制定有效受控外国公司规则

Designing Effective Controlled Foreign Company Rules

G20税基侵蚀和利润转移（BEPS）项目
2015年成果之三

第3项行动计划
action 3: 2015 Final Reports

OECD/G20 Base Erosion and Profit Shifting Project

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本文件由张溥、陈岚、马怡如、王碧盈、孙娇翻译，李静初审校。
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# ABBREVIATION & ACRONYMS

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<thead>
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<th>Acronym</th>
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<tbody>
<tr>
<td>BEPS</td>
<td>Base Erosion and Profit Shifting</td>
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<td>CFA</td>
<td>Committee on Fiscal Affairs</td>
</tr>
<tr>
<td>CFC</td>
<td>Controlled Foreign Companies</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<tr>
<td>ETR</td>
<td>Effective Tax Rate</td>
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<tr>
<td>FBE</td>
<td>Foreign Business Establishment</td>
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<tr>
<td>IFRS</td>
<td>International Financial Reporting Standards</td>
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<tr>
<td>IP</td>
<td>Intellectual Property</td>
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<tr>
<td>MNC</td>
<td>Multinational Corporation</td>
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<tr>
<td>MNE</td>
<td>Multinational Enterprise</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>PE</td>
<td>Permanent Establishment</td>
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<tr>
<td>R&amp;D</td>
<td>Research &amp; Development</td>
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<tr>
<td>SGI</td>
<td>Société de Gestion Industrielle</td>
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缩略词表

BEPS 税基侵蚀和利润转移
CFA 财政事务委员会
CFC 受控外国公司
ECJ 欧洲法院
EEA 欧洲经济区
ETR 有效税率
FBE 外国营业设施
IFRS 国际财务报告准则
IP 知识产权
MNC 跨国公司
MNE 跨国企业
OECD 经济合作与发展组织
PE 常设机构
R&D 研究与开发
SGI 工业管理公司
EXECUTIVE SUMMARY

Controlled foreign company (CFC) rules respond to the risk that taxpayers with a controlling interest in a foreign subsidiary can strip the base of their country of residence and, in some cases, other countries by shifting income into a CFC. Without such rules, CFCs provide opportunities for profit shifting and long-term deferral of taxation.

Since the first CFC rules were enacted in 1962, an increasing number of jurisdictions have implemented these rules. Currently, 30 of the countries participating in the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project have CFC rules, and many others have expressed interest in implementing them. However, existing CFC rules have often not kept pace with changes in the international business environment, and many of them have design features that do not tackle BEPS effectively.

In response to the challenges faced by existing CFC rules, the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) called for the development of recommendations regarding the design of CFC rules. This is an area where the OECD has not done significant work in the past, and this Report recognises that by working together countries can address concerns about competitiveness and level the playing field.

This Report sets out recommendations in the form of building blocks. These recommendations are not minimum standards, but they are designed to ensure that jurisdictions that choose to implement them will have rules that effectively prevent taxpayers from shifting income into foreign subsidiaries. The Report sets out the following six building blocks for the design of effective CFC rules:

- **Definition of a CFC** – CFC rules generally apply to foreign companies that are controlled by shareholders in the parent jurisdiction. The Report sets out recommendations on how to determine when shareholders have sufficient influence over a foreign company for that company to be a CFC. It also provides recommendations on how non-corporate entities and their income should be brought within CFC rules.

- **CFC exemptions and threshold requirements** – Existing CFC rules often only apply after the application of provisions such as tax rate exemptions, anti-avoidance requirements, and de minimis thresholds. The Report recommends that CFC rules only apply to controlled foreign companies that are subject to effective tax rates that are meaningfully lower than those applied in the parent jurisdiction.

- **Definition of income** – Although some countries’ existing CFC rules treat all the income of a CFC as "CFC income" that is attributed to shareholders in the parent jurisdiction, many CFC rules only apply to certain types of income. The Report recommends that CFC rules include a definition of CFC income, and it sets out a non-exhaustive list of approaches or combination of approaches that CFC rules could use for such a definition.

- **Computation of income** – The Report recommends that CFC rules use the rules of the parent jurisdiction to compute the CFC income to be attributed to shareholders. It also recommends that CFC losses should only be offset against the profits of the same CFC or other CFCs in the same jurisdiction.
概要

拥有外国子公司控制权的纳税人可以将其居民国或在特定情况下其他国家的税基转移至一家受控外国公司（CFC）。CFC规则正是用于应对此类风险。如果没有CFC规则，受控外国公司将会为利润转移及长期避税提供便利。

自1962年第一个CFC规则颁布，越来越多的国家已采用此规则。目前，已有30个国家参与OECD和G20国家税基侵蚀和利润转移计划的国家拥有CFC规则。其他国家也有意愿引入CFC规则。然而，现行的CFC规则很难跟踪国际商业环境的变化，而且其中很多规则的设计难以有效应对税基侵蚀与利润转移。

为了应对现有的CFC规则所面临的挑战，税基侵蚀和利润转移行动计划（BEPS行动计划，OECD, 2013）呼吁为CFC规则的设计提供建议。先前，OECD在此领域并没有进行大量工作，本报告认为通过各国协同工作，可以解决对国家间竞争的担忧并创造公平竞争的环境。

本报告分构成要素提供建议。这些建议并非最低标准，但是可以确保实施本报告的管辖区能有效防止纳税人将收入转移到外国子公司中。本报告通过以下六个构成要素为制定有效的CFC规则提供建议：

- **CFC的定义**——CFC规则一般适用于受控于母管辖区股东的外国企业。当股东对外国企业有足够的影响力时应如何判断该外国企业是否为一家CFC？本报告对这一问题给出了建议，并同时对非公司制实体和其他收入应如何被包含在CFC规则中这一事项给出了建议。

- **CFC的豁免及门槛要求**——现行的CFC规则下，外国企业只有在排除了税务避免、低税率及最低门槛等条款的适用性后方才适用CFC。报告建议仅在外国企业的有效税率显著低于母管辖区的有效税率时才应用CFC规则。

- **收入的定义**——尽管一些国家现行的CFC规则将CFC所有应分配给母管辖区股东的收入认定为“CFC”收入，许多地区的CFC规则仅适用于部分特定类型的收入。本报告建议CFC规则应包含对CFC收入的定义，且就CFC规则可以用来定义CFC收入的方法或方法组合列出了一张非穷尽的清单。

- **收入的计算**——本报告建议CFC规则采用母管辖区的税基计算应归属于股东的CFC收入。同时建议，CFC的亏损应仅能与自身或位于同一管辖区的其他CFC的收入相互抵消。
• **Attribution of income** – The Report recommends that, when possible, the attribution threshold should be tied to the control threshold and that the amount of income to be attributed should be calculated by reference to the proportionate ownership or influence.

• **Prevention and elimination of double taxation** – One of the fundamental policy issues to consider when designing effective CFC rules is how to ensure that these rules do not lead to double taxation. The Report therefore emphasises the importance of both preventing and eliminating double taxation, and it recommends, for example, that jurisdictions with CFC rules allow a credit for foreign taxes actually paid, including any tax assessed on intermediate parent companies under a CFC regime. It also recommends that countries consider relief from double taxation on dividends on, and gains arising from the disposal of, CFC shares where the income of the CFC has previously been subject to taxation under a CFC regime.

Because each country prioritises policy objectives differently, the recommendations provide flexibility to implement CFC rules that combat BEPS in a manner consistent with the policy objectives of the overall tax system and the international legal obligations of the country concerned. In particular, this Report recognises that the recommendations must be sufficiently adaptable to comply with EU law, and it sets out possible design options that could be implemented by EU Member States. Once implemented, the recommendations will ensure that countries will have effective CFC rules that address BEPS concerns.
• 收入的归属——报告建议在可能的情况下，应将归属的门槛与控制门槛联系在一起，并将应归属的收入按所有权或影响比例进行计算。

• 防止和消除双重征税——在制定有效的CFC规则时，一个需要考虑的问题是怎样确保CFC规则不会导致双重征税。因此，本报告强调了防止和消除双重征税的重要性并提出建议，例如，采用CFC规则的管辖区应允许实际支付的外国税进行抵扣，包括在CFC机制中的中间控股公司应缴纳的税款。报告还建议，如果CFC已经将CFC税制下缴纳过税款，这些税款可以抵扣从此CFC股份中所获得的股息或利益所应缴纳的税款以避免双重征税。

因为每个国家优先考虑的政策目标不同，本报告建议在CFC规则的执行上提供一定的灵活性，使得管辖区在应对BEPS问题时可以与自身整体税务体系的政策目标保持一致，并符合该国所应承担的国际法定义务。报告特别指出，所提出的建议应充分适应欧盟的法律，并提供了可能的制定选项供欧盟成员国选择。报告一旦实施，建议将确保各国拥有有效的CFC规则来应对BEPS问题。
INTRODUCTION

1. Action 3 of the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) recognises that groups can create non-resident affiliates to which they shift income and that these affiliates may be established wholly or partly for tax reasons rather than for non-tax business reasons. Controlled foreign company ("CFC") and other anti-deferral rules combat this by enabling jurisdictions to tax income earned by foreign subsidiaries where certain conditions are met. However, some countries do not currently have CFC rules and others have rules that do not always counter BEPS situations in a comprehensive manner. Action 3 calls for the development of "recommendations regarding the design of controlled foreign company rules". The objective was to develop recommendations for CFC rules that are effective in dealing with base erosion and profit shifting.

2. CFC rules have existed in the international tax context for over five decades, and dozens of countries have implemented these rules. This report considers all the constituent elements of CFC rules and breaks them down into the "building blocks" that are necessary for effective CFC rules. These building blocks would allow countries without CFC rules to implement recommended rules directly and countries with existing CFC rules to modify their rules to align more closely with the recommendations, and they include:

   I. Rules for defining a CFC (including definition of control)
   II. CFC exemptions and threshold requirements
   III. Definition of CFC income
   IV. Rules for computing income
   V. Rules for attributing income
   VI. Rules to prevent or eliminate double taxation

3. Before discussing these six building blocks, this report first addresses the policy considerations to be considered in the context of Action 3. These include shared policy considerations that all jurisdictions consider when designing CFC rules as well as different policy objectives that are linked to the overall domestic tax systems of individual jurisdictions. Shared policy considerations include the role of CFC rules as a deterrent measure; how CFC rules complement transfer pricing rules; the need to balance effectiveness with reducing administrative and compliance burdens; and the need to balance effectiveness with preventing or eliminating double taxation. When addressing these policy considerations, jurisdictions prioritise their policy objectives differently depending, in part, on whether they have worldwide or territorial tax systems and whether they are Member States of the European Union. These policy issues are all briefly considered in Chapter 1. The following chapters then set out the building blocks. The recommendations discussed in this report are designed to combat base erosion and profit shifting. It is recognised that some countries are concerned about long-term deferral and that recommendations need to provide sufficient flexibility so that jurisdictions can design CFC rules that combat BEPS in a way that is

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1 Non-tax business reasons could include, for example, the availability of employees, increased resources, or a more favourable legal environment. CFC rules are not by definition limited to situations where CFCs are controlled by companies, and jurisdictions should consider designing may also design-CFC rules to apply in situations where individuals control foreign entities.

2 In reality, jurisdictions' tax systems are almost never purely worldwide nor purely territorial but fall within a spectrum between these two.
介绍

1. 税基侵蚀和利润转移行动计划（BEPS 行动计划，OECD，2013）的3号行动计划认为集团可以通过设立非居民附属机构来转移收入，设立这些附属机构的全部或部分目的是出于税收考虑而非出于非商业理由。CFC及其他反避税规则为应对这一情况采取了以下措施，即当满足特定条件时，管辖区可以对外国子公司取得的收入征税。然而，目前有许多国家还没有制定CFC规则，有些国家虽已实施CFC规则，但却无法全面应对BEPS问题。3号行动计划呼吁制定关于CFC规则的设计建议，并提出可以有效应对税基侵蚀及利润转移问题的CFC规则的设计建议为目标。

2. 国际税收中的CFC 规则至今已有五十多年的历史，并且很多国家已实施了此规则。本报告考虑了CFC规则所有的组成因素并将其分解为几个“构成要素”，这些构成要素对于一个有效的CFC规则而言是必要的。没有实施CFC 规则的国家可以直接采用建议的规则，对于已实施CFC 规则的国家可以对原有的规则加以修改，使其与本报告的建议保持一致。建议包括：

   I. CFC的定义（包括控制的定义）
   II. CFC的税制及门槛要求
   III. CFC收人的定义
   IV. 收入计算的规则
   V. 收入归属的规则
   VI. 防止或消除双重征税的规则

3. 在讨论这六个构成要素之前，本报告首先阐述了3号行动计划的政策考虑，包括所有国家在制定CFC规则时都应考虑的因素和单个国家与自身国内整体税体系相关的一个政策目标。共同的政策考虑包括将CFC规则制定为一种威慑措施，CFC规则怎样补充转让定价规则，如何平衡有效性及减轻监管及合规负担，以及如何平衡有效性和防止或减少双重征税。当进行政策考量时，管辖区优先考虑的政策目标会有所不同，这取决于管辖区是采用全球征税体系还是采用领土征税体系，以及管辖区是否为欧盟成员国。这些政策问题在第一章中都有简略提及。后续的章节将从各构成要素着手。本报告所讨论的建议将用来应对税基侵蚀及利润转移。一些国家担心税款的长期递延，因此建议需要提供足够的灵活性，以便管辖区可以制定出既与其国际法律义务又与其国

1. 除商业理由外还包括，例如，直接或间接，增加的资源或是更详细的法律条款。CFC规则并不限于CFC受控子公司的情形，管辖区也应考虑制定可适用于个人控制的CFC 的规则。

2. 实务中，国家的税制体系几乎不会是完全的全球征税，也并非完全的领土征税，而是介于两者范围之间。
consistent with both their international legal obligations and the policy objectives of their domestic tax systems.

4. The work on CFCs is being co-ordinated with the work on other Actions, including Action 1 (addressing the tax challenges of the digital economy), Action 2 (hybrid mismatch arrangements), Action 4 (interest deductions), Action 5 (countering harmful tax practices), and Actions 8-10 (transfer pricing).

BIBLIOGRAPHY

http://dx.doi.org/10.1787/9789264202719-en
内税收体系政策目标一致的 CFC 规则来应对 BEPS。

4. CFC 相关的工作将与其他行动计划的工作相协调，包括 1 号行动计划（应对数字经济面临的税收挑战）、2 号行动计划（混合错配安排）、4 号行动计划（利息扣除）、5 号行动计划（打击有害税收实践）、8-10 号行动计划（转让定价）。

参考文献

OECD（2013），税基侵蚀和利润转移行动计划，OECD 遗布，巴黎。
http://dx.doi.org/10.1787/9789264202719-en
CHAPTER 1: POLICY CONSIDERATIONS AND OBJECTIVES

5. This Chapter sets out a high level policy framework for CFC rules. Because CFC rules fit within a jurisdiction's overall system of tax, the design and objectives of CFC rules can differ from one jurisdiction to another because they reflect different policy choices. The chapter therefore first introduces the policy considerations that underlie all CFC rules and then lists several policy objectives that jurisdictions may prioritise differently.

I. Shared policy considerations

6. Depending on their design, CFC rules tax parent companies based on some or all of the income of some or all of their foreign subsidiaries. For most countries, they are used to prevent shifting of income either from the parent jurisdiction or from the parent and other tax jurisdictions. However, countries could also be concerned about long-term deferral. All CFC rules share some general policy considerations, including (i) their role as a deterrent measure; (ii) how they complement transfer pricing rules; (iii) the need to balance effectiveness with reducing administrative and compliance burdens; and (iv) the need to balance effectiveness with preventing or eliminating double taxation.

A. Deterrent effect

7. CFC rules are generally designed to act as a deterrent. In other words, CFC rules are not primarily designed to raise tax on the income of the CFC. Instead, they are designed to protect revenue by ensuring profits remain within the tax base of the parent or, in the case of CFC regimes that also target the stripping of third countries' bases ("foreign-to-foreign stripping"), other group companies, typically by preventing taxpayers from shifting income into CFCs. CFC rules will, of course, raise some revenue by taxing the income of CFCs, but there is likely to be a reduction in the income shifted to CFCs after the implementation of CFC rules. In common with other rules designed to change taxpayer behaviour, CFC rules may not exclusively have the effect that their design suggests. For example, the design of CFC rules suggests that they grant secondary taxing rights to the residence jurisdiction. In reality, however, if CFC rules effectively tax profits at a sufficiently high rate, they may also increase taxing opportunities in source jurisdictions by reducing or eliminating the tax incentives for multi-national enterprises (MNEs) to shift income into subsidiaries in low-tax jurisdictions.

B. Interaction with transfer pricing rules

8. Transfer pricing rules are intended to adjust the taxable profits of associated enterprises to eliminate distortions arising whenever the prices or other conditions of transactions between those enterprises differ from what they would have been if the enterprises had been unrelated. Because controlled foreign company rules by definition address related parties (as the companies that are captured by such rules are controlled by another party), jurisdictions often also use these rules to combat the adjusted prices charged between related parties. In other words, CFC rules are seen as a way for a parent jurisdiction to capture income earned by a foreign subsidiary that may not have been earned had the original pricing of the income-creating asset been set correctly. CFC rules are thus often referred to as
第一章 政策考量及目标

5. 本章为CFC规则制定了具体的政策框架，因为CFC规则应适应管辖区的整体税收体系，因为CFC规则反映了不同的政策选择，不同管辖区制定的CFC规则的设计和目标也有所不同。因此，本章首先介绍了CFC规则背后的政策考量，并列出一些管辖区可能优先考虑的不同政策目标。

1. 共同的政策考量

6. 根据各自的设计，CFC规则会根据部分或全部子公司的部分或全部收入来对母公司征税。在大多数国家，CFC规则通常被用于防止企业从母管辖区或者从母管辖区及其他管辖区转移收入。然而，有些国家也承担税款的递延。所有的CFC规则都应有共同的政策考量，包括：（1）起到威慑作用；（2）如何补充转让定价规则；（3）在保持有效性的基础上降低监管及合规负担；（4）在保持有效性的基础上防止或减少多重征税。

   A. 威慑作用

7. CFC规则通常被用来起到威慑作用。换句话说，CFC规则最初的制定不是为了增加对CFC的困境。与此相反的是，CFC规则旨在通过确保利益包含在母公司税基或其他集团公司税基（当CFC机制也针对剥离第三国税基即“外国至外国剥离”）的方式保护利益。通常采用的方法是阻止纳税人将收入转移至CFC。CFC规则将会提高针对CFC收入的税收，但执行CFC规则后，也可能使得转移到CFC的收入减少。与其他旨在改变纳税人行为的规则相比，CFC规则可能会完全实现制度的初衷。例如，CFC规则的初衷是赋予居民管辖区第二税收征管权。然而实际上，如果CFC规则使得利益被推以足够高的税率，它会降低跨国公司将其收入转移到低税率国家的努力，从而增加来源地的征税机会。

   B. 与转让定价规则的相互作用

8. 转让定价规则旨在调节关联企业的应税利润，以此来消除关联企业间交易的定价或其他交易条件与非关联交易不同而造成的扭曲。由于受控外国公司规则定义的本身就是指关联方（因为受此规则限制的公司为被另一方所控制的公司），管辖区通常也使用这些规则来应对关联方之间的价格调整。换句话说，CFC规则也被看作母管辖区取得海外子公司所赚取收入的一种手段，若按照收入相关资产的最初定价，这些收入将无法被赚取。因而CFC规则经常被视为转让定价规则的
"backstops" to transfer pricing rules. That terminology, however, is misleading, in that CFC rules do not always complement transfer pricing rules. CFC rules may target the same income as transfer pricing rules in some situations, but it is unlikely that either CFC rules or transfer pricing rules in practice eliminate the need for the other set of rules. Instead, while CFC rules may capture some income that is not captured by transfer pricing rules (and vice versa), neither set of rules fully captures the income that the other set of rules intends to capture.

9. Transfer pricing rules, which generally rely on a facts and circumstances analysis and focus primarily on payments between related parties, do not remove the need for CFC rules. CFC rules are generally more mechanical and more targeted than transfer pricing rules, and many CFC rules automatically attribute certain categories of income that is more likely to be geographically mobile and therefore easy to shift into a low-tax foreign jurisdiction, regardless of whether the income was earned from a related party. CFC rules therefore play a unique role in the international tax system. Transfer pricing rules should generally apply before CFC rules, but even after the completion of the BEPS work on transfer pricing under the BEPS Action Plan, there will still be situations where income allocated to a CFC could be subject to CFC rules. For example, current work on transfer pricing may allow a funding return to be allocated to a low-function cash box that just provided financing. If that cash box were a low-tax foreign subsidiary and a country were to choose to subject that return to CFC taxation, this choice would be consistent with the BEPS Action Plan. CFC rules can also be used after the application of transfer pricing rules to address situations where the transfer pricing rules were implemented or applied in a way that is inconsistent with the goals of the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013).

C. Effectively preventing avoidance while reducing administrative and compliance burdens

10. A third policy consideration is how to achieve effective rules that do not unduly increase compliance costs and administrative burdens. Although one of the benefits of CFC rules can be their relatively mechanical application, CFC rules that are entirely mechanical may not be as effective as rules that allow more flexibility. However, flexibility can also create uncertainty, which may affect the costs of both applying and complying with CFC rules. CFC rules must strike a balance between the reduced complexity inherent in mechanical rules and the effectiveness of more subjective rules. This policy consideration is reflected most clearly in rules on defining income. In that context, although an approach that attributes income based purely on its formal classification may reduce administrative and compliance burdens, such an approach may be less effective, and countries with existing CFC rules have generally opted to combine this approach with less mechanical substance analyses to ensure that the income that is attributed in fact arises from base erosion and profit shifting. Concerns about the administrative burden of substance-based rules can, however, be reduced by including suitably targeted CFC exemptions such as an exemption for companies that are not subject to a lower rate of tax.

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4 See the 2015 Report on Action 8-10: Aligning Transfer Pricing Outcomes With Value Creation (OECD, 2015) which allocates a risk-free financial return to an entity that lacks the ability to control risks.
5 CFC rules also interact with rules other than transfer pricing rules. In the 2014 Deliverable on Neutralising the Effects of Hybrid Mismatch Arrangements (OECD, 2014), for example, Recommendation 5 recognised the importance of CFC rules when it encouraged jurisdictions to improve their CFC rules to prevent deduction/inclusion outcomes arising in respect of payments to a reverse hybrid.
6 Entirely mechanical CFC rules also may not be compatible with EU law for the reasons set out later in this chapter.
“后防线”。然而这种说法其实有些误导，因为 CFC 规则并不总是转让定价规则的补充。在一些情况下，也许 CFC 和转让定价规则都关注相同的收入，但这并不意味着它们在实际操作中会互相排除对对方规则的需求。与此相反，尽管 CFC 规则可以对部分转让定价规则所无法抓住的收入（反之亦然），它们之中没有任何一套规则可以对对方可以抓住的所有收入。

9. 转让定价规则通常依赖于事实和情况分析，主要关注关联企业间支付的价格，因此并不能完全取代 CFC 规则。CFC 规则比较转让定价规则而言通常更为直接和有针对性。实务中，许多 CFC 规则可以自动归属部分类别的地域流动性很强从而更容易被转移到税收低区域的收入，而不论此收入是否从关联方取得。因此，CFC 规则在国际税收体系中扮演了一个特殊角色。通常情况下，转让定价规则应先于 CFC 规则适用，但即使根据 BEPS 行动计划完成转让定价方面的工作，被分派到一家受控外国公司的收人还须参照 CFC 规则。例如，现行的转让定价方面的条款允许资金使用回报归属于一个仅提供融资的较少功能的现金点子。如果该现金点子是一个适用低税率的外国子公司且国家选择将此收益归属于 CFC 征税，则选择与 BEPS 行动计划一致。如果转让定价规则的实施或应用与税基侵蚀和利润转移行动计划（BEPS 行动计划，OECD，2013）不一致，CFC 规则也可以在转让定价规则后应用以应对这种情况。

6. 有效防止避税并减少监管与合规负担

10. 第三个政策上的考虑是实施有效的规则但又不过度地增加合规成本和监管负担。尽管 CFC 规则的一个优点是可以相对机械地实施，但完全机械的 CFC 规则可能并不如有一定灵活性的规则更有效。然而，灵活性也同样会增加不确定性，可能会影响 CFC 规则的应用和合规成本。CFC 规则需在降低机械性规则中固有的复杂性与成本更有实质性规则的有效性间寻找一个平衡点。这项政策的考虑尤为体现在确定收益的规则方面。在此方面，尽管完全基于形式上的分类确认收入的归属的方法可以减少监管和合规负担，但这种方法有效性较差。现有实行 CFC 规则的国家通常将此方法结合更为非机械化的实质分析，以确保被分配的收入确实实际上来源于税基侵蚀和利润转移。对于基于实质性规则的监管负担的担忧可以通过在规则中加入有针对性的 CFC 防止规则得以减轻，比如对不适用低税率公司的豁免。


4. 请参照 2015 年报告的 8-10 行并计划："按转定价结果与价值创造相匹配（OECD，2015）"，该报告允许一家缺乏创造新能力的企业获得无风险收入。

5. CFC 规则与转让定价之外的其他规则也相互影响。例如，2014 年 OECD 的成果“消除混合错配安排的影响”（OECD，2014），建议 D 指出了 CFC 规则的重要性，该建议鼓励管理改进其 CFC 规则，以防止在无一家双向混合支付时出现扣除/不包含的情况。

6. 完全机械的 CFC 规则可能基于本条界定的原则与欲显法律不兼容。
D. Avoiding double taxation

11. An additional consideration is how to avoid double taxation. As CFC rules effectively subject the income of a foreign subsidiary to taxation in the parent jurisdiction, they can lead to double taxation if, for example, the subsidiary is also subject to taxation in the CFC jurisdiction. Double taxation concerns can be limited by incorporating tax rate exemptions, which are discussed in the next section, into CFC rules. Existing CFC rules also seek to prevent double taxation through provisions such as foreign tax credits. These provisions are outlined in the discussion of the sixth building block in Chapter 7.

II. Specific policy objectives

12. Whilst the above policy objectives are consistent among most jurisdictions with CFC rules, individual jurisdictions may design CFC rules to achieve a variety of other policy objectives. This is inevitable given that CFC rules are part of a jurisdiction's general system of taxation and the underlying systems vary. As a result, CFC rules also vary significantly in how they prioritise different policy objectives. Two fundamental differences that can affect the design of CFC rules are (i) whether a jurisdiction has a worldwide tax system or a territorial tax system and (ii) whether a jurisdiction is a Member State of the European Union.

A. Worldwide and territorial systems

13. If a jurisdiction has a worldwide tax system, its CFC rules could apply broadly to any income that is not being currently taxed in the parent jurisdiction and still remain consistent with the parent jurisdiction's overall tax system. If, however, a jurisdiction has a territorial tax system, it may be more consistent for its CFC rules to apply narrowly and only subject income that should have been taxed in the parent jurisdiction to CFC taxation. In reality, jurisdictions' tax systems are almost never purely worldwide nor purely territorial but fall within a spectrum between these two. This may influence the policy choices that jurisdictions make in terms of how they address international competitiveness and how they address base stripping.

i. Striking a balance between taxing foreign income and maintaining competitiveness

14. In designing CFC rules, a balance must be struck between taxing foreign income and the competitiveness concerns inherent in rules that tax the income of foreign subsidiaries. CFC rules raise two primary types of competitiveness concerns. First, jurisdictions with CFC rules that apply broadly may find themselves at a competitive disadvantage relative to jurisdictions without CFC rules (or with narrower CFC rules) because foreign subsidiaries owned by resident companies will be taxed more heavily than locally owned companies in the foreign jurisdiction. This competitive disadvantage may in turn lead to distortions, for instance it may impact on where groups choose to locate their head office or increase the risk of inversions, and it may also impact on ownership or capital structures where groups attempt to avoid the impact of CFC rules. CFC rules can therefore run the risk of restricting or distorting real economic activity. Second, multinational enterprises resident in countries with robust CFC rules may find themselves at a competitive disadvantage relative to multinational enterprises resident in countries without such rules.

