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International Fiscal Association
Curaçao-Aruba-Sint Maarten

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LETTER FROM THE EDITOR

Dear Readers,

This first edition of 2024 marks an exciting new chapter for the Caribbean Tax Law Journal. We are pleased to share that as of this year, the journal will be published under the umbrella of the IFA Branch Curaçao-Aruba-Sint Maarten and thus reaching a broader and more diverse audience with quality contributions.

It is safe to say that reading international tax contributions on the OECD minimum tax proposal (Pillar-two) entail wading through technicalities and all kinds of abbreviations such as UTPR, STTR, GloBE, QDMTT and IIR. This new edition of the Caribbean Tax Law Journal is not different as we are covering several articles on Pillar-two.

Aitor Navarro discusses the optimal policy responses of the OECD minimum tax proposal adoption by non-aligned developing countries, arguing that tax competition will continue to exist under new forms. Leopoldo Parada stresses in his article that the 2023 UN resolution on international tax cooperation represents an extremely important recognition of the need of counterbalances in the dynamics of powers in international taxation, emphasizing the role of flexibility in international cooperation.

Svetislav Kostic sheds some light on the need for reflection over the general goals of tax policy for developing countries. Tim van Brederode explores in his contribution the interaction between CFC rules and QDMTT from a Dutch perspective, offering new insights in this important debate. This edition includes a news report by Nayarid Sanchez on the relevance of a QDMTT for Curaçao. Finally, Federica Casano examines the EU tax list of non-cooperative jurisdictions from a Caribbean angle.

The production of this edition involved the effort of contributors and peer reviewers. We would like to thank all who made this publication possible. A special word of thank you goes to Wessel Geursen and Shu-Chien Chen for peer reviewing some article(s) of this edition.

To all our readers, enjoy!

Germaine Rekwest

POLICY RESPONSES TO THE OECD MINIMUM TAX PROPOSAL

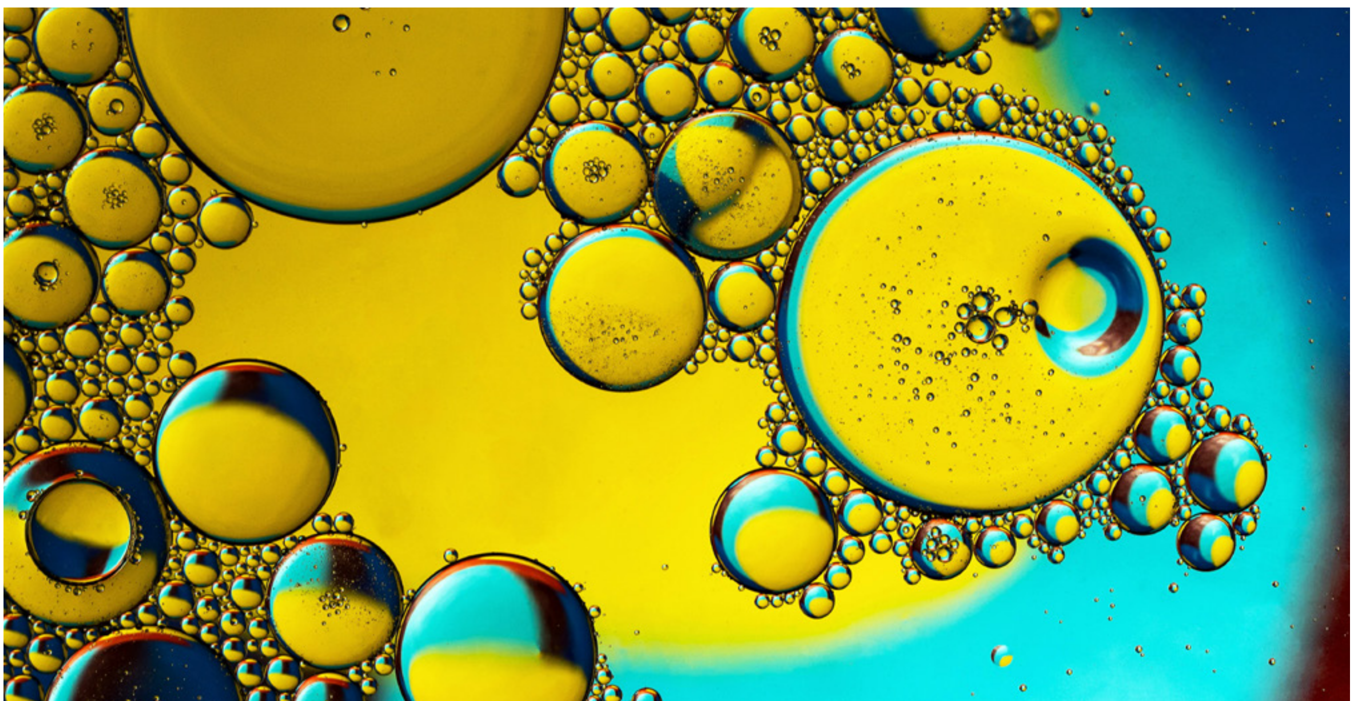
By Dr. Aitor Navarro, Max Planck Institute for Tax Law and Public Finance[1]

