Ministerie van Financiën

TER BESLISSING
Aan
5.1.2e Algemene Fiscale Politiek

Directie Algemene Fiscale Politiek

Inlichtingen
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5.1.2e @minfin.nl

Auteur
5.1.2e
5.1.2e

nota

Instructie RWG Pijler 2, 4 januari 2022

Datum
3 januari 2022

Notanummer
2022-0000000357

Bijlagen
geen

Aanleiding

Op 22 december 2021 heeft de Europese Commissie het richtlijnvoorstel ten aanzien van een minimumniveau aan belastingheffing (ook wel Pijler 2 genoemd) gepubliceerd. Op dinsdag 4 januari vindt de eerste (virtuele) Raadswerkgroep plaats. Op de agenda staan een presentatie van de Europese Commissie en een ronde exchange of views. 5.1.2e (PV), 5.1.2e (IA), 5.1.2e (FJZ), 5.1.2e (Winst), 5.1.2e en 5.1.2e (beiden AFP/EIZ) zullen deze vergadering virtueel bijwonen.

Beslispunten

Graag uw akkoord op onderstaande inzet.

Inzet:

- NL zal de presentatie van de Commissie met belangstelling aanhoren.
- Beleidsmatig is NL positief over het richtlijnvoorstel en geeft NL zijn volle steun aan de ambitie van de Fransen om dit dossier prioriteit te geven tijdens hun voorzitterschap en te streven naar een voortvarende behandeling in de RWG'en, en, uiteindelijk, een snelle aanname in de Ecofin Raad.
- Inhoudelijk heeft NL een politiek en studievoorbehoud in afwachting van akkoord van het nieuwe kabinet en de Tweede Kamer.

Toelichting

In het Inclusive Framework (IF) georganiseerd door de Organisatie voor Economische Samenwerking en Ontwikkeling (OESO) is de afgelopen jaren gesproken over een herziening van het internationale belastingstelsel. Tijdens de IF-vergadering op 1 juli 2021 is met 130 landen een akkoord op hoofdlijnen bereikt om deze herziening te bewerkstelligen. Vervolgens is tijdens de IF-vergadering van 8 oktober 2021 overeenstemming bereikt over de openstaande onderdelen en de manier waarop landen de voorstellen in gaan voeren. Inmiddels hebben 137 landen het akkoord onderschreven.

Het IF-akkoord steunt op twee pijlers. Het doel van deze pijlers is om de overgebleven uitdagingen uit het Base Erosion and Profit Shifting (BEPS) project[1]

[1] Om internationale belastingontwijking tegen te gaan zijn er in het BEPS-project van de OESO in opdracht van de G20 verschillende maatregelen ontwikkeld om te voorkomen dat belastingsystemen of -

aan te pakken en om schadelijke belastingconcurrentie tussen landen tegen te gaan. Pijler 2 van het akkoord bevat afspraken over een wereldwijd minimumniveau van belastingheffing. Deze afspraken zorgen ervoor dat grote multinationals altijd ten minste effectief 15% aan winstbelasting betalen.

Het IF kan geen bindende wetgeving vaststellen. Op 20 december 2021 heeft het IF modelteksten gepubliceerd waarmee de deelnemende landen Pijler 2 in hun nationale wetgeving kunnen omzetten. Het op 22 december 2021 door de Europese Commissie gepubliceerde richtlijnvoorstel bevat de modelteksten voor de EU-lidstaten. Dit betreft in tegenstelling tot het IF-akkoord bindende wetgeving.

Het richtlijnvoorstel is vrijwel geheel gelijk aan de modelteksten die door het IF zijn vastgesteld. Om de teksten in lijn te brengen met het Europese recht is op enkele punten afgeweken van de OESO-modelteksten. Zo is het voorstel ook van toepassing op grote concerns die geen vestigingen in een ander land hebben (dus volledig binnenlandse groepen), terwijl in de OESO-modelteksten enkel grensoverschrijdende concerns onder de reikwijdte vallen. Ook is in het richtlijnvoorstel de optie opgenomen dat de zogenoemde top-up tax ook in de lidstaat waar de laagbelastende dochter is gevestigd kan worden geheven.

Krachtenveld: 26 van de 27 lidstaten maken onderdeel uit van het IF. Deze landen hebben het IF-akkoord dan ook onderschreven. Cyprus maakt geen deel uit van het IF.

5.1.2a
5.1.2a
5.1.2a

Pijler 1 wordt pas in mei/juni verwacht en kan daardoor een snelle aanname van de Pijler 2-richtlijn in de weg staan. Dit is het grootste politieke vraagstuk dat het FRA VZ-schap zal moeten oplossen.

Informatie die niet openbaar gemaakt kan worden
Deze nota bevat informatie die betrekking heeft op lopende internationale onderhandelingen.

verdragen op oneigenlijke wijze worden gebruikt om de belastinggrondslag van staten uit te hollen of winsten te verschuiven.

To: 5.1.2e (AFP/EIZ)[5.1.2e @minfin.nl]
From: 5.1.2e
Sent: Thur 1/6/2022 10:03:12 AM
Subject: FW: [RIJK] Europa - EU - Financien - RWG Implementatie Pijler 2
Received: Thur 1/6/2022 10:03:24 AM
CIE_Presentatie_Pijler_2.pdf
WP_Pillar_04012022.docx

From: 5.1.2i @minbuza.nl>
Sent: woensdag 5 januari 2022 12:34
To: 5.1.2i @minbuza.nl>; 5.1.2i @minbuza.nl>; 5.1.2i @minbuza.nl>; 5.1.2i @minbuza.nl>; 5.1.2i @minbuza.nl>; 5.1.2i @minbuza.nl>; 5.1.2i @minbuza.nl>; 5.1.2e 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e 5.1.2e @minbuza.nl>; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl> 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl; 5.1.2e < 5.1.2e @minbuza.nl> 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e < 5.1.2e @minbuza.nl>; 5.1.2e @minfin.nl; 5.1.2e @minfin.nl
Subject: [RIJK] Europa - EU - Financien - RWG Implementatie Pijler 2

Kunt u dit bericht niet goed lezen? Bekijk dan de online versie. 5 januari 2022

Ministerie van Buitenlandse Zaken
Berichtenverkeer

Rijks-Intern

Europa - EU - Financiën - RWG Implementatie Pijler 2

Van : 5.1.2i

Verzonden op : 5 januari 2022 12:33

Land/regio : Europa

Forum : EU

Thema : Financiën

Samenvatting

Gisteren vond de kick-off meeting over de implementatie van pijler 2 van het OESO-akkoord plaats in

Raadsverband. Er was een uitgebreide presentatie van de Commissie (zie bijlage) met gelegenheid voor vragen of statements. Op 20 januari beginnen de inhoudelijke onderhandelingen. De Fransen willen het pijler 2 voorstel nog onder hun VZS afronden. NL heeft in algemene zin haar steun uitgesproken voor het voorstel en de tijdslijn van het FRA VZS, maar wel een studie- en parlementair voorbehoud gemaakt.

Uit de interventies van lidstaten kwam al een eerste krachtenveld naar voren. 5.1.2a

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Bericht

De echte inhoudelijke discussie moet nog aanvangen, vooralsnog waren er drie hoofdpunten te onderscheiden:

1) Timing behandeling huidig pijler 2 voorstel vs. toekomstig pijler 1 voorstel

5.1.2a

5.1.2a

2) Afwijkingen van OESO-model rules in EU-richtlijn pijler 2.

5.1.2a

5.1.2a

3) Implementatietermijn

In OESO/IF-verband is overeengekomen dat het akkoord per 2023 moet zijn geïmplementeerd. 5.1.2a

5.1.2a

PS: Naast deze inhoudelijke punten was er ook nog een discussie over de logistieke inregeling van de werkgroepen over pijler 2. De Fransen willen graag fysieke werkgroepen in Brussel organiseren vanaf 20 januari (met één attaché en één expert). 5.1.2a

5.1.2a

Berichtgegevens

Aan : 5.1.2i 5.1.2e

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Council of the European Union
General Secretariat

Brussels, 04 January 2022

WK 26/2022 INIT

LIMITE

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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Delegations
N° Cion doc.:	ST 15294/21 - COM(2021) 823 final
Subject:	Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union - presentation by the European Commission

Delegations will find attached the presentation made by the European Commission.


European Commission
COUNCIL DIRECTIVE
on ensuring a global minimum level of taxation for multinational groups in the Union
Working Party on Tax Questions
Presentation DG TAXUD
4 January 2022

Introductory remarks

European Commission

Commissioner for Economy Paolo Gentiloni

"In October of this year, 137 countries supported a historic multilateral agreement to transform global corporate taxation, addressing longstanding injustices while preserving competitiveness. Just two months later, we are taking the first step to put an end to the tax race to the bottom that harms the European Union and its economies. The directive we are putting forward will ***ensure that the new 15% minimum effective tax rate for large companies will be applied in a way that is fully compatible with EU law****. We will follow up with a second directive next summer to implement the other pillar of the agreement, on the reallocation of taxing rights, once the related multilateral convention has been signed. The European Commission worked hard to facilitate this deal and I am proud that today we are at the vanguard of its global rollout."*

European Commission

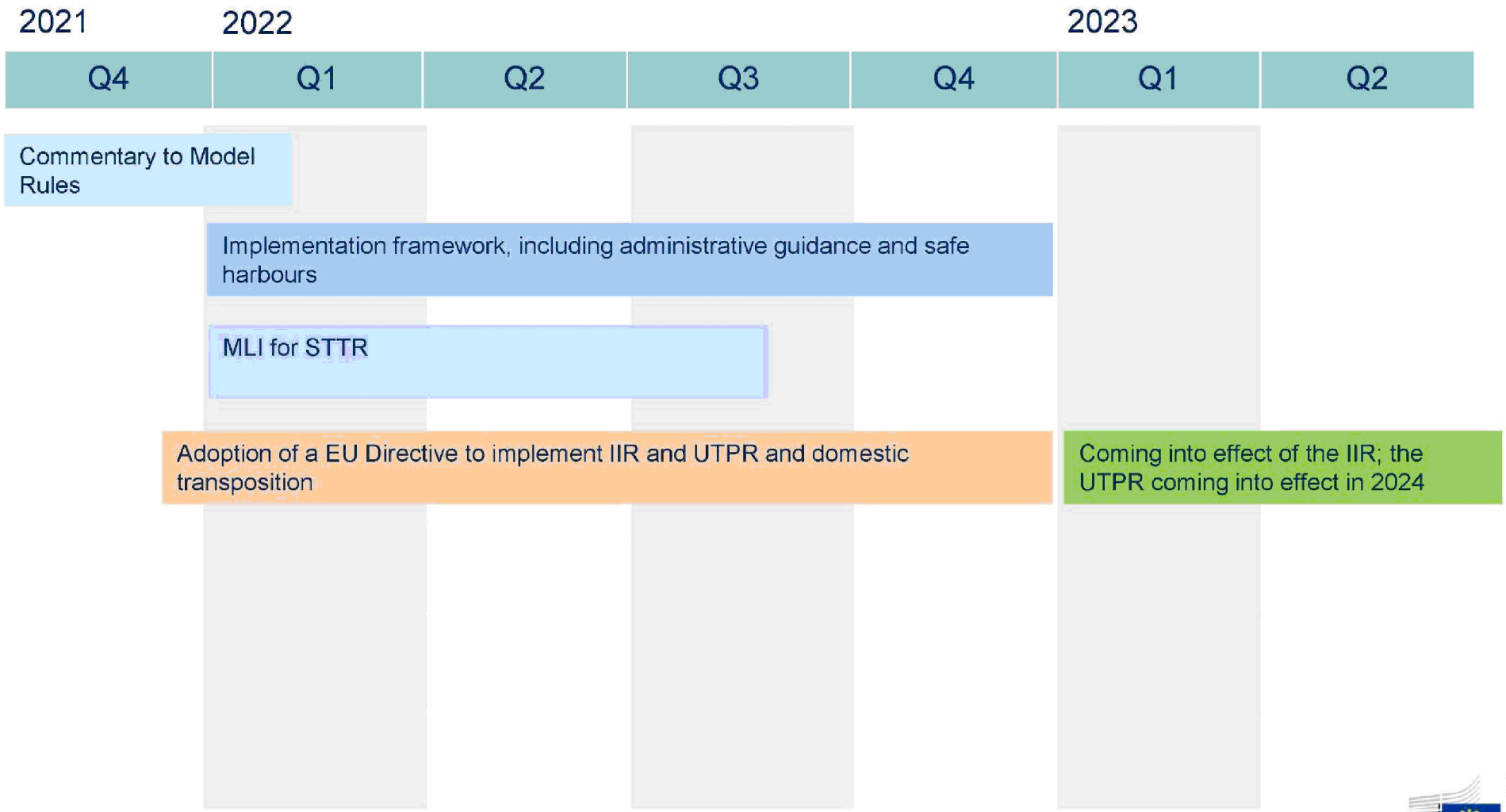
Pillar 2

➔ Ensure multinational enterprises (MNEs) will be subject to a **minimum tax rate of 15%**

Important **policy goals** Pillar 2:

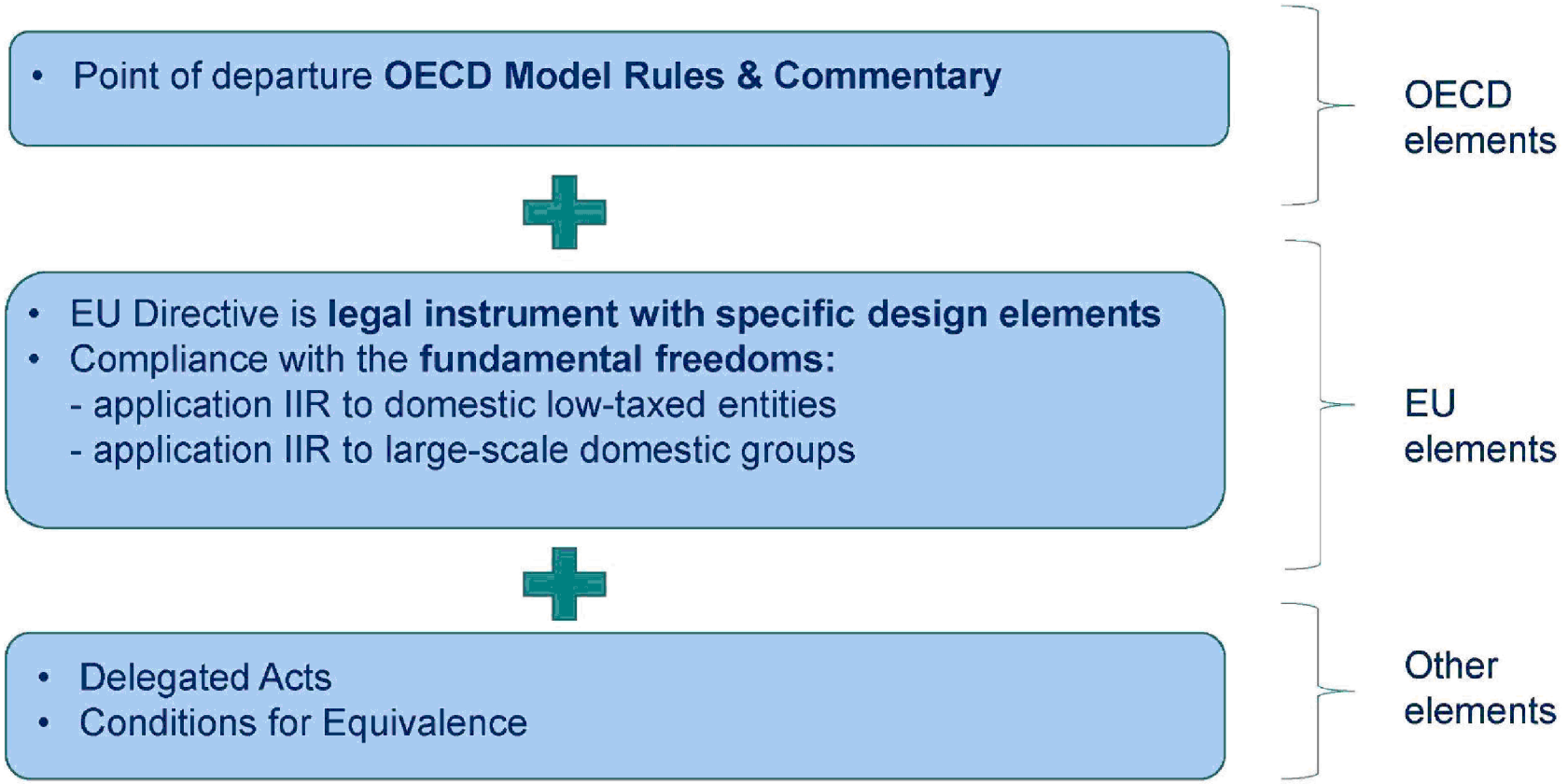
European Commission

Timeline



European Commission

Design elements of EU Directive to implement Pillar 2



European Commission

Pillar 2 Directive

Chapter 1: General Provisions
Chapter 2: Application of the Income Inclusion Rule (IIR) and the Undertaxed Payments Rule (UTPR)
Chapter 3: Computation of the Qualifying Income or Loss
Chapter 4: Computation of Adjusted Covered Taxes
Chapter 5: and Acquisitions
Chapter Computation of the Effective Tax Rate and Top-up Tax
Chapter 6: Special Rules for Mergers 7: Tax Neutrality and Distribution Regimes
Chapter 8: Administrative Provisions
Chapter 9: Transition Rules
Chapter 10: Specific Application of the IIR to Large-Scale Domestic Groups
Chapter 11: Final Provisions

Pillar 2 Directive

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Chapter 7: Tax Neutrality and Distribution Regimes
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Chapter 11: Final Provisions

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Chapter 1 – General Provisions

Income Inclusion Rule (IIR)

- Imposing a **top-up tax** on a parent entity in respect of the low taxed income of a constituent entity of an MNE group

Undertaxed Payments Rule (UTPR)

- **Backstop** to the IIR and applies in situations where there is no qualifying IIR

Art. 1 - Subject-matter

Chapter 1 – General Provisions

Art. 2 - Scope:

- Pillar 2 Directive applies to:

i. One or more **Constituent Entities (CEs) located in the European Union**; and

ii. An **MNE group** or a **large-scale domestic group with annual revenue of at least 750 million euros** based on consolidated financial statements in at least two of the four consecutive fiscal years

- The Directive shall not apply to **Excluded Entities**:
  - Governmental entities, international organisations, non-profit organisations and pension funds;
  - Investment funds and real estate investment vehicles that are an UPEs; and
  - Entities that are owned by one or more excluded entities under certain conditions.

Chapter 1 – General Provisions

Art. 4 - Location of a CE:

An Entity	• Located in jurisdiction where it is tax resident. • In other cases, located in the jurisdiction where it is created.
A Flow-through Entity (fiscally transparent entity)	• If it is the UPE or required to apply the IIR, located in jurisdiction where it is created; • In other cases, treated as a stateless
PE	

	Definition PE	Location PE
a)	PE in accordance with an applicable Tax Treaty and taxed Article 7	Where it is treated and taxed under the Tax Treaty
b)	PE in accordance with national corporate income tax system	Where it is subject to taxation based on its business presence
c)	PE in accordance with OECD MTC	Where it is situated
d)	Operations are conducted outside the jurisdiction and such jurisdiction exempts the income	Stateless PE

Special rules for **dual-located entities**

Pillar 2 Directive

Chapter 1: General Provisions
Chapter 2: Application of the Income Inclusion Rule (IIR) and the Undertaxed Payments Rule (UTPR)
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Chapter 4: Computation of Adjusted Covered Taxes
Chapter 5: Computation of the Effective Tax Rate and Top-up Tax
Chapter 6: Special Rules for Mergers and Acquisitions
Chapter 7: Tax Neutrality and Distribution Regimes
Chapter 8: Administrative Provisions
Chapter 9: Transition Rules
Chapter 10: Specific Application of the IIR to Large-Scale Domestic Groups
Chapter 11: Final Provisions

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Chapter 2 – Application of the IIR

Art. 5, 6, 7, 8 and 9 - Income Inclusion Rule (IIR):

Application of the IIR by:

- **Ultimate Parent Entity (UPE):** an entity that owns a Controlling Interest in any other Entity and is not owned by another Entity
- **Intermediate Parent Entity (IPE):** CE that owns an Ownership Interest in another CE in the same MNE Group
- **Partially-Owned Parent Entity (POPE):** CE that owns and Ownership Interest in another CE of the same MNE Group and has more than 20% of the Ownership Interest in its profits held by third parties.

EU Fundamental Freedoms:

- IIR applies to **both domestic and foreign low-taxed CEs** (as well as to **large-scale domestic groups).**

Ordering rules:

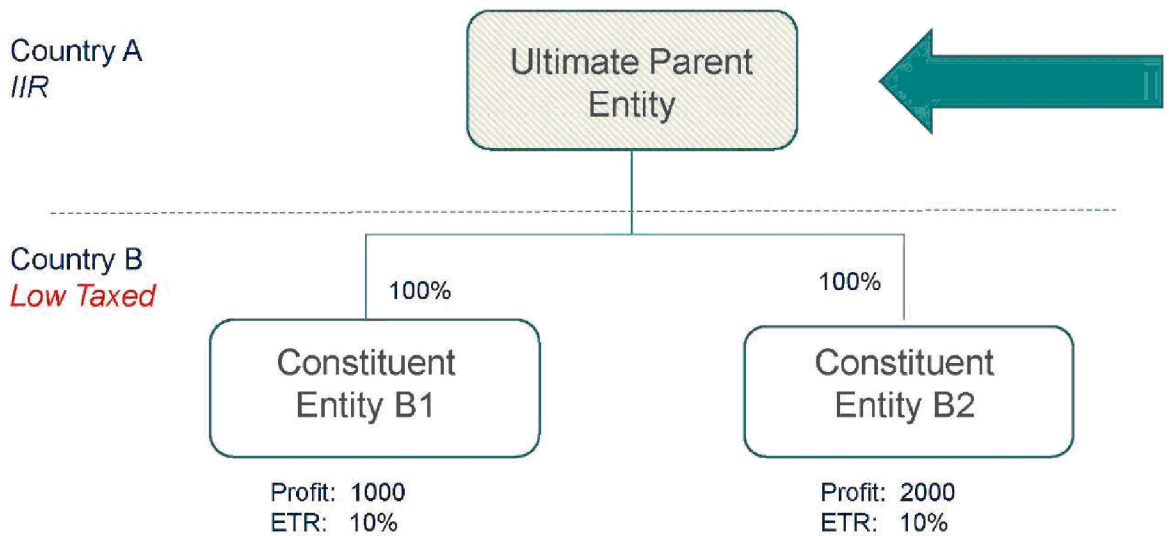
- **Top-down Approach:** give priority to the UPE or the IPE with the controlling interest at the top of the ownership chain to apply the IIR
- **Split-ownership:** push-down the primary obligation to apply the IIR to the POPE

Mechanisms:

- **Inclusion Ratio:** $\frac{\text{Qualifying Income of Low-Taxed CE – amount attributable to Ownership Interest held by other owners}}{\text{Qualifying Income of Low-Taxed CE}}$
- **IIR Offset Mechanism:** reduction of the Top-up Tax by an Upper-Tier Parent Entity where that amount has already brought into charge under a Qualified IIR applied by a Lower-Tier Parent Entity ('Bottom-up Approach')

Chapter 2 – Application of the IIR

Example IIR - UPE:



- The UPE is located in a jurisdiction that applies the IIR
- The minimum tax rate is 15%
- UPE is subject to IIR top-up tax relating to CE B1 and CE B2:
  - CE B1: EUR 50 (1000 * (15% - 10%))
  - CE B2: EUR 100 (2000 * (15% - 10%))

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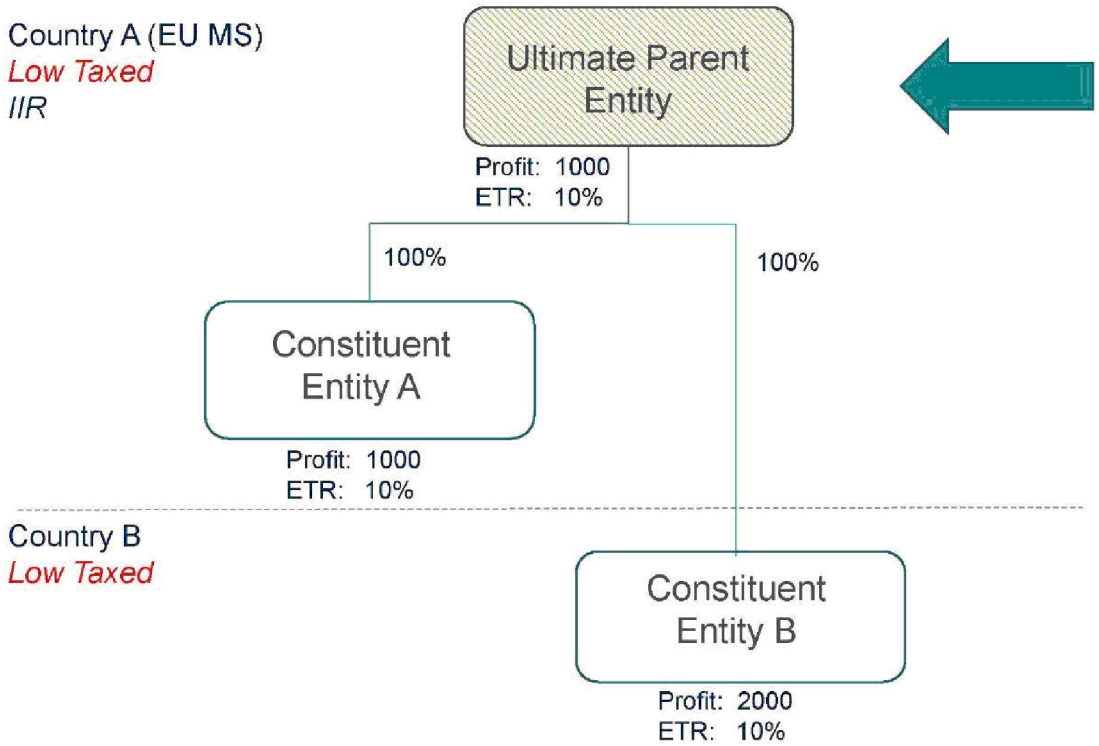
Chapter 2 – Application of the IIR

Example IIR – EU Fundamental Freedoms:



- The UPE is located in a jurisdiction that applies the IIR.
- The minimum tax rate is 15%.
- UPE is subject to IIR top-up tax relating to CE A, CE B and itself:
  - CE A: EUR 50 (1000 * (15% - 10%))
  - CE B: EUR 100 (2000 * (15% - 10%))
  - UPE: EUR 50 (1000 * (15% - 10%))
- For application of the IIR to **large-scale domestic groups** see Chapter 10.

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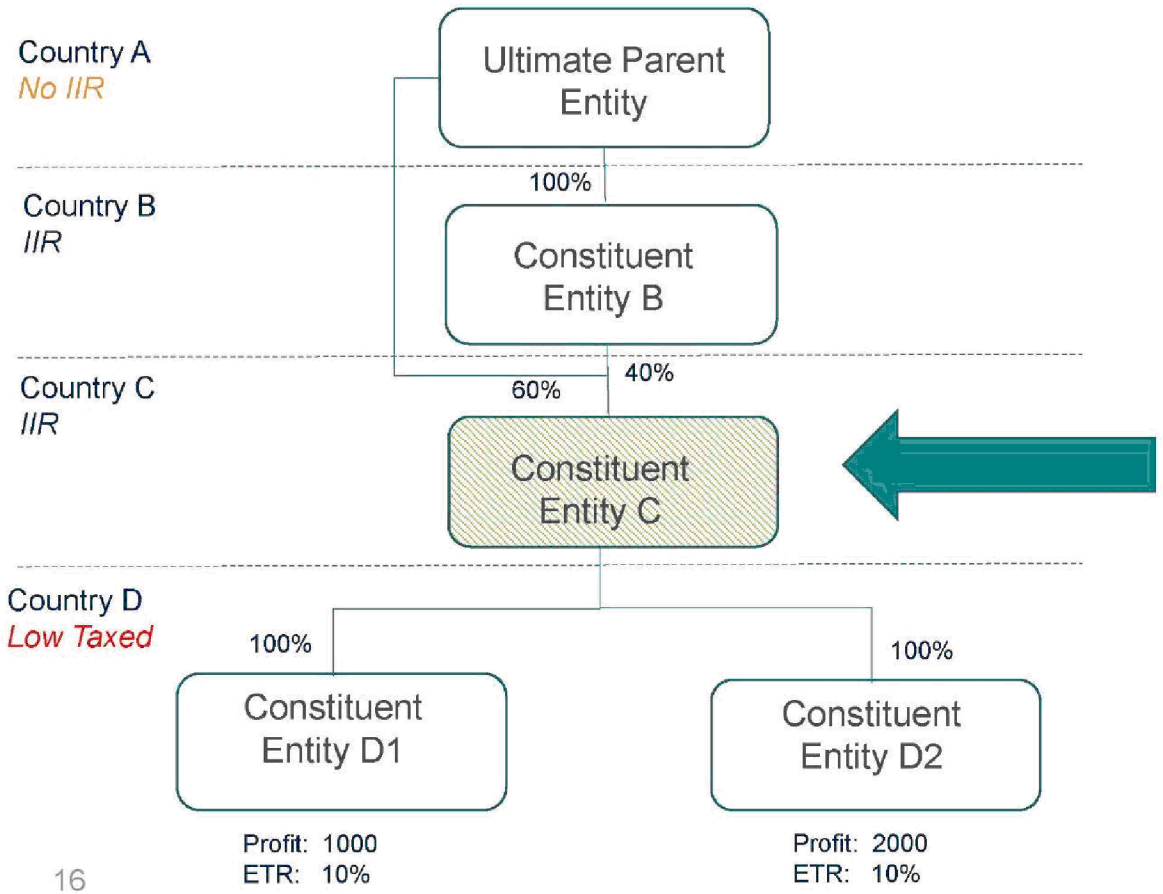
Chapter 2 – Application of the IIR

Example IIR – IPE:



- The UPE is located in a jurisdiction that does not apply the IIR
- The minimum tax rate is 15%
- CE B and CE C are considered as **IPEs**
- Through the '**Bottom-up approach**', CE C is subject to IIR top-up tax in respect of CE D1 and CE D2:
  - CE D1: EUR 50 (1000 * (15% - 10%))
  - CE D2: EUR 100 (2000 * (15% - 10%))
- CE B will apply the IIR Offset Mechanism

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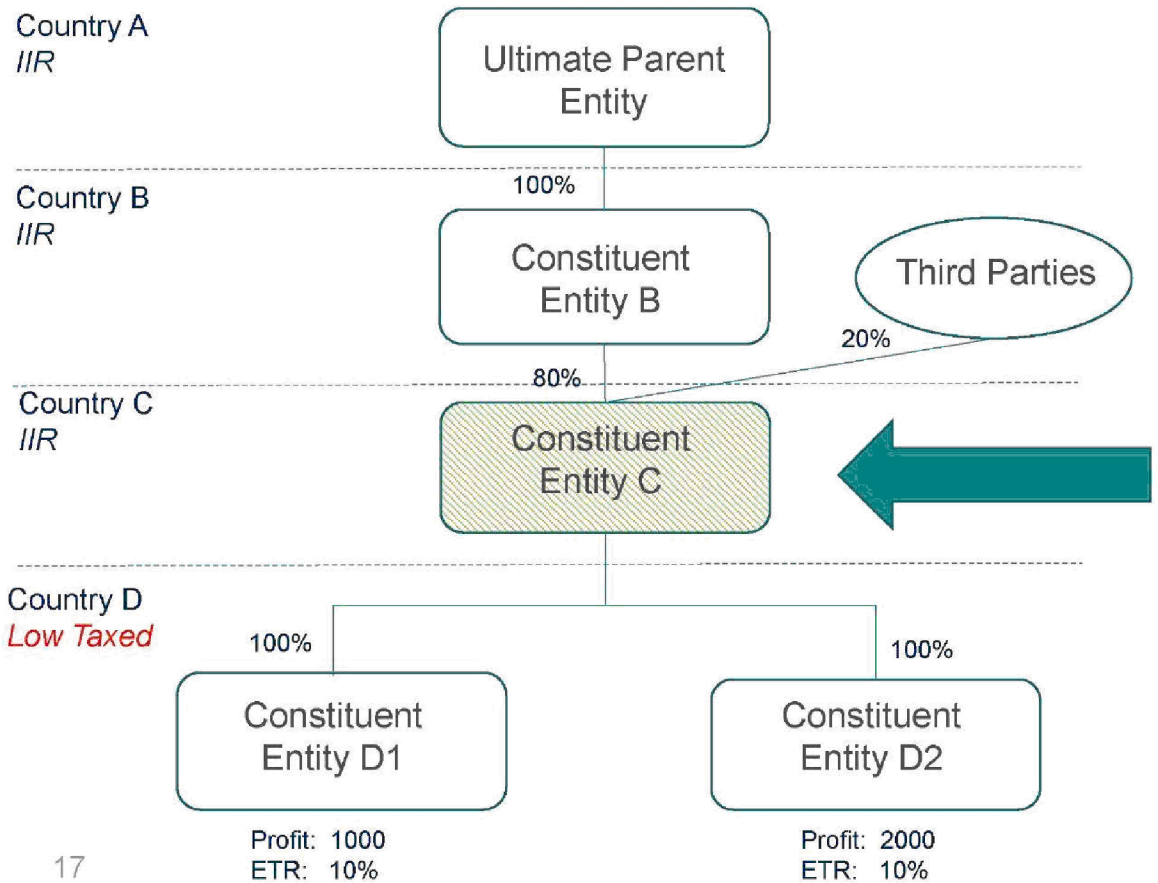
Chapter 2 – Application of the IIR

Example IIR – POPE:



- The UPE is located in a jurisdiction that applies the IIR
- The minimum tax rate is 15%
- CE C is a **POPE**
- Through the **Split-ownership rule,** CE C is subject to IIR top-up tax in respect of CE D1 and CE D2:
  - CE D1: EUR 50 (1000 * (15% - 10%))
  - CE D2: EUR 100 (2000 * (15% - 10%))
- UPE will apply the IIR Offset Mechanism

European Commission

Chapter 2 – Application of the IIR

Art. 10 – Election to apply a qualified domestic top-up tax (Qualified DMTT):

- Member States can opt to apply the top-up tax domestically to constituent entities located in their territory. It provides that the **top-up tax could be charged locally**.
- IIR top-up tax shall be **reduced** by qualified domestic top-up tax.
- **Recalculation** at level of the parent entity if not paid within 3 years.
- Definition qualified DMTT:

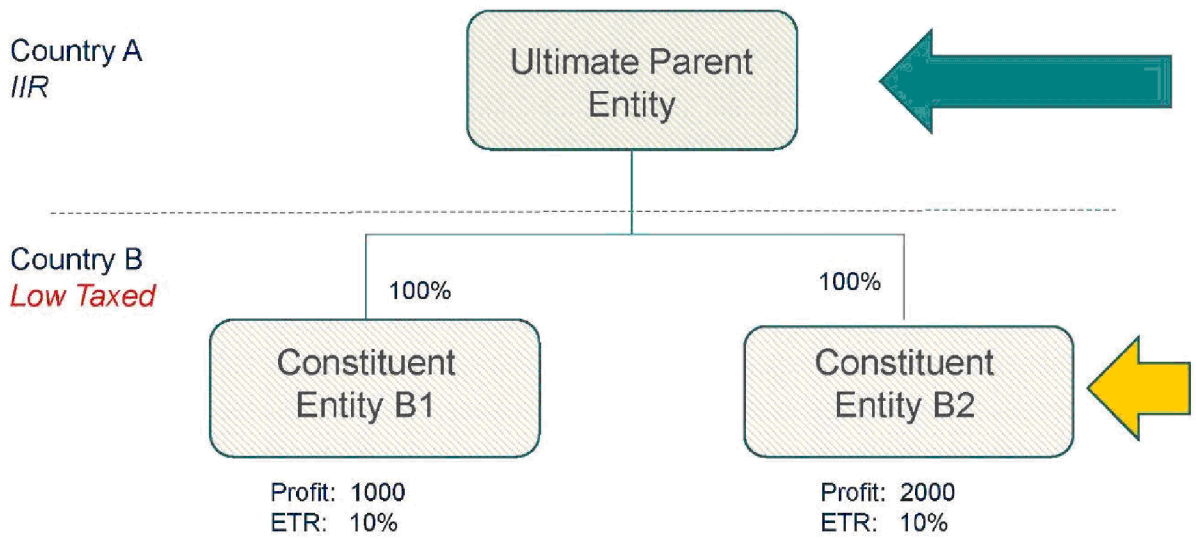
'qualified domestic top-up tax' means a top-up tax that is implemented in the domestic law of a jurisdiction and that:

a) provides for the determination of the excess profits of the constituent entities located in that jurisdiction in accordance with the rules laid down in this Directive and the application of the minimum tax rate to those excess profits for the jurisdiction and the constituent entities in accordance with the rules laid down in this Directive; and

b) is implemented and administered in a way that is consistent with the rules laid down in this Directive and does not allow the jurisdiction to provide any benefits that are related to those rules;

Chapter 2 – Application of the IIR

Example IIR – Qualified DMTT:



- The UPE is located in a jurisdiction that applies the IIR
- The minimum tax rate is 15%
- Country B makes use of the option to apply the DMTT. CE B1 and CE B2 are subject to DMTT for the following amounts:
  - CE B1: EUR 50 (1000 * (15% - 10%))
  - CE B2: EUR 100 (2000 * (15% - 10%))
- UPE is subject to IIR top-up tax relating to CE B1 and CE B2. The DMTT levied in Country B reduces the IIR top-up tax in Country A.

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Chapter 2 – Application of the UTPR

Art. 11, 12 and 13 - Undertaxed Payments Rule (UTPR):

Subject to the UTPR :

- CEs located in the EU related to (domestic or foreign) low-taxed CEs.
- Not apply to CEs that are an **Investment Entities.**

Ordering rules:

- Any top-up tax under Qualified DMTT and Qualified IIR related to (domestic or foreign) low-taxed CEs will have priority.

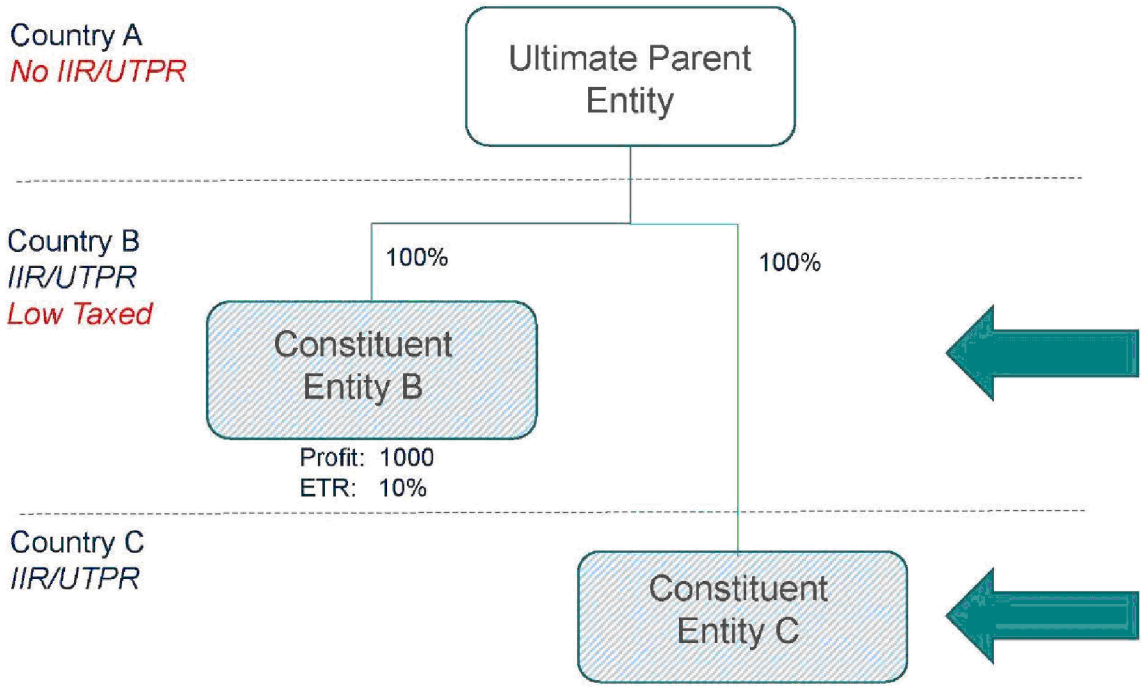
Allocation mechanism:

- Allocation among the UTPR jurisdictions based on the **UTPR percentage:**

$$50\% \frac{\text{Number of Employees in the jurisdiction}}{\text{Number of Employees in all UTPR jurisdictions}} + 50\% \frac{\text{Tangible assets in the jurisdiction}}{\text{Tangible assets in all UTPR jurisdictions}}$$

Chapter 2 – Application of the UTPR

Example – UTPR:

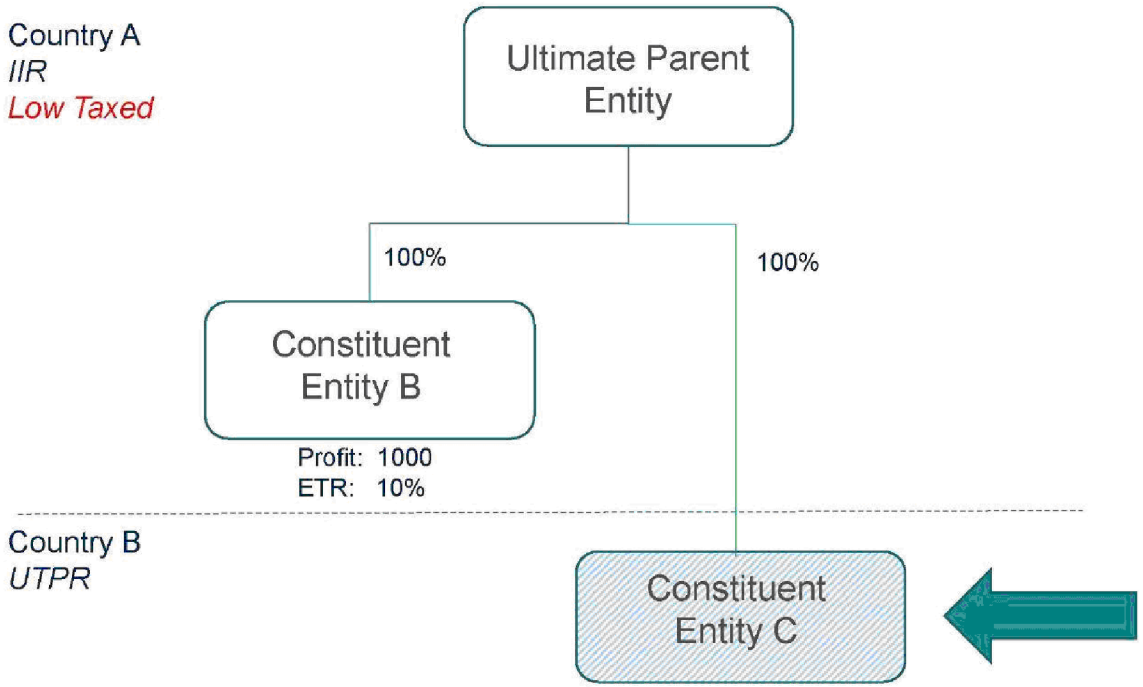


- The UPE is located in a jurisdiction that **does not** apply the IIR
- The minimum tax rate is 15%
- As there is no Qualified IIR, the **UTPR applies as a 'backstop' rule**
- CE B and CE C are subject to UTPR top-up tax in relation to the low-taxed CE B:
  - CE B: EUR 50 (1000 * (15% - 10%))
- **Allocation** among CE B and CE C based on number of employees and tangible assets; UPE not entitled to a share of top-up tax

European Commission

Chapter 2 – Application of the UTPR

Example – UTPR in the UPE jurisdiction:



- The UPE is located in a jurisdiction that applies the IIR, but **only in relation to foreign low-taxed CEs**.
- The minimum tax rate is 15%
- As there is no Qualified IIR in relation to CE B, the **UTPR applies as a 'backstop' rule**
- CE C is subject to UTPR top-up tax in relation to the low-taxed CE B:
  - CE B: EUR 50 (1000 * (15% - 10%))
-

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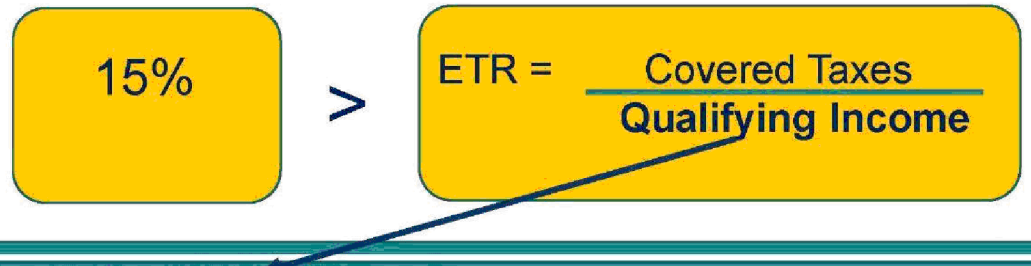
Chapter 3 – Computation of the Qualifying Income or Loss

Art. 14 – Determination qualifying income or loss

For determining low-taxed CEs:



Basis Qualifying Income:

Financial Accounting Net Income or Loss

→ Based on accounting standard used in preparation of **Consolidated Financial Statements of UPE**; or

→ If not reasonably practicable, may be determined using **another Acceptable Financing Accounting Standard or an Authorised Financial Account Standard** under certain conditions.

Adjustments:

1. Adjustments (art. 15)
2. Exclusion International **Shipping Income and Qualified Ancillary International Shipping Income** (art. 16);
3. Allocation Qualifying Income or Loss **between PE and Main Entity** (art. 17);
4. Allocation Qualifying Income or Loss from a **Flow-through Entity** (art. 18).

Chapter 3 – Computation of the Qualifying Income or Loss

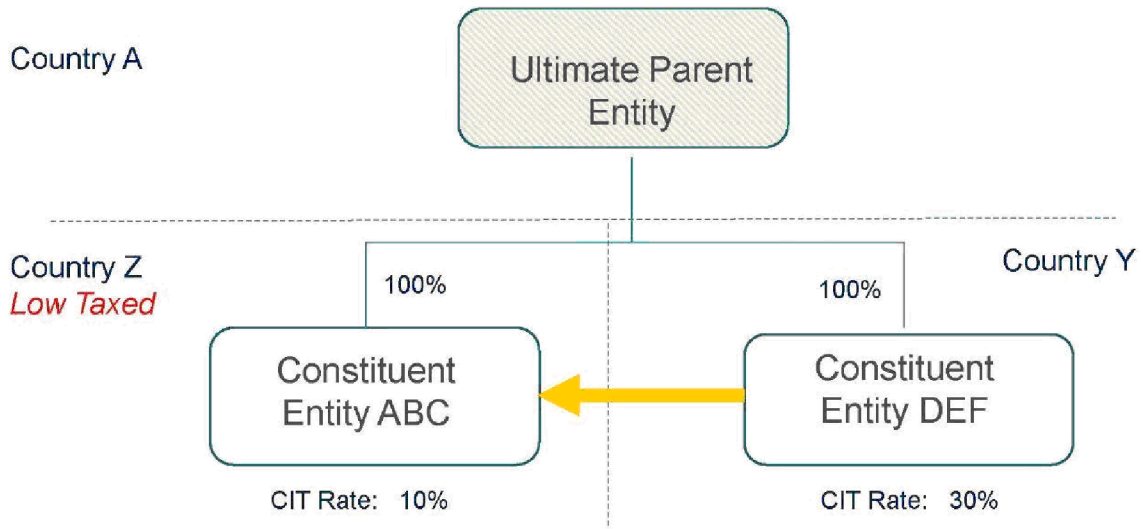
Art. 15 - Adjustments to determine the qualifying income or loss

Purpose: Bring it more in line with the computation of taxable income under a general corporate income tax and prevent double taxation of the MNEs income. Many of these adjustments relate to permanent differences:

1./ 2.	Net Taxes Expenses; Excluded Dividends; Excluded Equity Gain or Loss; Included Revaluation Method Gain or Loss; Gain or loss from disposition of assets and liabilities excluded under Art. 63; Asymmetric Foreign Currency Gain or Loss; Policy Disallowed Expenses; Prior Period Errors and Changes in Accounting Principles; and Accrued Pension Expenses;	7.	Possibility for an election to **spread the effect** of locally exempt gains from the sale of **certain tangible assets;**
3.	Possibility for an election relating to **stock-based compensation;**	8.	Exclusion expenses **intra-group financing arrangements** which increased the amount of expenses of the low-tax entity, without resulting in an increase of the high-tax counterparty (Prof. De Wilde);
4.	Adjustments to make transaction between CEs located in different jurisdictions consistent with the **Arm's Length Principle**;	9.	Possibility for an election to **mitigate the requirement to apply the Arm's Lengths Principle** to transactions between CEs located in the same jurisdiction;
5.	**Qualified Refundable Tax Credits and non-Qualified Refundable Tax Credits;**	10.	Exclusion of certain income of an **insurance company;**
6.	Possibility for an election to **use the realisation principle** for assets that are accounted for using the fair value method or impairment accounting;	11.	Decreases or increases to equity in relation to **additional tier one capital;**

Chapter 3 – Computation of the Qualifying Income or Loss

Example art. 15(8):



Facts & Circumstances:

- Financial instrument is put in place between CE ABC and CE DEF.
  For financial accounting purposes is **debt** and for tax purposes is **equity**.

Consequences:

- Interest expenses at level of CE ABC and interest income at level of CE DEF
- Qualifying income CE ABC decreases and CE DEF increases.
- Covered taxes CE ABC and CE DEF do not change.
- Without art. 15(8) **ETR of CE ABC increases** and **ETR of CE DEF decreases**.

- With art. 15(8) the **interest expense deduction at CE ABC will be denied**.

Chapter 3 – Computation of the Qualifying Income or Loss

Art. 16 – International shipping income exclusion:

Excludes from the scope the profits from transportation of passengers or cargo by ships in international traffic

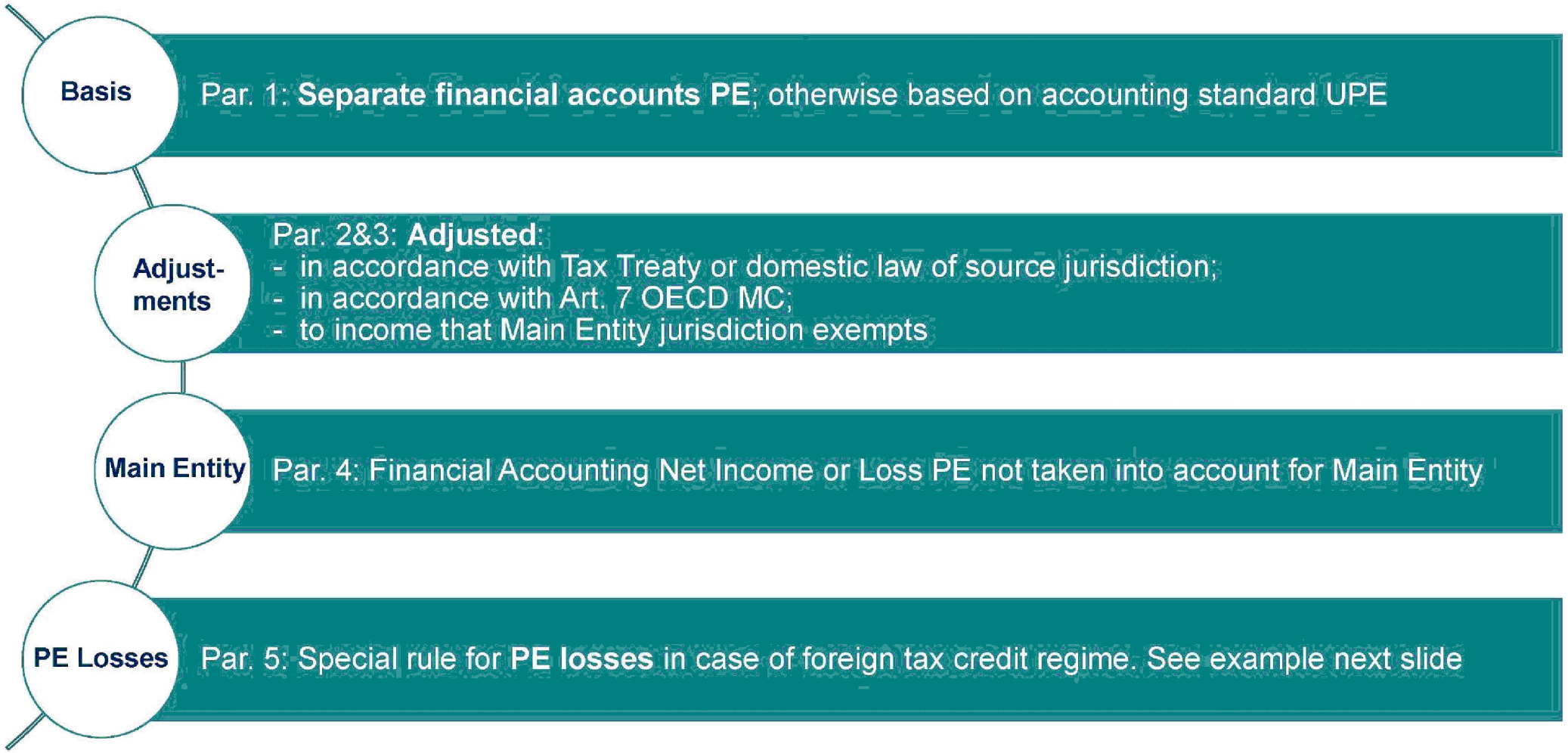
Based on the scope of **Article 8 OECD MC**

Exclusion also applies to certain **ancillary activities**. Must be performed primarily in connection with. Not exceed 50%.

Substance criterion to ensure that strategic or commercial management of ships is effectively carried on from jurisdiction where CE is located

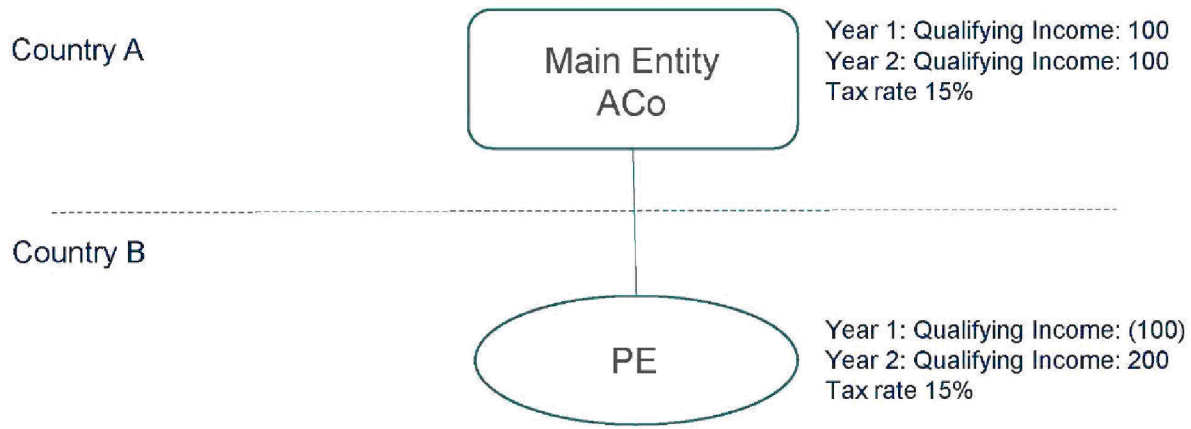
Chapter 3 – Computation of the Qualifying Income or Loss

Art. 17 - Allocation qualifying income or loss between Main Entity and PE:



Chapter 3 – Computation of the Qualifying Income or Loss

Example PE losses:



- ACo:

	Year 1	Year 2
Qualifying income/loss	100	100
PE income/loss allocated to Aco	(100)	100
Net qualifying Income	0	200
Covered Taxes	0	30

Y1: follow local treatment to avoid preference for PE exemption regimes.
Y2: recapture PE loss

- PE:

	Year 1	Year 2
Qualifying income/loss	(100)	200
Income/loss allocated PE	100	(100)
Net Qualifying Income	0	100
Covered Taxes	0	15

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Chapter 3 – Computation of the Qualifying Income or Loss

Art. 18 - Allocation qualifying income or loss of a Flow-through Entity:

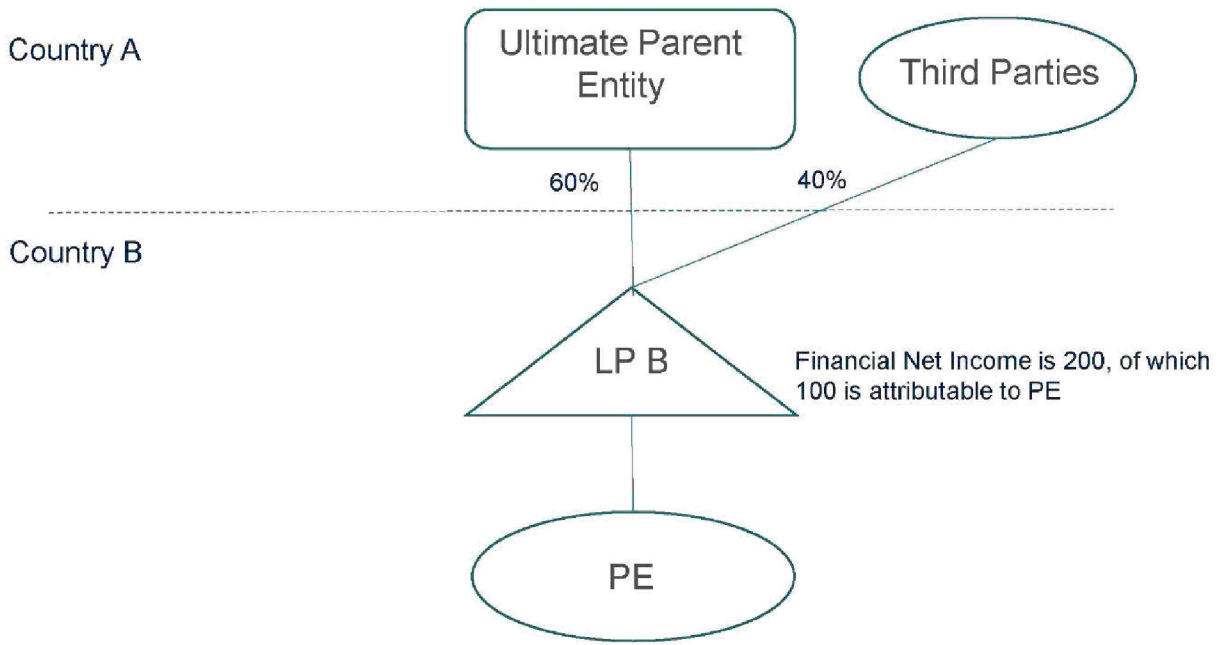
1. Financial Accounting Net Income or Loss of the Flow-through Entity has to be reduced by the amount attributable **to the owners that are not members of the MNE Group**

2. Financial Accounting Net Income or Loss of the Flow-through Entity has to be reduced by **Financial Accounting Net Income or Loss of the PE**

3. Remaining amount is allocated:
   - If Flow-through Entity as Tax Transparent Entity (other than UPE) → **allocated to CE owners**
   - If Flow-through Entity is Reverse Hybrid → **allocated to the entity**

Chapter 3 – Computation of the Qualifying Income or Loss

Example allocation Flow-through Entity:



Financial Accounting Net Income or Loss of Flow-through Entity	200
1. Attributable to third parties = 80 (200 x 40%)	120
2. Attributable to PE = 60 (100 x 60%)	60
3. Attributable to UPE = 60 (100 x 60%)	0

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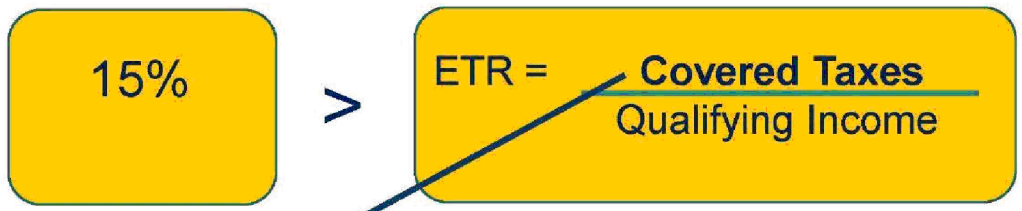
Chapter 4 – Computation of Adjusted Covered Taxes

Art. 19 – Covered taxes:

For determining Low-Taxed CEs:



Covered taxes

See definition (art. 19).

Adjusted covered taxes:

Basis: Current tax expense accrued in its financial accounting net income or loss with respect to covered taxes

Adjusted by:

- Additions (par. 2) & reductions (par. 3);
- Total Deferred Tax Adjustment Amount (art. 21);
- Any increase of decrease in covered taxes recorded in equity or other comprehensive income relating to amounts included in the computation of qualifying income or loss that will be subject to tax.

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Chapter 4 – Computation of Adjusted Covered Taxes

Art. 19 – Covered taxes:

Covered taxes shall be:

a) taxes **accrued in the financial accounts of a constituent entity** with respect to its income or profits, or its share of the income or profits of a constituent entity in which it owns an ownership interest;

b) taxes on **distributed profits, deemed profit distributions, and non-business expenses imposed under an eligible distribution tax system**;

c) taxes imposed **in lieu of a generally applicable corporate income tax**; and

d) taxes levied **by reference to retained earnings and corporate equity**, including taxes on multiple components based on income and equity.

Covered taxes shall not include:

a) the top-up tax accrued by a parent entity under a **qualified income inclusion rule**;

b) the top-up tax accrued by a constituent entity under a **qualified domestic top-up tax**;

c) taxes attributable to an adjustment made by a constituent entity as a result of the application of a **qualified undertaxed payment rule**;

d) a **disqualified refundable imputation tax**;

e) **taxes paid by an insurance company** in respect of returns to policyholders.

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 20 – Adjusted covered taxes:

Additions (par. 2):		Reductions (par. 3):	
a)	**Covered Taxes accrued as an expense** in the profit before taxation in the financial accounts;	a)	Current tax expense with respect to income **excluded** from the computation of qualifying income or loss **under Ch 3;**
b)	**Qualifying loss deferred tax assets** (art. 22(3));	b)	Credit or refund in respect of a **Non-qualified refundable tax credit** that is not recorded as a reduction to the current tax expense;
c)	Covered taxes relating to an **uncertain tax positions** where that amount has been treated as a reduction to covered taxes under art. 3(d);	c)	Covered Taxes **refunded or credited** (except qualified refundable tax credits) to a CE that was **not treated as an adjustment** to current tax expense in the financial accounts;
d)	Credit or refund in respect of **qualified refundable tax credit** that is recorded as a reduction to the current tax expense.	d)	Current tax expense which relates to an **uncertain tax position;**
		e)	Current tax expense that is not **expected to be paid within 3 years.**

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Chapter 4 – Computation of Adjusted Covered Taxes

Art. 20(4) and 20(5) – Adjusted covered taxes:

- No amount of covered taxes may be taken into account more than once.

- Where there is a net qualifying loss in a jurisdiction and the amount of adjusted covered taxes for that jurisdiction is negative and less than the amount resulting from the multiplication of the qualifying loss by the minimum rate, the constituent entities in that jurisdiction shall be liable to **additional top-up tax** on the difference between the two amounts.
  - Designed to **prevent incremental tax benefit or arbitrage generation** in a year in which a MNE Group has a qualifying loss and a permanent difference in the same jurisdiction

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 21 – Total deferred tax adjustment amount

Total Deferred Tax Adjustment Amount (DTAA) (par. 1):

Basis:

- Deferred tax expense accrued in the financial accounts of the CE.
- Recast at METR, to the extent they have been recorded at a rate in excess of METR.
- See example next slide.

Exclusions (par. 4):

a) Amount with respect to items excluded from the computation of the qualifying income or loss under Chapter 3;
b) Amount with respect to disallowed accruals and unclaimed accruals;
c) Impact of valuation adjustment or accounting recognition with respect to a deferred tax assets;
d) Amount arising from re-measurement with respect to a change in the applicable domestic tax rate;
e) Amount with respect to the generation and use of tax credits.

Adjustments (par. 2&3):

- Increased by disallowed accrual or unclaimed accrual paid during fiscal year;
- Increased by any recaptured deferred tax liability determined in a preceding fiscal year which has been paid during the fiscal year;
- Reduced by amount that would be a reduction to the DTAA due to recognition of a loss deferred tax asset for a current year tax loss, where a loss deferred tax asset has not been recognised because the recognition criteria are not met.

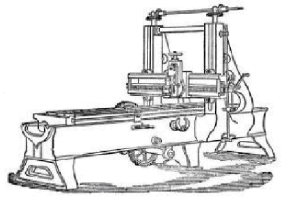
Chapter 4 – Computation of Adjusted Covered Taxes

Example Total Deferred Tax Adjustment Amount (DTAA):

Country A
Tax rate 30%

Company A

Buy asset 100



Financial accounting purposes:

Income:	100
Depreciation	20
Tax purposes:	
Income	100
Expenses	100
Tax Rate:	30%

Treatment asset:

- Financial accounting purposes: depreciate asset in 5 years
- Tax purposes: immediate expensing asset

In case no DTAA:

- ETR: 0% (0/80)
- Top-up tax: 12 (80 * (15% - 0%))

In case DTAA:

- DTAA: 12 (80*15%)
- ETR: 15% (12 / 80)
- Top-up tax: 0 (80 * (15% - 15%))

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Chapter 4 – Computation of Adjusted Covered Taxes

Art. 21 – Total deferred tax adjustment amount

Recasting at METR (par. 6):

- A deferred tax asset that has been recorded at a rate lower than the METR may be **recast at the METR**, if the taxpayer can demonstrate that the deferred tax assets is **attributable to a Qualifying Loss**. The DTAA is reduced by this amount.

Recapturing (par. 7&8):

- Recapture **within 5 years**, to ensure that deferred tax liabilities that do not relate to specific policy allowed categories are actually settled within a certain period of time.
- **Exception applies to the following categories**:
  - Cost recovery allowanced on tangible assets;
  - Costs of licence or similar arrangement from the government for the use of immovable property or exploitation of natural resources that entails significant investment in tangible assets;
  - Research and development expenses;
  - De-commissioning and remediation expenses;
  - Fair value accounting on unrealised net gains;
  - Foreign currency exchange net gains;
  - Insurance reserves and insurance policy deferred acquisition costs;
  - Gains from sale of tangible property located in the same jurisdiction as the CE that are reinvested in tangible property in the same jurisdiction;
  - Additional amounts accrued as a result of accounting principle changes with respect to the above categories.

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 22 – Qualifying loss election

- Possibility for an election to carry forward the qualifying loss deferred tax asset and use it in any subsequent fiscal year

- When revoked any remaining Qualifying Loss Deferred Tax Asset is reduced to zero
- Qualifying loss election must be filed with the first Top-up tax information return
- Special rule for Flow-through Entities that are UPE

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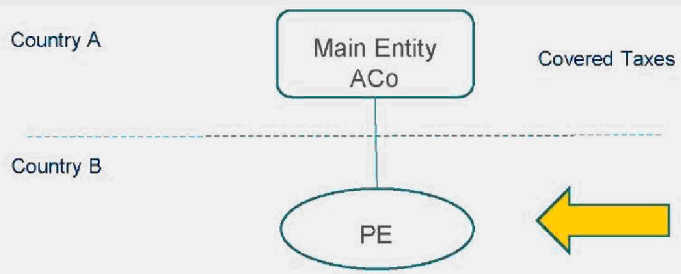
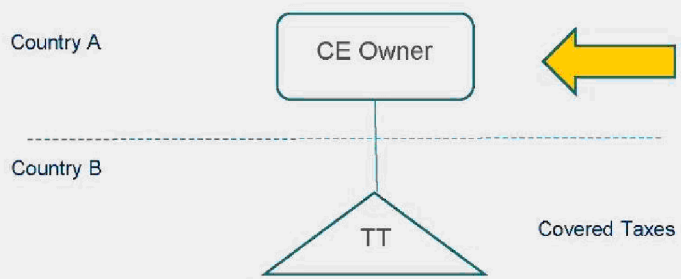
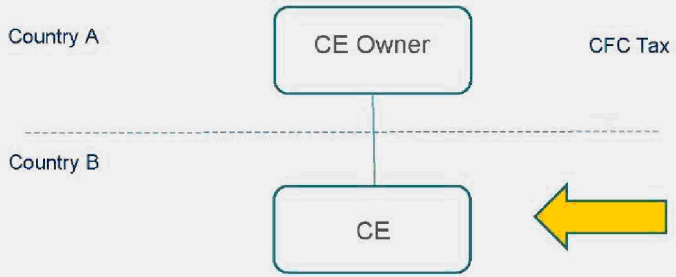
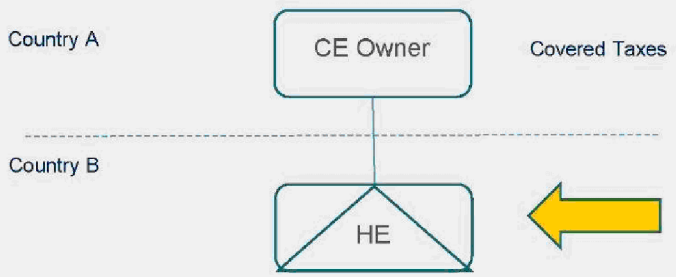
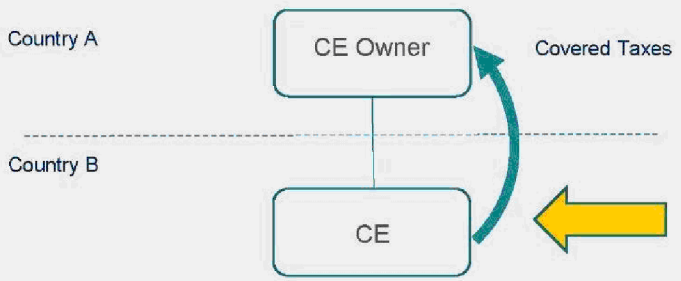
Chapter 4 – Computation of Adjusted Covered Taxes

Art. 23 – Specific allocation of covered taxes incurred by certain types of constituent entities

- In general, covered taxes are allocated to the CE that earned the income
- Special rules to allocate covered taxes related to:

1. Permanent Establishment	
2. Tax Transparent Entities	

Chapter 4 – Computation of Adjusted Covered Taxes

3. Controlled Foreign Company Tax Regime	
4. Hybrid Entities	
5. Distributions	

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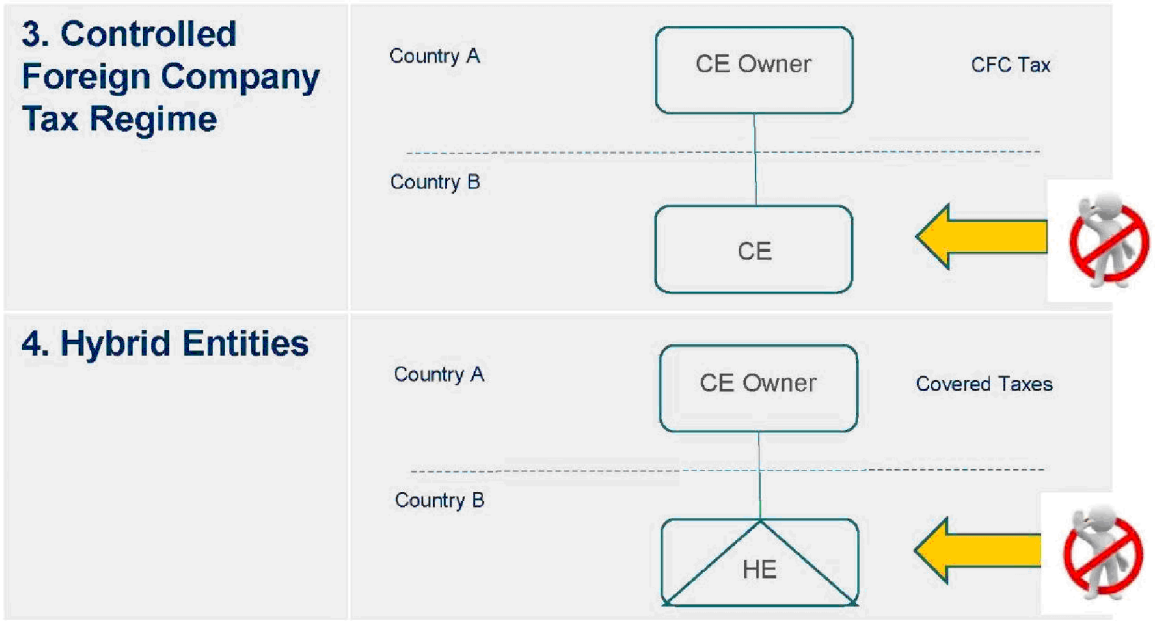
Chapter 4 – Computation of Adjusted Covered Taxes

Art. 23(6) - Limitation on 'push down':



- **Limitation 'push-down'** of taxes relating to a CFC-regime of a Hybrid Entity from CE Owner attributable to **passive income.**
- Ensures integrity of the **jurisdictional blending** rules in relation to highly mobile income.
- Amount equal to the lesser of:
  - Covered Taxes allocated in respect of passive income; or
  - Top-up tax % of low-taxed CE * passive income

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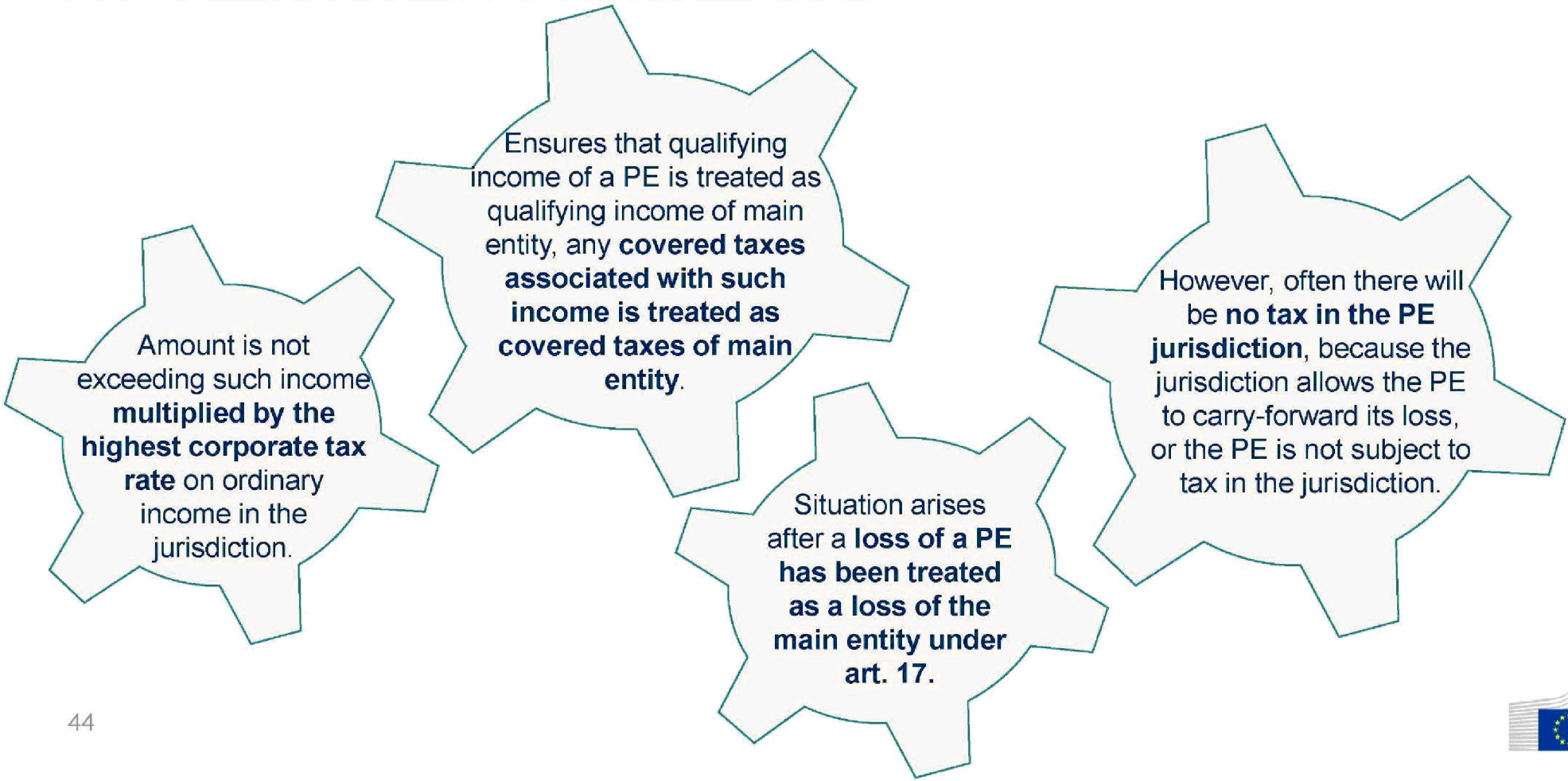
Chapter 4 – Computation of Adjusted Covered Taxes

Art. 23(7) – Covered taxes follow recapture PE losses



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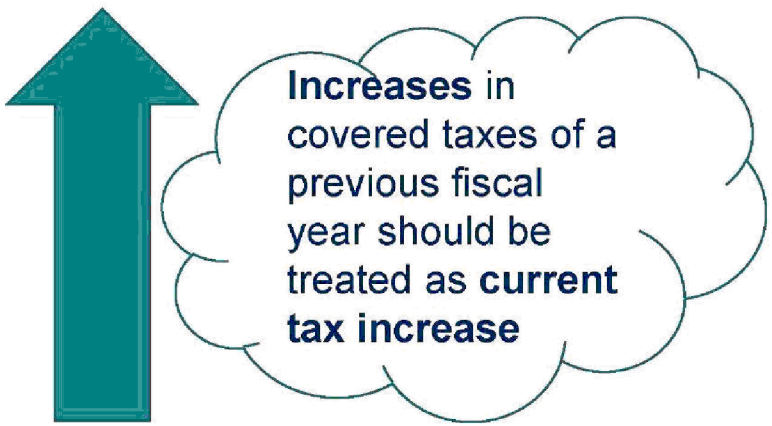
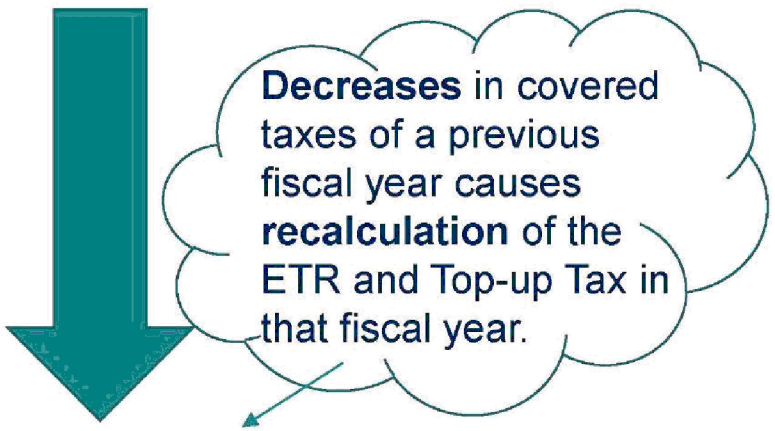
Chapter 4 – Computation of Adjusted Covered Taxes

Art. 24 – Post-filing adjustments and tax rate changes

- An MNE Group's liability for covered taxes may increase or decrease due to various reasons and changes in time.





Possibility for an election to treat an immaterial decrease (i.e. less than EUR 1 million) as adjustment to covered taxes in fiscal year in which adjustment is made.

- These rules also applies when there is a **reduction to the applicable domestic tax rate** to a rate below the METR.
- A **recapture rule** applies when an amount claimed as covered taxes of **more than EUR 1 million is not paid** within **three years**.

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Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 25 - Determination of the effective tax rate

- Calculation **Effective Tax Rate** (per jurisdiction):

$$\frac{\text{Covered Taxes}}{\text{Qualifying Income}}$$

- **Investment entities** excluded.
- **Stateless CEs** calculated separately.

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 26 - Computation of the top-up tax

- Calculation **Top-up Tax** (per jurisdiction):

((15% - ETR) x (Qualifying Income – Substance-based income exclusion)) – Domestic Minimum Top-up Tax

- Calculation **Top-up Tax of CE:**

$$\text{Jurisdictional Top-up Tax} \times \frac{\text{Qualifying income of CE}}{\text{Aggregate Qualifying income of all CEs}}$$

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 27 - Substance-based income exclusion (per jurisdiction):

5% eligible payroll costs of eligible employees + 5% carrying value of eligible tangible assets

Eligible Payroll Costs not include:

- Costs that are capitalised an included in the carrying value of **Eligible Tangible Assets**
- Costs related to **International Shipping Income**

Eligible Tangible Assets are:

- Property, plant and equipment;
- Natural resources;
- A lessee's right of use of tangible assets;
- A licence or similar arrangement from the government for the use of immovable property or exploitation of natural resources that entails significant investment in tangible assets.

Eligible Tangible Assets not include:

- Carrying value of property that is held for **sale, lease or investment**
- Carrying value of tangible assets related to **International Shipping Income**

- Special rules for allocation of Eligible Payroll Costs and Eligible Tangible Assets to **PEs and Flow-through Entities**
- **Investment entities** excluded and **stateless CEs** calculated separately.

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 28 – Additional Top-up Tax

Par. 1: Mechanism performing re-calculations of top-up tax compared to original calculation.

- To the extent recalculated top-up tax exceeds top-up tax originally computed, this shall be **treated as additional top-up tax arising in current Fiscal Year.**
- For ordinary mistakes the normal administrative procedures and rules should be followed.

Par. 2: Mechanism in place in case **no qualifying income** for the current fiscal year

Par. 3: Allocation of additional current top-up tax relating to article 20(5)

Par. 4: Additional top-up tax causes treatment as **low-taxed CE**

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 29 – *De Minimis* Exclusion:

***De Minimis* Exclusion:** When profits of MNE groups' CEs in a jurisdiction are below EUR 1 million and revenues below EUR 10 million, **the top-up tax is deemed to be zero**.

- Take the **average** of the current and the two preceding years into account.
- At **election of Filing CE**
- Shall not apply to **stateless CEs or investment entities**

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Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 30 – Minority-owned CEs:

Definitions:

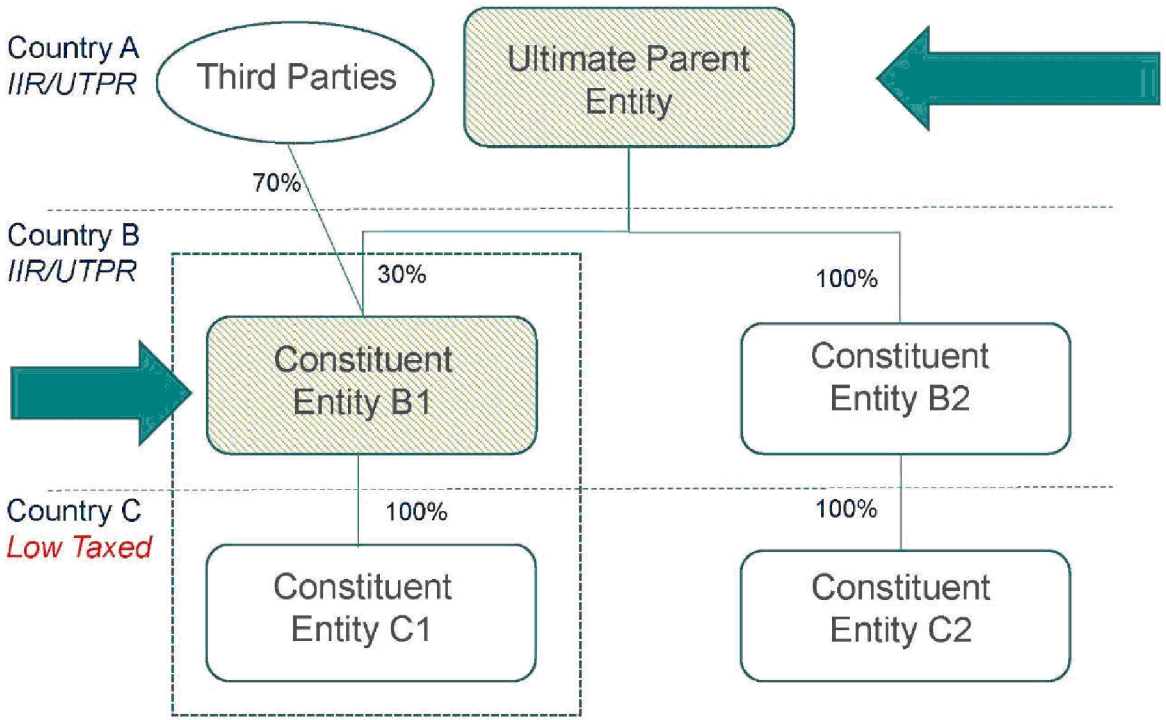
- **Minority-owned CE**: CE of the MNE Group where the UPE holds directly or indirectly 30% or less of its ownership interest
- **Minority-owned parent entity:** Minority-owned CE that holds directly or indirectly the controlling interest of another minority-owned CE.
- **Minority-owned subsidiary:** Minority-owned CE whose controlling interests are held, directly or indirectly, by a minority-owned parent entity.
- **Minority-owned subgroup:** Minority Owned parent entity and its minority-owned subsidiaries

Consequences:

- **Minority-owned subgroup:** The ETR and top-up tax for a jurisdiction should be computed as if the Minority-owned subgroup is a separate MNE Group. No changes of the mechanics itself.
- **Minority-owned subsidiary which is not a member of a Minority-owned subgroup**: The ETR and top-up tax should be computed on an entity basis. No changes of the mechanics itself.

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Example Minority-owned CEs:



- The ETR and top-up tax for CE C1 and CE CE C2 should be calculated **separately**.
- No changes of the mechanics itself.
  - UPE is subject to IIR relating to CE C2.
  - CE B1 (POPE) is subject to IIR relating to CE C1.

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Chapter 6 – Special Rules for Mergers and Acquisitions

Art. 31 – Application of consolidated revenue threshold to group mergers and demergers:

- **Revenue threshold:**

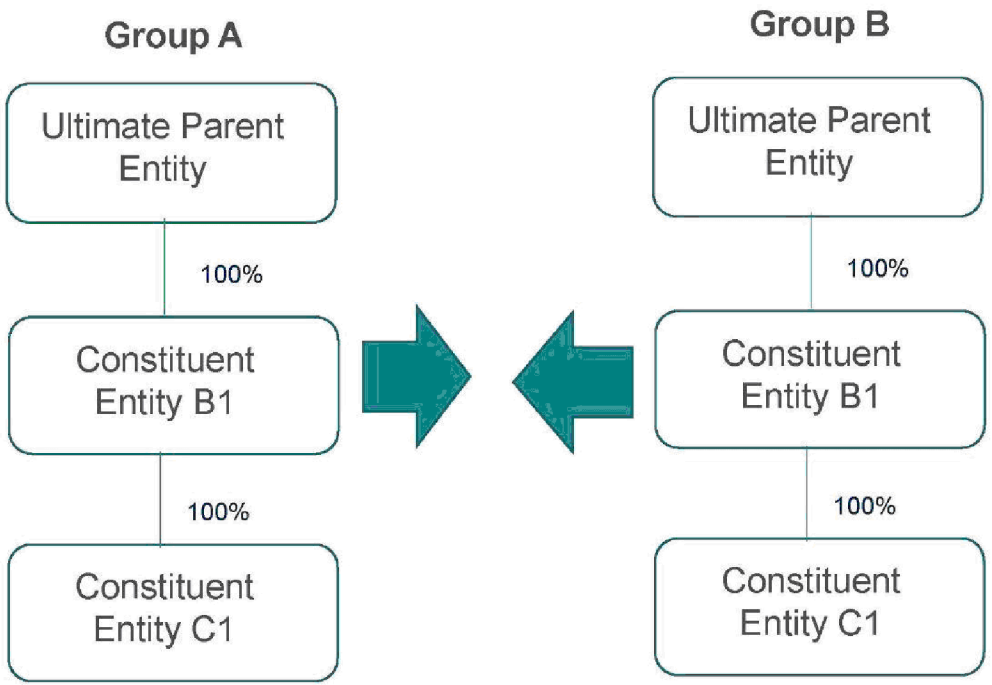
A **combined group turnover of at least 750 million euros** based on consolidated financial statements in at least two of the four preceding fiscal years.

- **In case of mergers or demergers:**

Situation	Determination revenue threshold
a) **Two or more groups merge** to form a single group	**Sum of revenue** included in each of the consolidated financial statements.
b) Two **single entities** merge to form a group or one single entity becomes part of a group	**Sum of revenue** included in each of the financial statements or consolidated financial statements
c) Single MNE group **demerges into two or more groups**	i) **First tested year**: demerged group has annual revenues of EUR 750 or more; ii) **Second to fourth tested year**: demerged group has annual revenues of EUR 750 or more in at least two years following the demerger.

Chapter 6 – Special Rules for Mergers and Acquisitions

Example Merger:



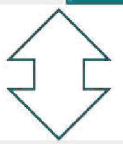
- Group A consolidated revenue:
  - Year 1: 400
  - Year 2: 300
  - Year 3: 300
  - Year 4: 400
- Group B consolidated revenue:
  - Year 1: 500
  - Year 2: 200
  - Year 3: 100
  - Year 4: 600
- Merged AB Group is **subject to the Directive**, because in 2 of the 4 preceding fiscal years the sum of consolidated revenue was greater than EUR 750 (year 1: 900 and year 4: 1,000).

European Commission

Chapter 6 – Special Rules for Mergers and Acquisitions

Art. 32 – CEs joining and leaving an MNE group

1.	Target will be treated as a **member of the group** for the purpose of the Directive if any portion of its assets, liabilities, income, expenses or cash flows are included in the **Consolidated Financial Statements of the UPE.**	5.	The computation of the **eligible tangible assets** (for substance-based income exclusion), shall be adjusted proportionally to correspond the length of the year.
2.	In the acquisition year, take the **Consolidated Financial Statements of the UPE** into account for the determination of the financial accounting net income or loss and adjusted covered taxes of the target.	6.	Transfer **dta's and dtl's shall take into account in the same manner and to the same extent** as if the acquiring MNE Group controlled the CE when assets and liabilities arose.
3.	In acquisition year and each succeeding year, the target shall use the **historical carrying value of assets and liabilities.**	7.	**Total deferred tax adjustment** amount shall be treated as reversed by disposing MNE Group and treated as arising by acquiring group.
4.	For computing the **eligible payroll costs** (for substance-based income exclusion), the costs in the Consolidated Financial Statements of the UPE shall be taken into account.	8.	If target is a parent entity, then it should **apply the IIR separately for each MNE Group.**



9.	The acquisition or disposal of a controlling interest in a target shall be **treated as an acquisition or disposal of assets and liabilities** under certain circumstances.

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Chapter 6 – Special Rules for Mergers and Acquisitions

Art. 33 – Transfer of assets and liabilities

1. Acquisition or disposition in case there is no reorganisation
   → Follow accounting treatment

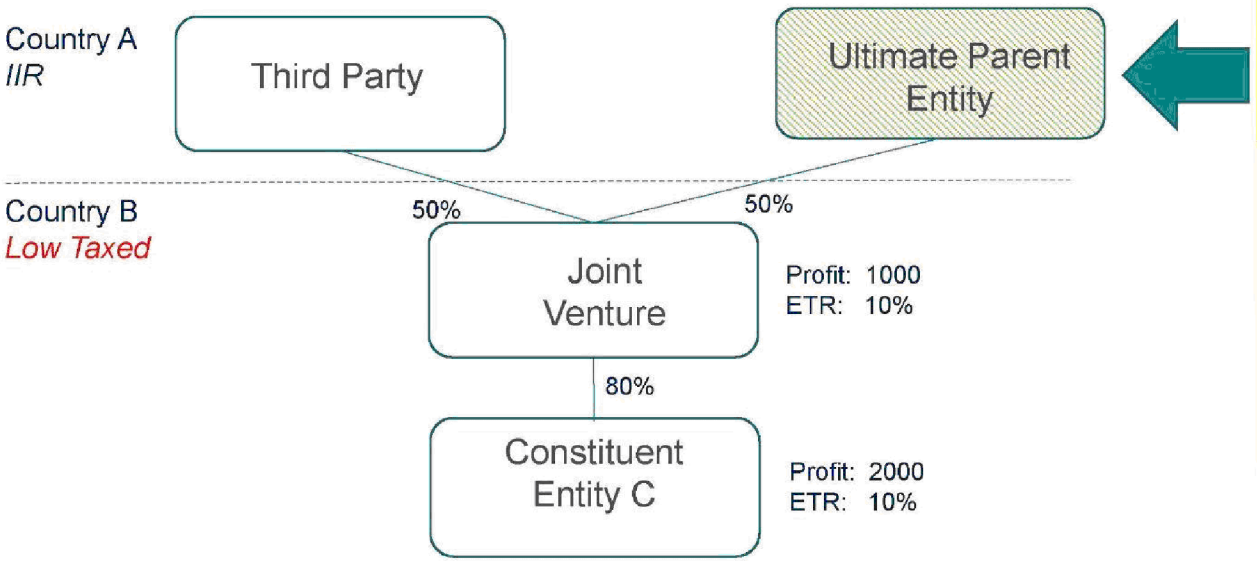
2. Acquisitions or disposition in case there is a reorganisation
   → Align tax deferral treatment of reorganisations under domestic law

3. Acquisitions or disposition in case there is reorganisation where a taxable gain (or loss) is recognised
   → Align with taxable gain under domestic law

4. Possibility for an election in case permitted or required to adjust assets & liabilities to fair value.
   → CE may elect to recognize gain or loss and adjust the carrying value to fair value

Chapter 6 – Special Rules for Mergers and Acquisitions

Art. 34 - Joint ventures



Joint Ventures:

- Bring Joint Ventures and its affiliates into the scope, but only with respect to the UPE's share.

Example:

- UPE is subject to IIR top-up tax relating to Joint Venture and CE C:
  - JV: EUR 25
    (50%* (1000*(15% - 10%)))
  - CE C: EUR 40
    (50%*80%*(2000*(15% - 10%)))

European Commission

Chapter 6 – Special Rules for Mergers and Acquisitions

Art. 35 – Multi-Parented Groups (MPG)

Situation in which two or more Groups prepare Consolidated Financial Statements in which the Groups are presented as a single economic unit in accordance with a **on Dual-listed or stapled structure**

Special rules :

- Entities and CE of each Group are treated as members of a **single MNE Group**. An entity shall be **treated as a CE** if it's consolidated on a line-by-line basis or its controlling interest is held by entities in the MPG;
- Consolidated Financial Statements of the MPG shall be the **Consolidated Financial Statements referred in the Stapled Structure or Dual-listed arrangements** prepared under Acceptable Financial Accounting Standard;
- The UPEs of the separate Groups shall be **the UPEs of the MPG**;
- Parent entities of the MPG shall apply the IIR with respect to their **allocable share of top-up tax of the low-taxed CE**;
- The CEs of the MPG shall **apply the UTPR** taken into account the top-up tax of each low-taxed CE of the MPG;
- The UPEs are required to submit the **Top-up tax information return**.

Pillar 2 Directive

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European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

Art. 36 – UPE that is a flow-through entity

Background:

- As the owners of a **tax transparent UPE** are outside the Group, the ordinary allocation rules could cause a lower ETR (and as such a significant amount of top-up tax).

Qualifying Income

- This article determines that in general the qualifying income of the UPE shall be **reduced by the amount that is subject to tax in the hands of the UPE's owners. Three situations:**

1. Holder of the ownership interest meets the **taxable period test and the minimum tax test**
2. Safe harbour for holders that are **natural persons**
3. Holder of the ownership interest is a **governmental entity, international organisation, non-profit organisation or a pension fund**

Other details:

- **Qualifying loss** of UPE and reduction, unless holders of the ownership interests are not allowed to use the loss.
- **Covered taxes** should be reduced proportionally.
- **Extent rules to PEs.**

European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

Art. 37 – UPE subject to Deductible Dividend Regime

Background:

- **Deductible dividends** are distributions of profits that are deductible from taxable income in the CE jurisdiction. Deductible dividend regimes typically apply to investment entities and other similar purpose entities.

Qualifying Income:

- This **article sets similar rules** as when the UPE is a flow-through entity, **except for losses**, which do not flow through to the owners.

Other details:

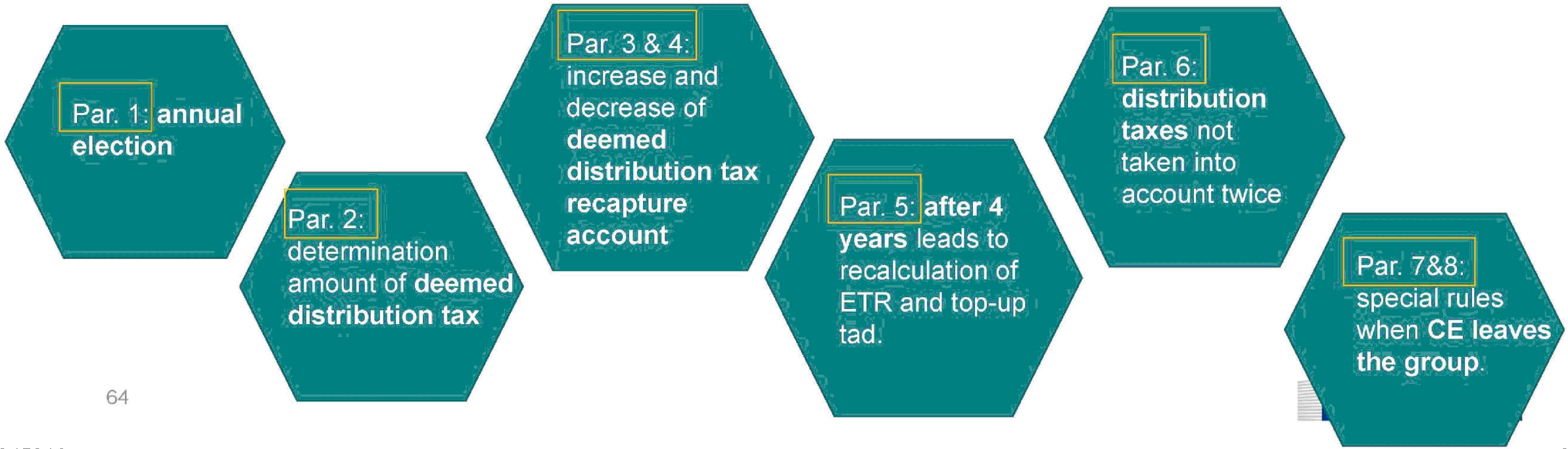
- **Covered taxes** should be reduced proportionally.
- **Extent rules to other CEs** located in the UPE jurisdiction that are subject to the deductible dividend regime.
- Clarification with respect to certain patronage dividends distributed by cooperatives.

Chapter 7 – Tax Neutrality and Distribution Regimes

Art. 38 – Eligible Distribution Tax Systems

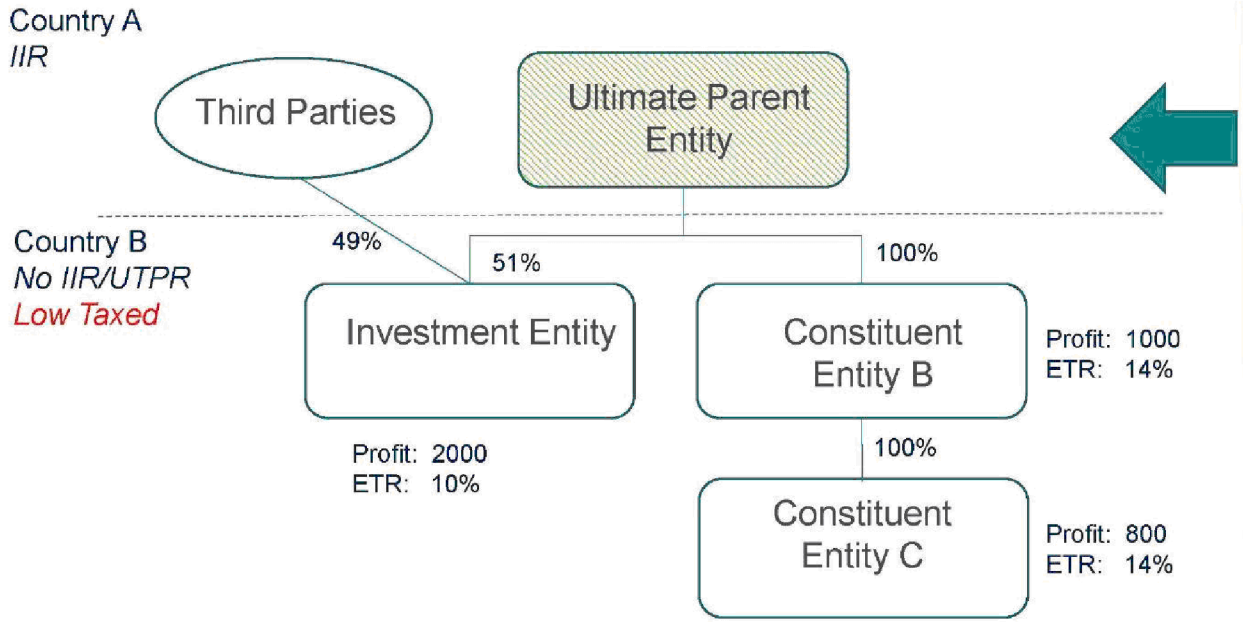
Background:

- **Distribution tax regime:** a tax system that generally imposes income tax on a corporation when the corporation's income is distributed or deemed to be distributed to its shareholders, rather than when it is earned.
- This article mitigates the differences between time the income accrues and the time it its subject to distribution tax to the extent that distributions are made within 4 years.



Chapter 7 – Tax Neutrality and Distribution Regimes

Art. 39 – Determination of the effective tax rate and top-up tax of an investment entity



General:

- Not apply to investment entities that are **UPE** (i.e. excluded entities) or **tax transparent entities**;
- Applies to investment entities that have its **income consolidated with the group**;
- Consequence: **compute ETR and Top-up tax on a standalone bases and only to the extent attributable to the MNE Group**

Example:

- UPE is subject to IIR top-up tax relating to CE B and CE C:
  - EUR 18 (1800*(14% - 10%))
- UPE is subject to IIR top-up tax relating to Investment Entity:
  - EUR 51 (51%*2000*(15% - 10%))

European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

Art. 40 – Election to treat an investment entity as a tax transparent entity

Alternative rule 1 for investment entities

Election	Five-year election to treat an investment entity or insurance investment entity as a **tax transparent entity**
Condition	CE owner is **subject to tax** on changes in the value of its interest in the investment entity or insurance investment entity under a mark-to-market or similar regime at a rate that **equals or exceeds the METR**.
Conse-quence	Allows to report the results as **income of the CE-owner** and apply the **substance-based income exclusion**

Chapter 7 – Tax Neutrality and Distribution Regimes

Alternative rule 2 for investment entities

Art. 41 – Election to treat an investment entity as a tax transparent entity

Election

Five-year election to use the **taxable distribution method.**

Condition

CE-owners can be **reasonably expected to be subject to tax on distributions from the investment entity** at a tax rate that equals or exceed the METR

Conse-quence

- **Distributions and deemed distributions** shall be included in qualifying income of the CE-owner;
- **Amount of covered taxes incurred by the investment entity that is creditable against** the tax liability of the CE-owner shall be included in the qualifying income and covered taxes of the CE-owner;
- The share of the CE-owner in the undistributed net qualifying income of the investment entity arising in the third year preceding the fiscal year shall be **treated as qualifying income of the investment entity** and the result of such **qualifying income multiplied by the METR** shall be treated as **top-up tax of a low-taxed CE**;
- The qualifying income or loss of an investment entity and the adjusted covered taxes attributable to such income shall be **excluded from the computation of the effective tax rate**.

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Chapter 8 – Administrative Provisions

Art. 42 – Filing obligations

- **Top-up tax information return** is a standardised form that provides tax administrations with information it needs to assess a CE's tax liability under the Directive.
- Filed by **CE located in MS**, the **UPE** or the **designated filing entity**.
- Top-up tax information return when **UPE is located in a third country jurisdiction that applies rules which have been assessed as equivalent** to the rules of the Directive:
  - Information for application of the IIR by the POPE;
  - Information for application of the UTPR in the UPE jurisdiction.

Top-up tax information return shall include:

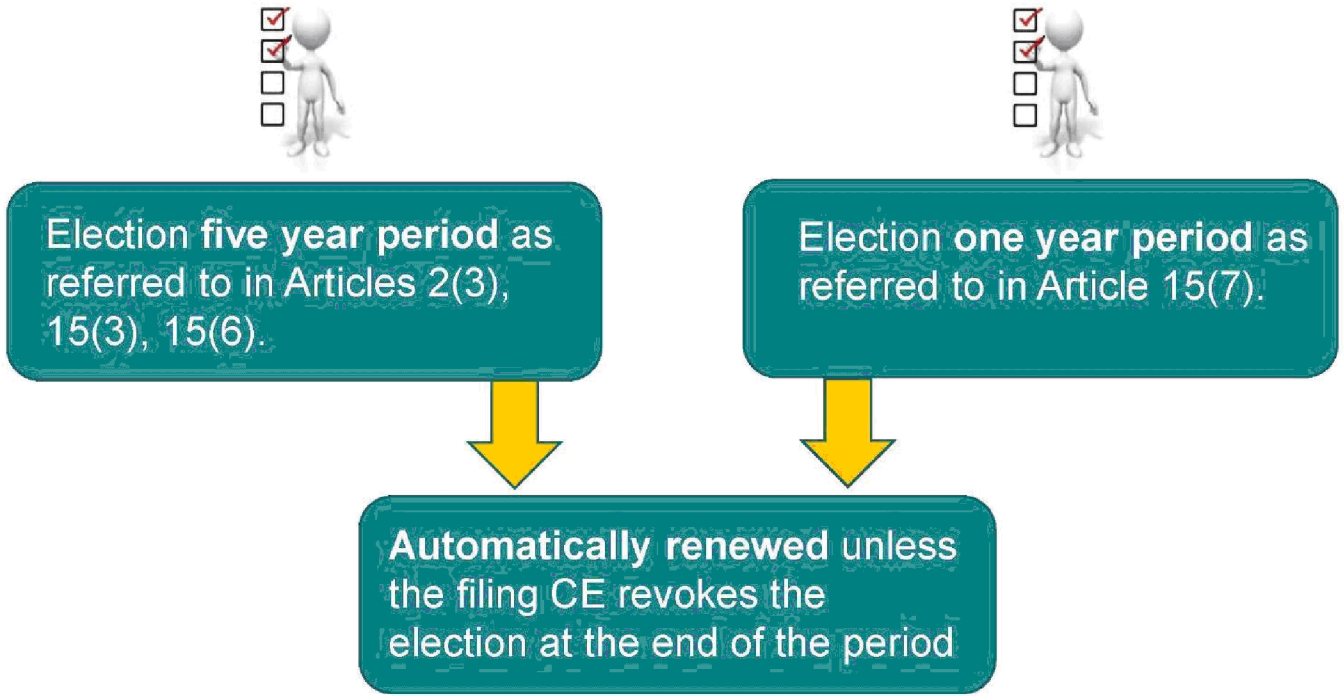
- *identification of the constituent entities, including their tax identification numbers, if any, the jurisdiction in which they are located and their status under the rules of this Directive;*
- *information on the overall corporate structure of the MNE group, including the controlling interests in the constituent entities held by other constituent entities;*
- *the information that is necessary in order to compute:*

a) *the effective tax rate for each jurisdiction and the top-up tax of each constituent entity;*
b) *the top-up tax of a member of a joint-venture group;*
c) *the allocation of top-up tax under the income inclusion rule and the UTPR top-up tax amount to each jurisdiction; and*

- *a record of the elections made in accordance with the relevant provisions of this Directive.*

Chapter 8 – Administrative Provisions

Art. 43 – Elections



European Commission

Chapter 8 – Administrative Provisions

Art. 44 – Penalties

- MS shall take all necessary measures to **ensure that they are effectively applied**.
- Effective, proportionate and dissuasive.
- An **administrative pecuniary penalty amounting to 5% CE's turnover** if CE does not comply with requirement to file a top-up tax information return within the prescribed deadline or make a false declaration.
- Reminder should have been issued within a period of 6 months.

European Commission

Pillar 2 Directive

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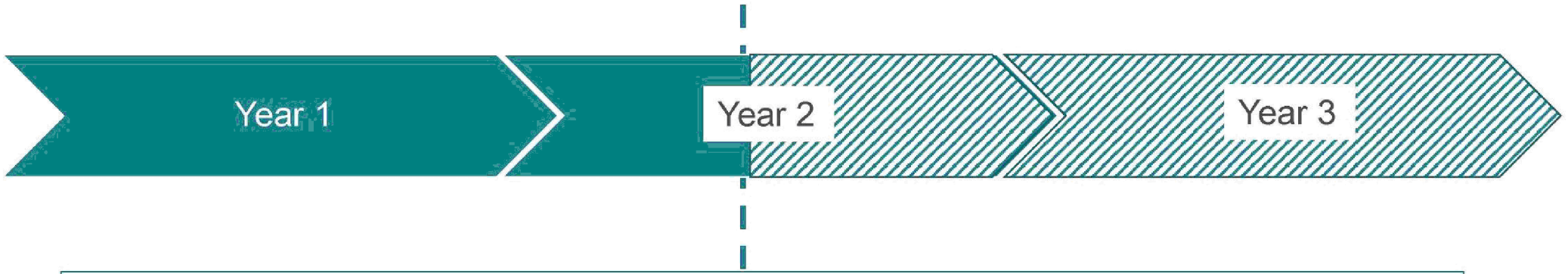
Chapter 9 – Transition Rules

Art. 45 – Tax attributes upon transition



- Application of the Directive and **transition rules with respect to existing deferred tax accounting attributes, including losses**, to prevent distortions (par. 3):
  - MNE group shall take into account the **deferred tax assets and deferred tax liabilities** reflected in the transition year;
  - Deferred tax assets and deferred tax liabilities shall be taken into account at **the lower of the minimum tax rate and the applicable domestic tax rate**. If taxpayer can demonstrate that deferred tax asset is attributable to a qualifying loss, it may be taken into account at the METR.
  - The impact of any valuation adjustment or accounting recognition adjustment with respect to a deferred tax asset **shall be disregarded.**
- Rules to provide a limitation to prevent the triggering of permanent difference losses (par. 4) and to provide a limitation on intragroup asset transfers (par. 5) before application of the Directive.

European Commission

Chapter 9 – Transition Rules

Art. 46 –Transitional relief for the substance-based income exclusion

Replacement of 5% for eligible payroll costs of eligible employees

2023	10 %
2024	9,8 %
2025	9,6 %
2026	9,4 %
2027	9,2 %
2028	9,0 %
2029	8,2 %
2030	7,4 %
2031	6,6 %
2032	5,8 %

Replacement of 5% for carrying value of the eligible tangible assets

2023	8 %
2024	7,8 %
2025	7,6 %
2026	7,4 %
2027	7,2 %
2028	7,0 %
2029	6,6 %
2030	6,2 %
2031	5,8 %
2032	5,4 %

Chapter 9 – Transition Rules

Art. 47 – Exclusion from the IIR and UTPR of MNE groups in the initial phase of their international activity

MNE groups in the initial phase of their international activity

Exclusion IIR

The IIR Top-up Tax of the UPE located in a MS, relating **to itself and its low-taxed CEs located in the same MS**, shall be **reduced to zero** if the MNE Group is within the scope of the Directive for **no more than 5 Fiscal Years**.

Exclusion UTPR

The UTPR Top-up Tax shall be **reduced to zero** if the following conditions are met:

i) MNE Group is not located in **more than 6 jurisdictions**;

ii) The net book values of tangible assets in the other jurisdictions does **not exceed EUR 50 million**; and

iii) MNE Group is within the scope of the Directive for no more than **5 Fiscal Years**.

Chapter 9 – Transition Rules

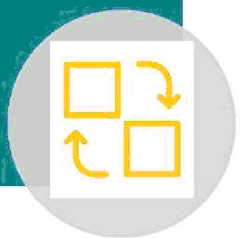
Art. 48 –Transitional relief for filing obligations

- The top-up tax information return and any relevant notifications shall be filed with the tax administration of the Member State in which the CE is located **no later than 15 months** after the last day of the fiscal year.

General rule (art. 42(7))

- The top-up tax information return and the notifications shall be filed with the tax administration of the Member States **no later than 18 months** after the last day of the fiscal year that is the transitional year.

In transitional year (art. 48)



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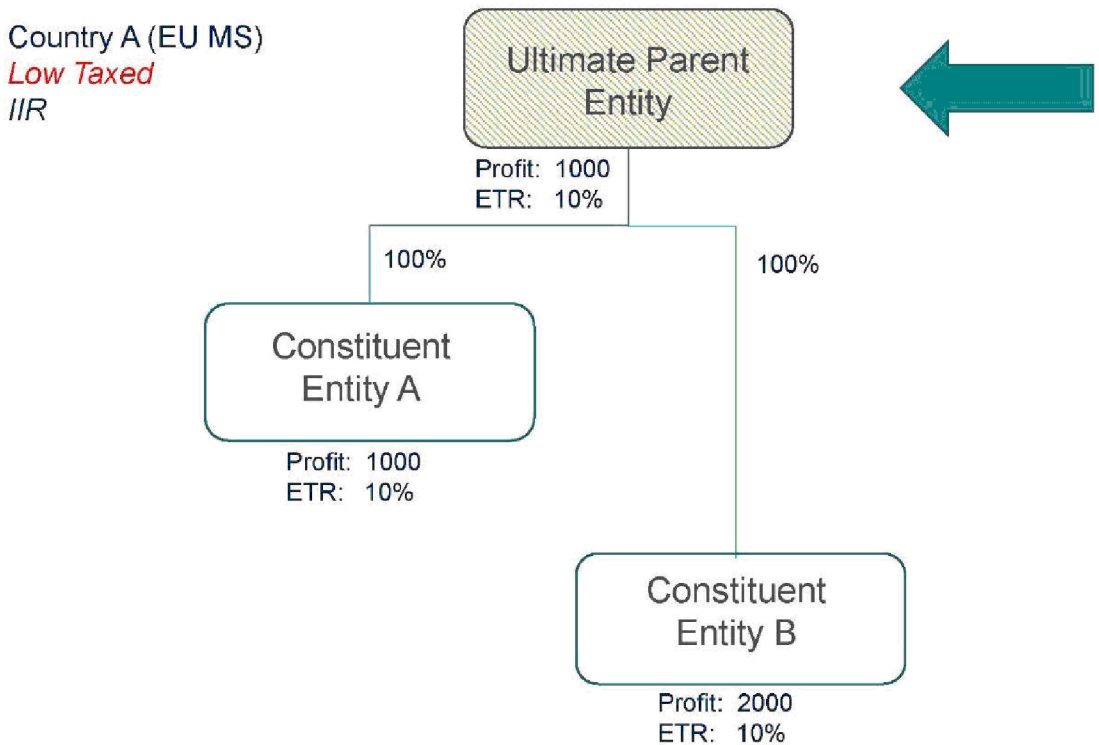
Chapter 10 – Specific Application of IIR to Large-Scale Domestic Groups

Art. 49 – Large-scale domestic groups



Background:

- In order to be consistent with the **EU Fundamental Freedoms**, the Directive also applies to **large-scale domestic groups** located in a EU MS.

Example:

- UPE is subject to IIR top-up tax relating to CE A, CE B and itself:
  - CE A: EUR 50 (1000 * (15% - 10%))
  - CE B: EUR 100 (2000 * (15% - 10%))
  - UPE: EUR 50 (1000 * (15% - 10%))

European Commission

Chapter 10 – Specific Application of IIR to Large-Scale Domestic Groups

Art. 50 – Transitional rules

Large-scale domestic groups in the initial phase

- Top-up Tax shall be **reduced to zero in the first five fiscal years**, starting from the first day of the fiscal year in which the large-scale domestic group falls within the scope of this Directive for the first time.
- For large-scale domestic groups that are in scope of this Directive when it enters into force, the five-year period abovementioned shall **start on 1 January 2023**.

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Chapter 11 – Final Provisions

Art. 51 – Assessment of equivalence
Art. 54 – Bilateral agreement on simplified reporting obligations

- For equivalence **the following conditions needs to be met:**

1. it enforces a set of rules in accordance with which the parent entity of an MNE group shall **compute and collect its allocable share of top-up tax in respect of the low-taxed constituent entities of the MNE group**;
2. it establishes **a minimum effective tax rate of at least 15%** below which a constituent entity is considered as low-taxed;
3. for the purpose of computing the minimum effective tax rate, it only allows the **blending of income of entities located within the same jurisdiction**; and
4. it **provides for relief for any top-up tax that was paid** in a Member State in application of the income inclusion rule set out in this Directive.

- Agreements may be concluded with third countries that have implemented equivalent rules.

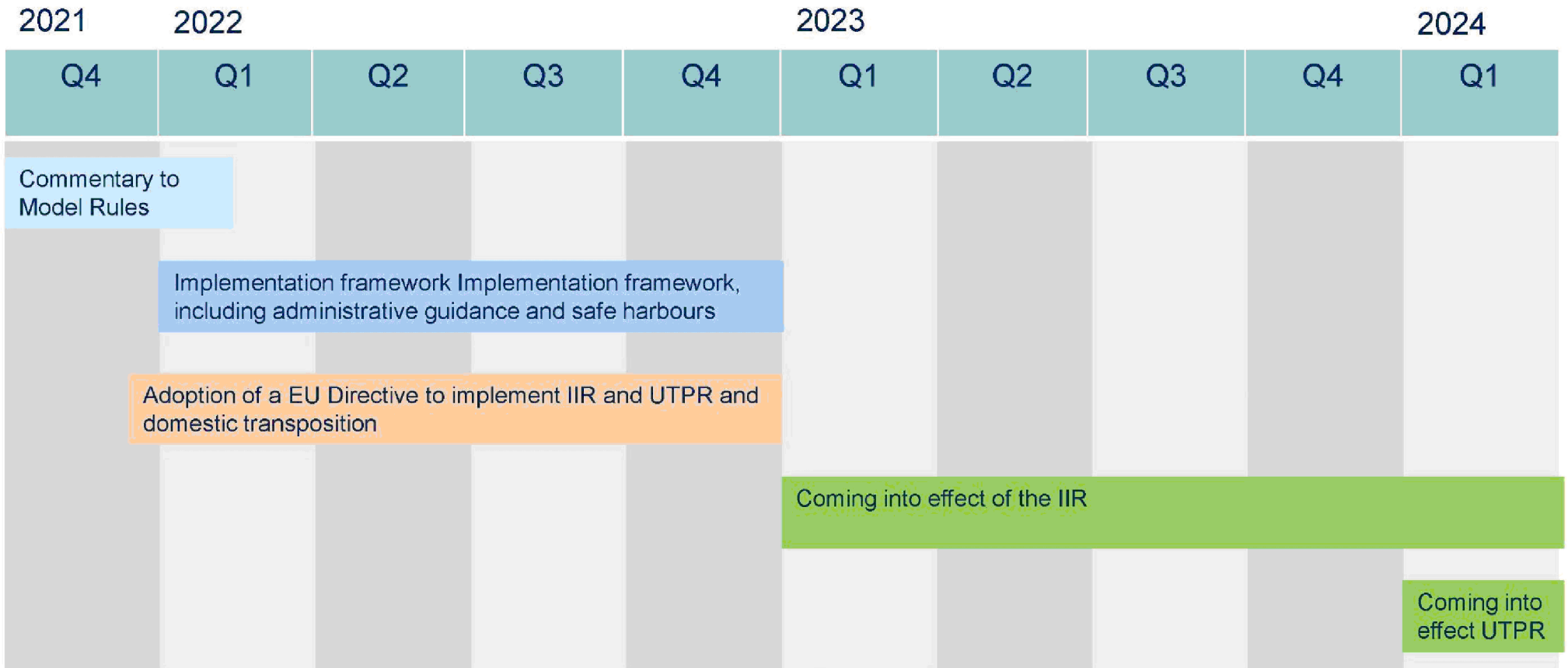
Chapter 11 – Final Provisions

Art. 52 – Exercise of the delegation
Art. 53 – Informing the European Parliament

European Commission

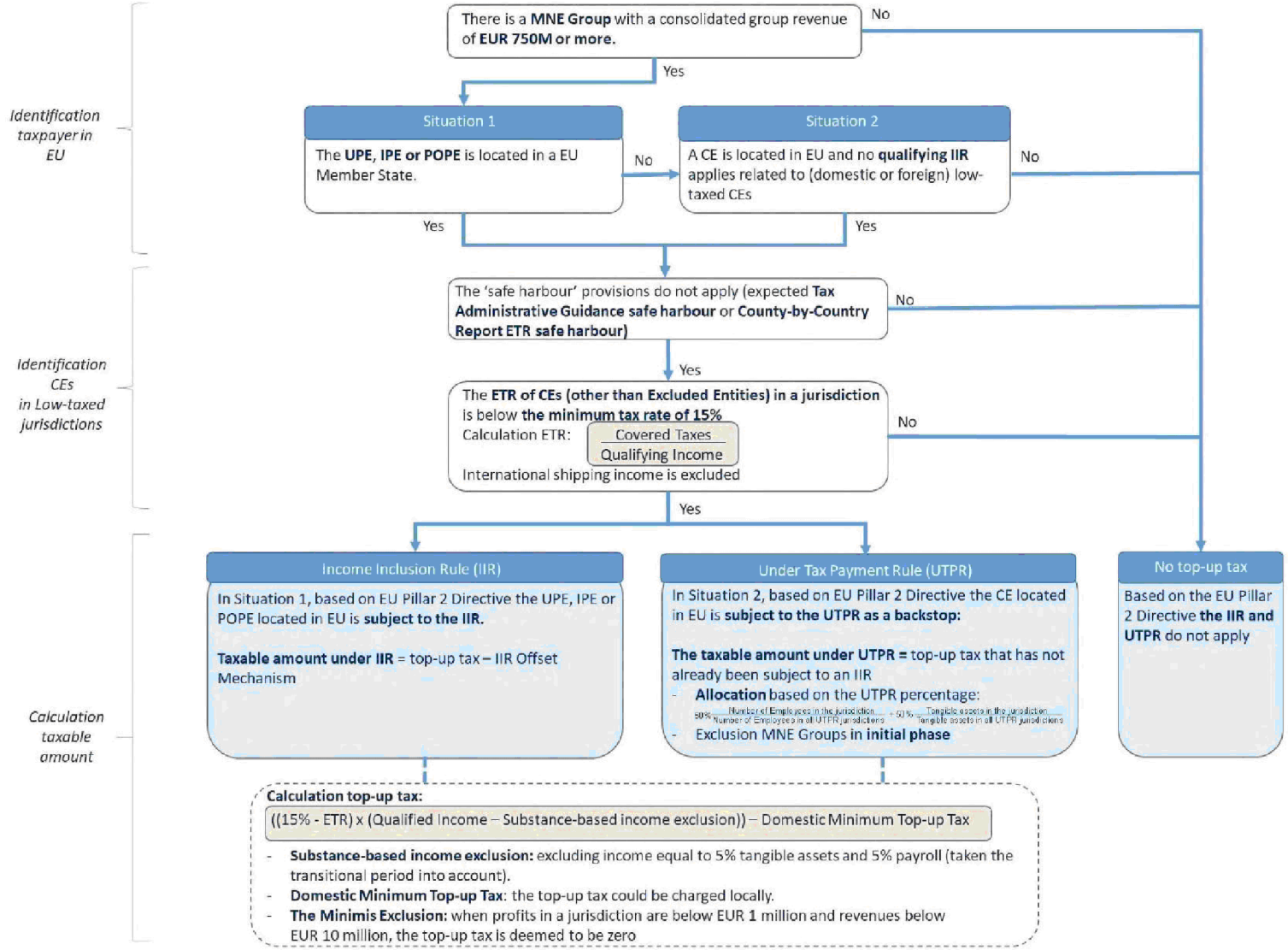
Chapter 11 – Final Provisions

Art. 55 – Transposition



Closing remarks

Flow Chart of the Operation of Pillar 2 in the EU



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Pillar2

Vragen bij hoofdstukken 3-5

5.1.2a

Vragen bij hoofdstukken 6-7

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NL: Cf. instructie.

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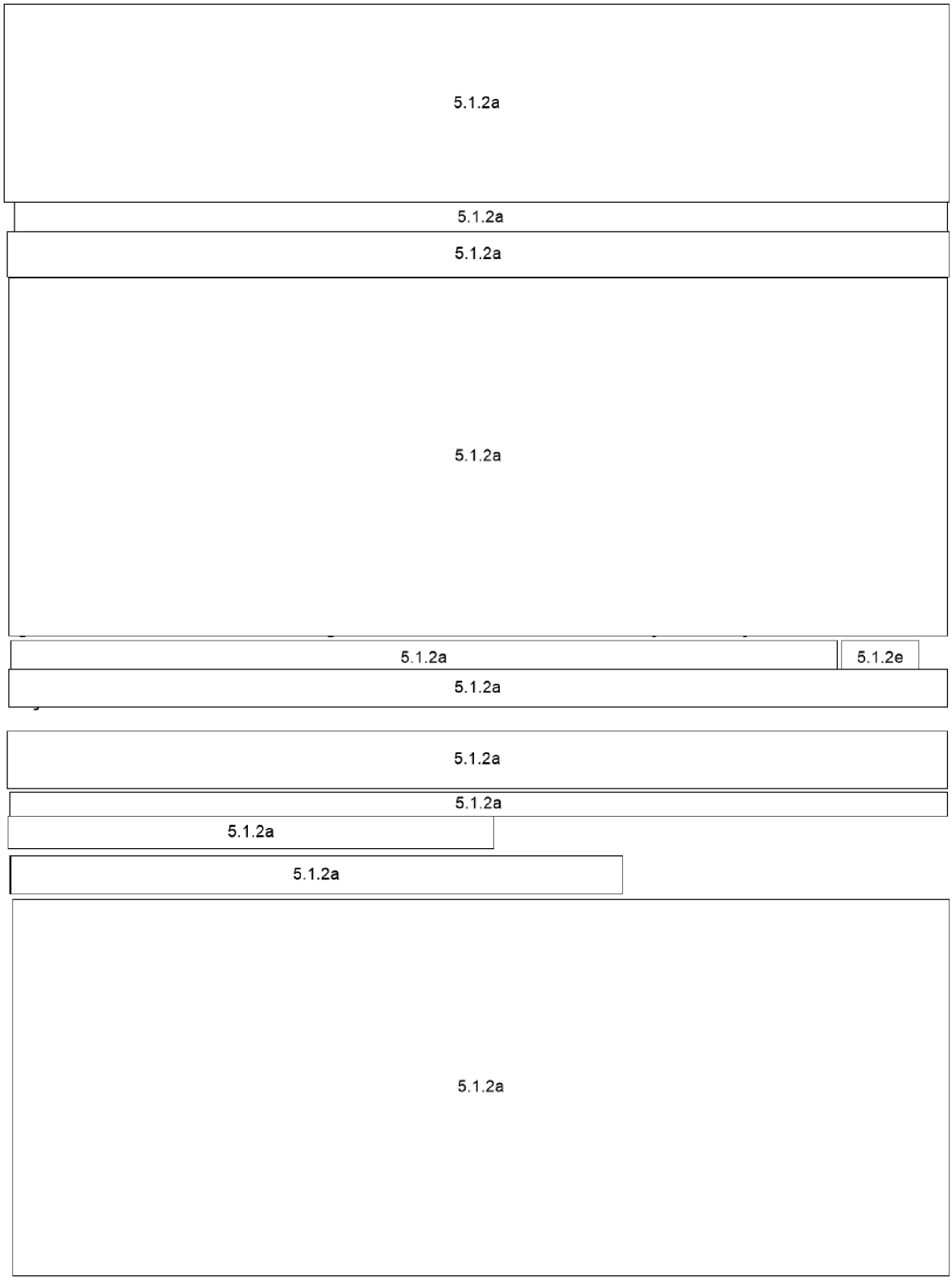

VZS: Next meeting January 20. Chapters 1 and 2. Physical meeting in EBS 5. 1+1 meeting. Could send written comments by the 13th of January COB. 27 January, also physical meeting, chapters 3 until 5. Deadline 21st of January comments.

Ministerie van Financiën

TER BESLISSING

Aan

5.1.2e Algemene Fiscale Politiek

Directie Algemene Fiscale Politiek

Inlichtingen
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Auteur
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nota

Instructie RWG Pijler 2, 20 januari 2022

Datum
18 januari 2022

Notanummer
2022-0000011900

Bijlage
1

Aanleiding

Op 22 december 2021 heeft de Europese Commissie het richtlijnvoorstel om wereldwijd een minimumniveau aan belastingheffing voor multinationals in de Europese Unie te waarborgen (Pijler 2) gepubliceerd. Op dinsdag 4 januari jl. vond de eerste (virtuele) Raadswerkgroep plaats, waarbij de Europese Commissie een presentatie heeft gegeven en een ronde exchange of views heeft plaatsvonden. De maanden januari en februari staan in het teken van de technische behandeling.

Donderdag 20 januari 2022 vindt de tweede (fysieke) Raadswerkgroep plaats. Tijdens deze Raadswerkgroep staat de behandeling van hoofdstuk 1 en 2 op de agenda. We verwachten een technische bespreking zonder dat er politieke/inhoudelijke gevoeligheden aan de orde zullen komen. 5.1.2e (IA) en 5.1.2e (EIZ) zullen deze vergadering fysiek bijwonen.

Beslispunt

Graag uw akkoord op onderstaande instructie:

Kern

- Beleidsmatig is NL positief over het richtlijnvoorstel en geeft NL zijn volle steun aan de ambitie van de Fransen om dit dossier prioriteit te geven tijdens hun voorzitterschap en te streven naar een voortvarende behandeling in de Raadswerkgroepen, en, uiteindelijk, een snelle aanname in de Ecofin Raad. Tijdens de Ecofin Raad van 18 januari jl. heeft ook de staatsecretaris zijn steun uitgesproken.
- Het concept BNC-fiche over het richtlijnvoorstelvoorstel is afgelopen week door de staatssecretaris geaccordeerd en wordt deze week besproken in de BNC-werkgroep. Het streven is om het BNC-fiche op 2 februari naar de Kamers te sturen.
- Hoofdstuk 1 betreft algemene bepalingen zoals de reikwijdte van het richtlijnvoorstel en de definities. Hoofdstuk 2 betreft de bepalingen aangaande de zogenoemde Income Inclusion Rule (IIR)[1] en Undertaxed Payments Rule

[1] Onder de IIR moet het land waar de uiteindelijke moedervennootschap van een multinational is gevestigd belasting bijheffen als de winsten van het concern in het buitenland lager worden belast dan het effectieve minimumtarief.

(UTPR)[2]. De heffing van de minimumbelasting wordt vormgegeven via deze twee hoofdregels. Gezamenlijk ook wel de Global anti-Base Erosion-regels (GloBE-regels) genoemd. In hoofdstuk 1 en 2 houden de noemenswaardige afwijkingen van de modelteksten[3] van het Inclusive Framework (IF) verband met het in lijn brengen van de richtlijnartikelen met het Europese recht. De overige afwijkingen zijn technisch van aard en houden met name verband met de vertaalslag van de modelteksten van het IF naar het richtlijnvoorstel.

- Tijdens de Raadswerkgroep van donderdag 20 januari 2022 zal Nederland (zie bijlage 1) vragen ter verduidelijking stellen, suggesties doen om de tekst van het richtlijnvoorstel meer in lijn te brengen met hetgeen de Raad en de Europese Commissie lijken te beogen en (eventueel) tekstuele suggesties doen.
- Op verzoek van het Franse voorzitterschap zijn deze vragen en suggesties reeds schriftelijk met hen gedeeld.

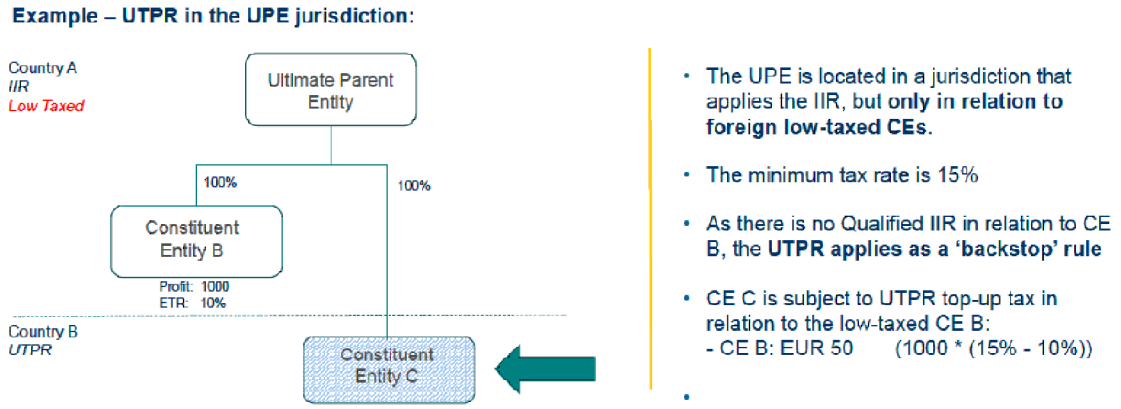
Informatie die niet openbaar gemaakt kan worden
Deze nota bevat informatie die betrekking heeft op lopende internationale onderhandelingen.

[2] Als het land van de moedervennootschap onvoldoende of geen belasting (bij)heft, of als de winsten van die moedervennootschap in dat land lager belast worden dan het effectief minimumtarief, moeten andere landen op grond van de UTPR bijheffen. Dit zorgt er onder meer voor dat multinationals de regels niet kunnen ontgaan door de uiteindelijke moedervennootschap te vestigen in een land dat de IIR niet toepast. De UTPR werkt dus als 'backstop' van de IIR.

[3] Op 20 december 2021 heeft het IF de modelteksten gepubliceerd waarmee de deelnemende landen het Pijler 2-akkoord in hun nationale wetgeving kunnen omzetten.

Bijlage 1

Question about the presentation by the Commission on 4 January 2022 (sheet 22): shouldn't CE C be subject to the UTPR top-up tax in relation to the UPE as well? (Given that CE B's income is blended with the UPE's income.)



General comments

1. Given that the proposal for a Directive is (by its very nature) rather sparing of explanation we suggest including a reference in the recitals to the commentary on the OECD GloBE model rules, in line with recital 28 of Council Directive (EU) 2017/952 (a.k.a. ATAD 2). Such a reference could read: *"In implementing this Directive, Member States should use the applicable explanations and examples in the OECD Commentary on the GloBE Rules under Pillar Two as a source of illustration or interpretation to the extent that they are consistent with the provisions of this Directive and with Union law."*
2. Although the term 'Undertaxed Payments Rule' has been removed from the Model GloBE Rules under Pillar Two, the proposed Directive still refers to this term. We think that any references to the term 'Undertaxed Payments Rule' should also be removed from the Directive, since it has become a misnomer. It should be (just) UTPR, as in the Model GloBE Rules. Alternatively, if a mere abbreviation is not advisable, the term Undertaxed Profits Rule could be considered.

Article by-Article comments

3. Article 1 (Subject matter), point (b) on the UTPR refers to the top-up tax *computed by the ultimate parent entity*. However, the UPE may be located in a jurisdiction that does not apply the GloBE Rules and thus no top-tax is computed by the UPE. We suggest removing the wording "computed by the ultimate parent entity".
4. Article 2 (Scope), paragraph 3, point (a) refers to "an investment entity that is an ultimate parent entity and a real estate investment vehicle that is an ultimate parent entity". As the definition "investment entity" already includes real estate investment vehicles (see Article 3, paragraph 24, point (a)), we suggest deleting "and a real estate investment vehicle that is an ultimate parent entity". Alternatively, "investment entity" could be replaced by "investment fund" (as in the GloBE rules).
5. Article 3 (Definitions), paragraph 5, on the definition of "large-scale domestic group": the wording "large-scale" is not amplified in the definition. Furthermore, "large-scale" does not seem to have any significance. The € 750 million revenue criterion has already been included in Article 2, paragraph 1. It would not make any difference for the operation of the rules if "large-scale" was left out.
6. Article 3 (Definitions), paragraph 13, on the definition of "top-up tax": the wording "computed for a jurisdiction" does not seem to be necessary and thus could be deleted.

7. Article 3 (Definitions), paragraph 14, on the definition of 'controlled foreign company foreign tax regime': this definition only refers to a foreign entity. However, it could (or should) also refer to a (by definition foreign) permanent establishment (PE) as the draft commentary on the GloBE rules regarding the CFC Tax Regime makes clear that CFC rules can also apply to a PE.
8. Article 3 (Definitions), paragraphs 15 (qualified income inclusion rule), 23 (qualified domestic top-up tax) and 37 (qualified undertaxed payment rule): these definitions refer to rules that are equivalent to or in accordance with the rules laid down in this Directive. However, comparable rules in third countries which are perfectly in line with the OECD GloBE rules might not be equivalent to or in accordance with the rules of this Directive. After all, the proposal includes two provisions (on large-scale domestic groups and on domestic subsidiaries) that were not included in the OECD GloBE rules. As this outcome could not have been intended, we suggest adding a reference to the OECD GloBE rules in these definitions.
9. Article 5 (UPE in the Union), paragraph 1: why was the wording "is subject to" included? Given that the GloBE rules include the wording "shall pay". The latter seems clearer.
10. Article 10 (Election to apply a qualified domestic top-up tax): we note that this rule is optional. Nevertheless, we are still wondering if the cross-border application of the IIR within the Union is compatible with the freedom of establishment. A restriction could also arise in regulations that give in almost all or in the vast majority of cases (tax) advantages to domestic companies and do not grant these advantages to foreign companies[1]. Or, more precisely, the disadvantage only applies to foreign companies. The IIR could *de facto* only affect cross-border situations, resulting in *de facto* discrimination. In the case of *de facto* discrimination, the legislation is neutrally worded and therefore does not distinguish between domestic and cross-border situations, but the 'advantage' is granted only in situations where the economic operator fulfills conditions or obligations which are by definition or *de facto* specific to the national market and, in general, cannot be complied with by non-resident economic operators[2]. The use of a minimum level of taxation can therefore be formulated neutrally in (national) legislation, but *de facto* only cross-border situations could be affected by an additional tax at the level of the ultimate parent company. For that matter, this tension could perhaps be removed if the optional domestic top-up tax became mandatory. Although we certainly do not intend to challenge the purpose of this Directive, it would be appreciated if the Commission could clarify in this regard.
11. Article 10, paragraph 3: what is the rationale for this provision? Is it likely that a tax that is due, is not paid within three years? If so, then much more must have gone wrong (either with the taxpayer or the tax administration).
12. Article 11 (Application of a UTPR across the MNE group) does not prescribe how the UTPR should be brought into charge. Under the GloBE rules the UTPR should be brought into charge by either a denial of deduction or an equivalent adjustment. Based on Article 11 the UTPR seems to be a separate tax charge. Is our understanding correct that for this reason Article 2.4.2 and Article 2.6.4 of the GloBE Rules are missing in the proposed Directive? Although we think that this approach has the benefit of simplicity, there might be a risk that such a separate tax charge runs counter to a Double Tax Convention.

Textual comments

13. Recital (9), 1st line: "would have to move down" should be replaced by: "moves down".
14. Recital (9), 4th line "does not to have" should be replaced by: "does not have".
15. Article 2 (Scope), paragraph 2, we suggest inserting "a period of" before "12 months".
16. Article 3 (Definitions) paragraph 22, on the definition of 'acceptable financial accounting standard': "Hong-Kong" should be replaced by: "Hong Kong" and "New-Zealand" should be replaced by: "New Zealand". (So, in both cases without a dash.)
17. Article 3 (Definitions) paragraph 27, on the definition of 'pension fund', point (a), (ii): "provide" should be replaced by: "provide**s**".

[1] CJEU 26 October 1999, C-294/97 (*Eurowings*), 36-40 en CJEU 8 June 2017, C-580/15 (*Van der Weegen*), 29.
[2] CJEU 30 January 2020, C-156/17 (*Köln-Aktienfonds Deka)*, 56 and CJEU 8 June 2017, C-580/15 (*Van der Weegen*), 29.

18. Article 4 (Location of a constituent entity), paragraph 1, first subparagraph: we suggest inserting "a" before "resident for tax purposes".
19. Article 4 (Location of a constituent entity), paragraph 3, first subparagraph: we suggest inserting "is" before "liable".
20. Article 21 (Total deferred tax adjustment amount), paragraph 8, point (e): for the sake of consistency and compliance with the Commission's own style guide "realized" should be written with an "s" (realised).
21. Article 39 (Determination of the ETR and top-up tax of an investment entity), paragraph 2: "more than one entity are" should be: "more than one entity ***is***".

From: the Netherlands
To: the French Presidency and the European Commission
Re: Chapter III, IV and V of the Proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union
Date: 21 January 2022

1. Article 15 (Adjustments to determine the qualifying income or loss), paragraph 1, subparagraph (b) (i): the definition of portfolio shareholding is not entirely clear. Should a shareholding of at least 10% be held by a constituent entity (which seems to be a requirement in the draft directive) or could it also be held by the MNE group (as in the model rules) in order not to qualify as a portfolio shareholding? This difference would be relevant in case of a disposal of an ownership interest. For example: if two constituent entities belonging to the same MNE group each dispose of a 9% shareholding (so 18% on aggregate) the gain or loss would be excluded under the model rules but not under the draft directive. Therefore, we propose to bring the definition of portfolio shareholding in line with the model rules.
2. Article 15 (Adjustments to determine the qualifying income or loss), paragraph 1, subparagraph (b) (i) and (c): the definition of portfolio shareholding in Article 15, paragraph 1, subparagraph (b) (i), could be read as an ownership interest of less than 10% held for less than one year at the date of distribution (in the model rules defined as a short-term portfolio shareholding). In other words: an ownership interest held for more than one year at the date of distribution would not be a portfolio shareholding. In article 15, paragraph 1, subparagraph (c) an adjustment is made for gains or losses from the disposal of an ownership interest, *except for portfolio shareholdings*. Given the definition in subparagraph (b) under (i) this could be read as if only a gain or loss from the disposal of a (portfolio) shareholding held for less than a year, was not an excluded equity gain or loss.
3. Article 15 (Adjustments to determine the qualifying income or loss), paragraph 8. The wording deviates from Article 3.2.7 of the model rules and should preferably be redrafted. Regarding subparagraph (b): we do not understand why an increase in the expenses should result in an increase of the taxable income (assuming that the same constituent entity is concerned). Regarding subparagraph (c) of the draft directive:"(c) the constituent entity is counterpart to an intra-group financing arrangement that is located in a high-tax jurisdiction or in a jurisdiction that would not have been low-taxed if the expense had not accrued to the constituent entity." Shouldn't it be 'high-taxed' in accordance with paragraph 3.2.7, subparagraph (b) of the model rules?
4. Article 15 (Adjustments to determine the qualifying income or loss), paragraph 1, subparagraph (e) on asymmetric foreign currency gain or loss: the final paragraph in the definition in the model rules has not been included in the draft directive. ("The tax functional currency … accounting functional currency.") It would be helpful if that paragraph were to be included.
5. Article 16 (International shipping income exclusion), paragraph 1, subparagraph (b), (ii): why are 'slot chartering arrangements' included?
6. Article 16 (International shipping income exclusion): Article 3.3.6 of the model rules on the strategic and commercial management of the ships has not been included. We propose to add that paragraph.
7. Article 25 (Determination of the ETR), paragraph 2, point (a): we suggest the elimination of the phrase "taking into account, where applicable, the international shipping income inclusion in accordance with Article 16". This is already covered by referring to Chapter III and thus unnecessary.
8. Article 25 (Determination of the ETR), paragraph 4, Article 26 (Computation of the top-up tax), paragraph 7 and Article 27 (Substance-based income inclusion), paragraph 8: these paragraphs refer to "stateless constituent entities located in a jurisdiction". This seems to be a contradiction in terms. Stateless entities are by definition not located in a jurisdiction.

Moreover, there can be two sorts of stateless entities: a PE or a flow-through entity. In both cases the relevant provisions (Article 4, paragraph 2 and paragraph 3, last subparagraph, respectively) do not contain any indication as to the jurisdiction of the relevant stateless entity.

9. Article 26 (Computation of the top-up tax), paragraph 4: we suggest the elimination of the phrase "*For the purpose of this paragraph, excess profit means an amount equal to the difference between the net qualifying income of the constituent entities computed at the level of the jurisdiction in which the constituent entities are located and the substance-based income exclusion of such constituent entities in that jurisdiction.*" This is already covered by the formula and thus unnecessary.
10. Article 28 (Additional top-up tax), paragraphs 2 and 3: the purpose of these paragraphs is the allocation of the additional top-up tax to the constituent entity. Shouldn't there be a reference to article 8: 'for the purpose of article 8' (in accordance with the OECD Rules)?

Textual comments

11. Article 15 (Adjustments to determine the qualifying income or loss), paragraph 1, subparagraph (b) (i): in this paragraph an ownership interest is defined as a "portfolio shareholding". Further on in this paragraph the word "shareholding" could be added for the sake of clarity (see in bold and between []): "(i) *an ownership interest in an entity of less than 10% (a "portfolio shareholding") in respect of which a constituent entity is entitled to all or substantially all of the rights to profits, capital or reserves, irrespective of whether the constituent entity owns the legal ownership of such portfolio* ***[shareholding]****, for less than one year at the date of the distribution; and"*
12. Article 26 (Computation of the top-up tax), paragraph 1: *"Where the effective tax rate of a jurisdiction"* should be: "Where the effective tax rate of the constituent entities in a jurisdiction" as a jurisdiction as such does not have an ETR.
13. Article 27 (Substance-based income exclusion), paragraph 2 refers to a "filing entity of an MNE group". Shouldn't this be the "filing constituent entity" (reference is made to Article 3(8)?

Ministerie van Financiën

TER BESLISSING
Aan
5.1.2e Algemene Fiscale Politiek

Directie Algemene Fiscale Politiek

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Auteur
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nota

Pijler 2 - Raadswerkgroep 27 januari 2022

Datum
25 januari 2022

Notanummer
2022-0000026630

Bijlage
1

Aanleiding

Op 22 december 2021 heeft de Europese Commissie het richtlijnvoorstel om wereldwijd een minimumniveau aan belastingheffing voor multinationals in de Europese Unie te waarborgen (Pijler 2) gepubliceerd. De maanden januari en februari staan in het teken van de technische behandeling.

Donderdag 27 januari 2022 vindt de derde (fysieke) Raadswerkgroep plaats. Tijdens deze Raadswerkgroep staat de behandeling van hoofdstuk 3 tot en met 5 op de agenda. We verwachten een technische bespreking zonder dat er politieke/inhoudelijke gevoeligheden aan de orde zullen komen. 5.1.2e (IA) en 5.1.2e (EIZ) zullen deze vergadering fysiek bijwonen.

