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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a Council Directive

on ensuring a global minimum level of taxation for multinational groups in the Union

{COM(2021) 823 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
<p>The legal basis for the intended action is Article 115 of the Treaty on the Functioning of the European Union (TFEU) on the approximation of laws of the Member States, which directly affect the establishment or functioning of the internal market. Although the provision does not mention direct taxation explicitly, this Article has consistently been used to date as the standard legal base for legislative initiatives with harmonisation objectives in direct taxation. The rule explicitly prescribes that the only legal instrument which can be used under this legal base is a Directive.</p>
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
<p>The Union competence represented by this Treaty is shared between the Commission and Member States pursuant to Article 4 (2) (a) Internal Market of the TFEU.</p>
<p><i>Subsidiarity does not apply for policy areas where the Union has exclusive competence as defined in Article 3 TFEU¹. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU² sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU³ sets out the areas for which the Unions has competence only to support the actions of the Member States.</i></p>
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2⁴:
<ul style="list-style-type: none"> - Has there been a wide consultation before proposing the act? <p>Most Member States are members of the OECD and of the Inclusive Framework on Base Erosion and Profit Shifting and have participated in detailed technical discussions on Pillar 2 work stream between 2019 and 2021. Moreover, the OECD experts gave regular updates and answered questions from the Council on the project.</p> <p>The OECD organised public consultations on elements of the Pillar 2 design in December 2019 and January 2021, culminating with online public conferences for both events. Furthermore, the Commission has debated internally, with Member States and with OECD experts, in particular, where there was doubt about certain technical aspects of the proposed solutions.</p> <p>Furthermore, on 6 November 2019, DG TAXUD organised a meeting of Working Party IV and Member States had the opportunity to debate: objectives and principles for the modernisation of international business taxation, legal aspects and the CJEU case law implications regarding the possible approaches to the modernisation of international business taxation and specific design options for the modernisation of international business taxation.</p>

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN>

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

As the Pillar 2 Directive will implement an internationally agreed standard for ensuring minimum effective taxation of corporate profits of large multinational groups and the OECD has consulted publicly quite extensively on this subject, considering a very tight timeline for implementation of such standard and in light of the fact that the OECD organised public consultations on this area, the Commission has decided to proceed with this proposal for a Directive without undertaking a public consultation.

- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?

The explanatory memorandum of the act contains a statement that the proposal ensures the principle of subsidiarity.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Statement on subsidiarity to be included in the explanatory memorandum:

This proposal complies with the principle of subsidiarity as set out in Article 5 TFEU. The nature of the subject requires a common initiative across the internal market.

This Directive introduces minimum effective taxation for large multinationals' profits operating in the internal market and beyond. It provides a common framework for implementing the OECD Model Rules into Member States' national laws in a coordinated manner and adjusted for EU law requirements.

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

Furthermore, as multinational groups are usually present in several EU Member States and the GloBE rules have a cross-border dimension, it is essential that no disparities arise in the operation of the rules, for example, in the method for computing the effective tax rate or the top-up tax liability. Such disparities could create mismatches and distort fair competition in the internal market. It is therefore critical to adopt solutions that function for the internal market as a whole and these can only be achieved at Union level.

An EU initiative would add value, as compared to what a multitude of national implementation methods can attain. Given that the GloBE rules have a cross-border dimension, action at EU level would balance divergent interests within the internal market and consider the full picture, to identify common objectives and solutions.. Finally, if the measures to implement the OECD Model Rules are enacted according to the *acquis* and follow a common line across the Union, they can provide taxpayers with legal certainty that the new legal framework is compatible with the EU fundamental freedoms, including the

freedom of establishment.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

Member States acting alone are not able to sufficiently achieve the objectives of minimum effective taxation of large multinational enterprises. It is clear that the problem has a cross-border dimension and the measures envisaged by the EU action apply primarily to cross border scenarios. The problem is not confined to a single Member State or a group of Member States, but affects all Member States.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

There are significant cross-border aspects of the problem. Multinational groups are usually present in several EU Member States. The GloBE rules have a clear cross-border dimension. Therefore, it is essential that no disparities arise in the operation of the rules, for example, in the method for computing the effective tax rate or the top-up tax liability. Such disparities could create mismatches and distort fair competition in the internal market. It is therefore critical to adopt solutions that function for the internal market as a whole and these can only be achieved at Union level.

