# CIOT-NOB European Branch Amsterdam Conference 2017

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)

\* = mimimum 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 <u>not</u> apply

Options generally need reciprocity (but asymetrical 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Last chance for reservation is ratification date But reservations can be withdrawn later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 asymetric (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	<b></b>	<b></b>
PPT + alternative benefits		
SLOB	<b>\$</b>	<b>\$</b>
Unilateral SLOB OK?	<b>(</b>	<b>(</b>



# 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)	<ul><li>(A) if exempt under DTA in source state</li><li>(B) If dividend deduction in source state</li><li>(C) ever (so credit)</li></ul>	(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)	<b>\$</b>	



#### MLI – PE anti-abuse provisions

Subject	MLI	NL	UK
Agency PE (Art. 12)	<ul><li>(A) Principal role agents = PE</li><li>(B) Exclusive agents = dependent</li></ul>		
Preparatory or auxiliary condition for specific activity exemptions (Art. 13(1))	<ul><li>(A) Condition applies to all OR</li><li>(B) Condition not applicable unless explicit</li></ul>	(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

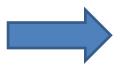
- Interpretation:
  - (official) languages/translations
  - consolidated text?
  - status of Explanatory statement; BEPS reports; MC
- Enforcement (peer review from 2018)
- Failure to notify provisions: MLI still applies!
- Significance of reservations/non-options



#### 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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