

# Tax Analysis

For more BEPS information,  
please contact:

International Tax  
Beijing

Jennifer Zhang  
Tel: +86 10 8520 7638  
Email: [jenzhang@deloitte.com.cn](mailto:jenzhang@deloitte.com.cn)

Shanghai

Leonard Khaw  
Tel: +86 21 6141 1498  
Email: [lkhaw@deloitte.com.cn](mailto:lkhaw@deloitte.com.cn)

Hong Ye \*

Tel: +86 21 6141 1171  
Email: [hoyeqinli@qinlilawfirm.com](mailto:hoyeqinli@qinlilawfirm.com)

Hong Kong

Anthony Lau  
Tel: +852 2852 1082  
Email: [antlau@deloitte.com.hk](mailto:antlau@deloitte.com.hk)

Transfer Pricing

Shanghai

Eunice Kuo  
Tel: +86 21 6141 1308  
Email: [eunicekuo@deloitte.com.cn](mailto:eunicekuo@deloitte.com.cn)

Hong Kong

Patrick Cheung  
Tel: +852 2852 1095  
Email: [patcheung@deloitte.com.hk](mailto:patcheung@deloitte.com.hk)

\* Hong Ye is from Qin Li Law Firm, which is a licensed Chinese law firm and forms part of Deloitte's global Tax & Legal network. Deloitte Legal is one of the major legal practices around the world.

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

On 16 September 2014, ahead of the G20 Finance Ministers' meeting on 20-21 September, the OECD published seven papers as a first tranche of deliverables under the Base Erosion and Profit Shifting (BEPS) Project. The OECD will be continuing its work on the remainder of the 15 Actions on BEPS throughout 2015. It is clear that the G20 and OECD governments intend that recommendations under each of the BEPS Actions will form a comprehensive and cohesive approach to the international tax framework, including domestic law recommendations and international principles under the model tax treaty and transfer pricing guidelines. As a result, the proposed solutions in the first seven papers, while agreed, are not yet finalised and may be affected by decisions and future work on BEPS in 2015.

The OECD has published a report in relation to Action 15, titled '*Developing a Multilateral Instrument To Modify Bilateral Tax Treaties*' as part of this first tranche of deliverables.

### Deloitte comments

The report confirms that a multilateral instrument is feasible in legal and practical terms, and the most effective way of implementing treaty outcomes under the BEPS project. The process of implementation will not be without technical issues, such as ensuring the maintenance of national sovereignty over bilateral treaties, ensuring transparency and clarity as well as compatibility with other multilateral obligations such as, for example, the European Union treaties.

Business will welcome an efficient multilateral dispute resolution procedure (a multilateral mutual agreement procedure) where it results in an outcome binding on the tax authorities within a reasonable timeframe.

### OECD proposals

The OECD recognises that updating more than 3,000 existing bilateral treaties (varying widely in their details) for any BEPS recommendations would require significant time and resources.

The report is an analysis of the benefits, feasibility and tax and public international law issues relating to the development of a multilateral instrument, which would have the same effect as simultaneous renegotiation of the bilateral treaties that are currently in effect. The report concludes that such a multilateral instrument is both desirable and feasible, and that a mandate should be quickly developed for the instrument to be implemented.

The report concludes that the multilateral instrument will sit alongside existing bilateral tax treaties. This option was preferred over others such as an instrument that replaces existing tax treaties (with issues for sovereignty and existing agreements) or one that directly modifies existing treaties (considered too cumbersome). The main advantages identified by the report of the approach of preserving the bilateral nature of tax treaties are (i) ensuring that the multilateral instrument is highly targeted; (ii) allowing existing bilateral treaties to be modified in a synchronised way; and (iii) allowing BEPS abuses to be swiftly curtailed and enable governments to achieve their international tax policy goals without violating existing bilateral treaties.

The report identifies a number of areas where a multilateral instrument may be useful, including potentially addressing abuse in cases of dual residence, transparent entities (hybrids), and 'triangular cases' involving permanent establishments in third states. The report suggests that permanent establishment definition amendments will require flexibility given existing country practices, but that boundaries will be required to ensure a consistent and coherent outcome. Similar issues arise with other treaty amendments.

Notably, the report identifies that the multilateral instrument could consider provision for multilateral mutual agreement procedures to allow for dispute resolution between several countries at once. This would assist in particular with complex transfer pricing matters, and may be of significance in relation to the likely increase in the use of the transactional profit split method for cases involving, for example, intangibles. In addition, the report notes that the multilateral instrument could be used to assist with confidentiality issues in relation to the sharing mechanism for the country-by-country report and for allocation of interest deductions.

A key theme of the report is the importance of respecting sovereign autonomy in tax matters and that countries will only be bound by amendments to which they have consented. An Annex presents a range of mechanisms which could be used in the development of a multilateral instrument, drawing on examples that have been successfully implemented in relation to other areas of international law.

#### [Timetable and Next Steps](#)

The report concludes that the multilateral instrument should be negotiated through an International Conference of OECD, G20 and other interested countries. The Conference's objective will be to implement the BEPS outputs related to treaties and also to recommend possible mechanisms for implementation of future changes to the model tax conventions. It is recognised that the treaty-based BEPS actions must be completed before the substantive components of the multilateral instrument can be finalised, but the report recommends that the International Conference begins its work in early 2015.

