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Implementation of Multilateral Instrument (MLI) in Switzerland

As one of the BEPS project's anti-tax avoidance measures, the OECD has developed a so called multilateral instrument which has been signed by 87 jurisdictions so far. The purpose of the MLI is to efficiently allow the modification of a large number of existing bilateral tax treaties with anti-avoidance measures.

On 22 March 2019, the Swiss parliament approved ratification of the MLI, enabling the Swiss government to place the ratification bill with the OECD, provided there won't be an objecting popular vote.

1. What is the MLI?

The MLI transposes results from the OECD/G20 BEPS Project into bilateral tax treaties, offering countries concrete solutions to close the gaps in existing international tax rules. It also implements minimum standards to counter treaty abuse and to improve dispute resolution mechanisms.

The MLI is divided into seven parts. Part I and Part VII contain formal provisions on

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the functioning of the MLI itself, whereas Parts II-VI deal with substantive rules.

Part II focuses on hybrid mismatches. Part III deals with so called Covered Tax Agreements (CTA), treaty abuse, dividend transfer transactions, capital gains from the alienation of shares or interests in entities deriving their value mainly from immovable property, anti-abuse rules for permanent establishments situated in third country jurisdictions and the so called "savings clause". Part IV contains provisions on the avoidance of the permanent establishment status, Part V addresses the improvement of dispute resolution and Part VI deals with mandatory binding arbitration.

2. Countries' MLI positions

Once a jurisdiction signs the MLI, it must submit a preliminary list of tax treaties it wishes to be covered by the MLI. If a tax treaty in force has been included in this list by both parties, it becomes a Covered Tax Agreement. Signatory states must also submit a list of changes they would like to make to their CTAs. The MLI distinguishes substantive rules which represent minimum standards and must be implemented in some form or other by all signatory states from measures which are considered recommendations. If both parties to a CTA have matching MLI positions, those provisions will apply to that CTA (with the exception of provisions allowing for asymmetrical application).

3. How does Switzerland implement the MLI?

Switzerland will implement the minimum standards either within the framework of the MLI or by means of bilateral negotiations of double taxation agreements. It has signed 94 bilateral tax treaties. 14 thereof are to be directly amended by the MLI (tax treaties with Argentina, Chile, India, Iceland, Italy, Liechtenstein, Lithuania, Lu-

xembourg, Austria, Poland, Portugal, South Africa, the Czech Republic and Turkey).

Switzerland has decided to largely limit itself to the adoption of the minimum standard. This includes the amendment of the preamble (modification to include a statement that no contracting party intends to provide opportunities for non-taxation or reduced taxation through tax avoidance or evasion, including by way of treaty-shopping). Further, Switzerland will introduce the Principle Purpose Test (PPT). Under this test, treaty benefits will essentially be denied if obtaining the treaty benefits appears to have been the principal purpose of a transaction or arrangement, unless granting that benefit is in accordance with the object and purpose of the relevant treaty provision. In terms of hybrid mismatches, Switzerland will adopt Option A. Simplified, this is a switch-over clause for Swiss residents which provides that provisions of a tax treaty that would normally exempt income or capital do not apply if the other contracting state exempts or limits taxation of such income or capital. The introduction of a mutual agreement procedure (MAP) to improve dispute resolution is a further mandatory amendment, which, however, should not have a considerable impact on Swiss tax treaties as they already contain MAP provisions. Finally, Switzerland has agreed to include mandatory binding arbitration in its tax treaties.

4. Impact on Tax Planning

We recommend to take into consideration in existing and future tax planning projects that existing tax treaties may have been impacted by the MLI. You may want to consult the OECD's MLI Matching Database which allows to make projections on how the MLI modifies a specific treaty covered

by the MLI by matching information from signatory states' MLI positions (<http://www.oecd.org/tax/treaties/mli-matching-database.htm>). In the future, reviewing tax treaty provisions impacted by the MLI will become a mandatory part of cross-border tax planning.

We remain at your disposal for discussing any questions and next steps.



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