KPMG Meijburg & Co Tax & Legal

Deputy Minister responds to parliamentary questions regarding the bill on the Minimum Profit Tax Act 2024 (Pillar 2)

On May 31, 2023 the bill on the Minimum Profit Tax Act 2024 was presented to the Lower House of Parliament. The purpose of this bill is to transpose EU Directive 2022/523 of December 14, 2022 into national legislation. The directive is based on the OECD's Pillar Two GloBE Model Rules published at the end of 2021.

Under the bill on the Minimum Profit Tax Act 2024, multinational and national groups with a turnover of EUR 750 million or more according to the consolidated financial statements of the ultimate parent entity should effectively pay 15% tax per jurisdiction on any profit realized in that jurisdiction. In our previous memorandum, we discussed the bill and emphasized important points based on various factors, including the published explanatory notes.

The bill has not been deemed controversial and will remain on the agenda for further consideration by the Lower House of Parliament.

On September 11, 2023, the memorandum in response to the report regarding the bill on the Minimum Profit Tax Act 2024 was sent to the Lower House of Parliament. In this memorandum, the Deputy Minister of Finance answered questions posed by the members of the different factions in the Lower House of Parliament. Below, we outline several important points for clarification.

What stands out in the memorandum in response to the report

Examples of the effect of corporate income tax measures on the effective rate
The comment is made in the memorandum that the corporate income tax payable is unrelated to the measures in the bill. The effect of various measures in the Corporate Income Tax Act 1969 ('CITA') on the effective tax rate for the application of the bill on the Minimum Profit Tax Act 2024 is described on the basis of a number of specific examples.

One of the examples concerns the application of the earnings stripping measure of Section 15b CITA. If, pursuant to this provision, an amount of interest is not deducted and is carried forward, the carried-forward amount leads to a deferred tax asset of 15% (the minimum tax rate at which tax deferrals must be recalculated) of that carried-forward amount. That amount thus reduces the effective rate for that year. The use of the carried-forward rate in a later year in turn leads to a decrease in the deferred tax asset and thus to an increase in the covered tax for that year.

Another example concerns the withholding tax levied by the Netherlands on interest and royalties. For the calculation of the effective rate, this withholding tax is attributed to the taxpayer (the recipient of the income) and not to the withholding agent (the payer of the interest and royalties) and thus increases the taxpayer's effective rate (in an example – in our opinion wrongly and apparently mistakenly – the profit tax is taken into account after crediting the Dutch withholding tax, while the credited withholding tax is not included).

It can also be inferred from the memorandum that the caretaker cabinet (hereinafter: cabinet) currently sees no reason to amend corporate income tax measures, such as the measures aimed at combating mismatches in the application of the arm's length principle.

Liquidation losses

The OECD's Administrative Guidance from February 2023 provide for the possibility on request to, under certain conditions, not exclude equity gains or losses on shareholdings in a specific jurisdiction for the purposes of calculating the GloBE Income. As a result, related tax positions therefore have an effect on the amount of Covered Taxes. That concession may be important for liquidation losses on participations. Without this exception, a deductible liquidation loss would have a negative impact on the effective Dutch tax burden. The bill had already created a formal framework for this possibility. It is now stated that this will be elaborated in more detail in a general administrative order.

Transfer pricing differences

In line with the OECD rules and the directive, the bill stipulates that the profit from transactions between group companies must be determined on the basis of the arm's length principle. According to the cabinet, if the amount is not determined on the basis of the arm's length principle but would be the same for both group entities in their financial reporting, an adjustment following that principle must also be made. Consider, for example, an interest rate applied to a loan. In response to a question how to act if the tax authorities involved have a different opinion on the adjustment to be applied, the cabinet indicates that this is still being discussed within the OECD.

More detailed explanation of 'de minimis exception'

A relaxation is included if the GloBE Revenue and the GloBE Income (or Loss) of a group in a jurisdiction does not exceed certain limits. In that case, the regular Top-up Tax will be deemed nil. These limits are determined on the basis of the average of the GloBE Revenue and GloBE Income or Loss for the relevant reporting year and the two preceding reporting years. If there are not yet three reporting years to which the law applies, those years are not taken into account and the GloBE Revenue and GloBE Income (or Loss) of the years in which the law did not yet apply are disregarded. This means, for example, that for the year 2024 only the amount of the GloBE Revenue and GloBE Income (or Loss) for 2024 is relevant.

