

CIOT-NOB
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*Treaty Abuse
in the UK and the Netherlands*

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Multilateral Instrument (MLI) Overview

MLI: Objective and Scope

To implement treaty related BEPS actions in an efficient manner into 3,000+ bilateral tax treaties

Action 2 (hybrids)

Action 6* (treaty abuse)

Action 7 (PE avoidance)

Action 14* (dispute resolution)

* = minimum standard

MLI: Parties

71 OECD and other ('inclusive framework') jurisdictions have signed (at 17/7/17)

6 more expressed 'intent'

US not joining in

MLI: Process

DTA only covered if both parties list (matching principle)

MLI provisions generally 'override' existing DTA but

- some provisions are optional
- reservations possible from all/part of MLI provisions

A reservation by one party means MLI provision does not apply

Options generally need reciprocity (but asymmetrical choices sometimes possible)

Last chance for reservation is ratification date
But reservations can be withdrawn later

MLI: Timing

Once MLI in force and DTA ratified will generally impact a specific DTA:

- for WHT, from 1 January after latest ratification
- for other taxes, from 6 months after latest ratification

MLI

NL v UK policy

	NL	UK
Treaties notified	82	119
Support	Positive/all-in	Reserved/selective
Explanation	Parliamentary Q&A	Public consultation & presentation
Consolidated text	?	?

Multilateral Instrument (MLI)

Anti-abuse provisions

MLI Art. 6 – Purpose of tax treaties*

Standard DTA preamble: “for the avoidance of double taxation and the prevention of fiscal evasion”

MLI adds: “without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements for the indirect benefit of residents of third jurisdictions)”

* Minimum Standard

MLI Art. 7 – Preventing Treaty Shopping*

- Principal Purpose Test: mandatory (very limited exceptions)
- Simplified LOB: optional, can be asymmetric (if all agree!)
- Detailed LOB: optional (no MLI text)

* Minimum Standard

MLI Art. 7 – Preventing Treaty Shopping (PPT)









No treaty benefit if obtaining it
= **one of main purposes**

unless in line with ‘**object and purpose**’ of DTA







Note:

- not limited to ‘the main purpose’
- importance of new preamble for ‘object and purpose’ of DTA
- Goes further than LOB
- Alternative benefits option (Art. 7(4))

MLI Art. 7 – Preventing Treaty Shopping UK v NL









	NL	UK
PPT		
PPT + alternative benefits		
SLOB		
Unilateral SLOB OK?		

MLI – Hybrid treaty abuse provisions (NL v UK)









Subject	MLI	NL	UK
Hybrid entities (Art. 3(1))	Subject to tax look through for treaty benefits	 (existing)	
Dual residents (Art. 4)	MAP tie-breaker		
No residence state exemption (Art 5)	(A) if exempt under DTA in source state (B) If dividend deduction in source state (C) ever (so credit)	 (A)	



MLI – Other treaty abuse provisions (NL v UK)

Subject	MLI	NL	UK
Dividend WHT (Art. 8)	365 day holding period		
Capital gains on real estate shares (Art. 9)	365 day holding period/ partnerships/50%		
WHT on payments to low taxed non-treaty Pes (Art. 10)	No WHT relief if residence state exempts		
Right to tax own residents (Art. 11)	Except as provided (e.g. double tax relief)		

MLI – PE anti-abuse provisions

Subject	MLI	NL	UK
Agency PE (Art. 12)	(A) Principal role agents = PE (B) Exclusive agents = dependent		
Preparatory or auxiliary condition for specific activity exemptions (Art. 13(1))	(A) Condition applies to all OR (B) Condition not applicable unless explicit	 (A)	
Anti-fragmentation rule (Art. 13(4))	Combination of exempt and non-exempt = PE if part of whole business		
Construction contracts splitting (Art. 14)	30+ day periods aggregated		



MLI – Practical issues

- Interpretation:
 - (official) languages/translations
 - consolidated text?
 - status of Explanatory statement; BEPS reports; MC
- Enforcement (peer review from 2018)
- Failure to notify provisions: MLI still applies!
- Significance of reservations/non-options

UK anti-abuse rules

Duke of Westminster
(1936):

“every man is entitled if
he can to order his affairs
so that the tax attaching
under the appropriate
Acts is less than it
otherwise would be”



Ramsay doctrine:
Steps inserted in a series
of transactions,
that have no commercial
purpose apart from the
avoidance of a liability to
tax, can be disregarded



Statutory
GAAR (2013)



Diverted profits
tax (2015)

UK anti-abuse rules: GAAR

(A) Reasonable tax adjustments if

- reasonable to conclude that (having regard to all the circumstances)....
- tax advantage = main purpose or one of main purposes, and

(B) Cannot reasonably be regarded as a reasonable course of action:

- not consistent with principles/policy
- contrived/abnormal
- exploits shortcomings

UK anti-abuse rules: GAAR

Taxpayer protections:

- Burden of proof on tax authorities
- Double reasonableness test
- GAAR panel must agree first

But no advance clearance

Only one panel decision so far

Can be applied to treaties (HMRC)

UK anti-abuse rules: Diverted profits tax

Charges profits 'diverted' from the UK at 25% (CIT = 20%) through:

(A) avoided PE, or

(B) transaction/foreign entity without substance

Diverted profits tax: avoided PE

Non-resident selling >GBP10m to UK
+ related Co assists in UK (= avoided PE)

- Reasonable to assume designed to avoid non-resident having PE AND
- One of main purposes to reduce UK tax OR
- Mismatch (> 20% tax benefit + insufficient substance)

Diverted profits tax: foreign co without substance

Arrangement between UK Co and a related Co +

Mismatch (> 20% tax benefit + insufficient substance)

E.g. royalty from UK to shell co in tax haven

Thank you!

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