International Fiscal Association

2020

cahiers de droit fiscal international

VOLUME 105

A: Reconstructing the treaty network

1938-2020

Denmark

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Summary and conclusions

On 28 March 2019, the Danish Parliament adopted a bill ratifying the OECD Multilateral Instrument (MLI), and on 30 September 2019 Denmark deposited its instrument of ratification. Accordingly, the MLI will wield influence on Denmark's covered tax treaties as of 1 January 2020.

Denmark does not have an official model convention. Instead, with certain deviations, Denmark's point of departure for the negotiation of tax treaties is the OECD Model Tax Convention on Income and Capital (hereinafter the OECD Model). Denmark's tax treaties typically contain a preamble stating that the purpose of the treaty is both to promote avoidance of double taxation and to prevent tax evasion. Moreover, Denmark's tax treaties normally contain the anti-avoidance rules directly mentioned in the OECD Model itself.

As the aim of the MLI is to mitigate base erosion and profit shifting related to tax treaties, the Danish government was of the opinion that the content of the MLI should apply to all of Denmark's tax treaties, despite the fact that they are not completely alike. When signing the MLI, Denmark therefore listed 65 out of its 70 tax treaties as *covered tax agreement*s. With respect to the remaining tax treaties, it has been decided to (wholly or partly) implement the content of the MLI through other *complying instruments*.

Even though Denmark has decided to include all elements of the MLI, a number of choices still had to be made between the different available alternatives in some of the MLI provisions. With respect to general anti-avoidance provisions, Denmark has decided to apply the *principle purpose test* (PPT). Denmark's preference for the PPT was no surprise as Denmark had already implemented a similar OECD inspired PPT-rule in domestic law in 2015. However, in line with article 7(7)(a) of the MLI, Denmark will apply the simplified limitation on benefits provision (SLOB) if the treaty partner has decided to adopt the SLOB.

The relationship between domestic Danish law and international law is based on a dualistic principle and Denmark's ratification of the MLI required a statutory basis, which was established by the parliament's enactment of a law. Constitutionally, nothing hinders the Danish parliament from passing a law that is in conflict with the MLI. However, it is generally recognized that Danish authorities and courts should advance an interpretation of Danish law that makes it compliable with Denmark's international law obligations and should presume that the intention of the parliament has not been to enact legislation in breach of Denmark's obligations.

Pursuant to Danish case law, the Commentary to the OECD Model plays a significant role when it comes to interpretation of Denmark's tax treaties. In this context, it must be expected that the Explanatory Statement to the MLI as well as the OECD reports, on which the MLI rests, will also constitute important means of interpretation onwards.

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All in all, even though Denmark's ratification of the MLI must be expected to increase legal complexity and uncertainty in some areas, Danish businesses and lobby groups have generally been quite positive towards the MLI. An important reason for the positive attitude was the fact that at the end Denmark decided to opt for mandatory binding arbitration. Accordingly, the prevailing opinion appears to be that a sensible balance has been struck.

Part One: Impact of the MLI and the BEPS Action Plan on the Tax Treaty Network

1.1. Introduction

Danish governments have by turns consistently supported the OECD/G20 Base Erosion and Profit Shifting Project (the BEPS Project) and actively tried to push forward the anti-tax avoidance agenda.[2] In line with these efforts, the Danish parliament adopted a bill on 20 December 2019 that implemented most parts of the EU Anti-Tax Avoidance Directive (the ATAD),[3] which aims at implementing (some of) the BEPS Actions across the EU in a coordinated manner.[4] Moreover, on 28 March 2019, the Danish parliament adopted a bill ratifying the MLI.[5]

1.2. Background to the MLI

1.2.1. Tax treaties entered into before the MLI

Denmark had 70 (comprehensive) tax treaties in force prior to the implementation of the MLI. The jurisdictions with which Denmark had concluded tax treaties prior to the MLI were Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, (the Peoples Republic of) China, Chinese Taipei, Croatia, Cyprus, Czech Republic, Egypt, Estonia, Finland, Georgia, Germany, Ghana, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Republic of Korea, Kuwait,

[2] Political agreement of 17 May 2017 (*Aftale om styrket indsats mod international skatteunddragelse*). This branch report is prepared in line with developments that have taken place prior to 15 October 2019.

[3] Law no. 1726 of 27 December 2018 (*Lov om ændring af selskabsskatteloven, lov om ophævelse af dobbeltbeskatning i forbindelse med regulering af forbundne foretagenders overskud, momsloven og forskellige andre love*). See also Bill L 28 A 2018/19 (1) (*Forslag til lov om ændring af selskabsskatteloven, lov om ophævelse af dobbeltbeskatning i forbindelse med regulering af forbundne foretagenders overskud, momsloven og forskellige andre love*) and Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD I), and Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (ATAD II).

[4] S. Govind & S. Zolles, *The Anti- Tax Avoidance Directive*, in *Introduction to European Tax Law on Direct Taxation* (Michael Lang et al. eds., Linde Verlag 2018), at p. 220, and D. Smit, *The Anti-Tax-Avoidance Directive (ATAD)*, in *European Tax Law*, Vol. 1 (P. Wattel et al. eds., Wolters Kluwer 2018), p. 485 et seq.

[5] Law no. 327 of 30 March 2019 (*Lov om anvendelse af multilateral konvention til gennemførelse af tiltag i dobbeltbeskatningsoverenskomster til forhindring af skatteudhuling og overskudsflytning*). See also Bill L 160 2018/19 (1) (*Forslag til lov om anvendelse af multilateral konvention til gennemførelse af tiltag i dobbeltbeskatningsoverenskomster til forhindring af skatteudhuling og overskudsflytning*).

Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Montenegro, Morocco, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Sri Lanka, Sweden, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States, Venezuela, Vietnam, and Zambia.[6]

Accordingly, the Danish treaty network is rather comprehensive[7] and it is an official political priority to extend and maintain it.[8] In this context, it is worth noticing that Denmark has concluded a multilateral tax treaty with the other Nordic countries[9] but currently has no tax treaties in force with the fellow EU member states of France and Spain. The reason for the latter is that Denmark chose to terminate the two tax treaties in 2009 due to disagreements caused by Denmark's strict negotiation policy aiming to ensure that all of Denmark's tax treaties give Denmark the right to impose taxes at source on remuneration of private and social pensions.[10]

Denmark does not have an official Danish model convention.[11] Instead, Denmark's point of departure for negotiation of tax treaties is the OECD Model with certain deviations.[12] However, some of Denmark's tax treaties (primarily the ones with developing countries) also reflect elements of the United Nations Model Double Taxation Convention between Developed and Developing Countries (hereinafter the UN Model).[13]

Denmark has made a number of reservations to particular articles of the OECD Model.[14] The first of which is a reservation to article 5 of the OECD Model regarding the definition of a permanent establishment. The reservation concerns the special problems of applying the provisions of the OECD Model to offshore hydrocarbon exploration and exploitation and related activities. In connection to this, Denmark thus reserves the right to insert, in a special article, provisions related to such activities.[15]

Further, Denmark has made a reservation to article 8 of the OECD Model on profits from shipping, inland waterways transport, and air transport. In this regard, Denmark reserves the

6 OECD/G20, *Prevention of Treaty Abuse – Peer Review Report on Treaty Shopping*, 2019, p. 88-90.

7 For more on the historical developments with respect to Denmark's tax treaty network see P. K. Schmidt, *The Emergence of Denmark's Tax Treaty Network – A Historical View*, 6 Nordic Tax Journal 1 (2018), p. 49-63, and L. Weizman, *Dobbeltbeskatningsoverenskomster vedrørende indkomst og formue* (Jurist- og Økonomforbundets Forlag 1994).

8 Bill L 160, supra n. 5, p. 91.

9 E. Andersson et al. *Det nordiska skatteavtalet med kommentarer* (Juristförbundets Förlag 1986).

10 Law no. 85 of 20 February 2008 (*Lov om bemyndigelse til opsigelse af dobbeltbeskatningsoverenskomster mellem Danmark og henholdsvis Frankrig og Spanien*). See also J. Bundgaard & K. Dyppel, *Corporate Tax Implications of Denmark's Unilateral Termination of its Tax Treaties with France and Spain*, 63 *Bulletin for International Taxation* 7 (2009), p. 295-301.

11 A. Michelsen et al., *International Skatteret* (Karnov Group 2017), p. 61.

12 Bill L 160, supra n. 5, p. 94. See also J. Sneum, *Forhandling af dobbeltbeskatningsoverenskomster og visse aspekter af disse*, Skat Udland (1990), p. 140-149, S. Ulstrup, *Den danske model-overenskomst*, Skat Udland (2001), p. 160-166, and P. Loft, *Har vi behov for dobbeltbeskatningsoverenskomster*, in *Festskrift til Aage Michelsen* (P. Krüger-Andersen et al. eds., Jurist- og Økonomforbundets Forlag 2000), p. 277 et seq.

13 See A.N. Laursen, *OECD's Modeloverenskomst og FN's Modeloverenskomst: en sammenligning*, Skat Udland (2015), p. 657-669.

14 Denmark made reservations for the first time in connection with the 1992-update of the OECD Model. Largely, these reservations reflected the already existing Danish negotiation policy at the time. See Schmidt, supra n. 7.

15 Commentary on art. 5 of the OECD Model 2017, para. 189. Denmark has made a corresponding reservation to art. 13 of OECD Model 2017 on taxation of capital gains. See Commentary on art. 13 of the OECD Model 2017, para. 43.

right to insert special provisions regarding profits derived by the air transport consortium Scandinavian Airlines System (SAS).[16]

Moreover, with respect to article 10 of the OECD Model on taxation of dividends, Denmark reserves the right, in certain cases, to consider as dividends the selling price derived from the sale of shares.[17] In line with this, Denmark has also made a reservation to article 13 of the OECD Model concerning taxation of capital gains. The reservation states that where the selling price of shares is considered to be dividends under Danish legislation, Denmark reserves the right to tax such selling price as dividends in accordance with paragraph 2 of article 10 of the OECD Model.[18]

Concerning article 15 on income from employment, Denmark reserves the right to insert special provisions regarding remuneration derived in respect of an employment exercised aboard an aircraft operated in international traffic by the air transport consortium Scandinavian Airlines System (SAS).[19] Finally, with respect to article 25 of the OECD Model on mutual agreement procedures, Denmark reserves the right not to include paragraph 5 on arbitration in its tax treaties.[20]

1.2.2. *Domestic and treaty-based doctrines, provisions and practices before the MLI*

Denmark's tax treaties typically contain a preamble stating that the purpose of the treaty is both to promote avoidance of double taxation and to prevent tax evasion. Moreover, Denmark's tax treaties normally contain the anti-avoidance rules directly mentioned in the OECD Model itself, whereas the various anti-avoidance rules mentioned only in the Commentary rarely find their way into Denmark's tax treaties.[21]

Since the 1980s, Denmark has paid increased attention to problems of abuse of tax treaties, including treaty shopping.[22] In 1983, the Danish government appointed a committee (*Skatteflugtsudvalget*) with the purpose of trying to investigate these problems as well as broader challenges connected with the so-called exodus of taxpayers from Denmark.[23] One offshoot of this increased attention was that Denmark began to terminate a number of

16 Commentary on art. 8 of the OECD Model 2017, para. 33. Denmark has made a corresponding reservation to art. 13 of OECD Model 2017 on taxation of capital gains. See Commentary on art. 13 of the OECD Model 2017, para. 44.

17 Commentary on art. 10 of the OECD Model 2017, para. 79.

18 Commentary on art. 13 of the OECD Model 2017, para. 41.

19 Commentary on art. 15 of the OECD Model 2017, para. 15. Denmark has made a corresponding reservation to art. 22 of OECD Model 2017 on taxation of capital. See Commentary on art. 22 of the OECD Model 2017, para. 12.

20 Commentary on art. 25 of the OECD Model 2017, para. 97.

21 J. Wittendorff, *Misbrug af dobbeltbeskatningsoverenskomster*, in *Den evige udfordring – omgåelse og misbrug i skatteretten* (J. Bundgaard et al. eds., Ex Tuto 2016), p. 299. Typically, Denmark's tax treaties already include provisions for a mutual agreement procedure as well as corresponding adjustments (as addressed in arts. 16 and 17 of the MLI), but none of Denmark's tax treaties contain provisions (in force) for mandatory binding arbitration. See J. Breau & K.S. Nilausen, *Denmark*, in *Cahiers de droit fiscal international* 101a (International Fiscal Association eds., Sdu Financiële & Fiscale Uitgevers 2016), p. 211-221.

