Implementation of the GloBE common approach on minimum taxation by individual EU Member States in compliance with EU fundamental freedoms

Joachim Englisch[*]

Index

[*] Dr *Joachim Englisch* is Professor for Public Law and Tax Law at the University of Muenster. This study has been commissioned by *Sven Giegold* MEP.

I. Executive Summary

1) On July 1st, 2021, a political agreement was reached by 130 Inclusive Framework member countries on a common approach regarding the "Pillar 2" GloBE minimum tax regime. Countries willing to implement GloBE are encouraged to do so by 2023 on the basis of further technical work to be concluded in October 2021. While the EU Commission has declared its intention to table a proposal for a directive to ensure a harmonized implementation of the GloBE within the EU, the prospects of this initiative are currently uncertain. Individual EU Member countries might therefore wish to proceed unilaterally, at least on a temporary basis.

2) If implemented as envisaged by the GloBE Blueprint and without any modifications, the Income Inclusion Rule (IIR) and the Undertaxed Payments Rule (UTPR) as the primary instruments for the collection of top-up tax on under-taxed profits would infringe the freedom of establishment as guaranteed by the European Treaties. Based on the settled case law of the CJEU, this could not be justified unless an extensive carve-out for "substantial activities" were introduced for intra-EEA relationships. However, this would be contrary to the agreed GloBE common approach and it would furthermore undermine the effectiveness of the minimum tax.

3) In order to avoid the problematic restrictive effects of the collection of top-up tax from the outset, and thus also steer clear of any need for justification, the internationally agreed minimum tax regime could be extended so as to cover also situations of domestic under-taxation of profits, including in case of purely domestic groups. The collection of top-up tax would then no longer exhibit any overtly discriminatory features. In the light of more recent CJEU jurisprudence, this approach should furthermore also not constitute any indirect or *de facto* discrimination of the exercise of the freedom of establishment, provided that the GloBE methodology of calculating the effective tax rate were maintained also in a purely internal context. Any eventual disparate impact of the minimum tax regime on cross-border situations would then not be inherent to it, but would instead have to be qualified as a "fortuitous" result of the application of neutral differentiation criteria, to which the CJEU has no objections.

The application of the IIR and the UTPR also to under-taxed profits of domestic group entities would therefore be a viable option for an implementation of GloBE that is in conformity with EU/EEA fundamental freedoms. It could furthermore also be justified on the basis of legitimate tax policy considerations, and it would potentially also have favorable revenue effects. The increase in compliance costs, if any, would be moderate at least if the internationally agreed GloBE consolidated group revenue threshold were maintained.

4) As an alternative, an EU Member State could also convert GloBE into a form of unitary minimum taxation with universal application regarding both, locally earned and foreign-sourced profits. The compatibility with the freedom of establishment would thereby also be achieved. This approach would have several additional advantages, including a more comprehensive coverage of the minimum tax regime. As a caveat, it would have to be ensured that it is accepted by other Inclusive framework members as an equivalent collection mechanism in lieu of the IIR and UTPR.

II. The GloBE common approach

This paper analyses how individual Member States of the EU could implement the GloBE[1] common approach on minimum taxation without violating the free movement guarantees of the TFEU and EEA. The background of this analysis is the following.

1. The underlying international political process

In 2016, the Inclusive Framework on BEPS ("IF") was established in the aftermath of the 2013-2015 BEPS project mandated by the OECD and G20. It created a common infrastructure for both OECD/G20 member countries and for emerging and developing countries that were not represented in the OECD/G20, in order to ensure an effective implementation of the BEPS recommendations. At the request of the G20, the IF was furthermore tasked with addressing the tax challenges arising from the digitalization of the economy. Since 2019, acting upon a French-German initiative, the IF examined a proposal for an international effective minimum taxation as "Pillar 2" of its programme of work in this context[2]. While earlier such initiatives had not garnered much support internationally, this changed when the 2018 tax reform of the United States introduced a new form of international minimum taxation, the co-called GILTI[3] regime. Consequently, technical work on minimum taxation made good progress, and an extensive "Blueprint" for an internationally coordinated Global anti-Base Erosion proposal was released in October 2020.

On this basis, and after further technical refinements and political negotiations, a political agreement was reached by 130 IF member countries and jurisdictions on the 1st of July 2021. In a joint Statement[4], these IF members have committed themselves to pursuing a "common approach" on key design elements of the GloBE minimum tax regime, and to finalizing the technical work on a detailed implementation plan by October 2021. The status of the agreed minimum tax regime as a common approach means that IF members "are not required to adopt the GloBE rules, but, if they choose to do so, they will implement and administer the rules in a way that is consistent with the outcomes provided for under Pillar 2", and that all members

---

[1] "GloBE" is a short form for "Global anti-Base Erosion".
[2] See OECD/G20, Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note, 23 January 2019; OECD, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, 2019.
[3] Global Intangible Low Taxed Income regime, see Section 951A IRC.
[4] Inclusive Framework, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy; accessible at https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf.

"accept the application of the GloBE rules applied by other IF members"[5]. According to the Statement, the timely conclusion of the remaining technical work and further guidance and model rules on GloBE should enable interested countries to implement this effective minimum tax as of 2023. Apparently, it is furthermore under discussion to gradually phase in GloBE and to begin by collecting top-up tax on undertaxed profits (only) by way of an Income Inclusion Rule (IIR)[6].

A group of – the remaining – nine IF member countries have not yet joined the aforementioned Statement; among them are the EU Member States Ireland, Hungary and Estonia.

2. Agreed key design features of GloBE

Some agreed key components of the GloBE common approach have been outlined in the Statement of July 1st. They build on the October 2020 Blueprint and subsequent discussions in the IF, which provide a greater degree of detail and which will form the point of departure for the still outstanding work on technicalities and guidance in the coming months. For the purpose of this study, the following elements are relevant[7].

(a) It is foreseen that the international minimum tax regime shall apply to multinational enterprises (MNEs) with consolidated group revenues above 750 million euros. However, countries will be free to choose a lower threshold for MNEs headquartered in their jurisdiction.

(b) The GloBE rules will operate to impose a top-up tax using an effective tax rate (ETR) test that is calculated on a jurisdictional basis. For each jurisdiction, the ETR is determined as the ratio between the tax base for the profits generated by all resident or established group entities, on the one hand, and the so-called covered taxes (essentially, taxes on income) that are attributable to the relevant profits, on the other hand. Permanent establishments are treated as separate "constituent entities" of the MNE. Covered taxes will also be taken into account when they have been levied by another jurisdiction. The rules for the calculation of the tax base for GloBE purposes are standardized and, in principle, independent from national tax accounting rules. They have their basis in international financial accounting standards, with a limited number of book-to-tax adjustments for permanent or temporary differences.

(c) If the MNE has an ETR in a particular jurisdiction below the minimum tax rate, top-up tax will be levied on the relevant under-taxed profits in another jurisdiction, so as to increase the

[5] Statement (supra note 4), p. 3.
[6] Statement (supra note 4), p. 5.
[7] Regarding this and the following key elements, see Statement (supra note 4), p. 4.

