
IFA 2022
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4 — 8 September 2022
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IFA/EU Seminar

Chair: Georg Kofler
Date: 8 September 2022

Agenda and Panel

IFA/EU Panel

I. **Presentation of the EU Commission's work in direct taxation**

II. **Focus 1: Global Tax Reform and Corporate Tax Reform (Pillar Two, DEBRA)**
   a. Core-EU issues of the Pillar II Directive Proposal
   b. The DEBRA Proposal and impact for Corporate Taxation
   c. General Policy Issues: Internal and External competence, own resources
   d. Concluding Comments

III. **Focus 2: The future of anti-tax avoidance**
   a. "Unshell" and extension to third countries
   b. Danish Beneficial Ownership cases in the context of recent developments
   c. Code of conduct
   d. Case law: PRA Group Europe (E-3/21)
   e. Concluding Comments

IV. **Focus 3: Administrative Cooperation and Compliance**
   a. DAC and ECJ Case Law
   b. Taxpayer protection
   c. Public CbCR
   d. Penalties and Proportionality
   e. Relevance of the OECD Materials for the Interpretation of EU Law
   f. Concluding Comments

V. **Focus 4: Highlight from Energy and Green Taxation**
   a. Introduction to current developments
   b. Deductions for interest expenditure
   c. Pillar II compatibility with renewables
   d. Importance of indirect taxes and excise duties for the green transition

Your Panel

Panel

- Nadia Altenburg (Germany)
- Benjamin Angel (TAXUD)
- Susi Baerentzen (Denmark)
- Alessandro Bucchieri (Italy)
- Juliane Kokott (Luxembourg)
- Bastien Lignereux (France)
- Adolfo Martín Jiménez (Spain)

Chair

- Georg Kofler (Austria)

Secretary

- Valentin Bendlinger (Austria)

Presentation of the EU Commission's Work in Direct Taxation

The European Commission's work in direct taxation

Initiatives to be covered:

- Proposed Directive to implement Pillar 2 agreement in the EU
- Debt equity bias reduction allowance (DEBRA)
- Unshell
- SAFE
- DAC7
- DAC8

Pillar 2 – The Directive's Design Elements

Point of departure: OECD Model Rules

OECD elements

+

- EU Directive is **legal instrument with specific design elements**
- Compliance with the **fundamental freedoms**
  - application IIR to domestic low-taxed entities
  - application IIR to large-scale domestic groups

EU elements

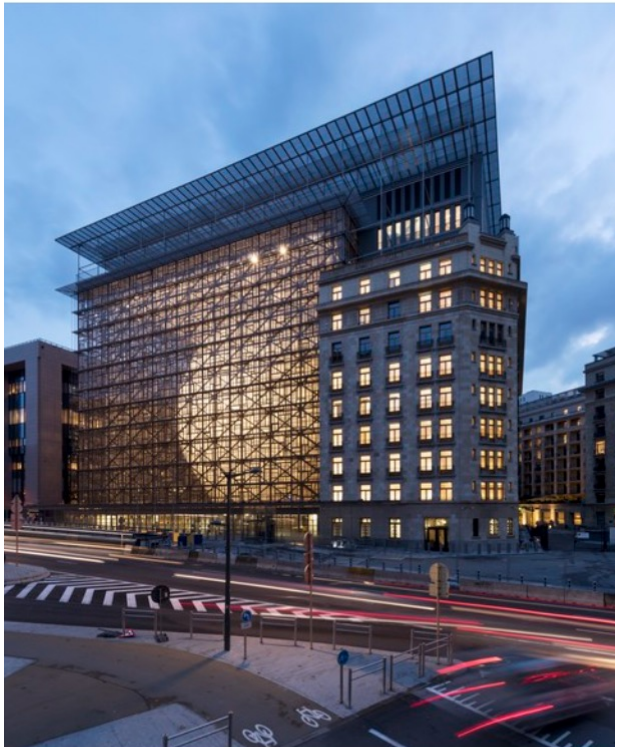
+

- Conditions for Equivalence and delegated acts
- Sanctions

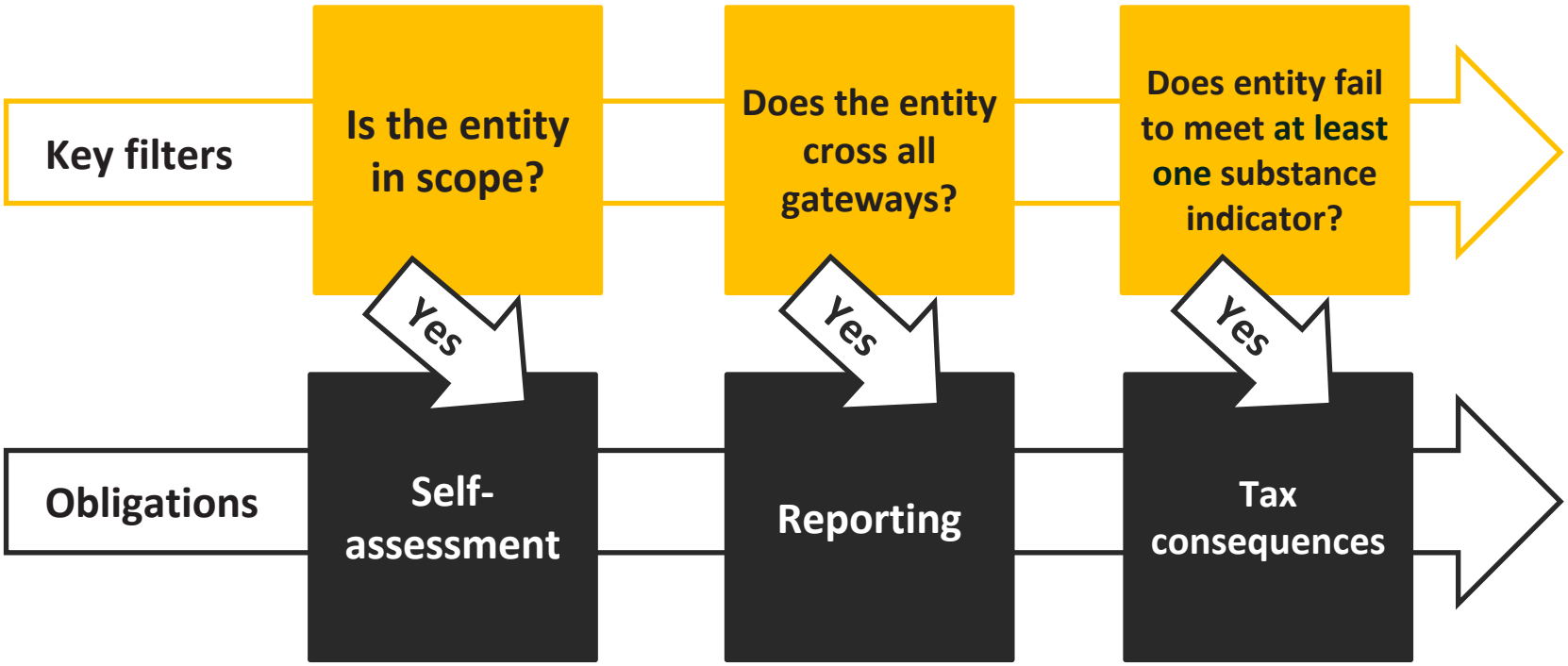
Other elements

Pillar 2 – Where do we stand?

