



BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

PEER REVIEW DOCUMENTS

May 2017

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This document formed the basis on which the peer review process was undertaken with respect to the implementation of the minimum standard on Action 6 for the years 2018, 2019 and 2020. In February 2021, the members of the Inclusive Framework on BEPS approved the 2021 Revised Peer Review Document which is an updated version of this document. The 2021 Revised Peer Review Document forms the basis on which the peer review process is undertaken as of the year 2021.

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Abbreviations and acronyms

BEPS	Base erosion and profit shifting
CFA	Committee on Fiscal Affairs
GFTEoI	Global Forum on Transparency and Exchange of Information
LOB	Limitation-on-benefits
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD	Organisation for Economic Cooperation and Development
PPT	Principal Purposes Test
TIEA	tax information exchange agreement
WP1	Working Party No.1 on Tax Conventions and Related Questions

Summary

The Action Plan on Base Erosion and Profit Shifting (“BEPS Action Plan”) identified 15 actions to address BEPS in a comprehensive manner. In October 2015, the G20 Finance Ministers endorsed the BEPS Package, which includes the report on Action 6: *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances* (“the Report on Action 6” or “the Report”, OECD (2015)).

The minimum standard on treaty-shopping included in the Report on Action 6 is one of the four BEPS minimum standards. Each of the four BEPS minimum standards is subject to peer review in order to ensure timely and accurate implementation and thus safeguard the level playing field. All members of the Inclusive Framework on BEPS commit to implementing the Action 6 minimum standard and to participating in the peer review, on an equal footing.

This note contains the key documents to be used for the peer review, which reflect the agreed approach: (1) the terms of reference and (2) the methodology for the conduct of peer reviews of the Action 6 minimum standard. The note additionally describes: the core output of the peer review and monitoring process, the process for the resolution of interpretation and application issues that might arise in the course of implementing the minimum standard on treaty-shopping; the process to be followed by jurisdictions that encounter difficulties in getting agreement from another jurisdiction member of the Inclusive Framework on BEPS in order to implement the Action 6 minimum standard; and the confidentiality of documents produced in the context of the review process.

Bibliography

OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264241695-en>.

The process for the review of the implementation of the minimum standard on Action 6

1. As noted in paragraph 23 of the Final Report on Action 6, the inclusion of the minimum standard on treaty-shopping in the multilateral instrument will provide an effective way to quickly implement that minimum standard. Members of the Inclusive Framework on BEPS are therefore encouraged to use the multilateral instrument for that purpose. Review of bilateral treaties and protocols will be needed, however, for jurisdictions that will not sign the multilateral instrument or that disagree as to how the minimum standard should be met through the provisions of that instrument.

2. Since it is expected that the first signatures of the multilateral instrument will only take place in the second part of 2017 and it is unlikely that many jurisdictions will ratify the multilateral instrument or bilateral treaties implementing the minimum standard before 2018, the review of the implementation of the minimum standard on treaty-shopping will only begin in 2018.

A. *Terms of Reference*

3. The minimum standard on treaty-shopping included in the Report on Action 6 is constituted by the provisions that jurisdictions that are members of the Inclusive Framework on BEPS have committed to include in their tax treaties. Concretely, as indicated in paragraphs 22 and 23 of the Report on Action 6, compliance with the minimum standard on treaty-shopping will therefore require these jurisdictions to include in their tax treaties:

- A. An express statement that the common intention of the parties to the treaty is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. This should generally be done by including the following in the preamble of the relevant tax treaties:

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital 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 Convention for the indirect benefit of residents of third States)

- B. Treaty provisions that will implement that common intention and that will take one of the following three forms:

- i) the Principal Purposes Test (PPT) rule included in paragraph 26 of the Report together with either the simplified or the detailed version of the Limitation-on-benefits (LOB) rule that appears in paragraph 25 of the Report, as subsequently modified, or
- ii) the Principal Purposes Test (PPT) rule included in paragraph 26 of the Report, or
- iii) the detailed version of the Limitation-on-benefits (LOB) rule that appears in paragraph 25 of the Report, as subsequently modified, together with a mechanism (such as a treaty rule that might take the form of a PPT rule restricted to conduit arrangements, or domestic anti-abuse rules or judicial doctrines that would achieve a similar result) that would deal with conduit arrangements not already dealt with in tax treaties.

4. As indicated in paragraph 23 of the final Report on Action 6, it is understood that:

- Jurisdictions only need to satisfy the requirements described in the previous paragraph if requested to do so by another jurisdiction member of the Inclusive Framework on BEPS.

- The way in which the minimum standard will be implemented in each bilateral treaty will need to be agreed to between the contracting jurisdictions.
- This commitment applies to existing and future treaties but since the conclusion of a new treaty and the modification of an existing treaty depend on the overall balance of the provisions of a treaty, this commitment should not be interpreted as a commitment to conclude new treaties or amend existing treaties within a specified period of time.
- If a jurisdiction is not itself concerned by the effect of treaty-shopping on its own taxation rights as a State of source, it will not be obliged to apply provisions such as the LOB or the PPT as long as it agrees to include in a treaty provisions that its treaty partner will be able to use for that purpose.