22 See Schmidt, supra n. 7.

23 Government Recommendation (*Betænkning – Reglerne om beskatning af udenlandsk indkomst i Danmark og for ophør af skattepligten til Danmark*), no. 1060, 1985, p. 127-135. From recent years see also the Tax Legislation Council (*Skattelovrådet*), *Rapport om skattely, udveksling af oplysninger, hvidvask og straf* (2018).

treaties primarily concluded with countries overseas that had previously belonged to the UK or the Netherlands as colonies.[24]

With respect to some of the other suggestions made by the committee, the results were more meager. Thus, no tradition for introducing general anti-avoidance clauses in the Danish tax treaties arose and it did not become common to include provisions in the Danish tax treaties that would explicitly establish that the states could apply domestic anti-avoidance rules.[25] However, provisions providing subsidiary taxing rights began to appear in a number of Danish treaties.[26]

In recent years, the notion of *beneficial ownership* has in particular attracted interest. Accordingly, most of Denmark's tax treaties contain beneficial ownership clauses in line with articles 10-12 of the OECD Model on dividends, interest and royalties, and the Danish tax authorities have raised a number of cases against Danish interest and/or dividend paying companies for not withholding tax at source.[27] In short, the position of the tax authorities is that the immediate recipients cannot be regarded as the beneficial owners of the received funds as the immediate recipients lack the powers to make decisions in respect of the received funds and because their only function has been to simply act as an intermediary or a conduit company.[28]

Only one beneficial ownership case has so far been decided by the Danish courts. The case – which had an atypical fact pattern as the immediate recipient had not re-distributed the dividends up the corporate chain – was won by the taxpayer.[29] However, more cases on beneficial ownership are currently on their way through the Danish legal system, and on the level of the National Tax Tribunal, the tax authorities have prevailed in a number of cases concerning interest payments.[30] Furthermore, in some of the ongoing court cases, requests for preliminary rulings were made to the European Court of Justice (ECJ). On 26 February 2019, the ECJ published its judgements[31] in which the ECJ appears to interpret the beneficial ownership concept rather broadly and to expand the scope of application of the general anti-

[24] J.W. Grav, *Dobbeltbeskatning – gamle engelske kolonier – 1950 UK-overenskomst*, Tidsskrift for skatter og afgifter 85 (1986). See also Weizman, supra n. 7, p. 77.

[25] Among the more important exceptions are the LOB clause found in the treaty with the US, the principal purpose test in the treaty with the UK, and the provision in the treaty with Germany specifically allowing the contracting states to apply domestic anti-avoidance rules. See J. Bundgaard & P.K. Schmidt, *Denmark*, in *Cahiers de droit fiscal international* 95a (International Fiscal Association ed., Sdu Financiele Uitgevers 2010), p. 261-279.

[26] Wittendorff, supra n. 21.

[27] See also P.K. Schmidt, *Corporate Taxation and the International Challenge*, 2 Nordic Tax Journal 2 (2014), p. 113-131.

[28] H.S. Hansen et al., *Denmark – Danish Beneficial owner cases – A Status Report*, 67 Bulletin for International Taxation 4/5 (2013), p. 192-199.

[29] Judgement of 20 November 2011, Eastern High Court (Østre Landsret), SKM2012.121.ØLR. The judgment was not appealed.

[30] For example, decision of 22 December 2010, National Tax Tribunal (*Landsskatteretten*), SKM2011.57.LSR and decision of 25 May 2011, National Tax Tribunal (*Landsskatteretten*), SKM2011.485.LSR

[31] Judgements of 26 February 2019, European Court of Justice, joined cases C115/16, C118/16, C119/16 and C299/16, and Judgments of 26 February 2019, European Court of Justice, joined cases C-116/16 and C-117/16.

abuse principle enshrined in EU law.[32] The referring Danish courts now have to re-open the cases and consider the facts against the answers received from the ECJ.

In domestic Danish tax law, a patchwork of anti-avoidance rules has gradually developed since the early 1990s. In the beginning, the focus was on introducing provisions mitigating abuse of Denmark's tax treaties, but it has gradually shifted towards other kinds of abuse and avoidance.[33] For example, Danish domestic law contains rules limiting deductions of interest, rules on controlled foreign companies, hybrid mismatch rules, and rules on exit taxation.[34] Moreover, in 2015, Denmark introduced a statutory general anti-avoidance provision aiming at mitigating corporate taxpayer abuse of Denmark's tax treaties (*OECD principal purpose test*) and certain EU directives.[35] The scope of the provision was broadened with effect from 2019 because of Denmark's implementation of the GAAR prescribed in article 6 of the ATAD.[36]

1.3. Direct impact of the BEPS Action Plan and the MLI

1.3.1. Signature, ratification, entry into force, and entry into effect

Denmark signed the MLI on 7 June 2017 at the signing ceremony in Paris. On 28 March 2019, the Danish parliament adopted a bill ratifying the MLI. The adopted bill entered into force as of 1 July 2019[37] but the MLI will only start having effect with respect to Denmark's covered tax treaties three months after Denmark has deposited its instrument of ratification with the Depository at the OECD.[38] As Denmark deposited its instrument of ratification on 30 September 2019, the MLI will start having effect with respect to Denmark's covered tax treaties as of 1 January 2020.[39]

Denmark's main reason for signing the MLI is that the MLI is perceived to introduce a

32 For more on the European Court of Justice's decisions in the Danish beneficial ownership cases see P.A.H. González-Barreda, *European Union – Holding Companies and Leveraged Buy-Outs in the European Union Following BEPS: Beneficial Ownership, Abuse of Law and the Single Taxation Principle*, 59 European Taxation 9 (2019), L.C. van Hulten & J.J. A.M. Korving, *Svig og Misbrug: The Danish Anti-Abuse Cases*, 47 Intertax 8/9 (2019), p. 793-800, and E. Banner-Voigt, *EU-Domstolens afgørelser i sagerne om retmæssig ejer*, Revision & Regnskabsvæsen 7 (2019), p. 58 et seq.

33 Wittendorff, supra n. 21, p. 302.

34 For a recent overview of the plethora of Danish anti-avoidance rules see J. Bundgaard & P.K. Schmidt, *Denmark*, in *Tax Avoidance Revisited in the EU BEPS Context* (A. Dourado ed, IBFD 2016), p. 261-284.

