Irish Tax Institute

Leaders in Tax

Irish Tax Institute

Response to OECD Discussion Draft: Follow Up Work on BEPS Action 6: Preventing Treaty Abuse

January 2015

About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland's AITI Chartered Tax Advisers (CTA) and is the only professional body exclusively dedicated to tax. Our members provide tax expertise to thousands of businesses and individuals in Ireland and internationally. In addition many hold senior roles within professional service firms, global companies, Government, Revenue and state bodies.

The Institute is the leading provider of tax qualifications in Ireland, educating the finest minds in tax and business for over thirty years. Our AITI Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice.

A respected body on tax policy and administration, the Institute engages at the most senior levels across Government, business and state organisations. Representing the views and expertise of its members, it plays an important role in the fiscal and tax administrative discussions and decisions in Ireland and in the EU.

Introduction

Action 6 of the OECD's Base Erosion and Profit Shifting (BEPS) project is entitled "Preventing Treaty Abuse".

The initial Discussion Draft, the September report and the Follow Up Work published on 21 November contain a number of far reaching changes to tax treaties which are being proposed in order to achieve the objective of preventing treaty abuse. In particular, two new "anti-abuse" tests are proposed:

a) A "Principal Purposes Test" (PPT); and
b) A Limitation-on-Benefits (LOB) clause.

The Irish Tax Institute fully endorses the OECD's overall objective of improving fairness in the international tax system and addressing the inappropriate use of tax treaties. However, we are concerned that the current proposals will have serious unforeseen consequences for smaller countries such as Ireland which could ultimately curtail the use of treaties by taxpayers based in smaller economies and thus impact on their ability to trade globally.

Clearly this is not what is intended by Action 6 but careful study of the consequences of the proposed tests in their current form, highlights significant difficulties for smaller economies that simply do not arise for larger economies and therefore a very concerning imbalance is created.

We believe that any proposals should not impact on location decisions where real substance and activity are envisaged.

Summary of recommendations

The particular concerns for smaller countries can be summarised as follows, with suggested changes to address these concerns.

A. Principal Purposes Test (PPT)

Businesses operating in a large country will find it much easier to conclude that they pass a PPT than businesses operating in a smaller country.

A company carrying out arrangements and transactions in a larger economy will find it easier to demonstrate the natural business advantages that arise from that economy, than a company in a smaller economy. These naturally occurring business advantages in an economy are likely to be more self-evident than any possible tax treaty benefits, if the economy is large rather than small.

In a smaller economy, greater weight is likely to attach to the specific business attributes of the taxpayer, the transaction and the taxpayer's status as a local tax resident (when measuring the benefits from the transaction or arrangement), rather than the infrastructure and market size of the economy.

In this context, it more likely that the positive benefits of access to the tax treaty to avoid double taxation in relation to the cross border transaction or business arrangements will be more evident in the case of the taxpayer based in the smaller economy. This benefit could more easily be identified as one of the main benefits that arise to that taxpayer from the cross border transaction. Smaller country businesses face considerable uncertainty as to whether they can ever pass the PPT test and actually may find it impossible to conclude with certainty that they do so. If the test is to remain part of the Action 6 proposals, then it needs to be substantially re-drafted.

In our view, the PPT and commentary on the rule should be drafted in a manner that does not impact on the certainty of access to treaty benefits for locally resident companies with the knock on adverse impact that uncertainty creates on investment location decisions for any business activity where it is intended that real substance and managerial control over the income flows related to that activity will be located in the territory. In addition, the application of any PPT to Collective Investment Vehicles (CIVs - funds that are widely held, hold a diversified portfolio of securities and are subject to investor–protection in the country in which they are established) should be precluded as CIVs are generally not used for treaty abuse purposes.

B. LOB

The Publicly Traded test

- Companies based in smaller countries often have global "footprints" well beyond their shores, and indeed are often commercially required to have such footprints due to their smaller home markets. They will have difficulty passing a test which requires senior management to spend most of their time and exercise day to day responsibility in the smaller country. This "management time" criterion should be removed from the Publicly Traded test or examples should be included to demonstrate that the test applies to substantive group **policy** decisions only.
- The definition of "another recognised stock exchange" should be extended to include US exchanges and exchanges in regional groupings such as the EEA. There are valid and particular reasons why many non US companies choose to list on NASDAQ as an example.
- There is currently a requirement [although there are diverse views] that where a country resident treaty claimant is indirectly owned by a quoted parent, all companies in the intermediate chain would have to be resident in the country concerned or resident in the treaty

counterparty State. We do not agree with the inclusion of this requirement in the text as it disproportionately affects smaller countries which can naturally expect to form a smaller part of an international group.

