



# Should the EU implement a minimum corporate taxation directive?

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## **Cover letter**

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### **Title:**

Should the EU implement a minimum corporate taxation directive?

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### **Abstract:**

The century old international tax system is in the middle of being rebuilt. Between the hope for a compromise and the fear of a tax war breaking out, this article inquires whether the EU should implement a minimum corporate taxation directive along the lines of the OECD GLOBE proposal. This question has legal and political dimensions. On the one hand, Art. 115 TFEU, which would be the basis for such a directive, demands an EU minimum taxation regime to promote the Internal Market. The article suggests that this may succeed. On the other hand, Art. 115 TFEU requires unanimity in the Council. Thus, and given the heterogeneity of Member States' interests, additional tax policy reasons favouring such a directive are needed. Considering expectable reactions of taxpayers in a competitive environment and taking account of potential developments outside the EU, the author concludes that, overall, the implementation of an EU minimum taxation regime may – especially as a safeguard of origin based taxation – benefit the EU and all of its Member States. With the credible enforceability of minimum taxation rules being key, the author suggests EU action to establish minimum corporate taxation even if all EU Members States support the OECD proposal.

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## Should the EU implement a minimum corporate taxation directive?

### 1. An outdated international tax regime and growing multilateralism

#### 1.1. What is the matter in international taxation?

The international tax system is widely regarded as outdated.<sup>1</sup> Considering the economic and social transformations that have taken place since the cornerstones of the current system was developed in the 1920,<sup>2</sup> this makes intuitive sense. Business models today tend to (radically) differ from business models a century ago.<sup>3</sup> Globalisation, digitalisation and the importance of intangible assets in value creation enable firms to obtain profits in a country without needing to have a physical presence there<sup>4</sup>. In its absence, the source state cannot tax. If, on the other hand, a taxable presence exists, profits can be shifted out of the states where they emerged. Whilst the techniques that can be used in this context differ,<sup>5</sup> it is fair to believe that the increasing relevance of intangible assets can make this process easier.<sup>6</sup> Put more simply: The match between rules and reality seems to decrease.

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<sup>1</sup> See, for political statements, e.g. European Commission, 'A Fair and Efficient Tax System in the European Union for the Digital Single Market' COM (2017) 547, [2017] OJ L78/65, 2, 6; European Parliament, 'Resolution on financial crimes, tax evasion and tax avoidance' (2018/2121, INI, 26 Mar 2019); HM Treasury, 'Corporate tax and the digital economy: position paper' (2017) para 1.4; more passively: IMF, 'Corporate Taxation in the Global Economy' 1 (IMF 2019), which regards the international corporate tax system to be under 'unprecedented stress'; and the academic discussion, eg Y. Brauner and P. Pistone, 'Adapting Current International Taxation to New Business Models: Two Proposals for the European Union', (2017) 71 *Bulletin for International Taxation* 681-687, 681 et seq; G. Kofler, G. Mayr and C. Schlager, 'Taxation of the Digital Economy: "Quick Fixes" or Long-Term Solution?', (2017) 57 *European Taxation*, 523-532, 523 et seq. See further going, eg W. Schön, 'Ten Questions about Why and How to Tax the Digitalized Economy', (2018) 72 *Bulletin for International Taxation* 278-292; and W. Schön, 'One Answer to Why and How to Tax the Digitalized Economy', (2019) 47 *Intertax* 1003-1022. For a recent and comprehensive discussion, see M.P. Devereux et al, 'Taxing Profit in a Global Economy' (Oxford University Press 2021); R. de Mooij, Ruud, A. Klemm and V. Perry (eds), *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed* (IMF 2021).

<sup>2</sup> League of Nations, 'Report on Double Taxation: Document E.F.S.73.F.19.' (5 Apr. 1923), and the following reports made prior to the release of the first Model Convention including a Commentary thereto, which is the League of Nations, 'Double Taxation and Tax Evasion C.562.M.178.1928.II' (22-31 Oct. 1928).

<sup>3</sup> Even though about half of the Fortune 500 companies are also actually older than 100 years. See S. Hebus, 'Global Firms, National Corporate Taxes: An Evolution of Incompatibility', in R. de Mooij, A. Klemm and V. Perry (eds), *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed* (IMF 2021), at 33.

<sup>4</sup> Which, according to *ibid*, is the distinctive difference to earlier business models.

<sup>5</sup> In this regard, taxpayers have different tax planning channels at their disposal. The European Commission distinguishes three of them which are the (i) interest channel, (ii) royalty channel, and (iii) strategic transfer pricing channel. See European Commission, 'Aggressive Tax Planning Indicators' (2017), Working Paper No. 71-2017, at sec. 2.2. In this cited work, at 7-10, relevant empirical evidence is discussed.

<sup>6</sup> See similarly, P. Saint-Amans, 'Die Pläne der OECD für die steuerlichen Herausforderungen der Digitalisierung der Wirtschaft', (2020) 73(3) *Ifo-Schnelldienst*, 3-5; and compare also J. Englisch and J. Becker, 'International Effective Minimum Taxation – The GLOBE Proposal', (2019) 11(4) *World Tax Journal* 483-529, at sec. 2.2.3.

Regardless of who is to blame for it,<sup>7</sup> empirical evidence clearly shows that multinational enterprises (MNEs) have been taking advantage of emerging tax planning possibilities.<sup>8</sup> For most states, this is extremely expensive.<sup>9</sup> Among the main losers are EU Member States and developing countries.<sup>10</sup> Yet, for a small number of jurisdictions, this has been quite lucrative: Data points to almost 40% of MNE profits having been shifted into “tax havens”.<sup>11</sup>

## 1.2. Multilateralism as the key? Far have we come – in theory, at least

In the aftermath of the financial crisis, the shining examples of the meagre tax bill of some very large MNEs gave rise to a public outcry<sup>12</sup> that induced,<sup>13</sup> together with states’ revenue needs, an attempt to reshape the

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<sup>7</sup> To oversimplify it: the tax benefits exploited by MNEs are often intentionally provided by someone. Compare, e.g. H.J. Ault, W. Schön & S. Shay, ‘Base Erosion and Profit Shifting: A Roadmap for Reform’, (2014) 5/6 *Bulletin for International Taxation* 275, who regard ‘MNE tax avoidance [to be] just the flipside of harmful tax competition’. Schön, for instance, has described the OECD/G20 BEPS project as some sort of revival of the OECD, Report on Harmful Tax Competition: An Emerging Global Issue’ (OECD 1998) and Council, ‘Conclusions of 1 December 1997 Ecofin Council Meeting on taxation policy –resolution of 1 December 1997 on a code of conduct for business taxation’, OJ C 2, 6 January 1998, with the difference being that now MNEs instead of states are in the focus. See eg an interview W. Schön, ‘Leichter auf die Anklagebank’, (2014) 2 *EY TAX&LAW Magazine*, available under [https://www.tax.mpg.de/fileadmin/TAX/docs/TL/WS/EY\\_BEPS.pdf](https://www.tax.mpg.de/fileadmin/TAX/docs/TL/WS/EY_BEPS.pdf) (accessed 2 June 2020). For sure, taxpayers may also achieve cross-border tax savings that are not ‘offered’ by the involved states but create some sort of unintended double non-taxation. See further going F.D. Martínez Laguna, ‘Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The Dividing Line between Intended and Unintended Double Non-Taxation’, (2017) 2 *World Tax Journal* 189, secs. 2.2.-2.3.; M. Helminen, ‘General Report’, in International Fiscal Association (ed), *The notion of tax and the elimination of international double taxation or double non-taxation* in sec. 4.1. (IFA Cahiers vol. 101a, Sdu Fiscale & Financieel Uitgevers 2016).

<sup>8</sup> See, for an overview of empirical literature on profit shifting, R. Collier and N. Riedel, ‘The OECD/G20 Base Erosion and Profit Shifting Initiative and Developing Countries’, (2018) 4/5 *Bulletin for International Taxation* 704, sec. 2.3., referring to D. Dharmapala, ‘What Do We Know about Base Erosion and Profit Shifting? A Review of the Empirical Literature’, (2014) 4 *Fiscal Studies* 421; J. Heckemeyer and M. Overesch, ‘Multinationals’ profit response to tax differentials: Effect size and shifting channels’, (2017) 4 *Canadian Journal of Economics* 965; R. Davies et al, ‘Knocking on Tax Haven’s Door: Multinational Firms and Transfer Pricing’, (2018) *Review of Economics and Statistics* 120; T. Karkinsky and N. Riedel, ‘Corporate Taxation and the Location of Patents within Multinational Firms’, (2012) 1 *Journal of International Economics* 176; and T. Tørsløv, L. Wier and G. Zucman, ‘The Missing Profits of Nations’, (2018) *NBER Working Paper*; with a focus on developing countries, see E. Crivelli, R. de Mooij and M. Keen, ‘Base Erosion, Profit Shifting and Developing Countries’, (2015) *IMF Working Paper* 15/118. This was reassessed by A. Cobham & P. Jansky, ‘Global Distribution of Revenue Loss from Corporate Tax Avoidance: Reestimation and Country Results’, (2018) 2 *Journal of International Development* 206, who also provide for country results. See further N. Johannesen, T. Tørsløv & L. Wier, ‘Are Less Developed Countries More Exposed to Multinational Tax Avoidance? Method and Evidence from Micro-Data’, (2017) 3 *The World Bank Economic Review* 790; L. Wier & H. Reynolds, ‘Big and ‘Unprofitable’: How 10 per cent of multinational firms do 98 per cent of profit shifting’, WIDER Working Paper 2018/111 (UNU-WIDER 2018), available at <https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2018-111.pdf> (accessed 19 Mar. 2021); and P. Janský and A. Prats, ‘International Profit-Shifting out of Developing Countries and the Role of Tax Havens’, 3 *Development Policy Review* 3 (2015).

<sup>9</sup> According to the OECD, the overall revenue losses caused by BEPS practices is estimated to be between USD 100-240 billion per year. This equals 4%-10% of global corporate income tax (CIT) revenues. See OECD, ‘Measuring and Monitoring BEPS – Action 11: 2015 Final Report’ (OECD 2015), p. 15 and para. 174; and OECD, ‘Policy Brief – Taxing Multinational Enterprises: Base Erosion Profit Shifting’ (OECD 2015), p. 1. Aside from this, see also M.T. Alvarez-Martinez et al, ‘How Large is the Corporate Tax Base Erosion and Profit Shifting? A General Equilibrium Approach’, (2018) *CESifo Working Paper No. 6870*, who state that ‘[o]ur central estimate of the impact of BEPS on corporate tax losses for the EU amounts to €36 billion annually or 7.7% of total corporate tax revenues. The USA and Japan also appear to lose tax revenues respectively of €101 and €24 billion per year or 10.7% of corporate tax revenues in both cases.’ The estimate of Crivelli, de Mooij & Keen, above, n. 8, for 2013 has been around USD 600 billion. See further N. Riedel, *Quantifying International Tax Avoidance: A Review of the Academic Literature*, 69 *Rev. Econ.* 2 (2018); and D. Dharmapala, above, n. 8.

<sup>10</sup> Tørsløv, Wier & Zucman, above, n. 8.

<sup>11</sup> Ibid.

<sup>12</sup> According to the Commission: ‘Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 on the profits of Apple Sales International’. See Commission, ‘State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion’, available under: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_2923](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923) (accessed 25. May 2020).

<sup>13</sup> Compare Y. Brauner, ‘BEPS: An Interim Evaluation’, (2014) 2 *World Tax Journal* 10, naming, as an example, the newspaper articles by C. Duhigg and D. Kocieniewski, ‘How Apple Sidesteps Billions in Taxes’, *The New York Times* (28 Apr. 2012); J. Drucker, ‘Google Revenues Sheltered in No-Tax Bermuda Soar to \$10 Billion’, *Bloomberg* (10 Dec. 2012); and R. Waters, ‘Microsoft’s foreign tax planning under scrutiny’, *Financial Times* (7 June 2011). See also OECD, ‘What the BEPS are we talking about?’, available at

international tax system. What started in 2008 with agreeing on enhanced information exchange standards<sup>14</sup> continued with the 2013-2015 OECD/G20 Base Erosion and Profit Shifting Project<sup>15</sup> that included various anti-abuse rules to be implemented into states domestic tax law and tax treaties. The speed of these developments and their rather wide acceptance are remarkable. That being said, the so far achieved changes are still incremental<sup>16</sup> – at least when compared to what is now on the negotiation table: As a companion to a considerable reallocation of taxation rights related to digital businesses between countries (Pillar 1), the so-called ‘Inclusive Framework’ (comprising more than two thirds of the world’s countries)<sup>17</sup> discusses the implementation of a minimum taxation regime (Pillar 2). Based on this initiative, the international tax system should be made fit for the future. In addition, the reform should bring a gain in global tax revenue of up to USD 100 billion annually.<sup>18</sup> In the middle of the COVID-crisis, this is clearly needed. As such, it appears obvious: States will implement the rules and fill up their coffers.

Yet, in tax matters, this final step of turning proposal into hard law is notoriously difficult to make. After all, states’ tax policy interests are heterogeneous. Even though taxes are, by far, not the only determinant on the location of investment,<sup>19</sup> they still matter;<sup>20</sup> especially vis-à-vis peer countries.<sup>21</sup> States tend to engage in tax

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<http://www.oecd.org/ctp/what-the-beps-are-we-talking-about.htm> (accessed 25 May 2020); On the importance of negative media coverage as an impetus for the OECD/G20 BEPS Project, see A. Christians & S. Shay, *General Report*, ‘General Report’, in International Fiscal Association (ed), *Assessing BEPS: Origins, Standards, and Responses* sec. 2.1. (IFA Cahiers vol. 102a, Sdu Fiscale & Financiele Uitgevers 2017), Books IBFD.

<sup>14</sup> See, including a further discussion, Shay & Christians, above, n. 13, at sec. 1.1.

<sup>15</sup> See *ibid.*, and for a detailed analysis, S. Kingma, *Inclusive Global Tax Governance in the Post-BEPS Era* ch. 9 (IBFD 2020).

<sup>16</sup> R. de Mooij, A. Klemm and V. Perry, ‘Introduction’, in R. de Mooij, A. Klemm and V. Perry (eds), *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed* (IMF 2021) 1, 3, who refer to the OECD/G20 BEPS Project as an effort ‘to resolve some of the most urgent issues of perceived tax avoidance’ and as an attempt to overcome ‘the most egregious forms of tax avoidance by multinational enterprises’.

<sup>17</sup> Per 11. Mar. 2021, the Inclusive Framework consists of 139 countries. See, for an actualised list of members, <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> (accessed 11. Mar. 2021).

<sup>18</sup> OECD, ‘Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS’, (OECD 2020) 10 (OECD Economic Impact).

<sup>19</sup> See, eg G.R. Zodrow, ‘Capital Mobility and Capital Tax Competition’, (2010) 63 *National Tax Journal* 865-901, at 866-867, who names the ‘proximity to markets, the costs of various primary and intermediate inputs, the skill levels available in local labor markets, the existence of economies of agglomeration, the local competitive, legal and regulatory environment, and the degree of political stability including the credibility of commitments to enforce property rights’ as further determinants. See also the literature provided in *supra*, n. 237, regarding the effectiveness of tax incentives in developing countries (generally concluding that tax incentives cannot make up serious deficiencies in the investment climate).

<sup>20</sup> eg R. de Mooij & S. Ederveen, ‘Corporate Tax Elasticities: A Reader’s Guide to Empirical Findings’, (2008) 24 *Oxford Review of Economic Policy* 4; Taxes can be a barrier to investment, see eg United Nations, ‘Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries’, (United Nations 2019) 4-9; or, P. Pistone, ‘General Report’, in M. Lang et al (eds) in *Trends and Players Tax Policy* (IBFD 2016) sec. 1.7.3. A survey conducted by the latter showed that the factors perceived to be existing barriers to inward investment are (i) the existence of a high tax burden; (ii) a high cost of tax compliance; (iii) the complexity of tax legislation; (iv) the legal uncertainty connected with the application of tax norms; (v) the instability of tax legislation; (vi) the outcome of specific tax provisions; (vii) the length of judicial or administrative procedures; or (viii) other factors, such as exchange control regimes.

<sup>21</sup> J. Morisset & N. Pirnia, ‘How Tax Policy and Incentives Affect Foreign Direct Investment’, in L.T. Wells, J. Morisset & N. Pirnia (eds), *Using Tax Incentives to Compete for Foreign Investment* (World Bank Group, Foreign Investment Advisory Service [FIAS] 2001), at ch. 5 who show that, even in the context of developing countries with a bad investment climate (where tax incentives usually do not matter too much), tax incentives can make a difference. For the argument stating that tax incentives matter little in developing countries with a bad investment climate, see S. James, *Tax and Non-Tax Incentives and Investments: Evidence and Policy Implications* (World Bank Group 2013).

competition,<sup>22</sup> be it through tax rates<sup>23</sup> or through the characteristic of their tax systems,<sup>24</sup> and taxpayers react to that.<sup>25</sup> Most importantly, if an increase in taxation shies off too much capital, the measure turns out to be an expensive choice. Against this background, estimates on overall revenue increases resulting from a global tax reform need to be looked at with a pinch of salt. Dynamics can change very quickly when countries decide not to join or to jump out after having stepped in.

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<sup>22</sup> There is ‘ample’ evidence that countries behave strategically in setting their tax rates. Further, countries are also engaged in tax competition by means of favourable tax regimes; see K.A. Clausing, ‘The nature and practice of capital tax competition’, in P. Dietsch and T. Rixeneds (eds) *Global Tax Governance: What is wrong and how to fix it* (ECPR Press 2015) secs. 2 and 6. A comprehensive overview of evidence is also provided by Zodrow, above, n. 19, at 881-890. See further J.K. Brueckner, ‘Strategic Interaction Among Governments: An Overview of Empirical Studies’, (2003) 26 *International Regional Science Review* 2; and M.P. Devereux, B. Lockwood & M. Redoano, ‘Do Countries Compete over Corporate Tax Rates?’, (2008) 92 *Journal of Public Economics* 5/6, who, focusing on OECD member countries, found strategic interactions with respect to the statutory tax rate for mobile profits and, to a lesser extent, the effective marginal tax rate for capital. See, however, K.G. Stewart and M.C. Webb, ‘International competition in corporate taxation: Evidence from the OECD time series’ sec 3.1. (2005), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.632.1084&rep=rep1&type=pdf> (accessed 9 July 2020); M. Mardan and M. Stimmelmayr, ‘Tax competition between developed, emerging, and developing countries – Same but different?’, (2020) 146 *Journal of Development Economics*.

<sup>23</sup> See, for a literature overview, M. Scherleitner, *Addressing Tax Arbitrage with Hybrid Financial Instruments: A Multidisciplinary Study and Proposal for Developed and Developing Countries* (IBFD, 2020) sec. 3.2.1.3.2.2.; see also, eg E. Röder, ‘Weltweite Mindestbesteuerung multinationalaler Unternehmen? Der Global Anti-Base-Erosion-Vorschlag der OECD und seine Relevanz für das deutsche Unternehmenssteuerrecht’, 97 *Steuern und Wirtschaft* 35, 39-40.