Beslispunt

Graag uw akkoord op onderstaande instructie:

Kern

- Beleidsmatig is NL positief over het richtlijnvoorstel en geeft NL zijn volle steun aan de ambitie van de Fransen om dit dossier prioriteit te geven tijdens hun voorzitterschap en te streven naar een voortvarende behandeling in de Raadswerkgroepen, en, uiteindelijk, een snelle aanname in de Ecofin Raad. Tijdens de Ecofin Raad van 18 januari jl. heeft ook de staatsecretaris zijn steun uitgesproken.
- Het concept BNC-fiche over het richtlijnvoorstelvoorstel wordt 2 februari naar de Kamers gestuurd.
- Hoofdstuk 3 tot en met 5 behandelen de materie over hoe te bepalen dat er sprake is van een effectieve minimumbelasting van 15%. In hoofdstuk 3 tot en met 5 zitten geen noemenswaardige afwijkingen van de modelteksten[1] van het Inclusive Framework (IF). De afwijkingen zijn technisch van aard en houden met name verband met de vertaalslag van de modelteksten van het IF naar het richtlijnvoorstel.
- Tijdens de Raadswerkgroep van donderdag 27 januari 2022 zal Nederland (zie bijlage 1) vragen ter verduidelijking stellen, suggesties doen om de tekst van het richtlijnvoorstel meer in lijn te brengen met hetgeen de Raad en de

[1] Op 20 december 2021 heeft het IF de modelteksten gepubliceerd waarmee de deelnemende landen het Pijler 2-akkoord in hun nationale wetgeving kunnen omzetten.

Europese Commissie lijken te beogen en (eventueel) tekstuele suggesties doen. Andere lidstaten hebben ook soortgelijke vragen en suggesties ingestuurd.
- Op verzoek van het Franse voorzitterschap zijn deze vragen en suggesties reeds schriftelijk met hen gedeeld.

Informatie die niet openbaar gemaakt kan worden
Deze nota bevat informatie die betrekking heeft op lopende internationale onderhandelingen.

To: 5.1.2e (Cd FJZ)[5.1.2e @minfin.nl]; 5.1.2e (Cd UHB)[5.1.2e @minfin.nl]; 5.1.2e 5.1.2e (AFP/ANALYSE)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/FRI)[5.1.2e @minfin.nl]; 5.1.2e (AFP/ANALYSE)[5.1.2e @minfin.nl]; 5.1.2e (AFP/ANALYSE)[5.1.2e @minfin.nl]; 5.1.2e (AFP/SPA)[5.1.2e @minfin.nl]; 5.1.2e (AFP/ANALYSE)[5.1.2e @minfin.nl]; 5.1.2i @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]; 5.1.2e - AFEP[5.1.2e @minfin.nl]; 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]; 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]; 5.1.2e (AFP/EIZ)[5.1.2e @minfin.nl] 5.1.2e (AFP/EIZ)[5.1.2e @minfin.nl]; 5.1.2e (AFP/EIZ)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (Cd FJZ)[5.1.2e @minfin.nl]; 5.1.2e [5.1.2e @belastingdienst.nl]
Cc: 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]
From: 5.1.2e (AFP/EIZ)
Sent: Tue 1/25/2022 8:21:09 PM
Subject: Richtlijnvoorstel Pijler 2 // Terugkoppeling Raadswerkgroep 20 januari 2020
Received: Tue 1/25/2022 8:21:00 PM
Pijler 2 - Aantekeningen - Raadswerkgroep 20 januari 2022.docx

Beste allen,

Zie hieronder de terugkoppeling van de Pijler 2 Raadswerkgroep van 20 januari 2022. Bijgevoegd de uitgebreidere aantekeningen.

Groeten, mede namens 5.1.2e
5.1.2e

***

Algemeen

Donderdag 20 januari 2022 vond de tweede (fysieke) Raadswerkgroep plaats. Tijdens deze Raadswerkgroep stond de behandeling van **hoofdstuk 1 en 2** op de agenda. Het betrof was een **technische, constructieve bespreking.**

Hoofdstuk 1 betreft algemene bepalingen zoals de reikwijdte van het richtlijnvoorstel en de definities. Hoofdstuk 2 betreft de bepalingen aangaande de zogenoemde Income Inclusion Rule (IIR) en Undertaxed Payments Rule (UTPR). In hoofdstuk 1 en 2 houden de noemenswaardige afwijkingen van de modelteksten van het Inclusive Framework (IF) verband met het in lijn brengen van de richtlijnartikelen met het Europese recht. De overige afwijkingen zijn technisch van aard en houden met name verband met de vertaalslag van de modelteksten van het IF naar het richtlijnvoorstel.

Tijdens de Raadswerkgroep van donderdag 20 januari 2022 **heeft Nederland conform de instructie vragen ter verduidelijking gesteld en suggesties gedaan om de tekst van het richtlijnvoorstel meer in lijn te brengen met hetgeen de Raad en de Europese Commissie lijken te beogen.**

Noemenswaardige opgebrachte punten tijdens de Raadswerkgroep

Modelregels (incl. commentaar): V 5.1.2a t
5.1.2a
5.1.2a

Grens van €750 miljoen: De Pijler 2 maatregelen gelden voor multinationals met een omzet van ten minste € 750 miljoen.
5.1.2a
5.1.2a

O.g.v. het richtlijnvoorstel kan een keuze voor de Qualified domestic minimum top-up tax (QDMTT) alleen worden gedaan tot uiterlijk vier maanden na implementatie en dus niet meer daarna. 5.1.2a
In de modelregels staat niet dat de QDMTT binnen een bepaalde termijn moet zijn ingevoerd.

UTPR. De modelregels gaan uit van 2 heffingsmethoden: de denial of deduction (weigeren van aftrek in de Vpb) en de equivalent adjustment (een aparte heffing). O.g.v. het richtlijnvoorstel zou alleen een equivalent adjustment mogelijk zijn.

5.1.2a

5.1.2a

5.1.2a

5.1.2a

Artikel 8: het richtlijnvoorstel bevat t.o.v. de modelregels een vereenvoudiging voor de verrekening van top-up tax bij meer dan één moedervennootschap. 5.1.2a

5.1.2a

Vervolgproces

Het FRA VZS heeft aangegeven de maanden januari en februari aan de technische behandeling te wijden**. Donderdag 27 januari vindt de volgende (fysieke) raadswerkgroep plaats, waarbij de hoofdstukken 3 tot en met 5 op de agenda staan.** Verder heeft het FRA VZS vandaag gemeld dat de HLWP op 4 februari wordt omgezet in een extra Pijler 2 meeting.

Van: 5.1.2e (AFP/EIZ)
Verzonden: dinsdag 18 januari 2022 18:09
Aan: 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e (Cd UHB) < 5.1.2e @minfin.nl>; 5.1.2e 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/FRI) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/SPA) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2i @minfin.nl>; 5.1.2e (DB&T/WINST) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/WINST) < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e AFEP < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e @belastingdienst.nl' < 5.1.2e @belastingdienst.nl>
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Onderwerp: Richtlijnvoorstel Pijler 2 // Raadswerkgroep 20 januari 2020

Ha allen,

Zoals bij jullie bekend vond op dinsdag 4 januari jl. de eerste (virtuele) Raadswerkgroep over **Pijler 2** plaats, waarbij de Europese Commissie een presentatie heeft gegeven en een ronde exchange of views heeft plaatsvonden. Zoals eerder aangegeven, de maanden januari en februari staan in het teken van de **technische behandeling**.

Donderdag 20 januari 2022 vindt de **tweede (fysieke) Raadswerkgroep** plaats. Tijdens deze Raadswerkgroep staat de behandeling van **hoofdstuk 1 en 2** op de agenda. We verwachten een technische bespreking zonder dat er politieke/inhoudelijke gevoeligheden aan de orde zullen komen. 5.1.2e (IA) en ik zullen deze vergadering fysiek bijwonen. De instructie (met veel dank aan 5.1.2e 5.1.2e 5.1.2e en 5.1.2e) zit momenteel in Digidoc richting 5.1.2e Zie bijgevoegd ter info de documenten.

Fijne avond!

Groet, mede namens 5.1.2e
5.1.2e

5.1.2e
.....
Directoraat-Generaal voor Fiscale Zaken
Directie Algemene Fiscale Politiek| Afdeling Europese en Internationale Zaken
Korte Voorhout 7 | Den Haag
Postbus 20201 | 2500 EE | Den Haag

Van: 5.1.2e (AFP/EIZ)
Verzonden: vrijdag 14 januari 2022 10:33
Aan: 5.1.2e (DB&T/WINST) <5.1.2e@minfin.nl>; 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e (Cd UHB) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/FRI) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/SPA) < 5.1.2e @minfin.nl>; 5.1.2e AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2i @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/WINST) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/WINST) < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e - AFEP < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>; 5.1.2e @belastingdienst.nl' < 5.1.2e @belastingdienst.nl>
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Onderwerp: Richtlijnvoorstel Pijler 2 // Stas akkoord met BNC-fiche

Ha allen,

Goed nieuws!! **De stas is akkoord met het BNC-fiche over Pijler 2** (zie bijgevoegd zijn akkoord)! Hij heeft geen verdere opmerkingen.

We zullen – ingevolge de eerder gecommuniceerde planning – het BNC-fiche dan ook aanleveren, zodat deze het BNC-traject in kan. Hieronder nogmaals de vervolgstappen.

Datum	Wat?
17 jan	Aanleveren BNC-fiche bij BNC
19 jan	BNC-overleg
25 jan	CoCo-behandeling fiche
28 jan	MR-behandeling fiche
2 feb	Verzending naar Tweede Kamer

Groeten, mede namens 5.1.2e
5.1.2e

5.1.2e

Directoraat-Generaal voor Fiscale Zaken
Directie Algemene Fiscale Politiek| Afdeling Europese en Internationale Zaken
Korte Voorhout 7 | Den Haag
Postbus 20201 | 2500 EE | Den Haag

Van: 5.1.2e (AFP/EIZ)
Verzonden: donderdag 13 januari 2022 16:08
Aan: 5.1.2e (DB&T/WINST) <5.1.2e@minfin.nl>; 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e (Cd UHB) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/FRI) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE)

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5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>
Onderwerp: FW: Richtlijnvoorstel Pijler 2 // Concept BNC-fiche en instructie

Ha allen,

De passage over de uitvoerbaarheid was nogmaals door de Directie IV bekeken en op basis daarvan op onderdelen aangepast. De wijzigingen gingen verder dan de aanpassingen die zijn besproken tijdens het vorige directeurenoverleg (voor degenen die niet bekend zijn met het directeurenoverleg – dit is een regulier overleg met het Pijlerteam DGFZ, Pijlerteam DGBD en de directeuren over de Pijlers). We waren dan ook genoodzaakt gisteren nogmaals op directeursniveau afstemming te zoeken, waarna vanochtend de Digidoc-lijn is gestart (zoals jullie hebben kunnen zien aan de vanochtend ontvangen ter info in Digidoc).

Zie bijgevoegd het finale BNC-fiche en de begeleidende stukken die vandaag in de tas van de stas zitten. Hartelijk dank voor jullie goede en snelle schakelen de afgelopen periode! We zijn benieuwd naar de reactie van de stas!

Groeten,
5.1.2e en 5.1.2e

Van: 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>
Verzonden: vrijdag 7 januari 2022 16:19
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5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>
Onderwerp: FW: Richtlijnvoorstel Pijler 2 // Concept BNC-fiche en instructie

Ha allen,

Hartelijk dank voor jullie goede suggesties en opmerkingen bij het concept BNC-fiche over Pijler 2, heel fijn!

Zie bijgevoegd de aangepaste versie. **Eventuele suggesties/opmerkingen ontvangen we graag uiterlijk maandag 10 januari** om het stuk vervolgens dinsdag 11 januari de Digidoc-lijn in te doen.

Groeten, mede namens 5.1.2e
5.1.2e

Van: 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>
Verzonden: woensdag 29 december 2021 17:24
Aan: 5.1.2e (DB&T/WINST) <5.1.2e @minfin.nl>; 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e (Cd UHB) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/FRI) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/SPA) < 5.1.2e @minfin.nl> 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2i @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e AFP/EIZ) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/WINST) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/WINST) < 5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e - AFEP < 5.1.2e @minfin.nl>; 5.1.2e @belastingdienst.nl
CC: 5.1.2e (AFP/EIZ) < 5.1.2e @minfin.nl>
Onderwerp: Richtlijnvoorstel Pijler 2 // Concept BNC-fiche en instructie

Ha allen,

In navolging van onderstaande mailwisseling ontvangen jullie hierbij het **concept BNC-fiche over het richtlijnvoorstel Pijler 2**. Zoals aangegeven ontvangen we suggesties/opmerkingen graag **uiterlijk woensdag 5 januari 17:00 uur**. Zie ook bijgevoegd de ontvangen **conversietabel** tussen de artikelen in de OESO-teksten en de richtlijnartikelen om te gebruiken bij de review.

Daarnaast sturen we hierbij ook de **concept instructie voor de eerste raadwerkgroep** op dinsdag 4 januari 2021. Eventuele suggesties/opmerkingen ontvangen we graag **uiterlijk maandag 3 januari om 10:00 uur**. Daarna doen we de instructie de Digidoc-lijn in. Zoals aangegeven betreft het een algemene en korte instructie, omdat de raadswerkgroep een algemeen karakter heeft. De EC zal een presentatie geven en er zal een exchange of views plaatsvinden.

Verder is inmiddels bekend dat de **volgende hoofdstukken tijdens de volgende raadsgroepen behandeld** worden:
20 januari – hoofdstuk 1 en 2
27 januari - hoofdstuk 3 t/m 5
8 februari – hoofdstuk 6 t/m 8
23 februari – hoofdstuk 9 t/m 11
De verschillende definities in artikel 3 worden verspreid gedurende de raadswerkgroepen behandeld.
Verder heeft het FRA voorzitterschap aangegeven dat landen uitgenodigd worden om voorafgaande aan iedere vergadering **schriftelijke vragen en opmerkingen** te sturen over de hoofdstukken die behandeld worden in de raadswerkgroep.

Veel leesplezier en alvast een fijn en gezond 2022!

Groeten, mede namens 5.1.2e
5.1.2e

Van: 5.1.2e (AFP/EIZ)
Verzonden: woensdag 22 december 2021 14:10
Aan: 5.1.2e (VDI/IA) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/WINST) <5.1.2e @minfin.nl>; 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e @belastingdienst.nl' < 5.1.2e @belastingdienst.nl>; 5.1.2e (Cd FJZ) < 5.1.2e @minfin.nl>; 5.1.2e (Cd UHB) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (DB&T/FRI) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2e (AFP/SPA) < 5.1.2e @minfin.nl>; 5.1.2e AFP/ANALYSE) < 5.1.2e @minfin.nl>; 5.1.2i @minfin.nl>
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Onderwerp: Richtlijnvoorstel Pijler 2 // Publicatiedocumenten, tijdlijn/acties BNC-fiche en traject Europese werkgroepen

Ha allen,

Een mooi cadeautje zo vlak voor Kerst: Zojuist is het langverwachte richtlijnvoorstel Pijler 2 (P2) gepubliceerd door de Europese Commissie. Zie bijgevoegd de publicatiedocumenten. Vanuit EIZ zijn 5.1.2e en ik dossierhouders van dit richtlijnvoorstel. Graag informeren we jullie met deze mail dan ook over de tijdlijn en acties van het BNC-fiche en het traject van behandeling van het richtlijnvoorstel in de Europese werkgroepen.

Tijdlijn/acties BNC-fiche

In de tabel hieronder is de planning t.a.v. het BNC-fiche opgenomen. We weten nog niet of de Tweede Kamer een behandelvoorbehoud zal plaatsen, maar nu wij dit verwachten is daar voor de zekerheid in de planning rekening mee gehouden. Het BNC-fiche moet uiterlijk binnen drie weken (reces niet meegerekend) na publicatie van het voorstel aan de Tweede Kamer worden verzonden. De planning zal jullie bekend voorkomen, omdat deze reeds eerder door het Pijlerteam tijdens presentaties is gecommuniceerd en ik hier vorige week tel. contact met de meesten van jullie over heb gehad. Belangrijk voor de komende periode is met name de actie voor jullie om in de periode 29 december t/m woensdag 5 januari input te leveren op het concept BNC-fiche.

Datum	Wat?
22 dec	Publicatie richtlijn P2
23 dec t/m 29 dec	Opstellen BNC-fiche door EIZ
Uiterlijk 29 dec	Uitsturen BNC-fiche naar betrokkenen voor input/(interne, DGFZ en DGBD) afstemming
5 jan	Uiterlijk aanleveren input BNC-fiche door betrokkenen
7 jan	Eerste conceptversie ter review
11 jan	Concept BNC-fiche in tas van stas
14 jan	Mogelijkheid aanpassing BNC-fiche n.a.v input stas
17 jan	Aanleveren BNC-fiche bij BNC
19 jan	BNC-overleg
25 jan	CoCo-behandeling fiche
28 jan	MR-behandeling fiche
2 feb	Verzending naar Tweede Kamer

Traject behandeling richtlijnvoorstel in Europese werkgroepen

We weten inmiddels dat de eerste werkgroep plaats vindt op dinsdag 4 januari. De volgende twee werkgroepen vinden plaats op 20 en 27 januari. De werkgroep van 4 januari vindt plaats via videoconference, terwijl de werkgroepen van 20 en 27 januari vooralsnog fysiek zijn ingepland. We moeten de steering note voor 4 januari nog ontvangen, maar we hebben reeds gehoord dat dit een werkgroep met een algemeen karakter wordt. De Europese Commissie zal een presentatie geven over het voorstel. We kunnen ons ook voorstellen dat er nog een algemene tour de table wordt gehouden. We maken dan ook een korte en algemene instructie voor 5.1.2e Deze instructie zullen we volgende week ook deze groep insturen, waarbij input kan worden geleverd indien jullie daar gelegenheid tot zien (omdat het fiche algemeen en kort is, is dit wat ons betreft niet noodzakelijk). Nu het 4 januari een videoconference meeting met een algemeen karakter betreft, stellen we voor dat naast EIZ tevens iemand van IA en iemand van Winst aansluit bij de werkgroep. Uiteraard wordt na de werkgroep een uitgebreide terugkoppeling gegeven. Vanaf 20 januari start de artikelsgewijze behandeling. Voorafgaand aan deze bespreking komen we nog bij jullie op de lijn over de afvaardigingen voor de inhoudelijke besprekingen die volgen.

Bij vragen, aarzel niet om contact met ons op te nemen.

Groeten, mede namens 5.1.2e
5.1.2e

5.1.2e

Directoraat-Generaal voor Fiscale Zaken
Directie Algemene Fiscale Politiek | Afdeling Europese en Internationale Zaken
Korte Voorhout 7 | Den Haag
Postbus 20201 | 2500 EE | Den Haag

Raadswerkgroep Pijler 2 – 20 januari 2022

FRA VZS: Korte terugblik 4 januari (eerste RWG), HLWP en Ecofin. 5.1.2a

5.1.2a

5.1.2a

5.1.2a

5.1.2a

Artikel 1 en 2

5.1.2a

5.1.2a

NLD: Dank. Nederland steunt opzet voortvarend van start te gaan. Drie algemene opmerkingen. Enkele delegaties al gezegd; zoveel mogelijk in overeenstemming met modelregels. Krijgen nu al wat vragen van wetgevingsjuristen over uitleg. Daarom goed zijn om in considerans verwijzing op te nemen naar commentaar dat nu in bewerking is, zoals bijv. gedaan bij ATAD 2. Term Untertaxed Payments Rule; term achterhaald. Er is geen verband meer tussen betaling en undertaxed zijn. UTPR is het alleen nog maar. Zou hier ook kunnen. Als het niet wenselijk is voorkeur Untertaxed Profits Rule. Ook opgevallen dat ze dat zo in UK zo noemen. Derde opmerking, detail over 1b;

computed, kan onduidelijkheid ontstaan als UPE gevestigd is in jurisdictie waar GloBE rules niet zijn geïmplementeerd en dat er geen verplichting is van UPE om top-up tax te berekenen. Dus wellicht kan deze zinssnede vervallen. Of anders vervangen.

5.1.2a

5.1.2a

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5.1.2a

Artikel 4

Geen delegaties die het woord vroegen.

Artikel 5 tot en 9

5.1.2a

5.1.2a

5.1.2a

5.1.2a

5.1.2a

NLD: Suggestie m.b.t. de presentatie over slide 41. Duidelijk voorbeeld alleen is nog niet helemaal compleet. Kan compleet gemaakt worden door ook het offset mechanisme toe te voegen aan het voorbeeld. Zo wordt het 100% inzichtelijk.

5.1.2a

5.1.2a

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5.1.2a

5.1.2a

5.1.2a

5.1.2a

Artikel 11 tot en met 13

5.1.2a

NLD: Begrjip ik het goed dat door tekst richtlijn de mogelijkheid wordt uitgesloten voor lidstaten om de denial of deduction toe te passen?

5.1.2a

5.1.2a

5.1.2a

5.1.2a

5.1.2a

5.1.2a

5.1.2a

Definities (1 t/m 29)

5.1.2a

5.1.2a

5.1.2a

NLD: 6c; Tekst wijkt iets af van modelregels. Duidelijker maken dat financial statements zijn opgesteld door UPE. 14: opmerking controlled foreign tax systeem. Dat kan ook zien op een vaste inrichting. Dit punt kwam ook langs bij WP11.

5.1.2a

5.1.2a

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5.1.2a

5.1.2a

5.1.2a

KPMG

Meijburg & Co
Tax & Legal

Memorandum

From	5.1.2e
Date	31 January 2022
Reference	EB/2022/0460/

Subject: Pillar 2, observations from a shipping and offshore industry perspective

---

1. Introduction

On 20 December 2021, the OECD published the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) report, involving 137 countries. The report describes the so-called Pillar 2 rules. The document contains 70 pages (KPMG summary), 15 of which are definitions, that are the rules for a Global Minimum Tax at 15% for Multi-national Enterprises (MNEs) with annual revenue of €750 million or more in at least two of the four previous financial years. It is anticipated that a document providing further commentary on the rules will be released February 2022.

The rules are due to be brought into law in each participating jurisdiction through domestic law changes in 2022, to be effective in 2023 for the Income Inclusion Rule (IIR), and 2024 for the Under-Taxed Payments Rule (UTPR).

The IIR imposes Top-Up Tax ('TuT') on a parent entity with respect to low taxed income of Constituent Entities (subsidiaries or PE's) in a low taxed jurisdiction. **The UTPR** denies deductions or provides for a similar adjustment for MNE constituent entities in a UTPR jurisdiction to the extent the TuT is allocated to that jurisdiction. The UTPR rules provide for a mechanism to carve-out amounts captured by the IIR.

The determination of whether TuT is required, either through the IIR or the UTPR, is based on a complex calculation of the Effective Tax Rate (ETR) for a jurisdiction. The Model Rules use modified deferred tax calculations for the timing differences and the treatment of losses.

1.1 Carve-out / exclusions

There is an elective **substance based carve-out** which may reduce the profits that are subject to top-up tax. This is based on the level of payroll and the carrying value of certain tangible assets, within a jurisdiction. There is also an exclusion for international shipping income and certain related income. This applies to both the transportation of passengers and cargo but does not include income from transportation in inland waterways of the same jurisdiction. The details of this shipping exclusion will be discussed later.

1.2 Domestic Top-up Tax

The rules also provide for a Qualifying Domestic Top-up Tax[1] where countries can impose a specific tax in their **own jurisdiction** to lift the ETR on certain profits, *excluding those that are subject to a substance-based exclusion*, to the minimum rate of 15% (also at the level of the Ultimate Parent Entity (UPE) in respect of low-taxed profits deriving in its own jurisdiction).

Please note that on December 22, 2021, the European Commission published a proposed EU Directive to incorporate the Pillar Two rules into EU law. The rules in this draft EU Directive generally mirror the OECD model rules released on December 20, 2021 but have a broader scope.

To achieve consistency with EU law, particularly the principle of freedom of establishment, the Directive is **not limited to cross-border situations** but also applies to domestic groups[2] and requires the Member State of a constituent entity applying the IIR, which is usually the jurisdiction of the UPE, to ensure effective taxation at the minimum agreed level, not only of foreign subsidiaries but also of all constituent entities resident in that Member State and permanent establishments (PEs) of the MNE group established in that Member State.

This difference (or broader scope) is especially relevant for special tax regimes for the maritime industry within the EU (EEA), such as tonnage tax and accelerated depreciation schemes which are based on EU State aid rules, in particular its Guidelines on state aid to maritime transport.

2. Impact of Pillar 2 on maritime business

Before we go into detail on the shipping exclusion as such we will discuss the effect and potential consequences of these rules for the offshore industry within the EU. We will also highlight some effects for the international shipping busines in relation to article 8 OECD Model Tax Convention structures.

---

[1] This Model has added a new concept of domestic top-up tax. This ***allows a jurisdiction*** to introduce a rule, which effectively duplicates the Model for top-up tax, but ensures that the tax is collected by that local jurisdiction and is not ceded to another jurisdiction under either the IIR or the UTPR. Assuming low-tax jurisdictions take this path, it may reduce the complexity of the rules in many circumstances while achieving the goal of the Pillar 2 project of providing a floor for tax competition. This may be considered by EU Member States in relation to shipping / offshore companies operating under a domestic (EU approved) tonnage tax regimes if the specific activities are not exempt under the shipping exclusion referred to in Pillar 2.

[2] The EU Directive provides for the extension of the scope of the IIR not only to an MNE group having at least one entity or a permanent establishment not located in the same jurisdiction of the UPE, **but also to a so called 'large-scale domestic group,' namely an MNE group of which all constituent entities are located in the same Member State with an annual revenue of EUR 750 million or more in its consolidated financial statements in at least two of the last four consecutive fiscal years**. In the explanatory memorandum to the Draft Directive, it is expressly stated that this extension was put in place "to avoid any risk of discrimination between cross-border and domestic situations."

2.1 EU based tonnage tax regimes

As described above the shipping industry (as in international transport / art.8 OECD Model Tax Convention), benefits from an exclusion under Pillar 2. The OECD included the exclusion for various reasons:

1. "The longstanding international consensus that the profits of enterprises operating ships … in international traffic should be taxable only in the jurisdiction in which the enterprise has its residence."[3]
2. Application to shipping would raise policy questions in light of the policy choices of jurisdictions that implemented beneficial regimes.

In the draft EU Directive it is stated that:

"Due to its highly volatile nature and the long economic cycle of this industry, the shipping sector is traditionally subject to alternative or supplementary taxation regimes in Member States. To avoid undermining that policy rationale and allow Member States to continue applying a specific tax treatment to the shipping sector in line with international practice and State aid rules, shipping income should be excluded from the system"

It has been a policy choice of the EU to allow Member States to adopt measures that improve the fiscal climate for shipping companies. This to address the risk of flagging out and relocation of shipping companies to low-tax countries outside of the EU as well as to ensure a level playing field for companies active in this industry from the EU. In this respect, the aim of the Guidelines is to encourage shipping companies to register their vessels in the EU and thus commit to the EU's high social, environmental and safety standards. The most prominent of such measures is tonnage tax, whereby shipping companies can apply to be taxed based on a notional profit or the tonnage they operate, instead of being taxed under the normal corporate tax system. The various tonnage tax regimes available within the EU are approved upfront by the European Commission and always include substance requirements.

Offshore industry

The European Commission has decided that certain activities, even if they do not or only partially fall within the definition of maritime transport, can be subject **by analogy** to the provisions of the Maritime Guidelines. This is the case for example for rescue and marine assistance vessels, dredging vessels, cable-laying, pipeline-laying, crane vessels (construction, wind-installation) and research vessels, given that (among others) they require similarly qualified staff and are similarly exposed to international competition. When it comes to the operation of such vessels we refer to "offshore" instead of shipping in this paper. The trend we see, as a consequence of the offshore industry developing overtime, is that the European Commission approves more and different types of vessels (not considered vessels for maritime transport) by arguing that those types of vessels are involved in maritime activities that are subject to the same legal requirements and competitive conditions as maritime transport.

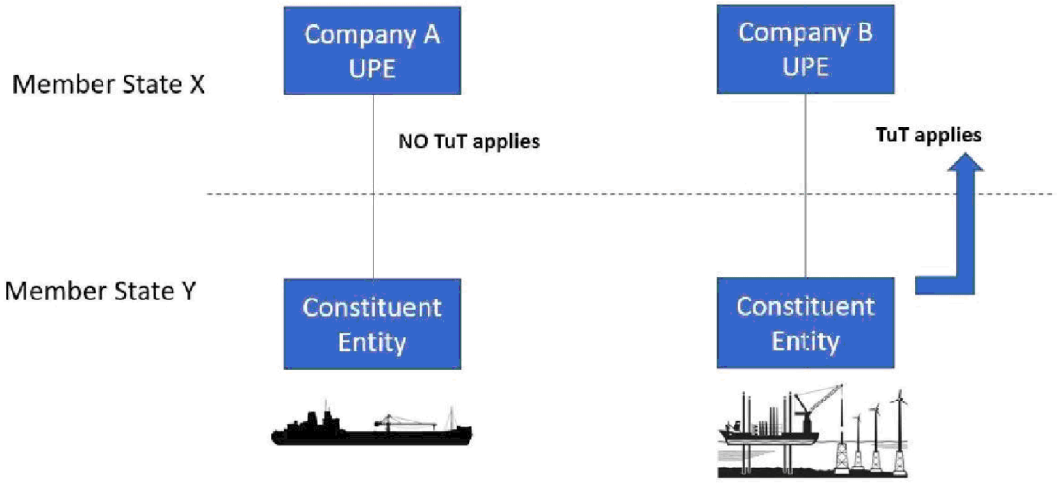
[3] Pillar One Blueprint, supra note 2, ¶ 158.

As the activities of such offshore vessels are not covered by the shipping exclusion of Pillar 2 (as this only covers international transport), these rules have a significant impact for this (offshore) industry.

Example (1) Offshore activities not exempt

- Company A (UPE) based in EU Member State X operates an international shipping company and benefits of a tonnage tax regime. Part of its business is conducted from Member State Y and benefits from a local tonnage tax regime and is therefore low-taxed. The relevant activities of the Constituent Entity in country Y fall within the relevant shipping exclusion (only owns and operates vessels involved in international transport) as a result of which no TuT is required for Member State X.

- Company B (UPE) based in EU Member State X operates an international shipping company and also benefits from a tonnage tax regime. Part of the business of the group is performed by Constituent Entity in Member State Y as well. However from this jurisdiction the group only operates its vessels active in the worldwide offshore industry (two cable laying vessels as well as its fleet of wind-installation vessels) but also applies locally a tonnage tax regime providing a low effective tax rate. In this case a TuT is required for that jurisdiction at the level of the UPE.



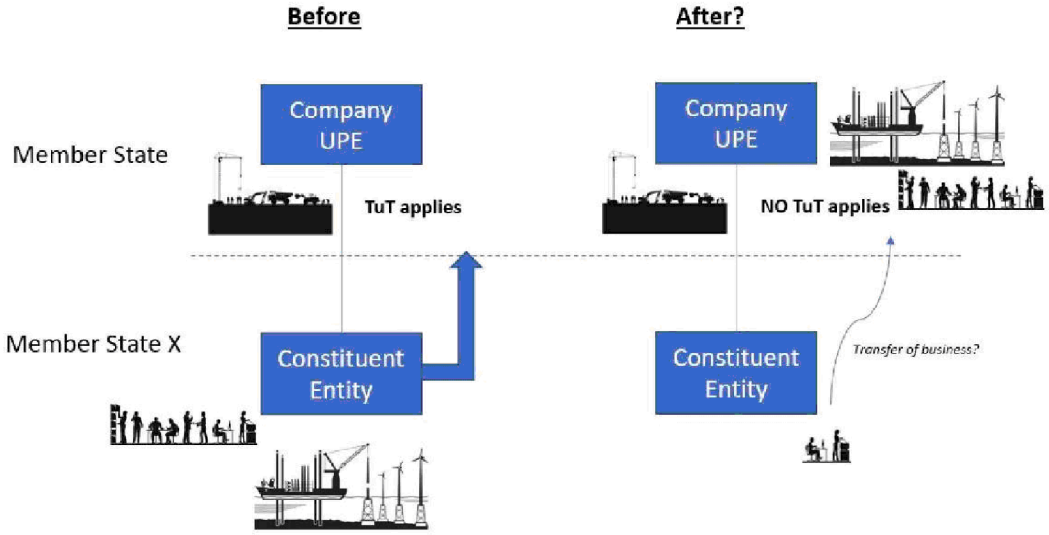
Tonnage tax and shipping exclusion (Pillar 2) *Tonnage tax NO shipping exclusion (Pillar 2)*

Example (2) Competition within the EU?

A worldwide operating construction group, has its UPE in the EU. In this jurisdiction the UPE could bring offshore vessels under the local tonnage tax regime. The business at the level of the UPE consist however of other types of activities effectively resulting in a high effective tax rate (25%).

The business of offshore vessels was acquired by this group from a third-party years ago and is therefore historically based in another Member State (X) where it benefits of a domestic tonnage tax regime. This regime results in a very low effective tax rate.

The UPE has to apply the IRR in respect of the TuT calculated for Member State (X).



If however the offshore business is transferred to the jurisdiction of the UPE it would have been subject to a tonnage tax regime as well, but most likely the TuT would not apply as on a jurisdictional level the effective tax rate is at such a level that the relevant low-taxed income of the offshore vessels will not result in an effective tax rate below 15% (assuming the MNE group does not have constituent entities in low taxed jurisdictions).

Alternatively, a group owns and operates at the level of the UPE offshore vessels subject to tonnage tax. The subsidiary in another Member State has a high effective tax rate. This could result in a TuT, either at the level of the UPE on the basis of the IIR (EU rules) or an UTPR in other MNE jurisdictions (OECD rules) to tax the low taxed income of the offshore vessels. This would not be the case if the UPE transfers its offshore vessel business to the relevant subsidiary provided a blending of income results in an ETR of 15% or more for that jurisdiction.

Example (3) Competition EU versus non-EU

A maritime offshore construction company operating various vessels, such as dredgers, heavy-lift vessels as well as cable-layers, benefits from an EU tonnage tax regime. It is tendering for a project for the construction of an offshore windfarm in another jurisdiction in or outside the EU. The construction of such a windfarm results in a permanent establishment in that other jurisdiction. As a result of the tonnage tax regime available at the level of the UPE the Pillar 2 TuT will apply to this company and takes this into account during the tender phase. During the tender phase the company is however informed by the potential client, that the bid is won by a competitor who was willing to make no profits in respect of such work (strategy of the competitor, market penetration strategy, project services a greater goal). The tonnage tax regime, available to create a level playing field is due to Pillar 2, is not helpful anymore and the position of the EU company is even worse than before.

Example (4) Bareboat in, no substance carve-out?

If a company operating an offshore vessel is not eligible to the shipping exclusion (of Pillar 2) the question is whether the substance carve out will apply. This seems to be the case however if the vessel used by this company, is not owned, but leased (bareboat charter[4]) from either a group company or a third party the substance carve out is not providing much relief[5] as typically such a mobile asset is often used outside that specific jurisdiction?

2.2 Effect of article 8 OECD Model Tax Convention under Pillar 2 rules (EU and non-EU)

As a starting point companies that are active in maritime transport (defined as the transport of goods and persons in international traffic) are eligible for measures under the Guidelines on State aid to maritime transport. This category is also exempt under the shipping exclusion of Pillar 2. From the shipping exclusion of Pillar 2 it derives that companies performing business ancillary to the shipping business as such cannot qualify for the exclusion of Pillar 2 (only if within the same jurisdiction also direct shipping income is earned by a Constituent Entity.

Is article 8 OECD Model Tax Convention still applicable?

Article 8 of the OECD Model Tax Convention is applied in most of the tax treaties concluded among various States as well as specific shipping (aviation)treaties or this concept is included in domestic rules (reciprocity concept). For Pillar 2 a permanent establishment is subject to its rules if it meets the criteria of a permanent establishment as referred to in clause 10.1.1 The definition of a permanent establishment[6] used shows that as such a permanent establishment that is covered by

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[4] The operation of a vessel hired under a bareboat charter also provides access to tonnage tax regimes within the EU.

[5] 5.3.4. The tangible asset carve-out for a Constituent Entity located in a jurisdiction is equal to 5% of the carrying value of Eligible Tangible Assets located in such jurisdiction. Eligible Tangible Assets means: (a) property, plant, and equipment located in that jurisdiction; (b) natural resources located in that jurisdiction; (c) a lessee's **right of use of tangible assets located in that jurisdiction**; and

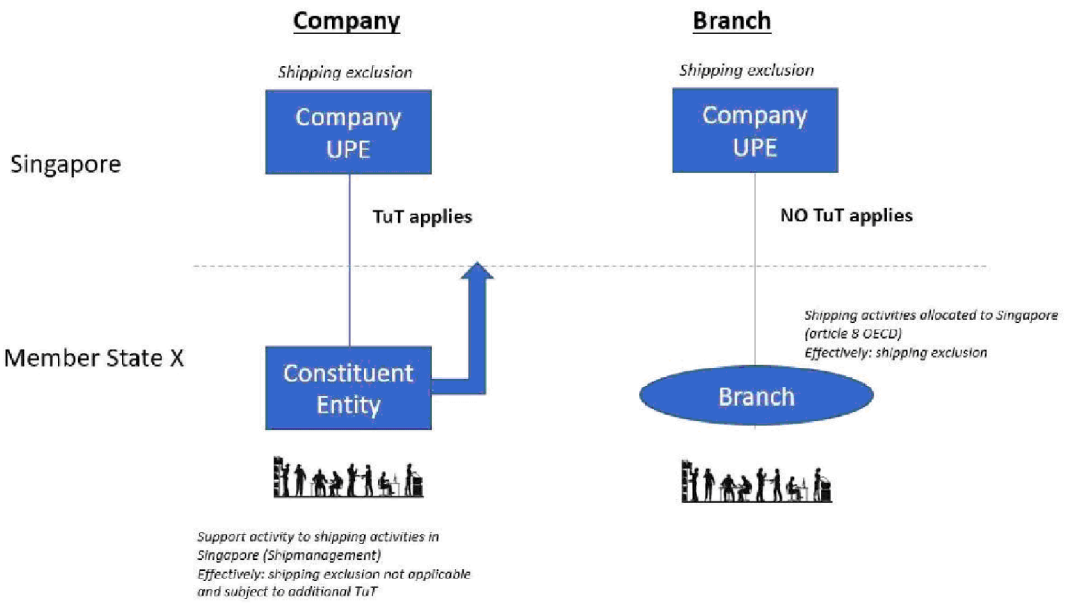
[6] Permanent Establishment means:
(a) a place of business (including a deemed place of business) situated in a jurisdiction and treated as a permanent establishment in accordance with an applicable Tax Treaty in force provided that such jurisdiction taxes the income attributable to it in accordance with a provision similar to Article 7 of the OECD Model Tax Convention on Income and on Capital;
(b) if there is no applicable Tax Treaty in force, a place of business (including a deemed place of business) in respect of which a jurisdiction taxes under its domestic law the income attributable to such place of business on a net basis similar to the manner in which it taxes its own tax residents;
(c) if a jurisdiction has no corporate income tax system, a place of business (including a deemed place of business) situated in that jurisdiction that would be treated as a permanent establishment in accordance with the OECD Model Tax Convention on Income and on Capital provided that such jurisdiction would have had the right to tax the income attributable to it in accordance with Article 7 of that model; or
(d) a place of business (or a deemed place of business) that is not already described in paragraphs (a) to (c) through which operations are conducted outside the jurisdiction where the Entity is located provided that such jurisdiction exempts the income attributable to such operations.

article 8 OECD Model Tax Convention (or its equivalent of the relevant tax or shipping treaty) is applied under Pillar 2. Hence, if article 8, as explained under the relevant treaty applies on the "shipping branch" as a whole there is no permanent establishment according to Pillar 2. The income is in that scenario allocated to the head office which in its turn is the Constituent Entity. Only if under the relevant tax treaty article 8 would not overrule all branch income (so there still a taxable permanent establishment left) Pillar 2 will also apply to the remaining permanent establishment.

Example (1) Legal entity versus a branch

(1) Below we compare 2 scenario's regarding shipmanagement activities of an international operating shipping group. The shipping company operates its vessels from a Constituent Entity in Singapore and benefits from a local tonnage tax. This will be covered by the exclusion at the level of the UPE. In this case the Singapore shipping company has a subsidiary in the EU that performs the shipmanagement (for example technical and crewing) activities for the vessels owned and operated by its Singapore based parent.
The EU based shipman company applies tonnage tax regarding its activities and therefore the IRR should apply as the effective tax rate is low and the EU Constituent Entity cannot fall within the shipping exclusion of 3.3.1-3.3.3. Hence at the level of the UPE (outside the EU) a TuT applies regarding the income generated in the EU.

(2) In the same scenario as under 1 a competitor in the shipping business decided to work in the EU with a branch instead of a company. Next to this exact the set-up is the same as that of its competitor in example 1 (also an office, local employees and also shipmanagement services). Due to the applied article 8 of the relevant tax treaty between the EU country and Singapore the relevant branch (permanent establishment) is overruled, as a result all activities and results are therefore allocated to the Singapore based shipping company. On that level the services of the branch are treated as cost of an activity directly benefitting from the shipping exclusion of Pillar 2. As a result effectively less tax is paid by the group compared to the former scenario.



The same applies for example for international operating shipping companies with agencies across the world. For legal (non-tax) reasons such a group decided to set up these activities with companies across the world. For Pillar 2 all these companies will not fall within the shipping exclusion of 3.3.1-3.3.3 but it on each level it should be seen whether the effective tax rate is below 15%. If so a TuT might apply. If however a company had decided to set up agencies via a branch instead of local companies it would not be required to determine the application of Pillar 2 in each jurisdiction. This has a potential impact on the business model while form a substance perspective there is no difference at all between both scenario's.

If the activities of such a group consist of shipmanagement only, whereby the EU based companies are taxed according to a tonnage tax regime, article 8 OECD Model Tax Convention would not apply. This might trigger the EU based companies to leave the EU.

2.3 Remarks

Following the examples discussed it is clear that the Pillar 2 rules (or its EU equivalent) can have a strange or unexpected outcome for companies operating in the shipping or offshore industry. First of all we find it difficult that the EU approves tonnage tax regimes, including strict substance requirements, in order to create a level playing field (within the EU as well as versus non-EU) which by the TuT is basically nullified. **This can trigger competition within the EU and the potential transfer of assets and functions (employment) from one jurisdiction to another and even outside the EU.**

We consider this even more strange considering the strict substance requirements that apply to companies that want to apply such a tonnage tax regime. Especially as in relation to the substance carve-out the EU explains that **its policy rationale is to exclude a fixed amount of income relating to substantive activities like buildings and people**. This, so the EU states, is a common aspect of corporate tax policies

worldwide, that seeks to encourage investments in economic substance by multinational enterprises in a particular jurisdiction.

This also applies for ancillary activities performed via company in a different jurisdiction other than the company performing the activity that falls within 3.3.1-3.3.3. A potential conversion into a branch of such a company can result in even less tax revenue compared to the former set up. Even the impact on business models applied for legal reasons might require review if the administrative burden becomes too high.

The EU should, in our view, **widen the scope of the shipping exclusion to activities that can also fall within the scope of the Maritime Guidelines (or at least have been approved by the European Commission as falling within that range**). Furthermore the shipping exclusion as such should also cover companies performing only ancillary activities for the group (or third parties if the activity is eligible to an EU based tonnage tax regime such as Shipmanagement) that otherwise[7] would have been covered by the relevant shipping exemption.

3. The shipping exclusion in detail

The international shipping exclusion itself is included in art. 3.3 of the OECD Pillar 2 rules. The exclusion clause stipulates that each Constituent Entity's International Shipping Income and Qualified Ancillary International Shipping Income shall be excluded from the computation of its Global Anti-Base Erosion (or GloBE) Income or Loss under art. 3.2 for the jurisdiction in which it is located. The relevant losses relating to this qualifying shipping income is also excluded from the GLOBE Income or Loss. In the past the OECD stated in relation to this exclusion that it would be in line with art. 8 of the OECD Model Tax Convention, however as we will discuss there are a number of differences.

Considering the concepts (wording) used in the exclusion we perceive influences from the tonnage tax regimes practice within the EU. The wording used in the OECD Pillar 2 rules is new and does not derive from the Commentary of the OECD Model Tax Convention. In our view by creating a new set of criteria in a mechanism that is well-established in treaty practice is challenging and triggers numerous questions. We will discuss the specifics and the differences as well as the complexities it triggers per paragraph below.

3.1 General

Article 3.3.1: For an MNE Group that has International Shipping Income, each Constituent Entity's International Shipping Income and Qualified Ancillary International Shipping Income shall be excluded from the computation of its GloBE Income or Loss under Article 3.2 for the jurisdiction in which it is located. Where the computation of a Constituent Entity's International Shipping Income and Qualified Ancillary International Shipping Income results in a loss, the loss shall be excluded from the computation of its GloBE Income or Loss

- As a starting point the explanation of *International Shipping Income and Qualified Ancillary International Shipping Income* should be explained similar as

[7] So if performed by the Costituent Entity which income falls within the shipping exclusion.

in article 8 OECD Model Tax Conventions (and its Commentary) as this has been the basis for the relevant exclusion for Pillar 2[8]. This means that, as discussed above, the operation of offshore vessels is not covered by the activities referred to under 3.3.2 as well as 3.3.3.

- As already discussed, the exclusion applies to Constituent Entity's as such. A branch or permanent establishment on which art. 8 OECD Model Tax Convention applies is not considered to be subject to the GloBE rules in the country in which the branch is active, but on the level of its head office (where the relevant corporate body is a tax resident and where the income of the branch is taxed under article 8 of the OECD Model Tax Convention).

The wording "for the jurisdiction in which it is located" should be explained as in the jurisdiction in which the company performing the relevant activities is a tax resident. The worldwide qualifying activities performed via branches of such a company are allocated to its head office according to art. 8 OECD Model Tax Convention. It makes sense that both profits and losses are effectively excluded from the GloBE rules.
We would expect numerous discussions whether a certain income or loss falls within the Pillar 2 exclusion or not. For example, a tanker that was used for international transportation activities is converted into a floating storage unit and sold directly after its conversion. Will the capital gain be (partially) covered by the Shipping Exclusion? Or a shipping company decides to bareboat charter a vessel to a third party and will not operate the vessel again. After one year the vessel is sold with a loss to the third party. Can the loss for such scenario's be taken into account for the GloBE rules or should it be allocated pro rata to both (present and former) activities?

3.2 International Shipping Income

Article 3.3.2: International Shipping Income means the net income obtained by a Constituent Entity from:
(a) the transportation of passengers or cargo by ships that it operates in international traffic, whether the ship is owned, leased or otherwise at the disposal of the Constituent Entity;

This is in line with the OECD Model Tax Convention and covers vessels owned, time or voyage chartered as well as bareboat charter (in).

If the technical management or commercial management of the vessels of a shipping company is performed by a separate entity in that, or another, jurisdiction, this income is not included in the exclusion. If those functions are performed by the relevant shipping company, they would however be covered by the exclusion.
Also, if this subsidiary was a branch / permanent establishment, the income will be allocated[9] to the Constituent Entity and can benefit from the Shipping exclusion.

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[8] *The GloBE rules also provide for an exclusion for international shipping income using the definition of such income under the OECD Model Tax Convention* OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors (Italy, July 2021)

[9] Commentary art. 8 OECD: *10. An enterprise that has assets or personnel in a foreign country for purposes of operating its ships or aircraft in international traffic may derive income from*

(b) the transportation of passengers or cargo by ships operated in international traffic under slot-chartering arrangements;

Not different compared to the relevant practice in the concept of art. 8 of the OECD Model Tax Convention. In the draft EU directive this is included as ancillary income instead of International Shipping Income.

(c) leasing a ship, to be used for the transportation of passengers or cargo in international traffic, on charter fully equipped, crewed and supplied;

This refers to the operation of time charters. Not different compared to the relevant practice in the concept of art. 8 of the OECD Model Tax Convention.

(d) leasing a ship on a bare boat charter basis, for the use of transportation of passengers or cargo in international traffic, to another Constituent Entity;

This is different compared to the Commentary to the OECD Model Tax Convention (wider scope[10]). It is helpful in practice where for legal reasons the ownership of seagoing vessels is separated from the direct operation of the vessels.

(e) the participation in a pool, a joint business or an international operating agency for the transportation of passengers or cargo by ships in international traffic; and

Not different compared to the relevant practice in the concept of art. 8 of the OECD Model Tax Convention.

(f) the sale of a ship used for the transportation of passengers or cargo in international traffic provided that the ship has been held for use by the Constituent Entity for a minimum of one year.