35 S. 3 of the Danish Tax Assessment Act, introduced by Law no. 540 of 29 April 2015 (*Lov om ændring af ligningsloven, boafgiftsloven, fondsbeskatningsloven, skatteforvaltningsloven og forskellige andre love*). See also Bill L 167 2014/15 (*Forslag til Lov om ændring af ligningsloven, boafgiftsloven, fondsbeskatningsloven, skatteforvaltningsloven og forskellige andre love*). Even though no statutory GAAR was adopted until 2015, Danish case law contains several examples where courts have struck down the arrangements of a taxpayer, inter alia, by taking the substance of the transaction(s) into account when interpreting and applying the law. See L. Madsen & A.N. Laursen, *Denmark*, in 103 *Cahiers de droit fiscal international* (International Fiscal Association ed., Sdu Fiscale & Financiële Uitgevers 2018).

36 See also s. 1.1 above. For an analysis of this development see for example P.K. Schmidt, *Avoidance and Abuse – A Contemporary Analysis of Danish Tax Law*, Revue européenne et internationale de droit fiscal / European and International Journal of Tax Law 4 (2018), p. 489-499.

37 See also s. 1.1. For more on the Danish implementation process see also s. 2.1.1.

38 Art. 34 (2) of the MLI.

39 OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting – Status as of 30 September 2019* (2019).

number of important measures against base erosion and profit shifting. In the view of the Danish legislator, this aim should be pursued with respect to all of Denmark's tax treaties, irrespective of the various treaties' differences. In addition, the fact that Denmark sees itself as a frontline jurisdiction – in the fight against the use of tax havens – also played a role with respect to Denmark's decision to support the MLI. Finally, as Denmark expects to continue using the OECD Model as a point of departure for negotiating new tax treaties – and since the 2017-version of the OECD Model already includes the content of the MLI – it makes sense to also align all of Denmark's existing tax treaties with the MLI.[40]

1.3.2. Covered tax agreements

As the aim of the MLI is to mitigate base erosion and profit shifting related to tax treaties, the Danish government was of the opinion that the content of the MLI should apply to all of Denmark's tax treaties, despite the fact that they are not completely alike.[41] When signing the MLI, Denmark therefore listed 65 out of its 70 tax treaties as *covered agreements*.[42] These include Denmark's tax treaties with the following jurisdictions: Argentina, Australia, Azerbaijan, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, Cyprus, Egypt, Estonia, Philippines, Georgia, Ghana, Greece, India, Indonesia, Ireland, Israel, Italy, Jamaica, Kenya, China, Republic of Korea, Croatia, Kuwait, Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Morocco, Mexico, Montenegro, New Zealand, Pakistan, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, Sri Lanka, United Kingdom, South Africa, Chinese Taipei, Tanzania, Thailand, Czech Republic, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, Hungary, United States, Venezuela, Vietnam, Zambia and Austria.[43]

In addition, with respect to Denmark's tax treaties with The Netherlands, Switzerland, Germany and the other Nordic countries, it has been decided to implement the content of the MLI (wholly or partly) through other *complying instruments*.[44] Moreover, Denmark's tax treaty with Japan from 2018 is based on the 2017 version of the OECD Model, which already includes the material content of the MLI.[45] Finally, it is the intention that the MLI should also apply with respect to Denmark's tax treaty with Armenia that was signed in 2018. At the time

40 Bill L 160, supra n. 5, p. 91 and 115. In the bill, no thorough attempt was made to assess the impact of the MLI on the state of the budget, tax compliance, administration and economic activity. Instead, it is just stated that the MLI is expected to have limited budgetary consequences, and that the tax authorities' costs of implementing new systems and routines could be estimated – under significant uncertainty – to DKK 1 million per year. Further, it is stated that the MLI is not expected to entail economic or administrative consequences for businesses and citizens. See Bill L 160, supra n. 5, p. 128.

41 Bill L 160, supra n. 5, p. 115.

42 OECD/G20, supra n. 6, p. 88-90.

43 Bill L 160, supra n. 5, p. 119-128.

44 Bill L 160, supra n. 5, annex 1. New protocols to the Nordic tax treaty and the treaty with the Netherlands were approved by parliament in 2018. See Law no. 1294 of 21 November 2018 (*Lov om indgåelse af protokol om ændring af dobbeltbeskatningsoverenskomst mellem de nordiske lande*) and Law no. 1293 of 21 November 2018 (*Lov om indgåelse af protokol om ændring af dobbeltbeskatningsoverenskomsten mellem Danmark og Nederlandene*). See also J.G. Nielsen, *Nyheder inden for dobbeltbeskatningsoverenskomster – de nordiske lande, Danmark og Nederlandene, Danmark og Japan samt Danmark og Armenien*, Skattepolitisk oversigt (2018), p. 293 et seq.

45 Bill L 160, supra n. 5, p. 115. The new treaty with Japan was approved by parliament in November 2018. See Law no. 1292 of 21 November 2018 (*Lov om indgåelse af dobbeltbeskatnings-overenskomst og tilhørende protokol mellem Danmark og Japan*).

of writing of this branch report the treaty with Armenia has not yet entered into force, but when it does, Denmark will notify the Depository that the treaty with Armenia should be added to the list of Denmark's covered agreements.[46]

1.3.3. *Applicable provisions of the MLI*

When signing the MLI on 7 June 2017, Denmark decided to make use of all reservations possible. In other words, Denmark initially only subscribed to the *minimum standard*.[47] Among other things, this would have entailed that the rules on mandatory arbitration would not be applied by Denmark. This received some criticism in both the Danish media and the Danish academic literature.[48]

However, these choices were only provisional, and Denmark has now generally embraced the MLI. The main reason for choosing to include all elements of the MLI was that Denmark expects to continue using the OECD Model as a point of departure for negotiating new tax treaties. Accordingly, as the 2017-version of the OECD Model already includes the content of the MLI, it made sense for the legislator to also align all of Denmark's existing tax treaties with the MLI.[49]

Even though Denmark has decided to include all elements of the MLI, a number of choices still had to be made between the different alternatives available in some of the MLI provisions. Below, focus will be on explaining these choices. However, before doing so it should briefly be mentioned that Denmark will apply article 3 of the MLI concerning transparent entities as well as article 4 of the MLI on dual residency. These provisions will be applied in their entirety as Denmark has not made use of any of the available reservations found in article 3(5) and article 4(3).[50]