<sup>24</sup> Which includes preferential tax regimes or even tolerating aggressive tax planning based on the plausible assumption of this being effectively only for more sophisticated taxpayers that tend to be relatively mobile. See further on this topic, eg Zodrow, above, n. 19, 888-889. Compare also, eg Clausing, above, n. 22, at secs. 2 and 6; J. Roin, ‘Competition and Evasion: Another Perspective on International Tax Competition’, (2000) 89 *Georgetown Law Journal* 600; L.V. Faulhuber, ‘The Trouble with Tax Competition: From Practice to Theory’, (2018) 71 *Tax Law Review*; N. Johannesen, ‘Strategic Line Drawing between Debt and Equity’, EPRU Working Paper No. 2011-04 (2011); N. Johannesen, ‘Tax avoidance with cross-border hybrid instruments’, (2014) 112 *Journal of Public Economics*; and R. Altshuler and H. Grubert, ‘The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Companies’, CESIFO Working Paper No. 1613 (2005), as referred to in M.C. Durst, ‘Chapter 2: Poverty, Tax Competition, and Base Erosion’, (2018) 89 *Tax Notes International* 1197, who elaborates on the topic at 1196-1199. At 1196-1197, he notes that this type of tax competition already emerged shortly after World War II.; See further H.J. Ault and B.J. Arnold, ‘Protecting the tax base of developing countries: an overview’, in A. Trepelkov, H. Tonino and D. Halka (eds), *United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries* (United Nations 2017), sec. 11.1., who differ between incentives that directly and indirectly lower the costs for a foreign investor to invest in the source country. The lax enforcement of thin capitalization and transfer pricing rules constitute an example of the latter. See also A. Haufler and M. Runkel, ‘Firms’ financial choices and thin capitalization rules under corporate tax competition’, (2015) 56 *European Economic Review*, who suggest that tax competition for MNEs occurs mostly through tax rules that are targeted on mobile capital. Statutory tax rates, on the other hand, are only of secondary relevance. See also the concise discussion in Collier and Riedel, above, n. 8, at, sec. 2.5.; as well as P. Egger, N. Strecker and B. Zoller-Rydzek, ‘Estimating Bargaining-related Tax Advantages of Multinational Firms’, (CESifo Working Paper 6979, 2018); See fundamentally Q. Hong & M. Smart, ‘In praise of tax havens: International tax planning and foreign direct investment’, (2010) 54 *European Economic Review*; and S. Peralta, X. Wauthy and T. van Ypersele, ‘Should countries control international profit shifting?’, (2005) 68 *Journal of International Economics*. See also, however, J. Slemrod and J.D. Wilson, ‘Tax competition with parasitic tax havens’, (2009) 93 *Journal of Public Economics*; A. Weichenrieder and F. Xu, ‘Are tax havens good? Implications of the crackdown on secrecy’, (2008) 127 *Journal of Economics*; and further compare the extension of Hong and Smart, id., by T. Gresik, D. Schindler and G. Schjelderup, ‘The effect of tax havens on host country welfare’, (CESifo Working Paper No. 5314, 2015), who, having added the exploitation of the transfer pricing channel to the model, show that the positive investment effect is more likely to dominate in host countries with developed economies whereas the negative tax base erosion effect is more likely to dominate in developing economies with weak institutions. See also T. Gresik, D. Schindler and G. Schjelderup, ‘Immobilizing corporate income shifting: Should it be safe to strip in the harbor?’, (2017) 152 *Journal of Public Economics*; and for a comprehensive discussion. S. Hebois, ‘Has Tax Competition Become Less Harmful?’, in R. de Mooij, Ruud, A. Klemm and V. Perry (eds), *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed* (IMF 2021) 87.

<sup>25</sup> OECD, Hajkova, D. et al, ‘Taxation, Business Environment and FDI Location in OECD Countries’, (OECD Economics Department Working Papers, No. 502, 2006) <http://dx.doi.org/10.1787/874058477248>; B. Arnold et al, ‘Tax Policy for Economic Recovery and Growth’, (2011) 120 *Economic Journal* 550 F59-F80; L. Feld and J. Heckemeyer, ‘FDI and taxation: A meta-study’, (2011) 25 *Journal of Economic Surveys* 2 233-272, <https://doi.org/10.1111/j.1467-6419.2010.00674.x>; S. Sorbe and Å. Johansson ‘International tax planning, competition and market structure’, (OECD Economics Department Working Papers No. 1358, 2017), as referred to in OECD Economic Impact, above, n. 18, at para. 26.

On the grounds of the international tax system being in need of revision, it may be welcomed that the status quo is not understood to be an option. Yet, immense dangers slumber in this insight. As the OECD repeatedly emphasises: The alternative, that is, states taking uncoordinated unilateral action to tax what they regard as belonging to them, can have disastrous consequences. Firms' reactions to a potential tax and trade war could, in a worst case scenario, cause global GDP to decrease by 1.2%.<sup>26</sup>

### 1.3. What has the EU got to do with it?

Other than in the field of indirect taxation<sup>27</sup> – where far reaching harmonisation has taken place<sup>28</sup> – EU Member States have always been reluctant to relinquish powers in the area of direct taxation.<sup>29</sup> In the “virtual”<sup>30</sup> absence of positive integration in direct tax matters, it has mainly been the European Court of Justice (ECJ) that has been impelled to shape the European income tax landscape.<sup>31</sup> That being said, in recent times, dynamics have changed remarkably. In the last term, the Commission issued not less than 26 tax related proposals,<sup>32</sup> and these five years also saw more EU legislative activity in the field of taxation than the previous 50 years.<sup>33</sup> In addition, the EU seems to be aiming at establishing itself as an active player in the international tax arena – and it has been quite successful in doing so.<sup>34</sup> Having regard to the undeniable tensions between the concept of the global firm, on the one hand, and the national tax systems, on the other,<sup>35</sup> it is not implausible to assume that the trend to coordinate international tax rules continues – at least with respect to these types of businesses. When international tax policy design indeed becomes a multilateral matter, there may be a good reason for EU Member States to act together. Conceivably, a common EU approach could benefit both Member States and their most valuable common asset, that is, the Internal Market.

This article starts from this intuition in the light of the above mentioned two major tax policy projects currently going on at the OECD level. Whilst the role of the EU is already reasonably clear in the field of digital taxation – the Commission will propose a directive for a digital levy regardless of the whether there is agreement on

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<sup>26</sup> OECD Economic Impact, above, n. 18, at sec. 4.8. According to the World Bank, the global GDP of 2019 amounts to USD 87.698 trillion. See <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (accessed 29. Oct. 2020).

<sup>27</sup> Indirect taxes are taxes on transactions/events such as eg the Value Added Tax (VAT).

<sup>28</sup> For a concise and very accessible overview, see eg W. Schön, ‘EU Tax Law: An Introduction’, (2019) Max Planck Institute, available under [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3432273](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3432273) (accessed 10. Mar. 2021), ch. 13

<sup>29</sup> Direct taxes are taxes on (natural or legal) persons, such as eg the personal income tax or the corporate income tax.

<sup>30</sup> P Wattel, ‘Taxation in the internal market’, in P. Koutrakos and J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar, 2017) 319, 319.

<sup>31</sup> Ibid: on the history of EU integration in the field of direct taxation see eg J. Hey, ‘Europäische Steuergesetzgebung – Binnenmarkt und Fiskalinteressen’, in M. Lang (ed) *Europäisches Steuerrecht* (Otto Schmidt, 2018) 9, 17 et seq.

<sup>32</sup> European Parliament resolution, above, n. 1, para 3.

<sup>33</sup> F. Vanistendael, ‘EU Elections and EU Taxation’, (2019) *Tax Notes International*, 729-732

<sup>34</sup> See, in detail on the EU's involvement Kingma, above, n. 15., at ch. 4, sec. 9.4.1.

<sup>35</sup> At its core, this has to do with the high importance of intangible assets and intra-group transactions that are hard to value and thus give rise to tax planning opportunities that are almost impossible for states to deal with under the current system. On the other hand, physical presence is relatively less important. Furthermore, global firms produce in and for the global market as opposed to fragmented national markets. See, for this and a more detailed elaboration. especially Hebous, above, n. 3.

the OECD Pillar 1 proposal<sup>36</sup> – it is less certain whether the EU could or should support a minimum taxation regime based on the OECD Pillar 2 proposal.

This study intends to overcome this deficit and aims to find out whether it is feasible for the EU and its Member States to implement a minimum taxation system via a directive grounded on Art. 115 of the Treaty of the Functioning of the European Union (TFEU). As such, the paper seeks to give policy advice to the European Commission and tax policymakers in EU Member States. For this purpose, a socio legal research framework is required.<sup>37</sup> The dimensions in which the addresses of this article act in should, as far as possible, underlie this inquiry. Hence, it is the legal possibility and the tax political sensibility that will be taken into account in this contribution.

The investigation will be structured as follows. In sec. 2.1. the OECD's proposal on a minimum taxation system (the 'GloBE proposal'), published in October 2020, will be briefly discussed. Given this 248 page report enjoys the general support of 139 jurisdictions, including almost all EU Member States, it seems – per today, at least – reasonable to assume that an EU minimum tax directive would be principally grounded on this blueprint. That does not mean that an EU minimum taxation directive is eventually fully consistent therewith. In fact, there are elements of primary EU law that could be at odds with the GloBE proposal. Whilst there is no room in this article to engage in this discussion in adequate depth, the author aims to concisely display the potential tensions and solutions thereto (sec. 2.2.).<sup>38</sup>

Thereupon, the author will zoom in on two preliminary research questions that are meant to reveal whether EU action is feasible from the perspective of its Member States. As outlined in more detail in sec. 3.1., this will include an inquiry into whether an EU minimum taxation regime can be expected to promote the Internal Market (sec. 3.2). In addition, it will be investigated whether a negative impact on the financial stability of all or certain Member States can be expected (sec. 3.3).

The discussion of ch. 3 will indicate that there may indeed be a case for the EU to implement a minimum corporate taxation directive. To increase the robustness of this argument, ch. 4 will discuss two counter-factual tests. The first one will inquire whether there is a better way to implement a minimum taxation system in EU Member States rather than doing so via a directive (sec. 4.1.). The second test will ask for whether abstaining from implementing a minimum taxation system in the EU may be superior to introducing it (sec. 4.2.).

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<sup>36</sup> eg J. Martin, 'EU to implement digital levy regardless of OECD-led effort', MNE Tax, available under <https://mnetax.com/eu-will-implement-digital-levy-regardless-of-oecd-led-effort-43005> (accessed 17 Mar. 2021).

<sup>37</sup> On socio-legal research in general, see, concisely, eg P. Minkinen, 'Oikeus- ja yhteiskuntatieteellinen tutkimus – suuntaus, tarkastelutapa, menetelmä?', (2017) 7/8 Lakimies 908, sec. 3, as well as, further going, the contributions and references provided for in D. Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013); and D. Cowan & D. Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave Macmillan 2016). See also B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001); and W. Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press 1997).

<sup>38</sup> The author aims to follow up on this question in a separate paper.



Thereafter, in ch. 5, the author will briefly shed light on the impact of an EU minimum taxation regime vis-à-vis third states. Chapter 6 will conclude.

As a preliminary conceptual remark – especially targeted to readers who are less familiar with EU tax law: In the case that the EU implements a minimum taxation directive based on Art. 115 TFEU, this would constitute (by far) the widest step forward in terms of positive integration in EU direct tax law. In addition, it could pave the way for proposals that are more ambitious, such as the Common Consolidated Corporate Tax Base (CCCTB), which would amount to even a more far reaching harmonisation of EU corporate tax systems.<sup>39</sup> Having regard to the political sensitiveness of taxation and noting that, for Euro-zone Members, direct taxation is, de facto, the last major social-economic policy tool left,<sup>40</sup> one can hardly underestimate the meaning of such projects for European integration. The extraordinary times we live in could well help such ambitions to progress. After all, we have also just seen the EU taking out common debt, which is partly funded by a new levy.<sup>41</sup> Two years ago, this would have been almost unthinkable – a term we should be using more carefully nowadays.

## 2. The potential cornerstones of an EU minimum taxation regime

### 2.1. The essence of the OECD GloBE proposal

The OECD GloBE Proposal is meant to apply to Multinational Entities (MNEs) with an annual gross revenue of at least EUR 750 million.<sup>42</sup> If the jurisdictional effective tax rate<sup>43</sup> – adjusted for carry-overs of losses or excess taxes and a formulaic substance based carve out<sup>44</sup> – is below the minimum rate, the GloBE rules kick in.<sup>45</sup> This means that the so called Income Inclusion Rule (IIR), complemented by a tax treaty based Switch-Over Rule,<sup>46</sup> imposes a tax up to the minimum rate.<sup>47</sup> The IIR follows a top-down approach thus it is first

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<sup>39</sup> For a discussion of the current proposal, see J. van de Streek, 'A Common (Consolidated) Corporate Tax Base (CC(C)TB)', in B. Terra and P. Wattel (eds), *European Tax Law* (Wolters Kluwer 2019) 655–657.

<sup>40</sup> Wattel, above, n. 30, at 323, noting that the European Central Bank sets exchange and interest rates.

<sup>41</sup> See Council Decision (EU, Euratom) 2020/2053, of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L424/1. The new levy is based on the amount of non-recycled plastic waste. Although this sounds banal, conceptually, it is a major step.

<sup>42</sup> In more detail on the scope, see, OECD 'Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS', OECD/G20 Base Erosion and Profit Shifting Project, ch. 2. (2020) (OECD GloBE Proposal).

<sup>43</sup> See *ibid* at ch. 3, on the calculation of this rate which starts from the financial statements prepared by the group and includes certain adjustments to arrive at the 'GloBE tax base'.

<sup>44</sup> See, in more detail, *ibid* at ch. 4. The rationale of the carry-forwards is to exclude mere timing differences from the scope of the rules. The rationale of the substance carve-out is to exclude a fixed return for substantive activities in a jurisdiction. The latter will be discussed in more detail in sec. 3.2.1.

<sup>45</sup> In less technical terms, the minimum taxation rules are meant to apply when the effective (that is, not the nominal) tax rate in a jurisdiction is below the minimum. The calculation of this rate follows certain, in part complex, rules that are outlined in *ibid*, at ch. 3-4.

<sup>46</sup> This provision is to be implemented into tax treaties that foresee the exemption method for profits attributable to permanent establishments (PE) in the source state. In effect, the Switch-Over Rule allows the residence state to apply its IIR on the income attributable to the PE which would otherwise be prevented by the tax treaty. See, in more detail, *ibid* at sec. 6.4.

<sup>47</sup> Stated differently, this means that the IIR leads to a tax liability at the level of a certain group company because it owns (directly or indirectly) another group company that is taxed below the minimum. As a result, the low taxation of one group company is taken away by taxing another one. Conceptually, this is similar to so called controlled foreign company (CFC) rules that have existed for a long time (in the US since 1962) and are also widely proliferated. The difference lies in the IIR also applying to active income (instead of only to passive income) and only imposing a top-up tax (instead of applying the ordinary tax rate). As a simplified example of how the IIR works, consider A Co. owning a 100% of the shares in B Co. that is resident in a country without a corporate

applied at the level of the group's Ultimate Parent Entity. If the latter is resident in a jurisdiction not having implemented the GloBE Proposal, the responsibility to apply the IIR falls to the 'Constituent Entity'<sup>48</sup> that is directly owned/controlled by the Ultimate Parent Entity provided this entity is resident in a jurisdiction having an IIR in place.<sup>49</sup> Otherwise, the search continues. Split ownership structures are subject to special rules.<sup>50</sup> Unless the IIR is applicable, the Undertaxed Payments Rule (UTPR) becomes relevant. Following a two-step allocation key, this provision allocates so called 'top up tax' to Constituent Entities subject to the UTPR,<sup>51</sup> which their residence states then collect, eg via (partially) denying the deduction for selected expenses or by making an equivalent adjustment.<sup>52</sup> Furthermore, a Subject To Tax Rule (STTR) should be implemented into tax treaties. This concept is apparently still relatively far less developed but should apply to certain payments between related parties with the result of enabling the payer jurisdiction to apply an additional tax up to an agreed minimum.<sup>53</sup> As the issue of scope of the STTR is still open, it is possible that the rule applies beyond the MNEs that are covered by the IIR and the UTPR.<sup>54</sup> Notably, the tax levied in line with the application of the STTR will be taken into account in calculating the effective minimum taxation rate for the purposes of the IIR and UTPR.<sup>55</sup>

## 2.2. The potential for EU deviations being necessary

As per March 2021, the author would not expect an EU minimum taxation regime to deviate conceptually from what has been proposed at the level of the OECD. For sure, a lot of details are still open, most importantly the minimum taxation rate. The latter is obviously the hottest iron of the whole proposal and will also have a

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tax system (eg. the Cayman Island). The IIR would, in essence, include the income of B Co. at the level of A Co. and tax it at the minimum rate. See, in more detail, *ibid* at sec. 6.1-6.3.

<sup>48</sup> On the definition, see *ibid* at sec. 2.2. With respect to excluded entities (Investment Funds, Pension Funds, Governmental Entities, International Organisations and Non-Profit Organisations), see sec. 2.3. For special rules regarding Joint Ventures and 'orphan entities', see. ch. 8.

<sup>49</sup> Consider as a simplified example: A Co. (resident in Country A, no IIR) owns 100% of the shares in B Co. (resident in Country B, has IIR) that owns 100% of the shares in C. Co. (resident in Country C that has a corporate income tax rate of 1%). In this case, B Co. is to apply the IIR. See, for examples, *ibid* at pp. 198 et seq.

<sup>50</sup> See, in more detail, *ibid* at secs. 6.2-6.3.

<sup>51</sup> Which is the so-called 'UTPR taxpayer'. The allocation key reads: 'First, if the UTPR Taxpayer makes any deductible payments to the low-tax Constituent Entity during the relevant period, the top-up tax of such Constituent Entity is allocated to the UTPR Taxpayer in proportion to the total of deductible payments made to that entity by all UTPR Taxpayers; Second, if the UTPR Taxpayer has net intra-group expenditure, in proportion to the total amount of net intra-group expenditure incurred by all UTPR Taxpayers.' See, *ibid* at 121 and, in more detail, sec. 7.4.

<sup>52</sup> In essence, the UTPR intends to protect countries against so-called tax base erosion strategies that work via making (tax deductible) payments to no/low taxed group companies. Subject to a plethora of existing anti-avoidance rules, this creates an advantage for the whole group because the tax deduction shields (operating) profits from taxation at a higher rate in the payer country whilst the payment is only subject to no/low taxation at the level of the receiving group company. In part, UTPR also serves as a backstop to the IIR because it takes away incentives to circumvent the IIR. See, in more detail on the precise concept and design of the UTPR, *ibid* at ch. 7.

<sup>53</sup> See, in more detail, *ibid* at ch. 9. Conceptually, the STTR is required to set aside legal obstacles that a tax treaty between two countries may contain with respect to the levying of a minimum tax. As such, it complements other minimum taxation rules included in the domestic law of a state.

<sup>54</sup> Considerations on materiality thresholds are included in *ibid* at sec. 9.2.5.

<sup>55</sup> See *ibid* at sec. 10.2.1. This is important when considering the hierarchy of the rules. So, the country that applies the STTR (and correspondingly levies the domestic tax) has priority.

decisive impact on whether it is feasible for the EU to implement a minimum taxation system.<sup>56</sup> That being said, it is fair to assume that it will lie somewhere between 10% and 15%.<sup>57</sup>

However, there may be one field in which the EU might *have to* deviate from the current OECD proposal, namely, the substance carve out.<sup>58</sup> At the core of this issue stands the possibility of the minimum taxation regime infringing the freedom of establishment which, having regard to the scope of the rules, has been regarded as the applicable fundamental freedom.<sup>59</sup> For sure, there could be an attempt to avoid this from the outset via a non-discriminatory application of the rules.<sup>60</sup> Yet, the success of this is unsure.<sup>61</sup> Aside from that, it would not be in line with the current way that the OECD GloBE Proposal is drafted.<sup>62</sup> Hence, an infringement may be found present which would require a justification.

