



Working Paper

The OECD/G20 and the EU Global Minimum Tax

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Abstract

The OECD approach to reduced taxation of multinational enterprises (MNEs) led to the release of “nexus rules” (Pillar One) and “profit allocation rules” (Pillar Two). Pillar Two has pulled ahead of Pillar One, and the EU Global Minimum Tax Directive converged with Pillar Two, while the NGEU created an incentive for the EU to create new EU own resources having a regulatory aim which will include the Carbon Border Adjustment Mechanism (CBAM), the EU Emissions Trading System (ETS) as well as the global minimum tax imposed by the Directive. In particular the global minimum tax is imposed by home states which undertake the obligation to tax their own MNEs on their own global profits in a defensive coalition against base erosion and profit shifting.

Keywords Pillar One, Pillar Two, global minimum tax, regulatory taxes, multinational enterprises,
EU own resources

1. Introduction

The chapter is structured as follows. Section 2 briefly describes the Organisation for Economic Co-operation and Development (OECD) approach to address reduced or nil taxation of multinational enterprises which started in 2013-17 and then through the activities of the Inclusive Framework led in 2021-23 to the release of “*nexus rules*” (Pillar One) and “*profit allocation rules*” (Pillar Two). While section 2 shows that Pillar Two has pulled ahead of Pillar One, section 3 addresses the European Union (EU) Global Minimum Tax Directive which followed Pillar Two and discusses the issue of expected revenues and impacts from the implementation of Pillar Two and the Directive. Section 4 describes the common features of the new EU own resources which include the Carbon Border Adjustment Mechanism (CBAM) and the EU Emissions Trading System (EU ETS) as well as the global minimum tax imposed by the Directive. Section 5 concludes developing the argument that these new EU own resources have a regulatory aim, rather than an exclusively revenue-raising aim, specifically highlighting that the EU global minimum tax is directed at reducing base erosion and profit shifting.

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2. The OECD approach: Pillar Two pulls ahead of Pillar One

The situations of reduced or nil taxation of multinational enterprises (“MNEs”) epitomised in the BEPS acronym (*base erosion and profit shifting*)² were initially addressed by the OECD/G20 Action Plan (the “BEPS Project”) which unfolded in 2013-17. This led to the release of 15 Reports in 2014-15³ and to the modification of the OECD Commentary and Model in 2017.⁴ This was quickly followed in 2018-2023 by the Inclusive Framework (the “Inclusive Framework”) initially with an Interim Report,⁵ then by proposing revised “*nexus rules*” (Pillar One)⁶ and different types of “*profit allocation rules*” (Pillar Two),⁷ and by advancing a comprehensive proposal together with a programme of work.⁸

The OECD started its work on Pillar One: the reallocation of taxing rights to market jurisdictions by defining as “in-scope companies” affected by the changes the MNEs with global turnover above 20 billion euros and profitability above 10% (i.e., profit before tax/revenue). The OECD envisaged a new special purpose nexus rule permitting allocation of so called “Amount A” to a market jurisdiction when the in-scope MNE derives at least 1 million euros in revenue from that

² OECD, *Measuring and Monitoring BEPS, Action 11 – 2015 Final Report* (2015), <<https://www.oecd-ilibrary.org/docserver/9789264241343en.pdf?expires=1622326728&id=id&accname=guest&checksum=08D70B8C3A37A999E2B44D6217C9D41C>> accessed 29 May 2023. See also: Ernesto Crivelli, Ruud A. de Mooij & Michael Keen, ‘Base Erosion, Profit Shifting and Developing Countries’ [2016] 72(3) FA 268 ; Fatih Guvenen, Raymond J. Mataloni, Jr., Dylan G. Rassier & Kim J. Ruhl, *Offshore Profit Shifting and Domestic Productivity Measurement* (NBER, Working Paper No. 23324, 2017).

³ OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, Paris, 2013), available at <<http://dx.doi.org/10.1787/9789264202719-en>> accessed 29 November 2023; OECD, *Part 1 of a report to G20 Development Working Group on the impact of BEPS in low income countries* (OECD Publishing, Paris, 2014), <<http://www.oecd.org/tax/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf>> accessed 29 May 2023.

⁴ Ibid, at 52.

⁵ OECD, *Tax Challenges Arising from Digitalisation - Interim Report 2018: Inclusive Framework on BEPS* (OECD Publishing, Paris, 2018), <<https://www.oecd-ilibrary.org/docserver/9789264293083en.pdf?expires=1622298762&id=id&accname=guest&checksum=CB32D91D859CDD529F0D74B6B024F180>> accessed 29 May 2023.

⁶ OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS* (OECD Publishing, Paris, 2020), <<https://doi.org/10.1787/beba0634-e>> accessed 29 May 2021.

⁷ OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS* (OECD Publishing, Paris, 2020), <<https://www.oecd-ilibrary.org/docserver/abb4c3d1en.pdf?expires=1622298926&id=id&accname=guest&checksum=BFEE294C4D66E061298F3043EC6AE31E>> accessed 29 May 2022. See also: EUROPEAN COMMISSION, *Fair Taxation of the Digital Economy* (2018), <https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en> accessed 29 May 2023.

⁸ OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (OECD Publishing, Paris, 2021) <www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm> accessed 29 May 2023. *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework on BEPS, (OECD Publishing, Paris, 2022) <www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm> accessed 29 May, 2022.

jurisdiction. Under this rule, revenues were thought to be “sourced” to the end-market jurisdictions where goods or services are used or consumed. To facilitate the application of this principle, detailed source rules for specific categories of transactions were developed.