The OECD minimum tax, also known as Pillar Two or Global Anti-Base Erosion (GloBE), has been at the centre of the policy debate in the last 4 years since the initiative was first announced in a policy note back in February 2019. Its purported goal is to limit tax competition, and its design follows a regulatory rationale. It nudges countries to raise their effective tax rates to meet a minimum of 15% because if they don't, other countries may tax the spread to reach such an outcome. In this regard, GloBE entails a relevant limitation on the jurisdiction not to tax corporate income as an incentive to attract investment, a tax policy tool mainly employed by developing countries to compensate for shortcomings in other relevant factors such as infrastructure, stability and the like. Plus, it is designed in a manner in which the adoption of a handful of countries would have a significant impact worldwide: any in-scope multinational enterprises (MNE) having a constituent entity located in a country that adopted GloBE will see all its constituent entities affected by the minimum tax, either through the effect of the income inclusion rule (IIR) or that of the undertaxed profits rule (UTPR). For instance, the adoption of GloBE by the European Union entails that all in-scope MNEs having a presence therein will be affected by the minimum tax not only at the level of such EU-located constituent entity but at the level of the whole chain of entities in the entire organisation.

That said, GloBE does not limit the jurisdiction to tax the said income, meaning that countries may raise their effective tax rates in order to prevent other countries from applying the said rules. Several policy options are available for countries to react to the full implementation of the proposal by other countries. For instance, the very GloBE proposal includes a so-called Qualified Domestic Minimum Top-Up Tax (QDMTT), which is prima facie designed to allow the country where a low-taxed constituent entity is located, to tax the spread resulting from the application of GloBE, but not more than that. Regarding existing responses to the minimum tax, one may draw a distinction between aligned countries, namely those agreeing

with the policy rationale and outcomes of GloBE, such as the European Union, and non-aligned countries, being this other group the focus of the present article.

There are several reasons that explain the non-alignment of certain countries with the minimum taxation proposal drawn by the OECD. This may come as a disagreement with at least the following aspects. First, due to a disagreement with its underlying policy, as there are several countries worldwide that do not have the need to curtail the options of other jurisdictions to attract investment through low or no taxes. Plus, it would certainly be hypocritical to impose a specific tax incentives' policy to foreign jurisdictions while maintaining tax incentives at home that would lead to an effective tax rate lower than that of the minimum tax proposal. Second, from a design perspective, GloBE is fairly complex and challenging to administer, especially regarding the calculation of the effective tax rate. Hence, even when one agrees with the aim of the minimum tax, one may criticise the configuration of the OECD proposal, as there are other alternatives available that would achieve a similar result while maintaining simplicity intact. Third, there may be concerns about the compatibility of the proposal with international public law or against specific international instruments, such as investment agreements, as defended by certain scholars[2]. Fourth, to avoid retaliation by the United States, as certain US politicians have expressed that GloBE could lead adopting countries to tax US MNE profit without nexus to their tax sovereignty sphere. Plus, GloBE could affect the effectiveness of US subsidies such as those granted through the Inflation Reduction Act (IRA), although the OECD has modified the reach of GloBE through the issuance of further administrative guidance to downplay its reach in this context. Fifth, rejection may come due to legitimacy concerns, inter alia, due to the perception of the OECD as a non-inclusive forum that should be abandoned in favour of the UN.



Without intending to evaluate the merits of the aforementioned reasons, what is indisputable is that there are countries non-aligned with the OECD minimum tax proposal, especially in the developing world. This already would lead to considering the non-adoption of either the IIR or the UTPR, as they would limit tax competition from other countries. If a country identifies with one of the reasons above not to be aligned with GloBE, it seems pretty clear that the adoption of the said measures is senseless. If revenue raising were an argument favouring adoption, it would be senseless as well because there are other means of raising revenue that are actually not dependent on the actions of other jurisdictions, as GloBE is. A country adopting the IIR and the UTPR would see revenue raised going to zero if all countries worldwide adopted a well-designed QDMTT because collection would take place at the level of those countries, as the QDMTT takes preference over the IIR and the UTPR. Therefore, if revenue raising is the goal, GloBE measures are not the best policy tool to achieve it.

Once the IIR and the UTPR are discarded for non-aligned countries, the query of how to react to the adoption by other countries in any case remains. Indeed, not reacting would mean assuming the risk of other countries applying GloBE rules to tax low constituent entities located in the non-aligned country to tax the spread and reach the preached 15% effective tax rate. In that case, the low-taxation incentive that existed pre-GloBE would be curtailed; therefore, if that is the outcome, it would make more sense for the country to collect such revenue, instead of a foreign one. The query would not be whether to react, but instead how to react. In this regard, two main aspects should be taken into account.

