The OECD/G20 Base Erosion and Profit Shifting (BEPS) Project deliverables include, among other recommendations, changes to the OECD Model. In order to fulfil the desire of OECD and G20 leaders to dramatically increase the pace in reforming international tax law, the OECD is introducing with the multilateral instrument an innovative tool which should allow rapid implementation of agreed treaty-related measures. The authors address the origin of and work related to this multilateral instrument, its potential contents and the outstanding issues.

1. Introduction

The OECD Model Tax Convention (OECD Model) can trace its roots back to the activities of the League of Nations. The latter produced draft models which reached, after World War II, their final forms in the Mexico Model (favouring source countries) and the London Model (favouring residence countries).

The work carried out by the League of Nations was taken over by the Organisation for European Economic Co-operation and subsequently the OECD. It led to the 1963 Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital. While the 1963 Draft Convention was to be originally used as a bilateral tax treaty, the Council of the OECD recommended the governments of member countries to examine, as and when appropriate, the feasibility of concluding multilateral conventions based upon the 1963 Draft Convention.

Despite the fact that hopes expressed for multilateralism may have reflected an unease with the efficacy of bilateral tax treaties to answer long-term international tax problems, a large network of bilateral tax treaties concluded on the basis of the Draft Convention existed by the time the final OECD Model was published in 1977. In effect, many jurisdictions negotiated and ratified bilateral tax treaties on this basis. To date, some are still in force and have not (or only slightly) been modified.

There are few examples of multilateral tax treaties. Some are based on the structure of the OECD Model, such as the Nordic treaty between Denmark, Finland, Iceland, Norway and Sweden. Nevertheless, existing multilateral treaties remain marginal. Hence, while the opportunity for a multilateral tax treaty has been explored since the origins of the OECD Model, it has not practically been achieved on a large scale to this day.

As part of his study "A Model Tax Treaty for the Asia-Pacific Region?", Professor Richard J. Vann identified what he considered to be three flaws of the OECD Model. He regarded the OECD Model as inefficient due to the biases it arguably created in economic decisions by firms and governments. He considered that the OECD Model failed to deal with emerging international tax issues, and finally revealed some flexibility issues because "as more treaties are negotiated, the more treaties there are to change if any new initiative is adopted in relation to terms of the actual Model.”

To address the latter issue, the OECD resorts to interpretation rather than change of the Model wherever feasible. The difficulty here is that the Commentary on the articles of the OECD Model does not have the same legal weight in all jurisdictions. While in some jurisdictions the Commentary is directly applicable, others rely on the Commentary only to the extent that the Commentary existed before the adoption of the applicable bilateral tax treaty. Thus, some tax courts do not use any Commentary on the OECD Model that was released subsequent to the adoption date of the applicable bilateral tax treaty, even where the wording of the article of the applicable bilateral tax treaty is similar to the commented article of the OECD Model.

Vann concluded that:

most of the flaws identified in the bilateral tax treaty network based on the [OECD] Model cannot be overcome by bilateral developments, and in any event the bilateral network has reached a stage where fundamental bilateral change is impossible because of the lock-in effect of the existing treaty network. International consolidation of transnational corporations and corporate groups represents the solution to current flaws. This method implies a multilateral approach to international tax problems but multilateralism will not simply arise by evolution from the bilateral OECD framework.

2. Few examples of early concluded bilateral tax treaties: France-Ireland (signed on 31 March 1968), Belgium-Germany (signed on 11 April 1967 and modified on 5 November 2002), Belgium-Greece (signed on 14 May 1968) and United States-Korea (4 June 1976).
Two proposals have been advocated to foster multilateral approaches.

The more ambitious approach would be to achieve a uniform tax system through a multilateral agreement at a regional – if not global – level. The EU Commission proposal for a Common Consolidated Corporate Tax Base is the most advanced proposal in this respect. However, after almost two decades of ups and downs, the Commission’s proposal has not achieved approval, and the Commission’s expected fall 2016 relaunch proposal should not encompass a consolidated base at first. Thus, the prospect of a global multilateral agreement is currently not foreseeable.

The less (yet very) ambitious way would be the adoption of a multilateral instrument which could modify the current network of bilateral tax treaties. This approach would seek to preserve the success of the OECD Model, while possibly providing faster adaptation to emerging international tax issues and bypassing the lock-in effect.