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#### Beijing

Kevin Ng  
Partner  
Tel: +86 10 8520 7501  
Fax: +86 10 8518 7501  
Email: [kevng@deloitte.com.cn](mailto:kevng@deloitte.com.cn)

#### Hong Kong

Sarah Chin  
Partner  
Tel: +852 2852 6440  
Fax: +852 2520 6205  
Email: [sachin@deloitte.com.hk](mailto:sachin@deloitte.com.hk)

#### Shenzhen

Sarah Chin  
Partner  
Tel: +86 755 8246 3255  
Fax: +86 755 8246 3186  
Email: [sachin@deloitte.com.hk](mailto:sachin@deloitte.com.hk)

#### Chongqing

Frank Tang  
Partner  
Tel: +86 23 6310 6206  
Fax: +86 23 6310 6170  
Email: [ftang@deloitte.com.cn](mailto:ftang@deloitte.com.cn)

#### Jinan

Beth Jiang  
Director  
Tel: +86 531 8518 1058  
Fax: +86 531 8518 1068  
Email: [betjiang@deloitte.com.cn](mailto:betjiang@deloitte.com.cn)

#### Suzhou

Frank Xu / Maria Liang  
Partner  
Tel: +86 512 6289 1318 / 1328  
Fax: +86 512 6762 3338  
Email: [frakxu@deloitte.com.cn](mailto:frakxu@deloitte.com.cn)  
[mliang@deloitte.com.cn](mailto:mliang@deloitte.com.cn)

#### Dalian

Frank Tang  
Partner  
Tel: +86 411 8371 2888  
Fax: +86 411 8360 3297  
Email: [ftang@deloitte.com.cn](mailto:ftang@deloitte.com.cn)

#### Macau

Sarah Chin  
Partner  
Tel: +853 2871 2998  
Fax: +853 2871 3033  
Email: [sachin@deloitte.com.hk](mailto:sachin@deloitte.com.hk)

#### Tianjin

Jason Su  
Partner  
Tel: +86 22 2320 6680  
Fax: +86 22 2320 6699  
Email: [jassu@deloitte.com.cn](mailto:jassu@deloitte.com.cn)

#### Guangzhou

Sarah Chin  
Partner  
Tel: +86 20 8396 9228  
Fax: +86 20 3888 0121  
Email: [sachin@deloitte.com.hk](mailto:sachin@deloitte.com.hk)

#### Nanjing

Frank Xu  
Partner  
Tel: +86 25 5791 5208  
Fax: +86 25 8691 8776  
Email: [frakxu@deloitte.com.cn](mailto:frakxu@deloitte.com.cn)

#### Wuhan

Justin Zhu  
Partner  
Tel: +86 27 8526 6618  
Fax: +86 27 8526 7032  
Email: [juszhu@deloitte.com.cn](mailto:juszhu@deloitte.com.cn)

#### Hangzhou

Qiang Lu  
Partner  
Tel: +86 571 2811 1901  
Fax: +86 571 2811 1904  
Email: [qilu@deloitte.com.cn](mailto:qilu@deloitte.com.cn)

#### Shanghai

Eunice Kuo  
Partner  
Tel: +86 21 6141 1308  
Fax: +86 21 6335 0003  
Email: [eunicekuo@deloitte.com.cn](mailto:eunicekuo@deloitte.com.cn)

#### Xiamen

Sarah Chin  
Partner  
Tel: +86 592 2107 298  
Fax: +86 592 2107 259  
Email: [sachin@deloitte.com.hk](mailto:sachin@deloitte.com.hk)

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#### National Tax Technical Centre

Email: [ntc@deloitte.com.cn](mailto:ntc@deloitte.com.cn)

#### National Leader

Leonard Khaw  
Partner  
Tel: +86 21 6141 1498  
Fax: +86 21 6335 0003  
Email: [lkhaw@deloitte.com.cn](mailto:lkhaw@deloitte.com.cn)

#### Northern China

Julie Zhang  
Partner  
Tel: +86 10 8520 7511  
Fax: +86 10 8518 1326  
Email: [juliezhang@deloitte.com.cn](mailto:juliezhang@deloitte.com.cn)

#### Southern China (Hong Kong)

Davy Yun  
Partner  
Tel: +852 2852 6538  
Fax: +852 2520 6205  
Email: [dyun@deloitte.com.hk](mailto:dyun@deloitte.com.hk)

#### Southern China (Mainland/Macau)

German Cheung  
Director  
Tel: +86 20 2831 1369  
Fax: +86 20 3888 0121  
Email: [gercheung@deloitte.com.cn](mailto:gercheung@deloitte.com.cn)

#### Eastern China

Kevin Zhu  
Director  
Tel: +86 21 6141 1262  
Fax: +86 21 6335 0003  
Email: [kzhu@deloitte.com.cn](mailto:kzhu@deloitte.com.cn)

If you prefer to receive future issues by soft copy or update us with your new correspondence details, please notify Wandy Luk by either email at [wanluk@deloitte.com.hk](mailto:wanluk@deloitte.com.hk) or by fax to +852 2541 1911.

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