Article 5 of the MLI concerns the application of methods for elimination of double taxation and the provision includes three alternative ways (options A, B, and C) with which countries may address problems arising from the inclusion of the exemption method in treaties with respect to items of income that are not taxed in the state of source.[51] All of Denmark's tax treaties – except for the 1974 treaty with Brazil – prescribe the use of the credit method to provide relief for double taxation. Accordingly, the problems addressed by article 5 are not present in a Danish treaty context. Anyway, Denmark has chosen to opt for option C which reflects the credit method for the elimination of double taxation and is based on article 23 B

46 Bill L 160, supra n. 5, p. 129. The new treaty with Armenia was approved by parliament in 2018. See Law no. 1291 of 21 November 2018 (*Lov om indgåelse af dobbeltbeskatningsoverenskomst og tilhørende protokol mellem Danmark og Armenien*).

47 OECD, *Status of List of Reservations and Notifications at the Time of Signature: The Kingdom of Denmark* (7 June 2017), available at http://www.oecd.org/tax/treaties/beps-mli-position-denmark.pdf.

48 For more on Denmark's initial positions see J. Wittendorff, *OECD/G20's multilaterale instrument (MLI) – et dansk perspektiv*, Skat Udland 197 (2017).

49 Bill L 160, supra n. 5, p. 91 and 115.

50 Bill L 160, supra n. 5, p. 130. In this context, it should be mentioned that Denmark has recently amended its domestic rules on hybrids in accordance with the ATAD. See s. 2 C and 8 B-8 E, enacted through Law no. 1726, supra n. 3.

51 OECD, *Explanatory statement to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting* (2016).

of the OECD Model (2017). The reason behind this choice is Denmark's general aim of aligning its tax treaties with the most recent version of the OECD Model.[52]

Article 6(1) of the MLI states that covered agreements should be modified to include preamble language stating that the purpose of the covered tax agreement is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. A party may reserve the right not to modify the wording of covered agreements that already contain a similar statement, pursuant to article 6(4) of the MLI. However, Denmark has not made use of this option. In addition, Denmark has opted not to include the additional preamble language in article 6(3) of the MLI which states that the parties wish to further develop their economic relationship and to enhance their co-operation in tax matters. The reason is that Denmark considers this part of the preamble text as non-binding and without significance for the interpretation of the covered agreements.[53]

Denmark has decided to apply the PPT in article 7(1) of the MLI which states that a benefit under a covered agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude – while having regard to all relevant facts and circumstances – that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting such benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the covered tax agreement. Denmark's preference for the PPT-rule was no surprise as Denmark had already implemented a similar OECD inspired PPT-rule in domestic law in 2015.[54] Accordingly, Denmark prefers the PPT rather than the other options for prevention of abuse mentioned in article 7 of the MLI. Among the reasons are that the PPT was inserted into the OECD Model in 2017 (which is not the case for the other options) and that Denmark, as explained above, uses the OECD Model as a basis for treaty negotiations.[55]

Denmark has chosen not to opt for *the discretionary benefits rule* in article 7(4) of the MLI because the flexibility provided by the provision (in the eyes of the legislator) already exists within the general framework for the conduct of competent authorities.[56] Furthermore, Denmark has chosen not to opt for applying the SLOB set out in article 7(8)-(13) of the MLI as the PPT is considered a preferred and sufficient solution.[57] However, in line with article 7(7)(a) of the MLI, Denmark will apply the SLOB if the treaty partner has decided to go for the SLOB. Denmark has made this choice in order to ensure not only that the SLOB will be applied symmetrically but also that the other treaty partner does not have the possibility of opting out of article 7 of the MLI in its entirety.[58]

Denmark will apply the rule in article 8(1) of the MLI which requires that a minimum shareholding period is satisfied in order for a company to be entitled to a reduced rate on dividends from a subsidiary, pursuant to article 10(2) of the OECD Model (2017). In other

52 Bill L 160, supra n. 5, p. 131-132.

53 Bill L 160, supra n. 5, p. 132.

54 See s. 3(5) of the Tax Assessment Act adopted through Law no. 540 of 29 April 2015 (*Lov om ændring af ligningsloven, boafgiftsloven, fondsbeskatningsloven, skatteforvaltningsloven og forskellige andre love*). For more on the domestic PPT rule see Madsen & Laursen, supra n. 35., and Schmidt, supra 36. *Avoidance and Abuse – A Contemporary Analysis of Danish Tax Law*, Revue européenne et internationale de droit fiscal / European and International Journal of Tax Law 4 (2018), p. 489-499.

55 Bill L 160, supra n. 5, p. 133.

56 Bill L 160, supra n. 5, p. 132.

57 Bill L 160, supra n. 5, p. 133.

58 Bill L 160, supra n. 5, p. 133.

words, Denmark has not made use of the possibility of entirely opting out of article 8. Accordingly, the rule will apply to Denmark's covered agreements if the treaty partner has made a similar choice.[59] However, it should be noted that the new rule will have no practical effect with respect to foreign parent companies' receipt of dividends from Danish subsidiaries (outbound dividends) as a minimum holding period requirement does not exist in domestic Danish law.[60] Similarly, the new rule will not have any practical effect with respect to Danish parent companies receiving dividends from a foreign subsidiary (inbound dividends).[61]

Article 9 of the MLI concerns capital gains from alienation of shares or interests of entities deriving their value principally from immovable property (immovable property shares). Denmark does not have domestic legislation in place that subjects foreign investors to tax on capital gains on immovable property shares. Anyway, since a similar provision is found in the OECD Model 2017, Denmark has chosen to opt for application of article 9(4) of the MLI, which introduces a specific requirement stating that the source jurisdiction can levy tax if more than 50 per cent of the value of the shares directly or indirectly comes from immovable property situated in the source jurisdiction.[62]

Denmark will apply the anti-abuse rule found in article 10 of the MLI concerning permanent establishments situated in third jurisdictions. In other words, Denmark has not made use of any of the possible reservations described in article 10(5).[63] Moreover, Denmark has in its domestic law introduced a similar provision on payments to *disregarded permanent establishments*.[64]

In line with Denmark's general embracement of the MLI, Denmark will apply article 12 of the MLI on preventing avoidance of permanent establishment status through commissionaire structures as well as article 13 of the MLI concerning the specific activity exemptions and article 14 of the MLI on the splitting up of contracts.[65] With respect to article 13, Denmark has chosen to apply option A as this option reflects the text of article 5(4) of the OECD Model (2017).[66]

Generally, Denmark's tax treaties already contain provisions on mutual agreement procedures. Accordingly, in a Danish context, the practical effect of applying article 16 of

59 Bill L 160, supra n. 5, p. 133.

60 S. 2(1)(c) of the Corporate Tax Act. Pursuant to the provision, dividends from a Danish subsidiary should as a main rule not be subject to taxation at source, if the taxation should be reduced or eliminated according to a tax treaty or the EU Parent-Subsidiary Directive.

