# Opinion of the European Economic and Social Committee on the Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union

*(COM(2021) 823 final — 2021/0433 (CNS))*

(2022/C 290/09)

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| Referral | Council of the European Union, 10.2.2022 |
| Legal basis | Article 115 of the Treaty on the Functioning of the European Union |
| Section responsible | Economic and Monetary Union and Economic and Social Cohesion |
| Adopted in section | 3.3.2022 |
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| Plenary session No | 568 |
| Outcome of vote (for/against/abstentions) | 197/1/5 |

## 1. **Conclusions and recommendations**

1.1. The Commission proposal aims at transposing the *GloBE Model Rules* included in Pillar 2 of the OECD/G20 *Inclusive Framework* in the EU. The EESC welcomes the fact that the Commission is working fully in line with international discussions and agreements and strongly supports the Commission's objectives.

1.2. The EESC agrees with the Commission that 'the effectiveness and fairness of the global minimum tax reform heavily relies on its worldwide implementation'. The EESC considers it very important that the negotiations are successful and concluded in a timely manner. Common global implementation without gold-plating is essential to make the rules effective and not to distort competition.

1.3. The EESC strongly agrees with the Commission that it is 'imperative to ensure uniform implementation of the OECD Model Rules in the EU' and that 'this can only be achieved if legislation is enacted centrally and transposed in a uniform fashion'.

1.4. While it is essential that technical discussions and preparatory work already take place at EU level, the EESC notes that the OECD is still working on drafting further detailed rules and clarifying definitions. Member States should therefore pay attention and include all the recommendations and working results from the ongoing OECD negotiations.

1.5. The EESC backs any effort aimed at reducing compliance costs for European companies and tax authorities when devising the new system. The full implementation of Pillar 2 will be complex and is going to require a long time and significant effort, both by companies and tax authorities. In the coming months, the OECD is expected to present important rules concerning safe harbours, simplified administrative filing etc., which could smooth the implementation of the new tax regime for both businesses and tax authorities. These rules should be included in the directive.

1.6. The EESC considers that specific tax provisions enacted by parliaments in Member States as deliberate incentives for investments and employment efforts should not be neutralised by the Model Rules. It is important to promote the achievement of a greener and digitalised economy, and taxes should play a role in this.

1.7. The EESC calls for the directive to include a provision making it possible to apply the directive on dispute resolution, at least between Member States, for disputes regarding Pillar 2.

1.8. The Committee agrees with imposing penalties for non-compliance and calls on Member States to perform thorough tax inspections to ensure full compliance with the Directive's provisions.

1.9. The EESC calls for the revision of the EU list of non-cooperative third countries in relation to the tax package.

1.10. The EESC would like to point out that the fair taxation of multinational companies represents a long-standing request from the general public and expects a swift agreement on Pillar 2 in the EU and world-wide.

## 2. **Background and Commission proposal**

2.1. The Commission Directive proposal on a global minimum level of taxation for multinational groups in the Union aims at transposing the OECD's Model Rules for domestic implementation of a global minimum tax (the OECD/Inclusive Framework (Model Rules) in the EU through uniform rules and implementation ([1]).

2.2. Century-old national and international taxation rules are no longer fit for some of the new business models used today. Many companies do not have a physical presence in many countries and they do not pay corporate income taxes in those jurisdictions to the same extent as companies that are physically present ([2]).

2.3. Public budgets were under pressure in the wake of the 2008-2009 financial crisis. These factors all contributed to a process in the OECD designed to address Base Erosion and Profit Shifting (BEPS).

2.4. Following the 2015 OECD BEPS project, the Members of the G20/OECD Inclusive Framework (IF) agreed on a solution to the problem of how to address the increasing tax challenges stemming from the digitalisation of the economy.

2.5. The agreed package involves two pillars, with companies in all sectors. Pillar 2 addresses business groups with a group turnover of at least EUR 750 million Pillar 1 imposes a partial re-allocation of the rights to tax excess profits towards market jurisdictions, and Pillar 2 introduces a minimum effective taxation of 15 % ([3]). The OECD Model Rules consists of 70 pages of highly complex and technical rules, including 10 pages of definitions to enable a 'common approach' to global minimum taxation.

2.6. Pillar 2 consists of two domestic rules: i) the *Income Inclusion Rule* (IIR) and ii) its backstop, the *Under Taxed Payments Rule* (UTPR), which are together known as the *Global Anti-Base Erosion* (GloBE) rules, and a treaty-based rule — the Subject to Tax Rule.

2.7. The proposal requires the Ultimate Parent Entity (UPE) to pay the top-up tax, i.e. the shortfall for the entire group in the jurisdiction in which it is resident. The tax revenues will consequently be collected by that jurisdiction, which means that taxation and tax revenues are in another jurisdiction. There is no obligation for countries to increase their tax rate up to the minimum level.

2.8. If the UPE is located in a country that has not enacted a qualifying IIR, the UTPR comes into play, requiring jurisdictions in which that Multinational enterprise (MNE) is active to make an equivalent adjustment according to the Model Rules so that the tax liability of the group companies is adjusted in such a way that the total top-up tax is collected.

2.9. A jurisdiction's allocation of total top-up tax is based on the jurisdiction's share of the group's total employees and tangible assets in jurisdictions that have enacted the UTPR provisions.

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([1]) Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021) 823 final.

([2]) The extent to which some so-called 'digital' companies pay corporate taxes and the countries in which they pay them has been analysed by, among others, Matthias Bauer, 'Digital Companies and Their Fair Share of Taxes: Myths and Misconceptions', ECIPE, February 2018, https://ecipe.org/publications/digital-companies-and-their-fair-share-of-taxes/?chapter=all

([3]) OECD/G20 Base Erosion and Profit Shifting Project as Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two) Inclusive Framework on BEPS, https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.pdf. For an overview, see also Jefferson VanderWolk, Squire Patton Boggs, Global Minimum Taxation for Large Multinationals, https://www.linkedin.com/feed/update/urn:li:activity:6884197871441207296/

2.10. The top-up tax calculation for each jurisdiction includes a substance-based carve-out exclusion that ultimately allows a certain amount of income to be taxed below the minimum effective rate. The excluded income is initially set at the sum of 10 % of local payroll costs and 8 % of the value of tangible assets used locally, being reduced to 5 % of each of the bases over a period of ten years.

2.11. The OECD Model Rules use financial accounts as the basis for calculation of the effective tax rates, with complex adjustments. They also provide for an option for a jurisdiction to enact a domestic minimum top-tax calculation, in which case the top-up tax is allocated to and collected by that jurisdiction and therefore no tax revenues are transferred out of the jurisdiction to another jurisdiction.

2.12. The OECD has already promised to deliver the Commentary on the Model Rules during the first quarter of 2022 to clarify interpretation of the rules and to develop further guidance/clarifications on Safe Harbours and Administrative Guidance. Further clarifications could be expected.

2.13. A common global interpretation of the rules and implementation that is uniform in content and time are paramount to avoid distortions and to ensure a level playing field and European competitiveness ([4]).

2.14. Building on the Communication from the Commission *Business Taxation for the 21st Century*, the Commission proposal contains only the *GloBE Model Rules* included in Pillar 2 of the OECD/G20 *Inclusive Framework*. Pillar 1 is not as well developed as Pillar 2. This part of the package may also be subject to an EU Directive ([5]).

2.15. The scope of the Directive is defined by reference to constituent entities located in the Union that are part of MNE groups or large-scale domestic groups with a consolidated group revenue exceeding EUR 750 million in at least two of the four preceding years.

2.16. The Directive provides that, in circumstances where the UPE is located outside the EU in a jurisdiction that does not apply a qualifying IIR, all its constituent entities in jurisdictions with an appropriate UTPR framework will be subject to the UTPR. In such a circumstance, constituent entities of the MNE group located in a Member State will be subject to top-up tax in the Member State, which is apportioned on the basis of the two-factor formula, calculated in respect of the low-taxed income of constituent entities of the MNE group.

2.17. The Directive includes rules for the determination of the '*qualifying income*', meaning the adjusted income to be considered for calculating the effective tax rate. In order to calculate this income, it is necessary to refer to the financial accounting net income or loss of the constituent entity for the fiscal year. Defined adjustments for the difference between financial accounting and tax accounting are made and are very complex. The main adjustments relate to requirements when income/costs are to be reported, but, for instance, low tax provisions for patent boxes are not recognised, while accelerated depreciation on fixed assets is.

2.18. Rules for the calculation of the '*adjusted covered taxes*' of a constituent entity for a fiscal year are outlined. The main principle in allocating covered taxes is assigning them to the jurisdiction where underlying profits subject to these taxes were earned. To uphold this principle, the Directive also provides for special rules in respect of cross-border taxes or in the case of a permanent establishment (PE), transparent entity, controlled foreign company, a hybrid entity, or taxes on dividends.

2.19. The Directive defines the effective rate as the ratio of the adjusted covered taxes of the group's constituent entities to the adjusted income earned by those constituent entities of the group in a specific jurisdiction for the fiscal year. In line with the global agreement and to ensure transposition, the Directive sets the minimum effective tax rate for the purposes of the GloBE Model Rules at 15 %.

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([4]) The US has its own global minimum tax regime — Global Intangible Low Tax Income (GILTI) — but the current law is, according to the Commission, inconsistent with the IIR provision. The US is in the process of reforming their GILTI to make it compatible with Pillar 2. The OECD will discuss with the US and Members of the IF the conditions for equivalence of the reformed GILTI with Pillar 2. Until such conditions are agreed, European businesses may be at a competitive disadvantage, even if an implemented UTPR would provide some cover.

([5]) 'In order to ensure its consistent implementation in all EU Member States, including those that are not Members of the OECD and do not participate in the Inclusive Framework, the Commission will propose a Directive for the implementation of Pillar 1 in the EU.' COM(2021) 251 final, page 9.

2.20. To reduce compliance costs in low-risk situations, an exclusion applies to minimal amounts, following a 'de minimis' approach. This is when profits of the MNE group's constituent entities in a given jurisdiction do not exceed EUR 1 million and revenues are below EUR 10 million.

2.21. Special rules are applicable in the case of mergers, acquisitions, joint ventures, and multi-parented MNE groups. It provides for the application of a consolidated revenue threshold to group members involved in a merger or in a demerger. When a constituent entity is acquired or sold by an MNE group within the scope of the rules, such a constituent entity should be treated as part of both groups during the year, with certain adjustments to the values of the attributes used for the operation of the GloBE Model Rules (such as covered taxes, eligible payroll, eligible tangible assets or GloBE deferred tax assets).

2.22. The Directive contains rules on tax neutrality arrangements and distribution tax systems. In order to avoid unintended outcomes, such as a disproportionate UTPR top-up tax liability in an MNE Group, the Directive provides for special rules for calculating the income of the ultimate parent entity, where such an entity is a flow-through or subject to a deductible dividend regime ([6]).

2.23. The Directive obliges a constituent entity of an MNE group located in a Member State to file a top-up tax information return, unless the return is filed by the MNE group in another jurisdiction, with which the Member State has a qualified competent authority agreement, which would permit the automatic exchange of the annual tax information return. The required tax return is to be filed within 15 months after the end of the fiscal year to which it relates.

## 3. **General Comments**

3.1. The EESC welcomes the Commission Directive proposal aimed at transposing Pillar 2 within the EU legal system and across the internal market. The EESC strongly supports and appreciates the fact that the Commission is aligning its work with international discussions and agreements. The EESC notes that companies below certain thresholds are not affected by the agreement but that the rules are general and will, according to the OECD, apply to hundreds of companies. Each business group within the proposal's scope may have numerous permanent establishments and subsidiaries.

3.2. The EESC notes that four countries out of all those participating in the Inclusive Framework negotiations have not agreed to the package, compared to 137 countries that have signed the global agreement. The EU directive on a minimum tax can provide further defensive measures against harmful BEPS practices and the EESC supports and has always supported the goals of the BEPS project in order to ensure sustainable public finances in the EU.

3.3. The EESC agrees with the Commission that 'the effectiveness and fairness of the global minimum tax reform heavily relies on its worldwide implementation'. The EESC considers it very important that the negotiations are successful and concluded in a timely manner. Common global implementation is essential to make the rules effective and not to distort competition.

3.4. The EESC considers that Pillar 1 and Pillar 2 of the OECD G/20 *Inclusive Framework* should be treated as a comprehensive and mutually integrated package. Consistency in implementing the two pillars is of paramount importance. The EESC encourages the Member States and the Commission to increase their negotiation efforts through the OECD to have the Pillar 1 implemented globally as soon as possible.

3.5. The EESC agrees with the Commission that action at the EU level is necessary and that it is 'imperative to ensure uniform implementation of the OECD Model Rules in the EU'. The EESC furthermore agrees that 'this can only be achieved if legislation is enacted centrally and transposed in a uniform fashion' ([7]). The EESC underlines the need for the directive to respect fundamental freedoms and Treaty obligations and competences.

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([6]) In respect of investment entities, there are specific rules for the determination of the ETR, the top-up tax, the option to treat them as tax transparent entities, and the option to apply the taxable distribution method.
In relation to distribution tax systems, the Directive provides that, on an annual decision by the filing entity with respect to constituent entities that are subject to an eligible distribution tax system, a deemed distribution tax is included in the calculation of the adjusted covered taxes of the relevant constituent entities.

([7]) COM(2021) 823 final, page 3.

3.6. The fact that all Member States participated in the OECD/IF deliberations, or have since agreed to the outcome, facilitates the EU process. The EESC would like to point out that the fair taxation of multinational companies represents a long-standing request from the general public and expects a swift agreement on Pillar 2 in the EU and world-wide.

3.7. While it is essential that technical discussions and preparatory work already take place at EU level, the EESC notes that the OECD is still working on drafting further detailed rules and clarifying definitions. Member States should therefore pay attention and include all the recommendations and working results from the ongoing OECD negotiations, since a process of amending or changing the directive should be avoided. Similarly, it is important that the EU carefully consider the timing of the implementation by third-country jurisdictions.

3.8. The EESC supports the Commission's choice to build on the extensive preparatory work carried out internationally, utilising the OECD impact assessment to develop the proposal currently under examination, without doubling the work by means of a new impact assessment. However, the EESC would have appreciated an impact assessment for the parts of the Directive making it compliant with EU law. The EESC calls for such an analysis to be undertaken and to be made publicly available.

3.9. The EESC notes and understands the need to comply with EU law requirements. The easiest method, but not necessarily the only one, is an extension of the IIR provisions to purely domestic situations.

3.10. The EESC agrees with the Commission that it is desirable to involve a limited number of taxpayers and that the threshold of EUR 750 million is 'consistent with the OECD Model Rules as well as with EU law requirements' ([8]), thereby respecting the principle of proportionality. The EESC notes that the threshold is in line with the rules for *Country by country Reporting* and the ATAD Directive.

3.11. The EESC agrees with the Commission that the minimum tax rate of 15 % agreed in the OECD/G20 Inclusive Framework on BEPS 'reflects a balance amongst corporate tax rates worldwide' ([9]). It is important to respect the agreement made by governments and to transpose the rules and to make the companies covered by its scope liable to pay the top-up tax. The EESC also supports, in line with the OECD agreement, the inclusion of the substance-based carve-out, relating to payroll costs and tangible assets, and agrees with the Commission's assessment that 'BEPS practices would be unlikely to flourish' when real economic activities are taking place ([10]).

