

# 4 Conclusion and next steps

23. The implementation of the minimum standard will continue to be monitored and, as set out in the Peer Review Document, the next peer review exercise will be launched in the first half of 2020.

24. As noted at paragraph 14 of the Peer Review document, the methodology for the review of the implementation of the Action 6 minimum standard will be reviewed in 2020, in light of the experience in conducting the peer review.

25. The Inclusive Framework on BEPS, together with Working Party No. 1 will carry out the 2020 review mindful of available resources, and recognising that many treaties that would implement the minimum standard have not yet entered into force.

## Background

### ***Context of the peer review***

26. Over the last decades, bilateral tax agreements, concluded by nearly every jurisdiction in the world, have served to prevent harmful double taxation and remove obstacles to cross-border trade in goods and services, and movements of capital, technology and persons. This extensive network of tax agreements has, however, also given rise to so-called “treaty-shopping” arrangements.

27. As set out in the Action 6 Final Report, treaty shopping typically involves the attempt by a person to indirectly access the benefits of a tax agreement between two jurisdictions without being a resident of one of those jurisdictions.<sup>1</sup>

28. Treaty shopping is undesirable for several reasons, including:

- Treaty benefits negotiated between the parties to an agreement are economically extended to residents of a third jurisdiction in a way the parties did not intend. The principle of reciprocity is therefore breached and the balance of concessions that the parties make is altered;
- Income may escape taxation altogether or be subject to inadequate taxation in a way the parties did not intend; and
- The jurisdiction of residence of the ultimate income beneficiary has less incentive to enter into a tax agreement with the jurisdiction of source, because residents of the jurisdiction of residence can indirectly receive treaty benefits from the jurisdiction of source without the need for the jurisdiction of residence to provide reciprocal benefits.

### *Some previous attempts to tackle treaty shopping*

29. Concerns about treaty shopping are not new. For example, in 1977, the concept of “beneficial owner” was introduced into the dividends, interest, and royalties articles of the OECD Model Tax Convention to clarify the meaning of the words “paid to”, and deal with simple treaty-shopping situations where income is paid to an intermediary resident of a treaty country who is not treated as the owner of that income for tax purposes (such as an agent or nominee).<sup>2</sup>

30. In 1977, the Commentary on Article 1 of the OECD Model Tax Convention was also updated to include a section on the improper use of tax agreements.<sup>3</sup> In 1986, the Committee on Fiscal Affairs (CFA) published two reports: *Double Taxation and the Use of Base Companies* and *Double Taxation and the Use of Conduit Companies*. In 2002, the Committee published the report, *Restricting the Entitlement to Treaty Benefits*. The Commentary on Article 1 of the OECD Model Tax Convention was expanded on several occasions, notably in 2003, with the inclusion of sample provisions that countries could use to counter treaty shopping.

31. A review of jurisdictions' practices shows that they have tried to address treaty shopping in the past and have used different approaches to do so. Some have relied on specific anti-abuse rules based on the legal nature, ownership, and general activities of residents of a jurisdiction party to a tax agreement.<sup>4</sup> Others have favoured a general anti-abuse rule based on the purpose of transactions or arrangements.

### *BEPS and treaty shopping*

32. The BEPS Action Plan<sup>5</sup>, developed by the CFA and endorsed by the G20 Leaders in September 2013<sup>6</sup>, identified 15 actions to address base erosion and profit shifting (BEPS). It identified treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns.

33. Action 6 (Prevent Treaty Abuse) of the BEPS Action Plan called for the development of treaty provisions to prevent the granting of treaty benefits in inappropriate circumstances. In parallel, Action 15 of the BEPS Action Plan called for an analysis of the possible development of a multilateral instrument "to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties".

34. After two years of work, the CFA, in which OECD and G20 countries work on an equal footing, produced the final BEPS Package,<sup>7</sup> which was endorsed by the OECD Council and the G20 Leaders in November 2015.

35. Jurisdictions agreed that four of the BEPS measures would be minimum standards that participating jurisdictions would commit to implement. The Action 6 Report sets out one of these minimum standards. The Action 6 minimum standard requires jurisdictions to commit to include in their tax treaties provisions dealing with treaty shopping to ensure a minimum level of protection against treaty abuse.

### *The Action 6 minimum standard*

36. The minimum standard on treaty shopping requires jurisdictions to include two components in their tax agreements: an express statement on non-taxation (generally in the preamble) and one of three methods of addressing treaty shopping.

37. The minimum standard does not provide how these two components should be implemented (i.e. through the MLI or amending instruments). It recognises, however, that these provisions need to be agreed bilaterally and that a jurisdiction will be required to implement the minimum standard when requested to do so by another member of the Inclusive Framework.

### **The express statement**

38. As set out in paragraphs 22 and 23 of the Final Report on Action 6, jurisdictions have agreed to include in their tax agreements an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping arrangements. The following provision now appears in the 2017 OECD Model Tax Convention:

39. 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)

### **Three methods of addressing treaty shopping**

40. Jurisdictions have also committed to implement that “common intention” through the inclusion of treaty provisions in one of the following three forms:

- a principal purpose test (PPT) equivalent to paragraph 9 of Article 29 of the 2017 OECD Model Tax Convention together with either a simplified or a detailed version of the limitation on benefits (LOB) rule that appears in paragraphs 1 to 7 of the 2017 OECD Model Tax Convention; or
- the PPT alone; or
- a detailed version of the LOB rule 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.

