



Ministerie van Financiën

ATAD2 impact measurement

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1 Introduction

The second EU Anti-Tax Avoidance Directive (ATAD2) entered into force on 1 January 2020. The legislation is intended to tackle hybrid mismatches. Under a hybrid mismatch, a financial instrument, permanent establishment or legal form is treated differently for tax purposes in two different countries. Taxpayers can take advantage of the difference in treatment to avoid or defer taxation, for instance if they can deduct costs for a particular transaction in one country but need not add the profit from the transaction to their earnings in the other country. ATAD2 neutralises the effects of a hybrid mismatch by denying a deduction or taxing the benefit in such cases.

A key hybrid mismatch that was relied on in the Netherlands is the 'CV/BV structure'. This impact measurement will focus on this mismatch in particular. For US enterprises, the CV/BV structure was a means whereby they could arrange the long-term deferral of taxation on profits they made outside the United States. This involved using a Dutch limited partnership (*commanditaire vennootschap*; CV). The CV was treated as transparent¹ for Dutch tax purposes, meaning that it had no tax liability in the Netherlands. From the Dutch perspective, the profit made by the CV was attributed to the CV's members established in the US. However, the US offered the possibility of treating a CV as opaque for tax. This meant that the US only taxed the CV's profit when it was distributed by the CV to its members in the US.

In this structure, the CV was generally the owner of intangible assets (such as a patent) made available via a Dutch private limited liability company (*besloten vennootschap*; BV) to other group enterprises. The payments (often royalties) received by the BV from the other group enterprises were taxed in the Netherlands after the deduction of costs. Because the payments (royalties) made to the CV were deductible, effective tax was levied in the Netherlands on a – limited – profit in respect of the activities carried out in the Netherlands. Because the US only levied tax on the profit when it was distributed by the CV to its members in the US, the ultimate taxation of the payments made to the CV could be deferred for a very long time.

¹ Transparent for tax means that, rather than the entity paying tax on its profit, tax on profit is paid by the members of the entity. Tax is therefore levied as if the entity did not exist.

2 Earlier analysis of hybrid CV/BV structures

In 2016, during the preparation of the hybrid mismatch measures in ATAD2, a specific analysis was conducted of the extent to which it was possible to gain an insight into the use of the CV/BV structure in the Netherlands. It was apparent from the analysis that it was not possible, on the basis of existing information, to identify CV/BV structures. This meant that the exact number of structures could not be determined. It was known, however, that the Tax Administration had issued rulings relating to the CV/BV structure to 98 enterprises. In order to gain more of an insight into the structure, a survey was then undertaken among enterprises' customer coordinators. In many cases the customer coordinators confirmed that the CV/BV structure had indeed been set up. But there was a significant limiting factor in that no insight could be provided into the amount flowing to the CV, since the cost deduction by the BV vis-à-vis the CV was not included specifically in the tax return. The customer coordinators also reported that some structures had been set up but were not used in practice since the enterprise did not generate a profit on the activity.

The analysis also identified at the time that there were CV/BV structures for which no ruling had been issued. A sample survey was therefore also carried out among all enterprises with a US shareholder. It was estimated on the basis of the survey findings that there were around 600 enterprises that did use the CV/BV structure but did not have a ruling. As in the previous survey mentioned, it was not possible from the survey of this group of enterprises to estimate the size and significance of the amounts involved for tax purposes. It was concluded that, as a consequence, the total amount of deferred tax could not be determined.

It is no longer possible to defer tax in this manner due to the ATAD2 legislation, either because the enterprises in question have dismantled or have stopped using the structure, or due to the deduction limitation laid down by ATAD2.

3 Analysis of the effectiveness of efforts to tackle CV/BV structures and other mismatches

On account of the hybrid nature, it proved impossible in 2024 – as before – to make a direct measurement of the prevalence of these structures and the sums involved. But there are four indicators which shed light on the effectiveness of efforts to tackle them. These indicators are discussed in the following sections.

