

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting signed by the Netherlands and other countries

On June 7, 2017, the Dutch Minister of Finance Dijsselbloem and other high-level representatives of 67 countries representing 68 jurisdictions signed the [Multilateral Convention](#) ("Multilateral Instrument" or "MLI") to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) and improve dispute resolution mechanisms. Eight other countries and jurisdictions have expressed their intention to sign the MLI and more countries are expected to sign by the end of this year.

The MLI will only enter into force three months after five jurisdictions have deposited their instrument of ratification, acceptance or approval. More than 1,100 bilateral tax treaties have already been matched and will be modified by the MLI once the respective signatories ratify the instrument in accordance with their domestic procedures. The MLI provisions will generally take effect with respect to withholding taxes on the first day of the calendar year following the last date on which the MLI enters into force for each of the two Contracting Jurisdictions and six months as of this date with respect to all other covered taxes.

Background

More than 100 jurisdictions (the Ad hoc Group) worked under a mandate from the G20 to develop the Multilateral Instrument with the aim of implementing the tax treaty related recommendations from the OECD BEPS Action Plan, including those on hybrid mismatches (Action 2), treaty abuse (Action 6), permanent establishments (Action 7) and dispute resolution mechanisms (Action 14), into their existing bilateral tax treaties.

Following the adoption of the MLI and its accompanying [Explanatory Statement](#) on November 24, 2016, interested jurisdictions were able to indicate how they wanted to incorporate the MLI into their existing tax treaties, i.e. their choices with respect to the different options available under the MLI – the "[MLI position](#)".

Signing of the MLI and provisional positions

A high-level ceremony was held on June 7, 2017, in Paris, where representatives of 68 jurisdictions signed the MLI, while others expressed their intention to join in the near future. Signatories are granted flexibility in meeting BEPS minimum standards on treaty shopping and dispute resolution and the possibility to opt out of provisions that do not reflect a minimum standard. The MLI Position submitted by each signatory prior to the signing ceremony includes a list of tax treaties they wish to modify using the MLI and their options and reservations. A total of 2,362 treaties have been listed by the signatories – treaties for which the two jurisdictions have sent notification of their intention to modify the agreement using the MLI ("Covered Tax Agreements"), with 1,103 treaties already matched (the two parties choose to apply the same optional provisions) and expected to be modified by the MLI.

The Principal Purposes Test introduced under BEPS Action 6 will apply to all treaties covered by the MLI, while an additional simplified Limitation on Benefits test will only apply to the treaties of 12 jurisdictions, including Argentina, Armenia, Bulgaria, Chile, Colombia, India, Indonesia, Mexico, Russia, Senegal, the Slovak Republic and Uruguay.

So far, 25 signatories have signed up for the mandatory binding arbitration mechanism provided for in the MLI: Andorra, Australia, Austria, Belgium, Canada, Fiji, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Malta, **the Netherlands**, New Zealand, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. It is expected that arbitration will be introduced in over 150 existing treaties, with most countries opting for the final offer arbitration mechanism (also referred to as "baseball arbitration"). Signatories can modify their MLI Positions until ratification and are required to notify subsequent changes to their MLI position to the OECD before they can become effective. Therefore, additional jurisdictions can choose to introduce mandatory arbitration in their treaties at a later date.

Next steps

The Multilateral Instrument will only enter into force three months after five countries have ratified, accepted or approved it. Once ratified, the MLI provisions chosen can potentially apply to all the Covered Tax Agreements specified by the countries, although a specific Covered Tax Agreement will only enter into force after the parties to that treaty have ratified the MLI. The OECD expects the first modifications to covered treaties to become effective during the course of next year.

The MLI does not override or amend existing bilateral tax treaties – as an amending protocol does – but is applied alongside the Covered Tax Agreements, modifying their application in order to implement BEPS measures. Even if there is no domestic legal requirement to prepare consolidated texts of modified treaties, jurisdictions may choose to prepare consolidated versions. Meanwhile, the OECD is developing [tools](#) to facilitate the application of the MLI to existing treaties.

Implementation of the four BEPS minimum standards (two of which – on treaty shopping and dispute resolution – are relevant in the context of the MLI) is subject to peer review. [Members](#) of the Inclusive Framework for BEPS Implementation have committed to implementing the minimum standards and are subject to the peer reviews. The first report on compliance with the minimum standard to address treaty shopping contained in Action 6 is expected to be issued by January 1, 2019. In order to meet the minimum standard on time, the countries signing the MLI may have to accelerate the ratification process.

The MLI is open for signature by all other jurisdictions, some of which are currently working to prepare for signature.

Our comments

The Dutch Deputy Minister of Finance had previously outlined the Dutch position on the MLI in a letter to the Lower House dated March 21, 2017 and in a position paper dated October 28, 2016. On June 7, 2017 the Ministry of Finance published an information notice on their website with comments on the outcome of the signing ceremony for the Netherlands.

The [List of Reservations and Notifications for the Netherlands](#), as published on June 7, 2017 after the signing ceremony, is mostly in accordance with the previously communicated positions. Of particular note are the following (non-exhaustive) points:

- The Netherlands has listed 82 tax treaties as Covered Tax Agreements and expects a match following the signing ceremony with at least 40 countries. This number is expected to increase if more of its treaty partners sign the instrument.
- Contrary to previous communications from the Deputy Minister of Finance, the tax treaties with Germany and France were listed as Covered Tax Agreements (and vice-versa).
- The provisions on hybrid mismatches (transparent entities and dual resident entities) will apply to all Covered Tax Agreements listed by the Netherlands, with the exception of the provision on transparent entities in relation to treaties concluded with Japan, the UK and the USA, which already contain such provisions.
- Like all other signatories, the Netherlands has opted to apply the Principal Purpose Test ("PPT") to all Covered Tax Agreements. Unlike 12 other jurisdictions, the Netherlands did not opt for an additional simplified Limitation on Benefits test ("LOB-Test"). The burden of proof for tax authorities under the PPT is lower than under the Main Purpose Test, as included in some treaties concluded by the Netherlands (e.g. the UK–NL treaty). Other Covered Tax Agreements listed by the Netherlands do not contain a PPT, LOB-Test or Main Purpose Test and discussions can therefore be expected in relation to the new provision and its interpretation.
- The provisions that broaden the definition of permanent establishments (e.g. provisions on commissionaire structures, definition of independency, specific activity exemptions and the splitting-up of contracts) will in principle all be implemented with respect to the Covered Tax Agreements listed by the Netherlands, with the exception of the splitting-up of contracts in respect of the exploration and exploitation of natural resources.

The next step is the ratification process in the Netherlands, which is expected to start in the second half of 2017. Assuming ratification by the Netherlands takes place during the course of 2018, the MLI provisions can enter into force for Covered Tax Agreements with a match (listed by jurisdictions that have also ratified before the end of 2018) as of January 1, 2019.

The MLI is in accordance with Dutch policy to combat BEPS on a multilateral basis and the Netherlands has taken a pro-active approach on this. The Netherlands is inside the scope of the MLI with respect to almost all options and makes relatively few reservations. The effectiveness of the instrument in the fight against BEPS in relation to Dutch treaty partners will depend on the reservations made by those treaty partners. In relation to treaty partners within the EU, the outcome of the MLI process should be seen in correlation with the EU Anti-Tax Avoidance Directive ("ATAD") and the proposal for an EU directive on double taxation dispute resolution mechanisms on which political agreement was recently reached.

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