

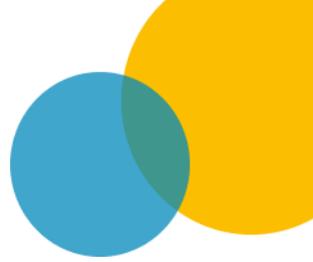


**INBOUND
INVESTMENT IN THE
EU & SUBSTANCE
REQUIREMENTS FOR
EU CORPORATE
HEADQUARTERS
POST-BEPS**

23 SEPTEMBER 2021

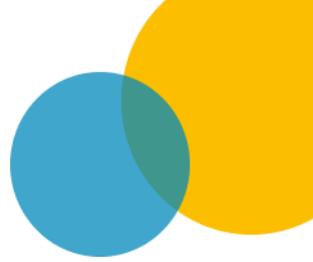
Your global tax partner

AGENDA



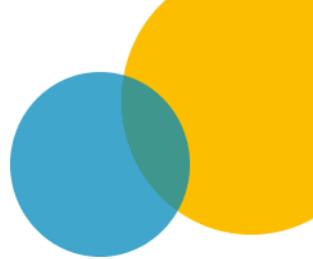
1. Introduction
2.
 - Cyprus - PPT & EU GAAR
 - Ireland - Beneficial ownership
 - Luxembourg - ATAD 3: a new concept of substance?
 - Malta - Substance
 - Netherlands - Netherlands & substance
3. Panel Discussion
4. Questions and Answers

BACKGROUND 1



- ❖ Top HoldCo is a company resident in ASIA/US/Africa and owns directly or indirectly various subsidiaries in different countries (the “Group”).
- ❖ Such subsidiaries carry on the business activities of the Group in local markets. The Group owns the shares of 5 such subsidiaries, located in EU.

GROUP STRUCTURE



▶ Top HoldCo owns directly or indirectly a number of subsidiaries in different countries.

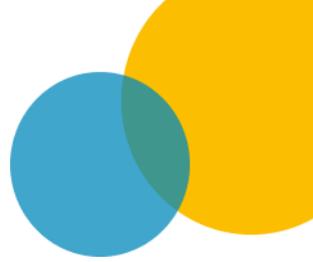
▶ Most Sub(s) carry on the business activities of the group in local markets

Principal Entity
TOP HoldCo

▶ In EU, owns the shares of five such companies, each located in different EU Member States.

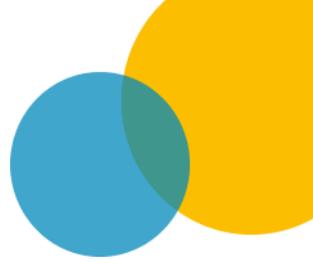


BACKGROUND 2



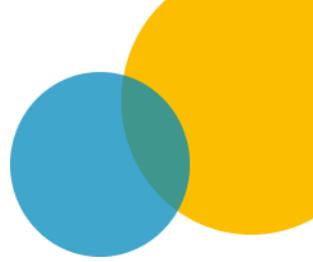
- ❖ The Group is considering establishing an EU regional company for the purpose of providing group services to these companies, including:
 - management services such as accounting, legal advice and human resources;
 - financing and treasury services such as managing currency risks and arranging hedging transactions; and
 - some other non-financing related services.

BACKGROUND 3



- ❖ For establishing an EU regional company, the Group is considering the following:
 - Skilled labour force;
 - Reliable legal system;
 - Business friendly environment;
 - Political stability;
 - Sophisticated banking industry; and
 - Comprehensive double taxation treaty network.

BACKGROUND 4



- ❖ For establishing an EU regional company, the Group is also considering the following tax related issues:
 - Principal Purposes Test (PPT) & EU General Anti-Avoidance Rule (GAAR);
 - Beneficial ownership;
 - Country by Country reporting (CbCR) and Pillar 2 implications;
 - Corporate and transfer pricing (TP) substance;
 - EU list of non-cooperative jurisdictions (e.g., non-deductibility of costs, CFC, WHT) & ATAD 3 fighting the abuse of shell entities; and
 - Comprehensive double taxation treaty network.

