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Submitted by Email to multilateralinstrument@oecd.org

30 June 2016

Dear Mr. VanderWolk

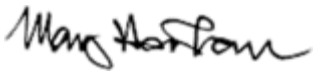
Submission in response to OECD Discussion Draft on Action 15: Multilateral Instrument

Please find enclosed our submission in response to the Discussion Draft on Action 15: "Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures" that was released on 31 May 2016.

We welcome the insights to be gained from the July Public Consultation and trust that our comments on this Discussion Draft contribute to the debate.

We are available for further discussion on any of the matters raised in our submission.

Yours truly,



Mary Honohan

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Irish Tax Institute

Response to OECD Discussion Draft:

BEPS Action 15

Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures

June 2016

About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland's AITI Chartered Tax Advisers (CTA) and is the only professional body exclusively dedicated to tax. Our members provide tax expertise to thousands of businesses and individuals in Ireland and internationally. In addition many hold senior roles within professional service firms, global companies, Government, Revenue and state bodies.

The Institute is the leading provider of tax qualifications in Ireland, educating the finest minds in tax and business for over thirty years. Our AITI Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice.

A respected body on tax policy and administration, the Institute engages at the most senior levels across Government, business and state organisations. Representing the views and expertise of its members, it plays an important role in the fiscal and tax administrative discussions and decisions in Ireland and in the EU.

Our response

The Irish Tax Institute is writing in response to the Discussion Draft on Action 15, which the OECD released on 31 May 2016. We prepared this submission with consideration and input from our members.

Overview

Action 15 of the OECD's Base Erosion and Profit Shifting ("BEPS") project focuses on assessing the tax and international law frameworks that affect the feasibility of a multilateral instrument ("**MLI**") to be used to implement BEPS recommendations. As anticipated, several such recommendations do require amendments to the existing network of bilateral tax treaties. Hence, the MLI initiative is an important mechanism to expedite the adoption of specified BEPS recommendations, in particular:

- **Action 2** – Neutralising the effects of hybrid mismatch arrangements
- **Action 6** – Preventing the granting of treaty benefits in inappropriate circumstances
- **Action 7** – Preventing the artificial avoidance of PE status
- **Action 14** – Making dispute resolution mechanisms more effective

In structuring an MLI it is critical to balance the important aim of addressing BEPS concerns without disproportionately creating risk for the majority of transactions which are supported by adequate commercial substance. If this balance is not achieved in the implementation and ratification of the MLI the result will be increased tax disputes and cases of double taxation, resulting in overburdened taxpayers and tax authorities. We would recommend a pragmatic approach to avoid placing more pressure on an already burdened dispute resolution process and adding further uncertainty to ordinary commercial transactions.

Ireland's Tax Treaty Network

As of June 2016, Ireland has signed comprehensive double tax treaties with 72 countries, of which 2 are coming into effect. Ireland's tax treaty network covers direct corporation taxes as well as personal income tax, capital gains tax and social security taxes. Relative to many larger economies, Ireland conducts a huge proportion of trade with other nations and the ease with which this trade can be carried on is very important to us. The commercial decisions underpinning both foreign investment into Ireland and Irish investment abroad rely on the effective operation of our network of treaties. Hence, the Institute's members are keen to ensure the MLI does not introduce unnecessary risk into the smooth operation of these treaties.

Timelines

The Discussion Draft has noted that the work by the Ad Hoc Group commenced in May 2015, with anticipation of having the MLI available for signature by 31 December 2016. In our view, what is more important is that this crucial international initiative is done right, more so than is done to meet this particular deadline.

OECD Request for Input

Input has been sought across four matters. It is recognised that the input should solely focus on implementation of the specified BEPS outputs including a MAP arbitration provision.

1. Technical issues that should be taken into account in **adapting the BEPS measures to modify or supersede existing provisions** of bilateral tax treaties that may vary from the OECD model[1]:
2. The approach to be taken in developing the **optional provision on mandatory binding MAP arbitration**, taking into account that it would need to serve the needs of the countries that have already committed to implement mandatory binding arbitration, as well as countries that are considering committing in the future.
3. The types of **guidance and practical tools that would be most useful to taxpayers** in understanding the application of the multilateral instrument to existing tax treaties.
4. Mechanisms that could be used to **ensure consistent application and interpretation** of the provisions of the multilateral instrument.

The Action 15 report issued in October 2015 demonstrates the lateral thinking already undertaken within the BEPS project. This report addresses issues and proposes high-level solutions to: (i) compatibility of MLI with existing tax treaties (A.1.2) (ii) timeline of entry into force (A.1.4), and (iii) ensure consistency in interpretation and implementation of the MLI (A.1.5).