There is a perception that robust CFC rules can lead to inversions, that is, that groups will change the residence of the parent company to escape the effect of CFC rules. However, whilst it is likely that CFC rules will increase the risk of inversions, they will not be the only factor and other issues such as tax rate and the general system of taxation (e.g., worldwide or territorial) will also play a role. For this reason inversions, and the rules that some countries have adopted to combat them, are not covered in this report, but countries may want to consider them as a separate matter.
D. 避免双重征税

11. 一项额外的考虑是如何避免双重征税。由于CFC规则要求将外国子公司的收入在母管辖区纳税，很可能会造成双重征税。有鉴于子公司将在CFC管辖区纳税，这可能是一个问题。不过双重征税的问题可以通过将税率调整纳入CFC规则来加以限制，这一点将在下一章节进行讨论。现行的CFC规则是通过外国税收抵免条款来防止双重征税。这些条款在第7章中的第6构成要素的讨论中有所列举。

II. 具体的政策目标

12. 既然上述政策目标与绝大多数管辖区的CFC规则保持一致，个别辖区可能通过CFC规则的细节来实现其他政策目标。鉴于CFC规则为管辖区整体税收体系的一部分且辖区间各异不同，上述情况将无法避免。因此，CFC规则也会因不同管辖区采取的优先政策目标不同而产生较大的差异。两个根本的将影响CFC规则制定的差异是：（1）管辖区是采用全球征税体系还是采用领土征税体系，以及（2）管辖区是否是欧盟成员国。

A. 全球和领土征税体系

13. 如果一个管辖区采用全球征税体系，CFC规则可以广泛地应用于任何没有在母管辖区缴纳的收入，并仍然符合母管辖区的征税规则。然而，如果一个管辖区采用的是领土征税体系，则该辖区的CFC规则只适用于那些应当在母管辖区缴纳的收入，以保持和整体税制一致。然而现实的情况是，国家的税收并非完全是全球征税体系或领土征税体系，而是兼于两者之间。这会影响到国家在对解决国际竞争力及税基剥离问题的政策选择。

i. 在对外收入征税及保持竞争力之间寻求平衡点

14. 在制定CFC规则时，必须在向外国收入征税及对外国子公司课税的规则中必然存在的对竞争力的担忧之间找到平衡点。CFC规则在竞争力方面有两个考虑。首先，广泛采用CFC规则的国家对于没有采用（或小范围内采用）CFC规则的国家，在竞争中会处于劣势，因为该企业所拥有的外国子公司比在外国管辖区当地的公司要承担更重的税赋。这种竞争劣势可能会导致扭曲，例如，将影响到集团公司对总部的选址或增加投资风险等，同样，当集团公司试图规避CFC规则的影响时，这种竞争劣势会影响所有权或资本结构。因此CFC规则存在限制或扭曲真实经济活动的风险。第二，为严格执行CFC规则的国家的跨国公司可能会发现，自己相比位于不执行

注：有一种观点认为，严格的CFC规则会引致扭曲，即集团会为了避免CFC规则的影响而改变投资公司的所在地。然而，尽管CFC规则可能会加大倒闭的风险，但其并非是唯一因素。其他因素如税制和整体税制（例如全球征税或领土征税）也会带来影响。因此，政策和一些国家已经采用的防避条款规则并没有在本报告中讨论。不过有些国家也有特定针对此项进行单独考虑。
(or with CFC rules that apply to a significantly lower rate or narrower base). This competitiveness concern arises because the foreign subsidiaries of the first MNEs will be subject to a higher effective tax rate on the income of those subsidiaries than the foreign subsidiaries of the second MNEs due to the application of CFC rules, even when both subsidiaries are operating in the same country.

15. To address these concerns, jurisdictions with territorial systems are more likely to tax only income that was clearly diverted from the parent jurisdiction, thereby prioritising competitiveness. In contrast, jurisdictions with worldwide systems are more likely to tax more income under CFC rules, thereby prioritising taxation of foreign income. Because existing tax systems are almost never pure worldwide systems nor pure territorial systems, CFC rules are typically exempt so-called "active" income that is, or is more likely to be, linked to real economic activity in the foreign subsidiary. This approach may not be entirely effective in combating BEPS, but, in developing recommendations for the design of CFC rules, the balance between taxing foreign income and maintaining competitiveness needs to be kept in mind.

16. Another way to maintain competitiveness would be to ensure that more countries implement similar CFC rules. This is therefore a space where countries working collectively and adopting similar rules could reduce the competitiveness concerns that individual countries may have when considering whether to implement CFC rules.

**ii. Preventing base stripping**

17. Where CFC rules are intended to prevent group companies from shifting income to CFCs, this does not necessarily mean that CFC rules only protect the base of the parent jurisdiction. CFC rules can either focus only on protecting the parent jurisdiction's base or protect against both stripping of the parent jurisdiction's base and foreign-to-foreign stripping. Rules that focus on stripping of the parent jurisdiction define CFC income to include only that income that has been diverted or shifted from the parent jurisdiction, while those that focus on foreign-to-foreign stripping include any income that could have been earned in any jurisdiction other than the CFC jurisdiction. Under the first type of rule, which focuses on stripping of the parent jurisdiction's base, income of the CFC that was earned from activities that took place in a third country would not be subject to CFC taxation. Under the second type of rule, which also includes foreign-to-foreign stripping, this same income would be subject to CFC taxation.¹

18. CFC rules that focus only on parent jurisdiction stripping may not be as effective against BEPS arrangements for two reasons. First, it may not be possible to determine which country's base has been stripped (for example, in the case of stateless income). Second, even if it were possible to determine which country's base was stripped, the BEPS Action Plan aims to prevent erosion of all tax bases, including those of third countries. This issue may be of particular relevance for developing countries because there may be more of an incentive to structure through low-tax jurisdictions in the absence of CFC rules that focus on foreign-to-foreign stripping.⁹

¹ Rules that allow companies to elect whether their subsidiaries are treated as partnerships or corporations also narrow the focus of CFC rules, with the result that they do not prevent foreign-to-foreign stripping. The modified hybrid mismatch rule discussed in Chapter 2, however, is designed to eliminate the effect of such an election for CFC rules and may therefore reduce the availability of this option.

⁹ For more on the effect of Action Item 3 and the other action items on developing countries, see the BEPS Action Plan and the BEPS Report, both of which refer to the knock-on effect of CFC rules on source countries.
CFC 规则（或者虽然执行 CFC 规则但仅适用于非常低税率或更窄的税基的情形）的国家的跨国企业处于竞争优势。造成这种竞争力差距的原因是，由于执行 CFC 规则，第一类跨国公司的外国子公司的有效税率较之第二类跨国公司的外国子公司更高，即使二者位于同一个国家。

15. 为了解决这些担忧，采用领土征税体系的管辖区更倾向于在这些明确从母管辖区转移的收入课税，从而将保持竞争力放在优先位置。与此相反的是，采用全球征税的国家更希望通过 CFC 规则对更多收入征税。由于现行的全球征税中，入没有完全采用全球征税体系的国家又没有完全采用领土征税体系的国家，CFC 规则通常免除所谓的“积极”收入，即相关国家或更可能相关国家的外国子公司的实际经济活动的收入。这种方法在应对 BEPS 的问题上可能并非完全有效，但在制定 CFC 规则的建议时，有必要避免对外国收入所税和保持竞争力的平衡。

16. 另一种保持竞争力的方式是确保更多的国家推行相似的 CFC 规则。因此，各国可以共同合作并采用相似的 CFC 规则，以减少个别国家在考虑是否应该推行 CFC 规则时对竞争力方面的担忧。这一点仍有力争空间。

ii. 防止设基地

17. CFC 规则的目的是防止集团公司将收入转移到 CFC，但这并不意味着 CFC 规则只用来保护母管辖区的税基。CFC 规则既可以用来保护母管辖区的税基，也可以用来防止母管辖区及国外对国外的税基剥。只关注母管辖区税基剥的规则定义 CFC 收入应只包括从母管辖区转移的收入，而关注国外对国内外源的税基剥的规则则包括来自除 CFC 管辖区外的任何国家的收入。在第一类关注侵蚀母管辖区税基的规则下，与发生在第三国家的经营活动不相关的 CFC 收入，将不会作为 CFC 收入征税，而在第二类也关注国外对国外源剥的规则下，同样的收入将会被作为 CFC 收入征税。

18. 仅关注母管辖区税基剥的 CFC 规则很可能不能有效应对 BEPS 安排，具体有以下两个原因：首先，难以确定哪些国家的税基已经被剥（例如，无国籍收入）。其次，即便能确定哪些国家的税基被剥，BEPS 行动计划的目的在于防止所有的税基剥。包括第三国。此事项可能与发展中国家更为相关，因为在缺乏关注外国至外国剥的 CFC 规则的情况下，发展中国家可能更有动力通过低税辖区进行架构安排。

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允许公司选择子公司是否看做会计企业还是公司的规则也会缩小 CFC 规则的适用范围，导致这些规则无法阻止外国至外国的剥。尽管如此，在第二款行动计划中讨论的改进的混合测税规则，系该设计用来将 CFC 规则中此类规定所造成的影响，因而可能会降低此可能性。

了解这一计划和行动计划对于发展中国家的影响，应参见 BEPS 行动计划和 BEPS 报告，二者都讨论了 CFC 规则对发展中国家的冲击效应。
B. CFC rules within the European Union

19. A particular competitiveness concern may arise in the context of the European Union. Since 2006, it is generally acknowledged that the European Court of Justice’s (ECJ) case law imposes limitations on CFC rules that apply within the European Union. Therefore, whilst recommendations developed under this Action Item need to be broad enough to be effective in combating BEPS they also need to be adaptable, where necessary, to enable EU members to comply with EU law. This policy consideration affects all jurisdictions, including those that are not Member States of the European Union, because recommendations that are inconsistent with EU law would mean that Member States could not adopt those recommendations to apply within the European Union. This in turn would mean that multinational groups that are based in jurisdictions that are not EU Member States could be at a competitive disadvantage compared to multinational groups that are based in Member States since the latter groups would not be subject to equally robust CFC rules.

20. In Cadbury Schweppes\(^\text{11}\) and subsequent cases, the ECJ has stated that CFC rules and other tax provisions that apply to cross-border transactions and that are justified by the prevention of tax avoidance must “specifically target wholly artificial arrangements which do not reflect economic reality and whose only purpose would be to obtain a tax advantage”.\(^\text{12}\) The ECJ’s jurisprudence applies to all Member States of the European Union and the European Economic Area (EEA),\(^\text{13}\) and it applies when the parent jurisdiction and the CFC jurisdiction are both within the EEA.

21. The aim of this report is to set out recommendations for effective CFC rules that can be implemented in all jurisdictions. Where recommendations are made, they are the same for EU Member States and non-EU Member States. However, where there are options, EU Member States will need to ensure that they make choices that are consistent with EU law.\(^\text{14}\)

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\(^{10}\) In 2006, the European Court of Justice issued its opinion in Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, C-196/04. This case considered the compatibility of Member State CFC rules with the EU treaty freedoms.

\(^{11}\) Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, C-196/04. More recent cases have echoed the decision in Cadbury Schweppes. In Iliecar – Automóveis de Aluguéis Lda. v. Fazenda Pública, Case C-282/12 (3 October 2013), the ECJ made it clear that a national measure restricting the fundamental EU freedoms may be justified where it specifically targets wholly artificial arrangements which do not reflect economic reality and the sole purpose of which is to avoid the tax normally payable on the profits generated by activities carried out on the national territory. In Iliecar the ECJ went on to say that it is apparent from the case-law of the Court that, where rules are predicated on an assessment of objective and verifiable elements for the purposes of determining whether a transaction represents a wholly artificial arrangement entered into for tax reasons alone, they may be regarded as not going beyond what is necessary to prevent tax evasion and avoidance, if, on each occasion on which the existence of such an arrangement cannot be ruled out, those rules give the taxpayer an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction.

\(^{12}\) Haribo Lakritzen Hans Riegel Betriebsgmbh and Österreichische Salinen AG v. Finanzamt Linz, Joined Cases C-436/08 and C-437/08, paragraph 165.

\(^{13}\) The ECJ’s jurisprudence applies to countries that are not Member States of the European Union to the extent that it interprets the fundamental freedoms protected by the Agreement on the European Economic Area.

\(^{14}\) Countries that are not Member States of the European Union could also implement the modifications adopted by EU Member States.
B. 欧盟下的CFC规则

19. 在欧盟法律环境下有一个特殊的竞争问题。众所周知，自2006年开始，欧盟法院案例法限制CFC规则在欧盟内的应用。因此，尽管本行动计划下制定的建议需要尽可能地广泛，以有效应对BEPs，这些建议也需要具备必要的适应能力，以便欧盟成员可以遵从欧盟法律。这一政策考虑影响到所有的管理区，包括非欧盟成员国。因为CFC规则的建议若与欧盟法律不一致，则意味着欧盟成员国在欧盟内采用此规则。这会使得位于非欧盟成员国的跨国集团与位于欧盟成员国的跨国集团相比处于劣势，因此后者不会同样受制于严格的CFC规则。

20. 在古利特等案件 
11 和随后的案例中，欧盟法院已经表态，以防止避税为目的的适用于跨境交易的CFC规则和其其他规则，必须“只能打击完全人为的安排，这些安排没有反映真实的经济活动且唯一的目的是获取税收优惠” 
12。欧盟法院的判决适用于所有的欧盟成员国和欧盟经济区（EEA） 
13，同时适用于母管辖区和CFC管辖区都在欧盟经济区的情形。

21. 本报告的目的旨在为在所有管辖区均适用的有效的CFC规则提供建议。这些建议一旦制定，需对于欧盟成员国及非成员国均一视同仁。然而，欧盟成员国需要有选项以确保他们的选择与欧盟法律保持一致。

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11 吉利特等案例及其境外公司和收入局委员会的案例 (C-196/04)。越来越多的案例与吉利特的判决相抵，在 Iteler Município de Alegrete Ltda. v. Fazenda Pública, 案例 (C-25/12) (2013年10月3日) 中，欧盟法院明确表示，限制欧盟自由的基础政策在上述情形中是合理的，即这些政策仅打击完全人为的安排，这些安排没有反映真实的经济活动且唯一的目标是为了避免在本国境内进行的活动所创造的利润被征税的历史。在 Iteler 案例中，欧盟法院继续说明，从法院案件法的案件中可以明显看出，有规则可以明确对一项交易是否完全出于税收目的与签订的合同各方和可供参考的证据相结合，如果在某个可能存在上述安排的情形中，这些规则可以给予纳税入一个机会，使其在不受正式的行政限制下可以提供任何可以证明交易的商业理由的证据。法院不会被认为是超出防止偷逃税的必要性的规则。

12 Harboe Lehmhus v. Riegels Egetrup GmbH 和 Österreichische Salinen AG v. Finanzamt Linz [联合案例 C-536/08 和 C-437/08案列]，第165页。

13 欧盟法院的法理在一定程度上也适用于非欧盟成员国，以其解释欧盟经济区内保护的基本自由原则为例。

14 非欧盟成员国的国家同样可以采用欧盟成员国所采用的修正方案。
22. Although the determination of how to comply with EU treaty freedoms is the decision of each individual EU Member State, in designing CFC rules, EU Member States could potentially consider the following when implementing adaptable and durable CFC rules:

- Including a substance analysis that would only subject taxpayers to CFC rules if the CFCs did not engage in genuine economic activities. Some Member States have already modified their CFC rules so that they do not apply to genuine economic activities and are therefore consistent with their understanding of the ECJ’s “wholly artificial arrangements” limitation.

- Applying CFC rules equally to both domestic subsidiaries and cross-border subsidiaries. A CFC rule will only be found inconsistent with the freedom of establishment if the rule itself discriminates against non-residents. This was made clear in Cadbury Schweppes, where the ECJ focused on the difference in treatment under UK CFC rules between a UK controlled company and a non-resident controlled company. The Court explained this by stating:

  That difference in treatment creates a tax disadvantage for the resident company to which the legislation on CFCs is applicable. Even taking into account [...] the fact referred to by the national court that such a resident company does not pay, on the profits of a CFC within the scope of application of that legislation, more tax than that which would have been payable on those profits if they had been made by a subsidiary established in the United Kingdom, the fact remains that under such legislation the resident company is taxed on profits of another legal person. That is not the case for a resident company with a subsidiary taxed in the United Kingdom or a subsidiary established outside that Member State which is not subject to a lower level of taxation.\(^{15}\)

Therefore, if a CFC rule treats domestic subsidiaries the same as cross-border subsidiaries, it arguably should not be treated as discriminatory under the case law of the ECJ, and no justification is needed. Such an approach would attribute the allocable income of any controlled company, whether foreign or domestic, to its resident shareholders.\(^{16}\)

- Applying CFC rules to transactions that are “partly wholly artificial”. Even if a direct tax rule in a EU Member State is found to implicate the freedom of establishment and to discriminate, it may still be upheld if it is justified and proportionate. Although earlier CFC cases found CFC rules in EU Member States to be justified and proportionate only if they were limited to wholly artificial arrangements, two more recent developments in the ECJ’s analysis suggest that CFC rules may now be justified and proportionate even if they apply beyond wholly artificial arrangements. The first development is that cases have suggested that rules may be justified by the need to prevent tax avoidance if they are targeted at arrangements that are not wholly artificial. In Thin Cap Group Litigation, for example, the ECJ stated that, in determining whether thin cap legislation was justified by the need to prevent abusive practices, the Court should determine “whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State”.\(^{17}\)

\(^{15}\) Cadbury Schweppes, paragraph 45.

\(^{16}\) At least one jurisdiction already applies such an approach. Denmark’s legislation has the effect that there is no different treatment, no matter whether the parent company owns a subsidiary resident in Denmark, a foreign subsidiary resident in the EU/EEA or a foreign subsidiary resident outside the EU/EEA.

\(^{17}\) Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue, C-524/04, paragraph 81 (emphasis added).
22. 尽管决定如何遵从欧盟协定自由由欧盟成员国自己来决定，在制定CFC规则上，欧盟成员国在考虑到CFC规则的适应性及持久性时，应注意以下几点：

- 包含一项实质分析规则，该规则仅在CFC没有从事真实经济活动时要求纳税人适用CFC规则。一些成员国已经修改了他们的CFC规则以便不针对真实经济活动，从而与他们了解的欧洲法院规定的“完全人为安排”的限制保持一致。

- 将CFC规则公平地适用于国内子公司与跨国子公司。CFC规则只有在规则本身歧视非居民时才会与设立自由相冲突。这点在古利此案例中已清楚地体现。在此案例，欧洲法院关注在英国CFC规则下英国控制的企业和非居民控制的企业不同待遇，法院就此事作了如下解释：

  这种不同待遇使得适用于CFC规则的居民公司在税收上处于劣势。即便考虑到由国家负责制定的这些居民公司中，如果CFC的利润支付的税款并没有与这些利润在英国的子公司所赚取的利润一样多这一情况，事实仍然是在当前的法规下居民公司仍然会因另一法人的利润而被征税。而对于拥有在英国纳税的子公司的居民公司，或是拥有在非成员国但非低税负地区成立的子公司的居民公司而言，这种情况并非如此。因此，如果一项CFC规则对于国内子公司及跨国子公司一视同仁，就有理由认为此规则在欧洲法院的案例下不应被视为存在歧视。这种方法可以将国外和国内任何受控公司的收入归于居民股东。

- 将CFC规则适用于“部分或全部人为”的交易。即使一个欧盟成员国的CFC规则被认为涉及成立的自由及歧视，如果规则本身是合理的适当的，仍可以通过。尽管在早期的CFC案例中，欧盟成员国的CFC规则仅在安排是完全人为的情况时才被视为是合理的适当的，欧洲法院的分析中的两个新的变化显示，即便不是全部人为安排，CFC规则也可能被视为是合理适当的。第一个变化是，如果是出于阻止避税的目的，即使针对非常完全人为的安排，规则仍有可能被认为是合理适当的。例如，在Thin Cap Group 诉讼案中，欧洲法院认为，在判断阻止实务中的滥用的需求能否使得资本弱化立法合理化这一问题时，法庭应当明确“是否有问题的交易部分或部分代表了纯粹的人为安排，且此项安排的核心目的是为了规避成员国的税收法规”。

  上述意见说明，只要产生收人的交易有部分人为因素，则就可能可以

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15 古百利史威克，第 45 页。
16 至少有一个管辖区已经采用了此种方式。在丹麦的立法中，无论是母公司拥有的位于丹麦的居民子公司，还是位于欧盟/欧元经济区的外国子公司，或是位于欧盟/欧元经济区之外的外国子公司，其待遇都没有区别。
17 Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue, c-524/04. 31 案（重点已删除）。
wording suggests that a CFC rule in a EU Member State that targets income earned by a CFC that
is not itself wholly artificial may be justified so long as the transaction giving rise to the income
is at least partly artificial.

- Designing CFC rules to explicitly ensure a balanced allocation of taxing power. The ECJ has
suggested that Member State tax provisions may not be restricted to wholly artificial
arrangements if they are justified by a reason other than the need to prevent tax avoidance. In
both SGI\textsuperscript{18} and Oy AA\textsuperscript{19}, for example, the ECJ stated that the rules in question could be justified
notwithstanding the fact that they were not restricted to wholly artificial arrangements because
they were justified by the need to maintain a balanced allocation of taxing rights. In SGI, the ECJ
clarified that this "justification may be accepted, in particular, where the system in question is
designed to prevent conduct capable of jeopardising the right of a Member State to exercise its
tax jurisdiction in relation to activities carried out in its territory."\textsuperscript{20} Although the Court has not
yet found that CFC rules are justified by the need to maintain a balanced allocation of taxing
rights, these cases suggest that CFC rules could be permitted to apply more broadly if they could
be explained by the need for a Member State to tax profits arising from activities carried out in its
territory.

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\textsuperscript{18} Société de Gestion Industrielle (SGI) v. Belgian State, C-311/08 (21 January 2010) (holding that the
freedom of establishment did \textit{not} prevent Member States from requiring profit adjustments in the case of
non-arm's length transactions involving non-resident parties).

\textsuperscript{19} Oy AA, C-231/05 (18 July 2007) (holding that the freedom of establishment did \textit{not} prevent Member
States from limiting interest deductions for intra-group transfers to payments made to resident companies).

\textsuperscript{20} SGI, paragraph 60.
令在欧盟成员国的以 CFC 所赚取的收人为目标的 CFC 规则被认为是合理的，即使这些 CFC 本身并非完全是人为安排的。

- 制定的CFC规则需要确保税权分配的平衡。欧洲法院建议，如果有除了防止逃税的需求以外的理由，成员国税收条款无需严格限制在完全人为安排的情形。例如，在SGI案例"和 Oy AA案例"中，欧盟法院提到，尽管有事实证明有疑问的规定并未限定于完全人为控制的情形，其合理性仍然可以由出于确保税权划分平衡的需求所证实。在SGI案例中，欧洲法院明确“合理性可以被接受，特别是当设立的体系是用于防止成员国无法对在其境内进行的经济活动行使税收管辖权时”。

尽管法庭还未明明确保税权划分平衡可以证明CFC规则的合理性，但这些案例至少表明，出于确保成员国对在其境内进行的活动所带来的利润的征税权的需求，CFC规则可以被更广泛地应用。

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26 SGI 第 60 段。
CHAPTER 2: RULES FOR DEFINING A CFC

23. In order to establish whether CFC rules apply, a jurisdiction must consider two questions: (i) whether a foreign entity is of the type that would be considered a CFC and (ii) whether the parent company has sufficient influence or control over the foreign entity for the foreign entity to be a CFC.

I. Recommendations

24. In the context of whether an entity is of the type that would be considered a CFC, the recommendation is to broadly define entities that are within scope so that, in addition to including corporate entities, CFC rules could also apply to certain transparent entities and permanent establishments (PEs) if those entities earn income that raises BEPS concerns and those concerns are not addressed in another way. A further recommendation is to include a form of hybrid mismatch rule to prevent entities from circumventing CFC rules through different tax treatment in different jurisdictions.

25. In the context of control, the recommendation is that CFC rules should at least apply both a legal and an economic control test so that satisfaction of either test results in control. Countries may also include de facto tests to ensure that legal and economic control tests are not circumvented. A CFC should be treated as controlled where residents (including corporate entities, individuals, or others) hold, at a minimum, more than 50% control, although countries that want to achieve broader policy goals or prevent circumvention of CFC rules may set their control threshold at a lower level. This level of control could be established through the aggregated interest of related parties or unrelated resident parties or from aggregating the interests of any taxpayers that are found to be acting in concert. Additionally, CFC rules should apply where there is either direct or indirect control.

II. Explanation

A. Entity considerations

26. Although CFC rules would appear based on their name only to apply to corporate entities, many countries include trusts, partnerships, and PEs in limited circumstances to ensure that companies in the parent jurisdiction cannot circumvent CFC rules just by changing the legal form of their subsidiaries.

27. Transparent entities such as partnerships should not be treated as CFCs to the extent that their income is already taxed in the parent jurisdiction on a current basis. However, if a transparent entity earns income that raises BEPS concerns and that is not taxed in the parent jurisdiction, CFC rules could apply in one of two ways. First, CFC rules could treat the transparent entity as a CFC to ensure that CFC income did not escape CFC taxation due to different entity treatment in the CFC jurisdiction. This situation could arise if, for example, an entity that was taxable in the parent jurisdiction was a partnership under the laws of the parent jurisdiction. Second, CFC rules could subject the income of a transparent entity that was owned by a CFC to tax as income of the CFC to ensure that the CFC could not shift income to the transparent entity in order to avoid CFC rules.

28. PEs may need to be subject to CFC rules in two circumstances. First, CFC rules should be broad enough to potentially apply to a situation where a foreign entity has a PE in another country. Second,
第二章 定义CFC的规则

23. 为了确定是否采用CFC规则，管辖区必须要考虑两个问题：（1）外国实体是否属于可被认定为CFC的类型；（2）母公司是否有足够的影响和控制以使得该外国实体被认定为CFC。

I. 建议

24. 关于何种类型的实体可被认定为是CFC，建议是广泛地定义满足条件的实体。除了公司实体外，CFC规则也可以适用于一些透明的实体和常设机构。前提条件是机构所赚取的收入会引起BEPS问题且这些问题无法通过其他方式解决。进一步的建议是包含一些混合错配规则，用来防止实体通过不同管辖区的不同税收处理来规避CFC规则。

25. 对于文中提到的控制，建议CFC规则至少应同时采用法律控制和经济控制两个标准，满足二者中的一个就会形成控制。国家也可以采取实体测试，以确保法律和经济控制测试无法被规避。当一国居民（包括企业实体、个人或其他）持有超过一个CFC的控制权时，该CFC应被视为是受控的。不过，想要实现更广泛的政治目标或者防止对CFC规则规避的国家可以将其控制门槛设定在更低的水平。这一级别的控制可以通过关联方或非关联居民方的合并利益或任何保持一致行动的纳税人的合并利益来达成。此外，CFC规则应适用于直接控制，也适用于间接控制。

II. 解释

A. 实体考虑

26. 尽管从CFC规则的名称上看起来只适用于公司实体，但有许多国家的CFC规则在特定情况下也包括信托、合伙企业和常设机构，以确保在母管辖区内的公司无法通过改变子公司的法律形式轻易地规避CFC规则。

27. 透明体例如合伙企业不应被视作CFC，前提是这些透明体的收入已在现有的基础上在母管辖区缴税。然而，如果一个透明体取得的收入引发了BEPS担忧且没有在母管辖区缴税，CFC规则可以采用两种方式中的一种。第一种方式，CFC规则可以视透明体为CFC，以确保CFC收入不会因CFC管辖区对不同组织形式的处理不同而免于缴纳CFC税。举例而言，当一个实体根据母管辖区的法律是纳税实体，而根据CFC管辖区的法律是合伙企业时，这种情况就可能出现。第二种方式，CFC规则可以将CFC所拥有的透明体收入作为CFC所收取的收入征税，以确保CFC无法将收入转移到透明体来规避CFC规则。
where a parent jurisdiction exempts the income of a PE\textsuperscript{21}, the income of that PE could potentially raise the same concerns as income arising in a foreign subsidiary. Where this is the case, the parent jurisdiction could address this either by denying the exemption or by applying CFC rules to the PE.

29. A further issue that arises in determining which entities could be CFCs is how to treat hybrid tax planning in situations where the parent jurisdiction’s rules concerning characterisation of instruments and entities results in payments that might otherwise be attributed under CFC rules being ignored or treated as being outside the scope of CFC rules. For example, entity classification rules in the parent jurisdiction can allow the payer and payee in a multinational group to be treated as the same entity for CFC purposes so that a deductible intra-group payment between these entities is not taken into account under the parent’s CFC rules. These rules ultimately exclude income that would otherwise be attributable as CFC income and they have this effect because they do not recognise certain entities. To the extent that the payment is deductible in the payer’s jurisdiction this gives rise to foreign to foreign base erosion issues.

30. It is recommended that countries address this issue. One way to do so could be to consider a modified hybrid mismatch rule that requires an intragroup payment to a CFC to be taken into account in calculating the parent company’s CFC income.\textsuperscript{22} A possible approach would take an intragroup payment into account if:

- The payment is not included in CFC income.
- The payment would have been included in CFC income if the parent jurisdiction had classified the entities and arrangements in the same way as the payer or payee jurisdiction.

31. The example below explains how this rule might operate. In the structure illustrated below, A Co, a company resident in Country A, holds all the shares of B Co, a company resident in Country B. B Co, in turn, holds all the shares in C Co, a company resident in Country C. Country A and Country C are high tax jurisdictions while Country B is a low tax jurisdiction. C Co is a disregarded entity for Country A tax purposes. C Co borrows money from B Co, and because C Co is treated as transparent under the laws of Country A, the payment of interest to B Co is ignored under the laws of Country A and therefore not included within the calculation of CFC income for Country A purposes. Note that this example would not currently be caught by the rules recommended under Action Item 2 as this payment does not create a hybrid mismatch under the rules of either Country B or Country C, which are the residence jurisdictions of the counterparties. Instead, it only creates a hybrid mismatch under the laws of Country A, which is the country that treats C Co as transparent.