**CYPRUS
- PPT & EU
GAAR**

CHRISTOSTHEOPILOU

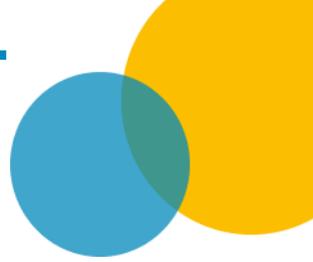
TAXANDCYPRUS

DECONSTRUCTION OF THE PRINCIPAL PURPOSE TEST (PPT)

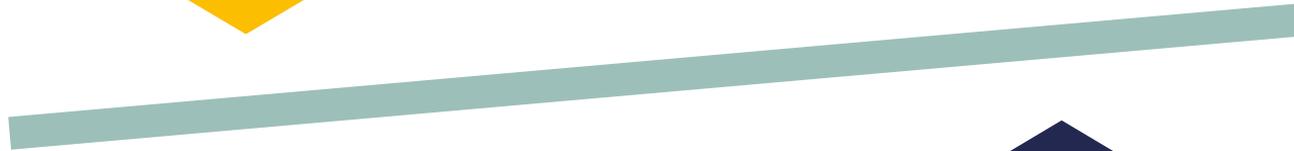


- ❖ “**Notwithstanding** the other provisions of this Convention,
- ❖ a **benefit** under this Convention shall not be granted in respect of an item of income or capital if it is **reasonable to conclude**, having regard to all relevant facts and circumstances, that obtaining that benefit was **one of the principal purposes** of any arrangement or transaction that resulted directly or indirectly in that benefit,
- ❖ **unless** it is established that granting that benefit in these circumstances would be **in accordance with the object and purpose** of the relevant provisions of this Convention.”

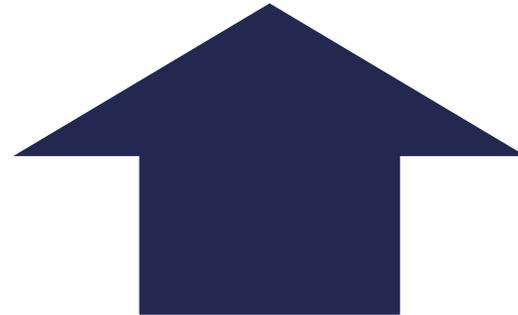
TWO MAIN ESCAPES FROM BEING CAUGHT BY PPT



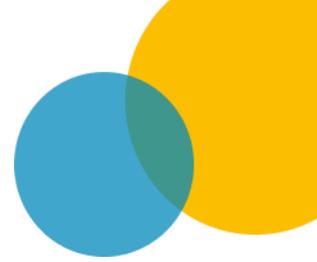
Obtaining tax treaty benefit is not a **principal purpose**



Granting of tax treaty benefit is in accordance with **object and purpose** of the relevant provisions of the tax treaty



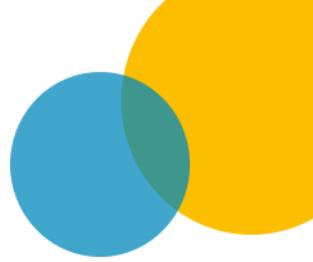
BENEFIT IS NOT A PRINCIPAL PURPOSE



2017 OECD Commentary

- ❖ Where an arrangement is **inextricably linked** to a core commercial activity, and its form has not been driven by considerations of obtaining a benefit, it is unlikely that its principal purpose will be considered to be to obtain that benefit.
- ❖ “[...] removing the obstacles that double taxation presents to the development of economic relations between countries” because “[its] harmful effects on the exchange of goods and services and movements of capital, technology and persons are so well known”.

