BASE EROSION AND PROFIT SHIFTING ACTION 15 – A MULTILATERAL INSTRUMENT TO IMPLEMENT THE TAX TREATY RELATED BEPS MEASURES

ICAEW welcomes the opportunity to comment on the discussion draft *OECD/G20 Base Erosion and Profit Shifting (BEPS) Project: Action 15: A Mandate for the Development of a Multilateral Instrument (MLI) to implement the Tax Treaty related BEPS measures* published by OECD on 31 May 2016.

This response of 30 June 2016 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

We should be happy to discuss any aspect of our comments.

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INTRODUCTION

1. We welcome the opportunity to comment on the issues raised in the OECD public discussion draft BEPS Action 15: Development of a Multilateral Instrument (MLI) to Implement the Tax Treaty related BEPS Measures published on 31 May for comment by 30 June 2016.

MAJOR POINTS

2. We understand that the sole purpose of the MLI is to transpose, into existing double tax treaties, the tax treaty related BEPS measures which, with the exception of the mandatory binding MAP arbitration measures, are all contained in the final reports published in October 2015 and endorsed by the G20 countries when they met in Turkey in November 2015.

3. It is therefore somewhat disappointing that the questions in the discussion draft are all of a purely technical nature and none of the actual provisions themselves have been published. In their absence we have not been able to comment on some of the more technical issues.

4. We also understand that the MLI will be, in effect, a one-off "upgrading" of the content of existing bilateral treaties. There will then, in practice, only be an upgrading to the extent the contracting parties to any particular double tax treaty sign up to a particular provision of the MLI which allows a new provision to be introduced, or an existing provision to be modified, in relation to the particular treaty.

RESPONSES TO REQUESTS FOR INPUT

5. The discussion draft has a "request for input" in section 4 and we have reproduced the requests below with our comments to the extent we are able to provide them.

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, including:

- **Existing provision or types of provisions that serve the same purpose as the BEPS measures and that would need to be replaced**
- **Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained**

6. It is difficult to comment on this without seeing a draft of the MLI detailed provisions. Given the unique nature of the MLI, and its far reaching effect, there seems no reason why a draft should not be made available to facilitate the current consultation.

7. We would urge OECD to release a further public discussion draft before the end of the year so that we, and others, can provide input to the more detailed provisions before the MLI is finalised.

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.

8. Incentives for agreeing to this should be included or disincentives for not agreeing. One possibility would be to only provide Country by Country Reporting information to States who agree to this.

9. We believe that a sensible approach might be for the taxpayer to be able to elect the form of arbitration i.e. baseball (formally called "last best offer" or principled) at the time they invoke the procedure.

10. Baseball arbitration is best suited to cases where quantification is the issue, mainly Article 7 (PE profit attribution) Article 9 (transfer pricing) and Articles 11 and 12 (interest and royalty special relationships). It is less suitable for cases that involve other issues.

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.

11. Clear and explicit drafting of the MLI itself is critical, as this will allow the provisions to "speak for themselves". Proposed commentary has already been provided in the various BEPS final reports. This should be sufficient. Understanding is not aided by excessive guidance, and guidance should not be used to make rules that will not be legally sanctioned by state legislators in ratifying the MLI.

12. We believe it would also be very helpful if contracting parties, that have amended their existing treaties via the MLI, publish a "consolidated" version of the treaty so that the revised provisions are clear to all. We understand that the MLI is only going to be produced in English and French so that it will be even more important for such treaties to have consolidated versions available in other languages for the benefit of potential users.

Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument.

13. All states which have not yet signed and ratified the Vienna Convention on the Law of Treaties should be encouraged to do so before, or at least at the same time as, they sign the MLI.

14. States should also be precluded from treaty override by domestic law: they should not be able to benefit from MLI or the Mutual Assistance Convention while they have legislation in place that purports to, or has the effect of, overriding tax treaty obligations.

Other comments

15. If the MLI is to be in effect a one off exercise to upgrade existing treaties it would still be helpful to either keep the OECD Ad Hoc Group in existence, or maintain a dedicated resource in OECD, to act as a clearing house for practical tips and best practice in introducing new, and amended, provisions to existing treaties in a way which achieves the intended purpose.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.

4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.

5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.

7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see via http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax).