

State of Tax, Legal & People

EU ATAD 3 Explained

12 April 2022



Welcome

- Watched live, this webinar qualifies for 1 PE point
- The button '[Ask a question]' allows you to ask a live question via chat
- Any other questions via your PwC advisor or fill in the form on pwc.nl
- View this webcast or presentation at a later stage
- Slides will become available afterwards
- Please complete the evaluation form

Agenda

1. Introduction and context
2. The Gateway Test
3. Reporting on substance in tax return
4. Rebuttal / exemption lack of tax benefits
5. Consequences
6. The impact of ATAD 3 in EU27
7. ATAD 3 insights
8. Wrap up & Questions



Theme of today

(lack of) **SUBSTANCE**

Poll

“A trust employee as a director of your holding company will be a problem under ATAD 3”

- A) This is not true, if structured very carefully.
- B) This is already causing me headaches even without ATAD 3.
- C) Yes, it may be an issue
- D) Yes! It may be an issue and action is required ASAP.



Three key actions to take away



Identify whether you are in scope of ATAD 3

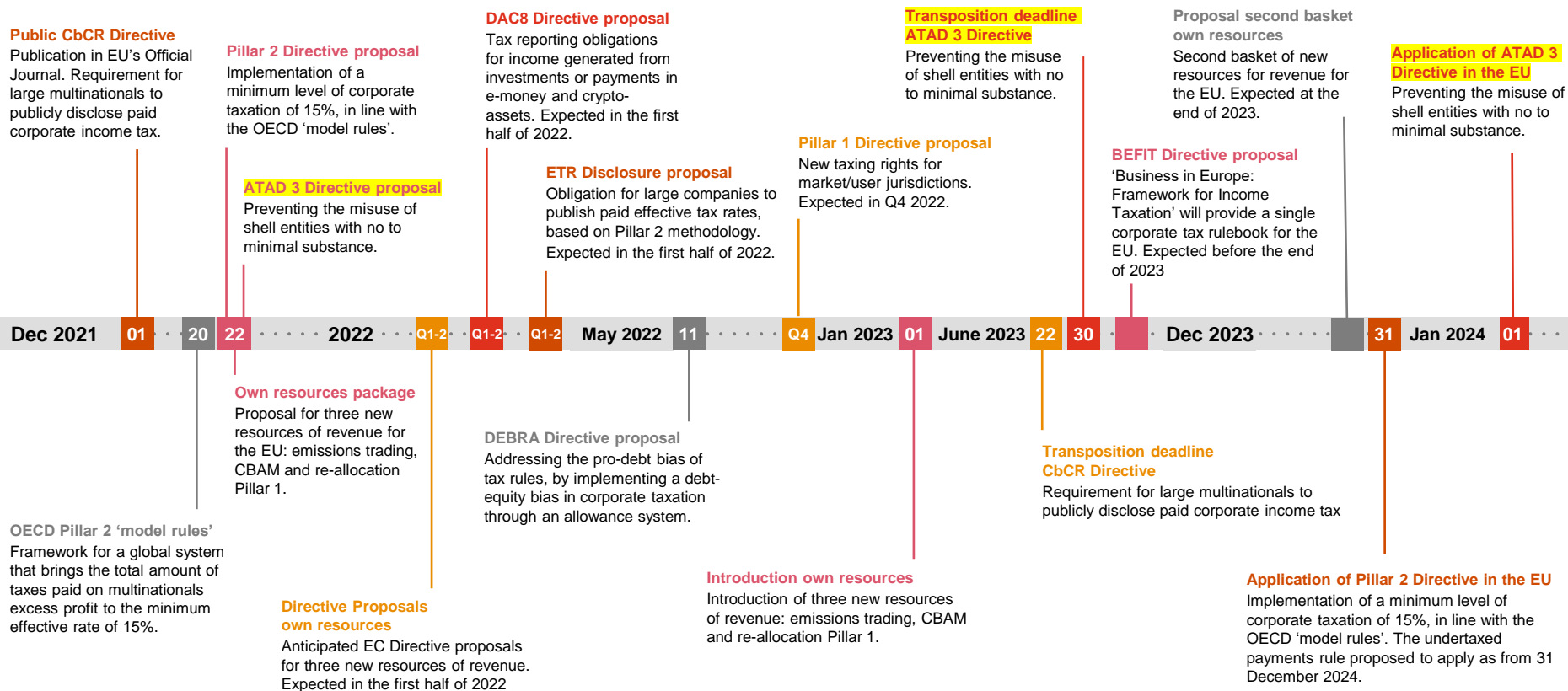


Assess impact of ATAD 3 (tax and compliance)

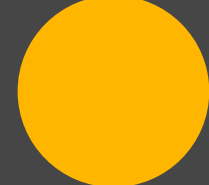


Take mitigating actions (simplification / adjustments)

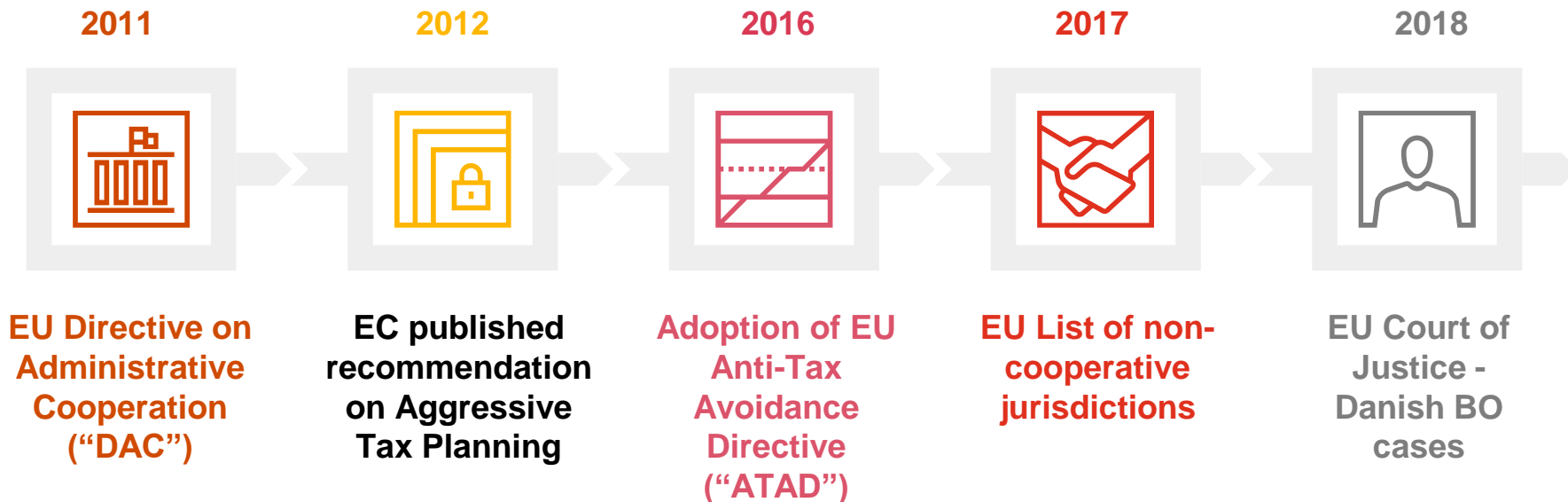
EU-Gateway: Timeline on EU legislative tax developments



Setting the scene



What has taken place over the last couple of years, prior to the ATAD 3 proposal?

