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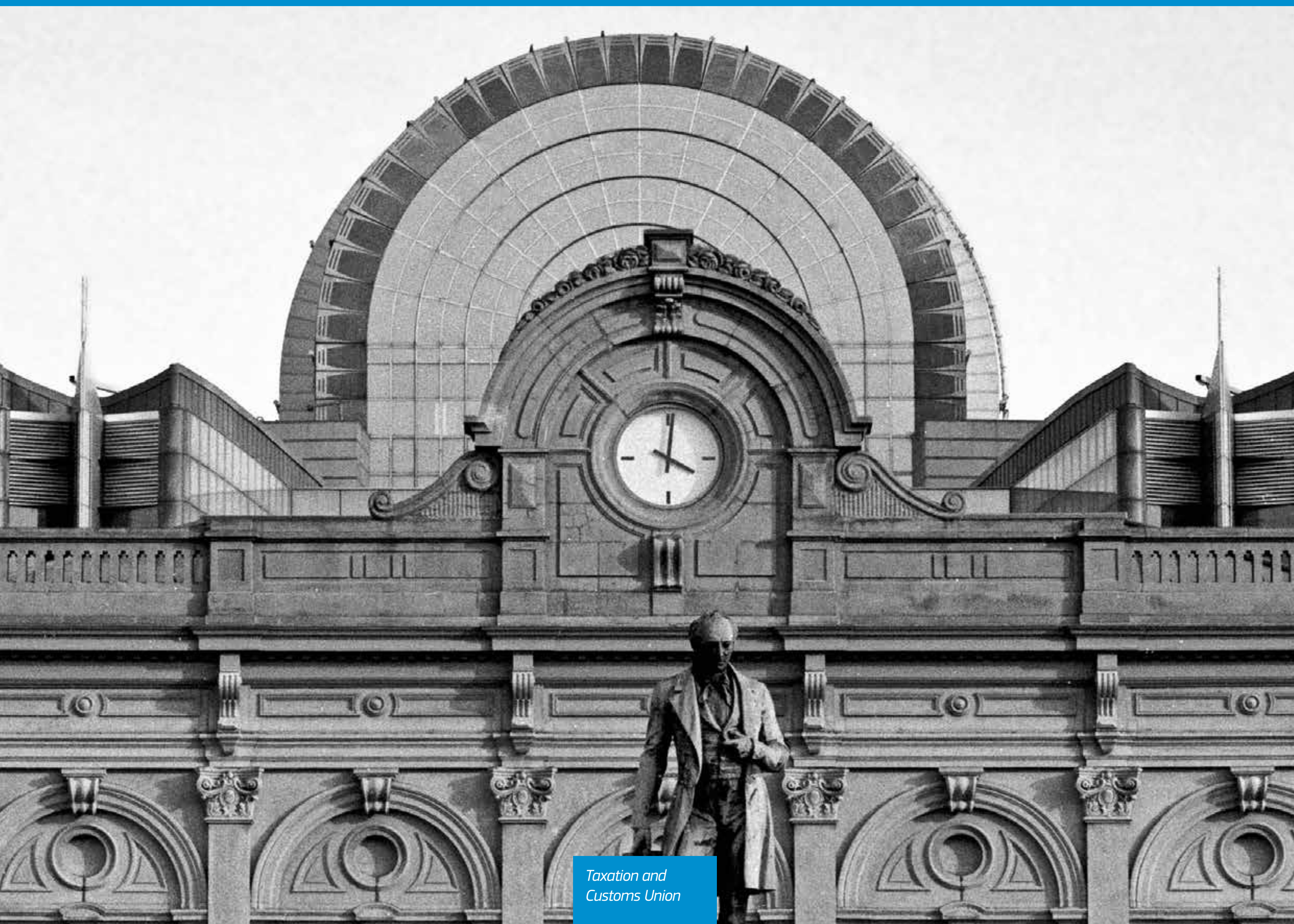
Study on Structures of Aggressive Tax Planning and Indicators

Final Report



Taxation and Customs Union

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Study on Structures of Aggressive Tax Planning and Indicators

- Final Report -

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RAMBOLL

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

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Table of Contents

List of Abbreviations and Acronyms.. 5
Abstract <EN> 6
Abstract <FR> 6
Executive Summary <EN> 7
Sommaire <FR> 11
1. Introduction 15
1.1 Policy background...15
1.2 Purpose of the study 16
1.3 Scope of the study 17
1.4 Overall approach 18
1.5 Content of the report 19
2. ATP Structures 21
2.1 Methodological considerations 21
2.2 Model ATP structures..25
3. ATP Indicators 51
3.1 Methodological considerations 51
3.2 Overview of ATP indicators..54
3.3 Description of the ATP Indicators 57
4. Screening of Member States 68
4.1 Methodological considerations 68
4.2 Assessment of the Member States 69
5. General observations and policy implications 144
5.1 Number and categories of indicators observed..................................144
5.2 Common findings across Member States..144
Appendix 1: Questionnaires for each MS 148
Appendix 2: Overview of ATP Indicators 149
Appendix 3: List of national tax experts 152
Appendix 4: List of literature 153
Appendix 5: Role of third-country jurisdictions 162

List of Tables

Table 1: List of abbreviations and acronyms ... 5
Table 2: Indicators resulting from Structure 1 ... 29
Table 3: Indicators resulting from Structure 2 ... 34
Table 4: Indicators resulting from Structure 3 ... 37
Table 5: Indicators resulting from Structure 4 ... 40
Table 6: Indicators resulting from Structure 5 ... 43
Table 7: Indicators resulting from Structure 6 ... 46
Table 8: Indicators resulting from Structure 7 ... 50
Table 9: ATP indicator categorization and explanations ... 52
Table 10: List of ATP indicators ... 55
Table 11: Austria: Overview ... 70
Table 12: Belgium: Overview ... 73
Table 13: Bulgaria: Overview ... 76
Table 14: Croatia: Overview ... 78
Table 15: Cyprus: Overview ... 80
Table 16: Czech Republic: Overview ... 83
Table 17: Denmark: Overview ... 85
Table 18: Estonia: Overview ... 86
Table 19: Finland: Overview ... 89
Table 20: France: Overview ... 92
Table 21: Germany: Overview ... 95
Table 22: Greece: Overview ... 97
Table 23: Hungary: Overview ... 99
Table 24: Ireland: Overview ... 102
Table 25: Italy: Overview ... 105
Table 26: Latvia: Overview ... 109
Table 27: Lithuania: Overview ... 112
Table 28: Luxembourg: Overview ... 114
Table 29: Malta: Overview ... 117
Table 30: The Netherlands: Overview ... 120
Table 31: Poland: Overview ... 124
Table 32: Portugal: Overview ... 126
Table 33: Romania: Overview ... 129
Table 34: Slovak Republic: Overview ... 131
Table 35: Slovenia: Overview ... 133
Table 36: Spain: Overview ... 136
Table 37: Sweden: Overview ... 139
Table 38: United Kingdom: Overview ... 141
Table 39: List of national tax experts ... 150

List of Figures

Figure 2.1: Offshore loan ATP structure ... 27
Figure 2.2: Hybrid loan ATP structure ... 32
Figure 2.3: Hybrid entity ATP structure ... 36
Figure 2.4: Interest-free-loan ATP structure ... 39
Figure 2.5: Patent box ATP structure ... 41
Figure 2.6: Two-tiered IP ATP structure ... 44
Figure 2.7: IP and cost-contribution agreement structure ... 48

List of Abbreviations and Acronyms

Table 1: List of abbreviations and acronyms

Abbreviation	Meaning
ACE	Allowance for Corporate Equity
APA	Advance Pricing Agreement
ATP	Aggressive Tax Planning
BEPS	Base Erosion and Profit Shifting
CCA	Cost Contribution Agreement
CCCTB	Common Consolidated Corporate Tax Base
CFC	Controlled Foreign Corporation
CIT	Corporate Income Tax
EBIT	Earnings Before Interest and Tax
EBITA	Earnings Before, Interest, Tax and Amortisation
EBITD	Earnings Before Interest, Tax and Depreciation
EBITDA	Earnings Before Interest, Tax, Depreciation and Amortisations
ECOFIN	Economic and Financial Affairs Council
EEA	European Economic Area
EU	European Union
G20	The Group of Twenty (19 countries + the EU)
GAAR	General Anti- Abuse Rules
IP	Intellectual Property
MNE	Multi-National Enterprise
MS	Member State
NID	Notional Interest Deduction
NTE	National Tax Expert
OCT	Overseas Countries and Territories
OECD	Organisation of Economic Cooperation and Development
OMR	Outermost Regions
PE	Permanent Establishment
PSD	Parent – Subsidiary Directive
R&D	Research & Development
SAAR	Specific Anti-Avoidance Rules
TFEU	Treaty on the Functioning of the European Union
TP	Transfer Pricing
WHT	Withholding tax

Abstract <EN>

As a response to the increasing sophistication of tax planners in identifying and exploiting the legal arbitrage opportunities and the boundaries of acceptable tax planning, policy makers across OECD, G20 and EU countries have taken steps to ensure that taxation duly takes place where economic value is generated and where the economic activity is actually carried out.

In this context, the European Commission sees a strong need to obtain increased knowledge of the tax laws and practices of Member States of the European Union, which may expose particular jurisdictions to aggressive tax planning (ATP). The present study was commissioned with the aim to:

1. Identify model ATP structures;
2. Identify ATP indicators which facilitate or allow ATP;
3. Review the corporate income tax systems of the EU Member States by means of the ATP indicators, in order to identify those tax rules and practices (or lack thereof) that result in Member States being vulnerable to ATP.

This study was carried out by Ramboll and Corit Advisory with the support of a network of independent national tax experts. It reviews and assesses the corporate income tax systems of all EU Member States. It identifies weaknesses of the national tax systems in the EU and sets the ground for additional analysis and new policy initiatives

Abstract <FR>

En réponse à la capacité croissante des planificateurs fiscaux à identifier et à exploiter les opportunités d'arbitrage juridiques et les limites de la planification fiscale acceptable, les décideurs politiques de l'OCDE, du G20 et de l'UE ont multiplié les initiatives afin de s’assurer que la fiscalité prend dûment place là où est générée la valeur économique et où l’activité économique est effectivement réalisée.

Dans ce contexte, la Commission européenne perçoit la nécessité d’acquérir une meilleure connaissance de la législation et des pratiques fiscales des États membres de l’UE et qui pourraient exposer les juridictions spécifiques à la planification fiscale agressive (PFA). En conséquence, la présente étude a été commanditée afin de:

1. Identifier les modèles de structures de PFA
2. Identifier les indicateurs qui facilitent ou permettent la PFA
3. Revoir les systèmes d’imposition du revenu des sociétés dans les États membres de l’UE, au moyen des indicateurs de PFA, et ce afin d’identifier les règles et les pratiques fiscales ou l’absence de celles-ci, qui rendent les États membres vulnérables à la PFA.

L'étude a été réalisée par Ramboll et Corit Advisory avec le soutien d’un réseau d’experts fiscaux nationaux indépendants. Elle examine et évalue les systèmes d’imposition des sociétés de tous les États membres de l’UE. Elle identifie les faiblesses des systèmes fiscaux nationaux et pose les bases d’analyses complémentaires et d’initiatives politiques nouvelles.

Executive Summary <EN>

Context, purpose and methodology

In the wake of the financial crisis and the subsequent economic downturn, corporate tax avoidance and tax planning have received a great deal of attention from policymakers and the media. The topic is high on the political agenda within the OECD/G20, the EU and a number of individual countries, which have increased initiatives to ensure that taxation duly takes place where economic value is generated and where the economic activity is actually carried out.

Against this background, the EU Commission finds it necessary to improve the knowledge of the tax laws and practices of EU Member States, which may expose particular jurisdictions to aggressive tax planning (ATP). As a result, the present study has been commissioned to:

1. Identify model ATP structures
2. Based on the ATP structures, identify ATP indicators which facilitate or allow ATP
3. Review the corporate income tax systems of the EU Member States by means of the ATP indicators, in order to identify those tax rules and practices (or lack thereof) that result in Member States being vulnerable to ATP

The study carried out by Ramboll and Corit Advisory, with the support of a network of independent national tax experts, is the first one of its kind. It reviews and assesses the corporate income tax systems of all EU Member States using a tailored methodology that is systematic, simple and easy to communicate. Although a more in-depth and circumstantiated analysis would be needed in order to investigate and possibly address specific cases of national tax systems being at risk of aggressive tax planning, it is hoped that this study provides useful information for policy makers with a view to improving the functioning of the national tax systems of EU Member States.

ATP structures

In order to identify relevant ATP indicators, ATP structures representing all major empirically proven channels for profit shifting[1] have been identified and described.

The selection of model ATP structures was inspired by the OECD's BEPS reports as well as other tax literature, and has been supplemented from the authors' professional experience and knowledge. This has resulted in the seven model ATP structures which are presented in the list that appears immediately below. The study considers four well-known corporate tax structures identified by the OECD[2], and adds an additional three model ATP structures. The seven model structures are:

- A hybrid financing structure
- A two-tiered IP structure with a cost-contribution arrangement
- A one-tiered IP with a cost-contribution arrangement
- An offshore loan structure

[1] (i) Debt shifting, (ii) Location of intangible assets and intellectual property, and partly (iii) Strategic Transfer Pricing

[2] See OECD: *Addressing Base Erosion and Profit Shifting*, 2013, OECD Publishing, Paris, Annex C, p. 73 et seq.

- A hybrid entity structure
- An interest-free-loan structure
- A patent-box ATP structure

The ATP structures identified in this study include only those which qualify as ATP structures in terms of the definition set out by the European Commission Recommendation on Aggressive Tax Planning[3]. According to this definition, ATP consists "*in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. It may result in double deductions (e.g. the same cost is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence)".*

ATP indicators

ATP indicators can be generally defined as those generic characteristics of a tax system which have the potential to facilitate ATP. Technically, an ATP indicator can take the form of a specific piece of legislation or case law, but it can also take the opposite form, namely the absence of such legislation.

A total of 33 ATP indicators were identified and assessed in the context of this study, 27 of which have been derived directly from the model ATP structures[4]. For the purpose of this study, a typology of indicators was constructed to reflect the manner in which they facilitate ATP.

The character of how indicators facilitate ATP can be either active or passive. An ***active ATP indicator*** is one which can directly promote or prompt an ATP structure. Often, it is the active indicators that are the main source of the tax benefit offered by an ATP structure. By contrast, a ***passive ATP indicator*** is one which does not by itself promote or prompt any ATP structure, but which is necessary in order not to hinder or block an ATP structure. A third category, the ***lack of anti-abuse ATP indicators***, represents the lack of rules aimed at counteracting the avoidance of tax.

Based on the discussion and definitions above, the study distinguishes between these three categories of indicators. Additionally, the absence of some anti-abuse and passive ATP indicators can combine with others into ***sets*** which are capable of facilitating the same or similar types of ATP structure.

It should be understood that no value judgement is intended by the nomenclature used in this study. Member State tax rules found to be ATP indicators for the purpose of this study may well pursue perfectly valid objectives. A final judgement of such rules would require a detailed analysis of their actual design and application. Such detailed analysis has been outside the scope of study.

Member State assessments

Using as its basis the list of ATP indicators, a questionnaire was designed for the purpose of factual primary data collection. The questionnaire was completed by

[3] Commission recommendation of 6.12.2012 on aggressive tax planning, C(2012) 8806 final, Brussels, 6.12.2012.

[4] In addition to the ATP indicators derived from the model ATP structures, a number of straightforward ATP indicators were also included.

individual national tax experts (NTEs) who provided up-to-date information on the tax system of each of the 28 Member States by reference to the ATP indicators. Questionnaires filled in by NTEs were sent for comments to the representatives of each Member State.

The questionnaire responses were analysed centrally in order to assess individual MS positioning by reference to the list of ATP indicators. The product of this task consists of a Member State-by-Member State assessment, highlighting the findings and identifying the MS' most salient tax features in the light of the indicators.

Relevant combinations of passive indicators plus lack of anti-abuse indicators were also given special attention, as they could contribute to increasing the risk of ATP.

The main results of this study are presented in the form of a detailed Member State by Member State assessment. The total number of indicators varies widely between Member States, ranging from four to seventeen. *Active indicators* are found in fifteen Member States, with three Member States having three active indicators. All Member States except two have indicators showing a *lack of anti-abuse rules*. Finally and not surprisingly, *passive indicators* are found in all Member States. Most Member States exhibit between three to five passive indicators.

General observations

In addition to the MS-by-MS assessment, a number of interesting general observations can be derived by comparing the results across the EU Member States.

Subject to further analysis, these observations could imply that scope exists for Member States to tighten their anti-abuse rules in order to counter base erosion by means of financing costs.

All twenty-eight Member States exhibit indicators that fall under the interest cost theme, and twenty-four Member States have at least two indicators within this category that combine into a set. This suggests that **base erosion by means of financing costs can occur**.

ATP via no or favourable taxation of dividends is also important, even though to a lesser extent. Thirteen Member States show a **combined set of indicators in the area of dividends received and dividends paid**. This may be taken as an indication that in many Member States, rules to counter ATP based on the tax-free flow-through of dividends are already well established in this area. In this context, it is noted that at the time of data collection, thirteen Member States **did not apply any beneficial-owner test when accepting a claim for a reduction or exemption of withholding tax**.

In the area of anti-abuse rules, this study finds that half of Member States – specifically, fourteen – **do not have CFC rules**, while those rules can play an important role in countering ATP. Additionally, with the exception of Denmark, Spain and (partly) Hungary, no Member State has rules to counter **the mismatching tax qualification of a local partnership or company by another state** (typically the state of the owners).

It is also worth noting that almost all Member States (specifically, twenty-six of them) have been reported to have general or specific anti-avoidance rules which are capable of countering parts of the model ATP structures considered in this study. However, this should not be taken to represent a ban of ATP structures. Based on the information collected, it appears that the rules in place can be only partially efficient to prevent these structures.

Finally, the appendix of the study identifies indicators which could prompt ATP structures if they are found in third countries' corporate income tax systems. Such a list could comprise a basis for joint work between Member States to prevent ATP by companies resident in these jurisdictions.

Sommaire <FR>

Contexte, objectif et méthodologie

À la suite de la crise financière et du ralentissement économique, l'évitement de l'imposition des sociétés et la planification fiscale ont reçu beaucoup d'attention parmi les décideurs politiques et les médias. Le sujet est haut placé dans l'agenda politique de l'OCDE/G20, de l'UE et d'un certain nombre de pays, lesquels ont multiplié les initiatives pour s'assurer que la fiscalité s'exerce là où est générée la valeur économique et où l'activité économique est effectivement réalisée.

Dans ce contexte, la Commission européenne juge nécessaire d'améliorer la connaissance de la législation et des pratiques fiscales des États membres de l'UE qui pourraient exposer les juridictions spécifiques à la planification fiscale agressive (PFA). En conséquence, la présente étude a été commanditée afin de:

1. Identifier les modèles de structures de PFA
2. Sur base des structures de PFA, identifier les indicateurs de PFA qui facilitent ou permettent la PFA
3. Passer en revue les systèmes d'imposition des revenus des sociétés dans les États membres de l'UE, au moyen des indicateurs de PFA, et ce afin d'identifier les règles et les pratiques fiscales ou l'absence de celles-ci, qui rendent les États membres vulnérables à la PFA.

L'étude réalisée par Ramboll et Corit Advisory, avec le soutien d'un réseau d'experts fiscaux nationaux indépendants, est la première en son genre. Elle examine et évalue les systèmes d'impôt sur le revenu de tous les États membres de l'UE à l'aide d'une méthodologie adaptée, qui est systématique, simple et facile à communiquer. Bien qu'une une analyse plus approfondie et circonstanciée serait nécessaire afin d'enquêter et éventuellement traiter les cas spécifiques des systèmes fiscaux nationaux étant à risque de la planification fiscale agressive, nous espérons que cette étude fournit des informations utiles pour les décideurs politiques en vue d'améliorer les systèmes fiscaux nationaux des États membres de l'UE.

Les structures de PFA

Afin d'identifier les indicateurs de PFA pertinents, l'étude identifie et décrit les structures de PFA représentant tous les canaux principaux et empiriquement éprouvés de délocalisation de bénéfices[5].

La sélection des modèles de structures de PFA a été inspirée par les rapports BEPS de l'OCDE ainsi que d'autres documents fiscaux, et complétée par l'expérience et les connaissances professionnelles des auteurs. Ce travail a abouti à l'identification de sept modèles de structures de PFA. L'analyse confirme quatre structures d'imposition des sociétés déjà identifiées par l'OCDE[6], auxquelles ont été ajoutés trois autres modèles de structures de PFA:

- Une structure hybride de financement
- Une structure IP à deux niveaux avec accord de répartition des coûts
- Une structure IP à un seul niveau et accord de répartition des coûts

[5] (i) Délocalisation de la dette, (ii) Localisation des actifs incorporels et de la propriété intellectuelle et, en partie, (iii) prix de transfert interne stratégique.

[6] OECD: *Addressing Base Erosion and Profit Shifting*, 2013, OECD Publishing, Paris, Annex C, p. 73 et seq.

- Une structure de prêt extraterritorial
- Une structure d'entité hybride
- Une structure de prêt sans intérêt
- Une structure de « patent boxes » (boîte à brevets)

Les structures de PFA identifiées dans cette étude ne comprennent que des structures qui sont considérées comme PFA, telle que définie dans la recommandation de la Commission européenne relative à la planification fiscale agressive[7]. Selon cette définition, la PFA consiste « *à profiter des aspects techniques d'un système fiscal ou de l'inadéquation entre deux ou plusieurs systèmes fiscaux dans le but de réduire l'obligation fiscale. Il peut en résulter une double déduction (par exemple, le même coût est déduit à la fois dans l'Etat de la source et de résidence) et une double non-imposition (par exemple le revenu qui n'est pas imposable dans l'État de la source est exonéré dans l'État de résidence)* ».

Les indicateurs de PFA

Les indicateurs de PFA peuvent être généralement définis comme des caractéristiques génériques d'un système fiscal qui peuvent faciliter la PFA. Techniquement, un indicateur de PFA peut prendre la forme d'un élément spécifique de la législation ou de la jurisprudence, mais il peut aussi prendre la forme opposée, à savoir l'absence d'une telle législation ou jurisprudence.

Un total de 33 indicateurs de PFA ont été identifiés et évalués dans le cadre de cette étude, dont 27 ayant été directement dérivés des modèles de structures de PFA[8]. Pour les besoins de cette étude, une typologie des indicateurs a été construite pour refléter la manière dont ils facilitent la PFA.

La manière dont les indicateurs facilitent la PFA peut être active ou passive. Un **indicateur PFA actif** est celui qui peut directement promouvoir ou susciter une structure de PFA. Souvent, ce sont les indicateurs actifs qui sont la principale source de l'avantage fiscal offert par une structure de PFA. Par contre, un **indicateur PFA passif** est celui qui ne peut promouvoir ou susciter aucune structure PFA par lui-même, mais qui est nécessaire afin de ne pas entraver ou bloquer une structure de PFA. Une troisième catégorie, les **indicateurs PFA de manque de dispositions anti-abus**, marque comme son nom l'indique l'absence de règles anti-abus. En général, les règles anti-abus sont des règles visant à lutter contre l'évasion fiscale.

Basée sur la discussion et les définitions ci-dessus, l'étude fait la distinction entre ces trois catégories d'indicateurs. En outre, un certain nombre d'indicateurs PFA passifs et de manque de disposition anti-abus peuvent se combiner avec d'autres dans des ***ensembles*** qui sont capables de faciliter les mêmes structures PFA ou des structures de type similaires.

Il doit être entendu que la nomenclature utilisée dans cette étude ne porte aucun jugement de valeur. Les règles fiscales des États membres présentées comme des indicateurs de PFA pour les besoins de cette étude peuvent en réalité poursuivre des

[7] Recommandation de la Commission du 6.12.2012 relative à la planification fiscale agressive, C(2012) 8806 final, Bruxelles, 6.12.2012.

[8] En plus des indicateurs de PFA dérivés des modèles de structures de PFA, un certain nombre d'indicateurs directs de PFA ont été inclus.

objectifs parfaitement valables par ailleurs. Un jugement définitif de ces règles demanderait une analyse détaillée de celles-ci et de leur application effective. Cette analyse détaillée est en dehors du champ de l'étude.

Les évaluations des États membres

Sur la base de la liste d'indicateurs de PFA, un questionnaire a été conçu dans le but de collecter de données factuelles primaires. Le questionnaire a été complété par les experts fiscaux nationaux individuels (EFN) qui ont fourni des informations à jour sur le régime fiscal de chacun des 28 États Membres par rapport aux indicateurs de PFA. Les questionnaires remplis par les EFN ont été envoyés pour commentaires aux représentants de chaque État membre.

Les réponses au questionnaire ont été analysées de manière centralisée afin d'évaluer le positionnement individuel de chaque État membre, par référence à la liste des indicateurs de PFA. Le résultat de cette tâche consiste en une identification des caractéristiques fiscales les plus saillantes de l'État membre en question à l'aune des indicateurs. Les combinaisons pertinentes d'indicateurs passifs et d'absence de dispositions anti-abus ont également reçu une attention particulière car ils peuvent contribuer à accroître le risque de PFA.

Les principaux résultats de cette étude sont présentés sous la forme d'une évaluation détaillée par État membre. Le nombre total d'indicateurs identifiés varie considérablement entre les États membres, de quatre jusqu'à dix-sept. Des indicateurs actifs sont identifiés dans quinze États membres, trois États membres ayant trois indicateurs actifs. Des indicateurs de manque de disposition anti-abus se trouvent dans tous les États membres sauf deux. Enfin, sans surprise, des indicateurs passifs sont présents dans tous les États membres. La plupart des États membres présentent entre trois à cinq indicateurs passifs.

Observations générales

En plus de l'évaluation par État membre, il est possible de formuler un certain nombre d'observations générales intéressantes en comparant les résultats entre les États membres de l'UE.

Sur base des éléments collectés pour l'ensemble des Etats membres, il apparaît qu'il y a matière à **renforcer les règles anti-abus pour lutter contre l'érosion de la base d'imposition par le biais du financement de la dette**. Tous les vingt-huit États membres présentent des indicateurs relatifs au traitement fiscal du financement de la dette et vingt-quatre États membres ont au moins deux indicateurs dans cette catégorie qui se combinent pour faciliter de la PFA par ce canal.

La PFA par le biais d'une taxation des dividendes non ou favorablement imposés est également pertinente, même si dans une moindre mesure. Treize États membres présentent un **ensemble combiné d'indicateurs dans le domaine des dividendes reçus et des dividendes payés**. Cela peut être considéré comme une indication que des règles anti-abus ont déjà été mises en place par de nombreux États membres dans ce domaine. Cependant, il est à noter que, au moment de la collecte des données pour cette étude, treize États membres **n'appliquaient aucun test sur le véritable ayant-droit lors de l'acceptation d'une demande de réduction ou exonération de la retenue d'impôt**.

Plus généralement, dans le domaine des dispositions anti-abus, l'étude conclut que la moitié des États membres - quatorze – **n'ont pas de règles relatives aux CFC**. Or ces règles peuvent jouer un rôle important dans la prévention de la planification fiscale agressive. En outre, à l'exception du Danemark, de l'Espagne et (partiellement) de la Hongrie, aucun État membre n'a de règles pour contrer une **qualification fiscale inadéquate d'un partenariat ou d'une entreprise local(e) par un autre Etat membre** (en général par l'Etat membre des propriétaires du partenariat ou de l'entreprise).

Il est en outre intéressant de noter que presque tous les États membres (vingt-six) ont des règles anti-abus générales ou particulières, capables de contrer certaines parties des modèles de structures de PFA considérés dans cette étude. Ceci ne doit néanmoins pas être interprété comme permettant d'éviter la mise en place de ces structures. Sur base des informations collectées, il apparaît que les règles en place peuvent n'être que partiellement efficaces pour contrer ces structures.

Finalement, l'étude identifie, en annexe, des indicateurs qui, s'ils se trouvent dans le système d'imposition du revenu des sociétés des pays tiers, pourraient susciter les structures PFA. Cette liste pourrait constituer une base de travail conjoint entre les États membres pour empêcher la PFA des sociétés résidant dans ces juridictions.

1. Introduction

1.1 Policy background

In the wake of the financial crisis and the economic downturn, corporate tax avoidance and aggressive tax planning have received a great deal of attention from policymakers and the media. As a consequence, the topic is high on the political agendas of the OECD/G20, the EU and a number of individual countries.

The overall policy rationale behind these initiatives is to ensure that taxation takes place where economic value is generated and where the economic activity is actually carried out.

As a response to the "*increasing sophistication of tax planners in identifying and exploiting the legal arbitrage opportunities and the boundaries of acceptable tax planning*"[9], the OECD/G20 has launched the Base Erosion and Profit Shifting (BEPS)[10] project, in which a large number of countries are now participating. Significant work has been carried out in this context: Following up on the 15 action points contained in the 2013 OECD Action Plan on BEPS, seven deliverables comprising approximately 900 pages of technical reports were published in 2014, while a final package of reports – together with a plan for follow-up work and a timetable for implementation – was published on 5 October 2015[11].

The work conducted in relation to the items contained in the BEPS Action Plan is of particular relevance to the present study. These items are:

- Action 2 on Neutralising the Effects of Hybrid Mismatch Arrangements[12]
- Action 3 on Strengthening CFC rules
- Action 4 on Limiting Base Erosion via Interest Deductions and Other Financial Payments[13]
- Action 5 on Countering Harmful Tax Practices

In 2012, the European Commission adopted an Action Plan[14] for a more effective EU response to tax evasion and avoidance. It was accompanied by the adoption of two Recommendations: the first related to measures intended to encourage third countries to apply minimum standards of good governance in tax matters[15], while the second focused on aggressive tax planning (ATP)[16]. ATP has been defined in the EU Recommendation as "*taking advantage of the technicalities of a tax system or of*

[9] OECD, *Action Plan on Base Erosion and Profit Shifting*, 2013, OECD Publishing, Paris, Chapter 1, page 11

[10] OECD, *Action Plan on Base Erosion and Profit Shifting*, 2013, OECD Publishing, Paris

[11] The 2014 reports have been consolidated with the remaining 2015 deliverables to produce a final set of recommendations for addressing BEPS

[12] OECD (2014), *Neutralising the Effects of Hybrid Mismatch Arrangements*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.

[13] OECD (2015), *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments*, Action 4 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

[14] Communication from the Commission to the European Parliament and the Council: An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final

[15] Commission Recommendation of 6.12.2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, C(2012) 8805

[16] Commission Recommendation of 6.12.2012 on aggressive tax planning, C(2012) 8806

mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include double deductions (e.g. the same loss is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence)"[17].

The domestic tax practices that are subject to scrutiny by the European Commission from the perspective of EU state aid rules and the recent leaks of specific beneficial arrangements in certain Member States confirm the need for increased coordinated efforts within the EU with respect to ATP.

On 17 June 2015, the Commission released an Action Plan for fair and efficient corporate taxation in the EU[18]. The Action Plan sets out to reform the corporate tax framework in the EU, in order to tackle tax abuse, ensure sustainable revenues and support a better business environment in the Single Market. The plan has identified five key areas for action: (a) Re-launching the CCCTB, (b) Ensuring fair taxation where profits are generated, (c) Creating a better business environment, (d) Increasing transparency, and (e) Improving EU coordination.

The European Council adopted a first amendment to the Parent/Subsidiary Directive[19] in July 2014, to prevent corporate groups from using hybrid loan arrangements.

On 27 January 2015, the Council formally adopted another amendment proposed by the Commission, namely a binding general anti-abuse rule. This rule aims at preventing Member States from granting the benefits of the PSD in respect of artificial arrangements, i.e. arrangements that are not 'genuine' and have been put into place to obtain a tax advantage without reflecting economic reality. The clause is formulated as a '*de minimis*' rule, meaning that Member States can apply stricter national rules, so long as they meet EU requirements. The deadline for implementation of both amendments is set at 31 December 2015.

Additionally, on 18 March 2015 the Commission presented a package of measures to boost tax transparency. A key element of this Tax Transparency Package is a proposal to introduce the automatic exchange of information between Member States about their tax rulings. On 6 October 2015, the Council reached a political agreement on the automatic exchange of information regarding cross-border tax rulings.

1.2 Purpose of the study

Based on the considerations presented above, the EU Commission sees a strong need to obtain increased knowledge of the tax laws and practices of all 28 EU Member States which may result in the specific Member States being at risk of ATP. In other words, a better understanding is needed to qualify the assessment and analysis of ATP structures in an EU context and to help the Member States protect themselves against these practices.

[17] Commission Recommendation of 6.12.2012 on aggressive tax planning C(2012) 8806

[18] COM(2015) 302 final, *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, Brussels, 17.6.2015

[19] The parent-subsidiary directive (recast under 2011/96/EU) is intended to ensure that profits made by cross-border groups are not taxed twice. It requires Member States to exempt from taxation profits received by parent companies from their subsidiaries in other Member States.

As a result, the purpose of the study is to:

(i) Identify model ATP structures
(ii) Based on the ATP structures, identify ATP indicators which facilitate or allow the ATP
(iii) Review the corporate income tax systems of the EU Member States by means of the ATP indicators. The overall objective is to identify the tax rules and practices – or lack thereof – that result in Member States being vulnerable to aggressive tax planning.

1.3 Scope of the study

1.3.1 Territorial scope

The focus of the study is on the general corporate income tax systems of the 28 Member States as reflected in their national tax legislation and tax practices.

As part of these jurisdictions, there may be specific provisions that differ from the general rules. This is, for example, the case of tax incentives in Special Economic Zones. These have not been covered by this study.

In addition, some regions in the EU Member States have some degree of fiscal autonomy; hence corporate income tax provisions in these regions may differ from the ones generally applicable in the Member States. These too have not been covered by this study.

A third category is constituted by Overseas Countries and Territories (OCT) and Outermost Regions (OMR), which are listed in various articles of the Treaty (TFEU). These territories and regions may have their own tax systems. They may have different tax arrangements vis-à-vis their Member State, and their interaction with EU law differs according to the TFEU provisions making reference to them. Depending on their interaction with EU law, they may be considered as third-country jurisdictions for tax purposes. It exceeds the scope of this study to review the corporate tax systems of all these jurisdictions. But the study discusses, in Appendix 5, the possible role that these jurisdictions (and more generally other third countries) may theoretically play in ATP structures, and which indicators in these jurisdictions could facilitate such ATP.

1.3.2 Temporal scope

In terms of cut-off date, only the laws and practices applicable as of the date of the questionnaires (i.e. May/June 2015) are considered. Any ‘grandfathering’ provisions which may still be applicable are generally not taken into account, but may be mentioned in the Member State assessments to the extent that they are relevant and have been brought to the attention of the authors.

As the study addresses the current laws and practices of the Member States, it follows that initiatives aimed at countering ATP which are being discussed by the EU and the OECD but have not yet been adopted by Member States have not been included in the Member State assessments.

1.3.3 Other subjects

The study focuses on national tax rules and therefore does not cover issues that are mostly relevant for tax conventions (such as the notion of permanent establishments) or correspond to international principles on the proper allocation of taxing rights.

1.4 Overall approach

In order to identify which elements of the tax systems of Member States are potentially most vulnerable, it was necessary to screen all Member States on the basis of a grid of indicators. This required first defining the indicators that were relevant for carrying out such a screening, and second, applying these indicators against the country-specific information for each Member State. This entailed the following tasks:

- **Task 1: Identification of relevant ATP structures**

In order to identify relevant ATP indicators, a selection of ATP structures representing basic ATP techniques was put together. The selection includes four well-known corporate tax structures based on those identified by the OECD[20]. To these, three model ATP structures drawn from other tax literature and supplemented by the authors' professional experience and knowledge have been added.

- **Task 2: Design of a list of ATP indicators**

On the basis of the model ATP structures, a number of relevant ATP indicators were identified and categorized.

- **Task 3: Overview of all Member States**

Using the list of ATP indicators, a questionnaire was designed for the purpose of primary data collection.

- Task 3.1: Survey administered to national tax experts

The questionnaire was completed by individual national tax experts, who provided up-to-date information on the tax system of each of the 28 Member States by reference to the ATP indicators. In this phase, national tax experts also had the opportunity to point out any other significant ATP indicators that they were aware of.

- Task 3.2: Validation

The underlying data used in this report has been subjected to validation on multiple occasions:

Immediately following the data collection phase, questionnaires filled in by NTEs were sent for validation to the representatives of each Member State.

The Permanent Representations of all Member States were contacted and asked to provide a single set of factual written comments strictly relating to the answers to the questionnaire and supported by clear references to tax law.

In addition to the above-mentioned review process, a seminar with Member States was organised on 2 October 2015 in Brussels. The results of the draft final report and underlying data were presented. Member States were invited to supply additions, corrections or comments to the study team.

[20] See OECD: *Addressing Base Erosion and Profit Shifting, OECD Publishing Paris, 2013*, Annex C, p. 73 et seq.

