DEBATE

Is There A Need for A Directive on Pillar Two?

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A legally binding link for a simultaneous implementation of Pillars One and Two in the European Union (EU), as requested by one Member State, has not been accepted by the French Presidency. The author contends that a legal link between the Directive on Pillar Two and international developments is not incompatible with European sovereignty. This is so, for several reasons: (1) the competence for implementing the minimum tax foreseen by Pillar Two is not exclusive to the EU; (2) the principle of primacy would not impede the EU harmonization on Pillar Two being made dependent upon the evolution of the international agreements on the topic; (3) taking into account the developments of Pillar Two and the contents of the proposal for a Directive, it is dubious that a Directive is necessary for fulfilling the requirements of the internal market; (4) the interaction among all the instruments, exceptions, deferrals, and options foreseen in the model rules, in the original Proposal and the concessions made lead to multiple regimes. The latter can be achieved by the national transposition of the model rules.

Keywords: Pillar Two Directive, principle of autonomy, principle of primacy, European sovereignty, EU legal order, international tax agreement, treaty override, EU external relations, EU competence, subsidiarity, proportionality

I Introduction

The European Union (EU) had committed to being at the forefront of the implementation of the global tax reform agreement on Pillar Two reached by 137 of the 141 countries in the OECD/G20 Inclusive Framework.[1] This commitment was translated in the European Commission's Proposal for a directive on the implementation of the OECD/G20's Pillar Two Global Anti-Base Erosion (GloBE) rules (the Proposal) that was issued on 22 December 2022,[2] two days after the OECD publication of the Pillar Two Model rules.[3]

Contrary to the expectations raised by the French Presidency of the EU, the required unanimity for the approval of the EU minimum tax for multinationals has thus far not been achieved.[4]

Estonia and Malta expressed concerns related to the administrative costs raised by the implementation of the income inclusion rule (IIR); Sweden requested more time to discuss the Proposal; and Poland (still) requires a legally binding link for a simultaneous implementation of Pillars One and Two.[5]

Notes

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1 'Today, the European Commission has proposed a Directive ensuring a minimum effective tax rate for the global activities of large multinational groups. The proposal delivers on the EU's pledge to move extremely swiftly and be among the first to implement the recent historic global tax reform agreement … , which aims to bring fairness, transparency and stability to the international corporate tax framework.Today's proposal follows closely the international agreement and sets out how the principles of the 15% effective tax rate – agreed by 137 countries – will be applied in practice within the EU. It includes a common set of rules on how to calculate this effective tax rate, so that it is properly and consistently applied across the EU': *Fair Taxation: Commission Proposes Swift Transposition of the International Agreement on Minimum Taxation of Multinationals*, Press Release (22 Dec. 2021), Brussels, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7028(accessed 2 May 2022). *See also Members of the OECD/G20 Inclusive Framework on BEPS joining the Oct. 2021 Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy as of 4 November 2021*, https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-members-joining-statement-on-two-pillar-solution-to-address-tax-challenges-arising-from-digitalisation-october-2021.pdf. *OECD/G20 Base Erosion and Profit Shifting Project Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (8 Oct. 2021)*, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf; *Press Background Brief*, Economic and Financial Affairs Council Brussels, Council of the European Union, 3–4 (18 Jan. 2022), https://www.consilium.europa.eu/media/53786/background-brief-ecofin-220114_en.pdf.

2 Proposal for a Council Directive on Ensuring a Global Minimum Level of Taxation for Multinational Groups in the Union, Brussels, 22 Dec. 2021 COM(2021) 823 Final, at 8, https://ec.europa.eu/taxation_customs/system/files/2021-12/COM_2021_823_1_EN_ACT_part1_v11.pdf (accessed 2 May 2022).

3 OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* 7 (Paris: OECD 2021), https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-theeconomy-global-anti-baseerosion-model-rules-pillar-two.htm (accessed 2 May 2022).

4 Frederik Boulogne, BDO, *Ecofin Meeting on Pillar 2 – No Consensus on Amended Directive* (17 Mar. 2022), https://www.bdo.nl/en-gb/insights/ecofin-meeting-on-pillar-2-%E2%80%93-no-consensus-on-amended-directive (accessed 2 May 2022); János Ammann, *Half-time for the French Presidency*, Euroactiv.com, https://www.euractiv.com/section/economy-jobs/news/half-time-for-the-french-presidency/ (accessed 2 May 2022).