The Ownership/Base Erosion test

For companies operating in a smaller economy, capital, and therefore ownership and financing, often comes from outside the country. Therefore the Ownership / Base Erosion test should be framed to take account of financing made available to the company from a local regional grouping such as the EEA and large capital markets such as the US.

The Active Business test

The substantiality test for dealings with connected parties impacts small countries disproportionately and should be removed. If the test remains, then an appropriately designed “safe harbour test” should be included.

The Derivative Benefits test

A widely cast Derivative Benefits test is essential if an LOB clause is to be included in tax treaties.

Collective Investment Vehicles (‘CIVs’)

The conclusions of the 2010 CIV Report are still valid. No single “preferred approach” should be adopted in dealing with the treaty entitlements of CIV and in the context of the application of a LOB provision to CIVs.

Domestic anti-conduit rules

Definition changes to the anti-conduit rules would render them more objective.

Detailed analysis

Principal Purposes Test (PPT)

Under the Action 6 proposals, treaty benefits could be denied if one of the business' main purposes in locating in a particular country is to access the relevant tax treaty.

Small countries like Ireland are attractive for FDI investment for many valid and commercial reasons, including the ability to attract qualified staff, the ability to operate business processes within a flexible labour market, the competitive tax environment and the stability of non-tax business regulations.

However, businesses which locate in a large economy can point towards the availability of tangible factors such as a large population, greater availability of capital and other infrastructure as their main purpose for locating there. Businesses which choose smaller countries for equally valid reasons which can include a stable government, the regulatory and tax environment (including the existence of tax treaties) face greater uncertainty. They choose the smaller economy despite the lack of the wider benefits that arise to business based in a large market, with capital availability, infrastructure, etc. Therefore, the reason for their choice and the factors that directly or indirectly underpin cross border arrangements and transactions of the company are much more likely in practice to include certainty of access to tax treaties when conducting cross border trade than in the case of a business in a large economy. The benefits from avoiding double taxation under a tax treaty are more likely to come to the fore in the case of cross border trade flows for business based in smaller economies. (See Example 3 in the Appendix).

A company carrying out arrangements and transactions in a larger economy will find it easier to demonstrate the natural business advantages that arise from that economy, than a company in a smaller economy. These naturally occurring business advantages in an economy are likely to be more self-evident than any possible tax treaty benefits, if the economy is large rather than small.

In a smaller economy, greater weight is likely to attach to the specific business attributes of the taxpayer, the transaction and the taxpayer's status as a local tax resident (when measuring the benefits from the transaction or arrangement), rather than the infrastructure and market size of the economy.

It is thus more likely that the positive benefits of access to the tax treaty to avoid double taxation in relation to the cross border transaction or business arrangements will be more evident in the case of the taxpayer based in the smaller economy. This benefit could more easily be identified as one of the main benefits that arise to that taxpayer from the cross border transaction.

In this context, a company resident in Ireland could find it fundamentally impossible to pass the PPT on this basis. Even if the test is aimed at a transactional level, such a fundamental difficulty makes it difficult for any individual transaction by the company based in a smaller economy to meet the test criteria.

A business operating in a large economy will find it much easier to pass the PPT than a business operating in a smaller economy, simply by virtue of the size of the economy. This is a distortionary effect and creates an un-level playing field as well as very significant uncertainty and cost for businesses in smaller countries.

The PPT rule should be redrafted to provide that treaty benefits can arise except where the main purpose of the arrangement or transaction is to obtain the treaty benefit. This we believe should achieve a balance between protection from treaty shopping and reflecting and preserving the benefits that treaties offer to taxpayers in smaller economies.

