European Association for Investors
in Non-Listed Real Estate Vehicles

MARLIES DE RUITER, HEAD
TAX TREATIES, TRANSFER PRICING AND FINANCIAL
TRANSACTIONS DIVISION, OECD/CTPA

2 RUE ANDRE PASCAL
75016 PARIS
FRANCE

Date: 16 June 2015

Subject: INREV's response to OECD's "Revised Discussion Draft BEPS Action 6: Prevent Treaty Abuse"

Dear Ms De Ruiter,

Please find attached INREV's response to OECD's "Revised Discussion Draft BEPS Action 6: Prevent Treaty Abuse", 22 May 2015 – 17 June 2015.

We hope again to provide a meaningful contribution to your work to support the development of a sound regulatory framework and remain available should you have any specific questions about the non-listed real estate fund industry.

Kind regards,

Matthias Thomas

Matthias Thomas

Chief Executive INREV

Attachment:

INREV response to OECD's "Revised Discussion Draft BEPS Action 6: Prevent Treaty Abuse", 22 May 2015 - 17 June 2015"

Submitted via email: taxtreaties@oecd.org

About INREV: the voice of the European non-listed real estate investment industry

INREV is the European Association for Investors in Non-Listed Real Estate Vehicles. We provide guidance, research and information related to the development and harmonisation of professional standards, reporting guidelines and corporate governance within the non-listed property funds industry across Europe.

INREV currently has 368 members. Our member base includes institutional investors from around the globe including pension funds, insurance companies and sovereign wealth funds, as well as investment banks, fund managers, fund of funds managers and advisors representing all facets of investing into non-listed real estate vehicles in Europe.

Our fund manager members manage more than 500 European non-listed real estate investment funds, as well as joint ventures, club deals and separate accounts for institutional investors. INREV's members represent almost all jurisdictions of the European Union's internal market and a range of underlying long-term investment vehicle structures, both CIVs and other non-listed real estate investment vehicles, the vast majority of which are Alternative Investment Funds ("AIFs") subject to regulation under the European Alternative Investment Fund Directive ("AIFMD").

Comments regarding the Discussion Draft on Treaty Abuse

INREV welcomes the opportunity to comment on the recent OECD Revised Discussion Draft: BEPS Action 6: prevent treaty abuse (the "Revised Discussion Draft"). We are very pleased that the OECD seeks the view of the stakeholders in the investment management industry in order to find appropriate solutions for CIVs and non-CIVs in connection with the work on BEPS Action 6 – Treaty Abuse.

As we have previously stated, INREV shares the concerns of the G20 and the OECD that action is needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it. INREV also supports a coordinated and comprehensive international approach to tackle these important issues.

INREV and other real estate associations have made submissions in response to the various BEPS Action 6 consultation drafts, noting that proposed measures could inadvertently have a significant negative impact on the future development of institutional real estate investment and institutional investment in related sectors such as infrastructure that generally use the same or very similar investment fund structures. The potential loss to the European economy of the benefits of investment in real estate and infrastructure funds, in terms of economic stimulation, job creation and growth, would be incalculable.

As we have argued in our previous submissions, the policy defined by the OECD in the 2010 CIV report should be upheld: the goal should be to put the investors in non-listed real estate vehicles in the same tax position that they would be if they invested directly in the underlying assets. In other words, there should be tax neutrality between direct investments and investments via a non-listed real estate fund or other investment vehicle, whether it is a CIV or a non-CIV.

In addition, we would again highlight that the various developments in the field of international transparency, including FATCA, CRS, EU Savings Directive, as well as the EU AIFM Directive, significantly mitigate the risk of non-listed real estate funds and other investment vehicles being used for inappropriate reasons including tax avoidance; most of these vehicles are entities with regulatory reporting obligations under the recently enacted transparency and regulatory supervision regimes.

Issues related to CIVs and the LOB rules

INREV welcomes the inclusion of clause 2(f) regarding CIVs into the LOB clause in the annex of the discussion draft. However, we note that this same clause is not included in the new simplified LOB clause and we would suggest that clause 2(f) should be included within the simplified LOB as well.

Reducing the equivalent beneficiary threshold to 75% within the simplified LOB would also be helpful for intermediaries in investment fund structures. In addition, we would urge to OECD to provide clarity on what these rules will mean at a practical level before they are implemented. In particular, it would be useful to provide examples regarding what evidence of ownership should be sufficient to assure tax authorities that investors in a fund structure are in fact equivalent beneficiaries.