The Inclusive Framework’s Task Force on the Digital Economy has then continued its work on the design of the Multilateral Convention to implement Amount A (“MLC”) submitted to public consultations resulting in stakeholders’ input, including the Administration and Tax Certainty Aspects of Pillar One in 2022⁹ and the draft MLC.¹⁰ In 2023 a text of the MLC 9 was released.¹¹ The MLC has been opened for signature in the second half of 2023, with the objective of enabling the MLC to enter into force in 2025. Obviously, the perspectives for finalisation and full implementation of such a complex multilateral agreement are subject to inherent uncertainty.

In Pillar One, “Amount B” aims to allocate profits to market countries that reflects in-country baseline marketing and distribution activities in those countries that will be applied on the basis of the arm’s length principle which aims at establishing a market value to intra-group transactions by referring to a complex identification of “comparable transactions”. The arm’s length principles concerning in-country baseline marketing and distribution activities in market countries will be simplified and streamlined. In-country baseline marketing and distribution activities are those typically developed by local units (such as agents, distributors, and affiliated companies) in the relevant markets to carry out the core-minimally required business presence of MNEs and therefore a commensurate amount of income must be attributed to such units to reflect those baseline marketing and distribution activities. Amount B applies the arm’s length principle to in-country baseline marketing and distribution activities, with a particular focus on the needs of low-capacity countries, as they lack appropriate local market comparable. In 2022-23, the Inclusive Framework released a public consultation document on Amount B¹² and released the Amount B framework for public consultation with the goal of incorporating key aspects of it into the OECD Transfer Pricing Guidelines in 2024.¹³

Pillar Two has a different purpose than Pillar One which tries to develop nexus rules to protect the tax interests of host states. Pillar Two in fact develops global anti-base erosion model rules that protect the tax interests of home states of MNEs. These rules consist of two interlocking domestic rules of home states of MNEs which ensure that they are subject to a 15% minimum tax: (i) an Income Inclusion Rule (“IIR”), which imposes a top-up tax on a parent entity in respect of the low taxed income of an entity of the group; and (ii) an Undertaxed Payment Rule (“UTPR”), which denies deductions or requires an equivalent adjustment to the extent the low tax income of an entity of the group is not subject to tax under an IIR. The UTPR thus operates as a backup of the IIR. In addition, a treaty-based rule (the Subject to Tax Rule, “STTR”) allows source jurisdictions to impose limited source taxation on certain related party payments subject

⁹<https://www.oecd.org/tax/beps/progress-report-administration-tax-certainty-aspects-of-amount-a-pillar-one-october-2022.pdf>.

¹⁰<https://www.oecd.org/tax/beps/public-consultation-document-draft-mlc-provisions-on-dsts-and-other-relevant-similar-measures.pdf>.

¹¹ <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf>

¹² <https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-b-2022.pdf>. > accessed on 29 November 2023.

¹³ OECD (2022), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD Publishing, Paris, <https://doi.org/10.1787/0e655865-en>.

to tax below a minimum rate. The STTR is creditable as a covered tax under the GloBE rules, with entry into force in 2024, depending on specific implementation by individual countries of GloBE Rules. The GloBE rules apply to MNEs that meet the 750 million euros threshold as determined under BEPS Action 13 (country by country reporting).

The Inclusive Framework on 14 December 2021 approved the so-called Model Rules for Pillar Two (“Model Rules P2” or “GloBE Rules”) setting the policies to be implemented by individual countries.¹⁴ In 2022, the OECD also released a Commentary on Pillar Two (“Commentary P2”), so that at OECD level Pillar Two has been completed before that of Pillar One.¹⁵

The GloBE Rules of 2021 were followed closely in the same year by the proposal of an EU Directive,¹⁶ which was adopted at the end of 2022. The Directive on ensuring a global minimum level of taxation for MNEs and large-scale domestic groups in the Union (the “Global Minimum Tax Directive”, hereinafter the “Directive”) must be implemented by Member States by January 1, 2024.¹⁷ The Directive follows closely OECD Pillar Two with the necessary adjustments to ensure compliance with EU law. For example, in order to comply with the EU fundamental freedoms, and specifically the freedom of establishment, the Directive also includes domestic groups, while OECD Pillar Two is limited to MNEs. The Directive implements GloBE Rules which become binding for each Member State through their administrative structures that will ensure enforcement through ordinary means.

The Inclusive Framework is also developing a GloBE implementation package to help countries and MNEs as they prepare for the implementation of the GloBE Rules from the beginning of 2024, and an administrative framework that will assist tax administrations. In December 2022, a guidance on Safe Harbours and Penalty Relief was released advancing a transitional safe harbour based on information available in country-by-country reports as well as a framework for developing permanent safe harbours.¹⁸

In February 2023, an Administrative Guidance document was released that provides further details on the operation of the transition rules and the design of Qualified Domestic Minimum

¹⁴ OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* (OECD Publishing, Paris, 2021) < <https://doi.org/10.1787/782bac33-en> > accessed 29 May 2023;

¹⁵ OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Base Erosion Model Rules (Pillar Two), First Edition: Inclusive Framework on BEPS* (OECD Publishing, Paris, 2022) < <https://doi.org/10.1787/1e0e9cd8-en> > accessed 29 May 2023;

¹⁶ Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union {SWD(2021) 580 final} COM(2021) 823 final.

¹⁷ See Council Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union [2022] OJ L 328/I.