ETR to the minimum rate. The primary instrument for the collection of the top-up tax will be an Income Inclusion Rule (IIR) which, technically, would operate like an extended Controlled Foreign Company (CFC) regime. Consequently, the IIR will be applied at the level of a parent entity of the entity with under-taxed profits, with priority for higher tier entities based on a top-down approach. Typically, the ultimate parent entity (UPE) jurisdiction will therefore collect the top-up tax for all foreign-sourced profits of the MNE if it has implemented the GloBE rules. Where the UPE itself has earned under-taxed profits in a PE that is located in another jurisdiction with respect to which a tax treaty prescribes the exemption method, the application of the IRR is to be facilitated by a switch-over rule (SOR).

Undertaxed profits that are not covered by any IIR conforming to the GloBE common approach, including under-taxed profits of entities located in the very UPE jurisdiction, will be subject to top-up tax in the source jurisdiction(s) where constituent entities that have made (net) intra-group payments are resident or established. The methodology of this Under-Taxed Payments Rule (UTPR) is still to be agreed; likely one option will consist in the full or partial denial of deductibility of the relevant intra-group payments.

(d) The minimum tax rate used for purposes of the IIR and UTPR will be at least 15%.

(e) No top-up tax will be levied on routine profits that are deemed to have been derived from business activities with sufficient underlying substance in a jurisdiction. To this effect, a formulaic “substance carve-out” will exclude an amount of income from the GloBE regime that is equivalent to at least 5% - and initially, at least 7.5% – of the carrying value of tangible assets and payroll.

3. Unilateral implementation by individual EU Member States

Ideally, the implementation of the internationally agreed GloBE rules by EU Member States would be harmonized by way of Union legislation; this would have several political, economic and technical advantages[8]. The EU Commission has indeed already declared its intention to transpose a political agreement by the members of the Inclusive Framework on the GloBE effective minimum tax concept into hard Union law[9]. To this effect, it will table a proposal in late 2021 or in the first quarter of 2022. However, considering that three EU Member States have so far for various reasons abstained from declaring their support for the joint Statement of

[8] For a detailed discussion, see *Becker/Englisch*, Implementing an International Effective Minimum Tax in the EU, July 2021; accessible at https://emedien.arbeiterkammer.at/viewer/api/v1/records/AC16237808/files/source/AC16237808.pdf.

[9] See EU Commission, Communication on Business Taxation for the 21st Century, 18 May 2021, COM(2021) 251 final, p. 8.

the other 130 IF members, and that one more Member State – Cyprus – has not even joined the IF and has recently voiced its opposition to GloBE, securing the necessary unanimity for EU tax harmonisation will be a challenge. It is currently unclear whether (and if so, how fast) this could eventually be achieved, and whether Enhanced Cooperation (Art. 20 TEU) could otherwise provide an alternative.

Some EU Member States might therefore wish to at least temporarily implement an international agreement on GloBE unilaterally, anticipating European legislation and also in order to increase the political incentives for such legislation. However, one major Union law hurdle for national solo efforts to this effect might consist in the requirement to respect the free movement rights of the TFEU and the EEA Agreement. If implemented without any modifications, the IIR and the UTPR in particular would likely contravene the freedom of establishment laid down in Art. 49 TFEU and Art. 31 EEA, as is generally assumed in scholarly literature and as will be briefly explained in the following section.

A viable alternative could consist in the general application of an effective minimum regime to undertaxed group profit, irrespective of whether it is attributable to foreign or domestic group entities. The fourth section of this study is devoted to an analysis as to whether such an approach would comply the EU and EEA fundamental freedom requirements. It will focus on the application of the IIR, since this will be by far the most relevant top-up tax collection mechanism, and furthermore possibly also the first one to be implemented globally under a phased implementation plan. This notwithstanding, the admissibility of an origin-neutral UTPR will also be analysed, as well as a further-reaching design option.

As a caveat, this study will not discuss the subject-to-tax rule (STTR) which according to the Blueprint should accompany the introduction of a GloBE minimum tax[10], but does not constitute an integral element of it and is furthermore also not a crucial component in case of unilateral implementation.

III. IIR and UTPR in conflict with the freedom of establishment

Business tax regimes which by design apply only to relationships between affiliated companies, with a parent company that is in a shareholder position which allows it to "exert a definite influence on the controlled company's decisions and determine its activities", must (only)

[10] OECD/G20, Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint, 2020, paras. 566 et seq.; accessible at https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint.pdf.

comply with the free movement of establishment enshrined in Art. 49 TFEU and Art. 31 EEA[11]. Arguably, this is the case for the core GloBE collection mechanisms (i.e. the IIR and the UTPR), because their personal scope is limited to MNE groups related through common ownership and control as established in the relevant IFRS 10 and equivalent standards[12].

This means that in relation to countries that are not Member States of the EU/EEA, the IIR and UTPR collection instruments could in principle be applied without any limitations imposed by the respective Treaty's free movement guarantees. By contrast, any restrictions of the freedom of establishment in intra-EU/EEA relationships would be in need of a proportionate justification, as indicated by settled CJEU case law.

1. IIR

As stated above, the *modus operandi* of the IIR regarding the profits of subsidiaries in low-tax jurisdictions would resemble a CFC regime. Parent companies with under-taxed subsidiaries would incur an additional tax liability that reflects their ownership share in the under-taxed entity. Moreover, under the concept of the GloBE Blueprint the application of the IIR would be limited to profits earned by non-resident companies, no different from conventional CFC regimes. The CJEU has repeatedly held such rules to restrict the relevant fundamental freedoms[13]. In particular, the CJEU assesses whether a difference in tax treatment exists at the level of the individual taxpayer that enjoys the protection of the free movement rights – here, the parent company that incurs an additional top-up tax liability – rather than at group level[14].

In the light of its settled case law, it is unlikely that the ECJ would find such a restrictive top-up tax collection mechanism to be justified.[15] In particular, the Court established very high standards for a proportionate justification based on the need to counter aggressive tax avoidance in its *Cadbury Schweppes* judgement, limiting it to situations where the foreign subsidiary has no economic substance[16]. However, such an extensive carve-out for "substantial" activities

---

[11] See, e.g., CJEU, 13 November 2012, case C-35/11, Test Claimants in the FII Group Litigation, EU:C:2012:707, paras. 91 et seq.; 31 May 2018, case C-382/16, Hornbach-Baumarkt, EU:C:2018:366, paras. 28-30; 3 March 2020, case C-323/18, Tesco-Global Áruházak, EU:C:2020:140, paras. 51-54.
[12] For a detailed analysis, see *Becker/Englisch* (supra note 8), pp. 48-50.
[13] See, e.g., CJEU, 12 September 2006, case C-196/04, Cadbury Schweppes, EU:C:2006:544, paras. 43 et seq.; CJEU, 23 April 2008, case C-201/05, Test Claimants in the CFC and Dividend Group Litigation, EU:C:2008:239, paras. 70 et seq.; CJEU, 26 February 2019, case C-135/17, X GmbH, EU:C:2019:136, paras. 67-73.
[14] Cf. CJEU, 12 September 2006, case C-196/04, Cadbury Schweppes, EU:C:2006:544, para. 45.
[15] Likewise *Blum*, Intertax 2019, 514 (521).
[16] See CJEU, 12 September 2006, case C-196/04, Cadbury Schweppes, EU:C:2006:544, paras. 54 and 67-68; see also CJEU, 23 April 2008, case C-201/05, CFC and Divided Group Litigation, EU:C:2008:239, para. 79; EFTA Court, 9 July 2014, case E-3/13 and E-20/13, Olsen, paras. 166 et seq.