In addition, the commentary on the interpretation of the PPT should be revised to acknowledge that it is legitimate to recognise that one of the main purposes of establishing and continuing to conduct business in a jurisdiction is the existence of a tax treaty and the benefits it affords. The commentary should make explicit that this can be especially the case for smaller economies where some of the wider business related benefits on offer in the case of larger economies are not present. Any evaluation of the purpose of an arrangement or transaction should take into account the relatively larger weight of importance that the existence of a treaty benefit is likely to present in this scenario.

In relation to CIVs, the unilateral application of the PPT by a government could create substantial uncertainty for CIVs. CIVs require certainty on the amount of foreign tax incurred on income and gains arising from investments as they typically determine the value of their assets and liabilities on a daily basis. In this regard, a clause should be included in the PPT confirming that CIVs (widely held and regulated in an OECD jurisdiction) automatically pass the PPT. Where a CIV has been established for the purposes of facilitating collective investment by a large number of investors, there should be an automatic assumption that treaty abuse is not one of the purposes for which the CIV was established. If there any concerns about potential abusive arrangements in relation to CIVs these specific concerns could be included as examples in the Commentary to the PPT.

Limitation of Benefits (LOB) Clause

In essence, the LOB clause contained in the Action 6 proposals is designed to prevent access to tax treaties where an entity is owned or financed from abroad or where its shares are traded on a foreign stock exchange.

Businesses in smaller countries often have very little capital available locally for investment and a small, if any, Stock Exchange. They are much more likely than companies based in large economies to be owned and financed from abroad and to be listed on a foreign stock exchange. (See example 2 in the Appendix).

There are a number of tests contained in the LOB clause proposed in Action 6 and difficulties arise at a number of levels with these tests.

a) The Publicly Traded test

Companies in small countries can qualify for treaty benefits if their shares, or those of their ultimate parent, are:

(a) quoted and primarily traded on a stock exchange in the country concerned, or

(b) quoted and regularly traded on another recognised stock exchange **and** the company's executive officers and senior management employees exercise day to day responsibility for more of the strategic, financial and operational policy decision making for the company (including its direct and indirect subsidiaries) in the country concerned than in any other State and the staff conduct more of the day to day activities necessary for preparing and making those decisions in the country concerned than in any other State.

This Publicly Traded test will, in practice, be very difficult for many companies based in smaller economies. A feature of these companies is that they have outgrown their domestic market and collectively management spend more time outside the base country, than would the management of a company and its subsidiaries based in a large economy.

(i) Stock exchanges in smaller countries will often not have large pools of capital and so companies operating in that country will choose to list on a foreign stock exchange. This is for purely commercial non-tax reasons.

(ii) Businesses in small countries are much more likely to be a relatively small part of the global operation and therefore a material portion of senior personnel will often be working overseas or spending material time overseas. Common examples would be where the Chief Marketing Officer is located in the territory where the final goods are sold e.g. the US or where the group's back office is centralised in a specific location and a Chief Technology Officer is located there e.g. the UK.

Successful listed businesses from a small country which have grown internationally will therefore struggle to pass this Publicly Traded LOB test.

To prevent distortions between small countries and larger countries, the Irish Tax Institute recommends that the management time test be removed from the OECD's proposed LOB. If this cannot be agreed, then examples in the text should make it expressly clear that operational day to day decision making can be devolved to local subsidiaries (which is normally the case) but that the key factor for management and control relates to substantive **policy** decisions, which are normally determined at head office.

The OECD commentary on the proposed LOB states that some countries may be willing to agree to include stock exchanges within a regional grouping such as the EEA in (a) above. This extension would be helpful. However, the extension will not cover all smaller country situations as some entities within the EEA as an example will be quoted outside the EEA. It would be helpful if (a) above could be extended to include groupings such as the EEA but also to include stock exchanges in major international markets such as the US, in particular, where many companies from smaller countries outside the US will seek to list and raise capital. This is particularly the case for certain industries – such as technology sector companies listing on the NASDAQ exchange.

