GloBE and EU Law: Assessing the Compatibility of the OECD’s Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market

This article examines the compatibility of the OECD’s proposed rules on GloBE (pillar II) with EU law, covering both primary law and secondary law. In addition, it discusses the amendments required by the implementation of this initiative within the internal market. In what concerns compatibility with primary law, this article suggests extending some of the measures to domestic scenarios (avoiding potential issues of discrimination or restriction). In what concerns secondary law, it suggests altering some of the provision of the directives. Furthermore, in the author’s view, the European Union would benefit from aligning some of its tax directives to the outcomes of OECD’s GloBE.

Contents
1. Introduction
2. Internal Market and the Need for an EU Corporate Minimum Effective Tax Rate
3. Structure
4. Compatibility of the GloBE Rules with EU Primary Law
   4.1. Introduction
   4.2. Fundamental freedoms
   4.3. Discrimination and restriction
      4.3.1. Introduction
      4.3.2. Income inclusion rule
      4.3.3. Switch-over clause
      4.3.4. Undertaxed payments rule
         4.3.4.1. Introduction
         4.3.4.2. Withholding tax
         4.3.4.3. Denial of deductions
      4.3.5. Subject-to-tax rule
      4.3.6. Thresholds
      4.3.7. Rules as connecting factors
   4.4. Justifications and proportionality
      4.4.1. Introduction
      4.4.2. The need to ensure the effectiveness of fiscal supervision
      4.4.3. The fight against abusive practices
      4.4.4. The need to ensure a balanced allocation of taxing rights
      4.4.5. Single taxation as a new justification
   4.5. In search of a solution I: Introduction of substance-based carve-outs
   4.6. In search of a solution II: Extension to domestic cases
5. Compatibility of the GloBE Rules with EU Secondary Law
   5.1. Introduction
   5.2. ATAD

* Deputy Academic Chairman at IBFD. Honorary Associate Professor at the University of Cape Town, South Africa. Lecturer at Catholic University Portugal. The author can be contacted at j.nogueira@ibfd.org or joaofelixpintonogueira@gmail.com.
1. Introduction

GloBE aims “to explore an approach that leaves jurisdictions free to determine their own tax system, including whether they have a corporate income tax and where they set their tax rates, but considers the right of other jurisdictions to apply the rules [of GloBE] where income is taxed at an effective rate below a minimum rate”\(^1\).

Despite this clear depiction, different stakeholders still find room to express their view on what the proposal is or on what it should be. This is particularly the case in the context of the European Union.

A report of the European Parliament claims that GloBE aims at ensuring that a minimum level of tax is paid where value is being created and where economic activity is taking place; and considers that the ultimate aim of the Pillar Two measures should be to address remaining BEPS issues while preventing damaging tax competition, notably by reducing pressures to grant unjustified tax incentives without any positive economic impact, on top of existing measures aimed at tackling tax evasion, aggressive tax planning and tax avoidance.\(^2\)

A member of the European Parliament believes its introduction would help to curb “tax competition, which currently exists between Member States, allowing multinationals to move to places with a lesser tax burden”. And that its introduction would lead to “[t]ax harmonisation at European level [and] would make it possible to put an end to this unhealthy competition between countries, businesses and ultimately European citizens.”\(^3\)

Regardless of the specific characterization of its goals, there is an increasing number of supporters of the minimum corporate income tax, even within the European Union. Note should be given to the fact that the proposal is also grounded on a Franco-German statement of 2018\(^4\) that pushed for proposals on “taxing the digital economy and minimum taxation”.

---

1. OECD, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy p. 25, para. 50 (OECD 2019).
GloBE and EU Law: Assessing the Compatibility of the OECD’s Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market

Despite the support, any output flowing from the current OECD/G20-led efforts needs to comply with EU law. This is expressly recognised by the OECD Secretariat when stating that the new rules should be

compatible with existing international obligations, including where appropriate the EU fundamental freedoms. Therefore, the design of the GloBE proposal rules will need to take into account their interactions with such international obligations.\(^5\)

And that GloBE would ensure “compatibility with international obligations (and, where appropriate, the EU fundamental freedoms)”.\(^6\) The same is also stressed by EU Member States, which consider it to be “important to conduct a timely examination of the EU law compatibility of the OECD proposal, as the negotiations evolve”.\(^7\)

Under the current normative framework, if the GloBE rules are not compliant with EU law, any entity affected by them could invoke its incompatibility and ask any (tax) authority or court within the European Union for the rule not to be applied. In some instances, the lack of compatibility could also be argued in third-country scenarios.\(^8\)

This contribution aims to answer the question of whether GloBE, taking into account the different modalities for its implementation, is compatible with EU law, considering both primary and secondary law. Furthermore, it discusses its practical implementation within the EU market, ensuring consistency with primary and secondary law.

2. Internal Market and the Need for an EU Corporate Minimum Effective Tax Rate

One could question whether the European Union could or should impose a minimum corporate effective tax rate initiative. Both in case the OECD fails to reach a broad consensus on the topic, or in addition to the OECD rules.

By merely looking at the statutory corporate income tax rates of the European Union, one can immediately conclude that there is a considerable diversity within the internal market. Statutory rates range from 32.02% in France to 9% in Hungary.\(^9\) The diversity in effective tax rates will undoubtedly be higher than the 23.02% verified at the statutory level.

It is possible to state that insofar as direct taxation is not harmonized, these disparities are admissible and even welcomed. In fact, they stimulate competition between Member States, which can bring advantages to the EU citizen.

However, at a certain stage, these rate disparities become harmful to the Member States (which lose the needed tax revenue) and to the internal market (as it leads to tax-driven arrangements, which are not always aligned with economic considerations). Introducing corporate income taxes below a certain minimum is certainly a harmful practice that


\(^6\) OECD, supra n. 1, at para. 30.


\(^9\) For instance, if the rule sub judice is incompatible with the free movement of capitals and payments, according to Art. 63 of the Treaty on the Functioning of the European Union of 13 December 2007, OJ C 115 (2008), Primary Sources IBFD [hereinafter TFEU].

should be ruled out of the internal market (and would prevent the feared “race to the bottom”). The reasons that lead to the emergence of a worldwide consensus on this matter reach a higher degree of intensity in the context of the European Union, given the integration of the domestic markets. Thus, this measure should be introduced even if, in the end, the OECD fails to reach a worldwide consensus. Furthermore, the minimum tax rate could be seen as part of the European Union’s staged approach for the introduction of a common consolidated corporate tax base.

However, there are no signs pointing in that direction. In its mission letter to Commissioner Paolo Gentiloni, the then President-elect of the European Commission explicitly referred to the ongoing work at the level of the OECD and of the G20 in this field. The letter stated that, in the absence of a consensus by the end of 2020, Gentiloni should “lead on the proposal for a fair European digital tax”. However, nothing was said about the minimum corporate effective tax, implying that this does not rank highly on the European Commission’s agenda.

The European Commission’s position seems to remain stable. In 2019, a member of the European Parliament had asked the previous Commission: “Does the Commission plan on championing the imposition of a minimum corporate tax rate in the European Union?”. The answer of Pierre Moscovici seemed to imply that pursuance of that goal would be a matter for a “global consensus” and that, within the Union, the focus would be digital taxation and the common corporate consolidated tax base. Again, not a single word on a minimum corporate effective tax rate.

In conclusion, and from a political perspective, it seems that both the previous and the current European Commission consider that GloBE should be pursued globally rather than within the European Union alone. In the author’s view, the Commission should re-evaluate its position. A minimum corporate tax base and common consolidated tax base should be seen as complementary actions and part of an overall plan of enhancing fairer competition within the internal market.

3. Structure

The final assessment of the compatibility of the GloBE rules depends on the format chosen to implement the rules. Therefore, and for the purposes of this article, the author will take into account three different scenarios: (i) implementation of the rules through domestic and bilateral conventional rules (sections 4. and 5.); (ii) implementation through an EU secondary law instrument, such as an EU directive (section 6.); (iii) implementation through a multilateral treaty (section 7.).

12. Lalucq, supra n. 3.
14. Even if there was a news report saying that the current commissioner stated that he would also propose an EU effective minimum tax in case global consensus at the OECD/G20 level is not possible. See S. Paez, EU to Propose Minimum Corporate Tax if OECD Can’t Get Consensus (28 May 2020), News Tax Analysts. However, the author was not able to find the primary source of that statement.
In this first scenario (sections 4. and 5.), neither set of rules prevail over EU law (comprising both primary and secondary EU law). Therefore, as the Court of Justice of the European Union (hereinafter CJEU or the Court) constantly reminds us, even if direct taxation remains a competence of Member States, they have to exercise it consistently with EU law, which comprises both primary and secondary law. Therefore, this article is focused on the compatibility of the GloBE rules with primary and secondary law.

In the second (section 6.) and third (section 7.) scenarios, the article will focus not only on the compatibility but mainly on the best way of implementing the GloBE rules to maximize pursuance of OECD and EU goals.

4. Compatibility of the GloBE Rules with EU Primary Law

4.1. Introduction

This section will take into account the traditional moments of the Court’s reasoning when assessing the compatibility of domestic rules with fundamental freedoms: (i) the scope of protection; (ii) restriction/discrimination; (iii) justifications; and (iv) proportionality.

Account should be given to the fact that we are assessing rules the final design of which is not yet known in its entirety. Further, the OECD has not yet provided feedback on the different design options submitted for public comments such as the tax base, the blending and the carve-outs. For the purposes of this study, the author has made several assumptions. Concerning these options, the author considered that there is a single form of computing the taxable base (eventually based on the International Financial Reporting Standards (IFRS)), that there is entity-blending (or no blending at all) and that no carve-outs have been introduced.

4.2. Fundamental freedoms

The four GloBE rules have different modus operandi, and thus, they may have a restrictive impact on the freedom of establishment, on the freedom to provide services, or on the free movement of capitals and payments.

In an intra-European situation, it does not matter which freedom is invoked. However, in third-country scenarios, the situation will only be covered if it falls within the free movement of capital.