61 S. 13(1)(2) of the Corporate Tax Act. Pursuant to the provision, dividends received by a Danish parent company from a foreign subsidiary should as a main rule not be subject to tax. See also Bill L 160, supra n. 5, annex 1.

62 Thus, Denmark has not made use of the reservations set out in Article 9(6). See Bill L 160, supra n. 4, p. 134.

63 Nor has Denmark made use of the possibility of opting out of the *savings clause* found in article 11 of the MLI. According to the preparatory remarks it is rather obvious that the domicile state has a right to tax in the situations mentioned in the provision. See Bill L 160, supra n. 4, p. 134. However, this view has been subject to criticism in Danish literature. See J. Wittendorff, *OECD's multilaterale konvention*, Revision & Regnskabsvæsen 8 (2019), p. 24 et seq.

64 Section 8 C(1)(1)(d) of the Corporate Tax Act.

65 Recently, it has been proposed to amend the domestic permanent establishment definition in order to bring it in line with the definition used in the OECD Model (2017). See draft bill of 13 September 2019 (*Forslag til lov om ændring af selskabsskatteloven, kildeskatteloven, skatteindberetningsloven, skattekontrolloven og forskellige andre love*), journal no. 2019-6665.

66 See the explanatory statement, supra 50. Denmark has not made use of any of the reservations available in Article 13(6) and Article 15(2) (definition of a person closely related to an enterprise). Moreover, even though Denmark does not see any need for applying Article 14, Denmark does not wish to hinder their treaty partners in applying such provisions. Accordingly, Denmark has not made use of the reservation available pursuant to Article 14(3). See L 160, supra n. 4, p. 135-136.

the MLI is that onwards the taxpayer will be able to present his or her case to the competent authorities in the country of source and not only to the competent authorities in the country of residence.[67]

Article 17 of the MLI concerns access to corresponding adjustments. Denmark's tax treaties typically already include such a provision and Denmark has therefore opted to make use of the reservation set out in article 17(3). Accordingly, article 17 of the MLI will only apply to those of Denmark's tax treaties where such provision is not already in place.[68]

After careful consideration, Denmark decided to apply articles 18-26 of the MLI providing for mandatory binding arbitration of disagreements between the contracting states. In reaching this decision, it seems to have played a role that Denmark is already forced to apply mandatory binding arbitration with other EU member states because of the EU directive on tax dispute resolution mechanisms.[69] Furthermore, it appears that the legislator has acknowledged a need for arbitration as a counter weight to the many new and complex anti-avoidance rules, which may increase taxpayers' risk of being subject to double taxation. Finally, it seems to have been of importance that the rules on mandatory binding arbitration are now an integrated part of the OECD Model (2017).[70]

By not making use of the available reservation in article 23(2) of the MLI, Denmark will by default apply the arbitration process' *final offer*, also known as the *last best offer arbitration* or simply *baseball arbitration*. In the view of the Danish legislator, this approach is more expedient than the so-called *independent opinion procedure* as *final offer* and ensures consistent interpretation, i.e. the interpretation as each of the competent authorities apply.[71]

Denmark has opted to apply article 23(5) according to which the competent authorities shall ensure that each person, that presents the case, and their advisors agree in writing not to disclose to any other person any information received during the course of the arbitration proceedings. Moreover, with respect to mandatory binding arbitration, Denmark has opted to make use of the following reservations:

- Article 19(12) of the MLI, which permits a party to reserve the right to exclude from arbitration issues a decision that has been rendered by a court.[72]
- Article 28(2) of the MLI, according to which Denmark has decided that the rules on mandatory binding arbitration shall not apply to Denmark's tax treaties with other EU member states (as the EU directive on tax dispute resolution mechanisms applies within the EU).
- Article 28(2) of the MLI, according to which Denmark has decided that the arbitration procedure shall only apply if the treaty partner accepts that the chairman of the arbitration panel has to be a judge and accepts that Denmark publishes a summary of the decision.
- Article 28(2) of the MLI, according to which the arbitration procedure cannot be used in situations where the taxpayer is subject to sanctions for tax fraud, intentional neglect or gross negligence.[73]

[67] Denmark has not made use of the reservation in art. 16(5), according to which the amendments can be introduced by other means. See Bill L 160, supra n. 5, p. 137.

[68] Bill L 160, supra n. 5, p.137.

[69] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union.

[70] Bill L 160, supra n. 5, p. 115-116.

[71] Bill L 160, supra n. 5, p. 140.

[72] The Danish tax authorities cannot deviate from a court decision. However, they may derogate from an administrative decision. See Bill L 160, supra n. 5, answer to SAU question 4, 5 and 6.

[73] L 160, supra n. 5, p. 141-143.

1.4. Indirect impact of the BEPS Action Plan and the MLI

Since signing the MLI on 7 June 2017, Denmark has entered into a new tax treaty with Japan (signed on 11 October 2017).[74] As already mentioned in the previous section, Denmark expects to continue using the most recent version of the OECD Model as a point of departure for negotiating new tax treaties. In accordance with this strategy, the new treaty with Japan is based on the OECD Model (2017) and includes the OECD minimum standards on treaty abuse and dispute resolution.