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providing goods or services in that country to other transport enterprises. This would include (for example) the provision of goods and services by engineers, ground and equipmentmaintenance staff, cargo handlers, catering staff and customer services personnel. Where the enterprise provides such goods to, or performs services for, other enterprises and such activities are directly connected or ancillary to the enterprise's operation of ships or aircraft in international traffic, the profits from the provision of such goods or services to other enterprises will fall under the paragraph

[10] 5. Profits obtained by leasing a ship or aircraft on charter fully equipped, crewed and supplied must be treated like the profits from the carriage of passengers or cargo. Otherwise, a great deal of business of shipping or air transport would not come within the scope of the provision. However, Article 7, and not Article 8, applies to profits from leasing a ship or aircraft on a **bare boat charter basis except when it is an ancillary activity** of an enterprise engaged in the international operation of ships or aircraft

The sale of a vessel operated for the use of international transportation would qualify under art. 8 OECD Model Tax Convention as well[11]. The threshold of one year seems to be implemented to avoid any abuse or misuse. Especially in today's shipping market it happens that vessels following delivery from the shipyard are sold or even during the construction phase. Apart from this, a vessel that is operated by a shipping company for less than a year could for various business reasons be sold. Still those companies would qualify for the international shipping exclusion under the proposed Pillar 2 rules, but not for the capital gain. As such capital gain would -within the EU- typically be covered by a tonnage tax[12], the capital gain would be taxed at an effective tax rate below 15% and could thus trigger a top-up-tax to 15%. Even further it might provide a safe-harbor for parties that actually do want to apply the exclusion.

International Shipping Income shall not include net income obtained from the transportation of passengers or cargo by ships via inland waterways within the same jurisdiction.

As a result the exclusion also applies to the operation of vessels that transport using inland waterways as long as it qualifies as international traffic. Pure domestic transport via inland waterways does not meet the requirements of the exclusion.

3.2.1 General remarks

In the Commentary to Article 8 of the OECD Model Tax Convention it is stated that any activity carried on primarily in connection with the transportation by the enterprise, of passengers or cargo by ships or aircraft that it operates in international traffic, should be considered to be directly connected with such transportation (and thus covered under article 8). It would be helpful if the OECD Pillar 2 rules could refer to the OECD Model Tax Convention and state that OECD International Shipping income in article 3.3.2 is the same as the shipping income of Article 8 of the OECD Model Tax Treaty. If not, questions will arise if for example the following income (and related costs) is covered by the shipping exclusion or not:

- the office (building) from which the business is performed and all related inventory and equipment, terminals, cargo handling equipment and installations for loading and unloading the vessels operated in a qualifying manner etc.;

For example, if a Constituent Entity decides to sell assets (not vessels, but the office and related domestic and foreign loading and unloading machinery) directly used to generate International Shipping Income with a gain this should be covered by the relevant exemption. If so, is it relevant whether these assets have always been used for this purpose by the company?

3.3 Qualified Ancillary International Shipping

3.3.3 Qualified Ancillary International Shipping Income means net income obtained by a Constituent Entity from the following activities that are performed primarily in

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[11] See paragraph 19 and 20.

[12] Such an exemption on the sale of ships covers only ships operated under the tonnage tax regime by companies engaged in genuine shipping activities and include a requirement that only ships acquired and sold whilst under the tonnage tax regime may benefit from such an exemption.

connection with the transportation of passengers or cargo by ships in international traffic:

From article 3.3.3 it derives that the ancillary income described in this article is covered by the Shipping exclusion. It would appear that for the Pillar 2 rules it is not required that these activities are performed by the same Constituent Entity that obtain the Shipping Income of article 3.3.2, but the Constituent Entities that earn that the ancillary income should be in the same jurisdiction (see article 3.3.4).

So, if a company performs only (maritime) supporting activities to a group company in another jurisdiction that owns and operates the vessel (and therefore generates International Shipping Income) such activities will not be covered by the exemption. This conflicts with the current way international operating shipping companies are structured.

If however in this case the activities are performed by a branch which falls under the scope of article 8 OECD Model Tax Treaty, the income would become taxable at the level of the head office (i.e. the shipping company). In that case the ancillary income would appear to be covered by the shipping exclusion (basically as a cost element for the International Shipping Income).

(a) leasing a ship on a bare boat charter basis to another shipping enterprise that is not a Constituent Entity, provided that the charter does not exceed three years;

We note that all ancillary income (article 3.3.3 (a) through (e)) must primarily be performed in connection with the transportation of passengers or cargo by ships in international traffic.

Article 3.3.3 (a) deals with bare boat chartering out of ships. In the OECD Model Tax Convention's Commentary on art. 8 paragraph 5 it is argued that *"however, Article 7, and not Article 8, applies to profits from leasing a ship or aircraft on a bare boat charter basis except when it is an ancillary activity of an enterprise engaged in the international operation of ships or aircraft."* The safe-harbor or maximum of three years itself is not mentioned by the OECD but is often dictated by the European Commission[13] as a maximum time a bareboat charter can benefit from tonnage tax. A match between Pillar 2 and the tonnage tax regimes in the EU like this is clearly helpful in practice. Please note that the European Commission considers this acceptable not only in periods of overcapacity but also in relation to chartering to group companies (this is for Pillar 2 treated as direct International Shipping Income according to 3.3.2 sub d). Article 3.3.3 (a) requires that the ship is bare boat chartered out to another shipping enterprise.

If a shipowner / shipping enterprise charters out the vessel to a third party due to overcapacity, it will likely do this with the purpose to mitigate the cost (of an idle vessel) by earning at least some income. It seems irrelevant to us whether the charterer itself

[13] Commission Decision (EU) 2019/1116 of 19 December 2017 on State aid SA.33829 (2012/C) Maltese tonnage tax scheme and other State measures in favour of shipping companies and their shareholders (notified under document C(2017) 8734)

is also a shipping company[14]. If it is relevant, does this refer to seagoing shipping companies or inland shipping companies? And if so, is it relevant what the activities of the charterer are?

(b) sale of tickets issued by other shipping enterprises for the domestic leg of an international voyage;

See also paragraph 8 of the OECD Commentary to art. 8 of the Model Tax Treaty. Article 3.3.3. (b) requires that the tickets are "issued by other shipping enterprises for the domestic leg of an international voyage". This relates to the situation where a shipping enterprise takes care of the international transport of passengers or cargo including a domestic leg, which latter is performed by another shipping enterprise. For example, a container carrier invoices its customer for a transport between Duisburg (an inland harbor within Germany) via Hamburg to China. If the inland transport is performed by another shipping company, the shipping exclusion would apply. If the tickets for the inland transport are however issued by a road or rail transport company the exclusion would not apply to this income. We believe this creates an unnecessary administrative burden and we would suggest to widen the scope of article 3.3.3 (b) as it is the case with article 8 of the OECD Model Tax Convention.

(c) leasing and short-term storage of containers or detention charges for the late return of containers;

This is similar as paragraph 9 of the Commentary to art.8 of the OECD Model Tax Convention.

(d) provision of services to other shipping enterprises by engineers, maintenance staff, cargo handlers, catering staff, and customer services personnel;

This is similar as paragraph 10 of the Commentary to art.8 of the OECD Model Tax Convention, however in paragraph 10 of the Commentary these activities are stated **as an example** of activities that can fall under this provision whereas article 3.3.3 (d) seems to be limited to the activities mentioned. Furthermore, the scope of article 8 OECD Model Tax Treaty relates to services provided to "other transport enterprises" whereas article 3.3.3 (d) is limited to services provided to "other shipping enterprises". We do not see why this limitation is included.

In respect of article 8 OECD Model Tax Convention these activities performed by a branch in respect of the vessels owned and operated by its head office fall within article 8. This paragraph makes it clear that also similar services to third parties are covered by article 8. Question in relation to Pillar 2 however is how "other shipping enterprises" should be explained in terms of Constituent Entities? Is reference made to third parties outside the group of the UPE or is this also applicable if the Constituent Entity provides these services to a group company that is based in another jurisdiction?

[14] A tanker can for example by the charterer be used for temporary storage offshore or in ports.

If such services performed to group shipping companies in other jurisdictions are covered by this clause we find that the 50% cap (see 3.3.4) should not apply in this respect. We do note that in general it would be more in line with the international practice if Constituent Entities that only perform ancillary activities should also be covered by the exclusion irrelevant whether the group company that generates International Shipping Income is based in another jurisdiction.

(e) investment income where the investment that generates the income is made as an integral part of the carrying on the business of operating the ships in international traffic

This is similar as paragraph 14 of the Commentary to art.8 of the OECD Model Tax Convention and relates to investment income such as interest which are made as an integral part of carrying on the business of operating the ships in international traffic. Under the European Union Emissions Trading System (ETS), an international shipping company may also generate income with respect to emission permits and credits. It would be good if the OECD can confirm that such income would fall under this article where such income is an integral part of carrying on the business of operating ships in international traffic.

3.3.1 Inland transportation

It is clear that for Pillar 2 the ancillary activities as referred to in paragraph 7 of the Commentary to art.8 of the OECD Model Tax Convention are not covered by the Shipping exclusion. Paragraph 7 covers the inland transportation activities performed by an international shipping company.

For example, an international shipping company transfers on its own vessel a container from the port of Shanghai to the port of Rotterdam. Subsequently the shipping company, as it provides a door-to-door service, arranges that a third-party transport company transports the container by truck over an inland road to the customer inland. In such a case, any profits derived by the first enterprise from arranging such transportation by the trucking company are covered by art. 8 OECD Model Tax Convention even though the profits derived by the other third-party trucking company that provide such inland transportation would not be.

These activities are potentially not covered to avoid any unfair competition with other, non-shipping, services providers (freight forwarders etc.). From a compliance perspective this results in an additional administrative burden.

3.3.2 The 50% cap

3.3.4. The aggregated Qualified Ancillary International Shipping Income of all Constituent Entities located in a jurisdiction shall not exceed 50% of those Constituent Entities' International Shipping Income

First of all, this is different compared to the Commentary to art.8 of the OECD Model Tax Convention. Secondly the cap approach seems to derive from the more recent approvals of the European Commission of tonnage tax regimes. This also results in additional administrative burden for the relevant shipping company.

We note that the 50% cap is calculated on the International Shipping Income. We understand that Income is understood to be a profit or loss, and not the turnover (reference is made to Article 3.3.1). This means that in case the International Shipping Income is a loss, all Qualified Ancillary Shipping Income is not covered by the Shipping Exclusion. We would suggest that the 50% cap is not measured on the profit, but on the turnover as is done in the Dutch tonnage tax regime (and approved by the European Commission).

What happens in case a vessel is chartered to a third party on a bareboat charter as referred to in 3.3.3 (a) and the ship is sold? Is such capital gain treated as ancillary income (which is capped) or will it be covered by 3.3.2 (f) without the 50% cap?

3.3.3 Cost allocation

3.3.5. The costs incurred by a Constituent Entity that are directly attributable to its international shipping activities listed in Article 3.3.2 and the costs directly attributable to its qualified ancillary activities listed in Article 3.3.3 shall be deducted from the Constituent Entity's revenues from such activities to compute its International Shipping Income and Qualified Ancillary International Shipping Income. Other costs incurred by a Constituent Entity that are indirectly attributable to a Constituent Entity's international shipping activities and qualified ancillary activities shall be allocated on the basis of the Constituent Entity's revenues from such activities in proportion to its total revenues. All direct and indirect costs attributed to a Constituent Entity's International Shipping Income and Qualified Ancillary International Shipping Income shall be excluded from the computation of its GloBE Income or Loss.

This provisions basically addresses an appropriate cost allocation also applied in practice for various tonnage tax regimes within the EU.

3.3.4 Strategic or commercial management

*3.3.6 In order for a Constituent Entity's International Shipping Income and Qualified Ancillary International Shipping Income to qualify for the exclusion from its GloBE Income or Loss under this Article, the Constituent Entity must demonstrate that the s**trategic or commercial management of all ships** concerned is effectively carried on from within the jurisdiction where the Constituent Entity is located.*

The concepts of strategic and commercial management are not included in the art. 8 OECD Model Tax Convention and its Commentary. These concepts are however well-known within the various EU tonnage tax regimes. This provision conflicts in our view with the current set up of international operating shipping companies. We do understand, and support this, that the OECD prefers to have management or substance at the level of the Constituent Entity that performs activities qualifying for the exclusion, however within EU based tonnage tax regimes this is already safe-guarded.

Example: a Constituent Entity is operating an international shipping business in jurisdiction X. A number of vessels of this fleet are completely managed from its branch in jurisdiction Y. Article 8 of the OECD Model Tax Convention is applicable to such a branch and therefore the relevant income of these vessels is allocated to the

Constituent Entity in jurisdiction X[15]. Will the income from the branch in this case not fall within the shipping exclusion?

The exact meaning of the wording strategic as well as commercial management is relevant for the industry. HMRC has published its view, in relation to tonnage tax, in respect of these concepts online[16] and so did the European Commission[17]. These views differ for example (slightly) with other EU based tonnage tax regimes which also apply similar wording and can trigger a lot of discussions. What for example if various of the elements of such concepts are outsourced to third parties? Guidance in this respect would be helpful in case the OECD prefers to keep the wording as it is.

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[15] See for example paragraph 19-21.

[16] TTM03810 - Tonnage Tax Manual - HMRC internal manual - GOV.UK (www.gov.uk) and TTM03820 - Tonnage Tax Manual - HMRC internal manual - GOV.UK (www.gov.uk)

[17] Communication from the Commission providing guidance on State aid to shipmanagement companies (Text with EEA relevance) OJ C 132, 11.6.2009, p. 6–9 .

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Cc: 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]
From: 5.1.2e (AFP/EIZ)
Sent: Tue 2/1/2022 2:05:53 PM
Subject: Pijler 2 // Terugkoppeling Raadswerkgroep 27 januari 2022
Received: Tue 2/1/2022 2:05:00 PM
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Aantekeningen Raadswerkgroep Pijler 2 - 27 januari 2022.docx

Ha allen,

Zie hieronder de terugkoppeling van de Pijler 2 Raadswerkgroep van 27 januari 2022. Bijgevoegd de uitgebreidere aantekeningen en de presentatie sheets van de CIE over de hoofdstukken 3 tot en met 5.

Groeten,
5.1.2e *en* 5.1.2e

***

Algemeen

Donderdag 27 januari 2022 vond de derde (fysieke) Raadswerkgroep plaats. Tijdens deze Raadswerkgroep stond de technische behandeling van de **hoofdstukken 3 tot en met 5** op de agenda. Het was een **constructieve bespreking**. Hoofdstuk 3 tot en met 5 behandelen de materie over hoe te bepalen dat er sprake is van een effectieve minimumbelasting van 15%.

5.1.2a
5.1.2a Tijdens de Raadswerkgroep van donderdag 27 januari 2022 **heeft Nederland conform de instructie vragen ter verduidelijking gesteld en suggesties gedaan om de tekst van het richtlijnvoorstel meer in lijn te brengen met hetgeen de Raad en de Europese Commissie lijken te beogen**.

Noemenswaardige opgebrachte punten tijdens de Raadswerkgroep

Modelregels: 5.1.2a
5.1.2a 5.1.2a
5.1.2a
5.1.2a
5.1.2a
Artikel 19 behandelt de 'covered taxes'. 5.1.2a
5.1.2a

Artikel 29 betreft de 'de minimis exclusion'. In het artikel worden gefixeerde bedragen van EUR 10 miljoen en EUR 1 miljoen genoemd.

5.1.2a
5.1.2a

Vervolgproces

Het FRA VZS heeft aangegeven de maanden januari en februari aan de technische behandeling te wijden. Op 4 februari stond een High Level Working Party gepland. Het FRA VZS heeft echter besloten deze meeting te vervangen door een extra Pijler 2 meeting. **Vrijdag 4 februari vindt dan ook de volgende (fysieke) raadswerkgroep plaats. In de ochtend wordt de compromistekst van hoofdstuk 1 en 2 besproken. In de middag staat hoofdstuk 5 tot en met 8 op de planning.** Wel heeft het FRA VZS aangegeven te verwachten niet toe te komen aan de behandeling van hoofdstuk 8. De Raadswerkgroep daarna vindt plaats op 8 februari, waarin verder wordt gegaan met behandeling hoofdstuk 6 tot en met 8 (afhankelijk van tot hoe ver 4 februari wordt gekomen).

Pijler 2 - Raadswerkgroep 27 januari 2022

5.1.2a

Artikel 14, 15 en 16

5.1.2a

NLD: 5.1.2a Willen eraan toevoegen: Op grond van het richtlijnvoorstel zou sprake zijn van een portfolio shareholding als minder dan 10% zou worden gehouden door CE. Daar wijkt de richtlijnvoorstel af van de modelregels. In modelregels gaat het over 10% gehouden door MNE-groep. Van belang als belang wordt vervreemd door MNE-groep, waarbij sprake is van een vervreemding door 2 groepsentiteiten die samen meer dan 10% belang hebben. Discrepantie tussen MR en RL-voorstel.

5.1.2a

5.1.2a

Artikel 16 en 17

5.1.2a

Artikel 19 en 20

5.1.2a

5.1.2a

Artikel 21 en 22

5.1.2a

Artikel 23 en 24

5.1.2a

Artikel 25, 26, 27 en 28

5.1.2a

NLD: 5.1.2a Formulering die we niet helemaal begrijpen. Statenloze entiteit is nooit in een staat gevestigd. Gaat meer om een fictie. Fictie om tot uiting te brengen dat ETR in afzondering berekend moet worden.

5.1.2a

Council of the European Union
General Secretariat

Brussels, 28 January 2022

WK 1227/2022 INIT

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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Delegations
Subject	Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union (Chapters III to V) - presentation by the European Commission

Delegations will find attached the presentation made by the European Commission.


European Commission
COUNCIL DIRECTIVE
on ensuring a global minimum level of taxation for multinational groups in the Union
Working Party on Tax Questions
Presentation DG TAXUD
27 January 2022

Chapter 3 – Computation of the qualifying income or loss

Articles 14, 15, 16, 17 and 18

Chapter 3 – Computation of the Qualifying Income or Loss

Art. 14 – Determination qualifying income or loss

Effective Tax Rate (ETR) = $\frac{\text{Covered Taxes}}{\textit{Qualifying Income}}$

Basis qualifying income:

Financial accounting net income or loss of CE before consolidation, as determined under the **accounting standard** used in the preparation of the **consolidated financial statements of the UPE.**

- Not based on acceptable financial accounting standard, make **adjustments to prevent any material competitive distortion.**
- No consolidated financial statements, use: a) **an acceptable financial accounting standard;** or b) **another financial accounting standard adjusted to prevent any material competitive distortion.** (par. 3)

- If not reasonably feasible, use **another Acceptable Financing Accounting Standard** or an **Authorised Financial Account Standard** under certain conditions (par. 2)

Adjustments to basis qualifying income:

1. Adjustments (art. 15)
2. Exclusion International **Shipping Income and Qualified Ancillary International Shipping Income** (art. 16);
3. Allocation Qualifying Income or Loss **between PE and Main Entity** (art. 17);
4. Allocation Qualifying Income or Loss from a **Flow-through Entity** (art. 18).

Chapter 3 – Computation of the Qualifying Income or Loss

Art. 15 - Adjustments to determine the qualifying income or loss

Par. 2	Nine specific categories of adjustments	Par. 7	Possibility for an election to **spread the effect** of qualifying income or loss arising from disposal of **immovable property**
Par. 3	Possibility for an election relating to **stock-based compensation;**	Par. 8	Exclusion expenses **intra-group financing arrangements** (Prof. De Wilde);
Par. 4	Adjustments to make transaction between CEs located in different jurisdictions consistent with the **Arm's Length Principle;**	Par. 9	Possibility for an election that permits **consolidated accounting treatment** to be applied to transactions between CEs of the same Group located in the same jurisdiction
Par. 5	**Qualified Refundable Tax Credits and non-Qualified Refundable Tax Credits;**	Par.10	Exclusion of certain income of an **insurance company;**
Par. 6	Possibility for an election to **use the realisation principle** for assets that are accounted for using the fair value method or impairment accounting;	Par.11	Decreases or increases to equity in relation to **additional tier one capital;**

Chapter 3 – Computation of the Qualifying Income or Loss

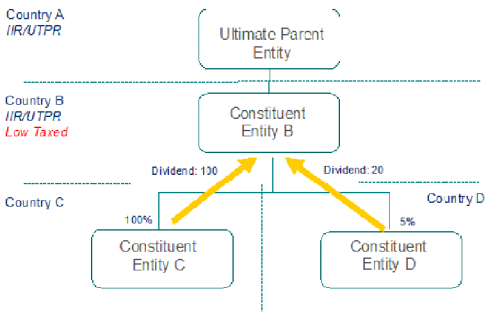
Art. 15(2):

Nine specific categories of adjustments

1. Net Taxes Expenses;
2. Excluded Dividends;
3. Excluded Equity Gain or Loss;
4. Included Revaluation Method Gain or Loss;
5. Gain or loss from disposition of assets and liabilities excluded under Art. 63;
6. Asymmetric Foreign Currency Gain or Loss;
7. Policy Disallowed Expenses;
8. Prior Period Errors and Changes in Accounting Principles; and
9. Accrued Pension Expenses;

Chapter 3 – Computation of the Qualifying Income or Loss

Example art. 15(2) – Excluded Dividends:



Background:

- 'Excluded dividend' = dividend distribution in respect of an ownership interest, except there is:
  i. an ownership interest of less than 10% (a "portfolio shareholding"), and which is held for less than 1 year at the date of the distribution
  ii. an ownership interest in an investment entity of Article 41;

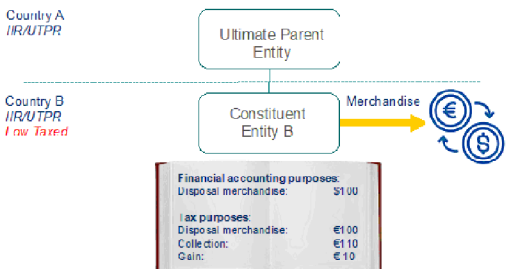
Example:

- The shares in CE C and CE D are held for less than 1 year.
- Constituent Entity B:

Financial Accounting Net Income:	1.000
Excluded Dividends:	100
Qualifying Income:	900

Chapter 3 – Computation of the Qualifying Income or Loss

Example art. 15(2) – Asymmetric Foreign Currency Gain or Loss:



Background:

- Differences between the functional currency for accounting purposes and the one used for local tax purposes.

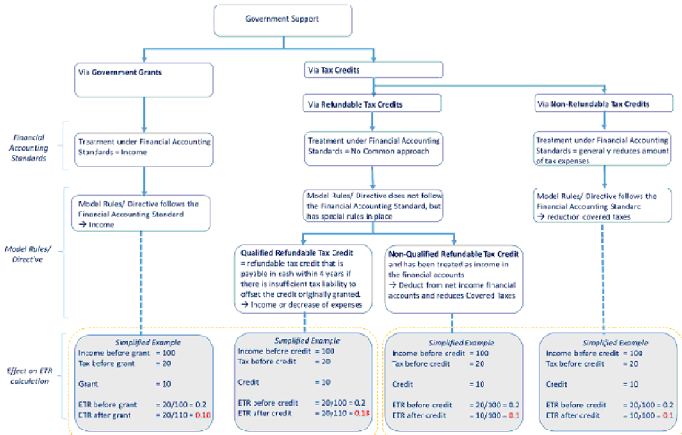
Example:

Constituent Entity B:

• Financial Accounting Net Income:	100
• Asymmetric Foreign Currency Gain:	10
• Qualifying Income:	110

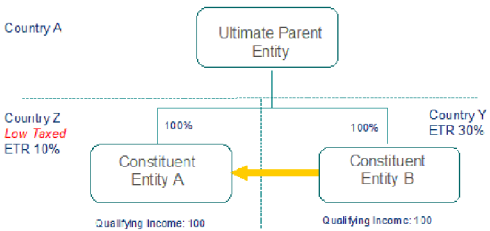
Chapter 3 – Computation of the Qualifying Income or Loss

Art. 15(5):



Chapter 3 – Computation of the Qualifying Income or Loss

Example art. 15(8) - Intra-group financing arrangements :



Facts & Circumstances:

- Financial instrument is put in place between CE A and CE B. For financial accounting purposes is **debt** and for tax purposes is **equity**.
- **Interest expenses** of 40 at level of CE A and **interest income** of 40 at level of CE B

Consequences:

- Without art. 15(8):
  - ETR CE A: 16.6% [10/60]
  - ETR CA B: 21.4% [30/140]
- With art. 15(8) the **interest expense deduction at CE A will be denied**.

Chapter 3 – Computation of the Qualifying Income or Loss

Art. 16 – International shipping income exclusion:

Excludes from the scope the profits from transportation of passengers or cargo by ships in international traffic

Based on the scope of **Article 8 OECD MC**

Exclusion also applies to certain **ancillary activities**. Must be performed primarily in connection with. Not exceed 50%.

Substance criterion to ensure that strategic or commercial management of ships is effectively carried on from jurisdiction where CE is located

European Commission

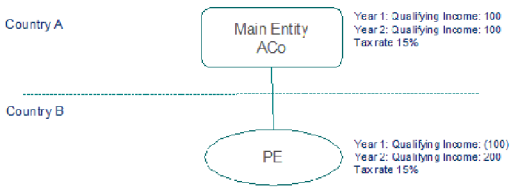
Chapter 3 – Computation of the Qualifying Income or Loss

Art. 17 - Allocation qualifying income or loss between Main Entity and PE:

- **Basis:** Separate financial accounts PE. Otherwise based on accounting standard UPE.
- **Adjusted**:
  - in accordance with Tax Treaty or domestic law of source jurisdiction;
  - in accordance with Art. 7 OECD MC;
  - to income that Main Entity jurisdiction exempts
- **Other elements**:
  - Financial Accounting Net Income or Loss PE not taken into account for Main Entity (par. 4).
  - Special rule for PE losses in case of foreign tax credit regime (par. 5).

Chapter 3 – Computation of the Qualifying Income or Loss

Example art. 17(5) - PE losses:



- ACo:

	Year 1	Year 2
Qualifying income/loss	100	100
PE income/loss allocated to Aco	(100)	100
Net qualifying Income	0	200
Covered Taxes	0	30

Y1: follow local treatment to avoid preference for PE exemption regimes.
Y2: recapture PE loss

- PE:

	Year 1	Year 2
Qualifying income/loss	(100)	200
Income/loss allocated PE	100	(100)
Net Qualifying Income	0	100
Covered Taxes	0	15

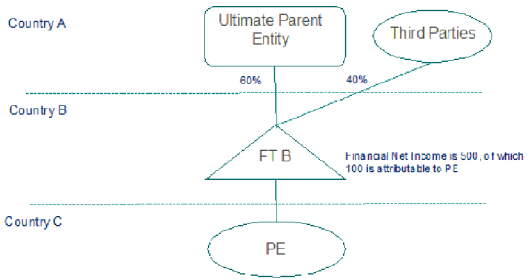
Chapter 3 – Computation of the Qualifying Income or Loss

Art. 18 - Allocation qualifying income or loss of a Flow-through Entity:

1. **Financial accounting net income or loss of flow-through entity** (not allocated to another CE).
2. Reduced by the amount attributable to **owners that are not members of the group**
3. Reduced by financial accounting net income or loss **of the PE**
4. **Remaining amount is allocated**:
   - If flow-through entity is tax transparent entity (that is not UPE) → **allocated to CE owners**
   - If tax transparent entity is UPE or reverse hybrid entity → **allocated to the entity**

Chapter 3 – Computation of the Qualifying Income or Loss

Example art. 18 - allocation Flow-through Entity:



	Remaining amount allocated
Financial Accounting Net Income or Loss of Flow-through Entity	500
1. Attributable to third parties = 200 (500 x 40%)	300
2. Attributable to PE = 60 (100 x 60%)	240
3. Attributable to UPE = 240 (400 x 60%)	0

Chapter 4 – Computation of Adjusted Covered Taxes

Articles 19, 20, 21, 22, 23 and 24

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 19 – Covered taxes:

Effective Tax Rate (ETR) = $\frac{\textit{Covered Taxes}}{\text{Qualifying Income}}$

Covered taxes:
See definition (art. 19).
Adjusted covered taxes:
Basis: Current tax expense accrued in its financial accounting net income or loss with respect to covered taxes **Adjusted by:** • Additions (par. 2) & reductions (par. 3); • Total Deferred Tax Adjustment Amount (art. 21); • Any increase or decrease in covered taxes recorded in equity or other comprehensive income relating to amounts included in the computation of qualifying income or loss that will be subject to tax.

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 19 – Covered taxes:

Covered taxes shall be:

a) taxes **accrued in the financial accounts of a constituent entity** with respect to its income or profits, or its share of the income or profits of a constituent entity in which it owns an ownership interest;

b) taxes on **distributed profits, deemed profit distributions, and non-business expenses imposed under an eligible distribution tax system**;

c) taxes imposed **in lieu of a generally applicable corporate income tax**; and

d) taxes levied **by reference to retained earnings and corporate equity**, including taxes on multiple components based on income and equity.

Covered taxes shall not include:

a) the top-up tax accrued by a parent entity under a **qualified income inclusion rule**;

b) the top-up tax accrued by a constituent entity under a **qualified domestic top-up tax**;

c) taxes attributable to an adjustment made by a constituent entity as a result of the application of a **qualified undertaxed payment rule**;

d) a **disqualified refundable imputation tax**;

e) **taxes paid by an insurance company** in respect of returns to policyholders.

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 20 – Adjusted covered taxes:

Additions (par. 2):		Reductions (par. 3):	
a)	**Covered Taxes accrued as an expense** in the profit before taxation in the financial accounts;	a)	Current tax expense with respect to income **excluded** from the computation of qualifying income or loss **under Ch 3;**
b)	**Qualifying loss deferred tax assets** (art. 22(3));	b)	Credit or refund in respect of a **Non-qualified refundable tax credit** that is not recorded as a reduction to the current tax expense;
c)	Covered taxes relating to an **uncertain tax positions** where that amount has been treated as a reduction to covered taxes under art. 3(d);	c)	Covered Taxes **refunded or credited** (except qualified refundable tax credits) to a CE that was **not treated as an adjustment** to current tax expense in the financial accounts;
d)	Credit or refund in respect of **qualified refundable tax credit** that is recorded as a reduction to the current tax expense.	d)	Current tax expense which relates to an **uncertain tax position;**
		e)	Current tax expense that is not **expected to be paid within 3 years.**

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 20(4) and 20(5) – Adjusted covered taxes:

- No amount of covered taxes may be taken into account more than once.

- Due to a **permanent difference** in the treatment between tax and financial accounting rules, the **local tax rules** in the Constituent Entities' jurisdiction **grant a deduction** from income that is **in excess of** what would be allowed for **financial accounting purposes** (e.g. a certain item is deductible for tax purposes but not pursuant to financial accounting rules) in the same **FIscal Year.**

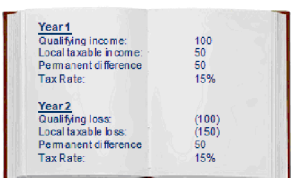
- The constituent entities in that jurisdiction shall be liable to **additional top-up tax** on the difference between (i) the negative amount of adjusted covered taxes and (ii) the outcome of multiplying the net qualifying loss (as determined in accordance with the applicable financial accounting standards) with the minimum tax rate.
  - Designed to **prevent incremental tax benefit or arbitrage generation** in a year in which a MNE Group has a qualifying loss and a permanent difference in the same jurisdiction

Chapter 4 – Computation of Adjusted Covered Taxes

Example art. 20(5) - Additional Top-up Tax:

Country A

Constituent Entity ABC



20

Year 1:

Qualifying income	100	
Covered Taxes	7.5	(15%*50)
ETR	7.5%	(7.5/100)
Top-up tax	7.5	(100*(15%-7.5%))

Year 2:

Without art. 20(5):

Qualifying loss	(100)	
DTA	22.5	(15%*150)
ETR	0%	(22.5/(100))
Top-up tax	0	

With art. 20(5):

Qualifying loss	(100)	
DTA	22.5	(15%*150)
ETR	0%	(22.5/(100))
Top-up tax	0	
Qualifying loss * METR	15	(15%*100)
Additional top-up tax	7.5	(22.5–15)

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 21 – Total deferred tax adjustment amount

Total Deferred Tax Adjustment Amount (DTAA) (par. 2):

Basis:

- Deferred tax expense accrued in the financial accounts of the CE.
- Recast at METR, to the extent they have been recorded at a rate in excess of METR.
- See example next slide.

Exclusions (par. 5):

a) Amount with respect to items excluded from the computation of the qualifying income or loss under Chapter 3;
b) Amount with respect to disallowed accruals and unclaimed accruals;
c) Impact of valuation adjustment or accounting recognition with respect to a deferred tax assets;
d) Amount arising from re-measurement with respect to a change in the applicable domestic tax rate;
e) Amount with respect to the generation and use of tax credits.

Adjustments (par. 3&4):

- Increased by disallowed accrual or unclaimed accrual paid during fiscal year;
- Increased by any recaptured deferred tax liability determined in a preceding fiscal year which has been paid during the fiscal year;
- Reduced by amount that would be a reduction to the DTAA due to recognition of a loss deferred tax asset for a current year tax loss, where a loss deferred tax asset has not been recognised because the recognition criteria are not met.

Chapter 4 – Computation of Adjusted Covered Taxes

Example art. 21 - Total Deferred Tax Adjustment Amount (DTAA):

Treatment asset:

- Financial accounting purposes: depreciate asset in 5 years
- Tax purposes: immediate expensing asset

In case no DTAA:

• ETR:	0%	(0/80)
• Top-up tax:	12	(80 * (15% - 0%))

In case DTAA:

• DTAA:	12	(80*15%)
• ETR:	15%	(12 / 80)
• Top-up tax:	0	(80 * (15% - 15%))

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 21 – Total deferred tax adjustment amount

Recasting at METR (par. 6):

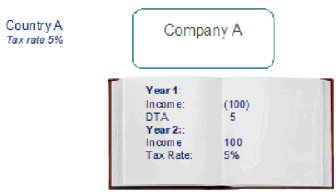
- A deferred tax asset that has been recorded at a rate lower than the METR may be **recast at the METR**, if the taxpayer can demonstrate that the deferred tax assets is **attributable to a Qualifying Loss**. The DTAA is reduced by this amount.

Recapturing (par. 7&8):

- Recapture **within 5 years**, to ensure that deferred tax liabilities that do not relate to specific policy allowed categories are actually settled within a certain period of time.
- **Exception applies to the following categories:**
  - Cost recovery allowanced on tangible assets;
  - Costs of licence or similar arrangement from the government for the use of immovable property or exploitation of natural resources that entails significant investment in tangible assets;
  - Research and development expenses;
  - De-commissioning and remediation expenses;
  - Fair value accounting on unrealised net gains;
  - Foreign currency exchange net gains;
  - Insurance reserves and insurance policy deferred acquisition costs;
  - Gains from sale of tangible property located in the same jurisdiction as the CE that are reinvested in tangible property in the same jurisdiction;
  - Additional amounts accrued as a result of accounting principle changes with respect to the above categories.

Chapter 4 – Computation of Adjusted Covered Taxes

Example art. 21(6) - Recasting at METR:



Without par. 6:

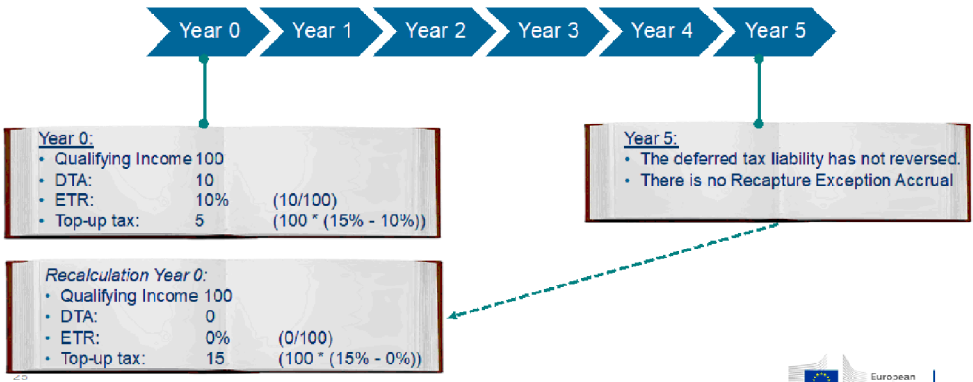
	Year 1	Year 2
Qualifying Income/Loss	(100)	100
DTA	(5)	5
DTAA	(5)	5
ETR	-	5% (5/100)
Top-up Tax	-	10 (100*(15%-5%))

With par. 6:

	Year 1	Year 2
Qualifying Income/Loss	(100)	100
DTA	(5)	-
DTA Recast	15	-
DTAA	(15) ((5) (10))	15
ETR		15% (15/100)
Top up Tax		0 (100*(15% 15%))

Chapter 4 – Computation of Adjusted Covered Taxes

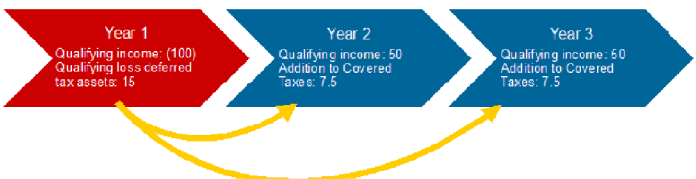
Example art. 21(7) - Recapture:



Chapter 4 – Computation of Adjusted Covered Taxes

Art. 22 – Qualifying loss election

- Possibility for an election to carry forward the qualifying loss deferred tax asset and use it in any subsequent fiscal year



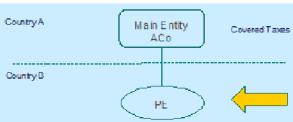
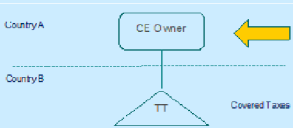
- When revoked any remaining Qualifying Loss Deferred Tax Asset is reduced to zero
- Qualifying loss election must be filed with the first Top-up tax information return
- Special rule for Flow-through Entities that are UPE

European Commission

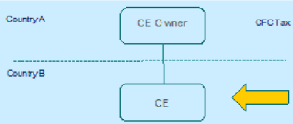
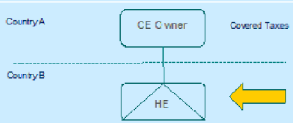
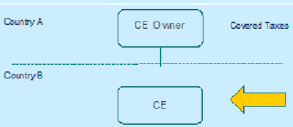
Chapter 4 – Computation of Adjusted Covered Taxes

Art. 23 – Specific allocation of covered taxes incurred by certain types of constituent entities

- In general, covered taxes are allocated to the CE that earned the income
- Special rules to allocate covered taxes related to:

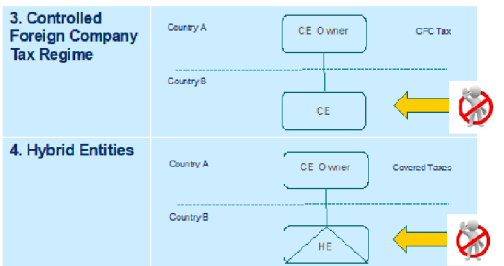
1. Permanent Establishment	
2. Tax Transparent Entities	

Chapter 4 – Computation of Adjusted Covered Taxes

3. Controlled Foreign Company Tax Regime	
4. Hybrid Entities	
5. Distributions	

Chapter 4 – Computation of Adjusted Covered Taxes

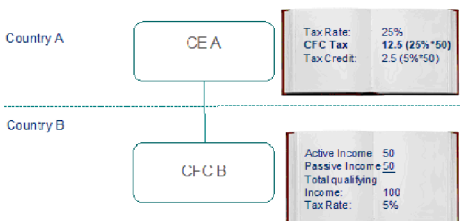
Art. 23(6) - Limitation on 'push down':



- **Limitation 'push-down'** of taxes relating to a CFC-regime of a Hybrid Entity from CE Owner **attributable to passive income.**
- Ensures integrity of the **jurisdictional blending** rules in relation to highly mobile income.
- Amount **equal to the lesser** of:
  - Covered Taxes allocated in respect of passive income; or
  - Top-up tax % of low-taxed CE * passive income

Chapter 4 – Computation of Adjusted Covered Taxes

Example art. 23(6) - limitation on 'push down' in relation to CFC tax:



Step 1 (CIT in Country B before 'push down'):
- EUR 5 [5% * 100]

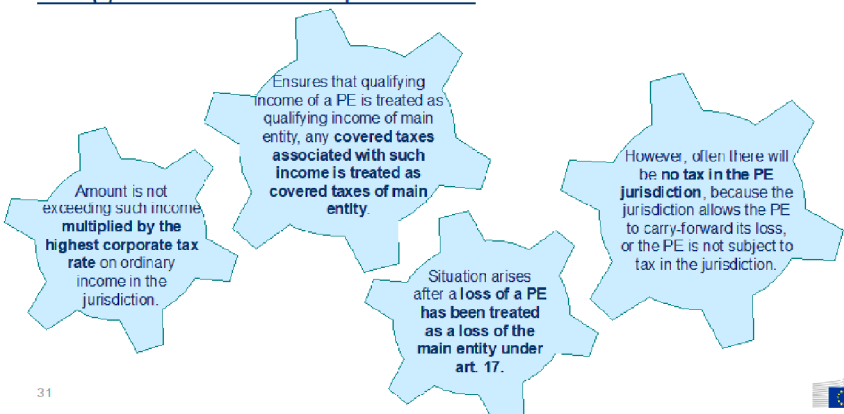
Step 2 ('push down' without limitation):
- EUR 10 [12.5 – 2.5]

Step 3 (limitation 'push down'):
- Amount equal to the lesser of:
  - Covered Taxes allocated in respect of passive income:
    EUR 10 [12.5 – 2.5]
  - Top-up tax % of low-taxed CE * passive income:
    EUR 5 [50 * (15% - 5%)]

- This means that instead of 10, in total 5 of the covered tax from Country A is allocated to Country B

Chapter 4 – Computation of Adjusted Covered Taxes

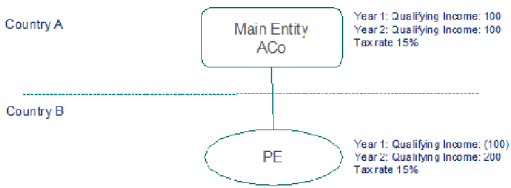
Art. 23(7) – Covered taxes follow recapture PE losses



European Commission

Chapter 4 – Computation of Adjusted Covered Taxes

Example art. 23(7) - Covered taxes follow recapture PE losses:



- ACo:

	Year 1	Year 2
Qualifying income/loss	100	100
PE income/loss allocated to Aco	(100)	100
Net Qualifying Income	0	200
Covered Taxes	0	30

Y2: Covered taxes PE follow allocation recapture PE loss and are taken into consideration as covered taxes of the main entity.

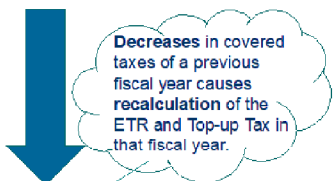
- PE:

	Year 1	Year 2
Qualifying income/loss	(100)	200
Income/loss allocated PE	100	(100)
Net Qualifying Income	0	100
Covered Taxes	0	15

Chapter 4 – Computation of Adjusted Covered Taxes

Art. 24 – Post-filing adjustments and tax rate changes

- An MNE Group's liability for covered taxes may increase or decrease due to various reasons and changes in time.



Possibility for an election to treat an immaterial decrease (i.e. less than EUR 1 million) as adjustment to covered taxes in fiscal year in which adjustment is made.

- These rules also applies when there is a **reduction to the applicable domestic tax rate** to a rate below the METR.
- A **recapture rule** applies when an amount claimed as covered taxes of **more than EUR 1 million is not paid** within **three years**.

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Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Articles 25, 26, 27, 28, 29 and 30

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 25 - Determination of the effective tax rate
Art. 26 - Computation of the top-up tax :

- Calculation **Effective Tax Rate** (per jurisdiction):

$$\frac{\text{Covered Taxes}}{\text{Qualifying Income}}$$

- Calculation **Top-up Tax** (per jurisdiction):

((15% - ETR) x (Qualifying Income – **Substance-based income exclusion**)) – **Domestic Minimum Top-up Tax**

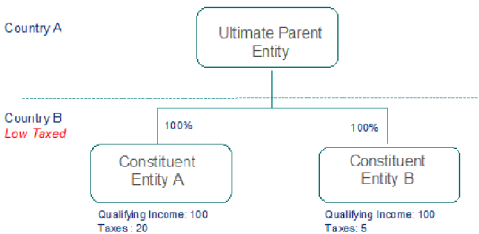
- Calculation **Top-up Tax of CE:**

$$\text{Jurisdictional Top-up Tax} \times \frac{\text{Qualifying income of CE}}{\text{Total Qualifying Income of all CEs}}$$

European Commission

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Example art. 25 & 26 – Computation top-up tax:



ETR Country B:

- ETR: 12.5% [25/200]

Top-up tax Country B:

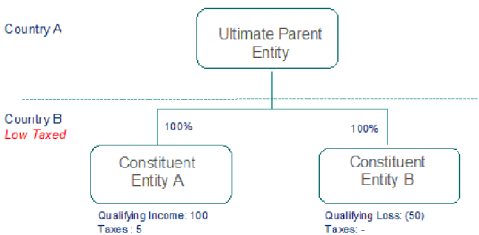
- Top-up Tax: 5 [(15% - 12.5%) * 200]

UPE is subject to the IIR Top-up tax in relation to CE A and CE B:

- Top-up tax CE A: 2.5 [5 x (100/200)]
- Top-up tax CE B: 2.5 [5 x (100/200)]

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Example art. 25 & 26 – Computation top-up tax:



ETR Country B:

- ETR: 10% [5/50]

Top-up tax Country B:

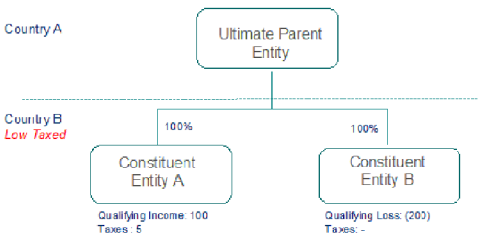
- Top-up Tax: 2.5 [(15% - 10%) * 50]

UPE is subject to the IIR Top-up tax in relation to CE A:

- Top-up tax CE A: 2.5 [2.5 x (100/100)]
- Top-up tax CE B: 0

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Example art. 25 & 26 – Computation top-up tax:



ETR Country B:

- No ETR as there is no net qualifying income

Top-up tax Country B:

- No top-up tax due as there is no net qualifying income

UPE is not subject to the IIR Top-up tax in relation to CE A and CE B:

- No top-up tax due as there is no net qualifying income
- Note: take art. 22 (Qualifying loss election) into account

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 27 - Substance-based income exclusion (per jurisdiction):

5% eligible payroll costs of eligible employees + 5% carrying value of eligible tangible assets

Eligible Payroll Costs not include:
- Costs that are capitalised an included in the carrying value of **Eligible Tangible Assets**
- Costs related to **International Shipping Income**

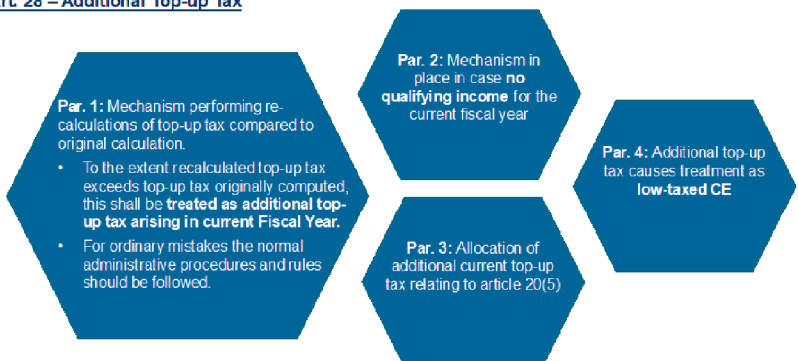
Eligible Tangible Assets are:
- Property, plant and equipment;
- Natural resources;
- A lessee's right of use of tangible assets;
- A licence or similar arrangement from the government for the use of immovable property or exploitation of natural resources that entails significant investment in tangible assets.

Eligible Tangible Assets not include:
- Carrying value of property that is held for **sale, lease or investment**
- Carrying value of tangible assets related to **International Shipping Income**

- Special rules for allocation of Eligible Payroll Costs and Eligible Tangible Assets to **PEs and Flow-through Entities**
- **Investment entities** excluded and **stateless CEs** calculated separately.

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 28 – Additional Top-up Tax



Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 29 – *De Minimis* Exclusion:

The top-up tax of a jurisdiction shall be **equal to zero** for a fiscal year if:

- the average qualifying revenue of the CEs located in that jurisdiction is **less than EUR 10 000 000**; and
- the average qualifying income or loss of that jurisdiction is **less than EUR 1 000 000**.

- Take the **average** of the current and the two preceding years into account.
- At **election of Filing CE**
- Shall not apply to **stateless CEs or investment entities**

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Art. 30 – Minority-owned CEs:

Definitions:

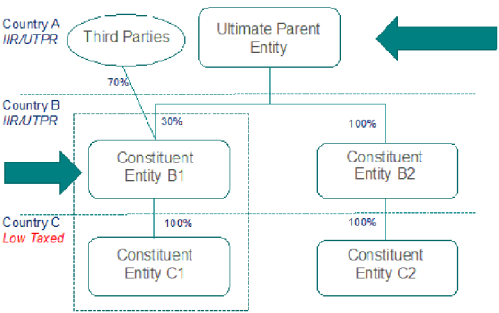
- **Minority-owned CE**: CE of the MNE Group where the UPE holds directly or indirectly 30% or less of its ownership interest
- **Minority-owned parent entity:** Minority-owned CE that holds directly or indirectly the controlling interest of another minority-owned CE.
- **Minority-owned subsidiary:** Minority-owned CE whose controlling interests are held, directly or indirectly, by a minority-owned parent entity.
- **Minority-owned subgroup:** Minority Owned parent entity and its minority-owned subsidiaries

Consequences:

- **Minority-owned subgroup:** The ETR and top-up tax for a jurisdiction should be computed as if the Minority-owned subgroup is a separate MNE Group. No changes of the mechanics itself.
- **Minority-owned subsidiary which is not a member of a Minority-owned subgroup**: The ETR and top-up tax should be computed on an entity basis. No changes of the mechanics itself.

