2 December 2016

Global Tax Alert

OECD releases multilateral instrument to implement treaty related BEPS measures on hybrid mismatch arrangements, treaty abuse, permanent establishment status and dispute resolution

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Executive summary

On 24 November 2016, the Organisation for Economic Co-operation and Development (OECD) released the text of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) under BEPS Action 15 (the MLI) and explanatory notes.

The MLI will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures. The tax treaty related BEPS measures covered by the MLI include (elements of): (i) Action 2 on hybrid mismatch arrangements, (ii) Action 6 on treaty abuse, (iii) Action 7 on the artificial avoidance of the permanent establishment (PE) status; and (iv) Action 14 on dispute resolution. The substance of the tax treaty provisions relating to these actions was agreed under the final BEPS package released in October 2015.[1]

Detailed discussion

Background

On 5 October 2015, the OECD released its final report on developing a multilateral instrument to modify bilateral tax treaties under its BEPS Action Plan (Action 15).[2] This report was released in a package that included final reports on all 15 BEPS Actions.

Building a better working world

The MLI was developed over the past year via negotiations involving more than 100 jurisdictions including OECD member countries, G20 countries and other developed and developing countries, under a mandate delivered by G20 Finance Ministers and Central Bank Governors at their February 2015 meeting. The text of the MLI and explanatory notes are available on the OECD website.

The intention of the MLI is to enable all countries to implement tax treaty related measures produced as part of the final BEPS package in a coordinated and consistent manner across the network of existing treaties without the need to bilaterally renegotiate each such treaty. Some signatory parties of the MLI (Party or Parties) may develop consolidated versions of the tax treaties that are part of the MLI (Covered Tax Agreements) as modified by the MLI, though notably doing so is not a prerequisite for the application of the MLI.

Structure of the MLI

Recognizing the complexity of designing a general instrument that applies to the Covered Tax Agreements and to the specific provisions included in bilateral tax treaties, the MLI provides flexibility for Contracting Jurisdictions to implement (parts of) the MLI based on their needs.

Many of the provisions of the MLI overlap with provisions found in Covered Tax Agreements. Where the provisions of the MLI may conflict with existing provisions covering the same subject matter, this conflict is addressed through one or more *compatibility clauses* which may, for example, describe the existing provisions which the Convention is intended to supersede, as well as the effect on Covered Tax Agreements that do not contain a provision of the same type.

Countries have the right to reserve certain parts of the MLI (opt-out) and to have these specific articles not apply to their tax treaties.

Minimum standard provisions

One of the main purposes of the MLI is to enable countries to meet the treaty related minimum standards that were agreed as part of the final BEPS package, which are the minimum standard for the prevention of treaty abuse under Action 6 and the minimum standard for the improvement of dispute resolution under Action 14. Those minimum standards can be satisfied in different ways.

For the minimum standard provisions, the right to opt-out only exists to the extent the Covered Tax Agreement already includes a similar minimum standard. The Contracting Jurisdiction may reserve its right to do so and should notify the Depositary of the MLI (the Secretary-General of the OECD) accordingly.

Where a minimum standard can be satisfied in multiple alternative ways, the MLI does not give preference to a particular way of meeting the minimum standard. However, in cases where Contracting Jurisdictions each adopt a different approach to meeting a minimum standard those Contracting Jurisdictions must endeavor to reach a mutually satisfactory solution consistent with the minimum standard. Whether a minimum standard is met would be determined in the course of the overall review and monitoring process by the Inclusive Framework on BEPS, which brings together a large number of countries and jurisdictions to work on the implementation of the final BEPS Package.

Other provisions

The MLI is drafted to provide flexibility in relation to provisions that do not reflect minimum standards. Those provisions include the articles relating to hybrid mismatches (articles 3, 4 and 5 of the MLI) and the provisions tackling the avoidance of PE status (articles 12, 13, 14 and 15 of the MLI). Also, some of the articles relating to the prevention of treaty abuse (articles 8, 10 and 11 of the MLI) are not considered to be minimum standard provisions.

A country may reserve the right to opt-out of the other provisions and to not apply these articles to its tax treaties or to a subset of its tax treaties.

The MLI also permits countries to reserve the right to opt-out of provisions with respect to Covered Tax Agreements that contain existing provisions with specific, objectively defined characteristics (i.e., countries may have policy reasons for preserving the application of specific types of existing provisions).