In this analysis it should however be noted in relation to the CV/BV structure that in 2018 the United States also enacted the GILTI legislation, which had already made the CV/BV structure less appealing. It is not possible to effectively distinguish between the effects of GILTI and ATAD2 in the results. But the expectation that the GILTI legislation will counteract CV/BV structures entirely is not necessarily warranted since, for instance, the GILTI legislation also has exceptions. For example, GILTI only taxes income in excess of an assumed return of 10% of tangible assets. This means that returns below the 10% threshold are not affected by GILTI. This impact measurement will examine specifically the extent to which impacts are visible from ATAD2's entry into force on 1 January 2020 in order to provide an indication of the extent to which they can be attributed to GILTI or ATAD2.

3.1 No more rulings for CV/BV structures

An initial indication of ATAD2's effectiveness is provided by the number of enterprises issued with a ruling. Because it became clear in 2017 that ATAD2 would be implemented in Dutch legislation, fewer CV/BV rulings were issued thereafter, and eventually none at all. Whereas in the period 2013-2015 an average of 25 rulings per year were issued for CV/BV structures, an average of 14 were issued in the period 2017-2019 for all types of hybrid entities (including CV/BV). In any case, no more rulings were issued as of 1 July 2019 due to a new ruling policy with regard to CV/BV structures.²

3.2 Fewer CVs with US dollars

A second indication that the legislation relating to hybrid mismatches is bearing fruit can be found in the commercial register of the Chamber of Commerce, in which CVs and the amount of capital paid into them by their partners are registered.³ That capital can for example consist of the abovementioned intangible fixed assets and can hence be an indicator of the degree of tax avoidance: the annual amount of tax avoidance via the CV/BV structure is an (unknown) percentage of this capital. Among the details registered is the currency of this capital. Because CV/BV structures

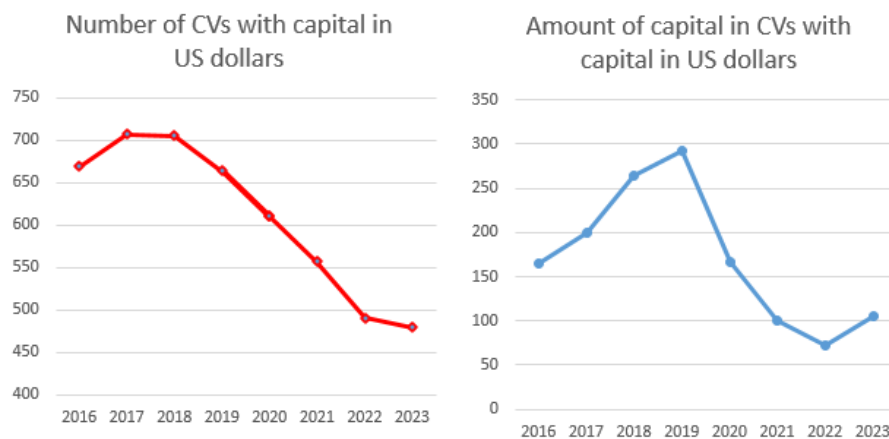
² Tax Administration (2019), Rulings with an international character. 2019 Annual Report.

³ Foreign CVs can also be registered in the commercial register if they carry on a business in the Netherlands.

generally involve US enterprises, it is instructive to look at CVs with capital issued in US dollars.

Ideally the actual presence of US partners would have been established on the basis of the commercial register, but this is not possible precisely in the case of CVs. It was possible, however, to determine the number of CVs and their paid-up capital. Capital issued in US dollars is indicative of CVs with a US partner. The results are presented in figure 1.

Figure 1: Capital in CVs



Source: Ministry of Finance calculations

The chart on the left shows that the number of CVs with capital in US dollars was still rising up to 2017, but from 2019 there was a clear downward trend. This may be a consequence of the announcement of ATAD2 in May 2017. From 2018/2019, multinationals probably began discontinuing these structures. While in 2017 there were still over 700 CVs with capital in US dollars, their number had fallen to just under 500 by 2022. By way of comparison, the number of CVs with capital in euros grew steadily over the same period.

