

Approval of the Law establishing a Global minimum top-up tax for large-scale groups (Pillar 2) - A practical guide to the new top-up tax

Tax Alert



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21 December 2024 saw the publication in the Official State Gazette of Law 7/2024 of 20 December 2024, which, *inter alia*, establishes a top-up tax to ensure global minimum taxation for multinational enterprise groups and domestic large-scale groups (the "Pillar 2 Law").

Introduction. Transposition of the Pillar 2 Directive, in the form of a top-up tax.

Spain's Pillar 2 Law is based on the OECD's Pillar Two framework, which is mandatory in the European Union ("EU") per Directive 2022/2523 - dealt with in the following [tax alert](#) (available in English [here](#)).

The new tax seeks to ensure a global minimum effective tax rate of 15% (calculated according to specific rules) in each of the jurisdictions in which large-scale groups (defined as those with consolidated revenues exceeding Euros 750 million in at least two of the four fiscal years preceding the fiscal year in question) operate.

Where the minimum effective tax rate in any given country falls below 15%, a top-up tax must be paid to align it with this minimum rate.

The Pillar 2 Law introduces into the Spanish legal system a new tax (the "top-up tax" or "TUT") that will be **applicable to fiscal years beginning on or after 31 December 2023**. For entities whose fiscal year coincides with the calendar year, 2024 will be the first year affected.

The regulations implementing the TUT are expected to be approved in the near future (the provisional wording of which was disclosed in the public consultation phase). The future regulations will flesh out some of the aspects already provided for in the Pillar 2 Law and will contain certain implementing or interpretative provisions deemed necessary for the tax's effectiveness.

The regulations will be followed by a ministerial order approving the relevant tax returns and self-assessments, and publication of any other formal obligations that may be applicable.

We outline below some of the practical aspects that we consider most important for those seeking to understand how the new tax works:

What is the top-up tax?

The TUT is a direct, personal tax on the income obtained by entities and permanent establishments of groups subject to the Law, where they are located in a jurisdiction with an effective tax rate ("ETR"), calculated at jurisdiction level, that falls below the minimum 15% tax rate.

Such entities and permanent establishments are referred to in the Law as Constituent Entities ("CEs").

Where does the top-up tax apply?

The TUT is applicable throughout the Spanish territory.

Does this include the "foral" territories?

Yes, this includes the "foral" territories (the Foral Region of Navarre and the three historical territories of the Basque Country). In these territories, the TUT will be applied having regard to the tax regimes applicable under the Economic Agreements currently in force in each territory, and it will thus be necessary to monitor any future TUT-related changes to such Economic Agreements.

How about the Canary Islands and the autonomous cities of Ceuta and Melilla?

Yes, it will affect all entities located in Spanish territory, including entities located in the Canary Islands, Ceuta and Melilla. Groups subject to Pillar 2 that have CEs that apply any of the tax incentives provided for in such territories (e.g., Canary Islands Special Zone; incentives for investment in fixed assets in the Canary Islands; tax credits for income obtained in Ceuta and Melilla) should therefore pay even greater attention - if this is possible - to the new regulations.

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A three-pronged tax structure

Spain has implemented Pillar 2 by means of the approval of three forms of TUT:

- The Spanish domestic minimum top-up tax (“DMTT”): all Spanish-resident CEs of groups affected by Pillar 2 will be subject to this form of the tax where their aggregate ETR in Spain falls below 15%.
- The primary top-up tax: this will apply to Spanish-based parents (of groups affected by Pillar 2), in respect of CEs in which they hold direct or indirect stakes and which are located outside Spain, where the ETR in the relevant countries falls below 15%. This is the mechanism to reflect in the Spanish Pillar 2 Law what is referred to by the OECD as the “income inclusion rule” (“IIR”).
- The secondary top-up tax: this will apply to Spanish-based CEs in respect of group CEs located outside Spain that (i) are subject to a ETR below 15%, provided that (ii) the relevant tax shortfall has not been collected by another group entity. This is the mechanism to reflect in the Spanish Pillar 2 Law what is referred to by the OECD as the “undertaxed profit rule” (“UTPR”). Unlike the two other forms of the tax, which became applicable in 2024, the secondary top-up tax will be applicable as of 2025.

