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From treaty abuse to tax integrity and sustainability: Swiss practices under OECD BEPS Action 6

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Abstract

The sustainability of tax systems has emerged as a pressing challenge in the era of economic globalization and digitalization, where gaps in traditional tax rules facilitated Base Erosion and Profit Shifting (BEPS). This article examines the relevance and impact of the OECD's BEPS Action 6, with a focus on Switzerland's implementation and practice. The research objective is to assess how Action 6 strengthens legal coherence, enhances economic substance requirements, and curbs treaty abuse, including treaty shopping. Using a doctrinal legal analysis of OECD instruments, Swiss legislative measures, and relevant case law, this study identifies practical trends in beneficial ownership tests, anti-abuse rules, and substance-based treaty entitlement. The findings indicate that Switzerland has integrated Action 6 standards through targeted treaty amendments and administrative practice, improving the alignment between taxation and genuine economic activity.

Keywords: tax sustainability, BEPS, treaty shopping, International Tax Reform.

1. Introduction

The sustainability of tax systems has become a critical concern in the era of globalization. As economies integrate and digitalize, the deficiencies of traditional tax rules have facilitated widespread profit shifting, resulting in significant revenue losses. In 2015, OECD countries adopted a 15-point action plan to combat BEPS practices. This plan is structured around three main pillars: 1) introducing coherence into domestic rules affecting cross-border activities, 2) strengthening substance requirements in existing international standards, and 3) improving transparency and certainty (OECD, 2015).

Action 6 of the BEPS project – "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances" – addresses the abusive use of Double Taxation Agreements ("DTAs"), which have long served to avoid harmful double taxation and remove obstacles to cross-border trade and investments. However, the vast network of over 3,000 tax treaties worldwide has given rise to abuses and so-called treaty shopping arrangements. Treaty shopping generally refers to the intention of a person or a company to indirectly benefit from the advantages of a tax treaty between two jurisdictions without being a resident of either of them (OECD, 2024).

Therefore, Action 6 marks a transformative step toward restoring the integrity and sustainability of international tax practices. Its aim is to prevent the misuse of

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tax treaties through treaty shopping and artificial structuring, thereby ensuring that taxation reflects genuine economic activity and value creation.

In a global context where cross-border flows of capital and income are increasing, the challenge of ensuring that profits are taxed where value is actually created has prompted the need for a more sustainable tax framework. BEPS Action 6 introduces a new paradigm where sustainability is not merely about long-term fiscal stability, but also about ethical responsibility, legal integrity, and international cooperation. Switzerland's engagement with these principles demonstrates how national legal systems are evolving under multilateral pressure.

2. Literature review

The scale of global tax avoidance through base erosion and profit shifting is significant. According to OECD estimates, when multinational companies shift profits to jurisdictions with low or no taxation, often where they have little or no actual business presence, the result is an annual revenue loss of USD 100 to 240 billion for affected countries. This equates to approximately 4% to 10% of global corporate income tax revenues (OECD, 2025). Such losses weaken public trust in tax fairness and undermine the ability of states to invest in sustainable infrastructure, public health, and education systems.

These figures underscore the urgency of reforms like BEPS Action 6. Without mechanisms to curb treaty shopping and ensure that tax treaties serve their intended economic purpose, international tax systems risk becoming fundamentally unstable. Embedding sustainability into tax governance - through fairness, transparency, and substance - is therefore not only a fiscal issue but a matter of international economic justice.

Treaty shopping is well-documented in international tax law. It refers to situations where an individual or entity, not originally entitled to benefits under a specific tax treaty, uses intermediaries or transactions to access more favorable tax treatments indirectly via other jurisdictions. This practice, often facilitated by complex networks of bilateral tax treaties, can significantly reduce tax liabilities and erode the tax base for governments. Recent literature highlights both the strategic motives of multinationals and the legal controversies surrounding the practice, which has prompted reforms such as the OECD’s BEPS Action 6.