would not be compatible with the agreed GloBE common approach, with its more modest and formulary carve-out compromise. It would furthermore be contrary to the very idea underlying the international minimum tax, which seeks to tackle not only profit shifting but also excessive tax competition[17]. But the only other relevant justification accepted so far by the CJEU, the need to preserve a balanced allocation of taxing rights between Member States, could not be invoked successfully, either, in the light of settled case law. The Court has found that the mere prevention of the "erosion of the national tax base which could result from tax planning […] cannot be confused with the need to preserve the balanced allocation of the power to impose taxes between the Member States."[18]

The only scenario in which the application of the IIR would not appear to raise any issues with the freedom of establishment, as interpreted by the CJEU, is in combination with the SOR in order to levy top-up tax on the profits of foreign-sourced PE profits. A switchover clause for profits attributed to PEs in low-tax jurisdictions entails that the company must pay tax for all of its profits regardless of whether they were generated by the head office or by the PE. There is thus no difference in treatment of the cross-border scenario and the purely internal one, i.e. a resident company with local PEs. To the contrary, foreign secondary establishments continue to benefit from lower tax burdens, since their profits only attract local top-up tax, rather than the regular business tax burden applied to domestic PE profits. The CJEU has moreover clarified in its *Columbus Container* judgement that it does not object to a difference in treatment between foreign establishments in different Member States, if the application of the credit method instead of the exemption method depends on the level of taxation in the respective Member State of establishment[19].

2. UTPR

The UTPR is conceived as a back-up mechanism for the collection of top-up tax where no IIR applies. Pursuant to the GloBE Blueprint, this rule would be implemented by fully or partially denying the deductibility of intra-group payments, or by otherwise linking those payments to a top-up tax liability. The proposed rule design would furthermore limit its scope of application

---

[17] See OECD, Press Release of 1 July 2021, accessible at https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm.
[18] See CJEU, 20 January 2021, case C-484/19, Lexel, EU:C:2021:34, para. 67.
[19] CJEU, 6 December 2007, case C-298/05, Columbus Container Services, EU:C:2007:754, paras. 36 et seq. and 52-54.

to cross-border transactions only. This kind of disadvantage for cross-border payments has almost consistently been regarded as restrictive by the CJEU[20].

For the reasons stated above regarding the IIR, it is not to be expected that the CJEU would accept any justification für a UTPR as proposed in the GloBE common approach, unless it were to change its case law under the impression of the global agreement on anti-BEPS measures – but so far it has shown little inclination to do so at least in case of unilateral national initiatives[21]. In the past, the Court even went so far as to state that a discriminatory denial of deduction, which is conceived as a "compensatory tax arrangement" that seeks to tax back when the level of taxation in another Member State is too low, would "prejudice the very foundations of the single market"[22].

The UTPR as envisaged by the Blueprint should therefore not be expected to pass CJEU scrutiny unless it featured an extensive carve-out for substantial economic activity. However, as explained above, this would run counter to the now agreed common approach and it would moreover undermine the effectiveness of the minimum tax regime.

IV. Extension of IIR and UTPR to domestic group entities

Against this backdrop, implementing GloBE as merely an *international* effective minimum tax would not be a sustainable approach for unilateral efforts of individual Member States. Instead, the GloBE common approach on minimum taxation could be extended to comparable purely internal situations, so as to avoid problematic restrictive effects of the collection of top-up tax from the outset. This rather obvious solution has indeed already been discussed in literature[23]. Remarkably, a precedent for this approach already exists in the context of CFC legislation. Denmark has chosen this path in reaction to the *Cadbury Schweppes* case law of the CJEU[24].

[20] See, e.g., CJEU, 26 October 1999, case C-294/97, Eurowings, EU:C:1999:524, paras. 44-45; CJEU, 26 June 2003, case C-422/01, Skandia, EU:C:2003:380, paras. 51-53; CJEU, 5 July 2012, case C-318/10, SIAT, EU:C:2012:415, paras. 18-20 and 39-40; CJEU, 20 January 2021, case C-484/19, Lexel, EU:C:2021:34, paras. 67 et seq. The only exception was the Schempp decision, see CJEU, 12 July 2005, case C-403/03, Schempp, EU:C:2005:446, paras. 32 et seq. and 42-47, which did not, however, concern a linking rule for the purposes of compensatory taxation. For a detailed discussion, see *Englisch*, EC Tax Review 2021, 136 (137); and (more extensively, in the context of an alternative proposal for an effective minimum tax) *Englisch*, Tax Notes International 2021, 219 (229-230).
[21] See, once more, CJEU, 20 January 2021, case C-484/19, Lexel, EU:C:2021:34, para. 67.
[22] *See* CJEU, 26 October 1999, case C-294/97, Eurowings, EU:C:1999:524, paras. 44-45; 26 June 2003, case C-422/01, Skandia, EU:C:2003:380, para. 52; see also CJEU, 5 July 2012, case C-318/10, SIAT, EU:C:2012:415, para. 39.
[23] See the extensive analysis by *Koerver Schmidt*, Intertax 2020, 983 (993-994), with further references; see also *Faccio*, Taxing Multinationals in the European Union, FEPS Policy Brief July 2021, p. 6.
[24] See *Koerver Schmidt*, Denmark, in Lang et al. (eds.), CFC Legislation, 2020/2021, chapter 14.

1. The concept

Within the framework of an effective minimum tax, this means that a Member State would require any group of companies which surpasses the relevant consolidated revenue threshold to apply the top-up tax collection mechanisms for any of its low-taxed profits. The top-up tax would thus be collected irrespective of whether those profits are foreign-sourced or have been generated by domestic constituent entities of the group. To this effect, the respective Member State would require the group to carry out a jurisdiction-wide ETR calculation in conformity with the GloBE rules also for the income of resident companies and local permanent establishments. To ensure equality of treatment, the domestic ETR would be calculated using the standardized GloBE tax base – with international financial accounting standards as a starting point – for the denominator, rather than on the basis of the national tax accounting rules.

Should the domestic ETR be lower than the agreed minimum tax rate, a resident parent company of a resident subsidiary would collect an amount of top-up tax that reflects its shareholding in the subsidiary, on the profits of the latter. If more than one tier of resident parent companies exists, the GloBE top-down approach for the IIR would apply. In a similar vein, a resident parent company would also apply the IIR on profits of a foreign subsidiary, to the extent that they are attributed to a local PE.

Under-taxed profits of a resident or locally established constituent entity that are not covered by the domestic IIR, because the relevant entity has no direct or indirect resident parent company, would have to trigger the application of the UTPR. The design of the latter would have to be streamlined with the GloBE common approach; no details have been agreed upon to date regarding its implementation. In the likely event that a full or partial denial of deductibility of intra-group payments would be declared the preferred methodology, this implies that such payments would then also be affected by the limitations of deductibility in a case where the under-taxed profits are attributable to a local group entity. Top-up tax would then be collected irrespective of whether the relevant intra-group payments were made between local constituent entities or cross-border. Moreover, the caps on the amount of top-up tax envisaged in the GloBE Blueprint[25] would then also apply internally within the Member State, even if that meant that the respective Member State would not collect the full amount of top-up tax.

