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## Multilateral Instrument on BEPS (MLI)

<http://docs.bepartners.pro/multilateral-convention-BEPS.pdf>

**On 24 November 2016, the OECD published its multilateral instrument on BEPS (MLI) together with an explanatory statement. In the following beinformed we provide a short overview highlighting the points we consider to be of particular interest for the investment management industry.**

### What is it about and how does it enter into force?

The MLI should serve states in the easy implementation of the BEPS findings into their existing double tax treaties. If so chosen by two corresponding parties ("Contracting Jurisdictions") to existing double tax treaties (the "Covered Tax Agreements" in the MLI), the MLI will override or supplement existing articles.

An official signing ceremony for the MLI is planned for June of this year. Article 34 provides that the MLI will come into force on the first day of the month following the expiration of three calendar months after the ratification by both of the Corresponding Jurisdictions. Article 35 sets out when the terms of the MLI will come into effect in any particular jurisdiction. The MLI provides

- for taxes withheld at source: the MLI will enter into effect on 1 January of the year following the final date on which the MLI enters into force for the Contracting Jurisdictions to that Covered Tax Agreement;

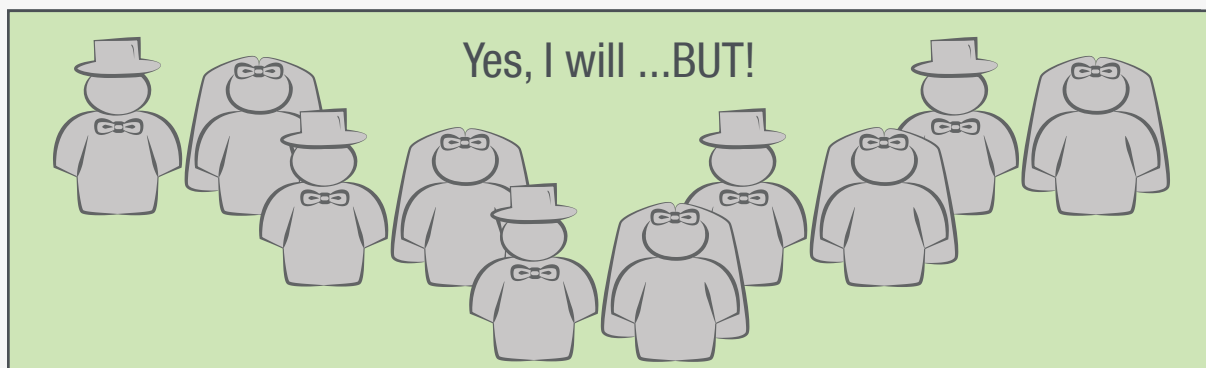
- for all other taxes: the MLI will enter into effect six calendar months (or such shorter period as agreed by all parties) after the final date on which the MLI enters into force for the Contracting Jurisdictions to the Covered Tax Agreement; and
- for the mutual agreement procedure and arbitration: the MLI will enter into effect for cases presented to the competent authority of a Contracting Jurisdiction on or after the final date on which the MLI enters into force for the Contracting Jurisdictions to the Covered Tax Agreement.

### Are the Articles in the MLI compulsory?

Each state is free to choose to become a party to the MLI. If it has chosen to become a party, then most of the Articles in the MLI are still optional. There are only two compulsory Articles in the MLI – Articles 6(1) and 7(1).

### Article 6(1) inserts the following preamble into a Covered Tax Agreement:

"Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provide in this agreement for the indirect benefit of residents of third jurisdictions)."





### Article 7 provides for a Principal Purpose Test. Specifically, Article 7(1) provides the following:

"Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item or income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement."

Which Articles may impact the Investment Management Industry in particular?

### Article 8: Dividend transfer transactions

Provisions of a Covered Tax Agreement that exempt dividends from tax, or that limit the rate at which such dividends may be taxed, will apply only if the ownership conditions described in those provisions are met throughout a 365 day period that includes the day of the payment of the dividends (for the purpose of computing that period, no account will be taken of changes of ownership that would directly result from a corporate reorganization, such as a merger or divisive reorganization, of the company that holds the shares or that pays the dividends).

### Article 9: Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property

Gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity may be taxed in the state where the real estate is located provided that these shares or rights derived more than a certain part of their value (recommendation is 50 per cent) from immovable property (real property).

### Article 12 – 15

These Articles deal with the artificial avoidance of permanent establishment status. We think that the amended definition of an independent agent may be of particular relevance for the investment management industry. Where a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person will not be considered to be an independent agent within the meaning of applicable the double tax treaty with respect to any such enterprise.

### Summary

The official signing ceremony for the MLI will be held in June 2017 in Paris. Nomen est omen: The MLI as such is not a straightforward recipe but rather 'grande cuisine' that needs meticulous preparation. We shall wait and see if it is to the taste of many states. However, it is celebrated by the OECD as a great success and therefore one can expect that the MLI will have many contributors. "The adoption of this multilateral instrument marks a turning point in tax treaty history," said OECD Secretary-General Angel Gurría. It may be better to check possible implications to your investments now in order to avoid marking a turning point to the tax efficiency of your investment structure.

**be** in touch: Any questions?  
Please do not hesitate to contact us!



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