This is the goal of Action 15 (“Developing a Multilateral Instrument to Modify Bilateral Tax Treaties”) of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project. The multilateral instrument addresses the desire of OECD and G20 leaders to dramatically increase the pace in reforming international tax law.

The whole BEPS Project was carried out in an unprecedented time-pressured environment. For some observers, “the compressed time frame puts extraordinary pressure on the consensus-driven process at the OECD, and risks creating a false consensus around vague standards that have not been adequately considered”. For the OECD, a change is urgently needed to eliminate the opportunities that the current tax treaty system creates for double non-taxation. The multilateral instrument would allow a rapid implementation of agreed treaty-related measures and preserve the bilateral nature of tax treaties.

This article addresses the origin of and work related to the multilateral instrument, its potential contents and the outstanding issues.

2. Origin of and Work Related to the Multilateral Instrument

2.1. The BEPS Action Plan

In September 2013, G20 leaders endorsed the BEPS Action Plan presented by the OECD, and committed to take the necessary individual and collective actions in order to tackle BEPS. Implementation of the BEPS outcomes was identified as the measure of success of the project. Action 15 was introduced to answer the need for swift implementation of the measures. It aimed at considering ways to implement the measures resulting from the OECD work. Its scope read as follows:

Analyse the tax and public international law issues related to the development of a multilateral instrument to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties. On the basis of this analysis, interested Parties will develop a multilateral instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution.

The Action Plan set two deadlines for the work related to the multilateral instrument. A report identifying relevant public international law and tax issues was due for September 2014, and the development of a multilateral instrument was due for December 2015.

2.2. The 2014 Report

The report “Developing a Multilateral Instrument to Modify Bilateral Tax Treaties” (the 2014 Report) was approved by the OECD Committee on Fiscal Affairs in June 2014 and endorsed by the leaders of the G20. The 2014 Report highlighted the need to eliminate opportunities for double non-taxation or less than single taxation that could be facilitated by the current tax treaty system, and for profit shifting by multinational enterprises which could take advantage of the interaction of different tax rules. The 2014 Report analysed the feasibility of a multilateral hard-law approach, identified its consequences as well as the “issues arising from the development of such an instrument and provided an analysis of the international tax, public international law, and political issues that arise from such an approach”.

The 2014 Report concluded that a multilateral instrument was desirable and feasible, and that negotiations should be carried out.

A desirable instrument. In the 2014 Report, the OECD identified several reasons in favour of the development and implementation of the multilateral instrument, including:

- “A multilateral negotiation can overcome the hurdle of cumbersome bilateral negotiations and produce important efficiency gains”.
- “The multilateral instrument can provide developing countries with the opportunity to fully benefit from the BEPS Project.”

8. See the Action Plan for Fair and Efficient Corporate Taxation in the EU presented by the EU Commission on 17 June 2015.
12. Id. at 24.
15. OECD, supra n. 14, at 10.
17. OECD, supra n. 14, at 16.
2.3. Negotiation of a multilateral instrument

The 2014 Report recommended convening an international conference to develop the multilateral instrument. On this basis, the OECD developed a mandate to set up the ad hoc group for the development of the multilateral instrument (the ad hoc group). Such mandate was endorsed by the G20 Finance Ministers and Central Bank Governors at their February 2015 meeting in Istanbul.19

2.3.1. Functioning of the ad hoc group

Membership in the ad hoc group is open to all interested countries (whether or not OECD/G20 members), and all countries are participating on an equal footing. As of May 2016, the ad hoc group counted 96 participants covering over 2,000 bilateral tax treaties.21 It is chaired by a senior official of the UK Treasury (HMRC),22 and three senior officials from China, Morocco and the Philippines were appointed as vice-chairs.23

Significantly, the goal of the ad hoc group is not to renegotiate the outcomes of the BEPS Project (i.e. not to work on the substance of those outcomes), but rather to draft a multilateral instrument which will implement the treaty-related outcomes released in October 2015.