Finally, the respective Member State that implements a domestic GloBE-style effective minimum tax could furthermore opt to refrain from applying the IIR or the UTPR to locally

[25] See Blueprint (supra note 10), paras. 498 et seq.

sourced profits to the extent that the latter are potentially – if left untaxed – subject to an adequate effective minimum tax elsewhere in conformity with the GloBE priority rules. This would put domestic constituent entities on an equal footing with foreign ones, with respect to which the same internationally agreed rule order applies. But this would merely be an option if it is politically desired to fully mirror the agreed common approach, at the cost of some forgone top-up tax revenue. In particular, the extension of the GloBE priority rules to purely internal scenarios is not needed in order to avoid international double minimum taxation. The *unilateral domestic* application of an effective minimum tax leads to an increase of the ETR of the group entities in this jurisdiction for the purpose of the *internationally* agreed GloBE rules (to be applied by other jurisdictions), which means that it has *de facto* priority over the international minimum tax regime[26]. Accordingly, other countries would then have to refrain from levying top-up tax on those profits themselves[27].

2. No more overt restriction

If the GloBE common approach were extended to purely internal situations as outlined above, the normative design of such an effective minimum tax regime could no longer be found to contravene the freedom of establishment in the light of settled CJEU case law.

The Court has traditionally shown judicial restraint when testing tax measures on their compatibility with the Treaty's free movement rights: The CJEU has almost never found tax measures to infringe a fundamental freedom in the absence of detrimental treatment of a cross-border situation. Instead, the Court normally – albeit often only tacitly – requires an element of discrimination or detrimental treatment, different from its jurisprudence in other areas of law[28]. As a consequence, the levy of a tax by a Member State, as such, does not normally constitute

[26] The GloBE rule order, including the top-down approach regarding the application of the IIR, applies only with respect to the agreed GloBE common approach, i.e. regarding the collection of top-up tax on *foreign*-sourced profits.

[27] For a detailed analysis, see *Noked*, 102 Tax Notes International 2021, 943 (945).

[28] See, e.g., CJEU, 13 July 2006, case C-438/04, Mobistar, EU:C:2006:463, paras. 31 et seq.; CJEU, 25 October 2007, case C-240/06, Fortum Project Finance, EU:C:2007:636, para. 27; CJEU, 22 November, 2018, case C-625/17, Vorarlberger Landes- und Hypothekenbank, EU:C:2018:939, para. 32; Advocate General *Kokott*, Opinion of 2 June 2016, case C-122/15, "C", EU:C:2016:65, para. 66; Advocate General *Bobek*, Opinion of 14 December 2017, case C-382/16, Hornbach BaumarktEU:C:2017:974, paras. 39 et seq.; Advocate General *Kokott*, Opinion of 12 September 2019, case C-482/18, Google Ireland, paras. 35-38, with further references; *Cordewener*, in Vanistendael (ed.), EU Freedoms and Taxation, 2006, 1 (26 et seq.); *Bizioli*, EC Tax Review 2017, 167 (168 et seq.).

an infringement of EU/EEA fundamental freedoms, regardless of the effective tax rate or amount of tax[29].

It is pertinent to point out that the CJEU has maintained this position also regarding taxes that become chargeable in a cross-border scenario only in the case of a low level of taxation in another Member State. This is evident from the Court's decision of the aforementioned *Columbus Container* case: The CJEU did not object to a selective switch-over rule whose application was contingent, i.a., on a low level of taxation in the source country, as long as the same tax burden was also imposed on domestically sourced profits. This finding is furthermore not called into question by some rulings in which the Court declared that "compensatory tax arrangements prejudice the very foundations of the single market"[30]. The Court thereby merely excluded a "justification" for "less favourable" tax treatment of cross-border situations[31]. This suggests that a form of minimum tax which would generally ensure a certain minimum level of effective taxation of business profits, both domestically and abroad, would not be regarded as an unjustifiable "compensatory arrangement" by the Court. At the very least, it would not be affected by this verdict, because as a non-discriminatory measure it would not be in need of justification in the first place.

Instead, the predominant approach of the Court is indeed to assess whether the measure at issue implies detrimental tax treatment of cross-border situations as compared to similar but purely internal situations. This means that as a general rule, the levy of GloBE top-up tax would only be held to restrict the freedom of establishment if the exercise of said freedom entailed – at least potentially – a tax treatment that is less favourable than the one applicable to comparable but purely internal situations.

If the IIR applied also with respect to under-taxed profits earned by resident subsidiaries of resident parent companies, there would no longer be any difference in treatment with respect to resident parent companies with subsidiaries that have been established in other EEA Member States. The exercise of the Treaty freedom of secondary establishment by a resident company would therefore no longer trigger the application of a special and detrimental minimum tax regime that could be avoided in the alternative scenario of setting up a local establishment.

[29] See, e.g., CJEU, 13 July 2006, case C-438/04, Mobistar, EU:C:2006:463, paras. 31 et seq.; 25 October 2007, case C-240/06, Fortum Project Finance, EU:C:2007:636, para. 27; 22 November 2018, case C-625/17, Vorarlberger Landes- und Hypothekenbank, EU:C:2018:939, para. 32.
[30] See supra at note 20.
[31] See CJEU, 26 October 1999, case C-294/97, Eurowings, EU:C:1999:524, para. 45; 26 June 2003, case C-422/01, Skandia, EU:C:2003:380, para. 52.

In a similar fashion, if the scope of application of the UTPR were extended so as to collect top-up tax also on under-taxed profits of resident or locally established group entities, contingent on the extent of intra-group payments made by other such domestic group members, equal treatment with the cross-border operation of the standard GloBE UTPR would be ensured. Under-taxed profits of local group entities would then subject to the UTPR to the same extent and under the same conditions as under-taxed profits of foreign group entities. The rule would thus be formally neutral regarding the exercise of the freedom of establishment by an EEA parent company.

Finally, under the approach suggested above, purely domestic groups with consolidated group revenues above the internationally agreed GloBE threshold would be subject to the effective minimum tax regime to the same extent as multinational enterprises of comparable size.

It should be noted that the non-discrimination standard inherent to the Treaty fundamental freedoms does not require equal treatment of purely internal and cross-border situations; it is only infringed upon by asymmetrical treatment to the detriment of the latter. Therefore, adherence to the GloBE rule order – allocating international taxing rights regarding the collection of top-up tax by prioritizing the IIR, under a top-down approach – also with respect to the collection of top-up tax on domestic under-taxed profits would not be necessary to avoid a restriction of the freedom of establishment. To the contrary, ignoring the rule order of the agreed common approach in a purely domestic context could result in the collection of top-up tax on the under-taxed profits of resident subsidiaries in situations where foreign subsidiaries would not be subject to the IIR in this Member State (because the resident parent company is only an intermediate holding controlled by another, non-resident parent company).

As a caveat, the CJEU has occasionally also required horizontal equal treatment between cross-border situations involving different Member States[32]. It has not consistently ruled so; the Court has indeed often also ignored this comparison or held two differently taxed cross-border situations not to be comparable[33]. In any event, cases where any of those possible dimensions of Art. 49 TFEU and Art. 31 EEA was decisive for the Court's ruling are very rare. Nevertheless, as a precautionary measure, it is suggested above that under-taxed profits of local

[32] See, e.g., CJEU, 21 September 1999, case C-307/97, Saint-Gobain ZN, EU:C:1999:438, para. 59; 11 June 2009, case C-521/07, Commission v Netherlands, EU:C:2009:360, para. 36; 24 February 2015, case C-512/13, Sopora, EU:C:2015:108, para. 25.