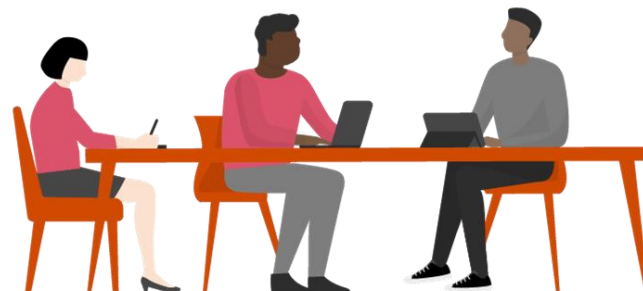


Setting the scene



But what was still missing according to the European Commission?

- “Explicit provisions targeting shell entities that can be misused for tax avoidance or evasion purposes.”
- Hence: ATAD 3 aims at combating tax avoidance and evasion practices involving shell entities!



How and when



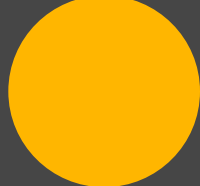
ATAD 3 introduces:

- Minimum substance requirements
- Reporting obligations
- Sanctions



- Transposition: by 30 June 2023
- Application: 1 January 2024 - but retroactive effect?
- Minimum harmonisation Directive: test against EU law possible

Important definitions



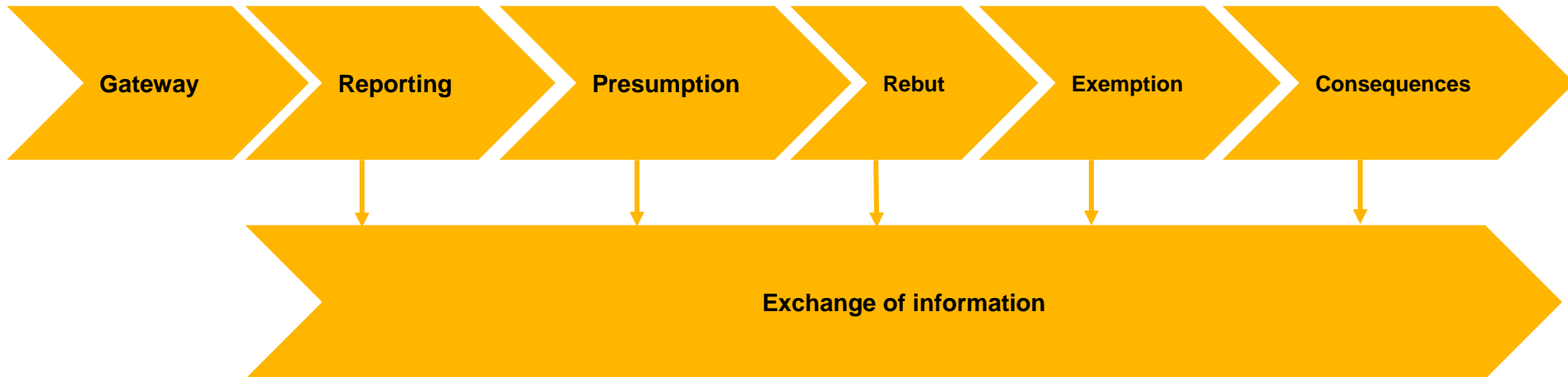
Scope

- All undertakings that are considered tax resident and eligible to receive a tax residency certificate in a Member State.
- Much wider than Pillar 2 Directive and relevant to all taxpayers.

Undertaking

- Any entity engaged in an economic activity, regardless of its legal form, that is tax resident in an EU Member State.
- Legal arrangements and partnerships that are deemed residents for tax purposes

ATAD 3 and the seven steps

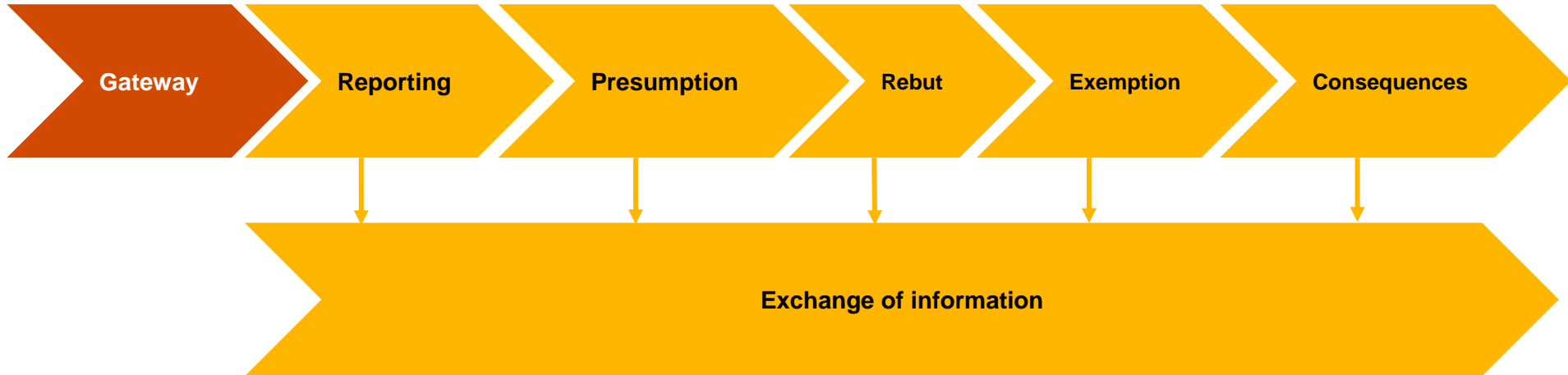


Agenda

1. Introduction and context
2. The Gateway Test
3. Reporting on substance in tax return
4. Rebuttal / exemption lack of tax benefits
5. Consequences
6. The impact of ATAD 3 in EU27
7. ATAD 3 insights
8. Wrap up & Questions



Order of steps



Entry point: The three-gateway test



Gateway 1
Relevant income



Gateway 2 Cross-border activity



Gateway 3
Outsourced administration
and decision making



AT RISK



Unless specific carve-outs apply!