17. For a detailed analysis, see J.F.P. Nogueira, Direito Fiscal Europeu – O paradigma da proporcionalidade; A proporcionalidade como critério central da compatibilidade de normas tributárias internas com as liberdades fundamentais pp. 205 et seq. (Wolters Kluwer / Coimbra Editora 2010).
18. Art. 49 et seq. TFEU.
19. Id., at art. 56 et seq.
20. Id., at art. 63 et seq.
21. And, in case there is definite influence of one company over the other, the Court will likely assess the case under the freedom of establishment considering that the restrictive effects on the free movement of services and free movement of capital, are “an unavoidable consequence of [a] restriction on the freedom of establishment and do not justify, in any event, an independent examination of that legislation in the light of Articles 49 EC and 56 EC”. UK: ECJ, 12 Sept. 2006, C-196/04, Cadbury Schweppes and Cadbury
It is not yet clear whether the income inclusion rule will only be applied in situations of control. In case it requires definite control (in the way that this expression is used in Baars), the situation will fall under the freedom of establishment, which grants companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the other Member States through a subsidiary, branch or agency.

If not, then it will likely be assessed under the free movement of capital and payments.

The switch-over rule may be assessed in the framework of the freedom of establishment (namely when it applies to exempt PEs) and the free movement of capital (namely in cases of exempt immovable property).

The undertaxed payments rule and the subject-to-tax rule will most likely fall under the free movement of capital or on the freedom to provide services.

Taking the above into account, there will be a significant number of situations with third countries that, as the rule is assessed under the free movement of capital, may (and likely will) claim EU law protection.

### 4.3. Discrimination and restriction

#### 4.3.1. Introduction

In this section, the author assesses whether the proposed rules may amount to prohibited discrimination or restriction under the traditional reasoning followed by the Court.

For this and the following sections, the author will assume that the GloBE rules are only applied to cross-border situations. Further in this article (see section 4.6.), the author assesses the extension of the GloBE rules to domestic situations as well.

#### 4.3.2. Income inclusion rule

The income inclusion rule will distinguish between parent companies with domestic subsidiaries and PEs and those with subsidiaries and PEs abroad. Whereas the first will not be obliged to do any top-up (regardless of the effective rate of its subsidiaries and PE’s), the

---

22. It will all depend on how the rule is effectively designed. For instance, art. 7(1)(2) ATAD, although designed for situations of control, includes a segment that requires the application of the rule in cases where the shareholder “is entitled to receive more than 50% of the profits of that entity”. That entitlement may be the result of a shareholders’ agreement and can be unrelated to any control over the specific company. If the domestic rule includes that feature, and following the criteria put forward by the Court, the case will be assessed under the free movement of capital. See Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (2016), Primary Sources IBFD [hereinafter ATAD].

23. NL: ECJ, 13 Apr. 2000, Case C-251/98, C. Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem, paras. 17 et seq., Case Law IBFD.


25. Namely in cases where there is a strong connection between the targeted payment and the provision of a specific service.

26. See sec. 4.5.
latter will be. Thus, there is a less favourable treatment of domestic companies depending on the location of their subsidiaries and PEs (whether they are in the same territory of the parent or not).27 This may render the exercise of the freedom of establishment (or free movement of capital) more burdensome as it dissuades companies “from establishing, acquiring or maintaining a subsidiary in a Member State in which the latter is subject to such level of taxation”,28 in this case, taxation below the effective minimum rate.

As the Court regularly states,

> [e]ven though, according to their wording, the provisions of EU law on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation.29

This also applies to cases where “a company established in one Member State carries on business in another Member State through a permanent establishment”.30

One could argue that the situations are not entirely comparable since, in the first scenario, the subsidiaries and PEs are taxed in that same Member State of the parent and in the second scenario, they are not. However, the Court considers that “comparability of a cross-border situation with an internal situation within a Member State must be examined having regard to the aim pursued by the national provisions at issue”.31

When the controlled company is a subsidiary, the rationale is similar to controlled foreign company (CFC) rules, which is to

> treat the situation of resident companies which have invested capital in a company established in a third country with a “low” tax rate in the same way as that of resident companies which have invested their capital in another company resident in [the same country], with a view, inter alia, to offset any tax advantages which the former might obtain from investing their capital in a third country.32

One could state that the rationale is not entirely similar and that the differences would require a different approach since CFC rules require fulfilment of an abusive test and lead to a full neutralization of the advantage obtained by the subsidiary (which is regarded as an indirect advantage of the parent). In fact, the income inclusion rule does not neutralize the advantage completely as it merely requires a top-up of the amount needed for the purposes of reaching the minimum effective tax rate. Moreover, it does not require meeting an abuse test, which makes its application much broader than CFC rules.33

However, those differences appear not to be relevant for the purposes of the Court’s analysis. To establish comparability, the Court requires only that the Member State takes into account

27. Cadbury Schweppes (C-196/04), para. 44.
28. Id., para. 46.
29. Argenta Spaarbank (C-459/18), para. 35.
30. Id., para. 36.
32. X (C-135/17), para. 67.
33. Nevertheless, some authors would prefer to simply strengthen CFC rules. See B.J. Arnold, The Evolution of Controlled Foreign Corporation Rules and Beyond, 73 Bull. Intl. Taxn. 12, sec. 6.3.2. (2019), Journal Articles & Papers IBFD.
account, for the purposes of determining the resident company’s tax liability, elements of the subsidiary. In the Court’s words:

[a]s soon as a Member State unilaterally taxes a resident company on the income obtained by a company established in a third country, in which that resident company holds shares, the situation of that resident company becomes comparable to that of a resident company which holds shares in another resident company.\(^{34}\)

Therefore, the difference in treatment between companies with domestic and foreign subsidiaries “concerns situations that are objectively comparable”\(^{35}\) as “it would deprive … TFEU of all meaning if it were accepted that situations are not comparable solely because the investor in question holds shares in a company established in a third country when that provision specifically prohibits restrictions on cross-border movements of capital”.\(^{36}\)

In what concerns PEs, the fact that the origin Member State (where the headquarters is located) takes into account the level of the taxation of the PE and uses it (eventually) to trigger taxation at the level of the headquarters is enough to conclude the existence of a restriction. In Argenta Spaarbank, the Court considered that legislation at issue established a difference in treatment between the assets of permanent establishments situated in a Member State other than the Kingdom of Belgium the income from which is not taxable in Belgium, and the assets of permanent establishments situated in the Kingdom of Belgium.\(^{37}\)

The Court considered that

[d]isadvantageous treatment of that kind is liable to deter a Belgian company from carrying on its business through a permanent establishment situated in a Member State other than the Kingdom of Belgium and therefore constitutes a restriction prohibited in principle by the Treaty provisions relating to freedom of establishment.\(^{38}\)

Even if the domestic “PE” and a foreign PE are not in the same situation (since only the first is taxed in the Member State of the headquarter company), the Court considers that this Member State could not, to determine the tax liability of the headquarter company, distinguish between elements related to the domestic and foreign shareholdings.

4.3.3. Switch-over clause

The chief function of such a clause is to enlarge the tax sovereignty of the residence state in cases where it originally, through domestic or tax treaty law, exempted foreign income, namely in cases of foreign PEs and income from immovable property. It aims to avoid an unintended effect of such a clause, namely the double non-taxation or the very low taxation of such income.

This clause had been inserted in the original proposal of the Anti-Tax Avoidance Directive (ATAD), where it had a gatekeeping function since it aimed to shield the internal market from “situations whereby untaxed or low-taxed income enters the internal market and then, circulates – in many cases, untaxed – within the Union”.\(^{39}\) The introduction of a

\(^{34}\) X (C-135/17), para. 67.

\(^{35}\) Id., para. 69.

\(^{36}\) Id., para. 68.


\(^{38}\) Id., para. 34.

\(^{39}\) European Commission, Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016) 26 final, recital 8 of the preamble (28 Jan. 2016), Primary Sources IBFD.
switch-over clause would allow exempted income to be taxed in the European Union “if it ha[d] been taxed below a certain level in the third country” and the Member State “should give a credit for the tax paid abroad, to avoid double taxation”. The European Parliament proposed amending this clause to other-than-active income and to cases where the statutory rate would be lower than 15%. This last proposal would make the rule closer to the GloBE one. However, this clause was not introduced in the final proposal, and the European Commission has never explained its removal.

Looking further, this clause is inextricably linked with the allocation of taxing rights. We should start by noting that this area was never harmonized and Member States are free to enter into tax treaties (among themselves and with third countries) and to draw up its rules autonomously. Moreover, the Court recognizes that EU law “does not lay down any general criteria for the attribution of areas of competence between the Member States” and that, apart from what is included in some directives, “no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level”.

The clause will indeed lead to higher taxation of the amounts that were not or low-taxed at source. However, such higher taxation results from the parallel exercise of the power to tax by the source and the residence state, and not by a discriminatory or restrictive provision of the residence state. With the switch-over clause, the residence state ends up treating domestic and foreign income alike, granting the latter a credit for the tax paid at source. Thus, this clause ends up even decreasing the tax differences in treatment, as it leads to subjecting those two streams of income to the same tax rate at residence. In conclusion, there is no prohibited discrimination or restriction.

The Court already had the opportunity to assess the compatibility of a switch-over clause with EU law in *Columbus Container Services*. In that case, the Court scrutinized a provision of the German foreign tax act that required the use of the credit method (instead of exemption) if the profits of a foreign permanent establishment (PE) were exempted by a tax treaty (and thus overriding that treaty) and if the foreign PE income would be caught by the CFC rules if it was income of a foreign subsidiary. This was the case were the PE profit was a low-taxed one (i.e. taxed 30% or less than the tax burden calculated under German rules). The Court started by considering that

Member States are at liberty to determine the conditions and the level of taxation for different types of establishments chosen by national companies or partnerships operating abroad, on condition that those companies or partnerships are not treated in a manner that is discriminatory in comparison with comparable national establishments.

and that

the freedom of companies and partnerships to choose, for the purposes of establishment, between different Member States in no way means that the latter are obliged to adapt their own tax systems to the different systems of tax of the other Member States in order to guarantee that
a company or partnership that has chosen to establish itself in a given Member State is taxed, at national level, in the same way as a company or partnership that has chosen to establish itself in another Member State.\textsuperscript{44}

At this point, in the author’s view, it is essential to differentiate treaty-based and domestic-based switch-over rules. Regarding the first, besides what the Court mentioned in *Columbus Container Services*, one can also take into consideration that they operate as connecting factors within the TFEU, determining the limits of what is subject to the source state and to the residence state’s sovereignty. Concerning the second (domestic-based), it is vital to also take into account the tax treatment of the domestic *tertium comparationis*.\textsuperscript{45}

If the domestic investing entity has the same tax treatment as the cross-border investing entity, the clause will not lead to any issues. However, the situation will be more problematic where the income is domestically exempt and, by virtue of the clause, becomes taxable in the cross-border scenario. That will not be the problem of the switch-over clause in itself, but of the underlying domestic law which differentiates between domestic and cross-border income. Thus, the latter should be challenged and not the switch-over clause, in itself.