¹⁸ OECD, *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two), OECD/G20 Inclusive Framework on BEPS* (OECD Publishing, Paris, 2022) < <https://www.oecd.org/tax/beps/safe-harbours-and-penalty-relief-global-anti-base-erosion-rules-pillar-two.pdf> > accessed 29 November 2023;

Top-up Taxes (QDMTT).¹⁹ In July 2023, another Administrative Guidance²⁰ included two additional safe harbours: a permanent safe harbour for jurisdictions that introduce a QDMTT, and a transitional UTPR Safe Harbour, which provides the Jurisdiction of the Ultimate Parent Company with relief from the application of the UTPR for fiscal years commencing on or before the end of 2025. The Inclusive Framework is also developing an administrative system and dispute settlement procedures for the GloBE Rules which include a template for the GloBE Information Return²¹ and a public consultation Tax Certainty for the GloBE Rules²², as well as a peer review process.

It should be emphasised that the policies pursued by the EU through the Directive²³ are convergent with those adopted by the OECD in Pillar Two. In fact, such Directive introduces a minimum EU 15% tax rate that will apply to any large group based in the EU, both domestic and international, including in the financial sector, with combined financial revenues of more than €750 million a year, and with either a parent company or a subsidiary situated in an EU Member State.

The effective tax rate is established by the provisions of Chapter V of the Directive in each Member State by dividing taxes paid by the entities in that Member State by their income. If the effective tax rate for the entities in a particular jurisdiction is below the 15% minimum, then rules akin to the GloBE Rules are triggered and the group must pay a top-up tax to bring its rate up to 15%, which applies irrespective of whether the subsidiary is located in a country that has signed up to the international OECD/G20 agreement: this means the effective minimum rate of 15% must be enforced by any individual Member states even in respect to subsidiaries located outside the EU in countries that have not implemented the GloBE Rules. The calculations will be made by the ultimate parent entity of the group unless the group assigns another entity. The amount of top-up tax that a Member State will collect from the entities of the group, localised in its territory is determined via a formula based on employees and assets.

The Directive, by introducing a global minimum effective tax rate of 15% for large groups operating in the EU, proves that the EU constitutes an important geopolitical bloc that implements the agreement reached by the Inclusive Framework on BEPS. It is important to note that while the rules of the Directive are legally binding, administratively enforced within the EU

¹⁹ OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS (OECD Publishing, Paris, 2023) <<https://www.oecd.org/tax/beps/agreed-administrative-guidance-for-the-pillar-two-globe-rules.pdf>> accessed 29 November 2023;

²⁰ OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)*, July 2023, OECD/G20 Inclusive Framework on BEPS (OECD Publishing, Paris, 2023) <<https://www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar-two-july-2023.pdf>> accessed 29 November 2023;

²¹ <https://www.oecd.org/tax/beps/public-consultation-document-pillar-two-globe-information-return.pdf>; OECD (2023), *Tax Challenges Arising from the Digitalisation of the Economy – GloBE Information Return (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, <https://www.oecd.org/tax/beps/globe-information-return-pillar-two.pdf>.

²² <https://www.oecd.org/tax/beps/public-consultation-document-pillar-two-tax-certainty-for-the-globe-rules.pdf>.

²³ DOC EU COMMISSION, 'Questions and Answers on Minimum corporate taxation' (2021), <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_6967> accessed on 29 November 2023.

framework and subject to common dispute resolution, the same rules of the OECD Pillar Two are not binding, administratively enforced by national structures, and not yet subject to common dispute resolution.

So, at the beginning of 2024 the strategic scenario is clear, and can be explained by adopting a retrospective view. Back in 2018, in the view of the OECD, Pillar One and Pillar Two constituted a sequence of a policy progression, not only numerically, but also logically and strategically: first “nexus rules” of Pillar One should have attributed taxing powers to host states, and then residually Pillar Two should have allocated taxable profits to home states when home states failed to tax. Pillar Two was viewed as a backstop of Pillar One, which was considered to be the primary solution that ensured taxation was where “value was created”.

The outcome of the process, so far, is exactly the opposite. First in 2022-23, rules of a global minimum tax (Pillar Two) have already been approved in a final format both at OECD and EU level ensuring effective minimum 15% taxation in home states, while an inclusive multilateral approach based on “nexus rules” to protect the interests of the host state (Pillar One) is still far from finalization. The latter is expected in 2025; however, it is subject to major uncertainties. Second, Pillar Two released by the OECD is now fully operative and binding in the EU through the Directive. Pillar Two is introducing an effective international tax regime, while Pillar One is lagging behind. This institutional evolution unfolded in a way that was neither planned nor envisaged by the OECD, but which found its cornerstone in the top-down normative powers of the EU, namely the enactment of the Directive which follows closely the GloBE Rules ensuring their application and enforcement within the EU..

3. The Global Minimum Tax Directive and its expected revenues

Pillar Two and the Directive are a reality, so a current issue is that of the expected revenues and impacts from their implementation. This analysis needs to be conducted on two fronts: the OECD at large and the EU. On the OECD and global side, the OECD Secretariat announced the Pillar Two is expected to raise up to USD 200 billion in additional revenues each year globally, based on the latest available data from 2020, with about one-third of those gains coming from reduced profit shifting. Of course, these expected revenues will depend on the number of countries who will implement the OECD guidelines of Pillar Two and therefore their estimate will be a major focus of quantitative analysis in the future.