In addition, Denmark has entered into a tax treaty with Armenia (signed on 14 March 2018).[75] As the negotiations partly took place before the 2017-version of the OECD Model was published, the treaty does not fully reflect the OECD minimum standards on treaty abuse and dispute resolution. As mentioned earlier, the treaty with Armenia has not yet entered into force, but when it does, Denmark will notify the OECD Depository that the treaty with Armenia should be added to the list of Denmark's covered agreements.[76]

For the time being, there are no signs indicating that the provisions of the MLI generally will be incorporated directly into Denmark's tax treaties. Accordingly, from a Danish perspective, the MLI must be expected to remain as a third layer of international tax law for the foreseeable future. However, as the 2017-version of the OECD Model will be the point of departure for Denmark's future negotiations of tax treaties the provisions of the 2017-version must to some extent be expected to be reflected in Denmark's future tax treaties.

Part Two: Practical Implementation of the Provisions of the MLI

2.1. Entry into force and legal value of the MLI

2.1.1. Procedure implemented in order to implement the MLI

Pursuant to section 19(1) of the Danish constitution, the king shall act on behalf of the realm in international affairs, but – except with the consent of the parliament – the king shall not undertake any act whereby the territory of the realm shall be increased or reduced and nor shall he enter into any obligation for which fulfilment requires the concurrence of the parliament or which is otherwise of major importance. Nor shall the king – except with the consent of the parliament – terminate any international treaty entered into with the consent of the parliament.[77]

Accordingly, as the ratification of the MLI entails that already concluded Danish tax

[74] Law no. 1292 , supra n. 45, adopting Bill L 32 of 3 October 2018 (*Forslag til lov om indgåelse af dobbeltbeskatnings-overenskomst og tilhørende protokol mellem Danmark og Japan*).

[75] Law no. 1291, supra n. 46.

[76] Bill L 160, supra n. 5, p. 129.

[77] S. 19 of the Danish Constitution, Law no. 169 of 5 June 1953 (*Danmarks riges grundlov*). Even though the provision refers to the King, it is nowadays the government that acts in the King's place. Until 1994, the so-called Enabling Act entailed that the government could enter into new tax treaties without the consent of the parliament. See Law no. 74 of 31 March 1953 (*Bemyndigelsesloven*). However, this right was eliminated when the Enabling Act was abolished in 1994. See Law no. 945 of 23 November 1994 *(Lov om ophævelse af lov om indgåelse af overenskomster med fremmede stater til undgåelse af dobbeltbeskatning mv*.). See also Schmidt, supra n. 7.

treaties are amended, the Danish implementation of the MLI required a statutory basis.[78] This statutory basis was established by the parliament's enactment of Law no. 327 of 30 March 2019.[79]

No members of parliament voted against ratifying the MLI, and during the reading of the bill in the parliament, the debate was very brief, as all political parties could support the bill.[80] However, a few questions were answered by the minister of taxation when the bill was reviewed by the members of the parliamentary committee of taxation.[81]

The Danish ministry of taxation contemplates to prepare synthesized tax treaties in cooperation with the treaty partner in question. As these synthesized texts will have no legal value of their own, the ministry expects to publish the texts directly on the ministry's website. However, the practicalities are not yet finalized.[82]

2.1.2. *Legal value of the MLI*

By signing and ratifying the MLI, Denmark has accepted an international law obligation. The relationship between domestic Danish law and international law is based on a dualistic principle[83] and, constitutionally, nothing hinders the Danish parliament from passing a law that is in conflict with the MLI. However, it is generally recognized that the Danish authorities and courts should advance an interpretation of Danish law that makes it compliable with Denmark's international law obligations and should presume that the intention of the parliament has not been to enact legislation in breach of Denmark's obligations. However, treaty override is possible in Danish law if the parliament has intended to do so.[84]

2.2. Interpretation issues

2.2.1. *Interpretation of the MLI*

The Vienna Convention on the Law of Treaties provides the general rules for the application and interpretation of treaties, including tax treaties.[85] In this regard, the Explanatory Statement to the MLI should most likely be considered a primary means of interpretation, pursuant to article 31 of the Vienna Convention.[86] Some interpretational guidance can probably also be found in the legal note published by the OECD, to the extent the note can be seen as a clarification (the note explains the functioning of the MLI under public international law).

78 Bill L 160, supra n. 5, p. 91.

79 See also s. 1.1.1 as well as Bill L 160, supra n. 5.

80 106 members of parliament voted in favour of ratifying the MLI.

81 Bill L 160, supra n. 5, SAU question 1-6.

82 Phone interview as of 11 October 2019 with Head of Unit, Nina Legaard Kristensen, Office for International Coordination, Danish Ministry of Taxation.

83 P. Germer, *Indledning til folkeretten* (Jurist- og Økonomforbundets Forlag 2010).

84 Aa. Michelsen, *Tax Treaty Interpretation in Denmark*, in *Tax Treaty Interpretation* (M. Lang ed., Kluwer Law International 2000), p. 63-76.

85 C. Garberino, *Judicial Interpretation of Tax Treaties – The Use of The OECD Commentary* (Edward Elgar Publishing 2016), p. 16 et seq.

86 Wittendorff, supra n. 63.

2.2.2. *Interpretation of tax treaties generally*

Pursuant to Danish case law, the Commentary to the OECD Model plays a significant role when it comes to interpretation of Denmark's tax treaties.[87] In this context, it must be expected that the BEPS reports, on which the MLI rests, will also constitute important means of interpretation onwards.[88] The legal weight of these BEPS reports will probably be more or less comparable to the legal weight of the Commentary to the OECD Model (2017), provided that the statements in the BEPS reports do not conflict with the Commentary. However, overall, the Danish approach to tax treaty interpretation should not be considered fundamentally changed as a consequence of the MLI.

2.2.3. *Interpretation of earlier tax treaties (pre-MLI)*

In the Danish literature, it is generally agreed that an ambulatory approach to tax treaty interpretation could and should often be followed. This approach is in line with paragraph 35 of the Introduction to the OECD Model (2017).[89] The leading precedent is the so-called *Texaco decision* issued by the Danish Supreme Court in 1992.[90] However, it is also commonly agreed that substantive amendments to the articles of the OECD Model and to the Commentary are not relevant to the interpretation or application of previously concluded tax treaties where the provisions of those treaties are different in substance from the amended articles/commentary. In other words, if an amendment cannot be seen as a mere clarification, a static approach applies.[91] Consequently, the substantive changes implemented through the MLI that are reflected in the 2017-version of the OECD Model should not affect the interpretation of Denmark's earlier tax treaties, if the other jurisdiction has not signed the MLI or if it has signed the MLI but not listed its treaty with Denmark as a covered tax agreement. More broadly, there have been no indications that the content of the MLI would be used in a retrospective manner for the purpose of interpreting Danish tax treaties, as applicable before the MLI entered into force.

