom, rather than a cause of BEPS. The OECD’s work on BEPS Action 4 and the development of more uniform expense deduction rules may deal more effectively with the cause, without such a significant need for the complex domestic law solutions proposed in the Discussion Draft. As ICC acknowledges that the timetable cannot be changed, the emphasis should be on establishing a framework for all BEPS Actions to be reviewed and considered in 2015 to ensure that further action undertaken is coordinated and coherent.

- ***Complexity of the Rules:*** The Discussion Draft does not acknowledge the significant complexity that the proposals will create. The tax treatment of particular transactions across borders can be difficult to determine, even in a related party context due to various factors (including timing issues and differences in accounting concepts). For unrelated party transactions, the complexity increases further. The proposal needs to address the complexity of implementing and managing these rules from the taxpayer and tax authority perspective. Defining what is considered abusive (through a “bottom up” approach) could assist here to avoid targeting commercial arrangements, rather than including all hybrid arrangements (through a “top-down” approach).



- **Impact on certain Market Segments:** The Discussion Draft does not fully consider the effects of the proposed rules on very important segments of the economy. For example, ICC is concerned about the FS funds and banking sectors, and fears that methods used to raise capital would be significantly impacted by the proposals. ICC does not believe that there has been time to fully investigate these issues before conclusions will be reached. There will be many other similar issues across other sectors of the global economy; for example, non-FS corporates with in-house treasury functions (including cash pooling arrangements) would also be impacted.
- **Allocation of Taxing Rights:** ICC is concerned about the impact of the proposals on the allocation of taxing rights between states. For example, as part of the proposals to address Imported Mismatches, the rules propose that a third country (that is not actually party to a hybrid transaction) can apply rules as a 'back-stop' to deny a deduction where two other countries may have chosen not to execute their rights.

Without an enquiry into the policy rationale of the two countries that have not sought to tax (or deny a deduction for) the payment, or enquiring into the tax effects of that non-hybrid payment (e.g., as to timing, partial relief, etc.) this appears to be a "soak-up" tax. If the payment in question is objectionable, ICC believes that there should be a more general consideration of whether it should be dealt with under BEPS Action 4 to ensure equal treatment of hybrid and non-hybrid payments. Again, if a "bottom-up" approach is adopted, this would be clearer.

- **Use of hybrids to avoid double taxation:** ICC notes that in some cases, taxpayers use hybrid entities and instruments to achieve self-help relief from double taxation (for example, resulting from non-creditable withholding taxes, application of loss expiration rules and inconsistent application of the PE concept and the arm's length principle). As the Discussion Draft stands, ICC is concerned that the proposed rules would make this form of relief impossible. The OECD's work on dispute resolution is a critical component of providing the certainty that business needs by addressing the double taxation issues that MNCs currently face and that a number of new international tax rules will create (including the proposals on hybrid mismatches and tax treaty abuse).

ICC believes that the Discussion Draft focuses too heavily on eliminating tax arbitrage without allowing the time to fully understand the potential unintended consequences of the proposals. Although ICC understands the political imperative behind this project, and the need to move quickly, ICC believes that not every issue needs to be resolved immediately. Decisions that could have potentially negative and unintended consequences for the wider economy should be well considered. Arbitrage is an important part of the issue, but equally important is the creation of a proportionate and workable approach that provides the stability and certainty that businesses need to invest.