

OECD releases guidance for development of synthesized texts and a note clarifying the entry into effect of BEPS Multilateral Convention

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Executive summary

On 14 November 2018, the Organisation for Economic Co-operation and Development (OECD) released *Guidance for the Development of Synthesized Texts* (the [Guidance](#)) to facilitate the interpretation and application of tax treaties modified by the *Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting* (the MLI). Synthesized text refers to a single document showing the text of specific tax treaties covered by the MLI (i.e., Covered Tax Agreement (CTA)) and the elements of the MLI that have an effect on the CTA as a result of the interaction of the MLI positions of its Contracting Jurisdictions, as well as information on the dates on which the provisions of the MLI have effect in each Contracting Jurisdiction for the CTA.

The Guidance, which has been developed by the OECD Secretariat with input from the members of the ad hoc Group on the MLI, sets out a suggested approach for the development of synthesized texts, and it also suggests sample language that could be included in the synthesized texts. Parties to the MLI have no legal obligation under the MLI to develop synthesized texts. However, if they decide to do so, the OECD encourages them to consult each other and take a consistent approach in developing such documents. The OECD expects that many Parties to the MLI will eventually develop synthesized texts based on the released Guidance, providing greater certainty and clarity for taxpayers.

Also, on the same date, the OECD released a secretariat note (the [note](#)) that seeks to clarify the entry into effect rules of the MLI. Generally, the provisions of the MLI have effect with respect to taxes withheld at source on amounts paid or credited to nonresidents, where the event giving rise to such taxes occurs 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 enters into force for each of the Contracting Jurisdictions to the CTA. The note addressed the situation where the latest of the dates on which the MLI enters into force is 1 January of a given year. As per the note, in such a case the MLI will have effect for taxes withheld at source on 1 January of that same given year.

Detailed discussion

Background

The MLI was developed and agreed in November 2016¹ by an ad hoc Group of approximately 100 jurisdictions, including OECD member countries, G20 countries and other developed and developing countries. It is open for signature to any interested jurisdictions.

Currently, 84 jurisdictions have signed the MLI, while 15 jurisdictions have deposited their instrument of ratification of the MLI with the OECD. The MLI will become effective on 1 January 2019 for the first 47 tax treaties concluded among the 15 jurisdictions that deposited their acceptance or ratification instrument.

While the ad hoc Group did not discuss an official format for the development of synthesized texts, it has expressed its interest in having the OECD Secretariat develop suggestions for the development of such synthesized texts.

On 14 November 2018, the OECD released Guidance for the Development of Synthesized Texts to provide suggestions to Parties to the MLI for the development of documents they could produce to help users of the MLI to understand its effects on the tax agreements it covers and modifies.

Guidance for development of synthesized texts

According to the Guidance, Parties to the MLI have no legal obligation under the MLI to develop synthesized texts. Also, they are not obliged to consult each other in developing these texts. However, if jurisdictions decide to produce synthesized texts, the OECD encourages them to consult each other in order to ensure a consistent interpretation of the application of the MLI's provisions to each CTA. The Guidance explains

that although a consolidated document that reflects the MLI modifications may be easier to read than a synthesized text, producing consolidated texts could be challenging and the result could be confusing as the MLI does not amend the text of CTAs. Instead, it applies alongside and modifies the application of the provisions of CTAs.

The Guidance is divided into three sections. Section 1 sets out as foreword an introduction on the Guidance. Section 2 includes the suggested approach for the development of the synthesized texts, and it discusses the principles for preparing the texts, the challenges that may arise for their preparation, as well as suggestions for their development. Section 3 of the Guidance provides per-article sample boxes for the development of synthesized text. Lastly, the Guidance also contains an Annex with an example of the synthesized text of the 2014 OECD Model Tax Convention as modified by the MLI.

Synthesized texts would take the form of a single document or webpage. The synthesized texts would reproduce the text of each CTA (including the texts of any amending protocols or similar instruments), and the provisions of the MLI that will modify that CTA in the light of the interaction of the MLI positions the Parties have taken. Synthesized texts would also include explanatory information in the form of a disclaimer, including information on the date on which the provisions of the MLI enter into effect and, at a minimum, should indicate that the modifications made to the application of a CTA may not have effect at the same time. The English or French text of the provisions of the MLI would ideally be inserted in the synthesized texts. Where a translation of the authentic provisions of the MLI is added to the synthesized texts, the general disclaimer would indicate that it is an unofficial translation.