The analysis of expected revenues and impacts of the Directive in the EU is more complex than the equivalent analysis for OECD Pillar Two as it is geared towards EU fiscal policies at large. In this context, already on 27 May 2020, the EU Commission presented the Next Generation EU (“NGEU”)²⁴ and on 21 July 2020, EU leaders agreed on the NGEU and the Multiannual

²⁴ European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic And Social Committee and the Committee of the Regions – *Europe’s moment: Repair and Prepare for the Next Generation* (COM(2020) 456 final) , available at < <https://ec.europa.eu/info/sites/info/files/communication-europe-moment-repair-prepare-next-generation.pdf>. > See also European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic And Social Committee and the Committee of the Regions – *The EU*

Financial Framework (MFF) for 2021-2027.²⁵ The NGEU plan amounts, in total, to EUR 750 billion, financed through a debt issue, and notes the conditions for important changes in revenue-raising at EU level.

The European Council of 17-21 July 2020, in fact, endorsed the agreement of national governments and stated that the Commission was empowered, in the Own Resources Decision, to borrow funds on the capital markets on behalf of the Union up to the amount of EUR 750 billion based on 2018 prices; new net borrowing activity was planned to stop at the latest at the end of 2026. The amount of funds borrowed to be used for loans was set at EUR 360 billion in 2018 prices and the amount of expenditure was set at EUR 390 billion in 2018 prices. On the basis of the MFF 2021–2027, the EUR 750 billion from NGEU results in a multiannual budget of more than EUR 1,800 billion.²⁶

The legal basis of the debt-funded portion of the NGEU is to be found in articles 122 and 311 of the TFEU:²⁷ the EU can resort to revenue other than “own resources” in the strict sense and thus borrowing in that context could be initiated. By contrast, an exact legal basis was for the EUR 390 billion in borrowed funds bound to be assigned as grants, i.e. non-reimbursable funds, cannot be easily found in the TFEU, so a practical approach was chosen: it was agreed that only in circumstances in which borrowing measures were not sufficient to generate the necessary liquidity could the Commission provisionally call for more resources from Member States as a last reserve.²⁸

At the end of 2020, the Council approved an increase in the level of the multiannual financial framework MFF 2021–2026.²⁹ In addition, a Joint Declaration was issued that allows Parliament to participate in such a budgetary procedure when article 122 of the TFEU is invoked in respect of measures that have “appreciable implications” for the budget.³⁰

budget powering the recovery plan for Europe, (COM(2020) 442 final) available at < https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/1_en_act_part1_v9.pdf. >

²⁵ European Council Conclusions, 17–21 July 2020 (EUCO10/20).

²⁶ In 2018 prices. See: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The next generation of own resources for the EU Budget* COM(2021) 556 final. For more detailed information, see European Commission, *The EU's 2021–2027 Long-term Budget and Next Generation EU: Facts and Figures* (Publications Office 2021). See also in this volume, chapters 3, 8 and 17.

²⁷ Article 122 of the TFEU provides that the Council decides “in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation” and grants financial assistance “where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”. Article 311 of the TFEU provides that “the Union shall provide itself with the means necessary to attain its objectives and carry through its policies” and also that the budget shall be financed wholly from own resources “without prejudice to other revenue”.

²⁸ The amount of additional resources that could be requested annually from Member States in such circumstances was to be established on a pro rata basis and, in any event, would be limited to the Member States’ share of the temporarily increased own resources ceiling, i.e. 0.6% of the Member States’ Gross National Income (GNI): European Council Conclusions, 17–21 July 2020 (EUCO/2020/10/20) p. 4.

²⁹ Council Regulation (EU, Euratom/2020/2093) laying down the MFF for the years 2021 to 2027 OJ L 433I (22Dec. 2020) p. 11.

³⁰ Joint declaration of the EP, the Council and the Commission on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget, OJ C 444I (22 Dec. 2020), p. 5.

The institutional evolution evidences that the NGEU in practice induces the EU to create its own tax resources through the structure of the EU own resources, i.e. the EU budget: if the amount of additional resources required to cover the gap between non-reimbursable grants and loans funded by debt will not come from an increase of EU own resources, then it will have to come, by necessity, directly from Member States on a pro rata basis.

As mentioned, in 2020 it was basically agreed that only in circumstances in which borrowing measures were not sufficient to generate the necessary liquidity, could the Commission provisionally call for more resources from Member States as a last reserve. Therefore, to prevent that occurrence, the EU institution must find new “EU own resources”³¹ directly attributable to the EU budget, a significant change from the past when the EU budget was essentially used to fund the functioning of EU institutions.

In this context, it should be considered that the NGEU is a strategy for the future because it anticipates Member States’ expenditures partially through grants which are non-reimbursable funds. In fact, these expenditures are financed through monetary provisions that do not need to be paid back and that will cover six broad areas: not only economic cohesion, productivity and competitiveness; social and territorial cohesion, health, economic, social and institutional resilience, but also the green transition and digital transformation. The green transition and digital transformation,³² in particular, are closely connected to the foundational core of the NGEU, i.e. policies for the next generation and clearly confirm that the NGEU is a strategy for the future that needs to be funded in the present.

The NGEU is therefore based not only on expenditures, but also on new prospective revenues because these non-reimbursable funds must be eventually covered by new forms of EU resources. The Commission has already announced that the NGEU will directly affect the EU budget in the quest of new resources to eventually make up of the grants that will be drawn down by Member States, while in the past the role of the EU budget has always been relegated to mere support of EU institution and/or special limited programs.

