



THOUGHT LEADERSHIP

| KENYA

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Kenya's Tax Treaties Are Changing: What The BEPS MLI Means For Business

The BEPS Multilateral Instrument is now a business issue, not just a tax technicality. For companies trading, investing or financing across Kenya's borders, the headline treaty rate is no longer the end of the analysis.

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For decades, applying a double tax treaty was comparatively straightforward: identify the country, find the relevant Kenya treaty, determine the character of the payment and apply the treaty rate or exemption. That approach is becoming increasingly unreliable.

Kenya's ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting - the MLI - adds another layer to Kenya's treaty network. The MLI does not replace Kenya's bilateral treaties. Instead, where Kenya and its treaty partner have both selected the treaty and made compatible choices, it changes how particular provisions of that treaty operate.

Kenya deposited its instrument of ratification in January 2025 and the MLI entered into force for Kenya on 1 May 2025. For businesses, the important point is that the date the MLI entered into force for Kenya is not necessarily the same as the date every modified treaty provision begins to affect a particular tax, transaction or treaty partner.

Treaty analysis has effectively become a three-layer exercise: the original DTA, Kenya's MLI position and the treaty partner's MLI position. Then comes the timing question: when did the modification take effect?

Not Every Kenyan Treaty Changes In The Same Way

This is perhaps the most important point for businesses. Kenya's deposited MLI position identifies a broader set of tax treaties that Kenya wishes to cover. But the MLI is not unilateral. A treaty is modified only where both jurisdictions have listed the relevant agreement and where their elections, reservations and notifications produce a match.

Public matching analyses following Kenya's ratification have identified matches involving a number of key commercial partners, including Canada, Denmark, France, India, Korea, Qatar, Seychelles, South Africa, Sweden and the United Kingdom. The exact treaty-by-treaty result still needs to be tested at the time of the transaction because not every MLI article applies to every matched treaty, and the entry-into-effect rules can differ. The commercial consequence is straightforward: a finance director should not price, structure or remit a cross-border transaction merely by looking up the rate in the printed bilateral treaty.

1

Read the bilateral DTA

2

Overlay both MLI positions

3

Confirm entry into effect

1. Treaty Benefits Increasingly Have To Be Earned

Perhaps the most significant change is the Principal Purpose Test (PPT). The MLI is intended to stop treaty shopping - the use of entities, arrangements or transaction steps designed principally to secure treaty benefits that would otherwise not be available.

Under the PPT, treaty relief such as a reduced withholding tax rate or capital gains protection can be denied where obtaining that benefit was one of the principal purposes of an arrangement or transaction and granting it would be inconsistent with the object and purpose of the relevant treaty provisions.

This changes the nature of treaty planning. Consider a Kenyan group paying interest, royalties or other cross-border charges through an intermediate company in a treaty jurisdiction. Historically, the analysis might have concentrated heavily on tax residence certificates, legal ownership and the treaty withholding rate. Those remain relevant, but management should now expect a more fundamental question: why does this company sit in the structure at all?

Does it employ people? Exercise genuine functions? Bear risk? Make decisions? Control the relevant assets or financing? Or does money simply enter one side and leave the other?

The practical implication is broader than 'substance'. Businesses increasingly need a contemporaneous commercial narrative explaining why their structure exists independently of the tax outcome.

The question is no longer simply whether a treaty exists. It is whether the business can demonstrate that the treaty benefit belongs to the commercial arrangement actually in place.

2. Local Sales Activity Can Become a Foreign Company's Tax Presence

The second area to watch closely is permanent establishment (PE). Modern multinational groups frequently operate through combinations of regional offices, commission agents, distributors, sales teams and service companies. Contract approval may technically take place abroad even though much of the commercial work happens in-market.

BEPS deliberately targeted structures in which contractual form and commercial reality diverge. The MLI contains provisions dealing with commissionaire and agency arrangements where a person habitually concludes contracts, or plays the principal role leading to contracts that are routinely concluded without material modification by the foreign enterprise.

For management teams, the question should therefore no longer simply be 'Who signs the contract?' The better questions are: who originates the customer, who negotiates the commercial terms, who effectively closes the sale and how routinely does the foreign principal accept what the local team has negotiated?

This is particularly relevant for technology businesses, telecoms, logistics companies, financial services groups, manufacturers using commission agents and businesses operating regional sales models from Nairobi.

Once a PE arises, the problem does not end with corporate tax registration. It immediately becomes a transfer pricing problem: how much of the enterprise's profit should be attributed to that PE? The MLI therefore brings treaty and transfer pricing analysis much closer together.

3. "Preparatory Or Auxiliary" Activities Deserve Another Look

Many international structures have historically relied on treaty PE exemptions for activities such as storage, purchasing, information gathering or other supporting functions. The BEPS project challenged the assumption that an activity is minor simply because an old treaty label appears to describe it.

Kenya has selected Option A under Article 13 of the MLI, which focuses the exemption on activities that are genuinely preparatory or auxiliary, subject to the position taken by the relevant treaty partner.