Two main economic impacts can be foreseen, namely an increase of tax revenues for Member States and putting a floor on the excessive tax competition between jurisdictions. Pillar 2 aims to making the “cake” bigger, by allowing jurisdictions to apply an internationally agreed minimum effective tax where income is taxed below the agreed minimum tax rate. Worldwide, a global minimum tax rate of 15% is estimated to generate around USD 150 billion in additional global tax revenues per year. Furthermore, a minimum level of tax on income where other jurisdictions have not exercised their primary taxing rights will allow jurisdictions to protect their tax base and as such, put a floor on tax competition on corporate income tax.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty⁵ or significantly damage the interests of other Member States?

The absence of EU level action in implementing the globally agreed rules for minimum effective taxation of large multinational groups could potentially damage the functioning of the single market.

For example, Member States could implement Pillar 2 in diverse ways, so that the calculation of the effective tax rate would create potential for tax arbitrage and loop holes for companies to exploit. Moreover, multinational groups would incur significant administrative burdens when complying with a proliferation of similar, yet different, national measures in implementing Pillar 2.

(c) To what extent do Member States have the ability or possibility to enact appropriate

⁵ https://europa.eu/european-union/about-eu/eu-in-brief_en

measures?
<p>Member States have the possibility to enact measures implementing Pillar 2 in their jurisdictions. Nevertheless, if a Member State enacts such measures on its own, it will not benefit from a coordinated, uniform action across the whole of the single market. This could create disputes between Member States arising from a different interpretation or implementation of Pillar 2 and risking to lead to double non-taxation of the relevant profits of multinational groups.</p>
<p>(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?</p>
<p>Pillar 2 applies to groups of MNEs that have a combined annual group turnover of at least EUR 750 million based on consolidated financial statements. Pillar 2 ensures that such MNEs pay tax of at least 15% on their profits in every jurisdiction they operate in.</p> <p>Large MNEs operating in different Member States incur different levels of average effective corporate taxation⁶. This result is a combination of different nominal corporate tax rates and various other features of a national tax systems including tax incentives. The implementation of the minimum effective taxation of 15% calculated on a common tax base will, therefore, impact differently MNEs, depending on which Member State they operate in. Subject to transitional measures, the substance cave-out and <i>de minimis</i> income exclusion, those MNEs will be required to pay additional top-up tax (at different levels, depending on where they maintain subsidiaries), in order to bring their effective taxation level in each jurisdiction they operate in to an effective rate of 15%.</p> <p>As the measures provided in the GloBE solution predominantly concern other jurisdictions than the jurisdiction applying the measure (i.e. jurisdiction of the group's Ultimate Parent Entity), it is not necessary that effective taxation in a Member State falls below 15% for that Member State to implement the GloBE rules. It follows that once a Directive is adopted in Council, all Member States, regardless of their effective tax rate, will have to implement the GloBE legal framework.</p>
<p>(e) Is the problem widespread across the EU or limited to a few Member States?</p>
<p>An average level of effective taxation of large MNEs of less than 15% is present in a few Member States⁷. The average figure in this context consists of MNEs having an effective tax rate above and below the 15% rate. Therefore, even in a Member State with a relatively high average effective tax rate, there may be MNEs with an effective tax rate below 15%. The problem is therefore not confined to a single or a group of Member States but is present in the single market.</p> <p>In addition, based on the way that the GloBE rules operate, they predominantly concern other jurisdictions than the jurisdiction applying the measure (i.e. jurisdiction of the group's Ultimate Parent Entity). It is therefore not necessary that effective taxation in a Member State falls below 15% for that Member State to be obliged to implement the GloBE rules.</p>

⁶ Source: Taxation trends in the European Union 2021 - https://ec.europa.eu/taxation_customs/taxation-1/economic-analysis-taxation/taxation-trends-european-union_en