Affected groups. Three main types of groups.

Based on the structure of the new tax, we understand that affected groups can be divided into three categories:

- i) Multinational enterprise (“MNE”) groups with a Spanish ultimate parent entity (“UPE”). In these groups, both the Spanish DMTT (in respect of the portion corresponding to Spanish-resident CEs) and the primary top-up tax (in respect of the portion corresponding to CEs located outside Spain) may apply. Since the TUT would be collected by the CEs, the secondary top-up tax would not, in principle, apply.
- ii) Foreign MNE groups with CEs in Spain (e.g. Spanish subsidiaries; permanent establishments in Spain; parent entities other than the UPE). In these groups, all three forms of the tax may apply: the Spanish DMTT (in respect of the portion of TUT corresponding to Spanish-resident CEs); the primary top-up tax (in respect of the portion corresponding to CEs located outside Spain, where parent entities other than the UPE are located in Spain); and the secondary top-up

tax (where the above forms of the tax have not been collected in respect of a given CE).

- iii) Large-scale domestic groups, in which all of the CEs are located in Spain. In these groups, only the Spanish DMTT may be applied (as all of the CEs are resident in Spain).

Identification of affected groups

As noted above, the TUT applies to groups with annual revenues of Euros 750 or more - per the UPE's consolidated financial statements - in at least two of the four fiscal years immediately preceding the reporting fiscal year in question.

To confirm whether or not Pillar 2 applies to a given group, it is thus necessary to identify the group's UPE, define its perimeter and confirm whether or not the above consolidated revenue threshold is met.

Calculation of the effective tax rate or ETR

The TUT is designed to ensure a global minimum ETR of 15% in each jurisdiction in which large groups operate. The ETR must thus be calculated in accordance with the Pillar 2 rules applicable in each of the jurisdictions in which the group in question operates.

Generally speaking, the ETR will be calculated on a jurisdiction-by-jurisdiction basis by dividing the “adjusted covered taxes” (which will be the numerator of the ETR fraction) by the “qualifying income or loss” (which will be the denominator of the ETR fraction).

Taxes to be included under adjusted covered taxes

The Pillar 2 Law contains specific definitions of covered taxes, which include, but are not limited to, taxes on income or profits recognised on the entity's income statement. In this case, for example, we understand that Spanish corporate income tax will be deemed a covered tax for Pillar 2 purposes.

Nonetheless, classification as a covered tax for Pillar 2 purposes will need to be analysed on a case-by-case basis (e.g. taxpayers must consider whether the business activity tax, the so-called tax on banks or the energy levy, *inter alia*, are deemed covered taxes for these purposes).

Deferred tax expenses and income should also be factored in. However, in this case very specific rules must be observed when calculating the covered taxes, which could have significant impacts on the ETR calculation.

Lastly, the transitional regime set out in transitional provision one of the Pillar 2 Law (“*Tax treatment of deferred tax assets and liabilities and of assets*

transferred during the transitional tax period") may be particularly relevant for the purposes of covered taxes and, consequently, the ETR, and particular regard should thus be had to this regime, at least during the first few years.

Calculation of qualifying income or loss and adjustments to be made.

Specific rules are laid down for calculating qualifying income or loss (i.e. the denominator of the fraction, comparable to the "taxable income" / "tax base").

In essence, qualifying income or losses will be determined on the basis of the accounting income or loss established for this purpose (basically, the accounting income/loss of the CEs, determined according to the UPE's consolidation rules, without consolidation adjustments for intra-group transactions).

A number of Pillar 2 adjustments (e.g. adjustments relating to dividends, penalties, pensions and capital gains or losses) will be made to this accounting income/loss, all in accordance with specific rules, and taking into account the various options provided for therein.

As can be seen, neither the starting point (accounting income/loss) nor the adjustments to be made coincide with the parameters established in Spain's domestic corporate income tax legislation. This could imply that the "tax base" for Pillar 2 purposes (qualifying income or loss) may differ very significantly from the corporate income tax base for Spanish tax purposes.

