

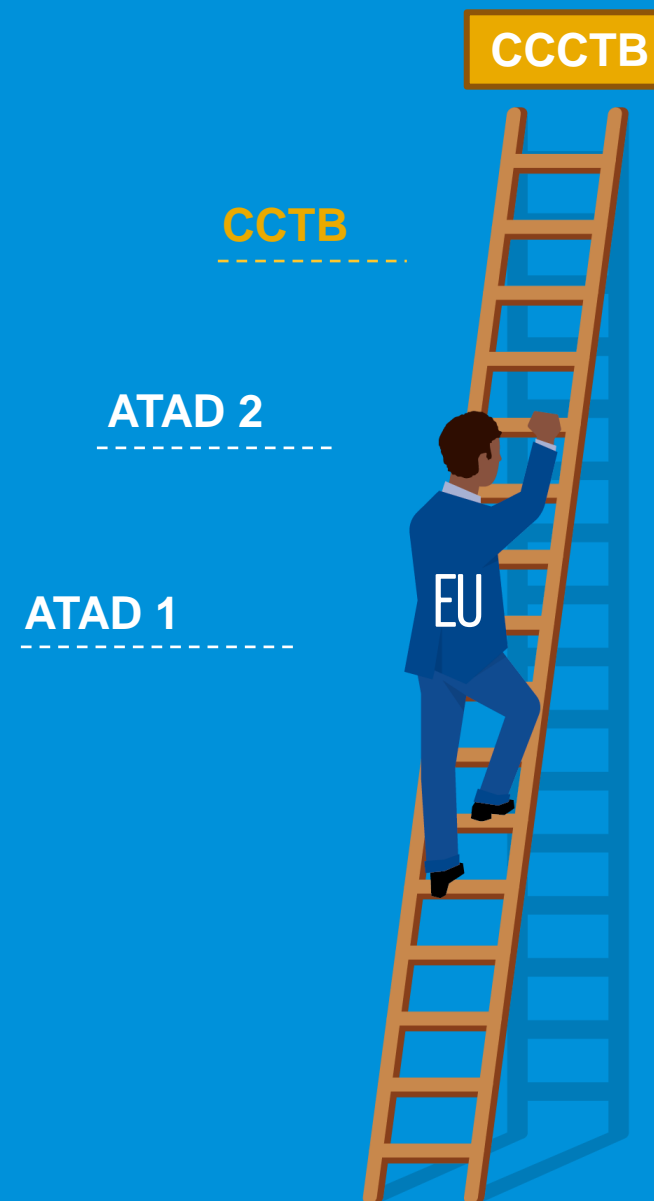


# Harmonized measures to combat tax avoidance - "Success stories"

April 2019

# The Anti-Tax Avoidance Directive

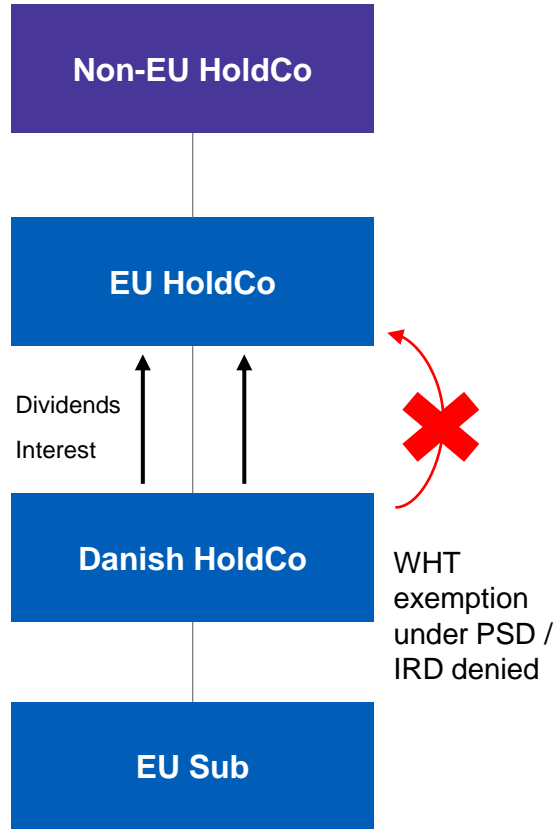
- Proposal **January 28, 2016** based on the ‘international aspects’ of the CCCTB proposal and the outcomes of the OECD/G20 BEPS project,
- ATAD 1 formally approved in **July 2016** and ATAD 2 in **February 2017**
- Anti-Tax Avoidance rules in 5 specific fields, applicable as of January 1, 2019 (General):
  1. Interest limitation rule (**January 1, 2024** provided certain conditions are fulfilled)
  2. Exit taxation (**January 1, 2020**)
  3. GAAR
  4. CFC
  5. Hybrid mismatches
    - ATAD 1: intra-EU for hybrid mismatches (**January 1, 2020**)
    - ATAD 2: hybrid mismatches etc. including third countries (**January 1, 2020**)
    - ATAD 2: reverse hybrid rules (**January 1, 2022**)
  6. Switch-over clause → no agreement reached → deleted
- EU Member States can apply stricter anti-avoidance rules (article 3)