A different development can be seen with regard to the amount of issued capital. A sharp rise is observable up to and including 2019, followed by a particularly sharp fall from 1 January 2020, the moment when the legislation entered into force. The sharp rise in capital in the years immediately before the new legislation was introduced suggests that enterprises may have made extra use of the structure in anticipation of the change. It is also possible that enterprises issued more capital on account of the GILTI legislation in order to stay below the 10% threshold.

From the start of 2020 the total amount of capital fell sharply, from around 300 billion dollars in 2019 to around 75 billion in 2022. This suggests that it was ATAD2 that had the greatest impact in combating the CV/BV structure.

3.3 Fall in Dutch profit at US enterprises in financial accounting statistics

A fourth indication that the ATAD2 legislation is effective can be found in the Country-by-Country Reporting (CbCR) statistics. In CbC reports multinationals indicate the countries in which they are represented and provide information on, among other things, their turnover, profit and number of employees in those countries. These statistics are based on financial accounting data, not tax data. Owing to the hybrid character of the CV/BV structure, there are no clear guidelines on the country in which a CV's profit must be recognised in these financial accounting statistics. From a Dutch tax perspective, the profit is part of the US tax base. However, the US offers the possibility of treating a CV as opaque for tax. From a CbCR perspective it is therefore unclear in what country these profits should be recognised, but it is probable that multinationals allocate these profits to the Netherlands in the financial accounting statistics. A comparison of corporation tax returns with reported profits in CbC reports shows that the CbCR profits are regularly considerably greater than profits according to the tax returns.

If the total profit of US multinationals is examined in the CbCR statistics, a very sharp fall in 2020 is immediately apparent. In 2017, US multinationals reported total positive profits of 70 billion dollars in the Netherlands. This amount rose to 99.5 billion dollars in 2019, the last year before ATAD2 entered into force. It then plummeted to 35.6 billion dollars in 2020. The figure rose again in the post-COVID-19 year 2021, but then the economy was picking up again.

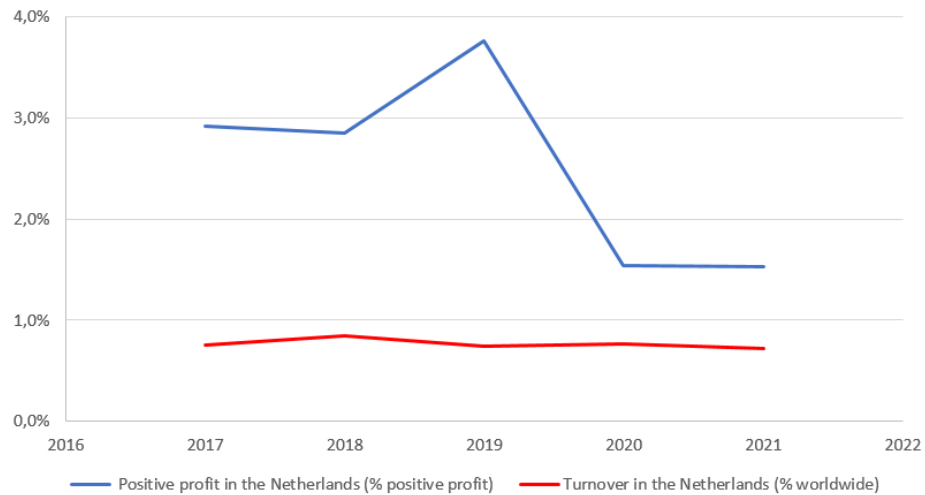
Table 1: Profit of US multinationals on the basis of CbCR

	2017	2018	2019	2020	2021
Positive profit in the Netherlands (\$bn)	70.0	84.4	99.5	35.6	52.4

Source: IRS, CbCR statistics

The effect of the economy can be corrected for by looking at the share of Dutch profit as a percentage of worldwide profit. It is also informative to compare fluctuations therein with changes in turnover.

Figure 2: CbCR financial accounting profit and turnover of US multinationals with positive profit attributed to the Netherlands as a percentage of worldwide profit and turnover.