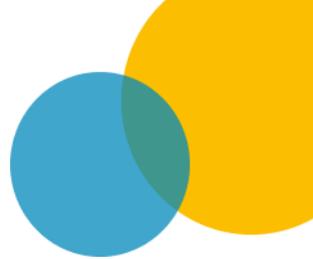
OBJECT AND PURPOSE OF A TREATY



2017 OECD Model: PREAMBLE TO THE CONVENTION

- ❖ Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,
- ❖ Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for **non-taxation** or **reduced taxation** through **tax evasion** or **avoidance** (including through **treaty-shopping** arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States),

EU GENERAL ANTI-ABUSE RULE (GAAR): ATAD ARTICLE 6



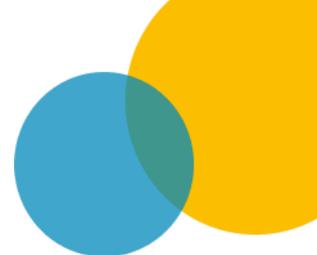
- ❖ An arrangement or a series of arrangements shall be ignored if:
 - put into place for the **main purpose** or **one of the main purposes** of obtaining a tax advantage that defeats the **object or purpose** of the tax law,
 - **are not genuine** having regard to all relevant facts and circumstances
- ❖ **not genuine means:** to the extent that the arrangement(s) lack valid commercial reasons which reflect economic reality.
- ❖ GAAR is a minimum rule because Anti-Tax Avoidance Directive (**ATAD**) shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse

**IRELAND
- Beneficial
Ownership**

SONYAMANZOR

WILLIAM FRY

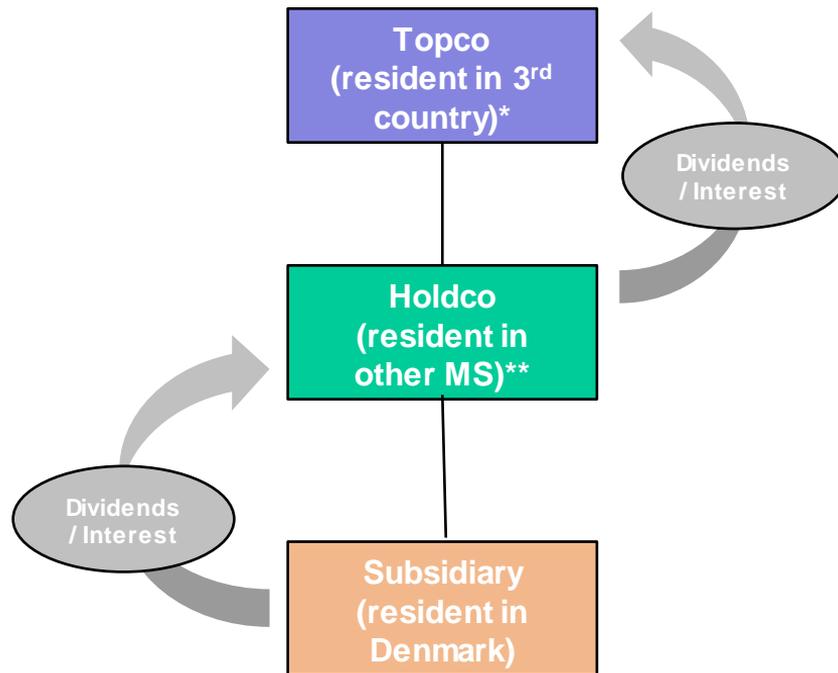
THE PRE 2019 CONTEXT



- ❖ A low threshold for holding companies to satisfy beneficial ownership/substance requirements in the EU.
- ❖ Many countries had little or no domestic anti-avoidance legislation.
- ❖ No general EU anti-abuse principle in relation to direct tax matters.
- ❖ No CFC provisions in traditional holding company locations.