Transitional CbCR Safe Harbour and CbCR reporting

The safe harbour rules, on which agreement was reached within the OECD's Inclusive Framework ('IF') on December 15, 2022, have been incorporated into the present bill. This does not apply to the agreement reached on July 13, 2023 on the QDMTT Safe Harbour and the Transitional UTPR Safe Harbour. These safe harbour rules will be added to the bill by means of a Memorandum of Amendment.

When assessing whether the Transitional CbCR Safe Harbour can be applied, information from the CbC report is important. The Dutch Association of Tax Advisors (NOB) has asked how to deal with a situation where a group falls within the turnover threshold of the Minimum Profit Tax Act but the turnover threshold for the CbCR reporting has not been met (for example, due to exchange rate differences) so that a qualifying CbC report has not been prepared. According to the cabinet, the Transitional CbCR Safe Harbour cannot then be used. The question of whether it would in that case be possible to voluntarily draw up a CbC report is not addressed.

Excluded entities: Transitional CbCR Safe Harbour and excluded income based on substance

For the application of the Transitional CbCR Safe Harbour, the income and taxes of excluded entities must be taken into account if they are included in the qualifying CbC report. However, employee's contributions and tangible fixed assets of excluded entities are not included in the calculation of the Substance-based Income Exclusion.

'Post-filing adjustments'

In response to the question of how to deal with adjustments to Covered Taxes in the financial reporting for a previous reporting year, known as 'post-filing adjustments', the cabinet responded that this is being investigated within the IF/OECD context. As soon as there is greater clarity about this in the OECD context, it will be examined in more detail whether legislation or regulations need to be amended.

GloBE Information Return

The amount of Top-up Tax due is determined on the basis of international financial data included in the GloBE Information Return. The GloBE Information Return contains, among other things, the calculation of the Top-up Tax and its allocation among jurisdictions and whether a safe harbour rule is invoked. If Top-up Tax is payable in the Netherlands, a tax return must be filed.

With the information included in both the GloBE Information Return and the tax return, the Dutch tax authorities can exercise risk-oriented monitoring and request more information from the group entities of the (multinational) group established in the Netherlands.

Even if no Top-up Tax is payable in the Netherlands, there is still an obligation to file a GloBE Information Return in the Netherlands. The requirement to file the GloBE Information Return in the Netherlands may be deviated from if the GloBE Information Return is filed by an ultimate parent entity or a designated group entity responsible for filing the return, such that these entities must be established in a state in which there is a qualifying agreement in force for the reporting year between the competent authority and the Netherlands. In that case, the Dutch tax authorities will receive the GloBE Information Return from that other state.

The question of whether the jurisdiction where the GloBE Information Return was filed can act as the first point of contact for questions that other tax authorities have about the GloBE Information Return has not yet been answered. The cabinet states that this item is on the agenda in the context of the discussions on the development of the exchange framework for the GloBE Information Return.

Liability for Top-up Tax

It may occur that a group entity established in the Netherlands does not have sufficient resources to pay the Top-up Tax. If the Top-up Tax is not paid, foreign group entities of a multinational group, for example, can also be held liable for an amount of the Top-up Tax payable. The various possibilities offered by, for example, the Convention on Mutual Administrative Assistance in Tax Matters and the Mutual Assistance within the European Union (Recovery of Tax Claims and Some Other Debt Claims) Act 2012 ('WWBEU') can be invoked. If a basis for this does not exist and no request for assistance can be made, it is uncertain whether the liability will actually lead to a payment. In that case, the recipient is dependent on the willingness of the liable group entity to pay the outstanding tax liability.

Dispute resolution

The cabinet is of the opinion that the introduction of the Minimum Profit Tax Act 2024 does not require the amendment of tax treaties, although it contends that the minimum profit tax falls under the scope of bilateral tax treaties, as it is a tax on profits. In this regard, reference is made to the IF's position, as stated by the OECD Secretariat, that the Top-up Tax is compatible with the provisions of the OECD and the UN Model Tax Conventions.