The proposed Publicly Traded test includes [in square brackets] a requirement such that, where a treaty claimant is indirectly owned by a quoted parent, all companies in the intermediate ownership chain would have to be resident in the country concerned or resident in the counterparty treaty State. Different countries have expressed different views on whether or not this is necessary. In our view, the narrow version creates problems for companies based in smaller economies:

(i) the publicly traded test is likely to be the more relevant for treaty access (because of the reasons outlined below the other test are more inherently difficult to meet); and

(ii) because that country subsidiary will often not be the main driver of the overall group structure (as, by definition, it is likely to be relatively smaller than a large country subsidiary).

b) Ownership/base erosion test

Under the ownership/base erosion test, an entity qualifies for treaty benefits if it meets both a detailed ownership and a "base erosion" test. These tests are designed to check whether the treaty claimant is ultimately owned and financed from its country of residence.

For non publicly listed companies, the ownership/base erosion tests set out in the LOB are reasonably straightforward to meet in the case of most companies operating in large economies. They are generally owned and financed domestically due to the availability of significant domestic capital. It would be particularly difficult and, in many cases, impossible for companies operating in a smaller economy to satisfy this test because capital, and therefore ownership and financing will often come from outside the country.

As with the Publicly Traded test above, we suggest that the base erosion test should be framed to take account of financing made available to the company from a local regional grouping such as the EEA and large capital markets such as the US.

c) Active Business test

A smaller economy company would qualify for treaty benefits if it is engaged in "the active conduct of a business" in the country concerned. This is an important test.

However the proposed LOB states that where income is derived from a related party, the Active Business test will only be considered to be satisfied if the business activity carried on in the smaller economy is substantial in relation to the business activity carried on by the associated enterprise in the other state.

This substantiality requirement will often be difficult for a small country entity to meet and we are unclear as to why it is necessary if there is operational substance in the small country.

The OECD commentary does helpfully note that due regard will be given to the relative sizes of the economies and markets in the two Contracting States. However, the text of the OCED active business test is based largely on the existing US treaty language and in practice, it has been found that US domestic rules can mean the test is often failed by legitimate businesses. This means that the application of the test could well be different in many countries if they interpret certain key provisions differently e.g. as to the meaning of active or passive income, the local definition of income source and whether or not that income source (reasonably considered to form part of the business of the company in the small country) has a source in that country from the perspective of sourcing rules in the counterparty jurisdiction.

For example, there could be large manufacturing facilities in the treaty partner location (because there may be a large market of consumers there) with substantial management oversight and support functions (R&D etc.) in the small country concerned – it is not at all clear that payments from the manufacturing facilities for the small country management / support functions would meet the substantiality test. This would depend on how the large country defines the key terms in the active trade or business test.

Many small country operations that a reasonable person would have thought would easily have met an Active Business test have, in practice, found it difficult to meet the Active Business test in US tax treaties which simply illustrates the challenges that meeting this test presents and which will be magnified if adopted across multiple jurisdictions.

In our view, it is critical the final 'active trade or business' test reflects changes in group supply chain practices since the original version of the US LOB was adopted.

We suggest that the OECD proposals are amended so that it is clear that business support activities (where the workforce in the smaller economy conducts substantial managerial and operational activities over those support services) can qualify as an active business even where those activities are provided for the benefit of related group parties and where there are no or limited sales of the relevant Group's products / services in the small country concerned.

In addition, the inclusion of a "safe harbour" with accepted definitions might address these concerns. Some US treaties contain a "safe harbour" whereby substantiality is assumed if, in prior years, the asset value, gross income and payroll of the small country activity are, for example, at least 7.5% of the equivalent numbers in the US, and the average of the three ratios exceeds 10%. In practice the US safe harbour can be difficult to meet because of the US source of income rules outlined above.

Options for a fair safe harbour might include a mathematical safe harbour which is similar to the ones in some US treaties but:

(i) with clarification that the resident country activity includes all sales / services from the resident country entity to counterparties outside the country concerned. This clarification would be required for the purposes of the general substantiality test and any mathematical safe harbour; and

(ii) with adjustment for the relative size of the economies concerned.

d) Derivative Benefits test

A company might qualify for treaty benefits if it meets the terms of a "Derivative Benefits" test. This is designed to allow treaty access where the company is owned and financed by "equivalent beneficiaries" i.e. certain defined persons from jurisdictions having a treaty with the other country which offers equivalent benefits as compared with the taxpayer country's treaty with that other country.