The output of the work on BEPS produced multiple alternative ways to address a particular BEPS issue or allowed a main provision to be supplemented with an additional provision. The MLI incorporates a number of alternatives or optional provisions that generally will apply only if all Contracting Jurisdictions to a Covered Tax Agreement affirmatively choose to apply a particular alternative or option. For example, this applies to article 13 which contains different options to cover the BEPS concerns with respect to the specific activity exemptions for the artificial avoidance of PEs.

For some specific articles, Contracting Jurisdictions may choose different options resulting in an asymmetrical application of this provision. For example, article 5 which covers the application of methods for elimination of double taxation provides three options to choose from for the elimination of double taxation. Contracting Jurisdictions may choose different options resulting in an asymmetrical application of this provision.

Signing, entry into force and timing

The MLI is open for signatures as of 31 December 2016, followed by ratification, acceptance or approval per country. Timing for this will depend on domestic legal requirements. It is generally expected that reservations and notifications, including a list of the Covered Tax Agreements, will be made at the time of signing or when depositing the instrument of ratification, acceptance or approval. A reservation may be withdrawn or replaced with a more limited reservation.

For taxes withheld at source, the MLI will enter into effect on or after the first day of the next calendar year that begins on or after the latest of the dates on which the MLI entered into force for each of the Contracting Jurisdictions to a Covered Tax Agreement. For example, if the Convention enters into force for the first Contracting Jurisdiction on 1 March 2018 and for the second Contracting Jurisdiction on 1 March 2019, the Convention will take effect with respect to all taxes which relate to an event occurring from 1 January 2020 onwards.

With respect to all other taxes levied by a Contracting Jurisdiction, the first taxes for which provisions of the Convention will enter into effect are those which are levied with respect to taxable periods beginning on or after the expiration of a period of six calendar months (or a shorter period if all Contracting Jurisdictions agree) from the latest of the dates on which the Convention enters into force for each of the Contracting Jurisdictions to a Covered Tax Agreement. For example, where the Contracting Jurisdictions do not agree to apply a shorter period, if the latest date of entry into force of the MLI is 1 September 2018 the provisions of the MLI will have effect, in the case of a taxable year that follows the calendar year, with respect to the taxable period beginning 1 January 2020.

BEPS related provisions included in the MLI

Hybrid mismatches

Part II of the MLI (articles 3 to 5) introduces provisions which aim to neutralize certain of the effects of hybrid mismatch arrangements based on the recommendations made in the Final BEPS Action 2 and 6 Reports released in October 2015.[3] The provisions cover hybrid mismatches related to transparent entities, dual resident entities and elimination of double taxation. These provisions are all not minimum standard provisions and therefore Contracting Jurisdictions have the right to opt to not apply these provisions to their covered tax treaties.

Transparent entities (article 3)

Article 3 addresses the situation of hybrid mismatches as a result of entities that one or both Contracting Jurisdictions treat as wholly or partly transparent for tax purposes. Under this provision, income derived by or through an entity that is treated as wholly or partly transparent under the tax law of either Contacting Jurisdiction shall only be considered income of a resident to the extent that the income is treated, for purposes of taxation by that Contracting Jurisdiction, as the income of a resident of that Contracting Jurisdiction.

Article 3 shall apply to all Covered Tax Agreements, unless the Contracting Jurisdiction makes a reservation. Contracting Jurisdictions may reserve the right not to apply the entirety or parts of the article. To the extent a Covered Tax Agreement already contains similar provision(s) to the main measure (whether through a general rule or rules based on specific fact patterns and types of entities and arrangements), the main measure shall apply in place of those similar provisions.

Dual resident entities (article 4)

Article 4 modifies the rules for determining the treaty residency of a person other than an individual that is a resident of more than one Contracting Jurisdiction (dual resident entity). Under this provision, treaty residency of a dual resident entity shall be determined by a mutual agreement procedure (MAP) between Contracting Jurisdictions.

Under the MAP in article 4, Contracting Jurisdictions are not obligated to successfully reach an agreement and in absence of a successful mutual agreement, a dual resident entity is not entitled to any relief or exemption from tax provided by the Covered Tax Agreement except as may be agreed upon by the Contracting Jurisdictions.