3.12. The EESC supports any possible effort aimed at reducing compliance costs for European companies and tax authorities when devising the new system. The full implementation of Pillar 2 will be complex and is going to require a significant amount of time and effort. Tax authorities will be required to develop the systems and routines to calculate and collect the new tax obligations. Furthermore, adequate and trained personnel will be needed to ensure swift implementation, while providing resources for other international tax competences such as Advanced Pricing Agreements (APAs) and dispute resolution mechanisms. The EESC encourages tax authorities to start or further advance this preparatory work if the timeline of implementation (January 2023) is to be achieved.

3.13. The EESC calls for making the directive on dispute resolution applicable to disputes regarding Pillar 2, at least between Member States. These new rules on tax dispute resolution have applied since 1 July 2019. They are laid down in Council Directive (EU) 2017/1852 ([11]) and bring a significant improvement to resolving tax disputes, as they ensure that businesses and citizens can resolve disputes related to the interpretation and application of tax treaties more swiftly and effectively.

3.14. The EESC supports, in line with the OECD agreement, the *de minimis* exclusion, which allows for the exclusion of an MNE's entity when the entity's profits do not exceed EUR 1 million and revenues are below EUR 10 million. The ceiling may have to be revised over time.

3.15. The EESC considers it important that the safe harbour rules envisaged are presented early enough so that these rules can be transposed into the final directive. This is important in order to avoid unnecessary administrative burden on taxpayers and tax administrations.

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([8]) COM(2021) 823 final, page 3.
([9]) COM(2021) 823 final, page 16.
([10]) COM(2021) 823 final, page 16.
([11]) OJ C 173, 31.5.2017, p. 29.

3.16. The EESC agrees with the intention that the Directive should provide for an assessment by the Commission of the equivalence IIR criteria, together with a listing of third-country jurisdictions that meet the equivalence criteria. This list would be modified through a delegated act.

3.17. The EESC notes the intention announced by the French Presidency of the EU Council to finalise the discussions, if possible, before the upcoming French elections in April 2022. The EU should encourage its trading partners to be equally ambitious.

## 4. **Specific Comments**

4.1. It is important that other tax provisions enacted by parliaments in Member States as deliberate incentives for investments and employment efforts are not neutralised by the Model Rules. Rules in place for a long time, for instance allowing for accelerated depreciation for fixed investments, incentives for R&D activities or newer initiatives to promote the development of a greener and more digitalised economy, should not be inhibited. This applies both to the economic recovery initiatives in connection with the pandemic, but also to future technological developments, which should be encouraged.

4.2. The implementation of the *GloBE Model Rules* in the EU will impact on existing provisions of the *Anti-Tax Avoidance Directive* (ATAD) and, more specifically, on the *Controlled Foreign Company* (CFC) rules, which could interact with the IIR as the basic rule of Pillar 2. The Commission Communication on Business Taxation for the 21st Century ([12]) stated that governments have engaged in adopting a patchwork of anti-tax avoidance and evasion measures and that the measures have added further complexity ([13]). Even if it is not necessary to amend the ATAD ([14]), a review of the effectiveness and the administrative burden of the combined rules could be beneficial, both for tax administrations and businesses.

4.3. The EESC shares the Commission's view that the transposition of the *GloBE Model Rules* in the EU could pave the way to agreement on the pending proposal to recast the *Interest and Royalties Directive* (IRD).

4.4. The EESC calls for close monitoring of the effectiveness of the rules and the administrative costs. Member States should avoid excessive use of tax rulings if they are harmful to the provisions of the global agreement.

4.5. The EESC agrees with imposing penalties for non-compliance and calls on Member States to perform thorough tax inspections to ensure full compliance with the Directive's provisions.

4.6. The EESC calls for a revision of the EU list of non-cooperative third countries in light of the implementation of the agreed OECD tax package.

4.7. The EESC would like to point out that the fair taxation of multinational companies represents a long-standing request from the general public and expects a swift agreement on Pillar 2 in the EU and world-wide.

Brussels, 23 March 2022.

*The President*
*of the European Economic and Social Committee*
Christa SCHWENG

([12]) COM(2021) 251 final.
([13]) See EESC opinion on Business Taxation for the 21st Century. Not yet published.
([14]) COM(2021) 823 final, page 2.