The availability of a broad based derivative benefits test is essential if the LOB is to operate effectively for business based in small economies. It should serve to mitigate the greater likelihood that companies in smaller economies will have shareholders who are not locally resident. However, there are some difficulties with the proposed test from a smaller country viewpoint:

- Some countries do not agree to include a Derivatives Benefit test (other than for dividends). The text is thus in [square brackets].

- Every entity in the chain of ownership must be "an equivalent beneficiary". This significantly limits the potential applicability of the test and will most adversely affect smaller country entities which are most likely to rely on the test (as they will have more difficulty passing other tests).

- The definition of an equivalent beneficiary is relatively narrow e.g. private companies are excluded. It is not clear why this is the case and, as with other restrictions, it is most likely to adversely affect smaller country entities where access to publicly held capital is less available.

To prevent significant disadvantage to smaller economies as compared with larger economies a widely cast Derivative Benefits test is essential if treaties are to include an LOB clause. The test must:

- Reflect a more diverse mix of non-locally resident ownership and financing because much of the financing for entities in those countries will naturally come from abroad (for reasons totally unrelated to tax). At a minimum, the Derivative Benefits test should include residents within a local regional grouping such as the EEA for both the ownership and base erosion tests.
- There should be no limit to the number of equivalent beneficiaries (seven is suggested in the draft) to satisfy the test once, for example, substantially all shareholders are equivalent beneficiaries.
- Take account of the greater incidence of privately held family business, by including the possibility to attribute to, and treat as held by, one person interests held by members of a family so that companies which are held by generations of one family will not fail the test simply because ownership is split amongst individual family members.
- Treat as held by one person, those share interests held under employee share schemes by executives of non-publicly listed groups.

e) Discretionary relief

If a company cannot satisfy any of the other LOB tests, it may be granted treaty access if, on foot of an application to the authorities in the treaty partner country, it persuades them that the

"establishment, acquisition or maintenance" of the company "and the conduct of its operations" did not have, as one of its principal purposes, the obtaining of treaty benefits.

If we draw on US experience as an illustration of the likely operation of this test in practice, in our members' experience, it has proved exceptionally difficult to persuade the US tax authorities that the principal purpose test is met, even where the fact pattern is very clearly in the company's favour (in the view of the small country resident).

It is problematic to place relief solely at the discretion of a tax authority in this type of situation. A more valid test would be one which:

a) does not require application to the foreign tax authority; and

b) has a clear right of appeal to the courts of the country concerned and ideally to an independent international arbitrator.

It should also be clear that any principal purpose clearance would apply retroactively because, in many cases, companies may be of the view that they meet the Active Business test and therefore may only wish to assert reliance on discretionary relief as a last resort.

f) Collective Investment Vehicles ; Application of LOB Provisions

The conclusion of the 2010 CIV Report (The Granting of Treaty Benefits with Respect to Income of Collective Investment Vehicles) remains valid and is the best approach for dealing with granting treaty benefits to CIVs. The 2010 CIV Report recognises that CIVs can take different legal forms in different countries and are subject to different tax treatments (both in respect of the CIV and the investors in the CIV). As a result, the 2010 CIV report provides alternative approaches for providing treaty relief for CIVs. In this regard, no single "preferred approach" should be adopted in dealing with the treaty entitlements of CIVs and in the context of the application of a LOB provision to CIVs. Furthermore, CIVs should be treated as "qualified persons" in the LOB without any further qualifications and countries should continue to be permitted to agree on a bi-lateral basis how CIVs should be treated based on the facts and circumstances of the CIVs resident in the two contracting states and by reference to paragraph's 6.8 to 6.34 of the commentary on Article 1 in the Model Tax Convention.

g) Non-CIV Funds; Application of LOB Provisions and Treaty Entitlements

Non-CIV Funds

The 2010 CIV Report did not deal with treaty entitlement issues relating to non-CIV funds such as sovereign wealth funds, pension funds and private equity funds and alternative funds. As a result, there is a real concern that the application of LOB provisions will have a detrimental impact on the ability of such non-CIV funds to claim treaty benefits. We would recommend that work similar to the 2010 CIV Report be undertaken through the OECD Informal Consultative Group to identify issues across the various types of non-CIV funds and develop practical solutions for treaty entitlement. In the absence of such work be completed in advance of the conclusion of the BEPS project, we would recommend the inclusion of an appropriate derivative benefits clause or some other equivalent beneficiary mechanism in the LOB provisions to facilitate the appropriate treaty entitlements for such non-CIV funds.