Calculation of the TUT

In jurisdictions in which the ETR equals or exceeds 15%, no TUT need be calculated. However, in jurisdictions with an ETR of less than 15%, the resulting TUT will need to be calculated and where the result is tax payable, the relevant amount must be paid to the tax authorities.

The TUT is not merely calculated by multiplying (i) the difference between the 15% rate and the ETR in the relevant jurisdiction by (ii) the "tax base" for Pillar 2 purposes (qualifying income or loss). This is because the tax base may be reduced by the relevant percentages in respect of personnel costs and the value of qualifying tangible fixed assets (the "substance-based income exclusion" - "SBIE").

The result of the above calculation may be modified (i) where prior years need to be recalculated, thus leading to a larger payment in the current year (although this would not happen in the first year), or (ii) due to the existence of a DMTT approved in the relevant jurisdiction on terms reflecting the Pillar 2 rules (in other words, each country may approve legislation whereby, if a business group based in that

country is subject to an ETR lower than 15%, the TUT may be levied in the country concerned).

Entities liable for the TUT

Generally speaking, the entities liable for the TUT will be the entities of affected groups located in Spain. This will nevertheless depend on the type of TUT chargeable:

- The **Spanish DMTT** will be payable by the CEs of the group located in Spain.
- The **primary top-up tax** will be payable by the following CEs located (as the case may be) in Spain:
 - i) The UPE.
 - ii) An immediate parent entity ("IPE") whose UPE is located in a third jurisdiction or is an excluded entity that is not subject to and does not apply a TUT under a qualifying income inclusion rule.
 - iii) A partially-owned parent entity ("POPE").
- Lastly, the **secondary top-up tax** will generally be payable by CEs located in Spain, in respect of the TUT attributable to other CEs with a low tax rate that are either non-resident or located in other jurisdictions (although certain special rules are provided for).

However, in certain cases, the formal and material obligations of some taxpayers will be imposed on the entities identified in the Pillar 2 Law as "**substitute taxpayers**". For these purposes, the substitute TUT taxpayer (the party obliged to file tax return(s) and pay the tax debt(s)) shall be one of the following, in order of precedence:

- i) The UPE, where it is located in Spain (insofar as it is not considered an excluded entity); or failing that:
- ii) The Spanish-based parent entity (other than the UPE) with the highest net book value of tangible assets (among the parent entities of the group located in Spain) during the tax period; or, failing that:
- iii) The Spanish-based CE of the group with the highest net book value of tangible assets of all of the group's CEs located in Spain.

With this in mind, it will be particularly important to properly classify each of the group's CEs according to the definitions set out in the Pillar 2 Law, in order to determine the obligations arising for each one of them.

Simplification rules

A number of rules have been established to date with a view to simplifying (in some cases at least temporarily) the Pillar 2 compliance obligations for affected groups. Such measures may mean that no detailed TUT calculation is required (even where the group is located in a low-tax jurisdiction per the Pillar 2 rules).

Among others, the following rules are worth noting:

i) **Transitional safe harbour: applicable from 2024 to 2026**

The transitional safe harbour may mean that no detailed calculation of Pillar 2 is required until 2026, inclusive (for groups whose fiscal year coincides with the calendar year).

Under this measure, by verifying completion of three simplified tests (essentially based on the information contained in the country-by-country report and on certain information from the financial statements of the ECs), it may be possible to postpone the obligation to perform the detailed calculations required for the purposes of Pillar 2 during the transitional period. To the extent that the one of the tests is completed, the jurisdiction could be exempt from performing the detailed Pillar 2 calculation. The above tests must be analysed annually in each jurisdiction.

Each of the tests to be met for each of the jurisdictions in which the group is present is described below. Groups may comply with the requirements to apply a safe harbour in all, none, or only some of the jurisdictions in which they operate, depending on the jurisdictions in which they meet at least one of the tests:

i. **De minimis test**

This test would be met where, in the jurisdiction in question (the "**tested jurisdiction**"): (i) total revenues fall below Euros 10 million; and (ii) the profit before tax is lower than Euros 1 million or a loss has been incurred. The relevant amounts will be those reflected in the country-by-country report for the current year.