First, how should effective tax rates be increased? Should countries aim at a "surgical cut" in order to collect GloBE amounts and not more? Or would an increase detached from GloBE be more plausible? This would depend, of course, on the country's policy preferences. If the intention is to remain tax competitive in the new framework created by GloBE, the aim should be to strictly collect amounts that fall under the scope of GloBE, and not more. To that end, adopting a well-tailored QDMTT would be in order, designed to match the calculations of GloBE liabilities that would otherwise arise. Calculations would mimic those of GloBE in such a scenario.

Countries could also adopt corporate tax increases detached from GloBE, such as the expansion of the corporate tax base, an increase in the corporate tax rate, the adoption of other minimum domestic taxes generally applicable to accounting profits –such as the US alternative minimum tax–, or a combination of any of these measures. Here, countries would have to assume overkill effects or the risk that, due to mismatches in calculating liabilities resulting from these measures vis-à-vis those of GloBE, instances of

taxation lower than the GloBE minimum could trigger GloBE liabilities elsewhere. Second, countries should re-evaluate the design of tax incentives aimed at in-scope MNEs due to the impact of GloBE on their effectiveness, as described above. Moreover, it must be stressed that OECD policymakers have, over time, eroded the effectiveness of GloBE as it was initially conceived through the introduction of several exceptions that would, in fact, leave some tax incentives out of the scope of the minimum tax. On the one hand, the introduction of a substance-based income exclusion (SBIE) that would reduce the taxable profit in accordance with a formula based on employees and tangible assets favours the modification of domestic tax incentives to be dependent on these factors, as exemplified by the new incentives introduced by Barbados in its Corporation Tax Reform 2024 proposal, granting for instance a "Qualified Jobs Credit" to certain sectors up to 475% of the average payroll cost. On the other hand, further implementation guidelines issued by the OECD have reduced or even neutralised the impact of the minimum tax on certain tax incentives in the form of tax credits, creating categories such as the "qualified refundable tax credits" or "marketable transferable tax credits" –as stated above, mainly to reduce the impact of the minimum tax on the incentives adopted by the US in the IRA– that should lead countries to rethink their array of tax incentives and whether they should be modified to match GloBE categories, maintained or eliminated.

Due to the aforementioned, the impact of GloBE on non-aligned developing countries may vary depending on the current status of their corporate taxes and the policy objectives to be pursued in the described new scenario. What seems clear all things being considered is that tax competition will continue to exist under new forms.

Aitor Navarro

[1] This note replicates considerations presented in the conference titled "The EU Minimum Corporate Tax Directive and its Impact on Non-Member Countries", organized by the University of Belgrade Faculty of Law and the Serbian Academy of Sciences and Arts that took place in Belgrade (Serbia) on November 24th, 2023. I'd like to thank Svetislav Kostic for the organization of the event and the kind invitation. My gratitude also goes to Leopoldo Parada, who also participated in the said conference and encouraged me to write this note and present it to the Caribbean Tax Journal for publication.

[2] See, e.g. P. Hongler et al., UTPR - potential conflicts with international law? 111(2) Tax notes international 141-151 (2023). See also B. Kuźniacki, Pillar 2 and international investment agreements: 'QDMTT payable' seals an internationally wrongful act, 112(2) Tax notes international 159-177 (2023).
[3] See Barbados Corporation Tax Reform 2024, paragraphs 48–54, available at https://www.barbadosparliament.com/uploads/sittings/attachments/8548dbe944a97cd2acfe22f78eade9f5.pdf.

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THE FIRST BRANCH LECTURE FOR 2024

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THE VALUE AND LIMITS OF EXPLAINABLE AI FOR TAX

PROGRAM

18.00 Welcome
Germaine Rekwest (President IFA branch Curaçao-Aruba-Sint Maarten)

18.10 The value and limits of eXplainable AI for tax
Błażej Kuźniacki, Ph.D. Hab. (Research Affiliate at the Singapore Management University - Centre for Artificial Intelligence and Data Governance, Senior Manager at Global Tax Policy & ITS at PwC NL)

- The need for transparency and explanation in tax contexts
- The value and limits of explainable AI (XAI) for tax
- Evaluating explanations for tax purposes
- Presentation of XAI in tax fraud detections and XAI methods for non-explainable by design AI tax fraud detector
- Legal & technical conclusions – future research

19.00 Closing

19.00-19.30 Network & drinks

1st IFA Branch lecture
12 March 2024
18.00-19.30

Location: Avila Beach Hotel, Curaçao

Register:
info@ifa-cas.com

INTERNATIONAL COOPERATION ON TAX MATTERS AT THE UN

By Dr. Leopoldo Parada, PhD, LLM, Associate Professor in Tax Law and Director of the Centre for Business Law and Practice at the University of Leeds in the United Kingdom.