Additionally, participation in the development of the multilateral instrument does not necessarily mean that the participants will sign on the final version of the multilateral instrument. This was made clear by several participants, notably among them the United States. Upon the decision taken in October 2015 to join the ad hoc group, the US Treasury24 indicated that the participation of the United States “by no means foreshadows any decision about whether to eventually join in signing such an instrument”.25

The ad hoc group began its work in May 2015. Several meetings have already taken place and the ad hoc group aims at reaching a consensus on the multilateral instrument before the end of 2016. The OECD Secretariat even suggested that the multilateral instrument would be ready by September 2016.26

2.3.2. Consultation process

Contrary to other BEPS actions which saw the public release of discussion drafts for comment, the draft multilateral instrument is currently subject to intergovernmental discussions in a confidential setting, and everything indicates that the OECD is unlikely to release a draft multilateral instrument. The Chair of the ad hoc group stated that:

some countries would have liked a more open consultation and would have been up for releasing the document. But other countries that maybe have less of a tradition of open engagement on tax policy matters might well have preferred really to not do a public consultation at all.27

Having decided not to disclose the draft multilateral instrument for comment, the OECD released, on 31 May 2016, a discussion draft and request for input solely focusing on technical issues of implementation and on issues related to the development of a binding arbitration pro-

18. Id.
19. The OECD has already acquired experience regarding competent authority multilateral instruments, on the basis of article 6 of the Convention on Mutual Administrative Assistance in Tax Matters. One competent authority multilateral instrument relates to the exchange of financial account information (CRS MCAA) and the other one relates to the exchange of country-by-country reports (CbC MCAA). The former was signed by 82 competent authorities in June 2016, and some countries have already transposed it into domestic law, while the latter was signed by 44 competent authorities in July 2016. While the negotiations of those MCAAs involve some common challenges with the negotiations of the multilateral instrument, their scopes and goals are significantly different.
21. Members of the ad hoc group are: Andorra, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Benin, Bhutan, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China (People’s Rep.), Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guatemala, Haiti, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kazakhstan, Kenya, Korea, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Moldova, Mongolia, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Russia, San Marino, Saudi Arabia, Senegal, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay, Vietnam, Zambia and Zimbabwe.
22. Mr Mike Williams.
23. Liao Tizhong (for China), Mohammed Amine Baina (for Morocco) and Kim S. Jacinto-Henares (for the Philippines).
25. Such stance was reiterated by Quyen Huynh (International Tax Counsel at the US Department of the Treasury), while speaking at the 2016 OECD International Tax Conference on 6 June 2016: “the [multilateral instrument] itself at present is not [complete] and we are hoping to see a final version sometime later this year, at which point we will step back and assess whether the US will sign onto the [multilateral instrument].”
27. Mentioned during the public consultation meeting held on 7 July 2016.
vision. The request for input provided a non-exhaustive list of measures which might be implemented through the multilateral instrument.

A compilation of more than 200 pages of comments from over 35 stakeholders was issued on 30 June 2016. A public consultation with commentators was held on 7 July 2016. Several business commentators have expressed disappointment about the lack of consultation on the instrument itself. While the OECD considers that the multilateral instrument should be subject to intergovernmental negotiations only, as is generally the case for bilateral treaties, commentators note that, on the one hand, it was difficult to provide a technical analysis of the multilateral instrument without having access to the actual language of the instrument, while on the other hand, the novelty and difficulty of the instrument would justify a public release.

3. Potential Contents of the Multilateral Instrument

The BEPS deliverables include recommendations for domestic law, taking the form of best practices and model domestic rules: changes to the OECD Model; changes to the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations; and analytical reports with no specific recommendations.

The multilateral instrument is to focus on the implementation of the tax treaty-related measures (minimum standards or not) which resulted from the BEPS Project. While the precise content of the multilateral instrument is yet to be defined, the direction is relatively clear. The OECD indicated that the BEPS measures to be implemented through this instrument include treaty provisions developed under the following actions of the BEPS Project: Action 2 (Neutralizing 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) and Action 14 (Making Dispute Resolution Mechanisms More Effective). Each of these measures is briefly discussed below.

Additionally, the ad hoc group will consider the possibility for signing countries to exercise their right to reserve on specific measures of the multilateral instrument. Several commentators consider that this right to reserve should be granted only on those measures that are not minimum standards.

