



Liechtenstein Ratifies the MLI

December 2019

The MLI modifies Liechtenstein double taxation agreements in accordance with international standards. After the approval of the Liechtenstein Parliament (Report and Motion No. 114/2019¹) the instrument of ratification was deposited with the OECD on December 19, 2019, thus completing the ratification procedure. This means that the MLI for Liechtenstein will enter into force on April 1, 2020 and take effect from 2021. Below is an overview of the MLI from a Liechtenstein perspective.

What is the MLI?

The MLI stands for a multilateral instrument that forms the basis for the modification of existing double taxation agreements. Also known as the BEPS convention, it should make a quick and efficient implementation of the treaty related measures drawn up as part of the BEPS project of the OECD and G20 possible in numerous DTAs without lengthy bilateral negotiations.

The MLI is a highly complex and at the same time very flexible set of rules that enables the contracting states to modify their DTA network to their specific needs by means of reservations and options. By making reservations, the application of specific provisions can be excluded entirely (in all DTAs) or partially (only in relation to certain DTAs). The multitude of alternatives makes it possible to opt for one or the other alternative, although it is only applied if the DTA contracting states have chosen the same option. It is only mandatory to implement the so-called BEPS minimum standards, although there is also some leeway here.

Implementation in Liechtenstein

Through the multilateral convention, the BEPS minimum standards, the implementation of which is subject to the peer review process of the OECD, are to be included in certain Liechtenstein double taxation agree-

ments. The treaty-related minimum standards include a preamble, an anti-abuse clause and a mutual agreement procedure. In addition, the MLI is intended to modify the method article and introduce an arbitration clause. All other provisions of the convention are "switched off" by means of reservations, which means that they will not apply to the DTAs covered. The table on page 2 provides an overview of the implementation of the MLI in Liechtenstein.

Covered Double Taxation Agreements

The MLI can only have an effect on the "tax agreements covered by the Convention". It is crucial that the respective DTA is notified to the depositary as being covered by the MLI by both contracting parties.

In Liechtenstein, those double taxation agreements are subject to the MLI that do not yet meet the BEPS minimum standards. The following 14 DTAs are affected:

Andorra	Luxembourg
Czech Republic	Malta
Georgia	San Marino
Germany	Singapore
Guernsey	United Arab Emirates
Hong Kong (China)	United Kingdom
Hungary	Uruguay

The multilateral convention does not cover those 5 DTAs that already contain the specified minimum standards with regard to abuse and mutual agreement procedures: Iceland, Austria, Monaco, Jersey, Lithuania.

The DTA with Switzerland is no longer on the list of agreements covered by the MLI and is therefore not modified by the MLI. This is due to the opposite attitude of the states to the effect of the convention. While Switzerland is of the opinion that the BEPS convention changes the DTAs covered (similar to a protocol of amendment), Liechtenstein agrees with the OECD po-

¹ Report and Motion of the Government to the Parliament of the Principality of Liechtenstein regarding the Multilateral Convention of 14 November 2016 to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, No. 114/2019.

sition that the MLI applies in parallel to the existing DTAs and does not directly change the text of the agreement (no protocol of amendment).

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Application of Methods for Elimination of Double Taxation (Art. 5 MLI)

Art. 5 MLI contains three options for eliminating double taxation:

- Option A: change from the exemption to the credit method for qualification conflicts
- Option B: change from the exemption method to the credit method for deductible dividends
- Option C: general application of the credit method.

Each contracting state can choose to apply one or none of the three options. Asymmetrical application of the options - if one party chooses one option and the other party chooses another or no option - is also possible. In each contracting state, the correspondingly notified option applies to the persons resident in its territory.

It is not intended that a contracting state can choose one option for specific DTAs and another option for other DTAs. However, it is possible not to extend the selected option to all covered DTAs. There is also the option of not allowing another contracting state to apply the credit method in general (option C).

Liechtenstein has opted for option A and will also make a reservation against the application of option C. Option A prevents non-taxation due to a qualification conflict, if a situation is assessed differently or a DTA provision is interpreted differently by the contracting parties. The state of residence does not exempt income, if the source state applies the DTA in such a way that this income is exempt from taxation or the withholding tax rate is reduced. In this case, the country of residence must use the credit method instead of the exemption method.

Preamble: Purpose of a Covered Double Tax Agreement (Art. 6 MLI)

In all Liechtenstein DTAs covered by the MLI, the wording of the preamble is modified in accordance with the prescribed BEPS minimum standards. This clarifies that the purpose of a double taxation agreement is not only to eliminate double taxation, but also to avoid (double) non-taxation. The double taxation agreements should not offer any chance of non-taxation or reduced taxation through tax avoidance or evasion. In particular, this refers to cases in which abusive structures are the cause of the tax evasion. Last but not least, the new preamble aims at preventing treaty shopping structures.

In addition, the preamble in the Liechtenstein DTAs is amended with another purpose of further developing economic relationships and deepening cooperation in tax matters. DTAs that do not already contain such a declaration of intent are affected.

Prevention of Treaty Abuse (Art. 7 MLI)

To prevent treaty abuse, the following versions are provided in accordance with Art. 7 MLI:

- introduction of a PPT rule (so-called Principal Purpose Test)
- introduction of a PPT clause together with a S-LOB rule (so-called Simplified Limitation on Benefits, simplified provision to limit benefits)
- introduction of so-called anti-conduit provisions (against structures that only serve the forwarding of earnings) in connection with a detailed LOB clause.