Article 4 shall apply to all Covered Tax Agreements, unless the Contracting Jurisdiction makes a reservation. To the extent a Covered Tax Agreement already contains provision(s) for determining whether a dual resident entity shall be treated as a resident of one of the Contracting Jurisdictions, article 4 shall apply in place of those provision(s). Article 4 shall however not apply to provisions of a Covered Tax Agreement addressing the residence of companies participating in dual-listed company arrangements.

Application of methods for elimination of double taxation (article 5)

Article 5 includes three options for Contracting Jurisdictions for the methods of eliminating double taxation. Option A provides that provisions of a Covered Tax Agreement that would otherwise exempt income derived or capital owned by a resident of a Contracting Jurisdiction would not apply where the other Contracting Jurisdiction applies the provisions of the Covered Tax Agreement to exempt such income or capital from tax or to limit the rate at which such income or capital may be taxed (switch over clause). Instead, a deduction from tax is allowed subject to certain limitations. Under option B, Contracting Jurisdictions would not apply the exemption method with respect to dividends if those dividends are deductible in the other contracting state. Option C includes that the credit method should be restricted to the net taxable income. Contracting Jurisdictions may choose different options resulting in an asymmetrical application of this provision. Contracting Jurisdictions may also opt not to apply article 5 to one or more of its Covered Tax Agreements.

Treaty abuse

Part III of the MLI (articles 6 to 13) contains six provisions related to the prevention of treaty abuse, which correspond to changes proposed in the Final Report on Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances).[4] In particular, the Report contains provisions relating to the so-called "minimum standard" aimed at ensuring a minimum level of protection against treaty shopping, mandating: (i) the inclusion of a statement of purpose of a tax treaty in the preamble; and (ii) the inclusion of alternative tests aimed at preventing inappropriate granting of treaty benefits. Articles 6 and 7 of the MLI provide the manner in which to adopt such minimum standard.

Part III also includes provisions relating to dividend transfer transactions (article 8), capital gains derived from alienation of shares or interests in entities that derive their value principally from immovable property (article 9), PEs situated in third jurisdictions (article 10), and rules on the application of tax agreements to retract a Party's right to tax its own residents (article 11).

Purpose of a Covered Tax Agreement (article 6)

Article 6 contains the proposal described in the Final Report on Action 6 to change the preamble language of a Covered Tax Agreement to ensure compliance with one of the requirements of the minimum standard consisting of expressing the common intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. Under the compatibility clause of the article, the preamble language contained in article 6 would replace the preamble text contained in Covered Tax Agreements, or would be added if such language is not already included.

Because the wording in article 6(1) is part of the so-called "minimum standard," no reservations are permitted, unless the Covered Tax Agreements already contain preamble language describing the intent to eliminate double taxation without creating opportunities for non-taxation, similar to article 6(1). Except in cases where a reservation is permitted, each Party would be required to notify the Depository of whether each of its Covered Tax Agreements contain preamble language described in article 6, and if so, specify the text. If all Contracting Jurisdictions have made such a notification with respect to the preamble language, the language would be replaced with the wording specified in article 6 of the MLI. If not all Contracting Jurisdictions have made such notification, then the language on article 6 would be added to the existing preamble language.

Article 6 also includes optional wording that may be added to the preamble of a Covered Tax Agreement referring to the desire to develop an economic relationship or to enhance co-operation in tax matters. Each Party that chooses to include that language will have to notify the Depository along with a list of its Covered Tax Agreements that do not include the language. That text will only apply once all Contracting Jurisdictions have notified their intention to include such language in their Covered Tax Agreements.

Prevention of treaty abuse (article 7)

Article 7 contains the provisions to be included in a Covered Tax Agreement to prevent treaty abuse. As concluded in the Final Report on Action 6, the prevention of treaty abuse should be addressed in one of the following ways: (i) a combined approach consisting of a Limitation on Benefits (LOB) provision and a principal purpose test (PPT); (ii) a PPT alone; or (iii) a LOB provision, supplemented by specific rules targeting conduit financing arrangements. With respect to the LOB provision, the Final Report on Action 6 provided for the option of including a detailed or a simplified version.