[33] See, e.g., CJEU, 23 February 2006, case C-513/03, van Hilten-van der Heijden, EU:C:2006:131, para. 46; 6 December 2007, case C-298/05, Columbus Container Services, EU:C:2007:754, para. 39 and 51; 4 September 2009, case C-439/07, KBC Bank, EU:C:2009:339, para. 80; 25 February 2010, case C-337/08, X Holding, EU:C:2010:89, para. 38.

PEs of foreign subsidiaries should also be subject to application of the IIR. This would ensure that the application of the minimum tax regime has no bearing on how a foreign subsidiary exercises its own freedom of (secondary) establishment: by establishing a branch either in the Member State with the GloBE minimum tax regime or in another EEA Member State (or in a third country).

As regards the fact that the collection of top-up tax would depend on the ETR of qualifying groups in a particular jurisdiction, and the IIR would thus apply with respect to group entities established in some (low-tax) EEA Member States but not in other (high-tax) Member States, no restriction should be found to exist in the light of settled case law. This can be inferred from the aforementioned *Columbus Container* judgement of the Court.

3. No *de facto* discrimination of foreign subsidiaries

Admittedly, the strategy to extend the GloBE minimum tax regime to purely internal situations would fail if it still entailed a prohibited *de facto* discrimination of an exercise of the freedom of establishment. It is settled case law of the CJEU that Art. 49 TFEU prohibits not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result[34]. At first sight, this could become problematic especially in high-tax EU Member States, where the domestic application of the effective minimum tax regime would likely result in the levy of top-up tax only in relatively few instances, as compared to its application vis-à-vis other, especially low-tax jurisdictions within the EEA.

Similar issues have already been extensively discussed in the context of the extension of CFC regimes to resident subsidiaries, as it is now practiced by Denmark, and as some other EU Member States have briefly considered it. Scholarly opinion is divided on whether a disparate geographical impact of such facially neutral tax regimes, i.e. their *de facto* more frequent application to foreign-sourced profits, should be characterized as a prohibited indirect discrimination.

Some have expressed the view that no unequal treatment and therefore no discriminatory restriction should be found to exist if CFC rules apply equally to purely internal and cross-

[34] See, e.g., CJEU, 5 February 2014, case C-385/12, Hervis Sport- és Divatkereskedelmi, EU:C:2014:47, para. 30; 26 April 2018, cases C-236/16 and C-237/16, ANGED, EU:C:2018:291, para. 18; 25 February 2021, case C-712/19, Novo Banco, EU:C:2021:137, para. 31.

border situations, regardless of the actual pattern of their application[35]. Notably, the OECD has also defended this position in its Report on BEPS Action 3 regarding the possible design of CFC regimes[36]. The same point has been argued to be the case for the collection of top-up tax within the framework of the GloBE minimum tax, if the IIR is modified so as to be universally applicable regarding under-taxed profits of both, foreign and local subsidiaries[37].

Others are more skeptical and consider CFC regimes to be *de facto* discriminatory and thus in need of justification if they disproportionally affect cross-border shareholdings and only exceptionally domestic ones[38]. Similar objections have been raised by some also regarding the extension of the territorial scope of the GloBE IIR to domestic subsidiaries with low-tax profits, should domestic companies *de facto* be unlikely to become subject to any additional tax under the income inclusion rule[39]. It has even been stated that an extended application of GloBE collection mechanisms to domestic group entities "would be at risk of being seen as mere window-dressing, making it vulnerable before the Court"[40].

Admittedly, the more skeptical positions find certain support in the Court's earlier case law. The Court has repeatedly held that a tax measure which is "based on an apparently objective criterion of differentiation but that disadvantages in most cases […] companies whose seat is in other Member States and that are in a comparable situation to companies whose seat is situated in the Member State where that tax is charged, constitutes indirect discrimination based on the location of the seat of the companies"[41]. However, at least in its more recent case law, the Court usually also qualified this conclusion in some form or another; it held that a finding of indirect discrimination would furthermore require an analysis of "the overall context in which the

35 See, e.g., *Rust*, Intertax 2008, 492 (498); *Schön*, Taxing Multinationals in Europe, 2012, pp. 23 f.; *Kofler*, in Lang et al. (eds.), Common Consolidated Corporate Tax Base, 725 (737).
36 OECD/G20, Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report, 2015, paras. 19 et seq.; accessible at https://www.oecd-ilibrary.org/docserver/9789264241152-en.pdf?expires=1625573855&id=id&accname=ocid54018433&checksum=E7F276D3AD80D2970554394F442D8869.
37 See *Pinto Nogueira/Turina*, in Perdelwitz/Turina (eds.), Global Minimum Taxation?, 2021, Chapter 10, 283 (311). See also *Koerver Schmidt*, Intertax 2020, 983 (994) who argues that *different* from CFC regimes, no de facto discrimination should be presumed regarding a generally applicable IIR.
38 See, e.g., *Maisto/Pistone*, European Taxation 2008, 503 (508-509); *Kuzniacki*, in Danon (ed.), Base Erosion and Profit Shifting (BEPS) – Impact for European and International Tax Policy, 2016, 125 (140-141).
39 See *de Broe Danon/Chand*, Comments to Public Consultation Document: Global Anti-Base Erosion Proposal ("GloBE") – Pillar Two, 2 December 2019, para. 30; *Devereux* et al., The OECD Global Anti-Base Erosion Proposal, 2020, pp. 50-51.
40 *Devereux* et al., The OECD Global Anti-Base Erosion Proposal, 2020, pp. 50-51.
41 See CJEU, 5 April 2014, case C-385/12, Hervis Sport- és Divatkereskedelmi, EU:C:2014:4, para. 39; 11 June 2015, case C-98/14, Berlington Hungary and Others, EU:C:2015:386, para. 38; ES: 26 April 2018, cases C-234/16 and C-235/16, ANGED, EU:C:2018:281, para. 23; 22 November 2018, case C-625/17, Vorarlberger Landes- und Hypothekenbank, para. 39. Moreover, the Court has formulated similar criteria also beyond the area of taxation; see, e.g., CJEU, 20 October 1993, case C-272/92, Spotti, EU:C:1993:848, para 18.

national legislation has effect"[42], or that the "features" of the measure must be responsible for its asymmetrical impact to the detriment of cross-border situations[43]. It was initially not entirely clear, though, whether the Court thereby implied that the *de facto* disadvantageous effects must be inherent to the normative design of the measure, possibly in combination with specificities of the relevant national markets.

But the most recent decisions of the Court now clearly point in this direction[44]. First, the Court held in its 2020 *Köln-Aktienfonds* ruling that an indirect discrimination could only be assumed to exist if the factual disadvantages for taxpayers who made use of their free movement rights have their root cause in legal "conditions or obligations which are, by their nature or in fact, specific to the national market, in such a way that only operators present on the national market are capable of complying with those conditions or obligations."[45] Still more importantly, a few months later two Grand Chamber rulings of the CJEU on progressive turnover taxation clarified that a disparate geographic impact of a national tax measure that applies indiscriminately to cross-border situations and to comparable purely internal situations will not, in itself, be sufficient to qualify this measure as a restriction in need of justification[46]. In addition, it is necessary for such a finding that the normative design of the tax "inherently" creates the disadvantageous effects for cross-border situations[47]. By contrast, if the disparate effects are owed to a situation in the relevant markets that is not attributable to the respective Member State and that is therefore "fortuitous, if not a matter of chance", the national legislation at issue does not restrict the free movement guarantees if it relies on objective differentiation criteria[48]. As a consequence, the fact that a tax is borne in the vast majority of cases or even exclusively, by non-residents or foreign-owned residents cannot automatically be regarded, in itself, as indirect discrimination[49].