\textsuperscript{21} This includes a branch as defined under domestic law that equates to a PE.

\textsuperscript{22} This is not the only way to tackle this issue. A jurisdiction that implements an excess profits approach similar to that described in Chapter 4, for example, may not need an additional rule to address these types of hybrid mismatches. If such an approach does not ignore the income earned in situations such as those illustrated in Figure 2.4.
28. 常设机构在两种情况下可能会适用CFC规则。首先，CFC规则应足够广泛以适用于外国实体在另一个国家有常设机构的情况。其次，当母管辖区免除常设机构的收入时，常设机构的收入会引起与外国子公司的收入同样的问题。出现这样的情况下时，母管辖区可以通过不允许PE免税或者对常设机构也应用CFC规则。

29. 判定哪些实体可以被认定为CFC时引起的进一步问题时，当母管辖区关于机构实体性质分类的规则可能会导致本应被视为归属于CFC收入的支付被忽视或被认为归属于不CFC收入的范围时，应当如何处理这一类的混合实体税务筹划。例如，母管辖区的实体分类规则可以允许跨国集团内的付款人和收款人在CFC规则内被视作同一实体，从而使得此集团内支付可以税前扣除，但又可以规避母管辖区的CFC规则。这些规则最终会导致本应归属于CFC收入的收入被排除在外，产生这种结果的原因是因为特定实体被视同为不存在。当这些支付在支付者所在辖区可在税前扣除时，这笔可扣除的支付造成了跨国交易中的税收侵蚀。

30. 建议各国解决此类问题。一种方式是考虑一项修正混合错配规则，这一规则要求在计算母公司CFC收入时，将内部成员向CFC支付的金额也包含在内。可能的方法是，当下列的条件被满足，则应将内部成员的支付包括在内：
- 支付的金额未被包括在CFC收入中。
- 如果母管辖区对实体和安排的分类与支付方管辖辖区一致，该项支付将会被包括在CFC收入内。

31. 下述案例解释了此规则履行。在下图展示的架构中，A国的居民企业A公司持有B国居民企业B公司的所有权。B公司同样持有C国居民企业C公司的所有权。A国和C国是高税收管辖区，而B国是低税管辖区。从A国税务角度来看C公司可被视为不存在。C公司从B公司借款，因此C公司在A国的法律下被视为不存在。C公司在B国的法律下同样被视为不存在，因此从A国角度来看C公司没有被CFC税务。需要注意的是，此例中C公司被视作不存在。本例中的支付在支付方所在居民国的B国或者C国的规则下并没有产生混合错配。相反，它仅在视C公司为透明的A国法律下产生了混合错配。

21 这包括国内法下与PE相似的分公司。
22 这并非解决此类问题的唯一方式。例如，一个采用类似第4节中描述的超额利润方法的管理法，可能不需要一个额外的规则来应对这些混合错配类型。前提是一种方法不会将第21节展示的情形下所赚取的收入视为不存在。
32. The interest payment is a deductible intra-group payment. The reason it is not included in the calculation of CFC income is due to the treatment of the payer under the laws of the parent jurisdiction. Under the rule set out above, the payment would be included as an item of interest paid by another CFC when calculating A Co’s CFC income.

33. While the example illustrated above involves a conflict in entity classification, a similar result can be achieved using a loan that is treated as equity for Country A purposes (so that the interest payment is characterised under Country A’s CFC rules as an exempt dividend). The effect can also be achieved by exploiting differences in the treatment of residence for tax purposes. For example, Country A, applying its own rules on tax residence, could treat B Co as tax resident in Country C so that the interest payment is ignored under a same country exception,23 under which Country A’s CFC rules do not include income in CFC income if it was received from taxpayers resident in the CFC jurisdiction. As these arrangements all rely on a conflict in the characterisation of the entity or instrument they would also be caught under the rule outlined above.

B. Control

34. The definition of control requires two different determinations: (i) the type of control that is required and (ii) the level of that control.

1. Type of control

35. Control can be established in various ways, which are outlined below.

- **Legal control** generally looks at a resident’s holding of share capital to determine the percentage of voting rights held in a subsidiary. Legal control is a relatively mechanical test that is easy for both tax administrations and taxpayers to apply and reflects the fact that a sufficient degree of voting rights should enable residents to elect the board of directors or an equivalent body responsible for the affairs of the foreign entity and thus ensure that a CFC acts in accordance with their instructions. However, corporate law often provides a large degree of flexibility in designing the share structure of a corporation, thus enabling the use of artificial share terms and structures to circumvent the control requirement. A focus on legal control is therefore likely to be too narrow, and most countries also use a concept of economic control. Although tests that consider the

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23 Several countries including the United States have exceptions in their CFC rules for payments made between companies in the same country.
表格 2.1. 修改后的混合错配规则

32. 支付的利息是一种可扣除的集团内存款。在计算 CFC 收入时它未被包含在内。原因是基于母管辖区法律对支付者的处理方式。根据上述规则，当计算 A 公司的 CFC 收入时，这笔支付款项将作为另一个 CFC 支付的利息被包含在内。

33. 尽管上面的例子展示了因实体分类而产生的冲突，其他方式同样可以达成相似的结果。例如一个在 A 国被认定为权益的贷款（这样利息支付就能在 A 国的 CFC 规则下被判定为免税的股息）。还可以利用不同地区对税收居民的不同认定方式。比如 A 国根据本国税收居民规则可以将 B 公司认定为 C 国的税收居民。从而根据同一国家豁免条款将支付的利息忽略。这是因为 A 国的 CFC 规则规定将自于同一管辖区的税收居民处获得的收入包含在 CFC 收入中。由于这些安排都利用了实体或工具分类上的矛盾，在上述规则下将不会发现。

B. 控制

34. 控制的定义要求两方面澄清：(i) 控制的类型，以及 (ii) 控制的水平。

i. 控制的类型

35. 控制可以由不同的方式建立，详见下述简介。

- 法律控制：通常着眼于一个居民企业与其子公司的持股比例。该持股比例可以定量其在子公司的表决权。法律控制是一种相对较容易被税收当局和纳税人运用的机械测试，它能反映出这样一个事实，即足够多的投票权应当能授权企业有权选举董事会或类似对外国实体负有监管职能的组织机构，以确保一个 CFC 按照他们的指示行动。然而，设计股权架构

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23. 包括美国在内的一些国家有针对在同一国家不同公司间支付款项的 CFC 路径规则。
entitlement to acquire shares, and therefore voting rights, through certain contingent rights such as options may help mitigate some of the weaknesses of legal control.

- **Economic control** focuses on rights to the profits, as well as capital and assets of a company in certain circumstances such as dissolution or liquidation. Such a test recognises that a resident can control an entity through an entitlement to the underlying value of the company even where they do not hold the majority of the shares. This entitlement may result from rights to the proceeds in the event of a disposal of the entity’s share capital or the entity’s assets on a winding up. It may also include rights to a distribution of profits other than on a disposal or winding up. Economic control is also a relatively mechanical test that focuses on facts that can be objectively assessed. It does add some complexity but in reality those with a majority stake in a company are likely to be aware of that fact and may have other reporting obligations in respect of that controlled relationship. However, economic control rules may be circumvented, most obviously by means of group reorganisations involving the insertion of a new group holding company. In such situations, both legal and economic control may change even though there is little or no change in the underlying business or the level of decision-making and business control exercised by the previous parent.

- **De facto control** can look at similar factors to those considered by many countries when considering where a company is resident for tax purposes. For instance, countries can look at who takes the top-level decisions regarding the affairs of the foreign company or who has the ability to direct or influence its day-to-day activities. Another approach could focus on any particular contractual ties with the CFC that permit taxpayers to exert a dominant influence over it. However, a de facto control test generally operates as an anti-avoidance rule to ensure that other control tests are not circumvented. De facto control tests therefore require a significant analysis of the facts and circumstances and some subjective assessment of these. If applied in all cases, this will lead to added costs, complexity and uncertainty for taxpayers. In addition, based on countries’ experience in operating residence rules, the type of criteria mentioned above may also be relatively easy to avoid and therefore difficult for a tax administration to prove.

- **Control based on consolidation** can look at whether a non-resident company is consolidated in the accounts of a resident company based on accounting principles (e.g. International Financial Reporting Standards, or IFRS). This is not fundamentally different from the approaches mentioned above. In fact, like the legal and de facto control tests, accounting principles also refer to criteria such as voting rights or other rights to exercise a dominant influence over another entity, but they use these criteria to establish whether or not an entity should be consolidated. For example, under IFRS 10 a taxpayer should consolidate any entity if, for instance, it has rights that give the power to direct the activities that most significantly affect the subsidiary’s returns. The power may be based on voting rights in relevant areas of the subsidiary’s business activity or generally on a controlling influence over the subsidiary which effectively tests legal and de facto control.

36. The above approaches are often combined to prevent circumvention and to ensure that rules operate effectively. Based on the above analysis, a control test should focus on a combined approach that includes at least legal and economic control. Both of these tests are reasonably mechanical and so should limit the administrative and compliance burden involved. However, countries could also consider supplementing these tests with either a de facto test or a test based on consolidation for accounting purposes. Both of these, but particularly a broad de facto test, could increase complexity and compliance costs. Therefore countries that are attracted to using one of the latter two tests to address specific problems (such as those raised by inversions) may find that these problems could be better addressed with separate targeted provisions rather than through an extension of the concept of control for CFC purposes.
时。公司法通常会赋予一个公司相当大的灵活性，从而使得公司不可以在法律限制更宽的情况下实施严格的控制要求。所以仅关注法律控制可能太过狭窄，并且实际上大部分国家也使用经济控制的概念。不过，如果在测试中包含部分或所有权利（例如控制权）来获取股权从而获得表决权的权益，可能可以中和法律控制的一些弱点。

- **经济控制** 看重的是对利润享有的权利，当公司处于某些特定情形时如股利政策或者清算时，也会考虑对于注册资本、资产的权利。这一测试认为，虽然企业并不拥有大多数股份，其仍然可以通过对目标公司的潜在价值享有权利这一方式来实现对目标公司的控制。这个权利可能来自于建立一家企业股权或是并购一家企业时对股权或资产处置所得的享有的权作，也可能包括从处置和解散之外对所分配的利润所享有的权利。经济控制着重于股东的客观评估的事实，也是一个相对机械的测试，这种方式虽然会增加复杂性，但在实践中，由于公司控制权的股东通常会从相关股东，并且可能对控制关系有其他的报告义务。不过，经济控制也有可能被操纵，最常见的方法是重组集团架构，包括插入一个新的集团控股公司。在这种情况下，法律控制和经济控制都可能改变，即使相应的母公司企业决策层和企业控制仍很小或没有变化。

- **实益控制** 看重的因素与许多国家在判断企业是否为外国税务居民时所考虑的因素类似，比如，相关国家可以考虑谁在外国公司财务上享有最高决策权或谁有资格指导或影响外国公司的日常事务，也可以关注任何允许税务人对 CFC 享有控制权的与 CFC 签订的特殊合同。然而，实际控制经常被作为另一个反避税措施来确保其他控制测试未被规避，因此要求对事实和条件有深入的分析并包含主观判断。如果这个方法被用于所有的情形，将会增加纳税人与监管的复杂性，这种典型方法是重组集团架构，包括插入一个新的集团控股公司。在这种情况下，法律控制和经济控制都可能改变，即使相应的母公司企业决策层和企业控制仍很小或没有变化。

- **基于合并表的控制** 基于一个非居民企业是否基于会计准则（如国际财务报告准则，即 IFRS）属于一个居民企业的合并范围。这个方法与前述方法并无本质区别，但实际上，正如法律和经济控制，会计准则同样涉及侵权损害或其他对另一实体加以控制的权利。只不过这些标准被用来衡量一个实体是否应当被纳入合并范围。举个例子，根据 IFRS 10，如果一个纳税人有权对会涉及到一家公司利润的合并活动加以指导，该公司应当被纳入此纳税人的合并范围。这种权利可能是基于对子公司不同经济活动的投票权或对子公司拥有的控制权。这有效地证明了法律和实际控制标准。

36. **上述方法** 经常综合在一起使用，以防范对它们的规避并确保规则得以有效执行。基于上述分析，一个控制测试应当是一个综合方法，至少包括法律和经济控制测试。这两种测试在合理的范围内有一定的机动性，所以应当能对相关监管和合规负担有所限制。然而，相关国家也可以考虑采用国际控制测试或基于合并报表的控制测试。这两种测试，尤其是国际控制测试，会增加复杂性和合规成本。因此希望采用后两种测试来应对一些特殊问题（比如由于所有引起的和问题）的国家会发现，比起通过延伸 CFC 控制的概念，独特的有针对性的条款可以更好地处理这些问题。
ii. Level of control

37. Once a CFC regime has established what actually confers control, the next question is how much control is enough for the CFC rules to apply. If the aim is to catch all situations where the controlling party has the ability to shift profits to a foreign company, then, as a minimum, CFC rules would need to capture situations where resident taxpayers have a legal or economic interest in the foreign entity of more than 50%. Some existing rules find control when the parent owns exactly 50%, but the majority of rules require more than 50% control. Because owning 50% or less could still allow parent companies to exert influence in certain situations, jurisdictions are free to lower their control threshold below 50%.24

38. The determination of whether this 50% threshold has been met is straightforward when control is held by a single resident shareholder. Shareholders can exert influence in other situations, however, and existing rules generally attempt to capture these instances as well with their control rules. The general principle underlying control tests is that minority shareholders that are acting together to exert influence should have their interests aggregated when determining whether the control test has been met. Whether or not minority shareholders are acting together can be determined in at least three ways, and it is recommended that jurisdictions adopt one of these approaches to ensure that minority shareholders who are in fact exerting influence are taken into account when determining whether there is control.

39. The first way of determining whether minority shareholders are acting together is to apply an “acting-in-concert” test, which applies a fact-based analysis to determine whether the shareholders are in fact acting together to influence the CFC. If they are, their interests will be aggregated to determine whether the CFC is subject to CFC rules. This approach is not very common because it creates significant administrative and compliance burdens, but one of its advantages is that it may more accurately identify when shareholders are in fact acting together than a more mechanical test. An example of how an acting-in-concert test would work is illustrated below.

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24 Some CFC rules recognise that control can be exercised below 50% ownership. For instance, New Zealand’s CFC rules find that the control threshold has been met when a New Zealand resident owns 40% or more of the foreign subsidiary. Note that a much lower control threshold may raise EU legal concerns for Member State CFC rules, even if they do not apply to CFCs in other Member States. This is because, as the control threshold is reduced, CFC rules may implicate not just the freedom of establishment but the free movement of capital, which applies to Member State rules that are discriminatory toward residents of third countries as well as residents of other Member States. This concern would only arise when the threshold is reduced below the level of “significant influence”.
1. 控制水平

37. 一旦一个 CFC 机制确立了什么是真正意义上的控制，下一个问题便是何种程度的控制才能满足应用 CFC 规则的条件。如果目标在于对控制主体有能力向外国公司转移利润的所有情形，那么，CFC 规则至少应该包括那些居民纳税人在一个外国实体中占有 50%以上法律或经济权益的情形。一些现有规则包含了母公司拥有 50%权益的情形，但是大多数规则要求控制比例大于 50%。鉴于在一些情况下，母公司即便只拥有 50%或以下的控制权仍可能施加影响，管辖权可以自由地选择是否将它们的控制门槛降低至 50%以下。\(^{24}\)

38. 当只由一个单独的居民股东控制时，可直接判断是否达到 50%的门槛。然而，在其他情况下施加影响，现有的规则通常会尝试厘清这些情况以及相关的控制原则。控制测试的潜在一般原则是在判定是否达到控制测试的标准时，共同行动施加影响的少数股东的权益应集中考虑。少数股东是否共同行动可以采用至少三种方法来判断，我们建议管辖权在判定是否存在控制时，采取其中一种方式来确保不会漏掉少数股东实际上共同施加影响的情况。

39. 第一种方式是采取“一致行动”测试，该测试基于事实进行分析以判定股东是否共同行动来对 CFC 施加影响。如果存在共同行动，他们的股权将被归集在一起来看此 CFC 是否要遵循 CFC 规则。这种方式并不十分常见，因为它增加了巨大的监管和合规负担，但它的一个好处是能发现少数股东事实上的一致行动，较机械测试更为精确。下面这个例子具体展示了“一致行动”测试的工作机制。

\(^{24}\) 一些 CFC 规则承认拥有 50%以下的权益仍可存在控制。举个例子，新西兰的 CFC 规则认为当一个新西兰居民拥有一个外国子公司 40%或以上股权时仍可满足控制门槛。需要注意的是，更低的门槛可能会引起欧盟对成员国 CFC 规则法律上的担忧，即使这些规则并不适用于在其他成员国的 CFC。这是因为随着控制门槛的降低，CFC 规则可能不仅影响设立自由，还影响资本的自由流动，而这两者正是为了防止欧盟成员国歧视第三国居民以及其他成员国居民。不过，这个担忧仅仅在门槛降低到低于“重要影响”水平时产生。
40. C Co, A Co and B Co are all unrelated parties. Country A’s CFC rules require a controlling interest of more than 50% before they can be applied. There is no other resident taxpayer in Country A so unless Country A has an acting-in-concert rule that aggregates the interest of both residents and non-residents, and the acting in concert rule can be shown to apply, then there will be no attribution of the income of CFC to A Co. As mentioned above, an acting-in-concert rule would add complexity and compliance costs, especially where it is applied to both residents and non-residents. However, it could also prevent circumvention of CFC rules.\(^\text{23}\)

41. The second way that some rules determine whether minority shareholders are acting together is to look to the relationship of the parties. If rules only include the interests of related parties when determining whether the 50% threshold has been met, this would eliminate the need for a fact-based acting-in-concert test, but it will apply more narrowly since it focuses more directly on the profit shifting opportunities created by structures involving related parties. However, since BEPS structures often involve wholly owned subsidiaries or at least subsidiaries owned by related parties, a focus on related parties may still capture most structures that raise BEPS concerns.\(^\text{24}\) An example of how a related party test would work is illustrated below.

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\(^{23}\) A similar scenario to that above could arise where there is a joint venture. Some countries have specific rules to deal with joint ventures. Under the UK CFC rules, a UK resident 40% joint venture partner would be treated as having control if there is a non-UK resident that holds at least 40% and no more than 55% of the legal and economic interest in the joint venture. This rule has a similar effect to an acting-in-concert type rule.

\(^{24}\) This may not capture all structures that raise BEPS concerns, however, and other action items have recognised that unrelated parties may act together to achieve a certain outcome. The work on hybrid mismatch arrangements, for example, includes structured arrangements involving unrelated parties.
表格 2.2. 由非关联方采取一致行动获得的控制权益

40. C 公司，A 公司和 B 公司都是非关联的实体。A 国的 CFC 规则要求控制权益超过 50%。在 A 国没有其他居民纳税人，除非 A 国有“一致行动”规则允许居民企业和非居民企业的权益合并计算。且一致行动规则可以被适用，否则 CFC 的收入不会被分配给 A 公司。正如前述提到的，“一致行动”规则将增加复杂性和合规成本，尤其是当它同时适用于居民企业和非居民企业。然而，它能阻止对 CFC 规则的逃避。

41. 某些规定中采用的第二种决定少数股东是否采取一致行动的方式是考量各方之间的关系。如果在决定是否达到 50%的门槛时规定仅考虑关联方，将减少对基于事实分析的一致行动测试的需求，但是由于这种方式更为直接地着眼于关联方架构带来的利益转移机会，其适用范围较窄。然而鉴于 BEPS 架构经常包括全资子公司或者至少被关联公司持有的子公司，着眼于关联方可能仍然可以应对大多数引起 BEPS 问题的架构。

有一个例子将展示某种关联方测试是如何运作的。

25 相似的情景在合资企业中也会出现。一些国家针对合资企业有特殊的规定，英国 CFC 规则规定，如果有一个非英国居民纳税人拥有合资企业至少 40%但不超过 55%的法律及经济权益，则一个拥有该合资企业 40%权益的英国居民合伙人将被认定为具有控制权。这个规则与“一致行动”规则有类似的效果。

26 尽管如此，着眼于关联方可能无法应对所有引起 BEPS 问题的结构。其他的行动计划发现非关联方可能通过一致行动从而达到特定的效果。例如，混合错配安排就包含了非关联方的架构安排。
42. **A Co1 and A Co2 are unrelated residents in Country A.** For Country A's CFC rules to apply, related parties or residents that act in concert must hold an aggregate interest in the CFC of more than 50%. Parent Co splits the interest in CFC between A Co1 and B Co, in order to circumvent the control requirement in country A. If, however, Country A applied a related party rule that aggregates the interests of related parties to determine control, then A Co1 would be found to be a controlling shareholder because of the shared ownership between A Co1 and B Co, which are both owned by Parent. This would mean that 30% of the income of CFC would be attributed to A Co1. No income would be attributed to A Co2. The same outcome is likely to arise under an acting-in-concert test. Whether or not income is attributed to B Co would depend on the rules in operation in Country B but if they operated the same form of related party rule, then 30% of the income of CFC would also be attributed to B Co.

43. **The third way that CFC rules determine whether minority shareholders are exerting influence over the CFC is to impose a concentrated ownership requirement.** In the United States, for example, the interests of all residents in the CFC are aggregated so long as each interest is higher than 10%. This approach leads to the interests of a concentrated group of residents being considered, and it also eliminates the need for separate rules for attribution, since the 10% threshold for control can also be used to determine which residents will have income allocated to them. Alternatively, a concentrated ownership requirement could require that ownership be divided between a small number of resident shareholders (e.g. 5 or fewer), regardless of their ownership percentage, but this may raise administrative and compliance concerns. CFC rules that aggregate all interests above a low threshold (e.g. 10%), or that focus just on the number of owners, may not always accurately identify whether taxpayers are in reality acting together.

44. **A concentrated ownership rule can be illustrated with reference to Figure 2.3 above.** If Country A expanded its control requirement and applied its rules where there were a small group of resident
42. A 国公司 1 和 A 国公司 2 是不相关的 A 国居民企业。根据 A 国的 CFC 规则，关联方或一致行动居民必须在 CFC 中持有高于 50% 的合计权益时规则才适用。母公司 CFC 的权益在 A 国公司 1 和 B 公司间进行了分配。然而，一旦 A 国运用以合计所有关联方的权益来决定公司控制权政策。就会发现 A 国公司 1 是控股股东，因为 A 国公司 1 和 B 公司共同拥有控制权。而 B 公司则是母公司所有的。这意味着 30% 的 CFC 所获取的收入将归属于 A 国公司 1，而并没有收入会归属于 A 国公司 2。在一致行动测试中相同的结果可能会出现。而收入是归属于 B 公司取决于 B 国的现行政策。如果其也采用相同的关联方政策，则 30% 的 CFC 所获得的收入将归属于 B 公司。

43. CFC 规则中决定少数股东是否对 CFC 施加影响的第三种方法是推行集中所有权要求。比如在美国，所有居民在 CFC 中的权益只要高于 10% 就会被集中起来。这种方式使得居民的集中权益被纳入考虑范围，并且将 10% 的控制门槛也能被用来决定收入将归属于哪些企业。这种方式也减少了对于单独的归属规则的需求。另外，集中所有权要求也可以要求所有权在少数几个持股居民（比如 5 个或更少）间划分，而不考虑他们的持股比例。这可能引起监管和合规方面的担忧。而将所有高于一个低门槛（比如 10%）的股权集中起来的 CFC 规则，亦或是仅聚焦于拥有者数量的 CFC 规则，可能无法总是准确地识别给税人是否真正的一致行动人。

44. 集中所有权要求也可以通过上表的图表 2.3 来展示。如果 A 国在它的控制要求并将其应用于一小群居民股东，如 A 国公司 1 和 A 国公司 2 的情况，则 CFC 规则将适用。30% 的 CFC 所获取的收入
shareholders, in this situation A Co 1 and A Co 2, then the CFC rules would apply and 30% of the income of CFC would be attributed to A Co 1 and 40% to A Co 2. This would prevent circumvention of the rules but would attribute income to A Co 2. This might not be a concern in the context of a 40% holding but a test that focuses on a small group of residents would potentially attribute profits to A Co 2 even if it was not acting in concert with A Co 1 and had no real ability to transfer income or profits to the CFC.

45. Including the interests of non-resident taxpayers in any of these three approaches could add to the complexity of the control provisions but such an addition could be considered if countries were concerned about either related or unrelated parties acting together to try and circumvent the CFC control provisions. The recommendations above therefore do not recommend that non-residents are also taken into account in determining the level of control, but, as with all recommendations, the recommendation included in this document only establishes a minimum, and jurisdictions with different policy aims could include non-resident interests when determining whether the 50% threshold (or any lower threshold) was met. If jurisdictions chose this option, limiting taxation of resident taxpayers to their actual share of CFC income (rather than the aggregated amount) should eliminate any concerns about double taxation.

46. Regardless of which of the three approaches is taken, control should be defined to include both direct and indirect control as profit-shifting opportunities also arise where a subsidiary is held indirectly through an intermediate holding company. If CFC rules do not apply to indirect holdings then they can be very easily sidestepped. The example below illustrates one of the questions raised by indirect control, which is whether a level of indirect control that falls below the control threshold should still lead to a finding of control if the control threshold is met at each level in the chain of ownership.

**Figure 2.4. Calculation of indirect control interest**

![Diagram of indirect control interest]

47. In this example, Parent has a 70% interest in A Co, which holds a 60% interest in CFC. There is therefore more than 50% control at each tier, but Parent itself only has an interest of 42% (70% x 60%) of CFC. Despite this limited legal control, A Co has enough economic control to influence CFC and Parent has enough economic control to influence A Co, so it is recommended that CFC rules should find Parent to

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37 Non-resident taxpayers whose interests could possibly be included could include family members of resident shareholders or board members of domestic parent companies.
收入将归属于 A 国公司 1 并且 40%的将归属于 A 国公司 2。这将防止对规定的规避但会将收入归属于 A 国公司 2。在 40%的持股比例下这可能不是问题，但是关注小辈居民的规则将会把潜在的利润归属于 A 国公司 2，即使它与 A 国公司 1 不是一致行动人并且没有真正的能力将收入或利润转移给 CFC。

45. 在以上三种方法中加入对非居民纳税人利益的考虑会增加控制条款的复杂性，但如果国家担心关联方或非关联方采取一致行动以试图规避 CFC 控制条款的情形则可以加入上述考虑。以上的建议并未要求在决定控制程度时考虑非本国居民，但如同其他建议一样，本文中的建议仅仅是一个最低标准，拥有不同政治目标的管辖权在决定是否已达到 50%的门槛（或者更低的门槛）时可以包括非居民权益。如果管辖区选择了这个选项，仅对居民纳税人根据其在 CFC 中的真 实占比所确认的收入（而不是整体）课税应该可以减少对双重课税的担忧。

46. 无论采取以上三种方法中的一种，控制应该被定义为包括直接控制和间接控制，因为利益转移机会也会在通过一个中间控股公司非直接控股一个子公司的 情况下出现。如果 CFC 规定不适用直接控股，那么它将被很容易被规避。以下的例子展示了间接控制引起的一些问题中的一个。即虽然间接控制比例没有达到控制的门槛，但如果控制链的每一层都已达到控制门槛，是否仍然可以形成控制？

### 表格 2.4 间接控制权益的计算

![图示]

47. 在这个例子中，母公司拥有 A 公司 70%的权益，A 公司拥有 CFC 60%的权益。所以每一层都大于 50%的控制，但是母公司自己只拥有 CFC 42%（70%×60%）的权益。尽管母公司对 CFC 的法律控制有限，但 A 公司对 CFC 有足够多的经济控制来影响 CFC，并且母公司也对 A 公司有足够多的经济控制来影响 A 公司，所以我们建议 CFC 规则应当确认母公司对 CFC 具有充足的影响，因

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27 利益有可能被包含在内的非居民的纳税人可能包括居民股东的家庭成员或者本国母公司的董事会成员。
have sufficient influence over CFC to meet the control threshold since the control threshold is met at each level in the chain of ownership. The amount of income attributed to Parent should, however, be limited to its actual economic interest of 42%.

48. Although including both direct and indirect control in the control analysis could arguably increase the potential for double taxation if all countries were to introduce CFC rules, this situation should be addressed with rules to reduce or eliminate double taxation.

49. Determining whether a company in the parent jurisdiction has control also requires a rule determining when control should be established as well as what types of entities can be considered to have control. On the first question, many rules determine control based on how much of an economic or legal interest was held at the end of the year, but jurisdictions concerned about circumvention of this rule can also include anti-abuse provisions or a test that looks at whether the parent company had the necessary level of control at any point during the year. On the second question, in order to ensure that all situations where resident shareholders have the opportunity to shift income into a foreign subsidiary are captured, CFC rules should consider the interests held by all resident taxpayers, rather than limiting this inquiry to corporate entities or other limited groups.