Gateway 1 - Relevant income



“**More than 75% of the revenues** accruing to the undertaking in the preceding two tax years is relevant income”



- A. **interest** or any other income generated from financial asset (including **Crypto income**)
- A. **royalties** or any other income generated from intellectual or intangible property or tradable permits;
- B. **dividends** and income from the disposal of shares;
- C. income from **financial leasing**;
- D. income from **immovable property**;
- E. income from **movable property**, other than cash, shares or securities, held for private purposes and with a book value of more than one million euro.
- A. income from **insurance, banking and other financial activities**;
- B. income from **services** which the undertaking has **outsourced** to other associated enterprises.

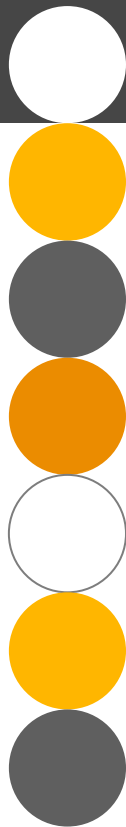
Gateway 1 - Example

Is this gateway criterion met for year 2024 if during the last two preceding years, the relevant income was as follows:

2022: Total income 100, relevant income 70 (70%)

2023: Total income 100, relevant income 90 (90%)

Answer: ?



Gateway 2 - cross border activity

The undertaking is engaged in cross-border activity on any of the following grounds:

- A. More than 60% of the **book value of the undertaking's assets** (movable and immovable property) was located outside the Member State of the undertaking **in the preceding two tax years**.
- A. At least 60% of the undertakings **relevant income** is earned or paid out via cross-border transactions



Test based on **location of assets** and **source of income**!



Gateway 3 - Outsourced administration and decision-making

“In the preceding two tax years, the undertaking outsourced

- the administration of day-to-day operations, and
- the decision-making on significant functions”



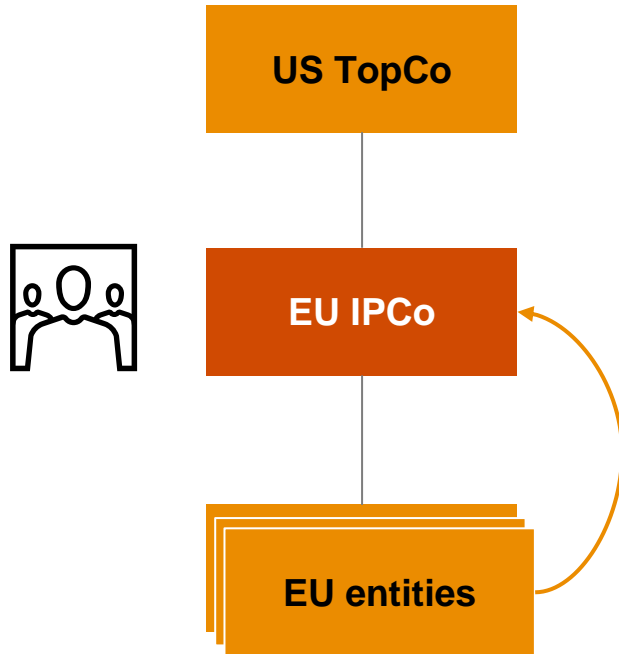
Targets undertakings that do not have adequate own resources to perform core management activities. Such undertakings tend to

- engage third party service providers of administration, management, correspondence and legal compliance services or,
- enter into relevant agreements with associated enterprises for the supply of such services in order to set up and maintain a legal and tax presence.

Outsourcing of certain ancillary services only, such as bookkeeping services alone, while **core activities** remain with the undertaking, would not suffice in itself for an undertaking to pass this gateway.



Example I - Gateway three (outsourcing)



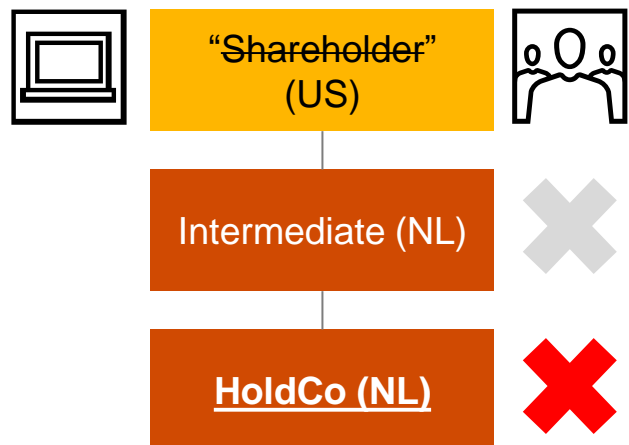
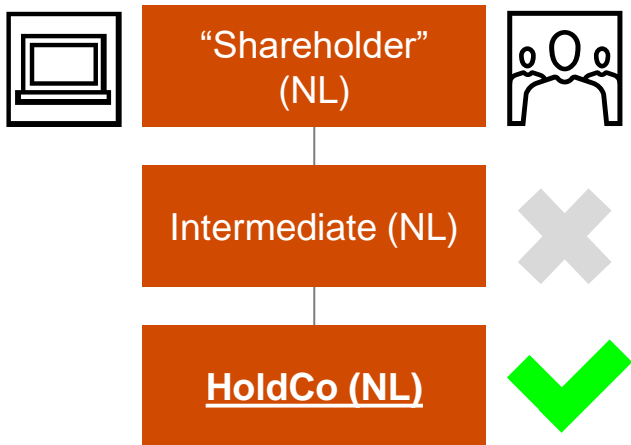
EU IPCo has the following characteristics

- **90% of its income** in the preceding two tax years consisted of royalty income from cross-border transactions.
- **EU IPCo has 2 directors. They reside in this EU MS.** They perform the decision-making on significant functions for EU IPCo.
- All EU IPCo's bookkeeping, administration, legal compliance and corporate address is **taken care of by a corporate service provider (e.g. trust company).**

All gateway criteria met? At risk!

Exempted entities (based on the activities)

1. SH's of operational businesses located in same Member State as "shareholder"/UPE.
2. HoldCo's resident for tax purposes in the same Member State as "shareholder"/UPE.
3. Undertakings with at least five full time employees



All gateway criteria met? At risk!

