

Base Erosion and Profit Shifting (BEPS)

Public Discussion Draft

BEPS ACTION 15

**Development of a Multilateral
Instrument to Implement the
Tax Treaty related
BEPS Measures**

31 May - 30 June 2016



REQUEST FOR INPUT ON THE DEVELOPMENT OF A MULTILATERAL INSTRUMENT TO IMPLEMENT THE TAX TREATY-RELATED BEPS MEASURES

1. Background

1. The OECD/G20 Base Erosion and Profit Shifting Project produced a number of recommendations that would be implemented through amendments to bilateral tax treaties. If undertaken on a treaty-by-treaty basis, the sheer number of treaties in effect would make such a process very lengthy. Recognising the need for an efficient and effective mechanism to implement the tax- treaty related measures resulting from the BEPS Project, Action 15 of the BEPS Action Plan called for the development of a multilateral instrument.

2. Drawing on the expertise of public international law and tax experts, the report “Developing a Multilateral Instrument to Modify Bilateral Tax Treaties” analysed the possibility of developing a multilateral instrument in order to allow countries to swiftly amend their tax treaties to implement the tax treaty-related BEPS recommendations. It concludes that such a multilateral instrument is not only feasible but also desirable, and that negotiations for the instrument should be convened quickly.

3. Based on this report, an Ad Hoc Group was established on 27 May 2015 with the objective of developing a multilateral instrument to modify existing bilateral tax treaties in order to swiftly implement the tax treaty measures developed in the course of the OECD-G20 BEPS Project. The Ad Hoc Group now includes 96 countries all participating on an equal footing, as well as a number of non-State jurisdictions and international organisations participating as Observers. The purpose of the multilateral instrument is to modify existing tax treaties to implement the tax treaty measures developed through the BEPS Project. As a result, with the exception of the development of a MAP arbitration provision (as discussed in section 2 below), the mandate of the Ad Hoc Group does not include changing the substance of the BEPS outputs or creating new measures that were not developed during the BEPS Project.

4. The Group began its work on 27 May 2015, and aims to conclude its work and open the multilateral instrument for signature by 31 December 2016. Development of the multilateral instrument is currently in progress. As with other bilateral and multilateral treaty negotiations, the draft text of the multilateral instrument is the subject of intergovernmental discussions in a confidential setting. Accordingly, the consultation has been organised around certain key technical issues and questions relating to the development of the instrument on which public input would be useful. Examples of the technical issues and questions on which input would be useful are outlined in sections 3 and 4 of this document. **Comments should be focused solely on technical issues of implementation and on issues related to the development of a MAP arbitration provision, rather than on the scope of the provisions to be covered in the multilateral instrument or on the substance of the underlying BEPS outputs.**

5. Comments and input should be submitted **by 30 June 2016 at the latest**, and should be sent by email to multilateralinstrument@oecd.org in Word format (in order to facilitate their distribution to government officials). Please note that all comments received will be made publicly available. Comments submitted in the name of a collective grouping or coalition, or by any person submitting comments on behalf of another person or group of persons, should identify all enterprises or individuals who are members of that collective group, or the person(s) on whose behalf the commentator(s) are acting. Persons and

organisations who submit comments on this document are invited to indicate whether they wish to speak in support of their comments at a public consultation meeting that is scheduled to be held in Paris at the OECD Conference Centre on 7 July 2016 beginning at 10.00 am.

6. This consultation meeting will be open to the public and the press. To request to attend the public consultation, please click here [LINK] and follow the instructions. Due to space limitations, priority will be given to persons and organisations who register first and we reserve the right to limit the number of participants from the same organisations. This consultation meeting will also be broadcast live on the internet and can be accessed on line. No advance registration will be required to access the live broadcast.

2. The multilateral instrument

7. The multilateral instrument will modify existing bilateral tax treaties in order to swiftly implement the tax treaty measures developed in the course of the OECD-G20 BEPS Project. The provisions to be implemented include in particular:

- The treaty provisions developed under Action 2 of the BEPS Project (Neutralising the Effects of Hybrid Mismatch Arrangements), including (1) the revision of Article 1 (Persons Covered) of the OECD Model Tax Convention to address fiscally transparent entities, and (2) the measures to address issues with the application of the exemption method to relieve double taxation.
- The provisions developed under Action 6 (Preventing the granting of treaty benefits in inappropriate circumstances), including the minimum standard on treaty abuse, the introduction of a “saving clause” to make explicit that treaties do not restrict a State’s right to tax its own residents, and the specific anti-abuse rules related to (1) certain dividend transfer transactions; (2) transactions involving immovable property holding companies; (3) situations of dual-resident entities; and (4) treaty shopping using third-country PEs.
- Provisions developed under Action 7 (Preventing the Artificial Avoidance of PE Status), including (1) measures to address commissionaire arrangements and similar strategies; (2) modifications the specific activity exemptions under Article 5(4) of the OECD Model and the addition of an anti-fragmentation rule; and (3) measures to address the splitting-up of contracts to abuse the exception in Article 5(3) of the OECD Model.
- Measures included in the minimum standards and best practices produced under Action 14 (Making Dispute Resolution Mechanisms More Effective), including the changes to paragraphs 1 through 3 of Article 25 of the OECD Model, as well as the inclusion of paragraph 2 of Article 9 of the OECD Model.

8. In addition to the implementation of the measures described above, a number of countries declared their commitment to provide for mandatory binding MAP arbitration as a mechanism to guarantee that treaty-related disputes will be resolved within a specified time frame. An optional provision on mandatory binding MAP arbitration is being developed as part of the negotiation of the multilateral instrument. The

3. Technical Issues Arising from Development of the Multilateral Instrument

9. A number of technical issues arise from developing a multilateral instrument to modify bilateral tax treaties. These include, for example, issues related to:

- **The relationship between the provisions of the multilateral instrument and the existing tax treaty network.** Existing tax treaties vary widely from both model tax treaties and from each other. As a result, the multilateral instrument must be able to modify existing tax treaties effectively, either by adding a new provision where no provision exists or by modifying or superseding existing provisions. This can be done by including “compatibility clauses” that describe in detail under what circumstances the new provision is intended to be added to or replace the provisions of an existing tax treaty.
- **Ensuring consistent application and interpretation.** The tax treaty-related BEPS outputs include agreed Commentary to facilitate their interpretation. Ensuring that this Commentary will be used to interpret the provision of the multilateral instrument will be important. In addition, because the multilateral instrument must modify a large network of existing treaties, it cannot provide the level of detail that a bilateral protocol can. The multilateral instrument may therefore need to be accompanied by tools, such as an explanatory statement or commentary, to ensure consistent application of its provisions to diverse bilateral tax treaties. The production of consolidated versions of the underlying bilateral tax treaties is also being considered.
- **Modifying bilateral treaties in multiple authentic languages.** The multilateral instrument is being negotiated in English and French, and is expected to be concluded in only those two authentic languages, but will modify bilateral tax treaties concluded in many authentic languages. It will be important to ensure consistent application to those bilateral treaties despite differences of language.

4. Request for input

10. 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 particular, comments are requested with respect to:

- Technical issues that should be taken into account in adapting the BEPS measures to modify or supersede existing provisions of bilateral tax treaties that may vary from the OECD model, including:
 - Existing provision or types of provisions that serve the same purpose as the BEPS measures and that would need to be replaced
 - Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained
- The approach to be taken in developing the optional provision on mandatory binding MAP arbitration, taking into account that it would need to serve the needs of the countries that have already committed to implement mandatory binding arbitration, as well as countries that are considering committing in the future.
- The types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties.
- Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument.