COMPATIBILITY OF A EUROPEAN METR MINIMUM TAX WITH EU/EEA FREE MOVEMENT GUARANTEES

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Título

Compatibilidad de un impuesto mínimo europeo METR con las garantías de libre circulación de la UE/EEE

Resumen

Un grupo de académicos asociados a la Tax Justice Network (TJN) ha propuesto recientemente la aplicación de un tipo impositivo mínimo efectivo internacional (METR) para las multinacionales. El METR se ha concebido como una versión revisada y modificada del concepto de impuesto mínimo global de GloBE que actualmente persigue el Marco Inclusivo sobre BEPS de la OCDE/G20. Al igual que GloBE, el METR ha sido diseñado para funcionar como un amplio instrumento contra BEPS. Sin embargo, la asignación internacional de derechos fiscales adicionales en relación con los beneficios que han sido gravados a un nivel demasiado bajo, así como el cálculo del impuesto complementario, diferirían del enfoque GloBE. Más concretamente, el METR se basaría en una fórmula de prorrateo para asignar los derechos de imposición, y permitiría a las jurisdicciones pertinentes recaudar un impuesto complementario proporcional que se corresponda con su propio tipo del impuesto de sociedades.

Este documento analiza la compatibilidad del concepto de METR con los derechos de libre circulación de la UE/EEE. Llega a la conclusión de que el METR daría lugar a menos casos de discriminación -tal como se entiende en la jurisprudencia del TJUE- que un impuesto mínimo GloBE no modificado. Además, es posible adaptar las normas del METR para preservar el concepto básico, garantizando al mismo tiempo la ausencia casi total de un tratamiento fiscal desventajoso de las situaciones

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transfronterizas. En ese caso, es probable que el TJUE acepte como justificadas las cuestiones marginales restantes.

Palabras clave

METR, impuesto mínimo, GloBE, economía digital, fiscalidad internacional

Abstract

A group of scholars who are associated with Tax Justice Network (TJN) has recently proposed to implement an international minimum effective tax rate (METR) for multinationals. The METR has been conceived as a revised and modified version of the GloBE minimum tax concept currently pursued by the OECD/G20 Inclusive Framework on BEPS. Like GloBE, the METR has been designed to operate as a broad instrument against BEPS. But the international allocation of additional taxing rights regarding profits that have been taxed too low, as well as the calculation of the top-up tax, would differ from the GloBE approach. More specifically, the METR would rely on formulaic apportionment for allocating taxing rights, and it would allow the relevant jurisdictions to levy a proportional top-up tax that corresponds to its own corporate tax rate.

This paper analyses the compatibility of the METR concept with EU/EEA free movement rights. It arrives at the conclusion that the METR would give less rise to instances of discrimination – as understood in case law of the CJEU – than an unmodified GloBE minimum tax. Moreover, it is possible to adapt the METR rules so as to preserve the core concept whilst ensuring the near complete absence of disadvantageous tax treatment of cross-border situations. The remaining marginal issues would then likely be accepted as justified by the CJEU.

Keywords

METR, minimum tax, GloBE, digital economy, international taxation

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1. Rationale and key design features of the METR

A group of scholars has recently proposed to implement an international minimum effective tax rate (METR) for multinationals[1]. They have conceived the METR as a revised version of the GloBE concept currently pursued by the OECD/G20 Inclusive Framework on BEPS (as Pillar Two of its work on tax challenges arising from digitalisation)[2]. Like GloBE, the METR has been designed to operate as a broad instrument against BEPS. But the international allocation of additional taxing rights regarding profits that have been taxed too low, as well as the calculation of the top-up tax, would differ from the GloBE approach. GloBE relies on priority rules to determine the jurisdiction(s) that are entitled to levy top-up tax on undertaxed profits, and determines the amount of the latter based on the difference between the minimum rate and the lower effective tax rate (ETR). By contrast, the METR would rely on formulaic apportionment for allocating taxing rights, and it would allow the relevant jurisdictions to levy a proportional top-up tax that corresponds to its own corporate tax[3].

Technically, the METR aligns with the GloBE concept regarding the calculation of the relevant ETR for each jurisdiction where a Constituent Entity of the MNE is resident or established. It therefore also has as its starting point the financial information used by the respective Constituent Entity in preparing an MNE's global consolidated accounts. The definition of covered taxes and the attribution of profits and taxes to a particular jurisdiction follow the methodology of GloBE, too. Moreover, like GloBE the METR allows (only) for jurisdictional blending of profits and corresponding covered taxes. However, different from the GloBE the METR does not calculate and allocate a fixed amount of top-up tax based on the spread between the ETR and the minimum rate. Instead, it calculates the share of «noneffectively taxed profits» (NETs) for the respective jurisdiction, i.e. it merely establishes a uniform *base* for the purpose of calculating the top-up tax, whereas the amount of tax for each jurisdiction collecting METR top-up tax is determined by applying the respective local rate to a share of this base (see below)[4]. To this effect, the METR splits the local tax base into (1) a part that is deemed to have been taxed at the minimum rate, i.e. the amount of profit needed for an ETR equalling the minimum rate if all the covered taxes are attributed to this amount; and (2) an untaxed base that is subject to the METR minimum tax – the NETs.

This deviation can be explained by the stark difference between GloBE and the METR regarding the allocation of taxing rights for undertaxed profits: GloBE would allocate taxing rights primarily to the (ultimate) parent jurisdiction, using

1 See *Cobham/Faccio/Garcia-Bernardo/Janský/Kadet/Picciotto*, For a better Globe – METR: a minimum effective tax rate for multinationals, 2021; see also *Picciotto* et al., TNI 2021, 863 et seq.
2 See OECD, Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint, October 2020.
3 See *Picciotto* et al., TNI 2021, 863 (864-865), also regarding the following more detailed outline.
4 See *Picciotto* et al., TNI 2021, 863 (864).

a top-down approach[5]. Under the METR, the MNE-wide aggregate of the individual country NETs is allocated to all countries in which the MNE has a taxable presence, irrespective of whether their ETRs are below, equal to, or above the minimum ETR. Under the *status* quo of international tax law, a taxable presence is assumed to exist in all countries where the MNE has a resident Constituent Entity or a permanent establishment (PE). For the purpose of apportioning the aggregate NETs among those countries, a formulaic apportionment rule (FAR) would be used, which would rely on three factors to reflect the «real» activities in each country: assets, employees and sales. The first two factors imply an element of «substance» which is intended to allow for certain international tax competition for real investment and job creation. Consequently, the METR does not provide for an additional formulaic substance-based carve-out like the one now favored for GloBE[6].

Countries where the MNE has a taxable presence and to which a portion of the MNE's aggregate NETs are therefore allocated under this formula are free to apply either the minimum ETR or their own domestic tax rate to their respective shares of MNE NETs[7]. Moreover, and similar to the GloBE concept in this regard, they could also choose their preferred technical approach to levy the top-up tax[8]. Where the Constituent Entity that has generated NETs has a resident parent company in the respective jurisdiction that is entitled to levy top-up tax, this could be done by way of an Income Inclusion Rule (IRR) like the one proposed for GloBE. In case of a branch with NETs, the head office jurisdiction which is entitled to tax a portion of those NETs could use a switch-over clause to achieve this. In yet other cases, a country with an MNE taxable presence could deny deductions or make other adjustments, particularly in relation to intra-group payments, to create a top-up tax effect. This would resemble, technically, the Undertaxed Payments Rule (UTPR) of the GloBE. In this sense, the METR has been described by its proponents as integrating the IIR and the UTPR of the GloBE into its FAR, but without a rule order[9]. Different from the GloBE concept, each jurisdiction with a taxable presence of the MNE would apply the top-up tax to NETs of both, domestic and foreign Constituent Entities.

2. Fundamental freedom analysis

If they were to implement the METR, EU and EEA Member States would have to respect the free movement rights of the EU and EEA Treaties. Moreover, according to settled CJEU case law, the free movement rights must be observed not only by Member States but also by the EU legislator[10], and also in the field

5 See OECD, Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint, October 2020, paras. 673-674.
6 See *Cobham* et al. (supra note 1), at 15.
7 See *Cobham* et al. (supra note 1), at 15.
8 See *Picciotto* et al., TNI 2021, 863 (864-865); *Cobham* et al. (supra note 1), at 16.
9 See *Cobham* et al. (supra note 1), at 4-5.
10 See, e.g., CJEU 25 June 1997, Case C-114/96, Kieffer and Thill, ECLI:EU:C:1997:316, para. 27; 26 October 2010, Case C-97/09, Schmelz, ECLI:EU:C:2010:632, para. 50; and the comprehensive analysis of CJEU case law by *Zazoff*, Der Unionsgesetzgeber als Adressat der Grundfreiheiten, 2011, pp. 70 et seq.

of taxation[11]. Against this backdrop, the METR minimum tax concept is analysed as to its compatibility with EU/EEA free movement rights. To this effect, it is useful to distinguish between the application of a minimum tax by EU/EEA Member States in their external relations to non-Member States, and the application within the internal market.

2.1. Implementation of the METR in third country scenarios

The personal scope of GloBE is limited to MNE Groups. According to the OECD October 2020 Blueprint on Pillar Two, the term «Group» means a collection of enterprises related through ownership or control such that it is either required to prepare consolidated financial statements for financial reporting purposes under applicable accounting principles[12]. Since the METR shares the anti-BEPS impetus of GloBE[13], it endorses this part of the GloBE design and is equally limited in application to MNE Groups[14], albeit possibly with much lower consolidated revenue thresholds than the 750 Mio. Euro envisaged for GloBE.

Arguably, the ownership and control criteria that are established in the relevant IFRS 10 and equivalent standards would always enable a parent company in the MNE Group to «exert a definite influence on the controlled company's decisions and to determine its activities», so that the GloBE rules would fall within the ambit of the freedom of establishment (Article 49 TFEU / Article 31 EEA)[15]. In the literature, it has been pointed out that an investor may have a controlling interest and therefore be required to prepare a consolidated financial statement under IFRS 10 even with less than a majority shareholding if additional, contractual arrangements allow him to exert influence over the subsidiary's economic activities[16]. However, even in such scenarios the shareholding will normally exceed the relevant threshold for a holding conferring «definite influence»; the Court does not require a majority shareholding to this effect[17]. It can moreover be inferred from the case-law that the level of entrepreneurial control exercised by a parent company within a group of companies need not be

11 See, e.g., CJEU 26 October 2010, Case C-97/09, Schmelz, ECLI:EU:C:2010:632.
12 OECD, Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint, October 2020, p. 23.
13 See *Cobham* et al., For a better Globe – METR: a minimum effective tax rate for multinationals, 2021, p. 3.
14 See *Cobham* et al., For a better Globe – METR: a minimum effective tax rate for multinationals, 2021, p. 14.
15 Cf. CJEU 13 April 2000, Case C-251/98, Baars, ECLI:EU:C:2000:205, para. 22; 20 September 2018, Case C-685/16, EV, ECLI:EU:C:2018:743, para. 34.
16 See Nogueira, J. F. P., Turina, A. (2021). Pillar Two and EU Law, in: Perdelwitz, A., Turina, A. (eds.). Global Minimum Taxation?, pp. 283-312 (at 288), who therefore consider it likely that the CJEU would assess the IIR and the UTPR as to its compatibility with the Treaty guarantee of free movement of capital.
17 See, e.g., CJEU 21 January 2010, Case C-311/08, SGI, ECLI:EU:C:2010:26, paras. 34-35; 20 December 2017, Joined Cases C-504/16 and C-613/16, Deister Holding and Juhler Holding, ECLI:EU:C:2017:1009, para. 82.

based exclusively on the shareholding in the subsidiary in order to come within the purview of the freedom of establishment[18].

The minimum tax rules would therefore *by design* fall within the substantive scope of the freedom of establishment. Unlike the EU Treaty guarantee of free movement of capital (Article 63 TFEU), the freedom of establishment cannot be invoked in third country scenarios. It only governs national measures which restrict the freedom of companies that are registered or domiciled within the EU/EEA to set up and manage dependent undertakings or branches in another EU/EEA Member State. The freedom of establishment therefore requires that both, parent and subsidiary or head office and branch are established in an EU/EEA Member State[19]. Furthermore, according to settled CJEU case law the freedom of capital movements is not applicable in parallel to the guarantee of freedom of establishment, where the tax regime at issue concerns only relationships and transactions between affiliated entities in the above sense. Instead, the free movement of capital would be superseded by the geographically more limited freedom of establishment.[20]

In literature, it has occasionally been argued that this might be different where a minimum tax targets specifically designated payments within an MNE Group, such as interest and royalty payments[21]. It is not necessary to discuss this opinion in the context of the METR, however. Different from the subject-to-tax rule envisaged under GloBE, a possible METR implementation in the form of a barrier to the deduction of intra-group payments would only serve as collection mechanism for the top-up tax, but not as a minimum tax instrument in its own right targeting specific forms of payment.

This means that in relation to countries that are not Member States of the EU/EEA, the METR could in principle be applied without any limitations imposed by the respective Treaty's free movement guarantees.

2.2. Implementation of the METR in intra-EU scenarios

This section explores the situation where the relevant NETs are sourced in an EU/EEA Member State and the application of top-up tax must respect the guarantees of the freedom of establishment, according to the above findings on the personal and territorial scope of the latter.

18 See, e.g., CJEU 13 March 2007, Case C-524/04, *Test* Claimants in the Thin Cap GL, ECLI:EU:C:2007:161, paras. 30-31 and 33; and, e contrario, CJEU 20 September 2018, Case C-685/16, EV, EU:C:2018:743, para. 35.

19 Likewise de Broe, L., Massant, M. (2021). Are the OECD/G20 Pillar Two GloBE-rules compliant with the fundamental freedoms?, EC Tax Review 2021/3: 86-98 (at 89).

20 See, e.g., CJEU, 13 November 2012, Case C-35/11, *Test* Claimants in the FII Group Litigation, EU:C:2012:707, paras. 90 et seq., esp. para. 99; 3 October 2013, Case C-282/12, Itelcar, EU:C:2013:629, paras. 16 et seq.; 24 November 2016, Case C-464/14, SECIL, EU:C:2016:896, paras. 31 et seq.; 20 September 2018, Case C-685/16, EV, EU:C:2018:743, paras. 34 et seq.

21 *Nogueira*, World Tax Journal 2020, 465 (470).

a) The relevant benchmarks for compliance with the freedom of establishment

According to settled case law of the CJEU, the imposition of a tax as a consequence of an actual or prior exercise of a free movement right constitutes a restriction of the latter if the cross-border situation is taxed less favourably than a comparable but purely internal situation[22]. This non-discrimination estándar must be respected with respect to both, the inbound and the outbound exercise of the free movement rights. Due to the historical evolution of its case law on the free movement rights, the CJEU tends to qualify only unequal treatment by the Member State where a subsidiary or branch is established as «discriminatory», whereas unequal treatment by the Member State where the company exercising the free movement right (as parent or head office) is domiciled is usually designated as «restriction»[23]. This notwithstanding, the CJEU will affirm an infringement of the respective free movement right only where there is detrimental taxation of a cross-border situation, different from its jurisprudence in other areas of law where the free movement rights are usually also effected as genuine freedom rights[24].

As a consequence, the levy of a tax by a Member State, as such, does not normally constitute an infringement of EU/EEA fundamental freedoms, regardless of the effective tax rate or amount of tax[25]. It is therefore only necessary to assess whether the implementation of the METR concept would or could imply detrimental tax treatment of cross-border situations as compared to similar but purely internal situations. As can furthermore be inferred from the Court's case law, there is no *de minimis* threshold for restrictions of the free movement rights[26]. Therefore, mere cash-flow disadvantages[27] or additional administrative burdens[28] for cross-border situations can also result in a restriction of a fundamental freedom. In a similar vein, the Court has consistently held that

22 See, e.g., CJEU 25 February 2010, Case C-337/08, X Holding, ECLI :EU:2010:89, paras. 18 et seq.; 12 June 2014, Case C-39/13, SCA Group Holding, ECLI :EU:C:2014:1758, para. 48.

23 See, e.g., CJEU 14 February 1995, Case C-279/93, Schumacker, ECLI :EU:1995:31, paras. 26 et seq.; 19 September 2015, Case C-10/14, Miljoen et al., ECLI :EU:C:2015:608, para. 57; CJEU 18 September 2003, Case C-168/01, Bosal, ECLI :EU:C:2003:473, para. 27; CJEU 19 January 200, Case C-265/04, Bouanich, ECLI :EU:C:2006:51, para. 30 et seq.

24 See, e.g., AG *Kokott*, Opinion of 2 June 2016, Case C-122/15, «C», ECLI:EU:C:2016:65 para. 66; AG *Bobek*, Opinion of 14 December 2017, Case C-382/16, Hornbach Baumarkt, ECLI:EU:C:2017:974 paras. 39 et seq.; *Cordewener*, in Vanistendael (ed.), EU Freedoms and Taxation, 2006, 1 (26 et seq.); *Bizioli*, EC Tax Review 2017, 167 (168 et seq.).

25 See, e.g., CJEU 13 July 2006, Case C-438/04, Mobistar, ECLI :EU:C:2006:463, paras. 31 et seq.; 25 October 2007, Case C-240/06, Fortum Project Finance, ECLI :EU:C:2007:636, para. 27; 22 November 2018, Case C-625/17, Vorarlberger Landes- und Hypothekenbank, ECLI:EU:C:2018:939, para. 32.

26 See, e.g., CJEU 4 April 1974, Case C-167/73, Commission/France, ECLI :EU:C:1974:35, paras. 45-47; 12 July 2012, Case C-269/09, Commission/Spain, ECLI :EU:C:2012:439, para. 55; 19 June 2015, Case C-53/13, Strojírny Prostějov, a.s. and ACO Industries Tábor, ECLI:EU:C:2014:2011, para. 42.

27 See, e.g., CJEU 15 October 2009, Case C-35/08, Busley/Cibrian, ECLI :EU:C:2009:625, paras. 26; 11 September 2014, Case C-47/12, Kronos International, ECLI :EU:C:2014:2200, para. 79 et seq.; 21 December 2016, Case C-503/14, Commission/Portugal, ECLI:EU:C:2016:979, para. 45.

28 See, e.g., CJEU 7 September 2006, Case C-470/04, «N», ECLI:EU:C:2006:525, para. 38.

there is no need to establish that the legislation in question has actually had a deterrent effect on the exercise of a free movement right[29].

Regarding the freedom of establishment in particular, the CJEU has furthermore occasionally held that taxation should be neutral with respect to branches and subsidiaries as the two possible forms of establishment[30]. The case law is inconsistent, however; in some cases the Court has refrained from addressing this question, or it has considered branches and subsidiaries not to be comparable for taxation purposes[31]. Furthermore, the CJEU has occasionally also required horizontal equal treatment between cross-border situations involving different Member States[32]. Again, it has not consistently ruled so; the Court has often also ignored this comparison or held the two situations not to be comparable[33]. In any event, cases where any of those possible dimensions of Article 49 TFEU and Article 31 EEA was decisive for the Court's ruling are very rare. The focus of the following analysis is therefore on the traditional «vertical» comparison of cross-border and internal situations. Finally, while the implementation of the METR should ideally not lead to instances of double (minimum) taxation, any eventual shortcomings or risks in this regard need not be assessed. According to settled –albeit not undisputed– CJEU case law, international double taxation cannot be objected to under the fundamental freedoms[34].

An eventual restriction of the freedom of establishment as a result of the implementation of the METR would only be contrary to EU primary law if it could not be justified. It is settled case-law that a restriction on the freedom of establishment is permissible if it is justified by overriding reasons in the public interest[35]. It is further necessary, in such a case, that its application be appropriate to ensure the attainment of the objectives in question and not go beyond what

29 See 13 March 2007, Case C-524/04, *Test* Claimants in the Thin Cap Group Litigation, ECLI:EU:C:2007:161, para. 62; 18 July 2007, Case C-231/05, ECLI:EU:C:2007:439, Oy AA, para. 42; 21 January 2010, C-311/08, SGI, ECLI:EU:C:2010:26, para. 50.

30 See, e.g. CJEU 28 January 1986, Case C-253/03, avoir fiscal, ECLI:EU:C:1986:37, para. 22; 23 February 2006, Case C-253/05, CLT-UFA, ECLI:EU:C:2006:129, para. 14; 18 July 2007, Case C-231/05, Oy AA, ECLI:EU:C:2007:439, para. 40.

31 See, e.g., CJEU 6 December 2007, Case C-298/05, Columbus Container Services, ECLI:EU:C:2007:754, para. 53; 25 February 2010, Case C-337/08, X Holding, ECLI:EU:C:2010:89, paras. 38 et seq.

32 See, e.g., CJEU 21 September 1999, Case C-307/97, Saint-Gobain ZN, ECLI:EU:C:1999:438, para. 59; 11 June 2009, Case C-521/07, Commission of the European Communities v Kingdom of the Netherlands, ECLI:EU:C:2009:360, para. 36; 24 February 2015, Case C-512/13, Sopora, ECLI:EU:C:2015:108, para. 25.

33 See, e.g., CJEU 23 February 2006, Case C-513/03, van Hilten-van der Heijden, C-513/03, ECLI:EU:C:2006:131, para. 46; 6 December 2007, Case C-298/05, Columbus Container, ECLI:EU:C:2007:754, para. 39 and 51; 4 September 2009, Case C-439/07, KBC Bank, ECLI:EU:C:2009:339, para. 80; 25 February 2010, Case C-337/08, X Holding, ECLI:EU:C:2010:89, para. 38.

34 See, e.g., CJEU 14 November 2006, Case C-513/04, Kerckhaert and Morres, ECLI:EU:C:2006:713, para. 20 et seq.; 12 February 2009, Case C-67/08, Block, ECLI:EU:C:2009:92, para. 27 et seq.; 16 July 2009, Case C-128/08, Damseaux, ECLI:EU:C:2009:471, para. 20 et seq.; 15 April 2010, Case C-96/08, CIBA, ECLI:EU:C:2010:185, para. 25.

35 See, e.g., CJEU 14 November 2006, Case C-513/04, Kerckhaert and Morres, ECLI:EU:C:2006:713, para. 20; 12 December 2009, Case C-67/08, Block, ECLI:EU:C:2009:92, para. 27; 16 July 2009, Case C-128/08, Damseaux, ECLI:EU:C:2009:471, para. 20; 15 April 2010, Case C-96/08, CIBA, ECLI:EU:C:2010:185, para. 25; 26 May 2016, NN (L) International, Case C-48/15, ECLI:EU:C:2016:356, para. 47.

is necessary to attain those objectives[36]. In the course of its jurisprudence over the last decades, the CJEU has further refined this justification estándar with respect to its scrutiny of taxation measures. The Court has consistently held certain reasons for restrictive tax measures not to be legitimate from an EU law perspective, whereas it has accepted certain other reasons as being imperative and in the public interest. With respect to the latter, its case law now also provides relatively detailed guidance for an assessment of its proportionality. In the following analysis, the relevant justifications will be discussed where necessary.

Finally, it is generally acknowledged –albeit not generally applauded[37]– that the Court shows considerably more constraint when assessing EU legislation as to its compatibility with the free movement rights, in comparison to its scrutiny of similar national measures[38]. In particular, the CJEU has repeatedly demonstrated its willingness to concede a wide margin of appreciation to the Union legislator regarding the proportionality of restrictive elements of its legislation, also in the field of taxation[39]. It has also considered that restrictions could be justified on grounds that cannot be invoked for unilateral actions of the Member States[40]. All of the aforementioned aspects could influence the fundamental freedom analysis of an eventual EU directive prescribing a minimum tax regime such as the METR. However, they cannot be anticipated with certainty, but rather any assumptions to this effect would be speculative. The following analysis will therefore mention such possible developments where appropriate, but it will not draw firm conclusions based on any such possibility.

As explained above, EU/EEA Member States could rely on various collection mechanisms to levy top-up tax on NETs. The relevant ones will now be analysed separately as to whether they could constitute a restriction of the freedom of establishment in the light of the aforementioned standards, and if so, whether they could be justified.

b) Switch-over clause

Where NETs are attributable to a foreign permanent establishment of a Constituent Entity, the Member State where the latter has its head office (i.e. the

36 See, e.g., CJEU 13 December 2005, Case C-446/03, Marks & Spencer, ECLI:EU:C:2005:763, para. 35; 12 September 2006, Case C-196/04, Cadbury Schweppes, ECLI:EU:C:2006:544, para. 47; 13 March 2007, Case C-524/04, *Test* Claimants in the Thin Cap Group Litigation, ECLI:EU:C:2007:161, para. 64; 20 January 2021, Case C-484/19, Lexel, ECLI:EU:C:2021:34, para. 46.

37 For a critical analysis, see *Englisch*, in Lang (ed.), Europäisches Steuerrecht, DStJG 41 (2018), 273 (353 et seq.).

38 For a comprehensive analysis, see *Szudoczky*, The sources of EU law and their relationships, 2014, 255 et seq.; *Szudoczky*, in Panayi et al. (eds.), Research Handbook on European Taxation Law, 2020, 93 (102 et seq.). See also *Kofler*, Diritto e pratica tributaria internazionale 2009, 471 et seq.; *Dourado*, in Weber (ed.), Traditional and Alternative Routes to European Tax Integration, 2010, 171 et seq.; *Brokelind/Wattel*, in Terra/Wattel (eds.), European Tax Law vol. 1, 2019, 655 et seq.

39 See, e.g., CJEU 26 October 2010, Case C-97/09, Schmelz, ECLI:EU:C:2010:632, esp. para. 71; *Szudoczky*, The sources of EU law and their relationships, 2014, 450 et seq. See also *Kokott*, Das Steuerrecht der Europäischen Union, 2018, § 2 para. 81, regarding the justification on grounds of fighting abusive tax planning in particular.

40 See, e.g., CJEU 14 October 2004, Case C-299/02, Commission/Netherlands, ECLI:EU:C:2004:620, para. 24.

country of residence) might have to rely on a switch-over clause in order to effectively collect top-up tax on its share of those NETs. This would be the obvious solution if the head office entity were made liable to pay the top-up tax for the foreign PE NETs, and if foreign PE profits were normally exempt in this Member State by virtue of a tax treaty or unilateral rules.

Such a switchover clause for profits attributed to PEs in low-tax jurisdictions entails that the head office Constituent Entity must pay tax for some of the profits generated by its foreign branch. In a hypothetical, purely internal situation of a resident company with local PEs, the company would be fully liable to pay tax for the entire PE profits. A switch-over that overrides the exemption method does therefore not imply any detrimental treatment of the cross-border scenario and the comparable purely internal situation. To the contrary, the tax burden of foreign secondary establishments would still be lighter, because only a share of their profits would be taxed, and moreover possibly only at the minimum rate, rather than at the regular rate applied to domestic PE profits. Accordingly, collection of the METR through a switch-over clause, i.e. by making the head office liable to pay the top-up tax, does not constitute a restriction of the freedom of establishment under the estándar approach of «vertical» comparison with a purely internal situation[41]. In its *Columbus Container* decision[42], the CJEU has indeed drawn the same conclusion with respect to a similar switch-over clause in German tax law, which was triggered by low taxation of certain PE income in the State of establishment of this PE.

Moreover, the Court also clarified in its *Columbus Container* judgement that it does not object to a difference in treatment between foreign establishments in different Member States, if the switch-over depends on the level of taxation in the respective Member State of establishment[43]. Against this backdrop, it is not to be expected that the Court would hold the selective application of the METR to the NETs of branches in low tax-jurisdictions to be incompatible with Art. 49 TFEU or Art. 31 EEA. In a similar vein, the Court held that in this context, equal treatment of subsidiaries and permanent establishments was not required by the freedom of establishment[44]. But this is of little relevance for the METR, anyways, because it subjects the NETs of foreign subsidiaries in low-tax jurisdictions to the same amount of top-up tax as the NETs of foreign branches.

As a caveat, the application of the credit method as a consequence of the switchover clause could require to also take into account losses of the foreign PE.[45]

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41 For similar conclusions regarding the GloBE switch-over clause, see *Nogueira*, World Tax Journal 2020, 465 (473); *Koerver Schmidt*, Intertax 2020, 983 (988); *de Broe/Massant*, Are the OECD/G20 Pillar Two GloBE-rules compliant with the fundamental freedoms?, EC Tax Review 2021, forthcoming.

42 CJEU 6 December 2007, Case C-298/05, Columbus Container Services, ECLI:EU:C:2007:754.

43 CJEU 6 December 2007, Case C-298/05, Columbus Container Services, ECLI:EU:C:2007:754, paras. 50-51.

44 CJEU 6 December 2007, Case C-298/05, Columbus Container Services, ECLI:EU:C:2007:754, paras. 52-53.

45 Cf. CJEU 6 September 2012, Case C-18/11, Philips Electronics, ECLI :EU:C:2012:532, paras. 23 et seq.

c) Income Inclusion Rule

To the extent that the share of NETs that are allocated to a particular EU/EEA Member State represents profits of a subsidiary which is directly or indirectly controlled by a Constituent Entity that is domiciled in the respective Member State, the latter could collect the corresponding top-up tax through an income inclusion rule (IIR). To this effect, the resident parent company –or one of them if the MNE Group has a taxable presence in form of several tiers of participation in the respective Member State– would have to include the respective share of NETs in its taxable base and thereby become liable to pay the top-up tax, at either the minimum or the regular rate.

aa) Possibly restrictive effects

At first sight, this form of collection of the METR appears to meet the non-discrimination requirements inherent to the freedom of establishment, too. Different from the GloBE IIR as envisaged in the OECD October 2020 Blueprint, the METR IIR would apply irrespective of the origin of the low-taxed profits. The METR would allocate a share in the NETs of both, resident and non-resident subsidiaries, to the Member State where the MNE group has a taxable presence (also) in form of a parent company domiciled therein. This Member State would consequently levy top-up tax on both categories of undertaxed profits, and the IIR would therefore also cover profits that are attributable to resident subsidiaries.

However, some caveats apply. First, the uniform application of the IIR at the level of the parent company could nevertheless give rise to a *de facto* difference in treatment regarding the portion of the subsidiary's profits to be included in the parent company's taxable base. While the proportional share in the MNE Group NETs that are subject to income inclusion in a particular Member State would always be the same irrespective of the origin of NETs, because it would be determined uniformly by the allocation factors of the apportionment formula, the calculation of the share of profits designated as NETs would depend on the effective tax rate applicable to them. Profits of a subsidiary that is resident in a jurisdiction with a ETR significantly below the minimum rate would generate higher NETs than profits of a subsidiary domiciled in another jurisdiction whose ETR is also low but closer to the minimum rate. Subsidiaries resident in a jurisdiction with a sufficiently high ETR would not see any of their profits classified as NETs and would thus not be caught by the IIR at all. From the parent company's perspective, this means that the degree to which its tax burden will increase as a consequence of the application of the IRR will depend on where its subsidiaries are located[46]. Especially in high-tax Member States, this will typically have the consequence that a parent company which exercises its free movement rights and acquires a controlling shareholding in a company resident

46 Regarding a similarly disparate de facto impact of the GloBE IIR, see *Koerver Schmidt*, Intertax 2020, 983 (988).

in another, low-tax Member State will be confronted with a higher overall tax burden than if it had established a local subsidiary.

In principle, the EU/EEA free movement rights can also be restricted where the cross-order situation is not openly discriminated against, but *de facto* made less attractive than a comparable purely internal situations[47]. With respect to national tax measures in particular, the CJEU has found a covert *de facto* discrimination to exist where the situations experiencing disadvantageous tax treatment were «in the majority of cases» linked to the exercise of a free movement right[48]. However, in a more recent judgement the CJEU was more reluctant to qualify a national tax measure as a covert restriction by applying the aforementioned estándar[49]. While the Court did not openly say so, its reasoning in this more recent case conveyed the idea that to constitute a restriction, the de facto discriminatory tax measure would also have to exhibit certain protectionist tendencies[50]. If the *de facto* greater impact of the disadvantageous tax treatment on cross-border situations is merely «fortuitous, if not a matter of chance» rather than inherent to the design of the measure, the Court held that it cannot be regarded as restrictive[51].

Against this background, it is unlikely that the CJEU would qualify the aforementioned, potentially unequal effects of METR IIR as *de facto* restriction of the freedom of establishment despite its origin-neutral design[52], at least if the METR were introduced through EU legislation. From the perspective of the EU as a whole, the divergent impact of the METR IIR on the taxable base of a parent company depending on the domicile of their subsidiaries is a random effect; it may lead to typically higher tax burdens for parents with foreign subsidiaries in some (high-tax) Member States and to typically lower tax burdens for such parents in certain other (low-tax) Member States. Certainly, EU legislation prescribing the METR or a METR IIR would therefore not *inherently* impair the exercise of free movement rights in the internal market.

Second, however, the METR does feature an openly discriminatory design element, which it has adopted from the GloBE concept: Its scope is limited to MNE Groups, meaning groups that include «two or more enterprises the tax residence for which is in different jurisdictions or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another juris-

47 See, e.g., CJEU 5 February 2014; Case C-385/12, Hervis Sport, ECLI:EU:C:2014:47 paras. 30 and 41; 18 January 2018, Case C-249/15, Wind 1014 GmbH, ECLI:EU:C:2018:21, para. 32; 26 April 2018, Cases C-234/16 and C-235/16, ANGED, ECLI:EU:C:2018:281, para. 23; 3 March 2020, Case C-75/18, Vodafone Magyarország, ECLI:EU:C:2020:139, para. 42.

48 See CJEU 5 February 2014 – Case C-385/12, Hervis Sport, ECLI:EU:C:2014:47 para. 39; 11 June 2015, Case C-98/14, Berlington Hungary, ECLI:EU:C:2015:386, para. 38; 18 January 2018, Case C-249/15, Wind 1014 GmbH, ECLI:EU:C:2018:21, paras. 29 et seq.

49 See CJEU 3 March 2020, Case C-75/18, Vodafone Magyarország, ECLI:EU:C:2020:139, paras 38 et seq.

50 See CJEU 3 March 2020, Case C-75/18, Vodafone Magyarország, ECLI:EU:C:2020:139, in particular paras. 49, 52, and 54.

51 See CJEU 3 March 2020, Case C-75/18, Vodafone Magyarország, ECLI:EU:C:2020:139, para. 52. In a similar vein, AG Kokott, Opinion of 10 January 2019, Case C-607/17, Memira Holding, ECLI:EU:C:2019:8, paras. 35-36.

52 For a similar conclusion regarding a possible extension of the GloBE IIR to domestic subsidiaries see *Nogueira*, World Tax Journal 2020, 465 (489).

diction»[53]. Groups that are exclusively composed of enterprises that are resident in one Member State only and that also do not have foreign permanent establishments do not fall within its personal scope of application. If the METR were to use also the consolidated revenue threshold of the GloBE, the issue would be merely theoretical in nature. Within the EU/EEA there exists not a single MNE with a consolidated revenue of EUR 750 million or more that does not have any cross-border secondary establishments, nor would that be a reasonable and economically viable option for any group of such size. However, according to the METR concept only a significantly lower threshold should be applied, if any at all, so as to exclude only SMEs from its scope of application[54].

In the light of the above, two situations need to be distinguished. To the extent that the METR IIR would require the inclusion of a share in a foreign subsidiary's NETs in the taxable base of a parent company which is, in itself, controlled by a foreign parent, it would not give rise to any restriction of the intermediate holding company's freedom of establishment. Had this company instead set up only resident subsidiary's, it would nevertheless still be subject to the METR IIR as part of an MNE group. By contrast, an ultimate parent company established in an EU/EEA Member State could claim that it would have escaped the METR altogether had it only resident subsidiaries and local PEs and not exercised its freedom of establishment. The same applies to intermediate holding companies with only resident parent companies.

Moreover, it can be inferred from the Court's settled case law on national CFC legislation that the Court would regard the cross-border and the purely internal situation as comparable in the aforementioned two problematic scenarios. In fact, when assessing CFC-style income inclusion rules in the light of the freedom of establishment, the Court routinely omits the comparability analysis, because it –unconvincingly– does not designate the unequal treatment of the two situations as «discrimination» in the context of its assessment of possible home State restrictions, as explained above at 2(a). But where the Court did engage in a comparability analysis of CFC legislation –namely in certain third country scenarios covered by the guarantee of free movement of capital– it held that «the purpose of the [CFC] legislation at issue [...] is, so far as possible, to treat the situation of resident companies which have invested capital in a company established in [another] country with a 'low' tax rate in the same way as that of resident companies which have invested their capital in another [resident] company [...], with a view, inter alia, to offsetting any tax advantages which the former might obtain from investing their capital in [another] country. As soon as a Member State unilaterally taxes a resident company on the income obtained by a company established in [another] country, in which that resident company holds shares, the situation of that resident company becomes comparable to that of a resident company which holds shares in another resident company.»[55]

53 Cf. OECD, Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint, October 2020, p. 23.
54 See *Cobham* et al. (supra note 1), at 14.
55 See CJEU 26 February 2019, Case C-135/17, X GmbH, ECLI:EU:C:2019:136, para. 67.

Depending on the exact design of the METR revenue thresholds, it is therefore possible that its implementation by way of an IIR can give rise to a discriminatory restriction of the freedom of establishment in certain scenarios.

bb) Justification of eventual restrictive effects

If the CJEU then were to apply its usual strict standards for justifying an infringement of a free movement guarantee, it is unlikely that it would find the METR IIR to be justified[56].

In particular, the Court established very high standards for a proportionate justification based on the need to counter tax avoidance in its *Cadbury Schweppes* judgement, limiting it to situations where the foreign subsidiary has no economic substance[57]. Since the METR, different from the GloBE, would not feature any substance-based carve-out from its scope of application, it could not possibly meet these proportionality requirements. Admittedly, the Court has recently adopted a less restrictive position in a series of rulings where it gave Member States more leeway to define the relevant substance criteria[58]. However, this more reconciliatory approach has not as yet solidified, as can be inferred from the subsequent *Lexel* decision of the Court. In this ruling, the Court limited the possibility for a justification on grounds of fighting tax avoidance once more to «fictitious, purely artificial arrangements» without any substance at all[59].

In any event, the Court has never gone so far as to accept national tax measures with the objective to combat a merely *abstract* risk of tax avoidance in another Member State. Instead, the Court has always insisted that the taxpayer must be given the possibility to demonstrate that they chose a particular firm structure for commercial reasons[60]. The METR, to the contrary, would trigger top-up taxation merely on grounds of a too low effective tax rate in the jurisdiction where the subsidiary is resident[61]. But according to settled CJEU case law, «any advantage resulting from the low taxation to which a subsidiary established in a Member State other than the one in which the parent company was incorporated is subject cannot *by itself* authorise that Member State to offset that advantage by less favourable tax treatment of the parent company [...][T]he mere fact that a resident company establishes a secondary establishment, such as a

56 For a similar assessment regarding the justification of restrictive effects of the GloBE IIR see *Blum*, Intertax 2019, 514 (521); *Nogueira*, World Tax Journal 2020, 465 (482 et seq.); *Koerver Schmidt*, Intertax 2020, 983 (989 et seq.).

57 See CJEU 12 September 2006, Case C-196/04, Cadbury Schweppes, ECLI:EU:C:2006:544, paras. 54 and 67-68; 23 April 2008, Case C-201/05, CFC and Divided Group Litigation, ECLI:EU:C:2008:239, para. 79; EFTA Court 9 July 2014, Cases E-3/13 and E-20/13, Olsen, paras. 166 et seq.

58 *See*, e.g., CJEU, 26 February 2019, Case C-115/16, N Luxembourg 1 v. Skatteministeriet, ECLI:EU:C:2019:134, paras. 127 et seq. and para. 155. See also *Traversa*, in Panayi et al. (eds.), Research Handbook on European Union Taxation Law, 2020, 75 (88).

59 See CJEU 20 January 2021, Case C-484/19, Lexel, ECLI:EU:C:2021:34, para. 53.

60 *See*, e.g., CJEU 20 December 2017, Cases C-504/16 and C-613/16, Deister Holding und Juhler Holding, ECLI:EU:C:2017:1009, paras. 70 and 97; 14 June 2018, Case C-440/17, GS, ECLI:EU:C:2018:437, paras. 79 and 56; 20 September 2018, Case C-685/16, EV, ECLI:EU:C:2018:743, paras. 98-99.

61 Regarding similar objections to a justification of the GloBE IIR on grounds of fighting tax avoidance see *Koerver Schmidt*, Intertax 2020, 983 (987).

subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty.»[62]

The only other overriding reason in the public interest accepted so far by the CJEU that might *prima facie* be invoked to justify a restrictive METR IIR is the balanced allocation of taxing rights between Member States. The Court considers restrictive tax measures to be justified on this ground where they are «designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory»[63]. However, the METR –like the GloBE– does not address situations where a Member State seeks to ensure that it can effectively tax income or gains that have been generated through economic activities carried out within its own territory[64]. Instead, in the context of the comparison underlying a possible restrictive effect of the METR discussed here –i.e. its application only with respect to MNE groups, not with respect to purely domestic groups– the METR would introduce a top-up tax for profits that have been generated «offshore», i.e. in another (Member) State.

One could try to argue that the rationale of the METR, and of its allocation formula for NETs in particular, is premised on the presumption that economically, the NETs have actually been generated by substantial activities carried out in the Member States which get to levy the top-up tax, because it is there where the economic «substance» (and sales) of the MNE Group are located. Hence, the concept of the METR presupposes that the low ETR which leads to NETs creates an incentive for BEPS and international tax planning, and the METR merely re-allocates the corresponding profits back to the «real» place of value creation. But if the CJEU were to maintain its position adopted so far in its case law, such an argument would very likely not succeed. The Court has only recently emphasized once more that the mere prevention of the «erosion of the national tax base which could result from tax planning [...] cannot be confused with the need to preserve the balanced allocation of the power to impose taxes between the Member States.»[65] This is indeed consistent with the Court's aforementioned rejection of a justification on grounds of a general presumption of tax avoidance due to a secondary establishment in another Member State with a low level of taxation.

