CONFEDERATION FISCALE EUROPEENNE

# Opinion Statement FC 15/2014

# on developing a multilateral instrument to modify bilateral tax treaties (BEPS Action 15)

**Prepared by the CFE Fiscal Committee**

**Submitted to the OECD**

**in December 2014**

*The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 32 professional organisations from 25 European countries (22 EU member states) with 180,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.*

*The CFE is registered in the EU Transparency Register (no. 3543183647-05).*

**Introduction**

This Opinion Statement relates to the report "Developing a multilateral instrument to modify bilateral tax treaties"[1] (hereinafter: the Report), presented on 16 September 2014 by the OECD, as a deliverable to Action 15 of the BEPS Action Plan.
Part I of this Opinion Statement comments on the concept of a multilateral instrument, while Part II deals with possible contents. In the following text, "multilateral agreement" is used for an agreement concluded via the multilateral instrument. Jurisdictions parties to this agreement are hereinafter referred to as signatories.
We will be pleased to answer any questions you may have concerning our comments. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

## I. Establishing a multilateral instrument

**The concept**

The CFE agrees with the necessity to develop a multilateral legal instrument to enable modifications of the international tax treaty framework in a quick, consistent, and coordinated way. We also agree to the idea that a multilateral instrument would modify but not replace existing tax treaties, thus leaving the bilateral nature of the tax treaty framework untouched.

A multilateral instrument will oblige governments to treat equally the jurisdictions which take part in it, making it more difficult for large economies to impose conditions on weaker counterparts.

We welcome that the Report underpins the principle of tax sovereignty, which any attempt to establish a multilateral instrument must never lose sight of. A multilateral instrument seeking to impose laws on countries which they do not agree with would not only be unacceptable from the viewpoint of democratic legitimacy and the principles of international law, but also politically unfeasible.

It also follows from the principle of tax sovereignty that, as a general rule, a multilateral agreement would not be open for further countries to join, unilaterally, under the same conditions. This seems logical, as a signatory will want to be able to decide with which countries it wants to cooperate. Any deviation from this (as considered on p. 43 of the Report) would need to be expressly stated in the agreement.

We fully agree that the procedures for ratification should be entirely governed by domestic law.

Moreover, the CFE is concerned with the ambitious timeline set within the BEPS Project on Action 15. In the CFE's view such multilateral instrument should be carefully considered and their impact on businesses and taxpayers carefully assessed. The success of a multilateral agreement will of course depend on the number of signatory countries, and experience shows that countries have always favoured bilateral agreements rather than implementation of multilateral agreements.

[1] http://www.oecd.org/tax/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-9789264219250-en.htm

**A flexible approach to different levels of commitment and opt-outs/-ins**(Section A.2.2.1. of the Report)

The Report mentions the practical necessity to allow for political concessions such as opt-ins and opt-outs (p. 17) and that countries may have differing levels of commitment towards different parties (p. 21) and advocates flexibility in these respects.

Although, in principle, options should be moderately applied in order not to endanger the overall goal of increasing the consistency of the international tax treaty framework, we welcome the suggested approach. The multilateral instrument is aiming to include a wide range of countries, including developing countries and financial centres, with wide differences in the established levels of cooperation and very different tax law and tax procedural regimes. Some of these countries provide for better protection of taxpayers and their data than others. States have to treat their taxpayers and their taxpayers´ data responsibly. It must therefore be possible to engage in closer levels of cooperation only with coun tries that provide sufficient safeguards.

A multilateral agreement should in no way hinder closer cooperation, e.g. at the EU level.

Moreover, the CFE agrees that "*Some provisions of the treaty-based portion of the BEPS Project require broad participation in order to successfully address BEPS concerns. Thus, to ensure a level playing field and fairly shared tax burdens, flexibility and respect for bilateral relations will need to be balanced against core commitments that reflect new international standards that countries are urged to meet and for which the multilateral instrument is a facilitative tool*" (p. 17 of the Report).

**Relation to existing bilateral agreements** (Section A.1.2 of the Report)

The Report suggests defining the relationship between the multilateral instrument and the existing treaties through compatibility clauses or "*conflict clause*" (p. 34-37). In our view, there cannot be a general rule on whether any difference or only an inconsistency between a multilateral and a bilateral provision will result in the modification of the latter. This will depend on the specific provision at issue: there may be provisions in a multilateral agreement which are meant to complement provisions in bilateral agreements, while other provisions in multilateral agreements may be exclusive. To ensure certainty, specific compatibility clauses should be included with the respective provisions in the multilateral agreement.

**Relation to bilateral agreements concluded after a multilateral agreement** (Section A.1.2.2. of the Report)

<u>Bilateral agreements between signatories</u>

The Report stresses that a multilateral instrument would not put in place agreements where they have not existed before (p. 19).

The Report subsequently raises the question of whether the conclusion of a multilateral agreement obliges all signatories to apply the same principles when concluding new bilateral agreements with each other.

In the interest of coherence of bilateral tax treaties and of the equality of countries concluding a multilateral agreement, the answer should be yes. If signatories were not bound by the multilateral agreement when concluding new treaties with each other, the possibility to terminate and renegotiate bilateral agreements would offer an easy way out of the obligations of the multilateral agreement.

