

Briefing June 2017

Switzerland signs the BEPS-Convention

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ('Multilateral Instrument', MLI) was signed by 68 jurisdictions, among them Switzerland, on 7 June 2017 in Paris. Nine further jurisdictions have signed a letter expressing their intention to sign the MLI. The signing ceremony marks an important milestone in the international tax agenda and brings us closer to the goals defined in the BEPS Action Plan.

Background

After the publication and subsequent endorsement of the final BEPS package by the G20 Finance Ministers in October 2015 it became clear that in order to implement some of the measures, it would be necessary to modify the existing double-tax treaties. Against this background, a group of over 100 countries and jurisdictions drafted a multilateral convention, which allows an efficient transposition of the results from the BEPS project into their existing bilateral treaty network. The text of this so-called "Multilateral Instrument" was published on 24 October 2016.

Functioning of the MLI

The MLI does not directly trigger a modification of, but needs instead to be read alongside the existing treaties. Each country can state, which of its existing treaties it wishes to modify by means of the MLI. Once a treaty is notified by both countries, it becomes a "Covered Tax Agreement". Over 1'100 treaties could already be matched.

Content and Position of Switzerland

Looking especially at the minimum standards, which were established in the course of the BEPS project (i.e. BEPS Action 2 - neutralize hybrid mismatch arrangements, BEPS Action 6 - prevent treaty abuse, BEPS Action 7 - prevent the artificial avoidance of PE status and BEPS Action 14 - make dispute resolution mechanisms more effective), these should be implemented through the MLI. With respect to the minimum standard regarding treaty abuse, the MLI provides for an amendment of the preamble to double-tax treaties with respect to its purpose and for the adoption of a principal purpose test (PPT). Regarding the minimum standard on dispute resolution, the MLI sets forth a commitment to apply mutual agreement procedures.

The MLI generally provides for the possibility to opt out of provisions, which do not constitute a minimum standard, as well as the potential to apply optional and alternative provisions.

Each jurisdiction's MLI position is accessible on the OECD website. Until the deposit of the respective ratification instruments they may, however, be subject

to additional changes. The Swiss position can be accessed under the following link:

<https://www.news.admin.ch/news/message/attachments/48549.pdf>.

Generally, Switzerland is committed to the application of only the minimum standards. Accordingly, it has reserved the right not to apply most of the provisions of the MLI. One of the exceptions, where Switzerland chose to apply the recommended option is Part VI of the MLI, which introduces a mandatory binding arbitration clause that should complement the mutual agreement procedure. This is consistent with Switzerland's policy when concluding double-tax treaties. Given that the implementation of the BEPS measures will most likely increase the need for effective dispute resolution mechanisms in future, this position can only be welcomed.

Amendment of Treaties

Switzerland expressed that it intends to implement the BEPS minimum standard either by means of the framework of the MLI or via bilateral negotiations and adaptations of double-tax treaties. Up until now, agreements on the precise wording of the treaty amendments could be reached with fourteen countries, namely Argentina, Austria, Chile, the Czech Republic, India, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, South Africa and

Turkey (see Swiss position under the link published above). It remains to be seen with what other states an agreement on the precise wording will be reached.

Due to the provisions of the Swiss Publications Act, there is a legal requirement to prepare consolidated texts of the modified double-tax treaties. Since the adoption of the MLI does not directly amend double-tax treaties, the consolidated versions will definitely facilitate the use of the modified treaties.

Next Steps

The Federal Council plans to submit the MLI for public consultation towards the end of 2017. Since the regular parliamentary approval process needs to be followed, it is difficult to estimate the time frame until ratification of the MLI. An entry into force before mid-2019 therefore seems unlikely.

Our support

Considering the changes that the MLI will bring with respect to existing double-tax treaties, international corporate taxpayers are particularly advised to review in detail its impact on international tax structures. We would of course be delighted to assist you in this process.

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