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Corporate Taxation

# Global Minimum Corporate Tax Regime (Pillar II)

## Law 41/2024 - Portugal transposes Council Directive (EU) 2022/2523 of December 15, 2022 (Pillar II Directive) into national law

Portugal - Legal Flash

November 18, 2024

### Key aspects

- Law 41/2024 of November 8 transposed Council Directive (EU) 2022/2523 of December 15, 2022, into national law.
- The directive, commonly referred to as the **Pillar II Directive**, establishes a **global minimum level of taxation** for multinational enterprise groups and large-scale national groups in the European Union.
- The Global Minimum Corporate Tax Regime ("**GMCTR**") introduces a new top-up tax when the effective tax rate of a covered group is below 15% in a given jurisdiction.
- Law 41/2024 includes (i) the income inclusion rule (IIR), (ii) the undertaxed profits rule (UTPR), and (iii) the qualified domestic minimum top-up tax (QDMTT).
- Transitional provisions and safe harbor rules for these enterprises are also included, enabling a gradual adaptation to the new requirements.
- The GMCTR takes effect for tax years starting on or after January 1, 2024, except for the UTPR rule, which will only apply from January 1, 2025.

## Background - Directive 2022/2523 (Pillar II)

The Pillar II Directive follows from an action promoted by the **Organization for Economic Co-operation and Development** (OECD) in the context of the base erosion and profit shifting plan ("**BEPS Plan**") aimed at combating the erosion of the tax base and the transfer of profits to low-tax jurisdictions. Published in the *Official Journal of the European Union* on December 22, 2022, the directive aims to establish a minimum effective tax rate of 15% on the profits of multinational groups, regardless of the jurisdiction in which their operations are located, to mitigate aggressive tax planning practices and promote tax transparency at a worldwide level.

The directive applies exclusively to large corporate groups; that is, those with a turnover of at least **€750 million** in 2 or more of the previous 4 tax years. The term "group" refers, as a rule, to a group of entities that are related to each other through ownership or control and, therefore, have an obligation to present consolidated accounts as one single economic unit, regardless of individual exemptions.

As we will describe below, despite the December 31, 2023, deadline established by the European Commission, Portugal only transposed the Pillar II Directive on November 8 last through Law 41/2024, which introduced the **GMCTR** into the Portuguese legal order.

## Transposition - Law 41/2024

**Law 41/2024 — transposing into national law Directive (EU) 2022/2523** on a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union — has been published.

This law introduces the **GMCTR**, in line with the model rules developed under the **OECD/G20 Inclusive Framework**, establishing a top-up tax when the effective tax rate of a covered group, calculated according to the criteria defined in law, is less than 15% in a given jurisdiction.

When a situation has been identified where the group's effective tax rate is below the minimum threshold of 15% in a specific jurisdiction, it may become necessary for the other group entities to pay the remainder, applying the specific rules established in the directive and now transposed into national law. To this end, article 1 of the GMCTR, under the heading "Subject-matter," introduces the following rules.

## Income inclusion rule (IIR)

The parent entity of a multinational enterprise group or large-scale national group calculates and pays its share of the top-up tax in respect of the enterprises in the group that are subject to low taxation.

**Articles 5 and 6 of the GMCTR** specify the procedures for applying this rule. First, they adopt a **top-down approach** to identify the enterprise responsible for paying the top-up tax (parent entity). Under this rule, the responsibility initially falls on the ultimate parent entity (as defined in article 3.1.14). If there is an exclusion or if the ultimate parent entity is located in a jurisdiction that does not apply this rule, the burden is transferred to **the intermediate parent entity** (as defined in article 3.1.20), maintaining the same top-down approach.

A **special rule** was also inserted for situations where there are **partially-owned parent entities** (as defined in article 3.1.22); that is, constituent entities of the group in which more than 20% is directly or indirectly owned by one or more entities that are not constituents of that group.

## Undertaxed profits rule (UTPR)

A constituent entity of a multinational enterprise group may have to assure the payment of the top-up tax that has not been collected through the IIR in respect of constituent entities of that group that are subject to low taxation.

