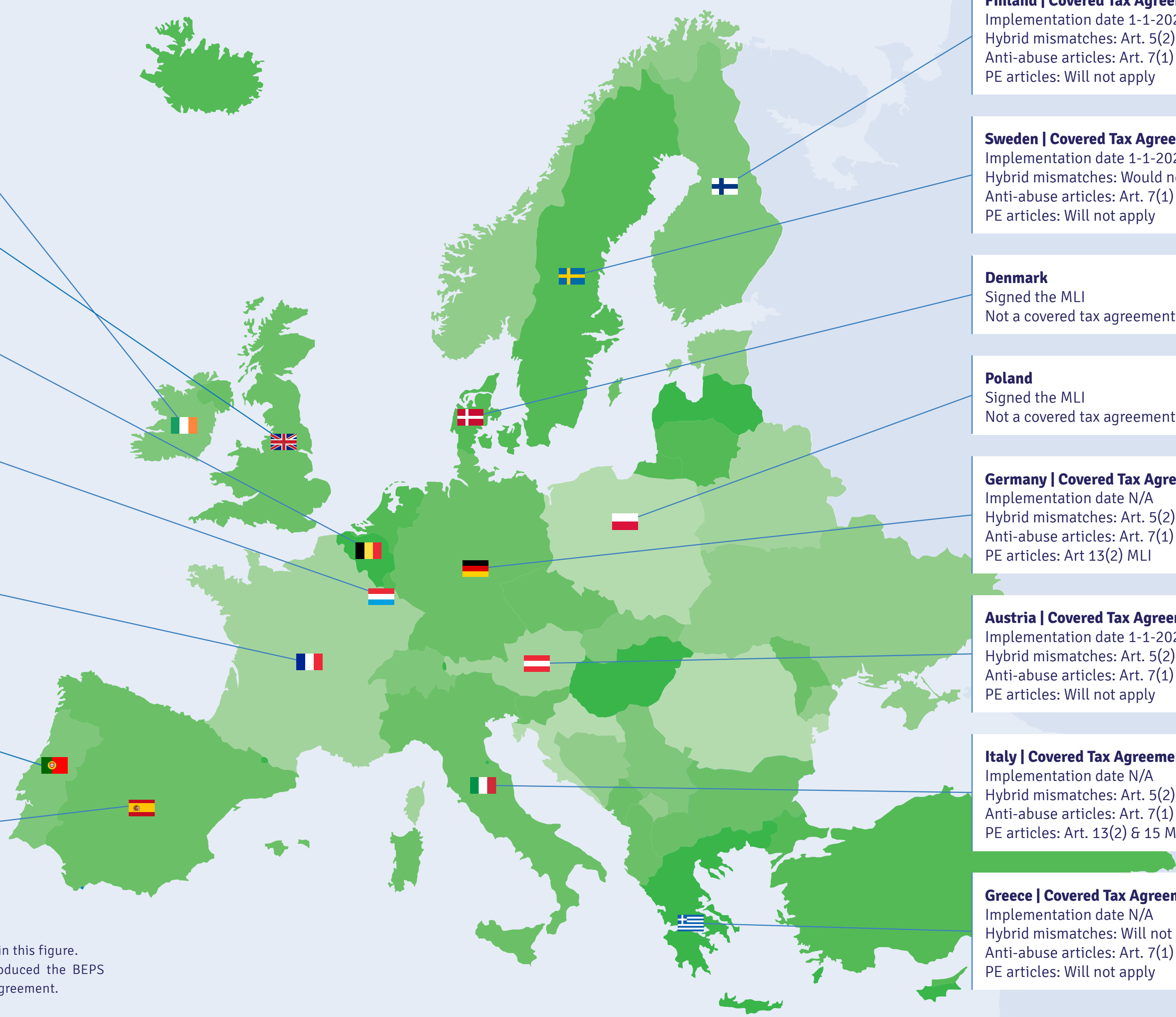
NovioTax
September 2019

The Multilateral Instrument – EU overview

Impact of the MLI on tax agreements with EU countries from a Dutch tax perspective[1]