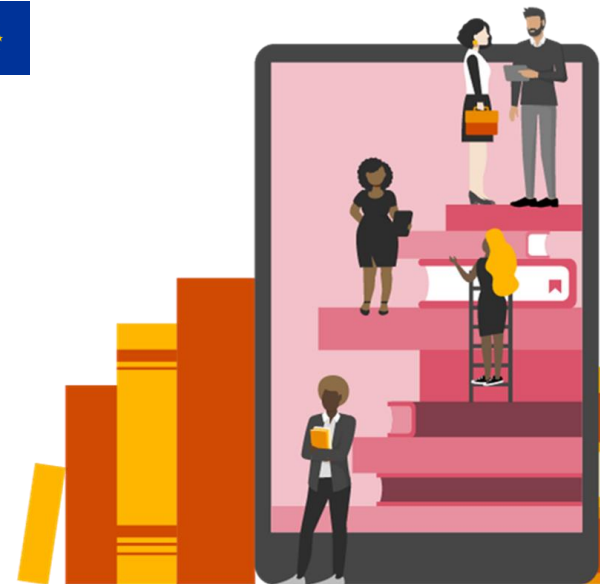
Exempted entities (based on the specific type)

Some specific type of undertakings:

1. Regulated financial undertakings
2. Listed companies on a recognized stock exchange



In any other case, we are officially within the scope of ATAD 3.

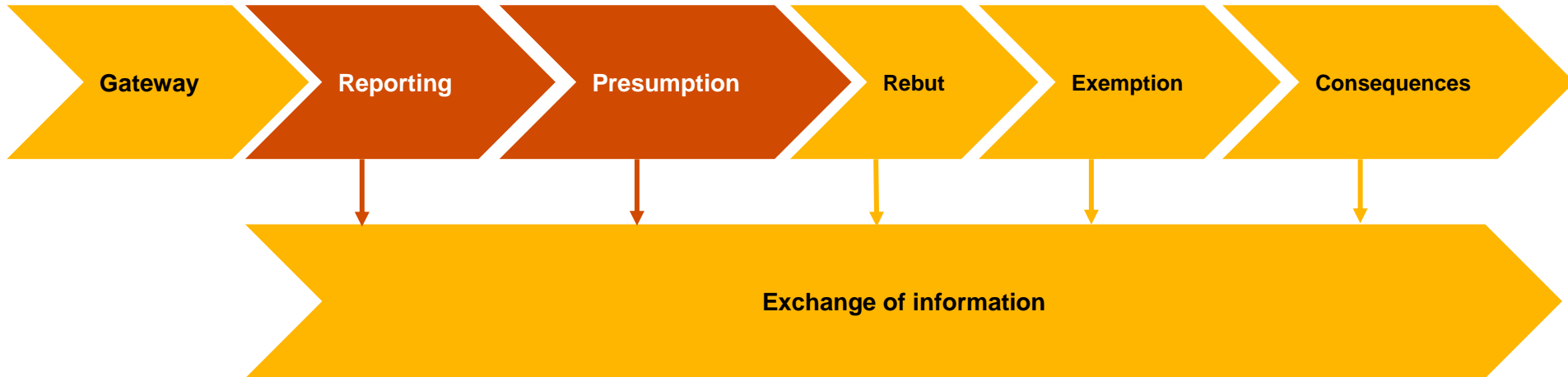


Agenda

1. Introduction and context
2. The Gateway Test
3. Reporting on substance in tax return
4. Rebuttal / exemption lack of tax benefits
5. Consequences
6. The impact of ATAD 3 in EU27
7. ATAD 3 insights
8. Wrap up & Questions



The seven steps - Where are we now?



At risk = reporting substance in the tax return



Own premises or premises for its exclusive use



At least one own and active bank account in the EU



At least one qualifying director/qualifying employees

Zooming in - What substance exactly required?



Qualifying director

1. **Tax resident in the Member State** of the undertaking or **at no greater distance from that Member State**;
2. **Qualified and authorized** to take decisions;
3. Uses the **authorisation actively and independently**;
4. Is **not an employee** of an enterprise that is **not a related enterprise** and does not perform the function of director or equivalent of other enterprises that are not related enterprises.

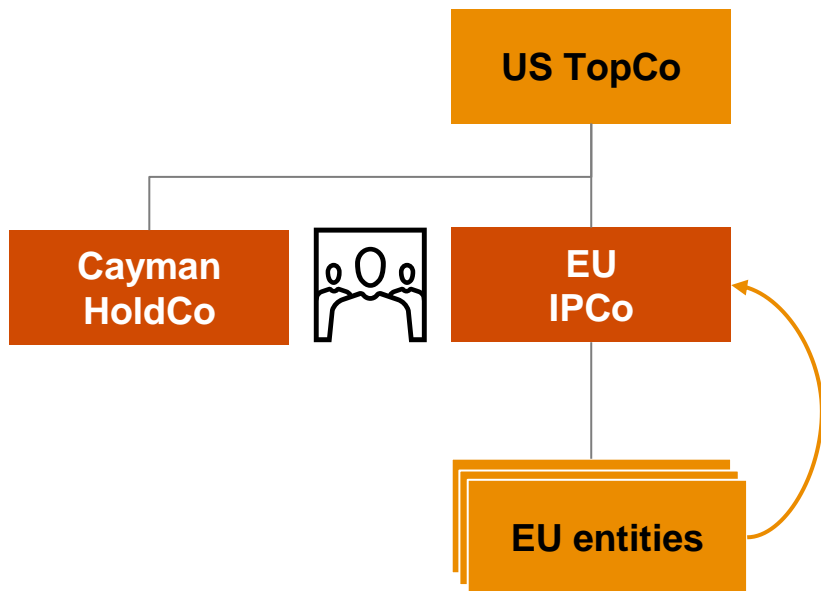
OR



Qualifying employees

Most of the employees who perform day-to-day functions (that generate relevant income) **are tax resident in the Member State** of the undertaking or **at no greater distance from that Member State**.

Example II - Does EU IPCo meet the three indicators?



EU IPCo has the following characteristics

- All three gateway criteria are met.
- EU IPCo has an **own office space** available, rented exclusively in building owned by Cayman HoldCo.
- EU IPCo has a **bank account in the EU**, for which the EU IPCo directors have the exclusive decision power.
- EU IPCo has **two tax resident directors who have an active role in the decision making processes, in the formal powers that they are vested and participate in day-to-day management for EU IPCo.**
- These directors do also serve as board members for the related company Cayman HoldCo
- **Bookkeeping, administration, legal compliance activities for EU IPCo are outsourced** to Cayman HoldCo.