B. Output of the peer review and monitoring process

5. The core output of the peer monitoring process will come in the form of an annual report on the implementation of the minimum standard on treaty-shopping that will be presented by WP1 at the January meeting of the Inclusive Framework on BEPS, starting in January 2019. The report will deal with compliance with the minimum standard by each jurisdiction member of the Inclusive Framework on BEPS.

6. That report will reflect whether and how the minimum standard has been incorporated in all the existing bilateral treaties of each jurisdiction of the Inclusive Framework. Since each jurisdiction of the Inclusive Framework will report on all its tax treaties, including those with jurisdictions of relevance that may be identified by the Inclusive Framework, there will be no need to request jurisdictions of relevance that are not part of the Inclusive Framework to provide similar information. The report will also describe any implementation issues on which guidance is requested (see section D below) and a description of any case where the Working Party considers that a jurisdiction is unwilling to respect its commitment to implement the minimum standard on treaty-shopping (see section E below).

7. The Inclusive Framework on BEPS will be invited to approve each such report and decide which part of it should be published. In order to avoid a situation where a jurisdiction would systematically block the approval or publication of a report because of what it says about that jurisdiction, the “consensus minus one” standard currently used for the adoption of reports by the GFTEoI would be used with respect to each section of a report that deals with a specific jurisdiction.

C. Methodology

8. The review of implementation of the minimum standard on treaty-shopping will be carried out by Working Party 1 and all jurisdictions that are members of the Inclusive Framework on BEPS will participate in that work on an equal footing. The process will begin in 2018 with the objective of publishing a first report on the implementation of the minimum standard for the January 2019 meeting of the Inclusive Framework on BEPS.

9. The first step of that review will be carried out through the preparation of a list that each jurisdiction of the Inclusive Framework will be asked to complete before 30 June 2018¹ and that will show all the existing comprehensive tax treaties on income taxes of that jurisdiction that will be in force² and in effect at that time. The list will be prepared on the basis of the template included in the Annex. It will indicate the date of signature and last amendment of each treaty, and indicate whether or not that treaty complies with the terms of reference of the minimum standard described in paragraph 3 above. This will require that jurisdictions that will have ratified the multilateral instrument analyse the effect of that instrument on each of their treaties covered by the instrument.

10. The Secretariat will analyse the lists prepared by all jurisdictions in order to reconcile divergent information that could be provided by the parties to the same treaty and in order to verify that treaties that are described as complying with the terms of reference actually do so.

11. At its September 2018 meeting, the Working Party will review a consolidated version of the lists together with the Secretariat comments in order to address any difficulties and discrepancies.

12. A revised consolidated version of the lists that will reflect the discussion and views expressed by Working Party 1 at its September 2018 meeting will be incorporated in a first draft of the report on the implementation of the minimum standard on treaty-shopping that will be sent to WP1 delegates before 15 October 2018. That report, which will also include aggregate statistical data based on the lists provided, will be revised through written procedure in order to be finalised before the end of December 2018.

13. Similar steps will be followed for the reviews that will take place in subsequent years.

14. The above methodology for the review of the implementation of the minimum standard on treaty-shopping will be reviewed in 2020 in light of the experience in conducting that review.

D. Interpretation and application issues that might arise in the course of implementing the minimum standard on treaty-shopping

15. As already indicated, paragraph 23 of the Final Report on Action 6 already addresses some implementation issues related to the minimum standard on treaty-shopping. It is possible, however, that additional questions will arise in the course of the implementation of the minimum standard by jurisdictions that are members of the Inclusive Framework. Any jurisdiction that wishes to raise a question related to the implementation of the minimum standard that was not previously addressed by the CFA or the Inclusive Framework on BEPS will be able to do so by sending that question in writing to the Secretariat, which will ensure that the question is discussed at the subsequent meeting of the Working Party. These questions and the responses provided by the Working Party will be notified and reviewed by the Inclusive Framework on BEPS as part of its discussion of the annual report on the implementation of the minimum standard on treaty-shopping that will be produced by WP1. In order to be submitted in such a report, the question will have to be brought to the attention of the Secretariat before 31 August of the year preceding the presentation of that report.

E. Jurisdictions that encounter difficulties in getting agreement from another jurisdiction member of the Inclusive Framework on BEPS in order to implement the minimum standard on Action 6

16. Since the application of the minimum standard to an existing bilateral treaty would involve two States, it would be possible to envisage a process through which any country that would face difficulties in getting agreement from another country to amend an existing treaty in order to implement the minimum standard could raise the matter with a monitoring body that would include representatives of the countries that committed to the implementation of the minimum standard.