Chapter 5 – Computation of the Effective Tax Rate and Top-up Tax

Example art. 30 - Minority-owned CEs:



- The ETR and top-up tax for CE C1 and CE CE C2 should be calculated **separately**.
- No changes of the mechanics itself.
  - UPE is subject to IIR relating to CE C2.
  - CE B1 (POPE) is subject to IIR relating to CE C1.

Related definitions to Chapter 3, 4 and 5

Related definitions to Chapter 3, 4 and 5

Relevant definitions:

Art. 3(30): '**qualifying income or loss**' means the financial accounting income or loss of a constituent entity adjusted in accordance with the rules defined in Chapter III and in Chapters VI and VII of this Directive;

Art. 3(31): '**disqualified refundable imputation tax**' means any tax, other than a qualified imputation tax, accrued to, or paid by, a constituent entity that is:
(a) refundable to the beneficial owner of a dividend distributed by such constituent entity in respect of that dividend or creditable by the beneficial owner against a tax liability other than a tax liability in respect of such dividend; or
(b) refundable to the distributing company upon distribution of a dividend to a shareholder.

For the purpose of this definition, a qualified imputation tax means a covered tax accrued to, or paid by, a constituent entity or a permanent establishment, that is refundable or creditable to, respectively, the recipient of the dividend distributed by the constituent entity or by the main entity, provided that the refund is payable, or the credit is provided:
(a) by a jurisdiction other than the jurisdiction which imposed the covered taxes;
(b) to a corporate beneficial owner of the dividend that is subject to tax at a nominal rate that equals or exceeds the minimum tax rate on the dividend received under the domestic law of the jurisdiction which imposed the covered taxes on the constituent entity;
(c) to an individual who is the beneficial owner of the dividend and tax resident in the jurisdiction which imposed the covered taxes on the constituent entity and who is subject to tax at a nominal rate that equals or exceeds the standard tax rate applicable to ordinary income; or
(d) to a governmental entity, an international organisation, a non-profit organisation, a pension fund, an investment entity that is not part of the MNE group or a life insurance company to the extent that the dividend is received in connection with pension fund activities that is subject to tax in the same manner as a pension fund;

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Related definitions to Chapter 3, 4 and 5

Relevant definitions:

Art. 3(32): '**qualified refundable tax credit**' means:
(a) a refundable tax credit designed in such a way that it is payable as a cash payment or a cash equivalent to a constituent entity within four years from the date when the constituent entity is entitled to receive the refundable tax credit under the laws of the jurisdiction granting the credit; or
(b) if the tax credit is refundable in part, the portion of the refundable tax credit that is payable as a cash payment or a cash equivalent to a constituent entity within four years from the date when the constituent entity is entitled to receive the partial refundable tax credit;

Art. 3(33): '**main entity**' means an entity that includes the financial accounting net income or loss of a permanent establishment in its financial statements;

Related definitions to Chapter 3, 4 and 5

Relevant definitions:

Art. 3(34): '**tax transparent entity**' means:
(a) a flow-through entity that is considered as fiscally transparent in the jurisdiction in which its owner is located;
(b) an entity that is not tax resident and not subject to a covered tax or a qualified domestic top-up tax based on its place of management, place of creation or similar criteria to the extent that, in respect of its income, expenditure, profit or loss:
(i) its owners are located in a jurisdiction that treats the entity as fiscally transparent;
(ii) it does not have a place of business in the jurisdiction where it was created; and
(iii) the income, expenditure, profit or loss is not attributable to a permanent establishment;

Art. 3(35): '**constituent entity-owner**' means a constituent entity that owns, directly or indirectly, an ownership interest in another constituent entity of the same MNE group;

Related definitions to Chapter 3, 4 and 5

Relevant definitions:

Art. 3(36): '**eligible distribution tax system**' means a corporate income tax system that:
(a) imposes income tax on profits only when those profits are distributed or deemed to be distributed to shareholders, or when the company incurs certain non-business expenses;
(b) imposes tax at a rate equal to, or in excess of, the minimum tax rate; and
(c) was in force on or before 1 July 2021;

Art. 3(37): '**qualified undertaxed payment rule**' ('qualified UTPR') means a set of rules implemented in the domestic law of a jurisdiction that:
(a) is equivalent to the rules laid down in this Directive in accordance with which a jurisdiction collects its allocable share of top-up tax of an MNE group that was not charged under the IIR in respect of the low-taxed constituent entities of such group;
(b) is implemented and administered in a way that is consistent with the rules laid down in this Directive and does not allow the jurisdiction to provide any benefits that are related to those rules;

Art. 3(38): '**designated filing entity**' means the constituent entity, other than the ultimate parent entity, that has been appointed by the MNE group to fulfil the filing obligations set out in Article 42 on behalf of the MNE group.

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Ministerie van Financiën

TER BESLISSING
Aan
5.1.2e Algemene Fiscale Politiek

Directie Algemene Fiscale Politiek

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Notanummer
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Bijlage
1

nota

Pijler 2 - Raadswerkgroep 4 februari 2022

Aanleiding

Op 22 december 2021 heeft de Europese Commissie het richtlijnvoorstel om wereldwijd een minimumniveau aan belastingheffing voor multinationals in de Europese Unie te waarborgen (Pijler 2) gepubliceerd. De maanden januari en februari staan in het teken van de technische behandeling.

Donderdag 4 februari 2022 vindt de vierde (fysieke) Raadswerkgroep plaats. Tijdens deze Raadswerkgroep worden de hoofdstukken 6 en 7 behandeld. Tevens staat een herziene versie (hierna: compromistekst) van de hoofdstukken 1 en 2 op de agenda. 5.1.2e (IA) en 5.1.2e (EIZ) zullen deze vergadering fysiek bijwonen.

Beslispunt

Graag uw akkoord op onderstaande instructie:

Kern

- Beleidsmatig is NL positief over het richtlijnvoorstel en geeft NL zijn volle steun aan de ambitie van de Fransen om dit dossier prioriteit te geven tijdens hun voorzitterschap en te streven naar een voortvarende behandeling in de Raadswerkgroepen, en, uiteindelijk, een snelle aanname in de Ecofin Raad. Tijdens de Ecofin Raad van 18 januari jl. heeft ook de staatsecretaris zijn steun uitgesproken.
- Het BNC-fiche over het richtlijnvoorstelvoorstel is 28 januari naar de Kamers gestuurd. De vaste commissie voor Financiën van de Tweede Kamer heeft de inbrengdatum voor het verslag bij het BNC-fiche vastgesteld op 16 februari 2022 om 14.00 uur.
- Hoofdstuk 6 betreft bijzondere bepalingen voor fusies, splitsingen, acquisities, activa/passiva transacties, joint ventures en de situatie dat sprake is van een multinationale groep met meerdere moederentiteiten. Hoofdstuk 7 bevat regels met betrekking tot fiscale neutraliteitsstelsels en uitdelingsbelastingstelsels. In beide hoofdstukken zitten geen noemenswaardige afwijkingen van de modelteksten[1] van het Inclusive Framework (IF). De afwijkingen zijn technisch van aard en houden met name

[1] Op 20 december 2021 heeft het IF de modelteksten gepubliceerd waarmee de deelnemende landen het Pijler 2-akkoord in hun nationale wetgeving kunnen omzetten.

verband met de vertaalslag van de modelteksten van het IF naar het richtlijnvoorstel. Hoofdstuk 1 betreft algemene bepalingen zoals de reikwijdte van het richtlijnvoorstel en de definities. Hoofdstuk 2 betreft de bepalingen aangaande de zogenoemde Income Inclusion Rule (IIR)[2] en Undertaxed Payments Rule (UTPR)[3]. De meeste suggesties van Nederland zijn overgenomen in de compromistekst. De tekst gaat de goede kant op. We hebben slechts nog enkele suggesties en opmerkingen.

- Tijdens de Raadswerkgroep van vrijdag 4 februari zal Nederland (zie bijlage) vragen ter verduidelijking stellen, suggesties doen om de tekst van het richtlijnvoorstel meer in lijn te brengen met hetgeen de Raad en de Europese Commissie lijken te beogen en (eventueel) tekstuele suggesties doen.
- Op verzoek van het Franse voorzitterschap zijn de vragen en suggesties van de hoofdstukken 6 en 7 reeds schriftelijk met hen gedeeld. Het Franse voorzitterschap heeft aangegeven dat – ondanks dat elementen niet ook mondeling door lidstaten worden opgemerkt tijdens de Raadswerkgroep – het ingestuurde schriftelijk commentaar sowieso wordt meegenomen bij de volgende compromistekst. Onze opmerkingen over de compromistekst van de hoofdstukken 1 en 2 hebben we nog niet schriftelijk ingediend, maar dat gaan we nog doen.

Informatie die niet openbaar gemaakt kan worden
Deze nota bevat informatie die betrekking heeft op lopende internationale onderhandelingen.

[2] Onder de IIR moet het land waar de uiteindelijke moedervennootschap van een multinational is gevestigd belasting bijheffen als de winsten van het concern in het buitenland lager worden belast dan het effectieve minimumtarief.

[3] Als het land van de moedervennootschap onvoldoende of geen belasting (bij)heft, of als de winsten van die moedervennootschap in dat land lager belast worden dan het effectief minimumtarief, moeten andere landen op grond van de UTPR bijheffen. Dit zorgt er onder meer voor dat multinationals de regels niet kunnen ontgaan door de uiteindelijke moedervennootschap te vestigen in een land dat de IIR niet toepast. De UTPR werkt dus als 'backstop' van de IIR.

Chapter VI and VII of the Proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union

Comments by Article

1. Article 31 (Application of the consolidated revenue threshold to group mergers and demergers), paragraph 2: "for that year" in the 3rd line should – in line with Article 6.1.1.(a) of the Model Rules - refer 'to any Fiscal Year *prior to the Merger'* and not to the year of the merger. The latter seems to follow from the draft directive.
2. Article 33 (Transfer of assets and liabilities), paragraph 1: the definition of reorganisation deviates from the definition in the model rules, apparently in order to adapt it to the Merger Directive. A clarification on the drafting would be appreciated. In particular, since it is not clear why the historical value of the assets should be used by the acquiring entity given that the Merger Directive refers to the value for tax purposes.
3. Article 35 (Multi-parented MNE groups), paragraph 1, subparagraph (c) on the definition of dual-listed arrangement: we would like to know why requirement (b) as in the definition in the model rules (on distributions) has been left out.

Textual comments

4. Article 32 (Constituent entities joining and leaving an MNE group), paragraph 1: the "a" before "direct or indirect ownership interests" should be deleted; furthermore, "entity" after "target" could be deleted as this is already a defined term.
5. Article 36 (Ultimate parent entity that is a flow-through entity), paragraph 1, subparagraph a: this requirement seems to deviate from article 7.1.1., paragraph (a), subparagraph (i) of the Model Rules. Article 7.1.1, paragraph (a), subparagraph (i) of the Model Rules requires that the holder of the Ownership Interest is subject to tax on the full amount of the income, while Article 36, paragraph 1, subparagraph a, only requires that the income is subject to tax and does not include the requirement that it is subject to tax at the level of the holder of the Ownership Interest.
6. Article 34 (Joint ventures), paragraph 1, subparagraph (b)(ii): should read: *a permanent establishment whose main entity is a joint venture or an entity referred to in point **(i)**."* instead of an entity referred to in point (a) which is also a joint venture.
7. Article 36 (Ultimate parent entity that is a flow-through entity), paragraph 1, subparagraph b: refers to '*the total amount of covered taxes'*, while Article 7.1.1., paragraph (a), subparagraph (ii) refers to '*the aggregate amount of **Adjusted Covered Taxes'***.
8. Article 36, paragraph 2, subparagraph b: refers to 'a pension fund other than a pension services entity', while Article 7.1.1., paragraph (c) refers to 'a Pension Fund' which also includes a Pension Services Entity. So, the draft directive seems to deviate from the Model Rules on this point.
9. We think that Article 37 (UPE subject to a deductible dividend regime), paragraph 6, should read:

   For the purpose of paragraph 4, a [patronage] dividend distributed by a supply cooperative ~~distribute patronage~~ shall be treated as subject to tax in the hands of the recipient insofar as such dividend reduces a deductible expense or cost in the computation of the recipient's taxable income or loss.

10. Article 37, paragraph 2, subparagraph b: refers to '*the total amount of **covered taxes'***, while Article 7.2.1., paragraph (a), subparagraph (ii) refers to 'the aggregate amount of ***Adjusted Covered Taxes'***.
11. Article 38 (Eligible distribution tax systems), paragraph 3:
    a) subparagraph 1: we suggest excluding "paid" after "deemed distribution tax": *"The amount of deemed distribution tax [paid] in the jurisdiction…"*
    b) subparagraph 2: we suggest including "in chronological order" after "shall be reduced": *"…for prior fiscal years shall be reduced [in chronological order], up to zero…"*

c) subparagraph 3: we suggest changing "first subparagraph" into "second subparagraph": "…*after* the application of the [second] subparagraph…"

12. Article 41 (Election to apply a taxable distribution method), paragraph 3, subparagraph b: we would suggest bringing the wording of the definition of "the testing period" more in line with the definition in the model rules.
    Now it reads: "*…from the beginning of the third year preceding the fiscal year and the end of the fiscal year*"
    Suggestion: "*… with the first day of the third year preceding the fiscal year and ending with the last day of the reporting fiscal year that the ownership interest was held by the group entity*"

Chapter I and II of the compromise text of the Proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union

1. Article 2, paragraph 3, (b) and (c) 'the value of the entity'. We suggest including the essence from the commentary on the model rules as regards the value of an entity, in the definitions Article.
2. Article 5, paragraph 2, 'is subject to the IIR together with all low-taxed CEs'
    a. Together with seems to suggest that the other CEs should also apply the IIR, which is not the case.
    b. All [low-taxed CEs] could be read as if the UPE should also apply the IIR in respect of low-taxed CEs of another group in the same MS.
    c. Low-taxed [CEs] is redundant given that the MS is a low-tax jurisdiction.

    Hence, we suggest a wording like "is subject to the IIR in respect of all CEs of the same group located in that/the same group for the fiscal year".

3. Article 8, paragraph 3, (b) (i) we are wondering about the policy rationale of this provision i.e. why should a(n) IPE/POPE only apply the IIR in proportion to the ownership interest of its UPE and not for 100%?
4. Article 10, paragraph 1, why are large-scale domestic groups included? Our understanding is that these groups are already subject to the top-up tax pursuant to Article 49. For them it is already an obligation, so it cannot be an option any more.
5. Article 12, 2nd paragraph, we think that the drafting could be clarified given that domestic does not seem to be defined, for example: "in case [a parent entity] in such a low-tax third country jurisdiction [is] subjects [to a qualified IIR in respect of] ~~domestic~~ its CEs [in the that jurisdiction].
6. Article 13, para 7, 3rd paragraph, 'the beginning and end values', we suggest including a reference to the fiscal year.

Ministerie van Financiën

TER BESLISSING
Aan
5.1.2e Algemene Fiscale Politiek

Directie Algemene Fiscale Politiek

Inlichtingen
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Direct contact
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Auteur
5.1.2e

Datum
7 februari 2022

Notanummer
2022-0000041373

Bijlage
1

nota

Pijler 2 - Raadswerkgroep 8 februari 2022

Aanleiding

Op 22 december 2021 heeft de Europese Commissie het richtlijnvoorstel om wereldwijd een minimumniveau aan belastingheffing voor multinationals in de Europese Unie te waarborgen (Pijler 2) gepubliceerd. De maanden januari en februari staan in het teken van de technische behandeling.

Dinsdag 8 februari 2022 vindt de vijfde (fysieke) Raadswerkgroep plaats. Tijdens deze Raadswerkgroep wordt hoofdstuk 8 behandeld. Tevens staat een herziene versie (hierna: compromistekst) van de hoofdstukken 3 tot en met 5 op de agenda. 5.1.2e (IA) en 5.1.2e (EIZ) zullen deze vergadering fysiek bijwonen.

Beslispunt

Graag uw akkoord op onderstaande instructie:

Kern

- Beleidsmatig is NL positief over het richtlijnvoorstel en geeft NL zijn volle steun aan de ambitie van de Fransen om dit dossier prioriteit te geven tijdens hun voorzitterschap en te streven naar een voortvarende behandeling in de Raadswerkgroepen, en, uiteindelijk, een snelle aanname in de Ecofin Raad. Tijdens de Ecofin Raad van 18 januari jl. heeft ook de staatsecretaris zijn steun uitgesproken.
- Het BNC-fiche over het richtlijnvoorstelvoorstel is 28 januari naar de Kamers gestuurd. De vaste commissie voor Financiën van de Tweede Kamer heeft de inbrengdatum voor het verslag bij het BNC-fiche vastgesteld op 16 februari 2022 om 14.00 uur.
- Hoofdstuk 8 betreft de administratieve bepalingen. De hoofstukken 3 tot en met 5 vormen de basis van de Pijler 2-maatregelen en bevatten het mechanisme om de bijheffing tot het afgesproken minimumbelastingtarief van 15% te berekenen en toe te rekenen. De eerdere suggesties van Nederland over de hoofdstukken 3 tot en met 5 zijn overgenomen in de compromistekst. De tekst ziet er goed uit, we hebben geen verdere opmerkingen. 5.1.2a

5.1.2a

5.1.2a

- Tijdens de Raadswerkgroep van vrijdag 8 februari zal Nederland (zie bijlage) bij hoofdstuk 8 een aantal opmerkingen maken. In het BNC-fiche is niet expliciet ingegaan op de positie van Nederland ten aanzien van de sanctiebepalingen en de bepalingen betreffende de gegevensverwerking.[1]
    - De bepalingen over de boetes staan niet in de modelregels, zijn een eigen invulling van de Europese Commissie en gaan Nederland op onderdelen te ver. Zo wordt er in het richtlijnvoorstel een vaste boete voorgesteld (5% van de omzet van de groepsentiteit) die *moet* worden opgelegd als niet, niet op tijd of niet juist aan de informatieverplichting wordt voldaan.
    - Verder zijn de bepalingen over de gegevensuitwisseling nog niet ingevuld, er is bijvoorbeeld ook nog niet bekend of de gegevensuitwisseling wordt opgenomen in een nieuwe DAC.[2] Het is de inzet van NLD om de gegevensuitwisseling vast te leggen in een (nieuwe) DAC. Binnen de OESO wordt nog gewerkt aan een *implementation framework*, waar ook de gegevensuitwisseling een onderdeel van uitmaakt. Het is nog niet bekend wanneer dit *implementation framework* zal zijn afgerond.
- Op verzoek van het Franse voorzitterschap zijn de vragen en suggesties van hoofdstuk 8 reeds schriftelijk met hen gedeeld. Het Franse voorzitterschap heeft aangegeven dat – ondanks dat elementen niet ook mondeling door lidstaten worden opgemerkt tijdens de Raadswerkgroep – het ingestuurde schriftelijk commentaar sowieso wordt meegenomen bij de volgende compromistekst.

Informatie die niet openbaar gemaakt kan worden
Deze nota bevat informatie die betrekking heeft op lopende internationale onderhandelingen.

[1] In het BNC-fiche wordt in onderdeel 6a het volgende opgemerkt: 'Verder heeft de Europese Commissie sanctiebepalingen in het richtlijnvoorstel opgenomen. Deze sanctiebepalingen gelden als een multinational niet voldoet aan de verplichtingen zoals opgelegd in de richtlijn. Sanctiebepalingen zijn geen onderdeel van het IF-akkoord.'
[2] Directive on administrative cooporation.

From: the Netherlands
To: the French Presidency and the European Commission
Re: Chapter VIII of the Proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union

****

General comments

1. Recital 18, penultimate sentence, reads: *"In the first twelve-months after its entry into force, the Commission should review this Directive in line with the agreement reached by the Inclusive Framework on filing requirements under the GloBE implementation framework."*
   a) Is our understanding correct that in the EU the top-up tax information return will be exchanged in the same way as agreed in the GloBE Implementation Framework?
   b) If so, will such an exchange be along the lines laid down in COM (2021)565 final on shell entities, in which proposal it is clarified in the explanatory notes that *: "The Proposal will use the practical arrangements currently under the Directive 2011/16/EU on Administrative Cooperation in Direct Taxation (the 'DAC')"* and *"The Proposal will use the procedures, arrangements and IT tools already established or under development under the DAC?"*
   c) If so, shouldn't the DAC be included in a recital as a legal basis for the exchange of information?
2. Chapter VIII (Administrative provisions) does not include a safe harbour rule. Although we are aware that the GloBE Safe Harbour still has to be fleshed out, we think that the Directive should leave the possibility open of including a safe harbour rule in accordance with the GloBE Safe Harbour.

Comments by Article

3. Article 42 (Filing obligations), paragraph 1: The definition of 'designated local entity' refers to filing *"the top-up tax information return and submit the notifications"*, whereas the OECD definition refers to "or". In our view "or" would be more appropriate since a notification would only be required if the top up tax information return is filed in another jurisdiction, according to Article 42, paragraph 4.
4. Article 42 (Filing obligations): we would like to know why Articles 8.1.4, paragraph (e) and 8.1.5 of the model rules have been left out.
5. Article 43 (Elections), paragraph 1: *"unless the filing constituent entity revokes the election at the end of the five-year period. A revocation of the election shall be valid for a period of five years, starting from the year in which the revocation is made."* Couldn't the retroactive effect of the revocation effectively limit the election to four years? It seems that the revocation can be made in the fifth year and starts (as) from that year (so including that particular year). Therefore, shouldn't it read: *"starting **after** the year in which the revocation is made?"*
6. Article 44 (Penalties): we have our doubts about this provision. We do not favour minimum penalties that exclude any discretionary power. Furthermore, we think that a penalty in the amount of 5% of the turnover may produce unfair consequences, especially when excluded entities are affected. Moreover, we think that a distinction should be made between false returns and returns that were filed too late. Besides we have the following questions about this article:
   a) Is "false" comparable to gross negligence or intent?
   b) When does the 6-month term in Article 44, paragraph 2 commence, is that after the reminder or when the filing was due?
   c) Should the turnover that is used to determine the penalty be in accordance with an acceptable financial accounting standard?
   d) Wouldn't penalties cumulate if no constituent entity has met its filing obligations and the 6 month term has expired?

Textual comments

7. Article 42 (Filing obligations), paragraph 7: we suggest including "reporting" before "constituent entity": *"…in which the [reporting] constituent entity is located…"*

To: 5.1.2e (VDI/IA) [5.1.2e @minfin.nl]; 5.1.2e (VDI/IA) [5.1.2e @minfin.nl]
Cc: 5.1.2e (AFP/EIZ) [5.1.2e @minfin.nl]; 5.1.2e (Cd FJZ) [5.1.2e @minfin.nl]
From: 5.1.2e
Sent: Wed 2/9/2022 9:14:46 PM
Subject: RE: Aandachtspunten zeevaart ivm bespreking implementatierichtlijn Pillar Two in RWG
Received: Wed 2/9/2022 9:14:51 PM

Hoi 5.1.2e
Dank voor supersnelle reactie. Ik zoek nog wel even contact met hem deze week, waarin ik jouw antwoorden meeneem. Algemene lijn is we hen danken voor input, maar dat de modelregels er nu eenmaal liggen en dat wij ons daaraan politiek conformeren. Daarnaast pleit TK voor zo min mogelijk uitzonderingen.
Vriendelijke groet,
5.1.2e

From: 5.1.2e (VDI/IA) <5.1.2e @minfin.nl>
Sent: woensdag 9 februari 2022 17:58
To: 5.1.2e <5.1.2e @minbuza.nl>; 5.1.2e (VDI/IA) <5.1.2e @minfin.nl>
Cc: 5.1.2e (AFP/EIZ) <5.1.2e @minfin.nl>; 5.1.2e (Cd FJZ) <5.1.2e @minfin.nl>
Subject: RE: Aandachtspunten zeevaart ivm bespreking implementatierichtlijn Pillar Two in RWG

Besten,
We hebben inmiddels al 5 RWG'en achter de rug en het scheepvaartartikel is al 2x aan de orde geweest. Ik vrees voor de KNVR dat we nu niets meer kunnen met bijna al hun punten, als we dat al zouden willen, nu de modelregels zijn vastgesteld. Daarbij merk ik nog op dat in de vergadering geen enkele LS om een uitbreiding van het scheepvaartartikel heeft gevraagd. (De schriftelijke commentaren heb ik er niet op nagekeken, maar als je als LS een afwijking wil van de modelregels zou je dat toch in de vergadering moeten aankaarten.) Hieronder mijn korte reactie op de aangedragen punten.
Groet,
5.1.2e

Van: 5.1.2e <5.1.2e @kvnr.nl>
Verzonden: woensdag 9 februari 2022 17:35
Aan: 5.1.2e <5.1.2e @minbuza.nl>; 5.1.2e (VDI/IA) <5.1.2e @minfin.nl>; 5.1.2e (VDI/IA) <5.1.2e @minfin.nl>; 5.1.2e - DGLM <5.1.2e @minienw.nl>; 5.1.2e - DGLM <5.1.2e @minienw.nl>
CC: 5.1.2e <5.1.2e @tilburguniversity.edu>
Onderwerp: Aandachtspunten zeevaart ivm bespreking implementatierichtlijn Pillar Two in RWG

Beste allen,
Wij begrepen zojuist dat deze week een RWG staat gepland, waarin het richtlijnvoorstel voor een minimumniveau van belasting (implementatierichtlijn Pillar Two) wordt besproken. Graag geven 5.1.2e en ik jullie ter voorbereiding op deze RWG graag nog het volgende ter overweging mee voor jullie inbreng:

- In the draft directive slot chartering arrangements are qualified as 'qualified ancillary international shipping income' while in the OECD final GloBE-rules it is considered 'international shipping income'. This seems a mistake based on the use by the European Commission of an earlier version of the OECD shipping carve-out, but still this point has to be changed/rectified; Is verbeterd in het compromisvoorstel.
- Article 16 (2) of the draft directive introduces additional "substance" requirements for the international shipping income and qualified ancillary international shipping income to be excluded, which (again) does not match with the EU tonnage tax systems (and also not with the OECD requirements for approved preferential tax regimes). The additional "substance" conditions require the "constituent entity" to demonstrate "that the strategic or commercial management of all ships concerned is effectively carried on from within the jurisdiction where the constituent entity is located." Several examples where those rules are deviating from the EU approved tonnage tax systems can be mentioned:
  - oUnder EU approved tonnage tax systems normally the strategic or commercial management of the shipping enterprise should be carried out from the jurisdiction where the eligible entity is located, not the strategic or commercial management of all ships involved;
  - oUnder EU approved tonnage tax systems quite often also the so-called classical ship managers (which do not perform the strategic or commercial management of the vessels but "only" the entire crew and technical management) qualify;

  Also in this respect we refer to the definition of qualifying shipping income as previously suggested by ECSA/ICS/CLIA/WSC which incorporates EU and/or OECD approved shipping regimes that only are granted approval in case they fulfill the EU/OECD substance requirements; Maar dat staat ook zo in de modelregels en ik zie de EU daar niet van afwijken.
- The risk is very concrete, now the EU seems to be ahead of the OECD with the implementation of the new minimum tax rules, that the EU directive is approved before the OECD implementation and clarification guidelines are

finalized and agreed-on. Implementation of the new minimum tax rules within the EU without the implementation (as from the same date) by the outside EU OECD countries would mean a big distortion of the level playing field presently existing within the international shipping community. Therefore, we suggest to make the implementation (date) of the EU directive conditional on the implementation (date) of the OECD Pillar 2 framework Dit is geen technisch maar een scheepvaartoverstijgend politiek punt dat bij de ECOFIN thuishoort.

-Both the OECD-rules and the draft directive use the article 8 definition of shipping income: "transportation of passengers or cargo by ship in international traffic". This definition is too narrow because it does not match with the EU-rules under which EU-based tonnage tax systems are approved by the EU Cie.Two examples:

- oUnder EU tonnage tax systems other types of vessels than "transportation" vessels are approved that qualify, e.g. offshore service vessels, and also vessels that provide both transportation and other types of activities (e.g. cable layer, offshore windmill installation vessels);
- oUnder EU tonnage tax systems also other traffic than international traffic is approved, e.g. transportation between two ports in the same country or between a port and a location on the Continental Shelf, as long as it is transport by sea; Dat de OESO-modelregels afwijken van de door DG COMP goedgekeurde regels m.b.t. tonnageregimes is een gegeven waar we nu niets meer aan kunnen veranderen.

-The too narrow definition of shipping income causes qualifying shipping income under EU approved tonnage tax systems to be taxed under the top-up taxation of Pillar 2/the draft directive, which leads to a severe distortion of the present level playing field within EU (and outside) shipping tax regimes. Furthermore, the lack of linkage between the definition of shipping income and the definition of qualifying shipping income under EU approved tonnage tax systems causes ship owners and tax administrations an additional, unfair and unnecessary administrative burden. In our view, therefore, the definition of qualifying shipping income should be extended as previously suggested by ECSA/ICS/CLIA/WSC (art. 8 shipping income and qualifying shipping income under a EU and/or OECD approved shipping regime). Zie vorige antwoord.

Van harte hopen wij dat jullie dit willen inbrengen. Het is voor de internationale zeevaart van groot belang dat deze mismatches worden opgelost. Alvast heel hartelijk dank voor jullie moeite. Vanzelfsprekend zijn 5.1.2e en ik graag bereid nog een en ander toe te lichten, wanneer dit voor jullie gewenst is.

Met vriendelijke groet,

5.1.2e
Fiscale en juridische zaken | Tax and legal | Public affairs
5.1.2e
5.1.2e @kvnr.nl

KONINKLIJKE VERENIGING VAN NEDERLANDSE REDERS

Koninklijke Vereniging van Nederlandse Reders
Royal Association of Netherlands Shipowners
Boompjes 40
3011 XBROTTERDAM
www.kvnr.nl

To: 5.1.2e (Cd FJZ)[5.1.2e @minfin.nl]; 5.1.2e (Cd UHB)[5.1.2e @minfin.nl]; 5.1.2e 5.1.2e (AFP/ANALYSE)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/FRI)[5.1.2e @minfin.nl]; 5.1.2e (AFP/ANALYSE)[5.1.2e @minfin.nl]; 5.1.2e (AFP/ANALYSE)[5.1.2e @minfin.nl]; 5.1.2e (AFP/SPA)[5.1.2e @minfin.nl]; 5.1.2e (AFP/ANALYSE)[5.1.2e @minfin.nl]; 5.1.2i @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]; 5.1.2e AFEP[5.1.2e @minfin.nl]; 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]; 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]; 5.1.2e (AFP/EIZ)[5.1.2e @minfin.nl]; 5.1.2e (AFP/EIZ)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (Cd FJZ)[5.1.2e @minfin.nl]; 5.1.2e [5.1.2e @belastingdienst.nl]; 5.1.2e DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/FRI)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]; 5.1.2e (DB&T/WINST)[5.1.2e @minfin.nl]
Cc: 5.1.2e (VDI/IA)[5.1.2e @minfin.nl]
From: 5.1.2e (AFP/EIZ)
Sent: Fri 2/11/2022 8:17:09 AM
Subject: Pijler 2 // Terugkoppeling Raadswerkgroepen 4 en 8 februari
Received: Fri 2/11/2022 8:17:00 AM
Pijler 2 - Aantekeningen RWG 8 februari 2022 FINAAL.docx
Pijler 2 - Aantekeningen RWG 4 februari 2022 FINAAL.docx
wk01745.en22.pdf

Ha allen,

Zie hieronder de terugkoppeling van de Pijler 2 Raadswerkgroepen van 4 en 8 februari 2022. Bijgevoegd de uitgebreidere aantekeningen van beide Raadswerkengroepen en de presentatie sheets van de COMM over de hoofdstukken 6, 7 en 8.

Groeten,
5.1.2e *en* 5.1.2e

***

Algemeen

Vrijdag 4 februari en dinsdag 8 februari 2022 vonden de **vierde en vijfde (fysieke) Raadswerkgroepen** over het richtlijnvoorstel **Pijler 2** plaats.

- Tijdens de **Raadswerkgroep van 4 februari** stond de technische behandeling van de hoofdstukken 3 tot en met 5 op de agenda. De hoofstukken 3 tot en met 5 vormen de basis van de Pijler 2-maatregelen en bevatten het mechanisme om de bijheffing tot het afgesproken minimumbelastingtarief van 15% te berekenen en toe te rekenen.
- Tijdens deze **Raadswerkgroep van 8 februari** werd hoofdstuk 8 technisch behandeld. Hoofdstuk 8 betreft de administratieve bepalingen. Tevens stond een herziene versie (hierna: compromistekst) van de hoofdstukken 3 tot en met 5 op de agenda.

Beide Raadswerkgroepen waren weer **constructief**. 5.1.2a

5.1.2a

Noemenswaardige opgebrachte punten tijdens de Raadswerkgroep van 4 februari 2022

Compromistekst hoofdstukken 1 en 2: Veel landen (waaronder NLD) waren positief en gaven aan dat de tekst de goede kant op gaat.

Grens van €750 miljoen: De Pijler 2 maatregelen gelden voor multinationals met een omzet van ten minste € 750 miljoen.

5.1.2a

5.1.2a

5.1.2a

O.g.v. het richtlijnvoorstel kan een keuze voor de (QDMTT) alleen worden gedaan tot uiterlijk vier maanden na implementatie en dus niet meer daarna. 5.1.2a In de modelregels staat niet dat de QDMTT binnen een bepaalde termijn moet zijn ingevoerd. 5.1.2a

5.1.2a

5.1.2a

Domestic extension Income Inclusion Rule (IIR): 5.1.2a

5.1.2a

Noemenswaardige opgebrachte punten tijdens de Raadswerkgroep van 8 februari 2022

- Compromistekst hoofdstuk 3 – 5: 5.1.2a

  5.1.2a
- 5.1.2a
- 5.1.2a
- 5.1.2a

∀ 5.1.2a

5.1.2a

  - 5.1.2a
  - 5.1.2a

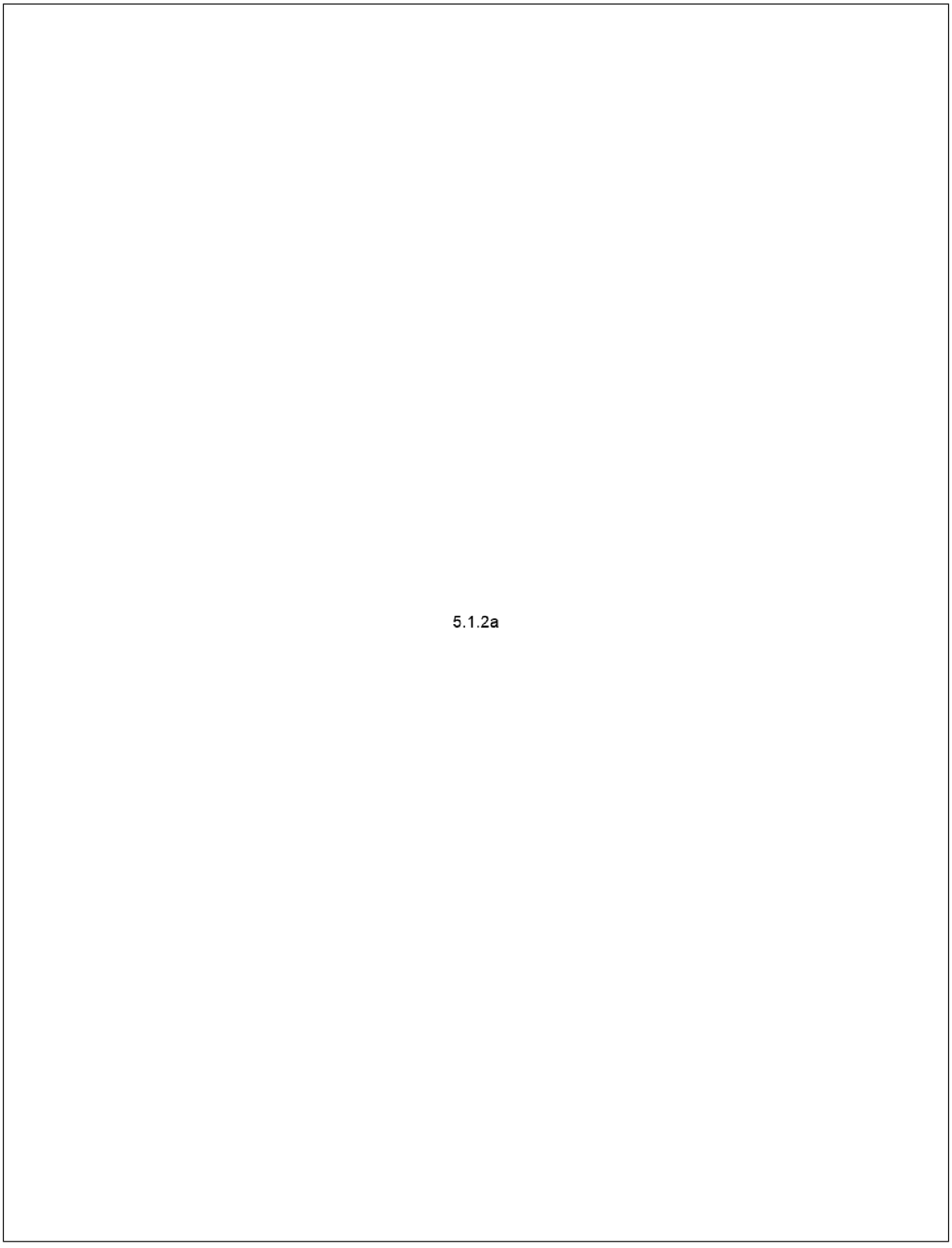
Vervolgproces

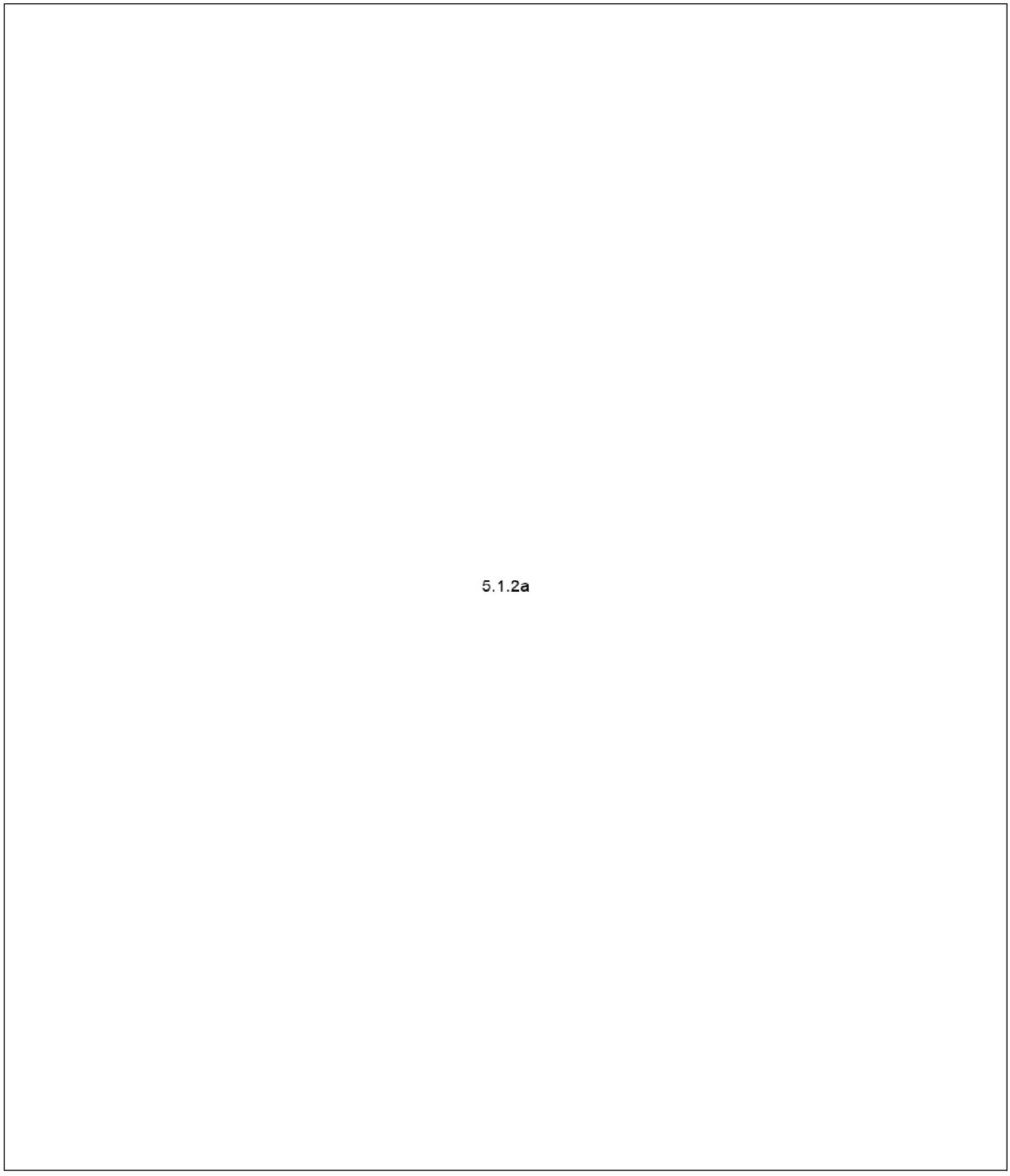
De maanden januari en februari worden aan de technische behandeling gewijd. FRA VZS gaf aan nu te werken aan compromistekst van de hoofdstukken 6 en 7. **Op 23 februari 2022** vindt de volgende (fysieke) Raadswerkgroep plaats. **Idee is in de ochtend compromistekst hoofdstukken 6 en 7 te bespreken en in de middag de technische behandeling van de hoofdstukken 9 tot en met 11.** Schriftelijke input (was reeds eerder doorgegeven) op de hoofdstukken 9 tot en met 11 kan tot en met 11 februari worden ingediend. Hoofdstuk 11 is het laatste hoofdstuk van het richtlijnvoorstel. Het FRA VZS gaat nog steeds voortvarend met dit dossier verder. Of de richtlijn kan worden aangenomen in de maart Ecofin blijft de vraag, ondanks dat de besprekingen constructief zijn en veel LS aangegeven dat we de goede kant op gaan, is er ook nog redelijk wat werk te doen.

Pijler 2 – Aantekeningen Raadswerkgroep - 4 februari 2022

Compromistest

Artikel 1 en 2



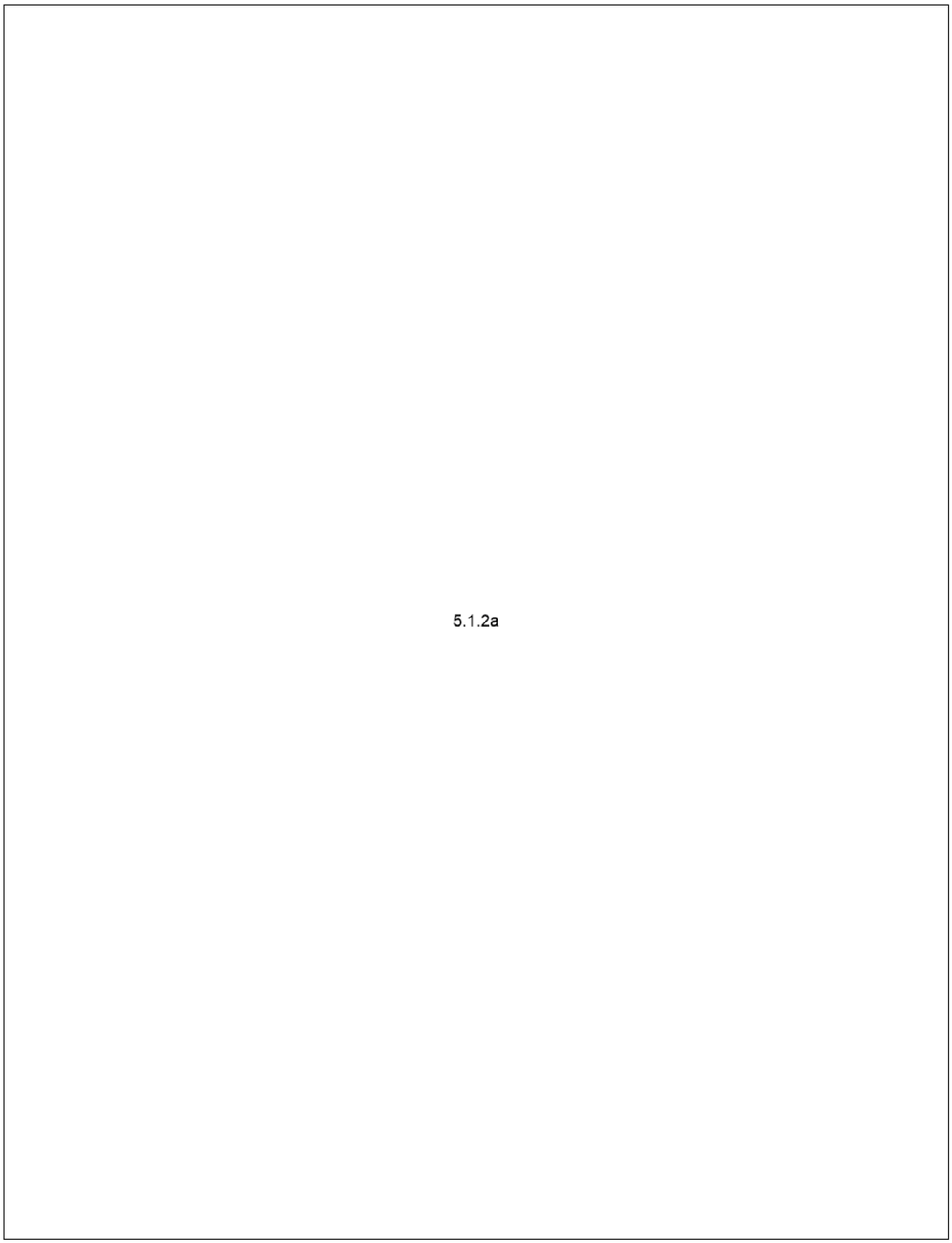


Hoofstuk 2

Artikel 5 tot en met 9

NLD: Stap in de goede richting. Zit er al veel beter uit. Technische opmerkingen. Together with; kan wat onduidelijk zijn. Kan lijken alsof andere CE's onderworpen zijn aan IIR. Dit is enkel PE. Dus together with beter in respect of. All low taxed CE; duidelijker maken dat moet gaan om CE van

zelfde MNE. Ten slotte: Low taxed CE, low taxed is niet nodig, omdat het al om low taxed jurisdictie gaat. Aan andere kant. Kan geen kwaad. Voor de rest; onderschrijven bedoeling artikel. Artikel 8, lid 3 onderdeel b onder 1, begrijpen dat bij toepassing van IIR in LS dat het laagbelaste inkomen van PE (in dit geval IME of POPE) dat het inkomen belast wordt in verhouding tot belang dat UPE (dat in derde land zit) heeft in desbetreffende PE. Wat is hier de gedachte achter?



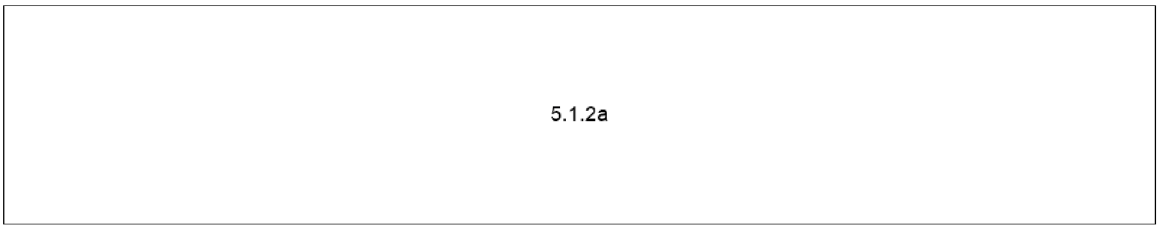
5.1.2a

Artikel 10

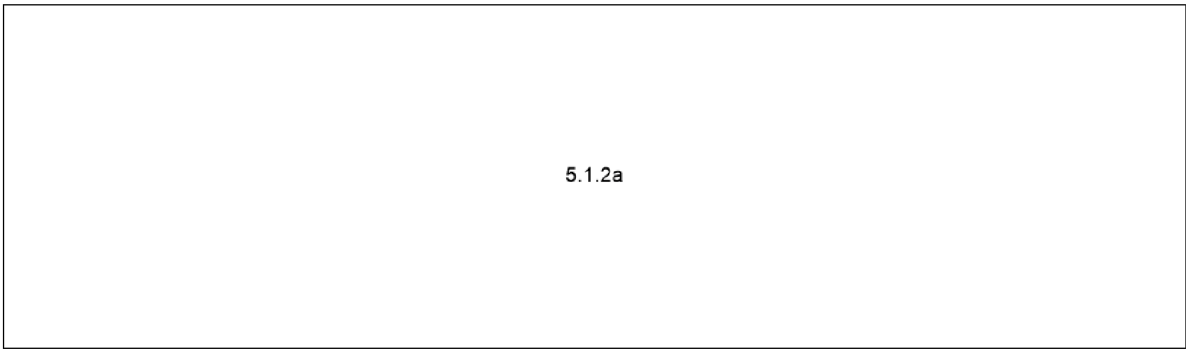
5.1.2a

NLD: Lid 1 toevoeging : Onderschrijven de analyse dat het niet nodig is om large scale domestic groups toe te voegen. Ook niet correct. Als sprake is van large scale domestic group is er een verplichting en kan er geen keuze meer zijn. Kortom, wij stellen voor om toevoeging te schrappen.

