

## BEPS Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

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.

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 consider provision for multilateral mutual agreement procedures to allow for 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.

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