On 15 November 2023, the United Nations General Assembly decided to establish a member-state-led, open-ended and ad hoc intergovernmental committee for the purpose of drafting the general terms of a UN Framework Convention on international tax cooperation (hereinafter, the "2023 UN resolution").[1] This decision followed the UN Secretary General Report of 26 August 2023,[2] which outlined three options to address a more inclusive and effective international tax cooperation at the UN in response to the previous UN General Assembly Resolution 77/244 that in turn recognised the importance to increase and enhance international tax cooperation worldwide, especially for developing countries.[3]

The reactions to the UN 2023 resolution were to some extent predictable. On one side, there was evident scepticism, possibly influenced by the dominant narrative —supported by those who subscribe to it— that has attributed control to the OECD over the developments of international tax standards for decades, or simply by the fact that swapping roles regarding who governs the making of international tax law is simply not enough.[4] On the other side, there was optimism, especially from those who perceive the 2023 UN resolution as turning point in the history of international tax policy, capable of shooting down the OECD's historical dominance of the international tax agenda, which has disregarded in many occasions the genuine interests of developing nations.[5]

This article adopts a moderated stance, suggesting that whilst it is still premature to speak of a turning point in history, the 2023 UN resolution represents an extremely important recognition of the need of counterbalances in the dynamics of powers in international taxation. It also highlights the significance of flexibility as a policy strategy that may foster a more inclusive international tax cooperation in the future.

CENTRALISED TAX POLICY DEBATE AND THE NEED FOR COUNTERBALANCES

The centralisation of the international tax debate in the hands of the OECD is not a secret to anybody. Indeed, for decades the OECD has been moving towards a more active role in the drafting and enforcing of what we could denominate "international tax standards". However, this movement has been exponentially incremented during the last decade.

Let me take the example of the ambitious Base Erosion and Profit Shifting Project (BEPS) launched in 2013. The BEPS project, unlike previous OECD work, was not only characterised by best practices and general recommendations for countries. Indeed, it showed two very distinctive features. First, the inclusion of the so-called "minimum standards". That is, among the fifteen different actions proposed in the BEPS project, the OECD included a baseline for countries adhering to it, giving them no choice but to implement these measures as a sunk cost (or perhaps benefit from the OECD perspective) to cooperate internationally. Second, the invite for countries to adhere to a new international convention (so-called "multilateral instrument or MLI") to address similar matters that countries would historically address with the use of double tax conventions (DTCs), although now from a multilateral perspective.

The BEPS minimum standards as well as the MLI did not only set up the agenda of the international tax debate for the next years, but also, they were a perfect laboratory for testing the dynamics of powers at the international level. In other words, they served to determine the level of country adherence to the OECD narrative in tax matters, paving the way to something bigger. In fact, only a few years after the launch of the OECD BEPS project, the OECD was announcing an even more ambitious aim, namely the two-pillars project to address the taxation of business profits in cases of absence of physical presence in a determined country (Pillar 1), and the establishment of a minimum effective corporate income tax rate of 15% to address global corporate income tax competition (Pillar 2). However, the difference between the two-pillars approach and its predecessor (BEPS) is radical, because the two-pillars approach does not appear as a set of generic standards for countries to decide about their implementation but rather as a carefully designed narrative for countries to adopt, regardless of the costs associated to it.

Let me use the OECD Pillar 2 to illustrate the above. Pillar 2 is presented as an altruistic measure aimed to eliminate the negative effects of corporate income tax competition through a set of domestic rules that countries are supposed to decide implementing (or not) but with a special caveat: If they do not do it, there is a chance of losing revenues or "leaving money on the table", as constantly repeated in the international fora. This is at least how the OECD has promoted the "revenue narrative" of Pillar 2 among countries. However, and beyond the technicalities of the rules and the valid criticism that this author and others have posed on the different arguments regarding the implementation of a minimum corporate tax globally, the important question here is simpler: How did the OECD move from recommending standards to setting up