[42] CJEU, 5 April 2014, case C-385/12, Hervis Sport- és Divatkereskedelmi, EU:C:2014:4, para.40.
[43] See CJEU, 26 April 2018, cases C-234/16 and C-235/16, ANGED, EU:C:2018:281, para. 23; 22 November 2018, case C-625/17, Vorarlberger Landes- und Hypothekenbank, para. 39.
[44] See also *Pinto Nogueira / Turina*, in Perdelwitz/Turina (eds.), Global Minimum Taxation?, Chapter 10, 2021, 283 (308).
[45] CJEU, 30 January 2020, case C-156/17, Köln-Aktienfonds Deka, EU:C:2020:51, paras. 55-56.
[46] See CJEU, 3 March 2020, case C-75/18, Vodafone Magyarország, EU:C:2020:139, in particular paras. 49, 52, and 54; 3 March 2020, case C-323/18, Tesco-Global Áruházak, EU:C:2020:140, paras. 72-75.
[47] See CJEU, 3 March 2020, case C-75/18, Vodafone Magyarország, EU:C:2020:139, para. 54; 3 March 2020, case C-323/18, Tesco-Global Áruházak, EU:C:2020:140, para. 74.
[48] See CJEU, 3 March 2020, case C-75/18, Vodafone Magyarország, EU:C:2020:139,para. 52; 3 March 2020, case C-323/18, Tesco-Global Áruházak, EU:C:2020:140, para. 72.
[49] See *CFE*, Opinion Statement ECJ-TF 2/2020, European Taxation 2021, 555 (561).

The Grand Chamber reached its conclusions with reference[50] to several well-argued Opinions of Advocate General *Kokott*[51], which shed further light on the Court's now solidified position regarding *de facto* discrimination. The Advocate General had reasoned that a quantitative approach towards assessing indirect discrimination is problematic for various reasons and, ultimately, not appropriate[52]. She had suggested that "more important than this purely quantitative element is the qualitative criterion now used more frequently by the Court, according to which the distinguishing criterion must *intrinsically* or *typically* affect foreign companies […] A merely incidental link, even if it is sufficiently high in quantitative terms, cannot therefore be sufficient, in principle, to establish indirect discrimination."[53] Instead, the distinguishing criterion of the disadvantageous tax regime at issue must, in itself and "on an abstract analysis", clearly suggest the likelihood of a correlation between its application and a cross-border situation, in the vast majority of cases[54]. In the view of the Advocate General, a clear protectionist or discriminatory motive of the legislator could also, exceptionally, support the classification of the measure as restrictive[55].

Against this backdrop, an effective minimum tax regime that relies on the objective and *prima facie* neutral criterion of an ETR below a certain minimum rate would nevertheless risk to be qualified as *de facto* discriminatory if the ETR were calculated on the basis of the national tax accounting standards. Under this premise, it would be inherent to the design of the minimum tax that it would normally not apply with respect to resident group entities, provided that the national nominal tax rate were above the minimum rate. Namely, in such a scenario, the reason for the asymmetric impact would be built into the minimum tax regime itself; since the ETR is

[50] See CJEU, 3 March 2020, case C-75/18, Vodafone Magyarország, EU:C:2020:139,para. 52; 3 March 2020, case C-323/18, Tesco-Global Áruházak, EU:C:2020:140, para. 72.
[51] See Advocate General *Kokott*, Opinion of 13 June 2019, case C-75/18, Vodafone Magyarország, EU:C:2019:492, paras. 63 et seq.; Advocate General *Kokott*, Opinion of 4 July 2019, case C-323/18, Tesco-Global Áruházak, EU:C:2019:567, paras. 59 et seq.
[52] See Advocate General *Kokott*, Opinion of 4 July 2019, case C-323/18, Tesco-Global Áruházak, EU:C:2019:567, paras. 59-69; Advocate General *Kokott*, Opinion of 13 June 2019, case C-75/18, Vodafone Magyarország, EU:C:2019:492, paras. 63-73.
[53] Advocate General *Kokott*, Opinion of 4 July 2019, case C-323/18, Tesco-Global Áruházak, EU:C:2019:567, para. 70; Advocate General *Kokott*, Opinion of 13 June 2019, case C-75/18, Vodafone Magyarország, EU:C:2019:492, para. 74. See also already Advocate General *Kokott*, Opinion of 10 January 2019, case C-607/17, Memira Holding, EU:C:2019:8, para. 36.
[54] See Advocate General *Kokott*, Opinion of 4 July 2019, case C-323/18, Tesco-Global Áruházak, EU:C:2019:567, para. 74; Advocate General *Kokott*, Opinion of 13 June 2019, case C-75/18, Vodafone Magyarország, EU:C:2019:492, para. 78.
[55] See Advocate General *Kokott*, Opinion of 4 July 2019, case C-323/18, Tesco-Global Áruházak, EU:C:2019:567, paras. 85 et seq.; Advocate General *Kokott*, Opinion of 13 June 2019, case C-75/18, Vodafone Magyarország, EU:C:2019:492, paras. 89 et seq.

calculated as the ratio between tax base and corresponding tax burdens, it could then normally not fall below the minimum rate in domestic settings.

However, this would be fundamentally different if the GloBE common approach were extended to internal situations in its entirety, including the special rules on the GloBE tax base, as suggested above. The calculation of the relevant ETR for minimum taxation purposes would then be based on the calculation of group profits under international commercial accounting standards, with only a few flexible book-to-tax adjustments. Since this GloBE tax base is not congruent with the national tax base, it is therefore possible that the ETR of the group is below the agreed minimum rate also in a jurisdiction with a relatively high nominal tax rate, especially where group entities benefit from tax incentives or beneficial tax regimes[56]. As a consequence, the collection of top-up tax in function of an objective and neutral criterion – an ETR below the minimum rate – would then not *intrinsically* affect only foreign subsidiaries and foreign branches of the group. Group entities that are resident and active in the domestic market would not automatically escape minimum taxation.

Admittedly, it is well conceivable that the measure would nevertheless predominantly affect foreign subsidiaries and establishments, especially if the minimum rate were set relatively low – as now internationally agreed – and therefore within the EU, group entities that are resident or established in certain low-tax EU Member States would be disproportionally affected. But from the perspective of a Member State that unilaterally introduces a minimum tax regime, this effect is beyond its control and in this sense “fortuitous, if not a matter of chance”. In particular, any eventual disparate impact of the minimum tax regime would then be a volatile “snapshot” of the situation rather than inherent in the design of this national measure, because the low-tax jurisdiction might amend its tax system and raise its ETR at any time it chooses to do so. In fact, this is precisely what many expect to happen in reaction to the introduction of GloBE by a sufficiently large number of countries world-wide.

In the light of the aforementioned two recent Grand Chamber rulings of the CJEU, and the corresponding Opinions of Advocate General *Kokott*, the extension of the agreed GloBE common approach to purely internal situations should therefore not amount to indirect *de facto* discrimination of foreign subsidiaries or establishments of groups that come within the ambit of the minimum tax regime.