Given the lack of a discriminatory or restrictive element of the switch-over rule in itself, the author will not take this rule into account when assessing justifications and proportionality.

\textbf{4.3.4. Undertaxed payments rule}

\textbf{4.3.4.1. Introduction}

This rule operates from the source state side. It allows such state to tax income (namely through the application of a withholding tax or a denial of deductions) whenever a payment has its source in the source state’s territory and the level of taxation of that income, in the hands of the beneficiary located in another state (the residence state), is below the effective minimum rate.

There are different issues in terms of compatibility with EU law. First, the application of withholding tax in itself and the different bases used for residents and non-residents. Second, the issue of denial of deductions.

\textbf{4.3.4.2. Withholding tax}

Regarding the first, the Court accepts that the source state applies the technique of a withholding tax both in case of dividends\textsuperscript{46} and in case of interest.\textsuperscript{47}

The asymmetrical application of the withholding tax (only to non-residents) as a “method of taxation” is prima facie considered as a restriction.\textsuperscript{48}

However, in the author’s view (and in what concerns this asymmetrical application of the method) there will always be a cash-flow disadvantage and a higher administrative burden

\begin{itemize}
\item \textsuperscript{44} Id., para. 51.
\item \textsuperscript{45} For this article, the author always assumes that the GloBE measure is not rolled out for domestic situations.
\item \textsuperscript{46} NL: ECJ, 17 Sept. 2015, Case C-10/14, Miljoen, X, Société Générale SA v. Staatsecretaris van Financiën, Case Law IBFD.
\item \textsuperscript{47} PT: ECJ, 13 July 2016, Case C-18/15, Brisal – Auto Estradas do Litoral S.A., KBC Finance Ireland v. Fazenda Pública, Case Law IBFD.
\item \textsuperscript{48} It should be noted that the Court consistently considers this difference justified by the need to ensure the effective collection of tax (see Brisal and KBC Finance Ireland (C-18/15), para. 21 and case law cited).
\end{itemize}
for non-residents which may be hard to reconcile with the Court’s case law. In what concerns the cash-flow disadvantage, the Court considers that "the exclusion of a cash-flow advantage in a cross-border situation when it is granted in an equivalent situation on national territory constitutes a restriction".\(^49\) Regarding higher administrative burden, the Court has already recognized that,

irrespective of the effects that the withholding of tax at source may have on the tax situation of the company that receives the interest, the obligation on the company paying the interest to withhold tax at source when that payment is made to a non-resident company may, inasmuch as it results in an additional administrative burden and risks concerning liability which would not exist if the loan had been taken with a resident company, render cross-border loans less attractive than domestic loans.\(^50\)

The second issue relates to the tax base considered for the purposes of applying the withholding tax. In most systems, non-residents are taxed on a gross basis whereas residents are taxed on a net basis. That being the case, the Court has already considered that this difference in treatment would amount to a restriction. In case of dividends, the Court considers that the comparison has to be made taking into account

on the one hand, the tax on dividends payable by the non-resident taxpayer [in that state] and, on the other, the income tax or corporation tax payable by the resident taxpayer which includes in its taxable base the income from the shares from which the dividends arise.\(^51\)

And that the distinction in the base would be a restriction. In case of interest, the Court considered that “national tax legislation which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income after deduction of those expenses” would amount to a restriction.\(^52\)


\(^50\) DK: ECJ, 26 Feb. 2019, Case C-115/16, N Luxembourg 1 v. Skatteministeriet, para. 159, Case Law IBFD. Similarly, in X (C-498/10) the Court stated that “obligation on the recipient of services to withhold at source tax on the remuneration paid to non-resident service providers, whereas such a witholding tax at source is not levied on remuneration paid to resident service providers, constitutes a restriction on the freedom to provide services in that it entails an additional administrative burden and related liability risks”. NL: ECJ, 18 Oct. 2012, Case C-498/10, X NV v. Staatssecretaris van Financiën, para. 32, Case Law IBFD.

\(^51\) Miljoen (C-10/14, C-14/14 and C-17/14), para. 74.

\(^52\) Brisal and KBC Finance Ireland (C-18/15), para. 24.
The solution would be a withholding tax levied on a net basis. Even if this is a possibility left open by the Court, it is quite cumbersome to devise such a system that would be at the same time feasible and compatible with EU law. On the one hand, the system could allow for a deduction of “directly connected business expenses” at the moment of the withholding. However, this may be difficult to implement since some expenses are only known, ascertainable or even computable at the end of the taxable year. On the other hand, the withholding computation could take place after the end of the taxable year, mirroring the computation system for residents. However, the rationale underlying withholding taxes would not be met since the original payment would be made without any deduction. The Court hints at a third possibility which would be applying a withholding at the moment of the original payment while opening up the possibility of a reimbursement procedure to the taxpayer (non-resident). In this case, the non-resident would assess “whether or not it is appropriate to invest resources in drawing up and translating documents intended to demonstrate the genuineness and the actual amount of the business expenses that it seeks to deduct”.

This system would not, however, prevent the cash-flow disadvantages and higher administrative burdens on non-residents, which could, by themselves, be considered a restriction of EU law, as mentioned above. And even if it was admissible from an EU law perspective, the system would be difficult to roll out on a worldwide basis.

Neutralization also needs to be addressed in this respect. This amounts to the possibility of one state claiming that the discrimination it unilaterally imposes can be overcome by the relief granted by the residence state of the taxpayer. The Court considers this line of reasoning admissible, but sharply limits its application.

---

53. Id., para. 44 et seq.
54. Comprising: (i) specific expenses, and particularly “travel and accommodation expenses, legal or tax advice” if also granted to residents, and (ii) apportionable general expenses or overhead (comprising “the fraction of the general expenses of the financial institution that may be regarded as necessary for the granting of a particular loan”). Brisal and KBC Finance Ireland (C-18/15), paras. 47 and 48.
55. As recognized by the Court, the goal is to ensure adequate collection of tax in what concerns non-residents.
57. As the Court states “the obligation, even where the non-resident provider of services has informed his payment debtor of the amount of his business expenses directly linked to his activity, to commence a procedure for the subsequent refund of those expenses is liable to impede the provision of services. In that commencing such a procedure involves additional administrative and economic burdens, and to the extent that the procedure is inevitably necessary for the provider of services, the tax legislation in question constitutes an obstacle to the freedom to provide services”. See DE: ECJ, 3 Oct. 2006, Case C-290/04, FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel, para. 47, Case Law IBFD.
GloBE and EU Law: Assessing the Compatibility of the OECD’s Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market

Firstly, the Court only admits neutralization if it is imposed by a tax treaty. That being the case, even if the neutralization is effectively secured by the residence state, it is still a result of the “internal legislation” of the source state. In the Court’s words:

it cannot be ruled out that a Member State may succeed in ensuring compliance with its obligations under the Treaty by concluding a convention for the avoidance of double taxation with another Member State.  

As a consequence, any (unilateral) neutralization that is not a consequence of a treaty is not considered admissible as the residence state “cannot rely on the existence of a tax advantage granted unilaterally by another Member State in order to escape its obligations under the Treaty.”  

Secondly, neutralization needs to be complete, i.e. the effects of the discrimination imposed by the source state must be entirely removed by the credit granted by the residence state. In the Court’s words, and in the case of dividends, the application of the method by the residence state

should therefore enable the tax on dividends levied by that Member State to be deducted in its entirety from the tax due in the Member State of residence of the recipient company, so that if the dividends received by that company were ultimately taxed more heavily than the dividends paid to companies resident in [the source state], that heavier tax burden could no longer be attributed to the [source state], but to the State of residence of the company receiving dividends which exercised its power to impose taxes.  

However, this line of reasoning does not seem to be applicable in this case. The main reason why GloBE applies is precisely because the taxation on the resident side falls below the minimum effective rate. If the state applies a withholding based on that reason, the residence state will never be in a position of crediting the amount levied at source. Therefore, the potential discrimination from the resident side would never be neutralized by a credit on the resident side.

4.3.4.3. Denial of deductions

There are already several cases on asymmetrical denial of deductions, i.e. denial of deductions in case of payments to a foreign entity, which would give rise to a deduction if they were paid to a resident entity.

For instance, in Schwarz and Commission v. Germany, the Court considered as discriminatory a rule that had the effect of denying deductions made to private schools outside of Germany (whereas similar deductions would be allowed domestically regarding institutions mainly financed by private funds). In Persche, the Court considered as restrictive German domestic legislation that allowed deductions of donations made to charitable organizations but only if those organizations were located in the same Member State. Sometimes, the

60. Amurta (C-379/05), para. 66.
61. Commission v. Spain (C-487/08), para. 60.
62. DE: ECJ, 11 Sept. 2007, Case C-76/05, Herbert Schwarz und Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach, Case Law IBFD.
63. DE: ECJ, 11 Sept. 2007, Case C-318/05, Commission of the European Communities v. Federal Republic of Germany, Case Law IBFD.
64. DE: ECJ, 27 Jan. 2009, Case C-318/07, Hein Persche v. Finanzamt Lüdenscheid, Case Law IBFD.
cross-border element can be very nuanced. In _NN/AS_, the Court considered the Danish rules on group taxation to be discriminatory. Under these rules, resident companies of a group could deduct, from their overall profits, the losses of a PE located in Denmark but could not deduct the losses of a PE located in Denmark belonging to a non-resident subsidiary of the group.

