

SPAIN – MLI ARBITRATION PROFILE

AS OF 25-03-2021

This document contains information on Spain’s arbitration position under Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). It also contains hyperlinks to Spain’s competent authority agreements concluded to settle the mode of application of the provisions contained in Part VI of the MLI.

References

- MLI Position (<https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>)
- MAP Profile (<https://www.oecd.org/tax/dispute/country-map-profiles.htm>)
- Synthesised text (the hyperlinks to the synthesised texts obtainable from the MLI Matching Database <https://www.oecd.org/tax/treaties/mli-matching-database.htm>)

Type of arbitration process

The “final offer” arbitration process (otherwise known as “last best offer” arbitration) will apply as the default type of arbitration process to Spain’s Covered Tax Agreements except to the extent that competent authorities mutually agree on different rules or except where other Contracting Jurisdictions have reserved their right to adopt the “independent opinion” approach as the default type of arbitration process pursuant to Article 23(2) of the MLI.

Competent authority agreements and entry into effect of Part VI

Competent authority agreements:

The competent authority of Spain has, by mutual agreement, settled the mode of application of the provisions contained in Part VI of the MLI with the competent authority of the jurisdictions as indicated below:

No	Treaty partner	Hyperlinks to competent authority agreements	Date on which both Contracting Jurisdictions have notified that they reached mutual agreement ¹
1	Andorra		
2	Australia		
3	Austria		
4	Barbados		
5	Belgium		
6	Canada		
7	Finland		
8	France		
9	Germany		
10	Greece		
11	Hungary		
12	Ireland		

¹ Dates and hyperlinks will be added once notified.

13	Italy		
14	Luxembourg		
15	Malta		
16	New Zealand		
17	Portugal		
18	Singapore		
19	Slovenia		
20	United Kingdom		

Entry into effect of Part VI of the MLI:

Article 36 of the MLI governs the entry into effect of the provisions of Part VI of the MLI with respect to:

- cases presented to the competent authority of a Contracting Jurisdiction on or after the later of the dates on which the MLI enters into force for each of the Contracting Jurisdictions; and,
- cases presented to the competent authority of a Contracting Jurisdiction prior to the later of the dates on which the MLI enters into force for each of the Contracting Jurisdictions.

Reservations on the entry into effect of Part VI

Pursuant to Article 36(2) of the MLI, Spain has reserved the right for Part VI to apply to a case presented to the competent authority of a Contracting Jurisdiction prior to the later of the dates on which the MLI enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement only to the extent that the competent authorities of both Contracting Jurisdictions agree that it will apply to that specific case.

Pursuant to Article 35(7)(a) of the MLI, Spain has reserved the right to delay the entry into effect of Part VI until 30 days after the date of receipt of the Depositary of a notification regarding the completion of internal procedures for this purpose. In accordance with Article 35(7)(a) of the MLI, Part VI will take effect with respect to a covered tax agreement 30 days after the date of receipt by the Depositary of the notification regarding the completion of internal procedures.

Reservations on the scope of cases eligible to Part VI of the MLI

Pursuant to Article 28(2)(a) of the MLI, Spain has formulated the following reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI:

1. The Kingdom of Spain reserves the right to exclude from the scope of Part VI cases involving the application of anti-abuse rules in a Covered Tax Agreement as modified by the MLI or domestic law. For this purpose, anti-abuse rules contained in domestic law shall include the cases dealt with in Articles 15 and 16 of the General Tax Law (Law 58 of 17th December 2003). Any subsequent rules replacing, amending or updating these rules would also be comprehended. The Kingdom of Spain shall notify the Depositary of any such subsequent rules.
2. The Kingdom of Spain reserves the right to exclude from the scope of Part VI cases involving conduct for which a person directly affected by the case has been subject, by a final ruling resulting from judicial or administrative proceedings, to a penalty for tax fraud, wilful default or gross negligence. For these purposes, penalties for tax fraud, wilful default or gross negligence shall be understood as those regulated under Articles:
 - a) 305 and 305 a of the Spanish Criminal Code.
 - b) 191, 192 and 193 of the General Tax Law (Law 58 of 17 December 2003), provided that a qualification criterion referred to in Article 184 of said General Tax Law applies;
 - c) 18.13.2º of the Corporate Income Tax Law (Law 27 of 27 November 2014), provided that

a qualification criterion referred to in Article 184 of the General Tax Law (Law 58 of 17 December 2003) applies. For these purposes, any reference to “tax return” in said Article 184 of the General Tax Law shall be understood as references made to transfer pricing documentation.

Notwithstanding the provisions of subparagraph iii), penalties applied for incomplete provision of transfer pricing documentation, where the quantification or determination of market value is not seriously hampered, shall not be considered as penalty for tax fraud, wilful default or gross negligence.

Any subsequent provisions replacing, amending or updating these provisions would also be comprehended. The Kingdom of Spain shall notify the Depositary of any such subsequent provisions.

3. The Kingdom of Spain reserves the right to exclude from the scope of Part VI transfer pricing cases involving items of income or capital that are not taxed in a Contracting State either because they are not included in the taxable base in that Contracting Jurisdiction or because they are subject to an exemption or zero tax rate provided only under the domestic tax law of that Contracting State that is specific to that item of income or capital.
4. The Kingdom of Spain reserves the right to exclude from the scope of Part VI cases eligible for arbitration under the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC), as amended, or any subsequent regulation.
5. The Kingdom of Spain reserves the right to exclude from the scope of Part VI cases which the competent authorities of both Contracting Jurisdictions agree are not suitable for resolution through arbitration. Such agreement shall be reached before the date on which arbitration proceedings would otherwise have begun and shall be notified to the person who presented the case.

Additional note