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28 For example, once control is established at a level, some CFC rules deem the control at that level to be 100% for the purpose of determining the level of indirect control at the next level.

29 See infra Chapter 7.
为所有权链条的每一层，控制门槛都已得到满足。然而，归属于母公司的收入数被限制于母公司拥有的 42% 的真实经济权益。

48. 如果所有的国家都引入 CFC 规则，在控制分析中涵盖直接控制和间接控制可能会增加双重征税的风险，因此应该起草相应规则以减少或消除双重征税。

49. 当决定在母管理区的公司是否拥有控制权时，还需要一个规则决定确定控制的时点，以及被认定为具有控制权的实体类型。对于第一个问题，很多规定基于年度时拥有多少经济或法定权益来确定。但是，担忧此方式被规避的管理区可以包含反滥用条款，或是加人一个考察公司在一年内的任何一个时点是否拥有必要程度的控制权的测试。对于第二个问题，为了确保能够发现居民股东有机会将收入转移至国外子公司的所有情形，CFC 规定应该考虑涵盖所有居民纳税人持有的利益，而不是只考虑法人实体或其他有限集团。

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28. 比如，在某一层次上确立了控制，有些 CFC 规则在决定下一层次的控制程度时会将此层的控制程度视为 100%。
29. 请参见第 2 章。
CHAPTER 3: CFC EXEMPTIONS AND THRESHOLD REQUIREMENTS

50. CFC exemptions and threshold requirements can be used to limit the scope of CFC rules by excluding entities that are likely to pose little risk of base erosion and profit shifting and instead focusing attention on cases that are higher-risk because they exhibit some characteristic or behaviour that means there is a greater chance of profit shifting. These provisions can therefore both help make CFC rules more targeted and effective and also reduce the overall level of administrative burden by ensuring that certain companies are not affected by the rules, although these companies may still need to satisfy certain reporting requirements to show that they meet any requirements for these provisions.

I. Recommendations

51. The recommendation is to include a tax rate exemption that would allow companies that are subject to an effective tax rate that is sufficiently similar to the tax rate applied in the parent jurisdiction not to be subject to CFC taxation. The effect of this tax rate exemption would be to subject all CFCs with an effective tax rate meaningfully below the rate applied in the parent jurisdiction to CFC rules. This exemption could be combined with a list such as a white list.

II. Explanation

52. Three different types of CFC exemptions and threshold requirements were considered by the countries involved in this work:

   (i) a set de minimis amount below which the CFC rules would not apply;
   (ii) an anti-avoidance requirement which would focus CFC rules on situations where there was a tax avoidance motive or purpose;
   (iii) a tax rate exemption where CFC rules would only apply to CFCs resident in countries with a lower tax rate than the parent company.

A. De minimis threshold

53. A de minimis threshold could reduce administrative burdens and make CFC rules more targeted and effective by ensuring that certain companies are not subject to the rules. Many countries' rules already include a de minimis threshold under which income that would otherwise be treated as CFC income is not included in the taxable income of the parent company if it falls under a certain ceiling. Generally, countries provide an entity-based exemption where the entity's attributable income is less than either a certain percentage of the CFC's income or a fixed amount of the CFC's income or where the taxable profits are less than a fixed amount. Some rules also include a separate cap for certain types of profits that present a higher risk of being diverted. The UK rules, for example, use two different thresholds with a much higher de minimis threshold applying to CFCs that can show that they do not earn much income that is likely to be highly mobile.

30 A de minimis threshold could also eliminate the need for a special rule for exempting working capital under a transactional approach. See infra Chapter 4.
第三章  CFC的豁免和门槛要求

50. CFC 的豁免和门槛要求能限制 CFC 规则的适用范围。它可以排除具有侵蚀性和利润转移可能性非常小的实体，并且省去一些具有更高可能性转移利润特点或行为的高风险情形。这些条款因此能够帮助 CFC 规则更有针对性更有效，同时确保特定公司不受影响从而减少总体上的监管负担。不过，这些特定公司仍然需要满足某些报告要求以展示他们可以满足这些条款的所有要求。

I. 建议

51. 建议包含一个豁免税率，该税率率允许实际有效税率足够接近母公司税率的公司可以免于被征收 CFC 税。这种豁免税率将所有足够低于母公司税率的 CFC 入 CFC 规则的覆盖范围。这种豁免与与名单合并执行，予按白名单。

II. 解释

52. 参与这项工作的国家考虑了三种不同类型的 CFC 豁免和门槛要求：

(i) 一个 CFC 规则不适用的最低数量门槛

(ii) 一项反避税要求，该要求将 CFC 规则集中于存在避税动机或意图的情况

(iii) 一项豁免税率，CFC 规则仅适用于 CFC 所在国的税率低于母公司税率的情形

A. 门槛

53. 该门槛通过确保特定企业不受规则限制，从而减少监管负担并令 CFC 规则更具针对性和有效性。很多国家的规定已经包含最低门槛规则。根据此规则，如果本应确认为 CFC 收入的所得低于最低门槛，则可以免于被包括在母公司的所得当中。一般来说，某些国家按实体提供豁免，当该实体的可归属收入比特定比例的 CFC 收入或固定数额的 CFC 收入低时，或者当应纳税所得小于某一特定数额时，此豁免适用。一些规定也为高转移风险的特定类型利润设定一个单独的限额，比如英国的规则就使用两种不同的最低门槛，表现出没有缴纳高流动性收入的 CFC 适用其中高一些的门槛。

[30] 最低门槛能消除交易法下对流动资金特殊规则的需要。参见下面的第 4 章。
54. One possible way that de minimis thresholds can be circumvented is through fragmentation, under which companies split their income amongst multiple subsidiaries, each of which falls below the threshold. Countries' current rules often include safeguards to protect against such circumvention. Although this may add some complexity to the rules, countries' experience has shown that these safeguards may not necessarily be inconsistent with the threshold's purpose of reducing administrative and compliance burdens. For example, the de minimis test under the United States rules includes a general anti-abuse rule which looks at the income of two or more controlled foreign corporations in aggregate and treats it as the income of a single corporation if a principal purpose for separately organizing, acquiring, or maintaining such multiple corporations is to prevent income from being treated as attributable under the de minimis test. Although such an anti-abuse rule increases the potential administrative burden of the de minimis threshold, this increased burden is counteracted in the US rule with a rebuttable presumption that automatically treats the income of multiple CFCs as that of a single corporation if the CFCs are related persons and carry on a business previously conducted by a single CFC or carry on a business as partners in a related partnership. Under the German rules, the general de minimis test is subject to the condition that the attributable income must not exceed the same amount at the level of the CFC and at the level of the shareholder. This means that even if the attributable income of one CFC does not exceed the threshold, the CFC may still be subject to CFC rules if the same threshold is exceeded by adding all of a taxpayer's shareholdings in several CFCs. Examples of these two different types of anti-fragmentation rules are set out below.

55. In Figure 3.1 below, A Group rearranges its operations to ensure that profits that previously arose in a single CFC are split between three CFCs in different territories. After the reorganisation, A Co is the sole shareholder of three controlled foreign corporations, CFC1, CFC2 and CFC3 all have the same taxable year, and they are partners in FP, a foreign entity in Country C classified as a partnership. For their current taxable years, each of the CFCs derives part of its attributable income from FP and part from other activities undertaken separately.

![Figure 3.1. De minimis test](image-url)
能规避最低门槛的一种可能的方式是拆分。公司将其收入分配给多个子公司，使得每个公司的收入都低于门槛值。各国现行的规则中通常都包括保障措施，以防止此类规避方式。虽然这可能会增加一些复杂性，但各国的经验表明，这些保障措施可能不必要与设立门槛以降低管理和合规性负担的目标相违背。比如，在美国规则的门槛测试中就包括一个'一般反滥用规则'。如果单独设立、收购或保留多个公司的主要目的是为了防止收入根据最低门槛测试将被归属为 CFC 收入，则这一规则会将两个或两个以上受控外国公司的利润合并计算。尽管这种反滥用规则增加了最低门槛的潜在风险负担，但如果美国的规则，增加的负担可以被一个可反驳的假设所抵消。当这些 CFC 是关联方，且进行以前由一个 CFC 所开展的业务或作为合伙人共同在一个合资企业开展业务时，这一假设将这些 CFC 的收入看作一个企业的收入。根据德国的规则，一般最低门槛测试有一个前提条件是，在 CFC 层面的可归属收入和股权层面的可归属收入需不超过相同数额。这意味着即使一个 CFC 的可归属收入不超过门槛，但相同的所有被纳税人所拥有的多个 CFC 的可归属收入合计额超过时，此 CFC 可能仍然要遵从 CFC 规则。这两种不同类型的反滥用规则的例子如下所示。

55. 在以下的图表 3.1 中，A 集团重新安排它的运营以确保过去来自一个 CFC 的利润被分配到三个在不同国家的 CFC。经过重组后，A 公司是三个受控外国公司的唯一股东。CFC1、CFC2 和 CFC3 的纳税年度相同，且都是 FP 的是合伙人。FP 为一个根据 C 国法律被定义为合伙制企业的外国实体。在目前的纳税年度中，每一个 CFC 的可归属收入部分来自 FP，部分来自其单独开展的其他活动。

<table>
<thead>
<tr>
<th>表格 3.1 最低门槛测试</th>
</tr>
</thead>
<tbody>
<tr>
<td>A公司</td>
</tr>
<tr>
<td>CFC1</td>
</tr>
<tr>
<td>CFC2</td>
</tr>
<tr>
<td>CFC3</td>
</tr>
<tr>
<td>FP</td>
</tr>
</tbody>
</table>

可归属收入

可归属收入

不可归属收入
56. Under the de minimis test in Country A, attributable CFC income is not taken into account for the purposes of residence taxation if the sum of the attributable CFC income is less than the lesser of 5% of total income or 1 000 000. Based on the figures in the table below, the attributable income derived by each CFC for its current taxable year, including income derived from FP, is less than five percent of the gross income of each CFC or is less than 1 000 000.

<table>
<thead>
<tr>
<th></th>
<th>CFC 1</th>
<th>CFC 2</th>
<th>CFC 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross income</td>
<td>3 000 000</td>
<td>7 000 000</td>
<td>11 000 000</td>
</tr>
<tr>
<td>5% of gross income</td>
<td>150 000</td>
<td>350 000</td>
<td>550 000</td>
</tr>
<tr>
<td>Attributable income</td>
<td>140 000</td>
<td>348 000</td>
<td>547 000</td>
</tr>
</tbody>
</table>

57. Therefore, without the application of an anti-abuse rule, each CFC would be treated as having no attributable income after the application of the de minimis test.

58. If, however, Country A were to have either an anti-abuse rule similar to the US rule or an anti-fragmentation rule similar to the German rule, A Co would be subject to CFC taxation on the income earned by its foreign subsidiaries. If Country A has an anti-abuse rule that treats the income of all three CFCs as the income of one CFC for the purposes of calculating the de minimis threshold if the CFCs are related persons (or if the principal purpose for separately organising, acquiring, or maintaining such multiple corporations is to prevent income from being treated as attributable under the de minimis test), then the attributable income is aggregated. The sum of the attributable income of the CFCs is 1 035 000, so it exceeds the 1 000 000 de minimis threshold and will be taken into account under Country A’s CFC rules. If, instead, Country A has a rule that the attributable income at the level of the shareholder must not exceed the attributable income at the level of the CFC, the de minimis threshold would also be overcome because the attributable income at the level of the shareholder is 1 035 000, while it is significantly less at the level of the CFCs.

59. Therefore, although there is no general recommendation under this building block for or against de minimis thresholds, if jurisdictions choose to implement such a threshold, best practice would be to combine this with an anti-fragmentation rule.

B. Anti-avoidance requirement

60. An anti-avoidance threshold requirement would only subject transactions and structures that were the result of tax avoidance to CFC rules. This could narrow the effectiveness of CFC rules as preventative measures, and it could also increase the administrative and compliance burdens of CFC rules if it were administrated as an up-front rule. Additionally, an anti-avoidance rule should not be necessary if the rules defining the income within the scope of a CFC regime are properly targeted. An anti-avoidance requirement is therefore not considered further in this report, but this is not intended to imply that an anti-avoidance requirement can never play a role in CFC rules that tackle base erosion and profit shifting.

C. Tax rate exemption

61. Most CFC rules include a tax rate exemption that exempts CFCs subject to a tax rate above a certain level. Such an exemption is included for two reasons. First, this approach means that the rules only apply to companies that benefit from low foreign taxes and therefore pose the greatest risk of profit shifting. Second, a focus on low-tax CFCs can provide greater certainty for taxpayers and reduce the overall administrative burden. A tax rate exemption can, however, mean that CFC rules do not prevent all base
56. 根据 A 国的最低门槛测试，如果可归属的 CFC 收入低于总收入的 5% 或 1 000 000 的较低者时，可归属的 CFC 收入将不被纳入本国居民的应税收入。基于下表中的数字，每个 CFC 在其目前的纳税年度中的可归属收入，包括来自 FIP 的收入，低于每个 CFC 的总收入的 5% 或低于 1 000 000。 

<table>
<thead>
<tr>
<th></th>
<th>CFC1</th>
<th>CFC2</th>
<th>CFC3</th>
</tr>
</thead>
<tbody>
<tr>
<td>总收入</td>
<td>3 000 000</td>
<td>7 000 000</td>
<td>11 000 000</td>
</tr>
<tr>
<td>总收入的 5%</td>
<td>150 000</td>
<td>350 000</td>
<td>550 000</td>
</tr>
<tr>
<td>可分配收益</td>
<td>140 000</td>
<td>348 000</td>
<td>547 000</td>
</tr>
</tbody>
</table>

57. 因此，如果没有采用反避税规则，在实施最低门槛测试后，每个 CFC 将会被认定为没有可归属收入。

58. 然而，如果 A 国有类似于美国的反避税规则或类似德国的反分拆规则，A 国公司通过其外国子公司获取的收入将缴纳 CFC 税。假设 A 国有反避税规则，在计算最低门槛时，如果 CFC 是关联方（或如果单独设立、收购或保留多个公司的主要目的是为了防止收入虚增的门槛测试将被认定为可归属的），那么可归属收入将被合并计算。这些 CFC 的可归属收入总额是 1 035 000，超过了 1 000 000 的最低门槛，根据 A 国 CFC 规则将被作为 CFC 收入。假设 A 国规定在股东层面上的可归属收入不能超过 CFC 层面的可归属收入，最低门槛也会被超过，因为股东层面的可归属收入是 1 035 000，而 CFC 层面的可归属收入显然大大低于此金额。

59. 因此，虽然在此部分没有通用的建议以支持或反对最低门槛，但如果管理辖区选择实施此门槛，最好的选择是将反反分拆规则相结合。

B. 反避税要求

60. 根据反避税门槛要求，只有交易或架构是出于避税目的，才会受 CFC 规则限制。这会减少 CFC 规则作为预防性措施的效率性。当 CFC 规则作为剥削政策时，也可能会增加 CFC 规则的监管和合规负担。此外，如果规则正确地定义了目标 CFC 收入，反避税规则就无必要。因此本报告中不再对反避税规则作进一步的分析，但并不意味着在应对税基侵蚀和利润转移问题的 CFC 规则中反避税规则不能发挥作用。

C. 豁免税率

61. 大多数的 CFC 规则都包括了豁免税率，当 CFC 的课税水平超过该税率时可获得豁免。这样的豁免基于两个理由，首先，这种方法意味着规则只适用于受益于低外国税而利润转移风险最高的公司。其次，将重点放在低税 CFC 能为纳税人提供更大的确定性并减少总体的监管负担。但
erosion and profit shifting since they still allow erosion of the parent jurisdiction’s base to high- or medium-tax jurisdictions, so a few jurisdictions do not include such an exemption.

62. There are different ways for jurisdictions to determine when a CFC has paid a low rate of tax. Jurisdictions may require taxpayers to apply a comparative approach on a case-by-case basis, or they may use a black list or white list to simplify the process. Using a list generally eliminates the need for a case-by-case analysis of a CFC’s tax rate and is a way of communicating whether jurisdictions apply a lower level of tax. The use of black or white lists can make it easier for tax administrations to determine when CFC rules do and do not apply and for taxpayers to know whether they will be subject to CFC rules, and the use of lists such as a white list is included in the recommendation under this building block. The United Kingdom, for example, has a white list that excludes CFCs located in listed jurisdictions which are sufficiently similar in terms of tax base and tax rate to the United Kingdom, provided that several other conditions are also met. Finland issues a list of tax treaty countries (not including EU Member States) to be considered low-tax based on nominal tax rates and tax incentives but only regards a company in those countries as a CFC if the company itself pays less than three-fifths of the taxes that would have been paid in Finland. This approach therefore sets a presumption that a CFC is low taxed, but that presumption must be supported with an actual comparison of taxes paid. Sweden applies a similar approach under which countries are broken into three categories: (i) countries where no entities would be CFCs; (ii) countries where entities without CFC income would not be CFCs while entities with CFC income would be compared against the tax rate exemption; and (iii) countries where all income will be compared against the tax rate exemption. Australia applies a white list approach under which companies resident in countries with an income tax system comparable to Australia’s tax system are not subject to CFC taxation. CFCs in a listed jurisdiction are therefore exempt from Australia’s CFC rules unless they are subject to a concessional tax regime.

63. Tax rate exemptions require that the rate at which the CFC was taxed be below a given benchmark. Tax rate exemptions apply one or two benchmarks. They either compare the tax rate in the CFC jurisdiction to a particular fixed rate that is considered low-tax or they compare the tax rate in the CFC jurisdiction to a portion or percentage of the parent country’s own rate. Both approaches are equally relevant within the context of designing rules to combat BEPS as both recognize that the incentive to shift profits will be greater where there is a significant differential between effective tax rates.

64. Under the first approach, countries would need to set a fixed tax rate below which certain CFC rules would potentially apply. An example of such an approach would be the German CFC rules, which define any level of taxation below 25% as low taxation. The second approach instead calculates the tax rate exemption based on a percentage of the tax that would have been paid to the parent jurisdiction, which thereby includes both tax rates and tax base in the analysis. The UK and Finnish CFC rules provide examples of this approach. Under UK law, there is no low taxation if the “local tax amount” is at least 75% of the “corresponding UK tax”. As mentioned above, under the Finnish rules, a low-tax regime is considered to exist if the company itself pays less than three-fifths of the taxes that would have been paid in Finland. Whichever approach is adopted, the benchmark should be meaningfully lower than the tax rate in the country applying the CFC rules. Most CFC rules apply benchmarks that are at the most 75% of the statutory corporate tax rate.

65. Once the benchmark has been set, CFC rules must determine the tax rate in the CFC jurisdiction in order to compare this to the benchmark. Current CFC rules do this in one of two ways. They either compare the benchmark to: (i) the nominal (or statutory) tax rate in the CFC jurisdiction; or (ii) the

These conditions are that there cannot be more than insignificant amounts of certain defined types of income that are not effectively taxed in the CFC’s territory of residence, that none of the CFC’s income has been generated using IP that has been effectively transferred from a UK related party in the previous six years, and that the CFC is not involved in any arrangement intended to create a UK tax advantage for any person.
是豁免税率意味着 CFC 规则不能阻止所有的税基侵蚀及利润转移，因为其仍然允许侵蚀母管辖区的税基到高或中税负管辖区，所以一部分管辖区并不包含这种特例。

62. 管辖区有多种不同的方法来判断 CFC 是否按低税率缴纳。管辖区可以要求纳税人适用个案为基础的比较方式，或者您可以使用单个或组名单来简化程序。使用名单通常可以免去对 CFC 税率个案分析的需求，也表明了部分管辖区税负水平较低。单个名单或组名单的使用可以方便税务管理部门确定 CFC 规则是否适用，也可以方便纳税人知道他们是否会被 CFC 规则影响，且本构成要素也推断使用类似名单等的列表。比如英国有一个白名单，如果其他几个条件均符合，将与英国的税基率和税率分配相同的管辖区排除在 CFC 规则之外。爱尔兰发布了一个名单，该名单上的征税协定国家（不包括欧盟成员国）基于名义税率为低税率为被认定是低税为地区。但只有在这些国家的公司支付的税款低于本应在爱尔兰支付税款的 35% 时，位于这些国家的公司才被认为是 CFC。这种做法因此有一个假设 CFC 被课征的税款低，但这个假设必须通过实际已纳税款的比较加以证实。瑞典应用了一种类似的方法，将这些国家分为以下三类：（1）在这些国家中的实体不会被认定为 CFC；（2）在这些国家中，没有 CFC 收入的实体不会被认定为是 CFC，而有 CFC 收入的实体需要与豁免税款进行比较；（3）在这些国家中，所有收入将被进行税率豁免比较。澳大利亚采用白名单的方法，白名单上的国家的所得税系统类似于澳大利亚的所得税系统，因而位于这些国家的公司将免于按 CFC 规则课税。因此，位于名单上所列举的管辖区的 CFC 将免于适用澳大利亚的 CFC 规则，除非它们适用一项优惠的税收制度。

63. 税率豁免要求 CFC 被征收的税率要低于一个给定的基准。税率豁免采用两个基准中的一个，他们或者将 CFC 管辖区的税率与一个被认为是低税为的税率的特定固定利率来比较，或者将 CFC 管辖区的税率与母公司股东收益率的一定百分比来比较。这两种方法在制定应对 BEPS 问题的规则这一背景下不具同等性，因为这两种方法都认为有效收益率存在显著差异时，转移利润的动机就存在。

64. 根据第一种方法，这些国家将需要设置一个固定的税率，一旦低于此税率，CFC 规则将适用。这种方法的一个例子是德国 CFC 规则，它定义任何低于 25% 的税率为低税为。第二种方法是以设管辖区应支付税款的百分比来确定税率，因而同时包括了税率和税基的分析。英国和芬兰的 CFC 规则提供了这种方法的例子。根据英国法律，如果“当地税为”至少是“相应的英国税”的 75%，则不存在低税为。如前所述，根据芬兰的规则，如果公司本身支付的税款低于本应在芬兰支付税款的 35%，则被认为存在低税为。无论采用哪种方法，基准税率应显著低于那些采用 CFC 规则的国家的税率。大多数 CFC 规则采用的基准是最高不超过 75% 的法定企业税率。

65. 一旦设定基准税率，CFC 规则必须确定 CFC 管辖区的税率以与基准税率相比较。目前的 CFC 规则采用两种方式中的一种，他们将基准税率与下述两个标准之一相比较：(i) CFC 管辖区的名义(法定) 税率;

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31这些条件是，仅有少数的特定类型的收入在 CFC 所在国未被有效抵税，在过去六年 CFC 的收入不是来自事实上的从英国的关联方转移过来的 IP，且 CFC 未参与任何企图向任何其他人创造英国税收优惠的安排。
effective\textsuperscript{32} tax rate of the CFC. Although using the statutory tax rate may reduce administrative complexity and compliance costs, the recommendation is to use the effective rate. This latter approach takes into account the tax base or other tax provisions that may increase or reduce the effective rate paid by the CFC and therefore is likely to create a much more accurate comparison than focusing on the statutory tax rate. Using the effective tax rate, however, means that whether the tax rate exemption has been met must be determined in two steps. First, there must be a calculation of the effective tax rate, which requires determining both how much tax the CFC paid and how much income the CFC earned. Second, the effective tax rate must be compared to the benchmark.

66. The determination of the effective tax rate is typically based on the ratio of the actual tax paid in the CFC jurisdiction to the total taxable income either computed according to the rules of the parent/shareholder's country or according to an international accounting standard such as International Financial Reporting Standards (IFRS). This method generally recognises that even in a situation where the statutory tax rate is not considered a low tax rate, low taxation may occur as a result of (i) reducing the tax base; or (ii) lowering the tax burden by subsequent rebates of taxes paid or through non-enforcement of taxes.\textsuperscript{33} This can be illustrated in the following two examples.

**a) Example 1:** A CFC in Country C generates 80,000 of income in one year. Country A applies its CFC rules if the effective tax rate applied to the CFC was below a fixed rate of 25% taking into account the tax base as computed under Country A's rules. Country C allows an exemption of 20% when computing the taxable income to promote investments.

<table>
<thead>
<tr>
<th>Calculation of actual tax paid in Country C:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Income in Country C</td>
<td>80,000</td>
</tr>
<tr>
<td>Exemption (20%)</td>
<td>16,000</td>
</tr>
<tr>
<td>Taxable income</td>
<td>64,000</td>
</tr>
<tr>
<td>Corporate tax due (30%)</td>
<td>19,200</td>
</tr>
<tr>
<td>Actual tax paid</td>
<td>19,200</td>
</tr>
</tbody>
</table>

**Income in Country C:**

| Income in Country C                       | 80,000 |

**Effective tax rate calculation:**

\[
\frac{19,200}{80,000} = 24\%
\]

**b) Example 2:** A CFC in Country C generates 80,000 of income in one year. Country A applies its CFC rules if the effective tax rate applied to the CFC was below a fixed rate of 25% taking into account the tax base as computed under Country A's rules. Country C does not provide for an exemption to

\textsuperscript{32} The effective tax rate may be computed as an average of the effective tax rates over several years.

\textsuperscript{33} However, where jurisdictions do not apply a substance analysis as discussed in Chapter 4 they may choose to adjust the calculation of the effective tax rate so that situations where a lower tax burden is justified under commonly agreed standards such as the nexus approach agreed under Action 5 are not considered to affect the effective tax rate calculation for the purposes of applying a CFC regime.

\textsuperscript{34} The income is calculated according to Country A's rules. All other calculations in this table are calculated using Country C's rules since they were used to determine the tax actually paid to Country C.
成（ii）CFC 的有效税率。虽然使用法定税率可以降低行政监管的复杂程度和合规成本，但本报告建议使用有效税率。后者考虑到计税基础或其他可能增加或减少 CFC 实际支付的税金，从而较之法定税率更为准确。然而，使用有效税率意味着是否享受税收优惠必须使用两个步骤。首先要求计算出有效税率，这需要确定 CFC 支付的税金和获得的收入。然后，将有效税率与基准税率进行比较。

66. 有效税率通常基于 CFC 管辖区所实际缴纳的税金和应税收入的比率来确定，应税收入通常按照母公司/股东所在国的法规或国际会计标准（如国际财务报告准则（IFRS））计算。这种方法认为，即使在法定税率不被确认为是低税率的情况下，通过（i）缩小税基或（ii）纳税返还或退税执行不严来降低实际税负，从而造成低税负。这种方法可由以下两个例子来说明。

a）例 1：一个 CFC 在 C 国的年收入为 80,000。如果 CFC 的有效税率低于根据 A 国的法规计算的税基的 25%这一固定税率，则 A 国将运用 CFC 规则。为了促进投资，C 国允许计算应纳税所得额时享受 20%的减免。

<table>
<thead>
<tr>
<th>在C国实际支付的税额的计算</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>在C国的收入</td>
<td>80,000</td>
</tr>
<tr>
<td>豁免（20%）</td>
<td>16,000</td>
</tr>
<tr>
<td>应税收入</td>
<td>64,000</td>
</tr>
<tr>
<td>企业所得税(30%)</td>
<td>19,200</td>
</tr>
<tr>
<td>实际支付税款</td>
<td>19,200</td>
</tr>
<tr>
<td>在C国的收入**</td>
<td>80,000</td>
</tr>
<tr>
<td>有效税率的计算</td>
<td>24%</td>
</tr>
</tbody>
</table>

b）例 2：一个 CFC 在 C 国年收入为 80,000。如果适用 CFC 的有效税率低于根据 A 国的法规计算的税基的 25%这一固定税率，则 A 国将运用 CFC 规则。C 国并未提供免税以促进投资。然而，根据 A 国规则，在支付股息时，CFC 的股东可申请退还 CFC 所付的企业所得税的 20%。股息将在 A 国免税。

32有效税率可以用几年的平均有效税率计算得出。
33然而，在未采用在第 4 章中讨论的复利分析的地区，可选择调整有效税率的计算，以便在计税 CFC 制度是否适用时，确保实际税基与税收负担合理的差额（如第 5 章讨论的关联法）不会被认为是影响有效税率计算。
34税基中的收入是根据 A 国的法规计算的，此外所有其他计算都是根据 C 国的法规，原因是这些数据被用于判定在 C 国实际缴纳的税额。
promote investments. However, according to Country C’s rules, shareholders of the CFC may claim a refund in the amount of 20% of the corporate income tax paid by the CFC upon distribution of dividends. The dividends would be tax exempt in Country A.

### Calculation of actual tax paid in Country C:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income</td>
<td>80000</td>
</tr>
<tr>
<td>Taxable income</td>
<td>80000</td>
</tr>
<tr>
<td>Corporate tax due (30%)</td>
<td>24000</td>
</tr>
<tr>
<td>Refund upon distribution (20% of 24000)</td>
<td>4800</td>
</tr>
<tr>
<td>Actual tax paid</td>
<td>19200</td>
</tr>
</tbody>
</table>

### Income in Country C:

| Income in Country C                          | 80,000  |

### Effective tax rate calculation:

\[
\text{Effective tax rate} = \frac{19200}{80000} = 24\% 
\]

67. In both Example 1 and Example 2, the tax rate exemption does not apply because the effective tax rate is below the fixed rate of 25%. The calculation of the effective tax rate should therefore ensure that situations such as those illustrated in Example 1 and Example 2 are subject to CFC rules, and the discussion below provides ways to ensure this.