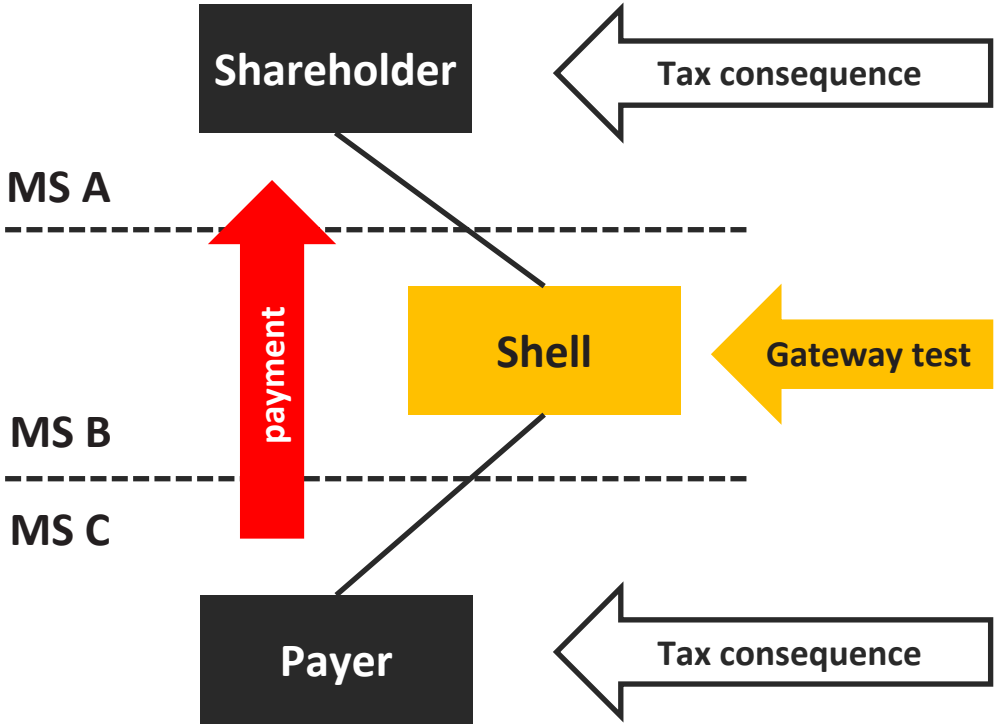
- **Technical discussions on Pillar 2 Directive in Council on e.g.:**
  - Align with OECD Model Rules
  - Application IIR as from 31 December 2023 and application UTPR as from 31 December 2024
  - Provision on election for a delayed application of the IIR and UTPR
- **Latest version of FR Compromise text (dated 16 June 2022) is available on** https://data.consilium.europa.eu/doc/document/ST-8779-2022-INIT/en/pdf
- **Political discussions on Pillar 2 Directive continues**
- **Implementation Framework**



Unshell – Filtering Flow: How does it work?



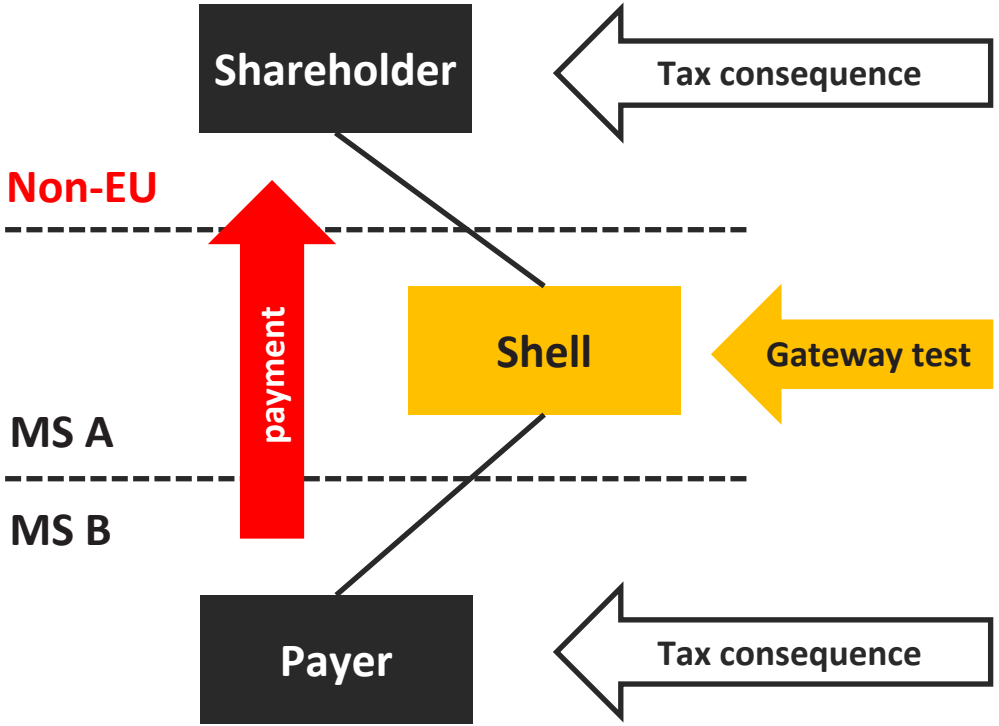
Tax Consequences for Shells – Intra EU



Unshell

- MS A of the shareholder taxes the income and deducts any tax paid at the MS B and C
- MS C of the payer disregards the tax treaty concluded with MS B of the shell as well as relevant directives

Tax Consequences for Shells – With Non-EU Country



Unshell

- MS B of the payer disregards the tax treaty concluded with MS A of the shell
- If the shareholder is outside the EU, the MS B of the payer can apply withholding tax in accordance with its national law / tax treaty (if applicable)

Securing the Activity Framework of Enablers “SAFE”

Problem

- Panama and Pandora Papers show role of enablers worldwide
- Aggressive tax planning is still a ‘grey zone’
- ATAD measures effect the taxpayer
- DAC6 is a reporting obligation of potentially aggressive tax planning schemes

Unshell does not cover non-EU shell entities

- Follow-up initiative is needed
- Clear and objective criteria for ‘aggressive tax planning’
- Targeted ‘ex ante’ rules addressed to enablers
- Monitoring and enforcement procedures across the EU (e.g. deregistration or blacklisting)

Public consultation (06 July 2022 - 12 October 2022)

Council Directive (EU) 2021/514 “DAC7”

Reporting by Digital Platform Operators

- **Overview:** Reporting obligations for operators of digital platforms from 1 January 2023 in respect of sellers carrying out relevant activities and mandatory exchange of reported information between tax authorities.
- **Territorial Scope:** EU Platforms and Foreign Platforms with a nexus to the EU
- **Reportable Sellers:** Sellers active on a Platform + resident in a MS or has rented out an immovable property in a MS
- **Relevant activities for consideration in scope of reporting :**
  - Personal Service (e.g. Uber Eats)
  - Rental of any mode of transport (e.g. Lime)
  - Sale of Goods (e.g. eBay)
  - Rental of immovable property (e.g. Airbnb)
- **First exchange of information:** By the end of February 2024 for the fiscal year 2023

Enhanced administrative co-operation

- **Clearer definition of the principle of “foreseeable relevance” (Article 5a):** *“the requesting authority considers that, in accordance with its national law, there is a reasonable possibility that the requested information will be relevant to the tax affairs of one or several taxpayers, whether identified by name or otherwise, and be justified for the purposes of the investigation”*
- **New legal framework for Joint Audits (Article 12a):** for tax authorities of two or more Member States to conduct joint audits (stars applying on 1 January 2024)

Scheduled Proposal for a Council Directive “DAC8”

Reporting on Crypto-Assets

- **Overview:** Reporting obligations for crypto-asset service providers and mandatory exchange of reported information between tax authorities. The proposal will be aligned with:
  - The Regulation on the Market for Crypto-Assets (MiCA)
  - The Transfer of Funds Regulation
  - The OECD framework for EoI on crypto-assets
- **Territorial Scope:** EU service providers and foreign service providers with a nexus in the EU
- **Reportable assets:** Payment tokens, Asset-referenced tokens, Equity tokens, Non-fungible tokens
- **Relevant service providers :** Crypto-Asset Service Providers (CASPs) are defined as any person whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis.
- **Services in scope:**
  - Exchanges between crypto-assets and fiat currencies
  - Exchanges between one or more forms of crypto-assets
  - Transfers of crypto-assets
- **Timing:** scheduled for November 2022.

Other amendments improving the DAC

- Updates to DAC2 following OECD amendments to the Common Reporting Standard (CRS)
- Clearer framing of compliance measures applicable to DAC implementation in Member States
- Updates to cover potential loopholes and enhance the use of information

Debt Equity Bias Reduction Allowance (DEBRA)

An initiative to **mitigate the tax-induced debt-equity bias in corporate investment decisions**:

- Allowance on incremental equity for ten years
- Deduction of net interest payments limited to 85%
- The interest limitation under DEBRA applies first. ATAD interest limitation (including a possible carry forward/backward) applies to the remaining amount
- Encompasses a sound anti-abuse framework
- Scope: all non-financial undertakings

Focus 1:
Global Tax Reform and Corporate Tax Reform

II.a Core-EU Issues of the Pillar II Directive Proposal

Objectives of the EU Directive and State of Play

Objectives

- Coordinated implementation in the 27 Member States
- Stick to the OECD Model Rules
- Comply with EU Law

State of play

- Commission proposal in December 2021
- Debate of the 27 Finance ministers (EU Council) in January 2022
- April 2022: finalisation of the technical discussion
- Unanimous political agreement still needed

Key Differences I: Extended Scope and Simplification

1. **Extension of scope**
   - **Purpose:** ensure compatibility with the freedom of establishment
   - **Extension to:**
     - Domestic subsidiaries
     - Purely domestic groups

2. **Simplification of the domestic top up tax (DMTT)**
   - Safe harbour in order to avoid a double computation
   - Safety net (4 years delay) in case the DMTT is not effectively collected

Key Differences II: Sanctions and Transition Rules

3. Sanctions:

- **Commission proposal:** harmonized sanction (5 % of turnover) when information is not made available
- **Council text:** classical provision on the need of dissuasive and proportionate sanctions

4. Entry into force and transition clause

- **Entry into force:** 31 December 2023
- **Report on Pillar 1** implementation by 30 June 2023
- **Transition clause** for Member States with **no more than 12 UPE**: possible election for a delayed application of IIR and UTPR

Retrospective Effects of Transition Rules?

Art. 9.1.3. OECD-MR:

„*In the case of a transfer of assets **between Constituent Entities after 30 November 2021 and before the commencement of a Transition Year**, the basis in the acquired assets (other than inventory) shall be **based upon the disposing Entity's carrying value** of the transferred assets upon disposition with the **deferred tax assets and liabilities brought into GloBE determined on that basis**.*"

TBD:

- The provision stipulates to **apply the book value for the transfer of assets** taking place before the introduction of the new legal framework
- Without differentiating whether hidden gains

  (i) have been taxed at all,

  (ii) above 15% or

  (iii) below 15%

Retrospective Effects of Transition Rules?

Art. 9.1.3. OECD-MR:

"…with the deferred tax assets and liabilities brought into GloBE determined on that basis."

OECD-Commentary, Chapter 9, para. 10:

"[…] such asset must be recorded at its historic carrying value for GloBE purposes **to limit the ability to step-up the basis in such assets without including the resulting gain in the computation of GloBE Income or Loss.** It follows that when this rule applies, because there is no change in asset basis, **items of deferred tax expense with respect to such transaction will be recorded for GloBE purposes** with respect to the historic carrying value of the assets transferred."

TBD:

- Deferred taxes can only arise where there is a difference between tax and financial accounting – if an asset is transferred at fair value, no deferred taxes would occur!
- Unclear whether deferred taxes should be taken into account for GloBE purposes – however, taxation of hidden gains would create a deferred tax assets and would not lead to deferred tax expense!
- Compatibility with constitutional law?

Retrospective Effects of Transition Rules?

FY	2021	2022	2023	2024	2025	2026
Revenue of UPE (in €m)	680	720	750	760	755	770
GloBE Scope	✗	✗	✗	✗	✓	✓

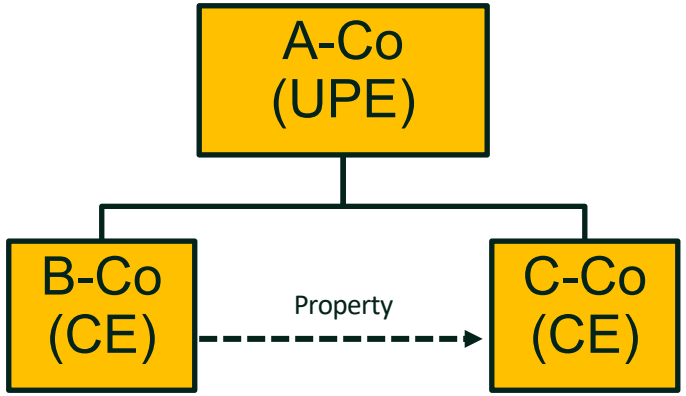
A-Co. holds 100% in B-Co and C-Co that are both have their seat and effective management in Germany.

A-Co ist the Ultimate Parent Entity (UPE) of the group with B-Co and C-Co being Constituent Entities (CE).

On 1 January 2022 B-Co sells a property with a book value of 1 Mio € a fair value of 11 Mio € to C-Co at fair value price. C-Co sells the property three years later to a third party for 11 Mio. €.

Assumption:

- German tax rate = 30%
- Global minimum tax rate = 15%



EU-Compatibility of Pillar 2 Without a Directive?

- **Pillar 2 Directive would provide for so-called "exhaustive" harmonization**
- **EU-Compatibility of Pillar 2 Without a Directive?**
  - Freedom of establishment (EU) versus freedom of capital movement (also third countries)
  - Main focus: Compatibility of the IIR with *Cadbury Schweppes*?
    - Justification of purely cross-border rules by a valid harmonized Union interest to achieve a "fair" minimum level of taxation? → "[O]bjective of ensuring a minimum level of taxation [...] is regarded as an overriding reason in the public interest" (AG Kokott in *Allianzgi-Fonds*)
    - Consensus at the level of OECD/IF as a new ground of justification?
  - Extension to domestic situations/groups?
- **Optional exhaustive harmonization?** (Similar to directive concerning indirect taxes on the raising of capital: *HSBC*, *Air Berlin*.) **Enhanced Cooperation?**

Pillar 2: Responding to Complexity

Main implementation challenges – The business perspective

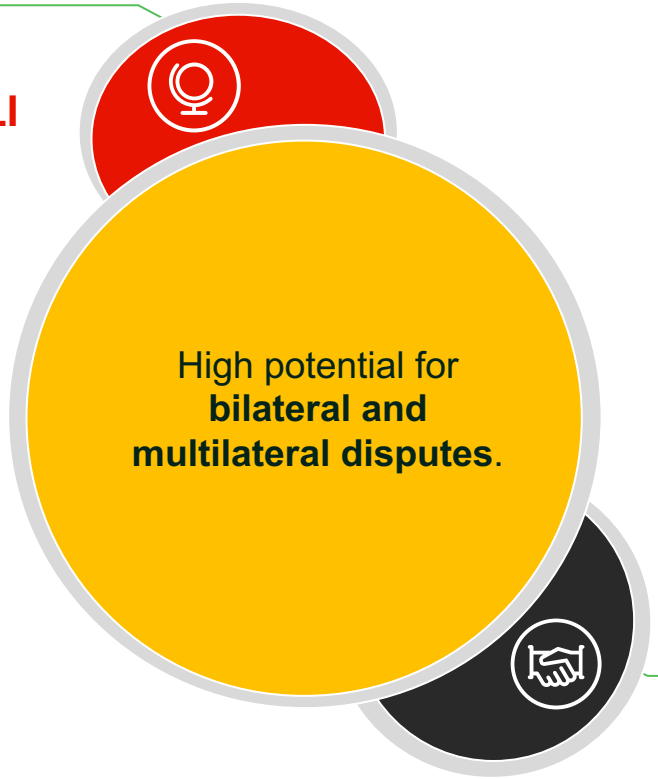
- Interpretative matters: what is still not clear/not explained within the Model Rules and the related Commentary;
- Dispute prevention and resolution mechanisms
  - Need of legal certainty
  - Secure method to prevent tax challenges
- Complex compliance processes and procedures: automation and digitalization within a very complex tax environment
- Need for simplification – Safe Harbours

Pillar 2: Responding to Complexity

- Absence of complete/clear regulatory set
- Deferred Tax Liabilities
- Tax Incentives
- Negative ETR
- US GILTI/CAMS Co-existence

Pillar 2: Responding to Complexity

Advanced tax agreements - MLI



MAP

Pillar 2: Responding to Complexity

Complex compliance processes and procedures

Perimeter

Complexities deriving from the number of Constituent entities and countries involved within an MNEs Group as well as the corporate structures within the same Group

Data source

Consolidated financial statements before consolidation adjustments: Need to automate and integrate information into tools/software already available in the company while minimizing manual data entry→ *we are experiencing a very complex path on this*.

Project Team

Heterogeneity of the team composed of stakeholders working in different business functions of the Group (tax, IT engineers, legal, administrative, accounting, audit, etc.).

Data analysis, management and certification

Check for any anomalous results on the various items of Globe Income/Loss and Covered Taxes at the Country and Company level; Certification required for tax return preparation/filing; Reconciliation with public data (CbcR/TTR/Declarations).

Pillar 2: Responding to Complexity

Qualified domestic minimum top-up tax

CbCR Safe Harbour

Pillar Two, in its concept as a global measure of tax on profits, is inevitably extremely complex. It will introduce a significant compliance burden for businesses, both in the transition year and on an ongoing basis.

Leveraging from CbCR figures and Domestic minimum tax regulations should be a priority path to follow.

II.b The DEBRA Proposal and Impact on Corporate Taxation

Debt-Equity Bias Reduction Allowance (DEBRA)

- Communication on Business Taxation for the 21st Century (COM(2021)251) → Commission **Proposal for a DEBRA-Directive** in May 2022 (COM(2022)216)
- Two Directions: **“Carrot”** (Allowance for Equity) and **“Stick”** (Limitation to Interest Deduction)

Debt-Equity Bias Reduction Allowance (DEBRA)

“Carrot” → Allowance on (Corporate) Equity (ACE) (Art 4, 5)

- Calculation

Allowance on Equity = Allowance Base · Notional Interest Rate (NIR)

- Increase in *net* equity (including profits)
- Net equity → Equity ./. book value of participations in associated enterprises, own shares
- Recapture in case of equity decrease (excluding losses)

Two components:

- Risk free interest rate (currently 2,089% for € +/- adjustments per country)
- Risk premium (1% or 1.5% for SMEs)

- Duration → For consecutive **10 years** (~ maturity of most debt)
- Limitation → Maximum of **30% of EBITDA** (but carry forward of ACE or unused allowance capacity)
- **Anti-Abuse Rules** (based on 2019 CoC Report) → E.g., regarding loans, transfers, reorganizations between associated enterprises

Debt-Equity Bias Reduction Allowance (DEBRA)

“Stick” → Limitation to Interest Deduction (Art 6)

- Deductibility of “exceeding borrowing costs” only **up to 85%** (includes interest on all debt, not only increase in debt)
- Coordination with the **“interest barrier”** of Art 4 ATAD → Only lower of 85% of exceeding borrowing costs or 30% of EBITDA is deductible (and the difference “shall” be carried forward or back in accordance with Art 4 ATAD/national transpositions)

Debt-Equity Bias Reduction Allowance (DEBRA)

- **“Hybridizing” of the tax treatment of returns on capital without options for Member States (“shall”)**
- **Competence?**
  - Based on the internal market competence (Art 115 TFEU)
  - Subsidiarity and proportionality (SWD(2022)144)
- Transposition as from 1 January 2024, but option to defer application (also of the limitation to interest deduction) for 10 years for taxpayers that already benefit from an ACE under domestic law (e.g., in Belgium, Cyprus, Italy, Malta, Poland and Portugal) (Art 11)

II.c General Policy Issues: Internal and External Competence, Own Resources

EU's Internal Competence?

- **Legal base for:**
  "directives for the approximation of such laws, regulations or administrative provisions of the Member States *as directly affect the establishment or functioning of the internal market."* (Art. 115 TFEU)
- **Initially:**
  removing obstacles to the internal market, mainly double taxation, cf. Parent-Subsidiary Directive, Interest and Royalties Directive, Merger Directive and the common VAT system.

EU's Internal Competence?

Direct Effect on the internal market

- **ATAD**
  - Restore trust in the fairness of tax systems
  - Allow governments to effectively exercise their tax sovereignty (cons. 1)
- **Pillar Two – Minimum taxation** – "*ensure that all corporations pay their fair share of tax*" (Expl. Mem.)
- **DEBRA**
  - Eliminate incentives to make debts, neutralize the "*debt equity bias*";
  - "*[P]art of the EU strategy on business taxation, which aims to ensure a fair and efficient tax system across the EU*" (Expl. Mem.) – Art. 115 TFEU.

EU's Internal Competence?

EU's competence to secure tax revenue and its fair distribution?

- **ATAD**
  - Restricts fundamental freedoms to protect the domestic tax base.
  - Doubts about EU's competence, especially as regards internal cases?
- **Pillar Two, Minimum taxation**
  - Competence to "rectify inconsistencies" (Com., Expl. Mem.)?
  - Absence of minimum taxation as inconsistency?
  - Distinguishing from inadmissible top up tax (Cadburry Schweppes, C-196/04)
- **DEBRA**
  - Aim to create an equitable and stable business environment
  - Broad interpretation of legal basis justified by unanimity?

EU‘s External Competence?

- **Complex division of powers between the EU and its Member States**
- **External sphere differs significantly from internal competence**
  - Pre-Lisbon CJEU case law: EU Treaties also provide for *implied* external powers
  - Judge made doctrin of EU‘s external powers codified in Art 216(1) and Art 3(2) TFEU
  - Exercise of internal competence can give rise to exclusive external powers
- **Consequence for direct tax matters**
  - The more legal acts EU adopts internally, the more powers EU gains to conclude international treaties
- **Could adoption of EU’s ambitious tax agenda give rise to exclusive competence to conclude tax treaties in the future?**

EU Own Resources: Limits and Constraints

How it should be:

- *"we start with an arbitrary size of our financing (the amount of taxes to be raised), and we make no effort to design the structure of that financing to most effectively complement the purposes to which the money will be put"*

- **E. Kleinbart, We Are Better Than This: How Government Should Spend Our Money,** Oxford: Oxford University Press, 2016.

How it is:

- *EU has no taxing power, no EU taxes as such*
- *EU revenues conditioned by*
  - *The size of the EU Budget (too small)*
  - *The MS*
  - *No fiscal policy*
- *MS contributions (fundamental part)*
- *Disconnect revenue, spending and democratic control*
- ***Post Covid reform (2020,2021) connected with 'single market' policies and 'fresh money principle' to return EU loans (2058), not with EU expenditure***

The Present and Future of EU Own Resources

A boost to the EU Budget v. a revolution?
➔ No EU taxes

- The NOR (2020) and (2021):
- **'Green taxes':**
  - MS Contribution on non-recycled plastic packaging waste (2021)
  - CBAM (75%?) and revised EU ETS (25 %?) (2023?)
- **'Other Harmonization measures'** (2026):
  - Digital levy: 15 per 100 Pillar 1
  - FTT
  - EU 'corporate tax' linked to BEFIT (harmonized CT base)

Open questions:

1st block:

- Will the new resources be sufficient to limit the role of MS contributions in the EU budget?
- Are the NOR proposals realistic or the best alternatives?
  - Recycling old proposals
  - Effects of new alternatives

2nd block:

- Should the EU have an independent taxing power from the MS?
- What type of EU do we want?

II.d Concluding Comments on Focus 1

Concluding Comments

Focus 2:
The Future of Anti-Tax Avoidance

IFA/EU Panel

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II.a “Unshell” and Extension to Third Countries

Unshell Directive Proposal I

- **Goals:** Fairness, insufficiency of other tools, harmonization of substance requirements
- **Scope:** intra EU Shell companies, non-EU shells attacked with the 'enablers initiative'
- **Features of shell companies** (art. 6):
  - No definition (even with EP Parliament additions)
  - Undertakings: entities resident in a Member State
    - Obtaining mainly (75 per 100) passive (dividends, interest, royalties, capital gains, income from immovable property etc.) and
    - some active income (banking, insurance etc.) (art. 4)
    - More than 60 per 100 of the income (or certain assets) is connected with cross-border activities
    - The undertaking has outsourced in the previous 2 years the administration of day-to-day operations and the decision making on significant functions
    - Do not qualify as excluded entities (quoted companies, regulated entities certain holdings with substance etc.)
    - Exemption procedure

Unshell Directive Proposal II

Obligations:

- Annual reporting in tax return of 'minimum substance indicators' (art. 7) (supporting evidence)
- If the undertaking does not have 'minimum substance', it can provide evidence that the entity controls relevant risks in connection with the affected income or assets
- Substantial penalties for not reporting or false declaration (at least 5 per 100 of the turnover and national penalties), proportionality?
- AEoI with other MS and request for tax audits to MS of the Shell Co

Effects: 'look-through approach'

- *MS of undertaking*: no certificate of residence / certificate that Unshell applies (third countries?)
- *MS where income is obtained:* No access to DTC or PS and IR Directives; domestic law or DTCs will apply to non-EU shareholders
- *MS of the shareholder*: Income allocated to shareholder regardless of residence of payer (EU or not).

Unshell Directive Proposal: Open Issues …

Technical issues:

- Undefined, obscure provisions (hallmarks, minimum substance) and procedures?
- Technical issues and incoherence with the stated goals (Letterbox Companies Report 2021)?
- Double / multiple taxation

EU law questions:

- Competition between legal orders?
- Compatible with primary EU law (substance, procedures, burden of proof, effects)?
- Proportionality principle?
- Over and underkill effects and overlapping with other tools

International tax policy perspective:

- A departure from the OECD Minimum Standard on BEPS Action 6?
- A hybrid? A tax treaty override? Legal certainty?
- Right moment to overburden EU undertakings?

III.b Danish Beneficial Ownership Cases in the Context of Recent Developments

The Unshell Directive and the Danish BO cases

ATAD 3 - Fighting the use of shell entities and arrangements for tax purposes

- How to reconcile the outcome of the BO cases with domestic safe harbour rules?
  - Indications of abuse
  - The possibility to buy substance to get out of an abusive situation?!?

Domestic outcomes of international importance

- **The NetApp Case - C-117/16 Y Denmark ApS (Dividend)**
  - Partial victory for the taxpayer
  - No tax benefit?
- **New question on interest**
  - SKM2021.409.ØLR – NetApp – question of added interest.
  - 31 March 2022 ruling: "*general principles of the rule of law and principle of a right to a fair trial*".

The Whistleblower Directive and Anti-Tax Avoidance

IFA/EU panel 2019 IFA Congress in London vs. now:

- *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.*
  - Non-tax initiative with a great impact on tax matters (broad scope).
  - Application only requires that a whistle-blower can reasonably expect that there was a breach of law or abusive behaviour
  - Any tax advantage that defeats the object or purpose of the applicable corporate tax law can be reported.
  - Once an employee blows the whistle, an immunity against a termination of his/her employment contract applies.
  - Previously, the level of protection varied significantly within the EU, so a common level of protection was needed.
  - Came into force in November 2019, deadline for the MS to implement was December 2021.
- **Whistle-blowers played an important role in influencing the tax agenda (LuxLeaks etc.)**
- **Only 14 MS have transposed the directive into domestic law.**
- **Article 6 ATAD – Whistle-blower protection in purely domestic corporate tax planning?**
  - Scope and application of the directives.
  - Transpose just the rules or also the underlying principles?

III.c Code of Conduct

Revision of the Code of Conduct

Objective

- Text unchanged since it was created in 1997
- Extension of the scope to cover features of tax systems that have general application

State of play

- Work launched under DE Council Presidency
- Continuation under SI Presidency: draft text of the revised code submitted to the Council in December 2021
- No political agreement (unanimity)

EU list of non-cooperative jurisdictions

Developments in the dialogue with third country jurisdictions

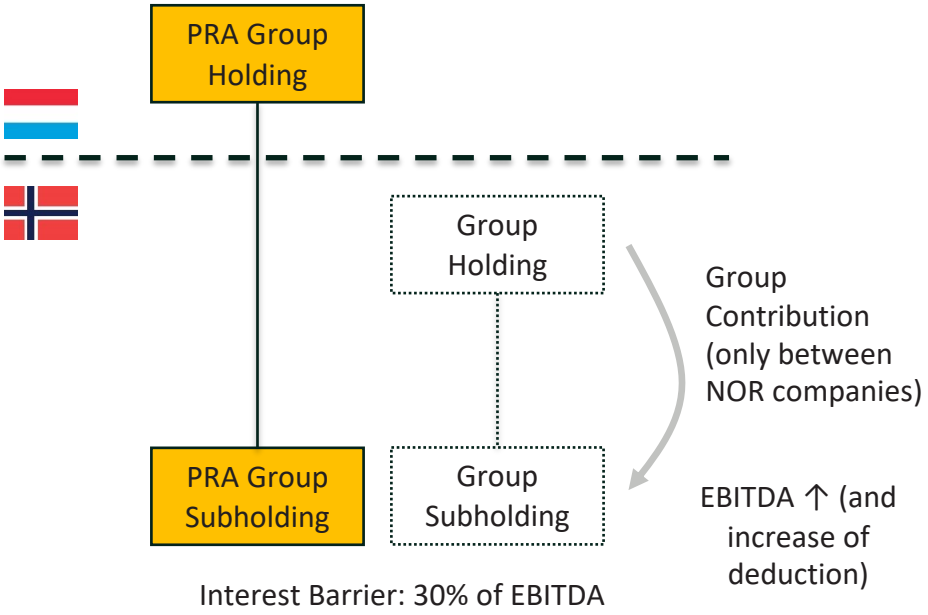
- FSIE regimes
- CBCR reporting

Towards a strengthening of the list

- Coordination of the defensive measures towards non-cooperative jurisdictions
- Reflection on a revision of the criteria, especially in light of the Pillar 2 reform

III.d Case Law: PRA *Group Europe*

PRA Group Europe: Interest Barrier



- EFTA Court, 1 June 2022, E-3/21, ***PRA Group Europe AS***
  - Comparability and discrimination analysis based on the combination of rules (i.e., interest barrier rules and group contribution rules) and even if only deterrent effect
  - No justification based on either allocation of taxing rights (as it is about deductibility of interest in Norway) or fight against tax avoidance and evasion (only wholly artificial arrangements, not proportionate, even in light of ATAD)
  - NOR legislation not in line with Art 31 EEA Agreement (= Art 49 TFEU)

PRA Group Europe: Interest Barrier

Impact of ***PRA Group Europe AS*****?**

- **Art 4(1) of the Anti-Tax Avoidance Directive** (ATAD)

> For the purpose of this Article, Member States may also treat as a taxpayer:
>
> (a) an entity which is permitted or required to apply the rules on behalf of a group, as defined according to national tax law;
>
> (b) an entity in a group, as defined according to national tax law, which does not consolidate the results of its members for tax purposes.
>
> In such circumstances, exceeding borrowing costs and the EBITDA may be calculated at the level of the group and comprise the results of all its members.

- A group-perspective can have certain **benefits for taxpayers**, e.g.,
  - interest income and expense of all group members may be combined → Neutralization of **interest payments between group members**
  - EBITDAs of all group members are combined (~ *PRA Group Europe AS*) → Might **increase the maximum deduction** in a group-wide perspective in a given year

PRA Group Europe: Interest Barrier

Impact of *PRA Group Europe AS*?

- But the ATAD (just like BEPS Action 4) arguably limits the group perspective to **domestic entities** (group, "as defined according to national law"), which becomes clearer in Pt 7 of the Preamble:

> Where a group includes more than one entity in a Member State, the Member State may consider the overall position of all group entities in the same State, including a separate entity taxation system to allow the transfer of profits or interest capacity between entities within a group, when applying rules that limit the deductibility of interest.

- Conflict between the perspective in the **EU** because of the ATAD (broad discretion of the EU legislature in light of the freedoms) versus in the **EEA** (judgment of the EFTA Court)?

III.e Concluding Comments on Focus 2

Concluding Comments

Is EU tax law only about abuse?

- Focus on measures against BEPS, tax avoidance, aggressive tax planning and tax evasion.
- But also anti-avoidance focus in “normal” secondary EU law
  - E.g. reference to anti-abuse issues in DEBRA
  - Even in non-abuse related tax measures

Concluding Comments

EU-Mandated Tax Treaty Overrides?

