

EUROPEAN UNION GLOBAL MINIMUM LEVEL OF TAXATION FOR MULTINATIONAL ENTERPRISE GROUPS AND LARGE-SCALE DOMESTIC GROUPS REGULATIONS

- GUIDANCE NOTE -

1.0 Introduction & Scope

The purpose of these regulations is to transpose within domestic legislation the provisions of Directive (EU) 2022/2523 of 14 December 2022 as adopted by the Council of the European Union [hereinafter referred to as the ‘directive’]. Such directive provides for a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the EU and largely reflects the Model Rules issued by the OECD/G20 Inclusive Framework on BEPS on 14th December 2021, being the Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two). The directive requires Member States to effect transposition by **31st December 2023**, with the main rule of such directive [the Income Inclusion Rule, hereinafter referred to as ‘IIR’] becoming effective on or after 31st December 2023 while the secondary rule [the Undertaxed Profit Rule, hereinafter referred to as ‘UTPR’] becoming, in principle, effective on or after 31st December 2024. The regulations bring within scope constituent entities located in Malta that are members of an MNE group or of a large-scale domestic group which has an annual revenue of €750,000,000 or more in its ultimate parent entity’s consolidated financial statements in at least two of the four fiscal years immediately preceding the tested fiscal year.

2.0 Delayed application

Article 50 of the directive provides for an election for a delayed application of the IIR and UTPR:

*“1. By way of derogation from Articles 5 to 14, Member States in which no more than **twelve ultimate parent entities of groups within the scope of this Directive** are located may elect not to apply the IIR and the UTPR for six consecutive fiscal years beginning from 31 December 2023. Member States that make such election shall notify the Commission by 31 December 2023.”*

Malta has notified the EU Commission of its election for such a delayed application in September 2023. To this end and in line with guidance issued by the EU Commission to Member States as to the provisions of the directive that will need to be transposed by those which elect to make use of the derogation in Article 50 of such directive, Malta has sought to transpose those parts of the directive which have been outlined in such guidance. It has been clarified that the fact that a Member State may take such an election for a delayed application of the IIR and UTPR ought not to distort the operation and functioning of the Pillar 2 system within the EU and elsewhere. Moreover, the election does not result in a waiver of the top-up tax liability of the group in other Member States or third countries. For that reason, the Member States making the election must nevertheless transpose a minimum number of provisions of the directive so as to enable taxpayers and other States/jurisdictions to properly comply with and apply the system outlined in the directive.

As a result of this, the regulations which have been issued transpose solely those parts outlined in such guidance and which are a necessary minimum in order to allow for the proper functioning of the directive while simultaneously faithfully transposing the directive into domestic legislation. The following are the provisions which should thus be transposed and applied, given that Malta has elected for a delayed application of the IIR and UTPR, while not applying a qualified domestic top-up tax [hereinafter referred to as “QDTT”]:

- Chapter I (subject matter, scope, definitions and location of constituent entity);
- Chapter VIII (Administrative Provisions);
- Chapter IX (Transition Rules [in particular Articles 49 and 51]; and
- Chapter X (Final Provisions [Art. 52(1)]).

These regulations will continue to apply insofar as Malta continues to adopt a delayed application of the IIR and UTPR, which in any case is for a maximum period of six consecutive fiscal years beginning from 31 December 2023. The entire provisions of the directive will be transposed into domestic legislation at the earlier of:

- (a) the lapse of the maximum six-year period;
- (b) Malta rescinding such election before that date; or
- (c) Malta electing to introduce a QDTT.

Notwithstanding the above, if Malta were to elect to introduce a QDTT before the lapse of the events under (a) and (b) above, then although the entire provisions of the directive would need to be transposed into domestic legislation, the delayed application of the IIR and UTPR provisions would continue to apply until the occurrence of the earlier of any of the two events referred to under (a) or (b) above. Furthermore, it is understood that should Malta rescind the election or introduce a QDTT, such events shall be clearly communicated in advance in order to allow for sufficient implementation and application by taxpayers.

3.0 Filing Obligations

The regulations place certain information gathering and filing obligations on constituent entities located in Malta that are part of an MNE group. Regulation 5(2) imposes an obligation to file a top-up tax information return with the Commissioner for Tax and Customs [hereinafter referred to as the “Commissioner”] unless this has already been filed by the ultimate parent entity or a designated filing entity located in a jurisdiction that has, for the reporting fiscal year, a qualifying competent authority agreement in effect with Malta. Furthermore, the constituent entity located in Malta must also notify the Commissioner of the identity of the entity that is filing the top-up tax information return as well as the jurisdiction in which it is located, in terms of regulation 5(4). The format of such notification as well as the procedure for notifying the Commissioner will be communicated at a later stage.

However, given that Malta has elected for the delayed application of the IIR and UTPR in terms of Article 50 of the directive, then the top-up tax information return cannot be filed in Malta. Nevertheless, in order to ensure the proper functioning of the directive as explained above, ultimate parent entities of in scope MNE groups which are situated in Malta must nominate a designated filing entity in another Member State or a third country, for the latter entity to be able to file such return. It is understood also that in such cases, constituent entities of an in scope MNE group would still be required to process and transfer all information necessary to the designated filing entity of the group, in order to permit such entity to duly compile and file the top-up tax information return.

The obligation imposed by regulation 5(4) would remain in force even during such delay period, and thus local constituent entities would still have the obligation to inform the Commissioner of the identity of the filing entity as well as other pertinent information which the Commissioner may require.