The commercial question becomes one of substance over description. A warehouse supporting an e-commerce fulfilment model may look very different from a warehouse that merely stores samples. A procurement operation managing a major supply chain may be difficult to characterise as auxiliary simply because the treaty historically referred to 'purchasing'.

Businesses should therefore map what the local operation actually contributes to the value chain, rather than relying on inherited treaty labels.

4. Acquisitions, Dividends And Exits Need To Be Modelled Differently

The MLI is not only about anti-avoidance structures. It can affect ordinary acquisition economics. Kenya's MLI choices include provisions addressing dividend holding periods and capital gains on shares or interests deriving substantial value from immovable property, where the relevant treaty partner's position produces a match. This can be particularly significant for private equity, infrastructure, energy, property and other asset-heavy investments. The India treaty is a useful illustration: the analysis can extend to shares or interests that derive more than 50% of their value, directly or indirectly, from immovable property, tested over a 365-day period before disposal.

The broader lesson is more important than any one treaty: exit taxation should be modelled at entry. Likewise, acquisition teams should not automatically assume that a preferential dividend rate will apply immediately after an acquisition simply because the shareholder percentage requirement in the underlying DTA is satisfied. The transaction timetable itself may affect the tax result.

5. Hybrid Structures and Residence Mismatches Become Harder To Rely Upon

The MLI also targets outcomes created because two countries characterise the same entity, instrument or taxpayer differently. This is relevant for structures involving partnerships, fiscally transparent entities, hybrid financing and companies whose residence or effective management could potentially be claimed in more than one jurisdiction.

For businesses, the practical review should extend beyond the legal form of an instrument. Groups should ask whether Kenya and the counterparty jurisdiction see the entity, payment and recipient in the same way. Where they do not, relying on the mismatch itself to generate a favourable tax outcome is increasingly difficult.

6. The Dispute-Resolution Safety Net Remains Imperfect

BEPS was intended not only to strengthen anti-abuse rules but also to improve the mechanisms for resolving the double taxation that can follow from more assertive cross-border enforcement.

Kenya has taken a relatively cautious approach. Its MLI position limits the broader access to the competent authority contemplated by the first sentence of Article 16(1), and Kenya has not opted into the MLI's mandatory binding arbitration regime. Kenya nevertheless has an established Competent Authority function and KRA has published guidance on Mutual Agreement Procedure (MAP).

For business, the distinction is important. A technically available MAP does not eliminate the cash-flow, provisioning, management-time and uncertainty costs of a dispute. For a multinational facing a significant PE or transfer pricing adjustment in two jurisdictions, prevention remains preferable to cure.

2026 Should be the Year of the Treaty Health Check

The practical implication of Kenya's MLI implementation is not that every multinational needs to restructure. It is that businesses should stop assuming their existing structures produce the same treaty outcome simply because the underlying bilateral treaty text has not visibly changed.

Review Lens	Question Management Should Test
Treaty Footprint	Which Kenya treaties does the group currently rely upon for dividends, interest, royalties, business profits, financing or other cross-border flows?
MLI Matching	Is each treaty actually a matched Covered Tax Agreement, which MLI provisions match, and when do they take effect for the tax concerned?
PPT & Substance	Can the commercial rationale, governance, people, functions and risk profile of the structure withstand the Principal Purpose Test?
PE Exposure	Do local employees, agents, warehouses, procurement teams or contract-negotiation activities create an expanded taxable presence?
Deal Economics	Do acquisition, financing, dividend and exit assumptions remain correct once the MLI overlay is applied?

Transfer pricing should sit inside this review rather than alongside it.

The same facts that demonstrate where value is created, where decisions are made and which entity assumes risk will increasingly influence both whether treaty protection exists and how much profit can be taxed once a PE or other taxable presence is established.

A Policy Opportunity for Kenya

Kenya's adoption of the MLI is a sensible part of protecting the tax base and modernising an ageing treaty network. Several Kenyan treaties were negotiated decades before digital business models, modern global supply chains and today's approach to aggressive tax planning.

But effective anti-abuse rules work best when accompanied by certainty. The MLI is inherently complex because its effect has to be reconstructed from the bilateral treaty, both countries' MLI elections, reservations and commencement rules.

A useful next step would be clear, publicly accessible synthesised texts or a definitive Kenya treaty-by-treaty MLI matrix showing businesses exactly which provisions apply and from what date. This would serve both sides: KRA would obtain a clearer compliance baseline, while businesses would have greater certainty before investing, financing or reorganising.

The success of the MLI should therefore be measured by whether it achieves two objectives simultaneously: preventing treaty abuse while preserving the certainty that legitimate cross-border investment needs.

The TaxIQ Africa view

The question is no longer simply: "Is there a DTA and what rate does it provide?" The more useful question is: "Given how this business actually operates, is the treaty benefit still available - and can we demonstrate why?"

For businesses operating across Kenya's borders, that is now a governance question as much as a tax question.

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