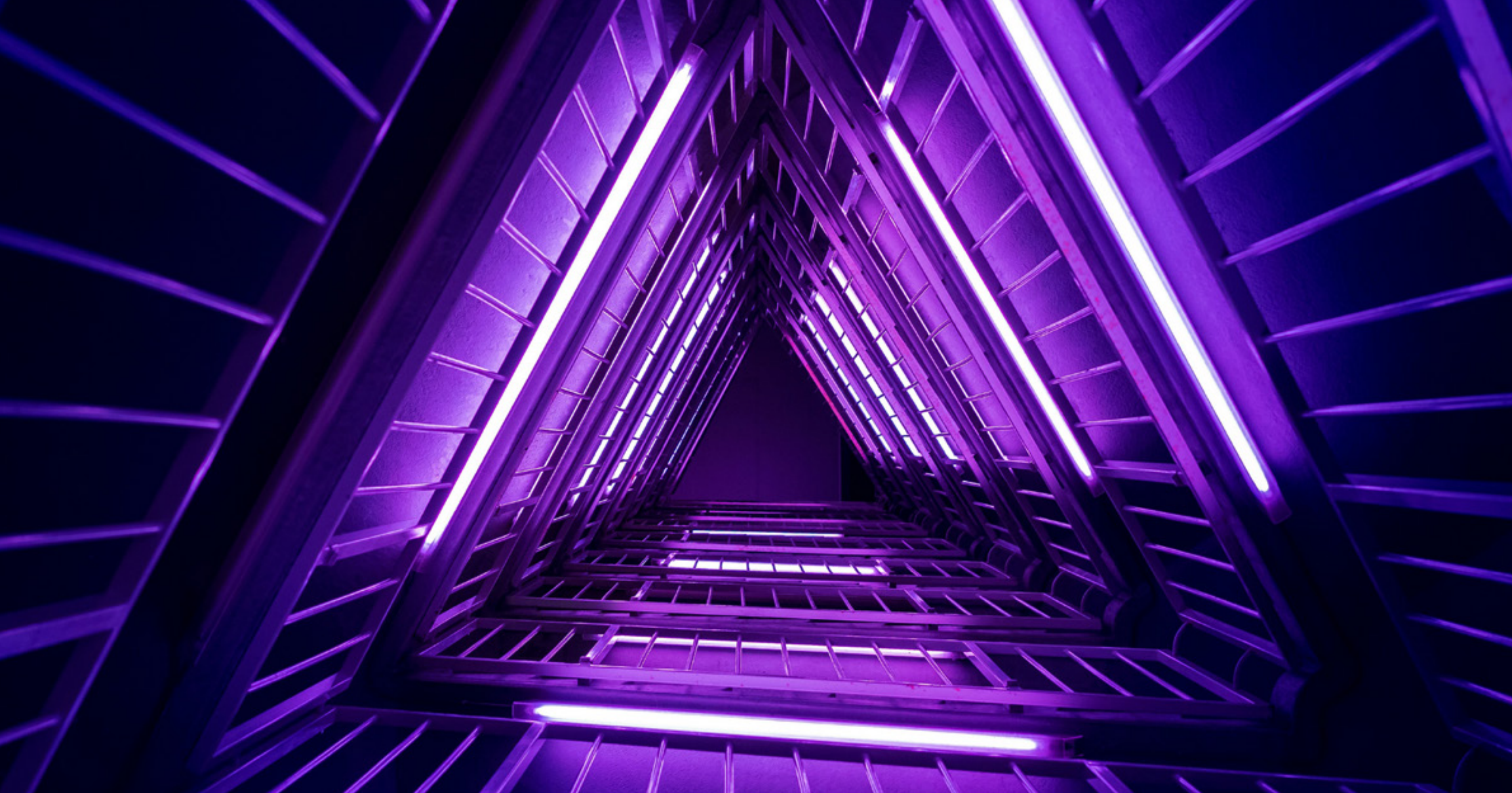
policies for countries around the world? What did really change in the decision-making process of international taxation? Probably nothing, except for one small thing, that is, the existence of alternatives or counterbalances in the dynamics of power at the international tax level. In other words, the OECD monopolistic position was simply reinforced during the last decade —from BEPS to the two-pillars approach— with almost no friction or counterbalances. Put simply, suddenly the OECD became an international tax rule maker simply because the rest of the world allowed it.

Bearing this in mind, therefore, the fact that United Nations General Assembly has decided to establish a member-state-led, open-ended and ad hoc intergovernmental committee for the purpose of drafting the general terms of a UN Framework Convention on international tax cooperation is not a simple anecdote, but rather an expected reaction to a much-needed decentralisation in the current international tax policy debate. This does not mean that a UN Framework Convention will solve all the issues that countries face when dealing with cross-border issues — far from it— but it provides a strong signal for countries to endorse a more active and fruitful global tax cooperation.

Some may validly argue that using well-settled international organisation such as the UN for this purpose may generate a nil impact and be seen as a simple swap in the current hegemony of the international tax debate in the hands of the OECD. To certain extent, this is true. However, it is the role of the whole international tax community to create the space for an independent, more democratic and participative forum for global tax cooperation, and that should start from renouncing the temptation to monopolise the international tax debate, offering the international community a new, more transparent, and truly inclusive tax governance. In other words, although the establishment of a member-state-led, open-ended and ad hoc intergovernmental committee may not satisfy all tastes right now, it is a necessary step to avoid a tax world dominated by acronyms and policies created in a room in Paris, and legitimised in a forum where all countries are invited to listen (i.e., the so-called "Inclusive Framework").

FLEXIBILITY: THE MISSING CORNERSTONE IN INTERNATIONAL COOPERATION

Perhaps one of the forgotten —although most important— aspect when discussing international cooperation is the concept of flexibility. That is, the idea that countries may have the possibility to accommodate the so-called "international standards" to their own social, political, and economic realities. In other words, offering countries the opportunity to address global tax concerns and to cooperate, but without renouncing entirely to their own sovereign interest.