3.1. Action 2: Neutralizing the Effects of Hybrid Mismatch Arrangements

The October 2015 Final Report on Action 2 contains recommendations for changes to domestic law and changes to the OECD Model. It notably recommends the revision of article 1 of the OECD Model (Persons Covered) to deal with transparent entities. The latter revision is likely to be included in the multilateral instrument. Concerns have arisen in the business community as to how the new language may interact with existing provisions of bilateral tax treaties that may relate to similar concepts but do not use the same wording. The business community also raised questions about how the Action 2 recommendation on use of the credit method for providing double taxation relief on income exempted by a source state, would interact with existing treaty provisions that provide a zero rate of withholding on parent-subsidiary dividends.

3.2. Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

The October 2015 Final Report on Action 6 includes a minimum standard with respect to the inclusion of anti-abuse rules in treaties. However, it indicates that countries are free to implement in their treaties:

- a more general anti-abuse rule based on the principal purposes of transactions or arrangements (the principal purpose test); and/or
- a specific anti-abuse rule, such as a limitation-on-benefits rule that limits the availability of treaty benefits to

34. Treaty-related minimum standards contained in the Final Reports released in October 2015 are:

- insertion of special language in the title and preamble of a bilateral tax treaty as set out at section B of the Action 6 Final Report, which will clarify that by entering into treaties, states do not intend to create "opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States)"
- introduction of anti-treaty shopping measures in any of the following forms: (i) the combined approach of a detailed or simplified limitation-on-benefits provision, plus a principal-purpose test provision; (ii) the principal-purpose test rule alone; or (iii) a detailed limitation-on-benefits rule supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties (see Action 6 Final Report); and
- elements to ensure the timely, effective and efficient resolution of treaty-related disputes (see Section I-A of the Action 14 Final Report).

entities that meet certain conditions, supplemented by a mechanism that would deal with conduit financing arrangements.

This flexibility was found necessary due to irreconcilable views between governments. On 28 January 2016, the European Commission formulated a recommendation on the implementation of measures against tax treaty abuse. It notably recommends the inclusion of a general anti-abuse rule based on a principal-purpose test, albeit one that differs slightly from the Action 6 wording. It also issued an infringement formal notice against the Netherlands, finding that the limitation-on-benefits article in its bilateral tax treaty with Japan violated the fundamental freedoms of the Treaty on the Functioning of the European Union. On the other hand, it is expected that countries such as the United States will push for the implementation of a limitation-on-benefits clause, especially as the "US Senate over the years has made clear that [the principal purpose test] is not acceptable". One can wonder how these views would be dealt with under the multilateral instrument.

The October 2015 Final Report on Action 6 also contains non-minimum standards, notably related to:

- the addition to article 10(2)(a) of the OECD Model that imposes a 365-day holding requirement on companies seeking the benefit of a treaty’s direct investment withholding tax rate on dividends paid by their subsidiaries;
- transactions that circumvent the application of article 13(4) of the OECD Model on immovable property; and
- the modification of article 4(3) as regards dual residency.

If these items are part of the multilateral instrument, their integration will also lead to questions regarding how they will interact with similar provisions contained in existing bilateral tax treaties.

3.3. Action 7: Preventing the Artificial Avoidance of PE Status

The October 2015 Final Report on Action 7 addresses several items that modify the wording of article 5 of the OECD Model on permanent establishments, namely:

- articles 5(5) and 5(6) to address "commissioneer arrangements and similar strategies";
- article 5(4) to address "the [a]rtificial avoidance of permanent establishment status through the specific activity exemptions"; and
- article 5(4) to address the "[f]ragmentation of activities between closely related parties".

It also proposes a modification of the Commentary on the OECD Model with respect to the artificial splitting up of contracts.

Such modifications are expected to be implemented through the multilateral instrument, leaving several unanswered questions, notably relating to the attribution of profits to permanent establishments. While the proposed modifications will lower the triggering threshold of PE characterization, further work is needed on how the rules of article 7 of the OECD Model would apply to attribute profit to the permanent establishments that will be found to exist under these new standards. The US Treasury indicated that one of the key issues is to determine what additional income should be attributed to the permanent establishment when the latter was created by a related party that has already had transactions between itself and the home company.

On 4 July 2016, the OECD released for public comments a non-consensus discussion draft on the attribution of profits to permanent establishments. The outcome of this further work, expected to be released before the end of 2016, is likely to ultimately weigh in on the decision of countries to sign and ratify the multilateral instrument.