- Typically, EU legislation takes into account the **tax treaty obligations** of Member States (especially towards third countries)
- But (potential) **treaty overrides**, e.g., through the GAAR in Art 6 ATAD, CFC rules in Art 7 and 8 ATAD (concerning permanent establishments), the minimum taxation proposal (COM(2021)823), and the "Unshell" proposal (COM(2021)565)
- Supremacy of EU law and **impact of Art 351 TFEU**?
  - Tax treaties between Member States?
  - Tax treaties with third countries?
  - Analogous application of Art 351 TFEU with regard to post-accession tax treaties that become incompatible with a subsequent Directive?

Focus 3: Administrative Cooperation and Compliance

IFA/EU Panel

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II. **Focus 1: Global Tax Reform and Corporate Tax Reform (Pillar Two, DEBRA)**
   a. Core-EU issues of the Pillar II Directive Proposal
   b. The DEBRA Proposal and impact for Corporate Taxation
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   d. Concluding Comments

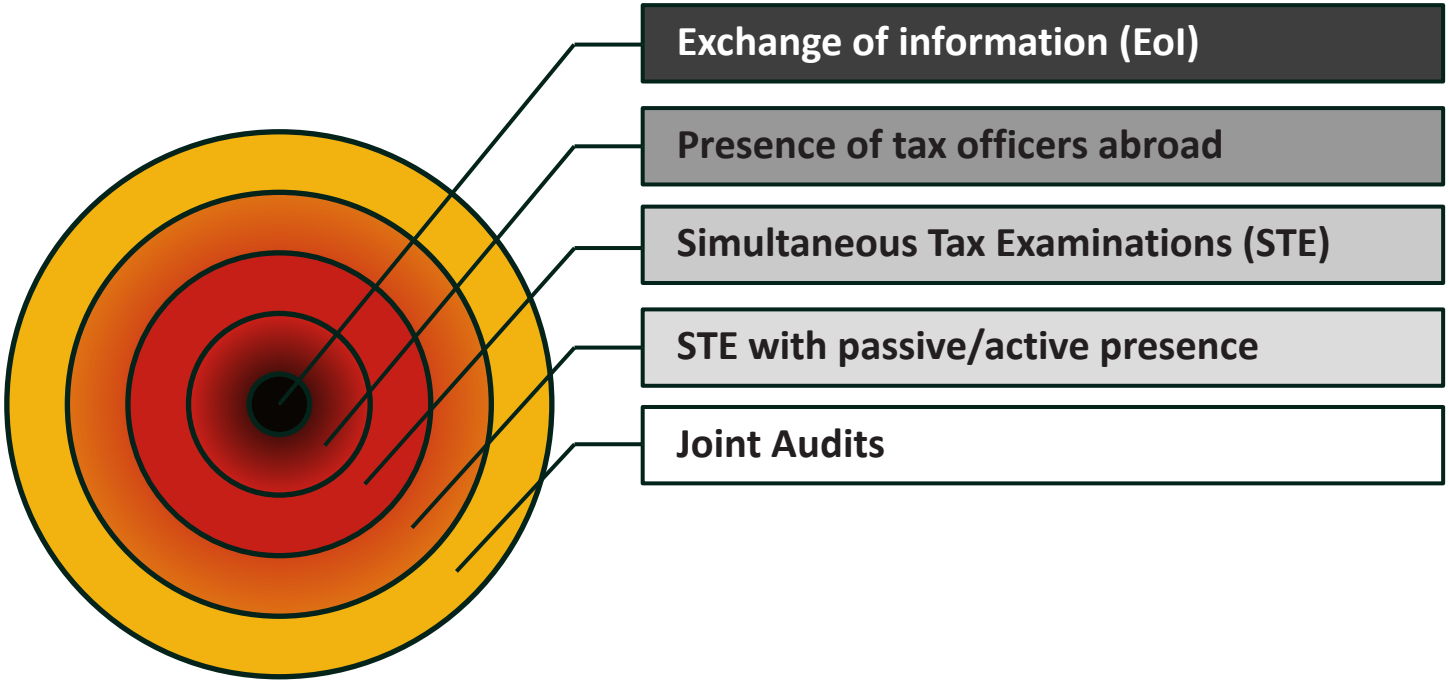
III. **Focus 2: The future of anti-tax avoidance**
   a. "Unshell" and extension to third countries
   b. Danish Beneficial Ownership cases in the context of recent developments
   c. Code of conduct
   d. Case law: PRA Group Europe (E-3/21)
   e. Concluding Comments

IV. **Focus 3: Administrative Cooperation and Compliance**
   a. DAC and ECJ Case Law
   b. Taxpayer protection
   c. Public CbCR
   d. Penalties and Proportionality
   e. Relevance of the OECD Materials for the Interpretation of EU Law
   f. Concluding Comments

V. **Focus 4: Highlight from Energy and Green Taxation**
   a. Introduction to current developments
   b. Deductions for interest expenditure
   c. Pillar II compatibility with renewables
   d. Importance of indirect taxes and excise duties for the green transition

IV.a DAC and ECJ Case Law

Overview – The Degree of Enhanced Authority Cooperation



Following OECD, Joint Audit Report 2019, p. 19.

Instruments of Administrative Cooperation

Item	Changes induced by DAC7 (2021/514/EU)
Exchange of Information Art. 1	▪ Description of Foreseeable Relevance **and** extension to group requests[2]: „at the time the request is made, the *requesting authority considers* that..” “*demonstrate* the foreseeable relevance” ▪ 3-months-deadline for responses unter EoIR
Presence of tax officers abroad Art. 11	▪ Possibility to attend digitally, Art. 11 (1) lit. c). ▪ Implementation of a 60-days deadline to react to the foreign authority‘s request, Art. 11 (1) subpara. 2 ▪ „In accordance with the procedural arrangements“ - general authorisation to (active) presence under the host jurisdiction‘s legal framework?

[1] OECD, Joint Audit Report 2019, para. 21. [2] Art. 5a, para. 1 2021/514/EU of 22.03.2021.

Instruments of Administrative Cooperation

Item	Changes induced by DAC7 (2021/514/EU)
Simultaneous Tax Examinations Art. 12	▪ Implementation of a 60-days deadline to react to the foreign authority‘s request to engage in a simultaneous tax audit, either by consent or justified refusal, Art. 12 (3).

Joint Audits Art. 12a	▪ CHAPTER III - other Forms of administrative cooperation – still an instrument of EoIR?
	▪ No reference made to Art. 1 (1) as in Art. 11 and Art. 12
	▪ Emphasis on active presence, Art. 12a para. 3 a), but subject to procedural arrangements. However:
	  ▪ Para. 4 – „endeavour to reach an agreement on the tax position” and incorporation of findings in a final report!
	  ▪ Para. 5 – audited person shall be provided with copy of final report within 60 days!

[1] OECD, Joint Audit Report 2019, para. 21. [2] Art. 5a, para. 1 2021/514/EU of 22.03.2021.

What has changed through DAC7?

DAC7-induced change	Purpose acc. to EU legislator	Side effect on taxpayer
Reaction deadlines	Higher efficiency	Accelerated examination without taxpayer participation
Digital attendance	Facilitating cooperation	Higher compliance burden
Less restrictive active presence	Enhanced cooperation and effectiveness	More resources of long-run savings?
Extension of JA	Legal clarification	Data confidentiality weakened
Definition of Foreseeable Relevance	Limitation of profit shifting	More taxpayer resources needed
Lower requirement of EoIR and wider scope of AEoI	Higher legal security	Legal insecurity as authorities aim to derive common results

[7] Recitals 22, 23, 2021/514/EU of 22.03.2021. [8] Recital 3, 2021/514/EU of 22.03.2021. [9] Recitals 6, 20, 2021/514/EU of 22.03.2021. [10] Recitals 26 f., 2021/514/EU of 22.03.2021.

What has *not* changed through DAC7?