Let me take again the example of the implementation of a global minimum effective corporate income tax rate to illustrate the forgotten flexibility in the current debate. If we consider the domestic implementation of the OECD Pillar 2 among countries, very little has been said regarding the impact that such a measure will have on the foreign direct investment (FDI) in some developing countries, or on the pressure that some of these countries will face when switching from corporate income tax competition to other forms of tax competition, or even non-tax competition, opting for the wrong policies that end up affecting their own sovereign interest6. On the contrary, everything seems to be designed in such a way that countries have no other option than to accept it as it is, after all "Paris made it for you". For example, let me assume a developing country that currently discusses the strategic implementation of the OECD Pillar 2 in its domestic legislation, particularly the so-called "QDMTT or Qualified Domestic Minimum Top-Up Tax". It would not be surprising to me that, from a strict policy perspective, this hypothetical jurisdiction may want to add some flexibility to the implementation of a QDMTT, for instance, making the QDMTT contingent to the application of an IIR in the country of the Ultimate Parent Entity (UPE) or Intermediary Parent Entity (IPE). This may benefit the international position of this country since the QDMTT will be part of its legislation making it compliant, although it will not be triggered when investment comes from countries without an IIR. In simple words, that hypothetical country may remain attractive from a pure investment perspective, while proving to be compliant with the new international standard. Nevertheless, implementing such a "targeted" or "flexible" QDMTT might prove to be risky since the OECD has repeatedly sustained that a domestic

minimum tax must be “qualified”, and so far, we do not know neither whether such level of flexibility might amount to disqualify this valid policy strategy nor who will ultimately assess this (i.e., the “Q” in the acronym QDMTT).

One can go even further and think: What if a given developing country does not want to implement any of the proposed OECD rules, but rather simply modify its domestic laws to ensure that all companies in that country pay a 15% ETR of Corporate Income Tax? Simple logic should support this. After all, the original aim of the OECD Pillar 2 rules was to push countries to increase their ETR domestically. Therefore, if they do it through a set of complex rules or just modifying slightly its own Corporate Income Tax system should be indifferent. However, that hypothetical country, even though willing to accommodate its domestic law to the new standard of minimum corporate income taxation —although without the complexities added by an IIR, UTPR, or QDMTT— may face pressure from its own stakeholders who will have to incur any way into the ETR calculations under the OECD rules in that given country to avoid the OECD rules in others. In simple words, flexibility has been restricted since the moment the OECD Pillar 2 rules were presented not as voluntary standards but rather as pre-drafted legislation for countries to implement.

It is therefore extremely important that the UN does not disregard the current and past OECD mistakes and addresses international cooperation with a level of flexibility that recognises the inherent differences among countries, both between developed and developing countries, as well as among developing countries themselves. After all, a truly inclusive global tax cooperation is impossible with a policy of impositions that leave no scope for adaptability.

LOWERING EXPECTATIONS BUT REMAINING OPTIMISTIC

It is difficult not to be overly optimistic when the international community seems to have —finally— reacted to the OECD decades of a self-attributed mandate to design the international tax system as we know it. However, it is important to remain realistic and keep expectations low since nobody can guarantee that simply swapping roles from the OECD to the UN will become the holy grail. Yet, two key factors can ensure success in the long-term. First, understanding the momentum. That means, both the UN and the newly formed member-state-led, open-ended and ad hoc intergovernmental committee for the purpose of drafting the general terms of a UN Framework Convention on international tax cooperation should bear in mind that if the process fails, there will not be a second chance. Therefore, undertaking a serious work — with the commitment of countries worldwide— is fundamental. Second, promoting flexibility as a core to achieve inclusivity in this process. Indeed, as noted in this article already, a truly inclusive global tax cooperation is impossible without recognising the inherent differences among countries, including their own sovereign interests. Therefore, learning from the current developments on international taxation can serve a crucial guidance to avoid similar mistakes that end up deterring countries from cooperation. The initial step has been made, now it is time to permanently join the show.