For the Court, a restriction may arise even in cases where a deduction is admissible in the domestic and cross-border scenarios but is subject to stricter conditions in the latter. For instance, in _EV_, the Court considered as restrictive German legislation which required stricter conditions for benefiting from the participation exemption in case the company had its management and head office in a third country.

One should, however, note that the issue is not the asymmetry of the deductions but the fact that the asymmetry leads to a discrimination or a restriction. A contrario, a non-discriminatory asymmetry may be allowed.

This is the case of _Schempp_ regarding deductibility of alimony payments. In case they were made to German residents, they would always be deductible (and also always taxed in the hand of the recipient). If paid to a non-resident, they would only be deductible if they were taxed. In this case, the alimony payments were made to the spouse, who was an Austrian resident. Payments received by the spouse were not subject to tax in Austria. For that reason, deductibility was denied in Germany. The Court not only admits this different treatment but also considers that its genesis is a disparity between the rules of two Member States and not discriminatory treatment by Germany.

In the author’s view, _Schempp_ paves the way for admitting the denial of deductions as proposed by GloBE. Both cases encompass domestic linking-rules, in which the deductibility is made dependent on the tax treatment of the payment in the recipient’s hands. In both cases, there is no discrimination since the difference in treatment results from a disparity between domestic legislation of the two states: the difference in treatments between the payment in the hands of a resident and a non-resident recipient.

However, _Schempp_ does not consent to automatic asymmetrical denial of deductions in the cross-border scenario. Insofar as the tax treatment of the payment made (in the hands of the recipient) is the same in the domestic and cross-border scenario, the denial restricted to the cross-border scenario will not be admissible. This will happen whenever the level of taxation of the comparable domestic recipient is the same as that of the cross-border recipient and is below the minimum effective tax rate.

4.3.5. Subject-to-tax rule

This rule conditions the source state granting of the benefits of a treaty to the fact that the income is effectively subject to tax in the source state at the defined minimum rate.

65. _DK_: ECJ, 4 July 2018, Case C-28/17, _NN A/S v. Skatteministeriet_, Case Law IBFD.
67. _DE_: ECJ, 12 July 2005, Case C-403/03, _Egon Schempp v. Finanzamt München V_, Case Law IBFD.
68. Id., para. 45.
The Court has already had the opportunity to assess a similar clause in Bosal. However, the clause was applied by the residence Member State and in the framework of the Parent-Subsidiary Directive. Thus, that decision is not of relevance in this situation.

Its asymmetrical application (i.e. application restricted to cross-border situations) appears to place non-residents in a different and worse tax position than the comparable domestic counterparts. However, what is at stake is the mere granting of the benefits of a treaty, on a bilateral basis. This clause appears to simply be an extra condition for the application of the benefits of a treaty, which the Member States are still free to determine autonomously.

This will be expand on in section 4.3.7.

4.3.6. Thresholds

The GloBE may limit its application to multinational enterprises having a global turnover above a certain threshold. According to the consultation document, GloBE rules will be applied only to companies meeting “[t]hresholds based on the turnover or other indications of the size of the group.” It is often assumed that this threshold amount of EUR 750 million is set to match the one used by the European Union in its proposal for a digital services tax (DST).

When examining that proposal, the author had the opportunity to examine the compatibility of the use of thresholds with EU law. The claim could be that the threshold would limit the application of the DST to companies outside of the European Union, thus shielding this measure to non-EU cases.

We should start by noting that this is not an EU initiative, but an OECD/G20 initiative. Any claims connected with a subjective element or intention of the legislator are, therefore, not applicable in this context.

Moreover, the author does not consider that the threshold is designed to affect companies located outside of the European Union. In the case of the DSTs, such claim stemmed from the fact that a significant number of companies active in this sector had their residency in the United States. GloBE does not apply to a particular sector but applies to all sectors of the economy.

However, even in case the threshold would narrow GloBE’s application, making it apply exclusively or mostly to companies of a certain jurisdiction, the author believes that this would still not amount to prohibited indirect discrimination. The Court has recently

69. NL: ECJ, 18 Sept. 2003, Case C-168/01, Bosal Holding BV v. Staatssecretaris van Financiën, Case Law IBFD.
71. NL: ECJ, 5 July 2005, Case C-376/03, D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, ECLI:EU:C:2005:424, para. 52, Case Law IBFD.
revisited the issue in cases related to turnover taxes. In what concerns the criteria for distinguishing indirect discrimination, the Court seems to partly endorse the proposal of Advocate General Kokott in ANGED. In her opinion, there would be indirect discrimination when the tax would apply to nonnationals (i) either in the vast majority of cases, or (ii) when relying on a criterion that inherently amounted to discrimination. The author has indicated only a partial acceptance by the Court of the AG’s view in that the Court appears to only take into account the second proposed criterion.

In Hervis, the Court merely refers to AG Kokott’s second argument. In Vodafone, the Court refers to the first argument and acknowledges that, due to the way the tax was designed (with steep progressivity and with a system of bands), the higher band covered only foreign-owned companies and most of the tax was borne by companies owned by foreign-owned companies (which would be the first point of AG Kokott). However, this was not equated to indirect discrimination and was considered “fortuitous”. It was merely “due to the fact that the Hungarian telecommunications market is dominated by such taxable persons, who achieve the highest turnover in the market”. For the Court, “the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person’s ability to pay”.

In conclusion, the Court appears to limit indirect discrimination to cases were the criterion “inherently” amounts to discrimination, this way abandoning previous assessments focused on how the domestic-used criterion led, in the large majority of cases, or systematically, to a less favourable treatment of nonnationals or non-residents.

In the author’s view, it is correct to move from a quantitative-based approach to a qualitative-based approach. The fact that a tax is levied, in the majority of cases, by or even exclusively on nonnationals (or non-residents) cannot be seen, in itself, as indirect discrimination. In the context of the internal market and of highly integrated economies, it is normal that states specialize in the production of goods and services in which they have a comparative advantage. Therefore, a normal (and wanted) potential consequence of the internal market is that, at a certain point, national economic operators of one state decide to stop offering a certain good or service which starts to be offered by economic operators of another Member state. The fact that goods and services are (vastly or exclusively) provided by non-residents cannot mean that a state cannot levy a tax on those products or services, or even on the economic operator offering them. On the contrary, that would trigger issues...
GloBE and EU Law: Assessing the Compatibility of the OECD’s Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market

both at a domestic (namely in terms of compliance with domestic constitutional law) and at a European level (namely in what concerns fundamental freedoms or State aid).

Returning to the GloBE threshold, it will clearly not provide an intrinsically safer harbour for EU companies in comparison with third-country companies. In conclusion, the author is of the view that the introduction of thresholds does not, per se, lead to indirect discrimination or to any added concerns in terms of EU law. Nonetheless, and although not related with the European Union, it is the author’s considered view that high thresholds do not add anything to the fairness of the measure and may lead to some abusive fragmentation practices (if not accompanied by strong anti-splitting measures).

4.3.7. Rules as connecting factors

The GloBE rules require intervention at the conventional level to be fully operational. Therefore, it will not only lead to an amendment of the OECD Model but also to changes in bilateral treaties. Once incorporated in bilateral treaties, the rules will become part of the equilibrium achieved by the contracting states in a given treaty. This section only deals with the GloBE rules that are introduced as amendments to tax treaties.

One could argue that, in this scenario, insofar as the GloBE rules apply automatically (and regardless of any abusive test), they become an element of the allocation rule (such as the time limits or the minimum holding requirements). They would constitute a special element since they are based on a linking-rule reasoning (i.e. depending on the effective tax rate of the counterparty). Nevertheless, they would form a condition and an integral part of the connecting factors.

Currently, the allocation of taxing powers within the European Union is not harmonized. According to the Court, “Member States are free to determine the connecting factors for the allocation of fiscal sovereignty for the avoidance of double taxation”. To that end, “it is not unreasonable for Member States to use the criteria followed in international tax practice” and particularly in the OECD Model.

Consequently, a criterion used “in a provision which is intended to allocate fiscal sovereignty” will not amount to “prohibited discrimination”.

Furthermore, the “objective of a bilateral convention for the avoidance of double taxation … is to prevent the same income from being taxed in each of the two parties to that convention; it is not to ensure that the tax to which the taxpayer is subject in one State is no higher than that to which he or she would be subject in the other contracting State”.

Thus, even if the end result of applying the GloBE rules clause is a higher level of taxation for an entity otherwise not subject to a tax above the minimum effective tax rate or an equivalent, that fact alone is not enough to consider that the rule itself is contrary to EU law since the

84. Most recent version: OECD Model Tax Convention on Income and on Capital (21 Nov. 2017), Treaties & Models IBFD.
85. IT: ECJ, 30 Apr. 2020, Case C-168/19, HB v. Istituto Nazionale della Previdenza Sociale, para. 16, Case Law IBFD.
86. Id., para. 17. The Court, however, required Member States to exercise that power and freedom consistently with EU law. See DE: ECJ, 21 Sept. 1999, Case C-307/97, Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt, paras. 56-58, Case Law IBFD.
87. Istituto nazionale della previdenza sociale (C-168/19 and C-169/19), para. 18.
88. Id., para. 17.
differences would arise from “disparities existing between the respective tax systems of those contracting parties.” In fact, “[t]he choice of various connecting factors, made by those parties for the purpose of allocating powers of taxation between them … must not be regarded, as such, as constituting discrimination”.

In case the Court considers that tax treaty GloBE rules seek to allocate fiscal sovereignty between countries, delimiting the cases in which the source and residence state may exercise their tax jurisdiction, the rules may not amount to prohibited discrimination or restriction. However, it is not certain that this will be the case. For this purpose, the next steps of the Court’s reasoning should be assessed.

4.4. Justifications and proportionality
4.4.1. Introduction

In the previous sections, the author has concluded that some rules may amount to prohibited discrimination or restriction. These rules can still be considered compatible with EU law insofar as pursuing a valid justification in a proportionate way. Although justifications and proportionality are two separate steps of the Court’s reasoning, for the purposes of this contribution, the author addresses them jointly. Important for this article is that the rules are not distinguished (as was done in the previous section) since the argumentation discussed in the following sections may apply to more than one of the profiles of rules.

