Executive summary

On 7 June 2017, 68 jurisdictions signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI), including Norway.¹ Unlike the other countries, Norway did not submit its preliminary MLI positions at the time of signing the MLI; Norway submitted its positions on 5 July 2017.²

In its preliminary position, Norway has included a list of 28 tax treaties entered into with other jurisdictions³ that it would like to designate as Covered Tax Agreements (CTAs), i.e., tax treaties to be amended through the MLI. Accordingly, Norway has chosen to include the minority of the jurisdictions that form part of its tax treaty network (i.e., only 28 of the 94 jurisdictions with which Norway has entered into a tax treaty). Estonia, which is on Norway’s CTA list, however, has not (yet) signed the MLI.

Together with the list of CTAs, Norway also submitted a provisional list of reservations and notifications (MLI positions) in respect of the various provisions of the MLI. During the fall 2017, the Norwegian Ministry of Finance will submit a proposal to the Norwegian Parliament requesting the ratification of the MLI.

Norway has made partial or full reservations against a number of the articles of the MLI. These reservations are discussed in more detail below, together with the options chosen by Norway where a provision of the MLI allows for a choice to be
made. The most important change that will affect Norway's CTAs relates to the introduction of a principal purpose test (PPT) as an interim measure. Norway has expressed its intention, where possible, to adopt a limitation on benefits (LOB) provision, in addition to or in replacement of the PPT through bilateral negotiation at a later stage.

**Detailed discussion**

**Topics covered by the MLI**

**Hybrid mismatches**

Part II of the MLI (Articles 3 to 5) introduces provisions which aim to neutralize certain of the effects of hybrid mismatch arrangements based on the recommendations made in the BEPS Actions 2 and 6 final reports released in October 2015. These provisions are not minimum standard provisions and therefore Contracting Jurisdictions have the right to opt not to apply these provisions to their CTAs.

**Article 3 – Transparent entities**

This provision addresses the situation of hybrid mismatches as a result of entities that one or both Contracting Jurisdictions treat as wholly or partly transparent for tax purposes.

Under Article 3(1), “for the purposes of a CTA, income derived by or through an entity that is treated as wholly or partly transparent under the tax law of either Contracting Jurisdiction shall only be considered income of a resident to the extent that the income is treated, for purposes of taxation by that Contracting Jurisdiction, as the income of a resident of that Contracting Jurisdiction.”

Article 3 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Norway has chosen to apply Article 3(1) to all of its CTAs, except for the CTA with India. Thus, Article 3(1) will not have an impact for the CTA with India. In relation to the other CTAs, Article 3(1) shall apply to them, provided that the other Contracting Jurisdiction(s) has not opted out of Article 3.

**Article 4 – Dual resident entities**

Article 4 modifies the rules for determining the treaty residency of a person other than an individual that is a resident of more than one Contracting Jurisdiction (dual resident entity). Under this provision, treaty residency of a dual resident entity shall be determined by a mutual agreement procedure (MAP) between Contracting Jurisdictions.

Article 4 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Norway has chosen to apply Article 4(1) to its CTAs. However, pursuant to Article 4(3)(d) of the MLI, Norway has reserved the right for Article 4 not to apply for the CTAs entered into with Bulgaria, Chile, Cyprus, Estonia, Latvia, Lithuania, Romania, Serbia and the United Kingdom.

The above implies that Article 4(1) will not apply to Norway's CTAs listed above. In relation to the CTAs not mentioned above, their respective provision will be amended by Article 4(1) provided that the other Contracting Jurisdiction(s) has not reserved its right for Article 4 not to apply to its CTAs.