In the light of the above, an IIR designed to collect top-up tax on NETs in the context of a METR with low revenue thresholds might not pass the *test* of fundamental freedom compatibility if the Court would not relax its justification standards. As explained above, any assumptions to this effect are rather speculative. However, while it cannot be excluded that the Court would concede considerable discretion to the EU legislator with regard to the proportionality of

62 CJEU 12 September 2006, Case C-196/04, Cadbury Schweppes, ECLI:EU:C:2006:544, paras. 49-50, with further references (emphasis added).
63 See, e.g., CJEU 26 February 2019, Case C-135/17, X GmbH, ECLI:EU:C:2019:136, para. 72, with further references.
64 For a similar assessment regarding GloBE, see *Nogueira*, World Tax Journal 2020, 465 (484); *de Broe/Massant*, Are the OECD/G20 Pillar Two GloBE-rules compliant with the fundamental freedoms?, EC Tax Review 2021, 86.
65 See CJEU 20 January 2021, Case C-484/19, Lexel, ECLI:EU:C:2021:34, para. 67.

presumptive anti-avoidance measures, it is maybe not overly likely that it would accept the degree of generalisation inherent to the METR. It is one of the mantras of the Court that the mere exploitation of a lower level of taxation in another Member State cannot justify restrictive anti-avoidance measures of the Member States, and it would come as a surprise if the Court were to fully abandon this legal position vis-à-vis the Union legislator.

It is well conceivable, however, that the CJEU could accept a new type of justification to which it has not been susceptible in the context of unilateral measures of Member States, especially if this new «overriding reason» would be supported by broad global consensus of the G20/OECD membership and of the membership of the Inclusive Framework on international effective minimum taxation. In literature, it has been assumed that the principle of single taxation («always –sufficiently– taxed somewhere»), which up to date has not been acknowledged by the Court[66], could justify an international effective minimum tax[67]. Others have argued that different from a classical CFC regime, a minimum tax IIR is not primarily an instrument against tax avoidance and artificial structures, but instead chiefly seeks to level the playing field between foreign and domestic investments in the internal market; and this should be acknowledged as legitimate aim by the CJEU[68]. The author of the present analysis has also suggested that the Court should be open to accept a justification based on the need to reduce harmful effects of tax competition as legitimate where it is not invoked unilaterally by individual Member States[69], but instead reflects an international consensus (at least) among EU/EEA Member States[70]. It would remain to be seen whether the Court would be willing to reconsider its current, restrictive position if all Member States signalled through unanimous adoption of a directive to this effect that they indeed do consider this objective a legitimate public interest.

d) Undertaxed Payments Rule for intra-group payments

If the taxable presence of the MNE Group in a Member State consists only of Constituent Entities that are not (directly or indirectly) controlling the Group

66 See CJEU 17 September 2015, Case C-589/13, Familienprivatstiftung Eisenstadt, ECLI:EU:C:2015:612, para. 73: «In none of [earlier] cases [...] did the Court recognise a principle of single taxation as a distinct justification.»;

67 See *Nogueira*, World Tax Journal 2020, 465 (485-486).

68 See *Devereux* et al., The OECD Global Anti-Base Erosion Proposal, p. 53 (specifically for an income inclusion rule without any substance carve-out, such as the METR); mentioned as a possible justification also by *Koerver Schmidt*, Intertax 2020, 983 (991). Critical *de Broe/Massant*, Are the OECD/G20 Pillar Two GloBE-rules compliant with the fundamental freedoms?, EC Tax Review 2021, 86.

69 Regarding unilateral measures to this effect, the Court has reacted negatively in the past; see, e.g., CJEU 26 October 1999, Case C-294/97, Eurowings, ECLI:EU:C:1999:524, paras. 44-45; CJEU 26 June 2003, Case C-422/01, Skandia, ECLI:EU:C:2003:380, para. 52; 11 December 2003, Case C-364/01, Erben von H. Barbier, ECLI:EU:C:2003:665, para. 71; 5 July 2012, Case C-318/10, SIAT, ECLI:EU:C:2012:415, para. 39: «Such compensatory tax arrangements prejudice the very foundations of the single market.»

70 See *Englisch*, in Schaumburg/Englisch (eds.), Europäisches Steuerrecht, 2nd ed. 2020, § 7 para. 263. In a similar vein, while emphasizing the need for a thorough proportionality analysis, *Schön*, Bulletin for International Taxation 2020, 286 (301-302).

member with NETs, the corresponding top-up tax could be collected by way of an Undertaxed Payments Rule. This would presuppose that at least one of the resident Constituent Entities makes intra-group payments, whose deductibility could then be partially or fully denied and the tax liability of the respective CE accordingly increased to an amount equivalent to the top-up tax. The METR concept would apply such an UTPR to intra-group payments irrespective of where the MNE Constituent Entity receiving the payments is domiciled or established, abroad or domestically.

In the light of the above, the criterion for applying the UTPR, i.e. the generation of NETs by a Constituent Entity that is neither a subsidiary nor a PE of the company making the intra-group payments at issue, does not distinguish between cross-border situations and purely internal ones. Admittedly, it could have a *de facto* disparate geographical impact, because the extent to which the deduction would be denied in order to collect sufficient top-up tax would depend on where the CE with the NETs is established. However, it is unlikely that the CJEU would assume an infringement of Article 49 TFEU or Article 31 EEA for this reason alone. The aforementioned disparate effects would not concern the freedom of establishment of the entity which makes the non-deductible payments, because the latter is not taxed as a parent or head office company. Instead, the freedom of –direct or upper tier– parent companies domiciled in other Member States (of which there must be some, or else the METR and the fundamental freedoms would not apply) could be affected: The tax discrepancies could potentially influence these companies' choices in which Member State to set up subsidiaries, and it could moreover lead to unequal tax burdens depending on where these parent companies are domiciled in the first place. But as stated above at 2(a), the Court does not normally base its assessment of a tax measure on a difference in horizontal treatment between different cross-border situations, and even less so in case of differences regarding a mere *de facto* impact of an origin-neutral rule.

However, and for the same reasons discussed above at 2(c)(aa) for a METR IIR, the UTPR could be regarded as restrictive due to the limitation of the METR concept to MNE Groups. As a consequence of this limitation, an MNE Constituent Entity making intra-group payments subject to the UTPR would not face this additional tax burden if it were a member of a purely domestic group. Depending on how the MNE global revenue threshold of the METR would be designed, this difference in treatment between international and national groups of comparable size might also be real and not merely hypothetical.

In accordance with the considerations made above at (2)(c) regarding the IIR, it is therefore conceivable that a METR UTPR, too, could be in need of justification due to possible restrictions of the freedom of establishment. In this case, the justification analysis would mirror the one carried out for the IIR. The acceptance of the UTPR would then depend on the Court's willingness to significantly lower its estándar of review, or –more likely– to accept new grounds of justification for this type of minimum taxation.

e) Income Inclusion Rule beyond parent–subsidiary relationships

It is conceivable that under the METR and different from GloBE, an income inclusion rule could also apply beyond parent–subsidiary relationships. This might be required to the extent that the UTPR or a switch-over clause are not viable instruments to collect the top-up tax. In particular, such a situation exists where NETs stem from a non-resident parent company, and the resident Constituent Entity that creates the local taxable presence of the MNE Group does not make any relevant intra-group payments, for example because it is a mere toll manufacturer.

In principle, this extension of the IIR collection mechanism would give rise to the same issues with respect to the compatibility of the mechanism with the EU/EEA freedom of establishment as have been discussed above at (2) (c) with respect to the IIR as applied in parent-subsidiary relationships. Such an IIR might even be slightly more problematic as to its compatibility with the freedom of establishment. Whereas NETs of non-resident parent companies would then increase the tax burden of the resident subsidiary, NETs of resident low-taxed parent companies would possibly not, because and to the extent that the top-up tax would be collected directly from the resident parent itself in this case. This would depend on the design of the top-up tax collection mechanism in the EU legislation or, if left at the discretion of Member States, in the implementing legislation of the latter.