In all relevant cases, the comments provided by the Member States[21] were communicated to the national experts in order to construct a unified view and to cross-check the validity of any potential contrary assessments of the questionnaire results expressed by the Member States.

In cases where contrary assessments still remained, the authors of the study were responsible for deciding which version to use for the purpose of analysis. The decisions were taken on the basis of the strength of the arguments and the references to legal provisions and case law provided. Where such a decision was necessary, the final choice (and reasoning) is explicitly mentioned in the relevant analytical section. Contrary opinions made by the NTEs as well as the Member States are also presented in the final version of the questionnaires, for the sake of transparency. It is understood that comments by the Member States on the questionnaires constitute neither an official validation nor the Member State's endorsement of their content or the content of the report.

- Task 3.3: Assessment

The validated questionnaire responses have been analysed by the authors of the study in order to assess individual MS performance by reference to the list of ATP indicators.

The result of this task consists of a Member State-by-Member State assessment, highlighting the findings and identifying the MS' most salient tax features in the light of the indicators.

Critical findings should be taken as preliminary results only, as they are based on limited data. Any final conclusion would be subject to more thorough analysis in a possible follow-up study.

1.5 Content of the report

The present report is structured as follows:

The introductory chapter contains a brief recount of the objectives, scope and overall approach of the study.

Chapter 2 contains a discussion and explanation of the criteria which have been applied in the selection of model ATP structures, plus detailed descriptions of seven model ATP structures which have been deconstructed in order to identify a comprehensive and relevant set of ATP indicators against which the risk exposure of MS tax systems can be tested.

Chapter 3 starts off with a presentation of important methodological considerations relating to the development and classification of indicators. The chapter then proceeds to organise, present and explain each ATP indicator.

The results of the study detailed at the level of each Member State can be found in Chapter 0.

[21] The following Member States did not respond to the invitation to comment on the questionnaire: BG, FR, DE and SI.

Based on the Member State assessments presented in Chapter 4, Chapter 5 presents a number of general observations and common findings at EU level, while also considering any potential policy implications.

The filled-in questionnaires which have been used to collect the required data from the national tax experts, and which have formed the basis of the screening of Member States, are annexed to the report.

An internal working document, highlighting the number and nature of ATP indicators observed in all Member States is also annexed in order to help provide a simplified overview.

Finally, a text explaining the potential role in ATP of certain third-country jurisdictions can be found attached in Appendix 5.

2. ATP Structures

This section identifies and describes the model ATP structures from which the ATP indicators will be derived.

2.1 Methodological considerations

Before presenting the model ATP structures, the following sub-sections present:

(i) a very succinct summary of the typologies that economic literature normally uses when discussing ATP, together with the link between previous literature and the exemplifications presented in this study.

(ii) a number of important considerations comprising the basis for the selection of the seven structures described in our study, as well as our assessment regarding the coverage of the ATP indicators extracted.

2.1.1 Short review of economic literature

The existing body of literature does not necessarily provide granular details concerning the nature and composition of known ATP structures. However, an analysis of relevant papers shows that, with the aim of analysing specific aspects[22] related to profit shifting and anti-avoidance rules, existing literature (economic studies or meta-analyses in particular) has primarily taken into consideration three major, empirically proven channels for profit shifting.

- **Debt shifting**

An important body of literature has assumed that there exists a role for debt (both internal and external) as a vehicle for shifting profits to low-tax countries or obtaining double deductions or no inclusions. The 2015 Commission Staff Working Document titled "Corporate Income Taxation in the European Union" reports that this channel would be responsible for about a third of profit-shifting activities, the remainder being channelled via transfer pricing and IP location[23].

The empirical results of Buettner, T. and Wamser, G. (2013)[24] have shown a robust impact of tax rate differences on the use of internal debt, supporting the view that internal debt is used to shift profits to low-tax countries.

The effectiveness of thin-capitalization rules as an instrument to counter the use of internal debt for tax planning is confirmed by Buettner, T., Overesch, M., Schreiber, U. and Wamser, G. (2012)[25]. However, the same paper suggests that the use of external debt increases as a result. Possibilities for tax planning in the field of intra-group financing and licensing have also been discussed by Finke, K., Fuest, C., Nusser, H., and Spengel, C. (2014)[26].

[22] E.g. causes, drivers, inhibitors, or effects

[23] Commission Staff Working Document, *Corporate Income Taxation in the European Union* (SWD(2015) 121 final). Brussels, 17.6.2015 (page 24)

[24] Buettner, T. and Wamser, G. (2013) "Internal Debt and Multinational profit-shifting : empirical evidence from firm-level panel data", National Tax Journal, March 2013 66 (1), 63-96

[25] Buettner, T., Overesch, M., Schreiber, U. and Wamser, G. (2012) "The impact of thin-capitalization rules on the capital structure of multinational firms", Journal of Public Economics 96, 930-938

[26] Finke K., Fuest C., Nusser H., and Spengel C. (2014) "Extending Taxation of Interest and Royalty Income at Source – an Option to Limit Base Erosion and Profit Shifting?", ZEW Discussion Papers, No. 14-073

As Dharmapala, D. (2014)[27] points out, debt shifting is only one potential channel through which BEPS may operate, and reminds readers of other two important channels, namely strategic transfer pricing and the location of intangible assets.

- **Location of intangible assets and intellectual property**

The role of intellectual property and intangible assets in BEPS is thoroughly discussed among researchers. Recent literature on the role of intangibles uses Amadeus[28] data on European affiliates. Using this data, Dischinger, M. and Riedel, N (2011)[29] confirmed that intangible asset holdings are disproportionately concentrated among affiliates in low-tax jurisdictions; while Karkinsky, T. and Riedel, N (2012)[30], using patent application data from the European Patent Office, confirmed that (within an MNE group) a patent application is more likely to be made by an affiliate facing a lower tax rate (both in absolute terms and in relation to other group affiliates).

Fuest, C. et al (2013)[31] goes further, describing two prominent models for IP-based profit shifting, including one which uses IP box regimes.

- **Strategic Transfer Pricing**

Transfer pricing regulation as an anti-profit shifting instrument has long been accepted in the literature. Buettner, T., Overesch, M., and Wamser, G. (2014)[32]; Finke K *at al*[33] (2014); Lohse, T., Riedel, N., and Spengel, C. (2012)[34] are just a few examples of authors whose papers reflect this view.

Lohse T., and Riedel, N. (2013)[35] go further by empirically demonstrating that multinational profit-shifting activities are significantly reduced when countries introduce or tighten transfer pricing documentation requirements.

2.1.2 Criteria applied for the selection of model ATP structures

This section explains the criteria and methodology applied in selecting the model ATP structures from which the ATP indicators are derived.

[27] Dharmapala, D.(2014) "What Do We Know About Base Erosion and Profit Shifting? A Review of the Empirical Literature" CESifo Working Paper Series No. 4612

[28] Amadeus is a database providing financial and ownership data on 1.6 million European business entities

[29] Dischinger, M. and Riedel (2011) "Corporate taxes and the location of intangible assets within multinational firms"

[30] Karkinsky, T. and Riedel, N (2012) "Corporate taxation and the choice of patent location within multinational firms"

[31] Fuest, C. et al (2013) "Profit shifting and 'aggressive' tax planning by multinational firms: Issues and options for reform", ZEW Discussion Papers, No. 13-078

[32] Buettner, T., Overesch, M. and Wamser, G. (2014) "Anti Profit-shifting Rules and Foreign Direct Investment", CESifo Working Paper Series No. 4710.

[33] Ibid 26

[34] Lohse, T., Riedel, N. and Spengel, C. (2012). "The Increasing Importance of Transfer Pricing Regulations – a Worldwide Overview", Oxford University Centre for Business Taxation Working Paper No.12/27

[35] Lohse, T. and Riedel, N. (2013) "Do Transfer Pricing Laws Limit International Income Shifting? Evidence from European Multinationals", CESifo Working Paper No. 4404

- **The role of the model ATP structures**

The identification and listing of model ATP structures represents the analytical framework for identifying a comprehensive and relevant set of ATP indicators against which the risk exposure of MS tax systems can be tested.

In order to serve this purpose, it is neither necessary nor possible to use as a starting point all possible ATP structures and their potential variations. Under the qualification of a number of caveats, explained below, it is the authors' opinion that the model ATP structures which exemplify all three of the main ATP channels usually found in the existing literature[36] should provide reasonable confidence regarding the coverage of the indicators extracted. However, there can be no guarantee that all relevant ATP indicators have been included.

- **Definition of ATP**

It has been crucial for the selection process to include only such structures which qualify as ATP as have been defined in the European Commission Recommendation on Aggressive Tax Planning[37] and adopted by this study. According to these definitions, ATP consists "*in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. It may result in double deductions (e.g. the same cost is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence)".*

- **Limitations of scope**[38]

In accordance with the definition of ATP outlined above, certain well-known tax planning strategies are considered to fall outside the scope of the study.

Dividend repatriation strategies which seek to eliminate double taxation have been excluded, as have simple debt push-down strategies that seek to allocate the tax deduction of financing costs to the MS in which an acquisition is made. Such structures are not considered ATP structures so long as they do not produce any double tax deduction or double non-taxation.

Commissionaire structures[39] are not separately treated among the proposed structures. The tax issue that is particular to commissionaire structures relates to the appropriate allocation of income between the principal state and the commissionaire state. This is not a self-contained issue for any single MS; rather, it is an international issue to be addressed in the context of OECD work on the Model Tax Convention and

[36] (i) Debt shifting; (ii) location of intellectual property and (iii) (partly) abuse of transfer pricing arrangements.

[37] Commission recommendation of 6.12.2012 on aggressive tax planning, C(2012) 8806 final, Brussels, 6.12.2012

[38] For the territorial and temporal limitations of scope, see Section 1.3

[39] A commissionaire acts in its own name but on behalf of, and at the risk of, an undisclosed principal. As a result, it has so far been generally accepted amongst OECD member states that the commissionaire can be remunerated with a relatively small commission fee, so that the major part of profits is attributed to the principal. This has been interpreted as being in accordance with transfer-pricing rules, as well as rules on permanent establishments. The OECD has now reviewed these interpretations and made changes to Article 5 of the OECD Model Tax Convention as well as its commentaries. Please refer to Action 7: 2015 Final Report: *Preventing the Artificial Avoidance of Permanent Establishment Status*.

the definition of a PE and its guidelines[40]. It is also an acknowledged area of work at EU level in the context of the Action Plan for fair and efficient taxation.

The same applies to general transfer pricing issues. Transfer pricing is also mainly a question of the proper allocation of income between two or more states, and does not necessarily involve any double tax deduction or non-taxation. However, two types of unilateral-ruling practices relating to transfer pricing have been included in the study.

Finally, tax evasion structures have been excluded. Only structures that are not illegal from a tax and private law perspective have been included in the study.

- **Selection of model ATP structures**

The starting point for the definition of ATP structures has been the three well-known corporate tax structures identified by the OECD[41]:

- Leveraged acquisition with debt push-down and use of intermediate holding companies
- An E-commerce structure using a two-tiered structure and transfer of intangibles under a cost-contribution arrangement
- A transfer of manufacturing operations together with a transfer of supporting intangibles under a cost-contribution arrangement

These structures have been amended and modified in order to enable their ATP indicators to stand out as clearly as possible, and have been included in our selection of model ATP structures respectively as Models 2 (a hybrid finance structure), 6 (a two-tiered IP structure with a cost-contribution arrangement) and 7 (a one-tiered IP and cost-contribution arrangement).

Besides the three original structures, four additional model ATP structures have been included:

- An offshore loan structure
- A hybrid entity ATP structure
- An interest-free loan
- A patent-box ATP structure

The four additional model ATP structures (Model ATP Structures 1, 3, 4 and 5) were selected so that the study could also address the following important ATP indicators: offshore entities, patent box and other mismatches.

This selection is based on the authors' professional experience and knowledge. It has also been inspired by the OECD/G20 BEPS reports as well as other tax literature[42], including popular and technical sources. Another primary source comprised an analysis of international legislative developments. The analysis of the legislative developments helped to identify the specific international ATP structures that some states have been addressing. Finally, another source of inspiration has been the leak of private ruling documents from the Luxembourg tax authorities (popularly known as LuxLeaks).

[40] The issue is part of BEPS Action 7, and has most recently been addressed in "OECD: Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7" - 2015 Final Report (5 October 2015)
[41] See OECD: Addressing Base Erosion and Profit Shifting, 2013, OECD Publishing, Paris, Annex C, p. 73 et seq. and "*Neutralising the Effects of Hybrid Mismatch Arrangements*", pp. 33-34 (OECD, Action 2: 2014 Deliverable
[42] See Appendix 4: List of literature

- **Certainty about the coverage of indicators**

It is the opinion of the authors of this study that the model ATP structures allow for the extraction of ATP indicators which are general enough to satisfactorily capture the risk of ATP through structures which make use of the same types of mismatches, but which could take other forms (meaning that the indicators capture not only the risk that a particular structure can be set up, but also similar structures which may aim to take advantage of the same type of mismatch).

While it is the authors' view that the seven model ATP structures together with some stand-alone indicators (as presented below) cover a comprehensive and relevant range of typical ATP indicators of international ATP structures, no valid scientific method can actually verify this opinion. This follows from the fact that knowledge of particular ATP structures is typically kept confidential, and is available only to the MNEs concerned and their advisers. The means of obtaining knowledge about such structures relies on general working experience, various literature sources, published court cases and leaked documents that reveal the details of the relevant structures. However, even so, there can be neither any guarantee nor any evidence that full knowledge of all relevant ATP structures and indicators has been obtained. To a very large extent, the international tax planning carried out by MNEs is a confidential activity based on tacit knowledge.

Legal research ought to produce well-argued results on the basis of the existing sources. Even when the existing theoretical papers on ATP (primarily in the economic literature) are taken into consideration, certainty with respect to the full coverage of indicators is not ensured. Economic theory and empirical studies seem to address only very well-described and relatively simple tax planning techniques.

2.2 Model ATP structures

This section contains a description of the seven model ATP structures from which the ATP indicators are derived.

2.2.1 Structure 1 - Offshore loan ATP structure

This ATP structure is a simple one that is designed to illustrate some basic ATP indicators. As the structure is rather illustrative and generic, the authors have found no direct reference in the literature; however, it exemplifies a simple structure falling under the debt-shifting ATP channel.

The ATP structure relies on the payment of tax-deductible interest to a tax-exempt company resident outside the EU. There is no hybrid mismatch in qualification, whether of a financing instrument or of an entity. The ATP element of the structure is derived from the tax exemption of an offshore entity that is included in the structure, in combination with the tax treatment of interest in the MS of the intermediate holding company. Hence this ATP structure takes advantage of situations where interest can be fully deducted in one MS whereas only a small interest spread is being taxed in the other MS, because this other MS does not impose withholding tax on the interest paid to the offshore (low-taxed) entity.

- **Introduction**

The ATP structure is established in connection with a multinational group's acquisition of an operating company in MS C. However, it is worth observing that in many situations, it could also have been established in an existing MNE group outside the context of an acquisition.

The structure is intended to obtain tax relief for *internal (artificially created) financing costs* which do not reflect any external financing costs for the MNE group. This is achieved by contributing capital into a tax-exempt offshore company which in turn on-lends the funds as interest-bearing loans to other member companies of the group.

- **The mechanisms of the structure**

The ATP structure is established by means of the following transactions:

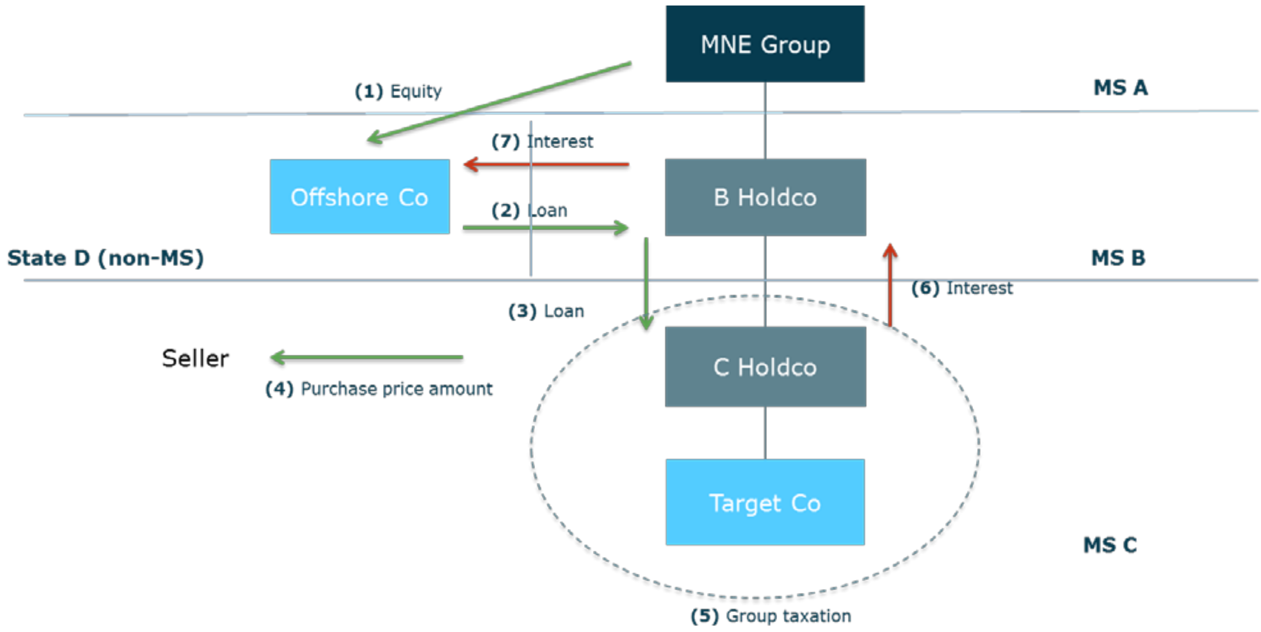
(1) The MNE group, a multinational parent company headquartered in MS A, sets up a tax-free company, Offshore Co, in State D, which is a non-MS, and contributes a large amount of share capital. In addition, the MNE group sets up B Holdco in MS B with a minimum share capital.
(2) B Holdco takes out an interest-bearing loan from Offshore Co.
(3) C Holdco is established in MS C as a wholly-owned subsidiary of B Holdco with a minimum share capital. C Holdco takes out an interest-bearing loan from B Holdco.
(4) C Holdco enters into a share purchase agreement with the sellers of the shares in Target Co, and uses the funds borrowed to pay the purchase price.
(5) Since C Holdco is purely a holding company with no income-generating activities of its own, the utilization of its tax deductions for interest on the loan has to be achieved by means of a local tax grouping (consolidation) with Target Co[43]. Target Co is assumed to have sufficient taxable profits to shelter the interest deductions of C Holdco.
(6) Interest on the loan from B Holdco is paid or accrued, and C Holdco claims a local tax deduction in MS C for the interest. The interest is included in B Holdco's taxable income in MS B. It is assumed that MS C does not levy any withholding tax on the payment of interest[44].
(7) B Holdco pays interest on the loan from Offshore Co, and claims a deduction against its taxable income in MS B. The deduction leaves no or only a small taxable income in MS B. It is assumed that MS B does not levy any withholding tax on interest.

The figure below illustrates the structure.

[43] If a tax grouping is not possible in MS C, there are alternative arrangements to achieve similar results. The alternatives include a downstream merger (C Holdco would merge into Target Co) and a reduction of capital (Target Co would declare a capital reduction payment to C Holdco and receive an interest-bearing loan in return).

[44] This can be because the domestic law of MS C does not provide for a withholding tax, or because the EU Interest/Royalty Directive or a tax treaty between MS B and MS C exempts the interest from withholding tax.

Figure 2.1: Offshore loan ATP structure



- **Discussion of the ATP indicators**

Below, we highlight the factors and characteristics which can either facilitate or restrict ATP in the structure set out above. The discussion follows the order of the transactional steps.

Step 1

The MNE group's equity investment in Offshore Co will typically not trigger any direct tax consequences in either MS A or State D.

Step 2

The granting of an interest-bearing loan from Offshore Co to B Holdco would normally not directly trigger any tax consequences in MS B or in state D. The tax consequences with respect to the interest are discussed below under Step 7.

Step 3

The granting of an interest-bearing loan from B Holdco to C Holdco would normally not trigger any tax consequences in MS B or in MS C. The tax consequences with respect to the interest are discussed below under Step 6.

Step 4

The sale of shares by the Seller will, as a main rule, be tax-exempt in many MSs, assuming that the Seller has been the sole shareholder prior to the sale. The actual receipt of cash payment by the Seller should not trigger any tax consequences. The acquisition of the shares by C Holdco would, as a main rule, not trigger any tax consequences in MS C.

Step 5

To ensure the overall economic benefit of the leveraged acquisition ATP technique, C Holdco should be able to offset the deductible interest payments against taxable income. Being a holding company, C Holdco is unlikely to generate taxable income on a stand-alone basis. Therefore, the economic benefit is typically ensured by the application of domestic group taxation regimes (also referred to as fiscal unity, tax grouping, group tax relief or joint taxation) through which the interest payments in C Holdco can be offset against the taxable operating profits of Target Co.

Step 6

A critical aspect of the structure is the fact that MS C allows C Holdco a tax deduction for the interest on the loan from B Holdco. Such tax deduction can be restricted under various forms of local thin-capitalization rules or interest-limitation rules in MS C.

It is also a critical aspect of the structure that MS C does not levy any withholding tax on the interest. The simplest situation would be if the domestic law of MS C does not provide for any withholding tax. A more complex situation would arise if MS C does levy a withholding tax; such a tax would then have to be suspended either under the EU Interest/Royalty Directive or a tax treaty between MS B and MS C. However, in the latter case, it remains to be tested whether B Holdco would qualify as the beneficial owner of the interest. Given the back-to-back character of the loans going through B Holdco, in practice B Holdco would be unlikely to qualify as the beneficial owner of the interest from C Holdco.

Finally, it is assumed that the interest is included in B Holdco's taxable income in MS B.

Step 7

It is a critical assumption that MS B allows B Holdco a tax deduction for the interest on the loan from Offshore Co and does not impose any withholding tax, regardless of the offshore location of the creditor.

Typically, B Holdco would have obtained a binding ruling from the tax authorities in MS B to that effect; also agreeing with the authorities what interest spread should be left for taxation in MS B.

- **Other comments**

It should be noted that the ATP structure set out above assumes that MS A does not apply any CFC rules to the structure. Generally, if CFC rules exist in MS A, they would normally prevent the ATP structure, since the MNE group would be required to include in its own taxable income in MS A the interest received on the loan by Offshore Co.

The ATP structure could also be applied if the MNE group's parent company is resident outside the EU.

- **Extraction of the ATP indicators**

The table below extracts from the discussion above the ATP indicators relating to the ATP structure. For the purpose of creating an overview of the listed indicators, it is helpful to distinguish between State A, State B, State C and State D, as the rules depend on the character of the income or cost involved in each tier of the structure.

Table 2: Indicators resulting from Structure 1

State A	State B	State C	State D
-Too generous tax-exemption of dividends received. -No CFC Rules.	-Tax deduction for interest costs. -Tax deduction does not depend on the tax treatment in the creditor's state. -No interest-limitation rules and no thin-capitalization rules. -No withholding tax on interest payments. -No beneficial-owner test for reduction of withholding tax. -Unilateral ruling on interest spread. -No general or specific anti-avoidance rules to counter the model ATP structures.	-Tax deduction for interest costs. -Tax deduction does not depend on the tax treatment in the creditor's state. -No interest-limitation rules and no thin-capitalization rules -No withholding tax on interest payments. -No beneficial-owner test for reduction of withholding tax. -Group taxation with acquisition holding company allowed. -No general or specific anti-avoidance rules to counter the model ATP structures.	-No withholding tax on dividends paid. -Nil corporate tax rate.

2.2.2 Structure 2 - Hybrid loan ATP structure

This ATP structure is a variation of an example presented in the OECD BEPS reports[45]. The publicly available literature identified that addresses this structure includes “Neutralising the Effects of Hybrid Mismatch Arrangements”, pp. 33-34 (OECD, Action 2: 2014 Deliverable). This structure describes a debt-shifting ATP channel.

The ATP structure takes into account the revision of the Parent/Subsidiary Directive.[46] This ATP structure takes advantage of the hybrid mismatch in the qualification of a financing instrument. Accordingly, the ATP structure benefits from a deduction of the payment in one MS (e.g. as interest) in combination with no inclusion in the other MS

[45] We have devised two variations:
(i) In the OECD example, MNE Group lends the funds to L Holdco. The authors of the study consider it an unnecessary complication that would limit the practical use of the structure to circumstances where the MNE group had other taxable income in Member State L and tax-deductible costs in Member State P. In practice, it would be simpler and more flexible for the funds to be transferred to L Holdco as share capital.
(ii) We have replaced the reference to MS L by state B (for Holding). MS L could erroneously be taken to mean Luxembourg.

[46] Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU *on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States*

(e.g. as a tax-free dividend). By inserting an intermediate company resident in a third country, this structure could still allow benefiting from a hybrid mismatch.

- **Introduction**

The ATP structure is established in connection with a multinational group's acquisition of an operating company in MS C, but it is worth observing that in many situations, it could also have been established in an existing MNE group outside the context of an acquisition.

The structure assumes that the MNE group, a multinational parent company headquartered in MS A, has agreed to acquire a profitable operating company, Target Co, resident in MS C. The purchase price is EUR 1,000 million. EUR 400 million is funded by means of funds that the MNE group already has available to it, whereas the remaining EUR 600 million has to be borrowed from an external bank on normal market terms. The structure has two tax objectives[47]:

Firstly, it aims to obtain tax relief in MS C for the external financing costs of the acquisition. This objective should not in itself generally be considered aggressive, as it normally just seeks to align the location of the tax deduction for the external financing costs with the location of the taxation of the profits of the acquired company. Therefore, it does not lead to any undue tax benefit for the MNE group1[48].

Secondly, the structure aims to obtain additional tax relief for *internal (artificially created) financing costs* which do not reflect any external financing costs of the MNE group. This is achieved by means of a hybrid loan that produces an additional tax deduction for interest in the hands of the borrower company in MS C, but triggers no taxation of the corresponding income in the hands of any other member company of the MNE group (nor by any external lender). Clearly, given the exploitation of a mismatch in tax treatment as well as the artificial nature of the hybrid loan, this is the element that makes it an ATP structure.

- **The mechanisms of the structure**

The ATP structure is established by means of the following transactions:

(1) A holding company, B Holdco, is established in State B – a state outside of the EU – as a wholly-owned subsidiary of the MNE group. The MNE group subscribes to a share capital in B Holdco of EUR 400 million.

(2) A holding company, C Holdco, is established in MS C as a wholly-owned subsidiary of B Holdco. B Holdco subscribes only to a nominal (minimal) share capital in C Holdco. In addition, C Holdco takes out a loan from B Holdco in the amount of EUR 400 million. The loan is structured on such hybrid terms and conditions[49] that for local tax purposes, State B qualifies the loan as an investment in shares whereas MS C qualifies it as debt. As a result, MS C allows a tax deduction for the interest accrued (or paid); whereas State B does

[47] In addition to tax objectives, business objectives often play a significant role.

[48] In practice, variations in the MS's tax rules such as different tax rates, different limitation rules on interest deductions, etc., can give rise to some tax benefits - or even tax disadvantages - for a MNE group. While such issues will normally have to be addressed by MNE groups when considering whether to push down debt into MS C, they are not considered core elements of ATP.

[49] Examples of such terms include perpetuity, super-long maturity, profit participation, optional or mandatory conversion features etc.

not tax the interest received but instead treats it as a tax-exempt dividend from a shareholding.

(3) C Holdco takes out an interest-bearing loan from an external bank in the amount of EUR 600 million. The loan is obtained on normal market terms and conditions, backed by a guarantee issued by the MNE group. C Holdco pays a guarantee fee to MNE Group.

(4) C Holdco enters into a share purchase agreement with the sellers of the shares in Target Co and pays the purchase price of EUR 1,000 million.

(5) Interest on the bank loan is accrued and paid. C Holdco claims a tax deduction in MS C for the interest accrued/paid. (The external bank is taxed on the interest income under the normal tax rules of its home Member State[50].) Also, C Holdco claims a tax deduction for the guarantee fee paid to MNE Group.

(6) Interest on the hybrid loan from B Holdco is accrued, and C Holdco claims a local tax deduction in MS C for the interest as it accrues. B Holdco is not taxed on the interest income either in State B or in MS C.[51]

(7) Since C Holdco is a pure holding company with no income-generating activities of its own, the utilization of its tax deductions pertaining to the interest on the bank loan and the hybrid loan has to be achieved by means of a local tax grouping (consolidation) with Target Co[52]. Target Co is assumed to have sufficient taxable profits to shelter the interest deductions of C Holdco.

(8) To the extent that C Holdco makes actual payment of the interest accruing to B Holdco on the hybrid loan, B Holdco would generate cash that could be used to pay a dividend to MNE Group. Such a dividend would not be taxable in the hands of MNE Group under MS A's tax rules, nor would it be tax-deductible to B Holdco under State B's tax rules. Moreover, it is assumed that State B does not levy any withholding tax on the dividend.

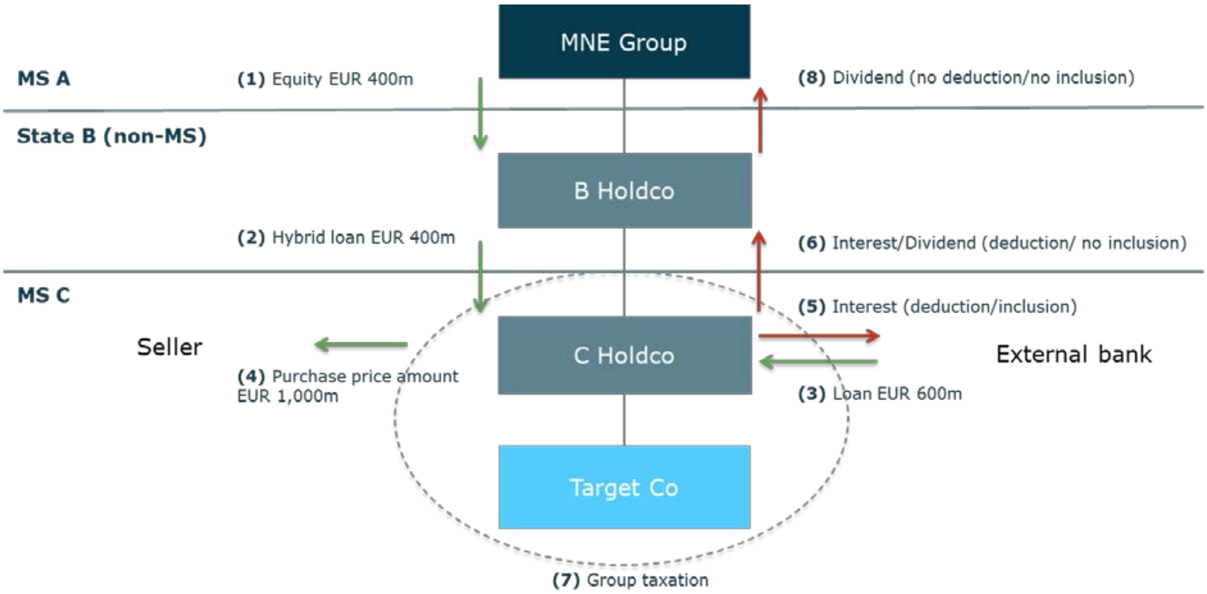
The figure below illustrates the structure.

[50] To keep things simple, it is assumed that MS C does not levy any withholding tax on the interest payments.

[51] Again, it is assumed that MS C does not levy any withholding tax on the payment of interest. Alternatively, a tax treaty between state B and MS C exempts the interest from MS C withholding tax.

[52] If a tax grouping is not possible in MS C, there are alternative arrangements for achieving similar results. These include a downstream merger (C Holdco would merge into Target Co), and a reduction of capital (Target Co would declare a capital reduction payment to C Holdco and receive an interest-bearing loan in -return).

Figure 2.2: Hybrid loan ATP structure



- **Discussion of the ATP indicators**

Below, we highlight the factors and characteristics which can either facilitate or restrict ATP in the structure set out above. The discussion follows the order of the transactional steps.

Step 1

MNE Group's equity investment in B Holdco will typically not trigger any direct tax consequences in either MS A or State B. However, there can be an indirect tax consequence to MS A in that the funds might have generated taxable interest or similar return on investment before they were transferred to B Holdco. After their transfer to B Holdco, the investment return will normally only come back to MS A in the form of a tax-exempt dividend. The tax consequences of dividend payments are discussed in further detail below under Step 8[53].

Step 2

The subsequent use of the proceeds from the capital increase as a hybrid loan from B Holdco to C Holdco would normally not directly trigger any tax consequences in State B or MS C upon issuance of the hybrid instrument. The tax consequences with respect to the yield are discussed below under Step 6.

Step 3

The loan obtained by C Holdco from a third-party bank would typically not directly trigger any tax consequences in MS C upon issuance.

Step 4

The sale of shares by Seller will, as a main rule, be tax-exempt in many MS, assuming that the Seller has been the sole shareholder prior to the sale. The actual receipt of cash payment by the Seller should not trigger any tax consequences. The acquisition

[53] Some MSs impose capital duty or stamp duty with respect to capital increases (e.g. a flat amount plus a low percentage (e.g. 0.6%)) computed on the basis of the nominal value of the capital increase. Such taxes are rare and are therefore not taken into account here.

of the shares by C Holdco would, as a main rule, not trigger any tax consequences in MS C.

Step 5
The yields on the third-party bank loan, in the form of interest payments, can be assumed to be deductible for tax purposes in most (if not all) MSs. This is a crucial feature in the overall tax benefits of leveraged acquisitions. A number of MSs have introduced tax rules to restrict interest deductions. Some of these rules apply only to interest on inter-company loans, but that can include external loans guaranteed by other member companies of the group. Other rules (e.g. EBITA and EBIT rules) apply to the interest on all loans, including third-party debt.

Step 6
In the ATP structure set out above, the yield on the hybrid loan instrument will take the form of tax-deductible interest in the hands of C Holdco in MS C and tax-exempt dividends in State B in the hands of B Holdco. Such a mismatch can arise because the classification of hybrid instruments largely depends on domestic case law in each state. For example, a mismatch of tax qualification can arise if MS C treats the instrument in accordance with its legal form and maintains the debt classification, while State B views the instrument in accordance with its economic substance and classifies it as equity. Accordingly, in State B the yield constitutes dividend, which falls under the scope of State B's domestic-law participation exemption regime, i.e. it is tax-exempt. As another example, the same result could be obtained via hybrid equity where State B maintains the legal form as equity (certain variations of preference shares) while MS C classifies the instrument in accordance with its economic substance as debt, and accordingly treats the yield as deductible interest payments.

In this ATP structure, it is assumed that State B is not an MS and therefore is not affected by the change of the Parent/Subsidiary Directive[54].

If B Holdco is the beneficial owner of the yield of the hybrid instrument, the payment of the interest from C Holdco to B Holdco would normally not trigger any withholding tax on the interest in MS C. This could follow either from an applicable double tax treaty between State B and MS C, or from the fact that MS C does not levy any interest withholding tax under its domestic law.

Step 7
To ensure the overall economic benefit of the leveraged acquisition ATP technique, C Holdco should be able to offset the deductible interest payments. Being a holding company, C Holdco is unlikely to generate taxable income on a stand-alone basis. Therefore, the economic benefit is typically ensured by the application of domestic group taxation regimes (also referred to as fiscal unity, tax grouping, group tax relief or joint taxation) through which the interest payments in C Holdco can be offset against the taxable operating profit of Target Co.

Step 8
A dividend payment to the MNE group would normally not trigger any tax consequences in MS A due to the existence of participation exemption type legislation, which will effectively exempt the income from taxation. If a double tax treaty (based

[54] Council Directive 2014/86/EU.

on the OECD Model Tax Convention) is in place between MS A and State B, Article 10 of the double tax treaty will normally result in 0% or 5% withholding tax in State B.

- **Absence of CFC taxation**

Finally, it should be noted that the ATP structure set out above assumes that MS A does not apply any CFC rules to the structure. Generally, if CFC rules exist in MS A, they would normally prevent the ATP structure since MNE Group would be required to include in its own taxable income in MS A the interest (treated as dividend in State B) received by B Holdco on the hybrid loan[55].

- **Extraction of the ATP indicators**

The table below extracts from the discussion above the ATP indicators relating to the ATP structure. For the purpose of creating an overview of the listed indicators, it is helpful to distinguish between State A, State B and State C, as the rules depend on the character of the income or the cost involved in each tier of the structure.

Table 3: Indicators resulting from Structure 2

State A	State B	State C
-Too generous tax-exemption of dividends received. -No CFC rules.	-No withholding tax on dividends paid. -Income from certain hybrid instruments can be treated as tax-free dividend or similar. -Too generous tax-exemption of dividends received, regardless of deduction by the distributing company (hybrid loan). - No general or specific anti-avoidance rules to counter the model ATP structures	-Tax deduction for interest costs. -Tax deduction does not depend on the tax treatment in the creditor's state. -No interest-limitation rules and no thin-capitalization rules. -No withholding tax on interest payments. -No beneficial-owner test for reduction of withholding tax. -Group taxation with acquisition holding company allowed. -No general or specific anti-avoidance rules to counter the model ATP structures.