---

[56] Likewise *Pinto Nogueira / Turina*, in Perdelwitz/Turina (eds.), Global Minimum Taxation?, Chapter 10, 2021, 283 (311).

It is also important to point out that the minimum tax regime would then obviously still not be introduced for protectionist motives or with the intention to discriminate the exercise of free movement rights. Nor would the strategy to apply GloBE also in a domestic context constitute an "abusive" maneuver on part of the respective Member State. First, an EU Member State may have a legitimate interest in applying an effective minimum tax also domestically, so as to curb the excessive use of tax incentives or to reduce incentives for tax planning schemes. Second, the GloBE common approach that has now been agreed upon by 130 countries explicitly strives to ensure that large MNEs are subject to a minimum level of taxation in each and every jurisdiction in which they are established, so that they "pay a fair share of tax wherever they operate"[57]. Ideally, this is achieved through the broad adoption of the IIR and UTPR globally. However, at least as long as this ideal is not yet fully achieved, because some relevant countries inside or outside the EU reject or delay the implementation of GloBE, a country would indeed act in the spirit of GloBE if it ensured that also profits that are under-taxed in its own jurisdiction attract a corrective top-up tax[58]. Extending the minimum tax regime to domestic group entities would therefore not defeat the purpose of GloBE[59], quite the contrary. Finally, along the same lines, a country may also legitimately be interested in collecting the top-up tax itself in such a case, rather than have it fill the coffers of another treasury. The GloBE common approach does not stand in the way of such revenue motives; in the opposite, one of its desired effects is to encourage countries to raise the level of taxation under their own, internationally agreed primary taxing rights so as to curb tax competition[60] and avoid the need for the collection of top-up tax elsewhere. Corresponding recommendations have therefore already been made in scholarly literature[61].

4. No *de facto* discrimination of multinational groups

It might theoretically be argued that the implementation of the GloBE common approach with extension to domestic group entities could create yet another form of indirect discrimination. If the personal scope of the minimum tax regime were limited to groups of companies above the

[57] OECD, Press Release of 1 July 2021, accessible at https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm.
[58] See also *Koerver Schmidt*, Intertax 2020, 983 (994): "[…] the proposed income inclusion rules […] arguably could be considered as having a broader and more general tax policy objective, i.e. the aim of promoting a level playing field by ensuring that the profits of internationally operating businesses are subject to a minimum level of tax". *Koerver Schmidt* argues that for this reason, and different from conventional CFC regimes, the domestic application of the GloBE minimum tax may be legitimate and does not contradict or undermine its purpose.
[59] For similar considerations regarding anti-avoidance provisions in general, see *Kuzniacki*, in Danon (ed.), Base Erosion and Profit Shifting (BEPS) – Impact for European and International Tax Policy, 2016, 125 (138).
[60] See OECD, Press Release of 1 July 2021, accessible at https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm.
[61] See *Noked*, 102 Tax Notes International 2021, 943.

high consolidated group revenues threshold of the GloBE concept, it would in all likelihood *de facto* affect only (or almost only) multinational enterprises, whereas purely domestic groups without any foreign subsidiaries or branches would hardly ever be caught by the measure. Typically, a group with a consolidated annual turnover of more than 750 million euro will have expanded internationally through secondary establishments.

However, once more such a finding of a disparate impact of an objective and neutral differentiation criterion would not, in itself, be sufficient to justify the qualification of the minimum tax regime as *de facto* discriminatory. As said, the two recent Grand chamber rulings of the CJEU and the preparatory Opinions of the Advocate General have considerably raised the bar for a finding of indirect discrimination. The disparate effect on MNEs would either have to be inherent to the differentiation criterion and its intrinsic consequence, even under an abstract analysis; or proof would have to be furnished that the national legislator designed the differentiation criterion precisely with such an imbalanced outcome in mind and as the true aim of the measure.

Neither of those two exceptional circumstances should be assumed to exist with respect to the design of the personal scope of a universally applicable minimum tax regime in alignment with the GloBE common approach. First, it can be derived from the aforementioned CJEU decisions that the amount of turnover is generally acceptable as a neutral criterion of differentiation[62], at least where it is supported by reasonable tax policy considerations[63]. This can moreover be assumed in particular where the more favourable treatment below a certain turnover threshold is not exclusively reserved to domestic companies, but also benefits multinational firms to a significant degree[64]. In the words of Advocate General *Kokott*, "the criterion of turnover is not an intrinsically cross-border distinguishing criterion."[65]

The high consolidated group revenue threshold of the GloBE concept is based on administrative reasons. Even with this high a threshold, GloBE is expected to cover approximately 8.000 MNEs globally[66], more than 2.000 of which are headquartered in the EU. This is still a considerable number for tax administrations to deal with, monitoring and enforcing the

[62] See also CJEU16 March 2021, case C-596/19 P, Commission / Hungary, EU:C:2021:202, para. 47.
[63] Cf. CJEU, 3 March 2020, case C-75/18, Vodafone Magyarország, EU:C:2020:139, para. 50; 3 March 2020, case C-323/18, Tesco-Global Áruházak, EU:C:2020:140, para. 70.
[64] Cf. CJEU, 3 March 2020, case C-75/18, Vodafone Magyarország, EU:C:2020:139, para. 53; 3 March 2020, case C-323/18, Tesco-Global Áruházak, EU:C:2020:140, para. 73.
[65] Advocate General *Kokott*, Opinion of 13 June 2019, case C-75/18, Vodafone Magyarország, EU:C:2019:492, para. 81; Advocate General *Kokott*, Opinion of 4 July 2019, case C-323/18, Tesco-Global Áruházak, EU:C:2019:567, para. 77.
[66] See OECD, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, 2020, 63.

minimum tax compliance, especially for countries which are the home of many UPEs. A lower revenue threshold, or the waiver of any threshold, would significantly increase this number and might thereby strain administrative capacities. Moreover, the need for resource-intense and lengthy international cooperation, as it can arise under the UTPR in particular, is also reduced by a high threshold. Conversely, the affected very large MNEs can best deal with the additional, significant complexity and compliance costs that the application of GloBE entails for them, given that compliance costs are generally regressive. While not without alternatives, the agreed limitation in the personal scope of GloBE is therefore based on rational considerations of administrative efficiency.

The revenue threshold is thus rooted in reasonable tax policy considerations[67], and should therefore be accepted as a neutral criterion of differentiation. The fact that it would likely affect MNEs disproportionally often even if purely national groups were also in-scope of the national minimum tax regime should therefore be regarded as a "fortuitous" phenomenon and not as an intrinsic feature of this design element. In particular, the high threshold can be expected to also benefit a very large number of multinational enterprises which would otherwise be covered by GloBE. Finally, for the aforementioned reasons the threshold would also clearly not be chosen by the legislator with the intention to covertly discriminate against multinational groups.

As a consequence, no indirect discrimination should be assumed to exist with respect to the relatively narrow personal scope of a GloBE minimum tax regime with domestic application, either. This notwithstanding, a national legislator might wish to choose a lower threshold; this would then also be compatible with the agreed GloBE common approach[68].

