de Nederlandse Orde van Belastingadviseurs

Response to draft bill Minimum Taxes Act 2024 (*Wet minimumbelasting 2024)* (Pillar 2)

Amsterdam, the Netherlands, December 5, 2022

It was with interest that the Dutch Association of Tax Advisors (NOB) took note of the internet consultation on the draft bill for the Minimum Taxes Act 2024 (Pillar 2). This is our response.

This response is based on our experience and expertise, and is meant to contribute to the creation of robust legislation. In our response, we have made allowance for the fundamental principles of law and legislation, such as legal equality, legal certainty, enforceability and feasibility.

After a general and international analysis, in which we will present a number of policy and other questions, we will address the procedural law aspects and the practical feasibility of the draft bill. In closing, we will elaborate on a number of specific tax-related aspects referencing the different chapters in the draft bill.

Yours faithfully,
Dutch Association of Tax Advisors

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A. General considerations

In the draft bill for the Minimum Taxes Act 2024 all terms used in the OECD model rules[1] have been translated into Dutch. Given that the English terms 'qualified domestic minimum top-up tax' (QDMTT), 'income inclusion rule' (IIR) and 'undertaxed payment rule' (UTPR) have become generally accepted, even in Dutch, NOB suggests adding the acronyms of these terms to the definitions. A number of NOB-affiliated firms and Business at OECD have already shared their suggestions, focus points and areas of concern with the OECD. Many of them are relevant to this bill as well; NOB would advise the Dutch government to take note of them.

While NOB is not opposed to a global minimum tax, it *is* concerned about some aspects relating to the design and introduction of such a tax. The rules are extremely complex and this has led to a vast number of questions about their interpretation. The lack of multilateral dispute resolution mechanisms for determining the distribution of, and the uncertainties associated with, the top-up tax do not work to the benefit of legal certainty. Another issue that has emerged is that some data points that are required for calculation purposes are not yet available in the ERP and financial systems of businesses, which will complicate and fragment the implementation process. In this general section, NOB will address the timing of the bill, the terms and definitions used and the overlaps with the Corporate Income Tax Act 1969 (CITA).

1. Timing of bill

NOB's concern about the fragmented implementation is due, in part, to the fact that the implementation of Pillar 1 seems increasingly unlikely because of the lack of support for these rules in US Congress in combination with the package principle that is supported by some countries that stand to benefit mainly from Pillar 1, but much less so from Pillar 2 (e.g. China and India). In addition, NOB would note that the most recent version of the directive proposal no longer includes the Council statements that endorsed the package principle.[2] If the Netherlands or the European Union (EU) goes through with the implementation without heeding this dynamic, there may well be consequences for their competitive position.[3]

[1] https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.pdf.
[2] https://data.consilium.europa.eu/doc/document/ST-8778-2022-INIT/en/pdf.
[3] Heckemeyer, Removal of taxation-based obstacles and distortions in the Single Market in order to encourage cross border investment, Study Requested by the FISC Subcommittee, July 2022.

What is more, expectations are that the new rules will be too complex for a number of developing countries.[4] Which scenarios does the Dutch government foresee? (QUESTION 1) Rather than the envisioned uniformity and a certain level of stability, a fragmented landscape seems to be developing with a far-reaching impact on cross-border business. Does the government agree and share this concern? (QUESTION 2)

2. Aim and purpose

As indicated in the draft bill, the bill will introduce, by way of separate tax-levying legislation, a tax to ensure a global minimum level of taxation for multinational groups and large domestic groups. This is in line with the international agreements, which have been endorsed by the Netherlands, among other countries. The draft bill is based on the compromise text of the directive proposal of June 16, 2022[5], which stipulates that this directive will ensure consistency in transposition into national law of the Pillar 2 rules across EU Member States and that they will be applied in order to prevent them being contrary to European law.

The aim of Pillar 2 is two-fold. The first aim is to lower the incentive for businesses to shift their profits to low-tax countries and the second is to institute a threshold for tax competition between states. The idea is that the rules would have to be applied globally to achieve this. Based on the current economic and geopolitical developments, NOB doubts whether global application would be feasible, however. NOB wonders whether the Netherlands should want to be one of the first countries to introduce minimum taxation. (QUESTION 3) The OECD's economic impact assessment dates back to before these major developments. The directive proposal does not come with an impact assessment and the fiscal clause of the draft bill mentions extensive provisos and uncertainties. Does the government have an up-to-date fiscal estimate? (QUESTION 4)

The representative of the Hungarian government who is Hungary's negotiator with the EU and the OECD said recently (at a conference organized by the Estonian Ministry of Finance) that, contrary to the OECD model rules, the fact that the directive proposal does not offer optionality, was a reason for Hungary not to endorse it at this time.[6]

[4] https://www.taxnotes.com/tax-notes-today-international/tax-reform/developing-country-gains-pillars-are-limited-report-says/2022/10/05/7f729?highlight=pillar%202.
[5] https://data.consilium.europa.eu/doc/document/ST-8779-2022-INIT/en/pdf.
[6] https://www.taxnotes.com/tax-notes-today-international/corporate-taxation/estonia-eyes-big-eu-countries-moves-global-minimum-tax/2022/10/28/7f9by?highlight=pillar%202

How does the government weigh that argument? (QUESTION 5) Should the Netherlands also have more leeway in adopting the OECD model rules? (QUESTION 6) It seems conceivable, for example, that a choice could be made not to apply the UTPR (undertaxed payment rule) to the countries on the list of developing countries of the Decree for the Avoidance of Double Taxation 2001 or to countries that have a tax system comparable to the Netherlands, as well as with which the Netherlands has a balanced trade balance, is this something that is being considered by the government? (QUESTION 7) The directive proposal does not provide scope for that.

3. The Netherlands playing a leading role during the implementation of Pillar 2

As indicated, the Netherlands has chosen to take a leading role internationally in the implementation of Pillar 2. The NOB recognizes the commitment of the Dutch government to make Pillar 2 a success, preferably EU-wide by means of a directive. The NOB also recognizes that early submission of the proposed Minimum Taxes Act 2024 for consultation may increase the quality of the intended legislation (in both domestic and foreign local Pillar 2 implementing legislation). The NOB commends this commitment, but reiterates the concerns of early Dutch implementation, without simultaneous (European) implementation. In that context, the NOB emphasizes that the Dutch economy, as an open market economy with a small home market, is fundamentally different from the large countries with which the Netherlands for the time being assumes a leading role (Germany, France, Spain and Italy).

The NOB asks whether the Netherlands will continue to act in line with this leading role in the follow-up to Pillar 2, and by extension asks for a response to the following points:

- The draft bill deals only very briefly with the role of the Dutch Tax and Customs Administration. According to the NOB, the Netherlands' leading role includes a proactive Dutch Tax and Customs Administration that offers taxpayers falling within the scope of the draft bill the opportunity to efficiently obtain advance certainty on issues. The NOB would therefore like to learn how the role of the Dutch Tax and Customs Administration will be shaped with regard to the proposed Minimum Taxes Act 2024 and in what way the Netherlands' leading role will be reflected in it. For example, do the same procedures apply as for (international) rulings? (QUESTION 8) Is joint learning by the taxpayer and the Dutch Tax and Customs Administration on how to apply this legislation in practice possible along the lines of horizontal monitoring? Is the Dutch Tax and Customs Administration's 'mindset' on this issue in line with its leading role? (QUESTION 9)

- The NOB asks for confirmation that, given the novel and complex nature of the draft bill, differences in interpretation will be dealt with sympathetically in the first few years in the situation where this effectively does not lead to a top-up tax. (QUESTION 10) Given the penalty provisions in the draft bill, the NOB asks whether a similar approach to the introduction of DAC6 can be expected. (QUESTION 11)

- Following on from the previous points, the NOB asks how the Dutch Tax and Customs Administration will deal with differences in interpretation of Pillar 2 issues with other countries. (QUESTION 12) Can a taxpayer be confident that a position taken by the Netherlands will be defended against other countries? (QUESTION 13) Will questions from other countries about Dutch positions be answered initially by the Dutch Tax and Customs Administration or forwarded to the taxpayer? (QUESTION 14)

- In the area of the legal development of Pillar 2, the Netherlands could play a leading role by publicly sharing its knowledge of and views on Pillar 2. The Netherlands already does this with rulings and - the NOB understands - soon also with positions of the knowledge groups.[7] In consideration of the international leading role, sharing views in English would even be preferable. This would also benefit smaller Member States, because the NOB has heard that it is very challenging for a limited number of Pillar 2 taxpayers in those countries to acquire knowledge about Pillar 2.

4. Ensuring legal certainty and outstanding issues

As indicated, the OECD model rules and the compromise text of the proposed directive of June 16, 2022 form the basis for the draft bill. On the one hand, this is understandable; on the other hand, many issues are still being discussed at the negotiating table in Paris. The OECD is still negotiating the Implementation Framework, including the Administrative Guidance. The topics discussed include the safe harbours for Pillar2 (temporary and permanent), guidelines to which QDMTTs must conform, the treatment of tax incentives, the top-up tax in situations where a constituent entity incurs a loss (paragraph 4.1.5 of the model rules), dispute resolution, the coexistence of the US GILTI (Global Intangibles Low Tax Income) rules with the OECD model rules and the GloBE (Global Anti-Base Erosion) Information return (top-up tax information return).

[7] https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2022/10/21/antwoorden-op-kamervragen-over-het-niet-publiceren-van-%3Cspan%20class=.

Some topics are administrative in nature, but some others are not. These guidelines, or some of them, are expected in December 2022. In view of all these outstanding issues, the draft bill lacks fundamental elements.

According to the NOB, to promote legal certainty, a number of these fundamental issues should be regulated by the OECD at the level of model rules rather than through administrative guidelines. After all, a national court will primarily look at the text of the Dutch law and its underlying model rules. How will the government ensure that these outstanding issues are uniformly explained and implemented? (QUESTION 15) There is already a delegation provision for safe harbours. Is the government considering a Dutch implementing act? (QUESTION 16)

The OECD model rules make no provision for dispute resolution. Disputes are expected to arise between countries about the level and allocation of the top-up tax. The question is whether the consultation procedure under Article 25 of the OECD Model Convention provides a solution. Is the government willing to enter into consultations with other countries under the banner of a bilateral tax treaty if such a dispute arises? (QUESTION 17) Is the government prepared to push for the application of the EU Arbitration Directive to the minimum profit tax in Brussels? (QUESTION 18) What is the Netherlands' commitment in the OECD where dispute resolution under the Minimum Taxes Act 2024 is concerned? (QUESTION 19)

Recitals 18 and 19a to the draft proposed directive suggest that Member States incorporate the OECD's additional guidelines into their national legislation. From the point of view of legal certainty and uniform application of the OECD model rules in the EU, this is insufficient. Is the Netherlands prepared to push for the inclusion of the OECD's additional guidelines in the proposed directive or, if the directive is adopted before the OECD publishes the additional guidelines, in a new directive? (QUESTION 20)

5. Terms, definitions and concurrence with Corporate Income Tax Act 1969 (*Wet Vpb1969*)

Interpretation in accordance with the directive and status of OECD Commentary

On the basis of the Supreme Court's judgment of August 10, 2007[8], an obligation to interpret in accordance with the directive cannot hinge on the result of a legislative-historical interpretation of the national provision in question, if the wording of that provision permits an interpretation that brings it into line with the directive.
That will only be otherwise if the deliberate intention to make the national legislation deviate from what the directive would oblige or leave free was unambiguously expressed.

[8] Supreme Court, August 10, 2007, no. 43169, ECLI:NL:HR:2007:AZ3758.

The proposed directive requires that the OECD Commentary be used as a source of illustration and explanation when implementing the text of a directive. To that extent, the OECD Commentary thus carries over into Dutch law if the legislation is based on a directive. This is also recognized in the draft bill, as it notes that the OECD Commentary can serve as a source of interpretation if the (national) legislative text is in line with the OECD model rules. This explanation is helpful in interpreting the national law. Nonetheless, the NOB requests the government to provide further clarification on which points are not aligned with the OECD model rules. In other words, when is there an 'unequivocal and deliberate intention' to make national law deviate from the OECD Commentary? (QUESTION 21)

Furthermore, the term 'OECD Commentary' is defined in the draft bill as the OECD Commentary as adopted on March 11, 2022. This definition suggests that subsequent amendments to the OECD Commentary are of lesser relevance to the interpretation of the Dutch implementation. The NOB requests the government to confirm that at the time of the adoption of the legislation, alignment will be sought with the latest OECD Commentary. This ensures that any changes to the OECD Commentary (made between March 11, 2022 and the adoption of legislation) are relevant to the interpretation of the national law. (QUESTION 22)

It is also possible that the OECD Commentary is updated after the adoption of legislation. These amendments to the OECD Commentary may also be of great importance for the interpretation of domestic law. However, the national legislative text in that case is based on an older version of the OECD Commentary. In the context of bilateral tax treaties, the Supreme Court[9] has explained the relevance of the OECD Commentary published after a tax treaty has been concluded (treaty posterior commentary). It follows from this judgment that relevance can accrue to treaty posterior commentary if it specifies or clarifies the relevant provision or treaty anterior commentary. Does the government believe that the same reasoning should be followed for subsequent amendments to the OECD Commentary on the model rules? (QUESTION 23) Can the government confirm that the intention is to keep national law in line with subsequent amendments to the OECD Commentary as much as possible in the future too, for example by changing the national definition of 'OECD Commentary'? (QUESTION 24)

[9] Supreme Court, October 14, 2022, ECLI:NL:HR:2022:1436.

Interpretation of terms and definitions

As previously stated, the draft bill indicates that the proposal aims to implement the proposed directive[10]. It also indicates that the draft bill has its own conceptual framework and that the definitions in this draft bill apply only in the context of these measures and that the definitions do not affect the interpretation of these terms in tax treaties or domestic legislation and regulations.

However, in the case where the draft bill refers (in)directly to other directives, it is uncertain whether the interpretation of those terms may differ in the context of this draft bill.
Thus, for example, it is in line with the turnover threshold applicable to Country-by-Country reporting (CbCR) rules. Similarly, when calculating a constituent entity's share of the UTPR (undertaxed payment rule) in respect of a low-taxed constituent entity, the term 'the number of employees' also follows CbCR rules. Another example is the term 'tax transparent entity'. This may relate to a reverse hybrid entity. The concept of reverse hybrid entity was previously introduced when ATAD2 was implemented, stemming from BEPS 1.0.

The NOB would like to see confirmation that where this draft bill refers to other directives implemented in national legislation and regulations, the interpretation and application of these terms can be followed in Dutch regulations. (QUESTION 25)

Corporate income tax act participation exemption versus draft bill

By extension, the NOB requests that attention be paid to the difference between the Corporate Income Tax Act 1969 (*Wet Vpb 1969*; CITA) and the draft bill. This draft bill may raise questions that have already been answered for CITA. Thus, for example, there is now extensive case law on the scope of the participation exemption in CITA that may also be relevant to the Minimum Taxes Act 2024[11]. The explanatory note to the participation exemption in the draft bill, on the other hand, is very brief. Can the government indicate how it will deal with the existing explanation and case law that may be relevant to the Minimum Taxes Act 2024? (QUESTION 26)

[10] https://data.consilium.europa.eu/doc/document/ST-8779-2022-INIT/en/pdf.
[11] See for example Supreme Court, July 10, 2020, no. 18/03268, BNB 2020/160.

Top-up tax due to difference between CITA and draft bill

Due to the differences between the draft bill and CITA, results may be recognized in qualifying income or loss (the fraction's denominator) while, for example, due to the application of the participation exemption or the liquidation loss scheme, no corporate income tax is included in the covered taxes (the fraction's numerator).

Does the government consider these different outcomes reasonable and defensible given the purpose and scope of the participation exemption in CITA? (QUESTION 27) Does the government see risks on this top-up tax in relation to bilateral tax treaties where an exemption has been agreed? (QUESTION 28)

Also when applying the Innovation Box and the tonnage regime (to the extent that the related income does not fall under the exclusion of Section 6.12 of the draft bill), whether or not in conjunction with other differences, the effective rate in CITA may be lower than the minimum tax rate of 15%. In those cases, additional tax is levied on those effectively low-taxed profits. The benefit is negated in those cases. How does the top-up tax in these cases relate to the Netherlands' competitiveness for multinational groups? (QUESTION 29)

A free depreciation regime, where taxpayers can sometimes choose to depreciate more quickly, but more importantly, can also choose to depreciate more slowly, could be a solution in some cases where a Dutch taxpayer is suddenly in danger of ending up in a top-up tax situation, without this leading to a net loss of Dutch tax revenue. In this context, the NOB also refers to the letter with suggestions to support the business climate.[12] Is the government considering free depreciation and/or other measures to bring the tax base for CITA for these taxpayers, optionally, more in line with the Pillar 2 tax base? (QUESTION 30) The top-up tax limits the ability to influence taxpayers' behavior (incentive) through tax rules in CITA. Will a process be put in place to assess the policy objectives of new legislative changes against Pillar 2? (QUESTION 31)

[12] NOB, Addressing the business climate policy, letter dated July 25, 2019.

Simplification of CITA

A downward transfer pricing adjustment is sometimes not taken into account on the basis of Sections 8ba-8bd CITA. However, under Pillar 2, the Netherlands will top-up the corresponding upward adjustment at a foreign constituent entity. This could be avoided by allowing the top-up tax under Pillar 2 to be taken into account for the question whether it is subject to a profit tax. The NOB would like to see this clarified. (QUESTION 32) As Pillar 2 will ensure that entities of groups that will be subject to these rules will in the future be subject to an effective rate of 15% in at least one jurisdiction, it could even be questioned whether Sections 8ba-8bd CITA are then still necessary. After all, for those entities, there is then effectively no possibility of a situation arising where a corresponding upward adjustment, asset or liability is not included in a profit tax.

Furthermore, a number of complex anti-abuse and anti-evasion rules in CITA may be redundant. By introducing Pillar 2, multinational companies, for example, will everywhere be subject to an effective tax rate of 15%. This eliminates the need for Dutch CFC legislation that prevents profit shifting to foreign low-taxed controlled entities. The same can be said about interest deduction limitations. Due to the lack of a tax motive, at least the presumption of proof that the transaction is business-motivated would be appropriate. What amendments to CITA is the government considering in connection with the introduction of this legislation? (QUESTION 33)

Arm's length adjustments

In addition, to determine the qualifying income or loss of a constituent entity, any transaction between constituent entities domiciled in different states that is not recognized at the same amount in the financial statements of those constituent entities, or is not in line with the arm's-length principle, is adjusted.

The question, however, is how 'not in line with the arm's length principle' should be interpreted. After all, states may apply the arm's length principle differently but believe they apply the correct interpretation. To what extent does this draft bill's interpretation of the arm's length principle differ from the Combating mismatches in the application of the arm's length principle Act (*Wet tegengaan mismatches bij toepassing zakelijkheidsbeginsel*)? (QUESTION 34) The purpose of the latter Act is to eliminate transfer pricing differences that arise as a result of a different application of the arm's length principle, leading to part of a multinational company's profits not being included in a profit tax. Should the same adjustments be made for determining qualifying income or loss? (QUESTION 35)

The OECD Commentary on the OECD model rules (paragraphs 96-109 of the OECD Commentary on Article 3.2.3) contains additional rules (and examples) that deal with adjustments to income that could lead to double or no taxation, and has specific rules for 'undertaxed jurisdictions'. The NOB requests clarification of the relevance of this Commentary for Dutch legislation. (QUESTION 36)

Adjustments of transfer prices in a low-tax state after the filing of the Minimum Taxes Act 2024 return may result in an increase in the covered taxes for a previous fiscal year. However, under the proposed Section 7.6(1) of the draft bill, that additional tax is taken into account as an adjustment in the fiscal year in which the adjustment is made. This effectively leads to double taxation for taxpayers. The NOB also asks the government to consider how such double taxation relates to (the principles of) Article 9 of the OECD Model Convention. (QUESTION 37)

Pillar 2 fair tax according to Dutch standards

The Explanatory Memorandum (page 4) includes the following passage:

> *'The top-up tax by virtue of Pillar 2 measures in respect of a low-taxed constituent entity in a state is, moreover, not regarded as a reasonable tax according to Dutch standards or a fair tax for the purposes of corporate income tax.'*

The NOB asks the government to elaborate on the background to this comment. (QUESTION 38) The IF agreement aims for a global effective rate of at least 15%. The rationale for Dutch schemes requiring a reasonable or fair tax according to Dutch standards seems to be consistent with this. The NOB wonders why a tax under the OECD model rules or similar minimum taxes is not (by definition) considered a reasonable or fair tax. (QUESTION 39)

The NOB requests clarification of what the significance will be of a top-up tax under Pillar 2 measures for the application of the Regulation on Low-tax States and Non-cooperative Jurisdictions for Tax Purposes, which is relevant for the Dividend Withholding Tax Act 2021 (*Wet Bronbelasting 2021*), the CFC measure in Sections 13ab and 15e(11) CITA and obtaining advance certainty (QUESTION 40). Is the government, partly for simplification purposes, considering amending the definition of low-tax states so that introduction of such a top-up tax by the state in question will result in the state in question no longer being classified as low-tax? (QUESTION 41)

Covered taxes permanent establishment

Section 7.5(1) of the draft bill regulates the allocation of covered taxes of a constituent entity to a permanent establishment. The section-by-section commentary states that if the profit generated by the permanent establishment is mixed with the other income of the principal entity, the total tax payable should be determined and split between the principal entity and the permanent establishment.

The NOB requests clarification of how to deal in the Dutch situation with the fact that, when applying the source exemption of Section 15e CITA, there is a difference between the contribution to worldwide profit and the profit for double tax relief purposes under the source exemption. (QUESTION 42)

Should the corporate income tax attributable to the elements that are included in the worldwide profit but not in the profit for double tax relief purposes, such as foreign exchange gains and differences in the way the tax base is determined in the Netherlands and abroad, be attributed to the permanent establishment in accordance with example 51 in the section-by-section commentary for the purposes of Section 7.5 of the draft bill? (QUESTION 43) Is it true that in the case of a Dutch head office, this could lead to a top-up tax in the Netherlands under certain circumstances? (QUESTION 44)

> **Example**
> Constituent entity A is domiciled in the Netherlands and has a permanent establishment in state X that is subject to profit tax there at a rate of 25%. The permanent establishment makes a profit of EUR 100 and EUR 25 is payable in tax on this in state X. Constituent entity A does not make any profit itself. The profit of the permanent establishment according to Dutch standards, and also the profit recognized in the financial statements for accounting purposes, is EUR 120. The Netherlands includes the entire profit generated by the permanent establishment in the worldwide profit. The source exemption amounts to EUR 100. The net tax payable in the Netherlands is (rounded) 25% of EUR 20 = EUR 5. State X's qualifying income and loss under Section 6.13 is EUR 100. The Netherlands' qualifying income and loss is EUR 120 - EUR 100 = EUR 20. Assuming that the tax payable in the Netherlands must be allocated to state X, the effective rate in the Netherlands is 0% and the effective rate in state X is 30%. This leads to a top-up tax in the Netherlands of 15% over EUR 20.

CFC rules and minimum tax

Section 7.5(3) of the draft bill regulates the allocation of taxes imposed under application of a CFC rule. Section 7.5 applies to all minimum taxes, including the QDMTT (qualified domestic minimum top-up tax). The NOB requests confirmation that as a result of this, foreign CFC taxes[13] levied in respect of income of Dutch constituent entities increase the relevant tax of these Dutch constituent entities, and effectively take precedence over the QDMTT (qualified domestic minimum top-up tax). (QUESTION 45)

In the case of example 16 of the draft bill included in the section-by-section commentary, the allocation of Dutch CFC taxes to a foreign CFC state is illustrated in the context of the top-up tax in the Netherlands. The NOB requests confirmation that the government believes that allocation should also take place in such a manner if the CFC state has introduced a QDMTT. Does this also mean that the government believes that in such a case, the CFC tax takes precedence over the QDMTT (qualified domestic minimum top-up tax), also in light of the comment that top-up tax under Pillar 2 measures in respect of a low-taxed constituent entity in a state should not be considered as a reasonable tax or fair tax for the purposes of CITA? (QUESTION 46)

B. International focus points

In the October 2020 blueprints, the OECD, in the NOB's view, pays too little attention to the compatibility of the IIR/UTPR (income inclusion rule/undertaxed payment rule) with tax treaties concluded by countries. Meanwhile, the compatibility of the undertaxed profits (and no payments) rule with the allocation of taxing rights provided for in Article 7 of the OECD Model Convention is increasingly questioned in the literature. The jurisdictional determination of the effective tax rate potentially constitutes discrimination within the meaning of Article 24 of the OECD Model Convention.[14] For this reason, the question whether the minimum profit tax also does not require a multilateral treaty is becoming increasingly important. A model convention would also be most welcome for legal certainty and uniform application. Is the IIR (income inclusion rule) and UTPR (undertaxed payment rule) provided for in the draft bill in line with the tax treaties concluded by the Netherlands? (QUESTION 47)

As previously stated, if the Netherlands decides to unilaterally implement the minimum profit tax, questions of compatibility with EU law (freedom of establishment/movement of capital) may arise. Consideration could be given to applying the IIR (income inclusion rule) to low-taxed profits of, for example, a Hungarian-based constituent entity of a Dutch multinational. In that case, the top-up tax would adversely

[13] Foreign CFC taxes could potentially include the GILTI tax levied by the United States.
[14] https://www.taxnotes.com/tax-notes-today-international/base-erosion-and-profit-shifting-beps/contemplating-multilateral-convention-implement-oecd-pillars-1-and-2/2021/06/16/76k35

affect the local competitive position of the group in question, which is at odds with the right to free movement. Without European harmonization on tax matters, taxpayers are free to exploit tax differences between Member States, such as effective differences in rates, according to well-established case law of the Court of Justice of the European Union (CJEU), except in cases of abuse of law. In the case of operating business activities, there is no abuse of law.

Is the government aware of this potential incompatibility? (QUESTION 48) What risks does the government itself see? (QUESTION 49) These questions are all the more pressing if Pillar 2 implementation does not take place through an EU directive but unilaterally. This is because a Pillar 2 directive requires unanimity of all Member States, making it less likely to conflict with primary EU law.

