

MAS – Master Class  
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# International selskabsskat – nye tiltag

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## Tiltag fra OECD

- Status på BEPS-projektet
- "BEPS 2.0"- Pillar I & II
  - Fokus på Pillar II fra et EU-perspektiv



## Tiltag fra EU

- Status på ATAD
- Fair & Simple Taxation
- Status on CCCTB
- "Own Resources"
- EU Black List



# Tiltag fra OECD

# OECD BEPS 2.0

2015

- BEPS Report on Action 1 – Addressing the Tax Challenges of the Digital Economy: More work to be done, solution in 2020...



2020 (October)

- Addressing the Tax Challenges of the Digital Economy – Report on Pillar I Blueprint
  - New taxing rights to market jurisdictions (new nexus and profit allocation rules)
- Addressing the Tax Challenges of the Digital Economy – Report on Pillar II Blueprint
  - A right to "tax back" where other jurisdictions have not exercised their primary taxing rights



2021

- Aim to reach political agreement in mid 2021

# Pillar II – GloBE

**Aim:** To mitigate remaining profit shifting linked to the digitalising economy (and originally also to curb tax competition between states)

**Idea:** To allow all countries to "tax back" profits where other countries have not sufficiently exercised their primary taxing rights

**Design:** A systemic solution designed to ensure that all internationally operating businesses pay a minimum level of tax

**Content:** New rules by way of changes to domestic law and DTTs

- [January 2019 – Policy Note](#)
- [May 2019 – Programme of Work](#)
- [November 2019 – Public Consultation Document](#)
- [October 2020 - Report on Pillar II Blueprint](#)

Rule	Mechanics	Details from blueprint
<b>Minimum tax</b>	<p>1) <b><u>Income inclusion rule:</u></b> Taxation at parent of income in controlled entities locally subject to low taxation</p> <p>2) <b><u>Switch-over rule:</u></b> Taxation at HQ of income in branches locally subject to low taxation</p>	<ul style="list-style-type: none"> <li>• A top-up tax to reach a minimum level of tax</li> <li>• Draws heavily on definitions and concepts used in BEPS 13 (CbCR)</li> <li>• Euro 750 million threshold</li> <li>• Reliance on financial accounting standards</li> <li>• A jurisdictional blending approach</li> <li>• Top-down coordination rule</li> </ul>
<b>Tax on base eroding payments</b>	<p>3) <b><u>Undertaxed payments rule:</u></b> No deduction for payments to a related party if payments are not subject to sufficient taxation.</p> <p>4) <b><u>Subject-to-tax rule:</u></b> Treaty benefits only granted if the income is sufficiently taxed in the other state.</p>	<ul style="list-style-type: none"> <li>• A backstop to the income inclusion rule</li> <li>• Applies many of the same definitions and concepts as the income inclusion rule</li> <li>• But the subject to tax rule should apply to individual payments and the low-tax trigger should rely on the nominal CIT</li> </ul>

# Pillar II – GloBE

Overview of the report (source: p. 16 of the report itself)

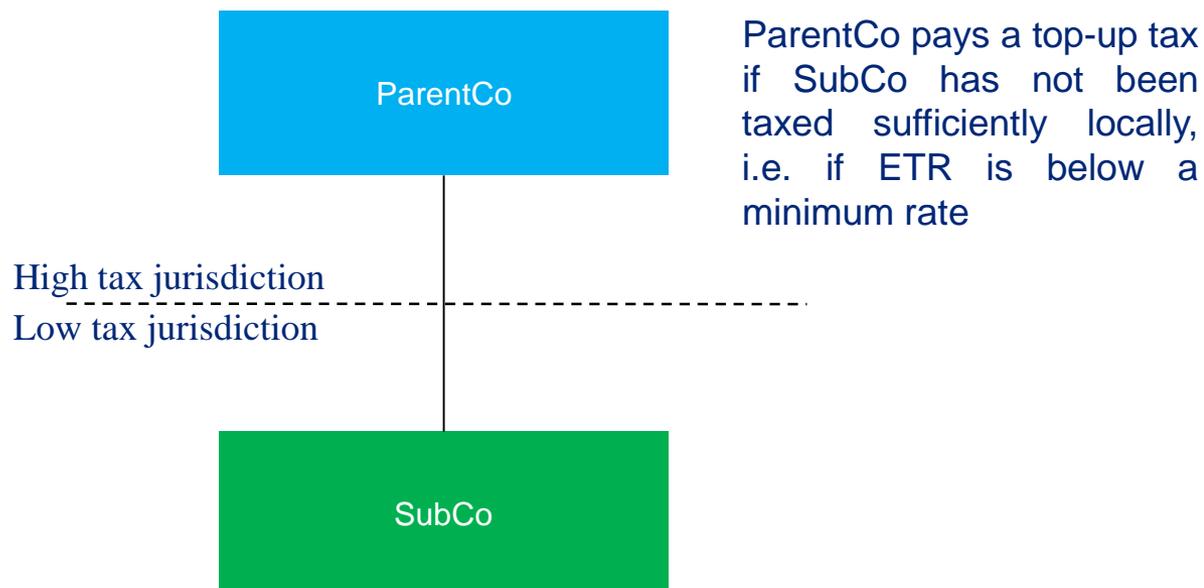


Plenty of outstanding issues:

- Still no decision on the minimum rate to be applied
- How to co-exist with US GILTI-rules and existing CFC regimes?
- Carveouts that reduces the GloBE tax base continue to be a point of discussion → The blueprint focuses on a formulaic substance-based carveout based on payroll and tangible assets
- The switch-over rule and the subject-to-tax rule requires changes to existing tax treaties → A new multilateral instrument contemplated
- Discussions on whether the rules could be implemented in a staggered manner (one at a time)
- The report leaves the door open to development of specific dispute prevention and resolution rules
- If agreement on Pillar I fails → Unclear whether countries mainly interested in Pillar I would agree to Pillar II on a stand-alone basis

# Pillar II – Income Inclusion Rule

- The main element of Pillar II is the Income Inclusion Rule (IIR) complimented by switch-over rule
  - The undertaxed payments rule (UTPR) is a kind of backstop
  - The subject-to-tax rule (STTR) protects source states (with lower administrative capacities)
- The IIR to some extent resembles CFC legislation...



## ARTICLE

### A General Income Inclusion Rule as a Tool for Improving the International Tax Regime – Challenges Arising from EU Primary Law

Peter Koerver Schmidt\*

Intertax, vol. 48, issue 11, pp. 983-997

Main aims:

- 1) To assess the IIR in light of EU primary law (fundamental freedoms)
- 2) Identify design options for MS
- 3) Discuss pros and cons of the identified options

- MS have retained competence in direct tax matters, but...
  - The competence must be exercised in line with EU law, e.g. the fundamental freedoms
    - Non-discrimination between domestic and cross-border situations
    - The starting point is that the fact that a taxpayer has sought to profit from tax advantages in another MS cannot, in itself, deprive the taxpayer of the right to rely on the relevant treaty provision
- Relevant treaty freedom?
  - Based on CJEU case law on CFC legislation: Free establishment is the relevant freedom, if the rules are targeted solely at situations with "definite influence"
    - C-196/04 Cadbury Schweppes
    - C-201/05 Test Claimants in the CFC and Dividend Group Litigation
    - C-135/17 X GmbH
    - E-3/13 & E-20/13 Fred. Olsen and Others and Petter Olsen and Others
  - IIR: Probably the same distinction should be made

- Different treatment of comparable situations?
  - The IIR (only) targets cross-border situations, i.e. the parent company only has to include income from foreign subsidiaries not domestic ones
  - CJEU case law on CFC legislation:
    - It entails different treatment of comparable situations
    - It does not matter that the group as such does not pay more tax than that which would have been payable if the income had been generated by a domestic subsidiary →
    - For the CJEU the decisive issue appears to be that the parent company – seen in isolation – experiences a disadvantage
  - IIR: It appears to entail different treatment of comparable situations, even though the IIR only entails top-up taxation

- Can the different treatment be justified (the rule of reason doctrine)?
  - CJEU case law on CFC rules
    - Prevention of abuse of rights may justify, but only if restricted to wholly artificial arrangements
      - Subjective element on the intention to obtain a tax advantage
      - Objective circumstances showing... (relevant factors: physical existence in terms of premises, staff and equipment)
    - Balanced allocation of taxing rights? Mentioned but not explored by CJEU
  - IIR and justifications?
    - Probably possible to ensure compatibility by including a "substance carve-out"
    - "Balanced allocation" or related "new" justification?
      - Possibly, but more uncertain
      - However, the IIR has a broader scope and the uncertainty may be reduced if implemented through a directive (full harmonization), as the CJEU seems to be more lenient in such situations as long as the directive can be seen to serve the interest of the internal market...

# IRR – Design Options for MS

- Already identified
  - Including an intra-EU substance carve-out
  - Justify the the rule on other grounds, e.g. "balanced allocation" or a variation hereof
- A third possibility?
  - Try removing any discriminatory effects by applying the rules also to purely domestic situations
  - Like the current Danish approach to CFC legislation?
    - But is the Danish approach bulletproof?
    - It still entails de facto different treatment, as the Danish parent company – seen in isolation – only experiences a tax disadvantage in the cross-border situation
    - But then again, the IIR has a broader scope...