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<p>(f) Are Member States overstretched in achieving the objectives of the planned measure?</p>
<p>Member States should not be overstretched in achieving the objectives of the planned measure. The initiative will require some additional human resources from national tax authorities to comply with the planned action. Nevertheless, this additional human resources would have been required in the absence of the EU action anyway, in order to unilaterally comply with the OECD global solution.</p>
<p>(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?</p>
<p>Twenty-six EU Member States have agreed on the main aspects of the GloBE rules (i.e. the scope, tax rate, tax base, carve-outs and the charging rules) and committed to apply the OECD Model Rules. Cyprus, which is not a member of the Inclusive Framework, has unilaterally expressed its support for the global agreement. The EU initiative implements this international agreement.</p>
<p>2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?</p>
<p>The objectives of the proposed EU action are better achieved at Union level by reason of scale or effects of that action (EU added value) rather than by national domestic measures. The EU action will keep compliance costs to a minimum, as businesses will need to adhere to a single set of, rather than different, national measures implementing the OECD Model Rules in the EU. A common policy approach envisaged by the EU action to ensuring minimum effective taxation will provide taxpayers with tax certainty, close loop-holes used for tax avoidance and will stop the race to the bottom on CIT rates.</p>
<p>(a) Are there clear benefits from EU level action?</p>
<p>An EU initiative would add value, as compared to what a multitude of national implementation methods can attain. Given that the GloBE rules have a cross-border dimension, action at EU level would balance divergent interests within the internal market and consider the full picture, to identify common objectives and solutions. This can only be achieved if legislation is designed centrally.</p>
<p>(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?</p>
<p>An EU action would keep compliance costs to a minimum as businesses would need to adhere to a single set of, rather than different, national measures implementing the OECD Model Rules in the EU. For a group active across the EU, there would be gains in terms of economies of scale, as all its entities, no matter in which Member State, would need to follow only one and the same set of basic requirements.</p> <p>In the EU, a market of highly integrated economies, there is a need for common strategic approaches and coordinated action, to improve the functioning of the internal market and maximise the positive impact of minimum effective taxation of business profits. This can only be achieved if legislation is prescribed centrally and transposed in a uniform fashion. The EU action on minimum effective taxation will ensure this objective and by doing it, it will improve the functioning of the internal market.</p>
<p>(c) What are the benefits in replacing different national policies and rules with a more</p>

<p>homogenous policy approach?</p>
<p>The GloBE rules aim at ensuring minimum effective level of taxation for large MNEs in every jurisdiction they operate in. As such, it is a review process of checking whether the national taxation has achieved the 15% minimum effective tax rate, and where this is not the case, the rules provide for a top-up tax to ensure such goal.</p> <p>A common policy approach envisaged by the EU action to ensuring minimum effective taxation will provide taxpayers with tax certainty, close loop-holes used for tax avoidance and will stop the race to the bottom on CIT rates.</p>
<p>(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?</p>
<p>The competence of Member States in tax matters is maintained as this proposal is complementary and contributes to the effectiveness of existing national, EU and international measures, in particular the BEPS framework for combatting tax avoidance. While the EU action sets the uniform and coordinated approach for ensuring minimum effective taxation of large MNEs, Member States remain free to determine their own tax systems, as well as the level of their corporate income tax rates. The top-up tax, if any, will be levied in addition to national corporate income tax to bring the effective tax rate of company profits taxation to 15%.</p>
<p>(e) Will there be improved legal clarity for those having to implement the legislation?</p>
<p>The EU action will ensure that the measures to implement the OECD Model Rules are enacted according to the <i>acquis</i> and follow a common line across the Union. As such the EU Action can provide taxpayers with legal certainty that the new legal framework is compatible with the EU fundamental freedoms, including the freedom of establishment.</p>
<p>3. Proportionality: How the EU should act</p>
<p>3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission’s proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?</p>
<p>Statement on proportionality to be included in the explanatory memorandum:</p> <p>The proposal complies with the principle of proportionality as set out in Article 5 TFEU.</p> <p>The OECD Model Rules apply to Multinational Enterprises with a combined group turnover of at least EUR 750 million based on consolidated financial statements. The envisaged measures do not go beyond ensuring minimum effective taxation of such entities operating in the internal market and they are consistent with the OECD Model Rules while they have been adjusted to comply with EU law requirements. The Directive, therefore, does not go beyond what is necessary to achieve its objectives and respects the principle of proportionality.</p>
<p>3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?</p>