Seeking Consistency, Clarity and Certainty

The MLI is much more than an update to the OECD Model Tax Convention and associated commentary. Once fully complete, the MLI initiative will bring into force notable changes from the existing language in tax treaties. Many businesses in Ireland (as elsewhere) rely on tax treaties today for the avoidance of double taxation on the same income/gains and they will similarly be expecting future tax treaties (post-MLI) to accomplish the same outcome.

Our members are seeking three prime themes in the development, execution and rollout of the MLI process into the network of tax treaties.

1. **Consistency** – We are looking for the MLI to enable consistency across both tax technical issues as well as procedural matters. Consistency with respect to technical elements will help expedite the process for the member states to reach agreement. It is our view that greater transparency should help to achieve greater consistency.

2. **Clarity** – The issues addressed across the above four BEPS Actions are technically complex, and thus require sophisticated solutions by the OECD to address perceived abusive transactions and abusive tax structures in the final BEPS reports. Our members are asking for clear implementation of these specific new rules, such that business can readily determine whether or not they apply to a particular commercial structure or cross-border investment.

3. **Certainty** – Business reasonably expects that for transactions which do not involve any BEPS element, the future state of tax treaties will be aimed equally at preventing double taxation as well as managing ongoing efforts to curb non-taxation. Certainty is sought first on technical interpretations and second on the timing of changes coming into force. Too much uncertainty will have undue consequences in cross-border trade and investment, to the detriment of all our economies.

[1] Two examples cited are: (1) existing provision or types of provisions that serve the same purpose as the BEPS measures and that would need to be replaced, (2) Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained.

Specific Comments and Suggestions

Our Institute members have an overall interest in the outcome of the MLI, particularly with respect to the impact on bilateral tax treaties involving the Republic of Ireland and its trading partners. We provide further suggestions in this response on each of the four areas where input was sought in the OECD Discussion Draft.

1. Adapting BEPS measures into treaty law

Consistent entry into force by country at member state discretion

Potential Issue - Differences in domestic laws between countries are likely to impact on how the signed MLI transforms a multitude of bilateral treaties that could be waiting to come into effect. If treaties enter into force at a number of different dates, then the practical compliance of those treaty changes would become very burdensome for business and for tax authorities to administer. It would be preferable if the entry into force is at the same date with respect to a single member state's network of tax treaties For instance, under the Country by Country reporting initiative, we have observed that the differing effective dates amongst member states has created some uncertainty for businesses as regards compliance.

Suggestion - Given the fundamental changes to be adopted via the MLI, our members would prefer those changes to come into force on the same date We suggest that the OECD, in leading Action 15, should recommend an effective entry into force date for all treaties to be amended by the MLI process, and that this effective date is to be no earlier than 24 months from the date that the MLI is concluded by all constituent member states.

Given the potential operational impact that these treaty changes may have for companies (particularly as regards PEs), it is important that any such effective date affords taxpayers sufficient time to transition to the new treaty rules. Where there is no global consensus on a suitable effective date, member states should be given the opportunity to agree this on a bi-lateral basis.

That said, the MLI process should permit Ireland (amongst other member states) to elect to defer the year / date where all its amended treaties are entered into force with all counterparty member states. This election could, potentially, defer the entry into force of some treaties to align with others. We suggest the deferral can only be for maximum of two years.

Flexibility in options available to secure greater consensus

Potential Issue – Treaty-based recommendations arising from Actions 2, 6, 7 and 14 can be categorised by how the MLI might structure the options available to member states as allowed for in the agreed Actions. The Institute understands that the OECD is discussing the permitted optionality to be available to member states under the MLI. This potential optionality would allow a member state to opt-in to specific Article provisions with specific treaty partners, i.e. not with respect to its entire treaty network.

These treaty-based Actions allow for flexibility on the implementation of certain provisions – if this flexibility is not built into the MLI framework, member states might disagree on some specific provisions in an Article that would then as a consequence inhibit the effectiveness of the MLI to amend treaty articles. On the other hand, too much flexibility in the available options

could result in a plethora of differing treaty rules that would be cumbersome and uncertain for businesses to comply with.

Suggestion – The framework of the MLI selection process should afford each member state the flexibility within the various treaty-based Actions to potentially choose more than one feature for the purposes of updating its bi-lateral treaties with several other member states.