Several justifications can be immediately discarded since they are also traditionally refused by the Court. This is the case of the loss of tax revenue or the compensation of disadvantages by other advantages provided by a tax treaty. Also to be discarded is the need to ensure the effectiveness of tax collection. Only the undertaxed payments rule could be equated under this justification. However, GloBE is not designed as a conservancy measure: it does not aim to protect tax collection but to create a new entitlement to tax.

A valid justification would be the pursuit of a domestic goal which has a “dimension of weight” that exceeds the dimension of weight of the interest underlying the fundamental freedoms. Taking into account the Court’s case law, the justifications that should be considered are: the need to ensure the effectiveness of fiscal supervision, the fight against tax fraud and avoidance, and the need to ensure a balanced allocation of taxing rights. Since there is no numerus clausus of justifications, this article will also evaluate the possibility of the Court accepting a new justification based on the single taxation argument.

4.4.2. The need to ensure the effectiveness of fiscal supervision

The Court considers that the need to ensure the effectiveness of fiscal supervision is a valid justification. However, and taking into account the available instruments for mutual assistance in exchange of information (both within the European Union and in the relations with third countries), the Court states that any restriction that goes beyond what is necessary to pursue that justification is inadmissible. This reduces the scope of the justification to cases with third countries in which there is no mutual assistance instrument between the EU Member State in question and the third country.

89. Id., para. 20.
90. In the sense that this expression is used by R. Dworkin in Taking Rights Seriously p. 26 (Harvard University Press 1977).
However, a closer look reveals that there will be little room for such justification to be invoked even in these scenarios. In fact, the rationale for introducing GloBE measures is not related to any hardship of getting access to tax-relevant data. For this reason, and even in the limited scenarios in which the justification could be used, the author believes that the Court will simply discard this justification since it does not match with the measure’s rationale.

4.4.3. The fight against abusive practices

The fight against tax avoidance is, undoubtedly, one of the main reasons behind the GloBE initiative. This is also one of the justifications accepted by the Court.

However, the Court uses proportionality to narrow down the scope of application to “wholly artificial arrangements”, i.e. to situations devoid of economic reality put forward to obtain a specific (tax) benefit. Measures exceeding what is necessary to tackle these (wholly artificial) arrangements will be considered disproportional. Rules cannot be applied even if the sub judice measure is being applied to a purely artificial construction.

It is clear that the GloBE rules are general measures that apply equally to genuine and non-genuine situations. This automatism in the application puts them outside of the realm of the justification discussed in this subsection.

Some authors argue that GloBE rules are anti-avoidance measures and, accordingly, they would need to abide by the requirements laid down by the CJEU as regards such rules. Relevance is given to the name of the proposal (“global anti-base erosion proposal”) and to its explanation which clarifies that the “GloBE-proposals are defined as a set of measures aimed at curbing down profit shifting to jurisdictions where they are subject to no or to very low taxation”. In conclusion, “they are measures against abusive tax practices consisting of base erosion and profit shifting”.

While it is true that the GloBE measures will not be supported by this justification, failure to meet the justification does not mean that the measure will necessarily be incompatible with EU law. Domestic measures can pursue a plurality of interests, each of them amounting to a different justification.

91. Already in ICI the Court clarified that “[a]s regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group’s subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the state of establishment.” See UK: ECJ, 16 July 1998, Case C-264/96, Imperial Chemical Industries (ICI) v. Kenneth Hall Colmer, para. 26, Case Law IBFD.

92. This automatism differentiates CFC rules from GloBE’s income inclusion rules. Whereas in the first there is normally an abuse test (which, depending on its wording, may allow narrowing the scope to “wholly artificial arrangements”), the latter does not have that test. This is the reason why all GloBE’s income inclusion rules, despite the similarities with CFC rules, cannot be considered within this justification. In what concerns the admissibility of CFC rules, see X (C-135/17).


94. For an analysis of this issue, see Nogueira, supra n. 17, at pp. 296 et seq.
Thus, the measure would still be compliant with EU law when it pursues another valid justification.

The proposal contemplates the inclusion of substance-related carve-outs. At present, it is not possible to anticipate how these carve-outs will be designed. For the purposes of this justification, though, the inclusion of substance-based carve-outs seems not to suffice. After removing all cases falling within the carve-out, we would still be left with a vast amount of cases that could not be considered wholly artificial arrangements. Moreover, the substance carve-out would not provide any relief to genuine payments made as a consequence of genuine transactions to lower-taxed entities in a different state.

4.4.4. The need to ensure a balanced allocation of taxing rights

The Court accepts measures aimed at a balanced allocation of taxing rights, i.e. domestic measures “designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory”.

This justification is designed, inter alia, to safeguard the symmetry between the right to tax profits and the right to deduct losses, in particular in order to prevent taxpayers from choosing freely the Member State in which profits are to be taxed, or losses are to be deducted.

One should note that this justification may also be invoked as regards relations with third countries.

The income inclusion rule mainly aims at compensating a lack of effective taxation at source. It does not take into account what happens in the residence state (the rule can be applied even if the parent company is a pure holding, not doing anything else apart from managing its participation in the subsidiary and even if that holding benefits from a full exemption). It also does not take into account any relationship between the activities of the subsidiary and the activities of the parent. Of course, one could claim that, as is the case with CFC rules, the goal is to prevent avoidance by establishing subsidiaries in lower-tax jurisdictions to artificially shift income to jurisdictions. However, the latter argument would amount to the justification assessed in the previous section, which, as discussed in the following paragraphs, infringes proportionality. Therefore, one cannot validly claim that the rule aims to safeguard the power of taxation over those activities taking place in the residence state.

The subject-to-tax and the undertaxed payments rule aim to compensate for a lack of effective taxation at the residence. It does not really address the protection of the tax sovereignty of the source state regarding activities taking place in its territory. In fact, nothing prevents the source state from applying its domestic rules. GloBE only comes into play after (both logically and chronologically) the unrestricted application of the source state’s taxing rules.

Moreover, the lack of consistency between the domestic and cross-border situations also comes into play in the assessment of this justification. In the pension fund cases, the Court has stated that

95. X (C-135/17), para. 72.
96. DE: ECJ, 17 Dec. 2015, Case C-388/14, Timac Agro Deutschland GmbH v. Finanzamt Sankt Augustin, para. 35, Case Law IBFD.
97. DE: ECJ, 13 Nov. 2019, Case C-641/17, College Pension Plan of British Columbia v. Finanzamt München III, para. 84, Case Law IBFD.
where a Member State has chosen to exempt completely or almost completely dividends paid to resident pension funds, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States and third countries of the power to impose taxes in order to justify the taxation of dividends paid to non-resident pension funds.98

If we import this reasoning, it may mean that a Member State applying a GloBE-styled cross-border compensation, while allowing that in the comparable domestic situation the counterparty remains subject to a low effective tax rate, cannot invoke the justification.

4.4.5. Single taxation as a new justification

Single taxation has recently been gaining supporters. The underlying idea is that income should be taxed only once.99 This may apply regardless of the way the rules are implemented (i.e. through domestic or tax treaty law).

One should start by noting that single taxation has never been recognized by the Court as a valid justification. However, there is no numerus clausus on valid justifications.100 Nothing prevents the Court from considering that pursuit of single taxation has more weight than the fundamental freedoms. Moreover, the Court may consider that there is a global need for a non-abuse-based “co-ordinated set of rules to address ongoing risks from structures that allow MNEs to shift profit to jurisdictions where they are subject to no or very low taxation”101 which are the result of a broad international consensus.

Looking at the case-law, the Court has recognized the value of the rules adopted as a consequence of the work of the OECD. It also values the importance of the OECD Model Commentaries for the interpretation of tax treaties, although it notes that this is a task for the domestic court.102 The Court acknowledges that the OECD’s work is the basis of the concepts used by the Directives103 and, as stated in the previous section, recognizes that OECD Model connecting factors may be used, even if they lead to effective differences in tax treatment.104

The OECD’s GloBE rules could be considered an inextricable element of a new model for international taxation, aiming at single taxation. Avi-Yonah and Xu recognize this as one of the underlying goals of the BEPS Project:

98. College Pension Plan of British Columbia (C-641/17), para. 85. See also Commission v. Germany (C-284/09), para. 78; FR: ECJ, 10 May 2012, Case C-338/11, Santander Asset Management SGIC SA and Others v. Directeur des résidents à l’étranger et des services généraux, para. 48, Case Law IBFD; and DK: ECJ, 21 June 2018, Case C-480/16, Fidelity Funds v. Skatteministeriet, para. 71, Case Law IBFD.
101. GloBE Proposal (2019), at p. 3 (Background).
103. Namely the concept of “Beneficial Ownership” – see N Luxembourg 1 (C-115/16, C-118/16, C-119/16 and C-299/16), para. 90.
104. Istituto nazionale della previdenza sociale (C-168/19 and C-169/19), paras. 16-20.
Based on the single tax principle, the mission of the BEPS project is to prevent and eliminate the double non-taxation. As the G20 leaders pointed out the new principle, "profits should be taxed where economic activities deriving the profits are performed and where value is created". Therefore, the new direction of international tax law reform in the context of BEPS project is to safeguard the single tax principle by fighting against the BEPS.\textsuperscript{105}

Rules pursuing single taxation could be considered legitimate since they just enlarge the scope of tax sovereignty of one Member State in cases were the other state does not exercise (or does not exercise properly) its power to tax, which would otherwise lead to double non-taxation (or under-taxation). The rules may even be considered necessary for the proper functioning of the domestic and internal market since it will prevent companies originally subject to their residence state tax sovereignty to benefit from importing income which has not been taxed (or was undertaxed) in another state.

Of course, the likelihood of the acceptance of this justification is inversely proportional to the final effective tax rate that will eventually be determined. The higher the rate, the less likely the acceptance of the justification insofar as the rules may lead to unrelieved double taxation.