**Article 5 – Application of methods for elimination of double taxation**

Article 5 includes three options for Contracting Jurisdictions for the methods of eliminating double taxation. Option A provides that provisions of a CTA that would otherwise exempt income derived or capital owned by a resident of a Contracting Jurisdiction would not apply where the other Contracting Jurisdiction applies the provisions of the CTA to exempt such income or capital from tax or to limit the rate at which such income or capital may be taxed (switch over clause). Instead, a deduction from tax is allowed subject to certain limitations. Under option B, Contracting Jurisdictions would not apply the exemption method with respect to dividends if those dividends are deductible in the other Contracting Jurisdiction. Option C includes that the credit method should be restricted to the net taxable income. Contracting Jurisdictions may choose different options resulting in an asymmetrical application of this provision.

Article 5 of the MLI is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this option entirely.

Norway has chosen to apply option C of Article 5, which introduces the credit method as the method for elimination of double taxation in situations where the relevant tax treaty establishes the application of the exemption method. Accordingly, this amendment will only affect the tax treaty with China.

This amendment will only apply, provided that China also agrees to apply Article 5 (option C) to its CTAs.
**Treaty abuse**

Part III of the MLI (Articles 6 to 13) contains six provisions related to the prevention of treaty abuse, which correspond to changes proposed in the BEPS Action 6 final report *(Preventing the Granting of Treaty Benefits in Inappropriate Circumstances)*.

**Article 6 – Purpose of a CTA**

Article 6 contains the proposal described in the Action 6 final report to change the preamble language of a CTA to ensure compliance with one of the requirements of the minimum standard consisting of expressing the common intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. Article 6 also includes optional wording that may be added to the preamble of a CTA referring to the desire to develop an economic relationship or to enhance cooperation in tax matters.

Article 6 is a provision required to meet a minimum standard and therefore jurisdictions cannot opt out of this article, unless they reserve the right for this article not to apply to its CTAs that already contain preamble language within the scope of the reservation.

All the CTAs included by Norway already contain a preamble text generally stating that the relevant CTA has been signed with the aim to avoid double taxation with respect to the taxes covered by the agreement and to prevent tax evasion or avoidance.

According to Article 6(5), where all Contracting Jurisdictions have made a notification with respect to preamble language, such preamble language shall be replaced by the following text:

*Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions).*

In all other cases (e.g., when the other Contracting Jurisdiction does not make the required notification), the text described above shall be included in addition to the existing preamble language.

Additionally, Norway has chosen to apply Article 6(3) aiming to add the following language to the preamble of its CTAs:

*Desiring to further develop their economic relationship and to enhance their co-operation in tax matters.*

Note that such additional language shall be included only where the other Contracting Jurisdiction has chosen to apply Article 6(3) and has made such a notification with respect to the CTA.

**Article 7 – Prevention of treaty abuse**

This article contains the provisions to be included in a CTA to prevent treaty abuse. As concluded in the Action 6 final report, the prevention of treaty abuse should be addressed in one of the following ways: (i) a combined approach consisting of a limitation on benefits (LOB) provision and a principal purpose test (PPT); (ii) a PPT alone; or (iii) an LOB provision, supplemented by specific rules targeting conduit financing arrangements. With respect to the LOB provision, the Action 6 final report provided for the option of including a detailed or a simplified version.

Specifically, Article 7 articulates the PPT which denies treaty benefits when, considering all relevant facts and circumstances, obtaining that benefit is one of the principal purposes for entering into a specific transaction or arrangement that resulted directly or indirectly in that benefit, unless if granting that benefit is not contrary to the object and purpose of the relevant provisions of the CTA.

Norway has opted to apply the PPT alone as an interim measure in addressing the prevention of treaty abuse. Norway has expressed its intention – where possible – to adopt a detailed LOB provision, in addition to or in replacement of the PPT provision through bilateral negotiation.

The PPT measure established in Article 7(1) shall apply and supersede the provisions of the CTA only to the extent those provisions are incompatible with Article 7(1).

