

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI): Implementation of Article 16 of the MLI (Mutual Agreement Procedure)

Opinion of the Conference of the Parties of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

1. This opinion of the Conference of the Parties of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) seeks to clarify the interpretation and application of Article 16 of the MLI (Mutual agreement procedure).
2. The opinion was approved by the Parties to the MLI under written procedure on 11 June 2021.

Question and opinion of the Conference of the Parties

3. The question which has arisen is on the interpretation of the expression “in the absence of” in the compatibility clauses in Article 16(4)(b)(i) and (ii) and (c)(i) and (ii) of the MLI and on whether those clauses apply to Covered Tax Agreements that contain existing provisions that are not in line with the Action 14 minimum standard (i.e. that include some but not all of the components of the relevant sentences in Article 16(2) and (3) of the MLI or that provide for additional requirements).
4. The Conference of the Parties confirms that the expression “in the absence of” in the compatibility clauses in Articles 16(4)(b)(i) and (ii) and (c)(i) and (ii) of the MLI should be interpreted to cover existing provisions that include some but not all of the components of the relevant sentences in Articles 16(2) and (3) of the MLI, as well as existing provisions that include all of the components of Articles 16(2) and (3) of the MLI but also contain additional restrictive elements. These existing provisions would therefore be modified by Articles 16(2) and (3) of the MLI and brought into compliance with the Action 14 minimum standard where Covered Tax Agreements are notified in accordance with Article 16(6)(c)(i) and (ii) and (d)(i) and (ii) of the MLI.

Background

5. Article 16 implements components of the BEPS Action 14 minimum standard on treaty disputes and mutual agreement procedure (MAP).¹ It allows jurisdictions to modify Covered Tax Agreements to introduce Articles 16(1) through (3) of the MLI which are based on the text of Article 25(1) through (3) of the OECD Model Tax Convention.² Article 16(4) of the MLI is a compatibility clause, which describes the interaction between each sentence of Articles 16(1) through (3) of the MLI and the provisions of Covered Tax Agreements.³ Article 16(6) of the MLI contains the corresponding notification requirements, to ensure clarity as to how Covered Tax Agreements will be modified by Article 16 of the MLI.⁴

¹ [Explanatory Statement](#), para. 192.

² [Explanatory Statement](#), para. 192 and 193.

³ [Explanatory Statement](#), para. 195.

⁴ [Explanatory Statement](#), para. 203.

Analysis

6. The compatibility clause in Article 16(4)(b)(i) and (ii) and (c)(i) and (ii) of the MLI states that a specific sentence in Article 16(2) and (3) of the MLI “shall apply in the absence of provisions of a Covered Tax Agreement” that would provide for what is contained in the sentence (i.e. the compatibility clauses describe the sentences in Article 16(2) and (3) of the MLI). The relevant notification clauses in Article 16(6) of the MLI provide that a Party shall notify the Depository of the list of its Covered Tax Agreements which do not contain the provisions described in the compatibility clauses and that the MLI would only apply where all Contracting Jurisdictions have made a notification with respect to a Covered Tax Agreement.

7. The Explanatory Statement provides that “in general, these compatibility clauses reflect that members of the ad hoc Group preferred to retain existing provisions relating to dispute resolution to the extent that those provisions are consistent in content with the provisions of paragraphs 1, 2 and 3”⁵ of Article 16 of the MLI (which correspond to Articles 25(1)-(3) of the OECD Model Tax Convention or UN Model Tax Convention). That is, the Explanatory Statement indicates that the provisions which are not consistent in content with the provisions of those paragraphs should be modified by the MLI.

8. Given that, the expression “in the absence of” should be interpreted as covering existing provisions that include some but not all of the components of the relevant sentences in Article 16(2) and (3) of the MLI, or that provide for additional requirements, in order to allow Parties to modify their Covered Tax Agreements and implement the treaty components of the Action 14 minimum standard.

9. For example, a Covered Tax Agreement that contains an existing provision modelled after the first sentence of Article 25(3) of the OECD Model Tax Convention (“[t]he competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention”), but that does not include the word “interpretation” would be within the scope of the compatibility clause in Article 16(4)(c)(i) of the MLI and could thus be modified by the MLI.

10. This interpretation is aligned with the object and purpose of the MLI and Article 16 of the MLI, which is to implement the Action 14 minimum standard.⁶ The MLI was developed in response to the need to ensure swift, co-ordinated and consistent implementation of the treaty-related BEPS minimum standards across the network of existing tax treaties without the need to bilaterally renegotiate each such treaty.⁷

11. This interpretation also recognises the fundamental importance of MAP to the proper application and interpretation of tax treaties, notably to ensure that taxpayers entitled to the benefits of the treaty are not subject to taxation by either of the Contracting States which is not in accordance with the terms of the treaty. The Action 14 minimum standard, which aims to strengthen the effectiveness and efficiency of MAP,⁸ minimises risks of

⁵ [Explanatory Statement](#), para. 195.

⁶ Preamble of the MLI, para. 7; and Opinion on Interpretation and Implementation Questions, issued on 20 May 2021, Guiding Principle 1.

⁷ Preamble of the MLI, para. 7 and 9 and [Explanatory Statement](#), para. 14 and 21.

⁸ The BEPS Action 14 Report, “Making Dispute Resolution Mechanisms More Effective” Executive summary, para. 2 and 3.

uncertainty and unintended double taxation by ensuring the consistent and proper implementation of tax treaties.⁹

12. Interpreting Article 16 of the MLI to allow its provisions to apply as broadly as possible, and in particular, to apply in cases where a Covered Tax Agreement would not otherwise satisfy the Action 14 minimum standard would therefore be in line with the object and purpose of the MLI and allow jurisdictions to implement the minimum standard.

13. As a result, the expression “in the absence of” in the compatibility clauses in Articles 16(4)(b)(i) and (ii) and (c)(i) and (ii) of the MLI is interpreted to cover existing provisions that include some but not all of the components of the relevant sentences in Articles 16(2) and (3) of the MLI, as well as existing provisions that include all of the components of Articles 16(2) and (3) of the MLI but also contain additional restrictive elements. These existing provisions would therefore be modified by Articles 16(2) and (3) of the MLI and thus brought into compliance with the Action 14 minimum standard.

14. As the notification clauses in Articles 16(6)(c) and (d) of the MLI provide that the MLI applies only where all Contracting Jurisdictions have made the required notification,¹⁰ the sentences of Article 16(2) and (3) of the MLI would modify a Covered Tax Agreement that contains existing provisions not in line with the relevant components of the Action 14 minimum standard only where both Contracting Jurisdictions notify that Covered Tax Agreement pursuant to the relevant notification clause in Article 16(6)(c) and (d) of the MLI.

⁹ The BEPS Action 14 Report, Executive summary, para. 3.

¹⁰ Notifications under Articles 16(6)(c) and (d) of the MLI trigger the application of Article 16(2) and (3) of the MLI. As expressed in the Explanatory Statement, the effect of notifications under the MLI varies depending on the type of compatibility clause of a provisions of the MLI. Generally, notifications trigger the application of a provision of the MLI where a compatibility clause provides that the provision of the MLI only applies “in the absence of” an existing provision of a Covered Tax Agreement.