\subsection*{4.5. In search of a solution I: Introduction of substance-based carve-outs}

Another possibility of ensuring compatibility with EU law would be through the introduction of substance-based carve-outs for transactions caught by the rules. According to Devereux et al.:

\begin{quote}
the most bullet-proof way of implementing the income inclusion rule in the EU with respect to controlled foreign companies would involve the harmonised application of a substantial activity carve-out for intra-EU situations, combined with a threshold shareholding requirement of above 25\%.
\end{quote}

\textsuperscript{106}

And, in what concerns the undertaxed payments rule it would require a:

substance-based carve-out in that a taxpayer should be provided with an opportunity to demonstrate that the transaction is genuine, in which case it would not become subject to disadvantageous tax treatment.\textsuperscript{107}

In the author's view, this proposal is not suitable to overcome the previously identified issues.

First, as mentioned, several GloBE rules fall within the scope of the free movement of capital and, given the criterion used by the Court to distinguish between the freedoms in third-country scenarios, it would be quite difficult to amend the rules to make them fall exclusively under the free movement of capital. Therefore, the introduction of any substance-based carve-outs would have to extend to third-country situations.

Second, the inclusion of these carve-outs would need to be decided on a global level, and it seems difficult to attain any consensus in that respect.

\begin{flushright}
\textsuperscript{106} M. Devereux et al., \textit{The OECD Global Anti-Base Erosion Proposal}, Oxford University Centre for Business Taxation, p. 53 (Jan. 2020).
\textsuperscript{107} Id., at p. 56.
\end{flushright}
GloBE and EU Law: Assessing the Compatibility of the OECD’s Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market

Third, the potential of introducing a carve-out that substantially affects the effectiveness of GloBE is quite high. Moreover, carve-outs pave the way for adjustments to entities and transactions, which could affect efficiency of the economic operators.

Fourth, as regards the proposal for the undertaxed payments rule, there would still be a procedural difference in treatment between domestic and cross-border situations. Whereas in the domestic situation the taxpayer would never be hit by the rule, in the latter, the taxpayer would have to provide evidence that its transaction is “genuine” (which appears to be quite burdensome particularly taking into account the difficulty to interpret that concept and the different and non-harmonized interpretations that the context would receive in different countries).

Last, the carve-outs would be needed to avoid that domestic rules go beyond what is necessary to combat abusive practices. In other words, this substance test would be able to overcome the issues created with the automatisms in the application of the GloBE rules. However, we could only entertain such application if the carve-out would effectively restrict the application of the rules to “wholly artificial arrangements”. The author has serious doubts if all non-substantial activities could immediately be considered “wholly artificial”. Moreover, and even if it was possible to design the carve-out in that way, the author considers that such alterations would substantially change the nature of the initiative, converting it into a worldwide minimum anti-abuse rule.

4.6. In search of a solution II: Extension to domestic cases

In the previous sections, the author provided evidence that limiting the application of the GloBE rules to cross-border cases may lead to cases of restriction or discrimination that are impeded in their quest to be considered justified or proportional in an EU law context.

The past offers us lessons that we can use in the present. In the wake of an unfavourable decision by the Court, many Member States have decided that, instead of merely abolishing the rule, they should extend it to domestic situations. Such a solution has been repeatedly accepted by the Court whenever these measures have again appeared before it. In the context of CFC rules, this solution was also proposed by the OECD’s BEPS Action 3 Final Report. The domestic extension means that the GloBE rules have to be applied indiscriminately, regardless of the residency of the parties.

One should start by acknowledging the shortcomings of such a proposal. Firstly, a domestic extension does not correspond to the implementation of a policy decision but merely to an issue of legality. Secondly, such extension almost amounts to a circumvention strategy since, in most cases, the domestic situations will not be impacted by the rule. Thirdly, it

108. The OECD stated as follows: “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. […] 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.” OECD/G20, Designing Effective Controlled Foreign Company Rules – Action 3: 2015 Final Report, pp. 17-18 (OECD 2015), Primary Sources IBFD.

109. In the same vein, see J. Englisch & J. Becker, International Effective Minimum Taxation – The GLOBE Proposal, 11 World Tax J. 4, p. 524 (2019), Journal Articles & Papers IBFD. It would not amount to an artificial circumvention or an abusive practice of the State insofar as the rule would effectively apply to all domestic scenarios. Therefore, whenever the domestic situation meets the conditions of the rule, it is also affected by the rule.
hampers domestic operators even in cases where there is no real reason for that obstacle (and domestic operators are collateral damage of a decision that merely aims to avoid issues of compatibility of rules targeting cross-borders operators).

In the words of Advocate General Geelhoed, on the extension of thin-cap rules to domestic scenarios:

Member States should necessarily be obliged to extend thin cap legislation to purely domestic situations where no possible risk of abuse exists. I find it extremely regrettable that the lack of clarity as to the scope of the Article 43 EC justification on abuse grounds has led to a situation where Member States, unclear of the extent to which they may enact prima facie “discriminatory”-abuse laws, have felt obliged to “play safe” by extending the scope of their rules to purely domestic situations where no possible risk of abuse exists. (60) Such an extension of legislation to situations falling wholly outwith its rationale, for purely formalistic ends and causing considerable extra administrative burden for domestic companies and tax authorities, is quite pointless and indeed counterproductive for economic efficiency. As such, it is anathema to the internal market.

It is true that this extension does not fall within the original rationale of GloBE, which is related to profit shifting to low-tax jurisdictions. However, it is also not prohibited by it. The GloBE rules are triggered by effective tax rates below a certain amount. One may find such cases in domestic scenarios. This could be the consequence of several factors, e.g. low nominal tax rates, subjective exemptions, objective exemptions covering all or a large extent of the entities’ income, incentives (such as patent boxes), depreciation and amortization.

In the author’s view, this extension would even lead to an enhancement of the GloBE project as a whole. If the rules are applied only in a cross-border scenario, they may lead to several cases of domestic protectionism and distortion of competition. For instance, in a post-GloBE scenario, a lower-taxed entity could prefer to operate only in the domestic market since payments made by them would never be subject to the undertaxed payments or subject-to-tax rule. On the other hand, a company operating an activity with an objective low level of taxation (for instance, because it generally benefits from a patent box) would prefer to set up the subsidiary in the same Member State, to avoid the application of the income inclusion rule.

Asymmetrical application of GloBE would inevitably lead to more elaborate schemes of planning, in which groups would organize themselves to ensure that investment in low-tax jurisdictions is made from non-GloBE participant jurisdictions and that income flows first to sufficiently taxed entities before it is exported to a GloBE jurisdiction.

According to some authors, the extension of the rule would not suffice, since it would be “very doubtful that within a domestic context a risk of tax avoidance and profit shifting of the kind contemplated here would ever be present”. Even with the extension, “the rule would entail a de facto discrimination of cross-border transactions, which is prohibited by EU law”.

---


111. Even if it does not lead to an increase of the burden of the paying agent, it surely leads to an increase of its administrative burden in comparison with a payment made to a domestic counterpart.

112. De Broe, supra n. 93, at sec. 2.3.
GloBE and EU Law: Assessing the Compatibility of the OECD’s Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market

In the author’s view, the extension will not amount to any de facto discrimination. Again, the author considers AG Kokott’s above-mentioned proposal for assessing cases of de facto discrimination to be quite helpful here. Applying the test contained in the proposal to this case, it can be easily concluded that low(er) taxation is not intrinsically a cross-border issue. Several entities without cross-border exposure are subject to low effective tax rates just because they are entitled to a (subjective or objective) exemption or an incentive. It may also be the case of market conditions, such as losses. Furthermore, and regardless of what constitutes the “vast majority of cases”, it can be concluded that there will always be a substantial number of cases of entities without cross-border exposure that will be subject to low effective tax rates. Thus, and in conclusion, domestic companies would also be effectively targeted, removing any suspicion of de facto discrimination.

It is true that this solution reshapes the intended outcome of the GloBE initiative, which will no longer be targeted at cross-border profit shifting. However, such reshaping would not deprive this initiative of achieving – and achieving in its entirety – the goals towards which it was created.

5. Compatibility of the GloBE Rules with EU Secondary Law

5.1. Introduction

The previous section examined the compatibility with EU primary law (which was done also under the assumption that primary law would not be amended solely for the purposes of allowing the implementation of GloBE. The analysis done in this section is naturally different, as secondary law can be more easily amended. In fact, one assumes that by adhering to GloBE, Member States implicitly express their willingness to amend secondary law instruments that are incompatible with that initiative. Therefore, not only the issues of compatibility must be taken into account but also the ways in which secondary law can be amended in order to allow for GloBE measures to be applied.113

One possibility would be to adopt a rule, through secondary EU law, determining that the GloBE measures prevail over EU secondary rules. In the author’s view, this is not advisable since (i) it would lead to uncertainty as to the cases of conflict; (ii) relations between these two sets of rules can go beyond situations of hierarchy.

In the author’s view, secondary law instruments need to be explicitly amended. Amendments must be formulated in a way that does not allow any room for Member States, in the implementation of the amendments, to introduce rules capable of jeopardizing the application of the EU directives beyond what is needed for the achievement of the GloBE goals.

The goal of this section is not to offer a complete review of all the provisions that would require amendment but merely to identify the main issues that need to be resolved in the implementation of GloBE. As a result, the scope of this paper excludes both the adminis-

113. For the purposes of this section, the author assumes that all EU Member States accept to be part of GloBE and to implement their provisions, even if they require an override of secondary EU law.
trative cooperation directives\textsuperscript{114} and the dispute resolution directive\textsuperscript{115} since their regime is unlikely to be affected by the GloBE rules. For the purposes of this section, all other (non-mentioned) requirements of these directives are considered to be met.

5.2. ATAD

In general, the application of anti-avoidance rules (being special anti-avoidance rules, targeted anti-avoidance rules or general anti-avoidance rules) may lead to an increase of the tax burden. Therefore, and from a mere logical perspective, anti-avoidance rules have to be applied before the GloBE rules.

For example, the GloBE income inclusion rule may only be applied after the application of the ATAD’s controlled foreign corporation rules.\textsuperscript{116} Moreover, the Commission should be careful in the design to avoid that the overlap does not result in double taxation.\textsuperscript{117} Another example is the undertaxed payments rule which needs to be preceded by the ATAD’s interest limitation rule\textsuperscript{118} and requires further alignment with that rule.