<p>The Pillar 2 agreement aims for a proportionate solution, as jurisdictions remain free to determine their own tax systems, including whether they have a corporate income tax at all, as well as the level of their corporate income tax rates. The new rules will thus enable jurisdictions to top-up the amount of tax paid by large multinationals to an agreed minimum effective level, while leaving individual countries free to decide on the features of their own tax systems. The proposed EU action is an appropriate way to achieve the intended objectives of the GloBE rules.</p>
<p>(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?</p>
<p>The initiative aims to provide a solid basis for a systemic solution that would address remaining base erosion and profit shifting (BEPS) challenges. To this effect, it will involve setting out rules that broadly provide jurisdictions with a right to “tax back” where other jurisdictions have not fully exercised their primary taxing rights, i.e. have not taxed to the agreed minimum effective rate. Thus, this is primarily about taxing income of large internationally operating businesses, which would otherwise be subject to a low effective taxation, up to an agreed minimum level.</p> <p>It is expected that this initiative will put a floor to tax competition on corporate income tax, as the introduction of a global minimum corporate tax, will allow jurisdictions to protect their tax base.</p> <p>With regards to proportionality of the proposed solution, the substance carve-out and de minimis exclusion in the proposed action mean that real economic activities and low risk MNEs are largely excluded from the application of the measures.</p>
<p>(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?</p>
<p>In order to ensure a consistent application of the rules within the EU and compatibility with EU law, the principal method for implementing Pillar 2 in the EU will be by way of a Directive. A Directive can provide a common framework for implementing the OECD Model Rules into Member States' national laws in a coordinated manner and adjusted for EU law requirements. Most importantly, this is the only legal instrument mentioned in the legal base of Article 115 TFEU, which is the base used for direct taxation.</p>
<p>(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument of approach?)</p>
<p>Yes, the proposal is limited to establishing minimum effective taxation on a jurisdictional basis and follows closely the globally agreed OECD Model Rules which are necessary to achieve the set objectives of Pillar 2. The EU action will be through a proposal for a directive, the adoption of which requires unanimity in the Council. In addition, the proposed rules do not impair Member States' tax sovereignty as Member States will remain free to determine the details of their corporate tax systems, including the nominal rates.</p>
<p>(d) Does the initiative create financial or administrative cost for the Union, national</p>

governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?

The initiative will create some additional administrative costs for national tax authorities to implement the initiative and to check compliance with measures provided by the initiative. Nevertheless, similar additional costs would have been incurred in the absence of the EU action, if a Member State decided to apply the OECD Model Rules. Moreover, in the absence of the EU and national action by a Member State, the low-taxed MNEs would effectively be subject to the GloBE measures via their subsidiaries in other jurisdictions, i.e. top-up tax which would deprive such Member State of additional tax revenue.

There will be some additional administrative costs for large MNEs to comply with the measures and by extension the EU action. Moreover, MNEs that are currently subject to effective taxation below 15% in a jurisdiction will be subject to additional top-up tax in order to bring the effective taxation in that jurisdiction to the minimum level of 15%.

The EU Action envisages as well that the MNEs that fail to provide adequate information in order to comply with the EU action will be subject to an appropriate sanction proportional to the turnover of the MNE.

(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?

In line with the OECD Model Rules there is a special provision for existing distribution corporate tax systems, which is relevant to Estonia and Latvia in the EU. In a distribution based corporate tax system, taxation of profits is postponed until the profits are distributed by way of dividends or otherwise. In accordance with the GloBE rules, as proposed by the EU initiative, there will be no top-up tax liability for MNEs operating in their territories if MNE earnings are distributed within 4 years and taxed at or above the minimum level.