2.2.3 Structure 3 - Hybrid entity ATP structure

This structure is a variation of the OECD example referred to in paragraph 72 of "Neutralising the Effects of Hybrid Mismatch Arrangements: Action 2: 2014 Deliverable". The structure falls into the debt category.

The ATP structure relies on allocating interest costs to a company which is considered a taxable entity in the state of incorporation, and which at the same time is considered a transparent entity for tax purposes in the state of the participants. Such a mismatch in tax subjectivity is often referred to as a hybrid entity (or rather, in the case at hand

[55] Of course, this assumes that MS A does not apply the same tax qualification to the hybrid loan as state B.

it is a *reverse* hybrid). Therefore this ATP structure takes advantage of the hybrid mismatch in the qualification of an entity, which results in a tax deduction for interest in one MS without any inclusion of the payment in the other MS.

- **Introduction**

The ATP structure is established in connection with a multinational group's acquisition of an operating company in MS B, but it is worth observing that in many situations, it could also have been established in an existing MNE group outside the context of an acquisition. The structure assumes that MNE Group, a multinational parent company headquartered in State A (MS or non-MS), has agreed to acquire a profitable operating company, Target Co, resident in MS B.

The structure aims to obtain tax relief for *internal (artificially created) financing costs* which do not reflect any external financing costs of the MNE group. This is achieved by means of a hybrid entity in MS B that takes out a loan from the MNE Group in state A. This produces a tax deduction for interest in the hands of the borrower company in MS B without any taxation of the corresponding income in the hands of the MNE group in State A.

This ATP structure can either be a result of: (1) different classification of partnerships for tax purposes in the states involved, or (2) check-the-box rules or similar legislation.

As none of the EU MSs currently have legislation similar to the US check-the-box rules, State A cannot be an EU MS in the second scenario. Thus, State A is considered to be an MS in Scenario 1 and non-MS in Scenario 2.

- **The mechanisms of the structure**

The ATP structure is established by means of the following transactions:

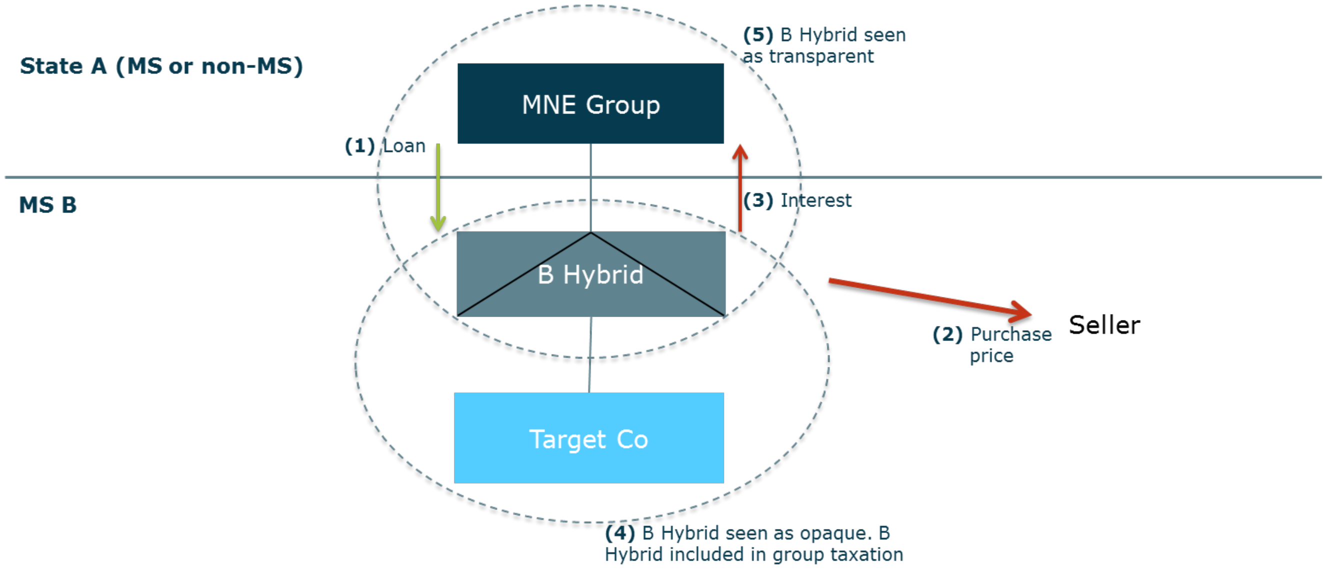
(1) MNE Group establishes a legal entity, B Hybrid, in MS B. B Hybrid takes out an interest-bearing loan from MNE Group.
(2) B Hybrid uses the funds borrowed to pay the purchase price for the shares in Target Co and acquires 100% of the shares.
(3) In its state of incorporation, MS B, B Hybrid is treated as a taxable entity. B Hybrid claims a local tax deduction in MS B for the interest as it accrues[56].
(4) Since B Hybrid has no income-generating activities itself, the utilization of its tax deductions for interest on the loan has to be achieved by means of a local tax grouping (consolidation) with Target Co. Target Co is assumed to have sufficient taxable profits to shelter the interest deductions of B Hybrid.
(5) In the State of its owner, State A, B Hybrid is seen as a transparent entity and is therefore regarded as an integral part of MNE Group. Consequently, the interest income from B Hybrid is seen as stemming from the taxpayer itself and hence is ignored for State A's tax purposes.[57]

[56] It is assumed that MS B does not levy any withholding tax on the payment of interest, either as a result of domestic law, a tax treaty between state A and MS B, or the EU Interest/Royalty Directive.

[57] Alternatively, state A recognizes the interest income from B Hybrid, but at the same time a tax deduction is allowed for the interest cost of B Hybrid.

The figure below illustrates the structure:

Figure 2.3: Hybrid entity ATP structure



- **Discussion of the ATP indicators**

Below we highlight the factors and characteristics which can either facilitate or restrict ATP in the structure set out above. The discussion follows the order of the transactional steps.

Step 1

In many cases, B Hybrid would be a limited partnership. This would normally require more than one owner, including a limited partner. In such cases, it is assumed that MNE Group would hold the largest possible degree of ownership/profit participation rights in C Hybrid. The granting of the loan by MNE Group to B Hybrid has no tax implications in itself.

Step 2

Payment of the consideration for the shares in Target Co has no tax implications in itself.

Step 3

Interest payments should be deductible for tax purposes in most MSs. This is a crucial feature in the overall tax benefits of leveraged acquisitions. Many MSs have introduced tax rules to restrict interest deductions in cases of so-called thin capitalization. Some of these rules apply only to interest on inter-company loans; other rules (e.g. EBITA and EBIT rules) apply to interest on all loans, including third-party debt. While such restrictions will have to be observed by the MNE group, they may not necessarily work to disallow all interest deductions.

Step 4

Subject to thin-capitalization restrictions, if any, B Hybrid claims a tax deduction in MS B for the interest cost on the loan from MNE Group.

The interest deduction is passed on to Target Co by means of domestic group taxation in MS C (also referred to as fiscal unity, tax grouping, group tax relief or joint taxation). This is a critical factor for the tax benefit of the structure.

It is critical that MS B does not levy any withholding tax on the interest paid to MNE Group in state A. Such exemption from withholding tax may follow either from domestic law, a tax treaty between State A and MS B, or the EU Interest/Royalty Directive.

Step 5
Most MSs apply their own tax qualification of foreign companies and partnerships when determining whether a resident owner (partner) should include the income and cost items of the foreign entity in the taxpayer's local tax return. Typically, such qualification would be based on the same criteria that are applied to domestic entities established/incorporated in that MS. Such qualification is rarely linked to that of the other MSs. Therefore, the qualification of a foreign entity in the owner's MS can differ from that of the entity's MS (state of residence/incorporation).

In the case at hand, it is assumed that State A qualifies B Hybrid as a partnership and hence as a tax-transparent entity. In general, this would normally imply that the owner, MNE Group, will have to include in its own taxable income the income and cost items of B Hybrid. However, most MSs would probably ignore the interest cost and income from the loan between MNE Group and B Hybrid. Either way, in effect there would be no taxation in State A of the interest received from the loan.

- **Extraction of the ATP indicators**

The table below extracts from the discussion above the ATP indicators relating to the ATP structure. For the purpose of creating an overview of the listed indicators, it is helpful to distinguish between State A and State B, as the rules depend on the character of the income or cost involved in each tier of the structure.

Table 4: Indicators resulting from Structure 3

State A	State B
-No general or specific anti-avoidance rules to counter the model ATP structures. -Tax qualification of the foreign entity does not follow that of the foreign state.	-Tax deduction for interest costs. -Tax deduction does not depend on the tax treatment in the creditor's state. -No interest-limitation rules and no thin-capitalization rules. -No withholding tax on interest payments. -Group taxation with acquisition holding company allowed. -No rule to counter a qualification mismatch of a local company. -No general or specific anti-avoidance rules to counter the model ATP structures.

2.2.4 Structure 4 – Interest-free-loan ATP structure

This ATP structure takes advantage of the fact that certain MSs do not adjust the taxable income of a company that grants an interest-free loan to a related company in another MS, while at the same time that other MS allows the borrowing company a tax deduction for a deemed interest cost.

Economically, the structure falls both into the debt category and the transfer pricing category.

- **Introduction**

The ATP structure is established in connection with an operating subsidiary's need for funding. Normally, it is not crucial to the structure whether the need for funding arises in connection with an acquisition or simply for general operational investment purposes.

The structure aims to obtain tax relief for *internal (artificially created) financing costs* which do not reflect any external financing costs of the MNE group. This is achieved by means of an interest-free loan which gives rise to a tax deduction for deemed interest on the one hand, but no income pick-up on the other hand.

- **The mechanisms of the structure**

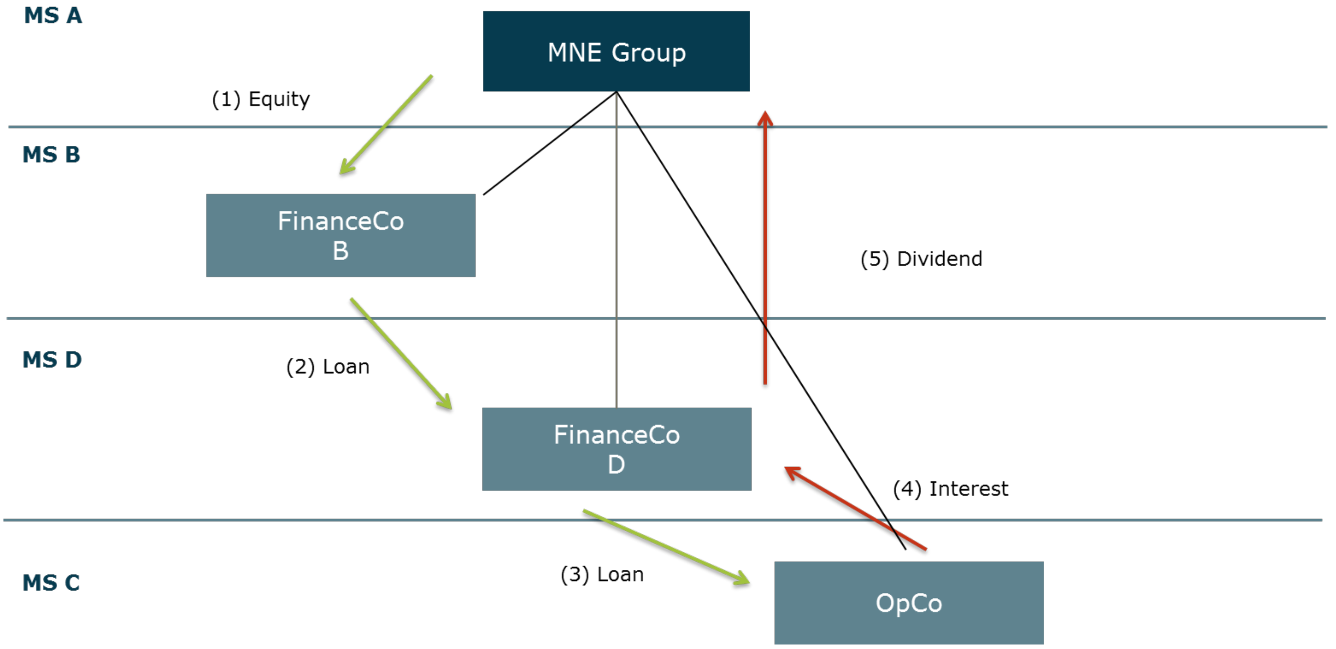
The ATP structure is established by means of the following transactions:

(1) FinanceCo B is established in MS B as a wholly-owned subsidiary of MNE Group and capitalized with 100% equity capital.
(2) FinanceCo D is established in MS D as a wholly-owned subsidiary of MNE Group. FinanceCo D takes out a loan from FinanceCo B. The loan is free from interest. Nonetheless, because of transfer pricing rules in MS D, FinanceCo D can claim a tax deduction for the hypothetical (deemed) interest that it should have paid had the interest-rate terms of the loan been on an arm's-length basis. By contrast, MS B does not make any corresponding adjustment of FinanceCo B's taxable income in MS B. This can be because of the absence of transfer pricing regulations or for other reasons.
(3) FinanceCo D on-lends the loan to an existing member company of the group, OpCo, in MS C. The loan is interest-bearing and on arm's-length conditions.
(4) OpCo pays interest to FinanceCo D and claims a local tax deduction in MS C for the interest – either as it accrues or as it is paid[58]. FinanceCo D in turn includes the interest in its taxable income in MS D, but the income is wholly or partly offset by the deemed interest deduction under paragraph 2 above.
(5) FinanceCo D uses the funds received as interest from OpCo to pay a dividend to MNE Group.

The figure below illustrates the structure.

[58] It is assumed that MS C does not levy any withholding tax on the payment of interest, either as a result of domestic law, a tax treaty between MS D and MS C, or the EU Interest/Royalty Directive.

Figure 2.4: Interest-free-loan ATP structure



- **Discussion of the ATP indicators**

Below, we highlight the factors and characteristics which can either facilitate or restrict ATP in the structure set out above. The discussion follows the order of the transactional steps.

Step 1

The capital contribution from MNE Group to FinanceCo B should have no tax implications in itself.

Step 2

It is critical to the structure that MS D allows a tax deduction for deemed interest which is neither contractually provided for nor paid between the parties[59]. Further, it is critical that the non-payment of interest is not considered a taxable contribution from FinanceCo B to FinanceCo D.

It is also critical that deducted non-paid interest is not picked up as taxable income in MS B. Finally, it is critical that FinanceCo B would not fall under any CFC rules of MS A. Failing to satisfy these conditions might render FinanceCo B taxable on a deemed interest income in another MS.

Step 3

The granting of the loan from FinanceCo D to OpCo should have no tax implications in itself.

Step 4

Interest payments should be deductible for tax purposes in most MSs. This is a crucial feature in the overall tax benefits of leveraged acquisitions. Many MSs have introduced tax rules to restrict interest deductions in cases of so-called thin capitalization. Some

[59] Some MS may make this notional tax deduction conditional on a ruling and the fact that a corresponding – or marginally higher – amount of interest income is generated from the on-lending under Step 3.

of these rules apply only to interest on inter-company loans; other rules (e.g. EBITA and EBIT rules) apply to interest on all loans, including third-party debt. While such restrictions will have to be observed by the MNE group, they may not necessarily work to disallow all interest deduction.

It is critical that MS C does not levy any withholding tax on the interest paid to FinanceCo D in MS D. Such exemption from withholding tax may follow either from domestic law, a tax treaty between MS D and MS C, or the EU Interest/Royalty Directive. Thus, it may be a requirement that FinanceCo D is considered the beneficial owner of the interest payment made by OpCo.

Step 5

A dividend payment to the MNE group would normally not trigger any tax consequences in MS A, due to the existence of participation exemption which should effectively exempt the income from taxation. Also, no withholding tax should be incurred in MS D, either as a result of a tax treaty between MS A and MS D or the EU Parent/Subsidiary Directive as implemented in domestic law.

- **Extraction of the ATP indicators**

The table below extracts from the discussion above the ATP indicators relating to the structure. For this purpose, it is helpful to distinguish between State A, State B, State C and State D, as the rules depend on the character of the income or cost involved in each tier of the structure.

Table 5: Indicators resulting from Structure 4

State A	State B	State D	State C
-Too generous tax-exemption of dividends received. -No CFC rules.	-No deemed income from interest-free loan (non-arm's-length transactions).	-No withholding tax on dividends paid. -Tax deduction for interest costs. -Interest deduction allowed for deemed interest costs on interest-free debt. -No taxation of benefit from interest-free debt. -No interest-limitation rules and no thin-capitalization rules -No general or specific anti-avoidance rules to counter the model ATP structures.	-Tax deduction for interest costs. -No interest-limitation rules and no thin-capitalization rules. -No withholding tax on interest payments. -No beneficial-owner test for reduction of withholding tax on interest. -No general or specific anti-avoidance rules to counter the model ATP structures.

2.2.5 Structure 5 - Patent box ATP structure

The ATP structure is established in connection with a multinational group's global operations using IP rights under an IP/patent box regime. This ATP structure benefits from the favourable tax treatment of IP income corresponding to a patent box or other specific tax regime in one MS, while at the same time the other MS allows a deduction of royalty payments and does not levy any withholding tax on the outbound royalty payment.

As the structure is rather illustrative and generic, the authors have found no direct reference in the literature. This structure exemplifies the IP ATP channel.

- **Introduction**

The structure assumes that MNE Group, a multinational company headquartered in MS A, owns IP rights and plans to develop new IP rights. For the purpose of minimizing the taxation of its global IP income, IP is transferred to a subsidiary resident in an MS that offers preferential tax treatment of IP income according to an IP/patent-box regime.

- **The mechanisms of the structure**

The ATP structure is established by means of the following transactions and actions:

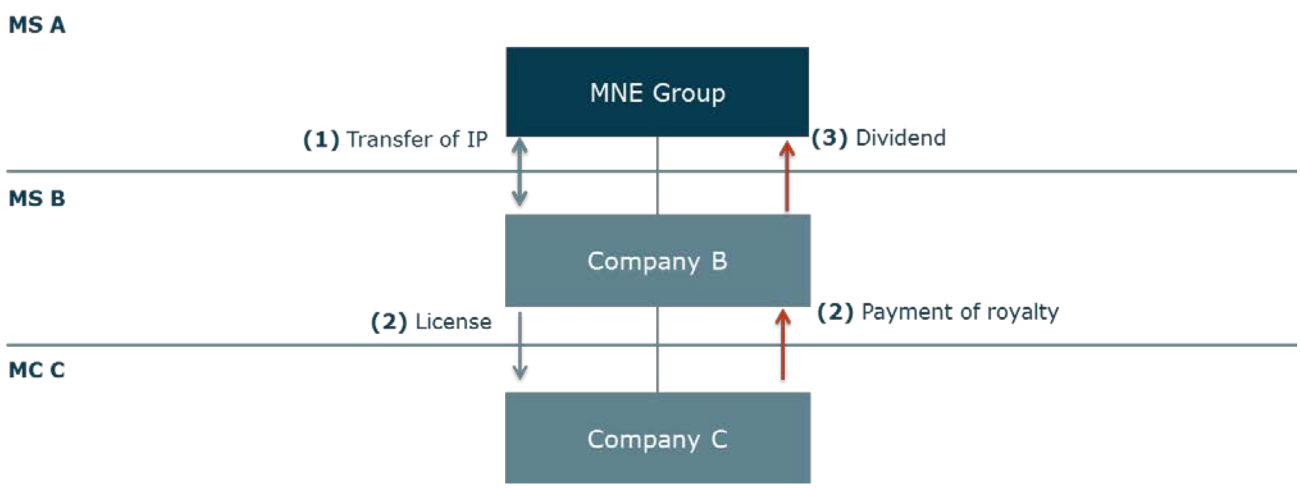
(1) MNE Group establishes Company B as a wholly-owned subsidiary based in MS B and transfers all its existing IP rights to Company B. Furthermore, it is agreed that all future research and development activities for the MNE group is to be carried out and owned by Company B. The transfer of the existing IP rights takes place either directly as a sale (contribution at fair market value) or pursuant to a cost-sharing agreement (on an arm's-length basis).

(2) Company B licenses IP rights to Company C, an operating group company resident in MS C. Accordingly, Company C pays royalties to Company B and claims a tax deduction for the licence pertaining to the MNE Group's IP rights. Because of the IP/patent-box regime in State B, the royalty income received by Company B is subject to preferential tax treatment.

(3) Profits of Company B are distributed as dividends to MNE Group.

The figure below illustrates the structure.

Figure 2.5: Patent box ATP structure



- **Discussion of the ATP indicators**

Below, we highlight the factors and characteristics which can either facilitate or restrict ATP in the structure set out above. The discussion follows the order of the transactional steps.

Step 1

The establishment of Company B will typically not trigger any direct tax consequences in either MS A or MS B.

The transfer of existing IP from MNE Group to Company B will take place either directly as a sale or pursuant to a cost-sharing agreement under which Company B is obliged to make a buy-in payment to MNE Group on arm's-length terms. The buy-in payment may be structured either as a lump-sum payment or as a royalty. Normally, MNE Group will be taxed in MS A upon disposal of its IP. Such taxation can be a critical tax issue that needs to be addressed by MNE Group, particularly if the transfer relates to mature and highly valuable IP[60].

Step 2

The royalty paid by Company C to Company B for the licence relating to the IP rights is deductible in MS C. In addition, the royalty payment is free of withholding tax in Country C, i.e. for payments between EU MSs this follows from the EU Interest-/Royalty directive if Company B is considered to be the beneficial owner.

As Company B is eligible for the IP/patent-box regime in MS B, which allows a preferential treatment of IP income, the received royalty payments are subject to low taxation in MS B.

Step 3

Dividends distributed from Company B to MNE Group are subject to participation exemption, i.e. no withholding taxes are levied in MS B, and no corporate income tax is imposed in MS A.

- **Absence of CFC taxation**

The ATP model relies on the absence of CFC legislation in MS A, which might otherwise include the income of Company B in the income of MNE Group.

- **Extraction of the ATP indicators**

The table below extracts from the discussion above the ATP indicators relating to the ATP structure. For this purpose, it is helpful to distinguish between State A, State B and State C, as the rules depend on the character of the income or cost involved in each tier of the structure.

[60] Given that Company B's tax rate is low, any tax amortization of the IP in MS B would far from outweigh the capital gains tax in MS A.

Table 6: Indicators resulting from Structure 5

State A	State B	State C
-Too generous tax-exemption of dividends received. -No or low taxation of capital gain (fair market value) upon disposal of IP. -No CFC rules.	-No withholding tax on dividends paid. -Patent box or other preferential tax treatment of income from IP.	-Tax deduction for royalty costs. -No withholding tax on royalty payments. -No beneficial-owner test for reduction of withholding tax. -No general or specific anti-avoidance rules to counter the model ATP structures.

2.2.6 Structure 6 - Two-tiered IP ATP structure

This ATP structure is a variation of the OECD example referred to in Annex C of the BEPS report[61] and in other OECD literature[62].

This structure exemplifies another type of IP ATP channel.

The ATP structure takes advantage of mismatches in the rules on tax residence of a company incorporated in an MS. Such mismatches enable the ATP structure to benefit from the deduction for royalty payments under licence/sub-licence arrangements without any inclusion of the received income.

- **Introduction**

The ATP structure is established in connection with a multinational group's global operations and its use of IP rights. The structure assumes that MNE Group, a multinational company headquartered in MS A, owns IP rights and plans to develop new IP rights.

The IP is being exploited by an operating subsidiary in MS C, OpCo. For the purpose of reducing the effective taxation of global IP income, the IP owned by MNE Group is transferred to a subsidiary which is incorporated in an MS but is tax-resident outside that MS and is tax-exempt. As a result, in combination with licence/sub-licence arrangements, the royalty deducted by OpCo escapes taxation (a phenomenon that is sometimes referred to as "stateless income")

- **The mechanisms of the structure**

The ATP structure is established by means of the following transactions and activities:

(1) MNE Group establishes Company B1 as a wholly-owned subsidiary which is registered in MS B, but is managed and controlled in State E and is therefore

[61] See OECD: Addressing Base Erosion and Profit Shifting, 2013, OECD Publishing, Paris, Annex C, p. 74 et seq. The model has been expanded so as to allow for operating subsidiaries in other MSs than the one in which Company B1 is incorporated.

[62] OECD (2014), *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.[63] See OECD: Addressing Base Erosion and Profit Shifting, 2013, OECD Publishing, Paris, Annex C, p. 76 et seq.

tax-resident there. State E is a non-MS, and does not levy any corporate income tax. MNE Group transfers ownership of all its existing and future IP rights to Company B1. The transfer of the existing IP rights takes place either directly as a sale or pursuant to a cost-sharing or cost-contribution agreement (CCA). The transfer of the future IP rights takes place pursuant to a CCA.

(2) Company B1 establishes Company D, a subsidiary resident in MS D, and Company B2, a subsidiary tax resident in MS B. Company B1 licenses all of its IP rights to Company D in exchange for a royalty. Company D performs no functions and holds no assets besides the sub-licensed IP rights. Moreover, Company D bears little or no risk with regard to the royalty flows.

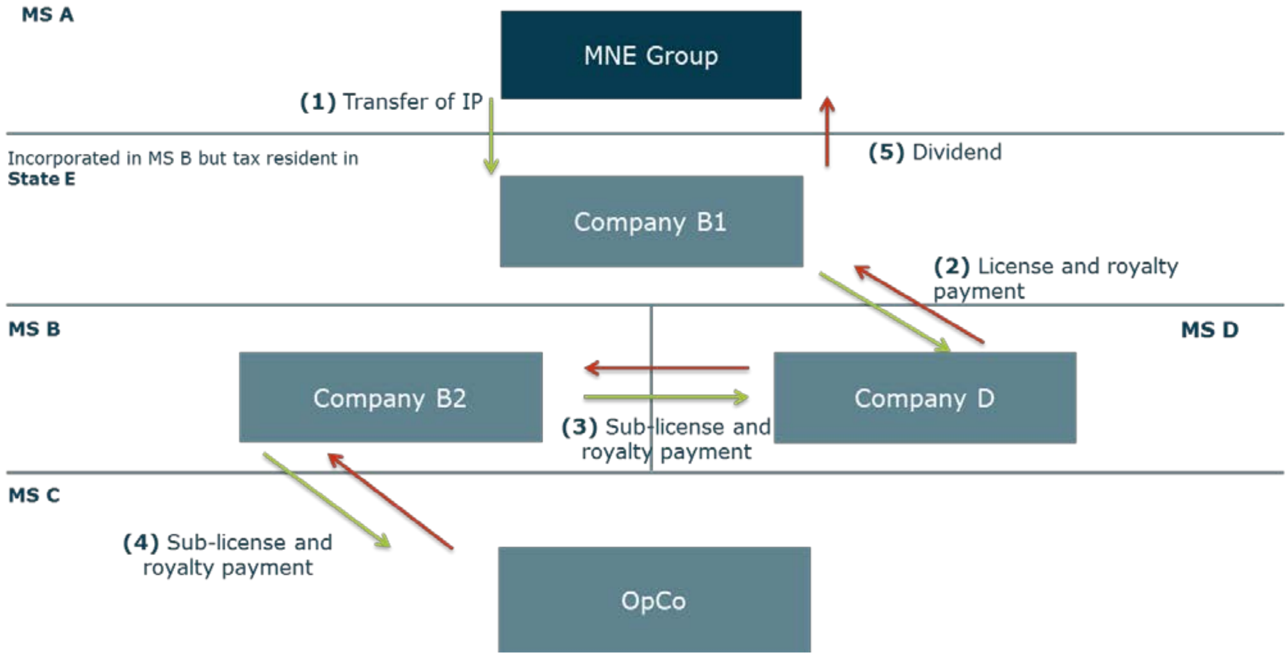
(3) Company D sub-licenses the IP rights to Company B2 in exchange for a royalty.

(4) Company B2 sub-licenses the IP rights to OpCo, an operating group member company resident in MS C, in exchange for a royalty. Company B2 performs no functions and holds no assets besides the sub-licensed IP rights. Moreover, Company B2 bears little or no risk with regard to the royalty flows.

(5) All the profits of Company B1 are distributed as dividends to MNE Group.

The figure below illustrates the structure.

Figure 2.6: Two-tiered IP ATP structure



- **Discussion of the ATP indicators**

Below, we highlight the factors and characteristics which can either facilitate or restrict ATP in the structure set out above. The discussion follows the order of the transactional steps.

Step 1

The establishment of Company B1 will typically not trigger any direct tax consequences in MS A, MS B or State E.

The transfer of the IP from MNE Group to Company B1 will take place either directly as a sale or pursuant to a CCA under which Company B1 is obliged to make a buy-in payment to MNE Group on arm's-length terms. The buy-in payment may be structured either as a lump-sum payment or as a royalty.

MNE Group's disposal of the ownership of the IP is taxable in MS A. Such taxation can be a critical tax issue that needs to be addressed by MNE Group, particularly if the transfer relates to mature and highly valuable IP. In order to avoid any significant taxation in MS A, the transfer would have to be effected early in the life of the IP, before the development of a significant track record of sales in the markets.

Step 2
Royalty payments from Company D to Company B1 are deductible to Company D. MS D does not levy withholding tax on royalty payments under its domestic laws.

Under its domestic laws, MS B does not subject Company B1 to taxation, since Company B1 has no taxable presence in MS B, it is centrally managed and controlled in State E, and its income arises from sources outside MS B. State E in turn does not levy any corporate income tax. As a result, the royalty income received by Company B1 from Company D escapes taxation in all three states.

This creates a situation where there is deduction of royalty in MS D and no inclusion of the royalty as taxable income anywhere.

Step 3
Company D and Company B2 both receive and pay royalty. They are subject to normal corporate income tax in their respective states of residence, MS D and MS B. However, their taxable profit is reduced to a small amount of "spread" earned. Neither of the two companies perform any substantial functions, and they bear little or no risk with regard to the royalty flows. According to international transfer pricing standards, Company D and Company B2 are therefore entitled only to very small profits.

Step 4
MS C imposes corporate income tax on the operating income of OpCo. However, OpCo can claim a local tax deduction for the royalty paid to Company B2. The royalty payment reduces or eliminates OpCo's taxable income in MS C.

The royalty payment is free of withholding tax in MS C. This can follow from the EU Interest-/Royalty directive, from a tax treaty between MS C and MS B, or from the domestic laws of MS C. By contrast, a direct payment of royalty to Company B1 might have been subject to withholding tax in MS C.

Step 5
Dividends distributed from Company B1 to MNE Group are subject to participation exemption, i.e. no withholding taxes are levied either by MS B or State E, and no corporate income tax is imposed in MS A.

- **Absence of CFC**

It should be noted that the ATP structure set out above assumes that MS A does not apply any CFC rules to the structure. Generally, the CFC rules of MS A would normally prevent the ATP structure by requiring MNE Group to include in its own taxable income in MS A the royalties received tax-free by Company B1.

If MNE Group is not resident in MS A but in the US, check-the-box rules can result in a situation where the US CFC rules do not apply if Company B2, Company D and OpCo are disregarded entities under the US check-the-box rules.

- **Extraction of the ATP indicators**

The table below extracts from the discussion above the ATP indicators relating to the ATP structure. For this purpose, it is helpful to distinguish between State A, State B, State C, State D and State E, as the rules depend on the character of the income or cost involved in each tier of the structure.

Table 7: Indicators resulting from Structure 6

State A	State B	State C	State D	State E
-Too generous tax-exemption of dividends received. -No or low taxation of capital gain (fair market value) upon disposal of IP. -No CFC rules.	-No withholding tax on dividends paid. -Tax deduction for royalty costs. -No withholding tax on royalty payments. -No beneficial-owner test for reduction of withholding tax on royalty. -Locally incorporated company not tax-resident if management/control is situated in another state. -No general or specific anti-avoidance rules to counter the model ATP structures.	-Tax deduction for royalty costs. -No withholding tax on royalty payments. -No beneficial-owner test for reduction of withholding tax on royalty. -No general or specific anti-avoidance rules to counter the model ATP structures.	-Tax deduction for royalty costs. -No withholding tax on royalty payments. -No beneficial owner-test for reduction of withholding tax on royalty. -No general or specific anti-avoidance rules to counter the model ATP structures.	-No withholding tax on dividends paid. -Nil corporate tax rate

2.2.7 Structure 7 - ATP structure based on IP and cost-contribution agreements

This ATP structure is a variation of a structure presented in the OECD BEPS report[63]. This ATP structure takes advantage of the allocation of all (or most) of the royalty payments to a tax-free company, and at the same time benefits from R&D tax credit and the deduction of royalties paid in high-tax MSs. It represents another example of the IP ATP channel.

[63] See OECD: Addressing Base Erosion and Profit Shifting, 2013, OECD Publishing, Paris, Annex C, p. 76 et seq.

- **Introduction**

The ATP structure is established in connection with a multinational group's intra-group transfer of manufacturing and sales operations and supporting intangibles.

The structure assumes that MNE Group, a multinational parent company based in MS A, transfers manufacturing and sales operations and supporting intangibles to (newly established) group companies. The group invests heavily in research, product design and development activities. Before the reorganisation and transfer of activities and IP, all the R&D activities were carried out by MNE Group. Furthermore, MNE Group owns all the IP resulting from its research and development activities, and has sole responsibility for (and assumes all the risks associated with) the manufacture of products, which it sells through a network of sales and distribution companies in markets around the world. Accordingly, most of the group's profit is considered taxable income in MS A.

The overall objective of the structure is to minimize taxation of the group's global income. This is achieved mainly by means of royalty payments to a tax-free company.

- **The mechanisms of the structure**

The ATP structure is established by means of the following transactions and actions:

(1) MNE Group establishes Company B as a wholly-owned subsidiary based in State B (a non-MS, e.g. a tax haven) and assigns the responsibility for the manufacture and sale of products outside MS A together with the supporting intangibles to Company B. MNE Group continues to carry out research and development activities for the group. The transfer of the existing and ongoing non-MS A IP rights takes place pursuant to a cost-sharing or cost-contribution agreement.

(2) Company C and Company D are established in MS C and MS D respectively as wholly-owned subsidiaries of Company B. Company C contractually assumes responsibility for producing all the MNE Group's products and selling the MNE Group's products outside MS A and contractually assumes the risks associated with the business. Thus, Company C serves as the principal company responsible for the manufacture and sale of the group's products.

(3) As the owner of non-MS A IP rights of the group, Company B licenses those IP rights to Company C. Accordingly, Company C pays royalties to Company B for the licences of the non-MS A IP rights of the group.

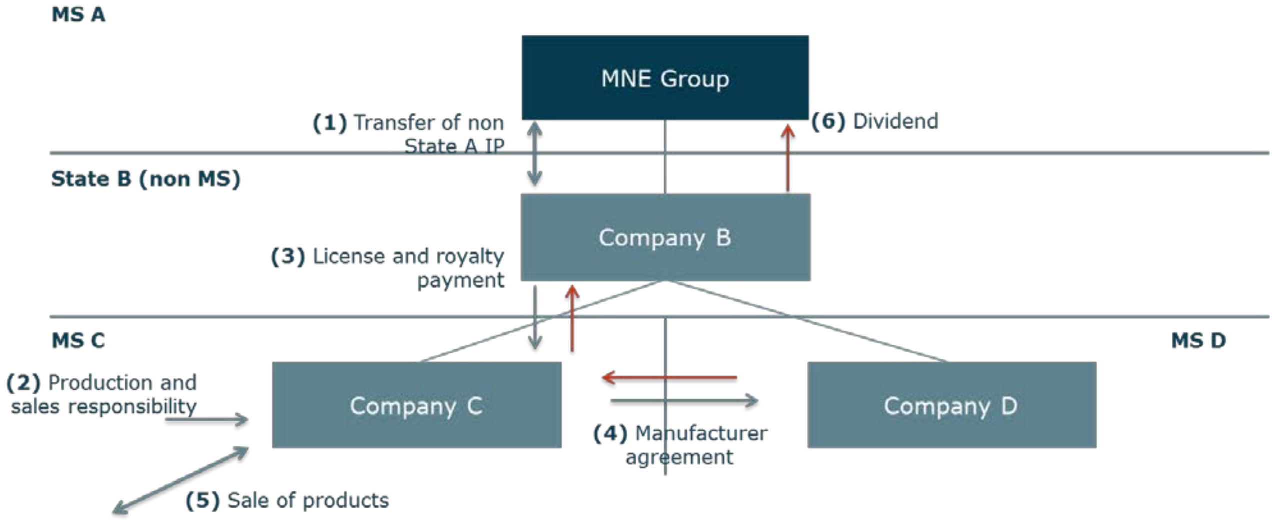
(4) Company C engages company D to serve as a contract manufacturer. Under the manufacturer agreement, Company D manufactures the group's products, whereas Company C bears the principal risks associated with the production of the products. The actual production of the products may take place in Country D or in a branch of Company D in a low-cost manufacturing country. Thus Company D serves as the contract manufacturing entity responsible for the production of the group's products.