4. Common features of the new EU own resources

There are currently four “own resources” for the EU budget that account for more than 90% of its revenues. The Commission has provided a detailed outline of these existing resources. The first is customs duties, which are levied on imports and collected at the external borders of the EU. These go directly to the EU budget. Member States retain 25% of the amount as a collection cost. The second is the VAT on own resource, which has been simplified as of 2021: a uniform call rate of 0.3% applies to the VAT bases of all Member States. The third own resource is based on non-recycled plastic packaging waste, which is the main novelty of the previous Own Resources Decision from 2020. Member States contribute EUR 0.80 per

³¹ See Chapters 17 and 18 in this volume.

³² See Chapter 11 in this volume.

kilogram of their plastics packaging waste that is not recycled (a correction is applicable for less prosperous Member States).³³

Among these existing resources, the fourth own resource currently plays the most relevant role: the Gross National Income (GNI) own resource which remains the main source of financing of the EU budget. All Member States contribute according to their share in the EU-27 GNI. Some Member States benefit from a gross reduction. The call rate is adjusted to finance the part of the budget not covered by other revenue sources.

In a Communication of 22 December 2021,³⁴ the European Commission made important announcements about the fiscal underpinnings of the NGEU, proposing an amendment to the Own Resources Decision to introduce *three new categories of own resources* based on (i) the carbon border adjustment mechanism (“CBAM”), (ii) the revised EU Emissions Trading System (“EU ETS”) and (iii) a share of the residual profits of the largest and most profitable MNEs that are allocated to EU Member States following the agreement by the Inclusive Framework and the ensuing Directive.³⁵

The Commission however has envisaged new types of “own EU” resources that will arise from innovative levies.³⁶ The first class of these levies are EU typical “regulatory” taxes levied at EU level such as the CBAM and the EU ETS (see Chapter 18 by Kendrick). The second class is mainly constituted by the revenues expected from the global minimum tax imposed by the Directive. In a broad sense, the purpose of the revision of the Own Resource Decision is to allocate a share of the revenue generated by these instruments to the EU budget.³⁷ Revenues for the EU budget are estimated, on average over the 2026-2030 period, to reach up to EUR 17 billion per year (in constant 2018 prices). These revenues will be used for both the repayment of NGEU and the financing of the Social Climate Fund.³⁸

The Commission has also clarified that since the repayment of the NGEU borrowing will be spread over more than three decades, to be concluded by 2058, sufficient revenue is needed to cover the Union’s repayment needs for the non-repayable part of the borrowing, stating that an amount of EUR 15-16 billion in current prices corresponds to a linear repayment profile from the Union budget for non-repayable support based on the Commission’s issuance planning for NGEU, including the maturity structure.³⁹

³³ European Council Conclusions, 17-21 July 2020, EUCO 10/20, available at <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>.

³⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The next generation of own resources for the EU Budget*, COM(2021)566 final (22 Dec. 2021)(hereinafter “Commission Dec. 22/2021”).

³⁵ *The next generation of EU own resources: Questions and Answers*, <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_7026>. See also Chapters 3 and 17 in this volume.

³⁶ Ibidem.

³⁷ Ibidem.

³⁸ Commission Dec. 22/2021, p. 5.

³⁹ *The next generation of EU own resources: Questions and Answers*, https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_7026. See also: Commission Dec. 22/2021, diagram , p. 4.

New own resources should raise an amount that is sufficient to cover the expected expenditure for the repayment of the principal and interest of the funds borrowed under NGEU. Repayments, however, will ultimately be financed through the general EU budget.⁴⁰ To that end, the Commission will present a proposal for a second basket of new own resources by the end of 2023. Can we say that these new levies truly constitute a new brand of “own EU resources”, in spite of the fact that they have clearly distinct constitutive features? To answer this question we need to briefly look at their respective structure.

EU ETS

The EU ETS - established in 2005 and now in its fourth trading phase (2021-2030) - is also denominated “cap and trade”. This means that the EU ETS is based on a cap, i.e. a limit that is set on the total amount of emissions that can be emitted by the installations and aircraft operators covered by the system. The cap is expressed in emission allowances, where one allowance gives the right to emit one tonne of CO₂eq (carbon dioxide equivalent). For each year, companies must surrender enough allowances to fully account for their emissions, otherwise fines are imposed.

The EU ETS in the view of EU institutions makes polluters pay for their emissions, helps bring those emissions down and generates revenues to finance the EU’s green transition and operates in all EU countries plus Iceland, Liechtenstein and Norway (EEA-EFTA states). The EU ETS covers emissions from around 10,000 installations in the energy sector and manufacturing industry, as well as aircraft operators flying within the EU and departing to Switzerland and the United Kingdom – or around 40% of the EU’s emissions and will also cover emissions from maritime transport from 2024.⁴¹ Since 2005, the EU ETS has helped bring down emissions from power and industry plants by 37%.⁴²

Within the cap, companies primarily buy allowances on the EU carbon market, but they also receive some allowances for free. Companies can also trade allowances with each other as needed. If a installations or operators reduce their emissions, they can either keep the spare allowances to use in the future or sell them. The cap is reduced annually in line with the EU’s climate target, ensuring that emissions decrease overtime. The declining cap offers companies certainty about the scarcity of allowances long term and ensures that allowances have market value. Allowance price serves as an incentive for companies to reduce emissions how and where it costs least to do so. It also determines the revenues that the EU ETS generates from the sale of allowances. Since 2013, the EU ETS has generated over EUR 152 billion in revenues.⁴³

The revenues from the EU ETS feed mostly into national budgets to support investments in renewable energy, energy efficiency improvements and low-carbon technologies that help reduce emissions further, while the sale of allowances supplies the EU ETS funds for low-carbon innovation and energy transition, the Innovation Fund and the Modernisation Fund.