68. The calculation of the effective tax rate uses a fraction where the numerator is the actual tax paid and the denominator is the CFC’s income. Although the determination of the actual tax paid could require proof that tax was in fact collected and not refunded, the definition of the numerator could be more straightforward if it instead focuses just on the final tax burden (including, for example, subsequent rebates of taxes paid and non-enforcement of taxes). The numerator could also include all taxes paid by the CFC that are comparable to the corporate income tax in the parent jurisdiction.

69. Compared to calculating the actual tax paid, the determination of what to include in the total taxable income (i.e., the denominator) may be more problematic. If the denominator were to refer to the foreign tax base, the effective tax rate would equal the statutory tax rate of the CFC jurisdiction, which would undermine the purpose of the effective tax rate calculation. The denominator should therefore be either the tax base in the parent jurisdiction had the CFC income been earned there or the tax base computed according to an international accounting standard such as IFRS, with adjustments made to reflect the tax base reductions that result in low taxation of the CFC income.

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35. The income is calculated according to Country A’s rules. All other calculations in this table are calculated using Country C’s rules since they were used to determine the tax actually paid to Country C.

36. This is, of course, only true if there are no rebates and the tax was in fact collected and enforced.

37. This tax base would require a determination of how to treat loss carry forwards of the CFC from previous years and any losses permitted in a consolidation or group relief regime. If CFC legislation uses the rules of the parent jurisdiction to calculate taxable income, they could also deal with losses in accordance with the rules of the parent jurisdiction (this could mean that a consolidation regime in the CFC jurisdiction would be ignored for purposes of CFC taxation by the parent jurisdiction). If, instead, they use a common standard, then there would need to be a common rule for how losses should be used to calculate taxable income.
以 C 国实际支付的税款的计算

<table>
<thead>
<tr>
<th>收入</th>
<th>80,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>应税收入</td>
<td>80,000</td>
</tr>
<tr>
<td>企业所得税（30%）</td>
<td>24,000</td>
</tr>
<tr>
<td>分红后返还（24,000 的 20%）</td>
<td>4,800</td>
</tr>
<tr>
<td>实际支付税款</td>
<td>19,200</td>
</tr>
</tbody>
</table>

在 C 国的收入：

| 在 C 国的收入 | 80,000 |

有效税率的计算

\[
\text{有效税率} = \frac{19,200}{80,000} \times 100\% = 24\%
\]

67. 在例 1 和例 2 中，因为有效税率低于 25%的固定比率，无法适用豁免税。有效税率的计算应确保在例 1 和例 2 中展现的情形适用于 CFC 规则，以下的讨论阐述了如何确保的方法。

68. 有效税率计算采用了分母形式，使用实际税额为分子，CFC 的收入为分母。尽管它可以要求提供证据来证明实际税额为实际征收税额且未被返还，如果关注于最终的税务负担（例如包括随后的税收返还和未缴纳的税），分子的定义可能更加直接。分子还可能包括 CFC 纳税的与母公司所得税具有可比性的所有税款。

69. 与计算实际税额相比，在总应税收入（即分母）中包括可能造成问题。如果分母指的是外国的税基，有效税率则等于 CFC 管辖区的法定税率。从而与计算有效税率的目的相隔离。因此，分母或者是根据 CFC 管辖区规则计算的 CFC 的税基，或者是根据国际会计准则如 IFRS 计算出的税基，并要进行相应调整以反映导致 CFC 收入低税负的税基减少。**

** 表格中的收入是根据 A 国的法规计算的。此外，这个表格中所有其他的计算都是根据 B 国的法规。原因是这些数据由 A 国的税法所规定，并且在 C 国实际征税的情况。

** 当然，此结论仅在没有税收优惠且税金被实际缴纳的情况下正确。

** 这个税基需要考虑是否符合 CFC 自上一年度结转的税和任何可享受的合并及集团间零税率制度的收入。如果 CFC 符合使用管理规则的条件来计算应税收入，它们也可以根据管理规则来处理损失（这可能意味着对管理规则的确认）。如果相反的，它们使用各国的标准，那么表示需要建立计算应纳税所得额时应如何对待损失的共同规则。
70. In theory, the effective tax rate calculation could find a higher effective tax rate than the statutory tax rate in the CFC jurisdiction if the base calculated under the rules of the parent jurisdiction is smaller than that calculated under the rules of the CFC jurisdiction. In reality, however, this situation is unlikely to occur much in practice as groups would not structure themselves into jurisdictions where the advantage of a low statutory tax rate is entirely or partially set off by a tax disadvantage in the tax base computation (e.g., non-deductible expenditures).

71. The effective tax rate computation could also be influenced by the “unit” used for the calculation. Country rules generally calculate the effective tax rate on a company-by-company basis, but it could in theory be computed either narrowly or broadly. A narrow approach could, for example, calculate the effective tax rate for each item of income earned by a company. Computing the effective tax rate on a narrower basis allows jurisdictions to apply the tax rate exemption just to the income that has been defined as attributable income under CFC rules. For example, if royalties were subject to taxation under a jurisdiction’s definition of CFC income, the tax rate exemption would apply more precisely to that income provided that the effective tax rate was computed narrowly for each type of income. This may also more directly address situations where only certain types of income benefit from a low tax rate, while others are subject to regular taxation. Calculating the effective tax rate on a narrower basis would, however, increase both the administrative complexity and compliance burden associated with the tax rate exemption. A broad approach could calculate the effective tax rate on a company-by-company or country-by-country basis. A country-by-country approach would aggregate the income of all entities of a group in a single country to calculate the effective tax rate. These broader approaches would reduce the administrative complexity and compliance burden compared to the narrow approach, but calculating the tax rate exemption on a country-by-country basis would add complexity compared to doing so on a company-by-company basis because it would require aggregating the calculations for all the CFCs in each jurisdiction rather than just calculating the effective tax rate for each CFC. If CFC jurisdictions exempt Permanent Establishments (PEs) from taxation, the effective tax rate of permanent establishments of a CFC should be calculated separately from that of the CFC to ensure that the tax rates of the PE and CFC cannot be blended to inappropriately exempt income of a CFC.

Most countries generally apply their own rules to compute the tax base of the CFC. In principle, however, not all differences in computing the tax base of the CFC under the rules in the CFC and the parent jurisdiction raise the policy concerns that are typically associated with preferential tax provisions or practices that could shrink the tax base for certain income and therefore have the effect of significantly reducing the taxes paid by the CFC. In theory, therefore, CFC rules could take account of only those differences that raise such policy concerns when calculating the tax base of the CFC. For example, if the tax base in the parent jurisdiction is higher than that in the CFC jurisdiction only because of timing differences in accounting, this may not need to be reflected in the denominator. A participation exemption also may not fall within the scope of tax advantages that are considered in determining the denominator because it is typically granted to eliminate double taxation and not to reduce the actual tax burden. However, the denominator should take into account any differences that are a result of a tax advantage in the CFC jurisdiction insofar as this is merely aimed at attracting offshore capital and therefore increases the risk of profit shifting. A notional interest deduction that has this aim may be an example of such a tax advantage. While it may make sense in theory to differentiate between tax base definitions that implicate the policy concerns underlying CFC rules and those that do not, the only rules that would be likely to make this differentiation are those that start with the tax base calculated under the rules of the CFC jurisdiction and then adjust this upward to reflect the rules of the parent jurisdiction.
70. 理论上，如果基于非豁免区的规则计算的税基比按照 CFC 管辖区的规则计算的数额大，在计算有效税率时可能会发现有效税率比 CFC 管辖区的法定税率高。然而实际上，这种情况不太可能发生，因为集团通常不会将结构搭建在低法定税率的优势会被税基计算过程的劣势（比如非扣除性支出）完全或部分抵消的辖区。

71. 有效税率计算也可能受到用于计算的“单位”的影响。一些国家在计算有效税率时通常采用按公司计算的规则，但在理论上，有效税率既能按小范围计算又能按大范围计算。比如小范围计算的方法可以将公司的每一项收入计算有效税率。如小范围计算有效税率的方法允许辖区仅针对根据 CFC 规则可归属的税金收入计算税金。比如，如果某种收入按 CFC 对收入的定义应纳税，采用根据每种收入类型为收入计算有效税率这一小范围计算方式，豁免税率可被更准确地适用。这也可能会更直接地解决只有某些特定类型的收入适用低税率，而其他收入则需要正常纳税的情况。然而，小范围计算有效税率的方式会增加税金计算监管的复杂性和合规负担。大范围的计算方法可以按公司或按国家来计算有效税率。按大范围计算的方法会将一个国家的同一集团的所有收入合并在一起计算有效税率。相对于按小规模计算的方法而言，这些大范围的计算方法可以减少监管的复杂性和合规负担，但是相对于按公司计算的方法，按大范围计算有效税率的方法会增加复杂性，因为需要将每个辖区的 CFC 收入合并计算而不只计算每个 CFC 的有效税率。如果 CFC 管辖区豁免常设机构（PE）的税金，CFC 及其常设机构的有效税率应该分别计算，以确保常设机构和 CFC 的税金不会混在一起而导致错误地豁免 CFC 的收入。

大多国家不通常应用他们自己的规则来计算 CFC 的税基。然而，原则上，并不是所有的 CFC 管辖区和非管辖区在计算 CFC 税基的差异都会造成税基上的决定。例如，这些规则包括一些税收优惠条款或导致可能减少特定收入的税基从而大大减少 CFC 应缴纳的税基。因此，在理论上，CFC 规则可以仅关注在计算 CFC 税基时可能造成上述情况的差异。例如，如果非管辖区的税基高于 CFC 的税基，仅由于会计上的时间差异造成的，可能较容易在会计中反映。在某些情况下，参与免税也可能不涉及税收优惠，因为它通常旨在消除双重征税而不是减少实际税负。然而，分情况考虑 CFC 管辖区的税收优惠而造成的差异，这些税收优惠仅是为了吸引外资而未增加利润转移的风险。假定结果是由于一个上述税收优惠的例子，虽然理论上应当在定义上区分包含 CFC 规则背后的税收考虑的税基和不包含前述税收考虑的税基，但唯一可能作为区分的规则是那些基于 CFC 管辖区规则计算出的税基，然后对其进行向上调整以反映非管辖区规则的方法。
CHAPTER 4: DEFINITION OF CFC INCOME

72. This chapter discusses the third CFC building block, which focuses on the definition of CFC income. Once a foreign company has been determined to be a CFC, the next question is whether the income earned by the CFC is of the type that raises concerns and should be attributed to shareholders or controlling parties. CFC rules therefore need to define attributable income, which is also referred to here as “CFC income.”

I. Recommendation

73. This report recommends that CFC rules should include a definition of income that ensures that income that raises BEPS concerns is attributed to controlling shareholders in the parent jurisdiction. At the same time, it recognises the need for flexibility to ensure that jurisdictions can design CFC rules that are consistent with their domestic policy frameworks. Jurisdictions are free to choose their rules for defining CFC income, including from among the measures set out in the explanation section below. This choice is likely to be dependent on the degree of BEPS risk a jurisdiction faces.

II. Explanation

74. This section provides a non-exhaustive list of approaches that CFC rules could use to attribute income that raises BEPS concerns, which may include, among other things, income earned by CFCs that are holding companies, income earned by CFCs that provide financial and banking services, income earned by CFCs that engage in sales invoicing, income from IP assets, income from digital goods and services, and income from captive insurance and re-insurance. These approaches could be applied on their own or combined with each other. CFC rules generally include income that has been separated from the underlying value creation to obtain a reduction in tax. Existing CFC rules use a variety of factors to identify income that raises these concerns. For example, some focus on whether the income is of a type that is more likely to be geographically mobile; some focus on whether the income was earned from or with the assistance of related parties; some focus on the source of the income; and some focus on the level of activity in the CFC. Depending on their policy priorities, different jurisdictions with CFC rules focus on different factors.

75. Regardless of which approach a jurisdiction applies, CFC rules should, at a minimum, capture the funding return allocated under transfer pricing rules to a low-function cash box if that cash box meets the requirements in the previous building blocks (although under CFC regimes that focus on preventing stripping from the parent jurisdiction, the extent of inclusion may depend on how much of the income has been shifted from the parent jurisdiction). However, as mentioned in Chapter 1, different jurisdictions use CFC rules to achieve different policy outcomes, and an approach that focuses only on funding returns would not be consistent with the policy goals of all jurisdictions. The analyses set out below provide a

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28 Some of these categories of income are discussed in greater detail in paragraph 78.

29 See the 2015 Report on Action 8-10: Aligning Transfer Pricing Outcomes With Value Creation (OECD, 2015) which allocates a risk-free financial return to an entity that lacks the ability to control risks.
第四章 CFC收入的定义

72. 本章讨论第三个 CFC 构成要素。本要素重点讨论 CFC 收入的定义。一旦一家外国公司被确定为 CFC，接下来的问题就是要确定是否 CFC 所获得的收入是属于问题收入，且应归属于股东或控制方。CFC 规则因此需要定义可归属收入，在此也称为 “CFC 收入”。

I. 建议

73. 本报告建议 CFC 规则应包含一项收入定义，以确保引发 BEPS 担忧的收入会被归属于母管辖区的控制股东。同时，报告也认为需要有一定的灵活性，以确保管辖区可以制定与其国内政策框架一致的 CFC 规则。管辖区可以自由地选择其定义 CFC 收入的规则，包括在下节 “解释” 部分提到的一系列措施。做出的选择很可能取决于管辖区面临的 BEPS 风险。

II. 解释

74. 本节提供一个方法的非详尽列表。CFC 规则可以使用这些方法来归属引发 BEPS 担忧的收入，其中包括但不限于作为控股公司的 CFC 所赚取的收入、提供金融服务的 CFC 所赚取的收入、从事分行贷款处理的 CFC 所赚取的收入、知识产权资产的收入、数字商品和服务收入、自保险和再保险的收入。这些方法可以单独使用或相互结合。CFC 规则一般包括脱离潜在价值创造，以获得缴税的收入。现有的 CFC 规则使用了许多因素来确认引发担忧的收入。例如，一些因素关注收入是否很可能具有地域流动性，一些因素关注收入是否从关联交易或者在关联交易的帮助下获取，一些因素关注收入的来源，一些因素关注 CFC 的活动水平。根据各自的政策重点，拥有 CFC 规则的不同管辖区侧重于不同的因素。

75. 无论管辖区运用哪一种方法，CFC 规则应尽可能涵盖资金回报，包括在一个将资金回报根据转让定价规则被分配到低功能的现金盒子。前提是此现金盒子满足前文的构成要素所讨论的要求（尽管专注于防止母管辖区被低 CFC 制度下，被包括收人的多寡可能取决于有多少的收人从母管辖区转移）。”然而，正如第 1 章中所述，不同管辖区使用 CFC 规则来实现不同的政策目标，专注于资金回报的方法不可能符合所有管辖区的政策目标。下面的分析提供了大量选项，既可以精确定量也可以宽泛地应用。管辖区还可以采用一种完全包含系统，将 CFC 收获的所

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38 这些收人的种类中的一部分将在第 78 章进行更详细的讨论。
39 参考 2015 年发布 8-10 的报告“特定定价结果与价值创造相匹配”（OECD 2015年）。该报告将一项无形资产或控制分解为一个具有控制能力的实体。
40 注意，尽管所有的分析都可能直接或间接分配到低功能的现金流盒子的资金回报，但是也可以通过设计达到相同的产出。例如，部分分析可能会直接或间接分配到低功能的现金流盒子的资金回报，而无需考虑资金回报的法律分类。
number of options that could apply more narrowly or that could apply more broadly.\textsuperscript{40} Jurisdictions could also apply a full-inclusion system, which would target income raising BEPS concerns by treating all income earned by a CFC as CFC income regardless of its character. Full-inclusion systems also aim to prevent long-term deferral of taxation, which is relevant in the context of worldwide tax systems.

\textit{A. Categorical analysis}

76. Existing CFC rules generally apply an analysis that divides income into categories and attributes income differently depending on how it is categorised. Jurisdictions define categories differently depending on which factors or indicia they find most relevant: (i) legal classification, (ii) relatedness of parties, and (iii) source of the income. However, not all income in these categories necessarily raises BEPS concerns.

\textit{i. Legal classification}

77. Jurisdictions generally first categorise income according to its legal classification, focusing on categories such as the following:\textsuperscript{41}

- dividends
- interest
- insurance income
- royalties and IP income
- sales and services income.

78. Jurisdictions that apply a categorical approach based on legal classification separate out these categories of income because they are more likely to be geographically mobile and therefore are likely to raise the concerns that CFC rules are designed to address.

- \textbf{Dividends} – The general concern underlying the treatment of dividends is that dividends could be used to shift purely “passive” income (i.e. income that does not arise from any underlying activity) into a CFC. However, dividend income typically does not raise such concerns in at least three situations. First, if the dividends were paid out of active income of an affiliate, those dividends may not raise BEPS concerns. Second, many countries now exempt certain dividend income from taxation more generally, and it may not trigger any BEPS concerns to exempt dividends earned by the CFC if those dividends would have been exempted from taxation in the parent jurisdiction had they been earned by the parent company. Third, if the CFC is in the active trade or business of dealing in securities, then dividends paid to that CFC may again not raise concerns if they are linked to the CFC’s trade or business.

- \textbf{Interest} – The general concern underlying the treatment of interest and financing income is that this income is easy to shift and therefore could have been shifted by the parent into the CFC,

\textsuperscript{40} Note that not all of these analyses automatically capture the funding return allocated to a low-function cash box, but they could all be designed to do so. The categorical analysis, for example, could be designed to include such a funding return in a category that was automatically attributed, regardless of the legal classification of the funding return.

\textsuperscript{41} Jurisdictions could also include other categories of income, such as rents and leasing fees.
有收人都视为 CFC 收入而不考虑这些收入的性质，从而打击引发 BEPS 担忧的收入。完全包含体系也旨在防止长期税收违规，这与全球征税体系相关。

A. 类别分析

76. 现有的 CFC 规则一般将收入划分为不同类别并根据不同类别确定收入的归属。根据相近的类别或特征来进行分类：(i) 法定类别，(ii) 各方的关联性和（iii）收入来源。然而，并不是这些类别的所有收入都必然引发 BEPS 担忧。

i 法定类别

77. 管辖区通常首先根据收入的法定类别来分类，侧重于以下类别的收入：

- 股息
- 利息
- 保险收入
- 特许权使用费及知识产权收入
- 销售及服务收入

78. 管辖区基于法定类别进行分类，并从中选出这些类别的收入，原因是这些收入更容易在不同的地理位置移动，从而可能会引起担忧，而这些担忧，正是 CFC 规则需要面对解决的。

- 股息——对股息的处理的通常担忧是股息可以被用于将纯然的“被动”收入（即，非来源于任何基础活动的收入）转移进 CFC。然而，至少在以下三种情况下，股息不会引起上述问题。第一，如果股息来源于一个子公司的主动收入，这些股息可能不会引发 BEPS 担忧。第二，很多国家现在允许某些股息收入免税，因此，允许 CFC 获得的股息可能不会引发 BEPS 担忧。前提条件是如果这些股息由母公司所获得，在母辖区也可以免税。第三，如果 CFC 积极从事证券交易业务，那么支付给 CFC 的股息可能也不会引发担忧，前提是这些股息与 CFC 的交易或经营活动相关。

- 利息——对利息及融资收入的处理的通常担忧是这类收入易于转移，因此可能被母公司转入 CFC，从而可能导致母公司的过度杠杆化和 CFC 的过度资本化。

47 管辖区还可以包括其他类别的收入，比如房产和租赁费。
possibly leading to overleveraging of the parent and overcapitalisation of the CFC. Interest and financing income is more likely to raise this concern when it has been earned from related parties, when the CFC is overcapitalised, when the activities contributing to the interest were located outside the CFC jurisdiction, or when the income was not earned from an active financing business. Rules designed to attribute this income should recognise that regulated entities are subject to capitalisation and other requirements, so any rules on overcapitalisation should take account of such requirements and should not attribute income just because an entity is required to maintain a certain level of capital for non-tax purposes.

- **Insurance income** - The general concern underlying the treatment of income from the insurance of risks is that profits can be shifted away from jurisdictions in which those risks are located and into a low-tax jurisdiction. Insurance income is more likely to raise these concerns in the following three cases: (i) the CFC was overcapitalised relative to comparable companies in the business of providing insurance; (ii) the policy holder, annuitant, beneficiary, or location of the risks insured were outside the jurisdiction; or (iii) the insurance income was derived from contracts or policies with a related party, particularly if the related party also received a deduction for the payment of the insurance premium. However, income earned by a regulated entity in an insurance group may not raise the same concerns because the regulatory environment sets restrictions in terms of risks and capital.42

- **Royalties and Intellectual Property (IP) income** - The general concern underlying the treatment of royalties and other income from IP is that, since IP assets are highly mobile, the income from these assets can easily be diverted from the location where the value of the assets was created. IP income (including income from digital goods and services43) raises several challenges for CFC rules:
  - IP income is particularly easy to manipulate because it can be exploited and distributed in many different forms, all of which may have different formalistic classifications under the CFC rules of different countries. For instance, income from IP could be embedded in income from sales and therefore treated as active sales income under the CFC rules of some countries.

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42 For example, CFC rules that attribute insurance income could exclude income from reinsurance activities that meet all or most of the following features:
- The reinsurance contract is priced on arms-length terms.
- There is diversification and pooling of risk in the reinsurer.
- The economic capital position of the group has improved as a result of diversification and there is therefore a real economic impact for the group as a whole.
- Both the insurer and reinsurer are regulated entities with broadly similar regulatory regimes and regulators that require evidence of risk transfer and appropriate capital levels.
- The original insurance involves third party risks outside the group.
- The CFC has the requisite skills and experience at its disposal, including employees in the CFC or a related service company with senior underwriting expertise.
- The CFC has a real possibility of suffering losses.

43 The digital economy cannot generally be defined separately from other parts of the economy, but the value of digital goods and services is typically due to intellectual property. In the context of both general IP income and digital goods and services, there is not always an identifiable IP asset, but income earned in both contexts is typically due to IP of some sort. Income from digital goods and services is therefore not considered a separate category of income but rather a subset of IP income in this report.
当利率与融资收入来自关联方时，当 CFC 过度资本化时，当获取利息的活动是在 CFC 管辖区外产生时，或者当收入不是从一项积极的金融活动中产生时，这种担忧可能进一步加深。旨在归属这一收入的规则应认识到，受监管的实体都要遵循资本要求或其他要求，所以任何关于过度资本化的规则应考虑到这些要求，不能仅因为实体出于非税务目的需要保持一定程度的资本而归属收入。

- **保险收入**——对保险收入的处理通常担忧是利润可以从风险所在地的管辖区转移到一个低税负的管辖区。以下三种情况下，保险收入更可能引发担忧：（i）与提供保险业务的可比公司相比，CFC 过度资本化；（ii）投保人、年金受益人、受益人或投保人所在地不在管辖区；或者（iii）保险收入来自于关联方的合同或关联方政策，特别是当关联方可以就支付的保费进行扣除。然而，从保险集团下的受监管实体所赚取的收入可能不会引起相同的担忧，因为法规环境会设置在风险和资本方面的限制。

- **特许权使用费和知识产权（IP）收入**——对特许权使用费和其他来源于 IP 的收入的处理通常令人担忧的是，因为 IP 资产的流动性很大，与这些资产相关的收入可以很容易地从创造资产价值的位置转移出去。IP 收入（包括来源于数字商品和服务的收入）给 CFC 规则带来了一些挑战。

  - IP 收入特别容易被操纵，因为它们可以以许多不同的形式开发和分配，在不同国家的 CFC 规则下，有着不同形式上的分类。例如，IP 收入可以视为销售收入，从而根据一些国家的 CFC 规则被视为股东的销售收入。

42 比如，归属保险收入的 CFC 规则可以确保满足下列全部或大部分条件的再保险收入：
  - 再保险合同按公平交易原则定价。
  - 再保险人承担的责任放在一个合理的风险集中。
  - 保险的经济资本状况因多样化而改善，因而对集团整体而言具有真正的经济影响力。
  - 保险人与再保险人是受类似法例体系监管的实体，监管机构要求提供风险管理资本水平的证据。
  - 再保险涉及集团以外的第三方。
  - CFC 在处置上具有必要的技能和经验，包括在 CFC 有雇员或有具备相同技能的关联服务公司。
  - CFC 具有实际提供服务的可能性。

43 数字经济通常不能与经济中的其他部分相分离进行单独定义，但在商品和服务的价值通常取决于知识产权。在通常的 IP 收入和数字商品和服务方面，并非总有一种可识别的 IP 资产，但在特定情况下取得的收入通常都来源于某种形式的 IP。因此，在本报告中，来源于数字商品和服务收入并未被视为一个单独类别的收入，而是作为 IP 收入的子类别。
- IP assets are often hard to value because there are often no exact comparables, and the cost base of these assets may be an inaccurate measure of the income they can generate.\(^{44}\)

- Income that is directly earned from the underlying IP asset is often difficult to separate from the income that is earned from associated services or products.

CFC rules that use a categorical analysis based on legal classification often attempt to address the concerns raised by IP income by separating out royalties and treating them as attributable. Given the challenges above, however, dividing according to legal classification on its own is not enough to attribute all income that does in fact arise out of IP and that raises BEPS concerns.

- **Sales and services income** – Income that arises from the sale of goods that were produced in the CFC jurisdiction or from services that were provided in the CFC jurisdiction generally does not raise any concerns about BEPS. Income from sales and services does, however, raise concerns in at least two contexts: (i) invoicing companies; and (ii) IP income. Invoicing companies raise concerns because they earn sales and services income for goods and services that they have purchased from related parties and to which they have added little or no value. As discussed above, income from IP that was shifted into the CFC and to which the CFC has added little to no value is commonly considered as sales and services income and could again escape CFC inclusion. Categorical analyses based on legal classification therefore may not attribute income that raises BEPS concerns if they exclude all sales and services income without taking account of these two situations.

**ii. Relatedness of parties**

79. Some jurisdictions focus on the party from whom income was earned rather than (or along with) the legal classification of the income. Many existing CFC rules include income if it was earned from a related party on the grounds that income is more easily, and more likely to be, shifted in that situation. Some jurisdictions apply a very broad related party test that includes both income from sales to a related party and income from a sale of a good originally purchased from a related party. Another version of a related party rule would apply to income from goods that were developed in conjunction with a related party (e.g., intellectual property that was developed with a related party or as part of a cost-sharing agreement with a related party).\(^{45}\) All of these use the relatedness of parties as an indicator that income was shifted into the CFC, but they differ based on how much involvement by a related party is enough to ensure that income is attributed.

**iii. Source of income**

80. Some existing CFC rules also categorise income based on where the income was earned. This approach can take the form of either an anti-base-stripping rule or a source-country rule, and the

\(^{44}\) See Public Discussion Draft on BEPS Action Item 8: Hard-to-Value Intangibles (OECD, 4 June 2015), available at [http://www.oecd.orgctp/transfer-pricing/discussion-draft-beps-action-8-hard-to-value-intangibles.pdf](http://www.oecd.orgctp/transfer-pricing/discussion-draft-beps-action-8-hard-to-value-intangibles.pdf). At paragraph 9, the Discussion Draft defines hard-to-value intangibles to include “intangibles or rights in intangibles for which, at the time of their transfer in a transaction between associated enterprises, (i) no sufficiently reliable comparables exist; and (ii) there is a lack of reliable projections of future cashflows or income expected to be derived from the 8 transferred intangible, or the assumptions used in valuing the intangible are highly uncertain.”

