

Ad-Hoc Group on the Multilateral Instrument
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Comments on the OECD Public Discussion Draft entitled “BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures” 31 May 2016 – 30 June 2016

The Confederation of Swedish Enterprise is Sweden’s largest business federation representing 50 member organizations and some 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Discussion Draft entitled "BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures" 31 May 2016 – 30 June 2016 (hereinafter referred to as the Draft).

The Confederation of Swedish Enterprise appreciates the efforts by the OECD and the Ad Hoc Group to develop a multilateral instrument to implement the tax treaty related BEPS measures. A swift and uniform implementation of the BEPS project are important to ensure certainty for business. Without swift implementation there is a clear risk of an increasing number of disputes, with double-taxation as a potential outcome.

The development of the multilateral instrument is without a doubt a delicate matter that is key for the BEPS project to be successful. We believe that the business community can be of great assistance in the development of the multilateral instrument through the consultation process. However, it would be much easier to leave comments on the draft text of the multilateral instrument rather than on certain technical questions such as in this consultation. We therefore encourage the Ad Hoc Group to release the draft text for public consultation. There is clearly a difference between other treaty negotiations and the negotiation of the multilateral instrument. As stated in the Draft the Ad Hoc group does not have the mandate to change the substance of the BEPS outputs (except MAP arbitration). The fact that the content basically already is public knowledge makes it even more difficult to understand the need for confidentiality. In addition, also in other bi- and multilateral treaty negotiations it is not uncommon to have an ongoing dialogue between the government and

business during the process, even though the treaty draft itself is confidential. We understand that there is a very tight time schedule for the development of the multilateral instrument, but hope that the Ad Hoc group will give business and others the possibility to leave comments on the draft text of the multilateral instrument.

Comments are requested on the technical issues that may arise from implementing the treaty-related BEPS measures in the context of the network of existing bilateral tax treaties. In the following we focus our comments according to this request.

The Confederation of Swedish Enterprise would like to highlight the need for mandatory binding MAP arbitration. From a business perspective, it is a very important provision that is key in avoiding double taxation. At the moment 20 countries have agreed to include such a provision. Although this is a good start, it is of utmost importance to get more countries on board. As far as an optional provision on mandatory binding MAP arbitration is concerned, we believe that “last best offer”/ “baseball arbitration” should be considered since this type of arbitration provides a quick and efficient way of resolving disputes. However, any type of mandatory binding arbitration is better than none at all. Therefore the optional provision should not exclude any other forms of arbitration. Giving flexibility to countries in the optional provision is probably needed to increase the number of countries to commit to mandatory binding arbitration.

In relation to “compatibility clauses”, we are not convinced that such clauses are a possible way forward. There are thousands of treaties that will be affected by the multilateral instrument if all 96 countries agree to sign it. To design a clause applicable to all of them will most likely lead to uncertainty regarding how different provisions in different treaties are affected.

An issue in developing the multilateral instrument (perhaps the most important issue) is what level of flexibility countries should be granted. Should every country have the possibility to “cherry pick”, i.e. choose freely what parts of the multilateral agreement they wish to adopt? This would no doubt facilitate more countries to sign the agreement. At the same time, it would make it more difficult to overview what has been agreed between countries. Alternatively, should the agreement be more of an all or nothing product leading to fewer signatories but at the same time a more uniform implementation. Although not an easy question to answer, we lean towards the first-mentioned alternative, i.e. a more flexible approach.

One way forward in designing the multilateral instrument could be to make the parts of the BEPS project that constitute minimum standards mandatory and the rest optional. This would mean that the minimum standards in Action 6 (treaty abuse) and Action 14 (Dispute resolution) would be mandatory, while Action 2 (hybrid mismatch arrangements) and Action 7 (Preventing artificial avoidance of PE status) would be optional. Since all countries taking part in the BEPS project have agreed on the minimum standards, it should not be associated with too much hesitation to get

countries to sign up to this also in the multilateral instrument. Action 2 and 7 are only recommendations and may be more difficult to get an agreement on.

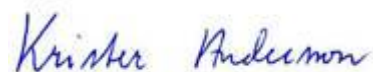
However, if not enough countries are willing even to sign up to a minimum standard, even more flexibility should be carefully considered, including letting countries choose exactly what parts of the multilateral instrument they wish to adopt.

Another request for input is on tools, such as an explanatory statement or commentary, to ensure consistent applications of the provisions included in the multilateral instrument. Such tools will be of great importance, especially given the fact that the multilateral instrument will be negotiated in English and French. To ensure consistent application also after translation to other languages, clear guidance is of utmost importance. However, we find it difficult to elaborate on what types of tools that could be most useful, without knowing the context of their application.

One thing that must be clearly stated in the multilateral instrument is how the new guiding tools relates to older ones. Preferably, this could be done by stating that the old commentary is replaced by the new one. After all, we do not want a situation where it is unclear which commentary that should be consulted to interpret the provisions from the multilateral instrument.

On behalf of the Confederation of Swedish Enterprise

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