(5) The manufactured products are the property of Company C, which sells the products to – or by means of related sales and marketing entities located in – higher-tax jurisdictions around the world. The contractual arrangements between Company C and the marketing companies specify that Company C assumes the principal risks relating to the marketing of the products.

(6) All excess profits of Company B are distributed as dividends to MNE Group.

The figure below illustrates the structure.

Figure 2.7: IP and cost-contribution agreement structure



- **Discussion of the ATP indicators**

Below, we highlight the factors and characteristics which can either facilitate or restrict ATP in the structure set out above. The discussion follows the order of the transactional steps.

Step 1

The establishment of Company B will typically not trigger any direct tax consequences in either MS A or State B.

The mere assignment of responsibility for the manufacture of the group's products and the sale of the products outside MS A will typically not trigger any direct tax consequences in either MS A or State B. However, the assignment will affect the allocation of income, which is described further under Step 2.

The transfer of existing non-MS A IP from MNE Group to Company B will take place pursuant to a CCA under which Company B is obliged to make a buy-in payment for pre-existing IP to MNE Group on arm's-length terms. The buy-in payment may be structured either as a lump-sum payment or as a running royalty. Such taxation can be a critical tax issue that needs to be addressed by MNE Group, particularly if the transfer relates to mature and highly valuable IP. The remuneration for the transfer of the existing non-MS A IP from MNE Group to Company B is taxable in MS A, and is deductible/eligible for depreciation in State B. However, if State B is a tax haven the value of the tax deductible/depreciation may be zero.

MNE Group continues to carry out research and development activities for the group. Therefore, on the basis of the CCA, Company B reimburses MNE Group for a share of the ongoing research and development expenses, reflecting the share of anticipated benefit Company B expects to derive from these ongoing research and development expenditures.

Company B's reimbursement of MNE Group's research and development expenses will be deductible for Company B in State B. However, if State B is a tax haven the value of the tax deductible/depreciation may be zero. Accordingly, the reimbursement will effectively eliminate MNE Group's current tax deduction for that portion of research and development expenses which is reimbursed by Company B under the CCA. Despite the fact that Company B is reimbursing MNE Group for a percentage share of its research and development costs, MNE Group is entitled to an R&D tax credit in MS A for the full amount of its R&D expenditures (including the portion reimbursed by Company B, following the transfer of part of the IP rights).

Step 2

The establishment of Company C and Company D will typically not trigger any direct tax consequences in State B, MS C or MS D.

As Company C contractually assumes responsibility for producing all the group's products and selling the group's products outside MS A and also contractually assumes the risks associated with the business, the taxable income of Company C is comprised of global (non-MS A) sales revenue.

Thus, Company C earns profits equal to its gross sales revenue on foreign (non-MS A) sales, less fees paid to Company D for the manufacture of the goods (see Step 4), payment to any related commission-based marketing entities (see Step 5), and royalties paid to Company B (see Step 3). This profit is subject to corporate income tax in MS C.

Step 3

By virtue of its buy-in payment and ongoing CCA payments, Company B is treated as the owner of the non-MS A IP rights of the group. Company B licenses those IP rights to Company C.

Royalties paid to Company B by Company C for its foreign IP rights are deducted in the computation of the corporate tax base of Company C. MS C does not impose withholding tax on royalty payments. If State B is a tax haven, State B does not impose corporate income tax upon receipt of royalties. Accordingly, a situation with deduction and no inclusion occurs. Almost the same situation occurs if State B only imposes a low income tax on the royalty income, e.g. due to a patent-box regime or because State B is a low-tax jurisdiction.

Step 4

Under the manufacturer agreement, Company D manufactures the group's products for a fee based on the arm's-length principle. As Company C bears the principal risks associated with the production of the products, the fee is assumed to be equal to the direct and indirect costs of production plus a mark-up. Company D includes this fee in its taxable income.

Step 5

Company C sells the products to or through related foreign sales and marketing entities. The contractual arrangements between Company C and the marketing companies specify that Company C assumes the principal risks related to the marketing of the products. On this basis, sales and marketing companies are compensated for their efforts on a basis reflecting their limited risk status. Such compensation would usually be computed on the basis of a target return on sales, which for transfer pricing purposes is determined by reference to the returns earned by arguably comparable limited-risk marketing and distribution companies. A ruling with the local tax authorities to confirm the level of profits may be sought.

Step 6

Dividends distributed from Company B to MNE Group are subject to participation exemption, i.e. no withholding taxes are levied in State B, and no corporate income tax is imposed in MS A.

- **Absence of CFC taxation**

Finally, it should be noted that the ATP structure set out above assumes that MS A does not apply any CFC rules to the structure. Generally, if applicable CFC rules exist in MS A, they would normally prevent the ATP structure, since MNE Group would be required to include in its own taxable income in MS A the royalties received by Company B.

If MNE Group is resident in the US instead of MS A, the so-called check-the-box rules can result in a situation where US CFC rules do not apply, as Company C and Company D are so-called disregarded entities under the US rules.

- **Extraction of the ATP indicators**

The table below extracts from the discussion above the ATP indicators relating to the ATP structure. For this purpose, it is helpful to distinguish between State A, State B and State C, as the rules depend on the character of the income or cost involved in each tier of the structure. In this structure, as such State C is not subject to the ATP structure, as it is assumed that the fee paid under Step 4 is remuneration at arm's length in accordance with Article 9 of OECD's model tax convention.

Table 8: Indicators resulting from Structure 7

State A	State B	State C	State D
-Too generous tax-exemption of dividends received. -No or low taxation of capital gain (fair market value) upon disposal of IP. -R&D tax incentive obtainable also for costs that are reimbursed. -No CFC rules.	-No withholding tax on dividends paid. -Patent box or other preferential tax treatment of income from IP. -Nil corporate tax rate. -No general or specific anti-avoidance rules to counter the model ATP structures.	-Tax deduction for royalty costs. -No withholding tax on royalty payments. -No general or specific anti-avoidance rules to counter the model ATP structures. -Unilateral ruling on earnings spread.	n/a (No critical indicators relevant)

3. ATP Indicators

From the model ATP structures, a number of so-called *ATP indicators* (or just *indicators*) are derived and identified.

This section sets out the ATP indicators and explains the reasoning behind each of them. The ATP indicators are applied in order to assess the risk exposure of the Member States to ATP.

3.1 Methodological considerations

The extraction of indicators relies on the definitions specified for the purpose of this study. Moreover, an element of subjectivity is incorporated in the categorization process. This should be kept in mind when assessing the results of the study. For example, when defining the indicators relating to hybrid mismatches, a choice had to be made as to which of the two MSs involved should be scored on that indicator (for example, see indicator 6).[64]

For the above-mentioned reason, the section below contains critical and necessary explanations regarding the approach to identifying risk indicators.

3.1.1 Categories of indicators

ATP indicators can be generally defined as generic characteristics of a tax system which can facilitate ATP. Technically, an ATP indicator can take the form of a specific piece of legislation (one rule or a set of rules) or case law, but it can also take the opposite form, namely the absence of such legislation or case law. This in itself is not important for the existence of an ATP indicator – what matters is its effects, not its form.

Typically, more than one ATP indicator will have to be combined in order to enable the creation of an ATP structure. This reflects the fact that cross-border ATP structures take advantage of the interaction of two or more (MS) tax systems.

The character of how indicators facilitate ATP can be either active or passive.

An ***active ATP indicator*** is one which can directly promote or prompt an ATP structure.

Often, it is the active indicators that are the main source of the tax benefit offered by an ATP structure. A simple example could be a patent-box regime: Such a regime offers a low tax rate on certain IP income and hence provides an incentive for MNE groups to establish a patent-box structure so as to obtain the tax advantage offered by the regime[65].

[64] On the other hand, as is explained under Indicator 6, Indicator 9 addresses the other state's involvement in the same structure.

[65] This example does not take into account the modified-nexus principle. Please refer to the discussion of Indicator 17 on page 59

Another example of an active ATP indicator is a notional interest deduction for share capital; it offers a tax deduction for a deemed cost which is not necessarily taxed in the hands of any (deemed) recipient.

By contrast, a ***passive ATP indicator*** is one which does not by itself promote or prompt any ATP structure, but which is necessary for an ATP structure not to be hindered or blocked. A simple example is the absence of royalty withholding tax, which aims to prevent double taxation. While not itself promoting any particular ATP structure, the absence of royalty withholding tax is nonetheless helpful to ATP because it represents the absence of an obstacle to payment of royalty, for example into a patent-box structure established in another MS. Another example of a passive ATP indicator is the general tax-deductibility of inter-company interest costs. On the one hand, ATP structures in the field of financing would not work without this deductibility; on the other hand, it is also a basic feature of a normal developed tax system, and provides for a symmetrical tax treatment of interest.

It is important to stress that passive indicators refer to features of a tax system that generally serve positive purposes, not least to ensure that businesses and other taxpayers are only taxed on their net income, not their gross income.

Finally, a third category of ATP indicators has been defined in the form of a ***lack of anti-abuse rules***. In general, anti-abuse rules are rules aimed at counteracting the avoidance of tax. Their scope can be either specific to certain transactions, or broader and generally applicable to several forms of transaction. Examples of the former include a beneficial-owner test for the reduction of withholding taxes and thin-capitalization rules; examples of the latter include a general anti-avoidance rule as well as CFC rules.

Based on the discussion and definitions above, in the following the study will distinguish between the following three categories of indicators:

- Active ATP indicators;
- Passive ATP indicators; and
- Lack of anti-abuse ATP indicators.

The table below summarises the definitions.

Table 9: ATP indicator categorization and explanations

Active	Passive	Lack of anti-abuse
An active ATP indicator is one which can promote or prompt an ATP structure. Often it is these indicators that are the main source of the tax benefit offered by an ATP structure. A simple example would be a patent-box regime: such a regime offers a low tax	A passive ATP indicator is one which does not by itself promote or prompt any ATP structure, but which is nonetheless needed in order to ensure that an ATP structure achieves its tax effectiveness without being restricted in any way. A simple example is the absence of royalty withholding tax in an	*Lack of anti-abuse ATP indicators:* these are indicators which represent the absence of certain anti-avoidance rules or practices which could have countered ATP. Examples include the

Active	Passive	Lack of anti-abuse
rate on certain IP income and hence provides an incentive for MNE groups to establish a patent-box structure so as to obtain the tax advantage offered by the regime.	MS; while not promoting any particular ATP structure, the indicator is nonetheless helpful in removing an obstacle to payment of royalty, for example into a patent-box structure established in another MS.	absence of CFC rules, and the absence of thin-capitalization/ interest-limitation rules.

It should be understood that no value judgement is intended by the nomenclature used in this study. It is perfectly possible that Member State tax rules found to be ATP indicators for the purpose of this study may well pursue valid tax policy objectives. A final judgement regarding such rules would require a detailed analysis of their actual design and application, taking into account to what extent the rules are safeguarded, e.g. through anti-abuse provisions. Such detailed analysis is outside the scope of this study.

Sets of combined ATP indicators.
The lack of some anti-abuse indicators and passive ATP indicators can combine with others into sets which are capable of facilitating the same or similar types of ATP structures. For example, if an MS has a passive ATP indicator created by the general interest deductibility (Indicator 8) and a lack of anti-abuse ATP indicator caused by the absence of thin-capitalization/interest-limitation rules (Indicators 12 and 13), these ATP indicators could be combined and exploited within the framework of a single ATP structure, e.g. a financing structure.

By contrast, if an MS exhibits one passive ATP indicator caused by the absence of interest withholding tax and another passive ATP indicator caused by the absence of withholding tax on royalty, these would constitute unrelated ATP indicators because they would not usually form part of the same ATP structure.

A total of three combined sets of lack of anti-abuse indicators and passive ATP indicators have been identified:

- Indicator 1 in combination with any of 2, 3 and/or 4. This combined set is capable of facilitating structures where dividends are routed through an MS without being taxed in any of the countries.
- Indicator 8 in combination with any of 9, 12, 13, 14 and/or 15. This combined set is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.
- Indicator 19 in combination with any of 20 and/or 21. This combined set is capable of facilitating structures where the tax basis in an MS is eroded by means of IP licensing and similar costs.

3.1.2 Indicators derived from the model ATP structures

27 out of a total of 33 ATP indicators were derived from the model ATP structures. This was done using an analysis which sought answers to the following two questions:

1. ***How does the tax benefit offered by the ATP structure arise?***

Taking Model ATP Structure 6 as an example, it is clear that it assumes that royalty costs are deductible in MS D, not subject to withholding tax in MS D, and the royalty income is not taxable to the ultimate owner in MS B because of Company B1's tax residence outside that MS. At first glance, this analysis produced three ATP indicators, namely (i) the tax-deductibility of royalty costs, (ii) the lack of or exemption from withholding-tax on royalty, and (iii) the absence of tax residency of a locally incorporated company due to its management and control being situated outside of that MS. In addition, the withholding-tax exemption itself raised the question of whether any beneficial-owner test is being applied, which in turn leads to a fourth ATP indicator, namely the absence of such a test.

2. ***What tax rules or practices in either of the MSs involved in the model ATP structure could in effect have reduced or eliminated the ATP benefit?***

Taking Model ATP Structure 6 again, it is clear that if MS A were to apply CFC rules to the structure, the non-taxation of the royalty income in MS B could be outweighed if Company B1's income was taxed as CFC income in MS A. This in turn would lead to a fifth ATP indicator, namely the absence of such CFC taxation. Finally, a sixth indicator was identified in the form of the absence of any general or specific anti-avoidance provision that could have disallowed, for example, the royalty tax deductions.

3.1.3 Other ATP indicators

In addition to the ATP indicators derived from the model ATP structures, we identified a further five indicators. In principle, they could also have been illustrated by means of model ATP structures, but we considered them straightforward ATP indicators for which illustration by means of an ATP structure would have been of lesser relevance.

These items are identified in the list of ATP indicators as No. 3 (no withholding tax on dividend equivalents), No. 5 (tax-deductibility of dividends paid), No. 16 (notional interest deduction for equity capital), No. 26 (no rule to counter mismatch qualification of local partnership) and No. 31 (excess profits ruling).

Finally, a residual indicator – No. 33 – was included in the list of ATP indicators. This reflects an open-ended question in the questionnaire which asked the national tax experts to flag any other significant ATP indicator that they might have been aware of while they were completing the questionnaire. The intention was to capture as many relevant ATP indicators as possible within this framework.

3.2 Overview of ATP indicators

The ATP indicators listed below have been numbered and classified by theme. There are fourteen themes in total. The numbering of the indicators and their thematic classification are not relevant to how important or critical they are.

Counting from the top, the first seven themes cover financial transactions in the shape of dividend payments, interest payments and royalty payments. Payments include fictitious/deemed payments. Each of the financial themes is split into an income (payee) side and a cost (payer) side.

The next six themes do not relate to any specific types of transaction, but instead represent the more general characteristics of the MS tax systems.

The final theme is the residual indicator resulting from the open-ended question in the questionnaire process.

For each indicator on the list, a reference is inserted into the relevant questions in the questionnaire that address the issue during task 2.

Finally, the ATP indicators have been marked with the following three categories: (i) active ATP indicator, (ii) lack of anti-abuse ATP indicator, and (iii) passive ATP indicator.

The table below provides an overview of all the ATP indicators.

Table 10: List of ATP indicators

Theme	No.	Subject	Category	Ref. to Questionnaire
Dividends received	**1**	Too generous tax-exemption of dividends received	Passive	3, 4
Dividends paid	**2**	No withholding tax on dividends paid (absent under domestic law)	Passive	5, 6, 7
	3	No withholding tax on dividend equivalents (e.g. buy-back of shares)	Passive	8
	4	No beneficial-owner test for reduction of withholding tax on dividends	Lack of anti-abuse	6c, 6d
	5	Tax deduction for dividends paid	Active	22
Interest income	**6**	Income from certain hybrid instruments non-taxable	Lack of anti-abuse	11, 12
	7	No deemed income from interest-free loan (non-arm's-length transactions)	Active	10
Interest costs	**8**	Tax deduction for intra-group interest costs	Passive	13
	9	Tax deduction does not depend on the tax treatment in the creditor's state	Lack of anti-abuse	14a-b
	10	Tax deduction allowed for deemed interest costs on interest-free debt	Active	17
	11	No taxation of benefit from interest-free debt	Lack of anti-abuse	18
	12	No thin-capitalization rules	Lack of anti-abuse	15, 16

Theme	No.	Subject	Category	Ref. to Question-naire
	13	No interest-limitation rules	Lack of anti-abuse	15, 16
	14	No withholding tax on interest payments (absent under domestic law)	Passive	19, 20
	15	No beneficial-owner test for reduction of withholding tax on interest	Lack of anti-abuse	20d-e
Allowance for equity capital	**16**	Notional interest deduction for share capital	Active	21
Royalty or other IP income	**17**	Patent box or other preferential tax treatment of income from IP	Active	23
	18	No taxation of capital gain (fair market value) upon transfer of IP	Passive	26, 27
Royalty or other IP costs	**19**	Tax deduction for intra-group royalty costs	Passive	28, 29
	20	No withholding tax on royalty payments (absent according to domestic law)	Passive	30, 31
	21	No beneficial-owner test for reduction of withholding tax on royalty	Lack of anti-abuse	31c-d
	22	R&D tax incentive obtainable also for costs that are reimbursed	Passive	24, 25
Group taxation	**23**	Group taxation with acquisition holding company allowed	Passive	32, 33
CFC rules	**24**	No CFC rules	Lack of anti-abuse	34-36
Foreign legal entities	**25**	Tax qualification of foreign partnership does not follow that of the foreign state	Passive	37
	26	No rule to counter a mismatch in tax qualification of a domestic partnership between own state and a foreign state	Lack of anti-abuse	38
	27	No rule to counter a mismatch in tax qualification of a domestic company between own state and a foreign state	Lack of anti-abuse	39
Tax-free company	**28**	Nil corporate tax rate	Active	1, 2
	29	Locally incorporated company not tax-resident if management/control is in another state	Active	40, 41
Ruling practices	**30**	Unilateral ruling on e.g. interest spread or royalty spread can be obtained	Passive	42, 43
	31	Excess profits rulings	Active	44

Theme	No.	Subject	Category	Ref. to Questionnaire
GAAR / SAAR	**32**	No general or specific anti-avoidance rules to counter the model ATP structures	Lack of anti-abuse	45
Other themes (residual)	**33**	Any other significant ATP indicator to be identified by national tax experts		46

3.3 Description of the ATP Indicators

The following is a discussion of each of the indicators and its potential role in ATP. The discussion seeks to explain why that tax characteristic is regarded as an ATP indicator.

1 –Too generous tax-exemption of dividends received
In a normal parent-subsidiary relationship, the fact that the MS in which a parent company is resident abstains from taxing dividends received from a subsidiary in another MS is not critical in itself. The Parent/Subsidiary Directive adopted in 1990 harmonised this practice at EU level.

However, such tax exemption can become critical if it is too generously applied and fails to take account of other ATP factors. Indicator 1 will be granted on the basis of a subjective yet consistent assessment which will include considerations about the tax status of the paying entity. This will consider *inter alia* whether the regime in question applies generally to dividends from all entities, including those resident in tax havens, or only to entities resident within the EU or in tax treaty states, or if certain thresholds regarding the effective taxation of the paying entity are applicable. The assessment will also depend on whether the exemption regime applies even if the dividends are deductible at the level of the paying entity. Finally, the ownership threshold that would apply in order to qualify for the exemption regime will also be a factor (e.g. if it is fixed at a lower level than the 10% specified in the Parent/Subsidiary Directive, in which case the dividend should be taxable).

Council Directive 2014/86/EU, amending the Parent/Subsidiary Directive, obliges Member States to ensure that rules are in place to tax dividends received if the dividends are deductible to the subsidiary in another MS. Such rules must be in place in all Member States by the end of 2015. If a MS has already introduced such rules at the time of the Questionnaire process, it will normally avoid Indicator 1. By contrast, a MS that has not yet introduced such rules cannot avoid Indicator 1 simply on the grounds that it is obliged to introduce such rules.

Indicator 1 is qualified as a passive ATP indicator.

2 – No withholding tax on dividends paid (absent under domestic law)
The absence of withholding tax on dividends generally serves a positive function in the international tax system, which is to prevent double taxation. The elimination of withholding taxes on dividend payments within an MNE group is therefore a key principle of the EU Parent/Subsidiary Directive. However, under certain circumstance, the absence of such withholding taxes may allow for ATP in the sense that had a

withholding tax existed, it could have impeded an ATP structure. ATP structures, particularly those that rely on tax-free repatriation of funds up to the ultimate parent company (i.e. the MNE Group in the model ATP structures) rely on the absence of withholding taxes. The absence of withholding tax could enable unwanted tax practices, and hence constitutes a passive ATP indicator. Therefore, an MS is only given an indicator in the total absence of withholding tax on dividends paid.

Some MSs might impose other forms of taxation on the company when it pays a dividend to its shareholders. Such taxes, if any, are included under this ATP indicator.

3 – No withholding tax on dividend equivalents

Dividends can often be paid to shareholders in alternative forms, e.g. by the company buying a proportion of the shareholders' shares or effecting a capital-reduction payment. If such types of transactions are not subject to withholding tax on the same basis as regular dividends, they may comprise a mechanism for circumventing the dividend withholding tax.

This can be critical in combination with other ATP indicators, or it can constitute a means of routing dividends from the EU to a tax haven without any dividend withholding tax. This indicator is classified as a passive ATP indicator using similar reasoning to that applied to ATP Indicator No. 2 above.

However, an MS is not assigned an indicator for this point if an indicator is already present for item No. 2 above. This is because there can be no circumvention of dividend withholding tax if no such tax is imposed in the first place.

4 – No beneficial-owner test for reduction of withholding tax on dividends

In cases where an MS levies withholding tax on dividends under its domestic law but offers an exemption in certain circumstances, e.g. as prescribed by the Parent/Subsidiary Directive or a tax treaty, the MS would be more exposed to playing a role in ATP if such tax exemption is granted without any test of the recipient's real role with respect to the dividend.

A beneficial-owner test would typically seek to determine whether the foreign shareholder claiming the tax exemption can dispose of the dividend, or whether it merely plays a flow-through role. In the latter case, the test would deny the tax exemption.

Accordingly, the absence of a beneficial-owner test, e.g. a test similar to the test in the OECD's Model Tax Convention, is considered a lack of anti-abuse ATP indicator since it represents the absence of an anti-avoidance provision as defined in Table 9 above.

However, an MS is not assigned an indicator for this point if an indicator is already present for item No. 2 above. This is because the absence of a beneficial-owner test will not constitute a further critical issue if there is no dividend withholding tax in the first place.

5 – Tax deduction for dividends paid

Since many states do not tax dividends received by local parent companies from subsidiaries in other states, it would result in double non-taxation of the underlying profits if the subsidiary was allowed a tax deduction for the dividend paid. This applies particularly in contexts that fall outside of the scope of the revised Parent/Subsidiary Directive, for example where the parent company is tax-resident outside the EU. The tax-deductibility of dividends paid can facilitate ATP structures.

While it is recognized that there can be a justification in economic theory for a dividend deduction (or a notional interest deduction) in order to place equity and debt financing on par, the potential for a tax mismatch nonetheless renders such a deduction an active ATP indicator in accordance with the definition in Table 9 above.

6 – Income from certain hybrid financial instrument not taxable

If one MS treats the return received on a financing instrument (loan) as a form of tax-free income (e.g. a dividend) while another MS allows a tax deduction for the same return paid, a clear mismatch arrangement has arisen and an ATP structure can be established. The main cause of such mismatch is that the tax classification of hybrid financing instruments largely depends on differing case law in each MS.

This makes it difficult to say precisely which MS offers the ATP indicator. Both sides are equally important. It has been decided to consider this an indicator for the MS in which the income is received. This choice is balanced by Indicator No. 9, which is considered to be an indicator for the other state.

It is fair to consider the possibility of receiving tax-exempt income from a hybrid loan as an absence of crucial anti-avoidance measures which could have prevented an ATP structure. This indicator is therefore classified as a lack of anti-abuse ATP indicator as defined in Table 9 above.

The non-taxation of income from hybrid loans has been included as an ATP indicator irrespective of the revision of the Parent/Subsidiary Directive[66] which will oblige MSs to tax dividends for which a tax deduction has been claimed. This is to ensure that current law is reflected, and to capture situations – if there are any – which might escape the revision.

7 – No deemed income from interest-free loan granted

Most MSs have transfer pricing rules that provide for adjustment of taxable income so as to reflect an arm’s-length pricing of inter-company transactions. However, there have been examples where no such adjustment was required if a company resident in that MS granted an interest-free loan to a company in another MS. This can give rise to ATP structures such as the one illustrated by Model ATP Structure 4 if the other MS allows the borrower company to claim a tax deduction for an arm’s-length interest cost regardless of the fact that no such interest accrues or is paid.

We have rated this indicator as an active ATP indicator because it is capable of prompting – and is known to actually have prompted - ATP structures in combination with ATP Indicator No. 10 below.

8 – Tax deduction for intra-group interest costs

Most, if not all, MSs allow companies to claim a tax deduction for their financing costs, particularly interest costs on their loans and other debts. As it is relatively easy to

[66] Council Directive 2014/86/EU.

adjust the mix of a company's debt and equity, the use of interest costs is one of the simplest international tax planning-tools available to MNE groups.

In addition, experience confirms that many ATP structures have as one of their critical components the tax-deductibility of interest costs, reducing the overall tax basis in a group of companies or an MNE. Good examples are Model ATP Structures 1 – 4 above. On the other hand, it is clear that interest tax deductibility is a basic and fundamental element of a developed tax system, and does not by itself prompt any ATP structure. Intra-group interest tax deductibility is therefore ranked as a passive ATP indicator in accordance with the definition in Table 9 above.

9 – Tax deduction of interest does not depend on the tax treatment in the creditor's state

This indicator is related to No. 6 above. Please refer to the discussion under No. 6.

If an MS makes the tax-deductibility of interest costs contingent on the qualification in the MS (or non-MS) in which the income is received and hence requires corresponding taxation at the other end of the transaction, ATP structures such as Model ATP Structure 2 would be countered. Therefore, the absence of such a linking rule – in effect, a specific anti-avoidance rule – is rated as a lack of anti-abuse ATP indicator in accordance with the definition in Table 9.

10 – Tax deduction allowed for deemed interest cost on interest-free debt

This indicator represents the other side of the coin relating to ATP Indicator No. 7 above.

If an MS offers a tax deduction for interest costs which have actually not accrued as a result of non-arm's-length conditions being applied to an inter-company debt, there is a risk of ATP if such a tax deduction is not contingent on a corresponding adjustment in the state of the creditor company. It is therefore rated as an active ATP indicator, also because it is known to have been exploited in actual ATP structures such as Model ATP Structure 4. Please refer to the discussion under No. 7.

11 – No taxation of benefit from interest-free loan

This indicator should be seen in the context of ATP Indicator Nos. 7 and 10 above. If the debtor MS were to tax the borrower company on the interest-cost saving it achieved from the interest-free loan, ATP structures exploiting interest-free loan arrangements would be countered. Consequently, the absence of such taxation represents the absence of a special anti-avoidance provision, and it is therefore classified as a lack of anti-abuse ATP indicator in accordance with the definition in Table 9.

A MS can only be awarded an indicator on this point in the event that Indicator 10 exists for the same MS.

12 – No thin-capitalization rules

With a view to countering base erosion, during the past 10-20 years several MSs have introduced rules to limit or restrict the tax-deductibility of interest cost. Such limitations have been introduced in many forms. Thin-capitalization rules are a common form which traditionally looks at the level of a company's debt (usually only inter-company debt) compared to the level of its share or equity capital. Often, thin-capitalization rules consider the gross debt position of the company.

As thin-capitalization rules are capable of restricting or limiting ATP based on financing structures, the absence of such rules in an MS represents the absence of anti-avoidance rules; it is therefore qualified as a lack of anti-abuse ATP indicator in accordance with the definition in Table 9.

Given that indicators 12 and 13 largely seek to cover the same ATP concerns, an MS is only awarded an indicator if both rules are absent. In such a case, only one indicator will be awarded.

13 – No interest-limitation rules

Interest-limitation rules are another common variation of limitation on the tax-deductibility of interest costs. They often look more generally to all interest costs of a company, taking into account not just inter-company interest cost but all interest. Often, interest-limitation rules consider the net interest position of the company according to certain thresholds.

As interest-limitation rules are capable of restricting or limiting ATP based on financing structures, the absence of such rules in an MS represents the absence of anti-avoidance rules; it is therefore qualified as a lack of anti-abuse ATP indicator in accordance with the definition in Table 9.

Given that indicator 12 and 13 largely seek to cover the same ATP concerns, an MS is only given an indicator if both rules are absent. And if so, only one indicator will be given.

14 – No withholding tax on interest (absent under domestic law)

The absence of withholding tax on interest generally serves a positive function in the international tax system, namely to prevent double taxation and to ensure the taxation of net income rather than gross income. The elimination of withholding taxes on interest payments within an MNE group is therefore a key principle of the EU Interest/Royalty Directive and hence of EU tax policy. However, under certain circumstances, the absence of such withholding taxes may allow for ATP in the sense that a withholding tax could have discouraged or impeded ATP structures based on financing structures.

Therefore, an MS is only given an indicator in the complete absence of withholding tax on interest payments.

This indicator is therefore qualified as a passive ATP indicator.

15 – No beneficial-owner test for reduction of interest withholding tax

This factor should be seen in connection with No. 14 above. If an MS levies withholding tax on interest under its domestic law but exempts or refunds the tax either under a tax treaty or the EU Interest/Royalty Directive, the MS would be more exposed to playing a role in ATP if such a tax exemption or refund is granted without any test of the recipient's real role with respect to the interest, e.g. a test similar to the test in the EU Interest/Royalty Directive and the OECD's Model Tax Convention.

A beneficial-owner test would typically seek to determine whether the foreign lender company claiming the tax exemption can dispose of the interest or merely plays a flow-through role. In the latter case, the test would deny the tax exemption. Accordingly, the absence of an effective beneficial-owner test is considered a lack of anti-abuse ATP indicator.

However, an MS is not awarded an indicator on this point if an indicator is already in place under No. 14 above. This is because the absence of a beneficial-owner test will not constitute an additional critical issue if there is no interest withholding tax in the first place.

16 – Notional interest deduction for share capital

While it is recognized that a notional interest deduction (or dividend deductibility) may be useful in order to place equity and debt financing on par and thereby address the debt-equity bias[67], the potential for a tax mismatch nonetheless renders such a deduction an active ATP indicator.

If a company can claim a tax deduction for a deemed cost of its share capital, it would obtain a deduction which would normally not be reflected in any corresponding inclusion of taxable income in the hands of its shareholder. Consequently, such a one-sided tax deduction may well lead to cross-border-mismatch arrangements that can give rise to ATP once the tax treatment of the shareholder is taken into account. This is the case where a company can claim an allowance for corporate equity, that is, a tax deduction for a notional interest on equity financing.

17 – Patent box regime or other preferential tax treatment of income from IP

A beneficial treatment of income from patents and other IP may well promote arrangements where royalty costs are deducted at the full tax rate in one MS but are taxed as income at a lower (beneficial) tax rate in the other MS. Consequently, a patent box or similar preferential tax regime for IP income is classified as an active ATP indicator, unless the regime is restricted in accordance with the so-called modified-nexus approach, defined in the context of the OECD/G20 BEPS project[68] and by the Code of Conduct Group on Business Taxation[69].

Under the modified-nexus approach, Member States should only grant the patent-box benefits to income arising from IP which is the result of substantial R&D activities undertaken by the taxpayer (company) itself. By contrast, income from acquired IP should not be eligible for the regime.

18 – No capital gains tax on transfer of IP

If IP can be transferred without triggering any substantial capital gains taxation, it can facilitate the creation of ATP structures such as Model ATP Structures 5 or 6 when it is transferred into a tax-beneficial structure.

[67] See, for example, Zangari, E. (2014), "Addressing the Debt Bias: A Comparison between the Belgian and the Italian ACE Systems," Taxation Papers 44

[68] OECD (2014), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.

[69] Outcome of the 3356th Council meeting, Economic and Financial Affairs, Brussels, 9 December 2014

However, this indicator should be reserved for situations where the IP actually has a substantial fair market value at the time it is transferred. If so, the absence of capital gains taxation should be classified as a passive ATP indicator.

By contrast, if the absence of capital gains taxation relies solely on the recognition that the IP's fair market value is actually small or nil, it should not be seen as an ATP indicator.

19 – Tax deduction for intra-group royalty costs
Most (if not all) MSs allow companies to claim a tax deduction for their royalty costs, regardless of whether such costs are paid to an external party or inter-company.

Clearly, in a normal business relationship, royalty costs are normal business costs and should therefore be fully tax-deductible in line with other business costs. The deductibility of royalty payments is also considered a basic and fundamental element of a developed tax system, and does not by itself prompt any ATP structure.

On the other hand, it has to be acknowledged that patent-box structures and other ATP structures (e.g. Model ATP Structure 6) have as one of their critical components the tax-deductibility of royalty costs in the hands of the payer. This indicator is therefore ranked as a passive ATP indicator in accordance with the definition in Table 9 above.

20 – No withholding tax on royalty (absent according to domestic law)
The absence of withholding tax on royalty payments generally serves a positive function in the international tax system, which is to prevent double taxation and to ensure that taxation takes place on a net-income basis rather than on gross income. The elimination of withholding taxes on royalty payments within an MNE group is also a key principle of the EU Interest/Royalty Directive and hence of EU tax policy. However, under certain circumstance, the absence of such withholding taxes may allow for ATP in the sense that it would not discourage or impede ATP structures based on IP and royalty.

Therefore, an MS is only given an indicator in the complete absence of withholding tax on royalty payments.

This indicator is qualified as a passive ATP indicator.

21 – No beneficial-owner test for reduction of royalty withholding tax
This factor should be seen in connection with No. 20 above. If an MS levies withholding tax on royalty under its domestic law but exempts or refunds the tax either under a tax treaty or the EU Interest/Royalty Directive, the MS would be more exposed to playing a role in ATP if such a tax exemption or refund is granted without any test of the recipient's real role with respect to the interest, e.g. a test similar to the test in the EU Interest/Royalty Directive and the OECD's Model Tax Convention.

A beneficial-owner test would typically seek to determine whether the foreign company claiming the tax exemption can dispose of the royalty or merely plays a flow-through role. In the latter case, the test would deny the tax exemption. Accordingly, the absence of a beneficial-owner test is considered as a lack of anti-abuse ATP indicator.

However, an MS is not awarded an indicator on this point if an indicator is already awarded under No. 20 above. This is because the absence of a beneficial-owner test will not constitute a further critical issue if there is no royalty withholding tax in the first place.

22 – R&D tax incentive obtainable for costs reimbursed

Many MSs offer special tax incentives for costs incurred by a company in connection with the research and development of new products and intangibles. The incentives can take various forms, e.g. accelerated tax depreciation, extra cost deductions or direct tax refunds.

If a company can obtain such tax incentives on the basis of R&D costs which are ultimately refunded by another company within a group and hence are not borne by the company that actually undertakes the R&D, this could constitute an add-on factor which could facilitate certain ATP structures such as the one illustrated by Model ATP Structure 7.

If an MS grants a double deduction or similar incentives, this is not in itself leading to being awarded an indicator. However, if the incentives are also granted for costs that are reimbursed by group companies, this is considered an ATP indicator.

This factor is classified as a passive ATP indicator.

23 – Group taxation with acquisition holding company allowed

Model ATP Structures 1-3 illustrate arrangements where a target company in an MS is acquired via a leveraged acquisition vehicle – a holding company – set up in the same MS. The objective is for the holding company to claim a local tax deduction for the financing costs of the acquisition and to have this deduction set off against the taxable profits of the target company. The latter would typically require the filing of a group tax return by the two companies.

While the ability to file a group tax return between a debt-financed acquisition holding company and an acquired company should not be regarded as an ATP in itself, it can nonetheless form part of a larger ATP structure as illustrated by Model ATP Structures 1-3. It is therefore ranked as a passive ATP indicator.

24 – No CFC rules

In general, CFC rules are tax rules which in effect disregard the corporate veil and seek to tax the parent company in respect of certain items of income earned by its foreign subsidiary companies. Existing CFC rules in Member States vary in their scope and application. Typically, most CFC regimes seek to target highly mobile income such as financial income or IP income if little or no tax has been paid abroad.

Accordingly, all of the Model ATP Structures except for model 3 (hybrid entity structure) would most likely be countered if the MS in which the parent company is tax-resident were to apply –well designed - CFC rules.

The absence of such CFC rules is not itself capable of prompting an ATP structure, but it would constitute the absence of a critical anti-avoidance measure which could have prevented an ATP structure. This indicator examines the absence (or existence) of CFC rules, but does not examine their effectiveness.

This indicator is correspondingly ranked as a lack of anti-abuse ATP indicator in accordance with the definition provided in Table 9 above.

