# The dawn of the multilateral convention

International Tax | Large Corporate



01 February 2019

*Bill Dodwell* considers the impact of the changes to double tax treaties arising from the Base Erosion and Profit Shifting project  which took effect in the UK from the start of the year

On 1 January 2019, some of the changes to double tax treaties arising from the Base Erosion and Profit Shifting project took effect in the UK.

All members of the BEPS Inclusive Framework have agreed to implement the project's minimum standards. There are now 127 members of the Inclusive Framework; it seems that new countries join almost every week. All countries work together in setting out new standards – although naturally there are coordinating groups to ensure that the practicalities of drafting can be met. It's thus not correct to refer to the BEPS project as an OECD project. It probably never was – since it was mandated and led by the G20, with the important presence of China India, Russia and Brazil as well as the traditional OECD members. The OECD secretariat – the Centre for Tax Policy and Administration – remains the key administrative body which is an essential part of delivering the project. CTPA Director Pascal Saint Amans remains the high-profile project leader – but the decisions come firmly from the participating countries and not from OECD officials.

The BEPS minimum standards include several which apply to double tax treaties and thus need to be adopted through bilateral agreements between countries – or, more straightforwardly, through ratifying the Multilateral Convention.

To date, 86 countries have signed the Multilateral Convention and eighteen countries have ratified it – which means that the Convention takes effect in those countries. Countries include Australia, Austria, France, Japan and the UK. However, none of the well-known intermediaries, such as Luxembourg, The Netherlands, or Switzerland have ratified yet. There are 47 treaties between those 18 countries which have been changed by the Convention.

The OECD secretariat produced a clever spreadsheet with a web viewer, so that we can all see which countries have signed; which treaties they have brought into the process and the changes that will be made once both parties to a treaty have ratified it. The database now shows ratification and effective dates.

The key changes made by the Convention (or bilaterally) are the adoption of anti-treaty shopping wording and the adoption of greatly-enhanced dispute resolution procedures. Most countries have chosen to adopt the so-called principal purpose rule, which is intended to disallow treaty benefits in circumstances where the countries did not intend they should be granted. A minority have chosen a limitation on benefits rule (which essentially narrows the class of taxpayer which might

benefit), supplemented by a principal purpose rule as a backstop. The UK preferred to avoid the over-prescriptive wording of a limitation on benefits rule, in case it removed a benefit inappropriately. The UK is also happy to agree that the dispute resolution procedures should apply to the principal purpose rule. Regrettably, not all countries are prepared to do this.

The OECD secretariat has estimated that ‘treaty shopping reduces the effective withholding tax rate by more than 5% from nearly 8% to 3%, generating large revenue losses for developed and developing countries alike.’

As well as the minimum standards, the Convention allows countries to adopt optional measures, including changes to the permanent establishment rules. Unlike the minimum standards, there is little global agreement on the right way forward for defining a taxable presence. The result is that it will be more necessary than ever to check precise treaty wording, rather than relying upon the older common standard. No doubt the work on defining a permanent establishment could in future be affected by the current debate on the taxation of the digital economy.

The Multilateral Convention doesn’t change underlying bilateral tax treaties. Instead, it adds overrides to specific treaty clauses. Countries thus agreed to produce synthesised texts of treaties, aided by guidance from the OECD. The objective, unsurprisingly, is to provide comprehensive information to taxpayers, auditors and advisors on the changes. Countries and the OECD secretariat have also produced official translations of the Convention, which has two authentic languages (English and French).

HMRC have published synthesised treaty texts covering Serbia, Slovenia, New Zealand and Japan.

The adoption of the Multilateral Convention brings the last legislative piece of the BEPS project. Countries may still need to adopt domestic legal changes, although the adoption of the EU’s Anti-tax avoidance directives ensures adoption across the Member States. The issue of commentaries still continues, with agreement looking far away on some aspects of defining profit allocation. All those participating in the reforms from the BEPS project should nonetheless celebrate the milestone of the Convention taking effect in practice.