6. Treaty law focus points

Extraterritorial top-up tax

When the Pillar 2 rules are introduced, no parallel adjustments to countries' tax treaties are envisaged for the time being. The question arises whether the envisaged extraterritorial top-up tax up to an effective rate of 15% is possible under the allocation rules of tax treaties, and then not only for the Subject To Tax Rule (STTR) and Switch-Over Rule (SOR) as also implied by the OECD itself, but also for the IIR (income inclusion rule) and UTPR (undertaxed payment rule). This is of vital importance from a Dutch perspective, since tax treaties by definition limit domestic law (i.e. *treaty overrides* are not possible under the Dutch system).[15] (QUESTION 50)

The government has indicated that the separate tax law implementing the Pillar 2 rules should in principle be regarded as a tax that is subject to tax treaties.[16] According to the government, there is no need to inform treaty partners separately about the introduction of the separate tax law, because treaty partners will be informed through the relevant working groups at the OECD when the Netherlands has implemented the Pillar 2 rules.[17]

[15] Articles 93 and 94 of the Constitution.
[16] Parliamentary Documents II, 2021/22, 22112, no. 3339, p. 5.
[17] Parliamentary Documents II, 2021/22, 22112, no. 3339, p. 5-6.

The NOB doubts whether this applies in a general sense and also whether it applies to treaty partners that are not part of the OECD working groups.

CFC rules

According to the OECD Pillar 2 Blueprint as published in October 2020, treaty effectuation for application of the IIR (income inclusion rule) is secured.[18] In this context, an analogy is made with the passages in the OECD Commentary on the treaty effect of CFC rules.[19] The NOB notes that the treaty effect of CFC rules is viewed differently in various countries.[20] In addition, the objectives of CFC rules and Pillar 2 are not entirely the same.

CFC rules are in particular aimed at combating abuse (top-up tax on the artificial diversion of the domestic tax base to a low-taxed foreign country), while Pillar 2 aims to reduce the incentive for companies to shift profits to low-tax states (top-up tax on foreign tax base that is subject to low tax there). Furthermore, Pillar 2 aims to set a lower limit to tax competition between states.[21] The NOB therefore questions whether the analogy made with CFC rules holds.[22] (QUESTION 51) The NOB also wonders whether and to what extent the arm's length principle enshrined in the treaty equivalent of Article 9 of the OECD Model Convention precludes the envisaged extraterritorial top-up tax. (QUESTION 52) After all, top-up tax goes beyond the allocation of the tax base to countries on the basis of the arm's length principle.

The same applies to the non-discrimination provisions in the treaty equivalent of Article 24 of the OECD Model Convention, especially Article 24(5). After all, top-up tax does not take place in the same way domestically, even under the application of the domestic top-up tax measure as currently provided for in the draft bill.

[18] OECD, *Tax Challenges Arising from Digitalisation - Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, Paris: OECD Publishing 2020, par. 10.4.2.
[19] Commentary to Article 1 OECD Model Convention, paragraph 81.
[20] D. Cane, '*Controlled Foreign Corporations as Fiscally Transparent Entities. The Application of CFC Rules in Tax Treaties*', World Tax Journal 2017, vol. 9, no. 4, par. 3.4 en V. Chand, A. Turina & K. Romanovska, '*Treaty Obstacles in Implementing the Pillar Two Global Minimum Tax Rules and a Possible Solution for Eliminating the Various Challenges*', World Tax Journal 2022, vol. 14, no. 1, par. 2.
[21] P. 2 of the consultation document.
[22] See also M.F. de Wilde, *'Why Pillar Two Top-Up Taxation Requires Tax Treaty Modification*', Kluwer International Tax Blog 2022 (January 12). Incidentally, Tulp believes that implementation of the Pillar 2 rules does not create a conflict with tax treaties (R.L. Tulp, 'Een verkennende analyse van de OESO Pillar 2 blauwdruk', MBB 2021/28, paragraph 4.1).

Relationship of the UTPR (undertaxed payment rule) to tax treaties

A separate issue concerns the relationship of the UTPR (undertaxed payment rule) to tax treaties. It was previously indicated that this would be considered in more detail.[23] Unfortunately, the draft bill does not include anything about this. Having chosen a separate top-up tax rather than a deduction limitation[24], the NOB wonders how this top-up tax relates to the agreements agreed in bilateral tax treaties. (QUESTION 53) After all, the top-up tax is allocated in proportion to the number of employees and tangible assets in the states where such a measure applies, while the presence of a permanent establishment is not a requirement.[25] This does not seem to fit with the traditional principles governing the distribution of the power to tax.

For the sake of completeness, the NOB points to the passage on page 33 in the OECD Commentary on the OECD model rules which states that

> *'[t]he adjustment under the UTPR (…) should be coordinated with (…) a jurisdiction's international obligations, including those under Tax Treaties.'*

A more technical point

Regarding the relationship of Pillar 2 to tax treaties, Section 1.3(11) of the draft bill more specifically stands out. The provision does not apply if the treaty on the avoidance of double taxation prohibits its application.

The NOB wonders, in general terms, how it is possible that Pillar 2, in the government's view, does not conflict with tax treaties, but possibly does with this specific provision. If that is related to treaty residence, the effect of this provision – in conjunction with the seventh paragraph of that provision – is not entirely clear to the NOB.

Pursuant to Section 1.3(7) of the draft bill, a Dutch BV (parent entity) with its actual management in a treaty state is, in the case of a treaty with an effective management tie-breaker,[26] deemed to be established in the relevant treaty state.

[23] Parliamentary Documents II, 2021/22, 22112, no. 3339, p. 5.
[24] P. 19 of the consultation document.
[25] See also J. Li, '*The Pillar Two Undertaxed Payments Rules Departs From International Consensus and Tax Treaties*', Tax Notes Federal 2022, vol. 174.
[26] If there is a MAP tie-breaker, residency for treaty purposes will depend on the mutual consultation procedure.

If there is no qualifying IIR (income inclusion rule) in the treaty state, the BV is deemed to be established in the Netherlands by application of Section 1.3(11) of the draft bill for the purposes of Chapter 4, unless the applicable treaty on the avoidance of double taxation prohibits the application of such a measure. Since there was treaty residence in the state of effective management (which – if the NOB understands correctly – prohibits application of the measure), the NOB wonders what specific situation this provision refers to. (QUESTION 54)

Is the IIR (income inclusion rule) and UTPR (undertaxed payment rule) provided for in the draft bill in line with the tax treaties concluded by the Netherlands? (QUESTION 55)

7. Considerations in relation to the United States and US multinationals

General

Introduction and implementation of the Minimum Taxes Act 2024 without clarity on bottlenecks that may arise in relation to the United States could lead to a number of complications.

The US has two forms of a minimum profit tax, i.e. the tax based on their Global Intangibles Low Tax Income, or GILTI, rules[27] and the Corporate Alternative Minimum Tax, or CAMT (formerly Book Minimum tax, or BMT) to be introduced by 2023.[28] Both GILTI and the CAMT are not technically qualifying IIR within the meaning of the OECD model rules (see below for a brief comparison).[29] The Build Back Better Act, which was not enacted, envisaged adjustments to bring the GILTI rules in line with the OECD model rules. These adjustments were not included in the Inflation Reduction Act 2022; instead, the CAMT was introduced.

Following the recent midterm elections in the United States, fundamental changes to the US tax system until at least the 2024 elections, seem highly unlikely. In our assessment, this means that the chances of the GILTI rules still being amended are nil. If other countries do adopt the OECD model rules, there is a real risk of double taxation and a risk of tension in the relationship between the United States and those countries.

[27] Tax Cuts and Jobs Act van 2017; https://www.congress.gov/bill/115/house-bill/1/text
[28] Inflation Reduction Act 2022, IRA 2022; https://www.congress.gov/bill/117/house-bill/5376/text
[29] See for example https://www.taxnotes.com/tax-notes-today-international/alternative-minimum-tax/remade-corporate-amt-walks-and-talks-duck/2022/08/22/7dygh?highlight=herzfeld; https://www.taxnotes.com/tax-notes-today-international/global-intangible-low-taxed-income-gilti/questioning-promise-gilti-conformity/2022/07/11/7dm00?highlight=herzfeld.

The NOB considers (economic) double taxation an undesirable outcome that is not compatible with the purpose and scope of the Minimum Taxes Act 2024 and international tax law in general.

Comparison of GILTI and CAMT with OECD model rules

Although the three different rules aim to achieve a similar policy objective (i.e. that multinational companies pay a minimum amount of profit tax), they are technically different.

The scope is different: GILTI has no lower limit; the OECD model rules use a lower limit of EUR 750,000,000 turnover and the CAMT uses a lower limit of USD 1 billion profit for accounting purposes. The tax base is different. For GILTI, the US corporate income tax base is used. For the OECD model rules, the profit for accounting purposes with some adjustments.

The latter also applies to the CAMT, albeit with different adjustments. A major difference between the various sets of rules is caused by the way in which the effective tax rate (ETR) is calculated. The OECD calculates ETR per jurisdiction and both GILTI and the CAMT do so on a global basis (global blending). The OECD uses 'deferred tax accounting' to account for losses. GILTI and the CAMT do not recognize loss set-off or the carryover of losses from 2019 and beyond, respectively. GILTI and the OECD model rules include a 'substance carve-out', albeit a different one, while the CAMT does not. Although the OECD seems to be working on the 'coexistence' of GILTI with the OECD model rules, the technical differences appear to rule out the possibility of GILTI and the CAMT being a qualifying IIR. In this context, the NOB has a number of questions:

- Is the government aware of the ambiguities and bottlenecks in the confluence with US tax law and resulting double taxation? (QUESTION 56)
- Has the concurrence with US tax law been taken into account – and if so, to what extent – in the legislative process so far? (QUESTION 57)
- Does the government intend – and if so, how – to clarify and resolve these ambiguities and bottlenecks in the concurrence with US tax law, either bilaterally or multilaterally (in the EU/OECD context)? (QUESTION 58)

US multinationals

The current uncertainty regarding concurrence with US tax law may be an incentive for US multinationals to reconsider their choice of the Netherlands as a country for their European head office and central investment jurisdiction. Should coordinated implementation within the EU fail to materialize, other EU Member States with a similar economic profile that are proceeding later or not even going ahead with local Pillar 2 implementation will be a more attractive alternative for US multinationals, as the IIR (income inclusion rule) there in respect of undertaxed activities will not be applied by the other EU Member State.

Should Pillar 2 implementation by this other EU Member State follow at a later stage, the investments have already moved and – from a Pillar 2 perspective – there is no longer an incentive to bring them back to the Netherlands. As such, simultaneous implementation seems desirable from a strategic point of view.

Is the government aware of the potential impact on the international competitiveness of the Netherlands as well as the Dutch business climate of the envisaged legislation in relation to US multinationals? (QUESTION 59)

Has – and if so, how and to what extent – the international competitive position of the Netherlands as well as the Dutch business climate been taken into account with regard to the legislative process so far, the integrated assessment framework and – more specifically – the currently pursued implementation date, also in relation to other (European) countries? (QUESTION 60)

UTPR (undertaxed payment rule) and top-up tax on US multinationals

The question arises how the Netherlands wishes to deal with the possible application of the UTPR (undertaxed payment rule) and the top-up tax on US multinationals, assuming that GILTI and the CAMT are not a qualifying IIR (income inclusion rule). The NOB would like to emphasize the political sensitivity that this could potentially entail. The NOB refers in this context to the recent advance of the digital services tax (DST), a tax that would affect US tech companies in particular. The United States responded to the possible introduction of this tax with policy that envisaged the intention of introducing (increased) import duties on typical exports from countries that were considering a DST. As such, a tax matter in relation to the United States – if weighty enough – seems sufficient to trigger policy implications in non-tax policy areas, even though the United States, as a member of the Inclusive Framework, actively contributed to the realization of the Pillar 2 rules.

What response from the United States does the government think is conceivable if the Netherlands, alone or together with some other EU Member States, potentially starts to impose top-up taxes on US multinationals? (QUESTION 61) And could a possible response be grounds for (temporarily) not applying the UTPR (undertaxed payment rule) to US-based multinationals? (QUESTION 62)

The latter question is all the more pressing because the United States has included a large number of 'green' tax incentives and subsidies in the Inflation Reduction Act 2022 (IRA), which will reduce the effective tax rate of US multinationals because they will lower either the numerator or the denominator of the fraction used to calculate the effective tax rate under the OECD model rules.

C. Procedural law focus points

Return-based tax

For the Minimum Taxes Act 2024, tax payable on the filing of a tax return (return-based tax) has been opted for. This means that the taxpayer formalizes the tax liability by filing a return and subsequently remits the tax due.

The tax inspector does not issue an assessment. Page 4 of the explanatory memorandum to the draft bill states that a return-based tax was chosen for two reasons. Firstly, the taxpayer has better access to the relevant financial data and, secondly, this method of taxation facilitates practicability for the Dutch Tax and Customs Administration.

