

# 1 Implementation issues, the minimum standard and the MLI

22. The minimum standard requires jurisdictions to do two things in their tax treaties: include an express statement on non-taxation (generally in the preamble); and adopt one of three methods of addressing treaty shopping. It does not specify how these two things should be achieved (e.g. through the MLI or bilaterally).<sup>1</sup>

23. The MLI has proven to be an effective way of implementing the minimum standard. However, a jurisdiction that prefers to implement the minimum standard through a detailed limitation on benefits provision cannot use the MLI to do so. Ninety-four jurisdictions have joined the MLI, 54 have ratified it, and the MLI would, once fully in effect, implement the minimum standard in about 1,700 bilateral agreements (thus modifying the majority of agreements concluded between members of the Inclusive Framework).

24. The efforts made by most members of the Inclusive Framework in tackling treaty shopping started to come to light in 2020 for those that ratified the MLI. The number of compliant agreements covered by the MLI has increased by nearly 500% since the last peer review.

25. Jurisdictions that have not signed or ratified the MLI have still generally made no or very little progress in implementing the minimum standard. This report acknowledges, though, that the starting point for a jurisdiction's exposure to treaty abuse may be different based on whether its existing agreements or domestic law already contain anti-treaty shopping tools.

26. Additional information is provided on jurisdictions' progress towards the implementation of the minimum standard in the jurisdictional sections in Chapter 5. As mentioned above, this information does not give rise to formal recommendations.

27. The information that can be found in the section "Implementation Issues" in some of the jurisdictional sections in Chapter 5 highlights the fact that:

- As the listed agreements under the MLI of jurisdictions that are members of the Inclusive Framework that are signatories to the MLI but that have not yet ratified it will only start to be compliant after their ratification of the MLI, those jurisdictions are encouraged to ratify the MLI as soon as possible (section 2.1 below);
- "Non-covered agreements" under the MLI (agreements concluded between pairs of signatories to the MLI where one treaty partner has not listed the agreement under the MLI; and agreements concluded between jurisdictions only one of which has signed the MLI)<sup>2</sup> will only be compliant if they are listed under the MLI or if their parties enter into bilateral renegotiations to implement the minimum standard (section 2.2 below); and
- The OECD Secretariat stands ready to discuss with any jurisdiction that is a member of the Inclusive Framework that has neither signed the MLI nor implemented anti-treaty-shopping measures in its agreements to see how support could be provided to bring those agreements into compliance with the minimum standard (section 2.3 below).

- Jurisdictions that are parties to the CARICOM Agreement are encouraged to bring that agreement up to date by commencing talks among all the treaty partners (see section 4 below).

## Ratification of the MLI: the key to the effective implementation of the minimum standard

28. The MLI started to show its effect and to strengthen the bilateral tax treaty network of jurisdictions that ratified it in the course of 2020. The number of agreements that became compliant with the MLI increased from 60 to over 350. The peer review, however, reveals an important difference in the progress made on implementing the minimum standard by jurisdictions that have ratified the MLI compared with other jurisdictions.

29. In fact, on average, approximately 30% of the treaty networks of jurisdictions for which the MLI started to take effect as of 1 January 2020,<sup>3</sup> are compliant with the minimum standard in 2020, as shown in the table below.