In this regard, the safest option has been understood to be exclusion of genuine arrangements from the scope of EU minimum taxation rules.<sup>63</sup> Whilst the precise meaning of this is not fully clear,<sup>64</sup> it is much more liberal than the current formulaic substance carve out that works by excluding a certain amount of payroll expenses<sup>65</sup> and costs related to tangible assets<sup>66</sup> from the so-called GloBE income.<sup>67</sup>

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<sup>56</sup> This will be revealed along the lines of ch. 3.

<sup>57</sup> Röder, above, n. 23, at 40. In OECD Economic Impact, above, n. 18, a 12,5% tax is assumed. Yet, also estimates for other thresholds are provided for above, n. 19, at ch. 3.

<sup>58</sup> See, eg also and for a further analysis: L. de Broe, 'Public Consultation Pillar 2', available under <https://www.law.kuleuven.be/fisc/brief-oecd-public-consultation-pillar-2-1.pdf> (accessed 6. Mar. 2021).

<sup>59</sup> See, eg P. Schmidt, 'A General Income Inclusion Rule as a Tool for Improving the International Tax Regime – Challenges Arising from EU Primary Law', (2020) 48 *Intertax* 11, at sec. 3.2.; Englisch and Becker, above, n. 6, at sec. 6.1.

<sup>60</sup> This would mean applying it alike to domestic and cross-border situations. See, with respect to the Income Inclusion Rule: Englisch and Becker, above, n. 6, at 526; for a discussion: Schmidt, above, n. 59, at sec. 4.

<sup>61</sup> It would still be the case that the rule de-facto only applies with respect to cross-border situations which is why the ECJ could nonetheless regard a restriction to be present. Sceptical eg M.P. Devereux et al, 'The OECD Global Anti-Base Erosion Proposal', Oxford University Centre for Business Taxation (2020), at 50 et seq, which is essentially grounded on the ECJ having struck down similar attempts, eg in Case 385/12 *Hervis Sport*, ECLI:EU:C:2014:4. Note that Englisch and Becker, above, n. 6, at 527 do not extend this to the Undertaxed Payments Rule.

<sup>62</sup> Based on what is indicated in the OECD GloBE Proposal, above, n. 42, at sec. 7.2.3., neither the Income Inclusion Rule nor the Undertaxed Payments Rule should apply to capture low-taxed income from the same jurisdiction.

<sup>63</sup> See, in more detail, especially: Schmidt, above, n. 59; Englisch and Becker, above, n. 4, 524-528; Devereux et al, above, n. 61, 47-58.

<sup>64</sup> Concisely, it will depend on whether the ECJ upholds the rather permissive substance requirements that were understood to be included in Case 196/04 *Cadbury Schweppes plc v. Commissioners of Inland Revenue*, ECLI:EU:C:2006:544, paras. 54 and 67-68, which notably was a case dealing with controlled foreign company rules (which are similar to the IIR) or whether the ECJ demands more substance as a result of interpreting the term 'wholly artificial arrangement' more broadly. A preparedness to may have shown in more recent case law, such as: Case 115/16 *N Luxembourg I v. Skatteministeriet*, ECLI:EU:C:2019:134, paras. 127 et seq and para. 155, compare that and the sources provided for in the above, n. 59, and J. Englisch, 'The Danish tax avoidance cases: New milestones in the Court's anti-abuse doctrine', (2020) 57 *Common Market Law Review*. Additionally, the very recent case, Case 484/19 *Lexel AB*, ECLI:EU:C:2021:34, has important implications in this context. This is because the ECJ struck down a Swedish rule that could, under certain circumstances, deny the deduction for intra-group interest payments despite them having been at arm's length (i.e. they have been priced as if the two group companies were not related to each other).

<sup>65</sup> Defined as: 'The payroll component is equal to [x]% of the eligible payroll costs of eligible employees. Eligible employees include all employees of the MNE, including part-time employees. Eligible employees would also include independent contractors participating in the ordinary operating activities of the MNE. [...]'. (Omitted footnote stating that the "x" should not indicate all percentages to be the same.). See OECD GloBE Proposal, above, n. 42, at sec. 4.3.

<sup>66</sup> Defined as: 'The tangible asset component is equal to the sum of: [x]% of the depreciation of property, plant and equipment; [x]% of the deemed depreciation of land; [x]% of the depletion of natural resources; and [x]% of the depreciation of a lessee's right-of-use tangible asset. Buildings and land that are held as investment properties are excluded from the carve-out. Assets held for sale, rather than use, are also excluded from the carve-out. [...]'. (Footnote omitted). See *ibid* at sec. 4.3.

<sup>67</sup> Defined as: 'Adjusted GloBE Income means the combined income and loss of all Constituent Entities located in the jurisdiction for the year decreased by the loss carry-forward for the jurisdiction.' See OECD GloBE Proposal, above, n. 42, at sec. 4.4.

As carving out genuine activities does not sit well with the spirit of a minimum taxation regime<sup>68</sup> it may, as the author will also urge for below,<sup>69</sup> not be desired to include such a broad exemption. Under these circumstances, compliance with primary EU law may require the ECJ to accept a new justification.<sup>70</sup> Whilst the Court employs a relatively strict approach in this regard,<sup>71</sup> it is not inconceivable for it to consent to such.<sup>72</sup>

It is also worth stressing that an implementation of a minimum tax directive based on Art. 115 TFEU can, by itself, have a decisive impact on the ECJ's examination. On the one hand, this is so because the ECJ usually follows a different and much more lenient approach in testing secondary EU law under primary EU law than when testing national law under primary EU law.<sup>73</sup> On the other hand, the Court may also regard a minimum taxation directive based on Art. 115 TFEU as a (unanimous) agreement between Member States as to how to reallocate certain taxation rights among them and thus abstain from interfering with it.<sup>74</sup>

Since this topic is much more complex than indicated here, the author will have to consider both options. Hence, whilst the remainder of this article will principally assume that a substance carve-out as currently included in the GloBE proposal may be accepted by the ECJ, it is still required to also shed light on the possibility of there being a need to include a substance carve-out into the EU minimum taxation regime that excludes genuine activities. Yet, given the applicability of the freedom of establishment, which does not apply

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<sup>68</sup> Compare, in principle, also *ibid* and see the discussions and references provided for in sec. 3.2.-3.3.

<sup>69</sup> See especially sec. 3.2.1.

<sup>70</sup> Especially the recent Case 484/19 *Lexel AB*, ECLI:EU:C:2021:34 indicates that justifications that have thus far been accepted may not be suitable for justifying a discrimination/restriction resulting from a minimum taxation regime. See, eg also J.A. García Bañuelos and J. M. Calderón, 'Lexel: Not All Base-Erosion Measures Are 'EU Proof,' CJEU Says', (2021) Tax Notes International.

<sup>71</sup> M. Helminen, *EU Tax law* (IBFD 2020) at sec. 2.3.1., including references to non-accepted justifications in each case.

<sup>72</sup> See for a broader discussion on the conceptually not unsimilar anti-hybrid rules: Scherleitner, above, n. 23, at 5.5.2; and M. Scherleitner, 'The Imported Mismatch Rule in Light of the Fundamental Freedoms', (2021) 5 *Intertax*, sec. 3.3.3.

<sup>73</sup> See, eg CFE ECJ Task Force, 'Opinion Statement ECJ-TF 2/2018 on the ECJ Decision of 7 September 2017 in *Eqiom* (Case C-6/16), Concerning the Compatibility of the French Anti-Abuse Rule Regarding Outbound Dividends with the EU Parent-Subsidiary Directive (2011/96) and the Fundamental Freedoms', (2018) 10 *European Taxation* 471, sec. 4, footnotes 48 referring to cases in which secondary EU law was under rather strict scrutiny by, namely, General Court case Case 324/05 *Republic of Estonia v. European Commission*, ECLI:EU:T:2009:381, para. 208; or Case 15/81 *Gaston Schul Douane Expéditeur BV v. Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, ECLI:EU:C:1982:135, para. 42. Still, the general approach is understood to be more lenient. See CFE, *ibid*, at footnote 49 under reference to Case 491/01 *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, EU:C:2002:741, para. 123 and Case 203/12, *Billerud Karlsborg AB and Billerud Skärblacka AB v. Naturvårdsverket*, EU:C:2013:664, para. 35. Most importantly, in the more recent Grand Chamber Decision Case 390/15 *Rzecznik Praw Obywatelskich (RPO)*, ECLI:EU:C:2017:174, para. 54, the ECJ, including further references, held: '[I]t is understood that, when the EU legislature adopts a tax measure, it is called upon to make political, economic and social choices, and to rank divergent interests or to undertake complex assessments. Consequently, it should, in that context, be accorded a broad discretion, so that judicial review of compliance with the conditions set out in the previous paragraph of this judgment must be limited to review as to manifest error.' Additionally, in parts of literature, it was emphasised that the implementation of the OECD GloBE Proposal via a directive can have an important impact on its compatibility with primary EU law. See, eg Schnitger, 'Verbot des Zinsabzugs für Zahlungen an ausländische Gruppengesellschaften und die Frage nach Zinsschranke und GloBE - Lexel AB/Skatteverket', (2021) 5 *Internationales Steuerrecht* 140, 148; Schmidt, above, n. 59, at sec. 3.4.2., under reference to a similar discussion in the context of the Anti Tax Avoidance Directive (2016/1164) and the Common Consolidated Corporate Tax Base: C. Brokelind and P. 'Wattel, Free Movement and Tax Base Integrity', in B. Terra and P. Wattel (eds) *European Tax Law* (Wolters Kluwer 2019) 655-657; Yet, such leniency should not and may not go too far because the criteria to create primary EU law are more stringent than implementing a directive based on Art. 115 TFEU. It is especially the role of the parliaments that is different on that: Hey, above, n. 31, at 30 et seq.

<sup>74</sup> The allocation of taxation rights between Member States is, in principle, accepted by the ECJ. There are, however, certain exceptions for which the Court has, in one way or another, taken a stance on that. See, in more detail, eg J. Kokott, *Das Steuerrecht der Europäischen Union* ch. 5 (Beck, 2018). The author thanks Dennis Weber for the insightful discussion on this matter.

to third country situations, it is only necessary to consider this possibility with respect to intra-EU transactions.<sup>75</sup>

### 3. Would an EU minimum taxation directive be feasible?

#### 3.1. A legal and political bottom line for a minimum taxation directive

Direct taxation matters are a shared competence.<sup>76</sup> Thus, Member States shall act to the extent that the EU has not done so.<sup>77</sup> The latter is relatively typical in direct taxation. Pursuant to Art. 114(2) TFEU, the ordinary legislative procedure does not apply in this field. This means that positive integration in the area of direct taxes must be based on Art. 115 TFEU which includes a general competence to ‘issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market’.<sup>78</sup> Whilst the mere finding of disparities between Member States or the abstract risk of infringements of fundamental freedoms or distortion of competition does not suffice to invoke Art. 115 TFEU,<sup>79</sup> recourse to this provision is possible when differences between Member States’ national rules obstruct the exercise of the fundamental freedoms<sup>80</sup> or cause significant distortions of competition.<sup>81</sup> In addition, Art 115 TFEU can also be relied on to prevent the emergence of future obstacles to trade resulting from the divergent development of national laws, provided this is likely and the measures in question are designed to prevent it.<sup>82</sup> That being said, the actual hurdle set by Art. 115 TFEU is a political one. In fact, Member States must reach unanimity in the Council. This should protect the sovereignty of the single Member State in areas, such as direct taxation, where this is seen as especially relevant.<sup>83</sup> Hence, should a Member State want to, it can block any EU wide initiative that is based on this provision. A recent attempt to change this decision making mechanism via the passerelle clause of Art. 48(7) TFEU (clearly) failed.<sup>84</sup>

To account for this reality, and to take in the right angle, the analysis conducted below needs to start from a common bottom line that unifies tax political considerations with the goals, possibilities, and borders enshrined in EU law. If, and only if, the discussion reveals that the objective of minimum taxation is better

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<sup>75</sup> To take account of unlikely but not impossible political dynamics that could water down the end result, the author will also briefly shed light on the potential consequences on allowing such a carve-out also with respect to third states. See sec. 3.3.

<sup>76</sup> Art. 4(2)(a) TFEU. See for a broader discussion e.g. G. Kofler, “EU power to tax: Competences in the area of direct taxation” in Panayi, Haslehner and Traversa (Ed.), *Research Handbook on European Union Taxation Law* (Elgar, 2020), pp. 11-50, at sec. 2.3.

<sup>77</sup> Art. (2)(2) TFEU.

<sup>78</sup> Art. 115 TFEU. Indirect taxes are dealt with in Art. 113 TFEU.

<sup>79</sup> eg Case 58/08, *Vodafone Ltd*, ECLI:EU:C:2010:321, para 32; Kofler, above, n. 76, at sec. 2.2.

<sup>80</sup> Case 58/08, *Vodafone Ltd*, ECLI:EU:C:2010:321, para 32; Case 380/03, *Germany v. Parliament and Council*, ECLI:EU:C:2006:772, para 37; Kofler, above, n. 76, at sec. 2.2.

<sup>81</sup> Case 58/08, *Vodafone Ltd*, ECLI:EU:C:2010:321, para 32; Case 380/03, *Germany v. Parliament and Council*, ECLI:EU:C:2006:772, paras 84 and 106; Kofler, above, n. 76, at sec. 2.2.; N. Braun Binder, *Rechtsangleichung in der EU im Bereich der direkten Steuern* (Mohr Siebek, 2017), at 48-49.

<sup>82</sup> eg Case 380/03, *Germany v. Parliament and Council*, ECLI:EU:C:2006:772, para 38; Case 58/08, *Vodafone Ltd*, ECLI:EU:C:2010:321, para 33; Kofler, above, n. 76, at sec. 2.2.

<sup>83</sup> Compare, eg J. Terhechte, ‘Artikel 115 AEUV [Nationales Recht mit unmittelbarer Auswirkung auf den Binnenmarkt; Rechtsangleichung]’ in M. Pechstein, C. Nowak and U. Häde (ed), *Frankfurter Kommentar EUV/GRC/AEUV Band III* (Mohr Siebeck 2017), 532-541, at para 3.

<sup>84</sup> European Commission, ‘Towards a more efficient and democratic decision making in EU tax policy’, COM(2019)8; [hereinafter: Commission decision making]; which was not picked up by the Council. See Council of the European Union, ‘Outcome of the Council Meeting: 3671st Council meeting Economic and Financial Affairs’, 6301/19, at pp. 4-5

served by EU action rather than by national action will a coordination at EU level make sense and be legally possible.<sup>85</sup>

In an attempt to lay such analytical ground, it seems that the promotion of the Internal Market, as a core aim of the EU,<sup>86</sup> is primarily relevant. This is also the *conditio sine qua non* for any action based on Art. 115 TFEU to be possible.<sup>87</sup> The overall contribution of a minimum taxation system to the Internal Market will depend on the size of the net welfare gains it causes due to inducing taxpayers to act in a more efficient manner (see sec. 3.2.1), the welfare costs it causes to the Internal Market through raising the cost of capital and by giving rise to a lower inflow and/or larger outflow of mobile capital (sec. 3.2.2.), as well as the welfare loss it causes through, eg its compliance and administration costs (3.2.3.).<sup>88</sup> Whilst it is impossible to quantify these dimensions, it still seems to provide for a framework to approach this issue. In addition, the financial stability of Member States, being a pre-condition for the economic and monetary Union, is also among the key interests of the EU.<sup>89</sup> EU tax legislation must take this into account as well.<sup>90</sup> The latter is, not in the least, a useful proxy to estimate whether a political commitment to the measure is realistic as it can be assumed that Member States that disproportionately lose revenue will be reluctant to commit to the relevant EU action.

If the analysis conducted in ch. 3 reveals the existence of overall good reasons to implement a minimum taxation directive and if, in addition, none of the counterfactual tests discussed in ch. 4 gives rise to the assumption of there being an overall superior alternative, it is prudent to assume that Art. 115 TFEU can be invoked for a minimum taxation directive.<sup>91</sup> Further comfort on the availability of Art. 115 TFEU as a legal basis is provided by the likelihood of the occurrence of at least some diverging unilateral action in the absence of EU action. The mitigation of the ‘fragmentation of the internal market in direct taxation’<sup>92</sup> was already relied

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<sup>85</sup> As direct tax law is a shared competence, EU action needs to comply with the principle of subsidiarity. See Article 5(1) in conjunction with Article 5(3) TEU. As a minimum, this is so because the EU can be expected to better enforce a minimum taxation regime, which is a key element for its functioning. Further advantages of EU action relative of a national implementation of minimum taxation regimes will come to the fore in ch. 3. In addition, there must be compliance with the principle of proportionality. See Article 5(1) in conjunction with Article 5(4) TEU. This principle will be of increased importance when it comes to the actual design of the rules. It should be noted that the principle of subsidiarity does not play an important role in practice when, as usual in the field of direct taxation, EU legislation is based on Article 115. This is a result of the unanimity requirement included in leg cit. See S. Korte, ‘Art. 115 (ex- Art. 94 EGV) [Richtlinien zur Angleichung von Rechtsvorschriften für den Binnenmarkt]’ in C. Calliess and M. Ruffert (eds), *EU/EAUV Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (Beck, 2016), 1553-1557, at para 12.; Braun Binder, above, n. 81.

<sup>86</sup> Article 3(3) Treaty on European Union (TEU).

<sup>87</sup> eg Braun Binder, above, n. 81, at 49-50; Kofler, above, n. 76, at 20.

<sup>88</sup> For clarity, in this regard, the social cost of taxation, ie the cost in excess of the tax collected, are subject to discussion. On the one hand, such costs include tax collection and compliance costs. On the other hand, and less visible, these costs also occur because something is not done or is done differently because of taxation. As a simplified example, consider that, in absence of taxation, doing business in country A is more costly than doing business in Country B. Now assume that, relative to Country A, Country B levies taxes that are sufficiently high to induce the business being conducted in Country A. The additional costs faced due to conducting business in Country A instead of Country B are a cost to society. In tax policy, maximizing economic efficiency means minimizing these excess costs (also known as deadweight loss). See, for this and a very accessible explanation of economic efficiency and other design criteria, Devereux et al, above, n. 1, at sec. 2.2.

<sup>89</sup> See, for a more detailed discussion, Hey, above, n. 31, at 45-47.

<sup>90</sup> See *ibid* 46, stating that the EU legislator is subject to an optimization requirement between Internal Market and stability goals.

<sup>91</sup> Generally, supportive as to Art. 115 TFEU being available as a legal basis for a minimum taxation directive, eg R. Achleitner & V. Bendlinger, ‘GloBE (Pillar Two) – Kompetenzrechtliche Erwägungen zur Umsetzung eines Mindestbesteuerungssystems innerhalb der Europäischen Union’, (2021) *beck.digitax* 2.

<sup>92</sup> Council Directive (EU) 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, 19.7.2016, recital 16.

on in the context of the conceptually similar but less far reaching Anti Tax Avoidance Directive (ATAD) (2016/1164).<sup>93</sup> For the same reasons, it can be brought forward in the context of a minimum taxation directive.<sup>94,95</sup>

### 3.2. The Internal Market perspective

#### 3.2.1. Efficiency gains achievable through a minimum taxation regime

Taxation, especially if too high or too low,<sup>96</sup> interferes with undistorted decision making, which is a feature enshrined in the ‘*legal DNA of the Internal Market*’.<sup>97</sup> When taxpayers, for tax reasons, behave differently than they would have in the absence of the tax outcome they try to achieve<sup>98</sup> or avoid,<sup>99</sup> the result is a decrease in allocation efficiency.<sup>100</sup> To be clear, the Internal Market will not be free of tax distortions after the implementation of a minimum taxation regime. In fact, as long Member States’ discrete tax systems co-exist, there will be disparities, and they will lead to distortions.<sup>101</sup> True cross-border tax neutrality is not at reach and

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<sup>93</sup> Council Directive (EU) 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, 19.7.2016, recital 16. See, on that, Kofler, above, n. 76, at sec. 2.2 Critical on Art. 115 TFEU being available as a legal basis for the ATAD, eg A. de Graaf and K.J. Visser, ‘ATA Directive: Some Observations Regarding Formal Aspects’, (2016) 25 *EC Tax Review* 4; G. Bizioli, ‘Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?’, (2017) 26 *EC Tax Review* 199-210; I. Lazarov and S. Govind, ‘Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD Under EU Law’, (2019) 47 *Intertax* 10, 852-868; Regarding Article 115 TFEU to be an adequate legal basis see, eg Braun Binder, above, n.81, at 92-94; R. Szudoczky, ‘The relationship between primary, secondary and national law’ in C. Panayi, W. Haslehner and E. Traversa (eds), *Research Handbook on European Union Taxation Law* (Elgar, 2020) 93-118, at sec. 2.2.