\(^{45}\) Such a rule was proposed by the US administration as part of its definition of foreign base company digital income in 2015.
IP 往往难以定价，因为通常缺乏准确的可比对象，并且用这些资产的成本来判断其能够取得的收入可能并不准确。[[44]]

直接由相应的 IP 资产所获取的收入往往难以与相关的服务或产品所获取的收入分开。

采用基于法律分类的类别分析法的 CFC 规则经常试图将特许权使用费单列出来作为可归属收入，以应对 IP 收入所带来的担忧。然而，鉴于上述挑战，仅仅依赖法律分类进行划分不足以将所有真正来自于 IP 并引发 BEPS 担忧的收入都确认为可归属收入。

- 销售和服务收入——销售在 CFC 管辖区生产的货物或在 CFC 管辖区提供服务所获取的收入通常不会引发 BEPS 担忧。然而，销售或服务收入至少在两方面带来担忧：(i) 开票公司和 (ii) IP 收入。开票公司引发担忧的原因是它们通过销售或服务来获取收入，而它们自身的价值贡献极小或为零。如上述讨论，被转移到 CFC 的 IP 收入（CFC 对这些收入的价值贡献极小或为零），通常被认为是销售和服务收入，而不仅是适用于 CFC 规则。如果基于法定分类的类别分析不考虑上述两种情况从而排除所有销售和服务收入，该类别分析法可能无法将所有会带来 BEPS 担忧的收入确定为可归属。

ii. 相关方的关联性

79. 某些管辖区更关注于收从何处赚取而不是（或同时考虑）收入的法律分类。很多现下的 CFC 规则将从关联方赚取的收入包含在内，这是出于关联方的形式下收入更容易也更可能被转移的考虑。某些管辖区采用了一种非常广泛的关联方测试，从而将向关联方销售所获取的收入和销售从关联方采购来的货物所获取的收入包含在内。另一版本的关联方规则适用于来自与关联方共同开发的货物的收入（比如与一个关联方共同开发的，而作为成本分摊协议的一部分的知识产权）。[[45]] 以上所有方式都是利用相关方的关联度作为收入转移到 CFC 的指标，但是它们对于确保收入可归属的关联方的参与程度的规定有所不同。

iii. 收入来源

80. 部分现有的 CFC 规则也基于收入来源地对收入进行分类。这种方法可采取反稀释剥离规则（anti-base-stripping rule）或收入来源国规则（source-country rule），这些规则的基本考虑是 CFC **


[[45]] 这样的规则于 2015 年由美国监管当局作为其对外国公司子公司收入的定义的一部分被提出。
The underlying principle is that income that was earned from activities undertaken in the CFC jurisdiction is less likely to raise concerns about profit shifting, while income that was earned from another jurisdiction is more likely to raise such concerns. Anti-base-stripping rules treat income as CFC income if it was earned for sales to a related or unrelated party located in the parent jurisdiction or for services or investments located in the parent jurisdiction. In keeping with the fact that different jurisdictions prioritise different policy objectives, jurisdictions with anti-base-stripping rules may focus on different “types” of base stripping. In jurisdictions that are focused primarily on preventing the stripping of the parent jurisdiction’s base, only income generated in the parent jurisdiction will be categorised as CFC income, although this raises the question of how to determine whether income was shifted from the parent jurisdiction. In jurisdictions that are focused on preventing both parent stripping and foreign-to-foreign stripping, however, CFC rules could treat any income generated in a jurisdiction other than the CFC jurisdiction as CFC income. This broader approach would be harder to manipulate than a narrower rule that focuses on just the parent jurisdiction, but it may attribute income that has genuinely been earned from activities carried out by the CFC. Such a situation could arise, for example, where a foreign company that previously had customers in the parent jurisdiction became a CFC when it was purchased as part of a merger or acquisition. A broad anti-base-stripping rule could also take the form of a source-country rule, which excludes highly mobile income from CFC income if it was earned in the CFC jurisdiction.

B. Substance analysis

81. A substance analysis looks to whether the CFC engaged in substantial activities in determining what income is CFC income. Many existing CFC rules apply a substance analysis of some sort, and many Member States of the European Union combine a categorical approach with a carve-out for genuine economic activities. Substance analyses can use a variety of proxies to determine whether the CFC’s income was separated from the underlying substance, including people, premises, assets, and risks. Regardless of which proxies they consider, substance analyses are generally asking the same fundamental question, which is whether the CFC had the ability to earn the income itself. Substance analyses could be combined with the categorical or excess profits analysis, and most existing substance analyses apply alongside more mechanical rules and are not stand-alone rules. Although such rules add to the complexity of CFC rules, they may be more able to accurately identify and quantify shifted income.

82. A substance analysis can apply as either a threshold test or a proportionate analysis. Under a threshold (or “all-or-nothing”) test, a set amount of activity (as identified through one or more proxies) would allow all income of the CFC to be excluded. A CFC that had not engaged in this amount of activity would have all of its income included in CFC income. Under a proportionate analysis, CFC income would only exclude the amount of income that was proportionate to the amount of activity that the CFC had undertaken. For example, if the CFC had undertaken 75% of the activity that would have to in fact be performed to earn the CFC’s income, then 25% of its income would be treated as CFC income. This could increase the administrative complexity and compliance costs of the rules, but it should prevent businesses from locating just the right type and amount of activity in a CFC to ensure that its profits are excluded by the CFC rules of its parent jurisdiction. One further advantage of applying a substance test on a proportionate basis is that it is more likely to comply with EU law because it would allow CFC rules to attribute only the income that does not arise from genuine economic activities.

83. As discussed in Chapter 1, one of the policy considerations underlying the design of CFC rules is how to limit administrative and compliance burdens while not creating opportunities for avoidance.

46 As discussed below, a proportionate substance analysis that considers more mechanical factors, such as expenditures, may not raise these same administrative and compliance issues. More mechanical proportionate approaches, however, are looking at proxies for substantial activities, so they may not always be accurate in their attribution.
在其管辖区进行的经营活动所产生的收入不太可能带来利润转移问题，但从此管辖区所赚取的收入带来此类问题的可能性较高。根据反税基剥离规则，同位于母管辖区的关联方/非关联方销售货物所带来的收入，或在母管辖区提供服务或投资所获取的收入被视为 CFC 收入。由于不同的管辖区有不同的定义政策目标，有反税基剥离规则的管辖区可能关注于不同类型的税基剥离。当一个管辖区的主要目的是为了防止母管辖区税基剥离，只有来源于母管辖区的收入才会被归类为 CFC 收入。不过这种规定会引发是否界定来源于母管辖区收款的问题。而当一个管辖区同时关注防止母管辖区税基剥离和外国至外国税基剥离，CFC 规则会将任何来源于 CFC 管辖区以外的收入视为 CFC 收入。这种更宽泛的政策相比较只关注母管辖区的政策更难以操作，但能够找出真正由 CFC 管辖区的经营活动所带来的收入。下列情况可能产生，例如，当一个曾经在母管辖区拥有客户的国外公司作为合并或收购的一部分被收购时，它就成为一家 CFC。宽泛的反税基剥离规则也可能采取收入来源国规则，而这一规则会从 CFC 收入中排除来源于 CFC 管辖区的高流动性收入。

**B. 实质性分析**

81. 实质性分析旨在分析 CFC 是否参与实质性经营活动，以确定哪些收入属于 CFC 收入。很多现行的 CFC 规则在一定程度上使用实质性分析。很多欧盟成员将分类法和分析法相结合以确认真实性的经济活动。实质性分析应用多种指标以确定 CFC 收入是否与内在实质相分离，包括人员、营业场所、资产和风险。无论他们采用何种指标，实质性分析通常会问同一个基本问题，即 CFC 是否有能力和独立经营。实质性分析可与分类或额外利润分析相结合，大多数现行实质性分析通常与其他更为机械性的规则相配合而非单独应用。尽管这些规则增加了 CFC 规则的复杂程度，但是他们也许能够更准确地识别和量化被转移的收入。

82. 实质性分析可用作分子性测试或者比例分析。在门槛（或“有无”）测试中，一系列的经营活动（由一个或多个指标确定）可以将所有收入排除在 CFC 收入之外。没有进行上述经营活动的 CFC，其全部收入将归属于 CFC 收入。在比例分析中，CFC 收入将按照 CFC 自身的经营活动占的比例确定部分收入。例如，如果 CFC 实质进行的经营活动为其带来的收入占比 75%，那么它的收入的 25% 将被视为是 CFC 收入。这会增加监管的复杂程度以及合规成本，但可防止企业刻意将不规范的活动类型和数量放在 CFC 以避免其收益不被 CFC 规则包括在母管辖区之内。在比例分析基础上应用实质性分析的另一个优势在于，因为其允许 CFC 规则只关注非来源于实质性经营活动的收入，更为符合欧盟相关法律。

83. 如在第1章中所讨论的，CFC 规则设计的基础政策考量之一是如何在不创造避税机会的同时，又能控制监管和合规成本。这一考量对于实质性分析而言更为重要。实质性分析通常依赖于定量指标而非定性分析，而且由于其通常比较机械方法更加精确，经常被包含在 CFC 规则中。然而，由于要求对 CFC 实事和环境加以分析，这种方法可能导致监管和合规成本的增加。不过，鉴于这种

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45 以下讨论，比例实质性分析提供更多考虑机械性因素，比如费用，可能会增加同样的监管和合规成本。但更为机械的比例分析方法更多考虑实质性活动的指标，因此可能在计算上准确率不高。
Substance analyses highlight this consideration since they typically rely on more qualitative measures than categorical analyses, and they are often included in CFC rules because they may be more accurate than a purely mechanical approach. Their inclusion, however, could lead to increased administrative and compliance burdens. This is because they require an analysis of the CFC's facts and circumstances. However, the incremental burden may be small because this analysis may be similar to that required for transfer pricing purposes. Where this analysis reveals that the CFC has insufficient substance, some or all of its profits, even after any transfer pricing adjustments, may be included in CFC income.

84. However, substance analyses can be designed to address these concerns and to apply more mechanically while still increasing the accuracy of purely objective analyses. One possible response would be to use a substance analysis only for certain narrow categories of income, so that income in other categories was either automatically included or automatically excluded depending on its categorisation. This approach could, at minimum, not apply a substance test to categories of income that jurisdictions considered to be automatically attributable because of their mobility, the relatedness of parties, or their source. A second response would be to apply a substance analysis as a threshold test instead of as a proportionate test. A third response would be to consider objective factors such as expenditures rather than factors that are harder to measure.47

85. Recognising the concerns about complexity and interactions with transfer pricing rules, there are many different ways that a jurisdiction could design a substance analysis that is consistent with the jurisdiction’s policy objectives, including the options listed below.

- One option would be a threshold test that applies a facts and circumstances analysis to determine whether the employees of the CFC have made a substantial contribution to the income earned by the CFC.48 This option could be designed to include certain safe harbours, ratios, or other more mechanical tests that determine whether there has been a substantial contribution.

- A second option would look at all the significant functions performed by entities within the group to determine whether the CFC is the entity which would be most likely to own particular assets,

47 These possible responses, particularly the first and second, may be less appropriate for Member States of the European Union.

48 One example of this first option is the U.S. CFC rules. Under the substantial contribution test that applies to sales income earned by a CFC, income from the sale of personal property that would normally be treated as attributable will not be attributable if “the facts and circumstances evidence that the controlled foreign corporation makes a substantial contribution through the activities of its employees to the manufacture, production, or construction of the personal property sold”. 26 CFR 1.954-3(a)(4)(iv)(a). The test then provides a list of seven activities that could indicate that the CFC did make a substantial contribution, all of which essentially consider whether the CFC was engaged in actual value creation. These activities include (1) oversight and direction of the activities or process pursuant to which the property is manufactured, produced, or constructed; (2) activities that are considered in determining whether the products were substantially transformed if the assembly or conversion of component parts into a final product are substantial in nature and generally considered to constitute the manufacture, production, or construction of property; (3) material selection, vendor selection, or control of the raw materials, work-in-process or finished goods; (4) management of manufacturing costs or capacities (for example, managing the risk of loss, cost reduction or efficiency initiatives associated with the manufacturing process, demand planning, production scheduling, or hedging raw material costs); (5) control of manufacturing related logistics; (6) quality control (for example, sample testing or establishment of quality control standards); and (7) developing, or directing the use or development of, product design and design specifications, as well as trade secrets, technology, or other intellectual property for the purpose of manufacturing, producing, or constructing the personal property. 26 CFR 1.954-3(a)(4)(iv)(b). The Regulations then provide examples to illustrate how this facts and circumstances test would apply.
分析可能与转让定价分析相似，增加成本可能较小。如果分析表明 CFC 不具有充分实质，即使已经进行了转让定价调整，其部分或全部利润，都有可能被认定为归属于 CFC 收入。

84. 然而，可以通过设计来解决实质性分析的这些问题，并且在提高和客观分析的准确度的同时使其可以更为机械地被执行。一种可能的方法是仅某些特定类型的收入上使用实质性分析，而其他类型是收入则自动被认定为属于或不属于 CFC 收入。这种方法至少可以保证对于那些由于流动性、关联关系或收入来源被自动归类的收入采用客观性分析。另一种方法是考虑类似支出等客观因素，而不是一些难以量化的因素。

85. 考虑到复杂性和与转让定价规则的相互作用，一个管辖区可以采取不同方法制定一个与其政策目标一致的实质性分析，方法如下。

- 一种选择是采用门槛测试，即根据事实和环境分析来确认 CFC 的雇员是否对 CFC 所赚取的收入具有实质性贡献。这个选项可设计成包括特定安全港、比率或其他更为机械的测试，用以确认 CFC 雇员是否做出实质性贡献。

- 第二种方法是查看集团内实体所承担的全部重要职能，如果这些职能是集团公司内实体所承担的全部重要职能，决定 CFC 是否是最有可能持有特定资产或承担特定风险的实体。

47 这些可能的方法，特别是前两个，可能不适合于欧盟成员国。

48 比方说的一个例子是美国 CFC 规则。根据对 CFC 所获取的销售收入的实质性贡献测试，如果事实和环境表明 CFC 可能是将这些销售收入用于其他目的，形成一个 CFC 所赚取的活动做出重大贡献。通常表现为可归属 CFC 收入的部分将不再视为可归属。26 CFR 1.954-3(f)(4)(iv)(a)(ii)，该法规根据前文所述的 CFC 重大贡献的 15 条标准，所有的活动主要考虑 CFC 是否参与了真正的价值创造。这些活动包括（1）客户服务的活动流程进行管理；（2）决策是否产生实质性变化或实现是否按照风险管理及战略考虑的活动具有决定性；（3）生产、采购和销售的控制；（4）生产过程或系统的控制（例如，管理损失与风险、生产过程中的成本控制、库存控制）；（5）产品相关的控制；（6）质量控制（例如，样本测试或建立质量控制标准）；以及（7）对于生产、生产、或生产活动的决定或产品的决策以及商业秘密、技术或其他知识产权的使用或发展。26 CFR 1.954-3(f)(4)(iv)(a)(ii)，该法规还提供了对“事实”和“环境测试”如何被应用。

49 在美国 CFC 规则中还有一些地方方法的例子。该规则采用从 OECD 第 7 号行动计划发展出的观点和指导，附以辨认与各案件相关的集团重要人员职责，从而确定 CFC 是否承担这些职能。
or undertake particular risks, if the entities were unrelated. If this were a threshold test, it would treat as CFC income all income of a CFC that fell below the threshold of significant functions (or exclude all income of a CFC that had the required functions). If it were a proportionate test, it would treat as CFC income only that income that the CFC did not have the significant functions necessary to earn.

- A third option would consider whether the CFC had the necessary business premises and establishment in the CFC jurisdiction to actually earn the income and whether the CFC had the necessary number of employees with the requisite skills in the CFC jurisdiction to undertake the majority of the CFC’s core functions. If applied as a threshold test, this would attribute all the income of a CFC that did not have the necessary people and premises (or exclude all the income of a CFC that did have the necessary people and premises). If applied as a proportionate test, this would treat as CFC income all the income that the CFC did not have the people and premises to earn.

- A fourth option that would be a variation on the third option and that would maintain consistency with work done in other areas of the BEPS Project would use the nexus approach that was developed in the context of Action Item 5 to ensure that preferential IP regimes require substantial activity. CFC rules could include a version of the nexus approach as a substance analysis, under which income earned by the CFC that met the requirements of the nexus approach would not be included in CFC income, while all other income from qualifying IP assets as defined by the nexus approach would be treated as CFC income. Under this version of the nexus approach, all IP income from qualifying IP assets would be attributed unless the taxpayer could show that the income would qualify for benefits under a nexus-compliant IP regime in the CFC jurisdiction. If the CFC jurisdiction did not operate a nexus-compliant IP regime, then this could apply to all income arising from a qualifying IP asset that was either acquired from or developed with a related party, and all such income would be attributed unless the taxpayer could show that it would qualify for benefits under the terms of the nexus approach itself. As this option would only apply to income arising from qualifying IP assets, it may need to be combined with another substance analysis for other types of income (including other IP income).

86. Substance analyses generally increase the accuracy of CFC rules, but this increased accuracy must be weighed against the increased complexity and expense of more fact-intensive substance analyses.

48 An example of the second option can be found in the UK’s CFC rules, which has used the concepts and guidance developed by the OECD for Article 7 to identify the group’s significant people functions associated with each asset, so that it can be determined whether the CFC undertakes those functions.

49 An example of the third option is the South African foreign business establishment test. Under this test, income of a CFC is not attributable if it is produced by a foreign business establishment (FBE) that operates at arm’s length. FBEs are places of business with a physical structure that are used (or will continue to be used) for at least one year. These places of business must be where the business of the CFC is undertaken and they must be suitably equipped and staffed with managerial and operational employees who render services for the purpose of conducting the CFC’s primary operations.

50 The nexus approach applies a proportionate analysis to income, under which the proportion of income that may benefit from an IP regime is the same proportion as that between qualifying expenditures (i.e., expenditures incurred for Research & Development (R&D) undertaken by the CFC or unrelated parties) and overall expenditures (i.e. qualifying expenditures plus capital investment expenditures incurred for R&D undertaken by related parties). Under the nexus approach, R&D expenditures are used as a proxy for substantial activities, and they provide a more mechanical way of determining whether the CFC had the necessary people to earn the IP income itself.
如果此方法为一项门槛测试，则一旦 CFC 低于重要职能门槛，则 CFC 的所有收入都将被视为是 CFC 收入（或如果 CFC 拥有所需职能的收入，则 CFC 收入）。如果为比例测试，只有当 CFC 不具有赚取这些收人的必要的重要职能时，这部分收入才可被判定为 CFC 收入。

- 第三种方法为评估 CFC 是否在 CFC 管辖区内拥有必要的经营场所而获取盈利，是否有必要设立一定数量具备所需技能的员工来承担 CFC 的核心职能。如果该方法为门槛测试，当 CFC 没有必要员工和经营场所时，其全部收入将被视 CFC 收入（或一旦具备必要员工和经营场所，其全部收入将被排除）。如果为比例测试，所有 CFC 收入的负债或未具备相应员工和经营场所的收入部分都将被视 CFC 收入。

- 第四种方法为将 BEIS 项目拟议项目保持一致，使用在第 5 号行动计划中发展出的联结方法以保证知识产权税收优惠的要求有实质性活动。CFC 规则可在实质分析中包含一种实质方法，在此分析中满足联结方法要求的收人将被包含在 CFC 收入里，而其他从符合联结方法中定义的条件的知识产权资产中所获得的收入将被视 CFC 收入。在此联结方法下，除非 CFC 管辖区内拥有合联结知识产权机制（benefits under a nexus–compliant IP regime）且纳税人的收入可以证明其收入可以享受该机制提供的优惠，否则所有来自符合条件的知识产权资产的收入都将被视 CFC 收入。如果没有合联结知识产权机制，这一规则将适用于所有来自从联合方购买或由联合方开发的符合条件的知识产权资产的收入，并且所有收入将被视 CFC 收入。除非纳税人可以证明其收入可以享受联结方法提供优惠，否则这种方法适用于来自不同条件的知识产权资产的收入。针对其他类型收人（包括其他知识产权收入），此方法可能需要与另一种实质分析方法相结合。

85 实质分析通常会增强 CFC 规则的准确性，但所增加的准确性需要与要求更加快速和准确的实质性分析所增加的复杂性和成本进行权衡。部分管辖区基于其政策目标，可能认为准确性比简便性更
Depending on their policy objectives, some jurisdictions may prioritise accuracy over simplicity, but others may design their rules to make their substance analyses more mechanical and less complex.

C. Excess profits analysis

87. Another approach to defining income is an “excess profits” analysis, which is not a feature of any existing CFC rules. This would characterise income in excess of a “normal return” earned in low tax jurisdictions as CFC income. Such an approach could, for instance, be relevant in the context of IP income as generally taxpayers cannot expect to earn a profit in excess of the normal returns from simply purchasing and selling and providing services or manufacturing, unless those activities involve the use of IP. In certain situations, intangibles and risk-shifting transactions among related parties could be susceptible to systematic mispricing, leading to a profit in excess of the normal returns that would not occur if the same transactions were undertaken with unrelated parties. This should mean that an excess profits approach will tend to apply to income from intangibles and risk shifting.

88. Depending on their policy objectives, jurisdictions could include a specific entry criterion so that the excess profits approach would only apply in situations in which the CFC made use of intangible property acquired from or developed by or with the assistance of a related party, which means this approach could be combined with categorical analyses. Alternatively, this approach could be combined with a prove-out under which the excess profits approach would apply to all CFCs unless they showed that they did not make use of any intangible property acquired from or developed by or with the assistance of a related party. Jurisdictions with different policy objectives could, however, not apply an entry criterion or a kick-out and could instead apply the excess profits analysis to all income earned by the CFC.

89. The proposed excess profits analysis calculates the normal return and then subtracts this normal return from the income earned by the CFC. The difference is the excess return, all of which is treated as CFC income. The normal return means the return that a normal investor would expect to make with respect to an equity investment. This normal return could be calculated using the following formula:

\[
\text{normal return} = (\text{rate of return}) \times (\text{eligible equity})
\]

90. This formula requires a determination, first, of what rate of return to use and, second, of how to calculate eligible equity.

- **Rate of return** — In terms of rate of return, normal investors are unlikely to accept a risk-free rate of return with respect to an investment with an uncertain income stream. The normal rate of return with respect to an equity investment therefore should be a risk-inclusive rate of return that equals the risk-free rate of return plus a premium reflecting the risk associated with an equity investment, although some jurisdictions may use the risk-free rate of return depending on their

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52 If either of these provisions were included, intangible property would be defined broadly to mean something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and which increases the value received by the company, over and above normal returns. Under this definition, intangible property should include intangibles that are not legally protected, such as trade secrets, know-how, customer lists, management systems, networks, data, goodwill, and other similar items. This approach could be combined with a source country rule, which would allow income that was earned from the market of the CFC jurisdiction (e.g., from customers in the CFC jurisdiction or for services provided in the CFC jurisdiction) to be excluded from the excess profits calculation.
C. 超额利润分析

87. 另一种确认收入的方法为超额利润分析法。这种分析在现行的 CFC 规则中并不存在。该分析可以在低税率管辖区获取的超过正常投资回报率的收入归类为 CFC 收入。举例而言，此方法可以用于与知识产权相关收入，因为一般来讲纳税人不会期望从简单购买、提供服务或制造中获取超过正常投资回报率的收益。除非这些活动包含知识产权的使用。在一些情况下，关联方间无形资产和风险转移交易会因被质疑为系统性定价错误，因为非关联方同样交易下不可能发生超过正常回报的收益。这意味着超额利润分析方法适用于由无形资产和风险转移所产生的收入。

88. 基于其政策目标，管辖区可以包含特定的推人标定，从而使得超额利润分析法仅适用于 CFC 使用的关联方取得。由关联方开发或协助的无形资产的情况，这意味着这种方法可以与分类分析相结合。或者，这种方法也可以与举证结合。在此情况下超额利润分析法适用于所有 CFC，除非它们可以证明其自身没有使用任何从关联方获得，由关联方开发或协助的无形资产。但是拥有不同政策目标的管辖区可以不选择推人标准或排除法，而对 CFC 的全部收入应用超额利润分析法。

89. 此处建议的超额利润分析法计算正常回报，然后将其从 CFC 所得收入中扣除。差额部分为超额利润，被视为 CFC 收入。正常回报指普通投资者预期从权益投资中得到的回报。正常回报可以用下列公式计算：

\[ \text{正常回报} = (\text{回报率}) \times (\text{符合条件的权益}) \]

90. 这个公式要求确定回报率以及如何计算符合条件权益。

- 回报率 - 对于回报率，普通投资者对于不确定收益的投资不太可能接受一个无风险回报率。虽然部分管辖区可能基于其政策目标采用无风险回报率。权益投资的正常回报率应为包含风险的回报率，相当于无风险回报率加上权益投资的风险溢价。经济学界通常估计包含风...
policy objectives. Economic studies often estimate the risk-inclusive rate as being approximately 8% to 10%, although this varies by industry, leverage, and jurisdiction.\footnote{53}

- **Eligible equity** – As the excess profits approach is intended to provide an exemption for normal returns from assets used in connection with the actual functions carried out in a low-tax jurisdiction, then only equity invested in assets used in the active conduct of a trade or business, including IP assets, should be treated as eligible equity. As income subject to taxation under other CFC rules in the parent jurisdiction would not be included in total returns, jurisdictions could exclude from eligible equity any equity invested in assets that produced income that had been subject to taxation under other CFC rules in the parent jurisdiction.\footnote{54}

91. The normal return would then be subtracted from all income earned by the CFC that was not subject to taxation under other CFC rules in the parent jurisdiction. The excess would be included in CFC income.

92. For an example of how the excess profits analysis would work, imagine that Sub B, located in Country B, is a wholly owned subsidiary of Parent, which is located in Country A. Sub B uses its manufacturing facilities in Country B to manufacture and distribute Product B, which uses IP purchased from Parent. In Year 1, Sub B spent 600,000 to purchase the rights to IP developed by Parent, and Sub B also invested a total of 500,000 in its manufacturing facilities. For book purposes, the acquisition of the IP and the investment in the manufacturing facilities result in assets on the balance sheet with a value equal to the acquisition costs. Both the IP and the manufacturing facilities are used in Sub B’s active trade or business of manufacturing and distributing Product B. In Year 2, Sub B earned 700,000 in profits from sales of Product B.\footnote{55} To determine whether Sub B has attributable income, the excess profits analysis would calculate normal returns using the following formula:

\[
\text{normal return} = (\text{rate of return}) \times (\text{eligible equity})
\]

93. If the rate of return for the excess profits approach had been set at 10%, then that formula would show that the normal return was 110,000 per year. (This is because 110,000 = 10% \times (600,000 + 500,000).) The excess returns would then be calculated by subtracting 110,000 from Sub B’s profits. Sub B’s excess

\footnote{53} The risk-free rate of return varies by country, and it can generally be calculated by reference to an average of the government bond rate over several years. Although it may at first appear sensible to use the risk-free rate of return in the CFC jurisdiction, the principle underlying CFC rules is that the parent company has the influence to determine where the CFC is located (and whether income is shifted to it). The parent company is therefore likely to make its investment decisions based on the rate of return in the parent jurisdiction. The risk-free rate of return used to calculate the risk-inclusive rate of return could therefore be based on that in the parent jurisdiction. The equity premium represents the additional expected return an investor requires in order to be compensated for the uncertainty of the return from a particular investment. Economic analysis has not conclusively determined what an appropriate equity premium would be, but it varies across industries and depends on the leverage of the company, and it is often calculated as being between 3% and 7%.

\footnote{54} In terms of how to calculate the equity invested in these assets, one option would be to use the book value of eligible assets less the liabilities apportioned to the eligible equity. Book value may sometimes be a more accurate measure than historic costs, but in other cases, assets are expensed as they are created and therefore not recognized on the balance sheet at all. Another option would be to use tax basis or tax acquisition cost for the valuation, as determined under the law of the parent jurisdiction. Liabilities would need to be apportioned, most likely based on relative asset values or earnings, potentially with the ability to trace liabilities associated with non-recourse debt.

\footnote{55} For ease of calculation, this example assumes that there are no liabilities apportioned to the manufacturing facilities.
91. 从母管辖区的 CFC 规则下应税的全部收入中扣除正常回报后的超额部分，将被视为 CFC 收入。

92. 下面的例子展示了超额利润分析是如何加以应用的。假设位于 B 国的子公司 B 是位于 A 国母公司的全资控股子公司。子公司 B 在 B 国使用其生产设备制造和分销产品 B，其中使用购于母公司的知识产权。第一年，子公司 B 购买母公司研发的知识产权共计 600,000，并在生产设备上投入了 500,000。从会计角度来看，购买知识产权和设备投资在资产负债表中属于资产，其价值相当于收购成本。知识产权和生产设备均用于子公司 B 的经营活动，即制造和分销产品 B。第二年，子公司 B 从产品 B 销售中获利 700,000。为确定子公司 B 是否有可归因收入，超额利润分析可按以下公式计算正常回报：

   正常回报 = (回报率) * (符合条件权益)

93.  如果超额利润分析的正常回报率设定为 10%，公式显示正常回报为 110,000 元（110,000 = 10% * (600,000 + 500,000)）。超额回报为子公司 B 收益与 110,000 的差异。

53. 无风险收益率根据国家文化而变化。通常会参考近几年政府债券利率平均值计算。尽管乍一看使用在 CFC 规则下的无风险收益率合理，但 CFC 规则的潜在原理是母公司可以影响 CFC 的选址（以及是否将利润转移到 CFC）。通常会基于母国税区的税负要求做出投资决策，因此应用基于母国税区的无风险收益率来计算包含风险的回报率。风险溢价率代表投资者要求的额外风险回报，以弥补特定股票回报的不确定性。经济学分析还没有最终确定合适的权益风险溢价。但这随行业和公司权衡的变化而变化，通常介于 3% 和 7% 之间。

54. 关于如何计算投资于资产的权益，一种方法是用符合条件的资产的账面价值减去分摊至符合条件权益的负债。账面价值在某些情况下与市场价值相一致，但在另一些情况下，资产在创建时已被使用。因此在资产的市场价值中无法确定。另一种方法是根据母国税制法律直接基础或税上的中性成本来定价。负债需要进行分摊，最大可能是基于相关负债价值或收益，也可能基于承担无违税责任的相关义务的能力。

55. 为简易计算，例子假设没有负债被分配到生产资产。
returns for Year 2 would therefore be 590,000, and all of this income would be treated as attributable income.