Further, as noted later, it should be incumbent on each member state to disclose on the tax authority website the consolidated versions of all updated treaties as well as treaties coming into force. This will enable businesses to understand how the existing treaty network has and is being updated.

2. Mandatory binding MAP arbitration (Action 14)

Ireland is amongst the 20 willing member states that are progressing the ability for the MLI to include a mandatory binding arbitration clause in the MAP article. This single initiative has the potential to relieve the global tax administration system of a substantial backlog in double taxation cases. It is widely known that the competent authorities of the tax administrations have become very burdened with the rising inventory of unresolved MAP cases. Over eight years (2006 to 2014), both newly initiated MAP cases and inventories amongst OECD member countries more than doubled.[2] At a time where government budgets are under pressure, a wholly new mechanism such as binding arbitration is required to alleviate the burden placed on both competent authorities and business.

The Irish Tax Institute would like to see the widespread adoption by other partner member states of mandatory binding arbitration in the MAP article of Ireland's treaties. In lieu, we would continue to seek voluntary binding arbitration, for those member states who prefer not to agree to mandatory arbitration.

The Institute recognises that both member states need to agree to such an amendment and are pleased that many of Ireland's key trading partners are participating in this subgroup endeavour.

Encouraging arbitration through flexibility

Potential Issue – Many countries will already have adopted a mandatory binding arbitration clause in more recently negotiated bilateral treaties with a partner country. While there may be some commonality between the arbitration measures in those treaties and the Model Tax Convention (2014), there will be some discrepancies. It is possible that such countries may want to preserve aspects of current treaty language (in Article 25) rather than replace the arbitration provision wholeheartedly.

For instance, the Convention allows arbitration to be initiated for unresolved cases from two years from presentation of the case to the competent authorities. In contrast, several arbitration clauses in existence today only allow unresolved cases from two years from the commencement date – a term defined within the treaty which means "…*earliest date on which the information*

[2] *Source*: http://www.oecd.org/ctp/dispute/map-statistics-2014.htm.

necessary to undertake substantive consideration for a mutual agreement…" While both contain a two-year clause, they are not equivalent in practice.

If countries are only able to elect through the MLI for the mandatory binding arbitration clause using the OECD Model language, some countries may opt not to follow as this will be inconsistent with existing arbitration provisions. The potential inconsistencies may lead a country not to opt-in for mandatory binding arbitration in the MLI process, although it might have in spirit preferred an option.

Suggestion – The MLI should contain some degree of flexibility on how countries opt-in to mandatory binding arbitration. If two countries both want to contain such a clause, they should be permitted to determine the appropriate language that suits the arbitration conditions and process they so choose.

While it is important that a broad arbitration framework is agreed upfront by the working group of 20 states, the MLI should not be prescriptive as to identify mutually exclusive arbitration options that could lead to misalignment and thus no such arbitration in the treaty. We would entrust the working group are looking at a series of negotiations, bilateral or otherwise, that result in the greatest number of new arbitration provisions, irrespective of the specific terms and conditions. For instance, two countries may agree that a three-year period should lapse before arbitration is available to the taxpayer. These terms are preferable over no arbitration option.

The Irish Tax Institute would like to see the application of the Arbitration process included in the OECD's BEPS Peer Review Framework.

Interaction with EU Arbitration Convention

Potential Issue– For disputes between competent authorities of EU member states, the existing EU Arbitration Convention provides an alternative venue for taxpayers to seek resolution to a double tax case. It remains unclear how the Action 14 elements of the MLI will work in parallel with the Convention for intra-EU disputes.

Suggestion – Both the EU Arbitration Convention and the proposed Mandatory Binding Arbitration in Article 25 (MAP) provide discretion to the taxpayer. On that basis, the MLI can structure the amendment to Article 25 in two ways: (1) when the treaty is between two EU member states, and (2) when the treaty involves no more than 1 EU member state. In case 1, the MLI should be phrased to afford the taxpayer the option of selecting which MAP resolution is preferable under the facts and circumstances of the case. The Convention does not apply to case 2.

3. Guidance and Tools

Open and consultative process

The Irish Tax Institute welcomes the openly transparent consultation process regarding the forthcoming MLI framework and negotiation of terms. Having public record on these developments, at key junctures, enables business and advisers to understand the potential outcomes that may occur from the individual choices member states will have with the MLI.

Many supranational bodies, including the OECD, the EU, International Accounting Standards Board and the Financial Accounting Standards Board, continue to keep the public aware of matters in process, including the deadlines when decisions are to be made and implementation is expected. Consultation throughout, at critical milestones in the process, has also been vital for adoption of fundamental changes to laws or regulations.