25 – Tax qualification of foreign partnership does not follow that of the other state

The main cause of hybrid mismatch arrangements involving partnerships and other hybrid entities is that the MS in which the entity is established and the MS in which its owners are tax-resident each apply their own criteria when determining whether the entity should be treated as a transparent or opaque entity for tax purposes. Similar conflicts can arise if the income of the entity is derived from a third state.

Clearly, if MSs align their tax qualification of partnerships and other hybrid entities, there would be no mismatch and hence no ATP opportunity. One way of aligning qualifications could be for MSs to follow the qualification applied by the MS in which the entity is established.

The absence of such an alignment is considered a passive ATP indicator.

Implicitly, this should be understood as an indicator for the MS of the owners – or, in the case of income from a third state, the MS from where the income is derived.

26 – No rule to counter a mismatch in tax qualification of a domestic partnership between own state and a foreign state

Please see No. 25 above. An alternative way for states to align their tax qualification of partnerships and other hybrid entities could be if the MS in which the entity is established were to follow the qualification applied by the MS in which the owners of entity are tax-resident.

As above, the absence of such alignment is considered a lack of anti-abuse ATP indicator.

27 – No rule to counter a mismatch in tax qualification of a domestic company between own state and a foreign state

It is a well-known fact that the US check-the-box rules allow US MNE groups to treat non-US subsidiary companies as tax-transparent entities. This can give rise to ATP involving an MS and the US. To the knowledge of the authors, no MS offers a similar tax qualification opportunity.

MSs can counter such ATP structures by aligning their tax qualification of a domestic company with that of the foreign state (the US), or by other means. The absence of such anti-avoidance rules is considered a lack of anti-abuse ATP indicator.

28 – Nil corporate tax rate

This indicator has been included to identify situations where an MS offers a general regime of tax-exempt companies which can give rise to ATP. Should such a regime be found, it would constitute an active ATP indicator.

In this connection, normal differences in statutory corporate tax rates between Member States should not generally be seen as an ATP indicator in this study. On the other hand, it has to be noted that Member States' standard corporate tax rates cover an extremely wide range: for example, the lowest nominal corporate tax rate in 2015 is 10% (Bulgaria), whereas the highest is 35% (Malta)[70]. The simple average rate is 22%.

It is clear that no objective definition of a low tax rate can be given. On this background, it is proposed that an indicator should only be awarded if a Member State offers a general nil rate of corporate income tax. Other cases may earn a remark in the Member State assessments but will not lead to any scoring in terms of an indicator.

29 – Locally incorporated company not tax-resident if management and control is in another state

If the tax residence status of a company incorporated in an MS follows the place where its management and control is located, the company may be able to escape taxation in that MS by locating its management and control in another state, possibly either a tax-haven state or an MS that does not tax companies which are incorporated in other MSs.

This opportunity can be particularly interesting to companies with highly mobile and/or minimal activities, e.g. ownership of valuable IP that generates royalty income, and it can create a so-called "stateless income" situation such as that illustrated by Model ATP Structure 6.

This factor is classified as an active ATP indicator, since it can promote ATP structures.

30 – Unilateral ruling on e.g. interest or royalty spread possible

The fact that an MS offers a tax-ruling institution is not in itself an ATP indicator. Tax rulings are generally used to give certainty to taxpayers regarding the taxation treatment of their transactions.

However, it is clear that the content or subject of the ruling may well include an ATP element, and hence an indicator. This is definitely so in the case of the excess-profit ruling described at No. 31 below. This can also be the case if a ruling is used to confirm an artificial flow-through arrangement of interest or royalty, and if it is used to agree what spread will satisfy the local tax authorities so that they will, for instance, abstain from challenging the arm's-length or beneficial-ownership character of the arrangements.

The availability of tax rulings for such practices is classified as a passive ATP indicator.

31 – Excess-profit rulings possible

Excess-profit regimes offer a tax exemption of a portion of local company profits to the extent that they are deemed to exceed a normal arm's-length profit. This practice can be agreed with the tax authorities in the form of a ruling, and targets profits earned on transactions with related parties (i.e. member companies of the group).

[70] For a discussion of this observation, please refer to the Member State Assessment for Malta.

In certain cases, the existence of this type of regime can facilitate ATP structures, and is therefore classified as an active ATP indicator.

However, it is worth noting that such a regime – whether or not confirmed by a unilateral tax ruling – cannot have any binding effect on the tax authorities in the other MSs. Therefore, any tax benefit of the ATP structure would remain vulnerable to having its non-arm's-length nature challenged by other MSs.

32 – No GAAR or SAAR to counter Model ATP Structures 1-7

In addition to the indicators listed above, MSs may have many other forms of either general or specific anti-avoidance rules that target ATP.

The absence of such rules is considered a lack of anti-abuse ATP indicator.

33 – Other items (residual)

Finally, additional information on other significant ATP indicators was requested to be identified by the national experts.

4. Screening of Member States

The purpose of Chapter 4 is to identify for each Member State how its corporate income tax system performs with respect to the ATP indicators, including the reasoning and argumentation underpinning such an assessment.

4.1 Methodological considerations

In order to present the exposure of Member States to ATP, all relevant indicators have been assessed. The priority has been to identify the presence of active ATP indicators as well as the (lack of) anti-abuse provisions. Relevant combinations of passive and anti-avoidance indicators were also given special attention, as they could contribute to an increased risk of ATP.

The assessment methodology applies both objective criteria (as described below) and subjective criteria (an assessment of the indicators identified) in assessing whether or not given ATP indicators are problematic for a particular Member State. For example, one cannot ignore the fact that several answers to the questionnaire will depend on how widely or narrowly the NTEs have interpreted the questions, and may consequently have affected our interpretations of their answers. The results should therefore be viewed as starting points for the country assessments, but they would require further and deeper analysis for a thorough exploration and investigation of the individual countries' ATP risk exposure.

With these caveats in mind, the process has been as follows:

4.1.1 Collection of data

The study has required detailed information regarding each MS in order to determine to what extent the various ATP indicators are found in that MS's tax system. This data was gathered from national tax experts using our questionnaire.

The questionnaire prepared by the national tax experts and reviewed by the respective Member State representatives are annexed to this report as part of Appendix 1: Questionnaires for each MS.

An overview of the indicators identified in the Member States is also attached to this report in Appendix 2: Overview of ATP Indicators.

Given the broad range and character of the ATP indicators, it is evident that they are found in every MS tax system. However, there can be significant variations between MSs, particularly in terms of how many ATP indicators are found; to what extent they are active, passive or lack of anti-abuse ATP indicators; and how the latter two types of indicator function in combination.

It is necessary to take these different dimensions and aspects into account in order to produce an initial assessment of each MS tax system's exposure to ATP.

4.1.2 Assessment

The assessments are based on our reading of the NTE answers in the questionnaires, follow-up dialogue with the NTEs, and finally, consultation with MS fiscal attachés or tax authorities and further follow-up dialogue with NTEs as part of the validation process.

Our best efforts have been used to obtain consistent assessments. Although this should eliminate most inconsistencies, please be aware that the assessments do not encompass fully comparable facts, as legislative details differ significantly across Member States. Moreover, some of the assessments regarding the existence or otherwise of certain indicators have required an interpretative judgement of the information available.

Finally, it follows from the methodology and scope of the study that the assessments of Member States should be seen only as a first, indicative, assessment. Final conclusions with respect to an MS's real ATP risk cannot be drawn until further detailed and thorough analysis is performed. Such analysis is outside the scope of the study.

4.2 Assessment of the Member States

This section sets out and discusses the assessments for all 28 of the MS corporate income tax systems on the basis of the indicators identified for each of them.

The section is supported by *Appendix 2: Overview of ATP Indicators,* which contains the complete list of indicators observed for each Member State. It essentially contains the schematic overview of the evaluation carried out regarding each of the existing ATP indicators for all the MSs.

Finally, this study tries to draw some conclusions regarding the existence or non-existence of an ATP indicator in all the relevant areas covered by the study.

4.2.1 Austria

Table 11: Austria: Overview

Indicators identified	Details
Active indicators	10 (Interest deduction allowed for deemed interest costs on interest-free debt)
Lack of anti-abuse indicators	11 (No taxation of the benefit from interest-free debt) 24 (No CFC rules) 26 (No rule to counter a mismatch in tax qualification of a domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	8 (Tax deduction for intra-group interest costs) 14 (No withholding tax on interest payments) 23 (Group taxation with acquisition holding company allowed) 25 (Tax qualification of foreign partnership does not follow that of the other state)
Set of combined indicators	8+14 (General interest deduction in combination with absence of withholding tax on interest payments)

The screening of the Austrian tax system revealed a total of nine ATP indicators, of which one is an active indicator, four are lack of anti-abuse indicators and four are passive indicators. Of these, one set of combined indicators was found.

Active indicators

The active indicator observed in Austria, Indicator 10, is the result of the fact that in general, Austria allows a tax deduction for deemed interest costs on an interest-free inter-company debt, without this deduction being contingent on a corresponding adjustment in the other state. However, it is noted that a general anti-avoidance rule applies whereby the deduction of the deemed interest cost would not be allowed if there is no corresponding adjustment abroad <u>and</u> if the transaction is qualified as abusive and artificial, or if the 'loan' is considered to be 'hidden equity'.

Lack of anti-abuse indicators

In connection with the active Indicator 10, Austria levies no taxation on the discount element (benefit) represented by the interest-free element of the loan, as the benefit is considered to be a tax-neutral 'hidden' capital contribution. This in turn produces a lack of anti-abuse indicator, Indicator 11.

As no CFC rules exist in Austria, Indicator 24 is observed. However, it should be noted that a switch-over provision applies with regard to dividends. Accordingly, dividends are not tax-exempt if, for example, the distributing companies' main business focus is to generate 'passive income' (interest, royalties, capital gains, certain kinds of rental income) and the distributing company is subject to 'low taxation', i.e. an average tax burden below 15%.

Other lack of anti-abuse indicators exist in Austria, including: Indicator 26 (no rule to counter a mismatch in qualification of a domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

It should be noted that in Austria, no beneficial-ownership test applies with regard to dividends. However, Indicator 4 has not been awarded, as it seems that the WHT exemption is subject to a similar anti-abuse measure. The WHT exemption is subject to a GAAR, which requires that the activities of the receiving company go beyond the mere administration of the assets, that it employs its own staff, and that it has a business office at its disposal.

In addition, it should be noted that Austria has interest-limitation rules and therefore does not score on the lack of anti-abuse Indicators 12 and 13 concerning the absence of thin-capitalization and interest-limitation rules respectively. According to the interest-limitation rules, interest is generally not deductible if it is incurred in order to generate tax-free income such as tax-free dividends. Also, the deduction is strictly tied to the tax status/residence of the receiving company. It is reported that overall, the Austrian rules are effective in countering ATP Structures 1 and 2. However, more detailed analysis is required to assess whether ATP Structures 3 and 4 would be countered by the Austrian interest-limitation rules or other anti-abuse rules.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In Austria's case, one such set was found:

- Indicator 8 plus 14 (general interest deduction combined with absence of withholding tax on interest payments).

Indicator 8, in combination with Indicator 14, is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs. However, Austria has introduced a linking rule which disallows tax deduction if the income is subject to low or no tax in the other state. Therefore a more detailed investigation is necessary in order to conclude under which circumstances this combination of indicators can facilitate ATP.

Other comments

Austria grants an 'invention premium', i.e. an R&D credit. It follows from the questionnaire that it seems possible to obtain the 'invention premium' while being reimbursed by another group company. However, it is reported that (subject to some uncertainty[71]) this 'invention premium' should be taken into consideration when allocating expenses under a cost-sharing agreement. Given these rather strict requirements, it seems less likely that the R&D tax credit could benefit an MNE which has not incurred all costs. Therefore Austria avoids the passive Indicator 22 (R&D incentive obtainable also for costs that are reimbursed).

[71] The Austrian Transfer Pricing Guidelines are not precise in this respect (VPR 2010, Rz 120). Overall, the legal situation is therefore not completely clear. Practitioners recommend taking this aspect into consideration within the CCA contract by including a specific clause that addresses this issue.

Also, it is worth noting that unlike most MSs, Austria has introduced the above-mentioned linking rule, which disallows tax deduction if the income is subject to low or no tax in the other state.

There were no significant conflicts between the answers from the NTE and the Austrian representatives stemming from the validation process. The final version of the questionnaire therefore includes the minor changes and supplementary information contributed by the Member State.

4.2.2 Belgium

Table 12: Belgium: Overview

Indicators identified	Details
Active indicators	16 (Notional interest deduction regime) 17 (IP regime) 31 (Excess-profit ruling)
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax) 6 (Income from hybrid loan non-taxable) 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 21 (No beneficial-owner test for reduction of royalty withholding tax). 24 (No CFC rules) 26 (No rule to counter a mismatch in tax qualification of domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	1 (Too generous tax-exemption of dividends received) 8 (Tax deduction for intra-group interest costs) 19 (Tax deduction for intra-group royalty costs) 22 (R&D incentive obtainable for costs reimbursed) 25 (Tax qualification of foreign partnership does not follow that of the other state) 30 (Unilateral ruling on interest or royalty spread possible)
Set of combined indicators	1+4 (Generous dividend tax exemption regarding inbound dividends combined with no beneficial-ownership requirement) 8+9 (Interest deduction in combination with absence of linking rule) 19+21 (Royalty deduction in combination with no beneficial-ownership requirement)

The research on Belgium revealed a total of sixteen ATP indicators, three of which are active indicators, seven are lack of anti-abuse indicators, and six are passive indicators. Of these, three sets of combined indicators were found.

Active indicators

The active indicator observed in Belgium, Indicator 16, has been awarded because Belgium has a notional interest deduction regime. According to the regime, resident companies may deduct a notional interest expense (déduction pour capital à risque, DCR/aftrek voor risicokapitaal, AVR) from their taxable profits. The deduction is based on the net accounting equity of a company in its annual accounts in accordance with the Belgian Generally Accepted Accounting Principles (GAAP), at the end of the preceding accounting year with some adjustments. The NID rate is based on the 10-year linear treasury bonds and may not exceed a rate of 3% (or 3.5% for small companies). The general anti-abuse clause in Belgian tax law is applicable where the main purpose of entering into an operation was to obtain a notional interest deduction and obtaining this deduction in these circumstances would be contrary to the object of the measure.

Any final conclusion on this indicator requires further detailed and thorough analysis of the specific details of the regime; in particular, this should include the existing anti-abuse measures included in the regime.

The active Indicator 17 has been awarded because Belgium offers a patent-box tax regime. According to this regime, 80% of qualifying gross patent income may be deducted from the taxable base, resulting in a maximum effective tax rate of 6.8%.

Further, active Indicator 31 is observed in Belgium, as companies can obtain an excess-profit ruling. The regime allows Belgium to unilaterally grant an advance ruling for downward adjustments, e.g. for profits that are shifted from abroad to Belgium and which would not have been realized if it had been a stand-alone enterprise.

Lack of anti-abuse indicators

In connection with the lack of anti-abuse Indicator 6, it is noted that the Belgian tax authority is generally fighting hybrid loans and the qualification of the income (interest or dividend). However, no linking rule exists, and the tax authority still needs to adapt its legislation in accordance with the amendment of Article 4 of the PSD. Therefore mismatches which result in a situation involving deduction/no inclusion can still occur. From the questionnaire, it appears that no draft bill on the implementation of the PSD seems to have been proposed. (Please note that the non-implementation of the PSD has also led to the identification of Indicator 1).

Belgium scores on Indicator 9, as deduction of interest does not depend on the foreign state's qualification, so mismatches may therefore occur. However, it should be noted that the deduction is denied if the interest is paid to a company which is resident in a tax haven or subject to a preferential regime. In such situations, interest is only deductible if the taxpayer shows that the payment corresponds to a genuine business transaction and that the amount is not abnormally high.

Other lack of anti-abuse indicators found include: Indicator 4 (no beneficial-ownership test for dividends paid); 21 (no effective beneficial-ownership test); 24 (no CFC rules); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

Passive indicators

It should be noted that Belgium grants an investment deduction for R&D-related investments and patents. The tax deduction is 14.5% of the investment value of assets which aim to promote the R&D of new products and advanced technologies that are environmentally friendly and for patents acquired or self-developed by the company. The deduction is also granted for costs that are ultimately reimbursed by group companies. This produces the passive Indicator 22.

It is reported that Belgium offers tax rulings (including so-called APAs) that in some cases can confirm non-arm's-length transactions or the amount of spread between interest or royalty income versus cost in various international flow-through structures. This produces the passive Indicator 30.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structures. In Belgium's case, three such sets are found:

- Indicator 1 plus 4 (generous tax exemption of dividends received combined with no beneficial-owner test on dividends paid); and
- Indicator 8 plus 9 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor); and
- Indicator 19 plus 21 (general royalty deduction in combination with no beneficial-ownership requirement).

The combination of Indicators 1 and 4 is capable of facilitating structures where dividends are routed through an MS without being taxed, while the combination of Indicators 8 and 9 may be capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs. With reference to the comments made to indicator 9 above, further investigation of the relevant rules would be necessary in order to conclude under which circumstances the combined indicators can facilitate ATP. In addition, the combination of Indicators 19 and 21 is capable of facilitating structures where the tax basis in an MS is eroded by means of royalty payments.

Other comments

There were no significant conflicts between the answers from the NTE and the comments provided by the Belgian representatives during the validation process. The final version of the questionnaire therefore includes the minor changes and supplements made by the Member State.

4.2.3 Bulgaria

Table 13: Bulgaria: Overview

Indicators identified	Details
Active indicators	10 (Interest deduction allowed for deemed interest costs on interest-free debt)
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax). 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS). 11 (No taxation of benefit from interest-free debt). 24 (No CFC rules). 26 (No rule to counter a mismatch in the foreign tax treatment of a Bulgarian partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of a Bulgarian company).
Passive indicators	1 (Too generous tax-exemption of dividends received). 8 (Tax deduction for intra-group interest costs). 19 (Tax deduction for intra-group royalty costs).
Sets of combined indicators	1+4 (Generous tax exemption of dividends received combined with no beneficial-owner test on dividends paid). 8+9 (General interest deduction combined with no requirement for taxation of the interest in the hands of the creditor).

The screening of Bulgaria's corporate income tax system revealed a total of ten indicators, one of which is an active ATP indicator, six are lack of anti-abuse indicators, and three are passive indicators. Of these, two sets of combined indicators were found.

Active indicators

The active indicator observed in Bulgaria, Indicator 10, results from the theoretical possibility of a tax deduction for deemed interest costs on an interest-free inter-company debt. However, despite this theoretical possibility, it cannot be ruled out that in practice, the Bulgarian tax authorities could successfully challenge the deemed interest-cost deduction. This renders the indicator subject to uncertainty and in need of further analysis.

Lack of anti-abuse indicators

In connection with the active Indicator 10, Bulgaria has no taxation of the discount element (benefit) represented by the interest-free element of the loan. This in turn produces a lack of anti-abuse indicator, indicator 11. (Please note that the same uncertainty arising from unclear practices applies).

Other lack of anti-abuse indicators found include Indicators 4 (no beneficial-ownership test for dividends paid); 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); 24 (no CFC-tax rules); 26 (no rule to counter a mismatch in the foreign tax treatment of a Bulgarian partnership); and 27 (same as 26, but relating to a Bulgarian company).

Interestingly, Bulgaria scores Indicator 4 because no test of beneficial ownership is applied to dividend payments, but it appears that Bulgaria does apply such a test in respect of interest and royalty payments. Hence Bulgaria avoids being awarded the lack of anti-abuse indicators 15 and 21. The basis for this varying practice may have to be tested further.

Indicator 9 should be seen in the context of the passive Indicator 8, the general tax-deductibility of interest costs.

As regards Indicator 24 (lack of CFC rules), this is common in many of the MS' tax systems.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In Bulgaria's case, two such sets are found:

- Indicators 1 plus 4 (generous tax exemption of dividends received combined with no beneficial-owner test on dividends paid); and
- Indicators 8 plus 9 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor).

The combination of Indicators 1 and 4 is capable of facilitating structures where dividends are routed through an MS without taxation, while the combination of Indicators 8 and 9 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments

It is noted that Bulgaria has the lowest statutory corporate tax rate within the EU, namely 10%.

Also, it is worth noting that unlike most MSs, Bulgaria's tax system treats foreign partnerships in accordance with their tax qualification in the other state. Bulgaria thus avoids scoring on the passive Indicator 25 regarding the qualification of foreign partnerships.

Finally, Bulgarian tax law has extensive general anti-avoidance rules that can apply to a wide array of ATP situations. Hence Bulgaria avoids being awarded the lack of anti-abuse Indicator 32.

The Bulgarian authorities did not provide any comments or additions to the original version of the questionnaire during the validation process.

4.2.4 Croatia

Table 14: Croatia: Overview

Indicators identified	Details
Active indicators	10 (Interest deduction allowed for deemed interest costs on interest-free debt)
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax). 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 11 (No taxation of benefits from interest-free debt) 15 (No beneficial-owner test for reduction of interest withholding tax). 24 (No CFC rules) 26 (No rule to counter a mismatch in tax qualification of domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	3 (No withholding tax on dividend equivalents) 8 (Tax deduction for intra-group interest costs) 19 (Tax deduction for intra-group royalty costs) 22 (R&D incentive obtainable for costs reimbursed)
Set of combined indicators	8+9 (General interest deduction in combination with absence of linking rule)

The screening of the Croatian tax system has revealed a total of twelve ATP indicators, of which one is an active indicator, seven are lack of anti-abuse indicators, and four are passive indicators.

Active indicators

The active indicator observed in Croatia, Indicator 10, results from the tax deduction for deemed interest costs on an interest-free inter-company debt. The determination of the deemed interest on loans granted by associated persons is based on the minimum calculated interest rate which would apply to non-associated persons at the time of granting a loan, currently 7%.

Lack of anti-abuse indicators

In connection with the active Indicator 10, Croatia has no taxation of the discount element (benefit) represented by the interest-free element of the loan. This in turn produces a lack of anti-abuse indicator, Indicator 11.

Croatia does not apply any beneficial-owner test in regard to withholding tax on dividends and interest. Indicators 4 and 15 have therefore been awarded.

Other lack of anti-abuse indicators found include Indicators 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); 24 (no CFC-tax rules); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

It should be noted that Croatia has thin-capitalization rules and interest-limitation rules, and therefore avoids the lack of anti-abuse Indicators 12 (no thin-capitalization rules) and 13 (no interest-limitation rules). The interest limitation rule is an excessive-interest rule that limits the amount of the interest (7%) on inter-group loans from foreign companies. The rule also applies to third-party debt guaranteed by direct shareholders, but does not take the local or total worldwide debt ratio into account.

According to the assessment of the NTE in response to the questionnaire, this excessive-interest rule seems, however, to be ineffective in countering ATP. In the NTE's response, it was noted that no specific anti-abuse provision exists in the Croatian tax law to counter these structures. The general anti-abuse rule may be applicable by the tax authorities; however, no information on the practice was publicly available at the time of the data collection.

Sets of combined indicators
Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structures. In Croatia's case, one set was found:

- Indicators 8 plus 9 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor)

The combination of Indicators 8 and 9 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments
Croatia offers a special deduction for R&D costs (150%). The qualification is subject to approval by the Ministry of Science, Education and Sports. Croatia scores on indicator 22, as the R&D credit also applies when the costs are reimbursed by group companies if certain conditions are met, e.g. if the reimbursements are made on the basis of a service agreement concluded with the group company.

It is worth noting that unlike most MSs, Croatia's tax system treats foreign legal entities in accordance with their tax qualification in the foreign state. Croatia therefore avoids being awarded the passive Indicator 25, as no mismatches should occur.

In addition, Croatia has a GAAR and therefore avoids Indicator 32. However, analysis of the effectiveness of the rule has been beyond the scope of this study, and further investigation would be necessary in order to conclude whether the rule is effective in countering ATP.

The validation process resulted in a number of modifications to the original version that arose from the comments and additions made by the representatives of Croatia. As the NTE agreed on the modifications suggested, the final version of the questionnaire includes the changes and supplementary information from the Croatian representatives.

4.2.5 Cyprus

Table 15: Cyprus: Overview

Indicators identified	Details
Active indicators	16 (Notional interest deduction regime) 17 (Patent-box regime) 29 (Locally incorporated company not tax-resident if management and control is in another state)
Lack of anti-abuse indicators	6 (Income from certain hybrid instruments non-taxable) 12 and 13 (No thin-capitalization rules and no interest-limitation rules) (Only one indicator given, cf. explanation under Indicators 12 and 13). 24 (No CFC rules). 26 (No rule to counter a mismatch in the foreign tax treatment of a Cyprus partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of a Cyprus company).
Passive indicators	1 Too generous tax-exemption of dividends received). 2 (No withholding tax on dividends paid) 8 (Tax deduction for intra-group interest costs). 14 (No withholding tax on interest paid) 19 (Tax deduction for intra-group royalty costs) 20 (No withholding tax on royalty paid) 23 (Group taxation allowed with acquisition holding company)
Sets of combined indicators	1+2 (Generous tax exemption of dividends received combined with a generous exemption from withholding tax on most outbound dividend payments); 8+12+13+14 (General interest deduction combined with no thin-capitalization or other interest-limitation rules, and no interest withholding tax); and 19+20 (General royalty deduction combined with no withholding tax).

The screening of Cyprus's corporate income tax system revealed a total of fifteen indicators, of which three are active indicators, five are lack of anti-abuse indicators, and seven are passive indicators. These gave rise to three sets of combined indicators.

Active indicators

Cyprus offers an IP regime providing for the tax exemption of 80% of profits, including the capital gain from a sale of IP. As a result, at the current standard rate of tax of 12.5%, income within the regime is subject to a tax rate of as little as 2.5%. There is currently no requirement for own R&D; even acquired IP can qualify. As a result of the information available, Cyprus has been awarded the active Indicator 17.

Also, Cyprus receives active indicator 29 for treating Cyprus's incorporated companies as non-taxable if their management and control is situated abroad. There is even confirmation that a Cyprus company could play the "stateless" role in ATP Model Structure No. 6.

Finally, Cyprus receives Indicator 16 for offering a notional interest deduction for equity capital. The provision has been in effect since 1/1/2015. The deduction is subject to the following anti-avoidance provisions, which aim to prevent cascading or double dips:

- The overall amount of the deduction shall not exceed 80% of the taxable income.
- The deduction will not be provided in the case of losses.
- In cases where new equity directly or indirectly comes from loans for which a deduction is provided to the other company, the amount of the interest deduction on the new equity will be reduced by the amount of interest (deductions) provided to the other company.

Any final conclusions regarding this indicator require further detailed and thorough analysis of the specific details of the regime, which should include, in particular, the existing anti-abuse measures incorporated into the regime.

Lack of anti-abuse indicators

Cyprus has been awarded the lack of anti-abuse Indicator 6 for the possibility that income from a hybrid loan could qualify as tax-free dividend income. However, the available information is scanty, and the position is likely to change once the amendment of the Parent/Subsidiary Directive is implemented. (However, no information in this regard was available at the time of the data collection.)

Cyprus has no thin-capitalization or interest-deduction-limitation rules, and therefore receives a combined lack of anti-abuse indicator under 12 and 13. This should be seen in the context of the passive Indicator 8 for the general tax-deductibility of interest costs. But it is notable that Cyprus will disallow an interest deduction if the interest income is not taxable to the creditor[72]. Consequently, Cyprus avoids being awarded the lack of anti-abuse Indicator 9.

As regards Indicator 24, Cyprus tax law does not provide for CFC taxation. Consequently, Cyprus has been awarded an indicator on this point.

[72] The national tax expert mentioned a potential change as a result of the amendment of the Parent/Subsidiary Directive, but it is not clear what any changes will consist of.

Cyprus also receives the lack of anti-abuse Indicators 26 and 27 for its lack of rules to counteract a foreign mismatch tax qualification of Cyprus partnerships and companies. The absence of such anti-avoidance rules is found in almost all the other Member States.

Passive indicators

Cyprus receives the passive Indicator 1 for offering a general tax exemption of dividends received from foreign shareholdings. There is no participation threshold, and only a small foreign-tax requirement or active-income test. Also, tax exemption is not suspended if a dividend is deductible to the subsidiary. No information is yet available on the implementation of the PSD in Cyprus.

Cyprus also receives the passive Indicator 2 for the total absence of withholding tax on dividends paid to corporate shareholders, regardless of their residence and degree of participation.

Likewise, Cyprus also receives the passive Indicators 14 and 20 for the absence of withholding tax on interest and royalty payments.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structures. In Cyprus's case, three such sets are found:

- 1 and 2 (generous tax exemption of dividends received combined with a generous exemption from withholding tax on most outbound dividend payments);
- 8, 12, 13 and 14 (general interest deduction combined with no thin-capitalization or other interest-limitation rules and no interest withholding tax); and
- 19 and 20 (general royalty deduction combined with no withholding tax).

These sets of combined indicators can facilitate ATP through Cyprus, particularly via structures based on the flow-through of dividends (the first set), financing (the second set), and royalty (the third set).

Other comments

The Cyprus authorities did not provide any comments in the course of the initial validation process. But comments were provided following a workshop in October 2015; these have been taken into account.

4.2.6 Czech Republic

Table 16: Czech Republic: Overview

Indicators identified	Details
Active indicators	n/a
Lack of anti-abuse indicators	9 (Tax deduction of interest does not link to the tax treatment in the creditor MS). 24 (No CFC rules). 26 (No rule to counter a mismatch in the foreign tax treatment of a Czech partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of a Czech company).
Passive indicators	1 (Too Generous tax exemption of dividends received). 8 (Tax deduction for intra-group interest costs). 18 (No capital gains tax on transfer of IP) 19 (Tax deduction for intra-group royalty costs) 22 (R&D incentive can also be received when costs are reimbursed)
Sets of combined indicators	8+9 (General interest deduction combined with no requirement for taxation of the interest in the hands of the creditor)

The screening of the Czech Republic's corporate income tax system revealed a total of nine indicators, of which four are lack of anti-abuse indicators and five are passive indicators. From among these, one set of combined indicators was found.

Lack of anti-abuse indicators

Indicator 9 for 'tax deduction of interest does not link to the tax treatment in the creditor state' should be interpreted in the context of the passive Indicator 8, the general tax-deductibility of interest costs. They combine into a set of indicators as explained below.

As regards Indicator 24 (lack of CFC rules), this is common in most of the MSs' tax systems. The same can be said of Indicators 26 and 27.

Passive indicators

As for the passive Indicator 1, the Czech tax exemption of foreign dividends is subject to strict conditions (at least 10% for at least 12 months plus residency in either the EU or a tax treaty state). Nonetheless, an indicator is awarded because dividends deducted can still be received tax-free until the amendment of the Parent/Subsidiary Directive is implemented (which has not happened yet). The responses provided by the Member State as part of the validation process of the questionnaire reported that the implementation of the amendment will close this loophole.

Notably, the Czech Republic receives the passive Indicator 18 for not providing for capital gains taxation upon the disposal of valuable IP by a Czech company.

As for Indicator 22, the Czech Republic allows for an enhanced tax deduction of R&D costs at 100% (and sometimes 110%) of the costs. Apparently, this super-deduction is not affected by any refund of R&D costs received from a foreign group member company.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structures. In the Czech Republic's case, one such set was found:

- Indicators 8 plus 9 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor).

The combination of Indicators 8 and 9 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments

The Czech tax system applies a beneficial-ownership test as a condition for the reduction of or exemption from withholding tax on dividends, interest and royalty. As a result, the Czech Republic avoids being awarded the lack of anti-abuse Indicators 4, 15 and 21. In this connection, it is also noted that a higher rate of withholding tax of 35% is applied to such payments when the recipient is resident outside of the EU, EEA and the Czech tax treaty network.

It is noted that unlike most MSs, the Czech Republic's tax system treats foreign partnerships (and companies) in accordance with their tax qualification in the other state. The Czech Republic therefore avoids being awarded the passive Indicator 25 on the qualification of foreign partnerships.

The questionnaire was validated by the Czech authorities. This did not give rise to any answers that conflicted with those given by the NTE.

4.2.7 Denmark

Table 17: Denmark: Overview

Indicators identified	Detail
Active indicators	n/a
Lack of anti-abuse indicators	n/a
Passive indicators	8 (Interest deductibility), 19 (Royalty deductibility), 23 (Group taxation) and 25 (Classification of foreign partnership on the basis of domestic tax principles)
Set of combined indicators	n/a

The screening of the Danish corporate income tax system revealed a total of four ATP indicators, all of which are passive indicators which do not cause any significant concerns.

The indicators identified are Indicators 8 (interest deductibility); 19 (royalty deductibility); 23 (group taxation); and 25 (classification of foreign partnership on the basis of domestic tax principles). The indicators are all passive indicators and fall within the categories of generally applicable tax rules which do not, on a stand-alone basis, cause any ATP risk. There are no active indicators or anti-abuse indicators. No sets of combined ATP indicators were found.

The validation process for the questionnaires did not result in any conflicts between the answers from the NTE and the representatives of the Member State. There were no borderline[73] assessments in our evaluation of the indicators.

[73] I.e. where a certain part of the legislation may or may not finally be concluded to constitute an ATP indicator.

4.2.8 Estonia

Table 18: Estonia: Overview

Indicators identified	Details
Active indicators	n/a
Lack of anti-abuse indicators	9 (Tax deduction of interest does not link to the tax treatment in the creditor MS). 12 and 13 (No thin cap-rules and no interest-limitation rules) (Only one indicator given, cf. explanation under Indicators 12 and 13). 24 (No CFC rules). 26 (No rule to counter a mismatch in the foreign tax treatment of an Estonian partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of an Estonian company).
Passive indicators	1 (Too generous tax-exemption of dividends received). 2 (No withholding tax on dividends paid) 8 (Tax deduction for intra-group interest costs). 14 (No withholding tax on interest paid) 19 (Tax deduction for intra-group royalty costs).
Sets of combined indicators	1+2 (Generous tax exemption of dividends received combined with a generous exemption from withholding tax on most outbound dividend payments); 8+9+12+13+14 (General interest deduction combined with no requirement for taxation of the interest in the hands of the creditor, no thin cap or other interest-limitation rules and no interest withholding tax).

The screening of Estonia's corporate income tax system shows a total of ten indicators, five of which are lack of anti-abuse indicators and five are passive indicators. Of these, two sets of combined indicators were found.

No active indicators were found.

Lack of anti-abuse indicators

Estonia was awarded the lack of anti-abuse Indicator 9 for not linking the general tax deduction of interest costs to the tax treatment in the hands of the creditor. Moreover, Estonia has no thin-capitalization or interest-deduction-limitation rules, and therefore receives a combined indicator under Nos. 12 and 13. This lack of anti-abuse indicators should be seen in the context of the passive Indicator 8 for the general tax deduction of interest costs.

As regards Indicator 24, Estonian tax law does include a limited set of CFC rules, but their target is mainly individual taxation, and their application is so limited that they would most likely not apply to the model ATP structures. Consequently, Estonia has been awarded an indicator on this point.

As for Indicators 26 and 27, the absence of such anti-avoidance rules is generally found among almost all Member States.

Passive indicators

Estonia offers a general tax exemption for dividends received from shareholdings of at least 10% in subsidiaries resident in the EU, EEA, Switzerland or third countries, provided the subsidiary is subject to corporate tax in that country. However, as the tax exemption of dividends received applies regardless of whether the distributing company can claim a tax deduction for the dividend, Estonia has been awarded the passive Indicator 1. It is not yet known how the amended Parent/Subsidiary Directive will be implemented in Estonia.

Estonia also receives the passive Indicator 2 for the total absence of withholding tax on dividends that are paid to corporate shareholders regardless of their residence and degree of participation.

Likewise, Estonia also receives the passive Indicator 14 for the absence of withholding tax on interest payments. Such withholding tax is only levied on interest paid by an Estonian real-estate fund which would be outside the MNE context of this study.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structures. In Estonia's case, two such sets were found:

- 1 and 2 (generous tax exemption of dividends received combined with a generous exemption from withholding tax on most outbound dividend payments);
- 8, 9, 12, 13 and 14 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor, no thin-capitalization or other interest-limitation rules, and no interest withholding tax).

These sets of combined indicators can facilitate ATP through Estonia, particularly structures based on the flow-through of dividends (the first set) and financing (the second set).

Other comments

It is worth recalling that Estonia's corporate income tax system is somewhat special system given that the liability to payment of tax is not triggered until a company distributes a dividend. Upon making such a payment, the Estonian company incurs a liability amounting to 20/80 of the dividend amount, payable in addition to the dividend payment. In assessing a company's distributable reserves, normal business costs, including interest and royalty costs, are deducted on the basis of normal accounting rules. In effect, this system means that tax deductions are generally obtained for normal business costs etc. at a tax rate of 25%, unless the company ends up never distributing a dividend.

It is worth noting that unlike most MSs, Estonia's tax system appears to treat foreign partnerships in accordance with their tax qualification in the other state. Estonia therefore avoids being awarded the passive Indicator 25 on the qualification of foreign partnerships.