ii. **Simplified ETR test**

According to this test, the group should calculate the ETR ("transitional ETR") for each jurisdiction in a simplified manner, i.e. by dividing the jurisdiction's "simplified covered

taxes" (according to specific criteria) by the profit before tax (as reported in the country-by-country report). The transitional ETR to be reached in order to meet this safe harbour test will be different for each of the fiscal years in which the transitional safe harbour applies: 15% for fiscal years commencing up to and including 2024; 16% for fiscal years commencing in 2025; and 17% for fiscal years commencing in 2026.

iii. **Routine profits test**

The routine profits test compares (i) the profit before tax of a tested jurisdiction (as reported in the country-by-country report) and (ii) the amount of the substance-based income exclusion ("SBIE"), calculated in accordance with the OECD Model Rules. If a jurisdiction's SBIE is equal to or exceeds its profit before tax reflected in the country-by-country report, this test would be met and the tested jurisdiction would therefore qualify for the transitional safe harbour. This test will also be met where the tested jurisdiction has incurred a loss before tax per the country-by-country report.

This transitional regime will only apply where the country-by-country report is deemed qualifying for these purposes. The OECD has published different documents setting out the requirements to be met by the country-by-country report in order for a group to be eligible for the transitional safe harbour. It will be important to check whether the country-by-country report meets these requirements in order to benefit from this transitional regime.

ii) **Transitional regime for domestic groups or groups in the early stages of international expansion**

A transitional regime is established for domestic groups or groups in the early stages of international expansion, which may involve deferral of the detailed calculation required for the purposes of Pillar 2.

According to this regime, the DMTT (i.e. the tax to be calculated and, where appropriate, paid to the Spanish tax authorities in respect of the Spanish CEs) could be deemed to be zero for a period of five years (with no need to perform a detailed calculation of either the ETR or any TUT payable in respect of the CEs resident in Spain). This transitional regime may also apply to secondary top-up tax, but not to primary top-up tax.

In short, a group will be considered to be in the early stages of its international activity if, in a

given tax period, (i) its CEs are not located in more than six different jurisdictions and (ii) the sum of the net book value of the tangible assets of all of the group's CEs located in jurisdictions other than the "reference jurisdiction" does not exceed Euros 50 million.

iii) De minimis exclusion

Lastly, the Law provides for a *de minimis* exclusion rule similar to the transitional safe harbour *de minimis* test, albeit with significant nuances and applicable on a permanent rather than a temporary basis, whereby groups may elect, on an annual basis, to have the jurisdictional TUT considered equal to zero in a given fiscal year if (i) the average qualifying turnover of the entities in a given jurisdiction is less than Euros 10 million, and (ii) the average qualifying profit or loss of such jurisdiction represents a loss or profit of less than Euros 1 million. For these purposes, the average of both figures shall be the average for the reporting fiscal year and the two preceding fiscal years.

Formal obligations

The following formal obligations are of note (although the specific details of such obligations have yet to be confirmed):

- **GloBE information returns ("GIRs"):** generally speaking, CEs must file a GIR within fifteen months of the end of the relevant fiscal year. This deadline is nevertheless extended to 18 months for the first GIR (i.e. for groups with fiscal years that coincide with the calendar year, the first GIR would have to be submitted by 30 June 2026 and the second by 31 March 2027).

CEs may be exempted from filing a GIR in certain cases where the GIR is filed by another of the group's CEs, including foreign CEs (e.g. where the GIR is filed by a designated local entity or by the UPE, if based in a jurisdiction that has a qualifying competent authority agreement in place with the State in which the CE is located).

This GIR will foreseeably be somewhat uniform at global level. In the EU, the content of the GIR to be implemented by the EU Member States was approved at the end of October in the form of an Annex to DAC9 (<https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52024PC0497>).

- **Prior notifications:** the Law provides that CEs must notify the Spanish tax authorities of the entity that will be filing the GIR, among other aspects. In accordance with the Draft Royal Decree approving the Implementing Regulations for the Spanish TUT Law, such notification must, in principle, be

filed within the three months preceding the 15-month period referred to above (the first notification must nevertheless be filed within the two months prior to the aforementioned extended 18-month period).

