The Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions

**Article 29(8) OECD MC 2017**

1. Where does the provision come from?
   - **1992 OECD Triangular Report**: loophole in OECD MC – change of the Commentary on Art. 24(3)
   - **U.S. tax treaty policy**: 1992 U.S.-Netherlands DTC first DTC that contains triangular provision
   - **Tax planning**: PE Finance Rulings and finance branches

2. What is the scope of the provision?
   - **Conditions for the provision to apply**
   - **Consequences if conditions are fulfilled**
   - **Exceptions**

3. What is the relationship with other anti-abuse provisions?
   - **Other tax treaty provisions**: PPT, LOB, Preamble ...
   - **Domestic anti-abuse provisions**: GAAR, CFC ...
   - **European law**: fundamental freedoms, ATAD, anti-abuse doctrine, direct tax directives

4. Is there still room for abuse? Are also genuine transactions covered?
   - **Situations covered**: intentionally covered/unintentionally covered
   - **Situations not covered**: intentionally not covered/unintentionally not covered

5. Do we need Article 29(8) OECD MC?
   - **If yes**: how can the wording be improved? Other recommendations?
   - **If no**: how to address the issue?

**Why a doctoral thesis on Article 29(8) OECD MC?**

- **Growing importance**: since the provision is in the OECD MC, states have to take position
- **Lack of information in BEPS Reports**: little information on origin and necessity of the provision
- **Research gap**: no detailed study of origin, scope and impact available

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**State R Exemption**

1) If no DTC
   - possible triple taxation
2) If DTC following OECD MC
   - R-S DTC: Reduced WHT
   - R-PE DTC: Exemption
   - S-PE DTC: N/A
   - PE State: low taxation

Result: overall low taxation

**State S denies benefits if**

- State R exempts income
- Tax in PE state is less than
  1) [Rate to be determined]
  2) 60% of tax in State R

**Exceptions**
- Active conduct business
- Bank/Insurance companies
- Competent Authority

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**Enterprise**

**Entry**

**State PE**

**Low Taxation**

**Article 29(8) OECD MC**

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    2) 60% of tax in State R

- **Exceptions**
  - Active conduct business
  - Bank/Insurance companies
  - Competent Authority