The mechanics and structures involved in treaty shopping are captured in Fig. 1, which illustrates common forms of intermediary routing within networks of tax treaties. The diagram demonstrates how companies may channel income through conduit entities located in jurisdictions with advantageous treaty networks, thereby reducing withholding taxes paid at each stage. This visual aid underscores the incentive for multinational groups to exploit treaty loopholes and clarifies why recent academic and policy efforts focus on substance requirements and anti-abuse provisions.

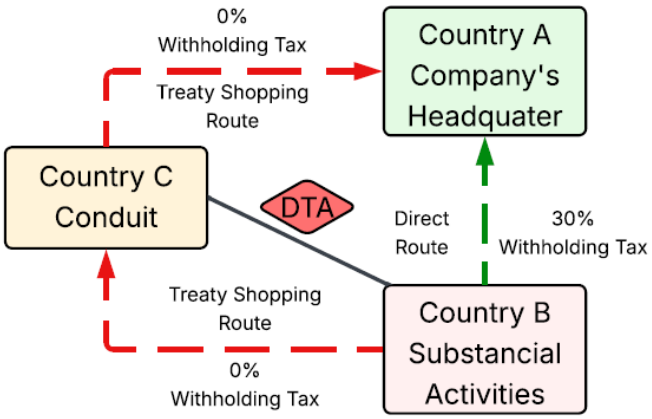

Fig. 1. Treaty Shopping

Treaty abuse, and particularly treaty shopping, often relies on conduit or low-tax jurisdictions that offer extensive treaty networks and minimal substance requirements, enabling the diversion of taxable income and contributing to significant revenue losses in source states (Heitmüller, 2024). Recent research has identified specific jurisdictions as disproportionately responsible for enabling tax avoidance through aggressive treaty networks and low-tax regimes. The United Kingdom, Switzerland, Luxembourg, and the Netherlands - often labeled the "axis of tax avoidance" - are collectively responsible for approximately 72% of the global tax losses generated by corporate profit shifting (Tax Justice Network, 2020). This places Switzerland at the center of global debates on tax sustainability and accountability.

Switzerland's engagement with BEPS initiatives can thus be seen as a strategic effort to balance its legacy as a tax-favorable jurisdiction with its future as a transparent, cooperative financial center. By progressively reforming its treaty network and implementing minimum standards, Switzerland contributes to correcting historical imbalances in global tax outcomes while maintaining legal certainty and economic competitiveness (SIF, 2024a).

The Action 6 targets the granting of treaty benefits in inappropriate circumstances, most notably through treaty shopping. It requires countries to adopt minimum standards that reflect a shared commitment to prevent double non-taxation and tax abuse. Three tools have emerged: the Principal Purpose Test (PPT), the Limitation on Benefits (LOB) clause, and the LOB rule supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties. (OECD, 2015).

The PPT, now adopted widely due to its flexibility, allows tax authorities to deny treaty benefits if obtaining those benefits was one of the principal purposes of the arrangement. The LOB clause, by contrast, imposes specific eligibility criteria. While the PPT offers adaptability, it also introduces uncertainty and challenges due to its subjective nature (Malek , 2018). The inclusion of a preamble in tax treaties under

the Multilateral Instrument (MLI) also reflects this shift in intention, asserting that DTAs are meant to eliminate double taxation without creating opportunities for tax evasion or treaty abuse.

This change marks a departure from formalistic interpretations of tax law toward a more holistic, purpose-driven approach. The PPT functions as a flexible standard that empowers tax authorities but also introduces interpretive risks. The sustainability of such a mechanism depends on transparent application, judicial oversight, and consistency across jurisdictions.