5 Boulogne, *supra* n. 4.

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Amended versions of the Proposal were discussed in the EU Economic and Financial Affairs Council (ECOFIN) on 15 March[6] and 5 April.[7] Concessions were introduced, and they refer to:

(1) the extension of deadlines for Member States to implement the Directive, specifically, a maximum period of six years after the transposition deadline of 31 December 2023; and
(2) the possibility for Member States to temporarily not apply the IIRs and the undertaxed payment rule (UTPR) (Member States where no more than twelve ultimate parent entities of in-scope groups are located can opt to not to apply them until 31 December 2029).[8] Nevertheless, other Member States and third country jurisdictions will be allowed to apply the GloBE rules.[9]

Taking into account the concessions to the initial proposal that were mentioned previously, Estonia, Malta, and Sweden withdrew their objections in the 5 April 2022 ECOFIN meeting.

However, the legally binding link for a simultaneous implementation of Pillars One and Two as requested by Poland has not been accepted by the French Presidency.[10] The latter 'maintains its proposal that the agreement on the EU Minimum Tax Directive should be accompanied by a Council statement confirming the Council's full commitment to the successful accomplishment of the OECD's Pillar One solution within the agreed timeline'.[11]

According to the French Minister of Finance, 'EU law does not allow making the EU minimum tax directive contingent on the entry into force of the multilateral convention implementing Pillar One – an international instrument, as this would undermine European sovereignty'.[12] Contrary to this position, this author contends that a legal link between the Directive and international developments is not incompatible with European sovereignty for several reasons.

First, the competence for implementing the minimum tax is not exclusive to the EU: it is not exclusive before the approval of the Directive; and is not exclusive after the approval of the Directive in respect of any complementary aspects that may be ruled by the Member States.

Second, the principle of primacy would not impede the EU harmonization on Pillar Two being made dependent upon the evolution of the international agreements on the topic.

Third, taking into account the developments of Pillar Two and the contents of the proposal for a Directive, this author also contends that it is dubious that a Directive is necessary for fulfilling the requirements of the internal market (Article 115 Treaty on the Functioning of the European Union (TFEU)). Stating it differently, it is questionable that national legislation implementing Pillar Two and adhering to the G20/OECD model rules and the TFEU fundamental freedoms will 'directly affect the establishment or functioning of the internal market' and therefore require a Directive. In order to comply with the internal market principles and rules, it is sufficient that Member States implement model rules in a nondiscriminatory manner.

Fourth, the interaction among the GloBE rules and the qualified domestic top up tax, exceptions, deferrals, and options foreseen in the model rules, in the original Proposal and the concessions made do not actually introduce an internal market regime. Instead, they propose

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6 ECOFIN, *NOTE From: Permanent Representatives Committee (Part 2) To: Council Subject: Directive on Ensuring a Global Minimum Level of Taxation for Multinational Groups in the Union General Approach*, Brussels, 4–7 (12 Mar. 2022) (OR. fr) 6976/22 FISC 62 ECOFIN 200, https://data.consilium.europa.eu/doc/document/ST-6976-2022-INIT/en/pdf (accessed 2 May 2022); *Ibid.*

7 https://video.consilium.europa.eu/event/en/25656 (accessed 2 May 2022).

8 ECOFIN, *Note From: Permanent Representatives Committee (Part 2) To: Council Subject: Directive on Ensuring a Global Minimum Level of Taxation for Multinational Groups in the Union General Approach*, Brussels (2 Apr. 2022) (OR. fr) 7709/22 FISC 86 ECOFIN 284, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_7709_2022_INIT&from=EN: '8. At the Ecofin Council meeting on 15 March 2022, most Member States were able to support the compromise text proposed by the French Presidency. Two Member States called for an adjustment of the parameters of the optional transitional derogation provided for in Article 47a of the Directive. One Member State indicated that it could not give its consent without a legal link with the entry into force of Pillar One, and one Member State maintained a parliamentary scrutiny reservation. 9. Taking account of these discussions, the Presidency circulated a new compromise text on 28 March (ST 7495/22) which adjusts the optional transitional derogation arrangements, extending the time frame for applying the derogation to six years and increasing the maximum number of parent entities in a Member State in order to qualify for the derogation to twelve. 10. At the meeting of the Permanent Representatives Committee on 30 March, the Member States confirmed their support for the French Presidency's compromise text, with the exception of one Member State which maintained its position on the link between Pillar One and Pillar Two, and another Member State (which intends to choose the option provided for in Article 47a) which requested further clarification on the transposition of the Directive'.

