

OECD/G20 Base Erosion and Profit Shifting Project

Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS



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A. Introduction

1. The Action Plan on Base Erosion and Profit Shifting (the BEPS Action Plan), published by the Organisation for Economic Cooperation and Development (OECD) at the request of the G20, identifies 15 actions to address BEPS in a comprehensive manner, and sets deadlines to implement those actions. Recognising that there will be a need to consider innovative ways to implement the measures resulting from this work, Action 15 of the BEPS Action Plan provides for the development of a multilateral instrument:

ACTION 15

Develop a multilateral instrument

Analyse the tax and public international law issues related to the development of a multilateral instrument to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties. On the basis of this analysis, interested Parties will develop a multilateral instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution.

2. Drawing on the expertise of public international law and tax experts, the report “Developing a Multilateral Instrument to Modify Bilateral Tax Treaties” (the Report) was approved by the CFA at its June 2014 meeting and delivered to the G20 in September 2014. The Report concluded that a multilateral instrument is desirable and feasible, and that negotiations for such an instrument should be convened quickly.

3. The Explanatory Statement accompanying the release of the 2014 deliverables recommended, therefore, that a mandate for the development of a multilateral instrument to streamline the implementation of the BEPS Action Plan be drafted for consideration by the CFA in January 2015.

4. At the meeting of the CFA Bureau Plus in September 2014, the delegates had an initial discussion of the elements of a draft mandate, as well as key issues regarding procedure and scope, based on a presentation by the Secretariat. Delegates expressed the view that the scope of the multilateral instrument should be limited to the implementation of tax treaty-related BEPS measures. It was agreed that the Secretariat would develop proposals for scope and process, along with pros and cons, for discussion and guidance at the next meeting of the Bureau Plus.

5. At the meeting of the CFA Bureau Plus in November 2014, the delegates discussed the elements of a draft mandate for the development of a multilateral instrument to streamline the implementation of tax treaty-related BEPS measures. It was agreed to develop a proposal for such a mandate for discussion and approval at the January 2015 meeting of the CFA.

6. This note highlights the elements of a mandate for the development of a multilateral instrument. It begins by discussing key issues considered in drafting the mandate, as well as recommended ways to address those issues. It then presents the mandate.

B. Key elements of the mandate

7. The mandate addresses the following key elements in order to ensure the efficient development of the multilateral instrument:

- the overall *objective* and intended scope of the work;
- the criteria for determining *participation* in the work;
- the *body* that will conduct the work;
- the *duration* of the work;
- the *governance* of the work, including the applicable rules and procedures; and
- the *funding* for the work.

1. Objective

8. As outlined in the Report, the main objective of a multilateral instrument would be to modify existing bilateral tax treaties in a synchronised and efficient manner to implement the tax treaty measures developed during the BEPS Project, without the need to expend resources individually renegotiating each treaty bilaterally. As a result, the mandate for developing the multilateral instrument should be limited in scope to modifying existing bilateral tax treaties to implement treaty-related measures developed in the course of the BEPS Project.

9. It would seem premature to include a detailed list of which tax treaty related BEPS outcomes would be included in the multilateral instrument, given that much of the substantive work is still ongoing. In addition, completing the remaining substantive work will require coordination with the other work under the Action Plan (see Action 3, for example, providing for “coordinat[ion] with other work as necessary”). Providing a detailed list of measures in advance may make it difficult to accommodate tax treaty-related measures that may be necessary to ensure this coordination.

10. As a preliminary matter, it appears clear that the negotiation of the multilateral instrument should include implementation of the tax treaty provisions on hybrid entities adopted during the course of the work on Action 2, the work to prevent treaty abuse under Action 6, the work to prevent the artificial avoidance of the PE standard under Action 7, the work to improve dispute resolution under Action 14, and any other treaty modifications developed during the course of the work on the remaining BEPS action items.

11. In addition, depending on the results of discussions to implement country-by-country reporting under Action 13, the negotiation could also include necessary modifications, if any, to bilateral tax treaties to provide for the exchange of such reporting. It would also include any changes to Article 9 of the OECD Model Tax Convention that may result from the work on Actions 8-10.

12. As part of the negotiation of the multilateral instrument, consideration will need to be given to whether each provision is optional, or whether it will be part of the minimum standard for joining the multilateral instrument. This will involve a balancing

of the need for flexibility in order to ensure broad adoption against the need to develop an instrument that will be effective in preventing BEPS outcomes among signatories. At the same time, the development of the instrument would not involve reopening issues that have already been decided at the level of the CFA and G20.