The NOB notes that the minimum tax is an addition to corporate income tax, which is levied by way of assessments (assessment-based tax). The NOB therefore believes that an assessment-based tax should also be the starting point for the Minimum Taxes Act 2024, given the nature of a profit tax and the interaction between the corporate income tax and the minimum tax. In our view, the reasons given in the explanatory statement to the legislation for departing from this are not convincing. After all, the tax return and remittance are based on the withholding information return, which also provides the Dutch Tax and Customs Administration with the most relevant information. Furthermore, the method of taxation by means of an assessment provides a greater degree of legal protection than a return-based tax. Given the complexity of the minimum tax rules, a sufficient level of legal protection is appropriate in the NOB's view.

Additional tax assessment and interest on tax due

Interest on tax due general

The proposed Section 11.3 provides that interest on tax due will be charged in respect of an additional tax assessment. This will follow the existing arrangements, with the understanding that interest on tax due will only take effect after the payment deadline has expired. The rate for interest on tax due will be announced by Order in Council at a later date.

The NOB would like to emphasize that – with the rates for interest on tax due varying widely (4% for personal income tax and dividend tax and 8% for corporate income tax and withholding tax, among others) – there is a real need for early disclosure of the applicable interest rate.

As far as the NOB is concerned, the 4% rate is better suited to the Minimum Taxes Act 2024, as the minimum tax has an international background and this rate is more in line with the rates for interest on tax due applied in other countries. For example, in 2021, the German constitutional court declared the German interest on tax due of 6% to be contrary to the German constitution[30], as the actual market rate is substantially lower. The NOB wonders whether clarification on this point can already be provided in the short term. (QUESTION 63)

Section 8.4(3), supplementary tax and interest on tax due

In respect of qualifying QDMTT (qualified domestic minimum top-up tax), the bill provides in the proposed Section 8.4(3) that an amount of top-up tax that is not paid within four fiscal years after the fiscal year in which the top-up tax became due will be treated as additional top-up tax for the fifth fiscal year. According to the proposed Section 11.2(3), the power to impose supplementary tax on this additional top-up tax will then end.

The NOB wonders, whether under this provision, the power to impose interest on tax due also ends. (QUESTION 64) Should that be the case, then the arrangement in respect of interest on tax due seems unbalanced. After all, in the case of payment defaults that lead to supplementary tax within four fiscal years, interest on tax due can be imposed for the entire period, while for payment defaults that lead to additional top-up tax for the fifth fiscal year, on the contrary, absolutely no interest on tax due can be imposed. The NOB wonders whether the foregoing effect is intended. (QUESTION 65)

[30] Bundesverfassungsgericht, July 8, 2021, case numbers 1 BvR 2237/14 and 1 BvR 2422/17.

Penalty

Section 12.3 proposes a sixth-category penalty if the top-up tax information return is not filed, not filed on time or for the correct amount. This is in line with the amount of the penalty in respect of country reports, reportable cross-border arrangements and the exchange of information in the digital platform economy.

The NOB notes that a penalty of the sixth category will be a maximum of EUR 900,000 in 2022 and wonders to what extent this amount relates to the seriousness of the punishable offense, especially when compared to the maximum default penalty that can be imposed for failure to file a tax return, incorrectly, or on time. (QUESTION 66)

Liability

Section I of the draft bill contains an addition to Section 39 of the Tax Collection Act 1990 (*Invorderingswet 1990*), which provides for joint and several liability of each group company in respect of the minimum tax.

The NOB wonders whether this means joint and several liability of all constituent entities worldwide, or whether the liability is limited to Dutch constituent entities. (QUESTION 67) If the latter is the case, the NOB suggests adding the words 'established in the Netherlands' to the legislative text. If a global scope of application is indeed envisaged, the NOB wonders how the Dutch Tax and Customs Administration will determine which entity is liable for the tax liability. (QUESTION 68)

Top-up tax information return and tax return

Penalty for intent or gross negligence

Pursuant to Section 12.1(3), a Dutch group company does not have to file a top-up tax information return if this is filed by (in short) an affiliated party, provided that that party is established in a state with which the Netherlands has a qualifying exchange agreement. This exception requires the group company to notify the tax inspector which entity is filing the top-up tax information return (Section 12.1(4)). Section 12.3(2) subsequently provides that a penalty of no more than the amount of the fourth category may be imposed if 'it is due to intent or gross negligence that the obligation referred to in Section 12.1(4) has not been or is not being complied with, on time, in full or correctly by the constituent entity or designated local entity'. The NOB requests the Deputy Minister to confirm that this penalty can only be imposed on a Dutch group company if the offense is the result of intent or gross negligence of that Dutch group company itself. (QUESTION 69)

Objections and appeals against choices made in the top-up tax information return

Under the proposed Section 12.1(5)(d), the information return contains a summary of the choices made under the relevant provisions of this legislation. These choices may affect the material tax liability. It is conceivable that, on reflection, a particular choice may not be desirable. The NOB wonders whether, and

how, these choices can be revised in (a) the situation where the top-up tax information return is filed in the Netherlands and (b) in the situation where the top-up tax information return is filed by a foreign affiliated entity. For example, will it be possible to file notices of objection and appeals within the statutory time limits against one's own top-up tax information return, or against the top-up tax information return filed by a group company? (QUESTION 70)

Designation under Sections 3.1(3) and 5.1(3) of the draft bill

Section 3.1(2) states that the QDMTT (qualified domestic minimum top-up tax) of all Netherlands-based group companies of a group is imposed as if there is one taxpayer. Section 5.1(2) of the draft bill has a similar provision for the UTPR (undertaxed payment rule).

If one of the group companies established in the Netherlands is the sole parent entity, this entity will be regarded as the taxpayer. If several parent entities are established in the Netherlands, or there is no parent entity established in the Netherlands, one of the group companies will be regarded as taxpayer. Taxpayers can submit a request for this designation, or the tax inspector can designate an entity. The tax inspector will decide by way of a decision open to objection.

The NOB asks the Deputy Minister for clarification on the basis of which criteria the tax inspector will determine which entity will be designated as taxpayer if the Dutch group companies themselves do not submit a request. (QUESTION 71)

D.Practical feasibility

Complexity of preparing GloBE information return (top-up tax information return) based on existing financial reporting

For the calculation of the effective tax rate, the financial reporting standard used for the consolidated financial statements of the ultimate parent entity is in principle followed. A whole series of adjustments must then be made to this, de facto creating a new system that differs from the existing profit determination for accounting and for tax purposes.

The primary purpose of the financial consolidation system is to produce consolidated financial statements in accordance with the group's financial reporting standard. The minimum tax definitions and data points deviate from the accepted financial reporting standards and the information required to prepare the top-up tax information return is therefore (partially) not available in the financial consolidation system (or the appropriate level of detail per entity is missing). In order to obtain the data required for the minimum tax, companies will therefore have to significantly modify their financial systems and processes, or perform significant manual operations on the standard data from the existing financial systems. In this context, the NOB foresees a significant increase in the administrative burden for companies. This can be illustrated by means of a few examples:

- A significant adjustment relates to temporary differences and the related deferred tax expense. The proposed Section 7.3(2) provides that in a state where the applicable tax rate is higher than the minimum tax rate, the deferred tax expense must be recalculated at the minimum tax rate. This recalculation must be performed for each entity and asset category. In addition, the proposed Section 7.3(7) provides that with respect to deferred tax liabilities, if there is no actual payment (and hence settlement of the temporary difference) within five fiscal years after such deferral is formed, the change in the deferred tax liability previously taken into account will be recaptured. On the basis of the proposed Section 7.3(8), a distinction must be made between components subject to recapture and those not subject to recapture. This obligation does not exist under accepted financial reporting standards, nor are financial systems in practice designed to administer it. This requires additional books and records in which all relevant tax deferrals for taxable temporary differences must be kept globally for each entity.

- The consolidation system and other financial systems are used to provide management with insight into the performance of the business units. In practice, the information reported on a business unit basis is sometimes a sub-consolidation of legal entities. Intercompany eliminations and related

deferred taxes are then also tracked in the consolidation system at the business unit level, i.e. not on an entity-by-entity basis as referred to in the proposed Section 1.2.

- The proposed Section 6.1(1) provides that a constituent entity's qualifying income must be determined before consolidation adjustments, including the revaluation of assets and liabilities resulting from acquisition accounting. These 'purchase price accounting adjustments' may not be included. In practice, the ultimate parent entity does not always have the right level of detail to apply these adjustments on an entity-by-entity basis.

Given the number of deviations from accepted financial reporting standards, the level of detail required and case-specific provisions, the preparation of the top-up information return will represent a significant increase in the administrative burden for businesses. Besides developing new financial systems and processes, local financial business administrations worldwide will also have to be educated and trained. In a similar vein, this will have an extensive and complex impact on supervision and control by the respective tax authorities.

With the many deviations from accepted financial reporting standards, tax authorities will also be faced with a new profit determination system that cannot be easily traced back to the ultimate parent entity's consolidated financial statements. The NOB therefore emphasizes the importance of proper safe harbour arrangements to minimize the administrative burden.

E. Chapter 1 – General provisions

Group definition

According to Section 1.2(1) of the draft bill, group is understood to mean, under a:

> *'a set of entities related by ownership or control as defined in the financial reporting standard for the preparation of consolidated financial statements by the ultimate parent entity, including any entity that is not included in those consolidated financial statements solely by virtue of its limited size, materiality, or being held for sale.'*

IFRS 10 contains an exception to the general consolidation rules such that, within the meaning of IFRS 10, 'investment entities' are not permitted to include investments in consolidated financial statements. IFRS 10 instead requires the investment entity to report the investments at their fair value through profit or loss.

> **Example**
> An investment entity within the meaning of IFRS 10 that qualifies as an ultimate parent entity (UPE) holds investments in entities A, B and C. The investment entity within the meaning of IFRS 10 is not an excluded entity as referred to in Section 2.2 of the bill, for example because the investment entity is not subject to supervisory regulation. Under IFRS 10, the investment entity is not permitted to consolidate entities A, B and C, regardless of whether there are controlling interests.

The NOB seeks confirmation that in this example, the investment entity on the one hand and entities A, B and C on the other do not form part of the same group within the meaning of Section 1.2(1) of the bill.

The NOB feels supported in this position given the OECD's CbCR Guidance which indicates that investments of the investment entity are not part of the investment entity's CbCR MNE Group, regardless of whether the investment entity has a controlling interest in the subsidiary held as an investment. (QUESTION 72)

F. Chapter 2 – Scope of application

Section 2.1

Section 2.1 stipulates when the Minimum Taxes Act 2024 applies. Under this provision, the Minimum Taxes Act 2024 applies in respect of a fiscal year to constituent entities (other than excluded entities) that are part of a multinational group or substantial domestic group, which group has revenue of at least EUR 750,000,000 per fiscal year in at least two of the four fiscal years immediately preceding the fiscal year according to the consolidated financial statements of the group's ultimate parent entity.

The NOB points out that what matters in this context is who qualifies as the ultimate parent entity and what is meant by a group and what constitutes consolidated financial statements. With regard to the group and consolidated financial statements, the financial reporting standards of the multinational company are in principle followed. However, the Minimum Taxes Act 2024 leaves room for interpretation in this area.

We illustrate this using the example below:

> A Dutch multinational company prepares its consolidated financial statements at the level of A BV. The family holds a 100% controlling interest in A BV through Family BV. The first step is to identify which entities belong to the group based on the consolidated financial statements at the level of A BV. The NOB observes that there is room for interpretation for determining the entities for the group.
>
> The first view can be formed on the basis of a grammatical interpretation. Based on the definition of the term 'ultimate parent entity' as included in the proposed Section 1.2(1) of the draft bill, in this example, Family BV may qualify as an ultimate parent entity because it holds an immediate controlling interest in A BV. This is based on the assumption that no other entity holds a controlling interest in Family BV.

> As a second view, the NOB notes that it is not clear how paragraphs a – c of the consolidated financial statements definition referred to in Section 1.2(1) of the draft bill relate to paragraph d of the aforementioned definition. Indeed, paragraph d includes a fiction if the ultimate parent entity does not prepare consolidated financial statements (which is the case at the Family BV level).

However, based on the draft bill, consolidated financial statements may still exist if the ultimate parent entity (in this case Family BV) 'would have been required to do so, would have been prepared in accordance with an accepted financial reporting standard (...)'. The NOB notes here that 'would have been prepared' implies that this is an optional provision under a financial reporting standard. NOB wonders how in this second view, in paragraph d the term 'would have been prepared' makes itself felt (QUESTION 73). One possible interpretation is that for financial reporting purposes consolidation takes place at the level of A BV, while for application of the Minimum Taxes Act 2024 consolidation takes place at the level of Family BV. With this in mind, in this context the NOB seeks clarification as to whether the consolidation requirement under the Minimum Taxes Act 2024 should be interpreted more broadly than under financial reporting standards (such as EU IFRS) and whether advance certainty can be provided by the Dutch Tax and Customs Administration as to the level at which the Minimum Taxes Act 2024 obligation may apply. (QUESTION 74)

In addition, the draft bill does not include a system for converting foreign currencies into euros, for example to determine whether the EUR 750,000,000 turnover threshold has been complied with. The CbCR legislation does include such a system, and is aligned with the exchange rate in January 2015.