9 ECOFIN, NOTE From: Presidency To: Permanent Representatives Committee/Council, *Draft Council Directive on Ensuring a Global Minimum Level of Taxation for Multinational Groups in the Union-Presidency Compromise Text*, Brussels (28 Mar. 2022) (OR. en) 7495/22 LIMITE FISC 82 ECOFIN 259; Euro Tax Flash from KPMG's EU Tax Centre, *Revised Proposal for an EU Minimum Tax Directive: No Agreement in April 5 ECOFIN Council,* e.g., recital 22 and Art. 47a, https://assets.kpmg/content/dam/kpmg/xx/pdf/2022/04/etf-470-revised-proposal-for-an-eu-minimum-tax-directive.pdf (accessed 2 May 2022).

10 ECOFIN, *Note From: Permanent Representatives Committee*, *supra* n. 6: '(a) Link between Pillar Two and Pillar One 11. The OECD/G20 Statement of 8 October 2021 is based on two separate pillars, with different arrangements for implementation in accordance with the detailed implementation plan also approved by the Inclusive Framework. At the start of negotiations on the proposal for a Directive, several Member States requested that the entry into force of the two pillars be linked by making the entry into force of Pillar Two contingent on the entry into force of the multilateral convention implementing Pillar One. 12. The Presidency would point out that the Commission and the Council Legal Service have confirmed the legal difficulties involved in the request, still maintained by one Member State, to link the entry into force of the two pillars by making the entry into force of Pillar Two contingent on the entry into force of the multilateral convention implementing Pillar One. In addition, this request is not acceptable to the majority of the Member States'.

11 Euro Tax Flash from KPMG's EU Tax Centre, *supra* n. 9; Economic and Financial Affairs Council, Press conference, Tuesday, 5 Apr. 2022–13:27, https://video.consilium.europa.eu/event/en/25656 (accessed 2 May 2022).

12 Euro Tax Flash from KPMG's EU Tax Centre, *supra* n. 9, https://video.consilium.europa.eu/event/en/25656: 13:35, 13:51 (accessed 2 May 2022).

several regimes that can be achieved by the national transposition of the model rules.

In conclusion, taking into account that the Proposal is as flexible as the model rules, the following argument in the Explanatory Memorandum of the Proposal (page 4) is not valid:

> Action at EU level is necessary, as it is imperative to ensure a uniform implementation of the OECD Model Rules in the EU. Firstly, the OECD Model Rules are "a common approach", so it would be important to have one set of uniform rules and a common minimum level of protection in the internal market. In the EU, a market of highly integrated economies, there is a need for common strategic approaches and coordinated action, to improve the functioning of the internal market and maximise the positive impact of minimum effective taxation of business profits. This can only be achieved if legislation is enacted centrally and transposed in a uniform fashion.

This analysis presupposes that all Member States would implement the GloBE rules unilaterally or at least the Qualified Domestic Top-Up tax (QDMTT). It also acknowledges that a Directive implementing Pillar Two could be the beginning for further desirable corporate income tax harmonization in the Union that would go beyond Pillar Two. It further acknowledges that a Directive would have the advantage of a uniform interpretation of Pillar Two rules by the Court of Justice of the European Union (CJEU). Such a uniform interpretation, especially in the case of accounting rules and the International Financial Reporting Standards (IFRS), could be a meaningful advantage for the taxpayers in the absence of an international efficient dispute resolution mechanism.

2 The meaning of European sovereignty and the scope of the EU exclusive powers vs the principle of subsidiarity

The reference to European sovereignty in this context is challenging because it calls upon a complex interplay between sovereignty, EU exclusive competences, subsidiarity, and primacy. As such, the concept of European sovereignty is not found in the treaties, however, it can be traced back to the constitutionalization of European law that departs from an understanding of EU law as an autonomous legal order.[13]

Its construction has been founded on the jurisprudential principles of direct effect and primacy, implied competences, state liability, and the idea that the EU is guided by the rule of law. EU law claims to be complete and valid (independent normative claim).[14]

European sovereignty has not only been pledged in respect of the relationship among Member States but also for the relationship between Member States and third countries. The construction of the internal market in the EU territory also requires competences in some cases for concluding international treaties.[15]

According to Article 3 (2) TFEU, 'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'.

