

Pillar II und EU Recht

**WIRTSCHAFTS
UNIVERSITÄT
WIEN VIENNA
UNIVERSITY OF
ECONOMICS
AND BUSINESS**

23. Jänner 2024
Pillar II im Lichte des Abkommensrechts
IFA Österreich/IV
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OECD (and EU) | *Pillar Two*

Proposal for a **Directive** implementing Pillar Two, COM(2021)823 (Dec. 22, 2021)

- Some MS's concerns addressed in the **compromise texts** in [Doc. 10497/22](#) (June 2022) and [Doc. 6975/22](#) (Mar. 2022)
- Complex political process (vetos, EP Resolution [P9_TA\(2022\)0290](#)) and **Joint Statement by France, Germany, Italy, Netherlands and Spain** (Sept. 2022) ("G5")
- Council Directive ([EU 2022/2523](#), [2022] OJ L 328/1 ("**Pillar Two Directive**") (including a Council Statement regarding Pillar One in [Doc. 15349/22](#))

Dec. 2021

Model Rules (Dec. 20, 2021), **Commentary** (Mar. 14, 2022), **Examples** (Mar. 14, 2022) and **Factsheet** – Announced Model Treaty Rule for STTR

- Consultations on **Implementation Framework** (Mar. 2022), **GloBE Information Return** (Dec. 2022) and **tax certainty** (Dec. 2022), FAQs (June 2024)
- Report "**Tax Incentives and the Global Minimum Corporate Tax**" (Oct. 2022) – EU Parliament Research Note, [PE 749_793](#),
- UN work on extractive industries ([E/C.18/2023/CRP.39](#)), special economic zones ([UNCTAD/DIAE/INF/2023/1](#)) and investment treaties ([IIA Issues Note 4/2023](#))
- [TIWB support](#) for developing countries

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OECD (and EU) | *Pillar Two*



- **Entry into force** → Fiscal years beginning from **Dec. 31, 2023** (for IIR), **Dec. 31, 2024** (for UTPR) (Art. 56)
- Council/Commission Statements on **subsequent OECD guidance** (Doc. 14732/1/23, Oct. 2023) (Art. 32 and Pt. 24 of the Preamble), agreement by (non-OECD member) **Cyprus** regarding safe harbors (Mar. 2023, Oct. 2023)
- **Delayed application** (Art. 50): Estonia, Latvia, Lithuania, Malta, Slovakia (C/2023/1536, Dec. 2023)
- **Infringement proceedings** against Spain, Cyprus, Poland and Portugal (Oct. 2024)
- **FAQs** on technical issues (Dec. 2023)
- Note: **ATAD evaluation** (Ares(2024)5539672)

2022/2023/2024/2025



- **Safe harbors and penalty relief** (Dec. 2022)
- Administrative Guidance: 1: Feb. 2023, 2: July 2023, 3: Dec. 2023 (→ Consolidated Commentary + Examples, Apr. 2024); 4: June 2024, Central Record: Jan. 2025
- **GloBE Information Return (GIR) Template** (July 2023) and revised GIR (Jan. 2025), **XML Schema** (Jan. 2025) (draft XML Schema Aug. 2024), **MAAC for GIR Exchange** (Jan. 2025)
- **STTR MR and Comm.** (July 2023), **STTR MLI** and **Explanatory Statement** (Oct. 2023 – 9 signatories as of Sept. 2024)
- **Minimum Tax Implementation Handbook** (Oct. 2023)
- **Qualified Status** (June 2024) → Self-certification and peer review → Central Record (Jan. 2025)



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- Legislation and consultations in numerous countries (with varying implementation IIR/UTPR/QDMTT) → Central Record (Jan. 2025)
- Opposition from US (e.g., on implications for U.S. Tax Policy, **R47174**, on countermeasures, **H. R. 3665**, on economic analysis, **JCX-35-23**, on revenue impacts, **Republican objections to the UTPR**, Sept. 2024)
- No indication, e.g., from India, China

US Memorandum on the OECD Global Tax Deal (Jan. 2025)

Sec. 2. Options for Protection from Discriminatory and Extraterritorial Tax Measures. The Secretary of the Treasury in consultation with the United States Trade Representative shall investigate whether any foreign countries are not in compliance with any tax treaty with the United States or have any tax rules in place, or are likely to put tax rules in place, that are extraterritorial or disproportionately affect American companies, and develop and present to the President, through the Assistant to the President for Economic Policy, a list of options for protective measures or other actions that the United States should adopt or take in response to such non-compliance or tax rules. The Secretary of the Treasury shall deliver findings and recommendations to the President, through the Assistant to the President for Economic Policy, within 60 days.

US Memorandum on America First Trade Policy (Jan. 2025)

(j) The Secretary of the Treasury, in consultation with the Secretary of Commerce and the United States Trade Representative, shall investigate whether any foreign country subjects United States citizens or corporations to discriminatory or extraterritorial taxes pursuant to section 891 of title 26, United States Code.