The absence of such a system in the Minimum Taxes Act 2024 may lead to ambiguity as to whether a multinational group falls under the rules of the Minimum Taxes Act 2024; furthermore, it is possible that a discrepancy may arise between the determination of the turnover threshold for the Minimum Taxes Act 2024 and the CbCR legislation, which may result in a multinational group falling within the scope of one rule but not the scope of the other.

NOB seeks confirmation that (i) there will be a system for converting foreign currencies to euros, and (ii) that the 2024 Minimum Taxes Act will be aligned with the CbCR legislation. (QUESTION 75)

Section 2.2

Section 2.2 of the draft bill stipulates when there is an excluded entity, thereby aligning definitions with the proposed directive. The NOB notes that certain definitions in Section 1.2 of the draft bill, for example for a 'pension fund', may differ from similar definitions in the Corporate Income Tax Act 1969 (CITA) for subjectively exempt entities. In practice, this could result in an entity being subjectively exempt under CITA, while no such exemption (by virtue of being an excluded entity) applies under the Minimum Taxes Act 2024.

G. Chapter 3 – Qualified domestic minimum top-up tax (QDMTT)

QDMTT and 'highest' parent entity

Section 3.1 of the draft bill regulates the tax liability for the QDMTT (qualified domestic minimum top-up tax). The low-taxed constituent entities established in the Netherlands are liable to pay tax. This means that if the Netherlands is a low-tax state, all entities established in the Netherlands are liable for tax. Section 3.1(2) provides that if there are multiple constituent entities, the QDMTT (qualified domestic minimum top-up tax) is levied as if there is one taxpayer. The top-up tax is levied on the parent entity whose interest is not held by another constituent entity established in the Netherlands (subsection 2(a)): the 'highest' parent entity. If there are several parent entities established in the Netherlands, the tax inspector will, whether or not at the request of a constituent entity, determine by a decision open to objection from which entity the top-up tax will be levied (subsection 2(b)). According to the section-by-section explanatory note to the draft bill (page 114), there is no option in the first situation (subsection 2(a)).

The lack of this option may lead to practical problems. Among other things, this provision could result in a 'highest' parent entity in the Netherlands holding less than the entire interest in another parent entity in the Netherlands being liable for the tax that relates to income from other constituent entities that are not fully held. This could trigger the need for the set-off of the tax with minority shareholders. In the IIR (income inclusion rule), this is (largely) avoided by the taxation of a partially held parent entity. In addition, it may lead to taxation of an entity that has insufficient liquidity to pay the tax, for example if there is an intermediate holding company with operating activities in the Netherlands.

The NOB suggests that the restriction of the option as currently included in the section-by-section commentary be removed, and that the option as included in Section 3.1(2)(b) also be made possible if there

are several parent entities in the Netherlands, one of which is the 'highest' parent entity in the Netherlands. (QUESTION 76)

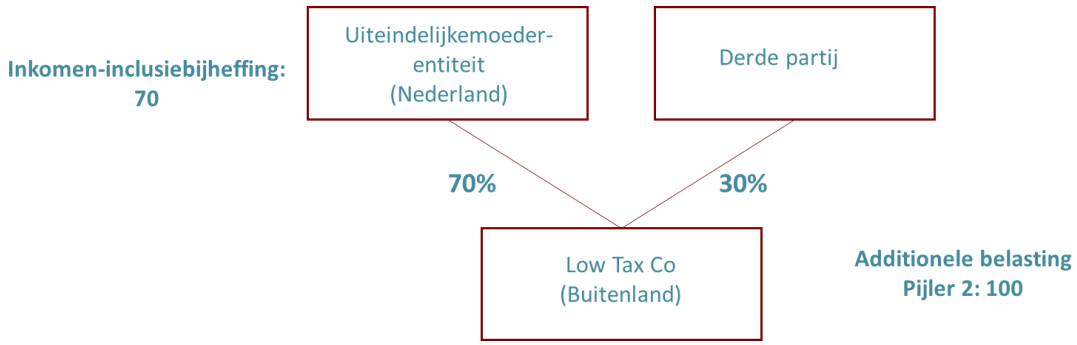
Furthermore, the NOB asks for further clarification of the term 'interest'. Based on the proposed Section 3.1 and the section-by-section commentary of the draft bill, page 113, this seems to refer only to an immediate interest. (QUESTION 77)

The relevance of this question lies in determining the 'highest' parent entity. This is also relevant to the application of the proposed Section 5.1 of the draft bill. An example may help to clarify this. If a Dutch-resident parent entity is held by a foreign constituent entity and that Dutch parent entity in turn holds a Dutch-resident parent entity through a non-Dutch-resident constituent entity, then two parent entities are identifiable if the concept of 'interest' is only an immediate interest. If this is the case, the NOB requests confirmation that, in this case, a choice can be made as to the entity on which the top-up tax can be imposed in accordance with Section 3.1(2)(b) and Section 5.1(2)(b) of the draft bill. (QUESTION 78)

Concurrence of QDMTT (qualified domestic minimum top-up tax) and IIR (income inclusion rule)

In addition, some situations are conceivable where the QDMTT (qualified domestic minimum top-up tax) and the IIR (income inclusion rule) overlap with different outcomes.

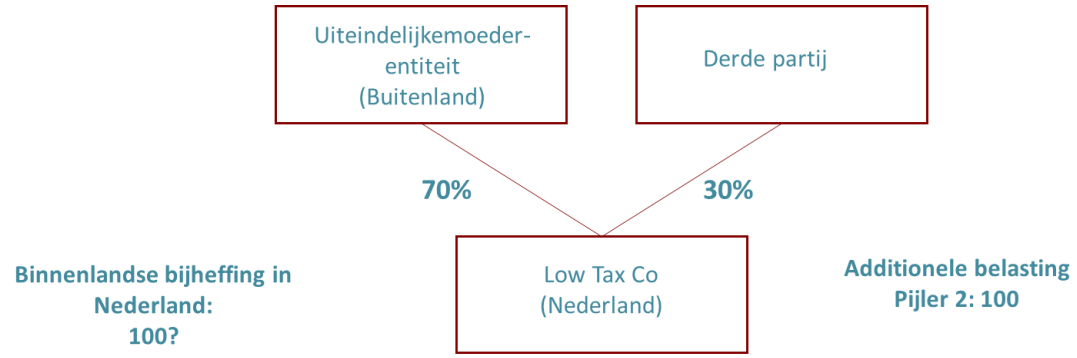
Example 1
An ultimate parent entity established in the Netherlands holds a 70% interest in a foreign subsidiary (Low Tax Co). Low Tax Co is consolidated by the ultimate parent entity and thus belongs to the Pillar 2 group. The remaining 30% interest is held by a third party.
Low Tax Co has a "tax deficit" of 100 based on Pillar 2 rules. LowTax Co is not subject to any QDMTT (qualified domestic minimum top-up tax) in its jurisdiction. Under the allocation rules of Sections 4.1 and 4.2 of the draft bill, the Netherlands will apply the IIR (income inclusion rule) in proportion to the interest held by the ultimate parent entity in Low Tax Co. In this case, that is 70% and thus results in additional tax of 70 under the IIR (income inclusion rule). The NOB understands that the remaining 30 is also not levied under the UTPR (undertaxed payment rule). After all, Section 5.3(3) provides that the top-up tax for that tax is set at nil if the entire interest of the ultimate parent entity in the low-taxed constituent entity is held by a parent entity that applies a qualified IIR (income inclusion rule). That condition is met in this case.



Example 2
The ultimate parent entity is established abroad and the low-tax entity Low Tax Co is established in the Netherlands.

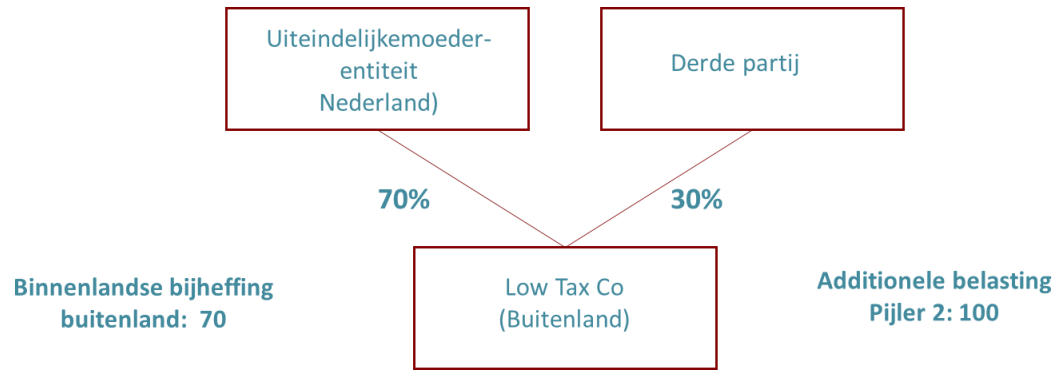
In this example too, the additional Pillar 2 tax due is 100. This is levied by the Netherlands itself in the form of a QDMTT (qualified domestic minimum top-up tax).

However, unlike the IIR (income inclusion rule), the provisions of the QDMTT (qualified domestic minimum top-up tax) in Sections 3.1 and 3.2 of the draft bill do not contain any reduction for that part of the top-up tax due in respect of the third party. This means that the total additional tax under Pillar 2 in example 2 is 100 while it amounts to 70 in example 1.



Example 3
Other countries are reportedly considering removing the above disparity. They do this by applying the top-up tax only to the extent that the interest in Low Tax Co is held by the Pillar 2 group, in line with the IIR (income inclusion rule). This is elaborated in the example below.
In this example, the foreign country levies 70 in QDMTT (qualified domestic minimum top-up tax) of Low Tax Co as the group (through the ultimate parent entity) holds 70% of the interest in Low Tax Co.

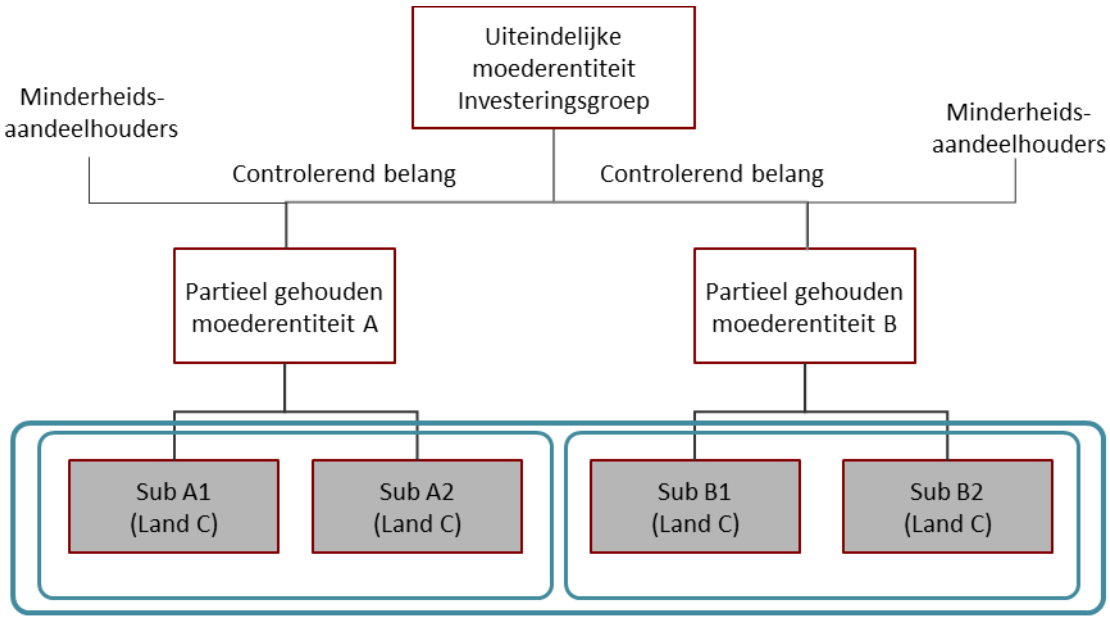
NOB asks for an explanation of how the Netherlands will deal with this. In such a case, can the conditions for a qualifying QDMTT (qualified domestic minimum top-up tax) still be met which, under Section 8.2(9), would dispense with top-up tax elsewhere? (QUESTION 79) If not, what is the effect of this under the allocation and netting mechanisms of the IIR (income inclusion rule) and the UTPR (undertaxed payment rule)? (QUESTION 80)



H.Chapter 4 – income inclusion rule (IIR)

The draft bill results in unexpected effects for investment groups that hold (long-term) controlling interests in disconnected groups through partially held parent entities. The additional top-up tax is calculated at the level of the ultimate parent entity for the group as a whole per country. But the additional top-up tax is primarily allocated to the partially held parent entities under Section 4.2 of the draft bill. This may result in Group A's POPE (partially owned parent entity) paying part of Group B's additional top-up tax because the calculation of the effective tax rate per country is performed at the UPE (ultimate parent entity) level (Group A and Group B together). This effect also occurs if the additional top-up tax is payable in country C on the basis of a qualifying QDMTT (qualified domestic minimum top-up tax). Indeed, it is determined for the group as a whole on a country-by-country basis whether an entity is low-taxed.