Bilateral agreements between a signatory and a third country (Section A.1.3 of the Report)

A different question is whether signatories of a multilateral agreement would also be bound by its rules for new bilateral agreements concluded with third countries (non-signatories). Prima facie, one would not assume this, because, as the Report states, countries may have good reasons not to concede the same level of cooperation to every other country. The Report considers whether signatories could be requested "*to take into account as far as possible the provisions of the multilateral instrument when negotiating bilateral tax treaties with third parties*" (p. 41). However, as no concrete obligations can be derived from it, the practical value of such rule seems questionable.

There is also the possibility that a signatory become a third country (again) by withdrawing from the multilateral agreement. When renegotiating with this ex-signatory, the remaining signatories would not be bound by the multilateral agreement. It seems, however, that this possibility will have to be accepted, as otherwise a signatory could never escape the rules of a multilateral agreement unless it chooses to conclude treaties on matters covered by the multilateral agreement only with non-signatories. This would be a severe loss of tax sovereignty.

**Relation to EU law**

Both the OECD and the European Commission should pay close attention to the compatibility of a multilateral agreement with EU law, in particular the EU fundamental freedoms, to prevent the highly undesirable situation that EU countries will be obliged to withdraw from a multilateral agreement concluded in violation of EU law. If compatibility issues are not clear, and the European Commission decides to request a legal opinion from the European Court of Justice, the OECD and EU member states should consider awaiting such opinion before proceeding with the signing of the multilateral agreement.

**Entering into force of multilateral measures** (Section A.1.4. of the Report)

The report considers that there could be a mechanism providing that a measure would only come into force (among all signatories) once a certain number of countries have signed it (p. 41), which seems a workable solution. The CFE supports the possibility referred to in p. 42 of the Report to specify different dates for different provisions of the treaty to take effect.
From a practical perspective, there should be a regularly updated on-line scoreboard showing the stage of implementation in the signatory countries.

**Amendments of the multilateral instrument and standalone measures**

The multilateral instrument may be used to update elements previously introduced by multilateral instrument, or it may be used to introduce new matters. Each measure adopted by multilateral agreement should specify which of the two is the case. It has to be clear whether two or more measures build on each other and which are independent.

*Example: Multilateral agreement X has been concluded in 2018 and amended in 2022 (agreement Xa). Agreement Y has been concluded in 2021 but concerns a matter not dealt with in agreements X or Xa.*

It follows from the above that

a) *There may be countries that have signed agreement X but not agreement Xa.*

b) *For a tax treaty between a country that has signed agreements X and Xa and a country that has only signed agreement X, the rules of agreement X would apply.*

c) *Any country that wishes to sign agreement Xa would be required to accept agreement X.*

d) *A country that has signed the agreements X, Xa and Y cannot withdraw from agreement X without also withdrawing from agreement Xa, while it could remain signatory to agreement Y.*

**Direct effect** (Section 1. B of the Report – p. 17)

We agree with the OECD that an agreement concluded via the multilateral instrument has to be legally binding. In order to make this effective, a citizen or business from a jurisdiction bound by the agreement should be able to rely directly on the agreement, if his country or another signatory fails to implement the multilateral agreement into national law within the agreed time frame and citizens or businesses can derive a right from a provision of the agreement which is defined in a sufficiently clear way, similar to the doctrine of *direct effect* in EU law.

If, for political reasons, the granting of direct effect should not be feasible, an agreement should allow for damages against a country that fails to duly implement its obligations under the multilateral agreement.

**Provision on withdrawal from a multilateral agreement**

In the interest of legal certainty, the bilateral instrument should deal with the legal consequences of a withdrawal of a country from a multilateral agreement. It follows from tax sovereignty that such withdrawal must remain possible.

The Report suggests that bilateral agreements stay in place (although they might be superseded by the modifications). Accordingly, the withdrawal from a multilateral agreement would restore the legal situation before adoption of the multilateral agreement by this country. Thus, a withdrawal from the agreement would not force a country to renegotiate its entire treaty network. Given that the modifications undertaken by multilateral agreement might well be very limited in scope, we believe that this is an appropriate solution.

A subsequent question worth considering is to what extent the withdrawal of a country from the multilateral agreement gives other signatories a right to cancel their bilateral agreements with this country.

**Transparency** (Section A.3. of the Report)

Tax administrations, taxpayers, and tax advisers need certainty as to the rules that apply in a particular situation. We strongly agree with a need for transparency and welcome the idea of publicly accessible databases (p. 58) and an automatic notification system for stakeholders with the depository of the multilateral instrument (p. 60). In the CFE's opinion, anyone interested should be able to sign up for notifications. In particular, the following information must be accessible:

e) The text of a multilateral agreement (including commentary/protocols, where applicable);
f) Which (version of a) multilateral agreement applies between two or among several countries;
g) The dates of entering into force of multilateral agreements or particular provisions thereof;
h) Any use of permitted options or derogations or different levels of commitment;
i) Any bilateral tax treaties affected by a multilateral agreement. We suggest that this be done electronically, in a way that renders visible the relevant provisions of both the bilateral and the multilateral agreement. We would prefer this to a consolidated text showing only the modified bilateral agreements, as the way a bilateral treaty is modified by a multilateral agreement may require interpretation.