Switzerland, while committed to the BEPS framework, has opted for a cautious implementation of Action 6. It ratified the MLI in 2019, accepting only the minimum standards and reserving on many optional provisions (SIF, 2024b): 1) change of the preamble language of DTAs to express the aim to eliminate double taxation without creating opportunities for non-taxation or reduced taxation, 2) adapt PPT as a minimum standard to prevent treaty abuse, 3) Mutual Agreement Procedure ("MAP"), 4) binding arbitration clause replacing a two-year period for resolving a case by a three-year period (Lawson B., 2018). Country's preference for bilateral renegotiation reflects a balance between aligning with global standards and preserving fiscal autonomy.

Importantly, Switzerland has emphasized that the MLI can only directly amend a DTA if both parties agree on its effect, thereby ensuring legal precision. As of the Sixth Peer Review Report, only 24 of Switzerland's 108 DTAs fully comply with the minimum standard, underscoring the gradual nature of this transformation (OECD, 2024). Switzerland has reserved the right to delay the entry into force of MLI provisions until it has completed its internal procedures for each listed agreement. Switzerland is encouraged to complete (and to notify the completion) of its internal procedures for the entry into force of the MLI with respect to each listed agreement (Diefenbacher, Schreiber, 2018).

This cautious approach demonstrates the complexity of aligning international obligations with national sovereignty. Swiss tax policy seeks to support long-term credibility and stability by ensuring legal certainty, which is itself a pillar of sustainable governance. Moreover, by selectively engaging with BEPS instruments, Switzerland maintains its attractiveness for investment while contributing to global tax integrity.

3. Results

This study conducts a comparative performance analysis of the largest exchange-traded funds by assets under management over the period 2010–2024. The aim is to evaluate and rank these funds using well-established performance and risk metrics. Data was sourced from Yahoo Finance, which provided historical daily adjusted closing prices. The study excludes dividends and focuses solely on price returns, ensuring consistency across funds and simplifying comparisons, particularly where dividend reinvestment schedules may vary or be inconsistently reported.

The methodology of this research is primarily doctrinal legal analysis, focusing on the examination of Swiss and international jurisprudence concerning treaty abuse and the implementation of BEPS Action 6. This approach involves a detailed review of relevant case law, including landmark decisions by Swiss courts and international tribunals, as well as analysis of legislative texts and administrative practices. By assessing judicial interpretations and the application of anti-abuse rules such as beneficial ownership and the PTT, the study aims to provide insights into the evolution of legal standards and their practical effects on sustainable tax governance in Switzerland and beyond.

A sustainable tax system relies not only on formal rules but on the economic realities behind them. The concept of beneficial ownership plays a central role in determining treaty entitlement. Swiss practice requires the recipient of income to demonstrate both legal and practical control over that income - not merely legal title.

Swiss courts have reinforced this approach. In the Federal Supreme Court case 2A.239/2005, the refund of withholding tax was denied due to lack of beneficial ownership, as income was contractually redirected (TF, 2A.239/2005). In contrast, in decision 9C_635/2023, the Court allowed a refund where the recipient had no obligation to transfer the income, marking a significant development in judicial interpretation (TF, 9C_635/2023). The following cases merit a closer examination to better understand the evolving interpretation of treaty entitlement and beneficial ownership. The first case is before the existence of the BEPS project and the second one – after the implementation of Action 6.

Federal Supreme Court Decision 2A.239/2005, delivered on 28 November 2005: this decision examined a request for the refund of withholding tax based on a DTA. The applicant company, domiciled abroad, had received income in Switzerland and sought a refund of the tax, invoking its status as beneficial owner. The Court denied the refund, finding that the applicant did not meet the beneficial ownership criteria due to the existence of structures and agreements requiring redistribution of income. This decision marked an important step in the restrictive interpretation of the concept of beneficial ownership, laying the foundation for subsequent decisions in similar cases.