5. No disproportionate compliance costs

At first sight, a practical concern could be that an extension of an effective minimum tax regime to domestic group entities would be inefficient, administratively costly and unnecessarily burdensome for the affected companies. Similar concerns have repeatedly been formulated when anti-avoidance regimes have been modified so as to cover also purely internal situations, in order to avoid having to comply with the (overly) strict CJEU benchmark for proportionate justification of such regimes that would otherwise have to be qualified as restrictive tax measures. This criticism once culminated in the famous words of late Advocate General

[67] See also *CFE*, Opinion Statement ECJ-TF 2/2020, European Taxation 2021, 555 (563): Thresholds that are based on "administrative reasons" are understandable and do not appear to be objectionable.
[68] See Statement (supra note 4), p. 4.

Geelhoed, who argued that such an approach would cause "considerable extra administrative burden for domestic companies and tax authorities, is quite pointless and indeed counterproductive for economic efficiency."[69]

Against this backdrop, it is first important to point out that the aforementioned criticism is based on tax policy objections; it is not legally relevant under a fundamental freedom analysis. Moreover, as has been extensively discussed above at (3.), in the specific case of the GloBE effective minimum tax, its extension to domestic group entities is not "pointless", but can be defended on grounds of several legitimate tax policy considerations. Finally, in this specific context even the concern of unnecessary and considerable additional compliance costs is largely unfounded upon closer analysis, at least if the internationally agreed GloBE revenue threshold of 750 million euros were maintained. The UPE would then in most cases have to calculate the ETR for the respective jurisdiction, anyways, for the purpose of the application of the IIR or UTPR elsewhere[70]. And even where is would not be the case, the affected MNEs are usually established in a multitude of countries, so that the need to carry out an ETR calculation for one more jurisdiction would imply a relatively small increase in the compliance burden. Additional relief could be provided by simplification measures as they are contemplated in the 2020 GloBE Blueprint, in particular through so-called tax administrative guidance[71]. Especially in high-tax EU Member States, this would then often render a full ETR calculation unnecessary[72].

In the future, it might moreover become necessary for MNEs above the consolidated group revenue threshold to carry out GloBE-style ETR calculations for each EU Member States regardless of the operation of an effective minimum tax regime. Pursuant to its recent Communication on Business Taxation for the 21st Century, the Commission plans to oblige "large companies with operations in the EU" to annually publish information on its ETR "using the methodology agreed for Pillar 2 calculations"[73].

With respect to compliance costs, too, the approach discussed here would therefore be reasonable.

---

69 Advocate General *Geelhoed*, Opinion of 29 June 2006, case C-524/04, Test Claimants in the Thin Cap Group Litigation, EU:C:2006:436, para. 68.
70 See *Noked*, 102 Tax Notes International 2021, 943 (944).
71 See Blueprint (supra note 10), paras. 404 et seq.
72 Together with a colleague, the author of this study has developed and extensively vetted such an approach on behalf of the OECD secretariat.
73 See EU Commission, Communication on Business Taxation for the 21st Century, 18 May 2021, COM(2021) 251 final, p. 9.

V. Alternative: Unitary taxation for minimum tax purposes

In this section, yet another possible GloBE design modification in case of a unilateral implementation by individual EU Member States will be briefly discussed.

Instead of extending the scope of application of the IIR and the UTPR to domestic group entities, an EU Member State could also create a new taxpayer (only) for GloBE purposes: the group itself, thereby converting GloBE into a form of unitary (minimum) taxation. The overall objective of this kind of minimum tax regime would be to ensure that large groups which operate on national territory through a parent, a subsidiary or a PE are subject to a minimum level of effective taxation in each jurisdiction in which they have such a physical presence, in the spirit of the GloBE common approach.

To this effect, national legislation would prescribe the liability of a qualifying group to pay top-up tax for each jurisdiction in which it is established that has an ETR below the minimum rate. A top-up tax liability could therefore also arise with respect to the domestic group entities in the country that operates this kind of effective minimum tax regime. The necessary territorial link for such a group minimum tax liability in this EU Member State would be the existence of a resident group member or a locally established PE. In order to facilitate compliance, the group would furthermore have to designate one of those domestic entities as the one that declares and pays the top-up tax. The latter would be calculated as provided for under the internationally agreed GloBE common approach. No group top-up tax liability would arise to the extent that the GloBE common approach allocates the right to collect top-up tax to another, prioritized jurisdiction.

This alternative measure, too, would avoid a restriction of the freedom of establishment due to the absence of any discriminatory elements; in this regard, it is no different from the extension of the IIR and UTPR to domestic situations discussed above at (IV.). But compared to the latter, it would have some additional advantages:

(1) Top-up tax could also be collected without a resident UPE or lower-tier resident parent company, and irrespective of local intra-group payments. The substantive scope of the effective minimum tax would therefore be more comprehensive. This might be desirable to expand geographic coverage, as long as GloBE is not as yet adopted sufficiently broadly by countries globally.

(2) The design as group minimum tax liability would make it even more transparent that the measure is not simply about transplanting a tax regime that has been conceived as an

international one into a domestic setting, but instead seeks to ensure an adequate minimum level of taxation for large firms regardless of where under-taxed profits have been earned.

(3) Top-up tax would not have to be collected by way of a denial of deductibility of intra-group payments, because the UTPR would also be converted into (or implemented as) a group tax liability. This avoids a conflict with the so-called net principle of income taxation, which would otherwise be liable to raise questions regarding its constitutionality in some EU Member States.

(4) The unilateral introduction of a system of unitary (minimum) taxation could pave the way for the more ambitious BEFIT initiative[74] of the EU Commission.

Despite the novel design, such an approach would imply only a few technical, but no substantive modifications of the agreed GloBE common approach. Arguably, any top-up tax collected in the form of a group tax liability should still qualify as the levy of top-up tax for the purpose of the application of the GloBE common approach by other jurisdictions, in particular with respect to the international rule order regarding the application of the IIR and UTPR. *Prima facie*, this could be doubted, because the GloBE common approach envisages to levy top-up tax from a parent company under the IIR collection mechanism, whereas under the model discussed here, it would formally be collected from the MNE itself, which could designate any local group entity as the actual taxpayer. However, ultimately the GloBE Blueprint merely requires to operate the IIR "in a way that produces the same overall result [in every jurisdiction] in order to ensure that an MNE Group is subject to a minimum level taxation in each jurisdiction that it operates regardless of where it is headquartered and without giving rise to the risk of double or over taxation."[75] This would also be ensured by the group effective minimum tax liability model[76].

And in a similar fashion as under the model of a simple extension of the IIR or UTPR to domestic entities, top-up tax collected for under-taxed profits of domestic entities should qualify as "covered tax" for the purpose of calculating the ETR for this jurisdiction in another country that implemented the GloBE common approach – which implies that no top-up tax should then be levied elsewhere. Namely, according to the 2020 Blueprint it is irrelevant for the characterization as covered tax "whether a tax charge is levied under a jurisdiction's corporate income tax rules or under a separate regime"; moreover, the example of CFC taxes

[74] See EU Commission, Communication on Business Taxation for the 21st Century, 18 May 2021, COM(2021) 251 final, pp. 11-13.
[75] See Blueprint (supra note 10), para. 411.
[76] Should a Member State seriously consider to implement this model, it is nevertheless suggested to clarify this in advance through consultation of the Inclusive Framework.

shows that covered taxes need not have been collected from the same group entity with respect to the profits of which the ETR is calculated[77]. The group effective minimum tax model would therefore potentially generate additional revenues without the risk of international double (minimum) taxation, as well.

[77] See Blueprint (supra note 10), paras. 130 and 145.