<sup>94</sup> See also Achleitner and Bendlinger above, n. 91.; It is worth mentioning that literature has expressed doubts as to whether the ATAD, being a minimum standard and including various options for Member States to choose from does, in fact, reach its non-fragmentation goal. See, eg D. Smit, ‘The Anti-Tax-Avoidance Directive (ATAD)’, in B. Terra and P. Wattel (eds) *European Tax Law* (Wolters Kluwer 2019) 489. While this is understandable as such, it is still to be kept in mind that, vis-à-vis unilateral action, the ATAD clearly provides for lower fragmentation. As such, it still promotes this goal, although it does not reach it.

<sup>95</sup> For the sake of clarity, different considerations apply concerning the complimentary rules, i.e. the switch-over rule and the STTR, to be included into tax treaties. Expectably, when Member States unanimously agree on a minimum taxation directive, they will also strive to renegotiate tax treaties that would prevent the application of the relevant minimum taxation rules. Optimally, this would work via a multilateral instrument which, apart from having been proven to be feasible in the OECD/G20 BEPS Project, is also discussed as a possibility in OECD GloBE Proposal, above, n. 42, at sec. 7.2.3. In the absence of a renegotiation of those tax treaties barring the application of minimum taxation rules, Member States would have to override these treaties in order to give effect to their minimum taxation rules included in domestic law. An EU directive based on Art. 115 TFEU can arguably force Member States to override their tax treaties with other Member States. Yet, this is – naturally – more complex with respect to tax treaties between Member States and third states. In this regard, it is worth mentioning that the Commission tends to avoid interfering with tax treaties with third states when making proposals for direct taxation directives. See, on this matter in more detail and including further references, eg G. Prats et al, ‘EU Report’, in International Fiscal Association (ed), *Anti-avoidance measures of general nature and scope – GAAR and other rules* (IFA Cahiers vol. 103a, Sdu Fiscale & Financiële Uitgevers, 2018), at sec. 2.

<sup>96</sup> Compare in the context of the Internal Market, eg Hey, above, n. 31, at 39; M. Helminen, ‘EU Law Compatibility of BEPS Action 2: Neutralising the Effects of Hybrid Mismatch Arrangements’, (2015) 60 *British Tax Review* 325-339, 326-328.

<sup>97</sup> See, with further references, W. Schön, ‘Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?’, (2015) 69 *Bulletin for International Taxation* 271-293, at sec. 1, based on the prohibition of Member States to take any action that is likely to ‘deter’, ‘discourage’ or ‘dissuade’ economic actors from moving freely within the confines of the European Union. See further, eg Hey, above, n. 31, at 38-39; S. Korte, ‘Art. 26 (ex- Art. 14 EGV) [Binnenmarkt]’ in C. Calliess and M. Ruffert (eds), *EUV/AEUV Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (Beck, 2016) 636-651.

<sup>98</sup> Which concerns instances when taxpayers attempt to achieve some more favourable tax outcomes by adapting their behaviour.

<sup>99</sup> Which concerns instances when the expected tax consequences deter a taxpayer conducting a certain activity.

<sup>100</sup> eg J. Mirrlees et al, *Tax by Design* (Inst. Fiscal Studies 2011), at 40; or: J. Furman, ‘The Concept of Neutrality in Tax Law’, available at [www.brookings.edu/wp-content/uploads/2016/06/0415\\_tax-\\_neutrality\\_furman-1.pdf](http://www.brookings.edu/wp-content/uploads/2016/06/0415_tax-_neutrality_furman-1.pdf). (accessed 16 June 2020).

<sup>101</sup> Advocate General Geelhoed’s Opinion in Case 374/04, *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue*, ECLI:EU:C:2006:139, paras 43 and 46.

decision neutrality is to be approached at the level of the Member State.<sup>102</sup> Still, it is fair to expect that inefficient tax induced behaviour may overall decrease as a result of the implementation of a minimum taxation system. The following factors need to be considered in this regard.

To begin with, it is arguable that substance carve-outs can have an impact on efficiency. Depending on the circumstances in question, it can be both positive and negative. The focus shall first be on market jurisdictions. A minimum taxation system without a substance carve-out can create distortions if such a jurisdiction's tax burden is below the minimum. This comes as foreign owned domestic activity would frequently end up being taxed higher than domestic owned activity.<sup>103</sup> The result would be a violation of capital import neutrality (CIN) which demands that capital originating in various states should compete on equal terms in the market of any state no matter where the investor is resident.<sup>104</sup> On the other hand, substance carve-outs can give rise to certain tax planning opportunities that cause inefficient behaviour. As underlined by the IMF (2019), '*potential tax savings may be so large that companies are willing to allocate whatever resources are needed to pass a substance test, however unproductive they truly are in that use*'.<sup>105</sup> Put into the relevant context, any substance carve-out that is included in a minimum taxation regime, *ceteris paribus*, incentivises tax-motivated relocation of real activities.<sup>106</sup> For such behaviour to actually occur, it is necessary that its costs (expenses related to reallocation of substance, consultant fees, exit taxes, etc.)<sup>107</sup> are lower than the achievable benefits (tax savings).<sup>108</sup> Based on this, it is fair to say that, optimally, a substance carve-out needs to (i) be aware of CIN issues from the perspective of low tax jurisdictions but (ii) must not itself give rise to inefficient behaviour.

The current OECD proposal aims at addressing these considerations via a formulaic substance carve-out that aims to exclude a fixed return for substantive activities within a jurisdiction from the GloBE rules.<sup>109</sup> Consequently, only 'excess income' should be subject to minimum taxation.<sup>110</sup> While the relevant amounts are

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<sup>102</sup> In short, this means that the tax treatment of international situations must not be worse than the tax treatment of a comparable domestic situation unless this is justifiable and proportional. For a comprehensive discussion, see Schön, above, n. 97, at ch. 2. In this regard also note that, whilst Member States themselves alleviate the problem by entering into double tax conventions, there is nothing in EU law that requires any action to prevent double taxation that can result from the interaction of two Member States' tax systems. See, in more detail, eg G. Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007), 134-150.

<sup>103</sup> See also Englisch and Becker, above, n. 6, at sec. 3.2.5.2.; see further: H. Grubert and R. Altschuler, 'Fixing the system: An analysis of alternative proposals for the reform of international tax', (2013) 66 *National Tax Journal* 3.

<sup>104</sup> With reference to Musgrave, *Criteria for Foreign Tax Credit*, in *Taxation and Operations Abroad* (Princeton: The Tax Institute 1960), 83; see E. Kemmeren, *Principles of origin in tax conventions. A rethinking of models* (Pijnenburg 2001) 71.

<sup>105</sup> IMF 2019 above, n. 1, at para 14.

<sup>106</sup> M.A. Sullivan, 'Fixing GILTI, Part 3: Substance Exception', (2019) 94 *Tax Notes International* 10, 931.

<sup>107</sup> See on that in also in sec. 3.2.2.

<sup>108</sup> According to the so called 'trade-off literature', taxpayers trade off tax benefits and non-tax costs when making tax planning decisions. See J. Kim et al, *How Quickly Do Firms Adjust to Optimal Levels of Tax Avoidance?* (Semantic Scholar 2015), available at <https://pdfs.semanticscholar.org/50dd/268f5f9d561dcfc43b87e372211ddaee09ab.pdf> (accessed 9 June 2020). With reference to M. Scholes, G. Wilson and M. Wolfson, *Tax planning, regulatory capital planning, and financial reporting strategy for commercial banks*, (1990) 3 *The Review of Financial Studies* 4. See also D.A. Shackelford and T. Shevlin, 'Empirical Tax research in accounting', (2001) 31 *Journal of Accounting and Economics* 1-3. Costs to set up the required substance are part of the costs; compare further, eg M. Keen, 'Competition, Coordination and Avoidance in International Taxation', (2018) 72 *Bulletin for International Taxation*, at sec. 3.

<sup>109</sup> OECD GloBE Proposal, above, n. 42, at sec. 4.3.

<sup>110</sup> *Ibid.* For clarity: The normal return is the minimum return required by an investor considering the risk of an investment. The excessive return is the return above the normal return, ie a so-called economic rent. See further, eg Devereux et al, above, n. 1, at 24.



still to be determined, the OECD has indicated that what remains in scope of the GloBE rules will include intangible-related income that it deems to be most ‘susceptible’<sup>111</sup> to base erosion and profit shifting (BEPS) behaviour.<sup>112</sup>

Having regard to conceptual support in literature,<sup>113</sup> it appears prudent to assume that distinguishing between normal and excessive returns adequately approximates a workable solution to the above-mentioned trade-off inherent in substance carve-outs. Nonetheless, tax planning opportunities and, partly as a result,<sup>114</sup> a substantial increase in complexity may be the consequence.<sup>115</sup> Whether this will become a problem will strongly depend on how the final parameters are set.<sup>116</sup> Experts need to strike a balance between a too permissive and overly strict approach. In this regard, it is worth stressing that both dimensions seem to matter in the EU, although differently for different Member States. For those imposing a lower CIT burden, the mentioned CIN considerations may be real – especially when there is agreement on a relatively high minimum tax rate.<sup>117</sup> For other EU Member States, the anti BEPS component may be more important. Ultimately, and subject to the parameters being well set, it seems that OECD’s formulaic approach seems to be a feasible compromise between different Member States’ needs and should find its way into an EU minimum taxation regime.

As mentioned in sec. 2.2., with a view to ensure compliance with relevant primary EU law, it could be necessary to include a (much) broader substance carve-out for intra-EU situations.<sup>118</sup> Yet, this can bring more harm than good. As just outlined above, when the adding of economic substance can switch-off the minimum taxation rules, then MNEs will bear the necessary costs should the achievable tax benefit justify that. This behaviour gives rise to inefficiencies.<sup>119</sup> Hence, and skipping complex legal assessments, it seems that an EU minimum taxation regime would fare better without a broad substance carve-out.<sup>120</sup>

For the sake of completeness, it is worth mentioning that the permission of blending high taxed with low taxed income raises somewhat similar concerns. As long as an MNE also has subsidiaries in high tax jurisdictions

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<sup>111</sup> Ibid.

<sup>112</sup> Readers less familiar with taxation may understand BEPS as some sort of synonym for aggressive tax planning and tax avoidance activities.

<sup>113</sup> Without having regard to the specific substance carve-out as included in the GloBE proposal: Englisch and Becker, above, n. 6, at sec. 3.2.5.2; compare further: Grubert and Altshuler, above, n. 103.

<sup>114</sup> Should undesired tax planning occur, it can be expected that anti-abuse rules will have to be implemented. Compare further, eg Mirrlees et al, above, n. 100, at 42. See also D. Dharmapala, ‘The Economics of Corporate and Business Tax Reform’, (2016) *Oxford University Centre for Business Taxation Working Paper* 16/04, at sec. 2.2.

<sup>115</sup> Compare Englisch and Becker, above, n. 6, at sec. 3.2.5.2; and Sullivan, above, n. 106.

<sup>116</sup> To give the reader some indication: In the OECD Economic Impact, above, n. 18, at 88, the substance carve-out is modelled as being 10% of the components included in the formula. As underlined by the OECD on many occasions, a decision has not been made. It was only included as the model needs to include some assumption. Based on this number, it is estimated that approx. 15% of global profit is carved out. See *ibid* at 92.

<sup>117</sup> Compare, conceptually, also Englisch and Becker, above, n. 6, at sec. 3.2.5.2.

<sup>118</sup> Here meaning either (i) its inclusion to, ex ante, decrease the possibility of the ECJ finding an unjustifiable/ non-proportionate restriction of the fundamental freedoms or, (ii) its inclusion as a potential result of such a judgment should it be made.

<sup>119</sup> See, eg above, n. 105.

<sup>120</sup> Apart from what was briefly discussed in sec. 2.2., it should be mentioned that especially the finding of a new justification has to go in hand with solving complex conceptual issues. In fact, essentially, the goal of the fundamental freedoms is to precisely provide for economic efficiency by promoting neutrality. See already above, n. 97. Yet, in this regard, the compliance with the fundamental freedoms would lead to a less efficient result. The author will reflect on this in a follow up paper.

against which the low taxes can be offset, there is an incentive for the taxpayer to shift profits (and potentially economic substance) into a low tax jurisdiction.<sup>121</sup> The OECD proposal, however, only foresees jurisdictional blending.<sup>122</sup> In this setting, such behaviour will principally not emerge.<sup>123</sup> An EU minimum taxation directive should not deviate therefrom.

Furthermore, minimum taxation regimes are also regarded as having the potential to increase economic efficiency by promoting capital export neutrality (CEN).<sup>124</sup> This concept demands that a taxpayer should invest in the same jurisdictions that it would have in the absence of taxes.<sup>125</sup> That way, investors will choose the investment location based on the highest pre-tax return.<sup>126</sup> CEN is missed when foreign income is taxed differently than domestic income. This includes the opportunity to defer tax payments until repatriation of the income. Due to minimum taxation rules applying based on accrued income, the benefit of deferral would be taken away.<sup>127</sup> CEN will not be fully reached, but the most extreme distortions would be significantly reduced.<sup>128</sup> Relatedly, it could be that corporate tax differentials between Member States decrease.<sup>129</sup> Higher minimum tax thresholds tend to more strongly promote CEN.<sup>130</sup> That being said, it does not seem that this should (anymore) be a major consideration for EU countries. CFC rules, which had to be implemented in all Member States based on Art. 7-8 ATAD (2016/1164), already deny deferral with respect to certain categories of income or, in fewer cases, regarding non-genuine arrangements.<sup>131</sup> Still, minimum taxation rules go beyond these CFC rules and their optional exemptions.<sup>132</sup> Depending on the relevant minimum threshold rate and ordinary rate of the single Member State, they could have an impact.<sup>133</sup> Notably, this also means that the

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<sup>121</sup> See, on blending in more detail, Englisch and Becker, above, n. 6, at sec. 3.2.4.1.; see in respect of the US-GILTI rules that allow blending, eg R.M. Kysar, 'Value Creation: A Dimming Lodestar for International Taxation?', (2020) 74 Bulletin for International Taxation, sec. 3.2.

<sup>122</sup> See OECD GloBE Proposal, above, n. 42, at sec. 3.4.

<sup>123</sup> Unless blending low taxed and high taxed income within a jurisdiction is possible. See further also OECD GloBE Proposal, above, n. 42, at 198 et seq.

<sup>124</sup> See also Englisch and Becker, above, n. 6, at sec. 2.1.; for an analysis see Devereux et al, above, n. 61, at ch. 3; and F. Bares, M. Devereux and I. Güçeri, 'The Impact of Pillar II on Incentives: A Trade-off between Revenue and Investment', CBT Blogs, available at <http://business-taxation.sbsblogs.co.uk/2020/03/03/the-impact-of-pillar-ii-on-incentives-a-trade-off-between-revenue-and-investment/> (accessed 3 July 2020), who demonstrate the importance of the minimum tax threshold and the permission of blending in this regard.

<sup>125</sup> eg P. Richman, *Taxation of Foreign Investment Income, An Economic Analysis* (John Hopkins Press 1963) 5; P.B. Musgrave, *United States taxation of foreign investment income: issues and arguments* (Law School of Harvard University 1969), 109.

<sup>126</sup> eg D. Weisbach, 'The Use of Neutralities in International Tax Policy' (Coase-Sandor Institute for Law & Economics Working Paper No. 697 2014) 1-20, at sec. 1.

<sup>127</sup> Englisch and Becker, above, n. 6, at sec. 2.1.

<sup>128</sup> *ibid.*

<sup>129</sup> See, in this context, T.P. Hanappi and A.C. González Cabral, 'The impact of the Pillar One and Pillar Two proposals on MNE's investment costs: An analysis using forward looking effective tax rates', (OECD Taxation Working Paper 2020), in whose sample (see *ibid* at para. 4) the difference between the highest and lowest effective average tax rate declined by 2,8%. As underlined by the OECD Economic Impact, above, n. 18, 216, this is a move to the CEN as well.

<sup>130</sup> See, in more detail, Devereux et al, above, n. 61, at ch. 3.

<sup>131</sup> Member States can choose whether to determine the CFC tax base using the 'income category approach' or the 'non-genuine arrangements approach'. The latter approach is only chosen by eight Member States. See KPMG, CFC Rules under ATAD, available at <https://tax.kpmg.us/articles/2019/beeps-cfc-rules-&-atad.html> (accessed 3 July 2020).

<sup>132</sup> Such as the 1/3 rule that allows a Member State to not treat an entity or permanent establishment as a CFC if one third or less of the income accruing to the entity or permanent establishment falls within the CFC income categories. See Art. 7(3) ATAD (2016/1164); and further, eg M. Helminen, above, n. 71, at sec. 3.4.6.3.

<sup>133</sup> See, for more detailed considerations, Devereux et al, above, n. 61, at ch. 3.

negative effects of disparities between Member States' tax systems – which are still out of reach for the ECJ – would decrease. The consequence would be an increase in welfare.<sup>134</sup>

### 3.2.2 Effects on the competitiveness of the Internal Market

In direct tax matters, it does not come natural to look at the Internal Market as something like a single national market.<sup>135</sup> This is prevented since the Member States retained a wide degree of fiscal sovereignty and political responsibility.<sup>136</sup> It is, to stress a famous metaphor, less of a snooker table spanning the whole EU but more of a room with 27 snooker tables that can be accessed in a non-discriminatory way.<sup>137</sup> This section will nonetheless focus the impact of an EU minimum taxation regime from the perspective of the Internal Market as a whole.<sup>138</sup> Doing so is inevitable because the positive effects of minimum taxes on the Internal Market discussed in sec. 3.2.1. could be washed away by a loss in the Internal Market's global competitiveness and the attached cost from capital leaving or capital not coming into the EU.<sup>139</sup>

At the core of the issue stands the rise in the cost of capital induced by a successful minimum taxation regime. This, *ceteris paribus*, decreases investment and, as a result, welfare.<sup>140</sup> Stricter forms of minimum taxation rules naturally increase these costs.<sup>141</sup> In search for a higher post-tax return, mobile capital may go elsewhere and investment projects in the EU may remain undone. An important exogenous factor is the proliferation of minimum taxation regimes outside the EU. Bluntly speaking, the higher the tax burden in third countries with similar attributes as the respective EU Member States (peer countries), the fewer places there are for mobile capital to go.<sup>142</sup> Aside from that, there are various other aspects which suggest that the implementation of a minimum taxation regime along the lines of the GloBE proposal may have rather modest negative effects on the competitiveness of the Internal Market.

To start with, consider that, based on current discussions, the minimum tax threshold will lie between a spread of 10-15%.<sup>143</sup> In the economic impact assessment, the OECD calculated with 12,5%.<sup>144</sup> Should that rate prevail, there would be two EU Member States with a lower nominal CIT rate – Hungary (9%) and Bulgaria (10%) –

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<sup>134</sup> Firms invest where the post-tax return is the highest. Yet, from a global efficiency point of view, they should invest where the pre-tax return is the highest. When minimum taxation rules lower tax differentials, an increase in welfare would follow. See, eg OECD Economic Impact, above, n. 18, at sec. 4.5.; or Englisch and Becker, above, n. 6, at sec. 2.1.

