



Corporate tax alert Belgium

BEPS update: Tax treaty abuse and feasibility of multilateral instrument



Download the Deloitte Belgium mobile App
A wealth of information within your finger's reach

An Android version will be available at a later point in time

The following is a BEPS update on action 6 regarding tax treaty abuse and action 15 regarding the development of a multilateral instrument.

BEPS Action 6: Preventing the granting of treaty benefits in inappropriate circumstances

On 16 September 2014, ahead of the G20 Finance Ministers' meeting on 20-21 September, the OECD published seven papers as a first tranche of deliverables under the Base Erosion and Profit Shifting ('BEPS') Project. The OECD will be continuing its work on the remainder of the 15 Actions on BEPS throughout 2015. It is clear that the G20 and OECD governments intend that recommendations under each of the BEPS Actions will form a comprehensive and cohesive approach to the international tax framework, including domestic law recommendations and international principles under the model tax treaty and transfer pricing guidelines. As a result, the proposed solutions in the first seven papers, while agreed, are not yet finalised and may be affected by decisions and future work on BEPS in 2015.

OECD proposals

Prevention of abuse: At a minimum, tax treaties should include either:

- i. a principle purposes test ('PPT') rule;
- ii. a limitation on benefits ('LOB') rule supplemented by a mechanism, such as a restricted PPT rule, that would deal specifically with conduit arrangements; or
- iii. a combined approach (i.e. including both LOB and PPT rules).

Certain targeted anti-avoidance clauses are also proposed, together with changes to the title, preamble and Commentary on the OECD Model Tax Convention to clarify that the prevention of tax evasion and avoidance, specifically including but not limited to treaty shopping, is one of the purposes of a double tax treaty.

Limitation on benefits rule: A specific anti-abuse rule is proposed based on the LOB provision already included in many US treaties. The rule is broadly designed to limit treaty benefits to companies with sufficient presence in the relevant country, based on their legal nature, ownership and activities. There are some new proposals like for instance optional clauses on the treatment of Collective Investment Vehicles ('CIVs'); competent authorities' considerations for discretionary relief, etc. There are also proposed amendments to the Commentary on the OECD Model Tax Convention, such as discussion of what constitutes an 'active business' for the purposes of LOB, which indicates that a company functioning solely as a headquarters company could have difficulties in meeting the test.

LOB – derivative benefits clause: The LOB proposals provisionally include a ‘derivative benefits’ clause, which would allow a treaty country to look through to the shareholders where the shareholders would also be entitled to benefits under a treaty. Negotiating states would be given the flexibility to restrict the clause to dividend income. The inclusion of the derivative benefits clause is based on an assumption that other BEPS Actions will address specific concerns which may arise from its inclusion, and this will therefore be re-examined in 2015.

Principle purposes test rule: The paper proposes a broadly drafted general purpose rule aimed at removing treaty benefits where one of the principal purposes of arrangements or transactions is to obtain treaty benefits.

Determining treaty residence: The existing ‘place of effective management’ tie-breaker clause for determining treaty residence is to be replaced by a requirement that the competent authorities of the two countries endeavour to determine residence. Countries which share the view that the ‘place of effective management’ rule was not being abused can continue to use it.

Minimum shareholding period re dividends: Reduced rates of withholding tax applicable to non-portfolio dividends will be restricted to shareholdings that are owned throughout a 365-day period that includes the date of the dividend payment, taking into account any internal reorganisations in the period.

Withholding taxes on payments to permanent establishments: There will be restriction of relief from withholding taxes on payments to a permanent establishment in a third country with a low rate of tax, where the permanent establishment’s profits are exempt from tax in the resident country.

Timetable

Further work will be undertaken in 2015 ahead of the multilateral instrument to implement changes, in particular in respect of the treatment of CIV and non-CIV funds, and on the implementation of minimum standards.

BEPS Action 15: Developing a multilateral instrument to modify bilateral tax treaties

The OECD has published a report in relation to Action 15, titled ‘*Developing a Multilateral Instrument To Modify Bilateral Tax Treaties*’ as part of this first tranche of deliverables.