This logical precedence is also aligned with the idea of a minimum level of protection to be achieved by the ATAD rules.\textsuperscript{119} GloBE appears to be the initiative of states that have decided to go beyond the ATAD, aiming at “safeguarding a higher level of protection for domestic corporate tax bases”.\textsuperscript{120}

It should be stressed that the application of the GloBE rules themselves continues to be subject to the general anti-avoidance rules. In other words, the logical precedence of ATAD does not allow taxpayers to adopt abusive practices aimed at circumventing the application of the GloBE rules.

5.3. Merger Directive

The Merger Directive\textsuperscript{121} requires that the passive and active elements of the company ceasing to exist must be transferred to the company that keeps existing in accordance to their book value.\textsuperscript{122}

It remains uncertain how the tax base is going to be assessed for the purposes of GloBE, but likely it will be global, based on the IFRS. That being the case, there may be a mismatch between the Merger Directive tax base (which requires a transition of the active and passive


\textsuperscript{116} Arts. 7 and 8 ATAD.

\textsuperscript{117} Arnold, supra n. 33, at sec. 6.3.2.

\textsuperscript{118} Art. 4 ATAD.

\textsuperscript{119} Id., at art. 3.

\textsuperscript{120} Id., at art. 3.

\textsuperscript{121} Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, pp. 34-46 (25 Nov. 2009) [hereinafter Merger Directive].

\textsuperscript{122} Id., at arts. 4(3) and 4(4).
elements from one company to the other at book value) versus the GloBE/IFRS tax value (which would require a fair market value consideration of those assets).

In case the European Union wants to avoid this mismatch, it should ensure inclusion of a carve-out or a specification for this situation in the GloBE proposal.

### 5.4. Parent-Subsidiary Directive

From a source state perspective, the Parent-Subsidiary Directive\(^{123}\) may clash with the undertaxed payments rule, insofar as it requires the application of a withholding tax to payments made to parents entities subject to an effective tax rate below the defined minimum. The Directive should be altered to allow the application of withholding tax in those cases.

Additionally, from a source state perspective, the Parent-Subsidiary Directive may be inconsistent with GloBE as regards the subject-to-tax clause. It is true that both instruments have embedded a subject-to-tax clause. However, whereas the Parent-Subsidiary Directive clause applies only to cases of non-taxation, the GloBE one applies also to taxation below the minimum effective tax rate. It is true that this does not lead to a clash since the GloBE clause is restricted to tax treaties and is aimed at limiting access to the benefits of tax treaties. As such, it would not have an impact on the Parent-Subsidiary Directive. However, if the European Union wants to ensure consistency between these two sets of rules, it may establish, as a requirement to access the benefits of the Directive, the need to be taxed above the minimum effective tax rate.

From the parent state perspective, the Parent-Subsidiary Directive requires either exemption of\(^{124}\) or taxation with an indirect foreign tax credit for distributed (i.e. received) profits.\(^{125}\) This may conflict with the income inclusion rule, which requires adding a top-up in case the profits of the subsidiary are taxed below the minimum effective tax rate. A linking rule needs to be added to the Directive providing that the exemption or the foreign ordinary tax credit shall be decreased by the amount required by the GloBE top-up. Regarding the switch-over clause, the consistency will depend on how it is drafted. Provided that it only applies to exemption cases and that it also covers profit distributions, then the Parent-Subsidiary Directive should include a new linking rule, allowing states to move from exemption to credit insofar as the subsidiary is taxed below the defined the minimum effective tax rate. This may be quite complicated for most countries, as the Court requires that there be no discrimination between the methods applied for the elimination of double taxation in domestic distributions and in cross-border distributions. Implementation of this clause in the EU context may require Member States to (again) revisit their methods for relieving economic double taxation between associated enterprises, ensuring that the end result of the domestic method is equivalent to the result following the application of the Directive’s (GloBE-induced) indirect foreign tax credit method. This, for many countries, will likely be impossible to effect unless the cross-border situation is also rolled out for domestic situations.

---

124. Id., at art. 4(1)(a).
125. Id., at art. 4(1)(b).
5.5. **Interest and Royalties Directive**

Assessed from the source state perspective, the GloBE’s undertaxed payments rule may hinder the possibility of deducting the amount paid as interest or royalties. In substance, this is not that much different from the application of the interest limitation rule of the ATAD, which also sets constraints for interest deductibility. Accordingly, the Interest and Royalties Directive\(^{126}\) rules should be altered.

With regard to the subject-to-tax clause, the considerations explained above also apply – mutatis mutandis – to the Interest and Royalties Directive.

From a parent state perspective, there is no need to amend the rules since the Interest and Royalties Directive does not restrict these states’ taxing powers.

5.6. **Proposal for the adoption of a DST and a significant economic presence PE**

Even though all the proposals appear in the framework of the discussion on the taxation of the increasingly digitalized economy, they pursue different goals. One the one hand, the DST and the significant economic presence proposals aim at creating a new nexus for the allocation of taxing rights between jurisdictions. GloBE is about the "development of a co-ordinated set of rules to address ongoing risks from structures that allow MNEs to shift profit to jurisdictions where they are subject to no or very low taxation".\(^ {127}\) Also in this case, there seems to be a logical precedence of the EU’s proposal over GloBE. The new nexus may lead to an increase (and, in some cases, a decrease) of the ultimate tax burden of entities. The GloBE final assessment can only take place once each state applies its domestic rules insofar as it may, taking into account the applicable allocation rules.

5.7. **Proposal for the adoption of a common consolidated corporate tax base**

The GloBE initiative was designed for state-based independent tax systems. It does not take into account the introduction of regional corporate tax systems based on apportionment, such as the common consolidated corporate tax base proposal (hereinafter CCCTB).\(^ {128}\) Therefore, consistency between the two initiatives needs to be ensured.

Firstly, it needs to be taken into account that a CCCTB is not mandatory for all EU corporate tax subjects. Therefore, its adoption will not remove the need to apply GloBE to all entities that are not subject to its regime.

Secondly, as regards entities covered by the regime, the consolidation will prevent the application of the separate-entity or the separate-jurisdiction approach to those entities. Therefore, the GloBE project should immediately include a specific clause providing that, in those cases, the sole entity to be considered for the purposes of its rules is the (parent) company in which the consolidation takes place.

---


127. GloBE Proposal (2019), at p. 3 (Background).

GloBE and EU Law: Assessing the Compatibility of the OECD’s Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market

In the author’s view, this specification does not hinder the effectiveness of GloBE. On the one hand, the outcome is not much different from what happens in federal tax systems. On the other hand, the CCCTB reduces (if not eliminates) the possibility of profit shifting within the European Union.

Thirdly, due consideration needs to be granted to the incentives proposed by the CCCTB as its application may lead to the application of an effective tax rate below the minimum effective tax rate. The European Union can: (i) accept the application of the GloBE rules to these companies; (ii) redesign benefits in a way that makes it less likely for covered entities to fall below the minimum rate; or (iii) negotiate a carve-out for all cases falling below the minimum rate as a consequence of those benefits (but only insofar as it is a consequence of those incentives).

6. Implementing GloBE through Secondary EU Law
6.1. Introduction and admissibility of EU secondary law in this field

The previous sections took into account the issues created through the implementation of GloBE via domestic and tax treaty rules. In this section, the issues arising from the implementation of the GloBE proposal through a binding act of the European institutions, namely a directive, are considered.

Regardless of the type, and as happens with any EU law act, such a directive would need to be compliant with the requirements of subsidiarity and proportionality for the measure to be considered admissible.

Proportionality is easily met insofar as the measures are not comprehensive but limit themselves to the surgical changes need to achieve the goal. It is quite challenging to think of less restrictive measures that would be adequate to achieve the goal effectively.

Some authors consider that an EU measure implementing GloBE would infringe the subsidiarity requirement. However, the Franco-German statement referring to both taxing the digital economy and minimum corporate taxation clearly called for an “international solution” to be “agreed and subsequently translated in EU law before 1st January 2021”.

Compliance with subsidiarity needs to be assessed, taking into consideration the underlying goal for that (at this stage merely hypothetical) legislative act. According to the settled

129. As it would allow the European Union to apply GloBE rules in the reverse scenario, i.e. in all these cases where the effective tax rate falls below the minimum even if this is the consequence of substance-based or other legitimate systems or incentives. Assuming that those situations are more frequent outside of the European Union than inside, this may be beneficial for the European Union.
130. Art. 288(3) TFEU. The Commission’s position has always been to adopt Directives, and not regulations for proposals on tax harmonization, under arts. 113 and 115. On this point, see the answer by the previous Commissionaire Pierre Moscovici (on behalf of the European Commission) to a question of a Member of the European Parliament on 27 June 2019, question reference E-001797/2019.
132. Art. 5(4) of the TEU.
133. Regarding the impact of these requirements in direct taxation, see Nogueira, supra n. 74, at sec. 4.5.1.
134. In this sense, see De Broe, supra n. 93, at footnote 5, who states that this would be an area which “belongs to the exclusive competence of the Member States”.
135. See the Franco-German joint declaration, supra n. 4.
The Commission could, firstly, argue the need of preventing a certain level of tax competition among the EU Member States (claiming that when effective tax rates lower a certain reasonable threshold, tax competition is harmful and should be eliminated). Secondly, it could also invoke the need to redefine the allocation rules for corporate taxes among the Member States (claiming that it was creating new allocation rules or new requirements for those allocation rules, which would operate side-by-side with the current OECD-shaped allocation rules).

Furthermore, pursuance of these goals by uncoordinated Member States’ actions could leave room for disparities which would hamper their achievement and would create new obstacles for the internal market. Thus, it seems that an EU-level initiative would allow a better fulfilment of the underlying goals.

Finally, one should note that, in direct tax matters, the Commission does not seem to be very demanding in justifying fulfilment of subsidiarity. In the recent proposal for the introduction of a DST, it considered the subsidiarity requirement to be met whenever “it is not possible for Member States to address the problem without hampering the single market” to be sufficient.

6.2. Assessing compatibility of an EU law instrument with primary law

The implementation of GloBE through an EU instrument would decrease the chances of it being declared as incompatible with EU law by the Court.