⁴⁰ *In this regard see:* Crowe R., ‘An EU budget of states and citizens’ [2020] 26.5-6 ELJ 331-344.

⁴¹ https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en

⁴² Ibidem.

⁴³ Ibidem.

CBAM

On 1 October 2023, the CBAM entered into application in its transitional phase, with the first reporting period for importers ending 31 January 2024.⁴⁴ CBAM is a levy that imposes a price on the carbon emitted during the production of carbon intensive goods that are entering the EU and to encourage cleaner industrial production in non-EU countries. The gradual introduction of the CBAM is aligned with the phase-out of the allocation of free allowances under the EU ETS to support the de-carbonisation of EU industry. By imposing a price on the embedded carbon emissions generated in the production of certain goods imported into the EU, the CBAM should ensure that the carbon price of imports is equivalent to the carbon price of domestic production, and that the EU's climate objectives are not undermined. The CBAM is designed to be compatible with WTO-rules.⁴⁵

The CBAM will initially apply to imports of certain goods and selected inputs of production: cement, iron and steel, aluminium, fertilisers, electricity and hydrogen. CBAM in the view of EU regulators should eventually – when fully phased in – capture more than 50% of the emissions in EU ETS covered sectors.⁴⁶ The objective of the transitional period is to serve as a pilot and learning period for all stakeholders (importers, producers and authorities) and to collect useful information on embedded emissions to refine the methodology for the definitive period.⁴⁷

During the gradual phasing in of CBAM, importers of goods in the scope of the new rules will only have to report emissions (“GHG”) embedded in their imports (direct and indirect emissions), without making any financial payments or adjustments. Indirect emissions will be covered in the scope after the transitional period for some sectors (cement and fertilisers), on the basis of a defined methodology outlined in the Implementing Regulation published on 17 August 2023 and its accompanying guidance.⁴⁸

Until the end of 2024, companies will have the choice of reporting in three ways: (a) full reporting according to the new methodology (EU method); (b) reporting based on an equivalent method; and (c) reporting based on default reference values (only until July 2024). As of 1 January 2025, only the EU method will be accepted. The Commission has developed IT tools to help importers perform and report CHG calculations. Once the permanent system enters into force on 1 January 2026, importers will need to declare each year the quantity of goods imported into the EU in the preceding year and their embedded GHG. They will then surrender the corresponding number of CBAM certificates. The price of the certificates will be calculated depending on the weekly average auction price of EU ETS allowances expressed in €/ton of CO₂ emitted. The phasing-out of free allocation under the EU ETS will take place in parallel with the phasing-in of CBAM in the period 2026-2034.

⁴⁴ Ibidem.

⁴⁵ Regulation (Eu) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Commission implementing Regulation (EU) 2023/1773 of 17 August 2023 laying down the rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards reporting obligations for the purposes of the carbon border adjustment mechanism during the transitional period.

Global minimum tax

One needs to abstract for a moment from the sheer complexity of the legal structure of the Directive and of the corresponding GloBE Rules to fully grasp the nature of the imposed charge. This charge is (i) directly an EU-based global minimum tax on MNEs and (ii) indirectly a disincentive for tax jurisdictions to offer effective rates below 15%. First of all, what is exactly a global minimum tax? In general terms, a “global minimum tax” is a corporate tax imposed by individual home countries that have a certain link with ultimate parent company of a MNE or other intermediate companies of the MNE: these home states undertake the ethical and political obligation to tax their own MNEs on their on global profits in a kind of “*defensive coalition*”⁴⁹ (as further explained hereinafter).

More precisely the EU-transposed global minimum tax is a “country-by-country minimum tax” in which each individual Member State participates in the cooperative framework in its capacity as home state of its own MNEs and unilaterally subjects those MNEs to taxation on global profits through the exercise of extraterritorial tax jurisdiction. This subjection to taxation is properly an “unilateral strategy” because it is adopted by the Member State -constrained by the Directive – taxes foreign companies of the group irrespectively from the legislation of the countries where those companies are located. These Member States cooperate in a multinational framework by taxing the global profits of their MNEs and will establish already in 2024 an international tax regime that functions according to the Directive. The country-by-country minimum tax is *not* a tax imposed at the international level but a charge imposed by individual Member States in their capacity as participants in the defensive coalition.

The fact that 27 EU Member States starting from January 1 2024 have adopted such global minimum tax and that other countries - *in primis* the United States - have adopted rules equivalent to Pillar Two⁵⁰ is evidence that EU and non-EU countries are converging in forging a “defensive coalition” against tax competition and profit shifting through geo-political compacts inspired by “minilateralism”. This concept initially suggested by Moses Naim in 2009⁵¹: when it is difficult to reach broad consensus, the most effective move is the inclusion of the smallest possible number of countries needed to have the largest possible impact on solving the problem of profit shifting. This “smallest possible number of countries” is the 27 EU Member States, plus the United States and other countries implementing Pillar Two. As a matter of fact, in 2023 in addition to the bloc of 27 EU Member States, several non-EU countries autonomously began to implement Pillar Two through different types of country-by-country minimum taxes based on Pillar Two.

⁴⁹ U.S. Department of Treasury, *Made in America Tax Plan* (2021) <https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf> accessed 23 May 2021.

⁵⁰ See G. Charles Beller, ‘GILTI: “Made in America” for European Tax: Unilateral Measures and Cooperative Surplus in the International Tax Competition Game’ [2019] 38 VTR 271, 306–10; Joachim Englisch & Johannes Becker, ‘International Effective Minimum Taxation – the GLOBE Proposal’ [2019] 11 WTJ. 483, 489–90; Mindy Herzfeld, ‘Debate on the US Tax Reform and the EU ATAD: Can GILTI + BEAT = GLOBE?’ [2019] 47 Intertax 504, 513; Susan C. Morse, ‘GILTI: The Co-operative Potential of a Unilateral Minimum Tax’ [2019] BTR 512, 518–19.