Leopoldo Parada

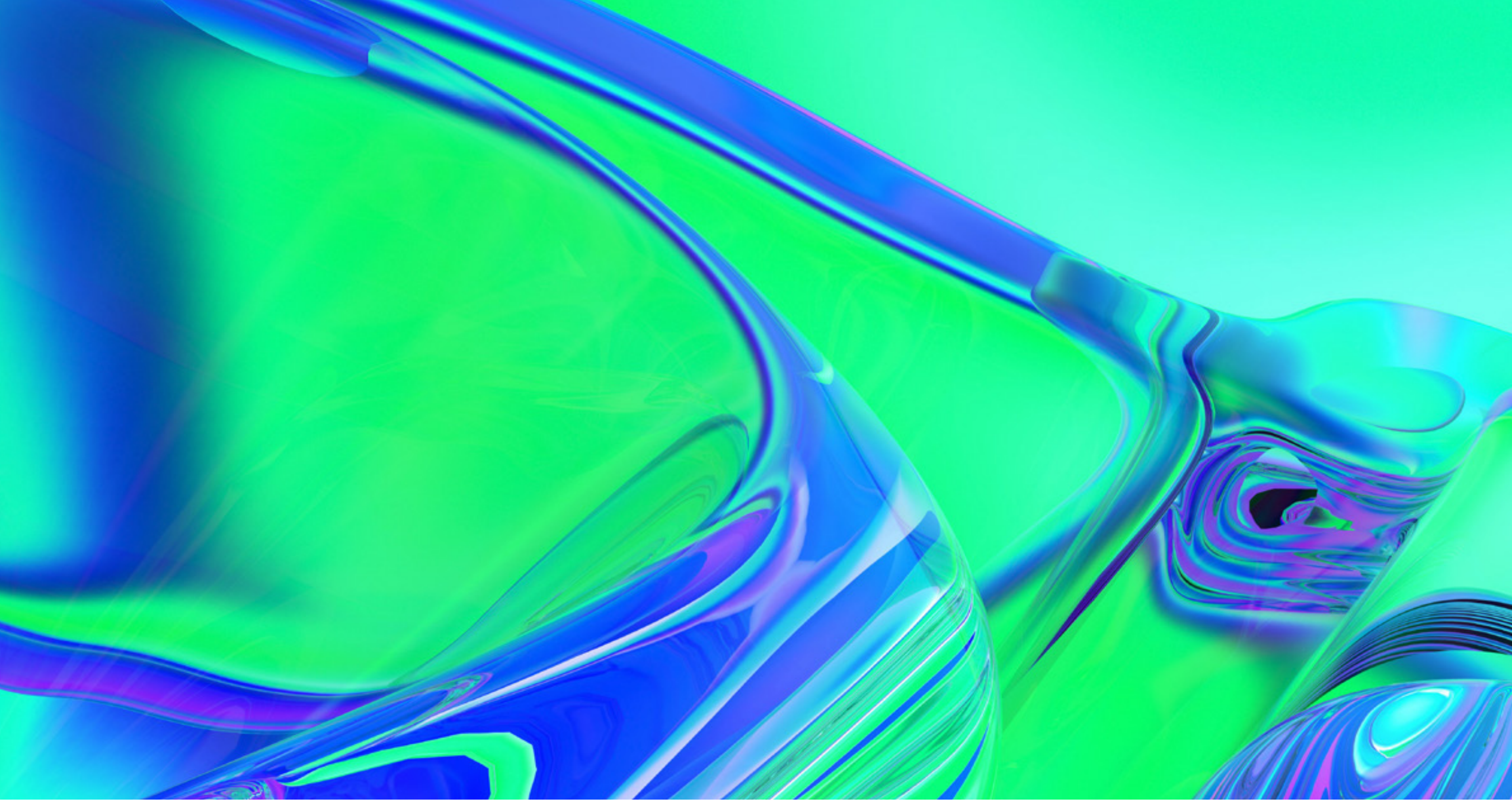
[1] UN General Assembly, 78th Session, Second Committee, Macroeconomic policy questions: promotion of inclusive and effective international cooperation on tax matters at the United Nations/ Nigeria: Revised Draft Resolution, A/C.2/78/L.18/Rev.1, 15 November 2023.
[2] Report of the Secretary-General on the Promotion of inclusive and effective international tax cooperation at the United Nation, General Assembly, Distr.: General, A/78/235, 26 August 2023.
[3] Resolution adopted by the General Assembly on 30 December 2022, A/RES/77/244, Promotion of inclusive and effective international tax cooperation at the United Nations, Distr.: General, 9 January 2023. See also, L. Parada, Response to the UN Resolution on A/RES/77/244 on Promotion of inclusive and effective international tax cooperation at the United Nations, available at https://financing.desa.un.org/inputs and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4452268
[4] See, e.g., R. Christensen, UN-doing the OECD's Global Tax Dominance, Personal Blog, 25 November 2023, available at https://phdskat.org/2021/11/25/un-doing-the-oecds-global-tax-dominance/ See also, e.g., R. Murphy, Would the UN do a better job on international tax than the OECD, Funding the Future, Blog, 26 November 2023, available at https://www.taxresearch.org.uk/Blog/2021/11/26/would-the-un-do-a-better-job-on-international-tax-than-the-oecd/
[5] See, e.g., M. Hearson, A New UN Tax Convention—How will it change Global Tax Governance, ICTD Blog, 1 December 2023 (speaking of a "historic resolution"), available at https://www.ictd.ac/blog/the-new-un-tax-convention-a-critical-juncture-for-global-tax-governance/#:~:text=Last%20week%2C%20the%20United%20Nations,supported%20by%20civil%20society%20activists; see also, T. Ryding, Historic tax vote paves the way for a UN Tax Convention, Press release, EURORAD, 22 November 2023, available at https://www.eurodad.org/historic_tax_vote_paves_the_way_for_a_un_tax_convention
[6] See L. Parada, Global Minimum Taxation: A Strategic Approach for Developing Countries, Columbia Journal of Tax Law (2024, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4280669 See also, e.g., R. de la Feria and G. Maffini, The Impact of Digitalisation on Personal Income Taxes, British Tax Review 2, (2021).