Norway has notified that the CTAs entered into with Australia, Bulgaria, Chile, Georgia, India, Ireland, Malta, Mexico, Romania, Serbia and the United Kingdom already contain a PPT provision. Such PPT provision will be replaced by the PPT contained in the MLI, provided that the other Contracting Jurisdiction have made the same notification. If the other Contracting Jurisdiction does not make the same notification, Article 7(1) will prevail over that existing provision superseding to the extent it is incompatible with Article 7(1) of the MLI.
Further, Norway has chosen to apply Article 7(7)(a) that implies that a simplified LOB provision will apply to all CTAs where the other Contracting Jurisdiction chooses to apply a simplified LOB provision.

**Article 8 - Dividend transfer transactions**

Article 8 of the MLI specifies anti-abuse rules for benefits provided to dividend transfer transactions consisting of exempting or limiting the tax rate on dividends paid by a company resident of a Contracting Jurisdiction to a beneficial owner or recipient that is resident of the other Contracting Jurisdiction, provided certain ownership requirements which need to be met throughout a 365 day period that includes the day of payment of the dividend are met.

Article 8 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Norway has reserved the right for this article not to apply to the tax treaty with Australia, Japan, Malta, Poland and Portugal as these agreements already include a minimum holding period. This implies that the provisions of these tax treaties will not be amended by Article 8, paragraph 1.

The dividend article included in the other CTAs (i.e., the CTAs not listed above) will be amended by Article 8, paragraph 1, unless the other Contracting Jurisdiction reserves its right not to apply Article 8 to its CTAs.

Note that this article requires approval by both Contracting Jurisdictions, which means that no change to the dividend withholding tax provisions of the other Norwegian CTAs will be introduced unless the other Contracting Jurisdiction agrees.

**Article 9 - Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property**

Norway has reserved the right for the entirety of this article not to apply to its CTAs. Thus, Article 9 of the MLI will not have an impact on Norway’s CTAs.

**Article 10 - Anti-abuse rule for permanent establishments (PEs) situated in third jurisdictions**

Norway has reserved the right for the entirety of this article not to apply to its CTAs. Thus, Article 10 of the MLI will not have an impact on Norway’s CTAs.

**Article 11 - Application of tax agreements to restrict a party’s right to tax its own residents**

Article 11 contains a so-called “saving clause” rule that preserves a Party’s right to tax its own residents. This article is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Norway has not made any reservation to this article. This implies that the provisions of Article 11(1) should apply to Norway’s CTAs, provided that the other Contracting Jurisdiction(s) has not reserved its right for Article 11 not to apply to its CTAs.

**Avoidance of PE status**

Part IV of the MLI (Articles 12 to 15) describes the mechanism by which the PE definition in existing tax treaties may be amended pursuant to the BEPS Action 7 final report to prevent the artificial avoidance of PE status through: (i) commissionaire arrangements and similar strategies (Article 12); (ii) the specific activity exemptions (Article 13); and (iii) the splitting-up of contracts (Article 14). Article 15 of the MLI provides the definition of the term “closely related to an enterprise,” which is used in Articles 12 through 14.

**Article 12 - Artificial avoidance of PE status through commissionaire arrangements and similar strategies**

This article sets out how the changes to the wording of Article 5 of the OECD Model Tax Convention to address the artificial avoidance of PE status through commissionaire arrangements and similar strategies can be incorporated in the CTAs specified by the parties. In particular:

- In Article 12(1), the concept of Dependent Agent PE is broadened so as to include situations where a person is acting in a Contracting Jurisdiction on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually exercises the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise.

- In Article 12(2), the concept of Independent Agent is restricted to exclude persons acting exclusively or almost exclusively on behalf of one or more enterprises to which it is “closely related,” e.g., certain situations of control, such as an enterprise that possesses directly or indirectly more than 50% of the interest in the agent.

Article 12 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.
Norway has not reserved the right for the entirety of Article 12 not to apply to its CTAs. Therefore, Article 12(1) and/or Article 12(2) of the MLI could apply in respect of matching CTAs of these jurisdictions if all Contracting Jurisdictions have made a notification with respect to the existing provision of the CTA.