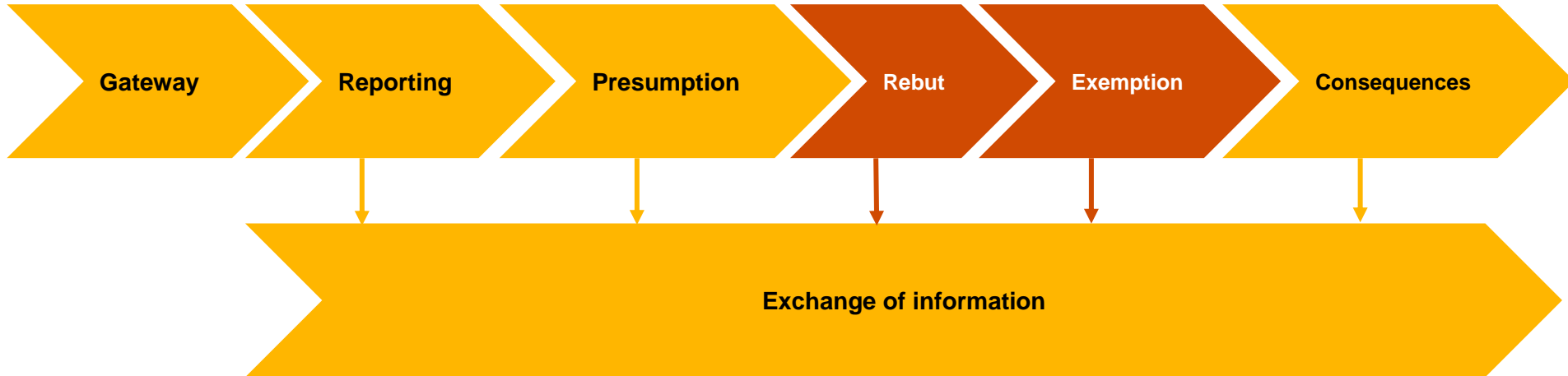
Reporting on substance in tax return - Submit evidence

The reporting must be accompanied by satisfactory documentary evidence, which should be attached to the tax return as well, if not already included.

The evidence, to show compliance with the three indicators, shall include the following information:

1. Address and type of premises;
2. Amount of gross revenue and type thereof;
3. Amount of business expenses and type thereof;
4. Type of business activities performed to generate the relevant income;
5. The number of directors, their qualifications, authorisations and place of residence for tax purposes or the number of full-time equivalent employees performing the business activities that generate the relevant income and their qualifications, their place of residence for tax purposes;
6. Outsourced business activities;
7. Bank account number.

The seven steps - I am not guilty!



Agenda

1. Introduction and context
2. The Gateway Test
3. Reporting on substance in tax return
4. Rebuttal / exemption lack of tax benefits
5. Consequences
6. The impact of ATAD 3 in EU27
7. ATAD 3 insights
8. Wrap up & questions



Presumption of lack of minimal substance (or not)

- Presumed shell
- Not presumed shell

However, this presumption does not exclude that the tax administrations still find that such undertaking:

- is a shell for the purposes of the Directive because **the documentary evidence produced does not confirm the information reported**; or
- is a shell or lacks substantial economic activity **under domestic rules other than this Directive**, taking into account the documentary evidence produced and/or additional elements; or
- is **not the beneficial owner** of any stream of income paid to it.

Rebuttal/exemption lack of tax benefit

Presumed shells can prevent the application of the tax consequences through:



Rebuttal

No shell company due to the commercial rationale behind the undertaking



Exemption

Shell does not impact the tax liability of its BOs or the group



Important opportunity: step 2 was based on indicators that as such, may fail to capture the specific facts and circumstances of each individual case.

Rebuttal

- Presumed shells can rebut the presumption by providing the following:
 - ✓ **Commercial (non tax) reasons** set up;
 - ✓ Information on **employee profiles** (experience, powers, role and position in the undertaking, contract, qualifications and duration of employment);
 - ✓ Nexus between **decision making** on value generating activities and EU Member State.
- Any additional information is allowed. Assessment based on Significant People Functions.
- Rebuttal certificate valid for 5 years (so 6 years in total), like a ruling.



Exemption due to lack of tax benefit



- An exemption applies to presumed shells if:
 - ✓ The existence of the undertaking **does not reduce the tax liability of its BO's or of the group**, as a whole, of which the undertaking is a member.
- The undertaking must provide:
 - ✓ Group structure and activities, and
 - ✓ Comparison between the amount of overall tax due by the BOs or the group
- Exemption valid for 5 years (so 6 years in total), like a ruling.
- Status of the exemption certificate

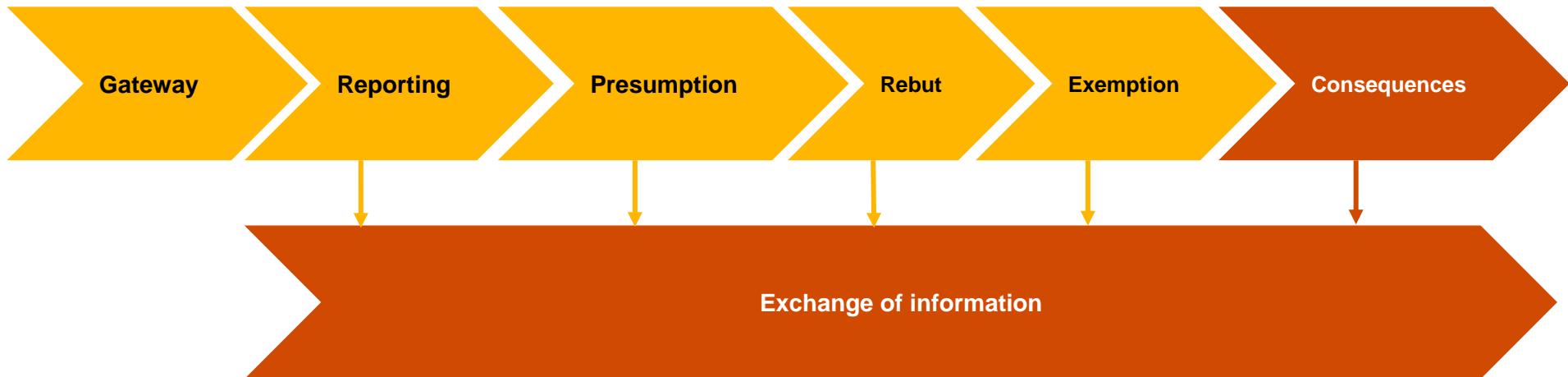


Agenda

1. Introduction and context
2. The Gateway Test
3. Reporting on substance in tax return
4. Rebuttal / exemption lack of tax benefits
5. Consequences
6. The impact of ATAD 3 in EU27
7. ATAD 3 insights
8. Wrap up & Questions



The seven steps - Face the consequences...