Pension Funds

Pension funds present unique issues in the context of treaty relief. It is widely accepted that they play a major role in the effective funding of the retirement of workers. In recognition of this, many double tax treaties, afford pension funds with zero withholding tax rates on investment income. Pension

funds invest directly in the global equity and bond markets but many use CIVs as their investment platform, principally to obtain appropriate economies of scale and exposure to global markets. It is imperative that pension funds (either investing directly or through CIVs) are not inadvertently negatively impacted by the introduction of LOB provisions. In addition, many pension funds pool their investments though CIVs which are tax transparent (i.e. the pension fund is the beneficial owner of the income) and recognition of such transparency is critical in ensuring the maximum benefits which pension funds are entitled to be granted in practice.

The issues impacting pension funds cannot be underestimated. It is essential that small investors are encouraged to make appropriate provision through pension funding arrangements to obtain the necessary long term financial security for workers into their retirement years. Recently FATCA (including Intergovernmental Agreements) and the Common Reporting Standard have afforded pension funds a "deemed compliant" status and provided practical definitions of pension funds falling within the "deemed compliant" status. The Action 6 agenda should follow that lead and recognise pension funds as qualifying residents in their home jurisdiction (country of establishment), without restriction under LOB (or indeed under a PPT).

Domestic anti-conduit rules

The OECD has recommended three options to countries, as regards the application of the PPT and LOB rules.

(1) Include both the PPT and an LOB in treaties.
(2) Include a PPT only, in treaties.
(3) Include an LOB but no PPT in treaties – in this case, the suggestion is that this be supplemented by the introduction of domestic "anti-conduit" rules which is apparently designed to prevent transactions being artificially routed through an active business.

The anti-conduit rules suggested are very broad. They would apply where a company which "receives an item of income… pays, directly or indirectly all or substantially all of that income (**at any time or in any form**) to one or more persons who are not resident" and "who, if they received that item of income direct.... would not be entitled under a convention for the avoidance of double taxation...to benefits which are equivalent" (emphasis added).

There are at least three respects in which a provision along these lines is particularly difficult for taxpayers based in smaller economies and problematic generally:

(1) A company operating in a small economy is naturally more likely to be foreign owned. Ultimately, a foreign owned company will usually pay all of its income to non-residents because it will ultimately pay dividends to overseas shareholders. However, it is not classically understood that conduit arrangements include situations where profits are retained within a country and then eventually paid out by way of dividend. Such a definition should be confined to payments which are deductible from taxable income.

(2) A company in a small country is also more likely to be foreign financed. Therefore, it is more likely to make financing payments to non-residents. It is suggested that the scope of exclusions for an 'equivalent beneficiary' is extended to financing raised from lenders in regional economic groupings such as the EEA. Although it is noted that companies in particular sectors may normally raise finance outside of the EEA (e.g. technology sector companies).

(3) The words "substantially all" are not defined, which will give rise to uncertainty and probably give rise to multiple different interpretations in different jurisdictions.

A more objective anti-conduit rule would:

(i) define “substantially all” (e.g. greater than 95%) and
(ii) replace the words “in any form” with “in any tax deductible form” - this would exclude dividends and is consistent with the base erosion test in the LOB which is based on a tax deductible payment.

Resolving treaty disputes

From time to time, disputes will arise as to the interpretation and / or application of tax treaties. This raises the question as to how such disputes ought to be resolved. Currently treaty disputes are typically resolved in accordance with the domestic procedures applicable in the country seeking to levy taxation. This process has a number of risks including:

(i) the risk of multiple different approaches and interpretations being taken in different countries.
(ii) varying quality as to the independence and rigour of procedures in different jurisdictions, and
(iii) a risk of bias, whether conscious or unconscious, in favour of the domestic tax collector and against the foreign taxpayer.

These risks will be exacerbated by the Action 6 proposals because the proposed new provisions are relatively complex and in many cases require a relatively high level of subjective judgement. Smaller countries are likely to have less power to redress any injustices arising from treaty disputes as they will have less resources and less diplomatic influence in seeking redress.