Thus, a legally binding link for the simultaneous implementation of Pillars One and Two would only be contrary to European sovereignty if the following conditions would be satisfied:

If the competence on Pillar Two were, a priori, exclusive to the Union; and if a Directive – once approved – would not only exhaust all aspects related to Pillar Two but also detach it from the initial international reasons that justified a relationship between the two pillars.

However, taking into account the principle of subsidiarity in tax harmonization (resulting from Article 115 TFEU) before the approval of the Directive, there is no EU exclusive competence on the introduction and implementation of a minimum tax regime.

Moreover, Pillars One and Two constitute an international initiative that includes but also goes beyond the EU Member States and therefore requires international coordination in order to be successful. Thus, a binding link between EU law and international law does not weaken the autonomy of the former. The EU, via the enactment of a Directive on Pillar Two, appears as one jurisdiction in the international legal order. It could claim that the approval of its regime would only come into force as long as the other states and jurisdictions commit to the announced measures (such as an agreement on Pillar 1).

It is not herein discussed whether requiring a link between Pillars 2 and 1 is adequate. It would probably

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[13] *See* e.g., Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in *Sovereignty in Transition* 502–537 (Neil Walker ed., Hart Publishing 2003); Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, European Journal of Legal Studies, 2 (2007); *WP IE Law School, WPLS08-02*, https://cadmus.eui.eu/bitstream/handle/1814/7707/EJLS_2007_1_2_8_POI_EN.pdf?sequence=1&isAllowed=y; Joseph H. H. Weiler, *The Constitution of Europe – 'Do New Clothers Have an Emperor', and Other Essays on European Integration* (Cambridge University Press 1999); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 Am. J. Comp. L. 205 (1990). Federico F. Mancini, *The Making of a Constitution for Europe*, 26(8) CMLR 595–614 (1989).

[14] Maduro, *Interpreting European Law*, *supra* n. 13, at 3.

[15] Paul Craig & Gráinne de Búrca, *EU Law, Text, Cases and Materials* 112 et seq. (7th ed., Oxford University Press 2020).

be more sufficient to link the entry into force of the Directive on Pillar Two to that of Pillar Two in a minimum number of states and jurisdictions similar to the entry into force of multilateral treaties.[16]

The point is that, from the perspective of EU sovereignty, a link between a Directive and an international commitment or multilateral treaty is not contrary to EU autonomy as a legal order.

3 THE PRINCIPLE OF PRIMACY

It can also be discussed whether and to what extent the European sovereignty argument contains an implicit reference to the principle of primacy of EU Law, originally stated by the European Court of Justice in the Costa/ENEL case.[17]

The principle of primacy of EU law initially took national laws and EU law as parameters. The primacy of EU law was required to assure a uniform application of EU law in the common market and a condition for the implementation of the common market itself. EU law could not be overridden by national laws without jeopardizing the objectives of the treaties and the prohibition of discrimination.

In any case, there is a reference in Costa/ENEL to the EU 'capacity of representation on the international plane' which means that any international agreement binding the Union cannot be overridden by national action.

According to the Court in that case:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.[18]
>
> …
>
> It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[19]

The principle of primacy is also part of Declaration 17 introduced in the TFEU:

> 17. Declaration concerning primacy
>
> The Conference recalls that, in accordance with well settled case law of the CJEU, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):
>
> 'Opinion of the Council Legal Service of 22 June 2007
>
> It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 (…)) there was no mention of primacy in the treaty. It is still the case today.

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[16] *See* Art. 34 of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*:
'Entry into Force 1. This Convention shall enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit of the fifth instrument of ratification, acceptance or approval. 2. For each Signatory ratifying, accepting, or approving this Convention after the deposit of the fifth instrument of ratification, acceptance or approval, the Convention shall enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by such Signatory of its instrument of ratification, acceptance or approval', https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (accessed 2 May 2022); Rita Szudoczky & Daniel Blum, *Unveiling the MLI: An Analysis of its Nature, Relationship to Covered Tax Agreements and Interpretation in Light of the Obligations of Its Parties*, in *International and EU Tax Multilateralism, Challenges raised by the MLI* 125–160 (Ana Paula Dourado ed., IBFD 2020).