**Table 1.1. Treaty networks and ratification of the MLI**

Jurisdiction	Date of MLI Ratification	Agreements in force	Compliant agreements on 1 July 2020	% of network compliant	% of network with IF members compliant
Australia	26 September 2018	45	18	40%	44%
Austria	22 September 2017	91	20	22%	26%
Belgium	27 June 2019	95	24	25%	31%
Canada	29 August 2019	94	24	26%	31%
Curaçao	29 March 2019	3	1	33%	33%
Denmark	30 September 2019	71	19	27%	32%
Finland	25 February 2019	73	25	34%	40%
France	26 September 2018	119	25	21%	28%
Georgia	29 March 2019	56	16	29%	33%
Guernsey	12 February 2019	13	6	46%	50%
Iceland	26 September 2019	41	19	46%	48%
India	25 June 2019	95	34	36%	43%
Ireland	29 January 2019	73	26	36%	39%
Isle of Man	25 October 2017	10	4	40%	40%
Israel	13 September 2018	58	25	43%	49%
Japan	26 September 2018	73	30	41%	48%
Jersey	15 December 2017	15	6	40%	46%
Lithuania	11 September 2018	57	25	44%	51%
Luxembourg	9 April 2019	83	32	39%	39%
Malta	18 December 2018	77	27	35%	38%
Monaco	10 January 2019	10	4	40%	44%
Netherlands	29 March 2019	92	25	27%	30%
New Zealand	27 June 2018	40	16	40%	42%
Norway	17 July 2019	84	15	18%	21%
Poland	23 January 2018	82	24	29%	36%
Russia <sup>4</sup>	18 June 2019	85	2	2%	3%
Serbia	5 June 2018	60	22	37%	42%
Singapore	21 December 2018	88	28	32%	38%
Slovak Republic	20 September 2018	70	23	33%	39%
Slovenia	22 March 2018	59	24	41%	47%
Sweden <sup>5</sup>	22 June 2018	81	2	2%	3%

Switzerland <sup>6</sup>	29 August 2019	106	4	4%	3%
Ukraine	8 August 2019	76	20	26%	33%
United Arab Emirates	29 May 2019	94	21	22%	29%
United Kingdom	29 June 2018	131	35	27%	32%

30. Albania, Barbados, Bosnia and Herzegovina, Burkina Faso, Chile, Costa Rica, the Czech Republic, Germany, Egypt, Indonesia, Jordan, Kazakhstan, Korea, Latvia, Liechtenstein, Mauritius, Oman, Pakistan, Panama, Portugal, Qatar, San Marino, Saudi Arabia and Uruguay also ratified the MLI, but they did so between October 2019 and December 2020. As a result, the MLI had not yet started to take effect for their agreements in July 2020. This is because the MLI can only start to take effect for an agreement after a period of time that follows the latest of the dates on which the MLI enters into force for each of the treaty partners to an agreement. This period could roughly amount to a year from the latest ratification.<sup>7</sup>

31. While the jurisdictions that ratified the MLI made good progress in the implementation of the minimum standard, those that did not sign or ratify the MLI generally made no or very little progress in implementing the minimum standard. On average, their treaty networks are generally about 1.5% compliant.

32. The 2020 peer review thus shows the importance of swift ratification of the MLI. All signatories to the MLI that have not yet ratified it are therefore encouraged to do so.

33. The OECD Secretariat has liaised with the signatories of the MLI that, at the time of the drafting of this report, had not yet ratified it and notes that Bulgaria, Cameroon, Colombia, Croatia, Estonia, Greece, Hungary, Jamaica, Malaysia, Mexico, Morocco, North Macedonia, Romania, Senegal, South Africa, Spain and Turkey are aiming to deposit their instrument of ratification of the MLI by mid-2021.

## Gaps in the coverage of the MLI

34. Throughout the 2020 peer review, gaps in the coverage of the MLI were identified. These gaps exist because the MLI is a flexible instrument that allows each signatory to decide which of its agreements it wishes to cover under the MLI. Thus, at the time of signature, signatories are required to deposit lists of agreements they want to modify. The MLI only modifies bilateral agreements listed by both treaty partners.

### **One-way agreements**

35. The 2020 peer review reveals that about 200 bilateral agreements, concluded between pairs of signatories to the MLI that are members of the Inclusive Framework, would not be modified by the MLI because, at this stage, only one jurisdiction had listed the agreement under the MLI (“one-way agreements”).<sup>8</sup>

36. In the course of the peer review, the OECD Secretariat liaised with some of the jurisdictions that are parties to those “one-way agreements” and asked why they had not been listed. In general, those agreements had not been listed under the MLI because their parties were planning renegotiations beyond the implementation of the BEPS treaty-related measures.

37. The jurisdictional sections identify those one-way agreements and recognise that, when no bilateral renegotiations are planned or envisaged for the implementation of the minimum standard, those agreements will not be compliant unless they are listed under the MLI or their parties enter into bilateral renegotiations to implement the minimum standard.