This distorts the minority shareholders' investments. The value of their investments is reduced by the under-taxation in another group, over which they exercise no control. NOB wonders whether this effect is intended (QUESTION 81). To avoid this unexpected and market-distorting effect, the NOB asks that consideration be given to a right of option to calculate the additional top-up tax for partially held parent entities as if they were the ultimate parent entity, as is the case with 'minority-owned parent entities' in line with Section 8.5 of the draft bill. Such an option may do justice to the independence of the separately operating groups and avoid distorting their market position. (QUESTION 82)



Effectieve belastingtarief land C groep uiteindelijke moederentiteit <15%

Effectieve belastingtarief land C groep A >15%

Effectieve belastingtarief land C groep B <15%

I. Chapter 5 – Undertaxed payment rule (UTPR)

The NOB draws attention to the operation of the UTPR (undertaxed payment rule), both in a general sense and in relation to the United States (the legal tenability of the provision in relation to international treaty law as well as EU law is described in more detail in the general considerations). The purpose of this secondary allocation provision is to allocate the remaining top-up tax balance – to the extent not allocable through the IIR (income inclusion rule) – within the group to the constituent entities established in jurisdictions that have introduced a UTPR (undertaxed payment rule). Allocation takes place on the basis of a formula based on employees and fixed assets. This also means that if the Netherlands is (one of) the first (or one of the few) jurisdiction(s) to implement a UTPR (undertaxed payment rule), a situation may arise where – despite limited employees and fixed assets in absolute terms – a large amount of top-up tax is allocated to the Netherlands. Incidentally, this does not only apply to top-up tax related to sister entities, but under certain circumstances, top-up tax on profits realized by the ultimate parent entity (i.e. the head office) can also be allocated to the Netherlands.

The sensitivity of the UTPR (undertaxed payment rule) is best illustrated in the US context by means of an example, but thus also applies in relation to all other countries:

> *A common reason why the United States qualifies as a low-tax country under the Pillar 2 rules despite a high tax rate is that the United States grants research and development credits to companies to stimulate the (local) economy. These credits produce a permanent accounting-tax difference and do not qualify as Qualified Refundable Tax Credit, which consequently has a downward effect on the ETR for Pillar 2 purposes.* As such, taxation via the UTPR (undertaxed payment rule) conflicts with the local policy objective of the United States, but also of other countries that have similar tax incentives (obviously only if they do not introduce QDMTT and qualifying IIR (income inclusion rule) themselves).

Furthermore, if only a (very) limited number of jurisdictions introduce a UTPR (undertaxed payment rule), there may be an economic incentive for MNEs to reconsider current business activities in these jurisdictions. A similar incentive applies to MNEs that do not (yet) operate in jurisdictions with a UTPR (undertaxed payment rule). The possible taxation payable under the UTPR (undertaxed payment rule) may therefore hinder the roll-out of economic activities.

Is the government aware of the political sensitivities in a general sense but also specifically in relation to the United States, but also for example in relation to developing countries, as well as the related effects on the investment decisions of MNEs? (QUESTION 83)

J. Chapter 6 – Determination of qualifying income or loss

Introduction

Chapter 6 and Chapter 7 of the proposed Act contain the core elements of the effective tax rate to be calculated. Chapter 6 covers the rules to be applied to calculate the qualifying income or loss and Chapter 7 covers the rules to be applied when calculating the amount of the covered taxes. The NOB notes that Chapters 6 and 7 closely follow the OECD model rules. The section-by-section commentary on the proposed Act also largely follows the OECD's commentary on the OECD model rules. Despite the detailed explanations by the OECD and to the proposed Act, due to the complexity of the rules, several questions remain unanswered and many will arise when applied in practice.

The NOB expects additional explanations to be provided by the OECD in the coming period and asks for confirmation that in addition to the OECD's existing explanations, these detailed explanations will also apply in the explanation and interpretation of the proposed Act. (QUESTION 84) The NOB also refers to the section on 'directive-compliant interpretation' and 'status of the OECD Commentary' under the general consideration. This may prevent the application of the proposed Act from diverging from the explanation and interpretation of the OECD model rules and may lead to discrepancies with implementing legislation of other (member) states.

On a number of points, the NOB already asks for clarification by means of additional explanations of various individual provisions included in the draft bill. The following provides a number of striking examples of this.

Section 6.1

Section 6.1(1)

The principle for determining the qualifying income or loss of a constituent entity is the financial reporting of the constituent entity prior to consolidation and elimination of intra-group transactions.

The NOB requests – for the sake of completeness – confirmation that this principle does not entail that, when determining the income of the constituent entity, a fictive stand-alone income statement for the constituent entity should be prepared as if it were an independent entity subject to the reporting standard of the ultimate parent entity. (QUESTION 85)

This means that within a reporting standard, there may be differences with regard to accounting at entity level and at consolidated level. An example can clarify this. The ultimate parent entity has prepared consolidated financial statements under IFRS. Based on the consolidated financial statements, property, plant and equipment are stated at their acquisition cost. Property, plant and equipment are made available within the group to other constituent entities. In the financial statements of the constituent entity on a standalone basis, in compliance with IFRS, IFRS16 (lease accounting) must be applied, which would differ from the valuation method used in the consolidated financial statements. (QUESTION 86)

Section 6.2

Section 6.2(1)(a) Covered tax

Does the Netherlands intend to make a list of foreign taxes that may be taken into account as covered taxes. (QUESTION 87) In practice, there is considerable demand for this. And to the extent that this is the case, how does the government intend to deal with countries that see / interpret this differently? (QUESTION 88)

Section 6.2(1)(b) Excluded dividend

The OECD Commentary states that all participation costs may be taken into account when determining qualifying income or loss. This provision was not reproduced in the explanatory memorandum of the draft bill. Can it be confirmed that this will work out the same way in the Netherlands. (QUESTION 89)

Section 6.2(1)(c) Compartmentalization

Can it be confirmed that if an interest decreases to less than 10%, compartmentalization can be applied? (QUESTION 90)

Section 6.2(1)(c) Foreign exchange risks

Paragraph 4.57 of the OECD Commentary states that there will be a further detailed explanation of the accounting for gains and losses arising from the hedging of foreign exchange risk on participations. Can it be confirmed that this is still the case? (QUESTION 91) Will this include the treatment of foreign exchange gains and losses on participation dividends? (QUESTION 92)

Section 6.2(1)(c) Gains on disposal

With regard to excluded dividends, the OECD Commentary, as described above, explains how associated costs are taken into account. With regard to acquisition and disposal costs associated with excluded capital gains and losses, neither the OECD Commentary nor the proposed explanatory memorandum make any reference to them.

In the financial reporting, these form part of the income statement. Can it be confirmed how these costs should be taken into account in qualifying income or loss? (QUESTION 93)

Section 6.2(2)(a)(4) Net tax expense
This part of the draft bill refers to *'belastinglasten als gevolg van deze wet of, waar het derde staten betreft, als gevolg van de toepassing van de OESO-modelregels;'* ('tax expenses arising pursuant to this Act or, as regards third states, the OECD model rules;') as a translation of 'taxes arising pursuant to the rules of this Directive or, as regards third country jurisdictions, the OECD Model Rules, accrued as an expense'. The NOB notes that the reference to tax expenses resulting from the application of the directive in other EU Member States appears to be missing here (QUESTION 94)

Section 6.2(2)(e) Asymmetric foreign exchange gains and losses
The profit of the permanent establishment itself is exempt. This does not apply to the foreign exchange translation gains and losses (Rupiah ruling). Should these foreign exchange translation gains and losses on an exempt permanent establishment be treated as asymmetric foreign exchange gains and losses? (QUESTION 95)

Section 6.2(2)(h) Accrued pension expenses
The amount of pension expenses included in the financial statements must be adjusted for the amount paid to the pension fund in that fiscal year. Outside the Netherlands, there are also companies that keep pensions on the balance sheet and pay them to pensioners themselves. Does this provision also apply to such self-administered pensions? (QUESTION 96) If not, no deduction would apply to such pensions. (QUESTION 97)

Section 6.3

Section 6.3(3) Share-based payments
In the year the choice is made to base the deduction on the tax deduction, the costs charged to the profit for accounting purposes in previous years must be recaptured. Does this also apply to the years prior to the introduction of Pillar 2? (QUESTION 98) If so, can a deferred tax asset (DTA) created for this purpose be released? (QUESTION 99)

Section 6.4

Section 6.4 Arm's length principle
The NOB requests clarification for what is meant by the arm's-length principle as included in the fourth paragraph. Relevant questions here include what is the significance of Article 9 of the OECD Model Convention and the OECD Transfer Pricing Guidelines. (QUESTION 100) We also refer here to the 'Arm's length adjustments' section under the general consideration.

Transfer pricing adjustments in a low-tax state after the filing of the minimum tax return may result in an increase in the covered taxes for a previous fiscal year.
However, under the proposed Section 7.6(1) of the draft bill, that additional tax is taken into account as an adjustment in the fiscal year in which the adjustment is made. This effectively leads to double taxation for companies. The NOB also asks the government to consider how such double taxation relates to (the principles of) Article 9 of the OECD Model Convention. (QUESTION 101)

Section 6.8

Article 6.8 Intra-group financing arrangement
Is there any likelihood of overlap between the carrying forward of deductible interest under Section 15b Corporate Income Tax Act 1969 (Wet Vpb 1969) and Section 6.8 of the draft bill? (QUESTION 102)

Section 6.12

Section 6.12 International shipping income exclusion
Section 6.12 of the draft bill provides that, subject to certain conditions, for the purpose of determining the qualifying income or loss of a constituent entity, the income or loss from international shipping and income from qualified ancillary international shipping activities of that constituent entity are disregarded.

While this Section appears to be almost identical to the EU's draft proposed directive of June 16, 2022, it appears to differ (perhaps unintentionally) in a number of respects. There are also a number of provisions that are very likely to cause implementation problems. These are discussed in more detail below.

Section 6.12(1)
Section 6.12(1) of the draft bill requires that 'the strategic or commercial management of all ships concerned is effectively carried on from the jurisdiction where the constituent entity is located'. Since the terms 'strategic management' and 'commercial management' are not firmly defined terms, we expect there will be a lot of discussion about them in practice. Especially since the text seems to suggest that 100% of the strategic or commercial management must take place in the jurisdiction, and if, for example, 5% of this management is carried out in another jurisdiction, the exclusion of income from international shipping does not apply. If it is not clear what that 100% consists of, it is not inconceivable to assume that regular discussions will take place as to whether 100% or 95% (or some other percentage) of the relevant management is carried on in the state of establishment. The explanatory note to this provision refers to the 'relevant facts and circumstances' and is therefore also ambiguous. It would help if the explanatory note provided a list of activities that would have to be carried on at least in the relevant state in order to refer to 'the strategic or commercial management of all ships concerned'. (QUESTION 103)

Section 6.12(6)
Section 6.12(6)(a) of the draft bill defines 'International shipping income' to be 'net income obtained by a constituent entity from the following activities, where such transportation is not carried out via inland waterways within the same jurisdiction'.
A ship from Shanghai calling at the port of Rotterdam sails the last leg of its journey on the Nieuwe Waterweg (an inland waterway). This also applies to the ports of Antwerp and Hamburg. The NOB assumes that if the transportation is carried out by sea including transportation on a waterway of a maritime nature, the transportation is deemed to be transportation by sea for the entire journey. This in accordance with Section 3.22(12) Personal Income Tax Act 2001 (*Wet op de inkomstenbelasting 2001*). (QUESTION 104)

Section 6.12(6)
Qualifying secondary income includes the 'provision of services to other shipping enterprises by engineers, maintenance staff, cargo handlers, catering staff, and customer services personnel' (Section 6.12(6)(b)(4) of the draft bill). The term 'ingenieur' in the Dutch text appears to have a different connotation than the term in the English version of the proposed directive where the term 'engineers' is used. 'Ingenieur' is a word used in the Netherlands for highly skilled technical personnel. The English word 'engineer' is used for different functions, job levels and knowledge levels.

Section 6.14

Section 6.14(4) Allocation of residual amount

The proposed Section 6.14(4) of the draft bill determines the allocation of a residual amount of net profit or loss of a tax transparent entity to the ultimate parent entity or reverse hybrid entity. The NOB wonders whether the last sentence of the explanatory note to this Section contains a clerical error and incorrectly states that 'this profit is therefore attributed to the tax transparent entity itself and not to its constituent entity stakeholders'. (QUESTION 105)

K. Chapter 7 – Computation of adjusted covered taxes

Section 7.2

The proposed text of Section 6.2 of the draft bill and Section 7.2 of the draft bill consistently refers to 'tax expense' or 'tax expenses', which may suggest that only tax expenses and not tax income must be taken into account when calculating the amount of covered taxes.