17. It is important, however, to distinguish cases where jurisdictions do not agree to modify a treaty in order to implement the minimum standard from cases where

- a) a jurisdiction does not agree on the anti-treaty shopping provision to be included in a treaty (*i.e.* detailed LOB and anti-conduit mechanism, PPT only or LOB plus PPT);
- b) a jurisdiction does not agree to enter into a new treaty with a jurisdiction, or
- c) a jurisdiction agrees to amend an existing treaty to incorporate the minimum standard but is unable to ensure a quick conclusion and ratification of the necessary protocol.

18. As indicated in paragraph 23 of the Report on Action 6 “since the conclusion of a new treaty and the modification of an existing treaty depend on the overall balance of the provisions of a treaty, however, this commitment [*i.e. to implement the minimum standard*] should not be interpreted as a commitment to conclude new treaties or amend existing treaties within a specified period of time.” The paragraph also provides that “two countries that are parties to an existing treaty may have different preferences as to how the minimum standard should be met”. For these reasons, a case that corresponds to situation a), b) or c) above will not be considered to be a case where a jurisdiction does not agree to modify a treaty in order to implement the minimum standard.

19. Subject to that caveat, it is proposed that any jurisdiction member of the Inclusive Framework on BEPS that is facing difficulties in getting another jurisdiction to agree to amend an existing treaty in order to implement the minimum standard on treaty-shopping will be able to raise that issue by writing to the Secretariat, which will ensure that the other jurisdiction is offered the opportunity to present its views in writing and that the case is discussed at the subsequent meeting of the Working Party. Any such case where the Working Party considers that a jurisdiction is indeed unwilling to respect its commitment to implement the minimum standard on treaty-shopping will be forwarded to the Inclusive Framework on BEPS as part of the annual report on the implementation of the minimum standard on treaty-shopping that will be produced by WP1. In order to be submitted in such a report, the case will have to be brought to the attention of the Secretariat before 31 August of the year preceding the presentation of that report.

F. Confidentiality

20. No part of any report or other document produced in the context of the review process for the implementation of the minimum standard on treaty-shopping should be made publicly available in any form or manner prior to its publication or before the Inclusive Framework on BEPS indicates that such document should not be treated as confidential. Any breach of confidentiality shall be brought to the attention of the Inclusive Framework on BEPS for a decision on the most appropriate action to take.

Notes

1. That “cut-off” date is suggested in order to leave sufficient time to complete the subsequent steps leading to the presentation of a report in January 2019.
2. Although compliance with the minimum standard will require the relevant treaty provisions to have entered into effect, the indication that such provisions have entered into force even if they have not yet entered into effect will provide a useful indication of the fact that both Contracting States have ratified the treaty that includes these provisions.

Bibliography

OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
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ANNEX

LIST TO BE PREPARED BY EACH JURISDICTION OF THE INCLUSIVE FRAMEWORK

Reporting Jurisdiction: _____

Date the list was sent to OECD Secretariat: _____

<u>TREATY WITH</u> ¹	<u>DATE OF SIGNATURE OF TREATY</u>	<u>COMPLIES WITH ACTION 6 MINIMUM STANDARD?</u> ² (Yes or No)	<u>IF YES, DATE OF LAST SIGNATURE OF COMPLYING INSTRUMENT</u> ³	<u>(optional)</u> <u>IF ONLY PARTLY COMPLIES WITH MINIMUM STANDARD, WHICH PART IS MISSING?</u> ⁴	<u>HAS COMPLYING INSTRUMENT ENTERED INTO FORCE?</u> (Yes or No)	<u>HAS COMPLYING INSTRUMENT ENTERED INTO EFFECT?</u> (Yes or No)	<u>EXPLANATIONS OR COMMENTS</u>
<u>Members of the inclusive framework</u>							
[jurisdiction]							
[jurisdiction]							
<u>Non-members of the inclusive framework</u>							
[jurisdiction]							
[jurisdiction]							

1 Only provide information with respect to comprehensive tax treaties on income taxes (this does not include, for example, estate and inheritance treaties, TIEAs, the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as well as shipping and air transport agreements). In the case of a multilateral comprehensive tax treaty on income taxes (e.g. the Nordic Convention), the information must be entered separately with respect to each party to the treaty.

2 In order to comply with the minimum standard on Action 6, a treaty must include the two elements that are part of the terms of reference described in paragraph 3 of this note (which includes the express statement referred to in A of that paragraph).

3 The complying instrument is the MLI or the treaty or last protocol that includes provisions that comply with the minimum standard on Action 6. Where that instrument is the treaty itself or a protocol, the date of last signature will be the date when both parties signed it. Where that instrument is the MLI or another multilateral treaty or protocol, the date of last signature will be the date when the two relevant parties will have signed the instrument.

4 In some cases, a treaty may not comply with the minimum standard because it lacks only part of the required provisions (e.g. a treaty includes a simplified LOB and PPT but not the preamble). In such cases, jurisdictions are free to indicate which part of the minimum standard is missing so as to prevent the treaty from complying.

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