Source: IRS, CbCR statistics

It can be seen that the positive profit in the Netherlands also falls – by almost half – as a percentage of worldwide profit, from 2.9% in 2017 to 1.5% in 2021. A similar trend is not observable with regard to turnover, which suggests that US enterprises have not wound down their substantive economic activities in the Netherlands. This is therefore an indication that US enterprises abandoned the CV/BV structure from 2020. This timing (i.e. from 2020) suggests that ATAD2, rather than the US GILTI legislation, has had the most significant impact.

It is noteworthy in this regard that, in 2019, the percentage of Dutch positive profit was considerably higher. This again suggests anticipation of the ATAD2 directive, with enterprises using the final year to channel extra profits to hybrid CVs.

3.4 Additions to taxable income for hybrid mismatches

Another indication of the effect of the measures against hybrid mismatches is the number of times an amount has been added to profit in connection with hybrid mismatches in corporation tax returns on the basis of this legislation. This is illustrated in table 2. In 2020, an amount was added to profit for hybrid mismatches in around 800 tax returns. The amounts totalled €1.1 billion. This means that the legislation is working in practice. It also means that not all hybrid structures have been discontinued, but that the advantage conferred by the mismatch has been eliminated. It is not possible to tell from the tax return what type of hybrid mismatch the adjustments specifically relate to. A breakdown has therefore been given by type of enterprise, distinguishing between multinationals, large enterprises

and SMEs.⁴ In the case of multinationals, figures are also given for multinationals with or without a US shareholder, and multinationals that had a ruling from 2016.

Table 2: Additions to taxable income for hybrid mismatches

Category	2020		2021	
	Number	Amount (mn)	Number	Amount (mn)
Multinationals	360	835	370	737
Non-US multinationals	100	666	110	594
US multinationals	260	165	260	143
US multinationals with a previous ruling	<5	4	<5	0
Large enterprises	18	60	80	49
SMEs	424	205	490	138
Total	802	1,100	950	924

It is clear that the largest additions to income in tax returns were made by multinationals. Multinationals added €835 million in 2020. The largest share of this amount is accounted for by non-US multinationals. In 2021 the amount was slightly lower, falling to €737 million.

Among multinationals, the largest number of additions to income in tax returns (around 260) were accounted for by parts of US multinationals. It is not possible to analyse on the basis of the data whether this is a consequence of a CV/BV structure or other hybrid mismatches, but it is plausible that in the case of US multinationals the hybrid mismatches in question included CV/BV structures. It is clear however that the amounts involved are on average relatively small, less than €1 million. This suggests that it is in particular the structures with the larger amounts that have been discontinued. The group of US multinationals that had previously applied for a ruling do not generally run up against ATAD2 legislation – the number of multinationals in this category is negligible (less than five). It appears that the group that previously had a ruling abandoned the structure as of 2020 or no longer channel profits through it.

There are also situations involving SMEs that make additions to taxable income on account of hybrid mismatches. They number some 400-500, around half of the total. They account for upward adjustments of profits totalling around €100 million to €200 million. It is possible that these 'SMEs' include entities that belong to large enterprises but have been classified as SMEs because they could not be linked to their parent company.

⁴ Multinationals are (parts of) enterprises with a worldwide turnover of more than €750 million. Large enterprises are enterprises that are not multinationals but that have more than 250 employees. SMEs are enterprises with fewer than 250 employees.

4 Conclusion

On account of their hybrid nature, it proved impossible to make a direct measurement of the prevalence of these structures and the sums involved. However, there are four indications that the legislation has been effective. There are no longer any rulings on CV/BV structures, the number of CVs with US dollars is clearly on the decline, and US enterprises are reporting less financial accounting profit in the Netherlands. The latter two effects only arise after the entry into force of ATAD2, which suggests that this legislation has had a greater impact than the US GILTI legislation introduced a few years earlier. Furthermore, where hybrid mismatches still exist, an adjustment is made to the profit in the tax return.

It may be concluded on the basis of these four indications that ATAD2 is effective in countering tax deferral via CV/BV structures.