Estonian tax law has extensive general anti-avoidance rules in sections 83-4 and 84 of the Taxation Act. Although the extent to which they would apply to the model ATP structures has not been tested, on this basis Estonia avoids being awarded the lack of anti-abuse Indicator 32.

The Estonian authorities provided comments to the original version of the questionnaire as part of the validation process. This did not result in any conflicting information or interpretations. The final version of the questionnaire includes the changes and supplementary information contributed by the Estonian representatives.

4.2.9 Finland

Table 19: Finland: Overview

Indicators identified	Details
Active indicators	N/A
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax) 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 26 (No rule to counter a mismatch in tax qualification of domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	1 (Too generous tax-exemption of dividends received)[74] 3 (No withholding tax on dividend equivalents) 8 (Tax deduction for intra-group interest costs) 14 (No withholding tax on interest payment) 19 (Tax deduction for intra-group royalty costs) 23 (Group taxation with acquisition holding company allowed) 25 (Tax qualification of foreign partnership does not follow that of the other state) 33 (Additional ATP indicator)
Set of combined indicators	1+3+4 (Too generous tax-exemption of dividends received regarding either inbound or outbound dividend payments, combined with no beneficial-ownership requirement) 8+9+14 (Interest deduction in combination with absence of a linking rule and absence of withholding tax on interest)

The screening of the Finnish tax system has revealed a total of twelve ATP indicators, four lack of anti-abuse indicators and eight passive indicators. From among these, two sets of combined indicators were found.

Active indicators
No active indicators were found in Finland.

[74] Generously applied participation exemption in relation to the tax exemption of dividends received.

Lack of anti-abuse indicators

In general, the Finnish domestic rules do not specifically mention that the recipient must be the beneficial owner. This results in Indicator 4 being awarded. However, it should be noted that tax benefits can be denied if the arrangements have obviously been set up in order to avoid tax. Nevertheless, until recently the threshold for the application of this general anti-avoidance rule has been rather high, and the GAAR seems to be applied only rarely. As no sufficient case law concerning these situations exists, it is unclear whether the GAAR can be considered to be an 'effective' beneficial-owner test. However, further investigation is necessary in order to be able to draw any conclusions regarding the efficiency of the current rules.

Other lack of anti-abuse indicators found include: Indicators 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

It should be noted that Finland has interest-limitation rules, and therefore avoids being awarded the lack of anti-abuse indicators 12 (no thin-capitalization rules) and 13 (no interest-limitation rules). The rules include an EBITD test and a solvency test. However, it is reported that because of the generous limits, the provision for interest-deduction limitation may not be effective in countering ATP. Further investigation is therefore necessary in order to be able to conclude whether the rules are effective in countering ATP.

It should be noted that Finland's CFC rules were reported to be generally effective as they would apply to companies subject to an effective tax in the entity's state of residence of less than three fifths of the Finnish effective corporate tax (12%). As a result of this consideration, Indicator 24 is avoided.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structures. In Finland's case, two such sets are found:

- Indicators 1 plus 3 and 4 (generous dividend tax exemption regarding inbound as well as outbound dividend payments combined with no beneficial-ownership requirement); and
- Indicators 8 plus 9 and 14 (interest deduction in combination with absence of a linking rule and absence of withholding tax on interest).

Indicator 1 in combination with Nos. 3 and 4 is capable of facilitating structures where dividends are routed through an MS without taxation, while Indicator 8 in combination with Nos. 9 and 14 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments

It was noted at the time of data collection that the tax authority still needs to adapt its legislation with respect to the amendment of Article 4 of the PSD, resulting in

Indicator 1 being awarded. (Note, however, that the PSD amendments will be implemented by the end of 2015[75].)

Generally, no withholding tax is levied on interest paid to non-residents. However, withholding tax is levied if the debt on which the interest was paid is comparable to equity. It follows from the questionnaire that this exception is very rarely applied, and it is noted that in practice the interest paid to non-residents is exempt in Finland. This has resulted in the passive Indicator 14 being awarded.

When qualifying a foreign legal entity for tax purposes, the tax qualification in the foreign state is not decisive for Finnish tax purposes. It is noted in the questionnaire that there exists published court praxis in which the qualification has followed that of the state in which establishment took place. However, as this is not a generally applicable approach, Indicator 25 has been awarded.

In addition, it is noted that even when the effective place of management is in Finland, this does not make a foreign entity a resident for Finnish tax purposes. However, a foreign entity may have a PE in Finland due to which it is taxed in Finland, and the income allocated to the PE will be taxed in Finland. Together with Indicator 29 (locally incorporated company not tax-resident if management and control is in another state) in the state of incorporation this can create potential ATP structures with which to escape tax residence, Finland is awarded Indicator 33 (residual). Any final conclusions in this respect will require further detailed and thorough analysis of the specific details of the regime.

Finally, it was noted that the threshold for the application of the Finnish GAAR is rather high, but it may be applied when an arrangement lacks real economic substance, the taxpayer is not able to show adequate business reasons for the arrangement, and one of the main purposes of the arrangement is to obtain a tax advantage. Until recently, the GAAR has rather rarely been applied for the purpose of countering international tax planning structures. However, there are cases pending before the courts at the moment where the application of the GAAR in different types of arrangement, e.g. so-called debt push-down arrangements, is being tested. Accordingly, further investigation is necessary in order to be able to draw a conclusion as to whether the GAAR is effective in countering ATP.

[75] According to the IBFD, on 1 October 2015 the Finnish government presented to the parliament a law proposal (HE 59/2015) which transposes the amendments made to the EU Parent/Subsidiary Directive (recast) (2011) by Directive 2014/86 and Directive 2015/121.

4.2.10 France

Table 20: France: Overview

Indicators identified	Detail
Active indicators	17 (IP regime).
Lack of anti-abuse indicators	26 (No rule to counter a mismatch in tax qualification of domestic partnership), and 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	8 (Tax deduction for intra-group interest costs), 19 (Royalty deductibility), 22 (R&D incentive obtainable for costs reimbursed), 23(Group taxation with acquisition holding company allowed), and 25 (Tax qualification of foreign partnership does not follow that of the other state)
Set of combined indicators	n/a

The screening of the French corporate income tax system shows a total of eight ATP indicators. The observed indicators consist of one active, two lack of anti-abuse and five passive indicators.

Active indicators

The active indicator found in France is Indicator 17 (IP regime). Subject to certain conditions, proceeds from the licensing of patents, patentable inventions and their improvements and associated manufacturing processes qualify for a reduced capital gains rate of 15%. For royalties received pursuant to a sub-license arrangement, the taxation at the 15% reduced rate is subject to the two following conditions: (i) the licensor must not have already qualified for this regime on royalties perceived, and (ii) the operation of the sub-licence is real and profitable. Special constraints exist in the case of sub-licences where the owner of the patent is located outside France.

The reduced rate also applies to the disposal of such patents, except between related companies. Such disposals are classed as producing ‘long-term’ gains or losses.

The law does not explicitly state that the IP must have been developed by the company itself, but if the IP has been acquired from a third party, it does require a 2-year period to have elapsed.

This preferential tax treatment can be applied to income from patents or other IP not developed by the company itself, to the extent that the company bears expenses relating to these patents.

The regime offers a low tax rate (15% on capital gains and royalties received) on certain IP income, and hence provides an incentive for MNE groups to establish a patent-box structure so as to obtain the tax advantage offered by the regime.

The possible risk of ATP may also be observed in the light of the observed passive Indicator 22 (R&D incentive obtainable for costs reimbursed). In this regard, it is reported that the tax authorities responded positively with respect to obtaining R&D incentives for costs reimbursed, provided that the company is not qualified as a public research company.

Lack of anti-abuse indicators

The French situation is characterized by an absence of certain linking rules regarding entity classification, namely No. 26 (no rule to counter a mismatch in tax qualification of domestic partnership) and No. 27 (no rule to counter a mismatch in tax qualification of a domestic company). However, with respect to these indicators it is reported that the tax authority could apply the domestic concept of abuse of law to counter the use of a hybrid entity in the operation indicated.

The absence of linking rules (Indicators 26 and 27) creates a possible risk of classification mismatch arrangements. It has been reported by the NTE that the case law is ambiguous. Any final conclusion regarding this issue will require additional detailed and thorough analysis of the specific details of the regime.

Effective CFC rules are reported to exist either on a stand-alone basis or in combination with other rules. In ATP Model No. 2, it is unclear whether the French CFC rule would apply. In other ATP structures with MS jurisdictions, it is reported that the French tax authorities may raise the issue of whether an artificial arrangement exists that justifies the denial of tax exemption for dividends received by the MNE Group.

It is reported that the general concept of abuse of law (French GAAR rule) could be tested with all of the ATP structures. Pursuant to Art. L. 64 of the Tax Procedure Code (which defines abuse of law), the French tax authorities may disregard legal acts (1) that are deemed to be ‘fictitious’ or (2) that in addition to being solely motivated by tax purposes, seek to take advantage of the literal application of a rule that is contrary to the lawmaker’s objectives. There is substantial case law in France regarding the concept of abuse of law.

The tax authority may also use the abnormal act of management theory (‘acte anormal de gestion’) to counteract some structures. Under this concept, a tax deduction may be refused for charges not incurred for the benefit of the business or not arising from normal commercial operations. This theory also provides a basis for the taxation of non-received income in non-arm’s- length situations.

Any final conclusion regarding this issue requires further detailed and thorough analysis.

Sets of combined indicators

No relevant combinations arise with these indicators.

Other comments

The French representatives did not provide any comments or additions to the questionnaire findings.

4.2.11 Germany

Table 21: Germany: Overview

Indicators identified	Details
Active indicators	n/a
Lack of anti-abuse indicators	9 (Tax deduction of interest does not link to the tax treatment in the creditor MS). 26 (No rule to counter a mismatch in the foreign tax treatment of a German partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of a German company).
Passive indicators	8 (Tax deduction for intra-group interest costs). 14 (No withholding tax on interest paid). 19 (Tax deduction for intra-group royalty costs). 23 (Group taxation with acquisition holding company allowed). 25 (Tax qualification of foreign partnership does not follow that of the foreign state).
Sets of combined indicators	8+9+14 (General interest deduction combined with no requirement for taxation of the interest in the hands of the creditor and no withholding tax on interest).

The screening of Germany's corporate income tax system revealed a total of eight indicators, of which three are lack of anti-abuse indicators and five are passive indicators. Of these, one set of combined indicators was found.

No active indicators were found.

Lack of anti-abuse indicators
Indicator 9 (tax deduction of interest does not link to the tax treatment in the creditor state) should be seen in the context of the passive Indicator 8 (the general tax-deductibility of interest costs). Together with the passive Indicator 14, they combine into a set of indicators as explained below.

Indicators 26 and 27 (the absence of rules to counter a foreign mismatching qualification of German partnerships and companies) occur in most MS' tax systems.

Passive indicators
Germany has been awarded the passive Indicator 14 because of the absence of withholding tax on interest paid to foreign companies.

Sets of combined indicators
Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structures. One such set was found for Germany:

- Indicators 8, 9 and 14 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor and no withholding tax on interest).

This set is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs. On the other hand, the opportunities for ATP should be limited, as Germany imposes restrictions on the general tax-deductibility of interest in the form of its so-called ‘Zinsschranke’ rules (as a result of which Indicators 12 and 13 are avoided).

Other comments

Regarding the amendment of the Parent/Subsidiary Directive, it is noted that Germany already has a rule to suspend the tax exemption of dividends received if the subsidiary obtains a deduction for the dividend. Germany therefore avoids the passive Indicator 1, as well as the lack of anti-abuse Indicator 6.

The German tax system applies a beneficial-ownership test as a condition for the reduction of or exemption from withholding tax on dividends and royalty. As a result, Germany avoids lack of anti-abuse Indicators 4 and 21.

Germany avoids lack of anti-abuse Indicator 32 because Section 42 of the General Tax Code provides for a general anti-avoidance rule (GAAR). Section 42 applies a general substance-over-form approach to inappropriate legal structures which appear to be mainly tax-driven and lacking in commercial justification.

The German authorities did not provide any comments or additions to the original version of the questionnaire as part of the validation process.

4.2.12 Greece

Table 22: Greece: Overview

Indicators identified	Details
Active indicators	n/a
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax). 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS). 15 (No beneficial-owner test for reduction of interest withholding tax). 21 (No beneficial-owner test for reduction of royalty withholding tax). 26 (No rule to counter a mismatch in the foreign tax treatment of a Greek partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of a Greek company).
Passive indicators	3 (No withholding tax on dividend equivalents) 8 (Tax deduction for intra-group interest costs). 25 (Tax qualification of foreign partnership does not follow that of the foreign state).
Sets of combined indicators	8+9+15 (General interest deduction combined with no requirement for taxation of the interest in the hands of the creditor and no beneficial-owner test for reduction of withholding tax on interest).

The screening of Greece's corporate income tax system shows a total of nine indicators, of which six are lack of anti-abuse indicators and three are passive indicators. Of these, one set of combined indicators was found.

No active indicators were found.

Lack of anti-abuse indicators

In general, Greece imposes withholding tax (ranging from 10% to 20%) on payments of dividends, interest and royalty, but it has been awarded lack of anti-abuse indicators 4, 15 and 21 because no test of beneficial ownership is applied to exemptions or reductions relating to the tax.

Indicator 9 (tax deduction of interest does not link to the tax treatment in the creditor state), should be seen in the context of the passive Indicator 8 (the general tax-deductibility of interest costs). Together with the passive Indicator 15, they combine into a set of indicators as explained below.

As regards Indicators 26 and 27 (the absence of rules to counter a foreign mismatching qualification of Greek partnerships and companies), these indicators are common in most MS' tax systems.

Sets of combined indicators

Three of the observed indicators combine in one set which is capable of facilitating the same or similar types of ATP structures.

- Indicators 8, 9 and 15 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor and no beneficial-owner test for the reduction of withholding tax on interest).

Under certain circumstances, this set of indicators could be capable of facilitating ATP structures based on the erosion of the tax basis by means of financing costs. On the other hand, the opportunities for ATP should be limited, as Greece imposes restrictions on the general tax-deductibility of interest in the form of an EBITDA-based rule (as a result of which Indicators 12 and 13 are avoided).

Other comments

Regarding the amendment of the Parent/Subsidiary Directive, it is noted that Greece already has a rule to suspend the tax exemption of dividends received if the subsidiary obtains a deduction for the dividend. Greece therefore avoids being awarded the passive Indicator 1, as well as the lack of anti-abuse Indicator 6.

Greece is one of the few MS in the study to avoid being awarded the passive Indicator 19 (the general tax-deductibility of intra-group royalty cost). This tax deduction seems to be strongly safeguarded against ATP, as evidence is required that the purpose is not tax avoidance or evasion when such costs are paid to non-cooperative states or states with privileged regimes. In theory, the latter can also include royalty payments to a patent-box entity abroad.

Greece avoids the lack of anti-abuse Indicator 32, as Article 38 of the Code on Tax Procedures provides for a general anti-avoidance rule (GAAR) which is applicable to artificial arrangements that have the purpose of tax avoidance. There is some initial indication that Article 38 could be applied to certain parts of the model ATP structures, but no details are available at this stage.

The Greek authorities provided comments to the original version of the questionnaire as part of the validation process, as well as in the follow-up to the workshop held in October 2015. This gave rise to the following information, which conflicts with that obtained from the national tax expert:

- Indicator 3: Based on the information provided by the national tax expert, Greece receives the passive Indicator 3 for the absence of dividend withholding tax on dividend equivalents such as the buy-back of shares, capital-reduction payments etc. However, the Greek authorities claimed in their review that all forms of distribution are subject to withholding tax. According to the NTE, this does not follow from the law; as a result, the authors decided to retain Indicator 3.

4.2.13 Hungary

Table 23: Hungary: Overview

Indicators identified	Details
Active indicators	10 (Interest deduction allowed for deemed interest costs on interest-free debt) 17 (IP regime)
Lack of anti-abuse indicators	9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 11 (No taxation of benefits from interest-free debt) 27 (No rule to counter a mismatch in tax qualification of domestic company)
Passive indicators	1 (Too generous tax-exemption of dividends received) 2 (No withholding on dividends) 8 (Tax deduction for intra-group interest costs) 14 (No withholding tax on interest payments) 20 (No withholding tax on royalty payments) 18 (No or low taxation of capital gains upon transfer of IP) 19 (Tax deduction for intra-group royalty costs) 25 (Tax qualification of foreign partnership does not follow that of the other state)
Set of combined indicators	1+2 (Generous dividend tax exemption regarding inbound and outbound payments) 8+9+14 (Interest deduction in combination with absence of linking rule and absence of withholding tax on interest payments) 19+20 (Royalty deduction in combination with absence of withholding tax on royalty payments).

The screening of the Hungarian tax system has revealed a total of thirteen ATP indicators, including two active indicators, three lack of anti-abuse indicators and eight passive indicators. Of these, three sets of combined indicators were found.

Active indicators
The active indicator observed for Hungary, Indicator 10, results from the fact that Hungary allows for a tax deduction for deemed interest costs on an interest-free inter-company debt without this deduction being contingent on a corresponding adjustment in the other state. The deduction is contingent on (i) the foreign company being subject to tax and (ii) both companies (debtor and creditor) signing a document stating that the terms of the interest-free loan are not on an arm's-length basis. However, the deduction is not contingent on a corresponding adjustment in the other state, i.e. these requirements do not prevent a situation with deduction/no inclusion. This accordingly results in an active indicator.

The second active indicator, No. 17, is a consequence of the fact that Hungary offers an IP regime which allows a deduction from the pre-tax profits of up to 50% of royalty income. The observed IP regime may be regarded as a concern for ATP purposes regarding IP rights. The possible risk of ATP should also be viewed in relation to the observed passive Indicator 18, given that capital gains on transferred IP are generally tax-exempt.

Lack of anti-abuse indicators
Regarding the active Indicator 10, Hungary has no taxation of the discount element (benefit) represented by the interest-free element of the loan. This in turn produces a lack of anti-abuse indicator, Indicator 11.

Other lack of anti-abuse indicators found include No. 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); and No. 27 (no rule to counter a mismatch in tax qualification of domestic company). With regard to the questions concerning hybrid financial instruments, it is noted that an anti-avoidance rule may apply. However, any conclusion about whether hybrid mismatches can be avoided due to this rule requires further analysis of the specific details of the provision.

It should be noted that Hungary has introduced thin-capitalization rules, and it therefore avoids the lack of anti-abuse indicators 12 (no thin-capitalization rules) and 13 (no interest-limitation rules).

It follows from the questionnaire that the finance structures referred to (Model ATP Structures 1-4) are viable with the participation of a Hungarian resident taxpayer. If, however, the taxpayer (e.g. C Holdco) is established with a minimum share capital, due to the 3:1 loan to capital ratio requirement, the accepted amount of the loan will be minimal, and in this sense, the thin-capitalization rule is effective. Further, it is noted that the involvement of a financial institution – including an intra-group financial institution – may alter the conditions due to the 'thin capitalization' provision that does not include loans from financial institutions. A more detailed analysis is necessary before it can be concluded to what extent the Hungarian thin-capitalization rules are effective in countering ATP.

In addition, Hungary has CFC rules and therefore avoids the lack of anti-abuse Indicator 24. However, the NTE considered the CFC rules to be ineffective, in the sense that they would not be applied in order to counter any of the ATP structures referred to in this study.

Finally, it should be noted that Hungary has no rules to counter mismatches in the tax qualification of a domestic partnership. However, transparent entities do not exist under Hungarian law, and therefore no mismatches can occur. Hungary thus avoids being awarded Indicator 26.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In Hungary's case, three such sets were found:

- Indicators 1 plus 2 (generous tax exemption of in- and outbound dividends); and
- Indicators 8 plus 9 and 14 (general interest deduction combined with no linking rule and no withholding tax on interest payments); and
- Indicators 19 plus 20 (general royalty deduction in combination with no withholding tax on royalty payments).

The combination of Indicator 1 with Indicator 2 is capable of facilitating structures where dividends are routed through an MS without taxation, while Indicator 8 in combination with 9 and 14 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs. In addition, Indicator 19 in combination with 20 is capable of facilitating structures where the tax basis in an MS is eroded by means of royalty payments.

Other comments

Hungary levies no withholding tax on dividends, interest payments or royalties. These withholding tax exemptions are not subject to any ownership requirements and apply regardless of the tax status/residence of the paying company. Therefore, Hungary is has been awarded the passive indicators 1, 14 and 20.

Hungary has a substance-over-form regime, a GAAR and other anti-avoidance measures. These rules may be applied to counter the model ATP structures, depending on the facts of the specific case. However, there is limited case law concerning direct corporate taxation in Hungary. It would therefore be difficult to construct a reasoned opinion on the practical implementation and effectiveness of the rules.

The Hungarian authorities did not provide comments or additions on the completed questionnaire as part of the validation exercise.

4.2.14 Ireland

Table 24: Ireland: Overview

Indicators identified	Details
Active indicators	7 (No deemed income from interest-free loan)
Lack of anti-abuse indicators	12 and 13 (No thin-capitalization rules and no interest-limitation rules)[76] 15 (No beneficial-owner test for reduction of interest withholding tax). 24 (No CFC rules). 26 (No rule to counter a mismatch in the foreign tax treatment of a domestic partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of a domestic company).
Passive indicators	8 (Tax deduction for intra-group interest costs), 19 (General royalty deduction). 23 (Group taxation with acquisition holding company allowed). 25 (Tax qualification of foreign partnership does not follow that of the foreign state).
Sets of combined indicators	8+15 (General tax deduction of interest costs combined with no beneficial-ownership test)

The screening of Ireland's corporate income tax system revealed a total of ten indicators, of which one is an active indicator, five are lack of anti-abuse indicators and four are passive indicators. Of these, one set of combined indicators was found.

Active indicators

Ireland was awarded Indicator 7 for not providing for the taxation of any deemed income from an interest-free loan granted to a group member company. This indicator renders Ireland vulnerable to ATP in the context of financing, particularly that illustrated by Model ATP Structure 4. TP rules were tightened in 2010, but a company with non-trading status falls outside the scope of Irish TP rules and therefore does not include any deemed interest income.

Lack of anti-abuse indicators

Ireland was awarded lack of anti-abuse indicators 12 and 13 (only one indicator combined) for not having any general thin-capitalization or interest deduction-limitation rules. The Irish authorities have argued that Ireland has other rules (i.a. section 65 of the Finance Act 2006 and section 37 of the Finance Act 2011) denying interest relief in certain situations. However, because these rules are not generally

[76] Only one indicator given; cf. explanation under Indicators 12 and 13.

applied to interest costs, the authors of this Report do not consider them equivalent to general thin cap or interest deduction-limitation rules.

Ireland also receives Indicator 24 for not having any CFC rules. The Irish authorities have argued that Ireland taxes dividends and does not exempt foreign branch income. However, because these mechanisms do not target directly the income of foreign subsidiaries, the authors of this Report do not consider them equivalent to CFC rules.

Regarding Indicators 26 and 27 (the absence of rules to counter a foreign mismatching qualification of Irish partnerships and companies), these indicators are common in most MS' tax systems.

Passive indicators

Ireland receives the passive Indicator 8 (tax-deductibility of interest costs). On the other hand, it should be noted that there are a number of anti-avoidance provisions which deny or restrict relief for interest on related-party borrowings for the acquisition of related entities, or the acquisition of assets or trades from a related party. These provisions should generally limit the risk of ATP based on financing costs.

Sets of combined indicators

Two of the observed indicators combine in a set that is capable of facilitating the same or similar types of ATP structure.

- Indicators 8 and 15 (general tax deduction of interest costs combined with no beneficial-ownership test).

Under certain circumstances, this set of indicators could be capable of facilitating ATP structures based on the erosion of the tax basis by means of interest charges.

Other comments

Ireland avoids the passive Indicator 1 (Too generous tax-exemption of dividends received) because it operates an underlying tax credit system instead of a participation exemption. This mechanism leads to less credit relief if the dividends have been deducted by the subsidiary, and thus ensures Ireland's compliance with Article 4 of the amended Parent/Subsidiary Directive.

Ireland avoids Indicator 20, since withholding tax is levied on royalty payments. But it is noted that the tax is levied only on patent royalty and not on other royalty. In addition, it is understood that patent royalty can be exempt from withholding tax upon application to the authorities, regardless of the tax residence of the recipient.

It is noted that prior to a change in the law, the Irish corporate income tax system would have been awarded the active Indicator 29 for allowing Irish incorporated companies to claim non-resident status if their management and control is situated abroad. The change of law took effect for new companies incorporated after 2014. Existing Irish companies incorporated before 2015 are allowed to remain non-resident until 2021, but subject to strict conditions. Firstly, a change in ownership of the company combined with a major change in the nature or conduct of the business of the company will lead to cancellation of the non-resident status. This ensures that it is not possible to buy a pre-incorporated 'off the shelf' company to use after 2014. Secondly, it is also the case that any merger and acquisition activity may have the effect of triggering the suspension of the transitional rules, depending on whether the change in ownership is accompanied by a major change in the nature or conduct of the business. On this basis, and given that the study primarily addresses current laws and practices, the authors have chosen not to grant Ireland an indicator on this point.

Finally, Ireland also avoids indicator 30. Based on the information reported by the NTE, it is understood that Ireland does not have any legislative procedure governing tax rulings as such. However, further analysis with respect to this indicator may be warranted. The authorities are willing to issue what they consider to be non-binding revenue opinions. One such opinion is currently under investigation by the European Commission. The authors have no information to determine whether that opinion or other opinions have been used to confirm artificial flow through-arrangements or similar ATP-structures.

Due to a communication error, the Irish authorities did not provide any comments to the original version of the questionnaire as part of the validation process, but came back with comments following the October 2015 workshop.

4.2.15 Italy

Table 25: Italy: Overview

Indicators identified	Detail
Active indicators	16 (Notional interest deduction for share capital)
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax) 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS), 26 (No rule to counter a mismatch in tax qualification of domestic partnership), 27 (No rule to counter a mismatch in tax qualification of a domestic company).
Passive indicators	8 (Tax deduction for intra-group interest costs), 19 (Royalty deductibility), 23 (Group taxation with acquisition holding company allowed), 30 (Unilateral ruling on interest or royalty spread possible).
Set of combined indicators	8+9 (Interest deduction in combination with absence of linking rule)

The research on Italy revealed a total of nine ATP indicators. The observed indicators consist of one active, four lack of anti-abuse and four passive indicators.

Active indicators

The active indicator found is Indicator 16 (notional interest deduction for share capital).

Italian resident companies and permanently established non-resident entities may benefit from an allowance for corporate equity (ACE). The ACE regime provides for the deduction of the notional interest on the net (qualifying) equity increases occurred as from the tax period ending on or after 31.12.2010.

The Ministry of Finance determines the applicable ACE rate by 31 January of each year, taking into account the average yields of government bonds[77].

The notional interest is deducted once the company's net income has been calculated. This means that in the case of tax losses carried forward from previous years, the notional interest may be deducted only once the net income of a given fiscal year has been netted of the tax losses carried forward from the previous fiscal years. The deduction of the notional interest cannot result in a tax loss for the company (it can only zero the company's taxable income). Excess notional interest can be carried forward indefinitely.

[77] 2015: 4.5% and 2016: 4.75%

If a company can claim a tax deduction for a deemed cost of its share capital, it can obtain a deduction which would normally not be reflected in any corresponding inclusion of taxable income in the hands of its shareholders. Consequently, such a one-sided tax deduction may well lead to cross-border mismatch arrangements that can give rise to ATP once the tax treatment of the shareholder is taken into account. This is the case where a company can claim an allowance for corporate equity, that is, a tax deduction for a notional interest on equity financing.

While it is recognized that there can be a theoretical justification in economic theory for a notional interest deduction (or dividend deductibility) in order to put equity and debt financing on par, the potential for a tax mismatch nonetheless renders such a deduction an active ATP indicator.

With respect to this indicator, various specific anti-avoidance provisions apply, limiting the benefit of the Italian ACE regime. In particular, the net equity increases on which the notional deduction is allowed shall be decreased for (a) cash contributions made to entities of the same group, (b) acquisitions of shareholdings in companies already qualified as related entities prior to the acquisition, (c) acquisitions of businesses from group companies, (d) receipts of cash contributions from non-resident companies if the latter are controlled by Italian resident companies, (e) cash contributions from entities resident in blacklisted jurisdictions, and (f) financing-related companies.

Any final conclusion regarding this indicator requires further detailed and thorough analysis of the specific details of the regime, which in particular should take into account the existing anti-abuse measures included in the regime.

An IP box has been introduced in Italy during 2015. As the regime was subject to enactment on the basis of the implementation of a ministerial degree which had not been issued at the time of the submission of the questionnaire, the envisioned Italian IP box regime did not trigger an active indicator.

The preparatory remarks read as follows (unauthorized translation):

"Paragraphs 8 and 9 clarify that the part of income and value of production eligible (the tax benefit from the exploitation of intangibles is applicable, other than income taxes, also to the regional tax on productive activities (IRAP)) is defined according to the ratio of: costs for the R&D paid for the maintenance, extension and development of the intangible and the overall costs paid for the production of the same intangible. This rule is justified by the aim of connecting the tax benefit to the actual payment of those costs, and therefore to the exercise of an actual economic activity in Italy (the so-called 'substantial activity' employed by OECD), consistently with the so-called 'nexus approach' developed by OECD in the context of the projects addressed to fight harmful tax competition (i.e. OECD document, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5: 2014 Deliverables)".

No additional analysis on whether the envisioned regime will fulfil the above-mentioned conditions has been performed in the context of this study.

Lack of anti-abuse indicators

The following lack of anti-abuse indicators can be observed in Italy: Nos. 4 (no beneficial-ownership test for dividends paid); 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); 26 (no rule to counter a mismatch in the foreign tax treatment of an Italian partnership); and 27 (same as 26, but relating to an Italian company).

With respect to Indicator 26, it should, however, be noted that although there is no alignment between the tax qualification of partnerships and other hybrid entities established in Italy and the qualification applied by the Member State in which the owners of entities are tax-resident, a provision in Article 23, paragraph 1, letter g) of the Italian Direct Tax Code may in practice make such mismatch impossible. In the case of partnerships (or similar entities) resident in Italy and owners resident outside Italy, the latter are always subject to tax in Italy (on the basis of the source state principle) irrespective of the qualification applied by the MS in which the owners of entity are tax-resident.

Indicator 4 (no beneficial-ownership test for dividends paid) is also triggered for Italy, since it is reported that there is no beneficial-ownership requirement. However, the absence of a beneficial-owner clause concerning dividends should be viewed in the context of the existence of the following anti-abuse measure, which seems to reduce the possibilities of ATP using flow-through structures in Italy. In the case of dividends paid to a company controlled directly or indirectly by persons not resident in a state of the European Union, the exemption under the Parent/Subsidiary Directive applies, provided that proof is given that the holding of the participation in the Italian company does not have the main or sole purpose of benefiting from such an exemption regime.

In terms of interest deductibility, there is no linking to the qualification in the creditor's state. Interest deduction depends on two general rules. The first general rule sets a deductibility limit up to the interest income accrued in the same tax period (net interest expenses) and for the excess up to 30% of the EBITDA. The second general rule is the transfer pricing rule. The cross-border rule concerns the non-deductibility of interest paid to low-tax jurisdictions, unless proof is given that the foreign recipient is conducting an effective business activity or that the transaction meets an actual economic interest and has been effectively carried out.

To a certain extent, the absence of linking rules (Indicators 26 and 27) creates risks of classification mismatch arrangements. Any final conclusion in this respect will require further detailed and thorough analysis of the specific details of the regime.

Sets of combined indicators
Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. One combination[78] of indicators occurs, namely Nos. 8 & 9 (interest deduction in combination with absence of linking rule), which is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments
The model ATP structures may be countered by the Italian SAAR and GAAR. The former is provided by Article 37-bis of the Presidential Decree n. 600 of 1973. The latter is a creation of the Supreme Court case law. In 2008, the Supreme Court stated that a general anti-avoidance rule stems from Article 53 of the Italian Constitution (ability-to-pay principle).

According to the NTE, the introduction in 2008 of a GAAR by the Supreme Court has given the Tax Administration a powerful tool for combating ATP. This rule can potentially cover any situation, as the evolution of case law demonstrates. Considering this, it may be said that Italy has an effective anti-avoidance regime in place. However, any such conclusion would require further analysis of the specific details of the provisions and case law.

The Italian Fiscal Representative has argued that Italy should not score on indicator 30. The argument was *inter alia* based on a reference to Article 8 of the Law Decree n. 269 of 2003. Considering the legal references provided, the NTE has maintained the original answer also taking into consideration that the result of the decree referred to by the Fiscal Representative (Law Decree n. 269 of 2003), in rare cases, would also have been at non-arm’s length and that, moreover, the decree in question had been abolished by Legislative Decree n. 147 of 2015. In light of the diverging views expressed in relation to indicator 30, further analysis with respect to this indicator may be warranted.

Other than this, there were no significant conflicts between the answers from the NTE and the representatives of Italy as a result of the validation process. The final version of the questionnaire therefore includes the minor changes and supplements made by the MS representative.

[78] Some anti-abuse and passive ATP Indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structures.

4.2.16 Latvia

Table 26: Latvia: Overview

Indicators identified	Details
Active indicators	n/a
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax). 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS). 15 (No beneficial-owner test for reduction of interest withholding tax). 21 (No beneficial-owner test for reduction of royalty withholding tax). 24 (No CFC rules) 26 (No rule to counter a mismatch in the foreign tax treatment of a Latvian partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of a Latvian company).
Passive indicators	1 (Too generous tax exemption of dividends received) 3 (No withholding tax on dividend equivalents) 8 (Tax deduction for intra-group interest costs). 19 (Tax deduction for intra-group royalty costs). 22 (R&D tax incentive obtainable for costs that are reimbursed) 25 (Tax qualification of foreign partnership does not follow that of the foreign state).
Sets of combined indicators	1+3+4 (Generous tax exemption of dividends received combined with no withholding tax on dividend equivalents such as capital-reduction payments, and no beneficial-owner test for dividend withholding tax reduction). 8+9+15 (General interest deduction combined with no requirement for taxation of the interest in the hands of the creditor, and no beneficial-owner test for interest withholding tax reduction). 19+21 (General royalty deduction combined with no beneficial-owner test for exemption from withholding tax).

The screening of Latvia's corporate income tax system revealed a total of thirteen indicators, of which seven are lack of anti-abuse indicators and six are passive indicators. Of these, three sets of combined indicators were found.

No active indicators were found.

Lack of anti-abuse indicators
In general, Latvia imposes a withholding tax (ranging from 15% to 30%) on payments of dividends, interest and royalty to recipients if they are resident in blacklisted states. Currently, 49 states (which is the total listed by the Latvian authorities) are blacklisted for this purpose. As a result, Latvia avoids the passive indicators 2, 14 and 20. Nonetheless, Latvia has been awarded lack of anti-abuse indicators 4, 15 and 21, because no test of beneficial ownership is applied to exemptions or reductions of the withholding tax when the recipients claim to be resident in states which are not blacklisted.

Indicator 9 (tax deduction of interest does not link to the tax treatment in the creditor state) should be seen in the context of the passive Indicator 8, the general tax-deductibility of interest costs. Together with the passive Indicator 15, these combine into a set of indicators as explained below. On the other hand, the opportunities for ATP should be limited, as Latvia imposes both thin-capitalization rules and rules for the limitation of the general tax-deductibility of interest (as a result of which Indicators 12 and 13 are avoided).

Latvia has been awarded Indicator 24 for the absence of any CFC rules.

As regards Indicators 26 and 27 (the absence of rules to counter a foreign mismatching qualification of Latvian partnerships and companies), these indicators are common in most MS' tax systems.

Passive indicators
Latvia has been awarded the passive Indicator 1 for its generous tax exemption of dividends received. While dividends received are tax-free unless the subsidiary is resident in one of the 49 blacklisted states, there is no linkage to check whether the subsidiary has obtained a tax deduction for the dividend paid. The amendment of the Parent/Subsidiary Directive has not yet been implemented. Also, according to the Latvian authorities' comments, Latvia considers that its present tax law already covers the amendment by reason of a specific definition of dividends and interest.

Subject to further clarification, Latvia has been awarded the passive Indicator 3, as it is unclear whether dividend equivalents, such as capital-reduction payments, would be subject to withholding tax at all.

Finally, Latvia receives the passive Indicator 22 for granting R&D incentives even for costs which have been reimbursed. There is a 300% enhanced deduction for R&D. A clawback clause applies if IP is sold within 3 years of the last R&D cost. Costs reimbursed still allow for enhanced deductions, provided the Latvian company remains the owner of the IP developed.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In Latvia's case, three such sets were found:

- 1+3+4 (generous tax exemption of dividends received combined with no withholding tax on dividend equivalents such as capital-reduction payments and no beneficial-owner test for dividend withholding tax reduction).
- 8+9+15 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor, and no beneficial-owner test for interest withholding tax reduction).
- 19+21 (general royalty deduction combined with no beneficial-owner test for exemption from withholding tax).