Deloitte Comments

The report confirms that a multilateral instrument is feasible in legal and practical terms, and the most effective way of implementing treaty outcomes under the BEPS project. The process of implementation will not be without technical issues, such as ensuring the maintenance of national sovereignty over bilateral treaties, ensuring transparency and clarity as well as compatibility with other multilateral obligations such as, for example, the European Union treaties.

Business will welcome an efficient multilateral dispute resolution procedure (a multilateral mutual agreement procedure) where it results in an outcome binding on the tax authorities within a reasonable timeframe.

OECD Proposals

The OECD recognises that updating more than 3000 existing bilateral treaties (varying widely in their details) for any BEPS recommendations would require significant time and resources.

The report is an analysis of the benefits, feasibility and tax and public international law issues relating to the development of a multilateral instrument, which would have the same effect as simultaneous renegotiation of the bilateral treaties that are currently in effect. The report concludes that such a multilateral instrument is both desirable and feasible, and that a mandate should be quickly developed for the instrument to be implemented.

The report concludes that the multilateral instrument will sit alongside existing bilateral tax treaties. This option was preferred over others such as an instrument that replaces existing tax treaties (with issues for sovereignty and existing agreements) or one that directly modifies existing treaties (considered too cumbersome). The main advantages identified by the report of the approach of preserving the bilateral nature of tax treaties are (i) ensuring that the multilateral instrument is highly targeted; (ii) allowing existing bilateral treaties to be modified in a synchronised way; and (iii) allowing BEPS abuses to be swiftly curtailed and enable governments to achieve their international tax policy goals without violating existing bilateral treaties.

The report identifies a number of areas where a multilateral instrument may be useful, including potentially addressing abuse in cases of dual residence, transparent entities (hybrids), and ‘triangular cases’ of payments to permanent establishments from third countries. The report suggests that permanent establishment definition amendments will require flexibility given existing country practices, but that boundaries will be required to ensure a consistent and coherent outcome. Similar issues arise with other treaty amendments.

Notably, the report identifies that the multilateral instrument could be a basis for multilateral mutual agreement procedures to allow dispute resolution between several countries at once. This would assist in particular with complex transfer pricing matters, and may be of significance in relation to the likely increase in the use of the transactional profit split method for cases involving, for example, intangibles. In addition, the report notes that the multilateral instrument could be used to assist with confidentiality issues in relation to the sharing mechanism for the country-by-country report and for allocation of interest deductions.

A key theme of the report is the importance of respecting sovereign autonomy in tax matters and that countries will only be bound by amendments to which they have consented. An Annex presents a range of mechanisms which could be used in the development of a multilateral instrument, drawing on examples that have been successfully implemented in relation to other areas of international law.

Timetable and Next Steps

The report concludes that the multilateral instrument should be negotiated through an International Conference of OECD, G20 and other interested countries. The Conference's objective will be to implement the BEPS outputs related to treaties and also to recommend possible mechanisms for implementation of future changes to the model tax conventions. It is recognised that the treaty-based BEPS actions must be completed before the substantive components of the multilateral instrument can be finalised, but the report recommends that the International Conference begins its work in early 2015.

Forthcoming Deloitte EMEA Dbriefs Webcast

Deloitte's Dbriefs webcast programme will include a discussion of the recent OECD actions. The links to the full range of webcasts is available via the links for [Asia Pacific](#), [EMEA](#), and the [United States](#).

In addition please refer to the Deloitte [BEPS site](#) which has useful resources and updates.

Contacts

Any questions concerning the items in this publication? Please contact your usual tax consultant at our Deloitte office in Belgium or:

- Pascal Van Hove, pvanhove@deloitte.com, + 32 2 600 67 70
- Patrick Cauwenbergh, pcauwenbergh@deloitte.com, +32 2 600 69 27
- Mieke Van Zandweghe, mvanzandweghe@deloitte.com, + 32 2 600 67 33

For general inquiries contact:

bedeloittetax@deloitte.com, + 32 2 600 60 00

Be sure to visit us at our website: <http://www.deloitte.com/be/tax>



Deloitte Belgium

Berkenlaan 8A, 8B, 8C
1831 Diegem
Belgium

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries and territories, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte's more than 200,000 professionals are committed to becoming the standard of excellence.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

Click [here](#) to (un)subscribe or modify your subscription.

© 2014. For information, contact Deloitte Belgium.