DANISH CASES

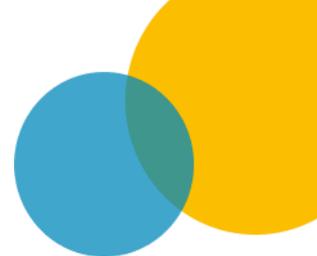
*WHT exemptions under
PSD/IRD*



* Topco's either resident in Tax Treaty States or Non-Tax Treaty States

** Luxembourg, Cyprus or Sweden

DANISH CASES

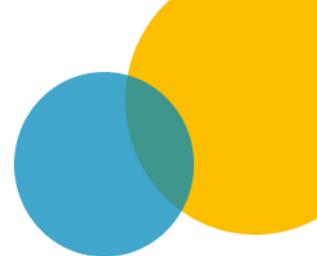


Findings of the court:

Beneficial Ownership requirement under I/RD:

- ❖ **Beneficial Owner:** The entity which economically benefits and has the freedom to use and enjoy the payment.
- ❖ OECD commentary is relevant for interpreting the concept of beneficial ownership.
- ❖ Domestic Courts should consider the “economic reality” of the situation: A substance over form approach.
- ❖ Wide scope for interpretation by national courts.

DANISH CASES

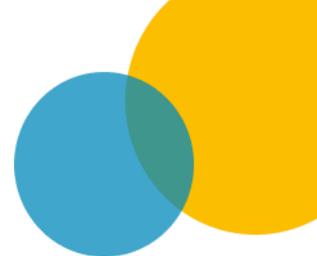


Findings of the court:

Abuse of rights principle:

- ❖ General EU anti-abuse of rights principle extended to direct tax matters.
- ❖ Tax benefit under I/RD or P/SD must be denied if an arrangement constitutes an abuse of rights.
- ❖ Abuse of rights principle is independent of beneficial ownership requirement. No obligation on member state to identify the beneficial owner of payments if abuse is identified.

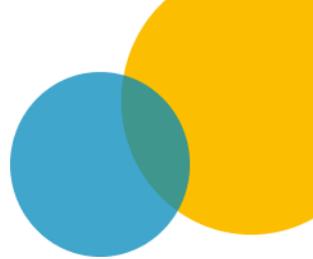
DANISH CASES



Indicators of abuse of rights:

- ❖ If the structure is purely one of form with a principal objective of obtaining a tax advantage running counter to the aim of the applicable law.
- ❖ If dividend or interest payments are very soon after receipt passed onto entities which do not qualify for benefits under the relevant Directive.
- ❖ If the sole activity of the conduit is the receipt of dividends or interest (fact-based test).
- ❖ If a contractual or legal obligation on the recipient company to pay the interest or dividends exists.

IMPLICATIONS OF THE DANISH CASES



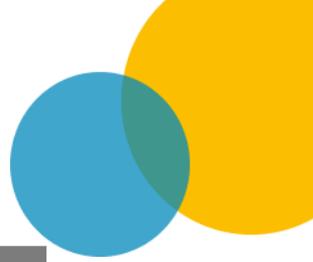
- ❖ A higher threshold for the beneficial ownership requirement to be satisfied and more emphasis placed on this by domestic courts and tax authorities.
- ❖ General EU anti-abuse of rights principle can be relied upon to deny a tax benefit under I/RD or P/SD even where no anti-avoidance legislation in domestic law.
- ❖ Increased structure risk for Corporate Groups.
- ❖ Source countries focus and sensitivities.
- ❖ An increase in sponsors' activities in a single regional jurisdiction.