- **TUT self-assessment:** generally speaking, the return must be filed within no more than 25 days of the end of the 15-month period following the close of the relevant fiscal year. The first TUT assessment must nevertheless be filed in Spain by 25 July 2026 at the latest (i.e. within no more than 25 days of the 18 months following the end of the fiscal year). This return must, in principle, be filed by the taxpayer or, as the case may be, by the substitute taxpayer. The substitute taxpayer may claim the amount of any TUT paid from the relevant taxpayer.
- **Other registration obligations:** certain countries are requiring groups to report in advance if they are within the scope of Pillar 2. We are currently unaware of any plans to establish such an obligation in Spain; it will nevertheless be necessary to monitor the matter closely in case this type of obligation is approved in the coming months.

Noteworthy aspects to be taken into account during the first year in which Pillar 2 is applied

The first year in which Pillar 2 applies may be particularly significant since the complex new principles to be incorporated into international taxation should be properly observed. The relevant systems will also need to be set up in this regard.

Moreover, the legislation sets out special rules for deferred taxes generated prior to the application of Pillar 2 (i.e. transitional provision one referred to above). These deferred taxes may need to be recognised or at least disclosed in the CEs' financial statements. Fulfilment of such requirements may prove extremely important, as failure to do so could lead items such as unused tax credits to result in higher taxation under Pillar 2 rules.

Other matters to be taken into account by the groups concerned

A brief overview of certain matters provided for in the Pillar 2 Law, which we consider should be taken into account by the groups and entities effected by Pillar 2 in the coming months, is provided below:

i) **The need to understand the Law and set up the relevant systems**

Pillar 2 establishes a very complex set of rules from both a technical and practical standpoint. Groups will need to adapt their systems to obtain the information required to meet Pillar 2 obligations, as their current systems most likely do not cater for the need to have the separate information (e.g. accounting information) necessary for the calculations required by the Law.

Moreover, in many cases, due to the level of complexity involved, it will be highly advisable to use specific software to confirm whether or not safe harbours should be applied by jurisdiction, perform the complex Pillar 2 calculations, comply with the formal obligations laid down in the various jurisdictions and properly document all of the above, even more so in the case of dynamic structures involving investments and divestments that modify the scope of the groups and further complicate application of the legislation.

In this regard, KPMG has developed a Pillar 2 tool, named **KBAT** ("KPMG BEPS 2.0 Automation Technology Platform"), to facilitate these calculations and the collection of data and criteria to be considered.

ii) **Accounting obligations**

The Pillar 2 Law amends the Spanish accounting framework (at both individual and consolidated level) to regulate potential accounting effects for the CE. Groups should therefore prepare for any new requirements that may be established in respect of disclosures to be included in the financial statements of their CEs. They should also be familiar with the Pillar 2 status in each countries, and foreseeably be in contact with accounting experts in the jurisdictions in which they operate.

iii) **Pillar 2 status in other countries**

Although most OECD member jurisdictions are moving steadily towards enactment of Pillar 2 rules, we have observed that they are working at different paces and are subject to different effective dates and tax obligations. Accordingly, it is important for the tax teams of the groups effected by Pillar 2 to keep abreast of Pillar 2 legislation in the coming years.

For example, the lawmakers of the various countries may adopt legislation whereby groups not subject to a minimum ETR of 15% in the jurisdiction concerned will pay a DMTT in their

own countries with a view to raising the tax rate to the 15% minimum rate stipulated in Pillar 2 (rather than paying such a tax in another jurisdiction - e.g. that of the UPE). The way this local TUT is considered and treated under Pillar 2 could vary depending on its characteristics (for example, if it meets the general Pillar 2 standards, it will be classified as a qualified domestic minimum top-up tax - "**QDMTT**".)

This QDMTT can also be classified as a safe harbour where certain requirements established by the OECD are met. The existence of a QDMTT classified as a safe harbour will avoid the need to perform the calculation in a different jurisdiction (e.g. in that of the UPE). Thus, where a group has CEs located in a country that has implemented a safe harbour QDMTT, it will only be necessary to review the implications in that country.

The OECD will both classify the DMTT as a (Q)DMTT and consider it as a safe harbour following a peer review of each of the DMTTs approved in the relevant jurisdictions.