[17] IT: ECJ, 15 Jul. 1964, *Flaminio Costa v. E.N.E.L.*, Case 6-64, ECLI:EU:C:1964:66, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61964CJ0006&from=EN (accessed 2 May 2022); Craig & de Búrca, *supra* n. 15, at 314 et seq., 356 et seq.

[18] ECJ, *Costa v. E.N.E.L.*, *supra* n. 17, at 593.

[19] *Ibid.*, at 594.

> The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

The question of whether it would be possible to include a legal binding link in the Directive between Pillars One and Two is slightly different because it apparently raises an issue of dependency/primacy of EU law (a certain regime approved by a binding EU Law instrument – a Directive) from/over an uncertain future international commitment. It is the opposite situation as those foreseen by the principle of primacy. Primacy presupposed EU law in force and a subsequent national (or international) law that overrides the former.

The introduction in the Directive of a binding link between the two pillars would mean that the efficacy of EU law could be overridden by (made dependent on) an inexistent instrument of international law.

Pillar 1 may be agreed upon via soft law (an international G20/OECD inclusive framework) and implemented with a multilateral treaty.[20] If Member States sign the multilateral treaty and the EU approves another Directive with a slightly different scope, the principle of primacy will apply.

Additionally, the commitment made by the EU concerning the implementation of Pillar Two is, in fact, a commitment by its Member States. As members of the OECD/G20 Inclusive Framework on the Base Erosion and Profit Shifting (BEPS) Project, they joined the October 2021 Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy as of 4 November 2021.[21]

Observing more carefully, however, the legal link requested by one Member State is not only a link between the entry into force of the Directive on a EU Minimum Tax and an international binding instrument. It is, in substance, a request that Pillars One and Two be in force in the EU (and its Member States) so that the allocation of taxing rights is regulated by both regimes.

An agreement concluded by the Union with third countries or international organizations pursuant to Article 216 (aimed at achieving the objectives of the treaties) or 217 (establishing an association involving reciprocal rights and obligations, common action, and special procedure) TFEU in respect of Pillar 1 is not foreseen. Thus, the link between Pillars 2 and 1 does not raise the issue of primacy of an EU international agreement over national law as mentioned in Costa/ENEL.[22]

Furthermore, the request for a link between the two pillars is not related to Article 351 TFEU that deals with international agreements to which the EU is not a contracting party but are binding to the Member States.

The implementation of Pillars One and Two could justify an international agreement between the EU and other parties, however, this does not correspond to the objections raised by Poland.

However, the argument that making the entry into force of a directive dependent from an international agreement, would make EU law dependent from international law, is acceptable. In a broad sense, international law would prevail over EU law.

Nonetheless, expanding the primacy principle in this direction is not advisable. In the context of external legal pluralism, a link between the entry into force of the Directive and the international implementation of Pillar 1 is a solution that is compatible with EU law, its autonomy, and desirable meaning of primacy.

4 Is a Directive on a Minimum Tax on MULTINATIONALS required by Article 115 TFEU?

The idea of an EU directive on Pillar Two is attractive as it would, in principle, bring more certainty to all involved players such as the taxpayers, the tax authorities, and the national courts (also with the possibility to refer cases to the CJEU). Such a directive would play a role similar to the Anti-Tax Avoidance Directive,[23] converting the international recommendations into legislation that would comply with the fundamental freedoms and state aid rules.

For example, the fact that the Member States will only apply IIRs and not UTPRs in the Union brings simplicity and certainty. Moreover, any potential discrimination issues prohibited by the TFEU will be reduced if included in a Directive.[24] This is the case of the application of the minimum tax regime set up with a threshold: i.e., application to multinational enterprises with a combined group turnover of at least EUR 750 million based on consolidated financial statements and the extension of the IIR to large-scale domestic groups (with a combined group turnover of at least EUR 750 million).

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[20] Amount A will be implemented via a multilateral treaty: OECD/G20 Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* 6 (8 Oct. 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf (accessed 2 May 2022).

[21] OECD/G20 Base Erosion and Profit Shifting Project, *supra* n. 20.

[22] ECJ, *Costa v. E.N.E.L.*, *supra* n. 17.

[23] Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19 Jul. 2016, at 1–14, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1164&from=EN (accessed 2 May 2022).