94. An excess profits approach would not rely on formal classification to determine whether income was included; it would not be necessary to consider where or from whom, or from which activities income was earned; and it should not lead to income that does not raise BEPS concerns sheltering income that does. However, the mechanical nature of this approach must be weighed against whether it could target shifted income with sufficient accuracy and challenges with quantifying the normal return. Depending on policy objectives, some countries that prioritise accuracy over a mechanical rule consider that the excess profits approach must be combined with a mandatory substance-based exclusion. Other countries may consider that excluding a normal return on eligible equity is an effective method for identifying CFC income. Because of these concerns, there is no consensus on whether the excess profits approach should be combined with a mandatory substance-based exclusion.

D. Transactional and entity approaches

95. Regardless of which type of analysis they use to define CFC income, jurisdictions need to determine whether to apply this analysis on an entity-by-entity basis or on a transactional basis, which would attribute individual streams of income. Under the entity approach, an entity that does not earn a certain amount or percentage of attributable income or an entity that engages in certain activities will be found not to have any attributable income, even if some of its income would be of an attributable character. Under the transactional approach, in contrast, the character of each stream of income is assessed to determine whether that stream of income is attributable. The difference between the two approaches is that, under the entity approach, either all or none of the income will be included depending on whether the majority falls within the definition of CFC income. Under the transactional approach, some income can still be included even if the majority does not fall within the definition of CFC income, and some income can be excluded even if the majority does fall within this definition.

96. The entity approach may reduce administrative burdens in certain situations because, once tax administrations have determined either that a certain amount of income earned by an entity is attributable or that the entity engaged in a certain level of activity, CFC rules are either applicable or not and no further analysis needs to be undertaken. The entity approach could also reduce taxpayer compliance costs and increase certainty because taxpayers know that they will only be subject to CFC tax if a significant portion of their income falls within the definition of attributable income. The entity approach thus reduces the chances that a taxpayer will be subject to CFC rules if CFC income makes up only a small portion of its overall income. However, the main disadvantage of the entity approach is that, by subjecting either all or none of an entity’s income to CFC rules, it is both over-inclusive and under-inclusive. An entity that earns enough CFC income will have all its income attributed (including income that would not otherwise be attributable), while an entity with some income that would otherwise be included may be able to escape CFC rules by swamping that income with income that is not subject to the CFC rules. For example, an entity that engages primarily in activities that generate active income may be able to shield a large amount of passive income from CFC rules.\textsuperscript{58} Also, the entity approach may not reduce administrative burdens significantly, since this approach still requires taxpayers to determine whether individual streams of income are attributable or not, but they may not have to make this determination for all income streams once they have determined whether they fall above or below the entity threshold.

97. The transactional approach may increase administrative burdens and compliance costs relative to the entity approach, and it may require tax administrations to consider a larger number of companies under their CFC rules, depending on how other elements of those rules are designed. For instance, if CFC rules

\textsuperscript{58} EU Member States may need to consider whether an entity approach is consistent with EU law.
子公司 B 第二年的超额回报为 590,000，均被视为可归属收入。

94. 超额利润分析法不依赖于形式上的分类来确定收入是否属于 CFC 收入；也不需要考虑收入来源于哪里、谁或者哪个经营活动，其不应针对不会引起 BEPS 问题的收入。但是，此方法的机械属性需要与它是否能够准确有效地找到转移收人以及量化正常回报相抗衡。基于政策目标，部分优先考虑准确度而非机械规则的管辖区认为超额利润分析方法需要与强制性基于实质的排除法相结合。其他国家可能认为排除符合条件收益的正常回报是识别 CFC 收入的有效方法。基于这些考虑，就超额利润分析方法是否应与强制性基于实质排除法相结合尚未达成一致。

D. 交易法和实体法

95. 无论采用何种分析方法来定义 CFC 收入，管辖区需要确定是按实体还是按交易进行分析，这会影响每笔收人的归属。按实体法时，没有获取一定金额或一定比例归属收人的实体或参与特定经营活动的实体会被视为没有归属收人，即使它的部分收入属于可归属收人性质。与此相反，按交易法则需要评估每笔收人的属性是否属于可归属收人。两种方法的不同之处在于，在实体法下，根据大部分收入是否符合 CFC 收入的定义，要么全部要么没有收入会被视为 CFC 收入。而在交易法下，即使大部分收入不符合 CFC 收入的定义，部分收入仍可能属于 CFC 收入。同样的，即使大部分收入属于 CFC 收入，部分收入仍可能不归属。

96. 实体法可能在特定情况下减轻监管负担，因为税务机关一旦确认实体收人中归属收人的金额或实体参与特定经营活动，就能确定 CFC 规则适用还是不适用，无需再进行额外分析。实体法也可以减少纳税人的合规成本并增加确定性，因为纳税人了解他们只有在大部分收入属于归属收入的情况下才需要缴纳 CFC 税。因此，如果纳税人全部收人中只有小部分属于 CFC 收人，实体法将极大减少需要遵循 CFC 规则的几率。但是，实体法的主要缺点在于它可能涵盖范围过大，可能导致范围不足，一个实体要么全部要么没有收人被 CFC 规则归属，获得足够 CFC 收人的实体的全部收人（包括不应当归属的收人）会被视为 CFC 收入，但是只有部分 CFC 收人的实体可能利用不适适用 CFC 规则的收人来规避 CFC 收入从而避免被适用于 CFC 规则。例如，一家主要从事产生积极收人的经营活动的实体，可以使其大量消极收人免于适用 CFC 规则。同样，实体法可能无法大幅减少监管负担，因为该方法仍需要纳税人决定其每类收人流是否应归属，不过，一旦他们已决定其在实体门槛之上或之下，很可能就无需对所有收人流进行判断。

97. 相对于实体法，交易法则可能会增加监管负担和合规成本，可能要求税务机关基于规则中其他因素的设置，在 CFC 规则下考虑众多公司。例如，在考虑 CFC 是否交税低时如果设置过高 CFC

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注：成员国可能需要考虑实体方法是否与欧盟法律一致。
set too high a threshold when considering if a CFC is low tax and apply a proportionate substance analysis, they may bring a large number of companies within the scope of CFC rules and this may be compounded if they also apply CFC rules on a transactional basis. Despite these disadvantages, the transactional approach is generally more accurate at attributing income. As a transactional approach requires consideration of each stream of income to determine whether it falls within the definition of CFC income, it is better able to target specific types of income more effectively than the entity approach. It is also possible to attribute only that income that raises BEPS concerns, and in this greater proportionality suggests that the transactional approach may be more consistent with both the goals of Action Item 3 and EU law.\textsuperscript{57} Transactional approaches may, however, require a threshold to ensure that active businesses that hold a cash surplus do not have to treat the income from that cash surplus as CFC income. This threshold could be a bright-line de minimis threshold. In Australia, for example, none of the income of a CFC is attributed if 5% or less of that CFC's income is passive income. Alternatively, CFC rules could require a functional analysis to determine how much otherwise attributable income is in fact being held as a cash surplus. The first type of threshold would reduce administrative burdens and compliance costs but may not be accurate in all situations, while the second type of threshold would be more accurate but would increase administrative burdens and compliance costs.\textsuperscript{58}

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\textsuperscript{57} Although the European Court of Justice (ECJ) has not yet considered genuine economic activities on a transaction-by-transaction basis, it appears that CFC rules that attribute income on a transactional basis would be more narrowly focused on income that raises concerns and therefore may be more consistent with EU law.

\textsuperscript{58} Some jurisdictions combine these two approaches into a hybrid approach and first determine whether an entity has a sufficient amount of attributable income to be treated as a CFC before assessing whether specific items of income are to be attributed. Japan's CFC rules provide an example of such a hybrid approach, under which certain entities are excluded from CFC taxation due to the type of income and activities, but certain streams of income earned by those entities may still be subject to CFC taxation. Because this approach ultimately considers different streams of income rather than just attributing all the income of an entity, it is essentially a version of a transactional approach.
门篮并采用比例实质分析，数家众多的公司会加入 CFC 规则。且如果还在交易性基础上运用 CFC 规则，情况会变得更为复杂。尽管有这些缺点，一般情况下交易法在分配与收入方面更加精确。因为交易法要求考虑每笔收入流，以确认其是否符合 CFC 收入的定义。相较于实体法，它能够更有效更多地针对特定类型的收入。交易法还有可能只认定那些会引起 BEPS 问题的收入，这种更高的配比性表明交易法可能更符合行动计划 3 和欧盟法的目标。

然而，交易法可能需要一个门槛来确保被转让资金的活跃企业无需将来源于现金盈余的收入确认 CFC 收入。这个门槛可以是一个明确的贷款门槛。例如在澳大利亚，如果只有小于或等于 5% 的收入为被动收入，则 CFC 的全部收入都不会被认定为 CFC 收入。或者，CFC 规则可能要求通过特定分析来确定多少被归属的收入事实上是以现金盈余形式持有的。第一种门槛可能较少监管负担和合规成本，但是不能保证在每个情况下都精确，第二种门槛可能更精确但同时会增加监管负担和合规成本。

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57 尽管欧盟法院未在案文基础上考虑实质经营活动，但看上去基于活动法属收入的 CFC 规则关注引发问题的收入这一更窄的范围。因此可能与欧盟法律更加一致。

58 部分管理将这种方法分成一种混合方法。在评估特定收入是否归属前首先确认实体是否有足够的归属收入被视作 CFC。日本的 CFC 规则提供了类似混合方法的例子。在此方法下特定实体由于其收入类型和活动类型不属 CFC 适用范围，但是这些类型的收入可能仍属于 CFC 适用范围。因此这种方法最终考虑的是不同收入流而非一个实体所有收入的归属。它本质上是交易法的一种。
CHAPTER 5: RULES FOR COMPUTING INCOME

98. This chapter sets out recommendations for the fourth CFC building block on computing income. Once CFC rules have determined that income is attributable, they must then consider how much income to attribute.

I. Recommendations

99. Computing the income of a CFC requires two different determinations: (i) which jurisdiction’s rules should apply; and (ii) whether any specific rules for computing CFC income are necessary. The recommendation for the first determination is to use the rules of the parent jurisdiction to calculate a CFC’s income. The recommendation for the second determination is that, to the extent legally permitted, jurisdictions should have a specific rule limiting the offset of CFC losses so that they can only be used against the profits of the same CFC or against the profits of other CFCs in the same jurisdiction.

II. Explanation

100. The first recommendation focuses on rules that are used to calculate taxable income. Four options were considered to arrive at the first recommendation.

1. One option would be to apply the law of the parent jurisdiction (i.e., the jurisdiction that is applying the CFC rules), which would be logically consistent with BEPS concerns particularly if CFC rules focus on the erosion of the parent jurisdiction’s tax base. This option would also reduce costs for the tax administration. Jurisdictions could achieve a broadly similar outcome by starting with the income calculated according to the rules of the CFC jurisdiction and then adjusting the income in line with the rules of the parent jurisdiction.

2. A second option would be to use the CFC jurisdiction’s rules for computing income, but this would be inconsistent with the goals of Action Item 3 as using the CFC jurisdiction’s rules may allow for less income to be attributed. This could also create complexity and increase the administration costs for the tax administration that would have to apply unfamiliar rules.

3. A third option would be to allow taxpayers to choose either jurisdiction’s computational rules, but this is likely to create opportunities for tax planning.

4. A final option would be to compute income using a common standard. For example, some jurisdictions instruct taxpayers to use the International Financial Reporting Standards (IFRS). The advantage of this option is that it could in theory lead to international consistency as all CFCs and parent jurisdictions would be using the same rules for calculating CFC income, regardless of the residence of either the CFC or the parent. Since most countries do not currently use such standards when calculating taxable income, however, this option may increase both administrative and compliance costs if taxpayers have to recalculate the income of the CFC according to standards that are applied by neither the parent jurisdiction nor the CFC jurisdiction.

101. Based on this analysis, the first option is recommended because it is consistent with the goals of the BEPS Action Plan (OECD, 2013) and it reduces administrative costs.
第五章 收入计算规则

98. 本章对于 CFC 第四个构成要素收入计算提出相关建议。一旦 CFC 规则确定了收入的可归属性，那么接下来需要考虑的是可归属收入的具体金额。

I. 建议

99. 计算 CFC 收入需要两个不同的判定标准：（i）适用范围是哪个管辖区的准则；（ii）计算 CFC 收入时是否需要特殊规则。对于第一条的建议是，利用母管辖区的准则来计算 CFC 收入。对于第二条的建议是，在法律允许的范围内管辖区应出台限制 CFC 损失抵扣的特殊规则，以使 CFC 损失只可抵扣同一个 CFC 或同一个管辖区内的其他 CFC 的收益。

II. 解释

100. 第一条建议关注用来计算应纳税所得额的规则。为达到第一条建议所述要求，可考虑以下四种方法。

1. 第一种方法是采用母管辖区的法律（即采用 CFC 规则的管辖区）。这种方法在逻辑上与 BEPS 所关注的问题保持一致，尤其是 CFC 规则关注的是管辖区税收的侵蚀。这种方法也可以降低税务监管成本。各管辖区按 CFC 规则计算的收入为起点，根据母管辖区的规则进行调整后可以得到相似的结果。

2. 第二种方法是采用 CFC 管辖区规则来计算收入，但这将与 BEPS 第 3 号行动计划的目标不一致。因为采用 CFC 规则将导致可归属收入的减少，这会增加税收复杂性，可能需要税务行政人员熟悉这些规则从而增加行政成本。

3. 第三种方法是将金融机构选择任意管辖区规则进行计算，但此种方式可能为税务筹划创造机会。

4. 最后一种方法是使用一个共同标准来计算收入。例如，一些管辖区要求纳税人使用国际财务报告准则（IFRS）来计算收入。此方法的优势在于，它可以在理论上引导国际一致，因为无论是 CFC 管辖区还是母管辖区的居民，所有 CFC 管辖区和母管辖区将使用相同的准则来计算 CFC 收入。但是，多数国家目前不使用此种标准来进行应纳税所得额的计算，因此如果纳税人必须根据既非母管辖区也非 CFC 管辖区使用的准则来重新计算 CFC 收入，此种选择可能同时增加监管成本与合规成本。

101. 基于此分析，对于第一种方法与 BEPS 行动计划（OECD, 2013）的目标相一致，且可降低监管成本，我们建议采用第一种方法。
102. In arriving at the second recommendation, the question of how to treat losses was considered. Most issues involving losses can be addressed by reference to pre-existing domestic laws in the parent jurisdiction. These include questions about whether the use of losses should be limited to offset against profits of a similar character, which would mean that, for example, passive losses of a CFC could only be used against passive profits if that limit applied in domestic laws on losses.

103. Another issue is whether CFC losses should only be offset against CFC profits or whether they can also be used against profits in the parent company. Most existing CFC rules only allow the losses of the CFC to be offset against the profits of that CFC or CFCs in the same jurisdiction, and this is the recommended approach since allowing CFC losses to be offset against the profits of parent companies or CFCs in other jurisdictions could encourage manipulation of losses in the CFC jurisdiction. However, this may not be an issue that is already dealt with in rules that apply in the domestic context, so a separate CFC-specific rule may be required. A rule that prevents CFC losses being set off against non-CFC profits could apply alongside a rule that limits the offset of losses to similar types of profits so that passive losses of a CFC could only be offset against passive profits of that same CFC. Any concerns about over-taxation resulting from this approach could be mitigated by allowing CFC losses to be carried forwards or backwards for use against profits arising in other years if such treatment is otherwise permitted under the laws of the parent jurisdiction.

104. The recommendation on loss limitation can be illustrated with the following example. Parent is a resident in Country A and Sub B is a wholly owned subsidiary in Country B that is a CFC. Country A has CFC rules. In year 1, Parent earns 1000 and Sub B earns 500 of CFC income. Parent has 200 in losses and Sub B has 1000 in losses. This is illustrated in Figure 5.1.

**Figure 5.1. Loss limitation**

![Diagram of Loss limitation](image)

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59 Using domestic law provisions to answer questions about the treatment of specific items such as losses would create complications if CFC income is generally calculated using the laws of a different jurisdiction but this is another reason supporting the use of the parent jurisdiction’s rules and the first recommendation above.

60 Jurisdictions could also implement rules permitting parent company losses to be used against CFC profits. This situation is less likely to raise BEPS concerns since this would lead to fewer losses in the parent company and fewer profits in the CFC.

61 Member States of the European Union should determine whether a restriction of CFC losses would be consistent with the fundamental freedoms of the European Union as considered in Chapter 1.
102. 对于第二条建议需要考虑如何处理亏损。大多数与亏损有关的问题可以由母管辖区现存的国内法律来解决。这包括了是否限制亏损只能被用于抵减具有相似特征的利润，比如，如果这个限制适用于国内法对于损失的规定，CFC 的被动亏损只能抵减被动利润。

103. 另一个问题，即 CFC 的亏损是只能用于抵减 CFC 的利润还是同样可以用于抵减母公司的利润。大多数现有的 CFC 规则只允许用 CFC 的亏损抵减该公司的税。这在 102 条中已经提到。然而，国内法也可能解决该问题，因此需要一个单独的 CFC 特殊规则。该规则能够防止 CFC 亏损被用于抵减非 CFC 利润，且应当与一个限制亏损只能被用于抵减相似类型的利润的规则一起运用。以上 CFC 的被动亏损只能用于抵减同个公司的被动利润。这个方法可能引起过度课税的担忧，但可以通过允许 CFC 将亏损向后或向前结转来解决，前提是相关的处理方法在母管辖区被允许。

104. 下例展示了限制亏损的建议。母公司为 A 国的居民企业，子公司 B 为母公司位于 B 国的全资子公司，是一个 CFC。A 国实行 CFC 规则。在第一年，母公司收入 1000，子公司 B 的 CFC 收入为 500，母公司损失为 200，子公司 B 损失为 1000。见图 5.1。

![图 5.1 损失限制](image)

如果 CFC 收入通常基于不同管辖区法律计算，应用本国法律回答特定事项，比如亏损的处理问题，可能会带来复杂性，但这也是使用除管辖区规则以及采用上述第二条建议的另一个理由。

管辖区可能实施允许母公司亏损抵减 CFC 利润的规则，这一方法不太可能引发 BEPS 问题，因为这会使得母公司损失更多以及 CFC 利润更少。

欧盟成员国需要确定 CFC 的亏损是否与第一章中考虑过的欧盟自由原则一致。
105. If Country A's CFC rules do not limit the losses of Sub B to the income of Sub B, then Parent will only be taxed on 300 because the full 1200 of losses will be offset against the full 1500 of income. If, however, Country A's CFC rules do limit the losses of Sub B to the income of Sub B, then Parent will be taxed on 800 (1500 - 700), and no income will be attributed to Parent from Sub B because all of Sub B's attributable income will be offset by the losses, and the remaining 500 could potentially, depending on Country A's CFC rules, be carried forward to be used against Sub B's future income. This limit will prevent use of CFCs to reduce the taxable income in the parent jurisdiction.

106. If Country A already has a rule that does not permit passive losses to offset active income, this rule can be combined with the recommended loss limitation as shown in Figure 5.2.

**Figure 5.2. Loss limitation with pre-existing passive limitation**

107. If all of Parent's income is passive and all of Parent's losses are active, while all of Sub B's income and losses are passive, Parent would be taxed on 1000 of its income. This is because Parent's active losses could not be used against its passive income and because Sub B's passive losses would offset all of its passive income, and the excess passive losses could not be used to offset Parent's income under the CFC loss limitation rule.

108. Another concern is potential loss importation. This concern could arise if a CFC has losses that date from before its characterisation as a CFC or if another activity bearing losses is transferred to the CFC to soak up profits. If losses are only available to be offset against CFC profits then the fact that the CFC incurred losses in prior years may not be a problem. However, there may be concerns if the activity of the CFC has changed and there is evidence that either profits or losses have been shifted to the CFC to reduce the amount of income that is ultimately taxed. Many countries have domestic law provisions designed to prevent tax avoidance that deal with these situations and these could equally be applied to the CFC's computation of income.

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105. 如果A国的CFC规则不将子公司B的亏损限制在仅可用于抵减子公司B的收入，那么母公司将只就500的所得缴税。原因是全部1200的亏损都可以用于抵减全部1500的所得。但是，如果A国的CFC规则限制子公司B的亏损仅可用于抵减其自身的收入，母公司只能就800（1000-200）的所得缴税，且因为子公司B的可归属收入会被其亏损所抵减，子公司将没有收入被汇总到母公司。根据A国的CFC规则，剩余500的亏损可能被结转至以后年度去抵减子公司B的未来收入。这个限制可以防止利用CFC以降低母管辖区的应税收入。

106. 若A国已经存在不允许被动损失冲减主动收入的规则，则该规则可以与图5.2所示的限制亏损的建议相结合。

图5.2 与现有被动限制相结合的损失限制

107. 若母公司全部收入为被动收入，所有亏损为被动亏损，而子公司B的收入和亏损都是被动性质的，则母公司将会需缴1000的收入应税。这是因为母公司的主动亏损不能被用于抵减其被动收入。子公司B的被动损失可以抵减其所有被动收入，且在CFC亏损限制规则下子公司B的被动损失的剩余部分不能用于抵减母公司的收入。

108. 另一个问题是在损失进口。如果CFC在其成为CFC前产生亏损或承担亏损的另一项经营活动被转移到CFC以吸收利润，则可能会产生该问题。如果亏损只可以用于抵减CFC的利润，那么CFC在以前年度产生亏损将不成问题。然而，如果CFC的活动已发生改变且有证据表明利润或亏损被转移到CFC以减少最终应税收入，这将会成为一个问题。许多国家的国内法律都有条款来防止此类避税，这些条款同样可以被用于CFC的收入计算。

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CHAPTER 6: RULES FOR ATTRIBUTING INCOME

109. This chapter sets out recommendations for the fifth CFC building block on attributing income. Once the amount of CFC income has been calculated, the next step is determining how to attribute that income to the appropriate shareholders in the CFC.

I. Recommendations

110. Income attribution can be broken into five steps: (i) determining which taxpayers should have income attributed to them; (ii) determining how much income should be attributed; (iii) determining when the income should be included in the returns of the taxpayers; (iv) determining how the income should be treated; and (v) determining what tax rate should apply to the income.

111. The recommendations for these steps are as follows:

i) The attribution threshold should be tied to the minimum control threshold when possible, although countries can choose to use different attribution and control thresholds depending on the policy considerations underlying CFC rules.

ii) The amount of income to be attributed to each shareholder or controlling person should be calculated by reference to both their proportion of ownership and their actual period of ownership or influence (influence could for instance be based on ownership on the last day of the year if that accurately captures the level of influence).

iii) and iv) Jurisdictions can determine when income should be included in taxpayers’ returns and how it should be treated so that CFC rules operate in a way that is coherent with existing domestic law.

v) CFC rules should apply the tax rate of the parent jurisdiction to the income.

II. Explanation

112. In arriving at the above recommendations, each of the five steps was considered in greater detail.

A. Which taxpayers should income be attributed to?

113. In order to attribute income correctly, jurisdictions must first determine to whom the income is to be attributed. Many existing CFC rules tie this determination to the earlier determination of control, so that, if a taxpayer met the minimum control threshold, then that taxpayer would also have income attributed to it. In jurisdictions that apply a concentrated ownership rule, CFC income is generally attributed not just to taxpayers who meet the overall control threshold but also to all resident taxpayers who have the minimum level of control (e.g., 10%) to be considered when calculating whether the control threshold has been met. The benefits of tying the attribution threshold to the minimum control threshold include administrative simplicity and reduced

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62 To limit competitiveness concerns, countries could also consider a top-up tax. This may be more appropriate where a more approximate or mechanical rule could potentially capture active income. See paragraphs 119-120 for a more detailed explanation of a top-up tax.
第六章 收入归属规则

109. 本章针对CFC第五个构成要素收入归属提出建议。一旦计算出CFC收入，下一步则是确定如何将这些收入归属给CFC的适当股东。

I. 建议

110. 收入归属可分为5步：(i) 确定哪些纳税人有归属收入，(ii) 确定多少收入应被归属，(iii) 确定纳税人纳税申报中何时应包含该收入，(iv) 确定该收入的处理方法，以及 (v) 确定该收入的适用税率。

111. 上述步骤的建议如下：

i) 尽管根据CFC规则的政策考量，不同国家可能选择使用不同的归属和控制门槛，但在有可能的情况下归属门槛应当与最低控制门槛相关联；

ii) 在计算归属给每个股东或控制人的收入时，应首先参考股东或控制人的所有权比例，也考虑其实际持有或影响的期间（例如，如果可以准确反映影响程度，影响可以基于年度最后一天的所有权确定）。

iii) 和 iv) 为使CFC规则在与国内现行法规一致的情况下运作，管辖区可确定纳税人纳税申报中应何时包含相应收入以及如何处理相应收入。

v) 针对收入，CFC规则应采用与管辖区的适用税率。^{82}

II. 解释

112. 为达到上述建议，应更详细地考虑每个步骤。

A. 哪些纳税人有归属收入？

113. 为正确归属收入，管辖区须首先确定收入的归属对象。许多现有的CFC规则将其与早期的控制决定相联系，因此如果一个纳税人符合最低控制门槛，那么该纳税人应有归属收入。在采用集中所有权规则的管辖区内，在计算是否满足控制门槛时，CFC收入通常不仅仅归属给符合整体控

^{82} 为限制对公司利益的控制，国家可能同时考虑部分股（part-share）。当存在更为类似集团的规则可能控制主动收入，这种方式可能更为合适。关于部分股的详细解释，请参见第119-120段。
compliance burdens. This also ensures that taxpayers have enough influence to gather information on the activities and income of the CFC. However, using control rules to determine attribution could potentially lead to under-inclusion if it is believed that a minority ownership could in fact have sufficient influence over the business decisions of a CFC to raise Base Erosion and Profit Shifting (BEPS) concerns, but this disadvantage can be reduced if the control rules aggregate the interests of minority shareholders or otherwise do not limit control to majority owners.

114. Some CFC rules may, however, use a different rule to determine which taxpayers have CFC income attributed to them, based on the theory that the amount of ownership that is sufficient for control may not be the same as the level that is sufficient for attribution. Jurisdictions that want to deter even minority investments in CFCs may use a lower attribution threshold, while those that are instead focused on deterring investments by residents that can influence the CFC may set their attribution threshold higher than their control threshold, particularly if their control threshold considers concentrated ownership. Further, CFC rules that look at de facto control or otherwise establish control in a less mechanical way may need to have different control and attribution tests to ensure that the correct taxpayers have income attributed to them. Although having separate rules for attribution and control may in theory create additional compliance costs or administrative burdens, actual attribution of profits may only occur relatively infrequently due to the deterrent nature of CFC rules. Best practice would therefore be either to tie the attribution threshold to the control threshold or to use another attribution threshold that attributed income to, at minimum, taxpayers who could influence the CFC.

B. How much income should be attributed?

115. Once CFC rules have determined which taxpayers will have income attributed to them, they must then determine how much of that income to attribute. All existing CFC rules attribute income in proportion to each taxpayer’s ownership, but they differ in how they treat taxpayers whose ownership lasted for only a portion of the year. Some jurisdictions attribute the entire portion of income based on ownership on the last day of the year. Whilst this could lead to inaccurate attribution and could create opportunities for tax planning, this may accurately capture whether or not the taxpayer was able to influence the CFC if voting or other power is determined based on ownership on the last day of the year or if there are other anti-abuse rules to prevent inappropriate under- attribution of profits. Other jurisdictions attribute income based on the period of ownership, which results in taxpayers being taxed on an amount that is similar to their actual share of the CFC profits. In addition, applying such a rule appears unlikely to add significant compliance costs in practice. Either of these approaches to determining how much income should be attributed can qualify as best practice so long as the determination based on the last day of the year accurately captures the taxpayer’s influence.

116. Attribution rules should also ensure that it is not possible to attribute more than 100% of the income of the CFC. This situation could arise, for example, where legal control and economic control together led to more than 100% control. Any rule designed to prevent over- attribution, however, should include anti-avoidance provisions to ensure that it is not used to prevent taxpayers from having an amount attributed to them that accurately captures their influence.

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53 It is assumed that such a rule would attribute income if the taxpayer held an interest in the CFC for a portion of the year but did not hold that interest on the last day of the year. If not, the recommended rule could be combined with a rule for imputing CFC income when CFC shares are disposed of in the middle of the year.