An independent, international, speedy and binding arbitration tribunal to resolve disputes over treaty access would substantially reduce the risk of unjust treatment of taxpayers generally and of those based in small countries in particular. In any event, a right of appeal to a qualified and genuinely independent body is a basic principle of justice.

Confidence in such a dispute resolution body would be best served by appointing to it respected, qualified and experienced jurists from countries with a strong reputation for an independent and fair judiciary.

If Proposals Implemented as per September 2014 Report

Example 1 Listed Companies		
Various Tests under new Proposal	**Listed company from a small country** Tech company grows and lists on NASDAQ. Strategic management and control/board meetings held in home country (Ireland) but 'day-to-day' management carried out all over the world.	**Listed company from a large country** Same fact pattern but company is from the US.
	Limitation-on-Benefits	**Limitation-on-Benefits**
Publicly Traded Test (1) – Listed on local exchange	FAIL Not listed on home Stock Exchange.	PASS
Publicly Traded Test (2) – Listed on recognised stock exchange & management test	FAIL Not clear. In practice, substantial 'Day-to-day' management outside of home territory.	PASS Not required to be proven.
Ownership/ Base Erosion Test	FAIL Majority ownership and finance from outside home territory.	PASS
Active Business Test	MATERIAL UNCERTAINTY Due to uncertainty over definitions.	PASS Not required to be proven.
Derivative Benefits Test	MATERIAL UNCERTAINTY Who are owners and can they qualify as equivalent beneficiaries?	PASS Not required to be proven.
Discretionary Relief	MATERIAL UNCERTAINTY	PASS Not required to be proven.
	Principal Purposes Test	**Principal Purposes Test**
	MATERIAL UNCERTAINTY Justification for access to local (Irish) treaty network.	PASS Justification for access to local (US) treaty network.

If Proposals Implemented as per September 2014 Report

Example 2 Non-Listed Companies		
Various Tests under new Proposal	**Private company from a small country** a) Ownership/Base Erosion test Small country based private export focused company (small home capital and consumer market). Investors and finance sourced from outside of home country (>50%). b) Active Business test Substantial management oversight and support functions (R&D) in small country but markets largely outside Ireland and therefore majority of manufacturing and distribution located worldwide.	**Private company from a large country** German based private company expands + seeks capital and finance (large home capital and consumer market). Investors and finance sourced from inside Germany.
	Limitation-on-Benefits	**Limitation-on-Benefits**
Publicly Traded Test (1) – Listed on local exchange	N/A	N/A
Publicly Traded Test (2) – Listed on recognised stock exchange & management test	N/A	N/A
Ownership/ Base Erosion Test	FAIL Ownership and finance sourced outside of home territory.	PASS Company was able to source sufficient local capital and finance.
Active Business Test	FAIL Due to uncertainty over definitions.	PASS Not required to be proven.
Derivative Benefits Test	MATERIAL UNCERTAINTY Can owners qualify as equivalent beneficiaries?	PASS Not required to be proven.
Discretionary Relief	MATERIAL UNCERTAINTY	PASS Not required to be proven.
	Principal Purposes Test	**Principal Purposes Test**
	MATERIAL UNCERTAINTY Justification for access to local treaty network.	PASS Justification for access to local treaty network.

If Proposals Implemented as per September 2014 Report

Example 3 FDI	
Various Tests under new Proposal	**Investing in a small country** US non-listed company locates activities in small country subsidiary due to availability of skilled workers and access to EU markets etc. Similar to all business decisions, the small country treaty network is one of the relevant factors taken into account when establishing location.
	Limitation-on-Benefits
Publicly Traded Test (1) – Listed on local exchange	N/A
Publicly Traded Test (2) – Listed on recognised stock exchange & management test	N/A
Ownership/ Base Erosion Test	FAIL Company is owned and financed outside of Ireland.
Active Business Test	MATERIAL UNCERTAINTY Can owners qualify as equivalent beneficiaries?
Derivative Benefits Test	MATERIAL UNCERTAINTY
Discretionary Relief	MATERIAL UNCERTAINTY Company is owned and financed outside of Ireland.
	Principal Purposes Test
	FAIL Treaty network a part of business decision to locate in Ireland.