The mere fact that the rules are incorporated in an EU law instrument does not exempt them from the Court’s review. According to article 19(3) of the Treaty on the Functioning of the European Union, the Court is competent to review these acts. Article 263 of the TFEU

136. For the Court, "according to settled case-law, the statement of reasons required by Article 296(2) TFEU, must be appropriate to the measure at issue and disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296(2) TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question". LU: ECJ, 24 Sept. 2019, Cases T-755/15 and T-759/15, Luxembourg v. Commission (Fiat Finance), ECLI:EU:T:2019:670, para. 178.

137. According to the Court "the principle of subsidiarity, set out in Article 5(3) TEU, provides that, in areas which do not fall within its exclusive competence, the European Union is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level”. see NL: ECJ, 6 June 2019, Case C-264/18, P.M. and Others v. Ministerraad, para. 20, ECLI:EU:C:2019:472.


clarifies the criteria for the revision of the acts.140 Thus, it is clear that the CJEU can ascer-
tain the compatibility of an act of an EU institution with both primary and secondary EU
law. However, when doing so, the Court tends to apply a more lenient standard of scrutiny
or review.

The Court considers that a state that “has done no more than maintain in force national
rules adopted on the basis of [a directive] and which comply with that provision, has not
failed to fulfil its obligations under community law”.141 Moreover, the Court considers that
– as a rule – all the Commission’s acts are compliant with EU law, apart from extreme cases
where there is a blatant infringement of EU law.142

The review of the Court is often limited to a process-oriented review.143 Under this approach,
the Court considers that it should not second-guess the policy options of the EU institu-
tions or to enter “into the realm of politics” as its action should be focused on “reviewing
the different procedural steps taken by the EU political institutions when adopting an act
of general application”.144 According to Lenaerts, “[w]hile ‘process review’ shows due de-
ference to the expertise and higher institutional capacities of policy makers, it may be the
only way of judicially enforcing principles that have a clear political nature, such as the
principle of subsidiarity”.145 Thus, it is the preferred approach for assessing compatibility
with primary EU law.

6.3. Assessing compatibility of an EU law instrument with the EU Charter of
Fundamental Rights

Since Internationale Handelsgesellschaft,146 the Court has frequently stated that:
respect for fundamental rights forms an integral part of the general principles of law protected
by the Court of Justice. The protection of such rights, whilst inspired by the constitutional tra-
ditions common to the Member States, must be ensured within the framework of the structure
and objectives of the Community.

The adoption of the EU Charter of Fundamental Rights147 has enhanced this protection. In
this section, account is taken both of the situation in which GloBE is applied through an EU
law instrument148 or otherwise triggers the application of the Charter.149

140. Comprising “lack of competence, infringement of an essential procedural requirement, infringement of
the Treaties or of any rule of law relating to their application, or misuse of powers”. Art. 263 TFEU.
24, Case Law IBFD.
143. See D. Harvey, Towards Process-Oriented Proportionality Review in The European Union, 23 European
Public Law 1, pp. 93-121 (2017).
144. K. Lenaerts, The European Court of Justice and Process-oriented Review, College of Europe, European
Legal Studies, Research paper in Law 01/2012, available at http://aei.pitt.edu/39282/1/researchpaper_1_
2012_lenaerts_final.pdf.
145. Id., at sec. IV.
für Getreide und Futtermittel, para. 4, Case Law IBFD.
148. Cases in which due consideration should be made of the provisions of the Charter, according to art. 51
TFEU [hereinafter EU Charter].
149. As otherwise, the issue of compatibility with the EU Charter would be outside the scope of this article.
From a procedural perspective, one could raise the issue of the right to be heard, in cases where the GloBE measure is applied in a state different than the one where the company with the low effective tax rate is located. However, there is no report of domestic EU Member State legislation that precludes effective application of said right. From a substantive perspective, one could also raise the issue of legal certainty. According to the Court, this requires that "rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings". A rule is not admissible if it is "framed in such terms [that it] does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability". Even though we need to know a bit more about the modus operandi of GloBE, no rule will be admissible insofar as it does not set straightforward ways of calculating the tax burden in the other State, and clear forms of computing the amount that needs to be computed in the Member State applying GloBE. If the rules in what concerns the tax base or the blending are not designed in such a way that allows for an unambiguous determination, there may be issues at this level. It is the hope of this author that the final design will include clear rules on the determination of those aspects.

In the author’s view, the right to property is not at stake insofar as the effective minimum rate is considerably low, and insofar as the reaction is limited to what is needed to ensure collection of the minimum tax.

After a careful review of all of the relevant provisions of the Charter, only two (described above) could raise some concerns. And, as explained, those provisions would not lead to issues of compatibility with EU law.

7. Implementing GloBE through a Multilateral Treaty

The assessment of the compatibility becomes more complicated if one considers an implementation through a multilateral treaty. This issue is to be solved by public international law and, in particular, by the principles enshrined in the Vienna Convention on the Law of Treaties.

One option would be having the European Union as the signatory of said treaty. That being the case, and in case of incompatibility, the provisions of said multilateral treaty would override the provisions of EU law.

For treaties signed by the Member States, one has to distinguish between (i) a multilateral treaty signed by all EU Member States, and (ii) a multilateral treaty signed by only some of the Member States. In the first scenario, the answer would be similar to the one of the previous paragraph: in cases of incompatibility, the provisions of the multilateral treaty

151. BE: ECJ, 5 July 2012, Case C-318/10, Société d’investissement pour l’agriculture tropicale SA (SIAT) v. État Belge, para. 58, Case Law IBFD.
152. Id., para.57.
154. At least lower or at the level of the effective tax rates of the country applying the measure.
156. Although it is quite questionable whether the European Union would have competencies to sign such an agreement.
157. Art. 41 VCLT.
would prevail. In the second scenario, given the different view of Member States, EU treaties would prevail. As the Court stated in Open Skies:158

Community’s tasks and the objectives of the Treaty would be compromised if the Member States were able to enter into international commitments containing rules capable of affecting rules adopted by the Community or of altering their scope.159

8. Conclusions

Assessing the compatibility of any proposal without knowing its final details is undoubtedly a cumbersome task. However, it is also vital since the research is made available at a moment in which it is still able to influence later drafts of the initiative positively.

This research has identified several issues of compatibility of the GloBE rules with both primary law and secondary law, in case the initiative is implemented via domestic and tax treaty law.

In what concerns EU primary law, several measures will lead to restrictions to either the freedom of establishment or the free movement of capital. The income inclusion rule restricts by differentiating companies based on where their subsidiaries and PEs are located (in the same or in a different Member State). The undertaxed payments rule restricts by asymmetrically applying a withholding tax to payments to non-residents (whereas similar payments to residents are not taxed) and also by denying deductions in payments to non-residents (whereas similar payments to residents are not subject to said denial). One cannot be sure that the Court will consider whether those restrictions are issued under a valid justification.

In the author’s view, the most efficient way to eliminate all these hurdles would be to extend the GloBE measures to domestic situations. Even though such extension would be outside the original rationale of GloBE, it may produce some positive spill-overs such as the equalization of competition conditions between companies operating domestically and those operating in a cross-border scenario.

Concerning EU secondary law, and in case the policy decision is to align directives with GloBE, this paper has identified several features that require amendment. For ATAD, it should be clarified that its rules have to be applied before GloBE as they may lead to an increase in the tax burden that needs to be taken into account when computing an entity’s effective taxation. Amendments are also needed for existing proposals, such as the DST, the significant economic presence PE and the CCCTB.

The Member States are also free to implement GloBE through an instrument of secondary law. In the author’s view, this is not only possible but even preferable, since it would ensure a harmonized implementation of the initiative within the internal market. Such implementation could even be accompanied by a list of required amendments to the existing direct tax directives.

---

159. Id., para.125.
Finally, implementation could take place through a multilateral treaty which includes all Member States as parties. The relationship between GloBE and EU law would become an issue of public international law and of the interpretation of those two treaties.

In the author’s view, the preferred option would be to extend the application of GloBE to also include purely domestic situations since it would not create differences in the tax treatment of domestic and cross-border operating companies, reducing the risk of domestic protectionism and of distortion of competition between similar companies.

Regardless of the way it is implemented, this research has shown that it is crucial to introduce – as soon as possible – the EU dimension into the discussion. Even if all published documents mention the need to comply with EU law, it is not clear that the discussions on the design have taken into account the different requirements flowing from primary and secondary law. Requirements which, as pointed out in this article, may entail a thoughtful revision of the proposal and even of its rationale.

Given the amount of coordination required (e.g. to define the minimum tax rate and the thresholds), it may be the case that no agreement is reached at the OECD/G20 level. That being the case, and even if it is not yet (at least apparently) on its agenda, the Commission could consider introducing it, autonomously, at the EU level. Such introduction may be beneficial, firstly, as it would reduce the range of admissible tax disparities between the corporate tax systems of Member States, decreasing the distortion of competition between companies and the so-called “tax dumping” which some EU Member States engage in by offering tax regimes that mostly distort intra-EU competition. Secondly, it would put an end to the “race to the bottom” in terms of corporate tax rates. Thirdly, it would pave the way for further EU measures, such as the common (consolidated) corporate tax base. Fourthly, it would further enhance the level of protection of the internal market against base erosion and profit shifting strategies. Finally, a successful EU-wide implementation would cause other countries to reconsider their position and, eventually, reach a global consensus for the adoption of this initiative.

160. The European Union could also consider a staged roll-out (insofar as treaty changes are needed) in the relations with third countries. This could be done through the adoption of a recommendation with treaty provisions that are required to be amended in order to allow application of GloBE measures in the relations with third countries. Those provisions would be introduced whenever existing treaties are to be amended or new ones are signed. However, this approach has several shortcomings. First, the bilateral adoption of the EU GloBE (even if under strict reciprocity) between a Member State and a third country could lead to an adjustment of the transactions and could lead to stakeholders routing the investments through a non-GloBE EU Member State. Second, the multilateral adoption of the EU GloBE (i.e. by all EU Member States in the relations with a specific third country) could also lead to an adjustment of the investments, with stakeholders routing their investments through a non-GloBE third country.