The Guidance also suggests sample language that could be included in the synthesized texts. Section 3 of the Guidance provides for a sample disclaimer on the synthesized text and a sample disclaimer on the entry into effect of the provisions of the MLI. It also includes for each substantive Article of the MLI (Articles 3 to 17 and Part VI on Arbitration), sample language for the development of synthesized texts. Finally, the guidance includes the sample footnotes on the entry into effect of the provisions of the MLI.

There is no timing for the preparation of synthesized texts, however the Guidance suggests that synthesized texts would ideally be prepared when the parties to each CTA have submitted a definitive version of their MLI positions. Several

jurisdictions have already started preparing synthesized texts, and some jurisdictions have already released such texts (for example Australia, Japan, Poland and the United Kingdom).

Secretariat note on the entry into effect of the MLI

The OECD also released a note clarifying the interpretation and application of Article 35 of the MLI on the entry into effect of the provisions of the MLI. More specifically, it answers the question of when the MLI will have effect for taxes withheld at source where the latest of the dates of entry into force of the MLI for a pair of Contracting Jurisdictions is on 1 January of a given year.

According to article 35 (1)(a) of the MLI, the provisions of the MLI shall have effect “with respect to taxes withheld at source on amounts paid or credited to nonresidents, where the event giving rise to such taxes occurs **on or after the first day of the next calendar year** that begins on or after the latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement.” The note explains that the use of the word “on” can only mean that the date from which the MLI can have effect can be the same as the latest of the dates of entry into force. The same reasoning and conclusion apply to the interpretation of the similar formulations used in Article 35.

As an example, the note indicates that if the second of the pair of Contracting Jurisdictions deposits its instrument of ratification on 15 September 2018, the date of entry into force of the MLI for that Contracting Jurisdiction pursuant to Article 34 of the MLI will be 1 January 2019. In this case,

the provisions of the MLI should have effect for events giving rise to withholding taxes which occur on or after 1 January 2019.

The note clarifies that this interpretation is confirmed by the intention of the negotiators of the MLI which was to ensure that the provisions of the MLI entered into effect quickly with respect to withholding taxes on amounts paid to nonresidents.

Implications

The Guidance will contribute to a consistent interpretation of the impact of the MLI and to a common understanding of the effects of the MLI on the tax treaties it covers and modifies. As the number of jurisdictions that have deposited or intend to deposit their instrument of ratification of the MLI is constantly increasing, it is expected that the development of synthesized texts will be an ongoing exercise.

It should be noted, however, that the character of the synthesized texts is informative. For legal purposes, the provisions of the MLI must be read alongside CTAs as they remain the only legal instruments to be applied, in light of the interaction of the MLI positions of the Contracting Jurisdictions.

Furthermore, the note brings clarity regarding the entry into effect of the MLI in situations where the entry into force for the MLI for the second of the pair of Contracting Jurisdictions occurs 1 January of a given year, which in effect makes the entry into effect of the MLI happen sooner in some cases.

Endnote

1. See EY 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](#), dated 2 December 2016, and EY Global Tax Alert, [Mandatory Binding Treaty Arbitration under OECD's Multilateral Instrument](#), dated 2 December 2016.

For additional information with respect to this Alert, please contact the following:

Ernst & Young Belastingadviseurs LLP, Transfer Pricing, Rotterdam

- ▶ Ronald van den Brekel ronald.van.den.brekel@nl.ey.com
- ▶ Marlies de Ruiter marlies.de.ruiter@nl.ey.com

Ernst & Young Belastingadviseurs LLP, Amsterdam

- ▶ Konstantina Tsilimigka konstantina.tsilimigka@nl.ey.com

Ernst & Young LLP, Global Tax Desk Network, New York

- ▶ Gerrit Groen gerrit.groen@ey.com
- ▶ Jose A. (Jano) Bustos joseantonio.bustos@ey.com
- ▶ David Corredor-Velásquez david.corredorvelasquez@ey.com

Ernst & Young LLP, Washington, DC

- ▶ Rob Thomas rob.l.thomas1@ey.com

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EYG no. 011948-18Gbl

1508-1600216 NY
ED None

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