Main consequences



Exchange of information within the EU on EU-shell entities



Denial to issue residency certificates or issue certificate with warning.



No EU-treaty or EU-directive benefits



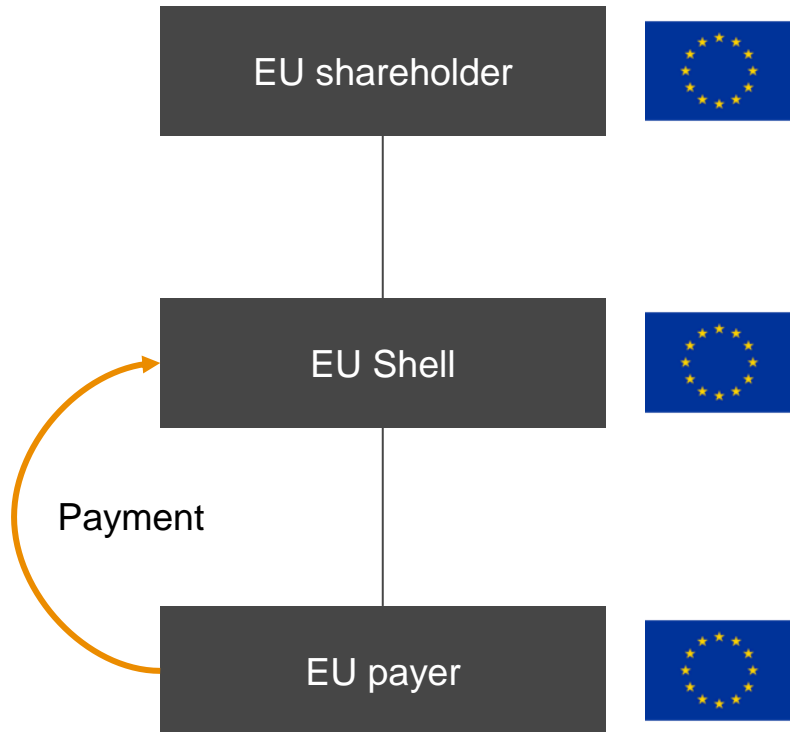
EU-shareholder gets CFC-type of taxation on EU shell's income



Non-compliance with the directive results in penalty of at least 5% of turnover.

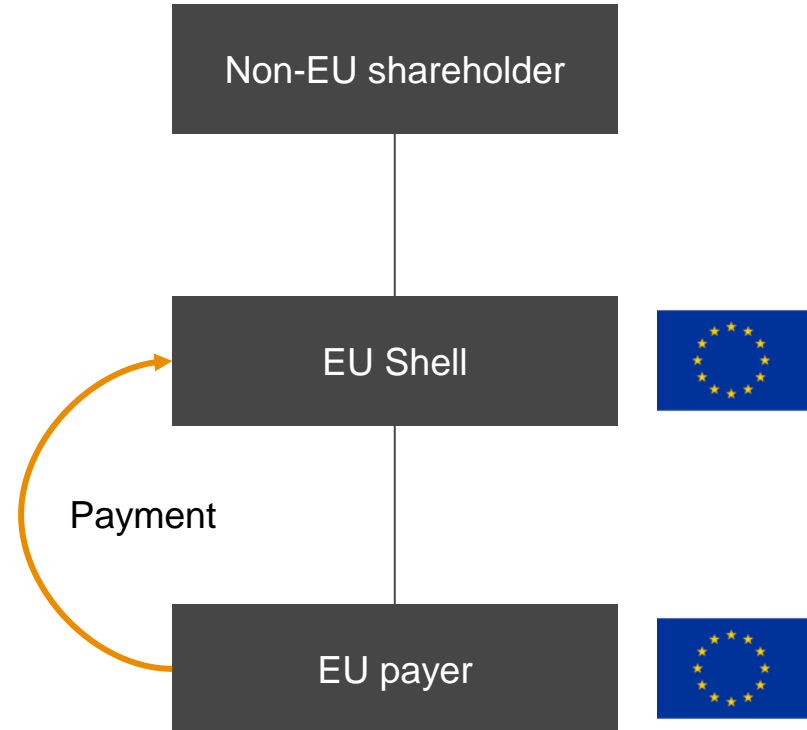
Consequences - Examples fully EU

- **EU source / payer:** No right to tax the payment
- **EU shell:**
 - Remains resident for tax purposes and will be obliged to fulfil relevant obligations as per national law, including by reporting the payment received
- **EU shareholder(s):**
 - **Will include the payment received by the shell** undertaking in its taxable income
 - Tax paid at source and/or by the shell (if any) will be available for relief.



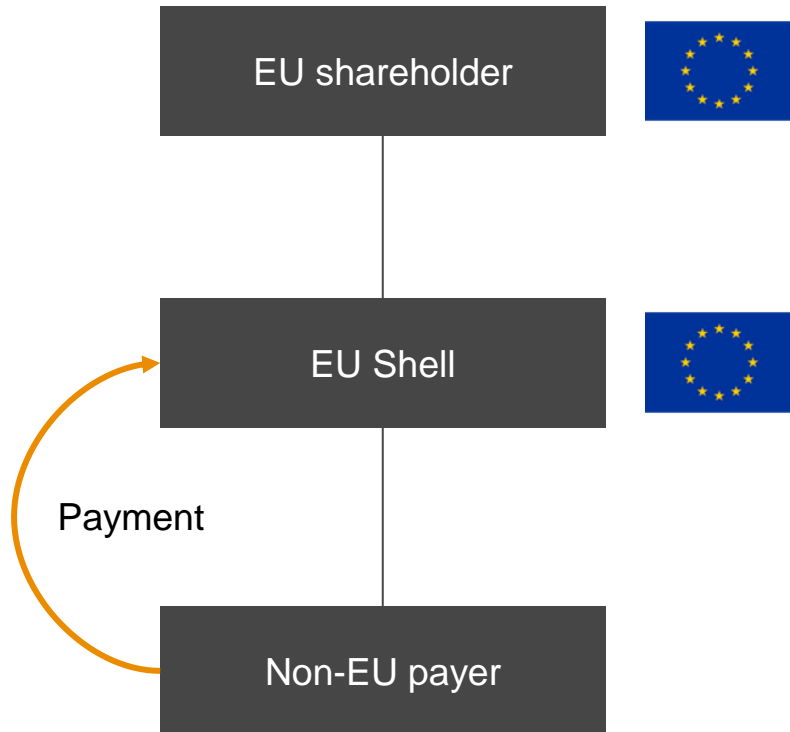
Consequences - Example third country shareholder