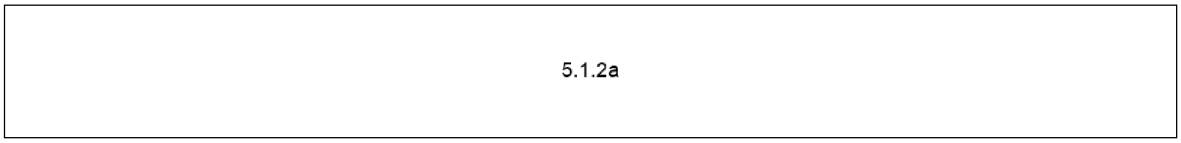
5.1.2a



Artikelen 11 tot en met 13



NLD: Artikel 13, lid 7, derde alinea: gemiddelde aan begin en einde van een asset. Verwijzing naar jaar ontbreekt.



Hoofdstuk 6 en 7

NLD: Artikel 33, lid 1: Waarom staat er historische waarde en niet carrying waarde. Of als in de fusierichtlijn, value for tax purposes.

5.1.2a

Artikel 34 en 35

5.1.2a

Hoofdstuk 7

5.1.2a

FRA VZS: We gaan teksten herzien en tweede versie voorleggen. Binnenkort ter beschikking stellen. Volgende vergadering dinsdag 8 februari. Ochtend compromistekst hoofdstukken 3, 4 en 5. In de middag gaan we door met hoofdstuk 8.

Council of the European Union
General Secretariat

Brussels, 07 February 2022

WK 1745/2022 INIT

LIMITE

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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union (Chapters VI to VIII) - presentation by the European Commission

Delegations will find attached the presentations by the European Commission (concerning Chapters VI to VIII of the proposal).


European Commission
COUNCIL DIRECTIVE
on ensuring a global minimum level of taxation for multinational groups in the Union
Working Party on Tax Questions
Presentation DG TAXUD
4 February 2022

Chapter 6 – Special Rules for Mergers and Acquisitions

Articles 31, 32, 33, 34 and 35

European Commission

Chapter 6 – Special Rules for Mergers and Acquisitions

Art. 31 – Application of consolidated revenue threshold to group mergers and demergers:

General revenue threshold: A combined group turnover of at least 750 million euros

1. **Two or more groups merge** to form a single group

   Sum of revenue included in each of the consolidated financial statements.

2. **Two single entities merge** to form a group or one single entity becomes part of a group

   Sum of revenue included in each of the financial statements or consolidated financial statements

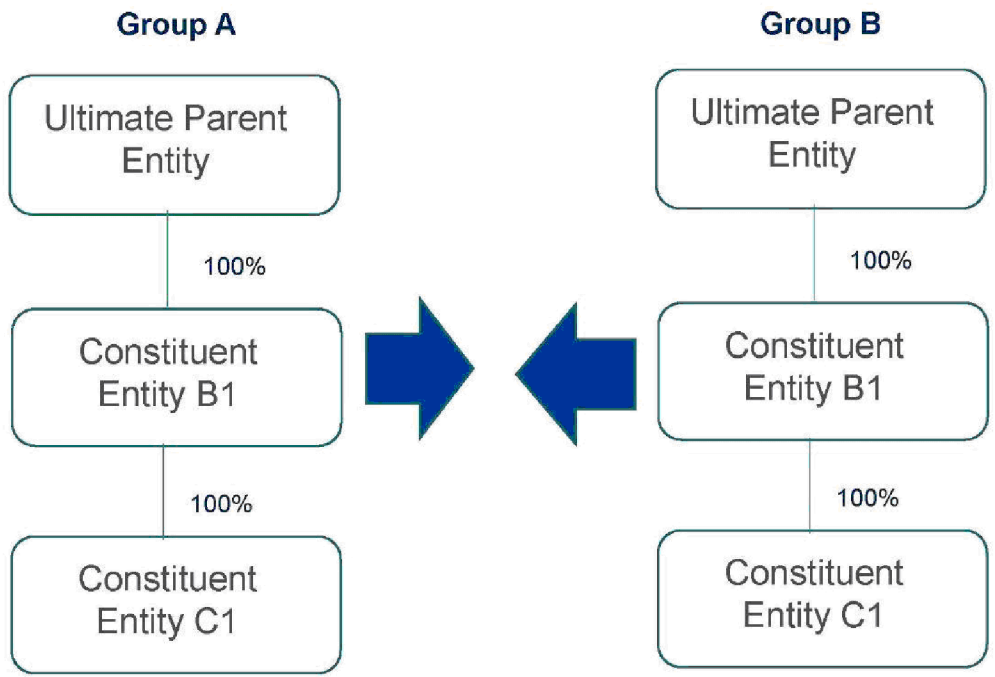
3. Single MNE group **demerges into two or more groups**

   i) **1ste tested year**: demerged group has annual revenues of EUR 750 or more;
   ii) **2nd to 4th tested year**: demerged group has annual revenues of EUR 750 or more in at least two years.

European Commission

Chapter 6 – Special Rules for Mergers and Acquisitions

Example art. 31 - Merger:



- **Group A consolidated revenue**:
  - Year 1: 400
  - Year 2: 300
  - Year 3: 300
  - Year 4: 300
- **Group B consolidated revenue**:
  - Year 1: 500
  - Year 2: 200
  - Year 3: 100
  - Year 4: 100
- Merged AB Group is **not subject to the Directive**, because in only one preceding fiscal years the sum of consolidated revenue was greater than EUR 750 (year 1: 900).

European Commission

Chapter 6 – Special Rules for Mergers and Acquisitions

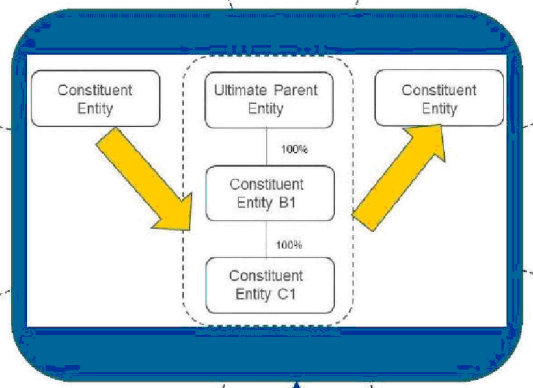
Art. 32 – CEs joining and leaving an MNE group

1. Target is **member of the group,** if a portion of its assets, liabilities, income, expenses or cash flows are included in the **Consolidated Financial Statements of the UPE.**

2. In the acquisition year, take the **Consolidated Financial Statements of the UPE** into account for financial accounting net income and adjusted covered taxes.

3. In acquisition year and each succeeding year, the target shall use the **historical carrying value of assets and liabilities.**

4. For computing the **eligible payroll costs**, take the costs in the Consolidated Financial Statements of the UPE into account.



5. Computation of **eligible tangible assets**, shall be adjusted proportionally to correspond length of the year.

6. Transfer **dta's and dtl's shall take into account in same manner and same extent** as if the acquiring MNE Group controlled the CE when assets and liabilities arose.

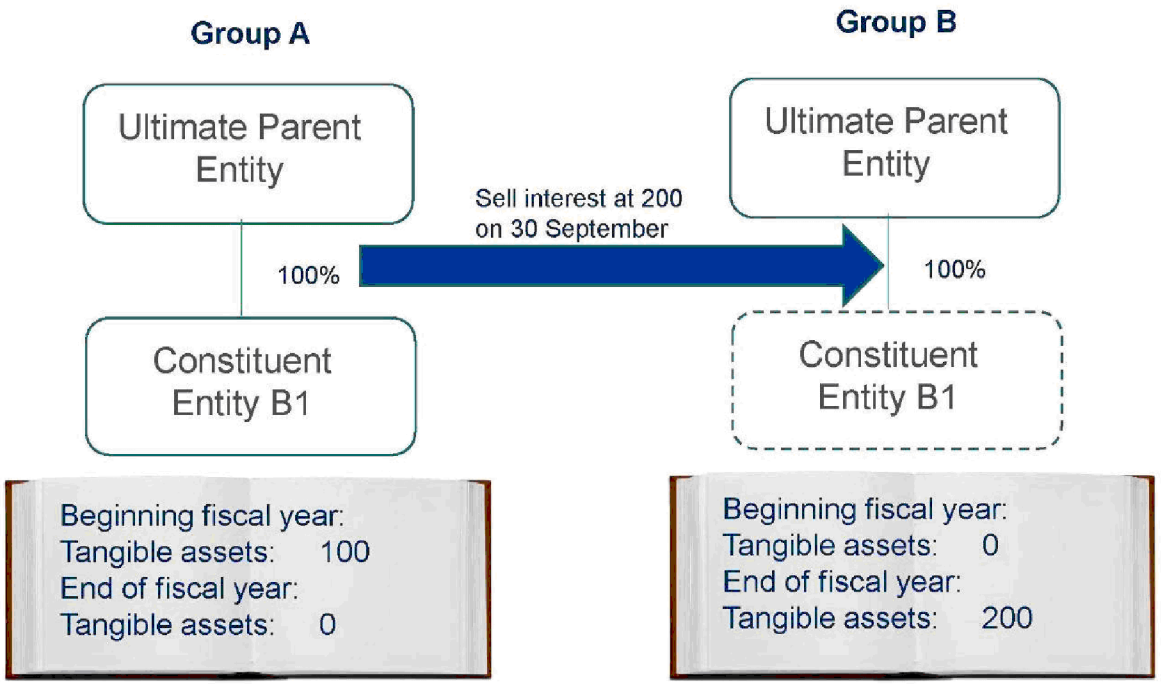
7. **Total deferred tax adjustment** amount shall be treated as deducted by disposing MNE group and as added by acquiring MNE group

8. If target is a parent entity, then it should **apply the IIR separately for each MNE Group.**

The acquisition or disposal of a controlling interest in a target shall be **treated as an acquisition or disposal of assets and liabilities** under certain circumstances.

Chapter 6 – Special Rules for Mergers and Acquisitions

Example art. 32(5) - eligible tangible assets:

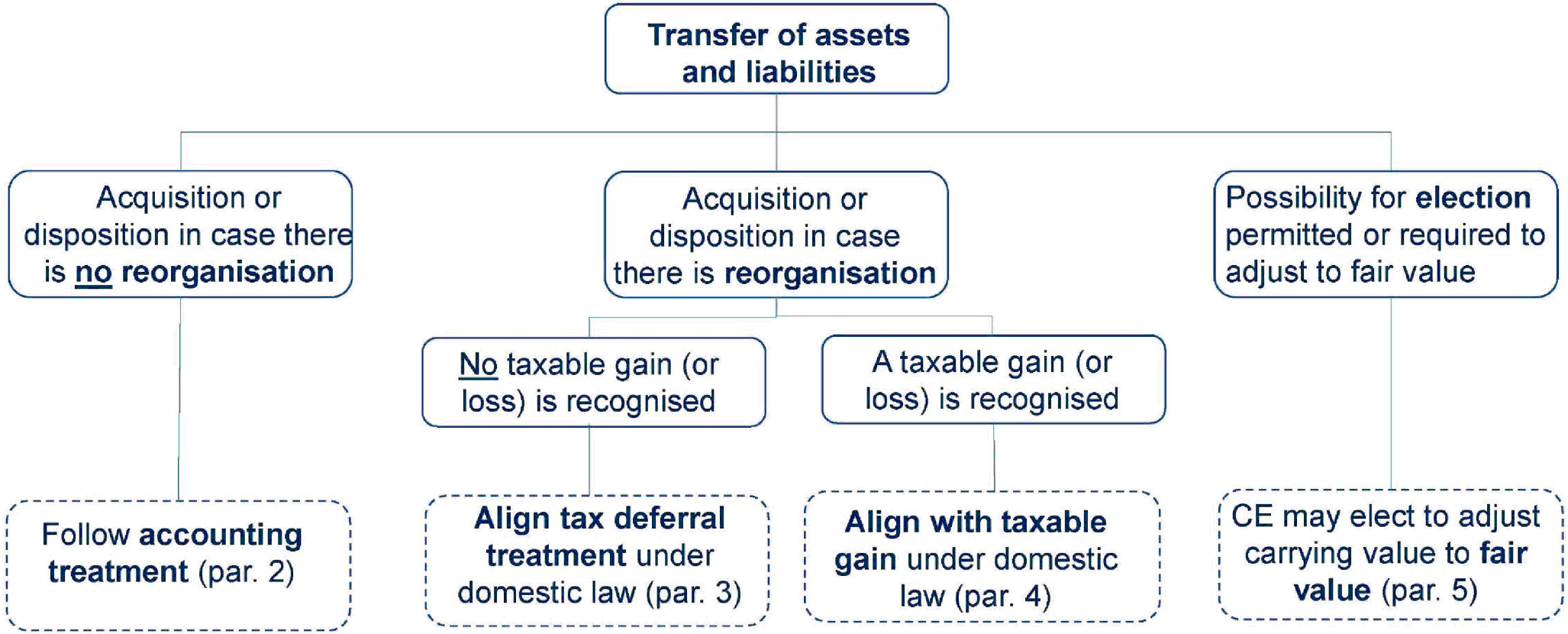


- The computation of the **eligible tangible assets** (for substance-based income exclusion), shall be adjusted proportionally to correspond the length of the year.
- **Carrying value Group A =** 37.50 [(100+0)/2)x(9/12)]
- **Carrying value Group B** = 25 [(0+200)/2)x(3/12]

European Commission

Chapter 6 – Special Rules for Mergers and Acquisitions

Art. 33 – Transfer of assets and liabilities



Chapter 6 – Special Rules for Mergers and Acquisitions

Art. 34 - Joint ventures

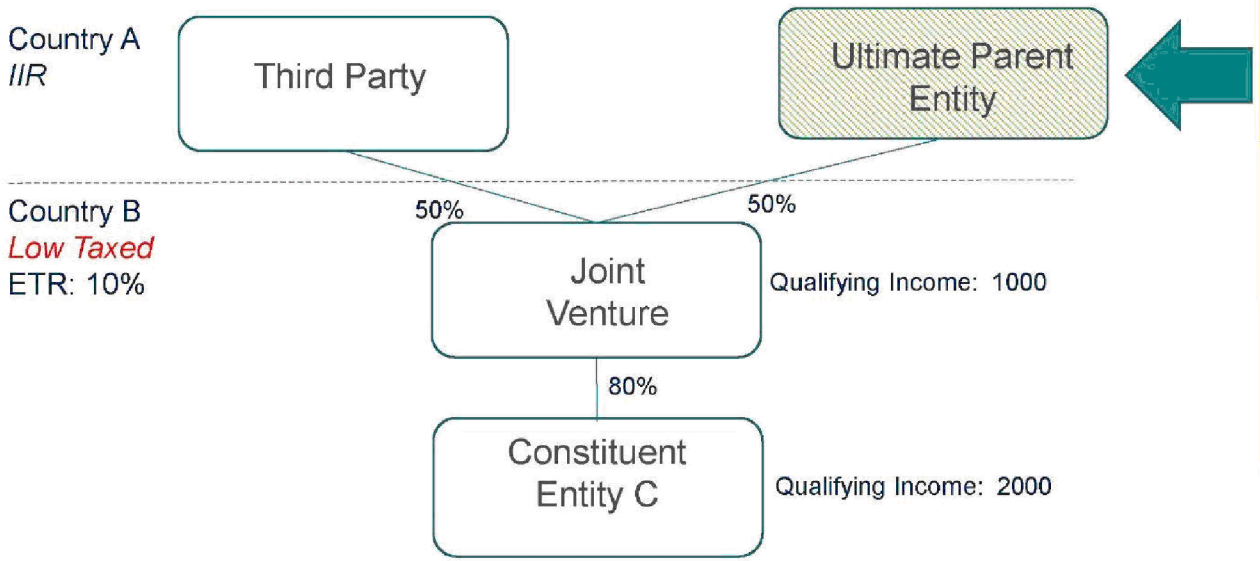
	Application Directive to Joint Ventures and JV affiliates:
1.	Parent entity shall apply the IIR **with respect to its allocable share of top-up tax of each member of the JV.**
2.	Computation of the top-up tax of the JV and its affiliates, **shall be made as if they are CEs of a separate MNE group.**
3.	Any remaining amount of top-up tax after application of an qualified IIR, shall be added **to the total UTPR top-up tax amount.**

'joint venture' means an entity other than an ultimate parent entity of an MNE Group whose financial results are reported under the equity method in the consolidated financial statements of the ultimate parent entity provided that the ultimate parent entity holds, directly or indirectly, at least 50 % of its ownership interest;

'joint venture affiliate' means: (i) an entity whose assets, liabilities, income, expenses and cash flows are consolidated in the financial statements of a joint venture under an acceptable financial accounting standard or would have been consolidated had the joint venture been required to consolidate such assets, liabilities, income, expenses and cash flows under an acceptable financial accounting standard; or (ii) a permanent establishment whose main entity is a joint venture or an entity referred to in point (a).

Chapter 6 – Special Rules for Mergers and Acquisitions

Example art. 34 - Joint ventures



- UPE holds 50% of the shares in Joint Venture.
- Effective Tax Rate Country B: 10%
- UPE is subject to IIR top-up tax relating to Joint Venture and CE C:
  - **Joint Venture: EUR 25**
    [50%* (1000*(15% - 10%))]
  - **CE C: EUR 40**
    [50%*80%*(2000*(15% - 10%))]

European Commission

Chapter 6 – Special Rules for Mergers and Acquisitions

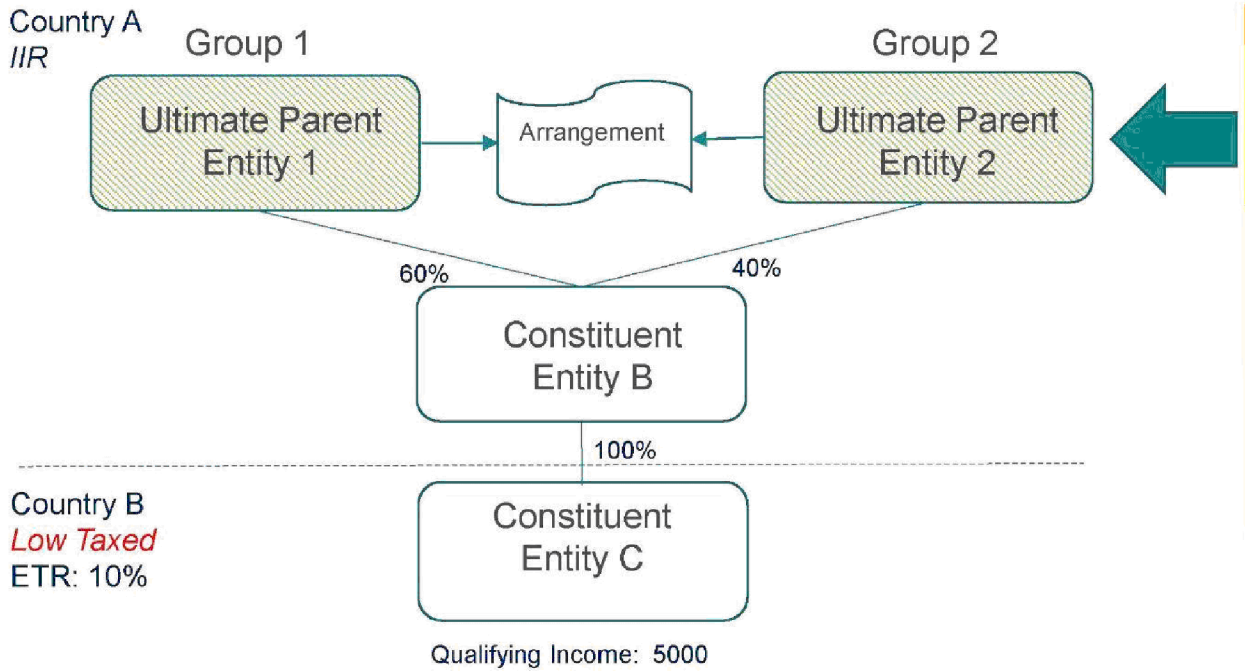
Art. 35 – Multi-Parented Groups (MPG)

Consolidated Financial Statements in which two or more Groups are presented as a single economic unit in accordance with **Dual-listed or stapled structure**

Special Rules	
Par. 2	Entities and CE of each Group are treated as members of a **single MNE Group**. An entity shall be **treated as a CE** if it's consolidated on a line-by-line basis or its controlling interest is held by entities in the MPG;
Par. 3	Consolidated Financial Statements of the MPG shall be the **Consolidated Financial Statements referred in the Stapled Structure or Dual-listed**
Par. 4	The UPEs of the separate Groups shall be **the UPEs of the MPG**;
Par. 5	Parent entities of the MPG shall apply the IIR with respect to their **allocable share of top-up tax of the low-taxed CE**;
Par. 6	The CEs of the MPG shall **apply the UTPR** taken into account the top-up tax of each low-taxed CE of the MPG;
Par. 7	The UPEs are required to submit the **Top-up tax information return**.

Chapter 6 – Special Rules for Mergers and Acquisitions

Example art. 35 - Multi-Parented Groups (MPG)



Without the rules on MPGs:

- Group 1 and Group 2 are considered as two separate Groups.
- CE B is POPE and subject to IIR top-up tax relating to CE C:
  - **CE B relating to CE C: EUR 250** [5000*(15% - 10%)]

With the rules on MPGs:

- Group 1 and Group 2 are considered as **one single Group.** CE B is not POPE.
- UPE 1 and UPE 2 are subject to IIR top-up tax relating to CE C:
  - **UPE 1 relating to CE C: EUR 150** [60%*5000*(15% - 10%)]
  - **UPE 2 relating to CE C: EUR 100** [40%*5000*(15% - 10%)]

Chapter 7 – Tax Neutrality and Distribution Regimes

Articles 36, 37, 38, 39, 40 and 41

European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

Art. 36 – Flow-through entity that is a UPE

Qualifying income of a **flow-through entity that is a UPE** is reduced by:

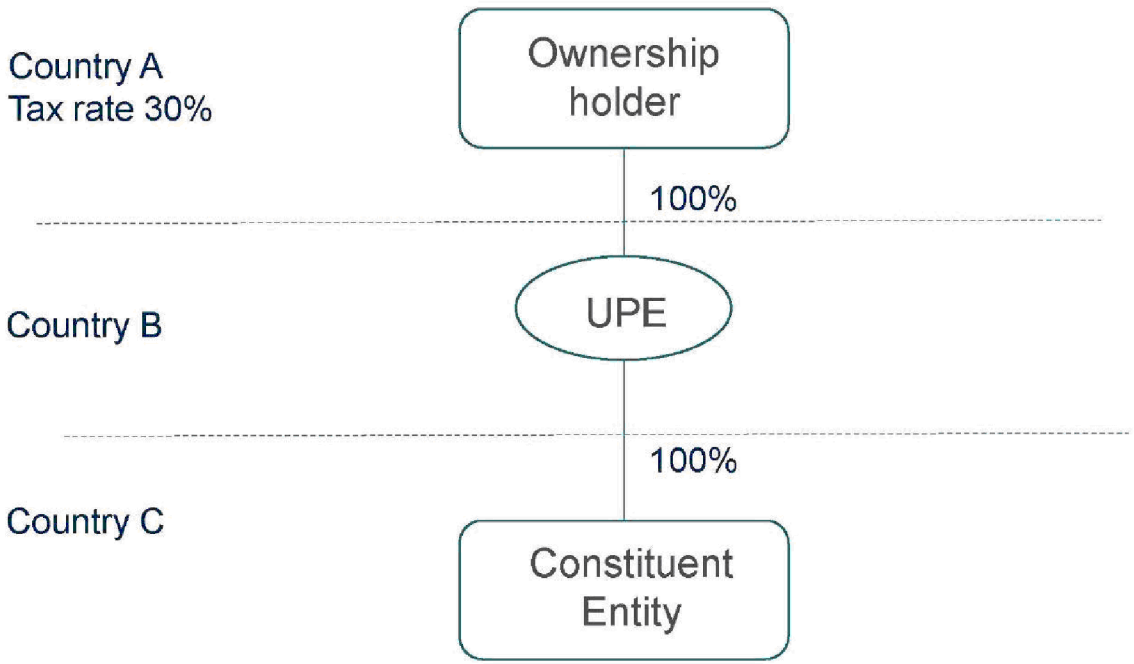
Qualifying income that is allocated to **an ownership holder** provided that income meets the **taxable period test** and the **minimum tax test**

Qualifying income that is allocated to an ownership holder that is a **natural person** provided it is tax resident in the UPE jurisdiction and has a right to 5% or less of the profits and assets of the UPE

Qualifying income that is allocated to an ownership holder that is a **governmental entity**, an **international organisation**, a **non-profit organisation or** a **pension fund** provided it is tax resident in the UPE jurisdiction and has a right to 5% or less of the profits and assets of the UPE

Chapter 7 – Tax Neutrality and Distribution Regimes

Example art. 36(1)



- UPE is a flow-through entity

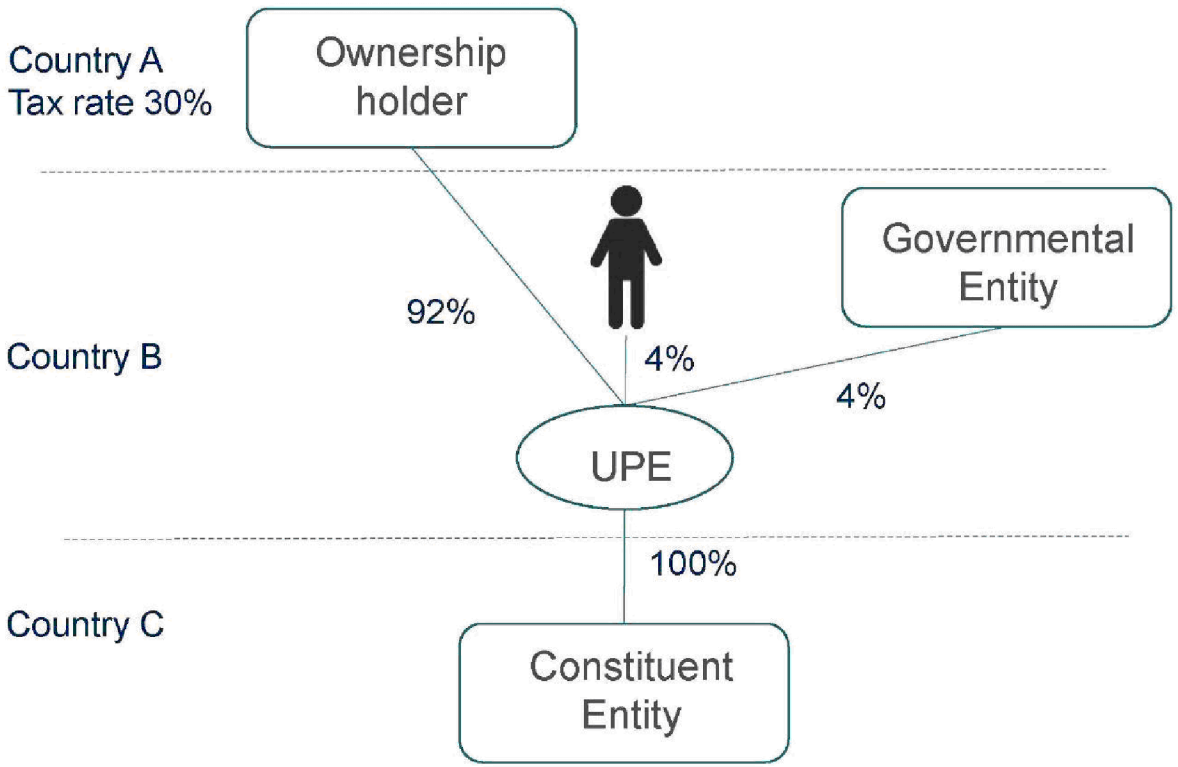
Without application art. 36(1):
- Qualifying income UPE: 2000
- Covered Taxes UPE: 0
- ETR UPE: 0
- Top-up tax UPE: 300
  [2000* (15%-0%)]

With application art. 36(1):
- Qualifying income of EUR 2000 should be reduced by qualifying income allocated to
  - Ownership holder: 2000
- **Qualifying income UPE: 0**

European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

Example art. 36(2)(a) and (b)



- UPE is a flow-through entity

Without application art. 36(2)(a) and (b):

- Qualifying income UPE: 2000
- Covered Taxes UPE: 0
- ETR UPE: 0
- Top-up tax UPE: 300
  [2000* (15%-0%)]

With application art. 36(2)(a) and (b):

- Qualifying income of 2000 should be reduced by qualifying income allocated to
  - Ownership holder 1840
  - Natural person 80
  - Governmental entity 80
- **Qualifying income UPE: 0**

European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

Art. 37 – UPE subject to Deductible Dividend Regime

Deductible dividends are distributions of profits that are deductible from taxable income in the CE jurisdiction (typically apply to investment entities and other similar purpose entities).

This **article sets similar rules** as when the UPE is a flow-through entity, **except for losses**, which do not flow through to the owners.

1. Qualifying income **UPE** that is subject to **deductible dividend regime**

Reduced by:

2. Qualifying income that is allocated to the **holder of an ownership interest** and meets the **taxable period test** and the **minimum tax test**

Reduced by:

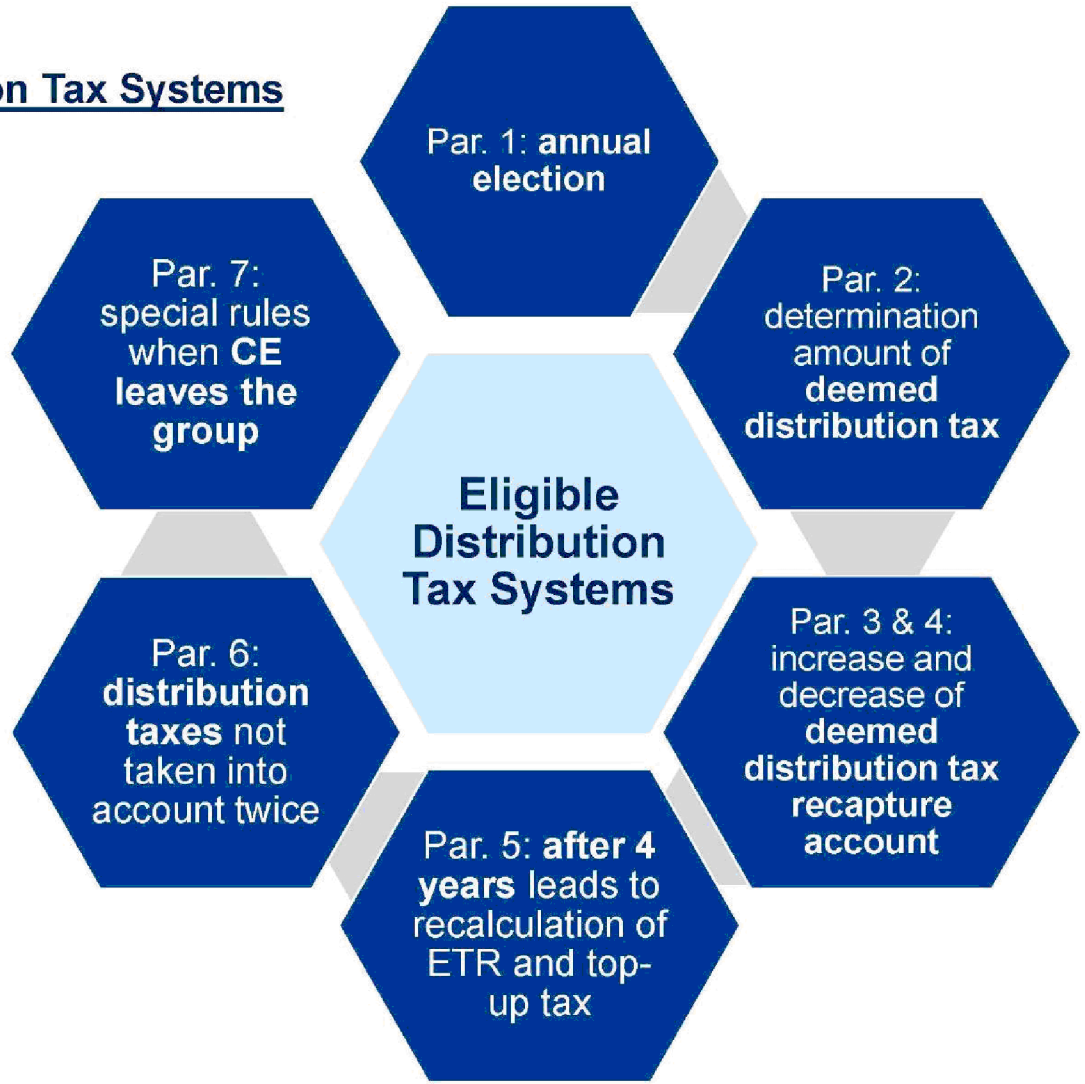
3. Qualifying income that is allocated to owners that are **natural persons**:
   - Less than 5% profit interests
   - Tax resident in UPE jurisdiction

Reduced by:

4. Qualifying income that is allocated owners that are **governmental entity, inter-national organisation, non-profit organisation or a pension fund**:
   - Less than 5% profit interests
   - Tax resident in UPE jurisdiction.

Chapter 7 – Tax Neutrality and Distribution Regimes

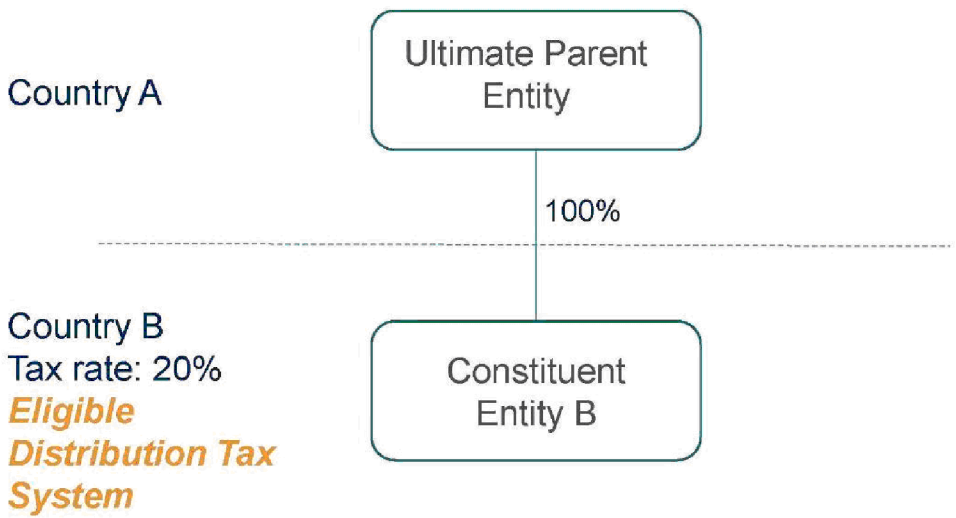
Art. 38 – Eligible Distribution Tax Systems



European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

Example art. 38(1) and (2) - Eligible Distribution Tax System



- In year 1 CE B earns 100 income. In year 3 the income is distributed and 20 income tax is imposed

Without application art. 38:

	Year 1	Year 2	Year 3
Qualifying income	100	0	0
Adjusted Covered Taxes	0	0	20
Top-up tax	15	0	0

With application art. 38:

	Year 1	Year 2	Year 3
Qualifying income	100	0	0
Adjusted Covered Taxes (incl. deemed distribution tax)	15	0	0
Top-up tax	0	0	0

European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

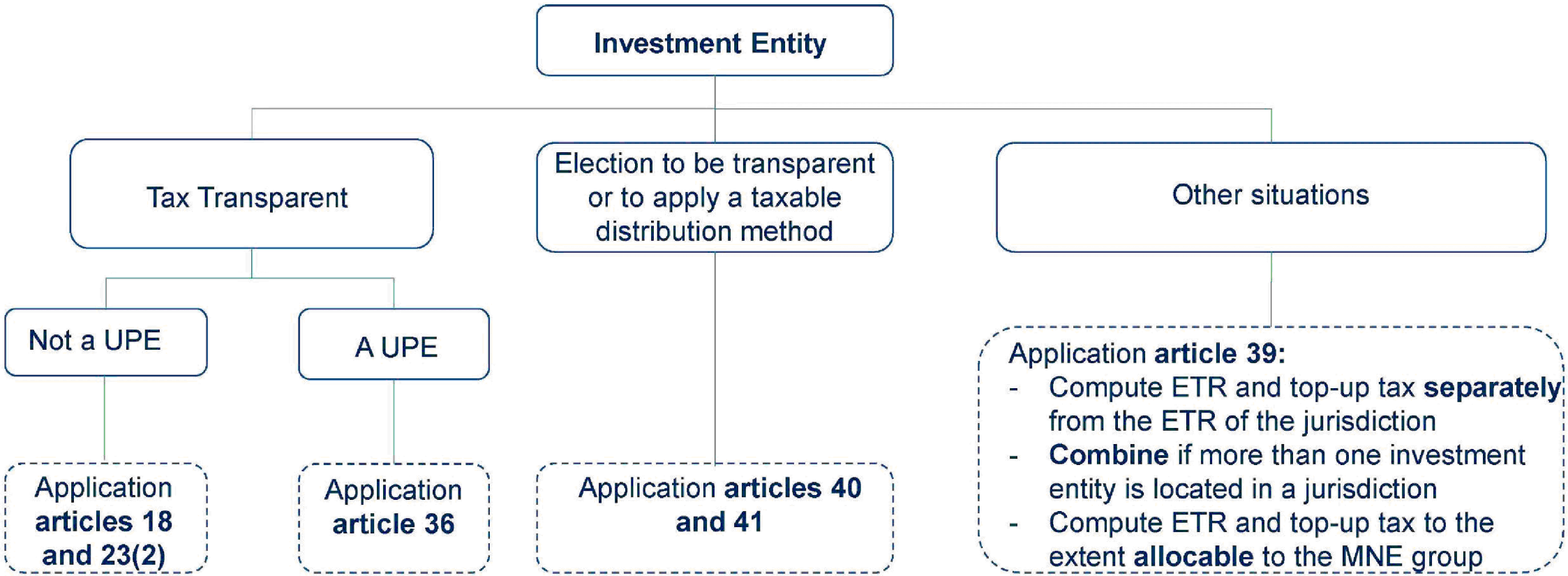
Example art. 38(3) and (5) – Deemed Distribution tax recapture account

- A distribution of 200 take place in Year 3. The rate is 20%. Tax paid: 40

	Qualifying income or loss	Deemed distribution tax	Tax paid on distribution	Qualifying loss * METR	Balance in deemed distribution tax recapture account	Tax recalculation	Top-up tax
Year 1	100	15	0		15	15	0
Year 2	200	30	0		45	25 + 5	0
Year 3	100	15	40		20	10	5
Year 4	200	30	0		50	0	30
Year 5	(100)	0		(15)	35		
Year 6	0	0			35		
Year 7	0	0			35		
Year 8	0	0			30		
Year 9	0	0			0		

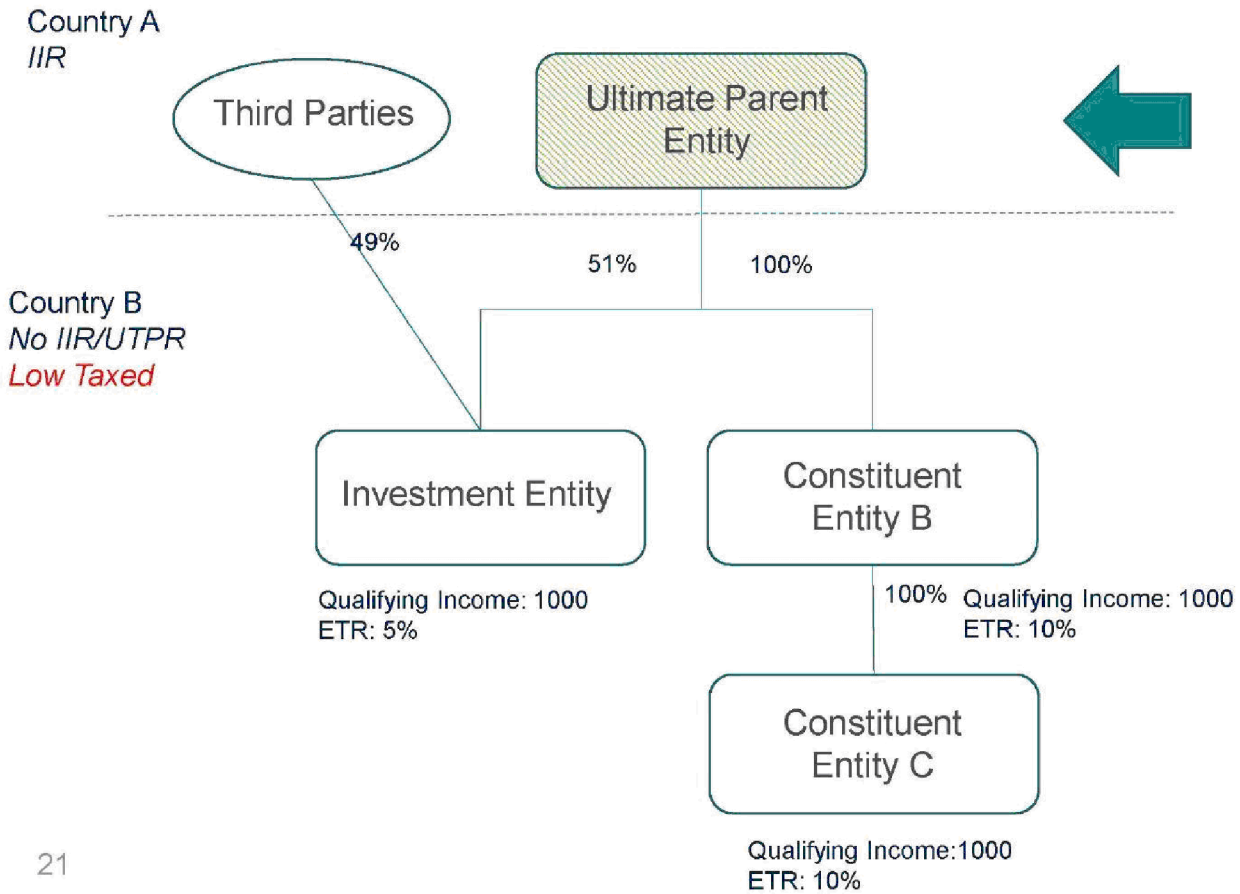
Chapter 7 – Tax Neutrality and Distribution Regimes

Art. 39 – Determination of the effective tax rate and top-up tax of an investment entity



Chapter 7 – Tax Neutrality and Distribution Regimes

Example art. 39 – Determination of the effective tax rate and top-up tax of an investment entity



- The UPE is located in a jurisdiction that applies the IIR.
- **Effective tax rate** CE B and CE C: 14%
  Effective tax rate Investment Entity: 10%
- **Top-up tax** CE B and CE C: 100
  [2000 * (15% - 10%)]
  Top-up tax Investment Entity: 51
  [51% * 1000 * (15% - 5%)]
- **UPE is subject to the IIR in relation to CE B & CE C**: 100 **and Investment Entity**: 51

European Commission

Chapter 7 – Tax Neutrality and Distribution Regimes

Alternative rules for investment entities

Art. 40 – Election to treat an investment entity as a tax transparent entity
Art. 41 – Election to apply a taxable distribution method

Investment Entity
Possibilities for election

Five-year election to treat an investment entity or insurance investment entity as a tax transparent entity (art. 40).

Conditions:
- CE-owner is subject to tax on annual changes in fair value of its ownership interests in such entity; and
- tax rate applicable to the CE-owner on such income equals or exceeds the METR.

Five-year election to apply a taxable distribution method (art. 41).

Conditions:
- CE-owner is not an investment entity; and
- It can be reasonably expected that the CE-owners is subject to tax on distributions from investment entity at a tax rate that equals or exceeds the METR.

See art. 41(2) for the consequences

COUNCIL DIRECTIVE
on ensuring a global minimum level of taxation for multinational groups in the Union

Working Party on Tax Questions

Presentation DG TAXUD

8 February 2022

Chapter 8 – Administrative Provisions

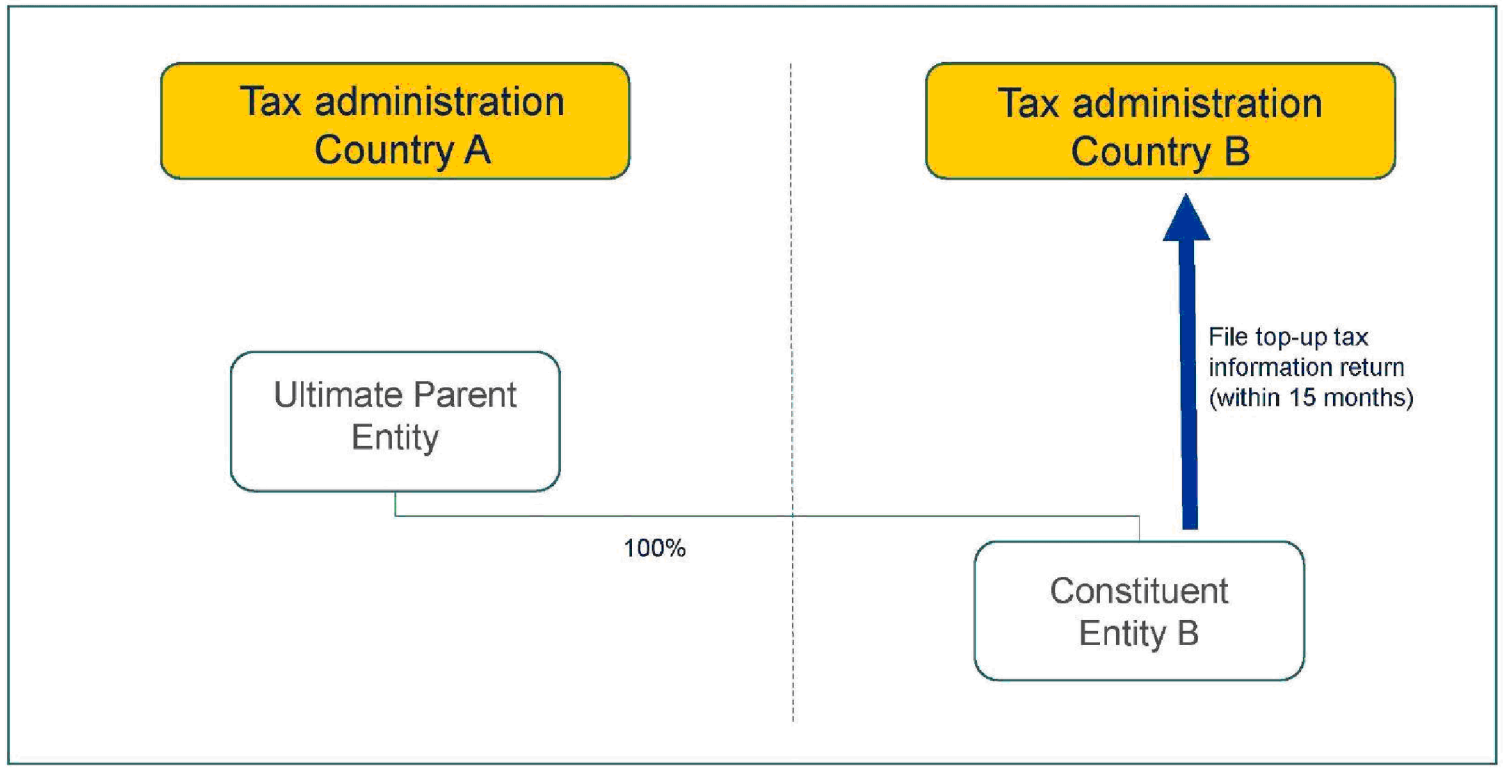
Articles 42, 43 and 44

European Commission

Chapter 8 – Administrative Provisions

Art. 42(2) and 42(7) – Filing obligations

CE files top-up tax return

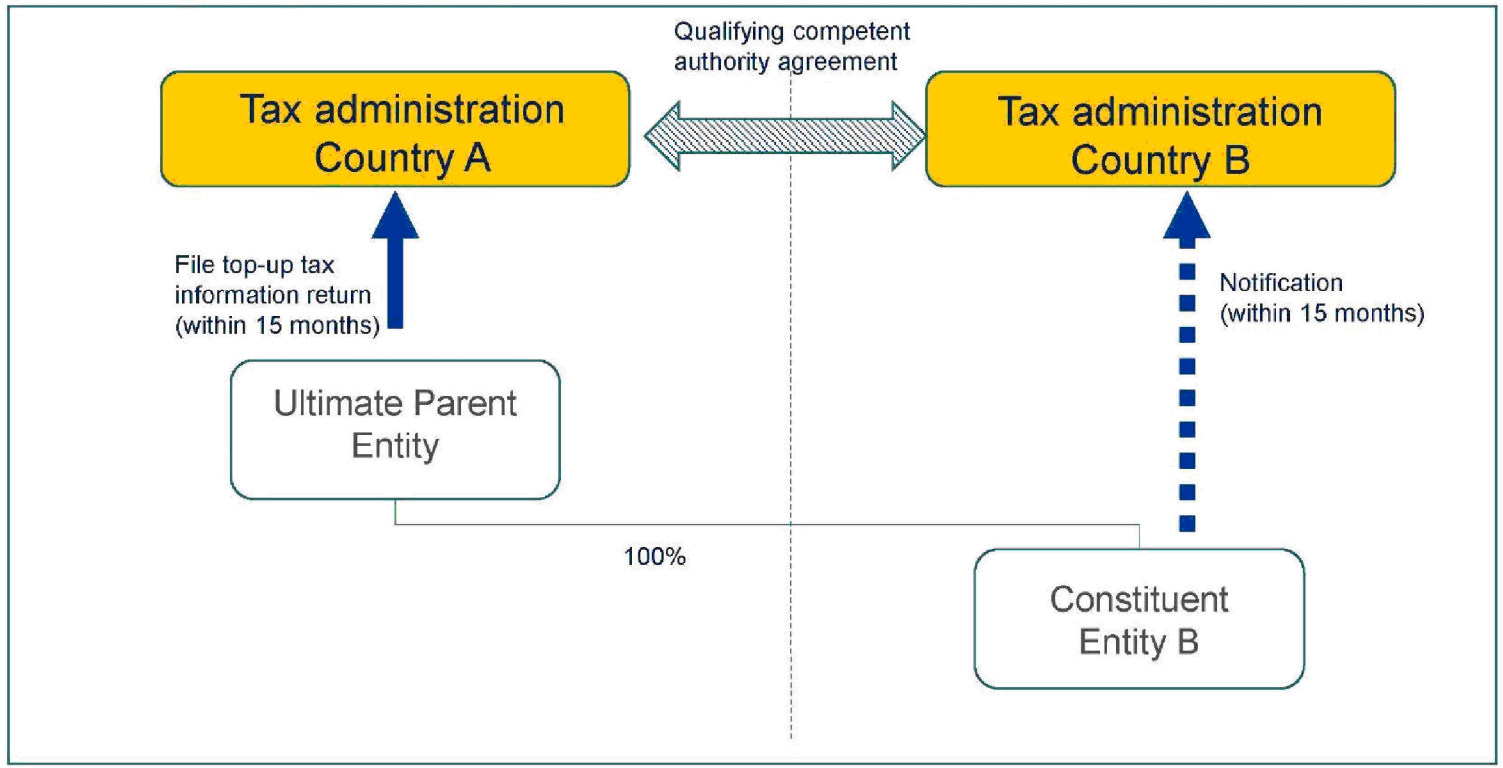


European Commission

Chapter 8 – Administrative Provisions

Art. 42(3), 42(4) and 42(7) – Filing obligations

UPE or designated filing entity files top-up tax return



European Commission

Chapter 8 – Administrative Provisions

Art. 42(5) – Filing obligations

Top-up tax information return shall include:

- **Identification of the constituent entities**, including their tax identification numbers, if any, the jurisdiction in which they are located and their status under the rules of this Directive;
- **Information on the overall corporate structure of the MNE group**, including the controlling interests in the constituent entities held by other constituent entities;
- the **information that is necessary** in order to compute:
  a) the **effective tax rate** for each jurisdiction and the **top-up tax** of each constituent entity;
  b) the **top-up tax of a member of a joint-venture group**;
  c) the **allocation of top-up tax** under the income inclusion rule and the UTPR top-up tax amount to each jurisdiction; and
- a **record of the elections** made in accordance with the relevant provisions of this Directive.