## **Waiting agreements**

38. The 2020 peer review reveals that there are about 325 agreements concluded between pairs of jurisdictions that are members of the Inclusive Framework where only one of them has signed the MLI (“waiting agreements”). None of these agreements would, at this stage, be modified by the MLI because one treaty partner has not signed the MLI. Nearly all these agreements would become covered under the MLI if the treaty partner that has not yet signed the MLI would join it and would list the agreement.

39. The jurisdictional sections identify those “waiting agreements” and recognise that, when no bilateral renegotiations are planned or envisaged, those agreements will not be compliant unless they are listed under the MLI<sup>9</sup> or their parties enter into bilateral renegotiations to implement the minimum standard.

40. In the course of this peer review, the OECD Secretariat liaised with some of the jurisdictions that were working towards signature of the MLI. Those included Bahrain, Mongolia, Thailand and Viet Nam, which between them had over 125 waiting agreements that would become covered agreements under the MLI following their signatures.<sup>10</sup> Thus, the signature of the MLI by jurisdictions with large treaty networks would materially improve the coverage of the MLI.

## **Support to jurisdictions to strengthen their network of agreements**

41. The 2020 peer review shows that jurisdictions that are members of the Inclusive Framework that did not sign the MLI or otherwise implement anti-treaty-shopping measures in their agreements have made no or very little progress in the implementation of the minimum standard.

42. Those jurisdictions are invited to contact the OECD Secretariat if they need support in planning the implementation of the minimum standard across their treaty networks, including, where relevant, towards the signature and ratification of the MLI.

## **Notes**

<sup>1</sup> See the BEPS Action 6 Final Report (2015). The Action 6 Final Report further states that (i) a jurisdiction is required to implement the minimum standard in a treaty only if asked to do so by another member of the Inclusive Framework; (ii) the decision on which of the three methods to adopt has to be agreed (a solution cannot be imposed); and (iii) reflecting treaties’ bilateral nature, there is no time limit within which a jurisdiction has to attain the minimum standard.

<sup>2</sup> The non-covered agreements identified in this report are agreements concluded between pairs of signatories to the MLI that are members of the Inclusive Framework and are not subject to bilateral negotiations where one treaty partner has not listed the agreement under the MLI; and agreements concluded between jurisdictions that are members of the Inclusive Framework where only one of the jurisdictions has signed the MLI.

<sup>3</sup> The MLI generally started to take effect as of 1 January 2020, with respect to agreements of jurisdictions that ratified it before the end of September 2019.

<sup>4</sup> The Russia Federation made a reservation under Article 35(7) of the MLI to delay the entry into effect of the MLI after completing its domestic procedures.

<sup>5</sup> Sweden made a reservation under Article 35(7) of the MLI to delay the entry into effect of the MLI after completing its domestic procedures.

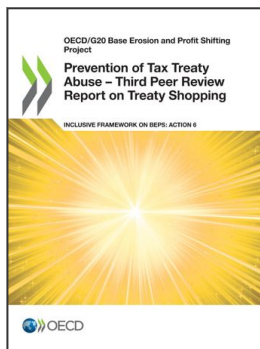
<sup>6</sup> Switzerland made a reservation under Article 35(7) of the MLI to delay the entry into effect of the MLI after completing its domestic procedures.

<sup>7</sup> Article 35 of the MLI provides for the rules on its entry into effect and divides modifications into two categories based on the type of taxation to which they apply. In general, under Article 35(1)(a), with respect to taxes withheld at source on amounts paid or credited to non-residents, the MLI enters into effect on or after the first day of the next calendar year that begins on or after the latest of the dates on which the Convention enters into force for each of the Contracting Jurisdictions to a Covered Tax Agreement. As for all the other taxes levied by a jurisdiction, Article 35(1)(b) provides that the MLI generally enters into effect with respect to taxable periods beginning on or after the expiration of a period of six calendar months from the latest of the dates on which the Convention enters into force for each of the Contracting Jurisdictions to a Covered Tax Agreement.

<sup>8</sup> The MLI can only modify bilateral agreements that have been listed by both treaty partners under the MLI.

<sup>9</sup> This way, should the other treaty partner sign the MLI and list that agreement to be covered under the MLI, it would become a covered tax agreement.

<sup>10</sup> Bahrain has since signed the MLI on 27 November 2020, and listed 44 of its treaties under the MLI.



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