



June 2017

On 7 June 2017 the Multilateral Convention implementing Action 15 of the BEPS Plan will be signed

On 7 June 2017, the signing ceremony of Multilateral Convention concerning implementation of measures envisaged in the BEPS Plan¹, i.e. Action 15 (hereinafter: the “Convention” or “MLC”) will be held in Paris.

In November last year the OECD published the text of the Convention, whose main purpose is to adjust the existing double tax treaties (hereinafter: “DTT”) to the standards specified in the BEPS Plan. The text of the MLC has been agreed in the course of negotiations between the OECD and G20 member states as well as the representatives of the developed and developing countries.

Main amendments

The amendments to be introduced by the MLC cover four main areas:

- 1) **Preventing the use of hybrid mismatch arrangements**, i.e. structures aimed at obtaining tax benefits resulting from different treatment of a particular entity/instrument for tax purposes in different jurisdictions;
- 2) **Preventing granting of tax benefits** in inappropriate circumstances, in particular by the means of:

- implementation of a Limitation of Benefits clause (LOB) which prevents entities that not meet required conditions that may be based on, *inter alia*, legal form or substance, from obtaining the DTT benefit;
- changes within the real estate company clause that enables in certain situations the source state to tax capital gains from the alienation of shares.

3) **Preventing the avoidance of permanent establishment (PE) status**, including by the use of agency agreements or other arrangements that may artificially eliminate the prerequisites of creation of the PE in the light of existing DTTs;

4) **Improving the dispute resolution mechanism** available in the DTTs, including the Mutual Agreement Procedure (MAP), corresponding adjustment and arbitration mechanisms.

Further procedure

The MLC will enter into force after at least five countries have ratified it.

It should be stressed that the modifications to the DTTs will not take place automatically – a given country that decided to sign the MLC should notify the Depository of the Convention – the OECD General Secretary – which of the DTTs signed by this country will be subject to modifications and indicate the scope of the intended modifications. To have these changes applicable, both countries being parties to a given DTT will have to reach agreement on the scope of modifications to be applicable to the given DTT.

Impact of MLC

It is assumed that the MLC may impact approx. 3000 existing DTTs that were signed by the MLC parties.

What is important, the signing and ratification of the MLC by the given country will not lead to repealing of the existing DTTs or even a direct amendment of their texts. Instead, the Convention will be applicable in parallel with the existing DTTs (as long as the consolidated version of a particular DTT as modified by the MLC is not executed).

¹ Base Erosion and Profit Shifting, project carried out by OECD and G20 countries

that refers to tax avoidance strategies that exploit gaps and mismatches in tax

rules to artificially shift profits to low or no-tax locations

It should also be noted that the MLC was designed to be flexible enough in order to accommodate the needs of various jurisdictions. Therefore, the parties were given, e.g. the possibility to decide which DTTs they want to modify, the possibility to choose from several alternative wordings of a given provision setting up the minimum standard of protection and the option to opt out of provisions going beyond the minimum standard of protection.

In order to modify the wording of a particular DTT, both countries being parties to such DTT will have to ratify the MLC and opt for the same scope of modifications when notifying to the Depositary of the MLC.

The MLC includes provisions governing the moment when the agreed modifications of the DTT would come into force.

Standpoint of the Ministry of Finance

So far, the Ministry of Finance has not released any official information on the scope of the planned amendments to the DTTs signed by Poland. Publication of information about the DTTs being impacted by the MLC should take place not earlier than after the official ceremony of signing the Convention, i.e. after 7 June 2017.

In the view of the goals of the MLC as well as of the current policy of the Polish government aimed to increase the efficiency of tax collection, it is expected that shortly the Ministry of Finance will provide information concerning the intended broad modifications that will most likely impact many of the existing DTTs.

Summary

Ratification of the Convention by particular countries will have a very significant impact on application of the DTT provisions.

In a short period of time (depending though on the length of the national ratification process in a particular country) modifications of the existing provisions may be expected.

Co-existence of two international agreements (the MLC and DTT), in each case requiring joint and parallel interpretation of both documents will result in additional difficulties for the taxpayers.

In the light of the proposed amendments, in particular regarding redefinition of PE conditions aimed at extending the catalogue of situations in which the PE is created or introduction of the LOB clause, we recommend reviewing the existing organizational structures as well as planned activities.

Please contact us if you would like to obtain more information on the aforementioned changes or discuss their impact of the discussed changes for your company.

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