Chapter 8 – Administrative Provisions

Art. 42(6) – Filing obligations

UPE is located in a third country jurisdiction that applies rules which have been **assessed as equivalent**

Information for **application of the IIR by the POPE**

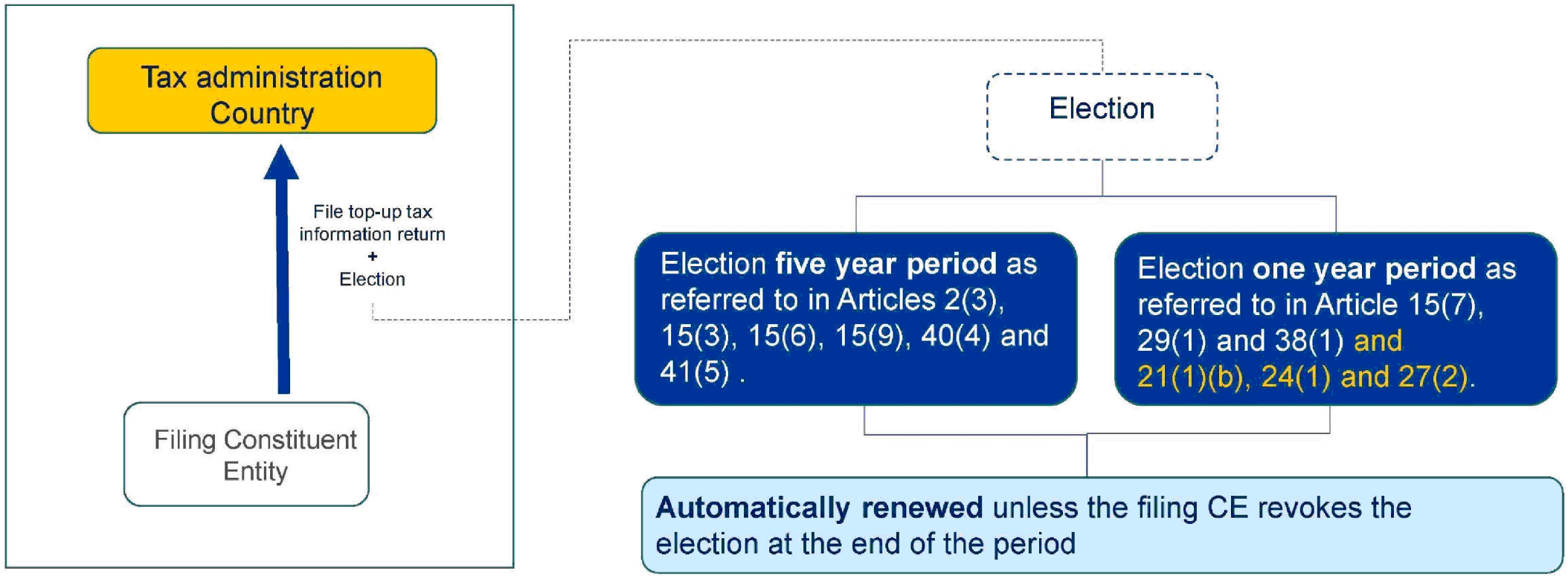
- **identification of CEs in which a POPE** holds an ownership interest and **the structure** of such ownership interests;
- all information that is necessary to **compute the ETR and the top-up tax due**; and
- all information that is relevant for **Articles 8, 9 or 10;**

Information for **application of the UTPR in the UPE jurisdiction**

- **identification of CEs** located in the UPE jurisdiction and the **structure** of such ownership interests;
- all information that is necessary to compute the **ETR** of the UPE's jurisdiction and **the top-up tax due;** and
- all information that is relevant for **Article 13.**

Chapter 8 – Administrative Provisions

Art. 43 – Elections



European Commission

Chapter 8 – Administrative Provisions

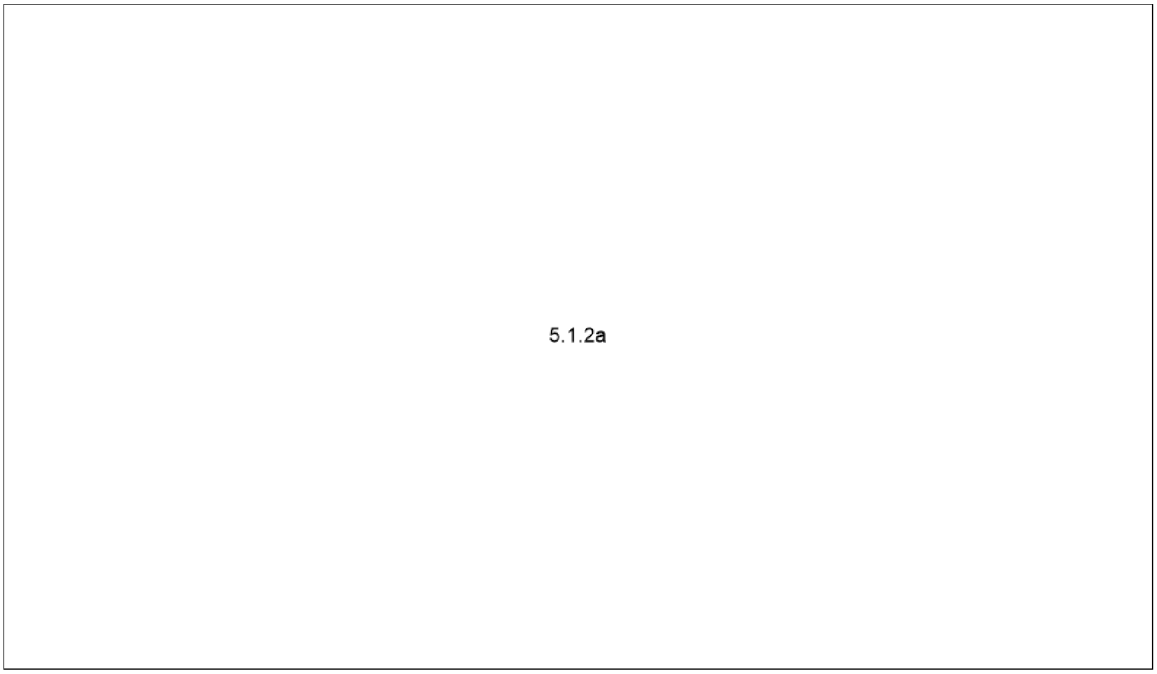
Art. 44 – Penalties

1. **Breach of national rules** adopted pursuant to this Directive → **Penalties** (Effective, proportionate and dissuasive)

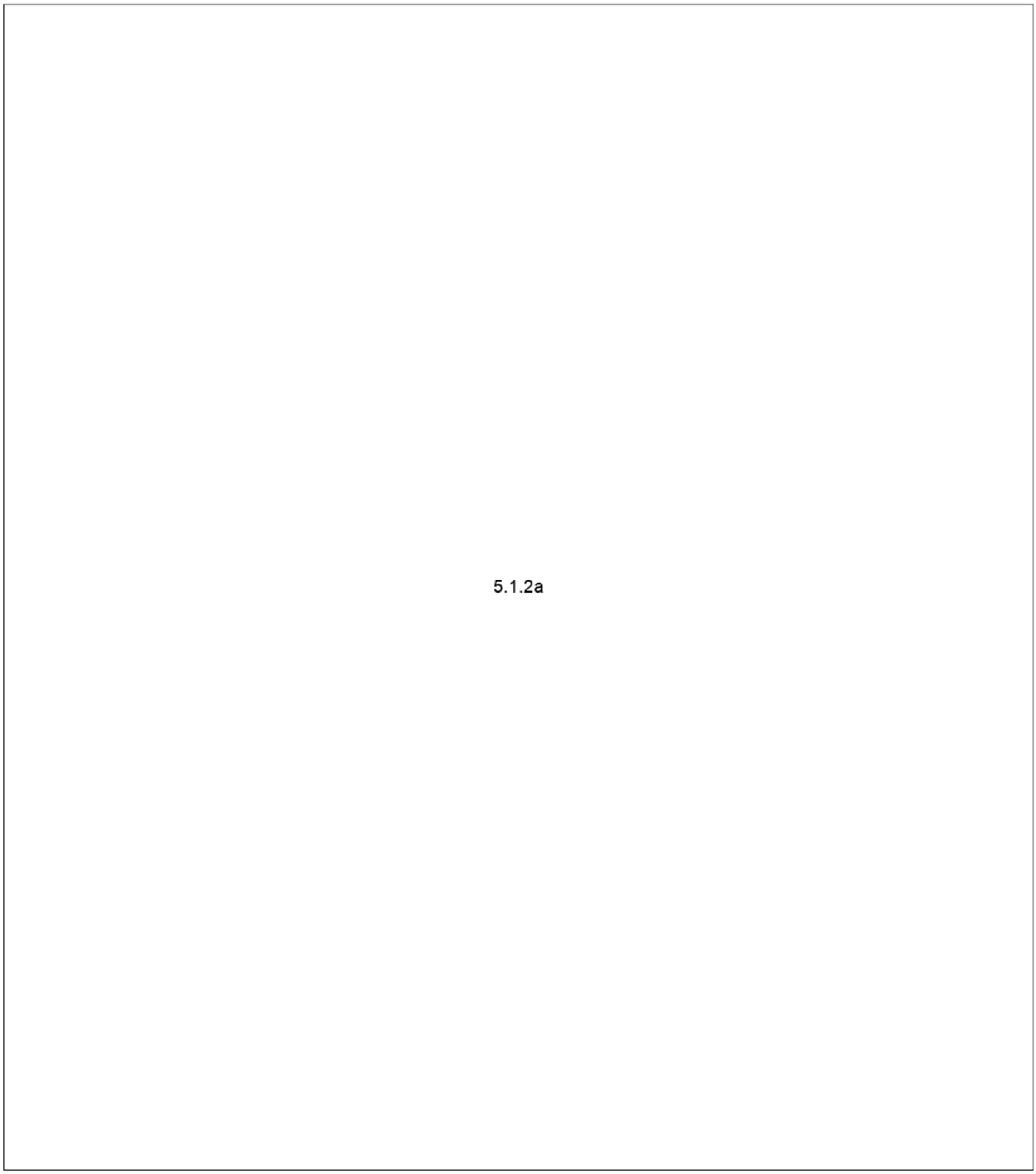
2. Not comply **with the requirement to file a top-up tax information return** → **Administrative pecuniary penalty** amounting to 5% of its turnover in the relevant fiscal year

Pijler 2 – Aantekeningen Raadswerkgroep 8 februari 2022

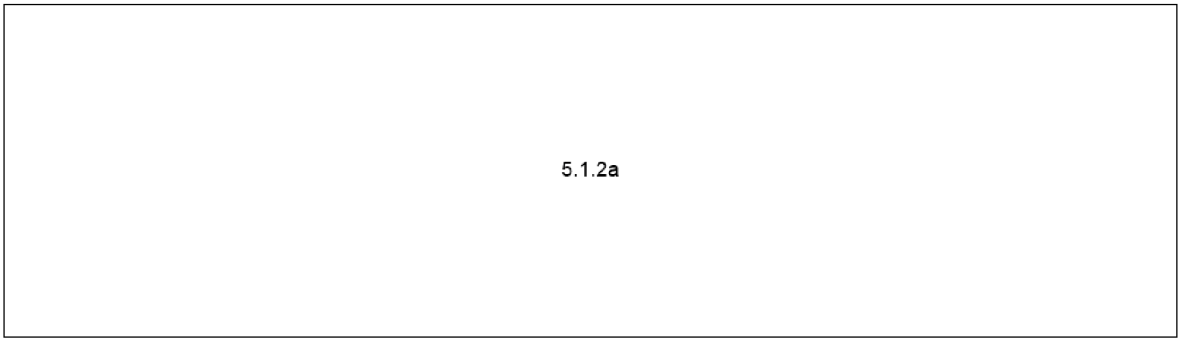
Definities 30 tot en met 38



Hoofdstuk 3



Hoofdstuk 4



5.1.2a

NLD: Dank voor compromisvoorstel. Vinden het compromisvoorstel goed. Verder geen opmerkingen. Korte reactie op voorstel lijst, wij steunen 5.1.2a geen voorkeur voor aparte EU lijst. Beter om aan te sluiten bij het werk in het IF bij de OESO.

5.1.2a

Hoofdstuk 5

5.1.2a

5.1.2a

NLD: Wij steunen het voorstel niet, er zijn drempels en bedragen afgesproken in de OESO. Als we dit aanpassen, waarom dan niet op andere punten? Argument dat het om kleine bedrijven gaat, begrijpen we niet. Bedragen van 1 mio en 10 mio, maar het betreft entiteiten die deel uitmaken van grote MNE, dan gaat het niet om kleine ondernemingen. Daarom zouden wij dit niet moeten doen.

5.1.2a

Hoofdstuk 8

Artikel 42

5.1.2a

NLD: Ook al schriftelijk commentaar ingediend. Gaan we niet herhalen. Twee opmerkingen. Eerste is al eerder genoemd. De safe harbour. Zit in OESO-regels, zit hier niet bij. Neem aan dat er hier nog een voorziening voor wordt getroffen. Uitwisseling LS: Is ons opgevallen dat in richtlijn shell entities verwezen wordt naar DAC, gaat dat hier ook zo?

5.1.2a

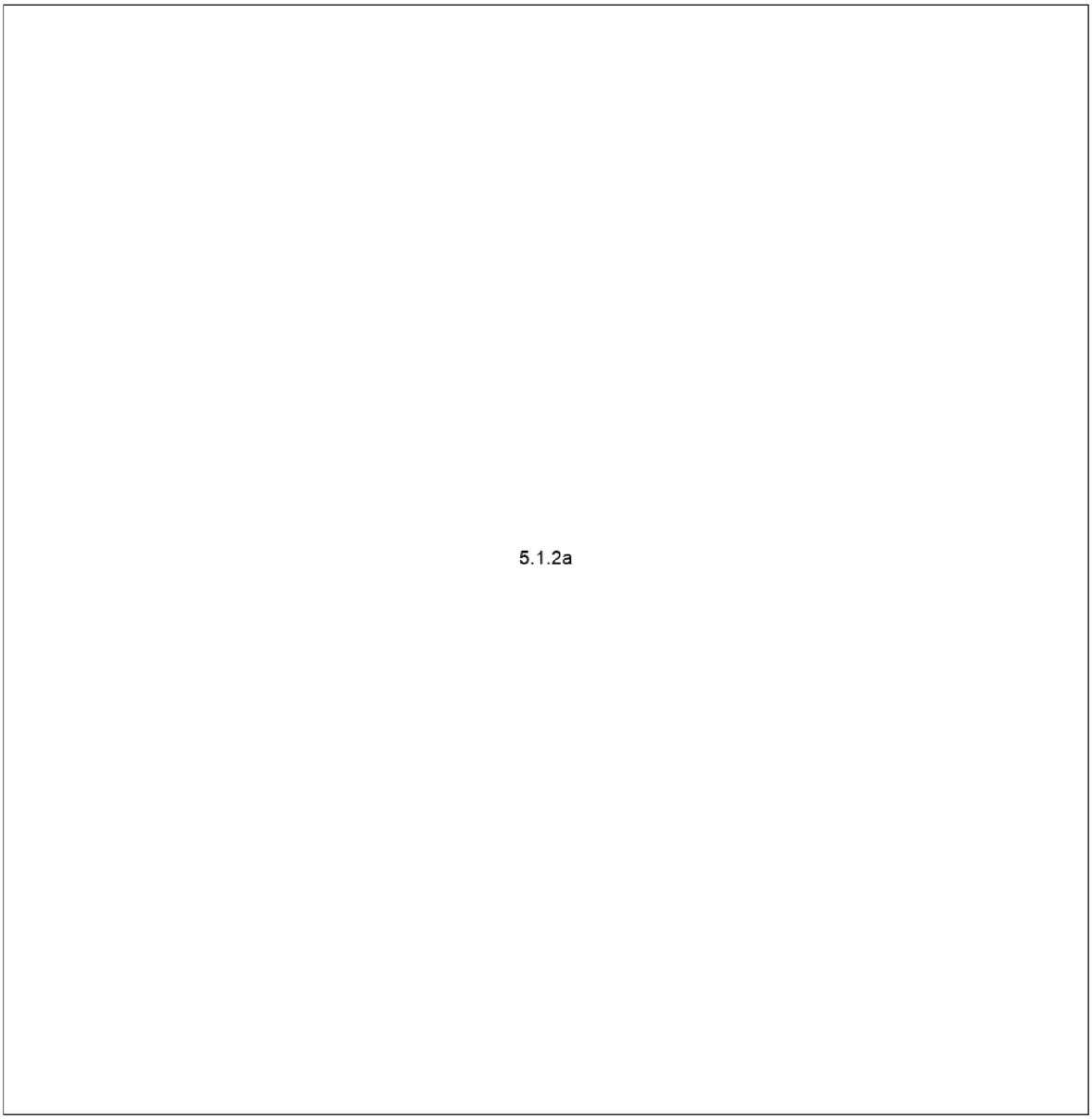
5.1.2a

Artikel 43

5.1.2a

Artikel 44

5.1.2a



FRA VZS: Werken aan compromistekst hoofdstukken 6 en 7. Idee dat te bespreken op 23 februari. Daarbij houden we rekening met compromistekst hoofdstuk 1 tot en met 5. 23 februari gaan we ook verder met hoofdstukken 9 tot en met 11. Tot en met 11 februari schriftelijke input aanleveren. Op 23 februari weer fysiek. Talenversie komt beschikbaar. Volgende week geen groep.

Ministerie van Financiën

TER BESLISSING
Aan
5.1.2e Algemene Fiscale Politiek

Directie Algemene Fiscale Politiek

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Auteur
5.1.2e

nota

Pijler 2 - Raadswerkgroep 23 februari 2022

Datum
22 februari 2022

Notanummer
2022-0000054703

Bijlage
1

Aanleiding

Op 22 december 2021 heeft de Europese Commissie het richtlijnvoorstel om wereldwijd een minimumniveau aan belastingheffing voor multinationals in de Europese Unie te waarborgen (Pijler 2) gepubliceerd. De maanden januari en februari staan in het teken van de technische behandeling.

Woensdag 23 februari vindt de zesde (fysieke) Raadswerkgroep plaats. Tijdens deze Raadswerkgroep worden de laatste hoofdstukken, te weten de hoofdstukken 9 tot en met 11, behandeld. Tevens staat een herziene versie (hierna: compromistekst) van de hoofdstukken 1 tot en met 8 op de agenda. 5.1.2e 5.1.2e (IA) en 5.1.2e (EIZ) zullen deze vergadering fysiek bijwonen. Dit is vooralsnog de laatste technische Raadswerkgroep voor de Ecofin Raad van maart, maar mogelijk worden nog extra Raadswerkgroepen ingepland.

Beslispunt

Graag uw akkoord op onderstaande instructie:

Kern

- Beleidsmatig is NL positief over het richtlijnvoorstel en geeft NL zijn volle steun aan de ambitie van de Fransen om dit dossier prioriteit te geven tijdens hun voorzitterschap en te streven naar een voortvarende behandeling in de Raadswerkgroepen, en, uiteindelijk, een snelle aanname in de Ecofin Raad. Tijdens de Ecofin Raad van 18 januari jl. heeft ook de staatsecretaris zijn steun uitgesproken. Op de agenda van de Ecofin Raad van maart staat voor Pijler 2 een stand van zaken discussie geagendeerd.
- Het BNC-fiche over het richtlijnvoorstelvoorstel is 28 januari naar de Kamer gestuurd. Op 16 februari is de inbreng van de Kamer bij het BNC-fiche ontvangen. Er wordt naar gestreefd de beantwoording 7 maart naar de Kamer te sturen, zodat deze beantwoording is ontvangen voor het Commissiedebat Ecofin van 10 maart.
- Het overgrote deel van de suggesties van Nederland op de hoofdstukken 1 tot en met 7 zijn overgenomen in de compromistekst. De tekst ziet er goed uit, we hebben geen verdere opmerkingen.
- Hoofdstuk 8 betreft de administratieve bepalingen, waaronder bepalingen ten aanzien van de sanctiebepalingen en de bepalingen betreffende de

gegevensverwerking. Conform instructie heeft Nederland - als aanvulling op het daarvoor reeds ingediende schriftelijke commentaar - tijdens de Raadswerkgroep van vrijdag 8 februari bij hoofdstuk 8 een aantal opmerkingen gemaakt en vragen gesteld. Ditzelfde gold voor veel lidstaten. Op het verzoek van het Franse voorzitterschap tijdens de Raadswerkgroep van 8 februari heeft Nederland additioneel schriftelijk commentaar bij de sanctiebepalingen ingestuurd (zie bijlage 1). In de compromistekst die nu voorligt is dit commentaar nog niet verwerkt, maar het Franse voorzitterschap heeft aangegeven dat de tekst nog volop in beweging is en een nieuwe compromistekst van hoofdstuk 8 volgt.

- Hoofdstuk 9 ziet op de overgangsbepalingen, hoofdstuk 10 op de toepassing van de Income Inclusion Rule (IIR) op binnenlandse situaties en hoofdstuk 11 omvat de afsluitende bepalingen. Tijdens de aankomende Raadswerkgroep zal Nederland (zie bijlage 1) vragen ter verduidelijking stellen en suggesties doen om de tekst van het richtlijnvoorstel meer in lijn te brengen met hetgeen de Raad en de Europese Commissie lijken te beogen. Het meest noemenswaardige ziet op de vaststelling van gedelegeerde regelgeving. De Europese Commissie zal onderzoek doen naar de gelijkwaardigheid van de nationale variant van de IIR van derde landen. Het doel van de gedelegeerde handeling is om, na een beoordeling door de Europese Commissie, wijzigingen mogelijk te maken in de bijlage waarin de landen worden opgesomd met een binnenlands wettelijk kader dat kan worden beschouwd als gelijkwaardig aan de IIR. Het Inclusive Framework (IF) zal ook een dergelijk onderzoek uitvoeren. Nederland zal – conform het BNC-fiche - vragen naar de verhouding tussen het voorstel van de Commissie en het aangekondigde IF-onderzoek omdat dubbel werk moet worden voorkomen.
- De suggesties/opmerkingen bij de hoofstukken 9 tot en met 11 zijn reeds schriftelijk ingestuurd. Het Franse voorzitterschap heeft aangegeven dat – ondanks dat elementen niet ook mondeling door lidstaten worden opgemerkt tijdens de Raadswerkgroep – het ingestuurde schriftelijk commentaar sowieso wordt meegenomen bij de volgende compromistekst.

Informatie die niet openbaar gemaakt kan worden
Deze nota bevat informatie die betrekking heeft op lopende internationale onderhandelingen.

Chapter IX, X and XI of the Proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union

General comments

- Chapter X: now that a reference to large-scale domestic groups has been included in the relevant Articles in the compromise proposal we are wondering if it is still necessary to include the provisions of Chapter X?
- Article 51 (Assessment of equivalence): we are wondering how this Article tallies with the forthcoming assessment of equivalent regimes by the Inclusive Framework. Separate or double assessments should be avoided. We are also hesitant as regards the assessment that is conferred to the Commission. At least a prior consultation of the Council should be ensured.

Comments by Article

- Article 47 (Exclusion from the IIR and UTPR of MNE groups in the initial phase of their international activity): we propose to insert a(n) (optional) provision similar to Article 9.3.5 of the GloBE rules in order to prevent unwarranted (ab)use of the exclusion.
- Article 49 (Large-scale domestic groups): as stated above we are wondering if it still necessary to include a separate Article on large-scale domestic groups given that they are already subject to the IIR pursuant to Article 5(2). Moreover, we note that Article 49 does not seem to require that the IIR must also be applied to the UPE of the large scale domestic group itself (contrary to Article 5(2)).
- Article 50 (Transitional rules): the top-up tax for large-scale domestic groups shall be reduced to zero for the first five fiscal years. Do these domestic groups have a filing obligation during this period? We would prefer a simplified filing obligation for these groups during the transition period. And should the provisions on large scale domestic groups be implemented by 31 December 2022? (Given that they will only apply as from 1 January 2028.)
- Article 55 (Transposition) lays down that Member States shall bring into force the laws etc. necessary to comply with this Directive by 31 December 2022. However, they shall apply the provisions necessary to comply with Articles 11, 12 and 13 from 1 January 2024. Does this mean that Member States must implement these Articles by 31 December 2022 although they have to apply them as from 1 January 2024?

Penalties

Further to the request by the FR PR in the WPTQ of 8 February 2022 our initial thoughts on the Article on penalties are:

- We do no support an obligation to charge a penalty. Depending on facts and circumstances it should be possible for MS to have discretionary powers to determine both the amount and whether a penalty should be charged at all.
- Bifurcation of late filing penalties versus penalties for false or no filing at all.
- What is the role of gross negligence or intent in article 44(2)?
- There should be clear guidance what constitutes a "false declaration" to avoid diverging interpretations (e.g. minor mistakes).
- If a penalty is charged, but still no top-up tax information return is filed, does the directive allow MS to impose additional national penalties or sanctions (since article 42(2) is specifically intended for the top-up tax information return)?
- Revenue may not be the best factor to impose a penalty on, especially when excluded entities are affected. Furthermore, revenue is not (directly) linked to the amount of top-up tax due and could lead to unequal penalties for the same (or at least similar) offences. Particularly for businesses with high turnover and (relatively) low profits (e.g. commodity traders), a revenue based fine may be disproportionate.
- Cumulation of penalties in cases there is no filing at all. Potentially all group entities are exposed to a 5% turnover penalty.

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From: 5.1.2e (AFP/EIZ)
Sent: Thur 2/24/2022 5:42:03 PM
Subject: Pijler 2 // Terugkoppeling Raadswerkgroep 23 februari 2022
Received: Thur 2/24/2022 5:42:00 PM
Aantekeningen - Raadswerkgroep Pijler 2 - 23 februari 2022.docx
wk02580.en22 (1).pdf

Ha allen,

Zie hieronder de terugkoppeling van de Pijler 2 Raadswerkgroep van gisteren 23 februari 2022. Bijgevoegd de uitgebreidere aantekeningen en de presentatie sheets van de COMM over de hoofdstukken 9 tot en met 11.

Groeten,
5.1.2e *en* 5.1.2e

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Algemeen

Gisteren 23 februari 2022 vond de **zesde Raadswerkgroep** over het richtlijnvoorstel **Pijler 2** plaats. Tijdens deze Raadswerkgroep werden de laatste hoofdstukken, te weten **de hoofdstukken 9 tot en met 11**, technisch behandeld. Tevens stond een **compromistekst van de hoofdstukken 1 tot en met 8** op de agenda.

Noemenswaardige opgebrachte punten tijdens de Raadswerkgroep van 23 februari 2022

Grens van € 750 miljoen: De Pijler 2 maatregelen gelden voor multinationals met een omzet van ten minste € 750 miljoen. 5.1.2a

5.1.2a

Indien binnen 4 jaar de Qualified Domestic Minimum Top-Up Tax (QDMTT) niet betaald is, dan hoeven andere landen daar geen rekening mee te houden en kunnen zij tot heffing overgaan. 5.1.2a

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5.1.2a

O.g.v. het oorspronkelijke richtlijnvoorstel kan een keuze voor de QDMTT alleen worden gedaan tot uiterlijk vier maanden na implementatie en dus niet meer daarna. 5.1.2a In de modelregels staat niet dat de QDMTT binnen een bepaalde termijn moet zijn ingevoerd. 5.1.2a

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In de definities wordt opgemerkt dat onder een 'eligible distribution tax system' wordt verstaan een corporate income tax systeem that was in force before 1 July 2021. 5.1.2a

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Om de richtlijn in lijn te brengen met het Europese recht is op enkele punten afgeweken van de IF-modelteksten. Een van die punten is de verplichting dat de bijheffing altijd plaatsvindt als in één lidstaat zowel een moeder- als een laagbelaste dochtervennootschap is gevestigd. 5.1.2a

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Bepalingen gegevensuitwisseling. 5.1.2a

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Boetes: 5.1.2a

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NLD pleitte voor een evaluatie van de richtlijn. 5.1.2a

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Vervolgproces

Het FRA VZS stuurt **vanavond een compromistekst van hoofdstukken 9 tot en met 11**. Vervolgens vindt op **maandag 28 februari de High Level Working Party on Tax Questions (HLWP)** plaats, waarbij Pijler 2 op de agenda (*Exchange of views in view of the Ecofin Council meeting on 15 March 2022*) staat. Er staan nog best wat punten open, maar het FRA VZS blijft ambitieus en voert de druk op: Het FRA VZS hoopt (een deel van) de openstaande punten af te kunnen tikken tijdens de HLWP. Vervolgens staat op de **Ecofin van 15 maart** Pijler 2 als **algemene oriëntatie of** (als algemene oriëntatie niet lukt) **oriënterend debat** gepland. Een algemene oriëntatie is een politiek besluit van de Raad waarin een politiek standpunt wordt aangenomen over een wetgevingsvoorstel van de CIE. Bij een algemene oriëntatie wordt bewerkstelligd dat de leden van de Raad politiek 'aan boord' zijn. Er is dan nog wel ruimte om technische vraagstukken nog verder uit te werken. Het Commissiedebat Ecofin vindt plaats op 10 maart 2022. Tussen de HLWP en de maart

Ecofin zijn vooralsnog geen Raadswerkgroepen ingepland.

Council of the European Union
General Secretariat

Brussels, 22 February 2022

WK 2580/2022 INIT

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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Delegations
Subject	Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union (Chapters IX to XI) - presentation by the European Commission

Delegations will find attached the presentation by the European Commission of Chapters IX to XI of the proposal).

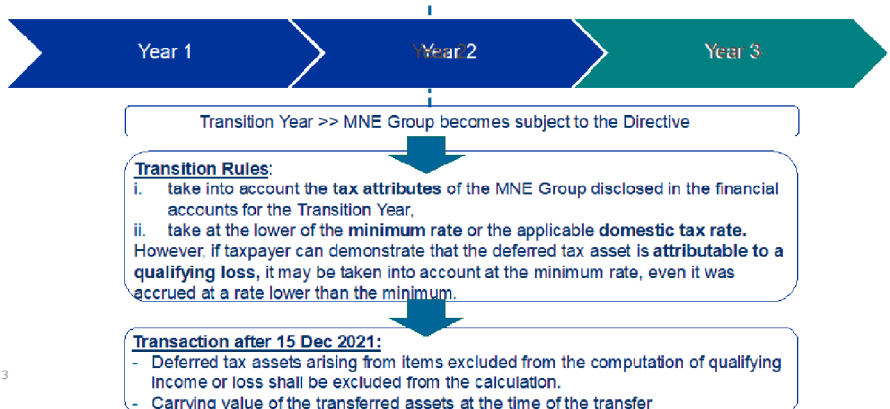

European Commission
COUNCIL DIRECTIVE
on ensuring a global minimum level of taxation for multinational groups in the Union
Working Party on Tax Questions
Presentation DG TAXUD
23 February 2022

Chapter 9 – Transition Rules

Articles 45, 46, 47 and 48

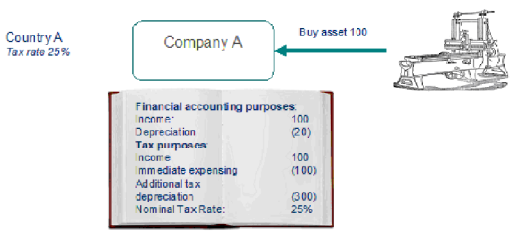
Chapter 9 – Transition Rules

Art. 45 – Tax attributes upon transition



Chapter 9 – Transition Rules

Example art. 45(4) - Tax attributes upon transition:



Treatment asset:

- Financial accounting purposes: depreciate asset over 5 years.
- Tax purposes: immediate expensing of the asset and 300 of additional tax depreciation in the same year.
- Based on Art. 45 of the Directive, tax attributes are taken into account for the transition year.

- **In case asset purchased prior to 15 Dec 2021:** DTA: 45 [300 * 15%]

- **In case asset purchased after 15 Dec 2021:** DTA: 0 [0 * 15%]
- Should only take into account DTAs that relate to items which are not excluded from the computation of qualifying income or loss

Chapter 9 – Transition Rules

Art. 46 –Transitional relief for the substance-based income exclusion

Replacement of 5% for eligible payroll costs of eligible employees

Fiscal Year	%
2023	10 %
2024	9,8 %
2025	9,6 %
2026	9,4 %
2027	9,2 %
2028	9,0 %
2029	8,2 %
2030	7,4 %
2031	6,6 %
2032	5,8 %

Replacement of 5% for carrying value of the eligible tangible assets

Fiscal Year	%
2023	8 %
2024	7,8 %
2025	7,6 %
2026	7,4 %
2027	7,2 %
2028	7,0 %
2029	6,6 %
2030	6,2 %
2031	5,8 %
2032	5,4 %

Chapter 9 – Transition Rules

Art. 47 – Exclusion from the IIR and UTPR of MNE groups in the initial phase of their international activity

MNE groups in the initial phase

UPE in the EU - Exclusion from the IIR
The IIR Top-up Tax, relating **to the UPE and its low-taxed CEs located in the same MS**, shall be **reduced to zero if:**

UPE in third country - Exclusion from the UTPR
The UTPR Top-up Tax shall be **reduced to zero** if:

The following conditions are met:
1 MNE Group has constituent entities in no more **than 6 jurisdictions;**
2a The sum of net book value of tangible assets in jurisdictions other than the reference jurisdiction does **not exceed EUR 50 million**; and
2b MNE Group is within the scope of the Directive for no more than **5 Fiscal Years**.

European Commission

Chapter 9 – Transition Rules

Art. 48 –Transitional relief for filing obligations

General rule (art. 42(7))	Transitional year (art. 48)
The top-up tax information return and the relevant notifications shall be filed **no later than 15 months** after the last day of the fiscal year to which they relate to.	The top-up tax information return and the relevant notifications shall be filed **no later than 18 months** after the last day of the fiscal year that is the transitional year.

Chapter 10 – Specific Application of the IIR to Large-Scale Domestic Groups

Articles 49 and 50

Chapter 10 – Specific Application of IIR to Large-Scale Domestic Groups

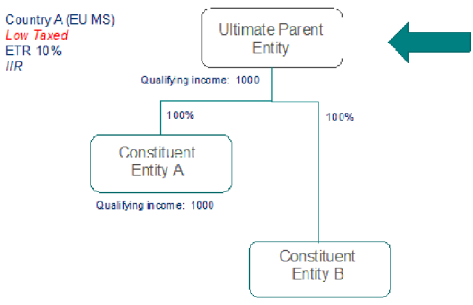
Art. 49 – Large-scale domestic groups

Large-scale domestic groups

- ***Content***: Large-scale domestic groups are **subject to the IIR** in relation to their low-taxed CEs.
- ***Reason***: The addition of this Chapter to the EU Directive is required in order to ensure that there is no risk related to the **EU Fundamental Freedoms**.

Chapter 10 – Specific Application of IIR to Large-Scale Domestic Groups

Example art. 49 – Large-scale domestic groups



- The UPE is located in an EU MS that applies the IIR
- **Effective tax rate** Country A: 10%
- Qualifying income = 4000
- **Top-up tax** Country A: 200
  [4000 * (15% - 10%)]
- The UPE is subject to the IIR top-up tax relating to CE A, CE B and itself:
  - CE A: EUR 50 (200 * (1000/4000))
  - CE B: EUR 100 (200 * (2000/4000))
  - UPE: EUR 50 (200 * (1000/4000))

Chapter 10 – Specific Application of IIR to Large-Scale Domestic Groups

Art. 50 – Transitional rules

Large-scale domestic groups in the initial phase

The IIR top-up tax shall be **reduced to zero in the first five fiscal years**.
Starting period:

1) Not in scope yet of Directive when it enters into force = starting from the first day of the fiscal year in which the large-scale domestic group falls within the scope of this Directive for the first time
2) In scope of Directive when it enters into force = start on 1 January 2023.

Chapter 11 – Final Provisions

Articles 51, 52, 53, 54 and 55

Chapter 11 – Final Provisions

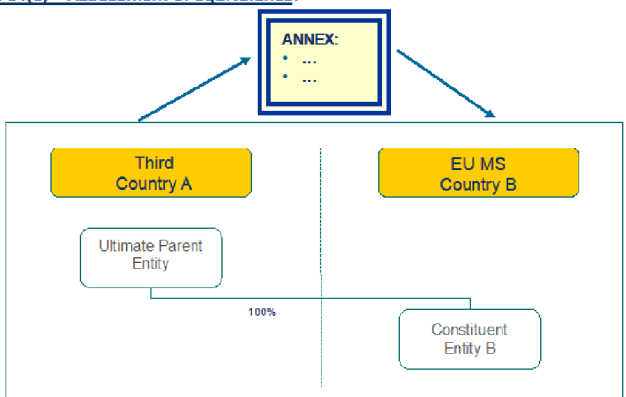
Art. 51(1) – Assessment of equivalence - Parameters:

i. Set of rules	Enforces a **set of rules** in accordance with which the parent entity of an MNE group shall **compute and collect** its allocable share of top-up tax in respect of the low-taxed constituent entities
ii. Rate	Establishes **a minimum effective tax rate of at least 15% per jurisdiction** below which a constituent entity is considered as low-taxed
iii. Jurisdictional Blending	Only allows the blending of income of entities located within the same jurisdiction
iv. Relief	**Provides for relief for any top-up tax that was paid** in a Member State in application of the IIR

European Commission

Chapter 11 – Final Provisions

Art. 51(2) and 51(3) – Assessment of equivalence:



Chapter 11 – Final Provisions

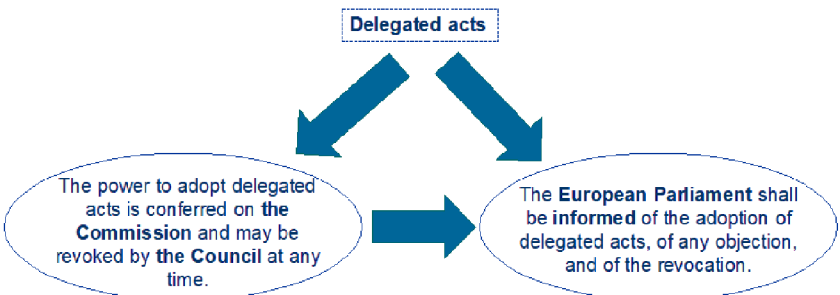
Art. 52 – Exercise of the delegation

The power to adopt delegated acts

1.	Conferred on **the Commission**
2.	For an indeterminate period of time
3.	May be **revoked** at any time by **the Council**
4.	The Commission shall **notify** it the Council as soon as it adopts a delegated act
5.	A delegated act shall enter into force only **if no objection has been expressed by the Council**

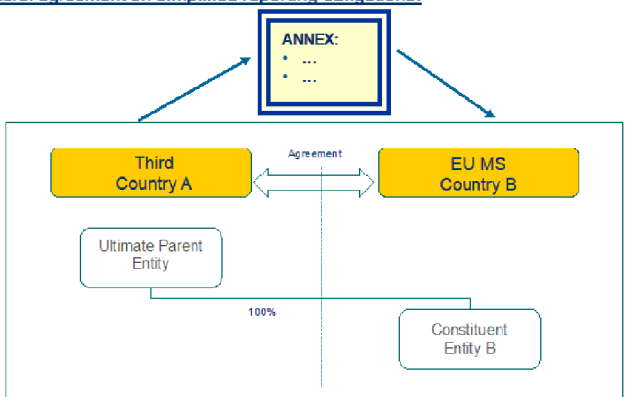
Chapter 11 – Final Provisions

Art. 53 – Informing the European Parliament



Chapter 11 – Final Provisions

Art. 54 – Bilateral agreement on simplified reporting obligations:



Chapter 11 – Final Provisions

Art. 55 – Transposition

Aantekeningen Raadswerkgroep 23 februari 2022

Hoofdstuk 1 en 2

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NLD: Vraag verduidelijking artikel 10, lid 2, eerst alinea: Bedoeling dat als M in land A en die heeft D in land B en land B kent QDMTT dan moet M in land A rekening ermee houden door die top-up tax te verminderen tot nul. Gaat nu ook om zelfde LS? 'Either in this MS'. Maar o.g.v. artikel 5, lid 2 geldt dat toch al? Wholly of partially, hoe kan dat? Artikel 11, lid 1: 'against the taxable income' staat niet in modelregels, wat betekent dit?

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Hoofdstukken 6 en 7

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NLD: Artikel 37, lid 4; afwijking modelregels. In modelregels staat dat GloBE ook moet worden verminderd met same amount. Dat ontbreekt.

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Hoofdstuk 8

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NLD: Artikel 44, lid 2: niet tegen gemeenschappelijke sanctiebepalingen. Mag in bepaalde gevallen best stevig zijn, maar moeite met omstandigheden en hoogte. Omstandigheden omdat het voor alle omstandigheden geldt (te laat, vals, geweigerd etc.). Moet onderscheid worden gemaakte. Hoogte, geen voorstander van hoogte die afhangt van omzet. Ook niet van de winst. Voorkeur voor absolute bedragen, betere maatstaf.

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Hoofdstukken 9 tot en met 11

NLD: Artikel 47: optie misbruik toevoegen net als in modelregels (9.3.5)

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NLD: Kunnen aansluiten bij wens grotere betrokkenheid Raad.

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FRA VZS: Nieuwe compromistekst hoofdstukken 9 tot en met 11 voor morgenavond. Maandag discussie in HLWP. 15 maart; algemene oriëntatie of oriënterend debat.

Verslag bespreking implementatie Pijler 2 – PwC

5-10-2022

Aanwezig: 5.1.2e (PwC), 5.1.2e (PwC), 5.1.2e (MinFin), 5.1.2e (MinFin), 5.1.2e (Belastingdienst), 5.1.2e (Belastingdienst).

- Korte introductie aanwezigen en focus meeting ligt op ontwikkeling GloBE Implementation Framework.
- Zekerheid vooraf is een belangrijk element van Pijler 2. Er is binnen P2 geen publieke consultatie gedaan over bindende panels zoals bij P1 wel het geval is. Dat is jammer aldus PwC.
- Veel bedrijven zijn begonnen met het in kaart brengen van de gevolgen. Dit leidt tot hoge administratieve lasten, temeer daar nog onduidelijk is welke landen P2 nu feitelijk gaan invoeren (landen als China en India geven wisselende signalen af bv.)
- Sommige bedrijven proberen nu al wijzigingen in hun structuur aan te brengen om zo de administratieve lasten en de kans op disputen te verminderen, bv. door verschillende houdster functies te centraliseren in een houdster.
- Een interessante safe harbour zou bv. het gebruik van CbC data kunnen zijn. Die is in de meeste gevallen ongunstiger dan P2 data, het betreft informatie die al beschikbaar is en waar internationaal consensus over bestaat. MinFin geeft aan dat dit soort input ook goed via de BAG bij de OESO ingebracht kan worden.
- US business maken zich zorgen over Pijler 2 en dan ihb de UTPR heffing, temeer daar de US GILTY heffing vooralsnog niet als een kwalificerende heffing lijkt te kwalificeren. Daarnaast heeft het US belastingsysteem nog een aantal andere kenmerken waarvan niet zeker is hoe dit onder P2 uitwerkt. Bij voorbeeld tav de toerekening van CFC taxes aan groepsentiteiten buiten de US en zogeheten "transitional credits", binnen de groep overdraagbare credits. Het zou goed zijn als de OESO hier duidelijkheid over zou verschaffen aldus PwC. MinFin heeft aangegeven dat binnen het OESO Implementation Framework wordt gewerkt aan een allocatiesleutel voor CFC-heffingen. Dat proces loopt nog.
- PwC geeft aan dat P2 veel datapunten betreft. Hierbij is het belangrijk alle brondata in een soort virtual database te hebben om zo een paper trail te hebben voor als de Belastingdienst meer inzicht wens in de totstandkoming van de P2 berekening en allocatie. De ruwe data kan vervolgens met behulp van verschillende soorten software bewerkt worden om tot P2 berekeningen te komen (bv longview of hfm oracle).
- PwC raadt de OESO aan om een data catalogue te bouwen om zo eenduidigheid te krijgen over welke datapunten er nodig zijn.
- Er is nog kort gesproken over een paar technische punten, bv. hoe bronbelasting op rente in de consolidatiepakketten verwerkt wordt. Dit hangt nogal eens af van de toepasselijke accounting standaard en ook van de accountant zelf (als kostenpost en dus netto inkomen, of bruto inkomen met bronbelasting als aparte belastinglast). Ander punt is economische gerechtigheid onder P2
- Er is ook kort gesproken over hoe om te gaan met economische gerechtigheid, bv. ten aanzien van aandelen.
- Belastingdienst geeft aan dat voor het toezicht zaken als heffingsbelang en het belang dat Nederland aan zijn uitwisselingsverplichtingen kan voldoen (door hoogwaardige kwalitatieve data uit te kunnen wisselen).
- MinFin heeft aangegeven dat NL binnenkort een internetconsultatie zal starten om het Nederlandse conceptwetsvoorstel van Pijler 2 te consulteren.
- PwC biedt aan om kennis te delen, bv. vragen die uit het PwC netwerk opkomen.

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