3.4. Action 14: Making Dispute Resolution Mechanisms More Effective

Article 25 of the OECD Model creates a mutual agreement procedure for resolving difficulties arising out of the application of treaties and economic or juridical double taxation not in accordance with the treaty. The October 2015 Final Report on Action 14 of the BEPS Project provides for “minimum standards, best practices and a framework for a monitoring mechanisms”. The multilateral instrument should logically incorporate the minimum standard and best practices indicated in the Report.

On the one hand, minimum standards notably refer to:

- ensuring that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that mutual agreement procedure cases are resolved in a timely manner; and
- ensuring that administrative processes promote the prevention and timely resolution of treaty-related disputes; and ensuring that taxpayers that meet the requirements of article 25(1) can access the mutual agreement procedure.

On the other hand, best practices notably encompass:

- the inclusion of article 9(2) of the OECD Model in bilateral tax treaties;
- the implementation of bilateral advanced pricing agreement programmes; and
- the provision of a suspension of collections procedures during the period in which a mutual agreement procedure is pending.
Furthermore, as uncertainty and unintended double taxation are expected to increase in the post-BEPS environment, the business community is urging the OECD and governments to radically improve the process of mutual agreement procedures, including through the addition of binding arbitration. For the business community, a mandatory binding mutual agreement procedure arbitration would be beneficial for both the governments and the business community, as it would help mitigate the uncertainty for businesses resulting from unilateral action in taxation and inconsistent application of the BEPS recommendations in some jurisdictions, as well as promote a more impartial view towards disputes issues.

According to the Action 14 Final Report, a group of countries has committed to adopt and implement mandatory binding arbitration as a way to resolve disputes that otherwise prevent the resolution of cases through the mutual agreement procedure. Despite the push made by the business community and the latter countries, no consensus was reached as to mandatory binding arbitration, and therefore it was regrettably not regarded as a minimum standard nor a best practice. In fact, many of the committed countries already have arbitration either in their recent bilateral tax treaties or under the European Union Arbitration Convention. On the other hand, it is striking that some countries which are party to the EU Arbitration Convention did not join the list of the committed countries.

A sub-group of the ad hoc group is working on the development of mandatory binding arbitration. Hopefully, this initiative will convince a larger number of countries. Moreover, it is expected that the proposed mandatory binding arbitration procedure will build on the experience acquired and challenges faced by arbitration provided under some bilateral treaties and/or the EU Arbitration Convention.

4. Some Outstanding Issues

4.1. Interaction between the multilateral instrument and bilateral tax treaties

4.1.1. Pre-existing bilateral tax treaties

The 2014 Report explores two ways to address the coexistence of the multilateral instrument and existing bilateral tax treaties, i.e. either explicitly define the relationship in the multilateral instrument itself or let the rules of international law apply. The former would consist in the addition of a clause to explicitly define the interaction between the multilateral instrument and the affected bilateral tax treaties. The latter would consist in the application of the lex posterior derogat legi priori principle, which states that when two rules apply to the same matter, the later in time prevails.

The May 2016 request for input seems to indicate that the OECD favours the application of a compatibility clause, since, when requesting for comments on the relationship between the provisions of the MLI and the existing tax treaty network, the request for input only refers to this compatibility clause.

Several commentators indicated that due to the large number of treaties, the diversity of existing bilateral treaties, the fact that some are based on the OECD Model whereas others are not, difference in languages, etc., concerns arise about the practicality of such a compatibility clause. One proposition brought forward is to allow countries to sign the multilateral instrument, but let its provisions be effective in respect of any particular bilateral tax treaty when each of the treaty partners implement, at a national level, the necessary ratification instruments which identify the exact provisions being modified in the relevant treaty and how exactly they are being modified. It remains to be seen whether this intermediary solution can be endorsed by the OECD, and whether it would fit the high ambition of a swift transposition of the treaty-related BEPS measures.

4.1.2. Future bilateral treaties

The 2014 Report indicates the possibility of integrating an obedience clause, stating that the parties to the multilateral instrument may not conclude subsequent agreements that are in contradiction with the multilateral instrument.

4.1.3. Third parties' bilateral treaties

The multilateral instrument will have no effect on bilateral tax treaties that are concluded by a signing country with a non-signing country. However, it is considered that a clause could be added to the multilateral instrument to encourage signing countries to take into account provisions of the multilateral instrument when negotiating a bilateral tax treaty with a third-party country.