**Language issues** (Section A.3.2. of the Report)

By default, English should be the relevant language in which agreements should be concluded via the multilateral instrument, as it is the language understood in the largest number of jurisdictions. However, as the agreement will have to be incorporated into existing bilateral tax treaties, the texts will have to be translated into other languages by the respective countries. To ensure that several countries using the same language will translate a technical term in a uniform way, it would be useful if these countries agree in working groups on a common translation (see p. 61 of the Report). These translations could be annexed to the multilateral agreement.

**Effect on the tax adviser profession**

We also see a benefit for the profession of tax advisers, as a multilateral instrument will help harmonising technical tax language and indirectly also technical tax matters, thus facilitating cross-border activities of tax advisers. Differing national tax laws are the main reason why the current professional landscape for tax advisers is highly fragmented. This would also benefit businesses, which would find more easily a tax professional qualified to accompany their cross-border activities.

## II. Possible contents of a multilateral agreement

We consider that one of the primary functions of a multilateral agreement is an agreed set of definitions. As to the technical content of possible measures to be included in a multilateral agreement, we will comment on these more in detail in the context of other (BEPS) actions.

**Dispute resolution instrument**

The CFE welcomes the idea to introduce a dispute resolution mechanism by multilateral agreement (p. 18-19, 23-24). The CFE has been highly supportive of the idea of setting up a permanent arbitration tribunal for international tax disputes. We agree with the Report´s suggestion that such dispute resolution mechanism should apply to disputes between all parties of a multilateral agreement, whether or not they have concluded bilateral agreements with each other. A multilateral mutual agreement procedure (MAP) seems a good idea in theory, but, given the experience with the EU Arbitration Convention and the average duration of OECD MAP procedures[2], we believe that it will only become a success if there is a possibility to reach binding decisions within an acceptable time frame.

**Other technical issues**

a) Dual residence structures
   A clear provision addressing dual residence cases would be welcome. Notwithstanding, in order to ensure certainty, a case-by-case solution would be acceptable for both businesses and taxpayers only in residual situations.
b) Transparent entities in the context of hybrid mismatches
   Any remarks on the issue should take into consideration and wait for the outcomes reached under Action 2 of the OECD BEPS Action Plan.
c) Triangular cases involving PEs in third states
   CFE favours any solution which ensures consistency and brings further clarity in the framework concerning triangular cases involving PE. A multilateral instrument could overcome the difficulties which arise with bilateral treaties.
d) Treaty abuse
   We recognise that any definition of treaty abuse needs a certain level of flexibility in order to react to newly appearing arrangements and will be open to methods of legal interpretation, allowing to take into account more than the actual letter of the provision. Therefore, a prescriptive and exhaustive definition of abuse is not possible.
   This does not change the fact that a definition of treaty abuse should aim at full, not minimum, harmonisation, not leaving signatories the possibility to excessively evoke national anti-abuse rules going beyond the agreed definition. We have had such experience in some EU member states (i.e. Spain) where the minimum harmonisation undertaken in the current EU Parent-Subsidiary Directive 2011/96/EU (see Art.1 (2)) offers such possibility.

**Exchange of Country-by-Country reporting (CbCR) in the absence of a double tax treaty or a TIEA**

[2] OECD MAP statistics 2013: http://www.oecd.org/ctp/dispute/map-statistics-2013.htm

It is advisable that the exchange/sharing of CbCR be done under the exchange-of-information articles in tax treaties or tax information exchange agreements (TIEAs); notwithstanding the above, many developing countries (e.g. African countries) do not have a solid treaty network in place; therefore, as an alternative in the event of absence of a treaty, the exchange could also be carried out through this multilateral instrument. Specific criteria and guidance should be included in order to safeguard the confidentiality concerns of businesses, to ensure that the requested information is reasonable based on the risk under consideration, and, of course, to ensure a proper usage of the information.

**Beyond BEPS** (Section 2 of the Report, p. 25)

We agree with the Report that the multilateral instrument should not be designed exclusively for BEPS issues. Page 25 of the Report considers addressing a wider range of BEPS-related issues by multilateral instrument, including double taxation resulting from unilateral and uncoordinated responses to BEPS. Indeed a multilateral agreement should offer a reasonable trade-off between measures to counter BEPS and measures to alleviate the burden that these measures create for businesses. If only counter-BEPS measures are prioritised, there is a risk that all other measures will never be concluded.

A good example in the Report for maintaining the balance in a multilateral agreement is the suggested inclusion of rules regarding the confidentiality of information obtained by tax administrations (p. 25).

In addition, we support the idea that a multilateral instrument should be conceived in a dynamic way (p. 26), although, "*for the moment, it is important to keep the multilateral instrument narrowly targeted, and at the same time start a reflection on what further incremental opportunities may be available*" (p. 26).