Exit Taxation

The Return of the CC(C)TB: First Critical Analysis

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Exit tax *versus* free movement in the internal market

A MS should be able to tax increases in value accrued in its territory (i.e. while a taxpayer was resident there or an asset was located there) – in line with the principle of territoriality



If a taxpayer ceases to be a resident of a MS or an asset is transferred out of the territory of a MS, the MS wants to tax the accrued but unrealized capital gains immediately upon the transfer, as the taxpayer/asset will be out of the reach of its taxing jurisdiction at any later moment, immediate tax charge on crossing the border is a serious obstacle to free movement



How to reconcile the fiscal interest of the MS with the requirement of unrestricted movement within the internal market?

Exit tax as an anti-avoidance measure

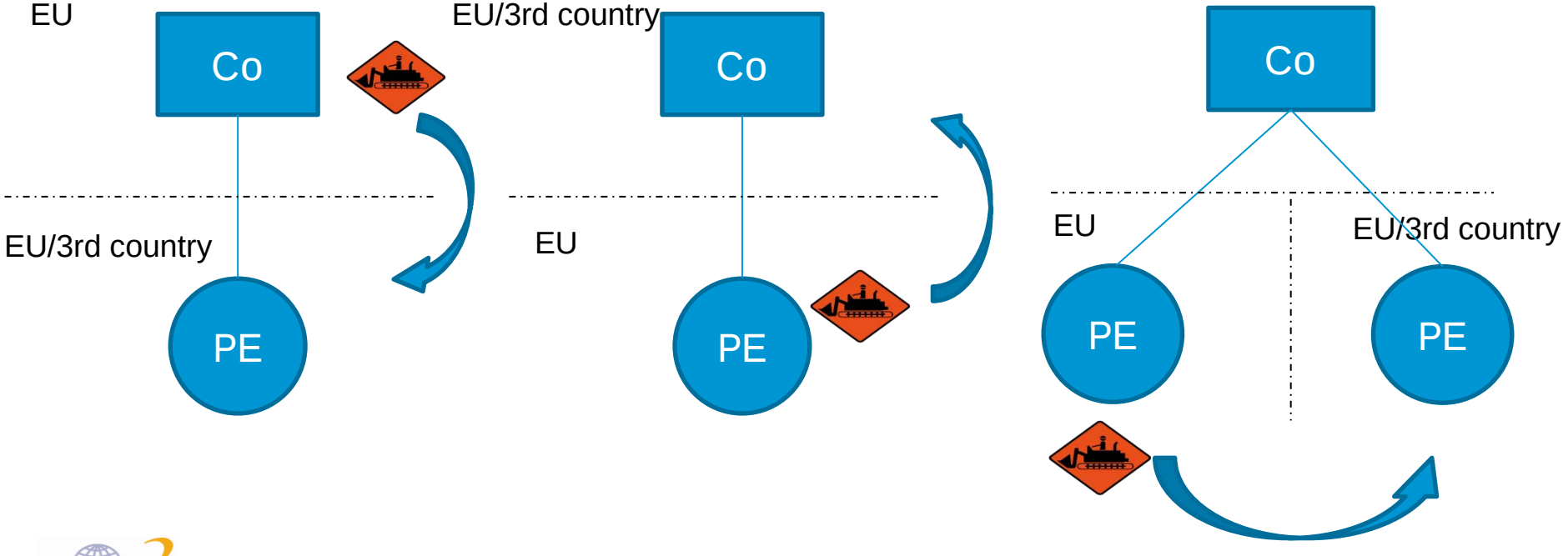
- Objective:

  to prevent an arrangement whereby assets expected to generate high income are moved to low-tax jurisdictions to be sold later and realize capital gains which will be low-taxed

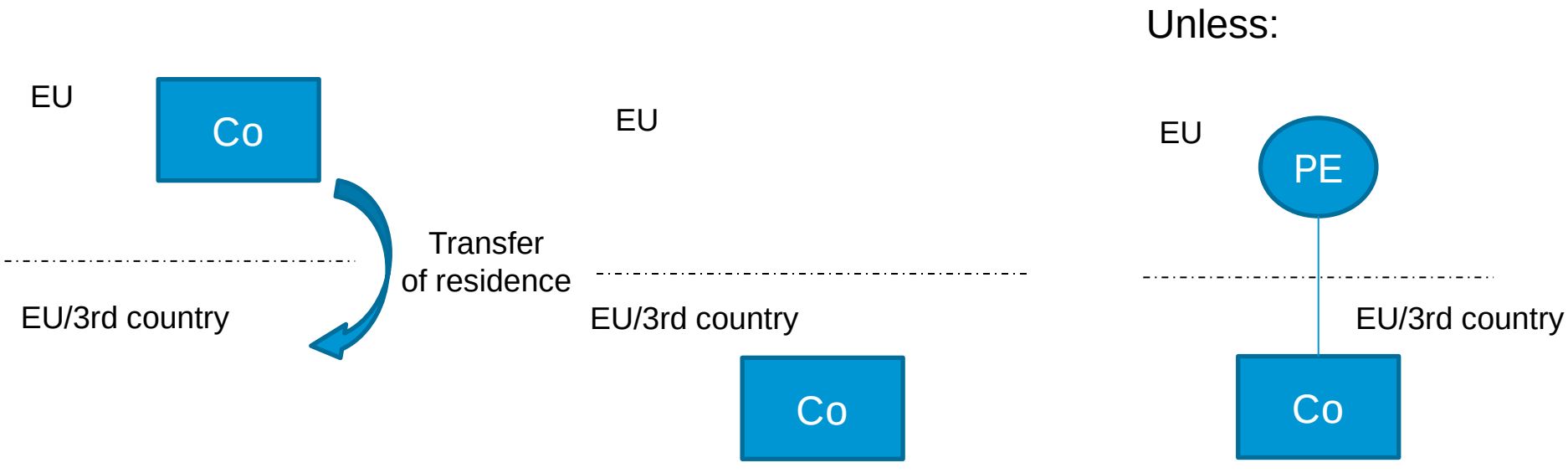
Transactions covered (1)