**LUXEMBOURG
- ATAD 3: A New
Concept Of
Substance?**

**ROMANTIFFON &
STEVE DRISSOU**

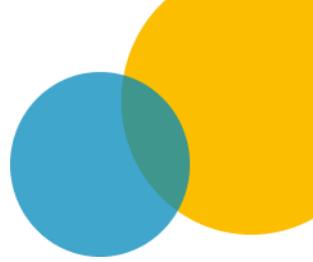
ATOZ

ATAD 3



IN A NUTSHELL	
WHAT IS IT?	Consultation on tax avoidance – fighting the abuse of shell entities and arrangements for tax purposes
WHY?	The EU Commission believes taxpayers operating cross-border are using legal entities with no or minimum substance and no real economic activities to reduce their tax liability
ORIGIN	Communication from the Commission on Business Taxation for the 21 st Century (18 May 2021)

ATAD 3



IN A NUTSHELL

FORM

Consultation under the form of a questionnaire

TIMING

- ❖ Consultation closed on 27 August 2021
- ❖ Legislative proposal setting out union rules to neutralize the misuse of shell entities for tax purposes: Q4 2021

ATAD 3

Do we really need a new legislative arsenal to tackle potentially aggressive tax planning structures?

DOMESTIC PROVISIONS

- ⌘ Interest deduction rules
- ⌘ CFCs
- ⌘ Exit tax
- ⌘ GAAR
- ⌘ Hybrid mismatch
- ⌘ DAC6

TREATY PROVISIONS

- ⌘ MLI/PPT
- ⌘ Beneficial ownership

EU LIMITATIONS

- ⌘ Anti abuse legislation to be aligned with EU law and EU case law
- ⌘ Wholly artificial arrangement doctrine developed by *Cadbury Schweppes*

**MALTA
- Substance**

WALTER CUTAJAR

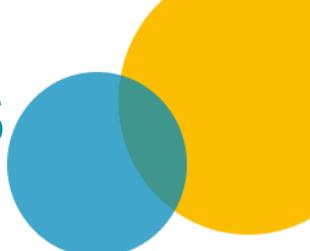
AVANZIA TAXAND

CORPORATE SUBSTANCE



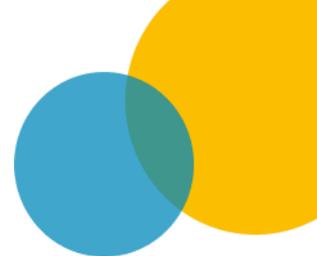
- ❖ Substance requirements for EU holding companies vs effective management and control (mind and management).
- ❖ Austrian Supreme Administrative Court for periods pre-2019 with respect to refund of Austrian WHT to a Luxembourg (VAT registered) company:
 - Several significant investments in other EU and non-EU countries,
 - Three employees (director, accountant and office manager),
 - Operating premises in Luxembourg,
 - Taxpayer for VAT purposes in Luxembourg.
- ❖ CJEU Judgements (6 in all) in the Danish Beneficial Ownership Cases:
 - C-115/16, C118/16, C-119/16 & C-299/16 re Interest and Royalties Directive (IRD),
 - C-116/16 & C-117/17 re Parent Subsidiary Directive (PSD).

CORPORATE SUBSTANCE – DANISH CASES



- ❖ Concept / definition of ‘Beneficial Owner’ (BO) and effect of Commentaries on OECD Model Tax Convention (MTC). Article 3(2) of MTC regarding the domestic law meaning.
- ❖ CJEU expands on the general anti-abuse principle enshrined in EU law:
 - Artificial arrangement/s, group structure, financing,
 - Conduit companies, BOs, treaty shopping, tax transparency,
 - Economic activity, real substance, value added.
- ❖ Anti-abuse in PSD to avoid double non-taxation and the Participation Exemption regimes in many EU Member States.

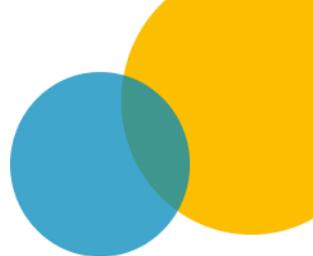
SUBSTANCE AND BEPS



- ❖ Five actions to align taxation and substance:
 - Prevent treaty abuse (Action 6)
 - Prevent the artificial avoidance of permanent establishment status (Action 7)
 - Assure that transfer pricing (TP) outcomes are in line with value creation (Actions 8, 9 and 10).

