

## Belgium acts to ratify MLI and revises position on commissionaire arrangements

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### Executive summary

On 12 October 2018, Belgium's Federal Council of Ministers approved a draft law on the ratification of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI). The draft has been referred to the Council of State for review, before it is submitted to the Federal Parliament for further approval. Further legislative action will be required in order to obtain approval by all five Regional and Community Parliaments as well as the Federal Parliament in order to ratify the MLI.

In this respect, the Flemish Government published a draft decree on the ratification of the MLI earlier in September 2018. The explanatory statement accompanying the decree provides further insights on the final MLI positions that will likely be adopted by Belgium upon deposit of its instrument of ratification. This draft decree has been submitted to the Social and Economic Council of Flanders for review, and will thereafter also be submitted to Council of State.

Notably, the explanatory statement confirms that Belgium will apply Article 12 of the MLI, which tackles artificial avoidance of permanent establishment (PE) status through commissionaire arrangements. Compared to the provisional reservation submitted at the time of signing of the MLI, the threshold for the recognition of a PE will be significantly lowered.

This revised position is consistent with recent measures taken in the context of the corporate tax reform which set out a more economic approach to the recognition of PEs for domestic purposes as of 2020.

## Detailed discussion

### Background

On 24 November 2016, the Organisation for Economic Co-operation and Development (OECD) released the text of the MLI under Action 15 of its Base Erosion and Profit Shifting (BEPS) Action Plan. The MLI aims to implement in a swift, coordinated and consistent manner the tax treaty-related BEPS actions into existing bilateral tax treaties. The MLI will be applied alongside existing tax treaties, and will replace or complete various articles of these treaties.

Further to BEPS Action 7, Article 12 of the MLI amends the PE definition included in existing tax treaties in order to tackle the artificial avoidance of PE status through commissionaire arrangements and similar strategies. In particular:

- ▶ The definition of a “dependent agent PE” is broadened to not only include situations where a person is acting on behalf of an enterprise and habitually concludes contracts, but also where this person habitually **exercises the principal role leading to the conclusion of contracts that are afterwards routinely concluded by the enterprise without any material modification**. This amendment provides for a more economic interpretation to the concept of a dependent agent.
- ▶ The scope of the definition of what an “independent agent” is, is restricted and excludes persons acting exclusively or almost exclusively on behalf of one or more enterprises to which the agent is closely related.

Article 12 applies “in place” of the existing treaty provision, to the extent that both contracting states have listed the relevant treaty as a Covered Tax Agreement (CTA) and opted to both include Article 12 without reservations.

### Revised position of Belgium

On 7 June 2017, Belgium signed the MLI during the signing ceremony hosted by the OECD. At the time of signing, Belgium submitted a list of 98 CTAs as well as a provisional list of Reservations and Notifications with respect to the various provisions of the MLI. Upon signing of the MLI, Belgium opted to reserve the right for the entirety of Article 12 not to apply to its CTAs.

The draft decree published by the Flemish Government on the ratification of MLI now confirms that Belgium will opt to apply Article 12. Consequently, both revised definitions of “dependent agent PE” and “independent agent” will apply in Belgium’s CTAs (under the condition both parties have listed the relevant treaty as CTA and made the same notifications on Article 12). In addition, note that both revised definitions were also included in the new Belgium-Japan tax treaty (not yet entered into force).

This revised position is in line with recent measures taken in the context of the Belgian corporate tax reform that was adopted in December 2017, where a more economic approach to the recognition of PEs has been adopted in domestic law (and will apply as of 2020), further aligning the domestic PE definition with BEPS Action 7. See EY Global Tax Alert, [Belgian Government approves draft law on corporate tax reform including 100% participation exemption](#), dated 7 November 2017.

### Other comments

Other positions that were made public at the Signing Ceremony in June 2017 remain unchanged, in particular Belgium’s election to apply the anti-fragmentation rule (Article 13 of the MLI). Application of the specific activity exemptions may be denied when an enterprise or a closely-related enterprise carries on business activities in the same jurisdiction, together forming “cohesive business operations” which would exceed what is considered as being preparatory or auxiliary activities. Belgium continues to opt for option B regarding the inappropriate use of the specific activity exemptions, which allows jurisdictions to retain the automatic exemption to listed activities, irrespective of actually being preparatory or auxiliary. See EY Global Tax Alert, [Belgium signs Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS and submits its MLI positions](#), dated 21 June 2017.

## Implications

Alongside the introduction of the Principal Purpose Test and the anti-fragmentation rule, Belgium’s revised position on commissionaire arrangements will result in an unprecedented wave of amendments to the Belgian tax treaty network in the context of PEs. The changes included in Article 12 of the MLI will substantially lower the threshold for the recognition of a PE where both parties to the treaty have made a notification to replace the existing provision of the CTA, which will give rise to additional uncertainty and a need for increased risk management by multinational enterprises.

Further legislative action will be taken in order to obtain approval by all five Regional and Community Parliaments as well as the Federal Parliament in order to ratify the MLI. Until the final MLI positions of Belgium have been provided upon deposit of its instrument of ratification, any further amendments will need to be monitored during the legislative proceedings. Although the MLI itself has entered into force

on 1 July 2018, the new rules will only enter into force for specific bilateral tax treaties after both parties to the treaty have deposited their instrument of ratification, acceptance or approval of the MLI. Many jurisdictions are expected to finalize their ratification procedures of the MLI during the course of 2018.

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