Building a better working world

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Mr. Pascal Saint-Amans
Director
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
2, rue André Pascal
75775 Paris Cedex 16
France

By email: multilateralinstrument@oecd.org

Comments on the OECD Discussion Draft on BEPS Action 15: *Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures*

Dear Mr. Saint-Amans:

EY appreciates the opportunity to submit these comments to the OECD on its request for input on the BEPS Action 15: *Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures* (Discussion Draft).

Action 15 mandates the development of a multilateral instrument (MLI) to implement measures developed in the course of the work on BEPS and to modify existing bilateral tax treaties. Tax treaties are necessary to facilitate cross-border investment and provide a stable investment environment. A relatively abrupt change in a multitude of treaties in a short period of time could jeopardize current operating models of multinational corporations that rely on the existing tax treaty network. Therefore, it will be critical to find a way of ensuring that the development of the MLI, that proposes to modify existing bi-lateral tax treaties, preserves the continued reliability of the international tax treaty network and provides reasonable transition periods.

This will require effective implementation by tax administrations of the respective countries. In this regard, it will be important to develop a robust mechanism to ensure that a treaty that has been modified through the use of an MLI, itself a generally untested procedure, may produce clear and precise rules that are understood and agreed to on a bilateral basis.

Moreover, changes in the international tax environment as a result of the implementation of BEPS recommendations by an increasing number of countries will likely give rise to more cross-border disputes. Thus, now more than ever, effective dispute resolution mechanisms will be required. We welcome the recommendations in the final report on Action 14, *Making Dispute Resolution Mechanisms More Effective*, both the minimum standard agreed therein and the commitment of an increased

number of countries to mandatory binding MAP arbitration. It is also critical that a mechanism be put in place to oversee the implementation of the recommendations under Action 14 to ensure that current and future disputes are resolved efficiently and effectively.

We understand that the negotiation of bilateral treaties or a multilateral treaty is confidential, but the use of the MLI to modify tax treaties is unprecedented and will undoubtedly impact stakeholders across the globe. We recommend that the discussion around the MLI be more inclusive. We believe that the development of the MLI could benefit from continued input from taxpayers, practitioners, and academic scholars. Therefore, we would encourage the OECD to release the specific draft MLI and any accompanying commentary for further input from stakeholders before finalization.

We thank you once more for the opportunity to comment on this Discussion Draft.

If you have questions or would like further information regarding any of the points discussed above, please contact Arlene Fitzpatrick (arlene.fitzpatrick@ey.com), Jose Antonio Bustos (joseantonio.bustos@ey.com), Ronald van den Brekel (ronald.van.den.brekel@nl.ey.com or me, Alex Postma (alex.postma@ey.com).

Yours sincerely
On behalf of EY

Alex Postma

Technical issues

1. Modification of the treaties and compatibility

The design and creation of the MLI to implement the BEPS recommendations is very important, but the process whereby bilateral treaties are modified as a result of the application of the MLI is equally important. We understand the desire to modify existing tax treaties in a swift manner, but such swift implementation should not be at the expense of clear and precise rules that must be understood by taxpayers and governments alike to avoid unnecessary cross-border disputes. In addition, in order to preserve a stable environment for cross-border investment, any change to the tax treaty network as a result of the application of the MLI must have a reasonable transition period.

It is of great concern that some of the outstanding work of the BEPS project that has a direct impact on the MLI is not yet finalized. For example, there is the outstanding work on treaty entitlement of non-CIVs funds, the definition of pension funds, as well as under Action 6, treaty abuse. In addition, the work on PE profit attribution could be relevant to any consideration of the PE recommendations under Action 7. Some of the guidance that will be included in those outstanding reports would be important for the suggested interpretative commentary of the MLI.

2. Categorization, minimum standards and flexibility

The final outcome of the BEPS project can be categorized into minimum standards, reinforced international standards, common approaches and best practices. Those provisions that have been designated as minimum standards could be implemented by all signatories of the MLI thereby avoiding re-negotiation by treaty partners that could delay the implementation process of the MLI. For example, a provision in the MLI that identifies the particular treaty provision that is being superseded by a specific new treaty provision that has been agreed to as part of the BEPS project would be more effective than a single and all-encompassing compatibility clause. Such compatibility clauses could create uncertainty as it may be unclear exactly which treaty provisions are being superseded. If a compatibility clause would be used, the compatibility clause should be detailed, defining its relationship with the existing bilateral treaty so that there is a clear understanding of the exact modification being made.