Public record managed by independent body

It was suggested that each member state could publish, on its own accord, consolidated versions of its treaties formalised with other member states as a result of the MLI process. We suggest that member states should be obligated to submit formally agreed treaties to a centralised and public record so that all interested parties can view the most up-to-date status of a particular country on its treaty network. We recommend that the OECD establishes a reporting framework and a minimum standard template, where delegates would provide (quarterly) a completed template indicating the status of provisions adopted with its treaty counterparties. Delegates would only have to update the template for developments in each quarter.

Ideally, a public record would be kept accessible via the OECD website, updated quarterly.

Alternatively, the OECD could volunteer to informally survey activity across its members and other countries on their progress to convert the MLI into treaties that are entered into force or scheduled to be entered into force. This survey may not be done as frequently as recommended above for the mandatory quarterly submission. The OECD would then publish annual status reports on what it has observed, regarding treaty amendments entered or entering into force as well as relevant tax administrations' public policies on treaty changes.

Member state obligation to disclose

There will certainly be many differences in terms of the content and process of updating the treaties of a particular member state. On the assumption (mentioned earlier) that the MLI will permit a member state to opt-in to certain provisions only with certain other member states, on which we agree, more variations will arise and the MLI will be especially complex and cumbersome for taxpayers to apply. It should be incumbent on each member state to oblige the tax authority to publish consolidated versions of all their tax treaties on their websites, clarifying how their state's network of treaties is to be / has been updated after conclusion of the MLI. The tax authority should be obliged to keep this information up to date.

4. Mechanism for consistent application

Independent body to ensure member states apply new provisions fairly and consistently

Potential Issue– Certain words or phrases embodied by the Article amendments and/or Commentary additions are open to significant interpretation. Some Commentary attempts to provide greater definition to the meaning of important terms in the amendments. Despite the informative commentary, our members would like to ensure that there is consistent treatment of equal facts by the tax authorities of member states. Our members believe that some tax authorities may take a more liberal interpretation to a number of subjective treaty terms in favour of an outcome that leads to double taxation. Examples of potentially subjective terms in Actions 6 and 7 include "*habitually*", "*principal*", "*material*", "*auxiliary and preparatory*".

Inconsistent interpretation by tax authorities can give rise to substantial uncertainty and hesitation for business investment, especially where the taxpayer is relying upon the treaty in a local language.

Suggestion – During the BEPS review period from now until 2020, we suggest the OECD establishes a review panel to facilitate the consistent implementation and application of specific Article amendments to the treaty network (those based on Actions 6, 7 and 14). This panel could serve two primary purposes: (i) to advise tax authorities of widely held interpretations on new treaty language, and (ii) to collect and disseminate views on treaty interpretation matters while publicising observed inconsistencies at a superficial level. Any findings or decisions of this panel could also be published on the OECD website.

Relative to a bilateral MAP process, a panel would represent international viewpoints on a subject matter and be permitted to assess global trends in treaty interpretation matters. Absent a legal framework, such a panel will not possess authority over a tax authority. We submit that such a legal framework is beyond the scope of the MLI.

The OECD Forum on Tax Administration ("**FTA**") has the broad access to personnel with the appropriate technical and administrative expertise to establish such a body. The United Nations includes the Committee of Experts on International Cooperation in Tax Matters, which comprises a delegation of experts not in government but selected by government. The FTA could similarly choose a panel of experts from the tax community to become a supervisory body to maintain consistency in interpretation and application of the treaty amendments.

Alternatively, the mandate of Tax Inspectors Without Borders ("**TIWB**") could be increased to include the responsibility to advise and assist tax authorities on the interpretation of treaty language instituted via the MLI. If a specific team within TIWB is given this particular mandate, those responsible will inherently have the capability to observe and share globally vetted best practices on technical matters. These efforts will help achieve greater consistency.

Peer review over adoption and enforcement of BEPS Actions

Peer review on a number of matters today provides a mechanism for governments and/or tax authorities to either establish rules or processes that align with the international norm. Business is strongly seeking this objective of international consistency across the implementation of BEPS. We welcome the establishment of the OECD's BEPS Peer Review framework and, as part of this, we would suggest that the OECD conducts annual peer reviews to check how countries have adopted BEPS minimum standards including those adopted through the MLI. Where possible, the same peer review should seek to identify how tax authorities are enforcing those minimum standards in accordance with the BEPS principles and Commentary.

As with any peer review process, the confidentiality of taxpayers must be respected at all times.