2024/2025

20 Jan. 2025



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Pillar Two | *EU Directive*



- Council Directive (EU) 2022/2523 of 14 December 2022 **on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union**, [2022] OJ L 328/1, based on the Commission's Proposal for a GloBE Directive, tabled by the EU Commission on Dec. 22, 2021 (COM(2021)823)
- Closely based on the **OECD Model Rules** ("common approach")
 - **Idea** → Uniform rules and a common minimum level of protection in the **EU internal market** and prevention of disparities in cross-border situations
 - **Optional elements** → QDMTT (Art. 11) – *And no top-up tax if QDMTT is calculated based on parent's accounting standards or IFRS (Art. 11(2))*
 - **EU-specific elements, fundamental freedoms compliance** → Application of the IIR (or QDMTT) to domestic low-taxed entities of MNEs (UPE + domestic CEs) and to large-scale domestic groups (LSDGs) (Art 5), i.e., little/no scope for the application of the UTPR in case of EU UPEs → *EEA: Liechtenstein (✓), Norway (✓)*
 - **Other non-OECD elements** → Penalties (Art. 46), initial phase of international operations for large-scale domestic groups and domestic CEs (Art. 49), election for delayed application for MS with ≤ 12 UPEs (Art. 50), assessment of equivalence of foreign IIR rules, e.g., GILTI (Art. 52), third-country agreements regarding reporting obligations (Art. 55)



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Pillar Two | *EU Issues*



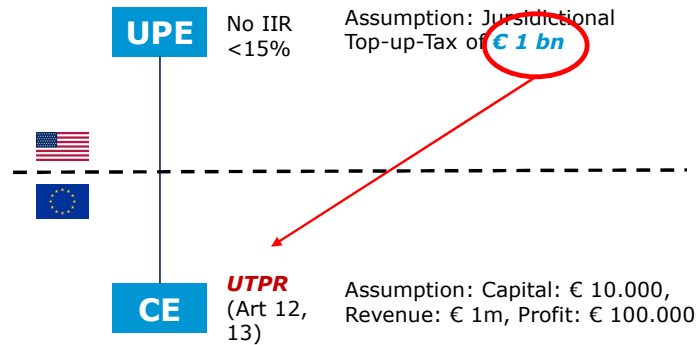
- **Competence** → Based on Art 115 TFEU to remove the "inconsistency" of the "absence of rules ensuring minimum effective corporate taxation across the Single Market" (COM(2021)823) → *Correct legal basis? Proportionality? – Dismissed case T-144/23, Koninklijke Boskalis and BOTS v. Council, pending case C-146/24 P, Fugro v. Council (appeal to T-143/23 – Commission's information note), and proceedings at the Belgian Constitutional Court (No. 8267)*
- **Fundamental Freedoms** → Clear approach to avoid conflicts with the non-discrimination rules of the **fundamental freedoms** by extending the IIR to purely domestic groups and domestic subsidiaries (Art. 5), i.e., to groups with the UPE and CEs (entities or PEs) in the same MS → No *de jure* discrimination, but perhaps *de facto* discrimination? → *"Shielding Effect", concerns regarding the "initial phase relief" (no problem under Austrian NES, § 82 MinBestG)*
- **State Aid** → Art 107 TFEU only refers to "aid granted by a Member State or through State resources" → No **imputability to the Member States** (e.g., *Deutsche Bahn*, Para. 44 of the 2016 Commission Notice)
- **Fundamental Rights** → UTPR versus freedom to conduct a business and right to property under Art 16, 17 of the Charter → *Proceedings at the Belgian Constitutional Court (No. 8267)*
- **Interpretation of EU Law in light of OECD Guidance** → Art 32 of the Directive, Pt 24 of the Preamble of the Directive Council and Commission statements, *Doc. 14732/1/23*
- **Investment Protection etc** → Connection with "QDMTT payable" in the OECD Administrative Guidance (Ch. 4 para. 73-81 *OECD July 2023 Guidance* → § 47 Abs 4 MinBestG versus Art 11 of the Directive)
- **Tax treaties** → IIR, UTPR versus Art 7, 10, 23 OECD MC → "EU mandated treaty override", but Art 351 TFEU (for pre-accession third-country treaties)



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Issue #1 | UTPR versus Property?

- **Fundamental Rights** → UTPR versus freedom to conduct a business and right to property under Art 16, 17 of the [Charter](#) → [Proceedings at the Belgian Constitutional Court \(No. 8267 and information by the U.S. Chamber of Commerce, Sept. 2024\)](#)
- Similar: Nexus questions under **Customary International Law**
- Note: **Transitional UTPR Safe Harbour** under [Administrative Guidance](#) (July 2023) → UTPR Top-up Tax Amount calculated for the UPE Jurisdiction shall be deemed to be zero if nominal statutory tax rate $\geq 20\%$ (for fiscal years ≤ 12 months beginning on or before 31 December 2025 and ending before 31 December 2026)



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Issue #2 | OECD versus EU?