<sup>135</sup> As summarised by the doyen in this field: F. Vanistendael, 'The functioning of fundamental freedoms and tax neutrality in the internal market', in C. Panayi, W. Haslehner and E. Traversa (eds), *Research Handbook on European Union Taxation Law*. (Elgar 2020) 142-162, at sec. 8.

<sup>136</sup> *Ibid.*

<sup>137</sup> See Schön, above, n. 97, at sec. 3.7., going back to F. Vanistendael, 'The Compatibility of the Basic Economic Freedoms with the Sovereign National Tax Systems of the Member States', (2003) 12 *EC Tax Review* 136-143, at 141 et seq.

<sup>138</sup> The Member States' perspective is reflected in 4.3.

<sup>139</sup> To continue the metaphor, the risk is that, as a response to an EU minimum taxation system, certain MNEs may decide to play (some of) their snooker game(s) elsewhere.

<sup>140</sup> Devereux et al, above, n. 61, at ch. 3; more comprehensively, Devereux et al, above, n. 1, at sec. 2.2.2. Note that the extent of this effect is difficult to estimate and may be influenced by other factors that impact firms' investment behaviour. For instance, a global savings glut could have a mitigating effect. The author thanks one of the peer-reviewers for this insightful comment.

<sup>141</sup> See for an analysis of the effects of different design options, *ibid.*

<sup>142</sup> See on the broader issue, the discussion and references provided for in ch. 3.

<sup>143</sup> See sec. 2.2.

<sup>144</sup> See above, n. 57.

as well as two Member States with a nominal CIT rate at the minimum rate: Cyprus and Ireland.<sup>145</sup> While this does not provide a full picture – only taking into account the tax base as well would do so – it still gives a good indication that Member States that impose a low CIT burden could still do so in the future. With respect to Member States with a higher CIT rate, different considerations apply. With the minimum being below the ordinary rate (the EU average lies at 21,7%),<sup>146</sup> taxpayers resident in these Member States are formally unaffected. The essential difference to the current system lies in the floor for MNEs to decrease their effective tax rate via tax planning. An MNE that, under compliance with all relevant existing anti abuse rules, was able to decrease its effective tax rate below the minimum threshold will, in the presence of a minimum tax regime, no longer be able to do so. Rather, it will be stopped at the minimum rate. As such, it is still possible for mobile capital to, for some costs,<sup>147</sup> escape the ordinary tax system and to reach a lower effective taxation. In addition, also Member States with nominally high CIT rates may well have in place special tax regimes that target certain activities. For instance, according to a ZEW (2018) survey, 19 out of 33 (mostly European) countries tax digital investments at an effective tax rate below 10%.<sup>148</sup> Twenty five taxed below 15% and 30 taxed below 16,5%.<sup>149</sup> MNEs can still benefit from such tax incentives, yet, if they are in the scope of the minimum taxation rules, they cannot do so below the minimum.<sup>150</sup>

Leaving the necessary look into detail to economists, there could at least be the impression that this may be enough.<sup>151</sup> In other words, even if a strong case can be seen for taxing the mobile tax base more lightly than the immobile tax base,<sup>152</sup> this does not necessarily mean that the taxation of the mobile tax base must be very low or even zero. In fact, Member States, as well as the Internal Market itself, provide for substantial non-tax benefits that an investor will appreciate. Seen in concert with the exit taxes that were implemented EU-wide through Art. 5 (ATAD 2016/1164) and that trigger taxation at the ordinary rate,<sup>153</sup> the author does not expect minimum taxation rules to have a substantially negative impact on the competitiveness of the Internal Market in the global economy.<sup>154</sup> After all, the US has also implemented a minimum taxation regime.<sup>155</sup> For sure, this

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<sup>145</sup> The Irish CIT rate of 12,5% only applies to trading income.

<sup>146</sup> See European Commission, ‘Taxation Trends in the European Union: Data for the EU Member States, Iceland and Norway’ (2019) available at [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/taxation\\_trends\\_report\\_2019.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_trends_report_2019.pdf).

<sup>147</sup> Such as the costs related to shift the relevant activity and fees for consultants; see eg Keen, above, n. 108, at sec. 3.

<sup>148</sup> ZEW, ‘Digital Tax Index: Locational Tax Attractiveness for Digital Business Models’ (2018); and see Englisch and Becker, above, n. 6, at sec. 3.1.

<sup>149</sup> Ibid

<sup>150</sup> This is so because the minimum taxation rules of another country would, in effect, top up the tax to the minimum rate.

Alternatively, the Member State having the tax incentive in place may redesign it with a view not to trigger minimum taxation elsewhere.

<sup>151</sup> For sure, this is a substantial generalisation – at the level of the single Member State different considerations may apply. On this issue, see sec. 4.3.

<sup>152</sup> See the discussion and references provided for in sec. 3.1.-3.2.

<sup>153</sup> See, for a more detailed discussion, eg Helminen, above, n. 71, at sec. 3.4.4.

<sup>154</sup> The reallocation costs, of which the exit tax is effectively a part, enables countries to tax so called “quasi-rents.” For example, production-based location specific quasi rents can emerge after a substantial investment into a production facility has been made. Plausibly, a minimum tax may, in part, fall on such quasi-rents. To the extent this is so, businesses will not adapt their behaviour (and, for instance, relocate). See, in more detail, Devereux et al, above, n. 1, p. 73.

<sup>155</sup> On the US minimum tax system in the context of the OECD proposal, see eg M. Herzfeld, ‘Can GILTI + BEAT = GLOBE?’, (2019) 2 *Intertax* 47; D.W. Blum, ‘The Proposal for a Global Minimum Tax: Comeback of Residence Taxation in the Digital Era?’, Comment on Can GILTI + BEAT = GLOBE?, 2 *Intertax* 47.

perspective is somewhat artificial because it is the Member States with their own taxing and spending regimes that gain or lose with mobile capital coming or leaving – and their location specific rents are different. For instance, Member States with a large installed capital base that creates positive externalities for new investors may find it easier to attract investment; even if tax rates are high.<sup>156</sup> Thus, the benefits of agglomeration can be taxed relatively safely.<sup>157</sup> Aside from that, also other location-specific rents, eg natural resources, may be present.<sup>158</sup> Further, countries with a higher stock of old capital have greater opportunity costs in reducing taxation in the ongoing period than countries that have a smaller stock of existing capital.<sup>159</sup> That being said, what still remains and what matters is that EU Member States can afford charging a higher CIT than a small resource scarce island in the Atlantic Ocean.<sup>160</sup> For some, this is easier than for others, but for all it is, arguably, easier as they are part of the Internal Market. If these thoughts are correct, a minimum tax would help in better exploiting the location specific rents existing in and because of the EU.<sup>161</sup>

In addition, there are reasons to believe that those caught by minimum taxation rules are less sensitive to taxation than average MNEs.<sup>162</sup> This is based on a relatively new finding that indicates that so called “superstar firms” – being generally characterised as firms with very high profitability rates and mark ups – are likely to react less strongly to changes in CIT than other firms.<sup>163</sup> Various explanations for this have been brought forward including potentially greater financial resources, the possible existence of economic rents (eg related to market power),<sup>164</sup> and the potential necessity to not reduce future investment to keep the dominant position.<sup>165</sup> Thus, there seems to be additional factors at the level of the covered MNEs themselves that may further smooth the negative impact on investment of an EU minimum taxation regime.<sup>166</sup> Notably, the relevant EU operations of such a ‘superstar firm’ can also be covered by the minimum taxation regime of third states,

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<sup>156</sup> M. Keen and K.A. Konrad, ‘The Theory of International Tax Competition and Coordination’, (2012) Max Planck Institute for Tax Law and Public Finance Working Paper 2012-06, at sec. 3.5.3.; and see R. Baldwin and P. Krugman, ‘Agglomeration, integration and tax harmonization’, (2004) 48 *European Economic Review* 1, 1-23.

<sup>157</sup> In which case it is important, as indicated by Baldwin and Krugman, above, n. 156, that the tax is not too high, that is, in sufficient excess of the agglomeration benefit. See, eg Devereux et al, above, n. 1, at p. 78, using the Silicon Valley (for tech companies), or the City of London (for finance companies) as two prominent (non-EU) examples for such rents. It is fair to expect that such rents also exist in the EU.

<sup>158</sup> A location specific rent has been defined by Devereux et al, above, n. 1, at p. 78 as ‘A location- specific rent may arise in a place of economic activity in any instance where the business has access to a resource where the cost of that resource is less than its value to the business’, the taxation of which is frequently recommended. See, eg IMF, ‘Fiscal Regimes for Extractive Industries—Design and Implementation’ (IMF Policy Paper 2012); IMF 2019 above, n. 1, at 19.

<sup>159</sup> Keen and Konrad, above, n. 156, at sec. 3.5.3; referring to: E. Janeba and W. Peters, ‘Tax evasion, tax competition and the gains from nondiscrimination: The case of interest taxation in Europe’, (1999) 109 *Economic Journal* 93-101; N. Marceau, S. Mongrain, and J. Wilson, ‘Why do most countries set high tax rates on capital?’, (2010) 80 *Journal of International Economics* 2, 249-259.

<sup>160</sup> Compare further going the discussion in Keen and Konrad, above, n. 156, at 4. Tax havens typically do not compete for real investment but for so called ‘paper profits’.

<sup>161</sup> To restate the underlying problematic of an increase in corporate tax in the words of Devereux et al, above n. 1, at p. 138: “In the end, countries would have to consider a trade- off between the benefits of additional revenue from taxing economic rents that were more location- specific and the costs of driving at least some economic activity elsewhere.”

<sup>162</sup> See OECD Economic Impact, above, n. 18, at sec. 4.6.

<sup>163</sup> See *ibid*; V. Millot et al, ‘Corporate taxation and investment of multinational firms: Evidence from firm-level data’ (OECD Taxation Working Papers, No. 51, 2020); and E. Kopp et al, ‘U.S. Investment Since the Tax Cuts and Jobs Act of 2017’ (IMF Working Papers, No. 19/120 2020).

<sup>164</sup> See in this regard Kopp et al, above, n. 163.

<sup>165</sup> See Kopp et al, above, n. 163; as well as the summary in OECD Economic Impact, above, n. 18, at sec. 4.6.

<sup>166</sup> Assuming that an EU minimum tax regime would also lead to an increase in MNEs tax burden. As it will be held immediately below, this is not necessarily the case.

especially the US.<sup>167</sup> When this is so, the relevant EU Member State should even tax itself because, otherwise, someone else will do it.<sup>168</sup>

Taken together, it appears that an EU minimum taxation regime could largely lead to an increase in tax on economic rents that have their origin at different sources. The potential increase in taxes through such a system may be used to offset decreases in taxes that have a stronger impact on investment.<sup>169</sup> Alternatively, the additional tax revenue may be spent in a way that gives rise to more welfare gains than what the minimum taxation system causes in welfare losses.<sup>170</sup> Both of these actions could again increase the competitiveness of the Internal Market. Hence, it is not clear whether the implementation of a minimum taxation regime indeed leads to a decrease in the competitiveness of the Internal Market as a whole – especially if a wide range of third states adopt such a system.

### 3.2.3. Compliance and administrative costs attached to a minimum taxation regime

An undisputed downside of a minimum taxation regime lies in the rise it gives to compliance and administrative costs.<sup>171</sup> Without actual rules being drafted, it is too early to delve into this topic too deeply. Rather, it should suffice to broadly outline the drivers of a minimum taxation system's complexity and the safeguards against it becoming it too difficult.

The seemingly most relevant factor in this context is understood to lie in allowing/disallowing the blending of high and low taxed income.<sup>172</sup> Some scholars even fear that, absent blending, the complexity of a minimum taxation system could reach uncontrollability.<sup>173</sup> The current GloBE proposal only allows for jurisdictional

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<sup>167</sup> Note that there is not yet a decision on the interaction between the current US minimum tax rules and the OECD GloBE proposal. Although both systems are conceptually very similar, there are some important deviations between the US GILTI rules and the IIR. Foremost, this concerns the fact that the GILTI rules largely allow global blending which is different under the GloBE proposal. See, in more detail on the relevant differences between these rules and the need find a political decision as to how to coordinate them, OECD GloBE Proposal, above, n. 42, at paras. 25-28.

<sup>168</sup> This is an important effect of minimum taxation rules that EU countries should make use of as they are currently often source states for such superstar firms. See also the discussion below in sec. 5 and further going on this matter eg S. Beer and G. Michielse, 'Strengthening Source- Based Taxation', in R. de Mooij, A. Klemm and V. Perry (eds), *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed* (IMF 2021), at 229, 248 et seq; K. Nakayama, V. Perry, and A. Klemm, 'Residence- Based Taxation: Is There a Way Forward?', in R. de Mooij, A. Klemm and V. Perry (eds), *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed* (IMF 2021), at 253, 257 et seq.

<sup>169</sup> As held in OECD Economic Impact, above, n. 18, at 21, it is generally believed that taxes on economic rents have a less strong effect on investment than taxes on normal profits. See further, including considerations on the economic incidence of the tax: A. Auerbach, *Who Bears the Corporate Tax? A Review of What We Know*, (National Bureau of Economic Research 2006). In an open economy, also taxes on economic rents can give rise to distortions. See, eg M.P. Devereux and P.B. Sørensen, 'The Corporate Income Tax: international trends and options for fundamental reform, European Economy' (European Commission 2006).

<sup>170</sup> See, for a concise summary of the underlying dynamics: P. Aghion et al, 'Taxation, corruption, and growth', (2016) 86 *European Economic Review* 21: 'Is taxation good or bad for growth? A dominant view is that taxation is detrimental to growth. Taxation reduces the reward to entrepreneurial innovation and therefore discourages investments that are important for growth. This perspective emphasizes minimizing the tax burden on successful innovators to encourage more people to try to become successful innovators. An alternative view argues that taxation should not be analysed independently from the surrounding economic and institutional environment. Taxation, in fact, is central for many aspects of this environment: tax revenues fund public infrastructure, education and schools, legal systems, and much more. Entrepreneurs and innovators often rely heavily on these public goods, and higher taxation can be growth enhancing if it supports the stronger provision of public goods because it raises the expected returns to entrepreneurial efforts.'

<sup>171</sup> Critical from an Internal Market perspective, eg Röder, above, n. 23, at 47.

<sup>172</sup> See, eg Englisch and Becker, above, n. 6, at sec. 3.2.4.1.

<sup>173</sup> D. Schanz, *An den Details kann die weltweite Neuordnung des Steuersystems noch scheitern*, (2020) 73 *Ifo Schnelldienst* 3, 14, 16.

blending which means that it is, in practice, disallowed.<sup>174</sup> This gives rise to new calculation and filing requirements all of which need to be understood and enforced.<sup>175</sup> Furthermore, tax authorities need to obtain and verify information also potentially from countries unwilling to cooperate.<sup>176</sup> In addition, anti-abuse rules are necessary to protect the integrity of the minimum taxation system. Taxpayers may try to plan around the minimum taxation rules or exploit the various carve-outs that may be included.<sup>177</sup>

On the other hand, two of these carve-outs contemplated in the OECD proposal may also provide for a considerable simplification.<sup>178</sup> Foremost, this concerns the exclusion of MNE groups that do not meet the revenue threshold of EUR 750 million. Thus, those who are too small, principally, do not need to apply (and understand) the IIR and UTPR.<sup>179</sup> The MNEs in scope are also subject to country-by-country reporting which, as the OECD underlines, should allow for synergies.<sup>180</sup> Secondly, a range of further simplifications are currently under discussion. Naturally, their implementation would also decrease compliance and administration costs. In general terms, these rules would allow MNEs to reduce compliance activities under circumstances that can be prudently assumed not to give rise to concerns. For example, MNEs may be spared the need to engage in a burdensome calculation of the ETR in the context of jurisdictions that are unlikely to trigger the minimum taxation rules.<sup>181</sup>

It is worth emphasising that the administration and compliance costs as well as the implementation costs induced by a minimum taxation regime have to be weighed against the respective costs that may emerge in plausible alternatives scenarios. If, for instance, the absence of an agreement on a minimum taxation system leads to the proliferation of diverging unilateral approaches, it is possible that a coordinated minimum taxation regime is the less burdensome option.<sup>182</sup>

### 3.3. The Financial Stability perspective

Against the background of what was discussed in sec.3.2., there are good reasons to believe that, overall, an EU minimum taxation directive can benefit the Internal Market. Thus, and still subject to the analysis

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<sup>174</sup> See, in more detail, OECD GloBE Proposal, above, n. 42, at sec. 3.4.

<sup>175</sup> Compare further going on this issue, eg J. Shaw, J. Slemrod and J. Whiting, ‘Administration and Compliance’, in J. Mirrlees et al. (eds) *Dimensions of Tax Design: The Mirrlees Review* (Oxford University Press 2011) 1105-1106, 1120.

<sup>176</sup> Notably, this would not be a new phenomenon. Yet, as outlined in the context of the – in this respect, conceptually similar – Imported Mismatch Rule, Scherleitner, above, n. 72, at sec. 5.4.5 this can be very challenging. See also Devereux, above, n. 1, at 160, who also stresses the need for the country in need of information having sufficient power. This also indicates that especially small EU countries could, in this context, benefit from coordinated EU action.

<sup>177</sup> The OECD has also recognised this and, on various occasions in the Pillar 2 blueprint, underlines the need to consider certain anti-abuse rules. See, eg OECD GloBE Proposal, above, n. 42, at paras 401, 578.

<sup>178</sup> Notably, carve-outs that would be included in an EU minimum taxation regime must meet the requirements of Art. 107 TFEU.

<sup>179</sup> See, on the scope, *ibid* at ch. 2; with respect to the scope of the STTR that is yet unclear, see *ibid* at sec. 9.2.5.

<sup>180</sup> *ibid* at ch. 5. Synergies emerge as certain numbers may also be usable for minimum taxation purposes.

<sup>181</sup> Which is a possibility discussed further in *ibid*, at sec. 5.5.

<sup>182</sup> At least with respect to implementation cost, a minimum taxation system is likely also a better alternative when compared to more far reaching reforms such as, eg the Destination Based Cash Flow Tax (DBCFT), which is an option favoured among academics. See eg Devereux et al, above n. 1, at ch. 7. Note, however, that precisely in the EU, the implementation cost of such a system may be lower than elsewhere because the EU has a VAT system that is – but for the non-deductibility of wages – conceptually similar. This would enable the EU and other countries with a VAT to gradually introduce such a system. In very general terms, this would function via an increase in VAT rates which is met by a gradual reduction in labour income tax and corporate income taxes. See *ibid*, at pp. 330 et seq. See also the discussion below in sec. 4.3.

conducted in ch. 4, this indicates that the legal requirements for relevant EU action based on Art. 115 TFEU should be met. That being said, whether the political requirements will be met as well is a completely different and much harder question. It is a European reality that, unfortunate in the eyes of many<sup>183</sup> but reconfirmed by a majority recently,<sup>184</sup> with one single Member State abstaining from giving its consent to a directive based on Art. 115 TFEU, the project fails.<sup>185</sup>

Typically, this question has been discussed from the opposite perspective. Positive EU integration in the field of direct taxation long aimed at improving the Internal Market by decreasing or extinguishing the tax liability for certain cross-border situations.<sup>186</sup> As such, the revenue directly lost from these measures was relevant. In the aftermath of the financial crisis, however, the direction changed. With the amendment of the Parent Subsidiary Directive in 2014 and 2015<sup>187</sup> as well as, more importantly, the implementation of the ATAD in 2016<sup>188</sup> and its amendment in 2017,<sup>189</sup> tax liability was increased. Here, revenue considerations look different. Rather than losing revenue as a direct consequence of EU law forbidding to tax a certain transaction, the concerns raised in this context have to do with the revenue effects that go in hand with a reaction of taxpayers to the increase in tax liability. While, as discussed in sec. 3.2.2., such capital flight may not be a major concern for the Internal Market seen as a whole – it could be a problem for some, likely smaller and more peripheral, Member States that tend to employ a rather ‘competitive’ tax policy. Should (one of) these Member States regard a minimum taxation system to be at too strong odds with (its) their interests, opposition can be expected.<sup>190</sup> The likeliness of this to happen will ultimately depend on the final design and strictness of the rules and their proliferation outside the EU. The more liberal and the more frequently that they are implemented elsewhere, the greater the chances of such jurisdictions also participating.

