

Implementation of BEPS in Switzerland

Teaser: On 1 December 2019, the Multilateral Convention to Implement Tax Treaty Related Measures to prevent Base Erosion and Profit Shifting (BEPS), the so-called Multilateral Instrument, or “**MLI**”, entered into force in Switzerland. As a consequence, existing double taxation agreements (DTAs) which are covered by the MLI can be swiftly adjusted to the recommendations from the OECD/G20 BEPS project.

As a brief reminder, in October 2015, the final results of the OECD / G20 project against BEPS were adopted with the adoption of the 15 Actions which represent recommendations in order to have a coordinated international approach to fight against tax evasion and to avoid that multinationals shift their profits from higher-tax jurisdictions to lower-tax jurisdictions, where no value is added, which would otherwise lead to eroding the tax base. Some of these recommendations provide for changes in DTAs of the involved States.

BEPS Action 15 provides for the creation of the MLI, an instrument which helps to efficiently implement the minimum standards (BEPS Action 6), improves dispute resolution procedures (BEPS Action 14) and avoids having to amend all DTAs one by one.

On 7 June 2017, Switzerland, together with 67 other jurisdictions, signed the MLI. Signatories of the MLI may choose which existing DTAs they would like to amend and once a DTA has been listed by the two parties, it becomes an agreement to be covered by the MLI.

The adoption of the MLI represents a turning point for DTAs. Indeed, it leads to a fast implementation of the BEPS recommendations in more than 1'100 DTAs worldwide without necessarily passing by bilateral negotiations.

On 22 March 2019, the Swiss parliament approved the ratification of the MLI. It chose to implement only the minimum standards under BEPS and formulated reservations on the majority of the MLI provisions. Switzerland adopted the following provisions: (i) change of the preamble language of DTAs to express the aim to eliminate double taxation without creating opportunities for non-taxation or reduced taxation, (ii) Principle Purpose Test as a minimum standard to prevent treaty abuse, (iii) Mutual Agreement Procedure (“MAP”) (reservation made by Switzerland: it will not apply the clause stating that the MAP shall be implemented notwithstanding any time limits foreseen by domestic law; as a substitute, it will provide in its DTAs for the maximum period of time during which jurisdictions can make adjustments to the profits of domestic taxpayers), (iv) binding arbitration clause (reservation made by Switzerland: replacing a two-year period for resolving a case by a three-year period).

In the case of Switzerland, the MLI will amend directly its DTAs if the parties to the treaty in question (i) share the view that the MLI has the same effect as an amendment protocol and (ii) agree to confirm the exact wording of the DTA as amended by the MLI. For now, out of its 100 DTAs, Switzerland has DTAs covered by the MLI with such countries as Argentina, Austria, Chile, the Czech Republic, Iceland, Italy, Lithuania, Luxembourg, Mexico, Portugal, South Africa and Turkey, which agree with Switzerland on the precise wording of the corresponding DTA. With respect to these DTAs, Switzerland had an “amending view” in the sense that it has reserved the right to apply the MLI once it has notified to the OECD that it has completed its internal procedures to modify the given DTA.

The alternative is to negotiate the BEPS minimum standards bilaterally, which requires a parliamentary approval process. Hence, Switzerland has already incorporated these minimum standards into the DTAs with Brazil, Latvia, Kosovo, Pakistan, Saudi Arabia, the United Kingdom and Zambia. Further DTA amendments are continuing. For certain treaty partners, such as the UK, Switzerland has opted to amend the DTA without including the agreement under the MLI.

As an important actor actively involved in all of the OECD working process related to BEPS, Switzerland supports international efforts to reach a level playing field and transparency. It pursues the idea to reach an agreement on the implementation of the MLI with other countries and thus correspondingly amend other DTAs by means of the MLI.

We believe that this latest development makes valuable contributions to the Swiss large and effective DTA network which is important for all companies and persons resident in Switzerland with activities and / or assets abroad.