Law 41/2024 transposes the UTPR in articles 8, 9, and 10 of the GMCTR, characterizing it as **a subsidiary rule** aimed at ensuring the effective collection of the top-up tax that has not been assessed and paid by the parent entities under the IIR. Therefore, payment responsibility is transferred to the entities owned, enabling the top-up tax to be collected.

The constituent entities that may be called upon to pay this tax are those belonging to a group where the **ultimate parent entity** is (i) located in a jurisdiction that does not implement the IIR, (ii) located in a low-tax jurisdiction that does not ensure application of the minimum rate, or (iii) an excluded entity under article 2.3 of the GMCTR.

## Portuguese qualified domestic minimum top-up tax (QDMTT)

The QDMTT is a top-up tax on the surplus profits of all constituent entities subject to low taxation and located in Portugal, taking precedence over the **IIR** and **UTPR**.

The introduction of the **QDMTT** in **article 7 of the GMCTR** enables tax revenue to be kept in Portugal, mitigating the erosion of the tax base and preventing foreign jurisdictions from taxing the difference between the effective rate applied in Portugal and the pre-defined threshold of 15%.

Therefore, a constituent entity that is covered by the GMCTR and subject to low taxation in Portugal will be subject to the QDMTT. This tax minimizes the need to apply international top-up tax allocation rules, such as the **IIR** and **UTPR**, by internally resolving the impact of minimum taxation and preventing tax allocation conflicts with other jurisdictions.

## Transitional regimes

Law 41/2024 establishes a **transitional regime** for applying the GMCTR, aimed at facilitating the gradual adaptation of companies to the new global minimum corporate tax rules and promoting a coordinated and consistent implementation among European Union Member States.

### Substance exclusion

Article 24 of the GMCTR establishes an income exclusion based on substance, enabling a constituent entity to exclude from its income 5% of its eligible salary expenses with eligible employees who work for the group and of the book value of the eligible tangible assets it holds.

Article 2 of Law 41/2024 introduces transitional percentages for excluding substance-based income to raise the standard percentage from 5% to specific ranges between tax years 2024 and 2032, varying from 9.8% to 5.8% for salary expenses associated with employees and from 7.8% to 5.4% for eligible tangible assets held by constituent entities of the group.

### Safe harbor rules

The GMCTR also establishes safe harbor rules that enable the reduction of the top-up tax if certain requirements are met:

a) UTPR - Article 3 of Law 41/2024 specifies that the top-up tax assessed under the **UTPR** for the ultimate parent entity's jurisdiction will be reduced to zero for tax years starting on or before January 1, 2026, and ending on or before December 31, 2026, if the jurisdiction applies a nominal corporate income tax rate of at least 20%.

b) Country-by-country reporting (CbCR) - Article 4 of Law 41/2024 establishes that based on the declaration of financial and tax information by country or jurisdiction, the top-up tax may be reduced to zero for each of the tax years starting on and before December 31, 2026, and ending on or before June 30, 2028, in the following situations:

1. ***De minimis* exclusion** - If the group declares a total income in the jurisdiction of less than **€10 million** and pre-tax earnings in the jurisdiction of less than **€1 million**;
2. **Transition rate** - If the group calculates a simplified effective tax rate of at least the transition rate for that jurisdiction and tax year; **namely, 15% in 2024, 16% in 2025, and 17% in 2026**; or
3. ***De minimis* exclusion of substance** - If the group's pre-income tax profit in the jurisdiction is less than or equal to the substance-based income exclusion amount in respect of the constituent entities that are considered resident in that jurisdiction for CbCR purposes.

c) **Initial phase companies** - **Article 44 of the GMCTR** establishes a reduction to zero of the top-up tax payable by an ultimate or intermediate parent entity in the first five years after the regime enters into force if the multinational enterprise group or national group is in the initial phase of its international activity. This initial phase is defined by the following criteria: (i) inclusion of constituent entities in no more than 6 jurisdictions, and (ii) the sum of the net book value of the tangible assets of all the constituent entities other than in the reference jurisdiction does not exceed **€50 million**.

## Entry into force

As regards the entry into force of the GMCTR, this regime takes effect for tax years starting on or after **January 1, 2024**, except for the **UTPR rule**, which will only apply to tax years starting on or after **January 1, 2025**.

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