Federal Supreme Court Decision 9C_635/2023, delivered on 3 October 2024: the request for a refund was based on the DTA between Switzerland and Denmark. The foreign company A (Fig. 2) argued that it met the conditions set out in the convention, particularly regarding the article on interest taxation. According to the DTA, interest arising in Switzerland and paid to a resident of Denmark is taxable only in Denmark. The Court confirmed the right to a refund of withholding tax for a foreign company that had acquired Swiss bonds as part of cross-currency rate swap transactions. Unlike previous decisions since 2015, where the Court had systematically denied beneficial ownership in similar situations, it recognized the right to a tax refund in this case. The central element of the judgment was the absence of a contractual or legal obligation to transfer the taxed income, allowing the company to retain its status as beneficial owner. However, the Court referred the case back to the lower court to determine whether abuse of rights might justify denying the refund. This decision

marks an important jurisprudential development, while maintaining some uncertainty regarding the conditions for applying the abuse of rights principle.

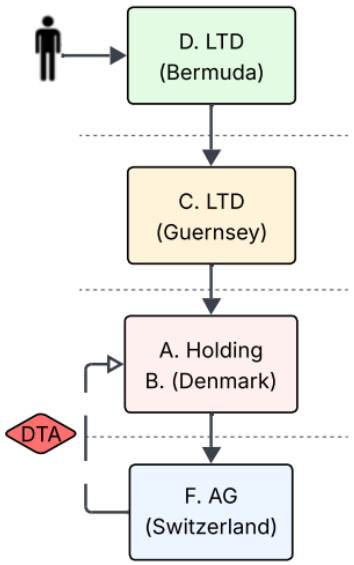

Fig. 2 The Denmark case

These cases show that while the PPT targets intent, beneficial ownership tests focus on economic substance. In Switzerland, both dimensions are used together to safeguard treaty integrity. This dual-layer analysis provides robustness and increases resilience against treaty abuse. Sustainability, in this context, is reinforced by legal clarity and economic authenticity.

Furthermore, the Swiss approach suggests that beneficial ownership is increasingly seen as a dynamic test, informed by factual control, decision-making autonomy, and functional presence. This test supports a more nuanced understanding of cross-border structures, reinforcing trust between treaty partners.

The transformation also affects how personal holding companies are treated. Structuring via a Luxembourg company (LuxCo) and a Swiss holding company (SwissCo), as pictured in Fig. 3, can offer tax advantages in the context of the refund of Swiss withholding tax on dividends. However, this structuring must comply with economic substance requirements and the double taxation conventions to avoid being deemed abusive. According to the practice of the Swiss tax authorities, LuxCo must be able to prove that it is the beneficial owner of the dividends. This means it needs to demonstrate sufficient economic substance - for example, active management, qualified staff, or adequate capital, typically measured by an equity ratio of around 30%. (Oesterhelt, Opel, 2021).

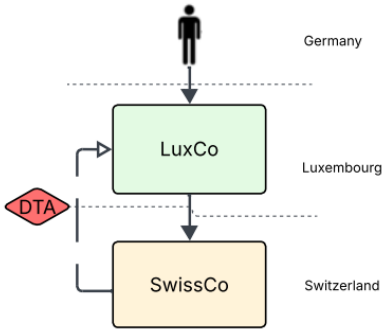

Fig. 3. Personal Holdings

For holdings linked to individual ultimate shareholders in zero-rate DTA countries, accounting substance may suffice. However, where individual ultimate shareholders reside in non-DTA countries, both functional and personal substance are required. Otherwise, treaty benefits may be partially or fully denied due to increased scrutiny under the PPT and beneficial ownership requirements (SIF, 2024).

This heightened scrutiny is reflective of a broader shift from formalism to functional analysis. The expectation is not merely that companies meet registration and documentation standards, but that they conduct real business operations. This demand for authenticity is at the heart of the tax transformation envisioned by BEPS. It also underscores the global trend toward substance-based taxation, where entities must justify their presence through real contribution to economic value creation. This requirement fosters transparency and discourages the proliferation of shell entities, contributing directly to a more sustainable tax system.

The transformation of tax sustainability is not limited to Switzerland. While examining the international perspective of treaty shopping and international corporate restructuring - the Alta Energy case in Canada is a strong precedent.