This is reinforced by the wording of Section 7.2(2)(a), which refers to 'the amount of covered taxes allocated as expenses in the fiscal year when determining the profit before taxation in the financial accounts'. The NOB believes that (also) the explanatory note is unclear whether the term 'tax expense' also includes tax income. The NOB requests confirmation that the term 'tax expense' also includes tax income. (QUESTION 106) In addition to this, the NOB also seeks confirmation that if the amount of covered taxes must be adjusted in accordance with Section 7.2(3)(a), 'income not taken into account when computing qualifying income or loss under Chapter 6' also includes both tax expense and tax income. The NOB assumes here that Chapter 6 (inter alia in Section 6.2) not only adjusts income but can also adjust costs/expenses when calculating qualifying income/loss (e.g. pension expenses). (QUESTION 107)

Section 7.2(3)(a)

The proposed Section 7.2(3)(a) of the draft bill provides that the amount of covered taxes will be adjusted for components of the covered taxes that relate to items of income (and loss), which are excluded under Chapter 6 when calculating qualifying income/loss.

The OECD Commentary on the model rules does not specify a precise method of calculation for how to calculate the tax component in relation to an excluded income component, but simply states that the amount of tax that is attributable to the relevant excluded income component must be adjusted. The explanatory note to Section 7.2(3)(a) does provide a method of calculation (on pages 168/169). However, that method of calculation in most cases does not provide an accurate outcome for the amount that can/must be allocated to the income component in question.

The formula proposed in the explanatory note is: excluded income component divided by the state's taxable amount multiplied by the current tax liability. Since the taxable amount and thus the current tax liability is also affected by other factors (e.g. other permanent differences in relation to the profit/loss on the basis of financial reporting or in relation to qualifying income/loss), the formula included in the explanatory note creates a situation where less (but also more) tax may be adjusted than the amount of tax on the excluded income component multiplied by the local tax rate. This cannot be the intention and is also contrary to the OECD Commentary (and therefore indirectly contrary to the proposed directive).

The method proposed in the explanatory note has a secondary positive or negative effect on the calculation of the effective tax rate: more or less tax is adjusted than the amount of tax that in reality relates to the exempted income component. The NOB suggests amending the explanatory note on this point to bring it in line with the OECD interpretation. If the legislator does opt to include a method in the explanatory note, the NOB believes that it would seem more logical for the amount of tax to be adjusted to be computed at the state's national tax rate. NOB seeks confirmation that this difference has not been foreseen and that the method to be applied will be in line with the OECD interpretation (QUESTION 108)

Incidentally, the explanatory note to Section 7.3(5)(a) of the draft bill does not mention a method to compute the adjustment of the deferred taxation associated with excluded income components. The NOB requests further clarification on this. (QUESTION 109)

Section 7.2(5)
Section 7.2(5) of the draft bill calculates additional top-up tax on the (negative) difference between the qualifying loss and the tax loss. This situation arises if, due to permanent differences, the tax loss exceeds the qualifying loss. An additional top-up tax is then levied on the permanent difference in fiscal years in which losses are incurred. The NOB believes that there is overkill in this provision, especially in situations where there is a structural, long-term loss situation.

In such a situation, deferred tax assets for losses are in general not created. As these deferred tax assets do have to be taken into account when calculating the amount of the adjusted movements in deferred taxes, the amount of covered taxes is presented more 'positively' than will actually be able to be utilized. The NOB suggests 'softening' the measure in Section 7.2(5) if there is no real possibility of utilization/set-off of tax losses.

Section 7.8

Section 7.8 of the draft bill provides that if more than EUR 1,000,000 of the amount accrued by a constituent entity as adjusted covered taxes for a fiscal year is not paid within three years after the end of

that fiscal year, the effective tax rate for that fiscal year should be recomputed. Section 7.8 of the draft bill refers to adjusted covered taxes, which includes both the current tax liability and deferred tax. Section 7.8 of the draft bill therefore deviates from the OECD model rules (Article 4.6.4) where the present recomputation only takes place if current taxes are not determined within three years. The time period within which deferred taxes must be paid is subject to other specific provisions contained in Section 7.3 of the draft bill. The NOB believes that Section 7.8 of the draft bill should be reworded to avoid ambiguity about the scope of Section 7.8 of the draft bill and bring it in line with the OECD model rules. (QUESTION 110)

Other sections Chapter 7 - Computation of adjusted taxes

In addition to the more general questions and comments above, there are quite a few individual provisions for which an additional explanatory note would be desirable. The following provides a number of striking examples of this. In addition, several provisions include terms that may be interpreted differently by taxpayers and tax authorities and between different tax authorities:

- Article 7.1 of the Explanatory Memorandum. Covered taxes versus the OECD Commentary on Article 4.24. The OECD Commentary refers to taxes on specific activities 'such as banking'. The explanatory memorandum to the draft bill does not refer to this. Can it be assumed here that the examples cited in the OECD Commentary will also apply in the Netherlands? (QUESTION 111)

- Explanatory Memorandum on Section 7.1.1(c) versus OECD Commentary on Article 4.31. Taxes imposed to replace a generally applicable profit tax. The Explanatory Memorandum to the draft bill lacks the reference to withholding taxes on interest and royalties that is included in the OECD Commentary. Can it also be assumed here that the examples cited in the OECD Commentary will also apply in the Netherlands? (QUESTION 112)
- Section 7.3.5(e). Deferred taxes in respect of a right of set-off. With regard to incentive regimes, it is sometimes a fine line between carrying forward an investment credit and carrying forward a tax credit. Will there be a list in which incentives are classified? (QUESTION 113) How can different countries be prevented from taking different positions? (QUESTION 114)
- Section 7.5.3. Tax regime for controlled foreign companies (CFC). Can Section 13ab Corporate Income Tax Act 1969 qualify as a CFC tax? (QUESTION 115)

L. Chapter 8 – Calculation of the effective tax rate and the top-up tax

Section 8.7 Safe harbour arrangement

Taxpayers must prepare the top-up tax information return for each constituent entity and jurisdiction while in many cases it will be immediately clear that no top-up tax is due. In many cases, the effective tax rate of constituent entities in a jurisdiction together will exceed the 15% minimum tax rate. It is also expected that many countries will follow the example of the Netherlands and introduce a QDMTT (qualified domestic minimum top-up tax), which will bring the effective tax rate in the country concerned to at least 15%.

The consultation proposal contains a delegation provision to establish ‘safe harbours’ by ministerial regulation (Section 8.7 of the draft bill). Express reference is made here to the ongoing development of such rules in the OECD context. The NOB commends the government’s commitment to adhere as much as possible to the safe harbour agreements made in the OECD context, as this will benefit uniform application. However, the NOB does question whether such an important issue, which could have far-reaching consequences in practice, lends itself to secondary legislation and whether such rules should not be included in the Minimum Taxes Act 2024. This is all the more pressing as the OECD ‘safe harbour’ regime has not yet been published, so its scope is not yet at all clear for the determination of its place in implementing legislation.
The NOB has the following questions about this:

- Has the government considered including the safe harbours directly in the Minimum Taxes Act 2024, and if so, what were the considerations for sufficing with a delegation provision (for the time being)? (QUESTION 116)
- Is the government prepared to reconsider its choice if the work still to be published by the OECD gives reason to do so, for example because a lot still remains unclear or because freedom of choice is provided? (QUESTION 117)

Therefore, in order to avoid many unnecessary administrative burdens, it is important to have an effective safe harbour arrangement. Consideration could be given to the following options:

- CbCR safe harbour: If the effective tax rate resulting from the existing CbCR for that jurisdiction exceeds a certain percentage (at least 15%), a simplified obligation to file a tax return with no underlying computation for each qualifying jurisdiction will suffice. Because it ties in with already existing information and reporting, this could mean a significant reduction in burden. However, it is important that this arrangement is introduced permanently and not just as a transitional arrangement.

- Tax administrative guidance: Under this option, there is no need for an effective tax computation for a jurisdiction if it complies with the OECD GloBE criteria. This will at least include countries that have introduced a Qualifying Domestic Minimum Top-up Tax with a rate of at least 15%. An OECD list of jurisdictions complying with this could be published. This could be combined with a list of special regimes or incentives per country that could potentially lead to an effective rate below 15%. If a taxpayer makes no use of these regimes or incentives, the safe harbour could also be used for this jurisdiction.

- High taxed companies safe harbour: A far-reaching simplification could be achieved if there is no need for a computation per qualifying jurisdiction if the multinational group consolidated over a number of years (for example the past three years) has an effective tax rate on a cash basis of more than (for example) 20%.

The NOB calls on the government to make the case in the OECD and EU context for an effective safe harbour regime to limit the increase in the administrative burden on businesses. (QUESTION 118)

M. Chapter 9 – Special provisions concerning business reorganizations and holding company structures

Application of the turnover threshold to group mergers and demergers

The NOB notes that in the case of a group that merges or demerges during the fiscal year, the turnover threshold is determined by paragraph 4 in conjunction with Section 2.1(2). As a consequence of this, the result realized up to that point is carried forward to an entire fiscal year. This could mean, for a group with a turnover that varies substantially throughout the year, that it is deemed to meet the turnover threshold, when in fact (on an annual basis) it has not yet done so. Are you willing to consider a rebuttal provision? (QUESTION 119)

NOB requests further clarification of a number of definitions referred to in the fifth paragraph. In Section a, reference is made to 'virtually all constituent entities'; can the government quantify what is meant by 'virtually all'? (QUESTION 120) The same Section refers to 'joint control', can the government confirm that this means that a (part of a) group must be compulsorily included in the consolidated financial statements of the acquiring group? (QUESTION 121) The final clarification requested by the NOB concerns 'a legal act' as referred to in both parts a and b: can there be a merger or demerger respectively when multiple legal acts are necessary to effect this? (QUESTION 122)

Section 9.2 Constituent entities joining or leaving a multinational group or large-scale domestic group

The NOB notes that the first paragraph differs from the draft directive proposal; the directive refers to 'on a line-by-line basis' for the accounting in the consolidated financial statements. The draft bill refers only to the accounting in the consolidated financial statements. The NOB wonders why this has not been followed in the draft bill and whether this represents a departure from the directive. (QUESTION 123)

Section 9.2(3)
The proposed Section 9.2(3) provides that an acquiring group computes the qualifying income or loss and adjusted covered taxes of the joining entity on the basis of the carrying values of the joining entity. No allowance is made for any adjustment or revaluation of carrying values for reporting purposes as a result of the transfer. These 'purchase price accounting adjustments' may therefore not be included.

The proposed provision corresponds to Article 6.2.1(c) of the OECD model rules. The OECD Commentary, paragraph 51, page 146, notes that the rule should be applied regardless of whether the acquisition took place before or after the introduction of the GloBE rules. For acquisitions before December 1, 2021, an exception to this may be made if the taxpayer does not have sufficient opportunities to eliminate the revaluation, which does include deferred tax assets and liabilities.

The NOB requests clarification whether the intention is to also apply such retroactive effect in the Dutch situation, and if so, to confirm that the exception provided in the OECD Commentary for acquisitions before December 1, 2021 also applies. In the latter case, the NOB also asks for an explanation of how to deal with deferred tax assets and liabilities. (QUESTION 124)

Section 9.2(6)
Section 9.2(6), in brief, provides that in the case of acquisitions or disposals of constituent entities, deferred tax assets and deferred tax liabilities are transferred to the acquiring party, except for the deferred tax asset relating to a qualifying loss. This provision is based on Article 32(6) of the draft proposed directive. The NOB understands the intention of Section 9.2(6) to allow all deferrals to be carried forward, with the exception of the 'deemed deferred tax asset' for which a choice can be made under Section 7.4. This is because this 'deemed deferred tax asset' applies per jurisdiction and not per entity. This is clear from both the text of the proposed EU directive and the OECD model rules.

The proposed Section 9.2(6) refers to 'the deferred tax asset relating to a qualifying loss' rather than the 'deemed deferred tax asset', which may give the idea that it applies to all deferred tax assets relating to losses.

The NOB notes that the explanatory memorandum to the proposed Section 9.2(6) makes a connection between the application of the proposed Sections 7.3(6) and 7.4 that is not in line with the OECD model rules and the proposed EU Directive. This is because the explanatory memorandum to the draft bill incorrectly suggests that the deferred tax asset for tax losses that can be recomputed at the minimum tax rate under the proposed Section 7.3(6) if it can be convincingly demonstrated that this deferred tax asset is caused by a qualifying loss that is also present, is, in accordance with the proposed Section 7.4, a deemed deferred tax asset - in the explanatory memorandum to the proposed Section 9.2(6), a 'qualifying deferred tax asset'.