- Tax on accrued increases in value upon transfer of:
  - *asset (*from head office to PE, from PE to head office or from PE to another PE)
  - *tax residence*
  - *the business* of a PE

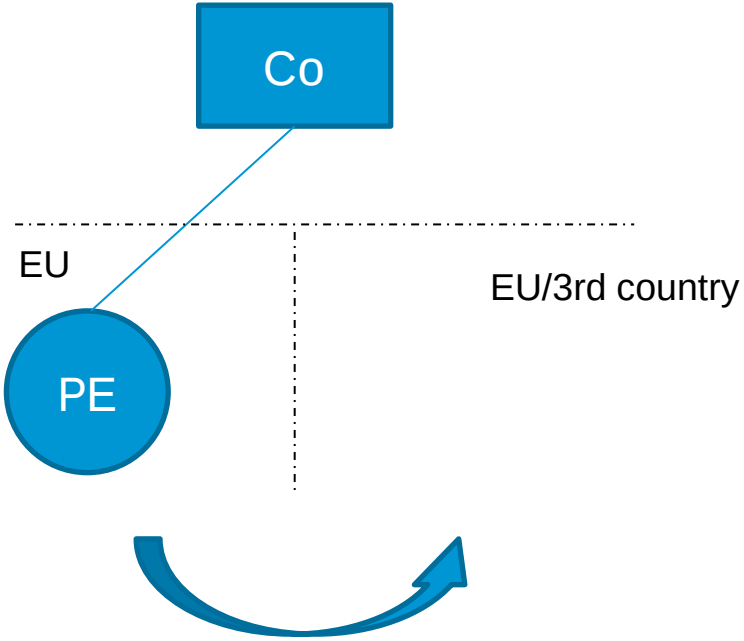
Transactions covered (2)

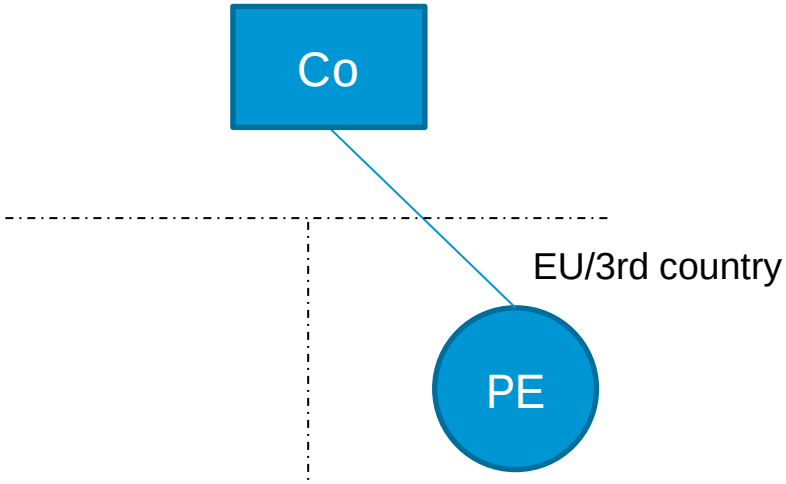


Transactions covered (3)



Transactions covered (4)





Prevention of double taxation

- Mutual recognition of value:

  when the transfer of asset/residence/business of a PE is to another MS, the destination MS accepts the value established by the departure MS as the starting value for tax purposes (i.e. for depreciation purposes)

Temporary asset transfers

- Certain temporary transfers are not subject to exit tax:
  - related to the financing of securities
  - assets posted as collateral
  - where the asset transfer takes place in order to meet prudential capital requirements or for the purpose of liquidity management

Deferral?

- Rules on deferral are missing
  - Fundamental freedoms require that deferral is granted in an EU context (CJEU case law on exit taxes on companies: *National Grid Indus*, *DMC*, *Verder LabTec* etc.)
  - 2011 CCCTB Proposal: no deferral rules either BUT exit tax only towards third country
  - ATAD: deferral if transfer is to a MS or an EEA country with which there is an agreement for recovery assistance

Deferral?

- How is the compatibility with primary law ensured?
  - Rules in the Directive are only about calculation of the tax base, rules on collection in national tax law? → BUT Art. 1(2): *"A company that applies the rules of this Directive shall cease to be subject to the national corporate tax law in respect of all matters regulated by this Directive, unless otherwise stated."* and Explanatory memorandum: "absolute rules"
  - Commission will enact Delegated or Implementing Reg, which would contain deferral rules? – no delegation/conferral of power in the Proposal



Scope complete?

- Reorganization transactions, e.g. mergers, are not covered
  - They are covered by the Merger Directive BUT Merger Directive only addresses situations where the assets remain connected to a PE in the exit state → what about other situations? The fact that they are not within the scope of the Merger Directive does not necessarily mean that they will have to be subject to exit tax, no obligation on the MS to impose an exit tax



Loophole?

- Transfer of assets to a PE in a third country
  - PE definition covers only PEs situated in the EU and belonging to a taxpayer who is resident within the EU
  - In a third country context, is it the national PE definition that applies when deciding whether the transfer is to a PE? What if the national PE definition is narrower than the one in the Directive? Transfers to a third country can escape exit tax?



Loophole?