That being said, upon a closer look, the author is not sure whether the potential concerns of Member States that use taxation to set off other disadvantages<sup>191</sup> and/or Member States that position themselves as intermediary jurisdictions<sup>192</sup> seem to be excessively high. First and foremost, the current thresholds would exclude 85% - 90% of MNEs from the scope of the rules.<sup>193</sup> In this context, things can remain as they are. At the same time, however, more than 90% of global corporate revenue would be covered by the rules because

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<sup>183</sup> Such especially the European Commission, above, n. 84, at 1 et seq.

<sup>184</sup> See above, n. 84.

<sup>185</sup> It is, however, possible that EU action will still take place based on another legal basis, such as, eg Art. 116 TFEU, which, under certain circumstances, allows EU action under the ordinary legislative procedure. The author will not discuss whether a minimum taxation directive can be based thereon. For a recent elaboration on Art. 116 TFEU from a tax perspective, see: J. Englisch, ‘Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?’, (2020) 29 *EC Tax Review* 58.

<sup>186</sup> See for an analysis of the relevant corporate tax directives, eg Helminen, above, n. 71, at sec. 3.1-3.3.

<sup>187</sup> See *ibid*, at sec. 3.1.2.7., 3.1.4.

<sup>188</sup> ATAD (2016/1164).

<sup>189</sup> Directive 2017/952 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, Art. 1, OJ L 144/1, 29.5.2017.

<sup>190</sup> The author consciously skips any normative discussions in this respect given this is an inherently difficult question for which the answer will ultimately depend on who is asked.

<sup>191</sup> Which may be Member States like Bulgaria, Hungary, or Ireland.

<sup>192</sup> Which may be Cyprus, Malta, or Luxembourg.

<sup>193</sup> OECD GloBE Proposal, above, n. 42, at para. 117.



this is what the MNEs meeting the threshold earn.<sup>194</sup> To the extent the tax base related thereto is concerned, Member States would face limitations in that they cannot effectively go below the minimum. At this stage, one could ask what is the matter for a Member State that has a low CIT rate? With the contemplated minimum tax rate being expected to lie somewhere between 10-15%<sup>195</sup> and although minimum taxation rules will be calculated on a different basis, the author would not expect there to be major differences for MNE entities in scope but for the increase in compliance cost. Aside from that, other tax policies can also be upheld. Member States that want to extract CIT from the immobile tax base but intend to be more generous with respect to those that are mobile can keep such policy within the limits of other EU law.<sup>196</sup> They are, in effect, only prevented from doing so to the extent this triggers minimum taxation rules elsewhere. What is more, those who want to employ a stricter approach can execute this as well; for instance, via tightening their anti-abuse rules.<sup>197</sup>

What remains are intermediary jurisdictions. If minimum taxation rules make routing investment via these jurisdictions unfeasible, they may lose the (CIT and non-CIT) revenue attached to it. Yet, also in presence of a minimum taxation regime, these countries can still retain a competitive tax treaty network. If the inbound investor is sufficiently taxed, the STTR included in a minimum taxation regime will not take away the benefit of a low withholding tax on outgoing payments. Furthermore, it could still remain attractive to bundle investments into the Internal Market via a holding company, located in a jurisdiction that allows for a repatriation with low, or no, withholding tax. The abuse concerns that emerge in this context are addressed by other rules, dealing with so-called treaty shopping and directive shopping.<sup>198</sup> Furthermore, investment funds are explicitly excluded from the scope of the GloBE rules.<sup>199</sup> Provisions that promote the tax neutrality of such vehicles can, hence, be upheld.<sup>200</sup> Likewise, also an investor friendly regulatory law can continue to exist. Thus, and summing up, the relevant activities and their revenues are unlikely to leave.

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<sup>194</sup> Ibid at para. 118.

<sup>195</sup> See above, n. 57.

<sup>196</sup> In this context, for instance, the state aid rules under Art. 107 TFEU can exert an influence. Furthermore, Member States that tolerate profit shifting activities of MNEs as a tax competition device are bound by the ATAD.

<sup>197</sup> This could especially concern tax planning with royalty payments, which have been left relatively unaddressed in the course of the OECD/G20 BEPS Project. See already sec. 4.2. and the discussion below in this section. Based on Art. 3 ATAD (2016/1164), this would be possible. Limitations on the deductibility for royalties or service payments are not covered by the ATAD. Member States can also set stricter rules there. For sure, the requirements of the TFEU must always be met. Alternatively, they can consider setting a somewhat higher threshold themselves. Whilst this option was denied in the GLOBE proposal, it would not seem impossible to provide for such a choice in the course of an EU directive that implements a minimum taxation regime. Whether this would be sensible in light of the increasing administration and compliance costs, however, is questionable. See also the discussion in English and Becker, above, n. 6, at sec. 3.1.

<sup>198</sup> With respect to treaty shopping, which has been concisely described as the act of borrowing a tax treaty (H.D. Rosenbloom, 'Derivative Benefits: Emerging US Treaty Policy', [1994] 22 *Intertax* 2, 83-86, at 83), L. de Broe, *International Tax Planning and Prevention of Abuse* (IBFD 2007) 5-20. Similar to tax treaties, also EU-directives can be shopped into by third state persons not entitled to their benefits. This is typically addressed by General Anti Abuse Rules that are included in secondary EU law. See, for a comprehensive overview: Prats, 'above, n. 94, at sec. 3.1.3.; Note also the ECJ's statements in Case 115/16 N *Luxembourg 1 v. Skatteministeriet*, ECLI:EU:C:2019:134, paras 96 et seq, regarding the EU law principle that EU law cannot be relied on for abusive and fraudulent ends, which means that benefits of EU tax directives must not be granted in the case of abuse. See, in this regard, the references provided for in above, n. 64.

<sup>199</sup> See OECD GloBE Proposal, above, n. 42, at sec. 2.3.1.

<sup>200</sup> See *ibid*.

The greater danger for EU Member States may come from substance carve-outs with respect to third states.<sup>201</sup> Whilst the formulaic substance carve-out included in the current GloBE proposal does not appear to create a substantial risk in this regard – a more liberal rule that provides for an exemption from the minimum taxation rules *once* sufficient substance is reached can give rise to undesired consequences. In this case, also profits related to intangibles may be shifted abroad. For sure, this has costs. Yet, as increasing digitalisation tends to go in hand with fewer people being needed to carry out key value creating functions, it may well be the transaction costs for shifting income by relocating functions and risk could become substantially lower.<sup>202</sup> Although it is conceivable that this may – to some extent – also be exploited in the context of the formulaic substance carve out,<sup>203</sup> the potential to do so is much lower than what would result from accepting compliance with the nexus approach, as contained in BEPS Action 5, as being enough to be carved out from the minimum taxation rules.<sup>204</sup> This has been contemplated in earlier versions of the GloBE proposal –<sup>205</sup> and should finding an agreement turn out more difficult than expected, the author would not be surprised to see this question re-emerge. However, already to date, distinguished commentators use precisely this example to stress the dangers existing in a post BEPS world.<sup>206</sup> So, in line with Englisch & Becker (2019), who correctly question the future proofness of substance carve-outs, the author suggests not to open a Pandora’s Box that may end up legitimising taxpayers’ actions that come at the EU’s disadvantage. What has been called ‘tax competition 2.0.’,<sup>207</sup> that is, the intensified tax fight for real investment in a post-BEPS setting, could turn out to be a real threat to the EU should such substance carve-outs be allowed. If it is possible to genuinely conduct high-value activities without requiring much or even no substance, there will be plenty of third states waiting to attract it. Hence, should sweeteners be needed to get a wider agreement, this one seems too bitter for the EU.

What concerns intra-EU substance carve-outs is that they may well create winners and losers among EU Member States. Whilst on efficiency grounds, the better reasons speak against providing for substance carve-outs, they could be in the interest of some Member States. Unless the inclusion of substance carve-outs for intra-EU situations is a legal necessity under primary EU law,<sup>208</sup> it will have to be sorted out through the course

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<sup>201</sup> For clarity: As mentioned in sec. 2.2, this would most likely not be a legal requirement because it is expected that minimum taxation rules fall under the freedom of establishment which does not apply to third states.

<sup>202</sup> Englisch and Becker, above, n. 6, at sec. 2.2.3.

<sup>203</sup> Conceivably, intangible profits may be stuffed into payroll expenses.

<sup>204</sup> Which, in the context of IP-regimes, means that the eligibility to the benefits from such regimes is conditional on the extent of the taxpayer’s relevant R&D activities. See OECD, ‘Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – Action 5: 2015 Final Report’, OECD, at paras 23-69 (2015); see, on this topic, also Hebous, above, n. 25.

<sup>205</sup> OECD, ‘Public consultation document Global Anti-Base Erosion Proposal (“GloBE”) - Pillar Two’, OECD, para. 74 (2019).

<sup>206</sup> ie the danger of the research activity being shifted into the country providing for the tax incentive. See, M. Devereux and J. Vella, ‘Value Creation as the Fundamental Principle of the International Corporate Tax System, (European Tax Policy Forum Policy Paper 2018), at sec. 4.2.2. Implicitly similarly: W. Schön, ‘Steuerpolitik im sich wandelnden internationalen Umfeld’, in J. Lüdicke, G. Frotscher and L. Hummel (eds), *Steuerliche Entwicklungen im Kontext der Globalisierung. Forum der Internationalen Besteuerung* (Otto Schmidt 2019), 93-105, at 99.

<sup>207</sup> Schön, above, n. 206, at 99; see also, eg Devereux et al, above, n. 1, at pp. 134 et seq.

<sup>208</sup> As mentioned, this question goes far beyond the scope of this article. See sec. 2.2., for a brief discussion.

of negotiations. Although probably not politically feasible, it could turn out to be sensible for the anticipated losers of an intra-EU substance carve-out to compensate the anticipated winners to renounce on it.<sup>209</sup>

#### 4. Some speculations on the counter-factual

##### 4.1. What to look at under what circumstances

The goal of this chapter is to check the above elaborations for plausibility. Unless the below, admittedly very speculative, elaborations give rise to the impression that there is (i) a better way to implement a minimum taxation in the EU, or (ii) it is better not to implement a minimum tax regime in the EU, the author will, based on what was discussed in ch. 3, conclude that the EU should implement a minimum corporate taxation regime via a directive based on Art. 115 TFEU.<sup>210,211</sup> Thus, sec. 4.2. will briefly elaborate on whether there are superior options to implement a minimum taxation system in the EU rather than doing so via a directive based on Art. 115 TFEU. Sec. 4.3. will then discuss whether there are reasons to believe that the inexistence of a minimum taxation system, and hence the status quo plus other expectable developments outside the realm of minimum taxation, is better than the implementation of a directive.

##### 4.2. Counter factual test 1 – are there better ways to implement minimum taxation in the EU?

Literature on international tax coordination suggests that countries will only commit and remain committed to an agreement if it is in their interest to do so.<sup>212</sup> In this regard, it seems most relevant that enough countries join and stay.<sup>213</sup> Unless this happens, the pressure on the coordinating states may be too high.<sup>214</sup> Ultimately, the countries not joining may see a chance to attract some of the tax base of the coordinating countries. Conceivably, this perspective might increase tax competition among them which, at the same time, increases the need for the coordinating countries to react. They could do so by competing in fields that were not restricted by the agreement.<sup>215</sup> It should be noted that regional tax coordination regimes have given rise exactly to these issues.<sup>216</sup> Likewise – and this is also a main lesson learned from existing attempts to reach tax coordination –

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<sup>209</sup> See also (stressing the typically overwhelming political difficulties of doing so) Keen, above, n. 108, at sec. 2; compare further: IMF 2019 above, n. 1, at para 106.

<sup>210</sup> To be clear, it cannot be ruled out that EU action may also be based on Art. 116 TFEU. However, it seems wiser to start the process by trying to reach agreement based on Art. 115 TFEU.

<sup>211</sup> It is a conscious choice not to include another test in this setting, namely, whether it can make sense for certain Member States to act via enhanced cooperation as regulated in Art. 20 TEU and Arts. 326-334 TFEU.

<sup>212</sup> Concisely: Keen, above, n. 108, sec. 2; more fundamentally, eg Keen and Konrad, above, n. 156, at sec. 3.

<sup>213</sup> See, more comprehensively, eg IMF, OECD, United Nations & World Bank, 'Options for Low Income Countries' Effective and Efficient Use of Tax of Incentives for Investment', (IMF Policy Papers, p. 10 2015), 29-32.

<sup>214</sup> See *ibid.*

<sup>215</sup> *Ibid* and eg the discussion in Keen, above, n. 108, at sec. 3; see further going M. Elsayyad, and K.A. Konrad, 'Fighting multiple tax havens', (2012) 86 *Journal of International Economics* 2.

<sup>216</sup> See M. Mansour and G. Rota-Graziosi, 'Tax Coordination, Tax Competition, and Revenue Mobilization in the West African Economic and Monetary Union', (IMF Working Paper 2013) who, having analysed the process of tax coordination in the West African Economic and Monetary Union (WAEMU), state: '*the tax coordination framework may have had the unintended effect of contributing to the fragmentation of policy making at the national level by providing countries with the incentive to enact special tax regimes outside their tax laws. This is particularly the case of investment incentives, where the framework allows unfettered tax competition as long as it is done outside countries' main tax laws. This, in turn, has made tax systems opaque, increased their complexity, and contributed to a culture of "tax negotiation"*'.

the credible enforceability of the rules is key.<sup>217</sup> A system that can be sound and ambitious de jure, may be ineffective de facto.<sup>218</sup> States that have committed to the rules may leave open loopholes in the domestic implementation legislation or laxly enforce them. In simpler terms, they may cheat.

For the time and circumstances being, it is a remarkable achievement to have 139 countries conceptually agreeing to something as huge, complex, and politically delicate as the rewriting of the international tax system. However, as realists, it must not be forgotten that the road to having a workable, enforceable, and actually enforced minimum taxation system is still very long; even for a much smaller number of states. Scholars emphasise that the GloBE proposal lacks incentive compatibility<sup>219</sup> – and hence one of the key conditions for successful business tax reform.<sup>220</sup> When interests are not aligned, it does not go too far to expect that certain countries will be willing to defect.<sup>221</sup> When this is successful, there is a risk for the agreement to break apart. Consequently, the GloBE proposal needs to be credibly enforceable, and it needs to be enforced credibly.

To overcome such challenges, it requires a supra national monitoring framework and powerful institutions.<sup>222</sup> The OECD knows that and aims to develop mechanisms that should ensure the ‘*consistent, comprehensive and coherent application*’<sup>223</sup> of the GloBE rules and an ‘*effective overall coordination of their application across multiple jurisdictions*’.<sup>224</sup> For this purpose, the OECD outlines an approach consisting of three elements. The first is the creation of model legislation that serves as a template that could be used by jurisdictions as a base for their domestic implementation legislation. In addition, common guidance on the interpretation of the rules will be provided.<sup>225</sup> Secondly, there may be a multilateral review process on the implementation and the workability of the rules.<sup>226</sup> Thirdly, and most relevantly, there may be a multilateral convention that could contain the ‘key elements and high-level principles’ of the GloBE proposal.<sup>227</sup>

Even though the OECD has plenty of experience and expertise in the realm of tax coordination,<sup>228</sup> it may well be doubtful that this will result in an enforceability comparable to what would follow from the implementation

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<sup>217</sup> Ibid at ch. 6.

<sup>218</sup> See, with respect to the tax coordination in the WAEMU, *ibid*.

<sup>219</sup> See Devereux et al, above, n. 61, at 12. and compare, eg also J. Englisch, ‘Internationale Unternehmensteuerreform – mehr als kostspielige Symbolpolitik?’, (2020) 73 *Ifo Schnelldienst* 11, 11; Röder, above, n. 23, at 43.

<sup>220</sup> Devereux et al, above, n. 61, at 12, and Devereux et al, above, n. 1, at ch. 2.

<sup>221</sup> Compare conceptually also Devereux et al, above, n. 61. at 12-14.

<sup>222</sup> Compare IMF, OECD, UN and World Bank, above, n. 213, at 31; compare also Keen and Konrad, above, n. 156, at sec. 3.3.

<sup>223</sup> OECD GloBE Proposal, above, n. 42, at para. 697.

<sup>224</sup> *Ibid*.

<sup>225</sup> *Ibid* at sec. 10.5.1.

<sup>226</sup> *ibid* at sec. 10.5.2.

<sup>227</sup> *ibid* at sec. 10.5.3. It seems that the OECD also considered including the tax treaty rules, ie the Switch Over clause and the STTR, into such an instrument. Alternatively, the latter two rules may also be implemented via the so-called Multilateral Instrument that has already been used to update tax treaties as a result of the OECD/G20 BEPS Proposal.

<sup>228</sup> Apart from employing and gathering people with significant expertise in taxation, the OECD has long standing experience in drafting and updating model tax legislation – most relevantly, the OECD Model Tax Convention, which consists of 2624 pages. What is more, it has set up peer-review processes that are used in the context of the implementation of certain measures included in the OECD/G20 BEPS Project. Further, the OECD has developed a ‘Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting’ (MLI) which impacted more than 1.680 tax treaties. See on that, eg N. Bravo, *A Multilateral Instrument for Updating the Tax Treaty Network* (IBFD 2020). Aside from that, and with a view to the broadness of the Inclusive Framework and the diverseness of its members, importantly, the OECD has been joining forces with the United Nations

of an EU directive. While this conception may be criticised for being too general and poorly founded, it is still fair to expect that the EU's strong institutions, experience, and expertise will be the best possible way to safeguard compliance of Member States.

As such, EU action is superior to comprehensive national action because it ensures the enforceability of the minimum taxation system that is crucial for its functioning. Hence, even if all EU Member States fully back the OECD proposal, they should show that through consenting to a directive based on Art. 115 TFEU for the sake of implementing it.

At this stage, it is also worth calling to mind that there are alternative legal sources on which EU action can be based in the absence of Member States being able to reach unanimity. On the one hand, the Commission may try to base a directive on Art. 116 TFEU that enables qualified majority decision making.<sup>229</sup> This would force Member States unwilling to consent to a directive based on Art. 115 TFEU into introducing such a system. If ultimately successful, the advantage of this option lies in it still leading to an implementation of a minimum taxation regime in the whole EU rather than only in the interested Member States. However, invoking Art. 116 TFEU also has clear downsides. First of all, it is not sure whether this provision can actually serve as a legal basis for such far reaching harmonisation.<sup>230</sup> Expectably, the overruled Member States would challenge the availability of Art. 116 TFEU as a legal basis for the directive. If they are successful, they could abolish their minimum taxation system. For those Member States that would keep the rules, the benefit of the enforceability is lost. Ultimately, it would then just be national law. That being said, there are few experiences with respect to Art. 116 TFEU, which means that it is not impossible that the ECJ ultimately confirms the availability of this provision.<sup>231</sup> Against the background of this legal uncertainty, it may also be that a qualified majority will not even be found among Member States; not in the least also because even those who would support a minimum taxation directive could be reluctant to risk the creation of a precedent that might turn against them in the future. Stated differently, if Art. 116 TFEU turns out to cover the (so far) most far reaching harmonisation measure in direct taxation, the unanimity requirement may factually have become a matter of the past.<sup>232</sup> Apart from that, it would not appear wise for the Commission to choose what has been called a “nuclear option” in times of a looming tax war<sup>233</sup>

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(UN), International Monetary Fund (IMF), and the World Bank to create the Platform for Collaboration on Tax which could conceivably play some role in facilitating a minimum taxation regime.