2. Participation

13. As described in the BEPS Action Plan and in the Report, it will not be compulsory to participate in developing the multilateral instrument or to sign it once it is finalised. Given that the goal of the instrument is to modify existing bilateral tax treaties to implement tax treaty-related BEPS measures, it is likely to appeal to a broad range of countries (both within the OECD and G20 and outside) that are concerned about abuse of their existing tax treaties. Development of the instrument should thus be open to all interested States who would participate on an equal footing in the negotiating group's meetings and fund its activities.

14. The mandate will also need to address whether or not non-State jurisdictions may participate in the negotiation, and if so, whether their participation will be on the same footing as the countries participating in the negotiations. Some jurisdictions have significant tax treaty relationships, and their participation in the process may be considered important to ensure that the multilateral instrument is as effective as possible at addressing BEPS issues involving these jurisdictions. Non-State jurisdictions would therefore be permitted to participate as Observers (i.e. able to participate in discussions but not in decisions) by specific invitation only. To ensure transparency, relevant international and regional organisations could also be invited to attend the discussions as Observers.

3. Body

15. The purpose of the work is to develop an instrument to implement the treaty-related measures developed during the BEPS Project across the existing tax treaty network in a synchronised and efficient manner, avoiding the need to individually renegotiate each treaty. In deciding upon the structure to be used for the development of the multilateral instrument, the following issues were taken into account:

- The process should be inclusive, and should be designed to encourage all interested States be they within the OECD and G20 members or beyond to join the process on an equal footing. Broader participation by interested countries will make it more likely to achieve the goal of implementing treaty-related measures across a broad network of tax treaties simultaneously, reducing the number of bilateral treaties that need to be amended through individual negotiations.
- The process should be flexible. The purpose of the work is to quickly and efficiently develop an instrument to implement measures that will have already been decided in substance. Although the body conducting the work needs to accommodate a large group of countries, it should be able to easily form smaller groups to conduct parts of the work as necessary.

- The process should be cost-efficient. To the extent possible, the body conducting the work should be able to rely upon existing resources and processes, including existing bodies with necessary expertise.

16. Given these objectives, it is proposed that the negotiation take place within an ad hoc non-permanent Group that is not a formal OECD body, but is convened under the aegis of the OECD and the G20 and served by the OECD Secretariat. The purpose of the ad hoc Group would be to develop 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 plenary of this Group would be the decision-making body, but technical sub-groups could be established as necessary by the Plenary to prepare the work efficiently. For administrative purposes, the ad hoc Group would be a new entity, but meetings could of course be scheduled back-to-back with meetings of Working Party No. 1 or the Global Forum on Tax Treaties, in order to take advantage of times when appropriate participants would be likely to be present. The Mandate of the ad hoc Group would run until finalisation of the multilateral instrument.

4. Duration

17. As noted in the Report, development of the multilateral instrument must be speedy, both to avoid uncertainty and to ensure cost-efficiency. As a result, the work should begin as soon as possible after the creation of the Group, and should be concluded as quickly as possible.

18. Work to develop the tax treaty measures to tackle BEPS is ongoing, and outputs of the remaining work will not be available until September 2015. Initial meetings to develop the multilateral instrument could, however, begin productively before then. For example, there will be a substantial number of questions to address in developing the framework for the multilateral instrument, including developing a preamble, language issues, and addressing in general terms the interaction with existing treaties and multilateral obligations. It would also be possible to begin work on the study of possible further steps to continue to streamline the implementation of future agreed changes to the OECD Model Tax Convention. Accordingly, the Group developing the multilateral instrument could begin meeting shortly after it is established, possibly during the first half of 2015.

19. In order to ensure speedy negotiation, the mandate should also set a timeline for the conclusion of negotiation and the opening of the multilateral instrument for signature. In this respect, it is proposed that the mandate set an objective to conclude the development of the instrument no later than 31 December 2016.

5. Governance

20. The work would be conducted within the administrative framework of the OECD and would be served by the OECD Secretariat. The Group's functioning would be governed by the OECD Rules of Procedure as well as the provisions of international law related to the development and conclusion of treaties. It is important to note that, as for all treaties, even after the conclusion of the text by the Group, each State will only be bound (subject to possible reservations) once it has signed and then ratified the multilateral instrument.