⁵¹ Moisés Naim, ‘Minilateralism’ [2009] 173 FP, 135.

At this stage there is no explicit minilateralist pact among those non-EU and EU countries, but their moves are an indication that minilateralism is beginning to work in the tax arena establishing an international tax regime. In international relations parlance, an international tax regime is not necessarily a binding legal instrument but a convergence of actors' interest toward a common framework.⁵²

5. The new EU own resources as regulatory taxes

The three classes of levies that have been scrutinized in the preceding section (CBAM, EU ETS and global minimum tax) truly constitute a new brand of "own EU resources". Indeed, they share several common features. I argue that the EU ETS, the CBAM and the global minimum tax share the common feature of having a *regulatory aim*, rather than an exclusively revenue-raising aim. In other words, the EU policy goal is to increase the amount of the EU own resources, not by introducing new revenue-raising direct or indirect taxes, but by introducing so-called "*regulatory taxes*". The latter are designed primarily to change behaviour with collateral revenue-raising effects.

Regulatory taxes have been proposed or enacted by governments on taxpayers (individuals and companies) on a wide range of products and activities – such as carbon, gasoline, fat, sugar, guns, cigarettes, alcohol, traffic, zoning, executive pay, financial transactions, and so on – by attributing a portion of or full social costs on those products and activities to the actors that make those products or perform those activities. The archetypal example of the use of regulatory taxes is environmental pollution. The idea is that, by placing a small tax equal to a marginal social cost on each unit of an activity that is to be discouraged, prices will rise and force polluters to internalize the social cost of the harmful activity; as a result, production will decrease, leading to an allocation of economic resources that reflects the true cost of the activity causing the pollution.⁵³

Regulatory taxes differ from standard direct taxes in terms of *purposes* because they mainly regulate behaviour and only marginally raise revenues, while standard direct taxes are generally not used to regulate behaviour and are essentially meant to raise revenues in a neutral way. Direct taxes should in fact be, as much as possible, 'neutral' or efficient in not altering the relative prices/costs of goods, services, or any other economic activity.⁵⁴ In contrast, this perfect neutrality is obviously not pursued by regulatory taxes. Regulatory taxes, however, compare/are similar with standard direct taxes in terms of *enforcement* because they are compulsory tax charges imposed by governments on private entities – i.e., the taxpayers – and enforced by tax

⁵² Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *International Regimes* 1, 2 (Stephen D. Krasner ed., 1983)

⁵³ Regulatory taxes can be used as an alternative to traditional command-and-control regulations. *See*, for example: N. Gregory Mankiw, 'Smart Taxes: An Open Invitation to Join the Pigou Club' [2009] 1 *EEJ* 35, 14-23; Jonathan Masur and Eric Posner, 'Toward a Pigouvian State' [2015] 93 *UPLR* 164; Steven Shavell, 'Corrective Taxation versus Liability as a Solution to the Problem of Harmful Externalities' [2011] 54 *J.L. & Econ.* 4, 249, 255-56.

⁵⁴ *See*, e.g. Harvey Rosen and Ted Gayer, *Public Finance* (9th ed, McGraw-Hill Education, 2010), 19; David Hasen, 'Tax Neutrality and Tax Amenities' [2012] 12 *FTR* 57, 77-78; for a review of the literature see: Shaheen, Fadi. "International tax neutrality: reconsiderations." *Va. Tax Rev.* 27 (2007): 203..

agencies through administrative binding measures such as tax assessments and collection that are generally used for other revenue-raising taxes.

As we have seen in the preceding section, there is no doubt that the CBAM and the EU ETS are typical “regulatory” taxes because they are aimed at indirectly regulating behaviour of private actors: reducing the emissions created by these actors in the production of certain goods and services. These charges have ancillary revenue effects. Regulatory taxes in fact are aimed at influencing indirect behaviour; they might have revenue effects that are usually directed to certain specific goals, but these revenue effects are not the primary goal as it occurs with ordinary (direct and indirect) taxes whose revenues are instinctively allocated to the public budget. Revenues, if any, from regulatory taxes are usually aimed at specific goals, rather than being allocated indistinctly to the general expenditures, and this occurs with CBAM and EU ETS.⁵⁵ The CBAM and the EU ETS are (i) directly EU-based regulatory taxes on private actors and (ii) indirectly a disincentive for non-EU jurisdictions to increase the emissions in the production of goods and services.

Similarly, for the global minimum tax, the mechanism introduced by the Directive is ultimately based on the concept of a regulatory tax because it is aimed at counteracting the opportunistic behaviour of MNEs which benefit from non-EU low tax jurisdictions that do not implement Pillar Two. This EU-based global minimum tax is (i) directly a charge on private actors – i.e. MNEs - and (ii) indirectly is a disincentive for tax jurisdictions to offer effective rates below 15% to continue their strategies in the so-called “race-to-the-bottom”. Like emissions in CBAM and EU ETS, tax competition is a social cost for the EU that needs to be counterbalanced by a regulatory tax. The EU global minimum tax therefore shares with the CBAM and EU ETS the feature of being a regulatory tax, with the result that the portfolio of new EU own resources is fully constituted by regulatory taxes.