Given that a PPT is the only way that a Contracting Jurisdiction can satisfy the minimum standard on its own, it is presented as the default option in article 7. Parties are allowed to supplement the PPT by electing to also apply a simplified LOB provision. The MLI does not include a detailed LOB provision given the substantial customization required by Contracting Jurisdictions. Instead, the MLI allows Parties that prefer to address treaty abuse by adopting a detailed LOB provision to opt out of the PPT and agree to "endeavor to reach a bilateral agreement that satisfies the minimum standard." In addition, the MLI allows Parties preferring a detailed LOB provision to express their intention to incorporate the PPT as an interim measure while the detailed LOB is being bilaterally negotiated. The Explanatory Statement to the MLI notes that the term "detailed LOB provision" refers to the detailed LOB provision as described in the Final Report on Action 6, but observes that it will be further developed in the course of follow-up BEPS work.

Specifically, article 7 articulates the PPT which denies treaty benefits when, having regard to all relevant facts and circumstances, obtaining that benefit is one of the principal purposes for entering into a specific transaction or arrangement that resulted directly or indirectly in that benefit, unless if granting that benefit is not contrary to the object and purpose of the relevant provisions of the Covered Tax Agreement. The MLI specifies that this PPT will apply in place of or in absence of equivalent provisions in a Covered Tax Agreement. In addition, the MLI allows an optional inclusion of a discretionary relief provision when treaty benefits are denied under the PPT. The mechanism would require that the competent authorities of the Contracting Jurisdictions involved shall consult with each other before rejecting such a relief request. Contracting Jurisdictions that have chosen to apply the discretionary relief with respect to the PPT will apply such relief in conjunction with the PPT of any Covered Tax Agreement as modified under the MLI.

As noted above, Parties may opt to apply a simplified LOB provision as a supplement to the PPT. The simplified LOB will apply once the Contracting Jurisdiction notifies its intention to apply it, provided all Contracting Jurisdictions have chosen to apply it. Importantly however, if some but not all Contracting Jurisdictions opt to apply the simplified LOB provision, it could still apply to a Covered Tax Agreement in one of two ways. First, the simplified LOB would apply to all Contracting Jurisdictions if the Parties that have not chosen to apply it agree to such application and properly notify the Depository (symmetrical application). Second, a Contracting Jurisdiction that chooses to apply the simplified LOB provision could apply such provision if all of the Contracting Jurisdictions that do not choose to apply the simplified LOB agree to such application and notify the Depository (asymmetrical application).

Importantly, article 7 of the MLI provides that a resident of a Contracting Jurisdiction would be entitled to the benefits otherwise accorded to residents of Contracting Jurisdictions only if they constitute a "qualified person" under article 7(9) of the simplified LOB, or unless benefits are otherwise granted to that resident under another provision of the simplified LOB (such as the active trade or business test). The article does not however restrict the ability, with respect to a resident of a Contracting Jurisdiction, to determine: (i) the residence of dual resident entities; (ii) the proper adjustments to taxes charged on profits of associated enterprises; or (iii) to allow for a request of a MAP.

With respect to the interaction between the simplified LOB and provisions of Covered Tax Agreements, the MLI specifies that the simplified LOB will replace existing provisions of Covered Tax Agreements that limit the benefits of the Covered Tax Agreements (or that limit benefits other than a benefit under the articles relating to residence, associated enterprises or non-discrimination or a benefit that is not restricted solely to residents of a Contracting Jurisdiction) only to a resident that qualifies for such benefits by meeting one or more of the tests provided. In case the Covered Tax Agreement lacks any such provision, the simplified LOB would be added. Thus, it is intended to apply in place of or in the absence of existing LOB provisions. However, it is not intended to restrict the scope or application of other types of anti-abuse rules in Covered Tax Agreements.

Article 7 contains a minimum standard and therefore, a Party may only reserve on the rules contained in article 7 in the following manner. First, a Party may reserve on the PPT if the Party intends to adopt a combination of a detailed LOB provision and either: (i) rules to address conduit financing structures, or (ii) a PPT. In such cases, according to the MLI, Contracting Jurisdictions must endeavor to reach a mutually satisfactory solution which meets the minimum standard. Second, a Party may also reserve on the application of the PPT (and the discretionary relief provided for the PPT if Parties have chosen to apply it) to its Covered Tax Agreements that already contain a PPT. Importantly, this reservation would only apply with respect to a comprehensive PPT denying all treaty benefits and would not apply to a PPT-type test that applies only to certain treaty benefits, such as dividends, interest or royalties. Finally, a Party can reserve on the application of the simplified LOB provision to its Covered Tax Agreements if its Covered Tax Agreements already contain tests described in the simplified LOB provision.