2.3. Tax planning and tax administration after the BEPS Action Plan and the MLI

It seems that the BEPS project, including the signing of the MLI, has supported an already ongoing trend, according to which larger Danish headquartered multinationals have moved towards a more responsible approach to international tax planning. As an indicator, it is worth mentioning that in recent years many of the largest Danish headquartered multinationals

87 A. Michelsen et al., supra n. 11, p. 79.

88 This was confirmed by the Danish Minister of Taxation during the reading of the bill. See Bill L 160, supra n. 5, SAU annex 1.

89 See e.g. Michelsen, supra n. 84.

90 Judgement by the Danish Supreme Court (*Højesteret*), 18 December 1992, TfS 1993, 7 (*Texaco*).

91 See also J. Wittendorff, *Armslængdeprincippet i dansk og international skatteret* (Karnov Group 2009), p. 156-159, A.N. Laursen, *Fast driftssted* (Jurist- og Økonomforbundets forlag 2011), p. 39-43, N.W. Sørensen et al., *Skatteretten 3* (Karnov Group 2013), p. 51-54.

have adopted and published tax policies/strategies in which they set limits for their use of international tax planning.[92]

As mentioned in section 1.2.2, in 2015, Denmark introduced a statutory general anti-avoidance provision in section 3 of the Tax Assessment Act aiming at mitigating corporate taxpayer abuse of Denmark's tax treaties (the OECD PPT) and certain EU directives. The scope of the provision was broadened with effect from 2019 because of Denmark's implementation of the GAAR prescribed in article 6 of the ATAD (the ATAD GAAR).

In August 2018, the Danish National Tax Board issued a ruling in which the board for the first time used the statutory PPT to set aside (contemplated) transactions of a taxpayer.[93] Roughly described, the decision concerned the company A-Co, domiciled in Denmark, which was fully owned by B-Co, a company domiciled in Singapore. B-Co had been established a year earlier by an individual resident in Singapore. A-Co directly and indirectly held shares in a number of subsidiaries domiciled in Singapore, Denmark, and two other jurisdictions. Now, A-Co contemplated to make two distributions to B-Co with one distribution in cash and one distribution in kind consisting of the shareholdings in two Singaporean subsidiaries. A part of the distribution in cash was meant to be further distributed by B-Co to the individual shareholder. In connection to these distributions, A-Co asked the National Tax Board to confirm that the distributions from A-Co would not be subject to Danish taxation at source.

The National Tax Board initially stated that B-Co should not be considered the beneficial owner of the part of the distribution in cash that was meant to be further distributed by B-Co to the individual shareholder. Accordingly, this part of the distribution should be considered subject to Danish taxation at source, pursuant to section 2(1)(c) of the Corporate Tax Act. With respect to the received dividend in kind and the part of the cash distribution that was not intended to be re-distributed, B-Co should be considered the beneficial owner and no taxation at source should take place, pursuant to section 2(1)(c) of the Corporate Tax Act and article 10 of the tax treaty between Denmark and Singapore.

However, before concluding that the latter distributions should not be subject to Danish taxation at source, the National Tax Board considered whether the new statutory PPT would be applicable. In connection to that, the Board initially assessed whether the arrangement contained a benefit with respect to the tax treaty. As the individual shareholder in Singapore would have been subject to Danish taxation at source if B-Co had not been interposed in the ownership structure, the board found that a benefit was obtained.

Subsequently, the board examined whether obtaining the benefit was one of the principal purposes. In this regard, the board placed emphasis on the fact that the newly established holding company (i.e. B-Co) did not perform any genuine business activities consisting of the administration of the underlying companies. As a consequence, the board found that one of the principal purposes was to obtain the tax benefit.

Finally, the board considered whether it could be established that granting the benefit under these circumstances would be in accordance with the object and purpose of the relevant provision of the tax treaty. The board found that B-Co was not founded on the basis of commercial reasons, and, thus, the board was not convinced by the taxpayer's arguments, including the argument that it would be commercially beneficial to gather the Singaporean

[92] See Økonomisk Ugebrev Ledelse, Ørsted bedste top 100 til ansvarlig skattepraksis, 12 May 2019.

[93] Decision from the National Tax Board (*Skatterådet*), 28 August 2018, SKM2018.466.SR. The decision is also analyzed in Schmidt, supra n. 36. It now follows from s. 3(7) of the Tax Assessment Act that cases involving the application of the GAAR (the PPT as well as the ATAD GAAR) shall be brought before the National Tax Board, in order for the Board to decide whether or not the taxpayer's arrangements should be set aside.

subsidiaries directly below B-Co in the corporate structure. The board therefore concluded that the PPT would be applicable and that the distributions should be subject to Danish taxation at source.

In sum, the conclusion reached by the National Tax Board appears to be correct – in particular due to the fact that a pure holding company had recently been interposed in the ownership structure, and since it is hard to see an adequate commercial reason for a sudden amendment of the existing structure.[94]

This decision – and others – seem to illustrate that Danish tax professionals as well as the tax authorities are increasingly aware of the statutory GAAR found in section 3 of the Tax Assessment Act. Furthermore, even though the ATAD-part of the GAAR has so far been more in the spotlight than the PPT-part, the PPT (the statutory PPT as well as the PPT in the MLI) must be foreseen to have considerable implications for the future use of Denmark's tax treaties in (aggressive) tax planning.

All in all, even though Denmark's ratification of the MLI will increase legal complexity and uncertainty in some areas,[95] Danish businesses and lobby groups have generally been quite positive towards the MLI. An important reason for the positive attitude was the fact that at the end Denmark decided to opt for mandatory binding arbitration. Accordingly, the prevailing opinion appears to be that a sensible balance has been struck.[96]

[94] See also J. Bundgaard et al., *Status på omgåelsesklausulen i ligningslovens § 3 – ved overgangen til skatteundgåelsesdirektivets GAAR*, Skat Udland, 2019.

[95] J. Buus & L.K. Terkilsen, *Danmark har nu ratificeret den multilaterale konvention af 24. november 2016* (2019), p. 259 et seq., and Wittendorff, supra n. 63.

[96] L 160, supra n. 5, annex 1.

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