Ireland
Signed the MLI
Not a covered tax agreement

United Kingdom | Covered Tax Agreement
Implementation date 1-1-2020
Hybrid mismatches: Art. 4 & 5(2) MLI
Anti-abuse articles: Art. 7(1&4) MLI (PPT)
PE articles: Art. 13(4) & 15 MLI

Belgium[2]
Signed the MLI
Not a covered tax agreement

Luxembourg | Covered Tax Agreement
Implementation date 1-1-2020
Hybrid mismatches: Art. 3 & 5(2) MLI
Anti-abuse articles: Art. 7(1&4) MLI (PPT)
PE articles: Will not apply

France | Covered Tax Agreement
Implementation date 1-1-2020
Hybrid mismatches: Will not apply
Anti-abuse articles: Art. 7(1) MLI (PPT)
PE articles: Art. 13(4) & 15 MLI

Portugal | Covered Tax Agreement
Implementation date N/A
Hybrid mismatches: Art. 5(2) MLI
Anti-abuse articles: Art. 7(1) MLI (PPT)
PE articles: Art. 13(4) & 15 MLI

Spain
Signed the MLI
Not a covered tax agreement

Finland | Covered Tax Agreement
Implementation date 1-1-2020
Hybrid mismatches: Art. 5(2) MLI
Anti-abuse articles: Art. 7(1) MLI (PPT)
PE articles: Will not apply

Sweden | Covered Tax Agreement
Implementation date 1-1-2020
Hybrid mismatches: Would not apply
Anti-abuse articles: Art. 7(1) MLI (PPT)
PE articles: Will not apply

Denmark
Signed the MLI
Not a covered tax agreement

Poland
Signed the MLI
Not a covered tax agreement

Germany | Covered Tax Agreement
Implementation date N/A
Hybrid mismatches: Art. 5(2) MLI
Anti-abuse articles: Art. 7(1) MLI (PPT)
PE articles: Art 13(2) MLI

Austria | Covered Tax Agreement
Implementation date 1-1-2020
Hybrid mismatches: Art. 5(2) MLI
Anti-abuse articles: Art. 7(1) MLI (PPT)
PE articles: Will not apply

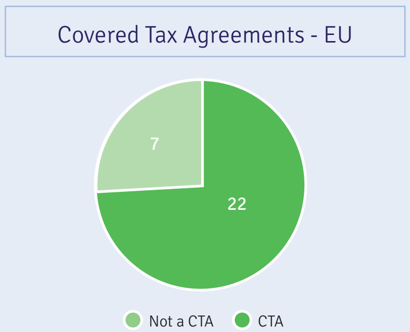
Italy | Covered Tax Agreement
Implementation date N/A
Hybrid mismatches: Art. 5(2) MLI
Anti-abuse articles: Art. 7(1) MLI (PPT)
PE articles: Art. 13(2) & 15 MLI

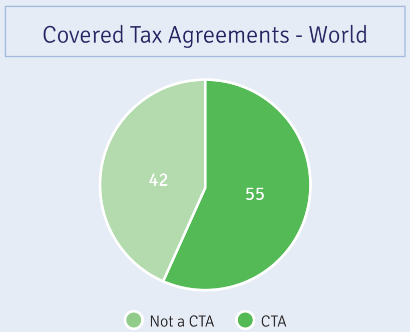
Greece | Covered Tax Agreement
Implementation date N/A
Hybrid mismatches: Will not apply
Anti-abuse articles: Art. 7(1) MLI (PPT)
PE articles: Will not apply

[1] Not all EU countries that fall under the scope of the MLI are depicted in this figure.
[2] It should be noted that Belgium and the Netherlands already introduced the BEPS minimum standards in the DTAA during the last renegotiation of the agreement.

The MLI in numbers

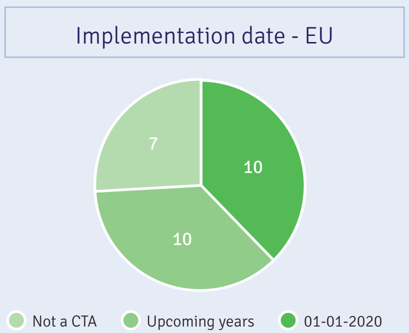
The Netherlands' government has adopted a relatively large set of MLI provisions, as compared to other Signatories. In addition to this, the Netherlands has put a relative large proportion of its tax agreements under the scope of the MLI.