Dividend transfer transactions (article 8)

Article 8 of the MLI specifies anti-abuse rules for benefits provided to dividend transfer transactions consisting of exempting or limiting the tax rate on dividends paid by a company resident of a Contracting Jurisdiction to a beneficial owner or recipient that is resident of the other Contracting Jurisdiction, provided certain ownership requirements which need to be met throughout a 365 day period that includes the day of payment of the dividend are met. The 365 day holding period will apply in place or in the absence of a minimum holding period contained in the provisions described above.

The MLI allows a Party to reserve on the application of the entire article, or to reserve on the application of the article because the relevant Covered Tax Agreements already contain a minimum holding period (irrespective of it being shorter or longer than the suggested 365 day period). In this respect, the article requires a Party (other than a Party that has reserved on the entire article) to notify the Depository of the Covered Tax Agreements that include a provision that does not require a holding period. The suggested 365 day holding period will apply only where all Contracting Jurisdictions have made such a notification with respect to the existing provisions.

Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property (article 9)

Article 9 incorporates an anti-abuse rule included in the Final Report on Action 6 with respect to capital gains realized from the sale of shares of entities deriving their value principally from immovable property. In this respect, article 9 provides two conditions to be incorporated into a Covered Tax Agreement. Such conditions would require meeting a relevant value threshold at any time during the 365 days preceding the sale, and would require that the rule is expanded to apply to shares or comparable interests such as interests in a partnership or trust. The article provides that the 365 day period will replace or add such minimum period in Covered Tax Agreements, unless a Party wishes to preserve the minimum period specified in its Covered Tax Agreements. In addition, Parties may apply article 13(4) of the OECD Model Tax Convention as included in the Final Report on Action 6 that provides a 365 day holding period prior to the alienation of shares, and requires that the shares or comparable interests derive more than 50% of their value directly or indirectly from immovable property. This provision will apply in place of or in the absence of provisions of Covered Tax Agreements addressing these types of gains.

Parties may reserve on the article completely, or with respect to particular provisions within it. This article will apply only where all Contracting Jurisdictions have made a notification in such respect.

Anti-abuse rule for PEs situated in third jurisdictions (article 10)

Article 10 contains the anti-abuse rule for PEs situated in third jurisdictions, the so-called "triangular provision." The article provides that treaty benefits will be denied if an item of income derived by a treaty resident and attributable to a PE in a third jurisdiction, is exempt from tax in the residence state and the tax in the PE jurisdiction is less than 60% of the tax that would be imposed in the residence state if the PE were located there. The article makes an exception for cases where the income is derived in connection to or incidental to an active trade or business carried out through the PE, and allows discretionary relief to be requested when treaty benefits are denied under this article. The triangular provision would replace existing provisions or would be added if such provisions are absent from Covered Tax Agreements.

Parties may reserve on the entirety of the article or with respect to certain provisions contained within the article and specific notifications would be required.

Application of tax agreements to restrict a party's right to tax its own residents (article 11)

Article 11 contains a so-called "saving clause" rule that preserves a Party's right to tax its own residents. Given that the saving clause is not required to meet the minimum standard, Parties are permitted to opt out of article 11 entirely. In addition, where a Covered Tax Agreement includes a saving clause, it is recognized that such clause would have to be customized based on the content of the Covered Tax Agreements.

Avoidance of PE status

Part IV of the MLI (articles 12 to 15) describes the mechanism by which the PE definition in existing tax treaties may choose to be amended pursuant to the Final BEPS Action 7 Report[5] to prevent the artificial avoidance of PE status through: (i) commissionnaire arrangements and similar strategies (article 12); (ii) the specific activity exemptions (article 13); and (iii) the splitting-up of contracts (article 14). Article 15 of the OECD Model Tax Convention provides the definition of the term "closely related to an enterprise," which is used in articles 12 through 14. These provisions are not minimum standard provisions and therefore Contracting Jurisdictions may opt not to apply these provisions to their Covered Tax Treaties. Article 12 sets out how the changes to the wording of article 5 of the OECD Model Tax Convention to address the artificial avoidance of PE status through commissionnaire arrangements and similar strategies can be incorporated in the Covered Tax Agreements specified by the Parties.