Suggestions related to non-CIVs

We note the statement in section 22 that most comments to the previous Public Discussion Draft did not sufficiently take into account the OECD's treaty-shopping concerns and would like to make a suggestion regarding how to address the treaty shopping concerns for non-CIVs. We also note the CFA's line of thinking and possible options for the upcoming June meeting mentioned in section 24 and support those efforts.

We would suggest that the OECD's treaty shopping concerns for non-CIVs could be addressed by granting treaty benefits if one of the following conditions is fulfilled:

1. In its jurisdiction of residence, the non-CIV maintains an 'active investment management business enterprise' involved in the management of the non-CIV, similar to the 'active business enterprise' illustrations in Example H on page 35 of the Public Discussion Draft. As in these examples related to active business enterprises, with an increased substance level (constituting an 'active investment management business enterprise') it would generally not be reasonable to deny treaty benefits to non-CIVs (see further explanation below); or

2. The non-CIV maintains an adequate percentage of equivalent beneficiaries, directly or indirectly.

In order to reflect the diversity of non-CIV legal structures, this rule should apply to:

- non-CIVs that are internally or externally managed in the jurisdiction of residence; and
- directly or indirectly wholly owned entities, resident in the non-CIV jurisdiction ('SPVs').

Regarding the first condition, we acknowledge that Example H is written for a regional company held by a publicly-listed company, not for a non-CIV held by various investors. Nevertheless, they share several important characteristics:

- Both the regional company and the non-CIV are set up in an intermediate country for valid business reasons: in the case of a regional company, in a jurisdiction that neighbours group subsidiaries, therefore allowing the efficient provision of group services; and in the case of a non-CIV, in a jurisdiction that has a robust regulatory environment and fund infrastructure, therefore allowing professional operation and distribution of non-CIVs while ensuring investor protection.

- As intermediate entities, both find themselves facing a similar tax treaty challenge: whether source income country governments will be willing to grant treaty benefits to them as an intermediate entity.

In practice, the legal structures of non-CIVs takes a wide variety of forms. Non-CIVs can be either internally or externally managed. Moreover, some non-CIVs tend to centralise their functions in a separate central fund management entity. In addition, investment structures of non-CIVs are typically comprised of one or more layers of wholly owned SPVs, both for legal, business operations or tax neutrality reasons.[1] Against this background, any treaty benefit rule should embrace all these various legal structures. In order to do so without affecting the treaty shopping concern, the rule on granting treaty benefits to non-CIVs should refer to the jurisdiction instead of the legal entity. By referring to an active investment management business enterprise domiciled in the same jurisdiction as the SPV or non-CIV, the treaty benefit rule proposed above includes the various non-CIV legal structures within its scope while respecting the treaty shopping concern.

Acknowledging that a publicly-listed company and funds are different economic activities, our suggestion would require additional thought on a set of functions and circumstances which makes an 'active investment management business enterprise' comparable to the 'active business enterprise' in examples G and H.

We believe that the substance suggestion above would reflect current developments as investment managers more and more consolidate and centralise functions in regional operations, driven by various regulatory, commercial, tax, operational and capital requirements.

Further work and the costs of regulatory uncertainty

We would be pleased to discuss any of the issues and implications with the OECD and to assist in further work, as referred to above. We agree with the conclusions of the Working Party that it should continue to explore solutions to issues related to the treaty entitlement on non-CIV and hope that our suggestions offer a constructive contribution.

We join with other industry associations in urging the creation of a specific OECD Working Group dedicated to examining solutions to non-CIVs that will continue work beyond the current deadline of September 2015 for Action 6 under the BEPS project. Nevertheless, we would point out that the current regulatory uncertainty surrounding future eligibility of non-CIVs to the benefits of double tax treaties is already casting a long shadow.

Given the critically important contribution of institutional real estate investment in the real economy and its impact on economic growth and job creation, this uncertainty should be resolved as soon and clearly as possible. This should be achieved in a way that allows investors in unlisted real estate funds, which are primarily pension funds and insurance companies, to obtain tax certainty that is both non-discriminatory and avoids double and, in some cases even, triple taxation.

[1] The same applies for a typical regional holding company; this may be addressed in further working out Example H.