- **EU source / payer:**
 - **Will** apply WHT on the outbound payment to the extent permitted by a **treaty** in effect with the third country jurisdiction of the shareholder(s)
- **EU shell:**
 - Remains resident for tax purposes and will be obliged to fulfil relevant obligations as per national law, including by reporting the payment received
- **Third country shareholder(s):**
 - Not compelled to apply any ATAD3 consequences, however **may** be asked to apply a **tax treaty** in force with the source Member State



Consequences - Example third country payer

- **Third country source / payer:**
 - **May** apply domestic tax on the outbound payment or **may** decide to apply **the treaty** with the EU shareholder
- **EU shell:**
 - Remains resident for tax purposes and will be obliged to fulfil relevant obligations as per national law, including by reporting the payment received.
- **EU shareholder(s):**
 - **Will include the payment received by the shell** undertaking in its taxable income
 - Tax paid at source and/or by the shell (if any) may be available for relief.



Poll

“Do you expect that ATAD 3 will have an impact on your organisation”

- A) Yes, definitely.
- B) Yes but I need to think about it.
- C) No, because my organisation meets all the substance requirements.



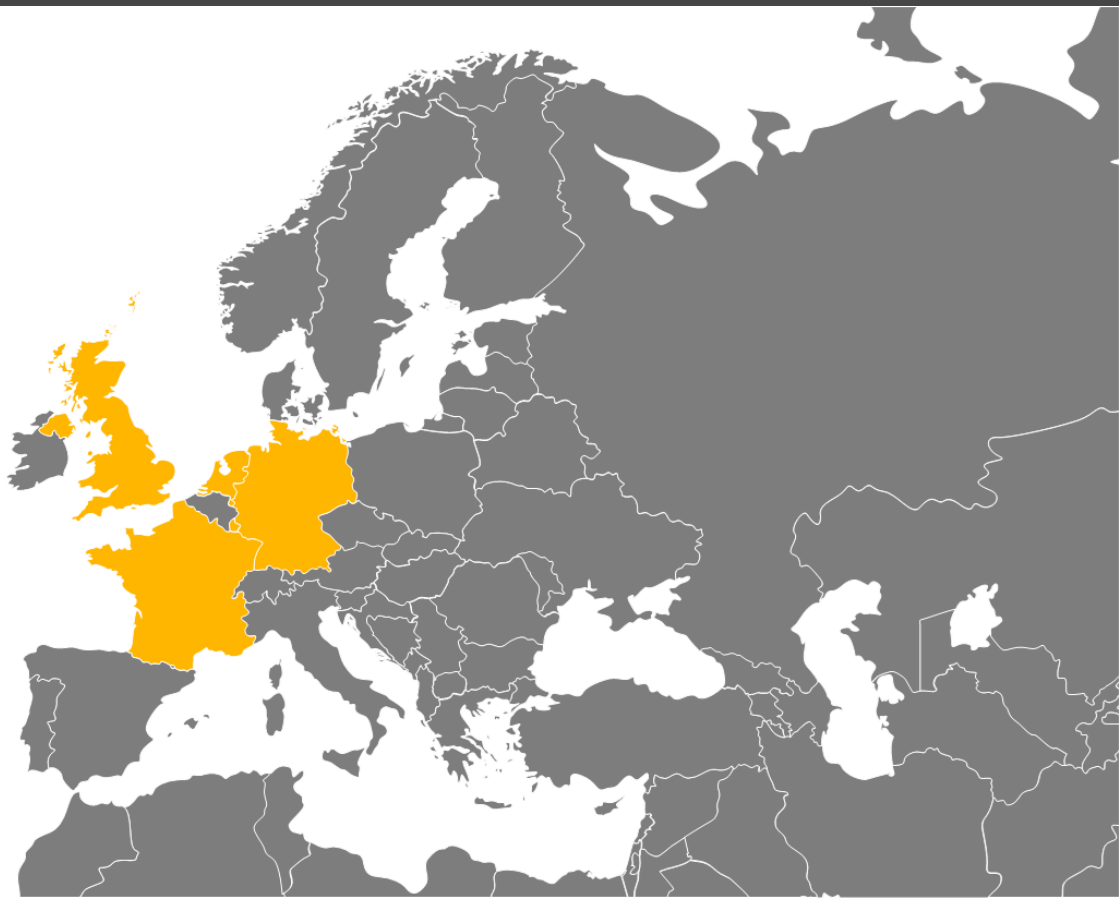
Agenda

1. Introduction and context
2. The Gateway Test
3. Reporting on substance in tax return
4. Rebuttal / exemption lack of tax benefits
5. Consequences
6. The impact of ATAD 3 in EU27
7. ATAD 3 insights
8. Wrap up & Questions



The impact of ATAD 3 in EU27

- **France**
 - **Germany**
 - **Luxembourg**
 - **The Netherlands**
 - + **The United Kingdom**
- **Current rules**
- **Implementation of ATAD 3**
- **Practical points**



Existing Dutch substance requirements vs ATAD 3 requirements

Existing Dutch substance requirements

- **Office space available** in the country where the company is tax resident (at least 24 months)
- The most important **bank account is managed and controlled** in the country where the company is tax resident
- **At least 50%** of decision-making board members should **live in the country where the company is tax resident** and these board members of the company are sufficiently qualified to carry out their tasks properly
- The company has qualified **staff** (own or outsourced) at its disposal
- The bookkeeping of the company is maintained in the country where the company is tax resident.
- At least EUR 100,000 employee costs.
- Board decisions are made in the country where the company is tax resident.

ATAD 3 requirements

- **Own premises or premises for exclusive use** of the undertaking, and;
 - The undertaking has at least one **own and active bank account in the Union**, and;
 - **One or more** director of the undertaking:
 - is domestic tax resident or **lives close** to the Member State.
 - is qualified and authorized to take decisions in relation to the activities that generate relevant income for the undertaking and use the authorization on a regular basis;
 - **are not employees of an enterprise that is not an associated enterprise and do not perform the function of director or equivalent of other enterprises that are not associated enterprises;**
- OR**
- the **majority of the undertaking's employees** engaged with its core income generating activities being resident close to the undertaking.