Article 13 - Artificial avoidance of PE status through the specific activity exemptions
This article addresses the artificial avoidance of PE status through the specific activity exemptions included in Article 5(4) of the OECD Model Tax Convention. The MLI provides two options for implementing the changes. Option A is based on the proposed wording in Action 7 (i.e., this exemption should only be available if the specific activity listed is of a preparatory or auxiliary character), while option B allows the Contracting Jurisdiction to preserve the existing exemption for certain specified activities.

Norway has chosen to apply Article 13(2) (option A). It is intended that Article 13(2) (option A) will replace the existing provision in Norway’s CTA. Note that this amendment will apply only in cases where both Contracting Jurisdictions agree to apply Article 13(2) (option A) and make a notification with respect to the existing provision of the CTA.

Article 13(4) contains a second substantial provision: the anti-fragmentation clause, pursuant to which exemptions included in Article 5(4) will not apply in situations where the business activities may constitute complementary functions that are part of a cohesive business operation.

The anti-fragmentation clause is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this option entirely. The anti-fragmentation clause will apply to a provision of a CTA only where all Contracting Jurisdictions have made a notification with respect to that provision pursuant to either paragraph 7 or paragraph 8.

Norway has not opted out of Article 13(4). Thus, Article 13(4) should be applicable to Norway’s CTAs, provided that the other Contracting Jurisdiction has not opted out either from Article 13(4) and has made a notification with respect to Article 13 pursuant to either paragraph 7 or paragraph 8.

Article 14 – Splitting-up of contracts
Under the Action 7 final report recommendations on Preventing the Artificial Avoidance of PE Status, the splitting-up of contracts is a potential strategy for the avoidance of PE status through abuse of the exception in Article 5(3) of the OECD Model Tax Convention, governing the situations where building sites, construction or installation projects may constitute a PE.

Article 14 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Norway has reserved the right for the entirety of Article 14 not to apply with respect to provisions of its CTAs relating to the exploration for or exploitation of natural resources.4

In the case of PE provisions not related to the exploration for or exploitation of natural resources, Norway has notified that the relevant provision in the CTAs with Australia, the Netherlands and Serbia, shall be replaced by Article 14(1) provided that the other Contracting Jurisdiction agrees.

In relation to PE provisions included in other CTAs (not covering exploration for or exploitation of natural resources and not listed above), the provisions of Article 14(1) shall apply and supersede the provisions of the CTA, provided that the other Contracting Jurisdiction has not reserved its right for Article 14 not to apply to its CTAs.

Article 15 – Definition of a person closely related to an enterprise
Article 15 describes the conditions under which a person will be considered to be “closely related” to an enterprise for the purposes of Articles 12, 13 and 14 of the MLI.

Norway has not reserved its right for this article not to apply to its CTAs. Thus, it is expected that this definition will apply to Norway’s CTAs, provided that the other Contracting Jurisdiction has not reserved its right for Article 15 not to apply to its CTAs.

Dispute resolution

Article 16 – MAP
Part V of the MLI (Articles 16 and 17) introduces provisions which aim to introduce the minimum standards for improving dispute resolution (the Action 14 minimum standards) and a number of complementing best practices.

Article 16 of the MLI requires countries to include in their tax treaties the provisions regarding the MAP of Article 25 paragraph 1 through paragraph 3 of the OECD Model Tax Convention, including certain modifications of those provisions.
Norway has not reserved its right for these provisions not to apply to its CTA. Hence, in all situations where all Contracting Jurisdictions do not opt out of Article 16(1) and have made the same notification, a possibility to present the MAP to the competent authority in either Contracting Jurisdiction, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, will be introduced.

In other cases (when the other Contracting Jurisdiction has opted to apply Article 16(1) without a notification of the CTAs), the first sentence of Article 16(1) shall apply and supersede the existing provisions of the CTAs if incompatible.

Further, Norway has notified that most of its CTAs (with the only exceptions of Chile and Luxembourg) contain an obligation to present a case for a MAP to either of the competent authorities of the treaty partners within a specific time period that is at least three years of the first notification for the action resulting in taxation not in accordance with a CTA. These CTAs will not be impacted by the second sentence of Article 16(1).