TBD	Relevance of the issue
Compliance with the taxpayer‘s rights?	▪ What rights do taxpayers have in the EoI-space? ▪ Are joint audits still an instrument of EoI? ▪ If so, how does the principle of foreseeabe relevance apply? ▪ If not, which role is attributed to the taxpayer and which procedural and substantive rights apply?
Evaluation of joint audit procedures	▪ JAs require substantially more resources from both, tax administrations and taxpayer and impact taxpayers’ sphere ▪ Despite recent evaluation under the OECD JA Project, DAC7 missed the opportunity to implement a sensible set of data to be collected to evaluate the outcome of the conduct / refusal of a JA

Comparison DAC-Status Quo vs. OECD Best Practice

Categories of data used to evaluate the effectiveness of the DAC-directive	Required according to OECD	Collected and considered under DAC-standard
Count of incidences	✓	✓
Additional yield indicator	✓	✓
Completion-time-related	✓	✓
Enhanced taxpayer compliance indicator	✓	
Indicator for improved risk assessment	✓	
Indicator for improved resource allocation / efficiency gain (e.g. MAP tracking in case of denied requests/initiatives)	✓	
Others (case-related data, personal data etc)	✓	

Joint Audits (JA) and Taxpayers' Rights

- **DAC 7 is linked with EU JTPF document on**
  "*A Coordinated Approach to Transfer Pricing Controls within the EU*" (2018)
- **The EU JTPF delineated different phases of JA and**
  - proposed practical solutions,
  - but it also focused on taxpayer rights'

JA and Taxpayers' Rights in EU JTPF Document

- **In abstract: EU CFR applied (as well as national constitutions)**
- **In particular, it recognized some taxpayers' rights with limitations**
  - To know and keep up to date with the evolution (main milestones) of the tax audit
  - To propose Joint-Audits
  - To know why a State rejects a JA (implicit)
  - To be presented with the final results of the tax audit and to make allegations before the final report
  - To be notified of the final report (with national document)
  - To carry over the JA solution to future (APAs) and past (MAPs) years: consistency
  - Independence of 'competent authorities' in MAPs to ensure independent review (disagreement)

JA and Taxpayers' Rights in DAC 7

- Abstract rights: EUCFR
- Less specific rights in Art. 12a DAC compared to EU JTPF: watering down?
- Is the regulation sufficient? Risk of asymmetries
- Connection with other trends in international taxation (MAP, Pillars, investment arbitration)

IV.b Taxpayer Protection

Taxpayer Protection and Professional Privilege

- **Art. 8 ab (5) Dir. 2011/16:**
  "*Each Member State may take the necessary measures to give* ***intermediaries the right to a waiver from filing information*** *on a reportable cross-border arrangement* ***where the reporting obligation would breach the legal professional privilege under the national law of that Member State****. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations*"

Taxpayer Protection and Professional Privilege

- **Right to privacy and data protection:**

  Art. 7, 8 EU Charter of Fundamental Rights, Art. 8 ECHR

- **Right to a fair trial**

  Art. 47 EU Charter; Art. 6 ECHR

- **French Conseil d´État:**
  Does Art. 8ab (5) infringe those provisions in that is does not exclude, in principle, lawyers participating in judicial proceedings or assessing their clients legal situation from the scope of intermediaries?

Taxpayer Protection and Professional Privilege

AG Rantos, op. C-694/20 (the Belgian case) of 5 April 2022:

- Interference with professional secrecy justified and proportionate to fight aggressive tax planning,
- "*[P]rovided that the name of that lawyer is not disclosed to the tax authorities in the context of compliance with the reporting obligation*"
- Difference to require a lawyer to notify other intermediaries or the relevant taxpayer of their reporting obligations?
- Perhaps possibility to interpret the Directive in such a way that the duty to provide information ultimately falls on the taxpayer, who can release one of his advisors from his duty of confidentiality

IV.c Public CbCR

EU CbCR and Tax Transparency

Actual Compliance Obligation: CbCR

Actual Public Disclosure Instruments: Sustainability Reports following the GRI 207-4

Info to be shared

- Name of the UPE
- Description of the nature of the activities
- Income tax paid
- Profit and loss before income tax
- Income tax accrued
- Accumulated earnings
- Number of employees
- Revenues (excl.d dividends and value adj.)

Differences

- **Temporal misalignment of information**: 12 month after year-end for CbCR; 6 months for GRI
- **CbCr** data reporting "*was*" **not intended for publication**, being directed only to tax authorities.

What's next?

2025

Directive 2016/881/UE

EU version of CbCR

EU CbCR and Tax Transparency

Business perspective

- **Sustainability and tax**
- **The future of tax transparancy**

Total tax contribution?

IV.d Penalties and Proportionality

Reporting, Penalties and Proportionality

Facts and legislation in CJEU, *Commission/Spain*, C-788/19

- Infringement procedure opened by the EC Commission in 2015
- Reporting obligations (individuals, companies) for certain **foreign assets** (form 720) introduced after 2013
- **Consequence for non-compliant taxpayers:**
  - **The application of the statute of limitations was severely limited:**
    The assets will be regarded as 'unjustified capital gains, subject to the 'general taxable amount' for the earliest tax year which has not become time-barred (unless proof is provided that the assets were acquired by means of declared income or income obtained in tax years the taxpayer was not liable to tax)
  - **Penalties:**
    - Automatic proportional fine: 150 per 100 taxable amount resulting in application of 'unjustified capital gains' treatment
    - Flat-rate fines: Per data, sets of data omitted penalties
    - Penalties could be higher than the value of the foreign asset

Reporting, Penalties and Proportionality

Reasoning of CJEU, *Commission/Spain*, C-788/19

- **Free movement of capital** (Art. 63 TFEU and Art. 40 EEA Agreement)
  - Effect on third countries
  - Differential treatment based on the place of location of assets (Spain or abroad)
- **Overriding reasons of public interest**
  - Effectiveness of fiscal supervision
  - Prevention of tax evasion and avoidance
- **Proportionality: Do the rules go beyond what is necessary?**
  - *Consideration of assets as unjustified capital gains*: legal certainty precludes that tax authorities could act without any temporal limitation or to call into question a limitation period that has already expired
  - *Proportional rate fine (150 %)*: automatic application (not a cap), high rate and amount, and possibility to accumulate with the flat rate penalties: disproportionate
  - *Flat rate fines:* discriminatory if compared with domestic penalties from incorrect or non-reporting (more severe and not capped, especially in cases of non-economic loss for Treasury)

Reporting, Penalties and Proportionality

Consequences of CJEU, *Commission/Spain*, C-788/19

- **Substantial differences between the judgment and AG Opinion**
- **Spanish perspective**
  - A great number of procedures against taxpayers are affected
  - E.g. Judgments of the Spanish Supreme Court of 4 and 6 July 2022 (nullity of penalties: flat rate) or 20 June 2022 (unjustified capital gains of periods already expired)
- **EU perspective**
  - Cross-border obligations v. national treatment
  - Effect on Member States and EU anti-avoidance and evasion rules?
  - The direct consequences of the judgment in the Commission consultation on ‘enablers’ of tax planning strategies

IV.e Relevance of the OECD Work for the Interpretation of EU law

Relevance of the OECD Work for the CJEU

EU transforms non-binding OECD recommendations into binding legislation

- ECJ, C-115/16 et al., Danish BO cases, no. 90:
  - "*The concept of 'beneficial owner', which appears in the bilateral conventions based on that model, and the successive amendments of that model and of the commentaries relating thereto are … relevant when interpreting Directive 2003/49.*"
  - Dynamic reference to OECD model and subsequent amendments and commentaries
- As also apparent from Focus 1, competences: predominant role of the executive in international tax law, EU tax law, to some extent national tax law

Relevance of the OECD Work for the CJEU

EU transforms non-binding OECD recommendations into binding legislation

- Recital 19a GloBE-Directive Proposal (as of Doc. 10497/22):

> (19a) In implementing this Directive, Member States should use the 'Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two)' agreed by the OECD/G20 Inclusive Framework on BEPS and the explanations and examples in the OECD Commentary on the GloBE Rules under Pillar Two, as well as the GloBE Implementation Framework, including its safe harbours rules, as a source of illustration or interpretation in order to ensure consistency in application across Member States to the extent that they are consistent with the provisions of this Directive and with Union law. The safe harbours rules should be of relevance as regards MNE groups as well as large-scale domestic groups.

- Also: Reference to OECD materials by the CJEU in, e.g., *Berlioz* and *État du Grand-duché de Luxembourg v. L* (concerning the DAC) and, e.g., by the GC in *Amazon* (concerning the OECD TPG in the context of State aid)

IV.f Concluding Comments on Focus 3

Concluding Comments

Focus 4: Highlights from Energy and Green Taxation

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V.a Introduction to Current Developments

Taxes to Accelerate the Green Transition

Background

- Acute need to accelerate the green transition and ensure independence from fossil fuels.
- The carrot or the whip?