Article 13 addresses the artificial avoidance of PE status through the specific activity exemptions included in article 5(4) of the OECD Model Tax Convention. Action 7 recommended that this exemption should only be available if the specific activity listed is of a preparatory or auxiliary character. However, there were some countries that had concerns with this view and considered that these specifically listed activities are intrinsically preparatory or auxiliary and therefore, there should be no need to subject these activities to the preparatory or auxiliary condition. Moreover, some States believed that any inappropriate use of the specific activity exemptions could be addressed through the anti-fragmentation rules. The MLI therefore provides two options for implementing the changes. Option A is based on the proposed wording in Action 7 while option B allows the Contracting Jurisdictions to preserve the existing exemption for certain specified activities. A Party can reserve the right for the entirety of article 13, or for option A, or for the proposed anti-fragmentation rule not to apply to its Covered Tax Agreements.

The Action 7 Report noted that the splitting-up of contracts is a potential strategy for the artificial avoidance of PE status through abuse of the exception in article 5(3) of the OECD Model Tax Convention. The Report further noted that the PPT provision will address such BEPS concerns related to the abusive splitting-up of contracts. Article 14 of the MLI includes a provision specifically addressing the splitting-up of contracts for use in treaties that would not include the PPT, or for Contracting Jurisdictions that wish to address such abuses explicitly.

Article 15 describes the conditions under which a person will be considered to be "closely related" to an enterprise for the purposes of articles 12, 13 and 14 of the MLI. The definition is based on the text of article 5(6)(b) of the OECD Model Tax Convention as set out in the Action 7 Report.

Existing tax treaties may include a wide variety of PE provisions and the MLI contains compatibility clauses which address any conflict that may arise between the provisions of the MLI and the provisions of Covered Tax Agreements.

Given that provisions addressing artificial avoidance of PE are not required in order to meet a minimum standard, the MLI allows a Party to reserve the right not to apply these articles to its Covered Tax Agreements. Given that article 15 is intended to apply to provisions of a Covered Tax Agreement that have been modified by a provision of the MLI that uses the term "closely related to an enterprise," Parties can opt out of article 15 only if they have made the reservations in articles 12, 13 and 14.

The MLI also requires each Party (other than a Party that has opted out) to notify the Depositary of each of its Covered Tax Agreements that contains an existing provision of the same type as the provision in the MLI and the article and paragraph number of each such provision. The MLI would apply with respect to a provision of a Covered Tax Agreement only where all Contracting Jurisdictions to the Covered Tax Agreement have made such a notification.

Improving dispute resolution

Part V of the MLI (articles 16 and 17) introduces provisions which aim to introduce the minimum standards for improving dispute resolution (the Action 14 minimum standards)[6] and a number of complementing best practices.

Article 16 of the MLI requires countries to include in their tax treaties the provisions regarding the MAP of article 25 paragraph 1 through paragraph 3 of the OECD Model Tax Convention, including certain modifications of those provisions:

- An option for taxpayers to present a case for a MAP to either of the competent authorities of the treaty partners within three years of the first notification for the action resulting in taxation not in accordance with a tax treaty.
- An obligation of the competent authorities of treaty partners to endeavor to resolve a case under MAP, if they're not able to arrive to a satisfactory solution unilaterally and a requirement that the agreements under MAP are implemented notwithstanding any time limits under domestic law.
- An obligation of the competent authorities of treaty partners to endeavor to resolve by mutual agreement any potential difficulties or doubts related to the implementation or application of a double tax treaty (DTT) and an option for them to consult on ways to eliminate double taxation in cases not provided for in the DTT.

One of the modifications to the MAP of article 25(1) of the OECD Model Tax Convention is the fact that a taxpayer should have the option to present his case to either of the competent authorities (rather than to the competent authorities of his residence state as currently provided in article 25(1)). The MLI allows, however, that Contracting Jurisdictions may reserve and not include this modification. Such reservation is only allowed if countries ensure that: (i) taxpayers are allowed to present cases to MAP regardless of any existing remedies under domestic law; or (ii) a bilateral notification or consultation process is in place requiring the country of the competent authority that refuses to accept a case for MAP to notify its treaty partner to that effect.

