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BUSINESSEUROPE POSITION ON THE PUBLIC DISCUSSION DRAFT ON BEPS ACTION 15: DEVELOPMENT OF A MULTILATERAL INSTRUMENT TO IMPLEMENT THE TAX TREATY RELATED BEPS MEASURES

Through its members, BusinessEurope represents 20 million European small, medium and large companies. BusinessEurope's members are 41 leading industrial and employers' federations from 35 European countries, working together since 1958 to achieve growth and competitiveness in Europe.

BusinessEurope is pleased to provide comments prepared by the members of its Tax Policy Group, chaired by Krister Andersson, on the OECD Discussion Draft entitled "BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax treaty related BEPS Measures" (hereinafter referred to as the Draft).

BusinessEurope fully supports fair tax competition and the objective to fight fraud and evasion as it creates strong competitive distortions at the expense of the vast majority of businesses who pay their taxes in full. We recognise the need to ensure that the international corporate tax system remains fit for purpose in light of challenges from increasing globalisation and particularly increasing digitalisation. For this reason, many BusinessEurope members have actively contributed to discussion at the OECD on the Base Erosion and Profit Sharing (BEPS) project through the BIAC.

In the context of the BEPS Project, the goal of a multilateral instrument is to expedite and streamline the implementation of the measures developed to address BEPS by modifying bilateral tax treaties. The number of bilateral tax treaties worldwide would mean that updating the treaty network one treaty at a time would take a substantial amount of time. This would not only mean that the implementation of certain BEPS measures would not be completed in a reasonable timeframe, but – more importantly – it would create a prisoner's dilemma for countries that could very easily result in further distortion of the global level playing field.

Therefore, BusinessEurope supports the development of 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. There is a clear need to coordinate the implementation of BEPS measures globally to prevent further distortion of the global level playing field. In this respect, we applaud the fact that the Ad Hoc Group now includes 96 countries all participating on an equal footing, as well as a number of international organisations participating as Observers to develop the multilateral instrument.



However, much more important than the function of the multilateral instrument as a carrier for the modifications to the global treaty network, is the precise content of the modifications that follow from the BEPS output that the multilateral instrument means to implement.

The initial and prime objective with tax treaties is and should continue to be to facilitate cross-border trade through the allocation of taxing rights between countries and to provide for mechanisms to eliminate double-taxation. This objective must also be safeguarded in the scope of the provisions of the multilateral instrument.

In addition to preventing double taxation there is a clear need for better and more efficient means of dispute resolution. Business expects that the implementation of BEPS measures will inevitably lead to more cases of double taxation. There need to be ways to resolve these if we are to foster cross border trade and investments and enhance a well-functioning and flourishing global economy.

BusinessEurope is therefore of the opinion that mandatory binding arbitration should be the norm. However, given the fact that some countries are still reluctant to adopt mandatory binding arbitration, an optional provision in the multilateral instrument would be the next best thing.

As to the approach to be taken in developing this optional provision BusinessEurope first of all is of the opinion that any form of mandatory binding arbitration in tax treaties is better than no provision at all. The possibility of mandatory arbitration will be tremendously helpful in better achieving a resolution in MAP procedures in the allotted time.

Insofar cases would have to be settled using mandatory binding arbitration BusinessEurope would say that as a rule business would have a preference for 'last-best-offer' or 'baseball arbitration' as this potentially would prove most effective in preventing drawn-out procedures. However, BusinessEurope is aware that not all countries would subscribe to this form of arbitration and therefore the optional provision should not exclude other forms of arbitration.

BusinessEurope finds it difficult to accept that the draft text of the multilateral instrument is to be kept confidential. Surely, there is a fundamental difference between other bilateral and multilateral treaty negotiations between governments and the design of the multilateral instrument under BEPS Action 15. Besides, even though business is not at the table at the other bilateral and multilateral treaty negotiations themselves, does not mean that governments do not seek the council of business in the run-up to these negotiations.

Exactly because this multilateral instrument must navigate between modifying existing bilateral treaties and respecting national sovereignty, more transparency regarding the draft texts and the scope of the provisions would enable business to make a much more meaningful contribution to help develop the multilateral instrument to be effective and efficient in realizing its objective.



BusinessEurope believes the existing bilateral treaty network should be considered as much as possible as start for the implementation especially when multiple options are made available. In those cases, some kind of bilateral agreement should underlie the multilateral instruments. As many bilateral treaties already address treaty abuse with clauses and implementation guidance along the lines of the BEPS Treaty Abuse recommendations, keeping compatible existing clauses in place would contribute to a swift implementation.

Obviously, in developing a multilateral instrument there is an inherent need to ensure that the provisions covered in the multilateral instrument are implemented and applied consistently and coherently throughout the world. For this purpose the technical instruments of compatibility clauses, commentary or explanatory notes and standardized translations all can serve a very useful role. Also other types of guidance or practical tools could be useful.

In any case, it is very difficult to speak to as to how these instruments could be best deployed without knowing the exact context in which they should be applied.

Certain details for implementation and interpretation can and should be found in the BEPS reports from October 2015, which were the result of an inclusive approach. More inclusive work would be required by OECD to develop positions needed to ensure an implementation of the BEPS recommendations. Specific examples include the work on the mandatory binding arbitration but also allocation of profits to PE. There is some clarity on how the expanded PEs would look like but no alignment on what that means on actual profit allocation and tax base determination.

BusinessEurope would urge the OECD therefore to reconsider and provide an opportunity for business to give input and make suggestions as to how the provisions of the multilateral instrument should be drafted to be best applicable in practice. It is then, of course, up to the Ad Hoc Group to decide whether or not they find the suggestions of business worthwhile to include in the final text of the multilateral instrument.

Such an approach would add to the spirit of openness and transparency of the process and should not interfere with the confidentiality of the ultimate intergovernmental discussions on the subject.