Characteristics

- Long-term investments, long expected lifetimes, high risk, high up-front investments.
- Ownership structures, capital, investments.
- Need for stability in tax regulation.

V.b Deductions for Interest Expenditure

Large Scale Long-Term Utility Renewable Assets

The Debt Equity Bias Reduction Allowance (DEBRA) initiative

- Intended to mitigate the tax induced debt-equity bias in corporate investment decisions.
  - Interest payments on debt-financing are tax deductible.
  - Costs related to equity financing are not deductible.

  ⇒ Asymmetric tax treatment of financing costs.

  ⇒ Bias in investment decisions towards debt financing.

Problem?

- The notional interest deductions do not account for large scale, long-term projects in renewables.

High Risk and Up-Front Investments

The European Union's ATAD II

- Rules against tax avoidance practices that directly affect the functioning of the internal market.
- Interest limitation rules: Interest expenditures exceeding 30% of EBITDA must be disallowed (subject to de-minimis interest costs).

Restrictions on deductions for interest expenses

- Increases the costs and limits the access to financial markets and debts.
- Hampers the possibility to recapture invested capital and recycling it in new projects.

Problem?

- High risk and costs, i.e. cannot be financed by equity alone.
- Inventing new technologies also means high risk, i.e. unsuccessful projects and sunk costs.

V.c Pillar II Compatibility with Renewables

Taxes and the Green Transition

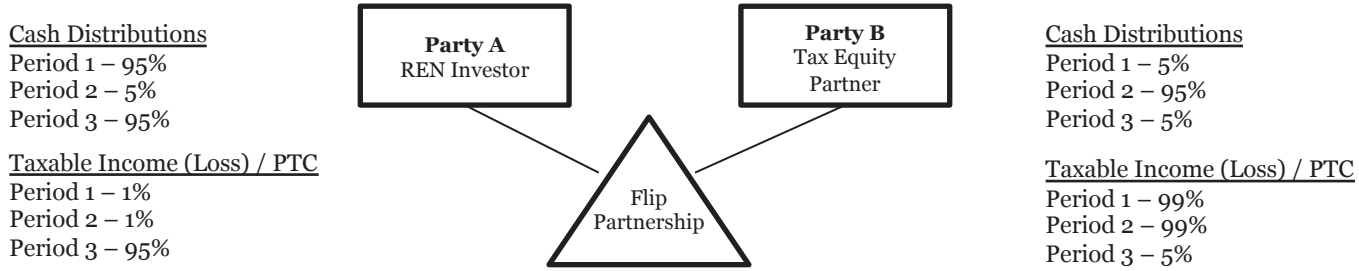
Pillar II compatibility with renewables - real life examples

Many states use tax benefits as incentives, such as accelerated depreciation or subsidies to attract investments into renewable energy solutions.

As one example, the US so-called ***Investment and Production tax credits***.

- ***ITC:*** **Investment Tax Credit** – Investors can take a tax credit equal to 30% of their incurred costs/investments in a new renewable energy system;
- ***PTC:*** **Production Tax Credit** – Business owners can take an inflation adjusted per-kilowatt-hour tax credit for electricity generated

Further, for these tax credits to be attractive for REN start-up companies (early stages of REN projects with no taxable income to be off-setted with such tax credits) particulars corporate structures are utilized: **Flow-through Entities** such as **Tax Partnerships** (US LLC).



To illustrate, assume a scenario where party A and party B jointly own a flow-through entity. The parties have agreed that party A is entitled to 95% of the cash-flows and 1% of the tax attributes in the flow-through entity, whereas party B is entitled to 5% of the cash-flows and 99% of the tax attributes in the flow-through entity.

See **next slide** for a simplified empirical example

Taxes and the Green Transition

Pillar II compatibility with renewables - real life examples

Assumptions: simplified calculation of the *Minimum Tax* impact for a stand-alone *REN* Project, without considering accelerated dep. *(timing difference)*

ITC/PTC
Value: ***200m***

- *Non-taxable items*

Net margin
Value: ***100m***

- Operational margin of the Renewable project
- Nominal Tax rate: 27%

ETR, often during **first years** of the Project, could be **lower than 15% minimum rate** due to tax credits

- ***Interpretation 1****:* PTC/ITC as **Qualified Refundable tax credits** (and therefore recognized as income);
- ***Interpretation 2****:* PTC/ITC as **Qualified Refundable tax credits** (and therefore recognized as income); attribution of about 99% of the "distributive share" to the Tax Partners
- ***Interpretation 3*** *:* PTC/ITC as **Non-refundable tax credits** (and therefore treated as reduction of Covered Taxes);
- ***Interpretation 4*** *:* PTC/ITC as **Non-refundable tax credits** (and therefore treated as reduction of Covered Taxes); corresponded reduction of the GloBE income;
- ***Interpretation 5*** *:* PTC/ITC as **Non-refundable tax credits** (and therefore treated as reduction of Covered Taxes); attribution of about 99% to the Tax Partners

Why so many hypothesis?
→ The current Model Rules and associated Commentary do not offer adequate guidance in such a scenario as to how the ITC/PTC are qualified (Refundable or not) and how profit/loss (and the tax attributes or tax cost) of the flow-through entity is to be allocated between the parties.

Taxes and the Green Transition

Pillar II compatibility with renewables - real life examples

@Country Level	*Refundable Tax credits*		*Non-refundable Tax credits*		
	Int 1	*Int 2*	*Int 3*	*Int 4*	*Int 5*
GloBE income	300	300	300	300	300
Other GloBE Adjustments: Tax Partnership/ Tax Credits	-	- 297	-	- 200	- 297
GloBE adjusted = **a**	300	3	300	100	3
Current Taxes	27	0,27	27	27	0,81
Deferred Tax adjustments @15%	-	-	-	-	-
Adjustment at Covered Taxes for Non-refundable Tax credit	-	-	- 200	- 200	-2
Covered Taxes = ***b***	27	0,27	- 173	- 173	- 1,19
ETR	**9%**	**9%**	**-58%**	**-173%**	**-40%**
Delta w/ minimum Tax = ***c***	6%	6%	73%	188%	55%
Top-up Tax	18	0,18	**218**	**188**	**2**
Carve-out	50	0,5	50	50	0,5
GloBE income post Carve-out	250	3	250	50	2,5
Top-up Tax adj.	15	0,15	**182**	**94**	**1,4**

Adjusting the GloBE income allocating about 99% of the Tax attributes to the Tax Partners

Adjusting the GloBE income by the amount related to the Non-refundable Tax credits

Should the *Top-up tax* to be computed by multiplying ***a*c***? Or is it possible to apply just the 15% to ***a***?

The Pillar 2 rules have mechanisms resulting in companies benefitting from such tax credits to be subject to additional taxation evaporating the value of these subsidies. EU headquartered renewable energy developers are put at a competitive disadvantage (compared to the US one).

V.d Importance of Indirect Taxes and Excise Duties for the Green Transition

Recent Initiatives in Green Taxation: Indirect taxes

→ Which tax incentives to promote the green transition?

1. New VAT rates Directive

2. Energy Taxation Directive recast proposal

New VAT Rates

New reduced VAT rates Directive (2022/542/EU) applicable to

- Solar panels (on private dwellings and public buildings)
- Repairing services of household appliances
- Supply of bicycles (including electric bicycles) and rental and repairing services of bicycles

Phasing out of reduced VAT rates on

- Fossil fuels, peat and firewood - 1 January 2030
- Chemical pesticides and chemical fertilizers - 1 January 2032

Energy Tax Directive Recast Proposal

Extension of the scope of the taxation:

- Phasing out of mandatory exemptions:
  - Aviation and maritime (intra-EU)
  - Mineralogical processes
  - Peat, solid biomass, hydrogen,…
- Phasing out of optional exemptions for agriculture, energy-intensive businesses, households…

Towards a greener tax structure:

- Vertical ranking of the rates in 3 categories in order to foster the use of alternative fuels
- Taxation in €/GJ
- Indexation of the minimum rates
- New optional reduced rates

Thank you!