- Council Directive (EU) 2022/2523 of **14 December 2022** precedes the **2023/24/25 OECD administrative guidance** (e.g., on safe harbours, rule order on QDMTT before CFC)
 - Pt 24 of the Preamble of the Directive
 - (24) In implementing this Directive, Member States should use the OECD Model Rules and the explanations and examples in the Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two) released by the OECD/G20 Inclusive Framework on BEPS, as well as the GloBE Implementation Framework, including its safe harbour rules, as a source of illustration or interpretation in order to ensure consistency in application across Member States to the extent that those sources are consistent with this Directive and Union law. Such safe harbour rules should be of relevance as regards MNE groups as well as large-scale domestic groups.
 - Art 32 of the Directive (*versus UTPR transitional safe harbor*)

Article 32

Safe harbours

By way of derogation from Articles 26 to 31, Member States shall ensure that, at the election of the filing constituent entity, the top-up tax due by a group in a jurisdiction shall be deemed to be zero for a fiscal year if the effective level of taxation of the constituent entities located in that jurisdiction fulfils the conditions of a qualifying international agreement on safe harbours.

For the purposes of the first paragraph, 'qualifying international agreement on safe harbours' means an international set of rules and conditions which all Member States have consented to and which grants groups in the scope of this Directive the possibility of electing to benefit from one or more safe harbours for a jurisdiction.

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Issue #2 | *OECD versus EU?*

- Council/Commission Statements on *subsequent OECD guidance* (Doc. 14732/1/23, Oct. 2023) (Art. 32 and Pt. 24 of the Preamble), agreement by (non-OECD member) *Cyprus* regarding safe harbors (Mar. 2023, Oct. 2023)

Statement from the Council

“The Council:

- IV) welcomes and supports the agreement reached by the Inclusive Framework on the clarifications concerning application of Pillar Two contained in the administrative guidance endorsed by the Inclusive Framework in December 2022, in February 2023 and in July 2023 – including the transitional Undertaxed Profits Rule and Qualified Domestic Minimum Top-up Tax Safe Harbours, the new guidance on Transferable Tax Credits, as well as the transitional Country-by-Country Reporting Safe Harbour and the GloBE Information Return;
- V) notes the statement by the European Commission and welcomes, in particular, its view that the administrative guidance endorsed by the Inclusive Framework in December 2022, February 2023 and July 2023 is compatible with the Pillar Two Directive;
- VI) recognizes the need to ensure consistency with the aforementioned documents when applying the Pillar Two Directive by Member States in order to avoid non-alignment or applicability of diverging standards;
- VII) recalls that the recitals of the Pillar Two Directive refer to the use of the guidance developed by the Inclusive Framework as a source of illustration or interpretation, and notes the intention of the EU Member States to follow this guidance when transposing the Pillar Two Directive into their national law in order to avoid divergences and inconsistencies in interpretation of the provisions of that Directive.”

Statement from the Commission

The European Commission welcomes all agreements reached by the OECD/G20 Inclusive Framework on BEPS between December 2022 and July 2023. These agreements mark an important milestone towards the completion and full implementation of the Two-Pillar Solution to address the tax challenges arising from the digitalisation of the economy.

On **Pillar Two**, the European Commission welcomes the Statement by the ECOFIN Council (of 9 November 2023).

The Commission is of the view that the administrative guidance endorsed by the OECD/G20 Inclusive Framework on BEPS in December 2022, February 2023 and July 2023 is compatible with Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (the Pillar Two Directive). The Commission encourages all Member States to proceed swiftly with the transposition of the Pillar Two Directive and will continue to support the efforts of Member States in this regard.



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Issue #3 | *Challenges to QDMTT*

- *Challenges to the QDMTT?* → Ch. 4 para. 73-81 *OECD July 2023 Guidance* → § 47 Abs 4 MinBestG versus Art 11 of the Directive

20.1 For purposes of Article 5.2.3, the amount of the “Qualified Domestic Minimum Top-up Tax payable” shall be equal to the amount accrued by the Constituent Entities in the jurisdiction in respect of the QDMTT for the Fiscal Year, except that such amount shall not include any amount of QDMTT that:

- (a) the MNE Group directly or indirectly challenges in a judicial or administrative proceeding; or
- (b) the tax authority of the jurisdiction has determined is not assessable or collectible based on constitutional grounds or other superior law or based on a specific agreement with the government of the QDMTT jurisdiction limiting the MNE Group’s tax liability, such as a tax stabilization agreement, investment agreement, or similar agreement.

Any QDMTT that was not included in QDMTT payable pursuant to this paragraph shall be included in QDMTT payable for the Fiscal Year to which it relates when such amount is paid and no longer contested by the MNE Group.



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Vielen Dank!



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