54 One possible way of capturing influence would be to combine a rule that considers ownership on the last day of the year with reporting requirements on ownership throughout the year.
制门槛的纳税人，还会被归属在控制门槛时所有符合最低控制门槛（例如 10%）的居民纳税人。归属门槛与最低控制门槛结合所带来的好处包括监管的简化和合规负担的减轻。这同时保证纳税人有足够的影响力以收集CFC的活动信息和收入。但是，如果少数股东实际上能充分影响CFC的商业决策，采用控制规则来确定归属可能潜在在内涵不足从而引发BEPS问题。不过，如果控制规则归属少数股东利益或者不将控制限定于重要股东，这一方法的缺点可以减少。

114. 然而，某些CFC规则基于达到控制程度的所有权数量可能不同于达到可归属程度的所有权数量这一理论，可能运用另一种规则来确定哪些纳税人有CFC归属收入。想要阻止对CFC投资（即便是少量）的管辖区可使用较低归属门槛，而对于想要阻止可影响CFC的居民对CFC进行投资的管辖区，则需要设置高于控制门槛的归属门槛，特别是如果他们的控制门槛考虑了集团所有权。此外，寻求实际控制或采用较不机械方式建立控制的CFC规则可能需要不同控制和归属测试，以保证将收入归属给正确的纳税人。尽管在归属和控制方法上有各自单独的规则在理论上可能增加额外的合规成本或监管负担，由于CFC规则的威慑性质，需要实际归属利润的情形可能会较少。因此最佳实践为根据控制门槛设定归属门槛，或者使用另一种归属门槛将收入归属于至少能够影响CFC的纳税人。

B. 多少收入应被归属？

115. 一旦CFC规则确定哪些纳税人需要被归属收入，必须确定多少收入需要被归属。所有现行的CFC规则都按照纳税人的持股比例分配归属收入，但是在对待持股时间不足一年的纳税人，规则则各不相同。部分管辖区按平均持股比例归属所有的收入。尽管会导致归属的不准确性，并为税务筹划创造机会，但如果投票权或其他权利根据每年最后一刻的持股比例确定，或者有其他防止利润不归国的反避税措施，此方法可以准确识别纳税人是否能够影响CFC。其他管辖区基于期初持股比例归属收入，这可以使纳税人接近于其CFC利润中实际享有的份额交税。此外，应用此规则不太可能在实践中增加高额的合规成本。虽然，只要确认基于年度最后一天的方法可以准确确认纳税人影响，则任意一种确定多少收入需要归属的方法均可作为最佳实践。

116. 归属规则同时需保证不会出现归属超过CFC 100%收入的情形。比如，当法律控制和经济控制共同导致控制超过 100% 的情形就会出现时，任何为防止归属过多而制定的规定都应包含反避税规则，以确保不被用来阻止纳税人获得可准确反映其影响的归属收入。

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63. 如果纳税人全在所有时间持有CFC权益但至少一年的最后一天没有持有该权益，根据该规则的假设此纳税人仍有可归属收入。如果不是这种情况下，纳税规则需要与CFC权益在年度中间被处置时如何归属CFC收入的方法相结合。

64. 核心影响的潜在方法之一是将考虑一年最后一天所有权的规则与全年度所有权益报告要求相结合。
C. **When should the income be included in tax returns?**

117. Many existing CFC rules specify that the attributed income must be included in the taxpayer's taxable income for the taxable year in which the end of the CFC's accounting period ends, although some countries have slightly different rules for determining the year in which the attributed income should be included. Korea's CFC rules, for example, state that the attributed income will be included on the return for the taxable year to which the 60th day from the end of the CFC's fiscal year belongs. Both approaches seem equally effective at combating BEPS, so there is no recommendation for this step and countries are free to adopt provisions that ensure that CFC rules are coherent with general domestic law provisions.

D. **How should the income be treated?**

118. A further question to be answered when attributing income to taxpayers is how that income will be treated in the parent jurisdiction. Existing CFC rules take several different approaches, including treating attributed income as a deemed dividend or treating it as having been earned by the taxpayer directly (i.e., the CFC is essentially treated as a partnership or flow-through entity but only for the purposes of attributing CFC income). If attributed income is treated as a deemed dividend, then the tax treatment can build on existing dividends rules with which taxpayers and tax administrations are already familiar. However, jurisdictions may not want to treat attributed income as a deemed dividend for all tax purposes and therefore the limit of any "deeming" will need to be made clear. In contrast, treating attributed income as if it were directly earned by shareholders of the CFC is like to reduce the need for any separate characterization rules since the income will be characterized according to existing domestic rules. Both approaches are equally appropriate in terms of dealing with BEPS and therefore the question of how to treat attributed income could be left for jurisdictions to decide in a manner that is coherent with domestic law.

E. **What tax rate should apply to CFC income?**

119. Finally, attribution of income raises the question of how that income is taxed once it is attributed. Whilst existing CFC rules subject CFC income to taxation at the rate that would apply to the parent company in the parent jurisdiction, a second option would be to apply a "top-up tax". A top-up tax, which builds closely on the concept of a minimum tax, would only subject CFC income to the difference between the tax paid and a set threshold. This threshold could be tied to the tax rate exemption used to determine whether CFC rules apply to a given CFC, or it could be an entirely separate threshold. A top-up tax would set a floor for the rate at which CFC income is taxed.

120. To illustrate how a top-up tax could work, imagine a parent jurisdiction with a flat 30% statutory tax rate and a CFC rule that applied only to CFCs that were subject to an effective tax rate of less than 12%. If the parent jurisdiction applied a top-up tax to a CFC that was subject to a 0% effective tax rate, it would only tax the CFC income at 12%, instead of its normal rate of 30%. This approach could mean that Multinational Corporations (MNCs) located in higher-tax jurisdictions with CFC rules would not be at a competitive disadvantage relative to MNCs located in some lower-tax jurisdictions. However, they would remain at a competitive disadvantage compared to both MNCs located in jurisdictions with CFC rules but with a tax rate below the top-up tax rates and MNCs located in jurisdictions without CFC rules. The top-up tax would also not necessarily eliminate incentives to shift profits away from higher tax jurisdictions. For instance, in the example above, MNCs located in the parent jurisdiction would have a considerable incentive to shift their income into the CFC jurisdiction because the maximum rate at which they would be taxed on their CFC income would be 12%, so 18 percentage points lower than the rate that would apply if their income were earned in the parent jurisdiction. The top-up tax may therefore not be consistent with all policy objectives that jurisdictions use their CFC rules to achieve. For some jurisdictions, however, it could be seen as a middle way that would enable jurisdictions to address some degree of competitiveness concerns. If the level set for the top-up tax rate was the same as that as the tax rate exemption, it may also make CFC rules more internally consistent.
C. 何时在纳税申报表中包含相应收入？

117. 许多现行CFC规则明确规定必须将归属收入计入CFC会计年度期末所在的纳税年度内，不过，部分国家对归属收入确认年份的规定有些许不同。例如韩国，其CFC规则规定，归属收入应包含在会计年度期末后第60天所在的纳税年度的纳税申报中。两种方法在打击BEPS方面似乎同样有效，因此对于这一步骤无特别建议，各国可自由选择采用能够确保CFC规则与国内法律条款一致的规则。

D. 如何处理收入？

118. 当将收入归属给纳税人时，还需要进一步解决的问题是在母管理区内收入应如何处理。现行的CFC规则采用不同方法，包括将归属收入视为股息，或将其视为纳税人直接收入（即仅仅应当确认CFC收入的归属时，CFC本质上被视为是一个合伙企业或透明体）。如果归属收入被视为股息，那么其税务处理应基于现有纳税人和税务机关已经熟悉的股息处理规则。然而，管辖区可能不希望将归属收入都视为股息，因此必须清楚阐明对于“股息”的规定。相反，将归属收入视为CFC股东直接收入可能减少对收入单独定性规则的需求，因为收入将根据现有国内法律分类。两种方法在解决BEPS问题上具有同等效果，因此可由管辖区以一种与国内法律相一致的方式决定如何处理归属收入。

E. CFC收入适用的税率是多少？

119. 最后，关于归属收入还有一个问题，即收入归属后应当如何征税？现行CFC规则规定应税CFC收入应使用母公司在母管理区的税率，不过还有一个选择是采用“补充税”（top-up tax）。补充税与最低税概念相近，即每CFC收入缴纳已支付税金和设立门槛的差额。该门限可以与税率相结合来决定一个CFC是否适用CFC规则，或者也可以是一个独立的门槛。补充税可以为应税的CFC收入设立一个税率上限。

120. 为了说明补充税如何执行，假设母管理区单一法定税率为30%，CFC规则只适用于有效税率低于12%的CFC。如果母管理区对一个有效税率为0%的CFC应用补充税，则CFC应税收入只需按12%税率而非正常税率30%缴税。这个方法意味着相比于在低税率管辖区的跨国公司（MNC），在具有CFC规则的较高税率管辖区选址的MNC并没有处于竞争优势。然而，与在具有CFC规则且税率为补充税税率的管辖区或在没有CFC规则的管辖区选址的MNC相比，在具有CFC规则的较高税率管辖区选址的MNC依然存在竞争劣势。补充税不能必然消除将利润从高税率管辖区转移的动机。例如，在上述例子中，位于母管理区的跨国公司将会相当大的动机将收入转移至CFC管辖区，因为其CFC收入的有效税率只有12%，将比在母管理区取得的应税收入所适用的税率低18%。因此，补充税可能不能与管辖区想要通过CFC规则实现的全部政策目标相一致。不过，对于一些管辖区而言，这对于被视为一种可以解决管辖区一定程度的竞争问题的较为折中的方式。如果补充税税率水平与税率豁免等，可以使CFC规则更具有内在一致性。
CHAPTER 7: RULES TO PREVENT OR ELIMINATE DOUBLE TAXATION

121. This chapter sets out recommendations for the sixth and final CFC building block on rules to prevent or eliminate double taxation. As discussed in Chapter 1, one of the fundamental policy considerations raised by CFC rules is how to ensure that these rules do not lead to double taxation, which could pose an obstacle to international competitiveness, growth and economic development.

I. Recommendations

122. CFC rules should include provisions to ensure that the application of these rules does not lead to double taxation. There are at least three situations where double taxation may arise: (i) situations where the attributed CFC income is also subject to foreign corporate taxes; (ii) situations where CFC rules in more than one jurisdiction apply to the same CFC income; and (iii) situations where a CFC actually distributes dividends out of income that has already been attributed to its resident shareholders under the CFC rules or a resident shareholder disposes of the shares in the CFC. However, double taxation concerns could arise in other situations, for instance where there has been a transfer pricing adjustment between two jurisdictions and a CFC charge arises in a third jurisdiction. CFC rules should be designed to ensure that these and other situations do not lead to double taxation.

123. The recommendation for addressing the first two situations is to allow a credit for foreign taxes actually paid, including CFC tax assessed on intermediate companies. The actual tax paid (this can also include withholding taxes) should include all taxes borne by the CFC that are taxes on income that have not qualified for other relief, and that are not higher than the taxes due on the same income in the parent jurisdiction. The recommendation for addressing the third situation is to exempt dividends and gains on disposal of CFC shares from taxation if the income of the CFC has previously been subject to CFC taxation, but the precise treatment of such dividends and gains can be left to individual jurisdictions so that provisions are coherent with domestic law. It is left to individual jurisdictions to address other situations giving rise to double taxation, but the overall recommendation for this building block is to design CFC rules to ensure that they do not lead to double taxation.

II. Explanation

A. Issues with respect to relief for foreign corporate taxes

124. Perhaps the most obvious situation where the application of CFC rules may lead to double taxation is the one mentioned above under point (i) where the CFC income is subject to taxation in the CFC jurisdiction as well as to CFC taxation in the parent or controlling parties’ jurisdiction.

125. Most jurisdictions address the situation where the CFC income is subject to taxation in both the CFC jurisdiction and the parent jurisdiction by providing for an indirect foreign tax credit that credits taxes that were incurred by a different taxpayer. This approach eliminates double taxation more comprehensively than the deduction method as it directly sets off the foreign tax against domestic tax rather than reducing

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65 In certain circumstances, the interaction of CFC rules and transfer pricing rules could give rise to double taxation issues. Whilst such circumstances may not be common, it is important that countries rules contain provisions to eliminate any double taxation that would otherwise result.
第七章 防止或消除双重征税规则

121. 本章就 CFC 第 6 个也是最后一个构成要件关于防止和消除双重征税提出建议。如第 1 章所讨论的，CFC 规则所引发的一个基本政策考量是如何确保这些规则不会导致双重征税，否则将对国际竞争，增长和经济发展造成阻碍。

I. 建议

122. CFC 规则应该包含确保这些规则的运用不会导致双重征税的规定。至少有三种情形会导致双重征税：（i）CFC 归属收入同样需要缴纳境外企业所得税，（ii）多个管辖区的 CFC 规则适用于同一 CFC 收入，以及（iii）CFC 从根据 CFC 规则已归属给居民股东的收入中派发股息，或居民股东处置 CFC 股份。但其他情况下也可能产生双重征税问题。例如当两个管辖区存在转让定价调整，而第三个管辖区要求收取 CFC 费用。* CFC 规则设计应该确保以上或其他情形都不会产生双重征税问题。

123. 解决前两种情况的建议是允许实际支付的境外税收进行税收抵免，包括评估的中间公司的 CFC 税收。实际支付税金（也包括预提税）应该包括所有由 CFC 所承担的无法享受其他减免的收入的税负，且该税负不高于在多个管辖区对同一收入的征税金额。解决第三种情况的建议是，如果 CFC 的所得税已根据 CFC 规则被征税，则股息或出售 CFC 股权的资本利得可以免税，但对该股息和资本利得的具体处理可由各个管辖区自行决定，以与国内法律保持一致。其他可能引起双重征税的情况由各个管辖区自行制定解决规则。但是针对该构成要件的总体建议是规划 CFC 规则以确保其不会导致双重征税。

II. 解释

A. 境外企业税减免相关事项

124. 可能最明显的因应用 CFC 规则而导致双重征税的情形是上述第 (i) 点中的情况，即 CFC 的收入在其所在管辖区被征税，同时又在其母管辖区或控制方所在的管辖区因 CFC 规则被征税。

125. 大多数管辖区解决 CFC 收入被 CFC 管辖区及其母管辖区双重征税的方法是提供间接境外税收抵免，即允许抵免由不同纳税人产生的税收。这一方法相比于扣除法能更加全面地消除双重征税。因为此方法直接用境外税收抵免国内税收，而非减少纳税人的税基。考虑到 CFC 规则的目标是对被转移到低税率或免税管辖区的收入主张征税权，扣除法可能削弱 CFC 规则的应用，故非给予减免的合适方法。间接境外税收抵免通常将抵免范围限制在有效双重征税的金额。大多数国

* 在特定条件下，CFC 规则和转让定价规则交互作用可能带来双重征税问题，这种情况虽然不会很普遍，但国家法规中需要包含消除可能的双重征税的规定。
the tax base to which the residence tax applies. Given that the purpose of a CFC regime is to assert taxing rights over income that has been shifted to another jurisdiction, the exemption method is not an appropriate method for granting relief in this context since it would undermine the application of CFC rules. An indirect foreign tax credit is generally limited to the amount of effective double taxation. This is addressed in most countries' rules by limiting relief to the lesser of the domestic tax or the foreign tax actually paid. The focus on the actual tax paid ensures that relief is not given if the foreign tax is subject to a refund or reimbursement claim. The actual tax paid (this can also include withholding taxes) should include all taxes borne by the CFC that are equivalent to taxes on income, that have not qualified for other relief, and that are not higher than the taxes due on the same income in the parent jurisdiction.

B. Issues with respect to relief for CFC taxation in multiple jurisdictions

126. Additional issues may arise when the income and profits arising in a CFC are taxed under the CFC rules operating in more than one jurisdiction, and this scenario may become more common in the future. If, for example, a subsidiary is treated as a CFC under the rules operating in multiple jurisdictions, then the subsidiary's income could potentially be taxed by the CFC jurisdiction and by any other jurisdiction that considers the subsidiary to be a CFC. Again an indirect foreign tax credit could be applied in this situation but in order to provide such a credit countries may need to change their double taxation relief provisions in order for CFC tax paid in an intermediate country to qualify as a foreign tax eligible for relief. There should also be a hierarchy of rules to determine which countries should have priority, and this hierarchy could prioritise the CFC rules of the jurisdiction whose resident shareholder is closer to the CFC in the chain of ownership.

127. This rule hierarchy is illustrated in the example below.

![Figure 7.1: Interaction of CFC rules](image)

128. In this situation, C Sub is both a direct CFC of B Sub and an indirect CFC of A Parent, and B Sub is also a CFC of A Parent. If both Country A and Country B have CFC rules, there should be a rule hierarchy to determine which country's CFC rules will apply first.
家的规则中也将将可抵免限额限定为按国内税法应缴纳的税金与境外实际支付税金中的较低者。关
注于实际支付税金可以确保税免不会在境外可以享受退税或补偿的情形下仍然被给予。实际
支付税金（还可以包括预提税）应包含所有由 CFC 承担的其收入应缴纳的税金，且不适用其他税
收优惠以及不高于在管辖区或相同收入应征收的税金。

B. 关于多管辖区 CFC 的税收减免问题

126. 当 CFC 的收人和利润被多个采用 CFC 规则的管辖区征税时可能产生其他问题，且这一情
况将来会变得更为常见。比如假设子公司根据适用于多个管辖区的 CFC 规则被认定为 CFC，那么
该子公司的收入很可能既被 CFC 管辖区征税，也被其他认定该子公司为 CFC 的管辖区征税。这
种情况下可应用间接境外税收抵免，但为提供此抵免，各国需要改变它们的双重税收抵免条款，
以使在中国国家支付的 CFC 税收也有资格申请境外税收抵免。同时需要制定层级规则以确定哪个
国家具有优先权。此层级规则可以使在所有链条中更加靠近 CFC 的居民股东的管辖区的 CFC 规
则具有优先权。

127. 下面这个例子解释了层级规则。

图 7.1 CFC 规则相互作用

128. 在这种情况下，子公司 C 既是子公司 B 的直接 CFC，也是母公司 A 的间接 CFC。子公司
B 同时也是母公司 A 的 CFC。如果 A 国与 B 国都具有 CFC 规则，那么必须有一个层级规则确定哪
一个国家的 CFC 规则应该优先适用。
129. Figure 7.1 could raise two different issues, depending on the tax rates of Country A and Country B. If Country C has a tax rate of 10%, Country B has a tax rate of 20%, and Country A has a tax rate of 30%, then both Country B and Country A will want to collect their full amount of tax, potentially only giving a credit for Country C's tax. If the income of C Sub is 100, this would mean that Country A would want to collect 20 (i.e., 30 minus 10) and Country B would want to collect 10 (i.e., 20 minus 10). The rule hierarchy suggested above, where Country B's rules apply prior to Country A's rules, would require that Country A provide a tax credit for taxes paid to both Country C and Country B. This would mean that Country C would collect 10, Country B would collect 10 (i.e., 20 minus 10), and Country A would also collect 10 (i.e., 30 minus 20).

130. If, in contrast, Country C still has a tax rate of 10% and Country A still has a tax rate of 30%, but Country B has a tax rate of 40%, then Country A would no longer collect any taxes if it granted a tax credit for taxes paid to Country B. Although this may raise concerns from the perspective of Country A, this is likely to be consistent with the principle underlying Country A's CFC rules as C Sub would be fully taxed on its income at a tax rate greater than that in Country A. Also, if Country B has a tax rate that is higher than the tax rate in Country A, it is less likely that the tax base that has been eroded is that of Country A. It is more likely that in this situation, if it were to exist, it would be Country B's tax base that was being eroded. It would therefore be appropriate for Country A not to apply its CFC rules if the profits of C Sub are taxed at an equivalent or higher effective tax rate in the jurisdiction of an intermediate party. The recommended rule hierarchy in both situations is therefore for Country A to apply its CFC rules only after Country B has applied its CFC rules (or to provide a credit for CFC taxes paid to Country B, which may be simpler).

C. Relief for subsequent dividends and capital gains

131. The third situation in which CFC taxation could lead to double taxation is where (i) the CFC actually makes distributions out of the CFC income or (ii) resident taxpayers of a CFC dispose of their CFC shares. With regards to the first scenario, most jurisdictions provide some type of relief for subsequent dividends paid by a CFC. In the majority of these jurisdictions, the dividends will qualify for the regular participation exemption for foreign dividends. If CFC rules require a level of control that is at least equal to the same percentage of shareholding as the participation exemption, then the participation exemption is likely to apply. Therefore an additional relief provision will only be necessary if there is no participation exemption or the participation exemption does not apply. In these cases, most jurisdictions apply a separate provision that also exempts the dividends even if they do not qualify for the normal participation exemption (or if there is no general participation exemption).

132. There may however be difficulties with the exemption method if only part of the CFC income has been attributed to a resident taxpayer or if a CFC is indirectly held through another non-resident company which does not have attributable CFC income. In these cases it may be hard to determine whether dividends have, in fact, been paid out of attributed CFC income and are therefore subject to double taxation. To address these difficulties, countries tend to adopt relatively mechanical approaches that assume that dividends are likely to have been paid out of previously attributed CFC income. These approaches include, for example, limiting the dividend exemption to the amount of profits generated by the CFC during the tax years when CFC rules have applied.

133. A further issue that arises with regards to the first scenario occurs when the CFC jurisdiction applies withholding taxes when the dividend is paid out. Since these withholding taxes represent income

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This analysis assumes that Country A does not have a tax rate exemption or that the cut-off for Country A's tax rate exemption is greater than 20%.
129. 根据 A 国和 B 国的税率，图 7.1 可能带来两个不同的问题。如果 C 国的税率为 10%，B 国的税率为 20%，A 国的税率为 30%，那么 A 国和 B 国都想征收全额税款，可能只允许 C 国征收的税款进行抵免。如果子公司 C 的收入为 100，这意味着 A 国希望收取 30 （也就是 30 减去 10）的税款，B 国希望收取 20 （也就是 20 减去 10）的税款。而根据上述层级规则，B 国规则优先于 A 国。这要求 A 国对 C 国和 B 国的税款都提供抵免。这意味着 C 国应征收的税金为 20，B 国应征收的税金为 10（20 减去 10），而 A 国应征收的税金同样为 10（30 减去 20）。**

130. 相反，如果 C 国税率依旧为 10%，A 国税率依旧为 30%，而 B 国税率变为 40%，如果 A 国允许在 B 国缴纳的税款进行税收抵免，A 国将不会有任何税收收入。尽管这可能将会引起 A 国的担忧，但这样的处理与 A 国 CFC 规则的基本原则是一致的，因为子公司 C 所适用的税率已经高于 A 国的税率。同样，如果 B 国税率高于 A 国税率，A 国将被税制所侵蚀。此种情况下，更可能是 B 国的税制被侵蚀。因此，如果子公司 C 的利润在中间方的管辖区被按照与 A 国相等或更高的有效税率，A 国不应用 CFC 规则是更为合适的。因此，这两种情况下建议的层级规则为，A 国当且仅当 B 国已应用其 CFC 规则后才再应用 CFC 规则（或以更简单的方式，即向支付给 B 国的 CFC 税金提供税收抵免）。

C. 后续股息和资本利得的税收豁免

131. 第三种可能引起 CFC 双重征税的情况是 (i) CFC 实际分配 CFC 收入或 (ii) 居民纳税人出售其持有的 CFC 股份。针对第一种情况，大多数管辖区会提供一些针对 CFC 后续支付的股息的税收豁免。如果在这些管辖区中的大多数地区，股息通常可以适用针对股息的参与免税规则。如果 CFC 规则要求的控制程度所要求的持股比例至少等于参与免税规则的要求，那么参与免税规则很可能可以适用。因此，只有在当参与免税规则或参与免税规则不适用时，才有必要设置额外的豁免条款。在这些情况下，大多数管辖区为没有常规参与免税资格（或没有常规的参与免税规则）的股息提供单独的豁免条款。

132. 但如果只有部分 CFC 收入归属给一名居民纳税人，或 CFC 通过另一个非居民企业间接持有且没有 CFC 收入归属于该企业，则应用免税方法可能会比较困难。此种情况下，很难界定股息是否实际上出自被归属的 CFC 收入而被双重征税。为解决这些困难，各国倾向于采用相对机械的方法，即假定股息很可能出自归属的 CFC 收入。这些方法包括，比如，将股息减免限制在适用 CFC 规则时的税务年度内 CFC 所取得利润。

133. 当 CFC 管辖区在支付股利时征收预提税，这种情况将带来进一步问题。由于预提税代表
taxation at the level of the CFC jurisdiction, it may be appropriate to provide relief for withholding taxes paid in respect of the CFC income.\textsuperscript{67}

134. With regards to the second scenario, double taxation may also arise where the shares of a CFC are disposed of and the taxpayer holding the shares has previously been taxed on undistributed income of the CFC. Following the logic above in respect of dividends, countries may choose not to tax subsequent gains realised by a taxpayer in respect of the shares of a CFC to the extent that the same amounts have previously been taxed under CFC rules operating in the taxpayer's jurisdiction. However, given countries' different approaches to taxing gains on assets, the mechanism for providing relief is likely to vary to accommodate the specific tax features in each jurisdiction, and this recommendation does not mean that countries that do not otherwise exempt gains on disposition should change their overall rules to comply with this recommendation for CFC rules.

D. Other situations

135. The report recognises that double taxation can also arise in other ways, for instance through the interaction of CFC rules and transfer pricing rules. These are not new issues but countries will need to consider whether their existing double taxation relief provisions are effective in relieving all instances of double tax.\textsuperscript{65}

E. Tax treaty provisions on the elimination of double taxation

136. The way in which a country should eliminate double taxation that may result from its CFC rules also needs to take account of that country's tax treaty obligations. The elimination of double taxation found in bilateral tax treaties may vary considerably from the wording of Articles 23A and 23B of the Model Tax Convention on Income and on Capital: Condensed Version (OECD, 2010). States should therefore carefully review the relevant provisions of their tax treaties when designing their CFC regimes in order to make sure that they are not inadvertently required to apply the exemption method to income that they wish to tax under these regimes.

\textsuperscript{67} The relief for withholding tax in a tax treaty situation is discussed in the Commentary of the OECD Model Tax Convention in paragraph 39 of Article 10.

\textsuperscript{65} For example, Parent A resident in Country A owns two subsidiaries, Sub B resident in Country B and Sub C resident in Country C. A transfer pricing adjustment is made between B and C resulting in higher profits in C. If Country A applies its CFC rules to both B and C it will need to give relief for the reduced foreign tax paid in B and the increased tax paid in C. In practice it seems more likely that where there are transfer pricing adjustments they will decrease the profits of a CFC and increase the profits of a more highly taxed subsidiary that is outside the scope of CFC rules. Therefore countries will need to be aware of any subsequent adjustments to the tax paid by a CFC to ensure that they do not provide relief for tax that has been repaid, and they should make it possible to reassess CFC taxation in similar situations even if the statute of limitation for such reassessments has passed.
CFC 管辖区层面征收的所得税，对 CFC 收入相关的预提税提供减免是合适的。

134. 对于第二种情况，当 CFC 的股利被出售且持有纳税人未分配的 CFC 收入做过税时，可能带来双重征税。依据上述关于股利的逻辑，各国可以选择不对纳税人取得的 CFC 股权的后续资本利得征税，免税额不超过已依照纳税人所在管辖区的 CFC 规则缴纳过税款的金额。但是考虑到各国采取不同方法对财产转让所得征税，提供税收减免的机制很可能为适应各管辖区特定的税收特性而变动，此建议并不意味着不对财产转让所得提供免税的国家需要改变其整个规则以遵循此项 CFC 规则的建议。

D. 其他情况

135. 报告认为还有其他情形可导致双重征税，例如 CFC 规则和转让定价规则相互作用。这些都不足新问题，但各国需要考虑其现有避免双重征税条款在所有的情况下是否有效。

E. 消除双重征税的税收协定规定

136. 一个国家消除由 CFC 规则造成的双重征税的方法还需要考虑其税收协定义务。

双边税收协定中关于消除双重征税的规定可能与《OECD 税收协定范本（简明版）》（OECD, 2010）中的 23A 和 23B 条款有很大的不同。因此各国在制定 CFC 制度时需仔细审阅税收协定中相关的条款，以确保其没有无意中要求对其希望征税的收入应用免税法。

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67《OECD 税收协定范本注释》中第 10 章 39 条对税收协定中预提税的减免情况进行了讨论。

68 例如，在 A 国的母公司 A 拥有两家子公司：B 国的子公司 B 和 C 国的子公司 C。B 与 C 之间的转让定价调整使得 C 拥有更高的利润。如果 A 国对 B 和 C 都应用 CFC 规则，则需要针对在 B 国支付的减少后的预提税和在 C 国支付的增加后的税款提供抵免。实践中更有可能发生的情况是，转让定价调整会减少 CFC 的利润，提高 CFC 规则范围内其余被课以较高税率的子公司的利润。因此各国需要考虑此时对 CFC 所纳税款的后续调整，以保证不会对被退还的税款提供抵免。各国还需在类似情况下重新评估 CFC 的课税成为可能，即使经过重新评估的法定调整。
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