# ATAD Implementation - Main provisions

Member State	Interest Limitation Rules			CFC Rules
	30% EBITDA	Safe harbor threshold	Group Escape	
Austria	NO	NO	NO	Passive income approach (Model A)
Belgium	30% EBITDA	EUR 3 million	NO	TP approach (Model B)
Bulgaria	30% EBITDA	EUR 3 million	NO	Unclear
Croatia	30% EBITDA	EUR 3 million	NO	Passive income approach (Model A)
Cyprus	Planned 30% EBITDA	Planned EUR 3 million	Planned YES	TP approach (Model B)
Czech Republic	30% EBITDA	CZK 80 million	NO	Passive income approach (Model A)
Denmark	30% EBITDA	DKK 22,313,400	Group ratio rule only	Passive income approach (Model A)
Estonia	30% EBITDA	EUR 3 million	YES	TP approach (Model B)
Finland	25% EBITD	Related parties - EUR 500,000 Unrelated parties - EUR 3 million	Equity escape rule only	Passive income approach (Model A)
France	30% EBITDA	EUR 3 million	YES	Different approach
Germany	30% EBITDA	EUR 3 million	Group ratio rule only	Passive income approach (Model A)
Greece	30% EBITDA	EUR 3 million	NO	Passive income approach (Model A)
Hungary	30% EBITDA	HUF 939,810,000	YES	Passive income approach (Model A)
Ireland	Existing rule based on qualification criteria / Adoption deferred until January 1, 2024			TP approach (Model B)
Italy	30% EBITDA	NO	NO	TP approach (Model B)
Latvia	30% EBITDA	EUR 3 million	NO	TP approach (Model B)
Lithuania	30% EBITDA	EUR 3 million	Equity escape rule only	Passive income approach (Model A)
Luxembourg	30% EBITDA	EUR 3 million	YES	TP approach (Model B)
Malta	30% EBITDA	EUR 3 million	Equity escape rule only	TP approach (Model B)
Netherlands	30% EBITDA	EUR 1 million	NO	Combination of both approaches
Poland	30% EBITDA	EUR 3 million	NO	Passive income approach (Model A)
Portugal	30% EBITDA	EUR 1 million	NO	Passive income approach (Model A)
Romania	30% EBITDA	EUR 1 million	NO	Passive income approach (Model A)
Slovakia	Existing rule based on 25% EBITDA (related parties) / Adoption deferred until January 1, 2024			TP approach (Model B)
Slovenia	4:1 debt to equity ratio applies / ) / Adoption deferred until January 1, 2024			TP approach (Model B)
Spain	30%	EUR 1 million	NO	Passive income approach (Model A)
Sweden	30% EBITDA	SEK 5 million	NO	Passive income approach (Model A)
UK	30% EBITDA	GBP 2 million	Group ratio rule only	Combination of both approaches

# The CJEU decisions on Beneficial Ownership



## Facts

- Back-to-back financing transactions - joined cases N Luxembourg 1 (C-115/16), X Denmark (C-118/16) C Danmark 1 (C-119/16) and Z Denmark (C-299/16)
- Dividend distributions - joined cases T Danmark (C-116/16) and Y Denmark (C-117/16)

## The CJEU decision in the Parent-Subsidiary Directive cases

- Abusive practices are prohibited by EU law ⇒ no need for distinct anti-abuse provisions
- Guidance on the constitutive elements of an abuse of rights under EU law:
  - Objective ⇒ purpose of the EU Directives is circumvented, despite formal observance of the rules
  - Subjective ⇒ wholly artificial arrangement and intention to obtain a (tax) advantage
  - Existence of a conduit company without economic substance, which cannot use the income received but has the obligation to pass it on ⇒ further indication of abuse.
  - Tax treaty with the residence country of the BO ⇒ not sufficient to rule out an abusive situation
- If abuse is identified, no obligation for the tax authorities to identify the BO of the income

## The CJEU decision in the Interest and Royalties Directive cases

- BO is the entity that economically benefits and has the freedom to use and enjoy the interest.
- OECD Model Tax Convention and commentaries are relevant for interpreting this concept

# The CJEU decisions on Beneficial Ownership



# The Mandatory Disclosure Rules in a nutshell

## Intermediary

- **Primary definition:** Any EU-established or resident person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement. – not limited to tax advisors
- **Secondary definition:** “any person that [...] knows or could be reasonably expected to know that they have undertaken to provide aid, assistance or advice with respect to [...] reportable cross-border arrangement.”.



## Reportable

- All taxes of any kind are within scope, with the exception of VAT, customs duties, excise duties and compulsory social contributions.
- Cross-border arrangements that fall within a set of so-called “hallmarks”
- Examples: confidentiality condition, contingency fee, payments to low-taxed beneficiaries or that benefit from preferential tax regimes, transfer pricing, circumventing information exchange

## Guidelines and penalties

- No EU level coordination
- Local guidelines (may be) issued by local authorities
- Implementation mismatch likely
- Penalties: Determined at Member State level. Must be effective, proportionate and dissuasive

## Main benefit test

- Any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement (or has implemented the first step of) a reportable cross-border arrangement.
- **Required to report** if no EU intermediary or intermediary is exempt.

- Applies to some hallmarks
- The main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage



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