The NOB proposes that the text of Section 9.2(6) be amended as follows:

> *'6. With the exception of the deemed deferred tax asset referred to in Section 7.4, deferred tax assets and liabilities of the joining or leaving entity that are transferred between multinational groups or large-scale domestic groups are taken into account by the acquiring multinational group or large-scale domestic group in the same manner and to the same extent as if the acquiring multinational group or large-scale domestic group controlled the constituent entity at the time those deferred tax assets and liabilities were incurred.'*

Similarly, the NOB suggests amending the relevant part of the explanatory memorandum to Section 9.2(6) (second paragraph, page 217) where the incorrect connection is made as follows:

> *'The proposed Section 9.2(6) only relates to deferred tax assets that are not deemed deferred tax assets, as referred to in the proposed Section 7.4. Such deemed deferred tax assets can be created under the option regime of the proposed Section 7.4 that a multinational group or a large-scale domestic group can apply per state. Deemed deferred tax assets that relate to a qualifying loss are therefore considered to relate to the level of a state and not to the level of a constituent entity, so these deferrals are considered non-transferable between groups. The phrase 'in the same manner and to the same extent' included in the proposed legislation is also intended to take account of deferred tax assets of the constituent entity that have been recomputed at the minimum tax rate under the proposed Section 7.3(6) in the same manner and to the same extent after the constituent entity joins or leaves.*

The NOB also notes that the sixth paragraph deviates from the directive. This now prevents all deferred tax assets in respect of losses from being left with the transferor. Could you further clarify that this should only apply to 'deemed deferred tax assets'? (QUESTION 125)

The NOB seeks further clarification on how deferrals should be treated when an entity is included in a group with a different accounting system. (QUESTION 126)

Section 9.2(9)
The NOB further notes that the ninth paragraph deviates from the directive text: the directive refers to 'consideration paid', the legislative text to 'agreed acquisition price'. Is a derogation from the text of the directive intended? (QUESTION 127)

Section 9.3 Transfer of assets and liabilities

The NOB notes that the third paragraph prevails 'in derogation of the second and third paragraphs'; we assume this should be the first and second paragraphs.

The NOB requests an explanation of the extent to which Sections 15ai, 15c and 20a(12) Corporate Income Tax Act 1969, revaluations on the basis of sound business practice and any other regulations can be regarded as 'circumstances triggering a revaluation for tax purposes' within the meaning of the fourth paragraph. (QUESTION 128)

The NOB requests further clarification on some of the definitions referred to in the fifth paragraph: Paragraph 5(a) refers to 'reorganization'. To what extent does this definition correspond to the (facilitated) variants of mergers, demergers and conversions as we know them in the Dutch system (QUESTION 129), for example:

- Does a conversion or simplified merger (Section 2:333 of the Dutch Civil Code), both without the issue of shares, fall under the definition of 'reorganization' because the issue of an equity interest in those cases would not have economic significance. (QUESTION 130)
- Do all triangular variations fall under the definition of 'reorganization'? This at least presumes the possibility of shares being issued by an 'associated person' of the acquiring party under the OECD Model Convention. (QUESTION 131)

Paragraph 5(a)(1) refers to 'all or a significant part' and 'all or substantially all'. Can you quantify these terms? (QUESTION 132) In the provision of the draft Directive from which Section 9.3(5)(a)(1) appears to have been derived, an earlier version used 'another method of payment not exceeding 10% of the nominal value of those shares', which in turn appeared to have been derived from the permissible additional cash payment under the Merger Directive (2009/133/EC).

It seems to us that top-up payments as permitted under the Merger Directive at least meet the criterion 'all or substantially all' in order to avoid mismatches in respect of facilitated cross-border transactions within the EU for local tax purposes and for purposes of the draft bill. NOB would like to see a further explanatory note and clarification of these terms.

We also request you to confirm that an issue of shares also refers to a credit to share premium. (QUESTION 133) Finally, please confirm that the term "carrying amounts of the assets and liabilities of the transferred entity" refers only to the transferred assets and liabilities ("insofar as approach"). (QUESTION 134)

Article 9.4 Joint Ventures

The NOB notes a difference between the explanatory note to Section 9.4(2) of the draft bill and the OECD Commentary to the corresponding provision in the OECD model rules (Article 6.4(a)). Paragraph 89 of the OECD Commentary expressly states that in calculating the joint venture group's covered taxes, the covered taxes recognized in the financial reports of the multinational group (interest holder in the joint venture group) that relate to qualifying income or loss of the joint venture group must be allocated to the joint venture group's covered taxes, with Article 4.3 of the OECD model rules also applicable.

The application of Article 4.3, in particular, for example, Article 4.3.2(e), results in covered taxes charged to the multinational group on income received from the interest in the joint venture group, for example withholding taxes withheld, being allocated to the amount of the covered taxes of the joint venture group for the computation of the effective tax rate of the joint venture group.

A reference to the applicability of Section 7.4 of the draft bill is missing from the explanatory note to Section 9.4(2) of the draft bill. As a result, it is unclear whether on the basis of the draft bill, partly because Section 9.4(2) of the draft bill is also inconclusive on this, covered taxes levied against the multinational group that holds an interest in a joint venture group must be allocated to the covered taxes of the joint venture group for the purpose of computing the effective tax rate of the joint venture group.

The NOB believes that allocation of the covered taxes levied against the multinational group to the joint venture group on the basis of Section 7.4 of the draft bill is logical because if such an allocation does not take place, top-up tax will potentially be imposed on qualifying income of the joint venture group while covered taxes have been levied on that (qualifying) income at the multinational group holding the interest in the joint venture group. The NOB seeks confirmation that when applying Section 9.4(2), the allocation under Section 7.4 should be included to calculate the joint venture group's top-up tax. (QUESTION 135)

N. Chapter 13 – Transitional provisions

Section 13.1 Constituent entities established in the Netherlands

The proposed Section 13.1 sets out the transitional rules for determining the effective tax rate in the transition year and for subsequent fiscal years. Section 13.1(1) limits this transitional rule to 'all constituent entities established in the Netherlands'. Section 13.1(4) also limits the definition of the transition year to constituent entities established in the Netherlands.

The NOB does not understand – in the systematics of the proposed Act – why this transitional rule is limited to constituent entities established in the Netherlands. A multinational group with an ultimate parent entity established in the Netherlands would also have to apply the transitional rules of Section 13.1(1) when taking into account the deferred tax assets and liabilities of foreign constituent entities to determine the effective tax rate of foreign constituent entities. The NOB requests further clarification on the said limitation of this transitional rule to constituent entities established in the Netherlands. (QUESTION 136)

Section 13.1(1)

Section 13.1 provides (inter alia) that active deferrals recognized or disclosed in the financial reports are taken into account in the transition year and each subsequent fiscal year. The explanatory memorandum does not explain what is meant by 'or disclosed'. The OECD Commentary on the model rules paragraph 9.1.1 states the following: '*These attributes include losses that have not been recognised due to an accounting recognition adjustment or valuation allowance*'. The NOB understands that the purpose of the provision in Section 13.1 is to determine that the amount of deferred tax assets that could have been recognized but were not recognized due to the level of expected profits ('recognition adjustment') may be recognized for the purposes of Section 13.1. Suffice it to say that amounts of losses subject to potential active deferrals have been reported in the notes to the consolidated financial statements. Can the Deputy Minister confirm this? (QUESTION 137)

The section-by-section notes to Section 13.1(1) state that deferred tax assets and deferred tax liabilities determined by applying the proposed Section 13.1(1) will not be taken into account if the proposed Section 7.4 is opted for. Section 7.4 contains the option regime for qualifying losses. If the application of Section 7.4

is opted for, a deemed deferred tax liability is determined for qualifying losses. Part of the background to this is simplification for the determination of deferred taxes for low-tax states. The option to apply Section 7.4 can be made only once, in the transition year. A taxpayer with activities in a low-profit tax state may, in line with the rationale of Section 7.4, opt to apply the deemed deferred tax asset of Section 7.4 with effect from the transition year. As a result, historical losses arising in that state before the transition year can no longer be taken into account when determining the effective rate, which may lead to top-up tax. The NOB notes an imbalance in the transitional rules here. Constituent entities in low-tax jurisdictions with losses incurred before the transition year are effectively forced to apply the (more) complex rules of Chapter 7.3 to avoid being in a disadvantaged position.

The NOB suggests expanding the scope of Section 13.1(1) and permitting the creation of a deemed deferred tax asset for qualifying losses if the application of Section 7.4 (from the transition year) is opted for. (QUESTION 138)

Section 7.3(5) provides that the amount of deferred taxes in respect of the acquisition of the right of set-off or tax credit is excluded for the determination of the total amount of adjusted movements in deferred taxes. The NOB understands that Section 13.1(1) is an independent provision, for which the provisions of Chapter 7 do not apply.

The NOB asks for confirmation that active deferrals in respect of 'tax credits', such as uncredited withholding tax, fall within the scope of Section 13.1(1). (QUESTION 139) The NOB also requests clarification on how the recomputation at the minimum tax rate should take place with regard to such deferrals. (QUESTION 140)

Section 13.1(3)
Section 13.1(3) regulates the effects of transactions between constituent entities during the period from December 1, 2021 until the start of the transition year. Under this provision, the carrying value of assets acquired in this period from a transferring entity to the acquiring entity is set at the carrying value used by the transferring entity at the time of disposal.

In this way, components of the acquiring entity's income or loss are adjusted for components (expenses/income) associated with the acquired assets that would not be recognized in the income or loss of the transferring entity. The qualifying income or loss of the acquiring entity is therefore adjusted. This is the denominator of the fraction for computing the effective tax rate of the acquiring entity, or the denominator of the fraction for computing the effective tax rate of the jurisdiction where the acquiring entity is established.

The NOB understands that the purpose of Section 13.1(3) is to prevent low-taxed capital gains realized with a transaction between constituent entities during the period from December 1, 2021 until the start of the transition year from (ultimately) being excluded from the global minimum taxation due to anticipatory actions. However, the measure in Section 13.1(3) does not distinguish between situations where the capital gain is (was) not taxed at the transferring entity or is (was) taxed at a rate lower than the minimum tax rate or is (was) taxed at a rate exceeding the minimum tax rate.

The NOB believes that this measure should not apply if the transferring entity has recognized the capital gain in its tax base, especially if it concerns a transferring entity established in a jurisdiction with a tax rate higher than the minimum tax rate. Can this view be confirmed? (QUESTION 141)

In addition, Section 13.1(3) states that 'deferred tax assets and deferred tax liabilities are determined on that basis'. The section-by-section explanatory note stipulates: 'Deferred taxes related to asset transfers are determined at the carrying value at the time of disposal. This deferred tax is then subsequently recognized in the computation of the covered taxes'.

Although not explicitly mentioned in the section-by-section explanatory note, the NOB assumes that this refers to the deferred taxes that the acquiring entity must use as a starting point for computing the covered taxes in the transition year and subsequent fiscal years. However, it is not clear to the NOB how the amount of those tax deferrals will be determined, and requests a more detailed explanatory note. In this respect, the NOB also requests that express attention be paid to the effect of this provision under the application of different financial reporting standards for transactions between constituent entities. (QUESTION 142)

The section-by-section explanatory note to the third paragraph states: 'It is not intended to bring a merger or acquisition under the scope of this paragraph'. It is not clear to the NOB what is meant by this. (QUESTION 143)

Again, the NOB asks for clarification of definitions. To what extent does the term 'merger' correspond to the (facilitated) variants of mergers that exist in the Dutch system, and does this mean that it is intended to

include other reorganizations, such as demergers, within the scope of the third paragraph? Does ‘acquisition’ refer to a share transfer? (QUESTION 144)

Section 13.1(4)
The definition of 'transition year' is contained in Section 13.1(4). The transition year is the first year in which this Act applies to a constituent entity established in the Netherlands because this constituent entity is part of Dutch multinational group (with an ultimate parent entity established in the Netherlands) or foreign multinational group (with an ultimate parent entity established outside the Netherlands), or of a large-scale domestic group, which falls or will fall under the scope of this Act.

For Dutch constituent entities that are part of a multinational group, or large-scale domestic group, which already meet the criteria set out in Chapter 2 (Scope of application) on the Act’s effective date (December 31, 2023; Section 15.1(1)), the transition year will be the first financial year, or fiscal year, commencing on or after December 31, 2023. It may also be that the multinational group, or large-scale domestic group, only meets the criteria of Chapter 2 in a later financial year and then the transition year will also only include that later financial year. The transition year may thus be in the (distant) future.

As a result, (existing or future) transactions after November 30, 2021 and before a potential future transition year will have to be monitored and recorded. This leads to a heavy and administrative burden. Does this also apply to enterprises that currently still fall below the EUR 750,000,000 turnover threshold? (QUESTION 145)

The NOB suggests that the date of November 30, 2021 referred to in Sections 13.1(2) and 13.1(3) be reconsidered, such that it at least does not apply to multinational groups and domestic groups, which do not fall within the scope of the Act on the date of the Act's entry into force, in order not to burden these multinational groups and domestic groups with the administrative burdens associated with the complex application and implementation of this Act, both now and for an indeterminable number of years in the future. (QUESTION 146)

O. Conclusion

We also refer to our earlier publication 'Initial observations on the proposed implementation of pillar 2'.[31]

The NOB will of course be happy to explain the above response to the bill in more detail and enter into consultations to that end. A copy of this response will be sent to the Deputy Minister of Finance and published on our website.[32]

About the NOB

The Dutch Association of Tax Advisors (NOB) was founded in 1954. We are the professional association of university-trained tax advisors in the Netherlands and promote the common interests of our members. We stand for professional excellence by providing training for our members, applying our code of conduct and enforcing it through independent disciplinary law. We form the bridge between members and society by deploying the (practical) knowledge possessed by our members across the entire scope of the tax field. We use this knowledge to contribute to the public debate on taxation.

[31] https://www.nob.net/eerste-observaties-voorgestelde-implementatie-van-pillar-2
[32] More information about the NOB's Committee on Legislative Proposals can be found here: https://www.nob.net/nob/commissies/commissie-wetsvoorstellen.