Countries are furthermore allowed to make reservations with respect to the time limit in which a case needs to be presented, as long as such country ensures that the taxpayer is allowed to present the case within three years. Lastly, countries can make a reservation with respect to the implementation of the MAP irrespective of any time limits in the domestic law, if they limit the time during which primary adjustments can be made to avoid late adjustments to which MAP relief will no longer be available.

The Action 14 minimum standard provides that countries should allow access to MAP in transfer pricing cases and that they should implement the resulting mutual agreements by making appropriate adjustments. As a complementing best practice to that minimum standard, the Action 14 Final Report suggested that countries include article 9(2) of the OECD Model Tax Convention in their tax treaties. Article 17 provides a mechanism for including that provision in bilateral tax treaties.

Article 17 is meant to apply in the absence of provisions in Covered Tax Agreements that require a corresponding adjustment where the other treaty party makes a transfer pricing adjustment.

The inclusion of article 9 paragraph 2 is not a minimum standard under Action 14. However, under the Action 14 minimum standard, countries are required to provide access to MAP in transfer pricing cases and to implement the agreements reached under MAP. That obligation is not conditional on the existence of article 9 paragraph 2 in countries' bilateral tax treaties. Therefore, countries are allowed to make a reservation and not include article 17 only if: (i) the country making the reservation will nevertheless make a corresponding adjustment; or (ii) the competent authority of the country making a reservation will endeavor to resolve the transfer pricing case under MAP.

Countries can also make a reservation as regards to article 17, if they have included in their Covered Tax Agreements alternative treaty provisions that limit the time during which a country may make an adjustment to transfer prices or income allocated to a PE.

Mandatory binding treaty arbitration (MBTA)

Part VI of the MLI enables countries to include MBTA[7] in their DTTs in accordance with the special procedures provided by the MLI.

Next steps

The MLI is a key part of the OECD's effort toward implementation of the recommended BEPS measures.

Currently more than 3000 of such treaties are in force. According to the OECD, the MLI could potentially lead to the amendment of at least 2000 of these treaties in the coming years.

Governments are currently preparing their lists of treaties to be covered by the MLI and are considering which options to select and reservations to make. They will have to notify this to the OECD, who will be the depositary of the MLI and will support governments in the process of its signature, ratification and implementation.

The MLI will be open for signature as of 31 December 2016 and a first high-level signing ceremony will take place in the week beginning 5 June 2017, with the expected participation of a significant group of countries.

Implications

The MLI constitutes an unprecedented change in international taxation and it will have a significant impact on the taxation of multinational companies given the expectation that it may amend at least 2000 tax treaties.

While it is not certain at this stage which countries will become signatories to the MLI, or the extent to which the provisions (other than the minimum standards) might apply with respect to any particular treaty, it is anticipated that a broad range of multinational companies may be impacted by the proposal in the coming years. Developments in this area should be monitored and existing arrangements should be carefully evaluated in light of the potential treaty changes across the world.

Endnotes

1. See EY Global Tax Alert, *OECD releases final reports on BEPS Action Plan*, dated 6 October 2016.
2. See EY Global Tax Alert, *OECD releases final report on developing a mulitlateral instrument to modify bilateral tax treaties under BEPS Action 15*, dated 10 October 2015.
3. See EY Global Tax Alert, *OECD releases final report on Hybrid Mismatch Arrangements under Action 2*, dated 11 October 2015 and EY Global Tax Alert, *OECD releases final report under BEPS Action 6 on preventing treaty abuse*, dated 20 October 2016.
4. See EY Global Tax Alert, *OECD releases final report under BEPS Action 6 on preventing treaty abuse*, dated 20 October 2016.
5. See EY Global Tax Alert, *OECD releases final report on preventing the artificial avoidance of permanent establishment status under Action 7*, dated 19 October 2015.
6. See EY Global Tax Alert, *OECD releases final report on improving the effectiveness of dispute resolution mechanisms under Action 14*, dated 8 October 2015.
7. See EY Global Tax Alert, *Mandatory Binding Treaty Arbitration under OECD's Multilateral Instrument*, dated 2 December 2016.

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