In any event, regarding possible justifications, the same considerations as under 2(c)(bb) would apply.

f) Taxation of the NETs entity with OSS clearance as an alternative collection model

The above analysis leads to the interim conclusion that in intra-EU situations, only the switch-over clause can be expected, without reasonable doubt, to pass fundamental freedom scrutiny. By contrast, the IIR and the UTPR could give rise to a restriction of the freedom of establishment, primarily due to the renunciation of the high GloBE consolidated group revenue thresholds. If the CJEU applied the same strict standards of justification as it routinely does in case of restrictive national tax measures, eventual restrictive effects of the METR IIR and UTPR could hardly be justified. However, in the light of earlier judgments on the compatibility of EU legislation with the free movements rights, it is likely that the Court would hold any such restrictions as legitimate and proportionate, either based on a lower estándar of proportionality review, or based on an extension of acceptable justifications, or both. This notwithstanding, such an outcome cannot be predicted with certainty. It would depend on how much judicial restraint the Court would show in the face of a unanimous agreement of Member States on the rationale of a minimum tax regime and the trade-offs underlying its implementation.

To have a higher degree of legal certainty, the Union legislator should therefore consider a different top-up tax collection mechanism that could replace the IIR and UTPR. Essentially, such an alternative would make every Constituent Entity with NETs liable to pay top-up tax itself, rather than collect it from other MNE Group members. Admittedly, in case of unilateral implementation of the METR by individual EU/EEA Member States or third countries, high legal hurdles would have to be overcome to this effect. Extending national taxation powers to the profits of a non-resident entity is then normally not feasible, due to tax treaty limitations and possibly also with respect to the «genuine link» requirement of customary public international law[71]. But in case of a harmonized implementation of the METR through EU legislation, public international law would no longer stand in the way. Since the «genuine link» requirement has been developed to protect the sovereignty of nation States, it can be waived where all States that are affected by the taxation measure collectively agree to do so. Moreover, existing bilateral tax treaties between individual EU Member States would not hinder such a solution, either, because they would be overridden by EU legislation[72].

Compliance with this new form of tax liability should be facilitated by a One *Stop* Shop approach, such as it has already been enacted in EU VAT legislation[73], and as it had been proposed for the EU Digital Services Tax[74]. The Constituent Entity with NETs could then file its METR return in its home State, and possibly also make the respective tax payments there. The home State would subsequently forward the declarations and, possibly, the corresponding tax revenue to the respective Member States where the MNE Group has a taxable presence.

What would be the advantages of such an approach? First, it could lower compliance and administrative cost, because it would centralize the tax collection procedure. Second, it would imply the near complete absence of disadvantageous tax treatment of cross-border situations, also under the premise of very low consolidated revenue thresholds. From the perspective of the Member State entitled to levy top-up tax, the non-resident Constituent Entity with NETs would then bear no higher national tax burden than a resident Constituent Entity faced with regular corporate income taxation of its profits. In fact, its tax burden would always still be lower, because only a share of NETs –rather than the full profit as in case of resident companies– would be subject to taxation. In other words, the respective Member State would not collect top-up tax from an undertaxed non-resident subsidiary of an MNE Group in excess of the tax burden imposed on a resident subsidiary of a comparable but purely domestic group, nor would it collect top-up tax from an undertaxed non-resident parent company within an MNE Group in excess of the tax burden of a resident parent company of a comparable but purely domestic group. The evaluation of this collection mechanism

71 Regarding the latter, see, e.g., *Gadžo*, Intertax 2018, 194 et seq.

72 See, by analogy, CJEU 8 September 2009 – Case-478/07, Budějovický Budvar, ECLI:EU:C:2009:521, paras. 98 et seq.

73 See, e.g., *Merkx*, The wizard of OSS: effective collection of VAT in cross-border e-commerce, 2020.

74 See Chapter 3 of the proposed Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final.

would therefore correspond to the one of a switch-over clause with similar effects regarding head office–branch relationships, as discussed above at (2)(b).

Admittedly, one situation that might then still give rise to restrictive effects in need of justification would remain. According to the METR concept, a certain share of a Constituent Entity's NETs is usually also attributable to its own State of residence, provided that the resident entity or at least the MNE Group has assets, personnel or sales in the respective Member State. As a consequence, this low-taxed entity would then incur an additional tax burden in its State of residence beyond the regular income tax. It would therefore be taxed higher than a company that is a member of a purely national group. However, this restrictive effect would be much smaller as compared to potentially restrictive effects of an IIR or UTPR, and it would therefore be more likely accepted as proportionate by the CJEU. In any event, levying a share of top-up tax also in the home State of a CE with NETs could hardly be considered an essential element for the functioning of the METR proposal, considering that the additional tax could be levied at the presumably low local CIT rate and would therefore not contribute much to the objectives of the METR. Therefore, in the unlikely event that the Court should consider this an unjustified restriction of the freedom of establishment, the system could be modified by treating the home State of the low-taxed CE as a jurisdiction without taxable MNE Group presence.

3. Conclusion

Under the METR concept, the collection of top-up tax for «noneffectively taxed profits» (NETs) of undertaxed MNE Group members would fall within the scope of the freedom of establishment. It would not be subject to an independent examination in the light of any other EU/EEA fundamental freedom, notably the free movement of capital. As a consequence, no fundamental freedom constraints would apply to the implementation of the METR in «third country scenarios», as specified in this article.

The collection of METR top-up tax would not give rise to any overt discriminatory or restrictive effects on grounds of the place of establishment of the undertaxed Constituent Entity. Under the premise that the METR would be prescribed by EU legislation, no relevant *de facto* restrictive effects should be objectionable, either.

If the METR used considerably lower MNE consolidated revenue thresholds than the GloBE proposal, collection of top-up tax by way of an income inclusion rule (IIR) or an undertaxed payment rule (UTPR) could however be regarded as restrictive. The MNE Constituent Entity liable to pay the corresponding top-up tax would then face a higher tax burden than if it were a member of a purely domestic group. By contrast, collection of the METR through a switch-over clause in head office–branch relationships can be expected to pass fundamental freedom scrutiny in the light of the CJEU judgement in the case *Columbus Container*.

To the extent that the IIR and UTPR were in need of justification due to eventual restrictive effects, an analysis on the basis of the strict standards of justification routinely applied by the CJEU in case of restrictive national tax measures would probably lead to a finding of incompatibility. However, earlier judgments on the compatibility of EU legislation with the free movements indicate that the Court would apply a lower estándar of proportionality review if the METR were prescribed by EU legislation, and it might also accept additional grounds of justification. It is therefore likely, albeit not certain, that an EU METR would be accepted by the Court, especially if it were backed up by a broad international consensus on minimum taxation.

As an alternative to the IIR and UTPR, the Union legislator could prescribe the collection of top-up tax directly from EU/EEA Constituent Entities with NETs, possibly in combination with a One-*Stop*-Shop mechanism. This would then imply the near complete absence of disadvantageous tax treatment of cross-border situations, and further increase chances of acceptance of the minimum tax regime by the CJEU.