It is notable that in the protocol of the new tax treaty between the Netherlands and Belgium, a provision has specifically been included stating that nothing in the treaty prevents the application of the directive.

Because the minimum profit tax is covered by the treaties, the Netherlands can, on the basis of treaty provisions in accordance with Article 25 of the OECD Model Tax Convention, consult with the other Contracting State, even on matters that are not provided for in the applicable tax treaty. But although the minimum profit tax is a tax within the meaning of a tax treaty the cabinet believes that the Tax Dispute Resolution Mechanisms Act (*Wet Fiscale Arbitrage*) or an arbitration provision under a tax treaty can only be applicable in a limited number of cases in disputes between countries with regard to the Pillar 2 rules.

According to the cabinet, the option that offers the most certainty is a multilateral agreement on dispute prevention and resolution on Pillar 2. It is not yet known when such a multilateral agreement will be drafted. The cabinet prefers an OECD agreement to which all IF members commit themselves and comments that it will also commit

itself to this.

The cabinet explains that the unilateral process in which taxpayers can request advance certainty is currently being developed. This is expected to be in line with the existing frameworks for preliminary consultations as much as possible. The unilateral process is independent of advance certainty in the bilateral and multilateral relationships that are being worked on within the IF.

Effect of OECD clarifications

The OECD rules on minimum taxation in the form of the OECD Model Rules, Commentary and the additional rules in the form of administrative guidance do not directly affect the Dutch legal system. The directive is based on the OECD Model Rules; through the implementation of the directive, the OECD Pillar 2 rules also become part of the national legislation of the Netherlands. This does not apply in advance to further regulations that the OECD has subsequently published and will publish, whereby a distinction can be made between interpretative rules on the one hand and supplementary rules on the other.

It is noted in the preamble to the directive that the OECD Model Rules and their explanations and examples, as well as the GloBE Implementation Framework, should be used as a source of illustration or interpretation to ensure consistency in application in all Member States insofar as those sources are consistent with the directive and with Union law. In this context, the cabinet notes that the OECD commentary can serve as a source of interpretation if the legal text is in line with the OECD Model Rules. In the case of interpretative rules published by the OECD, it is unlikely that the Netherlands would unilaterally deviate from them. This does not affect the fact that the cabinet will assess further regulations from the OECD, including the administrative guidance, and on the basis of this will – on a case-by-case basis – determine whether the legal text and the explanation of the bill should be supplemented. In this connection, the cabinet referred in particular to the administrative guidance of February 2023, which are of great importance in practice and relate to the transition rules for deferred tax assets, deferred tax liabilities and transferred assets (Article 14.1 of the bill).

Tax revenue

The estimated revenue from the minimum profit tax amounts to approximately EUR 466 million and is not so much attributed to the domestic Top-up Tax in the Netherlands (approximately EUR 55 million) and the Top-up Tax due to low-taxed foreign profits (approximately EUR 9 million), but mainly due to behavioral effects, since it is expected that multinational groups will allocate less profit to states with a low effective tax rate (estimated additional corporate income tax of about EUR 402 million).

Comments KPMG Meijburg & Co

The memorandum in response to the report provides answers to many questions, but there are still many points that need further elaboration, especially at the OECD level. These include the dispute resolution mechanism and the details of the simplified calculations as part of the permanent safe harbour rule. These points must still be reflected in the bill or in rules to be specified pursuant to a general administrative order.

For multinational groups or national groups, it is important that they do not delay in assessing the impact of the new rules. Although the period within which the GloBE Information Return must be submitted is long, the closing of the 2023 financial year and the preparation of the financial statements may already necessitate the inclusion of certain disclosures about the impact of the new rules. For groups that prepare their financial statements under IFRS, the International Accounting Standards Board ('IASB') has also recently amended IAS 12, 'Income Taxes'. For an explanation of this change, we refer to our website and a comprehensive talkbook that addresses these changes.

KPMG Meijburg & Co
September 2023

The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.