1. Including an intra-EU substance carve-out
  - Pros: Safest route to ensure alignment with EU primary law, reduces the sovereignty infringement
  - Cons: Undermines the policy goal of mitigating tax competition (also for real activities), and could entail proliferation of demands for carve-outs
  
2. Justify the the rule on "balanced allocation" or on a new ground, e.g. the need for establishing a level playing field...
  - Pro: Better in line with the policy goal of the GloBE Proposal
  - Con: Less clear whether ECJ would accept such justification
  
3. Try removing any discriminatory effects by applying the rules also to purely domestic situations
  - Same as under alternative 2, but creates extra layer of administrative burden

Tentative policy advice: Alternative 2 implemented through a directive

# Tiltag fra EU

## Overview - Member States' ATAD Implementation

- The Commission's report only deals with interest limitation rules, CFC rules and the GAAR (application deadline 1 January 2019)
- Not covering exit taxation and hybrid mismatches (application date 1 January 2020/2022)
- Key takeaways:
  - MS have made extensive use of the optionalities available
  - 4 MS have not yet fully complied with their obligations to adopt and notify transposition measures (Austria, Denmark, Spain and Ireland)
  - Other infringement procedures have been opened/closed
  - Currently hard to see ATAD as a truly unified response to BEPS – but better than no coordination at all?
  - More comprehensive report expected in early 2022

## Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy

- Part of the Tax Package adopted by the Commission on 15 July 2020 (also DAC 7 and "Tax Good Governance")
- Aims at making taxation fairer, greener and fit for the modern economy
- Only a first step – next steps to be presented before the end of the year in an "Action Plan for Business Taxation in the 21st century"
  - Postponed due to OECD delay on Pillar I & II
- The action plan sets out two kinds of actions
  - Measures aimed at reducing tax obstacles
  - Initiatives helping MS to enforce existing rules

## Examples from the action plan

- Pilot project on cooperative compliance framework – aims to simplify reporting requirements (2021, Q1-Q2)
- Establishment of expert group on transfer pricing (2021, Q1)
- Implementation of Standing Committee for dispute resolution (2021, Q3)
- Digital solutions to levy taxes at source to facilitate tax payment and collection (2022)
- Key takeaways
  - Multiple initiatives to be expected from the Commission in the coming years
  - The Commission stands ready to act if no global agreement is reached on Pillar I and II

# Status on CCCTB

## Proposal from 2016 - Common Corporate Tax Base (2CTB)

## Proposal from 2016 - Common Consolidated Corporate Tax Base (3CTB)

- Currently the proposal is “dormant”
- A small part implemented through ATAD
- The European Commission is assessing whether other parts can be proposed/implemented bit by bit
- Revenue from CCCTB could potentially contribute to the Union’s “own resources”...

# ”Own Resources”

- Longstanding debate on ”own resources” to the EU
  - Today the EU mainly relies on direct contributions from MS
  - EU’s vast borrowing to pay for pandemic recovery has reignited the discussions
  - European Parliament is strongly in favor
  
- [EP Report - Own Resources](#)
  - Ideas for raising ”own resources” have been floated, e.g. revenue from:
    - Financial transaction tax (FTT)
    - EU-wide digital services tax (DST)
    - EU Turnover Tax
    - The Emissions Trading System (ETS) and a new carbon adjustment mechanism (CBAM)
    - Penalty for non-recycled plastic
  
- (Some) MS more reluctant or against the idea
- Negotiations currently taking place

- The EU list of non-cooperative jurisdictions for tax purposes consists of a Blacklist and a Greylist (observation list)
  - Aims at helping EU Member States deal more robustly with countries that encourage abusive tax practices.
  - Encourage positive change in these countries through cooperation – not naming and shaming.
  - The list is based on a continuous and dynamic process of screening countries against international tax standards and engaging with countries which do not comply.
  - Criteria relate to tax transparency, fair taxation, the implementation of OECD BEPS measures and substance requirements for zero-tax countries.
- The following 12 countries were on the blacklist as of 12th March 2020:
  - American Samoa, Cayman Islands, Fiji, Guam, Oman, Palau, Panama, Samoa, Seychelles, US Virgin Islands, Trinidad and Tobago, Vanuatu.
  - October 2020: Cayman Islands and Oman to be removed, Barbados and Anguilla to be added

## EU Sanctions

- [The EU Blacklist is directly linked to EU funding](#)
- Funds from such instruments cannot be channeled through entities in blacklisted countries.
- Further there is a direct link to the EU Blacklist in other relevant legislative proposals, including:
  - Transparency requirements for intermediaries (DAC6), a tax scheme routed through an EU blacklisted country will automatically be reportable to tax authorities.
  - The public Country-by-Country reporting proposal also includes stricter reporting requirements for multinationals with activities in blacklisted jurisdictions.
  - The Commission is examining legislation in other policy areas, to see where further consequences for blacklisted countries is to be introduced.

## Member State Sanctions

- EU Member States are encouraged (only based on soft law) to apply at least one of the proposed defensive measures as listed below as of 1 January 2021.
- The defensive measures include:
  - Non-deductibility of costs
  - Controlled Foreign Company (CFC)
  - Withholding tax measures
  - Limitation of participation exemption on profit distribution

- Member States should ensure that they apply at least one of the following administrative measures in the tax area:
  - Reinforced monitoring of certain transactions.
  - Increased audit risks for taxpayers benefiting from the regimes at stake.
  - Increased audit risks for taxpayers using structures or arrangements involving these jurisdictions.
- Some Member States have their own domestic blacklists
  - E.g. Netherlands, Spain, France, Germany, Luxembourg, Sweden

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