These sets of combined indicators can facilitate ATP through Latvia, particularly via structures based on financing and the flow-through of dividends or royalty.

Other comments

Latvia avoids the lack of anti-abuse Indicator 32, as there is a general anti-avoidance rule (GAAR) providing for a substance-over-form principle. The national tax expert could not judge how this GAAR could be applied specifically to the model ATP structures, but the Latvian authorities stated that they consider the existing GAAR is sufficiently in line with the amendment of the Parent/Subsidiary Directive.

The Latvian authorities provided comments to the original version of the questionnaire as part of the validation process. This gave rise to certain clarifications, but not to any information which conflicted with that obtained from the national tax expert. The final version of the questionnaire takes account of the changes and supplements provided by the Latvian representatives.

4.2.17 Lithuania

Table 27: Lithuania: Overview

Indicators identified	Details
Active indicators	N/A
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax). 6 (Income from hybrid loan non-taxable) 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 26 (No rule to counter a mismatch in tax qualification of domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	1 (Too generous tax-exemption of dividends received)[79] 8 (Tax deduction for intra-group interest costs) 19 (Tax deduction for intra-group royalty costs), and 22 (R&D incentive obtainable for costs reimbursed) 23 (Group taxation with acquisition holding company allowed) 25 (Tax qualification of foreign partnership does not follow that of the other state)
Set of combined indicators	1+4 (Generous dividend tax exemption regarding inbound dividend payments combined with no beneficial-ownership requirement) 8+9 (Interest deduction in combination with absence of a linking rule)

The screening of the Lithuanian tax system revealed a total of eleven ATP indicators, five lack of anti-abuse indicators and six passive indicators. Of these, two sets of combined indicators were found.

Active indicators

No active indicators were found in Lithuania.

Lack of anti-abuse indicators

In connection with the lack of anti-abuse Indicator 6, it is noted that hybrid loans are not reclassified. Also, no linking rule exists, and the tax authorities still need to adapt their legislation in respect to the amendment of Article 4 of the PSD. Mismatches

[79] Generously applied participation exemption in regard to tax exemption of dividends received.

resulting in a situation with deduction/no inclusion can therefore still occur. From the questionnaire, it seems that a draft bill on the implementation of the PSD has been proposed but not enacted. (Please note that no information was available at the time of the drafting of this report regarding the implementation of the PSD; this has led to Indicator 1 being awarded).

Indicator 9 has been awarded, as the deduction of interest does not depend on the foreign state's qualification, and therefore mismatches may occur. However, it should be noted that the deduction is limited to the interest on profit-participation loans.

Other lack of anti-abuse indicators found include Nos. 4 (no beneficial-ownership test); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In Lithuania's case, two such sets were found:

- Indicator 1 plus 4 (generous tax exemption regarding inbound dividend payments combined with no beneficial-ownership requirement); and
- Indicator 8 plus 9 (general interest deduction combined with no linking rule)

The combination of Indicators 1 and 4 is capable of facilitating structures where dividends are routed through an MS without taxation, while Indicator 8 in combination with 9 and 15 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments

Lithuania offers a 300% deduction for qualifying R&D costs, including, to some extent, costs reimbursed by group companies. This has resulted in the awarding of the passive Indicator 22. However, generally speaking the only indirect situation where the R&D costs could be reimbursed by a group member company is when the R&D tax credit receiver transfers its loss to another group member company.

It should be noted that Lithuania – like most of the other MSs – has legislation regarding tax consolidation. However, unlike the legislation in most of the other MSs, it is possible to offset final losses from foreign subsidiaries that are resident in another EU MS.

As part of the validation exercise, the Lithuanian representatives appeared to have expressed a diverging view on the answers concerning Question 25b (Indicator 22). However, as the views expressed by the MS seemed to refer to another provision relating to the R&D incentive (i.e. the provision that requires exclusion from the deductible expenses of costs compensated by the state donations), the original answer to Question 25b (Indicator 22) which the NTE had prepared was retained.

4.2.18 Luxembourg

Table 28: Luxembourg: Overview

Indicators identified	Detail
Active indicators	17 (IP regime)
Lack of anti-abuse indicators	6 (Income from hybrid loan not taxable), 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS), 24 (No CFC rules), 26 (No rule to counter a mismatch in tax qualification of domestic partnership), 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	1 (Too generous tax-exemption of dividends received), 8 (Tax deduction for intra-group interest costs), 19 (Tax deduction for intra-group royalty costs), 20 (No withholding tax on royalty), 23 (Group taxation with acquisition holding company allowed), 25 (Tax qualification of foreign partnership does not follow that of the other state), 30 (Unilateral ruling on interest or royalty spread possible)
Set of combined indicators	8+9 (Interest deduction in combination with absence of linking rule), and 19+20 (Royalty deduction in combination with absence of royalty withholding tax).

The screening of the corporate income tax system performed on Luxembourg revealed a total of thirteen ATP indicators that might deserve further attention. The observed indicators consist of one active indicator, five lack of anti-abuse indicators and seven passive indicators.

Active indicators

The active indicator found is Indicator 17 (IP regime). Luxembourg offers a preferential tax regime for income from certain types of IP. Such income (including capital gains from the sale of qualifying IP and deemed income from IP that is exploited by the owner himself rather than licensed) may qualify for an 80% exemption[80]. The provision includes patents, copyrights on software, trademarks,

[80] The rules are contained in Art. 50-bis LIR.

designs, models and domain names that were created (i.e. legally constituted) or acquired after 31/12/2007. To qualify, IP does not have to be developed by the taxpayer, nor is there a requirement for further development. However, IP acquired from (directly) associated companies is excluded.

The regime offers a low tax rate (*in concreto* an 80% exemption) on certain IP income, and hence provides an incentive for MNE groups to establish a patent-box structure so as to obtain the tax advantage offered by the regime. Any final conclusion in this respect will require further detailed and thorough analysis of the specific details of the regime.

Luxembourg has not scored on the active Indicator No. 31 on excess-profit rulings. However, this assessment does not consider the recent amendment of Luxembourg's legislation regarding informal capital practice. The NTE has stated that there is still no administrative guidance, and it is therefore unclear whether such rulings can be obtained in practice. Luxembourg might score on Indicator 31 if future guidance demonstrates that the possibility remains available.

The NTE reported that such rulings are not expected to be possible, according to recently introduced transfer pricing legislation. According to the NTE, Luxembourg does not offer rulings confirming results that are not in line with the arm's-length principle[81]. Recent investigations suggest that Luxembourg tax rulings include elements of state aid; however, as details had not been published at the time of drafting this report, there is no information publicly available to unequivocally state whether, for instance, the rulings were in line with the arm's-length principle.

Lack of anti-abuse indicators

In terms of lack of anti-abuse indicators, Luxembourg exhibits five such indicators: Nos. 6 (income from hybrid loan not taxable), 9 (tax deduction of interest does not linked to the tax treatment in the creditor MS), 24 (no CFC rules)[82], 26 (no rule to counter a mismatch in tax qualification of domestic partnership), and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

The majority of these seem to concern the issue of mismatches and tax arbitrage, where the current legislation of Luxembourg to a certain extent seems to allow ATP through such arrangements, whether through hybrid financial instruments or through hybrid entities. The amendments to the Parent/Subsidiary Directive had not yet been implemented by the submission date of the questionnaire. However, Luxembourg has now initiated the implementation process.

In addition, CFC rules are totally absent. It is also reported that withholding tax on interest payments is rarely triggered.

[81] Even though Luxembourg scores Indicator 30 in the summary table, it also includes spreads in accordance with the arm's-length principle.

[82] It should be noted that the absence of CFC rules is not itself capable of prompting any ATP structures, but it constitutes the absence of a critical anti-avoidance measure which could have prevented an ATP structure.

Sets of combined indicators
Two relevant combinations[83] involving secondary ATP indicators have been identified, namely:
- 8, 9 (interest deduction in combination with absence of linking rule), and
- 19, 20 (royalty deduction in combination with absence of royalty withholding tax).

The combination of Indicators 8 and 9 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs. Such types of ATP structure are made even more possible in the context of Indicator 6, which allows for the tax exemption of income received from hybrid loans from other countries.

Other comments
Luxembourg applies a GAAR that is capable in principle of countering any of the ATP structures if they cannot be justified by economic reasons other than taxation, i.e. where they are inadequate for achieving a genuine business purpose in the absence of a tax benefit and are thus considered to be ‘abusive’. However, according to the NTE, there are justified doubts as to whether the GAAR can, by itself, effectively address all aggressive tax planning structures. On this basis, the GAAR may not be considered effective. However, any final conclusions will require thorough analysis and further information.

No significant conflicts between the answers received from the NTE and the representatives of the MS were highlighted. The final version of the questionnaire includes minor changes and supplements made in accordance with the comments provided by the representatives of Luxembourg.

[83] Some anti-abuse and passive ATP indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure.

4.2.19 Malta

Table 29: Malta: Overview

Indicators identified	Details
Active indicators	7 (No deemed income from interest-free loan) 17 (IP regime)
Lack of anti-abuse indicators	9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 12 (No thin-capitalization rules or similar) 24 (No CFC rules) 26 (No rule to counter a mismatch in tax qualification of domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	1 (Too generous tax-exemption of dividends received) 2 (No withholding tax on dividends) 8 (Tax deduction for intra-group interest costs) 18 (No or low taxation of capital gains upon transfer of IP) 19 (Tax deduction for intra-group royalty costs) 23 (Group taxation with acquisition holding company allowed) 25 (Tax qualification of foreign partnership does not follow that of the other state)
Set of combined indicators	1+2 (Generous dividend tax exemption regarding inbound and outbound payments) 8+9+12 (Interest deduction in combination with absence of linking rule and absence of interest-deduction-limitation rules)

The screening of the Maltese tax system revealed a total of fourteen ATP indicators, two active indicators, five lack of anti-abuse indicators and seven passive indicators. Of these, two sets of combined indicators were found.

Active indicators

It is reported that no deemed income on interest-free loans is taxable. This resulted in Indicator 7 being awarded. However, it is also reported that transactions should be executed on an arm's-length basis, and accordingly such a transaction may be challenged by the authorities. Further investigation is therefore necessary in order to conclude whether this may prompt ATP.

The second active indicator, No. 17 (patent box), arises because Malta grants a tax exemption for royalties, advances and similar income derived from patents in respect of inventions, copyright and trademarks, subject to the meeting of prescribed terms and conditions. It should be noted that it is reported that in practice, this is currently not available, because the Commissioner for Revenue has not yet started implementing this exemption provision. In addition, the tax exemption granted under the patent-box regime should be considered alongside Indicator 18, given that no tax on capital gains on transferred IP between group companies is levied.

Lack of anti-abuse indicators

Malta was awarded lack of anti-abuse indicators 12 and 13 (only one indicator combined) for not having any general thin-capitalization or interest-deduction-limitation rules. It should be noted that according to the general provision, expenses can only be deducted "… to the extent to which such outgoings and expenses were wholly and exclusively incurred in the production of the income". There must therefore be a direct link between the expense incurred and the income derived, and thus the general rule in itself represents a material limitation as to when a given expense can be tax-deductible.

For Malta, the additional lack of anti-abuse indicators found include Nos. 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); 24 (no CFC rules); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In Malta's case, two such sets are found:

- Indicator 1 plus 2 (generous tax exemption of in- and outbound dividends); and
- Indicator 8 plus 9 and 12 (general interest deduction combined with absence of linking rule and absence of interest-deduction-limitation rules)

The combination of Indicators 1 and 2 is capable of facilitating structures where dividends are routed through an MS without taxation, while Indicator 8 in combination with Nos. 9 and 12 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments:

Malta applies a participation exemption regime, i.e. it allows Too generous tax-exemption of dividends received under certain conditions. The amendment of Article 4 of the PSD has been implemented, and as of January 2016 dividends that hitherto were tax-deductible will henceforth be taxable. However, even though the exemption is tied to the tax status/residence of the paying company, it still seems to be too generous in its application. As an example, the participation exemption regime applies if the distributed company is incorporated in the EU, or if the distributing company derives no more than 50% of its income from passive income (i.e. interest or royalties). This has accordingly resulted in Indicator 1 being awarded.

Malta offers group taxation, resulting in the passive Indicator 23. However, it should be noted that according to the group loss provisions, only 'allowable losses', i.e. losses incurred in “any trade, business, profession or vocation” can be surrendered. Thus, regardless of whether C Holdco (in ATP Model Structures 1 and 2) or B Hybrid (in ATP Model Structure 3) could constitute a group (with their subsidiaries located underneath), no loss surrendering can take place because these companies are undertaking holding activities and so their losses do not constitute trade losses.

Malta has a GAAR, and therefore avoids Indicator 32. However, according to the questionnaire there is no information publicly available as to the application of the GAAR locally, resulting in no information being available with respect to the types of situations to which the GAAR has been applied to date. Therefore, further investigation is necessary for concluding whether the GAAR is effective in countering ATP.

Malta is considered to offer a specific regime with a very low effective tax rate. As the nominal rate of corporate income tax is 35%, Malta does not score on Indicator 28. However, due to the full imputation system of taxation, the ‘real’ rate can go as low as approximately 5%. This lower effective tax rate can be obtained if the taxpayer organises himself in a certain way, e.g. by having a group of minimum of two companies (parent and subsidiary) that are resident in Malta. Any final conclusions with respect to the real ATP risk associated with this indicator require further detailed and thorough analysis.

The validation process undertaken with Malta did not result in any significant conflicts of interpretation of the provisions. As a result, the final version of the questionnaire includes the minor changes and supplements provided by the Maltese representatives.

4.2.20 Netherlands

Table 30: The Netherlands: Overview

Indicators identified	Detail
Active indicators	10 (Tax deduction allowed for deemed interest cost without corresponding adjustment), 17 (IP regime), and 31 (Excess profits rulings possible)
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax). 6 (Income from hybrid loan not taxable), 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS), 11 (No taxation of benefit from interest-free loan), 26 (No rule to counter a mismatch in tax qualification of domestic partnership), 27 (No rule to counter a mismatch in tax qualification of a domestic company),
Passive indicators	1 (Too generous tax-exemption of dividends received), 8 (Tax deduction for intra-group interest costs), 14 (No withholding tax on interest), 19 (Tax deduction for intra-group royalty costs), 20 (No withholding tax on royalty), 23 (Group taxation with acquisition holding company allowed) [84] 25 (Tax qualification of foreign partnership does not follow that of the other state); 30 (Unilateral ruling on interest or royalty spread possible)

[84] The Netherlands scored on Indicator 23 because this indicator is granted on the sole basis that group taxation is possible (as per the definition applied). The Dutch authorities have indicated that interest limitations are in place, however this has no bearing on whether this indicator is present.

Indicators identified	Detail
Set of combined indicators	1+4 (Generous dividend tax exemption regarding inbound dividend payments combined with no beneficial-ownership test), 8+9 (Interest deduction in combination with absence of linking rule), and 19+20 (Royalty deduction in combination with absence of royalty withholding tax)

The screening of the corporate income tax regime in the on Netherlands revealed a total of seventeen ATP indicators. The observed indicators consist of three active indicators, six lack of anti-abuse indicators and eight passive ATP indicators.

Active indicators

The three active ATP indicators observed are: 10 (tax deduction allowed for deemed interest cost without corresponding adjustment), 17 (IP regime), and 31 (excess profits rulings possible).

With respect to Indicator 10, when the debtor of an intra-group loan is allowed to deduct deemed (i.e. non-paid) interest, regardless of whether the creditor includes a deemed interest income in its taxable income, a situation with deduction/no inclusion may result. This therefore provides an incentive for MNE groups to establish interest-free loans in order to obtain the tax advantage offered by this non-corresponding taxation. However, the interest deduction limitations could limit this deduction (depending on the maturity date of the loan). The possible risk of ATP should be viewed in the context of the observed indicators regarding taxation of the benefit from interest-free debt (Indicator 11) and no withholding tax on (deemed) interest payments (Indicator 14). Any final conclusions in this respect will require further detailed and thorough analysis, as this ATP risk may be hindered by the domestic GAAR.

The second active indicator identified is Indicator 17 (IP regime). The Netherlands has a so-called 'innovation box' (in Dutch: innovatiebox). This innovation box is a Dutch corporate tax facility that allows taxpayers to benefit from a lower effective tax rate with respect to income derived from qualifying intellectual property ('qualifying IP'), developed by the taxpayer. Both resident and non-resident taxpayers can benefit from this facility. The effective innovation-box tax rate is 5%. The election for the innovation box to be applied needs to be done at the time of filing of the Dutch corporate income tax return. Taxpayers can elect to apply the innovation box separately for each IP asset. The lower effective tax rate only applies if the cost base of the qualifying IP has been recouped.

For IP to qualify for the innovation box, the following cumulative conditions must be met:

- The IP must be self-developed and must have become a business asset after 12.31.2006 (patent) or 12.31.2007 (R&D IP);
- A patent or an R&D declaration needs to be obtained for the IP ('R&D IP'); and,
- In the case of a patent right, more than 30% of the anticipated income should be attributable to it.

R&D IP is IP which results from innovative technical research and development conducted by or on behalf of a taxpayer, and for which the taxpayer has obtained an R&D declaration from "RVO NL", a Dutch government organization which operates independently of the tax authorities. By requiring the IP to have been developed by the taxpayer themselves, the Dutch innovation box was reported by the NTE to prevent abuses such as those described in Model ATP Structure 5. The acquired IP would not qualify for the innovation box if Company B was resident in the Netherlands.

It is worth noting that the Code of Conduct Group has been looking extensively into patent box regimes that were available in ten Member States (including the Netherlands). It concluded that all existing regimes should be reviewed in order to comply with the modified nexus approach.[85]

The innovation-box arrangement does not apply to income derived from trademarks, logos and similar rights. Acquired IP does not qualify unless the IP is developed further by the taxpayer.

Generally, the observed IP regime (innovation box) may be considered a concern for ATP purposes regarding IP rights. The regime offers a low tax rate (*in concreto* an effective taxation rate of 5%) on certain IP income, and hence it provides an incentive for MNE groups to establish a IP structure to enable them to obtain the tax advantage offered by the regime. Any final conclusion regarding this issue will require further detailed and thorough analysis of the specific details of the regime.

The active Indicator No. 31 regarding excess-profit rulings is also observable in the Netherlands. The NTE reported that such rulings are possible. The starting point is that the Dutch entity must earn arm's-length remuneration for the activities it performs (in line with OECD transfer pricing guidelines). Any excess profit would be deemed "to have been left to the company by its shareholders". As such, these profits would be treated as an informal capital contribution to the Dutch entity. This concept is in line with Dutch case law established by the Supreme Court.

Lack of anti-abuse indicators

Six lack of anti-abuse indicators are identified: Nos. 4 (no beneficial-ownership test), 6 (income from hybrid loan not taxable), 9 (tax deduction of interest does not link to the tax treatment in the creditor MS), 11 (no taxation of benefit from interest-free loan), 26 (no rule to counter a mismatch in tax qualification of domestic partnership), and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

The majority of these indicators seem to concern the issue of mismatches and tax arbitrage, where the current legislation of the Netherlands seems to allow ATP via such arrangements to a certain extent, whether taking place through hybrid financial instruments or through hybrid entities. The amendments to the Parent/Subsidiary Directive had not been implemented by the questionnaire submission date. The latter also prompts the awarding of Indicator 1, because it is considered that the participation exemption regime is applied too generously: it applies regardless of the state of residence of the distributing company, and it even applies to distributions which are deductible for the distributing company.

[85] See report from the Code of Conduct to the Council (December 2014) . http://data.consilium.europa.eu/doc/document/ST-16553-2014-REV-1/en/pdf.

The Netherlands has CFC rules, and therefore does not score on Indicator 24 (lack of CFC rules). However, it is reported that the Dutch CFC rules would not catch all the model ATP structures presented in this report. The reason is that the participation exemption would apply, and would apparently override the CFC legislation. The CFC rules therefore risk being weak or ineffective.

Dutch tax law does not contain a general GAAR. However, in addition to several specific anti-abuse provisions, the principle of '*fraus legis*' has been introduced in case law by the Dutch Supreme Court. *Fraus legis* is applicable if a) the goal of the structure and/or transaction is to achieve a tax benefit, b) the decisive motivation for the structure and/or transaction is to achieve this tax benefit, and c) this conflicts with the object and purpose of the law.

Sets of combined indicators

Three relevant combinations[86] involving ATP indicators have also been identified:

- 1, 4 (generous dividend tax exemption regarding inbound dividend payments combined with ineffective beneficial-ownership test)
- 8, 9, 14 (interest deduction in combination with absence of linking rule and no withholding tax on interest), and
- 19, 20 (royalty deduction in combination with absence of royalty withholding tax).

In particular, the combination of Indicators 8 and 9 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs. Such types of ATP structures are made even more possible in the context of Indicator 6, which allows for the tax exemption of income received from hybrid loans from other countries.

Other comments

There were no significant conflicts between the answers from the NTE and the representatives of Netherlands. The final version of the questionnaire therefore includes the minor changes and supplements provided by the MS representative.

[86] Some anti-abuse and passive ATP Indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure.

4.2.21 Poland

Table 31: Poland: Overview

Indicators identified	Details
Active indicators	n/a
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax) 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 15 (No beneficial-owner test for reduction of interest withholding tax) 21 (No beneficial-owner test for reduction of royalty withholding tax) 26 (No rule to counter a mismatch in tax qualification of domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company) 32 (No GAAR or SAAR to counter the Model ATP structures 1-7)
Passive indicators	8 (Tax deduction for intra-group interest costs) 19 (Tax deduction for intra-group royalty costs) 22 (R&D incentive obtainable for costs reimbursed) 23 (Group taxation with acquisition holding company allowed)
Set of combined indicators	8+9+15 (Interest deduction in combination with absence of linking rule and no beneficial-ownership test) 19+21 (Royalty deduction in combination with no beneficial-ownership test)

The screening of the Polish tax system revealed a total of eleven ATP indicators, seven lack of anti-abuse indicators and four passive indicators. Out of these, two sets of combined indicators were found.

Active indicators
No active indicators were found in Poland.

It is reported that Poland does not offer any patent-box regime, and it therefore does not score on Indicator 17. However, it should be noted that R&D centres may deduct up to 20% of revenue earned in a given month from the tax base. The qualification requirements to earn the status of R&D centre involve net revenues of EUR 1.2 million and at least 20% of revenues being generated from the sale of R&D services or intellectual property rights. These benefits are still subject to some restrictions, and so there are only about 20 companies in Poland that possess R&D-centre status. It is reported that there is legislative work currently underway to amend these requirements. Further detailed and thorough analysis of the specific details of these rules is required to conclude whether this can be qualified as an IP regime.

Lack of anti-abuse indicators

Poland has no beneficial-owner requirements with regard to withholding taxes on dividends, interests or royalties. Indicators 4, 15 and 21 have therefore been awarded.

In addition, Poland has no GAAR to counter Model ATP Structures 1-7, which results in Indicator 32.

For Poland, the lack of anti-abuse indicators also includes Nos. 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In Poland's case, two such sets were found:

- Indicators 8 plus 9 and 15 (general interest deduction combined with no linking rule and no beneficial-ownership requirement); and
- Indicators 19 plus 21 (general royalty deduction in combination with no beneficial-ownership requirement).

The combination of Indicators 8, 9 and 15 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs, while Indicator 19 in combination with 21 is capable of facilitating structures where the tax basis in an MS is eroded by means of royalty payments.

Other comments

Poland grants a new-technology tax relief which provides for up to 50% deduction of the costs incurred for the acquisition of innovative technology. It is reported that a company is still eligible for this relief if the acquisition costs are reimbursed by a group company over 3 years from the acquisition date. This results in Indicator 22 being awarded. There is also a relief for income earned in a 'Special Economic Zone'. However, the relief/deduction is subject to strict limitations, and any credits obtained are reversed upon disposal.

The validation process generated a few conflicts between the original version being subjected to validation and the comments received from the Polish authorities; however, the modifications and comments were approved by the NTE. As a result, the final version of the questionnaire includes the changes and supplements made by the representatives of Poland.

4.2.22 Portugal

Table 32: Portugal: Overview

Indicators identified	Detail
Active indicators	17 (IP regime)
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax), 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS), 26 (No rule to counter a mismatch in tax qualification of domestic partnership), and 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	8 (Tax deduction for intra-group interest costs), 18 (No capital gains tax on transfer of IP), 19 (Tax deduction for intra-group royalty costs), 23 (Group taxation with acquisition holding company allowed), and 30 (Unilateral ruling on interest or royalty spread possible).
Set of combined indicators	8+9 (Interest deduction in combination with absence of linking rule)

The screening of the Portuguese corporate income tax system revealed a total of ten ATP indicators that might deserve further attention. The observed indicators consist of one active indicator[87], four lack of anti-abuse indicators and five passive indicators.

Active indicators

The active indicator found is Indicator 17 (IP regime). Portugal recently introduced a patent-box tax regime. Accordingly, income derived from the use or exploitation of registered patents, designs and industrial models is 50% tax-exempt. Qualifying IP is restricted to patents and industrial designs or models subject to registration after January 1, 2014. Trademarks, copyrights of literary, artistic or scientific work, image rights, or any other rights or assets other than patents and industrial models or designs are not eligible for the tax benefit. IP acquired from other entities, whether or not connected with the taxable entity claiming the benefits, does not qualify. The sale or transfer of qualifying IP is not included in the regime.

[87] An active ATP indicator is one which more or less explicitly promotes or prompts an ATP structure. Often, it is these indicators that are the main source of the tax benefit offered by an ATP structure.

To counteract abuse, among the requirements for the benefit to be applicable are:

- The qualifying IP must be developed by the taxable entity claiming the benefit (either by itself or through contract);
- The licensee must effectively use the IP rights assigned in the pursuit of an activity of a commercial, industrial or agricultural nature;
- If the licensee is a related company, the IP cannot be used to create deductible expenses for the taxpayer or any other company belonging to the same group;
- The licensee cannot be an entity with its domicile in a country, territory or region that is subject to a clearly more favourable regime (i.e. a blacklisted jurisdiction).

The regime offers a low tax rate (*in concreto* a 50% exemption) on certain IP income, and hence provides an incentive for MNE groups to establish a patent-box structure so as to obtain the tax advantage offered by the regime. Any final conclusion to be drawn regarding this issue will require further detailed and thorough analysis of the specific details of the regime.

Lack of anti-abuse indicators

Four lack of anti-abuse indicators have been identified: Nos. 4 (no beneficial-ownership test); 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); 27 (no rule to counter a mismatch in tax qualification of a domestic company). Among those, the absence of linking rules (Indicators 26 and 27) to a certain extent creates a risk of classification mismatch arrangements. Any final conclusion in this respect will require further detailed and thorough analysis of the specific details of the regime.

Among the passive indicators, Indicator 18 is triggered, since it is possible to transfer the ownership of IP to a foreign group company without incurring capital gains tax. However, this is only applicable to a dominant company located in an EU or EEA country when the IP rights are transferred by the member group company in Portugal. The EU/EEA company must comply with the requirements established by the Portuguese group taxation regime. However, if the criteria are not met, a transfer will trigger capital gains in accordance with the arm's-length principle.

The awarding of Indicator 30 is based on the possibility of obtaining tax rulings regarding spreads on royalty or interest spreads. However, this does not seem to include rulings confirming the non-arm's-length transactions. The rulings are used to confirm the most appropriate transfer pricing method applicable to the transaction.

Portuguese law contains a general anti-avoidance provision. Under this provision, acts are void if it is proved that they are carried out, by artificial means, with the main objective (or one of the main objectives) being to reduce, eliminate or defer tax that would otherwise be due. In such a case, the transaction will be subject to normal taxation without the planned tax advantages. Court decisions that have been issued in respect to GAAR provision are very few and are mainly connected with evidentiary issues, since the application of the GAAR must follow a procedural rule established in the Tax Procedure and Proceedings Code which stipulates that the onus is on the Tax Authority to prove that the requirements which trigger the consequences set out in the GAAR have been met. Model ATP Structures Nos. 1-7 can be targeted under specific anti-avoidance rules as explained in the questionnaire in the context of dividend/interest and royalty limitation rules covering both inbound and outbound payments. No final conclusion can be drawn on the basis of the information available.

Sets of combined indicators

One relevant combination[88] involving passive ATP indicators has been identified: The combination of Nos. 8 and 9 (interest deduction in combination with absence of linking rule) is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments

There were no significant conflicts between the answers from the NTE and the representatives of Portugal. The final version of the questionnaire therefore includes the minor changes and supplements provided by the representatives of the Member State as part of the validation process.

[88] Some anti-abuse and passive ATP Indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure.

4.2.23 Romania

Table 33: Romania: Overview

Indicators identified	Detail
Active indicators	n/a
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax), 6 (Income from hybrid loan not taxable), 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS), 21 (No beneficial-ownership test regarding interest withholding tax) 24 (No CFC rules) 26 (No rule to counter a mismatch in tax qualification of domestic partnership), and 27 (No rule to counter a mismatch in tax qualification of a domestic company).
Passive indicators	1 (Too generous tax-exemption of dividends received), 8 (Tax deduction for intra-group interest costs), 19 (Tax deduction for intra-group royalty costs), and 25 (Tax qualification of foreign partnership does not follow that of the other state).
Set of combined indicators	1+4 (Generous dividend tax exemption regarding inbound dividends and no beneficial-ownership test); 8+9 (Interest deduction in combination with absence of linking rule), and 19+21 (Royalty deduction in combination with absence of beneficial-ownership test regarding withholding tax on royalties).

The screening of the Romanian corporate tax system has revealed a total of eleven ATP indicators. The observed indicators consist of seven anti-abuse indicators and four passive indicators.

No active ATP indicators were found.

Lack of anti-abuse indicators
We have identified seven lack of anti-abuse indicators: Nos. 4 (no beneficial-ownership test); 6 (income from hybrid loan not taxable); 9 (tax deduction of interest

does not link to the tax treatment in the creditor MS); 21 (no beneficial-ownership test regarding interest withholding tax); 24 (no CFC rules); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

In particular, the absence of linking rules (Indicators 26 and 27) creates, to a certain extent, a risk of classification mismatch arrangements. Any final conclusion in this respect will require further detailed and thorough analysis of the specific details of the regime.

It should be noted that the absence of CFC rules is not itself capable of prompting any ATP structures, but it constitutes the absence of a critical anti-avoidance measure which could prevent an ATP structure.

Romania's taxation system includes GAAR and SAAR. In fact, the NTE has reported that they are used as a universal solution which is applicable in all cases when the tax authority does not agree with the taxpayer.

Sets of indicators

Three relevant combinations[89] involving ATP indicators have been identified:

- 1, 4 (generous dividend tax exemption regarding inbound dividends and no beneficial-ownership test)
- 8, 9 (interest deduction in combination with absence of linking rule), and
- 19, 21 (royalty deduction in combination with absence of beneficial-ownership test regarding withholding tax on royalties).

The combination of Indicators 1 and 4 is capable of facilitating structures where dividends are routed through an MS without taxation.

The combination of Indicators 8 and 9 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs. Such types of ATP structure are made even more possible in the context of Indicator 6, allowing for the tax exemption of income received from hybrid loans from other countries.

The combination of Indicator 19 and 21 is capable of facilitating structures where the tax basis in an MS is eroded by means of IP licensing and similar costs.

Other comments

No significant conflicts emerged following the submission of comments provided by the Romanian representatives. As a result, their additions were integrated into the final version of the questionnaire.

[89] Some anti-abuse and passive ATP Indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure.

4.2.24 Slovak Republic

Table 34: Slovak Republic: Overview

Indicators identified	Details
Active indicators	N/A
Lack of anti-abuse indicators	9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 24 (No CFC rules) 26 (No rule to counter a mismatch in tax qualification of domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	1 (Too generous tax exemption of dividends received) 2 (No withholding tax on dividends received) 8 (Tax deduction for intra-group interest costs) 19 (Tax deduction for intra-group royalty costs) 22 (R&D incentive obtainable for costs reimbursed)
Set of combined indicators	1+2 (Dividend tax exemption regarding inbound and outbound dividend payments) 8+9 (Interest deduction in combination with absence of a linking rule)

The screening of the Slovak tax system resulted in the identification of nine ATP indicators, four lack of anti-abuse indicators and five passive indicators. Out of these, two sets of combined indicators were found.

Active indicators
No active indicators were found in the Slovak Republic.

Lack of anti-abuse indicators
The lack of anti-abuse indicators found includes Nos. 9 (tax deduction of interest does not link to the tax treatment in the creditor MS); 24 (no CFC rules); 26 (no rule to counter a mismatch in tax qualification of domestic partnership); and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

It should be noted that the Slovak tax system has interest-limitation rules and therefore avoids the lack of anti-abuse indicators 12 (no thin-capitalization rules) and 13 (no interest-limitation rules). The rule only allows deduction of interest and other costs (expenses) relating to received loans up to 25% of the value of the EBITDA. The rule only applies to inter-group debt, and does not apply to financial institutions, banks, insurance companies, leasing companies and similar financing institutions.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In the Slovak Republic's case, two such sets were found:

- Indicators 1 plus 2 (generous tax exemption of in- and outbound dividends); and
- Indicators 8 plus 9 and 12 (general interest deduction combined with absence of linking rule and absence of interest-deduction-limitation rules)

The combination of Indicators 1 and 2 is capable of facilitating structures where dividends are routed through an MS without taxation, while the combination of Indicators 8, 9 and 12 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs.

Other comments

The Slovak Republic does not tax received dividends, irrespective of the tax status/residence of the paying company, and Indicator 1 is therefore awarded. Also, the amendment of Article 4 of the PSD has not been implemented, but it is reported that a draft bill has been presented.

Even though dividends are currently tax-free if they have been deducted in the distributed company, the Slovak Republic avoids Indicator 6. This is based on the information reported according to which the Slovak tax system has no special rules for the re-characterisation of hybrid instruments, and income will therefore be treated as interest. Accordingly, the income would not be considered to be a tax-exempt dividend, and therefore no mismatch would occur.

In addition, the Slovak Republic levies a withholding tax on interest, and therefore avoids being awarded Indicator 14. However, it should be noted that interest on bonds and bills of credit is always tax-exempt.

The Slovak Republic also allows a double deduction for qualifying R&D costs. The reimbursement of costs does not lead to loss of the incentive, and this therefore results in Indicator 22. It should be noted that if the intangible asset is sold, the incentive is no longer available and is recouped.

The validation process has resulted in minor modifications being made to the answers relating to Questions 11 (Indicator 6) and 25b (Indicator 22) of the questionnaire. The final version of the questionnaire includes the changes and supplements made by the Slovak representatives. These changes have no impact on the overall assessment of the Slovak Republic.

4.2.25 Slovenia

Table 35: Slovenia: Overview

Indicators identified	Details
Active indicators	n/a
Lack of anti-abuse indicators	4 (No beneficial-owner test for reduction of dividend withholding tax). 9 (Tax deduction of interest does not link to the tax treatment in the creditor MS). 15 (No beneficial-owner test for reduction of interest withholding tax). 21 (No beneficial-owner test for reduction of royalty withholding tax). 24 (No CFC rules) 26 (No rule to counter a mismatch in the foreign tax treatment of a Slovenian partnership). 27 (No rule to counter a mismatch in the foreign tax treatment of a Slovenian company). 32 (No GAAR to counter the model ATP structures).
Passive indicators	8 (Tax deduction for intra-group interest costs). 19 (Tax deduction for intra-group royalty costs). 25 (Tax qualification of foreign partnership does not follow that of the foreign state).
Sets of combined indicators	8+9+15 (General interest deduction combined with no requirement for taxation of the interest in the hands of the creditor and no beneficial-owner test for interest withholding tax reduction). 19+21 (General royalty deduction combined with no beneficial-owner test for exemption from withholding tax).

The screening of Slovenia's corporate income tax system revealed a total of eleven indicators, of which eight are lack of anti-abuse indicators and three are passive indicators. Out of these, two sets of combined indicators were found.

No active indicators were found.

Lack of anti-abuse indicators

In general, Slovenia imposes withholding tax on payments of dividends, interest and royalty. As a result, Slovenia avoids the passive indicators 2, 14 and 20. Nonetheless, Slovenia has been awarded lack of anti-abuse indicators 4, 15 and 21 because no test of beneficial ownership is applied to exemptions or reductions of the withholding tax.

The provision exists in the legislation, but according to the national tax expert it is not being applied in practice. A final conclusion with respect to this indicator will require an in-depth analysis of the applicable practice and case law.

Indicator 9 (tax deduction of interest does not link to the tax treatment in the creditor state) should be seen in the context of the passive Indicator 8 (the general tax-deductibility of interest costs). Together with the passive Indicator 15, they combine to form a set of indicators as explained below.

Slovenia receives Indicator 24 for the absence of any CFC rules.

As regards Indicators 26 and 27 (the absence of rules to counter a foreign mismatching qualification of Slovenian partnerships and companies), these indicators are common in most MS' tax systems.

Slovenia was awarded lack of anti-abuse Indicator 32, because no general anti-avoidance rule (GAAR) which could be applied to the model ATP structures was identified.