<sup>229</sup> R. Szudoczky and D. Weber, 'Constitutional Foundations: EU Tax Competences; Treaty Basis for Tax Integration; Sources and Enactment of EU Tax Law', in B. Terra and P. Wattel (eds) *European Tax Law* (Wolters Kluwer 2019) 11, 37, who note that the Commission has already earlier threatened Member States to use this procedure, whilst it has never actually done so.

<sup>230</sup> See eg id; doubtful on the availability of Art. 116 TFEU as a legal basis of a minimum taxation regime, eg. Achleitner and Bendlinger above, n. 91; see, including a very comprehensive analysis, also M.F. Nouwen, 'The Market Distortion Provisions of Articles 116-117 TFEU: An Alternative Route to Qualified Majority Voting in Tax Matters?', (2021) 1 *Intertax*.

<sup>231</sup> Notably, parts of literature seem to be more positive on the availability of Art. 116 TFEU for the harmonisation of direct taxes. See eg. J. Becker and D. Fehling, 'Art. 116 AEUV im Recht der direkten Steuern', (2020) *Internationales Steuerrecht* 823.

<sup>232</sup> See, on this, also Nouwen, above, n. 230, at sec. 7.

<sup>233</sup> J. Englisch, 'Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?', (2020) 29 *EC Tax Review*.

On the other hand, there is also the possibility for enhanced cooperation. The authorisation of this procedure requires the Council to establish that the objective of such cooperation, i.e. the implementation of minimum tax directive, cannot be reached ‘within a reasonable period’ by the EU as a whole.<sup>234</sup> Conceivably, this ultima ratio condition could be met in the case that certain Member States refuse to give consent to a directive based on Art. 115 TFEU. Based on the proposal of the Commission and grounded on a qualified majority decision by the Council as well as upon the consent by the European Parliament, a group of at least nine Member States could then proceed to create a minimum taxation directive among them.<sup>235</sup> As a result, the participating states could still reap the benefits of enforceability. That being said, the ultimate availability of the enhanced cooperation procedure depends on a plethora of further going questions.<sup>236</sup> Most relevantly, enhanced cooperation has to create an added value to the Union as a whole<sup>237</sup> and must not create new distortions.<sup>238</sup> The fact that, as argued in sec. 3.2., a minimum taxation directive implemented based on Art. 115 TFEU would benefit the Internal Market does not automatically mean that also a minimum taxation directive agreed upon between a smaller number of Member States yields the same effect. Apart from that, the existence of sufficient political consent is also hard to estimate beforehand.<sup>239</sup> Thus, enhanced cooperation is by no means easy to achieve.<sup>240</sup> Nonetheless, it seems reasonably clear that, compared to Art. 116 TFEU, enhanced cooperation is conceptually the better alternative in the event that unanimity is not reached.

#### 4.3. Counterfactual test 2 – would it be even better not to introduce a minimum taxation directive?

Asking this question should prevent us from too euphorically riding on the wave of change. While, as established in ch. 3, there are reasons to believe that an EU minimum taxation regime has advantages, it must still be shown that not adopting such a system appears to be the worse option.

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<sup>234</sup> Art. 20(2) Treaty on European Union (TEU). See, in more detail on this, last-resort requirement eg H. Blanke, ‘Article 20 [Enhanced Cooperation] in H. Blanke and S. Mangiameli (eds), *The Treaty on European Union (TEU)* (Springer 2013), sec. 2.1.5..

<sup>235</sup> See Art. 20 TEU and Arts. 326-334 TFEU; In more detail on the procedure see eg A. Schrauwen, ‘Sources of EU Law for Integration in Direct and Indirect Taxation’, in D. Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (IBFD, 2010), at 15, sec. 1.5. 2010).

<sup>236</sup> See, in more detail on enhanced cooperation in tax matters, eg Szudoczky and Weber, above, n. 229, at 37; Schrauwen, above, n. 235, at ch. 1.5.; H. Schaumburg, ‘Steuergesetzgebungskompetenzen der Union’ in H. Schaumburg and J. Englisch (eds), *Europäisches Steuerrecht* (Otto Schmidt 2020), paras. 11.8 et seq and in more detail A. Cédelle, ‘Enhanced Cooperation: A Way Forward for Tax Harmonisation in the EU?’ in J Englisch (ed), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (IBFD 2016); C. Heber, *Enhanced Cooperation and European Tax Law* (Oxford University Press, 2021).

<sup>237</sup> See eg Blanke, above, n. 234, at sec.

<sup>238</sup> See Art. 326 TFEU and, for a more general discussion, eg Cédelle, above, n. 238, at sec. 4.2., who suspects that the ECJ might not be overly strict in this regard. Rather, to a certain extent, it may simply accept the existence of distortions, not in the least as almost any attempt at differentiated integration is, to some degree, in tension with the idea of the Internal Market. Stated differently, a very strict approach towards the existence of distortions would deprive the enhanced cooperation procedure of its meaning. Yet, as emphasised in id, it needs further case law to delineate where the borderline is for the acceptable detriment to the Internal Market. It is possible that the Court applies a stricter approach in the highly sensitive field of taxation.

<sup>239</sup> Presumably, those Member States that opposed a directive based on Art. 115 TFEU could also oppose enhanced cooperation in implementing minimum taxation. This is may, for instance, be the result of concerns that the minimum taxation regime of the coordinating states taxes away tax benefits that the non-coordinating Member States grant. On the other hand, however, non-coordinating Member States may also welcome a minimum taxation regime in the coordinating Member State in the hope for activity to as a result relocate to them.

<sup>240</sup> The example of the Financial Transaction Tax (FTT) shows how cumbersome this process can be. Already in early 2013, the Council authorised 11 Member States to proceed with the introduction of a FTT under the enhanced cooperation procedure but, so far, not even the participating Member States can reach an agreement. See, in more detail, eg Cédelle, above, n. 238, at sec. 3.

In this regard, the reader should note/recall/accept that the current attempts to reshape the international tax system are ultimately about a global reallocation of taxation rights.<sup>241</sup> Market countries demand more.<sup>242</sup> Secondly, and relatedly, if there is no agreement at the OECD level, it is not the status quo that will remain. Rather, market countries will then just take more.<sup>243</sup> There are various ways in which this may happen: digital permanent establishments, digital service taxes (DSTs), or domestic rules that fill a taxation right that may be implemented into tax treaties via a provision based on Art. 12B UN Model Tax Convention (2019). Noting that these rules have a different scope and mentioning that unilateral action may trigger a devastating tax war, what matters for this article is that things will change in respect of the taxation of highly digitalised businesses. Expectably, the EU,<sup>244</sup> or at least most Member States,<sup>245</sup> will join this action. After all, there are valuable markets, and payment must be made for their exploitation. As such, it can justifiably be asked: What problem should the EU have with a shift of taxation rights to market states?

The intuitive, and actually unfortunate, answer lies in Europe being a market region for many highly valuable digital businesses. A DST might not hurt it as much as it hurts others, especially the US. That being said, at least some EU countries, and probably even the EU as a whole, could have an interest to not see this happening with respect to their own export industries.<sup>246</sup> For instance, German scholars<sup>247</sup> and politicians<sup>248</sup> fear that they would likely lose out dramatically if China, India, or Brazil could, as market states, tax the profits, say, BMW makes out of exporting cars to these countries. The fact that Germany has also a large market – the largest in the EU – and, hence, would also benefit from a shift of taxation rights to market countries does not seem to offset the concerns caused by the potential loss in taxation rights as a production country. For smaller EU Member States with a strong export industry, this could be a similar issue. Even more, it could also affect the role of small intermediary countries. A move towards destination-based taxation could change the playing field to their disadvantages.<sup>249</sup> In fact, when the location of the purchaser is decisive for the tax liability, it is not

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<sup>241</sup> Compare, eg M. Kreienbaum, 'Aktuelle internationale steuerpolitische Entwicklungen' in J. Lüdicke, G. Frotscher and L. Hummel (eds), *Steuerliche Entwicklungen im Kontext der Globalisierung. Forum der Internationalen Besteuerung* (Otto Schmidt 2019) 87; Kysar, above, n. 121.

<sup>242</sup> eg C. Fuest, 'Unternehmen am Ort der Wertschöpfung besteuern – eine neue Leitidee für die internationale Besteuerung?', (2020) 73 *Ifo Schnelldienst* 3, 6-11, at 7.

<sup>243</sup> This is also accepted in OECD Economic Impact, above, n. 18, at para. 95; Notably, the EU would do just that in the case that it would, as currently planned, implement a digital levy. See, on this, already above, n. 36.

<sup>244</sup> See the statement of Benjamin Angel in the hearing of the FISC committee, available under [https://multimedia.europarl.europa.eu/en/subcommittee-on-tax-matters\\_20201028-0900-COMMITTEE-FISC\\_vd](https://multimedia.europarl.europa.eu/en/subcommittee-on-tax-matters_20201028-0900-COMMITTEE-FISC_vd) (accessed 30 Oct. 2020).

<sup>245</sup> See, for an overview of various initiatives OECD Economic Impact, above, n. 18, at sec. 4.8.

<sup>246</sup> See similarly also Schön, above, n. 206, at 103 et seq.

<sup>247</sup> Röder, above, n. 23, at 38, referring also to Schön, 'Der digitale Steuer-Irrweg', FAZ 80 (2018) 16.

<sup>248</sup> See the speech of the German Minister for Finance, Olaf Scholz, 'indestbesteuerung bringt Fairness ins internationale Steuerrecht', 150 Jahre DBA – Fit for Purpose?, Symposium zur Internationalen Steuerpolitik, Berlin 8 May 2019, available at [www.bundesfinanzministerium.de/Content/DE/Reden/2019/2019-05-08-150-Jahre-DPA.htm](http://www.bundesfinanzministerium.de/Content/DE/Reden/2019/2019-05-08-150-Jahre-DPA.htm) (accessed 10 July 2020).

<sup>249</sup> See, in more detail on such systems: IMF 2019 cited above, n. 1, at paras 59-75. For an estimate of the revenue implications of global implementation of a DBCFT for a sample of 80 countries, see S. Hebous, A. Klemm, and S. Stausholm, 'Revenue-Implications of Destination- Based Cash- Flow Taxation', (2020) 4 *IMF Economic Review* 848–74. In their sample, Luxembourg and Cyprus, which are two typical intermediary jurisdictions, would be among the main losers of a global shift to such a destination based system.

possible to attract a tax base without attracting the consumer.<sup>250</sup> For sure, it is very difficult to make these types of estimates because it is not known what the alternative scenarios look like.<sup>251</sup> While a global reform towards a Destination-Based Cash Flow Tax (DBCFT) is popular among academics,<sup>252</sup> it is very unlikely to happen in practice. Although the overall amount of revenue raised after such a reform may stay approximately the same as in the current origin based system, it would be substantially reallocated between countries.<sup>253</sup> Losers will not consent to such a reform. However, once the first economically powerful country is prepared to bear the significant implementation cost of such a system,<sup>254</sup> including the risk for retaliation, and adopts such a reform, then others have an incentive to follow.<sup>255</sup> Apart from that, countries, including EU Member States, may also gradually expand on destination based taxation.<sup>256</sup>

What remains for EU Member States is the need to become clear of the role origin based taxation is to play in the future – paying due regard to potential demographic<sup>257</sup> and economic developments. If those qualified to answer this question think that origin based taxation is in the interest of the EU, then the time to safeguard it is now.<sup>258</sup> After all, the direction in which the CIT is moving is clear and must not be ignored: Between 2000-2018, combined nominal CIT rates decreased by 7,7% (G20 average), 8,5% (OECD average), and 9,5% (EU23 average).<sup>259</sup> Data suggests that, in general, the corresponding broadenings of the tax base have not compensated

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<sup>250</sup> See *ibid*, at para 65, also referring to the fact that profit shifting is a minor problem under VAT as it would be a minor issue under a destination based cash-flow tax.

<sup>251</sup> Notably, there are different ways to reach destination taxation. Destination elements can also be considered in formulary appointment systems. See, eg S. Hebous and A. Klemm, 'Destination- Based Taxation: A Promising but Risky Destination', in R. de Mooij, A. Klemm and V. Perry (eds), *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed* (IMF 2021), at 265, 275. Also the OECD Pillar 1 proposal includes a sale factor.

<sup>252</sup> A DBCFT, or other boarder adjusted taxes, tax sales at the destination. Labour and other costs remain deductible in the country of origin. Thus, a business that only exports will not be taxed in the production country. Yet, the country adopting a DBCFT taxes imports and, hence, businesses that incurred production costs abroad. If a country's exports equal imports, these effects would net out in the aggregate tax base. See, in more detail, Devereux, above, n. 1, at pp. 286 et seq; Hebous and Klemm, above, n. 251, at p. 266.

<sup>253</sup> See, for an estimate, Hebous, A. Klemm, and S. Stausholm, above, n. 249, who state that: 'Countries are more likely to gain revenue if they have trade deficits, are not reliant on the resource sector, and/or—perhaps surprisingly—are developing economies.'

<sup>254</sup> In the US, such a reform was seriously discussed in 2017 but it was ultimately not adopted.

<sup>255</sup> When a country unilaterally adopts such a system, this would create incentives to shift profits and real activity that earns export related rents to this country. Although this would not have immediate revenue implications in the DBCFT adopting country (but for an increase in, eg personal income taxes that come with the activity), it would create revenue losses in the countries keeping the origin based system. See Hebous, A. Klemm, and S. Stausholm, above, n. 249, who also note that the unilateral implementation of the US would lead to neighbouring countries losing around 40% of tax revenue of multinationals. See further, Hebous and Klemm, above, n. 251, at p. 277 and, in more detail, also: Devereux et al, above, n. 1, at pp. 298 et seq, who conclude: 'A unilateral move to the DBCFT can therefore be seen as the ultimate move in a tax competitive game being played out in origin-based business-level taxes on profit, as it results in an origin- based tax rate of zero. [...]'

<sup>256</sup> In principle, an increase in VAT combined with a decrease in labour tax achieve an economically similar outcome. See, already above, n. 182, and eg. Devereux et al, above, n. 1, at pp. 273 et seq. Notably, in practice, equivalence would not fully be reached because VAT systems typically include exemptions and different rates. See also Hebous and Klemm, above, n. 251, at pp. 276 et seq.

<sup>257</sup> In 2050, the EU is forecasted to have approximately the same number of inhabitants as currently. See Eurostat, Population on 1 Jan., available at [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=proj\\_19np&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=proj_19np&lang=en) (accessed 26 June 2020). Africa and Asia, on the other hand, will experience a growth in population. See <https://population.un.org/wpp/Download/Probabilistic/Population/> (accessed 26 June 2020).

<sup>258</sup> See further, in this regard, the discussion in Nakayama, Perry, and Klemm, above, n. 168, at 257 et seq; and Beer and Michielse, above, n. 168, at 229, 248 et seq. Also similarly compare conceptually H. Kroppen, 'Steuerpolitik im sich wandelnden internationalen Umfeld Podiumsdiskussion' in J. Lüdicke, G. Frotscher and L. Hummel (eds), *Steuerliche Entwicklungen im Kontext der Globalisierung. Forum der Internationalen Besteuerung* (Otto Schmidt 2019) 114: see further the discussion in Nakayama, Perry, and Klemm, above, n. 168, at 257, 257 et seq; and Beer and Michielse, above, n. 168, at (IMF 2021), at 229, 248 et seq.

<sup>259</sup> According to the OECD Tax Database, available at [www.oecd.org/tax/tax-policy/tax-database/tax-database-update-note.pdf](http://www.oecd.org/tax/tax-policy/tax-database/tax-database-update-note.pdf) (accessed 28 May 2020); see also Röder, above, n. 23, 39-40.



for the rate reductions.<sup>260</sup> Having regard to more recent events, although the UK reversed its decision to decrease its main corporate tax rate to 17%<sup>261</sup> and even plans to raise it to 25% in 2023,<sup>262</sup> other major economies have provided for in part substantial reductions in CIT – most importantly the United States (from 35% to 21%).<sup>263</sup> To be clear, considering the predictions in parts of economic literature towards the CIT disappearing over time, the tax proved to be remarkably robust.<sup>264</sup> Yet, the race to the bottom is possibly just in the middle.<sup>265</sup>

It may be a bit disappointing, but it will be the hard ground of politics we will eventually clash on. A universally accepted logical answer as to what the world's tax architecture should look like, at the least, does not appear to exist.<sup>266</sup> For sure, nearly everyone stands behind the slogan that has guided the international efforts since 2013, that is, taxation should be aligned with value creation.<sup>267</sup> However, it does not help when it comes down to the question of where taxation is actually to happen.<sup>268</sup> Ultimately, many countries can argue that value creation happened in precisely their jurisdiction.<sup>269</sup> The time honoured benefits principle,<sup>270</sup> which has legitimated source taxation since the 1920s,<sup>271</sup> also underlies today's tax claims.<sup>272</sup> Packed into a quest to tie taxation with value creation, the free riding on public services should be overcome.<sup>273</sup> However attractive it appears to be to those benefitting from public spending to pay for it, it has never been easy to apply this idea

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<sup>260</sup> So, at least with respect to the EU-15 for the time period of 1998-2017: Bräutigam, Spengel and Stutzenberger, 'The Development of Corporate Tax Systems in the European Union from 1998 to 2017: Qualitative and Quantitative Analysis', (2019) 47 *Intertax*, 536-562; See further going L. Kawano, and J. Slemrod. 'How Do Corporate Tax Bases Change when Corporate Tax Rates Change? With Implications for the Tax Rate Elasticity of Corporate Tax Revenues', (2016) 23 *International Tax and Public Finance*, 401, who, for 331 country-year corporate tax base changes during 1980–2004 in OECD countries, report 161 changes that broadened the tax base, 108 that narrowed the tax base, and 62 changes that both broadened and narrowed the tax base.

<sup>261</sup> See HM Revenue & Customs, 'Policy Paper: Corporation Tax main rate at 19% in 2020 and charge and main rate for 2021', available at [www.gov.uk/government/publications/changes-to-corporation-tax-rates-from-1-april-2020/corporation-tax-main-rate-at-19-in-2020-and-charge-and-main-rate-for-2021](http://www.gov.uk/government/publications/changes-to-corporation-tax-rates-from-1-april-2020/corporation-tax-main-rate-at-19-in-2020-and-charge-and-main-rate-for-2021) (accessed 29 May 2020).

<sup>262</sup> See HM Revenue & Customs, 'Policy paper Corporation Tax charge and rates from 1 April 2022 and Small Profits Rate and Marginal Relief from 1 April 2023', available at <https://www.gov.uk/government/publications/corporation-tax-charge-and-rates-from-1-april-2022-and-small-profits-rate-and-marginal-relief-from-1-april-2023/corporation-tax-charge-and-rates-from-1-april-2022-and-small-profits-rate-and-marginal-relief-from-1-april-2023> (accessed 10.3.2021).

<sup>263</sup> As provided in US: Tax Cuts and Jobs Act of 2017. Additionally, in France, a reduction in the CIT is discussed. See, with further references, eg Röder, above, n. 23, at 40.