In view of the above, the tax teams of the groups affected by Pillar 2 will need to ensure that they remain up to date with developments so that the relevant Pillar 2 obligations are duly fulfilled in the jurisdictions in which they operate.

iv) **Interpretation of the Pillar 2 Law**

For interpretation purposes, the General Directorate of Taxation is authorised to issue interpretative or clarifying provisions, which may include, where appropriate, the interpretative criteria derived from the Commentaries, Administrative Guidance and other principles or criteria drawn up and publicly disclosed by the OECD or the EU.

v) **Inspection procedures**

The Law provides that inspection procedures regarding the TUT will have a duration of up to 27 months. In this connection, tax inspections will generally be carried out on the CE considered to be the substitute taxpayer (subject to the provisions of the relevant implementing regulations).

vi) **Penalty regime**

The Pillar 2 Law provides for a specific penalty regime in relation to the CE's reporting obligations, with regard to both the GIR and any notifications to be submitted (it should be noted that, although certain limits are established, the amounts of the relevant penalties may be relevant).

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However, since no specific penalties are established for other circumstances, such as TUT revenue shortfalls, it will be necessary to refer to the General Taxation Law to categorise and determine the relevant penalties.

Contacts

Pelayo Oraa Gil
Partner
KPMG Abogados
Tel.: 91 456 38 41
poraa@kpmg.es

Isabel Fano
Partner
KPMG Abogados
Tel.: 619 980 994
ifano@kpmg.es

Clara Guasch
Director
KPMG Abogados
Tel.: 618 713 374
cguasch@kpmg.es

Felipe Martinez Sánchez
Director
KPMG Abogados
Tel.: 609 026 094
felipemartinez1@kpmg.es

KPMG offices in Spain

A Coruña

Calle de la Fama, 1
15001 A Coruña
Tel.: 981 21 82 41
Fax: 981 20 02 03

Alicante

Muelle de Levante, 8
Planta Alta
03001 Alicante
Tel.: 965 92 07 22
Fax: 965 22 75 00

Barcelona

Torre Realia
Plaça de Europa, 41
08908 L'Hospitalet de Llobregat
Barcelona
Tel.: 932 53 29 00
Fax: 932 80 49 16

Bilbao

Torre Iberdrola
Plaza Euskadi, 5
48009 Bilbao
Tel.: 944 79 73 00
Fax: 944 15 29 67

Girona

Edifici Sèquia
Sèquia, 11
17001 Girona
Tel.: 972 22 01 20
Fax: 972 22 22 45

Las Palmas de Gran Canaria

Bravo Murillo, 22
35003 Las Palmas de Gran Canaria
Tel.: 928 32 32 38
Fax: 928 32 45 55

Madrid

Torre de Cristal
Paseo de la Castellana, 259 C
28046 Madrid
Tel.: 91 456 34 00
Fax: 91 456 59 39

Malaga

Marqués de Larios, 3
29005 Málaga
Tel.: 952 61 14 60
Fax: 952 30 53 42

Oviedo

Ventura Rodríguez, 2
33004 Oviedo
Tel.: 985 27 69 28
Fax: 985 27 49 54

Palma de Mallorca

Edificio Reina Constanza
Calle de Porto Pi, 8
07015 Palma de Mallorca
Tel.: 971 72 16 01
Fax: 971 72 58 09

Pamplona

Edificio Iruña Park
Arcadio M. Larraona, 1
31008 Pamplona
Tel.: 948 17 14 08
Fax: 948 17 35 31

San Sebastián

Avenida de la Libertad, 17-19
20004 San Sebastián
Tel.: 943 42 22 50
Fax: 943 42 42 62

Seville

Avda. de la Palmera, 28
41012 Sevilla
Tel.: 954 93 46 46
Fax: 954 64 70 78

Valencia

Edificio Mapfre
Paseo de la Almeda, 35, planta 2
46023 Valencia
Tel.: 963 53 40 92
Fax: 963 51 27 29

Vigo

Plaza de Compostela, 20
36201 Vigo
Tel.: 986 22 85 05
Fax: 986 43 85 65

Zaragoza

Centro Empresarial de Aragón
Avda. Gómez Laguna, 25
50009 Zaragoza
Tel.: 976 45 81 33
Fax: 976 75 48 96

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