

Developing a Multilateral Instrument to Modify Bilateral Tax Treaties BEPS Action 15

Univ. -Prof. Dr. Michael Lang

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- **Introduction: BEPS Action 15**
- **Technical challenges related to the drafting and implementation of the multilateral instrument**
 - **Modification of DTCs**
 - **Relationship between the multilateral instrument and DTCs**
 - **Providing flexibility to contracting states**
 - **Authentic languages and translations**
 - **Substantive provisions**
 - **Amendment and termination of the multilateral instrument**
- **Conclusions**

BEPS Action 15

- **The purpose of the multilateral instrument is to modify existing DTCs to implement tax treaty-related measures developed to end BEPS practices**
- **The idea behind is avoiding the cumbersome and time-consuming process of renegotiating +3,000 DTCs**
- **The negotiations of the multilateral instrument started on 5-6 November and will continue until 31 December 2016, when it is expected that the instrument will be concluded and opened for signature**
- **+90 countries are participating in the negotiations**

BEPS Action 15 (cont.)

- **Modifications expected to be introduced through the multilateral instrument:**
 - **A new rule to address dual-residence structures and transparent entities in the context of hybrid mismatch arrangements (Art. 2 OECD Model)**
 - **Modification to the concept of PE for addressing strategies that avoid PE status (Art. 5 OECD Model)**
 - **Commissionaire arrangements**
 - **Specific activity exemptions**
 - **Fragmentation of activities and splitting-up of contracts**

BEPS Action 15 (cont.)

- **Introduction of anti-abuse provisions to prevent the granting of treaty benefits in inappropriate circumstances**
 - **Limitation-on-benefit rule and/or principle purpose test (Art. X OECD Model)**
 - **Saving clause (Art. 1 OECD Model)**
 - **Tie-breaker rule for dual-resident persons other than individuals (Art. 4.3 OECD Model)**
 - **Dividend transfer transactions (Art. 10.2 OECD Model)**
 - **Capital gains derived from immovable property by holding companies (Art. 13.4 OECD Model)**
- **Improve dispute resolution mechanisms**
 - **Agreed minimum standards (Paragraph 1 to 3 Art. 25 OECD Model)**
 - **New provision on mandatory binding MAP arbitration for the 20 (or more) states that agreed to it**

Modification of DTCs

- **The multilateral instrument will not terminate DTCs in force**
- **DTCs will continue to play the main role in defining the tax relations of two contracting states**
- **The result will be the concurrent and integrated application of the provisions of the multilateral instrument and the DTCs**
- **At least two different ways to accomplish this goal:**
 - **The multilateral instrument can be consolidated with each DTC**
 - **Both, the multilateral instrument and the DTC, may coexist as two independent treaties that will be simultaneously applied to solve cases of double taxation**

Relationship between the multilateral instrument and DTCs

- **Compatibility clause to define the relation of the multilateral instrument with DTCs already in force**
- **Obedience clause to define the relation of the multilateral instrument with future DTCs**
 - **In the case of the multilateral instrument both type of clauses seem to have only a declarative meaning**
- ***Lex posterior derogat priori* principle (Article 30.3 VCLT) → the provisions of a DTC will apply as long as it is compatible with the multilateral instrument**
- **Public international law scholars also posit the application of the *lex specialis derogate legi generali* principle → probably neither the multilateral instrument nor the DTCs can be understood as more general than the other**

Providing flexibility to contracting states

- **Opting-out mechanisms → reservations**
 - It has been anticipated the possibility of determining some provisions that will be core and thus will not be subject to reservations
 - Mandatory binding MAP arbitration will probably not be a core provision
- **Alternative provisions:**
 - Limitation-on-benefits rule and anti-conduit rules, or
 - Principle purpose test, or
 - Limitation-on-benefits rule and principle purpose test
 - Is it possible to establish asymmetrical obligations in the multilateral instrument?
- **Opting-in mechanisms → optional protocol or unilateral declarations**

Authentic languages and translations

- **States can conclude treaties in their official language or in any other language and all authentic versions of treaties have the same value**
- **However, some countries may have constitutional restraints for entering into treaties that are not in their official language**
- **Even if the multilateral instrument is negotiated only in English efforts to translate it into other languages should be taken**
- **Guidelines for uniform translation can be issued together with the multilateral instrument**

▪ **According to common practice in treaty law, other languages can be established as authentic after the**

Substantive provisions

- **Since bilateral tax treaties have different wording, terminology and enumeration; finding the proper way to modify them without infringing the principle of legal certainty is a challenge**
- **Examples that illustrate the difficulties of modifying bilateral tax treaties through the multilateral instrument are**
 - **The limitation-on-benefits rule**
 - **Some states have already implemented it in their DTCs and the provisions in force can be less or more restricted than the one proposed in BEPS Action 6**
 - **The rule require of relevant information of each state that should be subject to parliament approval by each contracting state (e.g. stock exchanges, non-profit organizations and financial institutions similar to banks)**
 - **The last point can be particularly difficult in case of countries that accede to the multilateral instrument after it is already in force**

Substantive provisions (cont.)

- **The saving clause**
 - It directly relates to the substantive content of the provisions of each treaty
 - Treaties have different enumeration
- **The modification of the PE concept**
 - Deviations (e.g. service PE and insurance PE)
 - The definition of PE might not be up-to-date (e.g. DTCs signed before the OECD Model or before the modification of Art. 5 OECD Model in 1977)
 - Different terminology
- **Tie-breaker rule for dual-resident persons other than individuals**
 - Some states also accept the place of incorporation as a relevant criterion
- **Dividend transfer transactions**
 - Some states already provide for a holding period in their treaties and the period might be different (e.g. 6 months instead of 365 days)

Amendment and denunciation of the multilateral instrument

- **The amendment of multilateral treaties normally is complicated to achieve, as consensus must be found**
- **Some level of flexibility can be guaranteed by allowing states entering into subsequent inter-se treaties, as long as they do not contravene the multilateral instrument**
- **States might withdraw from the multilateral instrument, in which case only the provisions of the pre-existing DTC would apply**
- **As this can result in new BEPS practices, a provision establishing that the pre-existing DTC should also lose its effects might be helpful**

Conclusions

- **Drafting and designing a multilateral tax instrument to amend + 3,000 bilateral tax treaties is complex**
- **Different mechanisms and principles of public international law can be helpful to accomplish the modification**
- **Another suitable solution to achieve the same result expected with the multilateral instrument is that**
 - **Interested states commit to conduct the synchronized renegotiation and amendment of all their treaty network**
 - **Such solution have been effective in previous cases where political will exists (i.e. the incorporation in numerous tax treaties of article 26 of the OECD Model)**



VIENNA UNIVERSITY OF
ECONOMICS AND BUSINESS

**INSTITUTE FOR AUSTRIAN AND
INTERNATIONAL TAX LAW**
Welthandelsplatz 1, Building D3, 1020
Vienna, Austria

Univ. -Prof. Dr. Michael Lang

T 0043 1 313 36-4182
michael.lang@wu.ac.at
www.wu.ac.at/taxlaw