<sup>264</sup> See, with further references, W. Schön, 'International Tax Coordination for a Second-Best World (Part I)', (2009) 1 *World Tax Journal*, 67-114, at sec. 2.3.5.1.

<sup>265</sup> Supportive, eg Devereux et al, above, n. 1, at sec. 2.5.

<sup>266</sup> See in this regard also, W. Schön, 'International Tax Coordination for a Second-Best World (Part III)', (2010) 2 *World Tax Journal*, 227-261, at sec. 5, who concludes his comprehensive analysis that there is no "absolute truth" for the outcome of international tax coordination. Note, however, that proposals for radical tax reform have recently been presented by academics. See especially Devereux et al, above, n. 1. For sure, they are far from being accepted as the way forward. Still, it shows that the discussion is proceeding.

<sup>267</sup> Starting in the OECD, 'Action Plan on Base Erosion and Profit Shifting' (OECD 2013), 10; and also used in, eg European Commission, 'Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services', COM (2018)148, 2. See further going, eg Fuest, above, n. 242, at 7; or Devereux et al, above, n. 61; Devereux and Vella, above, n. 206, at sec. 4.2.2.

<sup>268</sup> See, eg Fuest, above, n. 242, at 6; Kysar, above, n. 121; Devereux and Vella, above, n. 206.

<sup>269</sup> See, including further references, eg *ibid*.

<sup>270</sup> The underlying idea of the benefits principle is to justify taxation by reference to the benefits received by a taxpayer. This idea goes back to T. Hobbes, *Leviathan* (Green Dragon 1651), 213, who writes: '[W]hen the Impositions are layd upon those things which men consume, every man payeth Equally for what he useth.'

<sup>271</sup> In the form of 'economic allegiance', which was the principle favoured by the League of Nations' economic experts in their report on double taxation in 1923. See League of Nations, 'Report on Double Taxation: Document E.F.S.73.F.19.' (15 Apr. 1923).

<sup>272</sup> See, in this regard, also the discussion in Devereux and Vella, above, n. 206, at sec. 3.

<sup>273</sup> See European Commission, above, n. 1.

in practice.<sup>274</sup> That being said, someone has to finance public spending, and the introduction of a minimum taxation regime ensures that the corporate tax base will deliver its part – even though this decision can actually mean that it shrinks. It will otherwise be the immobile tax base or our children that are regarded to pay the bill.<sup>275</sup>

This could even have an implication on the tax system as a whole. In fact, taxation strongly depends on voluntary compliance which tends to decrease when the perception of taxpayers that the tax system is fair decreases.<sup>276</sup> Literature suggests that, if a group regards its tax burden to be heavier than that of another group, tax compliance is more probable to sink within this group.<sup>277</sup> Put into more concrete terms, for instance, this can mean that, if individuals think that their share in paying for the COVID-19 crisis is disproportionately large, there is a real risk for their compliance efforts to decline.<sup>278</sup> The resulting potential increase in tax evasion can be fatally expensive, in particular when considering how tremendous these numbers already are. According to Murphy (2019), available data points towards illegal tax evasion amounting to USD 850 billion – 1 trillion per year – in the EU alone.<sup>279</sup>

Apart from that, many EU Member States may hardly be able to renounce taxing the production activities that take place within their borders. When, as at least assumed above, a moderate minimum tax equals a moderate risk of losing mobile capital, then the time to act has come. Ultimately, EU Member States are among the main losers of profit shifting into tax havens,<sup>280</sup> and it seems doubtful whether they can afford that, especially in the aftermath of the COVID-19 crisis. A minimum taxation regime may be the bazooka they need. Should a single Member State block this initiative to retain a competitive advantage – it may be asked whether this is the solidarity such a Member State expects from larger Member States in funding EU initiatives to alleviate the impact of the current crisis. How substantial these political costs can be is, not in the least, revealed by the ATAD (2016/1164) which was agreed on in ‘breath-taking speed’ for EU circumstances.<sup>281</sup> This happened

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<sup>274</sup> In detail on the deficiencies of the benefits principle, *see*, eg Schön, above, n. 265, at sec. 2.2.2.1.

<sup>275</sup> Note that, in OECD GloBE Proposal, above, n. 42, at para 7 it is also stated: ‘The GloBE proposal is expected to affect the behaviour of taxpayers and jurisdictions. It posits that global action is needed to stop a harmful race to the bottom on corporate taxes, which risks shifting the burden of taxes onto less mobile bases.’ At this stage, it is worth stressing that the actual incidence of the tax will ultimately always fall on individuals. It is hard to estimate who exactly this may be. *See*, in more detail on this issue, Devereux et al, above, n. 1, at sec. 2.1.1. Yet, at least to the extent the corporate tax falls on immobile economic rents, it can be expected that it is borne by the shareholders. In as far as they are foreign, the tax burden would, c.p., be exported to non-residents. *See* further, Devereux et al, above, n. 1, at pp. 137-138. This could come to the benefit of the less mobile domestic tax base – eg domestic workers. On the size of foreign shareholding in different countries, *see* Devereux et al, above, n. 1, p. 157, referring to eg 55% (56%) foreign shareholding in the UK (Germany – DAX 30) in 2018. Note, however, that it is also relatively unlikely that individuals’ fairness perceptions are significantly influenced by the question of incidence. Rather, it appears that the tax burden of the corporation itself is considered. As argued below, the perception of fairness of the tax system tends to matter in practice.

<sup>276</sup> There is evidence for such behaviour. *See*, eg E. Kirchler, E. Hoelzl and I. Wahl, ‘Enforced versus voluntary tax compliance: The “slippery slope” framework’, (2008) 29 *Journal of Economic Psychology* 210-225.

<sup>277</sup> Literature suggests that, if a group perceives its tax burden to be heavier than that of another group, tax compliance is more probable to decrease within this group. Kirchler, Hoelzl and Wahl, above, n. 276, at sec. 3.7.

<sup>278</sup> As a caveat note, that literature typically calls for carefulness due to these effects being observed under laboratory conditions. *See*, eg I. Lindsay, ‘Tax Fairness by Convention: A Defense of Horizontal Equity’, (2016) 19 *Florida Tax Review* 2 79-119, at 114.

<sup>279</sup> R. Murphy, ‘The European Tax Gap’, Tax Research UK, available at [www.taxresearch.org.uk/Documents/EUTaxGapJan19.pdf](http://www.taxresearch.org.uk/Documents/EUTaxGapJan19.pdf) (accessed 10 July 2020). Note that these figures are under dispute among economists.

<sup>280</sup> *See* the reference provided for in above n. 11.

<sup>281</sup> Hey, above, n. 31, at 10.

despite it being fair to assume that the ATAD (2016/1164) does not similarly reflect each Member States' interest.<sup>282</sup> As such, peer pressure including the fear of reputational damage that could have gone in hand with staying out arguably seem to have been relatively strong factors in the context of this directive.<sup>283</sup> Such forces can also be at work when it comes to the EU wide implementation of minimum taxation, and countries blocking the initiative must be aware of them. This concerns both when considering whether to consent to a directive based on Art. 115 TFEU or, in the case that such an agreement is out of reach, at least when considering whether to give way for other Member States try to coordinate via enhanced cooperation.<sup>284,285</sup>

##### 5. The impact of an EU minimum taxation regime on third countries

To account for the state of the tax world per March 2021, the author thinks that the potential impact of an EU minimum taxation regime needs to be looked at from three perspectives: (i) the US, (ii) other peer countries, and (iii) developing countries.

Vis-à-vis the US, an EU minimum taxation regime has been seen as some sort of ace in the hand of the EU to bring the former to agree to multilateral solutions in the field of digital taxation. Pillar 1 and Pillar 2 are less of a logical than a political package that should also include something for the US.<sup>286</sup> This is necessary because the US would ultimately lose out under Pillar 1. However, with the US having a minimum taxation regime,<sup>287</sup> it has been argued that an EU minimum taxation regime would be favourable for them as competitive pressure

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<sup>282</sup> Not in the least as it includes controlled foreign company rules that can apply within the EU. Compare Vanistendael, above, n. 53, at 732.

<sup>283</sup> Similarly: Hey, above, n. 31, at 26-27.

<sup>284</sup> As mentioned in sec. 4.2., the availability of the enhanced cooperation mechanism depends on various further going legal and political questions that are not discussed here.

<sup>285</sup> A different argument that can be raised against a minimum taxation directive lies in the flaws of the current system itself. Devereux et al, above, n. 1, ch. 4-6, for instance, demonstrate in fair detail why the current tax regime is inferior to other forms of business taxation, i.e. an R-based tax, and a DBCFT. It could be argued that a minimum taxation regime helps locking in a suboptimal system, which is why it should not be pursued. However, it seems unlikely that the fundamental changes proposed by Devereux et al, above, n. 1. are implementable in the medium term. As such and in light of the COVID induced urgent need for revenue, it may be wiser to try to substantially improve the current system instead of taking on the costs and risks that are involved in a radical change. At this stage, it is again worth mentioning that, in 2017, the US seriously discussed a shift to a DBCFT which ultimately, however, did not happen. It was – so it is understood – too disruptive. Note also that, in the event such a move to an overall new system becomes realistic, a minimum taxation directive can still be abandoned. What is more, already at the time of drafting the directive, it may be possible to include an eased exit mechanism. See, for a conceptual discussion on this topic, eg. W. Schön, 'Facilitating Entry by Facilitating Exit: New Paths in EU Tax Legislation', (2018) 46 *Intertax*, 339.

<sup>286</sup> See the statement of Benjamin Angel in the hearing of the FISC committee at 09:41, available under [https://multimedia.europarl.europa.eu/en/subcommittee-on-tax-matters\\_20201028-0900-COMMITTEE-FISC\\_vd](https://multimedia.europarl.europa.eu/en/subcommittee-on-tax-matters_20201028-0900-COMMITTEE-FISC_vd) (accessed 30 Oct. 2020).

<sup>287</sup> With respect to the US 'Global Intangible Low-Taxed Income' (GILTI) rules which conceptually correspond to the IIR and also includes such logic, see above, n. 155, in more detail on the US. tax reform, see, eg D. Shaviro, 'The New Non-Territorial US International Tax System (Part 1)', (2018) 160 *Tax Notes International*; D. Shaviro, 'The New Non-Territorial US International Tax System (Part 2)', (2018) 160 *Tax Notes International*; S.E. Shay, 'The US International Tax Reforms: Competition and Convergence, Pay-Offs and Policy Failures', (2018) 46 *Intertax* 11; M.M. Levey, A. Minkovich, J. D. Odintz and K. E. Rimpfel, 'Taking Stock of US 'Tax Reform' as the Dust Settles', (2018) 46 *Intertax* 4; C.P. Gautrin, 'United States – US Tax Cuts and Jobs Act: Part 1 – Global Intangible Low-Taxed Income (GILTI)', (2019) 73 *Bulletin for International Taxation*, ; B. Wells, 'Get with the BEAT', (2018) 158 *Tax Notes*; J.L. Cummings, Jr., 'Selective Analysis: The BEAT', (2018) 158 *Tax Notes*; or the contributions in J. Hey and S. Härtwig (eds), *US-Steuerreform - Der Tax Cuts and Jobs Act 2017* (Otto Schmidt 2019); IMF 2019, above, n. 1, at Appendix IV

may decrease.<sup>288</sup> Hence, there is a certain tactical element in a minimum taxation regime as well. Exploiting this is a matter for politicians. Nevertheless, care should be taken not to exaggerate the meaning thereof. The EU needs to be confident for its own whether a minimum taxation regime helps it – irrespective of outside dynamics. After all, as hard as it is to get it implemented, it is difficult to get rid of it. This is subject to unanimity as well.<sup>289</sup>

With respect to other peer countries, it is plausible to assume that an EU minimum taxation regime can make it substantially easier for them to join as well. For sure, and as discussed in sec. 4.2., there will be countries staying out of the minimum taxation regime, hoping that investment will be routed into or via them. Still, considering the EU's geopolitical and economic weight, it seems possible that EU action may trigger dynamics that could significantly, and perhaps critically, increase incentives for other countries to also take part. Thus, EU action may give rise to a stronger proliferation of minimum taxation regimes in peer countries.

With respect to developing countries, different considerations occur. In fact, if the EU implements a minimum taxation regime, it would mean that two major capital exporting regions – the US and the EU – would have enforceable minimum tax rules. When this is so, it may be sensible for developing countries to increase their taxes, at least with respect to taxpayers that are subject to minimum taxation elsewhere.<sup>290</sup> Otherwise, it will just be someone else who cashes in on the revenue. The GloBE rules support such behaviour because they are switched off once there is a sufficiently high tax burden.<sup>291</sup> Notably, in this context, also withholding taxes are taken into account.<sup>292</sup> Hence, even though there could be a different impression when having regard to the hierarchy included in the GloBE rules, according to which the residence state of the Ultimate Parent Entity has the primary taxing right, it seems that, at least in general terms, the (capital importing) developing country will get the first shot.<sup>293</sup>

Interestingly, this does not extend to DSTs which are not taken into account in calculating the ETR.<sup>294</sup> Thus, the OECD took care not to incentivise the implementation of such taxes. That being said, the author urges to rethink this position should there be a strong proliferation of DSTs due to Pillar 1 not reaching final acceptance.

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<sup>288</sup> See the statement of Benjamin Angel in the hearing of the FISC committee at 09:41, available under [https://multimedia.europarl.europa.eu/en/subcommittee-on-tax-matters\\_20201028-0900-COMMITTEE-FISC\\_vd](https://multimedia.europarl.europa.eu/en/subcommittee-on-tax-matters_20201028-0900-COMMITTEE-FISC_vd) (accessed 30 Oct. 2020).

<sup>289</sup> See, for a more differentiated discussion, Schön, above, n. 285..

<sup>290</sup> See, in this regard, also the discussion on a pure system of taxation in the residence state of the parent company as held in Devereux et al, above, n. 1, 161, who eloquently close their analysis with: 'The appropriate response of other countries to country A introducing a tax on the worldwide profit of its resident companies, with a credit for taxes paid in other countries, would therefore be a note of thanks to the government of country A.' This holds, *mutatis mutandis*, also in the setting of the minimum taxation regime discussed here. To the extent the tax is creditable against the minimum tax liability of the relevant parent company, the capital importing (viz. developing) country can raise the tax without principally causing any consequences different from a shift in tax revenue from the residence state of the parent company to it.

<sup>291</sup> See already the discussion with respect to superstar firms from an EU perspective in sec. 3.2.2.

<sup>292</sup> See OECD GloBE Proposal, above, n. 42, at para. 130. Interestingly, this is different to what the OECD has foreseen in the conceptually similar rules on hybrid mismatch arrangements. See OECD, 'Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: 2015 Final Report' (OECD 2015), para. 407.

<sup>293</sup> See, in more detail on the mechanics of the GloBE rules, the brief description and further references provided for in sec. 2

<sup>294</sup> OECD GloBE Proposal, above, n. 42, at para. 148; see further the discussion in Nakayama, Perry, and Klemm, above, n. 168, at 257 et seq.

Ultimately, it may be more or less the same MNEs whose gross revenues would be subject to DSTs and who would be covered by a minimum taxation regime. To avoid economic double taxation, it could be required to take DSTs into account when calculating the ETR. In this case, it may even be necessary for an EU minimum taxation regime to deviate from the OECD proposal, especially when the EU, indeed, as recently announced, implements a digital levy.<sup>295</sup>

To offer another perspective, an EU minimum taxation regime could also be criticised on the ground of developed countries dictating tax policy in developing countries.<sup>296</sup> Whilst it is hard to reject such an argument in general, it is still worth underlining that whatever tax policy can be upheld with respect to taxpayers that are not in scope of the minimum taxation rules. Regarding those who are covered, it is well possible that different considerations apply. Conceivably, their attractiveness for countries is so substantial that they can get governments to grant tax incentives even though they may actually not be necessary because the MNE would have invested anyway. This is at least what has been indicated by various studies;<sup>297</sup> and, if that holds true in the underlying case, then the minimum taxation regime would provide for real help because there would be no point for an MNE subject to minimum taxation rules to ask for these tax incentives.<sup>298</sup>

## 6. Conclusion and open questions

It is hard to say what the hurricane sweeping over the current international tax architecture will leave behind. Maybe it is a stable, fair, and workable multilateral compromise, or maybe it is devastating worldwide tax war. Regarding either scenario along this spectrum to be conceivable, the author aimed to inquire into the question of whether the EU should introduce a minimum corporate taxation directive along the lines of the OECD GloBE proposal as it stands since October 2020.

The answer to this question is a legal and a political one. Art. 115 TFEU, which is the provision on which a minimum tax regime would be based, requires the rules to promote the Internal Market. The discussion above suggest that this can be expected. Thus, the implementation of such a system would be legally possible and, in principle, also appear sensible. A positive effect may be increased or, as the case may be, ensured by the fact that, through EU action, the minimum taxation regime would become credibly enforceable. This is a crucial element for the effective workability of the rules and an element that should be exploited even if all Member States fully agree to the OECD Proposal.

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<sup>295</sup> See above, n. 36.

<sup>296</sup> Compare broadly, eg B. Arnold, 'The Evolution of Controlled Foreign Corporation Rules and Beyond', (2019) 73 *Bulletin for International Taxation* 631-648 at sec. 7.

<sup>297</sup> Suggesting this after balancing empirical evidence, S. James, *Tax and Non-Tax Incentives and Investments: Evidence and Policy Implications* (World Bank Group 2013), 8 and note also the discussion at 14, according to which different types of investment tend to respond differently to tax incentives. Efficiency-seeking FDI appears to be highly responsive whilst resource-seeking, market-seeking, and strategic-asset-seeking FDI seems to be less responsive; See also P. Kusek and A. Silva, 'What Matters Most to Investors in Developing Countries: Findings from the Global Investment Competitiveness Survey' in *Global Investment Competitiveness Report 2017/18* (World Bank 2018); T. Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge University Press 2017); for a discussion see also OECD Economic Impact, above, n. 18, at sec. 4.7.5.; Hebous, above, n. 25, at 103.

<sup>298</sup> See, further going, OECD Economic Impact, above, n. 18, at sec. 4.7.5.

That being said, it is still clear that different Member States may have a different interest in the implementation of a minimum taxation system. Some may fear losing ground due to capital leaving or not coming into their country. For various reasons, the author does not share such scepticism. On the one hand, the scope of a minimum taxation regime along the lines of the OECD proposal would be limited to very large MNEs. Whilst they account for 90% of global corporate profits, it still remains possible to uphold whatever tax policy (in line with EU law) with respect to the 85% - 90 % of MNEs that are not covered by the rules. Potential later changes that may expand the scope of the rules are also subject to unanimity. Hence, Member States would not lose control. Aside from that, minimum taxation rules only take away the incentive for MNEs to structure their affairs to go below the minimum. Yet, once they are at the minimum, they can, in principle, remain there. Thus, Member States with low nominal CIT rates can keep them, and Member States that tolerate certain tax planning activities of MNEs to reach an effectively lower tax rate can do so as well. The actual question is only whether they should be allowed to go excessively low. Apart from that, the GloBE proposal includes exemptions for investment vehicles, meaning that this business – which is highly relevant for some Member States – will remain widely unaffected.

Upon taking a wider perspective, it seems that answering this question is related to answering the question of whether a CIT is needed at all. Based on some unqualified speculations, the author thinks that the reply of (all) Member States should be in the affirmative, given this is an origin based tax system that benefits a region with strong exports of tangible goods. If such a system needs a minimum taxation regime to protect it, then those Member States who doubt that a minimum taxation system will be in their direct interest should be careful not to risk the functioning of those Member States' tax systems that are, in practice, needed to fund EU programs that are in their interest. To close with an inherently polemic remark: Otherwise, the value of the passports they sell may plummet.