In *The Queen v Alta Energy Luxembourg Sarl*, the Canadian Supreme Court upheld treaty benefits for a Luxembourg company, despite the structure being tax-motivated. The Court ruled that if the arrangement complied with the treaty and did not constitute abuse, treaty shopping alone was insufficient to deny benefits and confirmed the company's right to benefit from the tax treaty between Canada and Luxembourg. The Court held that the structuring, although motivated by tax considerations, complied with the terms of the treaty, and that the main objective of the treaty was to prevent double taxation, not to prohibit cross-border tax planning. This decision provided greater clarity, predictability, and fairness for international investments in Canada via a treaty jurisdiction. Canada acted in its national interest by balancing economic competitiveness and revenue generation in its treaty network. The decision will likely be authoritative on this controversial issue in both, Canada and abroad, and may also influence the interpretation of the MLI. Finally, this underscores the fine line between legitimate planning and abusive structuring while also highlights the importance of clarity, predictability, and mutual trust in achieving sustainable tax governance (Kandev et al., 2021).

The discussed Canadian case reaffirms that treaty shopping must be assessed not only in legal terms but also with reference to the purpose of tax treaties. This perspective helps harmonize the interpretation of tax treaties across jurisdictions and supports the stability of investment flows.

4. Conclusions

This article describes how OECD BEPS Action 6 functions as both a legal and policy mechanism to prevent treaty abuse and promote sustainable tax integrity, with a particular focus on the Swiss legal and administrative framework. The analysis revealed that Switzerland has successfully integrated the minimum standards under Action 6 through targeted treaty amendments and consistent administrative practices, especially by reinforcing beneficial ownership tests and implementing anti-abuse clauses. These efforts have enhanced the alignment between treaty benefits and genuine economic activity, although some interpretive complexities persist, notably in the application of the PPT and its interaction with domestic substance requirements.

A comparative analysis of Swiss jurisprudence with international case, notably the Canadian Court's decision, further illuminates different judicial approaches to treaty abuse and treaty shopping. This case underscores the delicate balance between permitting legitimate tax planning and combating abusive structuring, reinforcing the importance of clear legal standards and mutual trust across jurisdictions.

Switzerland's approach demonstrates how cooperative international frameworks can address abusive practices without unduly hindering legitimate cross-border business operations. For practitioners, these developments underscore the growing importance of demonstrating substantive economic presence when claiming treaty benefits.

In parallel, other initiatives related to the BEPS project continue in Switzerland (SIF, 2024a): addressing the challenges of the digital economy, hybrid arrangements, transfer pricing. Switzerland has officially declared the implementation of the BEPS 2.0, which demonstrates its commitment to adhering to international tax standards while remaining an attractive location for business (EY, 2023).

As an international financial center, Switzerland must strike a balance between alignment with global tax standards and the maintenance of its economic competitiveness for international investors. By complying with the requirements of the OECD's inclusive framework while fostering a stable and competitive fiscal environment, Switzerland reinforces its reputation as a reliable and innovative financial hub, capable of meeting the challenges of the constantly evolving global tax landscape.

Looking ahead, a key challenge will be ensuring consistency in interpretation and enforcement. The PPT must be applied fairly, with safeguards for taxpayers. Beneficial ownership rules must be detailed yet flexible. And international cooperation must deepen to ensure that no country becomes a weak link in the global system. Ultimately, sustainable taxation is about building trust - between

governments, taxpayers, and international partners. BEPS Action 6 is a significant milestone in this journey, and Switzerland's measured implementation provides a valuable case study in how to pursue transformation without compromising legal certainty or economic vitality.

Moving forward, further research should address not only the long-term effects of Action 6 on inbound and outbound investments, but also the evolving intersection between anti-abuse mechanisms and new challenges such as digital economy taxation and emerging avoidance strategies. Comparative studies with other jurisdictions may provide valuable insights for refining anti-abuse measures and ensuring the continued sustainability and integrity of the international tax framework.

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