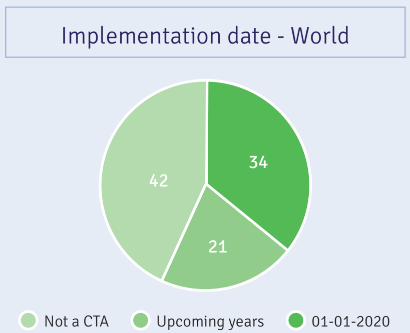




What can be expected?

With the ratification of the MLI in the Netherlands, what can be expected in terms of numbers in the upcoming months?





As from January 1st, 2020, 21 tax agreements will be modified as a result of the MLI. Almost half of that amount will be within the EU. The larger proportion however, 34 tax agreements that fall under the scope of the MLI, are going to be modified in the upcoming years, as soon as the other contracting states ratify and implement the MLI.

In some cases, for example France, the PE definition in the tax agreement is significantly modified in respect of the anti-fragmentation rule and the determination of a construction PE. Because of this, the threshold of the PE definition is in some cases lowered, such as in France.

In all cases where the MLI modifies an existing tax agreement the Principal Purpose Test ("PPT") would apply in its entirety and would address all cases of treaty abuse. Hence, companies should recheck their current tax position in respect of the upcoming changes when applying treaty benefits from tax agreements that are modified by the MLI as from January 1st, 2020.

MLI article explanation

Please note that not all of the minimum standards / standard provisions that come along with the MLI are presented. The provisions that on the one hand are opted in by the Netherlands and on the other hand we believe are relevant from a Dutch tax perspective are presented hereunder.

Hybrid mismatches

- **Art. 3 MLI:** Income derived by or through a transparent entity will only be considered income of a resident of a treaty jurisdiction (and thus eligible for treaty benefits) to the extent that income is treated as income of a (another) resident by that treaty jurisdiction.
- **Art. 4 MLI:** The treaty residency of a dual resident entity is determined by mutual agreement between the treaty jurisdictions. Treaty benefits are in principle withheld from the entity until such mutual agreement is reached.
- **Art. 5(2) MLI:** Provides the option to countries with respect to elimination of double taxation, specifically to disallow the exemption method for income that is exempt or subject to a reduced treaty rate in the other jurisdiction.

Hybrid mismatches

- **Art. 7(1) MLI:** The PPT provides a general way to address cases of treaty abuse, including treaty-shopping situations that are not covered by more specific anti-abuse rules. Unlike the Limitation on Benefits provision, which test the subject of an arrangement, the PPT tests the object of an arrangement (i.e. a transaction or arrangement). This results into a specific test that can be subjected to any transaction or arrangement, and not just the subject behind the transaction or arrangement.
- **Art. 7(1&4) MLI:** Applies the PPT as mentioned above, and in addition applies discretionary relief under PPT.

Permanent Establishments

- **Art. 13 MLI:** Stipulates that (option A) the specific activity exemption in the treaty definitions of a PE applies only to activities of an auxiliary or preparatory character or (option B) the specific activity exemption in the treaty definitions of a PE applies irrespective of whether an activity is of an auxiliary or preparatory character. The anti-fragmentation rule aggregates activities carried on by closely related enterprises for purposes of determining the existence of a PE.
  - **Par. 2:** selection for option A - specific activity exemption applies only to activities of auxiliary or preparatory character.
  - **Par. 4:** selection for the anti-fragmentation rule.
- **Art. 14 MLI:** For the determination if a building site, or construction or installation project constitutes a PE, (i) activities carried on during one or more periods of time that, in the aggregate, exceed 30 days and (ii) connected activities carried on by closely related enterprises, are aggregated.
- **Art. 15 MLI:** Persons are closely related if one has control of the other or both are under the control of the same person. A close relationship is deemed to exist in case a threshold of 50% of vote and value in a company is met.

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