Tax competition is in fact now addressed by the Directive which introduces a new special type of regulatory tax designed to change behaviour by attributing the social costs of tax competition on systemically detrimental activities of MNEs that exploit tax rate differentials globally. For example, environmental taxes place a charge equal to a marginal social cost of polluting activities which are, therefore, discouraged. Likewise, the Directive places a charge equal to marginal social cost of tax competition essentially the 15% top-up tax – so that tax competition will, therefore, be discouraged. The EU global minimum tax in this sense operates as a *countervailing measure* activated by each individual Member State participating in an EU defensive coalition that reacts by imposing the IIR or the UTPR to low taxation of non-EU countries which do not implement Pillar Two.

Countervailing measures are well known to the international community, and the primary example are the so called ‘countervailing duties’ under the international trade law of the World Trade Organization (WTO).⁵⁶ Other countervailing measures take the form of economic

⁵⁵ On these features of regulatory taxes see: Reuven Avi-Yonah, ‘Taxation as regulation: Carbon tax, health care tax, bank tax and other regulatory taxes’ [2011] 1 AE&L, 1-10.

⁵⁶ In general, on the concept of countervailing measures in the WTO context, see: Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press, 2014); Chad Bown and Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in*

sanctions in certain strategic scenarios, have a greater number of pervasive effects and, under certain conditions, can play out as countervailing measures rather than outright strategic penalties.⁵⁷ The countervailing measures envisaged by the Directive are amenable, in a broad sense, to the policy model of countervailing measures taking the form of a regulatory tax because they have the aim to regulate behaviour (of MNEs and low-tax jurisdictions) compensating for perceived imbalances. The Directive, in a broad sense, introduces countervailing measures because the 15% minimum tax is a balancing charge inspired by the regulatory tax model and draws its international legitimacy from multilateral cooperation of EU home states of MNEs.

An important feature of the Directive in that respect is that if a group based in Member State X has units in a non-EU country where the 15% minimum tax is not enforced, then Member State X will apply the minimum 15% tax initially through the IIR levied by the ultimate parent company or other intermediate parent companies to which the low-taxed profits are directly attributable: in this sense the IIR is a direct tax, a so called top-up tax.

However, should, for some reason, the IIR not be applied by the ultimate parent company or other intermediate parent companies to which the low-taxed profits are directly attributable, then the UTPR, which is a backstop rule to the primary IIR, will be applied. The UTPR is paid by any assigned company of the group to which the low-taxed profits are *not* directly attributable, so that company is *responsible* for a tax that should be imposed on *other entities of the group* but which has not been imposed.

Therefore, the UTPR applies even if the profits of the low-taxed non-EU company are not directly attributable to the EU company liable to the UTPR and is typically a regulatory tax in the form of a countervailing measure imposed by the Member State where the UTPR-liable company is located. As a result, the Member State where such company is liable to the UTPR is located will collect part of the top-up tax due at the level of the entire group if a jurisdiction where group entities operate does not impose the top-up tax. This charge clearly is not a direct tax on income attributable to the liable taxpayer – the company paying the UTPR – but a countervailing measure against both the non-EU jurisdiction which does not apply GloBE Rule and the MNEs that exploits the rate differential.

Please note that the same mechanism operates in non-EU countries that implement Pillar Two and which are participants in the defensive alliance. So, through this mechanism (IIR plus UTPR), non-EU countries that do not implement Pillar Two will be subject to the rules of EU Member States implementing the Directive and of non-EU countries that implement Pillar Two, so foreign affiliates of EU-based MNEs will be nevertheless subject to the 15% minimum tax imposed by the defensive alliance.

In practice, MNEs with subsidiaries in countries that apply a rate below the 15% minimum rate will ultimately have to face the consequences of the Directive or of Pillar Two. This is because

WTO Dispute Settlement (Cambridge University Press, 2010); James Nedumpara, *Injury and Causation in Trade Remedy Law: A Study of WTO Law and Country Practices* (Springer, 2016).

⁵⁷ See, for example: Gary Hufbauer, Jet al, *Economic Sanctions Reconsidered: History and current policy* (Vol. 1) (Peterson Institute, 1990).

the Directive and Pillar Two test the effective tax rate per jurisdiction and apply the IIR or the UTPR to companies in the low-tax jurisdictions. As a result of either the IIR or the UTPR, an EU Member State or a non-EU country that implements Pillar Two will collect the top-up tax due at the level of the entire group if some jurisdictions where entities are based impose tax below the 15% minimum level and do not impose any domestic top-up tax. This clearly shows that in those cases the defensive alliance of EU and non-EU countries implementing Pillar Two operates as a regulatory tax.

6. Conclusion

In conclusion this chapter shows that the NGEU has acted as an incentive for the EU in the future to create its own new tax resources through the EU budget. These new resources mainly include regulatory taxes, and in particular the global minimum tax which is a corporate tax imposed by individual home countries – and under the Directive by Member States – that have a certain link with the ultimate parent company of a MNE or other intermediate companies of the MNE. These home states at global and EU level are undertaking the ethical and political obligation to tax their own MNEs on their own global profits in a kind of defensive coalition against base erosion and profit shifting.

The CBAM, EU ETS and global minimum tax constitute a new brand of “own EU resources”. I argue that the EU ETS, the CBAM and the global minimum tax share the common feature of having a regulatory aim, rather than an exclusively revenue-raising aim. Therefore, one can argue that, at this stage, the EU policy goal is to increase the amount of the EU own resources, not by introducing new revenue-raising direct or indirect taxes, but by introducing regulatory taxes designed primarily to change behaviour with collateral revenue-raising effects.