#### *The obligation to implement the minimum standard*

41. The Action 6 Report recognised that “some flexibility in the implementation of the Action 6 minimum standard [would be] required, as these provisions need to be adapted to each country’s specificities and to the circumstances of the negotiation of bilateral conventions.” In particular:

- a jurisdiction is required to implement the minimum standard in a treaty only if asked to do so by another member of the Inclusive Framework;
- its form (which of the three options used) has to be agreed (a solution cannot be imposed); and
- the commitment to adopt in bilateral treaties measures that 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.

42. The Action 6 Report itself recognised that since participation in the multilateral instrument (see next section) was not mandatory and because jurisdictions could have different preferences about how the minimum standard should be met, monitoring its implementation would be necessary.

#### *The 2018 peer review*

43. The first peer review was conducted in 2018 and covered the 116 jurisdictions that were members of the Inclusive Framework on 30 June 2018. The Peer Review Report, which was adopted by the Inclusive Framework in January 2019, was published on 14 February 2019.

44. The 2018 peer review revealed that, as the provisions of the MLI had not taken effect at the time of the first peer review, nearly all of the agreements reviewed for the 2018 report did not at that time comply with the minimum standard. Substantial progress had, however, been made in 2017 and 2018 towards its implementation and a large majority of Inclusive Framework members had begun to translate their commitment on treaty shopping into actions and were in the process of modifying their treaty networks.

45. In total, on 30 June 2018, the peer review showed that 82 jurisdictions had some agreements that were already compliant with the minimum standard or were subject to a complying instrument that would bring their agreements into compliance.<sup>8</sup> The first Peer Review highlighted the effectiveness of the MLI in implementing the treaty-related BEPS measures. It was by far the preferred tool of Inclusive Framework members for implementing the minimum standard.

46. In the course of the first peer review, all concerns raised by jurisdictions on the implementation of the minimum standard in their agreements had been resolved when the Report was approved by the Inclusive Framework and therefore no recommendation was made under the first peer review.

#### *Conduct of the 2019 peer review*

47. The review started with a questionnaire sent to members of the Inclusive Framework in March 2019. The questionnaire was based on the 2018 Action 6 peer review<sup>9</sup> questionnaire with a few modifications. In 2018, each jurisdiction was asked to list all of its comprehensive income tax agreements in force. Those lists indicated whether each agreement included the provisions of the minimum standard, i.e. a complying preamble and the necessary anti-abuse provision(s), whether it was subject to a “complying instrument” that would soon bring it into compliance, what that instrument was, and which of the three methods of meeting the minimum standard had been used.

In 2019, each jurisdiction was invited to update its 2018 questionnaire, taking into consideration any new agreements that had entered into force by adding them to their list of agreements. Jurisdictions that joined the Inclusive Framework after 30 June 2018 were asked to complete the original questionnaire.

## Notes

<sup>1</sup> See paragraph 17 of the BEPS Action 6 Final Report (2015). As the Report also notes, cases where a resident of the Contracting State in which income originates seeks to obtain treaty benefits (e.g. through a transfer of residence to the other Contracting State or through the use of an entity established in that other State) could also be considered a form of treaty shopping.

<sup>2</sup> See paragraph 2 of Articles 10 and 11, and paragraph 1 of Article 12 of the OECD Model Tax Convention

<sup>3</sup> See paragraphs 7-10 of the Commentary on Article 1 of the 1977 Model Tax Convention.

<sup>4</sup> “Limitation on benefits” provisions commonly found in treaties concluded by the United States are the best-known example.

<sup>5</sup> OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing, <http://dx.doi.org/10.1787/9789264202719-en>

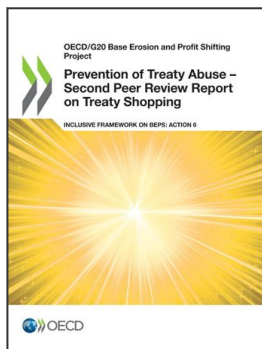
<sup>6</sup> G20 Research Group (2013), G20 Leaders' Declaration, <http://www.g20.utoronto.ca/2013/2013-0906-declaration.html>

<sup>7</sup> In October 2015, the CFA, including OECD and G20 countries working on an equal footing, produced the Final BEPS Package, in the form of reports on each of the 15 actions accompanied by an Explanatory Statement. The Final BEPS Package gives countries and economies the tools they need to ensure that profits are taxed where economic activities generating the profits are performed and where value is created, while at the same time giving businesses greater certainty by reducing disputes over the application of international tax rules and standardising compliance requirements.

<sup>8</sup> A further seven jurisdictions had no comprehensive tax agreements and were outside the scope of this exercise.

<sup>9</sup> OECD (2017), BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents, OECD/G20 Base Erosion and Profit Shifting Project, OECD,

Paris. [www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf)



**From:**  
**Prevention of Treaty Abuse – Second Peer Review  
Report on Treaty Shopping**  
Inclusive Framework on BEPS: Action 6

**Access the complete publication at:**  
<https://doi.org/10.1787/d656738d-en>

**Please cite this chapter as:**

OECD (2020), "Conclusion and next steps", in *Prevention of Treaty Abuse – Second Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/47e6ecc2-en>

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of OECD member countries.

This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area. Extracts from publications may be subject to additional disclaimers, which are set out in the complete version of the publication, available at the link provided.

The use of this work, whether digital or print, is governed by the Terms and Conditions to be found at <http://www.oecd.org/termsandconditions>.