Agenda

1. Introduction and context
2. The Gateway Test
3. Reporting on substance in tax return
4. Rebuttal / exemption lack of tax benefits
5. Consequences
6. The impact of ATAD 3 in EU27
7. **ATAD 3 insights**
8. Wrap up & Questions



ATAD 3 insights (1/2)

- The ATAD 3 proposal has not reached the ECOFIN yet.
- Ongoing discussions progressing - going well.
- ATAD 3 requires unanimity to be adopted.
- ATAD 4 (2022)

How does this fit in the wider Commission agenda on tax evasion and avoidance?

*This is one initiative in the Commission's toolbox of measures aimed at fighting abusive tax practices. In December 2021, the Commission tabled a very swift transposition of the international agreement on a global minimum level of taxation for multinational enterprises. In 2022, the Commission will put forward another transparency proposal, requiring certain large groups to publish their effective tax rates, and the 8th Directive on Administrative Cooperation, equipping tax administrations with the necessary information to cover crypto assets. In addition, while this proposal addresses the issue inside the EU, **the Commission will present in 2022 a new initiative to respond to the challenges linked to non-EU shell entities.***

ATAD 3 insights (2/2)

- GAAR in all EU Directives and DAC6
- Legal certainty?
- Reduction of compliance costs and multiple reporting by several group entities
- Substance requirements in a digitalised and post COVID-19-era
- Risk for divergent interpretation of substance requirements due to lack of definitions (“own and active bank account”) and use of open language (“two consecutive years”)
- Inconsistencies between the ATAD 3 rules and the Explanatory Memorandum.
- Connection between Pillar 2 Directive, ATAD 1 and ATAD 3.
- Why exchange of information if we have already DAC in EU27?
- The next step towards European taxation (CC(C)TB)?

Agenda

1. Introduction and context
2. The Gateway Test
3. Reporting on substance in tax return
4. Rebuttal / exemption lack of tax benefits
5. Consequences
6. The impact of ATAD 3 in EU27
7. ATAD 3 insights
8. Wrap up & Questions



Key takeaways



- Relevant to all taxpayers, no exceptions on size.
- Interpretation issues that need to be resolved.
- The current book year is already important for the Gateway Test.
- Be prepared now for ATAD 3 consequences that may kick in as of 1 January 2024.
- Think of ATAD 3 impact assessment / legal entity reduction / consolidating. substance.
- PwC's NL ATAD 3 group ready to help with materials / support / conversations.
- EU27 implementation - PwC NL as EU gateway.
- Monitor the EU developments in the coming months (ATAD 3, Pillar 2, DEBRA etc).

Three key actions to take away



Identify whether you are in scope of ATAD 3



Assess impact of ATAD 3 (tax and compliance)



Take mitigating actions (simplification / adjustments)

ATAD 3 Menu card

Create awareness

Create awareness

- PwC NL State of Tax webcast
- PwC ATAD 3 publications

Deep Dive ATAD 3

Deep dive session to analyse potential impact of ATAD3 for your organisation

- Extensive ATAD 3 impact analysis

Holistic impact assessment

Substance in a broader context: tax treaty benefits, EU directives, domestic exemptions/reductions

- Determination overall substance and beneficial ownership position in light of ATAD 3, MLI, EU case law and local rules and high level recommendation of enhancement (deliverable: report)

Co-creation workshop

Workshop with all relevant stakeholders:

- Zoom in on operating model, the value chain and the decision makers within your organization to assess feasibility of recommendations to enhance robustness of the structure.

On Demand / Apps / Substance analyser

Information Insert Data

Would you like to initiate the form by uploading the form data? Please click on the icon.

ATAD3 Analyzer

Tax is more relevant than ever. Globally, states are looking for revenue. Multinational corporations are looking for ways to reduce their tax burden. As a consequence of the newly introduced substance requirements, administrations have powerful means to challenge structures that are mainly tax-driven and not substance-driven. This further underlines that material risks may arise from below Substance analyser. This tool guides you through the relevant elements of the PPT and always recommend contacting an international tax specialist.

substance review

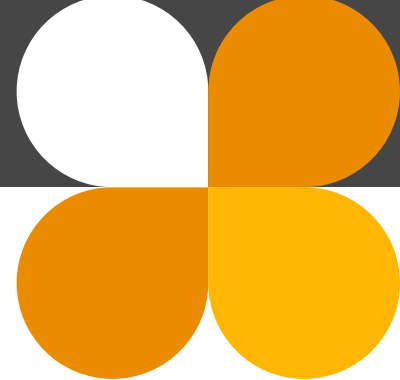
Beneficial Ownership and GAAR impact on Univac Solutions Netherlands Holdings BV
2 August 2021



Questions



Closing slide



- **Questions?** Please contact your PwC advisor or let us know in the evaluation of this webcast.
- View this webcast or presentation at a [later stage](#)
- **Stay up to date:** register for our PwC Tax Newsletter on [pwc.nl](https://www.pwc.nl)
- 'State of Tax' webcast series continues on [pwc.nl/evenementen](https://www.pwc.nl/evenementen)
- Please fill in the evaluation form

Contact



Jan-Willem Thoen

Director

T: +316 1002 9571

E: jan-willem.thoen@pwc.com

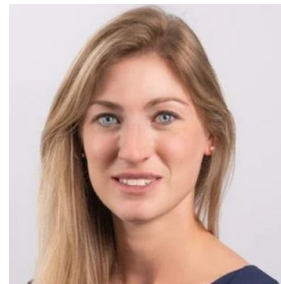


Jordy van den Bogaert

Manager ITS

T: +31 6 23295812

E: jordy.van.den.bogaert@pwc.com



Pauline Jonker

Senior Manager FS

T: +31 6 83608333

E: pauline.jonker@pwc.com



Hein Vermeulen

Senior Director /

EUDTG NL leader

T: +31 88 792 7521

E: hein.vermeulen@pwc.com



Thank you!



© 2022 PwC. All rights reserved. Not for further distribution without the permission of PwC. “PwC” refers to the network of member firms of PricewaterhouseCoopers International Limited (PwCIL), or, as the context requires, individual member firms of the PwC network. Each member firm is a separate legal entity and does not act as agent of PwCIL or any other member firm. PwCIL does not provide any services to clients. PwCIL is not responsible or liable for the acts or omissions of any of its member firms nor can it control the exercise of their professional judgment or bind them in any way. No member firm is responsible or liable for the acts or omissions of any other member firm nor can it control the exercise of another member firm’s professional judgment or bind another member firm or PwCIL in any way.