[24] L. de Broe & M. Massant, *Are the OECD/G20 Pillar Two GloBE Rules Compliant With the Fundamental Freedoms?*, 30(3) EC Tax Rev. 86–98 (2021).

However, taking into account the developments of Pillar Two and the contents of the proposal for a Directive, it is dubious that a Directive is necessary for fulfilling the requirements of the internal market requirements (Article 115 TFEU). Stating it differently, it is questionable that national legislation implementing Pillar Two and adhering to the G20/OECD model rules and the TFEU fundamental freedoms will 'directly affect the establishment or functioning of the internal market' and therefore require a Directive.

In fact, as it results from the proposal, in order to comply with the internal market principles and rules, it is sufficient that Member States implement model rules in a non-discriminatory manner. Moreover, the Vodafone and Tesco-Global cases[25] indicate that thresholds being included in national tax legislation is not contrary to the fundamental freedoms.

A different problem is raised by the OECD Pillar Two examples document. According to example 2.1.5-2, Pillar Two rules may also apply to minority holdings in the case of split ownership, i.e., involving third parties:

> Example 2.1.5 - 2 Application of the IIR - POPE 1. This example illustrates the application of the split-ownership rules and the top-down approach under Articles 2.1.4 and 2.1.5 in a situation where two POPEs are required to apply a Qualified IIR with respect to the same LTCE. 2. The facts are the same as Example 2.1.5 - 1, except that: a. 10% of the Ownership Interest in C Co is held directly by third parties; and b. the remaining 90% is still held by B Co.[26]

In this case, an issue involving the free movement of capital could be at stake,[27] and the fact that the regime is approved either by a directive or national law is irrelevant for the purposes of assessing its compatibility with the TFEU.

Finally, as contended in the introduction, the interaction among the GloBE rules and the qualified domestic top up tax, exceptions, deferrals, and options foreseen in the model rules in the original Proposal and the concessions made do not really introduce an internal market regime. Instead, there are several regimes that can be achieved by national transposition of the model rules.

5 Relationship with third countries

This author contended in a previous article that the IIR, the UTPR, the QDMTT, and the Subject-to-tax Rule (STTR) are taxes.[28] If introduced by states, a renegotiation of bilateral tax treaties or a multilateral agreement is required. It can be asked whether their inclusion in a Directive would have a different outcome taking into account the principle of primacy.

Concerning tax treaties among the Member States, the principle of primacy would be applicable, and there would be no need for renegotiation. However, renegotiation of bilateral tax treaties with third states and jurisdictions would be required by Article 351, paragraph 2 of the TFEU.

An international agreement between the EU and the third countries would be advisable in the case that a multilateral convention would not be approved or enter into force.

6 Conclusions

Approval of a Directive in direct tax matters is (always) welcome as an indication of demonstrating cohesion in the EU to the international community and a positive sign to EU and external investors. However, the advantages of approving a Directive on Pillar Two now seem less than initially believed for the following reasons.

The Proposal is very (too) close to the model rules with the disadvantage of being rigid; differences between the Proposal and the model rules only rely on the attempt to eliminate any discrepancies with the fundamental freedoms; there is settled case law on the fundamental freedoms that can guide transposition of the model rules into national law in a manner that is compatible with the TFEU; there are many possible ways of implementing Pillar two and the Directive which means that the latter does not bring harmony to the internal market; the combination of the GloBE rules with the QDMTT and the location of ultimate parent entities, partially-owned parent entities (POPEs), and intermediate entities will lead to multiple outcomes; and the concessions introduced in the latter versions of the Proposal jeopardize the consistency and uniform application of the rules and will not achieve a level playing field.

Notes

[25] HU: ECJ, 3 Mar. 2020, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:139; HU: ECJ, 3 Mar. 2020, Case C-323/18, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:140.

[26] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two) Examples* (Paris: OECD 2022), https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisationof-the-economy-global-anti-base-erosion-model-rules-pillar-two-examples.pdf.

[27] Free movement of capital, because there is no definite influence. *See* the Baars case: NL: ECJ, 13 Apr. 2000, *C. Baars v. Inspecteur der Belastingen Particulieren /Ondernemingen Gorinchem*, Case C-251/98, ECLI:EU:C:2000:205, para. 22: 'So, a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment'.

[28] Ana Paula Dourado, *The Pillar Two Top-Up Taxes: Interplay, Characterization, and Tax Treaties*, 50(5) Intertax 388–395 (2022).