There are however, many differences in the bilateral treaty network that the MLI will need to take into account. In addition, beyond the minimum standards, parties may not be ready to accept the same level of commitment vis-à-vis all other parties, so that we would expect that the MLI includes a mechanism to allow countries to modulate their level of commitment depending on the jurisdiction in question (i.e., a system of notifications as to the level of commitment vis-à-vis different parties). Moreover, some of the minimum standards contain optional elements, i.e., the policymaker may choose among different recommended approaches rather than

completely replacing existing tax treaty articles with new articles. Thus, some level of flexibility will be necessary in order for the MLI to be effective. In these circumstances, to avoid any uncertainty, exact changes to the texts of treaties should be identified on a bilateral basis and agreement should be reached with respect to the actual textual changes that need to be made.

Whether a detailed compatibility clause is used or specific textual changes are agreed to, consolidated versions of bilateral treaties containing the revisions made as a result of committing to the MLI should be produced by bilateral treaty partners. This would eliminate inconsistencies or ambiguity by reflecting exactly which changes are being made to the existing bilateral treaty.

Changes to existing bilateral treaties enter into force only after the completion of the normal ratification procedures in each country. Thus, we recommend that there is a clear understanding of the ratification process of the MLI and how this affects existing bilateral treaties, as well as the applicable transition period necessary.

The Discussion Draft indicates that the MLI is being negotiated in English and French and that it is expected that those two languages will be the official languages of the MLI. As noted above however, to ensure consistency and a clear understanding of the rules that are being modified under the MLI, we recommend that a consolidated draft of bilateral treaties containing the revisions made be produced. Treaty partners could follow their specific country's ratification procedures, including translating the consolidated draft into the language that may be required or permitted under that country's law. We also recommend that an express provision in the consolidated draft indicating the official language be required. This would help the smooth ratification and interpretation of the changes made.

3. Consistent application and interpretation

To ensure consistent application and interpretation of the MLI, an interpretative commentary that has been agreed among participating countries should accompany the MLI. This would be a practical tool to enhance interpretation and ensure a common understanding (precedent with the commentary to the OECD Model Treaty, technical explanations that accompany treaties in some countries).

The commentary should provide background information and guidance as to the meaning of provisions and its relationship to the OECD Model Treaty commentary.

Input from stakeholders is also important. Thus we encourage that the accompanying commentary and/or any other explanatory document should be opened for comments and input from any interested party.

4. Developing the optional provision on mandatory binding arbitration

As we have stated in prior comment letters, having a dispute resolution mechanism such as mandatory binding MAP arbitration would significantly improve the

effectiveness of the MAP. This measure has proven extremely useful in practice for resolving disputes when negotiations do not lead to resolution. It also encourages a more disciplined approach to the dispute resolution process as a whole as there is an incentive to resolve the dispute without the need to proceed to arbitration.

A number of countries have already committed to this mandatory binding MAP arbitration in dispute resolution and a broader discussion of mandatory binding arbitration should be facilitated by the OECD so that the process may be fully understood by those hesitant to undertake this approach. It would also be an opportunity for countries that have already implemented this measure to share their experiences about the process as well as the legal hurdles that had to be overcome.

Although mandatory binding MAP arbitration is the ultimate tool for ensuring resolution of MAP cases and should be promoted as such by the OECD, policy or practical concerns have been raised by certain countries with respect to this particular approach. To the extent that those concerns might preclude the use of mandatory binding arbitration, further consideration of alternative arbitration mechanisms should be undertaken by the OECD so that as many countries as possible supplement existing dispute resolution mechanisms in their tax treaties with a commitment to arbitration.

To ensure some level of consistency in the approach, it will be important to ensure that certain design elements, including the following, are preserved in any alternative arbitration provision:

1) A commitment by countries to adhere to a defined timeline by which cases would move to the arbitration procedure if there is no resolution under MAP (e.g., if the MAP case has not been resolved after two years)
2) Agreement among countries with respect to the scope of cases to go to arbitration
3) A commitment by the signatories of the MLI to peer reviews whereby the process and time to resolve MAP cases could be evaluated as recommended under Action 14

It is recommended that a peer review process would: i) track how many MAP cases there are and the length of time that the cases go unresolved; ii) develop and maintain a platform for reporting unresolved MAP cases or bad administrative practices; and iii) make findings public. Consideration should also be given to establishing a forum within the OECD to permit oversight (e.g., Ombudsman) whereby taxpayers may provide direct feedback on MAP (especially the MAP acceptance process) and MLI interpretation matters. This process could be valuable for the peer review process mentioned above. This mechanism could also provide important insights on the continued improvement of the MLI and the global tax treaty network.