The BEPS minimum standards can be fulfilled in these three ways, with the PPT clause being the standard version. Liechtenstein will adopt the PPT rule for all agreements covered by the MLI that do not yet contain this provision. The S-LOB clause is not applied, whereby any asymmetrical application of the S-LOB provision to Liechtenstein DTAs is also excluded.

The Principal Purpose Test (PPT) refuses to grant the benefits of the agreement if, considering all relevant facts and circumstances, it can be concluded that receiving any benefit under a DTA was one of the principal purposes of the structure. As an exception, benefits under a DTA can only be obtained, if it can be proved that the benefits are in line with the aim and purpose of the relevant provisions of the agreement. It should be emphasized that the PPT rule does not refer to certain income such as dividends, interest or licenses, but applies to all DTA provisions.

If DTA benefits are refused due to the non-fulfillment of the Principle Purpose Test, there is the option of discretionary relief, which Liechtenstein provides for its DTAs covered by the MLI. The so-called discretionary relief regulation stipulates that the competent authority can grant the benefits of the agreement on request and after checking the relevant facts and circumstances, if the taxpayer would have obtained them even without the "abusive" structure.

Mutual Agreement Procedure (Art. 16 MLI)

Art.16 MLI provides for a mutual agreement procedure to improve the settlement of disputes. In accordance with the BEPS minimum standards, taxpayers have the opportunity of submitting the case to the competent authority of one of the two contracting states, if the taxation is not compliant with the agreement. To date, the Liechtenstein double taxation treaties covered by the MLI lack the right to choose between the country of residence and the source country when applying to initiate a mutual agreement procedure. Liechtenstein uses the multilateral convention to modify its DTAs accordingly with regard to the mutual agreement procedure.

The content of other substantive MLI provisions on the mutual agreement procedure are substantially identical with the provisions in the Liechtenstein DTAs and include:

- a period of three years for initiating a mutual agreement procedure;
- the obligation for the competent authorities to try to reach an agreement by mutual understanding in a specific case;
- the obligation to implement the mutual agreement reached;
- the obligation for the competent authorities to try to resolve any difficulties or doubts regarding the interpretation or application of the DTA by mutual understanding;
- the possibility of joint consultation for cases outside the scope of the respective double taxation agreement.

Arbitration (Art. 18-26 MLI)

The provisions on arbitration (Part VI MLI) do not constitute minimum BEPS standards. Liechtenstein has generally opted for the use of arbitration and provided arbitration proceedings for double taxation agreements, which do not yet contain an arbitration clause. Part VI MLI will only apply, if both contracting states have submitted a corresponding notification.

The arbitration procedure requires a mutual agreement procedure. If the competent authorities fail to conclude a mutual agreement within a certain period of time, open questions will be submitted to arbitration upon written request from the person concerned. By reservation, Liechtenstein will extend the deadline for the agreement from two to three years.

The competent authorities can determine the type of arbitration by notification. If this is not the case, the convention provides two types of procedures. The so-called "Final Offer Arbitration" is the standard procedure and provides that the competent authorities of both countries submit a proposal for an agreement, including reasoning, to the arbitration panel, in which all open questions of the specific individual case are dealt with. The arbitration panel then selects one of the proposed solutions without justification. In the so-called "Independent Opinion Arbitration" all necessary information is made available to the arbitration panel. The arbitration panel independently rules and justifies its decision by specifying the legal sources. In both proce-

dures, the arbitration decision has no precedent for other cases. The "Final Offer Arbitration" is generally applied to the Liechtenstein DTAs concerned.

The decision is generally binding and must be implemented. Liechtenstein will make use of the opportunity not to apply the decision, if the competent authorities agree on another regulation within three calendar months of the service of the decision.

Entry into Force and Taking Effect

Under international law, the multilateral convention entered into force already on July 1, 2018. With the deposit of the instrument of ratification with the OECD on December 19, 2019, the MLI for Liechtenstein will enter into force on April 1, 2020.

The applicability of the convention to the double taxation agreements covered depends on its entry into force in the contracting states. For withholding tax purposes, the provisions of the multilateral convention will apply from the calendar year following the MLI's entry into force in the latter of the two contracting states; for Liechtenstein DTAs from January 1, 2021 at the earliest. For all other income and property taxes, the BEPS convention will take effect for tax years that begin after a period of six months after the MLI came into force in the latter of the two contracting states; for Liechtenstein double taxation agreements at the earliest from the tax year 2021. The exact time of the applicability of the MLI to an existing double taxation agreement will be notified separately. In addition, the Liechtenstein tax authority provides reading instructions ("synthesized text" by OECD definition) to facilitate the application of the DTAs, taking into account the MLI changes.

Effects

The implementation of the MLI represents an extensive modification of the worldwide DTA network. With the primary goal of combating base erosion and profit shifting, the MLI will undoubtedly have significant effects on international tax law. Liechtenstein double taxation agreements are also affected. International companies and private individuals are well advised to check the concrete effects of the MLI in cross-border situations at an early stage.

Outlook DTA FL-CH

As a member of the so-called Inclusive Framework of the OECD, Liechtenstein has committed to implement BEPS minimum standards. On closer inspection, the double taxation agreement between Liechtenstein and Switzerland does not meet the minimum requirements. First, there is no reference to the exclusion of chances of tax avoidance in the preamble. Secondly, the anti-abuse clause is limited to certain income and focuses on "the principal purpose" of a structure. And third, when initiating the mutual agreement procedure, there is no option to choose between the country of residence and the source country. Because of this, there will probably (have to) be another adjustment sooner or later

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