- ❖ Where the Economic Substance Test applies, companies must demonstrate that they have economic substance in that jurisdiction by satisfying all of the following:
 - Being directed and managed there,
 - Conducting Core Income Generating Activities (CIGA) there, and
 - Having adequate people, premises and expenditure there.

Application of substance requirements for IP Income



Lower risk scenarios			Higher risk scenarios (i.e. involvement of foreign related parties)		
1. IP assets (e.g. patents) <i>Substantial activity = R&D</i>	Necessary staff, premises, equipment, expenditure, decision-making etc.	<u>Filing information</u> Type A. Business type, gross income, expenses and assets, premises, employees, proof of core income generating activities, etc.	1. IP assets (e.g. patents) <i>Substantial activity = R&D</i>	Necessary staff, premises, equipment, expenditure, decision-making etc.	<u>Filing information</u> Type A. Business type, gross income, expenses and assets, premises, employees, proof of core income generating activities, etc.
2. Marketing assets (e.g. trademarks) <i>Substantial activity = branding and marketing</i>	Necessary staff, premises, equipment, expenditure, decision-making etc.	<u>Filing information</u> Type A. Business type, gross income, expenses and assets, premises, employees, proof of core income generating activities, etc.	2. Marketing assets (e.g. trademarks) <i>Substantial activity = branding and marketing</i>	Necessary staff, premises, equipment, expenditure, decision-making etc.	<u>Filing information</u> Type A. Business type, gross income, expenses and assets, premises, employees, proof of core income generating activities, etc.
3. Other Core Income Generating Activities (CIGA) <i>Substantial activity = Strategic decision-making, managing and bearing principal risks, underlying trading activities, etc.</i>	Necessary staff, premises, equipment, expenditure, decision-making etc.	<u>Filing information</u> Type A. Business type, gross income, expenses and assets, premises, employees, proof of core income generating activities, etc.	3. Other Core Income Generating Activities (CIGA) <i>Substantial activity =</i> <ul style="list-style-type: none"> • High degree of DEMPE; & • Historical DEMPE; & • Full time highly skilled employees that permanently reside and perform CIGA in the jurisdiction 	Necessary staff, premises, equipment, expenditure, decision-making etc.	<u>Filing information</u> Type A information PLUS Type B information • Detailed business plans • Employee information • Proof of decision-making in jurisdiction

Source:

Resumption of Application of Substantial Activities Factor to No or only Nominal Tax Jurisdictions

Inclusive Framework on BEPS: Action 5

© OECD 2018

Scenarios which are not sufficient to meet substance requirements for IP income

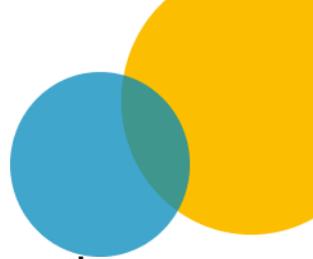
4. Merely passively holding the IP asset in the jurisdiction	=	
5. Periodic decisions of non-resident board members	=	

SUBSTANCE AND COVID-19



- ❖ Guidance from OECD entitled ‘OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis’:
 - Concerns related to the creation of PE – Home Office, Agency PE, etc,
 - Concerns related to the residence status of a company (place of effective management),
 - Concerns related to cross border workers and residence status of individuals.
- ❖ Some EU Member States enacted legislation such as the Dutch Emergency Act which includes the facilitation of electronic decision making by temporary derogation from the legal and statutory provisions concerning holding physical meetings of legal entities.