As the CTAs with Chile and Luxembourg provide for a specific time period that is shorter than three years, the second sentence of Article 16(1) will apply and supersede the provisions of the CTA to the extent of incompatibility.

Additionally, Norway would opt in for applying the following provisions to those CTAs that do not currently include them, in the case of:

- **Mexico**: “The competent authority shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Covered Tax Agreement.”

- **Chile and Mexico**: “Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.”

- **Chile, Mexico and Portugal**: “They may also consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement.”

The provisions above will only be included in the CTAs, provided that the other Contracting Jurisdiction has made a similar notification with respect to the same tax treaty provision.

**Article 17 – Corresponding adjustments**

This provision is meant to apply in the absence of provisions in CTAs that require a corresponding adjustment where the other treaty party makes a transfer pricing adjustment.

Article 17 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Norway has reserved its right for the entirety of Article 17 not to apply to its CTAs that already contain a provision similar to the MLI on corresponding adjustments. These CTAs will not be impacted by Article 17 of the MLI.

In relation to the other CTAs, (provided that the other Contracting Jurisdiction does not opt out of Article 17), the corresponding adjustment rule under Article 17 will apply and supersede the provisions of the CTA to the extent of incompatibility.

**Mandatory binding arbitration**

Part VI of the MLI (Articles 18 to 26) enables Contracting Jurisdictions to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI.

Norway has not opted to apply these provisions. Thus, Part VI of the MLI will not have an impact on Norway’s CTAs.

**Implications**

Norway wishes to apply MLI provisions to 28 tax treaties, i.e., the minority of those 94 tax treaties which make up its tax treaty network.

The provisional reservations and notifications made by Norway seem in general to be balanced and consistent with the double tax treaty negotiation policies followed by Norway during recent years, except for the detailed LOB provision, which Norway intends to bilaterally negotiate with its treaty partners.

The MLI will enter into force after five jurisdictions have deposited their instrument of ratification, acceptance or approval. During the ratification process, the choices made by jurisdictions may still change. With respect to a specific bilateral tax treaty, the measures will only enter into effect after both parties to the treaty have deposited instruments of ratification, acceptance or approval of the MLI and a
specified time has passed. The specified time differs for different provisions. For example, for provisions relating to withholding taxes, the entry into force date is 1 January of the following year after the last party has given notice of its ratification. It is possible that the changes made as a result of being a party to the MLI will become effective in 2019, though some tax treaties may be affected as early as sometime in 2018. During the fall 2017, the Norwegian Ministry of Finance will submit a proposal to the Norwegian Parliament requesting the ratification of the MLI.

However, Norway has reserved the right for the entirety of Article 35(4) regarding the specific regulation of the entry into force of the MAP provision, not to apply with respect to provisions of its CTAs. This implies that the MAP provision will not enter into force at an earlier stage, but will follow the main rule set out in Article 35(1).

Endnotes
1. For more background on the global significance of the MLI signature, see EY Global Tax Alert, 68 jurisdictions sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, dated 7 June 2017.
2. Definitive MLI positions will be provided by each country upon the deposit of its instrument of ratification, acceptance or approval of the MLI.
3. Argentina, Australia, Bulgaria, Chile, China, Cyprus, Czech Republic, Estonia, Georgia, Greece, India, Ireland, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovenia, South Africa, Turkey and the United Kingdom.
4. Argentina, Australia, Bulgaria, China, Cyprus, Czech Republic, Estonia, India, Ireland, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovenia, South Africa, Turkey and the United Kingdom.
5. The following CTAs already contact a provision similar to the MLI on corresponding adjustments: Argentina, Australia, Bulgaria, Chile, Cyprus, Czech Republic, Estonia, Georgia, India, Japan, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovenia, South Africa, Turkey and the United Kingdom.
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