21. Close co-ordination with the CFA in its BEPS format (including the BEPS Associates) and its subsidiary bodies, which are developing the tax-treaty related BEPS measures, will be essential to ensure that the parallel streams of work remain on track. To ensure this co-ordination, the Group would provide periodic updates regarding progress made, and consult as necessary with the CFA and its subsidiary bodies. These issues, as well as the appointment of the Chair and Vice-Chairs and the composition of the Bureau of the Group would be decided at the Group's first meeting.

6. Funding

22. The work to develop the multilateral instrument will involve the creation of an independent Group the functioning of which would extend beyond the completion of the BEPS Project in September/December 2015. As a result, the process will require limited additional resources beyond those currently allocated to the BEPS Project. However, part of the resource needed is already covered with BEPS contributions and part of it could be funded by reallocation in 2016 of WP1 funding, as the negotiation of the multilateral instrument will have an impact on WP1 programme of work (reducing it). Moreover, the use of secondees, already in the Secretariat, might reduce the amount of needed cash contributions. Overall, it seems possible to avoid a cumbersome budget plan given that the gap to bridge is limited. The Secretariat is confident that some voluntary contributions, as planned in the current Programme of work and budget, should be sufficient to fund this action item. A description of the budget will be shared with the CFA before the first meeting of the ad hoc Group and the PWB will be modified as necessary.

C. Mandate

23. The mandate for the negotiation of a multilateral instrument on BEPS is set out on page 8.

A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS

Preamble

Recognising that Action 15 of the Action Plan on Base Erosion and Profit Shifting (BEPS) called for the development of a multilateral instrument to implement measures developed in the course of the work on BEPS and modify bilateral tax treaties;

Considering that the Report “Developing a Multilateral Instrument to Modify Bilateral Tax Treaties”, which was approved by the Committee on Fiscal Affairs and endorsed by the Leaders of the G20, concluded that a multilateral instrument is desirable and feasible, and that negotiations for such an instrument should be convened quickly;

Noting that the G20 Leaders Communiqué adopted in Brisbane on 16 November 2014 welcomes the significant progress of the Base Erosion and Profit Shifting (BEPS) Action Plan “to modernise international tax rules”;

The countries participating in the OECD-G20 BEPS Project have agreed to establish an ad hoc Group (hereinafter “the Group”) with the mandate set out below. They recognise that the Group is not a formal or informal OECD body and therefore participation of non-OECD members in the Group does not create, and cannot be interpreted to create, a precedent in the context of OECD procedures for the participation of non-members in OECD activities.

A. Objective

1. The Group shall develop a multilateral instrument to modify existing bilateral tax treaties solely in order to swiftly implement the tax treaty measures developed in the course of the OECD-G20 BEPS Project.

B. Participation

1. Membership of the Group is open to all interested States.
2. All members of the Group participate on an equal footing.
3. Non-State Jurisdictions can participate in the Group as Observers upon a specific invitation by the Group.
4. Relevant international and regional intergovernmental organisations can be invited by the Group to participate as Observers.

C. Duration

1. The Group will start its work no later than July 2015.
2. The Group will aim to conclude its work and open the multilateral instrument for signature by 31 December 2016.
3. The term of the mandate for the Group will end upon the opening of the multilateral instrument for signature.

D. Governance

1. The Plenary of the Group is the decision-making body of the Group.
2. The Plenary is assisted by:
 - a. A Bureau appointed by the Plenary of the Group, which will prepare and guide the work of the Group; and
 - b. Sub-groups or existing OECD bodies, as deemed appropriate by the Plenary.
3. The Plenary of the Group shall appoint a Chair and two Vice-Chairs at its first meeting, who are also Chair and Vice Chairs of the Bureau.
4. The Group is convened under the aegis of the OECD and G20 and is served by the OECD Secretariat.
5. The functioning of the Group and its sub-groups will be governed by the OECD Rules of Procedure and the provisions of international law related to the development and conclusion of treaties.
6. The Group will provide periodic updates to the Committee on Fiscal Affairs (hereafter “the Committee”) regarding progress made and will consult with the Committee and its subsidiary bodies as necessary and appropriate.

E. Funding

1. The functioning of the Group will be funded by its Members.
2. Members and Observers in the Group will be responsible for covering the costs of their participation in the work of the Group.