SUBSTANCE – CONCLUDING REMARKS



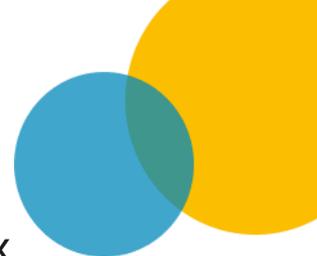
- ❖ Concept of substance has evolved and changed particularly following the Danish Beneficial Ownership Cases and BEPS – Actions 6, 7, 8, 9 and 10 but also Action 5 is relevant to substance.
- ❖ Temporary measures or derogations due to pandemic – OECD and EU Member States such as The Netherlands, Luxembourg and others.
- ❖ What's next? What about substance through a Cyber World?
- ❖ Will substance continue to be relevant once the global minimum tax of 15% is implemented?

NETHERLANDS

EVERT-JAN SPOELDER

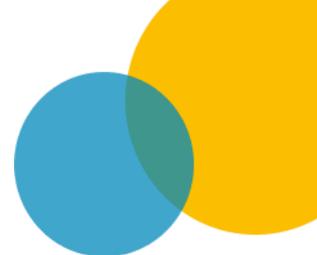
TAXAND NETHERLANDS

SUBSTANCE DEVELOPMENTS



- ❖ Post-BEPS trend: enhanced substance requirements throughout Dutch tax laws
 - Regional headquarter level (i.e. Dutch entities)
 - Financing companies (penalty: exchange of info)
 - Holding companies (announced. Penalty: exchange of info)
 - Access to Dutch advance tax ruling team
 - Inbound investments (i.e. foreign investor level)
 - Dividend WHT exemption rules
 - Interest WHT exemption rules

SUBSTANCE DEVELOPMENTS



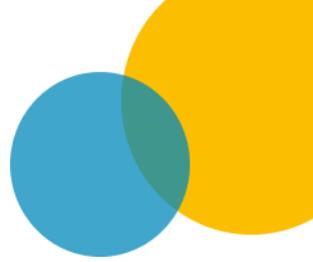
❖ Details on enhanced substance criteria

- General rules:
 - Typical substance criteria (local address, directors, bank account etc.); and
 - €100k relevant employment costs; and
 - Office space at disposal
- Note: no 'safe harbour' anymore, following ECJ case law (e.g. Jühler/Deister)
- For most rules, complying results in shifting burden of proof to DTA
- For WHT rules, counter-evidence remains possible
 - Ultimate test: absence of a 'wholly artificial arrangement'

A graphic consisting of three overlapping circles. The largest circle is dark blue and contains the text "PANEL DISCUSSION". It overlaps with a medium-sized light teal circle to its right and a medium-sized bright blue circle below it. The text "PANEL DISCUSSION" is centered within the dark blue circle in a bold, white, sans-serif font.

**PANEL
DISCUSSION**

CASE STUDY SUMMARY: REGIONAL GROUP SERVICES COMPANY IN EU



▶ **EU regional company** for providing group services

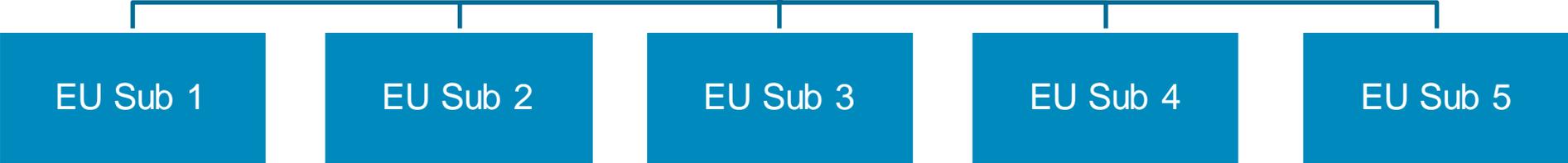
▶ **Management** services: accounting, legal advice & HR;
▶ **Financing** and treasury services: managing currency risks & hedging;
▶ **Other** non-financing related services.

Principal Entity TOP Holdco

EU Headquarters

Tax considerations:

- 1) PPT and EU GAAR;
- 2) EU Blacklist;
- 3) Beneficial ownership;
- 4) CbCR and Pillar 2;
- 5) Corporate and TP substance;
- 6) Tax Treaty network.



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