Sets of combined indicators

Some indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure. In Slovenia's case, two such sets were found:

- 8, 9, 15 (general interest deduction combined with no requirement for taxation of the interest in the hands of the creditor and no beneficial-owner test for interest withholding tax reduction).
- 19, 21 (general royalty deduction combined with no beneficial-owner test for exemption from withholding tax).

The first set of combined indicators can facilitate ATP based on financing (the first set). On the other hand, the opportunities for such ATP should be limited, as Slovenia imposes restrictions on the general tax-deductibility of interest in the form of thin-capitalization rules and a low-tax rule (as a result of which Indicators 12 and 13 are avoided).

The second set of combined indicators can facilitate ATP via flow-through of royalty.

Other comments

Slovenia avoids the passive Indicator 1, since dividends are generally 95% exempt from taxation only as long as the subsidiary is subject to Slovenian CIT or a comparable profits tax. Dividends are not exempt if they represent untaxed reserves, or where the subsidiary is tax-resident in a country that lies outside the European Union, has a corporate tax rate of less than 12.5%, and is included on a blacklist published by the Ministry of Finance. In June 2015, a proposal to implement the amendment of the Parent/Subsidiary Directive was presented. The proposal denies the tax exemption if dividends have been deducted by the subsidiary. It covers all dividends.

Subject to some uncertainty, Slovenia also avoids Indicator 6. Until now, Slovenia had allowed for income from profit-participating loans to qualify as tax-exempt dividend income. However, it is likely that this loophole will be closed with future effect as a result of the proposed implementation of the amendment of the Parent/Subsidiary Directive. Nevertheless, this remains to be confirmed by further analysis.

Interestingly, Slovenia applies a low-tax test as a condition for the deductibility of interest paid abroad. Interest on loans granted by companies or individuals whose registered office or place of actual management or residence is located in a country other than an EU Member State where the average nominal rate of income tax is lower than 12.5% is non-deductible[90]. This low-tax rule, together with a general thin-capitalization rule, means that Slovenia avoids lack of anti-abuse indicators 12 and 13.

The Slovenian authorities did not supply any comments regarding the original version of the questionnaire as part of the validation process.

[90] Sec 30(1)(8) ZDDPO-2

4.2.26 Spain

Table 36: Spain: Overview

Indicators identified	Detail
Active indicators	10 (Interest deduction allowed for deemed interest costs on interest-free debt) 17 (IP regime)
Lack of anti-abuse indicators	n/a
Passive indicators	8 (Tax deduction for intra-group interest costs), 19 (Tax deduction for intra-group royalty costs), 22 (R&D incentive obtainable for costs reimbursed), 23 (Group taxation with acquisition holding company allowed), and 25 (Tax qualification of foreign partnership does not follow that of the other state)
Set of combined indicators	n/a

The screening of the Spanish corporate income tax system revealed a total of seven ATP indicators. The observed indicators consist of two active indicators and five passive indicators.

Active indicators

The active indicator found is Indicator 17 (IP regime). Spain has introduced a patent box. The effect of this regime is that income (gross income less expenses connected with the asset) derived from transfers (including rights to use and sales) of patents, designs, formulas or secret processes, or for information concerning industrial, commercial or scientific experience will be included within the corporate tax base with a reduction of 60%. The following requirements apply:

(1) the company transferring the right has created the asset to the extent of at least 25% of its cost;
(2) the payer of the royalty is using the IP in an economic activity, and the use of the IP is not resulting in a supply of goods or provision of services that generates deductible expenses for the Spanish transferring entity if it is a company associated with the payer;
(3) the payer must not be resident in a country or territory listed as a territory of no taxation or tax haven, unless it is within the EU and the taxpayer proves that there are valid business reasons and is carrying out economic activities;
(4) if the same contract includes the provision of services, the component that corresponds to services must be split from the part corresponding to IP that is covered by the patent box;
(5) the Spanish entity must have accounting records that show the income and expenses corresponding to the IP that is being transferred;

(6) the patent box will not apply to alienation of the IP between companies of the same group.

The patent box will not apply to income / capital gains derived from trademarks, copyrights of literary, artistic or scientific works, including cinema films, personal rights such as image rights, software, or industrial, commercial or scientific equipment (or any asset other than those described above).

Tax rulings and APAs are admitted with regard to (1) the characterization of the transaction and property or rights as one which confers a right to the patent box; or (2) the valuation of gross income, expenses or capital gains.

The regime offers a low tax rate (*in concreto* a 60% reduction of taxable income) on certain IP income, and hence provides an incentive for MNE groups to establish a patent-box structure so as to obtain the tax advantage offered by the regime. Any final conclusion in this respect will require further detailed and thorough analysis of the specific details of the regime.

With respect to Indicator 10, when the debtor of an intra-group loan is allowed to deduct deemed interest (i.e. non-paid interest), regardless of whether the creditor includes a deemed interest income in its taxable income, this may result in a situation with deduction/no inclusion. This therefore provides an incentive for MNE groups to establish interest-free loans so as to obtain the tax advantage offered by this non-correspondent taxation. The possible risk of ATP should be viewed in the context of the fact that the benefit from interest-free debt is taxed in Spain, and that withholding tax is levied on interest payments. Any final conclusions in this respect will require further detailed and thorough analysis, as the risk of ATP may be impeded by the domestic GAAR and the question of whether interest-deduction limits may restrict the deduction.

Spain offers the possibility of a tax deduction for capital increases. At first glance, this provision would be considered to be the equivalent of an ACE regime (Indicator 16). However, Spain does not score on Indicator 16 because the regime only applies to retained earnings, which significantly reduces the scope for its application.

Lack of anti-abuse indicators

No anti-abuse indicators have been identified for Spain. Spain has enacted CFC rules. The following conditions have to be met for the CFC regime to apply:

- The resident taxpayer, alone or together with associated persons, holds 50% or more of the capital, funds, voting rights, or profits of the foreign company. This will apply both to directly and indirectly-controlled entities.
- The tax paid by the foreign company in relation to the type of income included within the CFC regime is lower than 75% of the tax that would have been paid in Spain.

For the CFC regime to apply, the type of income obtained by the foreign entity is also relevant. This regime will be triggered if the foreign company does not have the human and material resources to carry out its activity (except when the activity is carried out with resources provided by other entities of the group that are not resident in Spain, or it is shown that there are valid business reasons to set up that company, or it is a holding company as defined in the legislation). This means that active (and not only passive) income can fall within the CFC regime. If the above is not applicable, the taxpayer will only include certain types of (positive) income in the tax base.

However, it is reported that the model ATP structures would easily escape the rules if well-structured by the MNE. Consequently, the Spanish CFC legislation may be considered weak. Weak CFC legislation can potentially create a risk of certain ATP structures whereby passive income and low-taxed income is generated in other MSs or third countries without inclusion in Spain.

Other comments

Subject to some uncertainty, it seems possible to obtain R&D credit while being reimbursed from another group company. The Spanish Directorate General for Taxation has mentioned that a Spanish resident company may apply for a credit for all R&D costs even if other non-resident companies of the same group would reimburse the costs plus an arm's-length margin and are the owners of the final product, provided that the Spanish resident company has materially conducted the research. This has led to the identification of Indicator No. 22.

The questionnaire validation process resulted in a few conflicting answers from the NTE and the representatives of the MS. The final version of the questionnaire thus includes the minor changes and supplements made by the Spanish representatives. The answers for questions 38 and 39 have been adjusted in accordance with the interpretation of the MS representative, with the mention that the NTE disagreed with the interpretation provided by the Spanish representatives.

4.2.27 Sweden

Table 37: Sweden: Overview

Indicators identified	Detail
Active indicators	n/a
Lack of anti-abuse indicators	26 (No rule to counter a mismatch in tax qualification of domestic partnership) and 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	1 (Too generous tax-exemption of dividends received) 2 (No withholding tax on dividends paid), 8 (Tax deduction for intra-group interest costs), 14 (No withholding tax on interest), 19 (Tax deduction for intra-group royalty costs), and 23 (Group taxation with acquisition holding company allowed)
Set of combined indicators	1+2 (Generous dividend tax exemption regarding inbound as well as outbound dividend payments) and 8, 14 (interest deduction in combination with absence of withholding tax on interest).

The screening of the Swedish corporate income tax system revealed a total of eight ATP indicators that might deserve further attention. No active indicators were identified.

Lack of anti-abuse indicators

Two lack of anti-abuse indicators were identified: Nos. 26 (no rule to counter a mismatch in tax qualification of domestic partnership) and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

The observed indicators create a certain degree of ATP risk via classification mismatch arrangements. Any final conclusion in this respect will require further detailed and thorough analysis of the specific details of the regime.

Sweden's Law Against Tax Avoidance (1995:575) applies to the national (corporate and individual) income tax and the municipal income tax (applicable to individuals). According to this law, a transaction may be deemed to be a method of tax avoidance, and the transaction may be disregarded for tax purposes, if all of the following requirements are met:

- The transaction, alone or in conjunction with another transaction, results in significant tax benefit for the taxpayer;
- The taxpayer is, directly or indirectly, a party to the transaction;

- Such tax benefit is assumed to have been the predominant reason for the transaction; and
- Taxation resulting from the transaction would be in violation of the purpose of the law.

Case law regarding the application of the Swedish GAAR shows that the critical point in deciding whether or not it is applicable often comes down to the fourth requirement – the question of whether the transaction violates the purpose of the law. This requirement makes the GAAR difficult to apply to step-transactions, because each step is often in harmony with the purpose of the legislation, although the result of the overall transaction is in violation of the purpose of the tax system. For this reason, the Swedish interest-deduction limitation rules were adopted to deal with various kinds of debt push-down structures. As a result, it is difficult to give a qualified opinion on the application of the Swedish GAAR in relation to the general ATP structures.

Sets of combined indicators

Two relevant combinations[91] involving passive ATP indicators have been identified:

- 1 plus 2 (generous dividend tax exemption regarding inbound as well as outbound dividend payments) and
- 8 plus 14 (interest deduction in combination with absence of withholding tax on interest).

The combination of Indicators 8 and 14 is capable of facilitating structures where the tax basis in an MS is eroded by means of financing costs. The observed indicators create a certain degree of ATP via flow-through structures regarding dividends and interest payments.

Other comments

There were no significant conflicts between the answers given by the NTE and the representatives of the Member State stemming from the validation process. The final version of the questionnaire therefore includes the minor changes and supplements made by the Swedish representatives.

[91] Some anti-abuse and passive ATP Indicators can combine with others into sets that are capable of facilitating the same or similar types of ATP structure.

4.2.28 United Kingdom

Table 38: United Kingdom: Overview

Indicators identified	Detail
Active indicators	17 (IP regime)
Lack of anti-abuse indicators	26 (No rule to counter a mismatch in tax qualification of domestic partnership), 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	2 (No withholding tax on dividends paid), 8 (Tax deduction for intra-group interest costs), 19 (Tax deduction for intra-group royalty costs), 23 (Group taxation with acquisition holding company allowed), and 25 (Tax qualification of foreign partnership does not follow that of the other state)
Set of combined indicators	n/a

The screening of the corporate income taxation system of the United Kingdom revealed a total of eight ATP indicators. The observed indicators consist of one active indicator[92], two lack of anti-abuse indicators and five passive indicators.

Active indicators

The active indicator found is Indicator 17 (IP regime). The UK has a patent-box regime under which a broad range of qualifying patent profits can be taxed at a lower rate. For 2014, the rate is 12%, reducing to 10% from 1 April 2017. The regime is based around transfer pricing principles – the 10% rate applying to all residual profit attributable to patents after adjustment for routine returns and, where relevant, a notional ‘marketing royalty’.

The regime requires the patent-box company to have developed the intellectual property asset, or to be undertaking the active management of the commercialization of the intellectual property.

It has been announced that the current UK patent-box regime will be closed to new participants in June 2016, with transitional arrangements that will allow existing participants to continue benefiting until June 2021.

The regime offers a low tax rate (*in concreto* a 13% tax rate) on certain IP income, and thus provides an incentive for MNE groups to establish a patent-box structure so as to obtain the tax advantage offered by the regime. Any final conclusion in this

[92] An active ATP indicator is one which more or less explicitly promotes or prompts an ATP structure. Often it is these indicators that are the main source of the tax benefit offered by an ATP structure.

respect will require further detailed and thorough analysis of the specific details of the regime.

Lack of anti-abuse indicators
Two lack of anti-abuse indicators have been identified: Nos. 26 (no rule to counter a mismatch in tax qualification of domestic partnership) and 27 (no rule to counter a mismatch in tax qualification of a domestic company).

The absence of linking rules creates, to a certain extent, a risk of classification mismatch arrangements. Any final conclusion in this respect will require further detailed and thorough analysis of the specific details of the regime.

CFC legislation does exist in the UK. Moreover, a diverted-profits tax has been introduced. It is reported that all the model ATP structures could be subject to UK tax.

Highly complex CFC rules apply to non-UK-resident companies that are controlled by UK residents and to non-UK branches of UK-resident companies which have made an exemption election. If a CFC has profits that do not qualify for exemption, they are taxed as any UK-resident companies with 25% or more.

The CFC rules contain a series of gateways and exemptions. A CFC charge only arises if the CFC's profits pass through one of the 'gateways' and none of the exemptions apply. The gateways cover profits attributed to UK activities, non-trading finance profits, trading finance profits, and captive insurance. For example, the filter for UK activities excludes the majority of companies where:

- The purpose is not mainly to achieve a UK tax advantage.
- The management and control of the CFC's assets and risks are not carried out in the UK, other than through a UK PE.
- The CFC's activities are independent of the UK.
- The CFC only has property income and /or non-trading finance profits.

The exemptions include the following: the CFC is highly taxed; it is resident in a qualifying territory; it has low profits or a low profit margin; the local business premises and the business are not principally related to the UK; intellectual property has been transferred from the UK.

Full or partial exemption may also be available for profits from lending to other CFCs (full exemption in very limited circumstances), both being subject to TAARS.

The answers provided by the NTEs did not produce a clear conclusion as to whether the UK rules can be considered to be effective with respect to all the model ATP structures. The reported gateways are interpreted as in practice representing the legal requirements of the provision, and as not being likely to exempt the model ATP structures from UK CFC taxation.

The Diverted Profits Tax applies a 25% tax charge (55% for ring-fenced oil and gas companies) to diverted profits relating to UK activity. It applies from 1 April 2015.

Sets of combined indicators
There are no relevant combinations among the secondary indicators.

Other comments

There were no significant conflicts between the answers from the NTE and the representatives of the United Kingdom. The final version of the questionnaire therefore includes the minor changes and supplements made by the MS representative.

5. General observations and policy implications

While the main purpose of the study was to identify the critical ATP indicators which facilitate or allow the functioning of known ATP structures and to review the corporate income tax systems of the Member States on the basis of these indicators, the assessments presented in Chapter 4 allow for a number of interesting general observations when comparisons are made across the Member States. This chapter discusses such general observations, and points to some of their policy implications.

An overview of the findings regarding the indicators for each Member State and across all Member States can be found in Appendix 2: *Overview of ATP Indicators.*

5.1 Number and categories of indicators observed

5.1.1 Number of indicators

The number of indicators varies widely between Member States, from four to seventeen. Most Member States exhibit between nine and thirteen indicators.

5.1.2 Categories of indicators

Active indicators are found in fifteen Member States. The maximum number of active indicators found in any Member State is three; this situation exists in three Member States.

If Indicator 17 (patent/IP box regime) were set aside, the number of Member States with active indicators would fall to eleven.

All Member States except two have indicators indicating a *lack of anti-abuse measures,* and most Member States exhibit between four and six lack of anti-abuse indicators.

Finally, and not surprisingly, *passive indicators* are found in all Member States, and here there is less variation in the number than for the two other categories of indicator. Most Member States exhibit between three to five passive indicators.

5.2 Common findings across Member States

A number of indicators are common to many Member States. This section points out the most important ones.

5.2.1 Scope for tightening anti-abuse rules to counter base erosion by means of financing costs

All twenty-eight Member States exhibit indicators relating to the interest-cost theme (indicators 8–15). In addition, twenty-four Member States possess indicators in this category that combine into a set of indicators (Indicator 8 combined with any of Indicators 9 or 12-15) that are capable of facilitating the same base erosion by means of financing costs.

In other words, twenty-four Member States offer a general deductibility of interest costs without making it conditional on the creditor being taxed on the interest income and/or without imposing the full scale of thin-capitalization or other interest-limitation rules, interest withholding tax or a beneficial-owner test as a condition for withholding-tax exemptions in the context of group financing.

In particular, as many as twenty Member States do not link the tax-deductibility of interest cost to the tax treatment of the interest income in the hands of the recipient (lack of anti-abuse Indicator 9).

Moreover, six Member States exhibited the active Indicator 10, which offers a unilateral tax deduction of deemed interest costs on a non-arm's-length interest-free debt.

Subject to further analysis, these observations may imply that the Member States could find room to tighten their anti-abuse rules in order to counter base erosion by means of financing costs.

5.2.2 Dividend flow-through possible, although less of an issue

In contrast with the interest-cost theme discussed above, far fewer Member States – only thirteen – exhibited a combined set of indicators in the field of dividends received and dividends paid (Indicator 1 in combination with any of Indicators 2-4). This may be taken as an indication that rules in many Member States are already set better in place in this field than in the interest-cost field to counter ATP based on the tax-free flow-through of dividends.

However, it is noted that at the time of the data collection, thirteen Member States did not apply any beneficial-owner test when accepting a claim for the reduction or exemption of withholding tax.

The amendment of Article 1(2) of the Parent/Subsidiary Directive should prevent Member States from granting the benefits of the directive to arrangements that are not 'genuine'.

5.2.3 Lack of CFC rules

Half the Member States, fourteen, - do not have CFC rules (lack of anti-abuse Indicator 24). In general, CFC rules can be effective tools for countering ATP structures, particularly those based on financing and IP (royalty) payments. CFC rules would normally impose a tax in the state of the parent company on financial, IP and other mobile income earned by a subsidiary company in another state. On the other hand, as CFC rules normally only apply 'downstream' in a group structure, a Member State's CFC rules cannot usually counter ATP if the ATP transactions take place in a sister company or at a higher level in the group structure.

5.2.4 Lack of rules to counter mismatch in qualification of local entities

Other than Denmark, Spain and (partly) Hungary, no Member State has rules (lack of anti-abuse indicators 26 and 27) to counter the mismatching tax qualification of a local partnership or company by another state (typically the state of the owners).

Such mismatches can lead to hybrid or reverse hybrid mismatches in the form of no income pick-up as illustrated by Model ATP Structure 3 (mainly relevant in relation to US MNEs) or double deductions for the same cost.

Rules applied by some countries to counter hybrid mismatches include linking rules where a Member State's tax qualification of a local entity matches the qualification applied by the state in which the owners are resident.

Indicators 26 and 27 are by far the most frequently-encountered lack of anti-abuse indicators observed in the study.

5.2.5 Patent-box regimes

Among the active indicators, Indicator 17 concerning patent-box regimes is the most frequent indicator, being found in ten Member States. On the background of the initiatives already taken at EU level – in particular, the work of the ECOFIN Code of Conduct Group on Business Taxation[93] – the study did not perform an in-depth analysis on whether the IP regimes are compliant with the modified-nexus approach.

However, Question 23 of the questionnaire served to gather some details that are relevant to this indicator. In particular, the answers collected revealed that some of the existing regimes allow for acquired existing IP to come under the patent-box regime. Some of the regimes also allow other IP such as know-how and trademarks to be included in the patent-box regime.

5.2.6 Commonly found passive ATP indicators

As might have been expected, the study found a number of passive indicators that are common to most Member States. They include:

- the general tax-deductibility of interest cost (Indicator 8), found in all Member States;
- the general tax-deductibility of royalty costs (Indicator 19), found in twenty-six Member States; and
- the possibility of filing a group tax return with an acquisition-holding company (Indicator 23), found in seventeen Member States.

None of these findings are considered critical by themselves in terms of facilitating ATP. This is logical, given that passive indicators often relate to features of a tax system that generally serve a positive function. However, under some circumstances they may allow for ATP. Even so, the reader should refer to the above discussion regarding Indicator 8 when it is combined with other interest-cost indicators.

5.2.7 Positive findings

The study has brought to light a number of positive observations.

Firstly, no Member State offers any tax deduction for dividends paid (the active Indicator 5). This means that the scope for hybrid financing instruments is smaller, particularly in those cases where the parent company is resident outside the EU and therefore would not have been subject to the amendment of Article 4 of the Parent/Subsidiary Directive.

Secondly, no Member States offers a general nil corporate tax rate (the active Indicator 28).

[93] See Council Document of 11 December 2014 – 16553/1/14.

Thirdly, only one Member State allows for a locally incorporated company to claim non-resident tax status (the active Indicator 29), with another earning a remark for the lengthy duration of its grandfathering clause.

Finally, it is worth noting that almost all the Member States (twenty-six) have general or special anti-avoidance rules that are capable of countering parts of the model ATP structures considered in this study. Only two Member States exhibited the lack of anti-abuse Indicator 32. This should not be taken as a complete overturning or discrediting of the model ATP structures, but rather as an indication that at least some roles in the structures could be impossible for a company that is resident in the twenty-six Member States which have been reported to exhibit such anti-avoidance rules.

Appendix 1: Questionnaires for each MS

<Appendix 1> is available online at the following link
http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_61.pdf

Appendix 2: Overview of ATP Indicators

<See following pages>

List of ATP- Indicators					Reference to Model ATP-Structures (Letter refers to the relevant state)					
Theme	**No.**	**Subject**	**Category**	**Ref. to Questionnaire**	**Mod 1**	**Mod 2**	**Mod 3**	**Mod 4**	**Mod 5**	**Mod 6**
Dividends received	**1**	Too generous tax-exemption of dividends received	Passive	3 , 4	A	A, B		A	A	A, E
Dividends paid	**2**	No withholding tax on dividends paid	Passive	5, 6, 7	D	B		D	B	B, E
	3	No withholding tax on dividend equivalents (e.g. buy-back of shares)	Passive	8						
	4	No beneficial owner-test for reduction of withholding tax	Anti-abuse	6c, 6d						
	5	Tax deduction for dividends paid	Active	22						
Interest income	**6**	Income from certain hybrid instruments can be treated as tax-free dividend or similar	Anti-abuse	11, 12		B				
	7	No deemed income from interest-free loan (non-arm's length-transactions)	Active	10				B		
Interest costs	**8**	Tax deduction for interest costs	Passive	13	B, C	C	B	C, D		
	9	Tax deduction does not depend on the tax treatment in the creditor's state	Anti-abuse	14a-b	B, C	C	B			
	10	Interest deduction allowed for deemed interest costs on interest-free debt	Active	17				D		
	11	No taxation of benefit from interest-free debt	Anti-abuse	18				D		
	12+13	No interest-limitation rules and no thin-capitalization rules	Anti-abuse	15-16	B, C	C	B	C, D		
	14	No withholding tax on interest payments	Passive	19-20	B, C	C	B	C		
	15	No beneficial owner-test for reduction of withholding tax	Anti-abuse	20d-e	B, C	C		C		
Allowance for equity capital	**16**	Notional interest deduction by reference to a company's equity capital	Active	21						
Royalty or other IP income	**17**	Patent box or other preferential tax treatment of income from IP	Active	23					B	
	18	No or low taxation of capital gain (fair market value) upon disposal of IP	Passive	26, 27					A	A
Royalty or other IP costs	**19**	Tax deduction for royalty costs	Passive	28, 29					C	B, C, D
	20	No withholding tax on royalty payments	Passive	30, 31					C	B, C, D
	21	No beneficial owner-test for reduction of withholding tax on royalty	Anti-abuse	31c-d					C	B, C, D
	22	R&D tax incentive obtainable also for costs that are reimbursed	Passive	24, 25						
Group taxation	**23**	Group taxation with acquisition holding company allowed	Passive	32-33	C	C	B			
CFC-rules	**24**	No CFC-rules	Anti-abuse	34-36	A	A		A	A	A
Foreign legal entities	**25**	Tax qualification of the foreign entity does not follow that of the foreign state	Passive	37			A			
	26	No rule to counter a mismatch in tax qualification of a domestic partnership between your state and a foreign state	Anti-abuse	38						
	27	No rule to counter a qualification mismatch of a local company	Anti-abuse	39			B			
Tax-free company	**28**	Nil corporate tax rate	Active	1, 2	D					E
	29	Locally incorporated company not tax-resident if management/control is situated in another state	Active	40, 41						B
Ruling practices	**30**	Unilateral ruling on interest spread	Passive	42, 43	B					
	31	Excess profits rulings	Active	44						
GAAR / SAAR	**32**	No general or specific anti-avoidance rules to counter the model ATP structures	Anti-abuse	45	B, C	B, C	A, B	C, D	C	B, C, D
Other themes (residual)	**33**	Any other significant ATP indicator to be identified by national tax experts		46						
Total										

Mod 7	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SK	SI	UK	Total
A		x	x	x	x			x			x			x			x	x	x	x	x			x	x	x			15
B				x				x						x						x					x	x		x	7
									x		x		x						x										4
		x	x						x		x		x			x	x		x		x	x	x	x			x		13
																													0
		x		x													x	x			x			x					6
															x					x									2
	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	28
		x	x		x	x		x	x		x		x	x		x	x	x	x	x	x	x	x	x		x	x		20
	x		x							x			x	x							x								6
	x		x										x	x							x								5
				x				x							x					x									4
	x			x		x		x			x			x							x				x				8
									x				x		x				x			x					x		6
		x		x												x													3
B		x		x						x		x		x				x		x	x		x					x	10
A					x									x						x			x						4
C		x	x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	26
C				x										x				x			x								4
		x							x										x			x		x			x		6
A		x			x					x		x	x				x		x			x				x			9
	x			x		x	x			x	x	x			x	x	x	x		x	x	x	x		x			x	17
A	x	x	x	x	x			x					x		x			x	x	x				x		x	x		14
	x	x				x	x		x	x	x	x		x	x		x	x	x	x	x			x			x	x	18
	x	x	x	x	x	x		x	x		x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	x	25
	x	x	x	x	x	x		x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	26
B																													0
				x																									1
C		x														x		x			x		x						5
		x																			x								2
B, C																						x					x		2
											x																		1
	9	16	10	15	9	8	4	10	9	7	12	8	12	13	10	9	11	13	13	14	17	11	10	11	8	9	11	8	

AT: Austria, BE: Belgium, BG: Bulgaria, CY: Cyprus, CZ: Czech Republic, DE: Germany, DK: Denmark, EE: Estonia, EL: Greece, ES: Spain, FI: Finland, FR: France, HR: Croatia, HU: Hungary, IE: Ireland, IT. Italy, LT: Lithuania, LU: Luxembourg, LV: Latvia, MT: Malta, NL: Netherlands, PL: Poland, PT: Portugal, RO: Romania, SE: Sweden, SK: Slovakia, SI: Slovenia, UK: United Kingdom

Appendix 3: List of national tax experts

Table 39: List of national tax experts

Country	National Tax Expert
Austria	Christoph Marchgraber
Belgium	Michel Maus
Bulgaria	Valentin Savov
Croatia	Ivana Kireta-Van der Maas
Cyprus	Christiana Hji Panayi
Czech Republic	Danuse Nerudova
Denmark	Jakob Bundgaard
Estonia	Tanel Molok, on behalf of *Sorainen*
Finland	Marjaana Helminen
France	Daniel Gutmann
Germany	Ekkehart Reimer
Greece	Eleni Theocharopoulou
Hungary	Simon István
Ireland	Emer Hunt
Italy	Paolo Ludovici
Latvia	Janis Taukacs, on behalf of *Sorainen*
Lithuania	Saule Dagilyte, on behalf of *Sorainen*
Luxembourg	Werner Haslehner
Malta	Rosanne Bonnici
Netherlands	Ivo Kuipers
Poland	Hanna Litwinczuk, co-authored by Karolina Tetlak
Portugal	Gloria Maria Alves Teixeira
Romania	Radu Bufan
Slovakia	Renata Blahova
Slovenia	Gregor Zorman
Spain	Adolfo Martin Jiminez
Sweden	Axel Hilling
United Kingdom	Joy Svasti-Salee, co-authored by Christiana Hji Panayi

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Appendix 5: Role of third-country jurisdictions

This appendix discusses the possible role of third-country jurisdictions in ATP structures and which indicators in these jurisdictions could trigger or help these structures.

In this context, it is also worth looking at Overseas Countries and Territories and Outermost Regions, which may, depending on their interaction with EU law, be considered as third-country jurisdictions for tax purposes.

Overview of Overseas Countries and Territories and Outermost Regions

Some Member States have Overseas Countries and Territories (OCT) or Outermost Regions (OMR) with some, or full, fiscal autonomy. For historical, geographical, or political reasons these territories or regions enjoy special status within or outside the European Union. This covers territories identified in articles 349 and 355 TFEU. Please see Table 1, below, for a full list of OCTs and OMRs. OCTs and OMRs, which are referred to in the Treaty (TFEU), may have different tax arrangements vis-à-vis their Member State. Moreover, their interaction with EU law differs according to TFEU provisions.

Overseas territories listed under Article 355(2) below depend constitutionally on four EU Member States: Denmark, France, the Netherlands, and the United Kingdom. Thus, the overseas territories are dependent territories that have a special relationship with one of the EU Member States.

By contrast, although far from continental Europe, the OMRs listed under Article 349 and 355(1) TFEU are full members of its borderless economy – and are, in principle and unless otherwise stated, covered by all related legislation, rights and obligations.[1]

The OMRs of the EU are the Canary Islands (an autonomous community belonging to Spain), Madeira & the Azores (autonomous regions of Portugal) and Mayotte, Martinique, Guadeloupe, French Guiana, Réunion & Saint-Martin (overseas "departments" or "collectivities" of France).[2]

Further, some of the territories enjoy specific arrangements in their relationship with the EU. As an example, this is the case for Åland Islands, Channel Islands, Isle of Man and Gibraltar. Gibraltar is part of the EU, having joined the European Economic Community under the United Kingdom in 1973. However, Gibraltar is outside the customs union and VAT area. As a separate jurisdiction to the UK, Gibraltar's government and parliament are responsible for the transposition of EU law into local law.

A detailed analysis of the tax provisions applicable to these jurisdictions was not foreseen by this study, which rather looks at the presence/absence and design of tax provisions in the Member States. This is however an interesting topic for further research.

In the remainder of the section, the general term "overseas territory" is applied to cover any OCT and OMR which has its own corporate income tax systems different from that of the EU Member State to which the OCT/OMR relates. As far as overseas territories are concerned, we are unaware of any specific ATP schemes involving them.

[1] "Europe's outermost regions and the single market", European Commission, 24 April 2014.
[2] Article 349 & 355(1) TFEU.

Therefore, it is not possible to point to overseas territories that would be most prone to be used for ATP. The reasons for this are explained below.

Firstly, these territories have their own independent corporate income tax systems, i.e. independent from the tax regimes from those of the EU Member State to whom they relate. In other words the tax system of any of the British overseas territories may be as different from the British tax regime as, for example, the regime of any other country. Overseas territories can therefore not be seen as a mere addition to the tax regimes of the EU Member State to whom they relate.

Accordingly, conclusions on the extent to which the territories may be used in ATP structures and to the extent to which the presented Model ATP Structures would apply can only be made on the basis of a territory-specific screening of each of the territories. This assessment would therefore require a screening process similar to that performed for the 28 MS in regard to these territories.

Secondly, it depends on the domestic tax rules in the EU Member State(s) in which the (other) companies taking part of a specific ATP structure are resident. Based on the Questionnaires, it can be derived that many of the EU Member States have inserted different measures to prevent the use of tax havens in ATP, e.g. by introducing CFC legislation or making the tax exemption for inbound or outbound dividends, interest or royalty payments dependent on a “subject to tax requirement”, a “requirement of tax residence in a treaty state, etc. These different measures vary from Member State to Member State as well as the jurisdictions on the “black/white lists” (if applicable) vary.

Table 1, Full list of Overseas Countries, Territories (OCT) and Outermost Regions (OMR)

TFEU provisions extending the scope of the Treaty to the named Territories	
Articles 349 & 355(1) TFEU	**Article 355(2) TFEU (see annex II to TFEU)**
Guadeloupe	Greenland
French Guiana	New Caledonia and Dependencies
Martinique	French Polynesia
Réunion	French Southern and Antarctic Territories
Saint-Martin	Wallis and Futuna Islands
Mayotte	Saint Pierre and Miquelon
Azores	Saint Barthélemy
Madeira	Aruba
Canary Islands	Bonaire
	Curaçao
Article 355(3) TFEU	Saba
Gibraltar	Sint Eustatius
	Sint Maarten
Article 355(4) TFEU	Anguilla
Åland Islands	Cayman Islands
	Falkland Islands
Article 355(5)(c) TFEU	South Georgia and the South Sandwich Islands
Channel Islands	Montserrat
Isle of Man	Pitcairn
	Saint Helena and Dependencies
	British Antarctic Territory
	British Indian Ocean Territory
	Turks and Caicos Islands
	British Virgin Islands
	Bermuda
	Clipperton[3]

[3] Clipperton is not mentioned by the TFEU, but is a French OCT.

The role of third-country jurisdictions in ATP

The term "preferential tax regime" may be reserved for jurisdictions that have created, within their common taxation system, one or more particular regimes whereby they offer tax privileges to certain well-defined categories of taxpayers.[4]

Third-country jurisdictions could play an active part in ATP if they offer regimes that lead to low or no taxes, or score on some of the indicators identified in the ATP structures.

With reference to the Model ATP structures presented in this Study, companies resident in third-country jurisdictions could play the following roles:

- Structure 1 – Offshore loan ATP Structure: "Offshore Co" (tax resident in State D)
    - If State D (non-MS) is either a jurisdiction offering no or low taxes based under its general tax system or if State D offers a preferential tax regime for e.g. holding or finance companies resulting in Offshore Co being a tax-free company. Further, this is only possible if State D does not levy any withholding taxes on dividends

- Structure 2 – Hybrid loan ATP Structure: "B Holdco" (tax resident in State B)
    - If State B has no avoidance rules to counter mismatch on hybrid loans and therefore treats payments on the hybrid loan as a tax exempt dividend or if B Holdco is subject to no or low tax on income either based on the general tax system (if State B is a jurisdiction offering such regime) or due to a preferential tax regime. Further, this is only possible if State B does not levy any withholding taxes on dividends

- Structure 4 – Interest Free Loan ATP Structure: "FinanceCo B" (tax resident in State B)
    - If State B does not tax FinanceCo B of deemed interest income on an interest-free loan, e.g. because of the absence of transfer pricing-regulations. This is also possible if State B is either a jurisdiction offering no or low taxes based under its general tax system or if State B offers a preferential tax regime for e.g. holding or finance companies resulting in FinanceCo B being a tax-free company.

- Structure 6 – Two-Tiered IP ATP Structure: "Company B1" (tax resident in State E)
    - If State E is either a jurisdiction offering no or low taxes based under its general tax system or if State E offers a preferential tax regime for license and royalty payments resulting in Company B1 being a tax-free company

- Structure 7 – IP and Cost Contributing Agreements ATP Structure: "Company B" (tax resident in State B)
    - If State B is either a jurisdiction offering no or low taxes based under its general tax system or if State B offers a patent box or a preferential tax treatment of income from IP license. Further, this is only possible if State B does not levy any withholding taxes on dividends.

More generally, a third country jurisdiction is more prone to be used for ATP if the ATP indicators listed in Table 2 can be found in its corporate income tax system:

[4] See De Broe, Luc: *International Tax Planning and Prevention of Abuse*, IBFD Doctoral Series, 2007, para 53.

Table 2, Overview of ATP Indicators that may prompt ATP through the use of third-country jurisdictions

List of ATP- Indicators			
Theme	**No.**	**Subject**	**Category**
Dividends received	1	Too generous tax-exemption of dividends received	Passive
Dividends paid	2	No withholding tax on dividends paid	Passive
	3	No withholding tax on dividend equivalents (e.g. buy-back of shares)	Passive
Interest income	6	Income from certain hybrid instruments can be treated as tax-free dividend or similar	Anti-abuse
	7	No deemed income from interest-free loan (non-arm's length-transactions)	Active
Interest costs	8	Tax deduction for interest costs	Passive
	9	Tax deduction does not depend on the tax treatment in the creditor's state	Anti-abuse
	14	No withholding tax on interest payments	Passive
Royalty or other IP income	17	Patent box or other preferential tax treatment of income from IP	Active
Royalty or other IP costs	19	Tax deduction for royalty costs	Passive
	20	No withholding tax on royalty payments	Passive
CFC-rules	24	No CFC-rules	Anti-abuse
Foreign legal	25	Tax qualification of the foreign entity does not follow that of the foreign state	Passive
	26	No rule to counter a mismatch in tax qualification of a domestic partnership between your state and a foreign state	Anti-abuse
	27	No rule to counter a qualification mismatch of a local company	Anti-abuse
Tax-free company	28	Nil corporate tax rate	Active
	29	Locally incorporated company not tax-resident if management/control is situated in another state	Active
GAAR / SAAR	32	No general or specific anti-avoidance rules to counter the model ATP structures	Anti-abuse

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