4.2. Uncertainty created by the impact of the multilateral instrument on the balance of existing bilateral tax treaties

Most bilateral tax treaties are seen as a whole for the contracting countries, meaning that the articles are interconnected and have been agreed upon due to their interconnectivity. One of the potential impacts of the multilateral instrument is that it can affect this interconnectivity and the equilibrium reached by the contracting countries during the negotiation, and lead to situations which would have never been accepted in bilateral situations. This concern was notably raised by the United States, which referred to it as another point of uncertainty. The multi-

45. See e.g the letter of the US Council for International Business to the OECD: “strongly support[ing] the availability of mandatory, binding arbitration for the resolution of tax treaty disputes and encourage[ing] its widespread adoption”. Such adoption would be a major step in the right direction for dispute resolution. Available at: http://www.uscib.org/uscib-content/uploads/2016/02/USCIB_Letter_Binding_Arbitration_FINAL_2_15_16Saint-Amans.pdf.

46. The committed countries are: Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States.

47. Supra n. 28, at 3.
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A difficulty can arise when the multilateral instrument modifies a provision intrinsically connected to other provisions which are not in the scope of the multilateral instrument. As an example, modifications to article 5 of the OECD Model are expected to be part of the multilateral instrument. Each time a permanent establishment will be found to be in existence under the new version of article 5, profits will need to be attributed to it under article 7. Nevertheless, as article 7 has not been modified by the BEPS Project, it should not be amended through the multilateral instrument.

The majority of existing bilateral tax treaties do not incorporate the latest version of article 7 of the OECD Model (incorporating the modifications that occurred in 2010), and some are not even based on the OECD Model. Therefore, the consequences of the new drafting of article 5 will differ from one jurisdiction to the next, depending on (i) how the applicable bilateral tax treaty is drafted and (ii) the domestic application. Such situation creates legal uncertainty for companies and governments alike.

4.4. Uncertainty related to application and interpretation

As with any treaty, consistency of application and interpretation among jurisdictions will be paramount to the success of the multilateral instrument. The OECD has indicated that because the multilateral instrument is expected to amend over 2,000 bilateral tax treaties, it cannot provide the level of detail that a bilateral protocol can. The OECD announced at the public consultation that it may develop tools, such as an explanatory statement, commentary or consolidated versions, to assist with consistent application of its provisions.

An area of significant uncertainty relates to the weight that domestic courts will give to the multilateral instrument. It is proposed that the multilateral instrument itself might expressly refer to the explanatory statement or commentary, and signing countries might have to use the latter to deal with application and interpretation issues. This solution, if implemented, may lead to increased complexity in interpretation, adding a new layer of interpretative sources for the treaty provisions concerned, but potentially achieving more harmonized interpretations across countries.

Moreover, the application of the Commentary on the OECD Model is unclear. Should it apply only to the extent that it relates to provisions modified by the multilateral instrument? Or to a broader extent? Should the Commentary be applied by all the signing countries even though they have not taken part in the development thereof?

5. Conclusion

In a time where football is at the centre stage of Europe, the current situation of the OECD BEPS Project is best described by rugby: the OECD must “convert the try”.

The outcomes of the BEPS Project will become effective only once broadly and properly implemented into domestic and treaty laws. Some measures have already been, or are in the process of being implemented into domestic law, e.g. the country-by-country reporting requirement under Action 13.

The multilateral instrument is intended to ensure that the treaty-related BEPS outcomes be implemented quickly and consistently across jurisdictions. Failure to adopt a consistent implementation would lead to increased double taxation and have a negative impact on cross-border trade and investment – outcomes that are contrary to the objectives of the OECD.

The multilateral instrument provides a mechanism for the OECD to achieve its ambitious reform of bilateral tax treaties. However, as an innovative approach to modify bilateral tax treaties, it leaves multiple questions unanswered.

The many comments made by the various stakeholders in writing and at the 7 July consultation address only a portion of the unresolved issues, given the limited scope of the public request for input. It is expected that more questions will arise when the text of the multilateral instrument and of its commentary, if any, are released, and also as experience is gained in applying this new instrument in practice. On balance, it is hoped that the result will provide better certainty for taxpayers and governments.