A NEW INTERNATIONAL TAX PARADIGM - BUT WHAT'S IN IT FOR THE DEVELOPING WORLD

By Prof. Dr. Svetislav V. Kostić,
University of Belgrade Faculty of Law

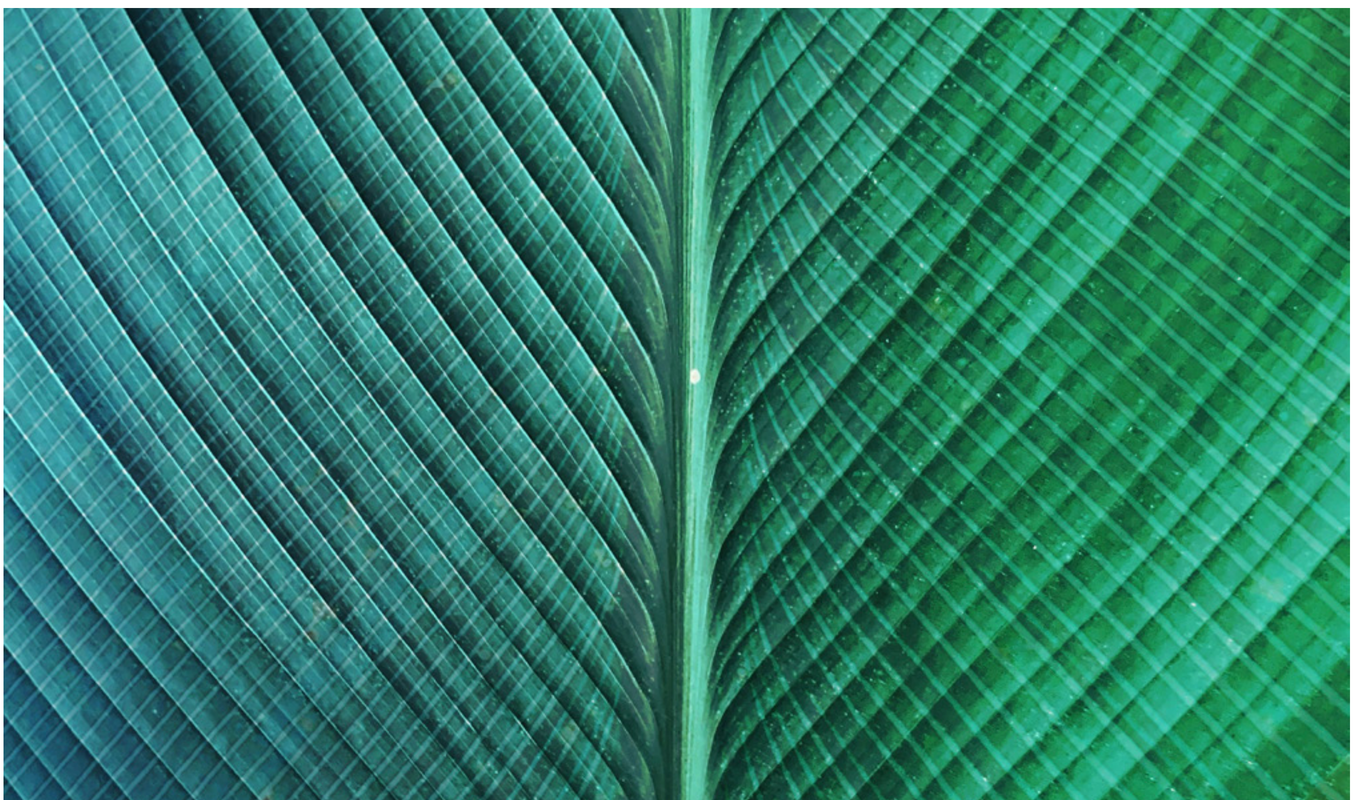
Even though absolute truths are dangerous and usually incorrect, one could note that the introduction of the Pillar II inspired legislation, i.e., minimum corporate income tax requirements for MNEs, such as the recent EU (Council Directive 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups) and US (GILTI rules introduced by the 2017 The Tax Cuts and Jobs Act) legislation are sounding the end of using low corporate income taxation as means of attracting foreign investment. However, it seems even more important that these developments provide developing countries with a much-needed incitement for reflection over the goals of their tax policy and perhaps even more importantly the means how to get their voices heard and considered on the global level. For this purpose, in this paper we will be using an example of a European, but nevertheless developing country: Serbia. In addition, it would be easy to align the following analysis with the circumstances of many comparable jurisdictions.

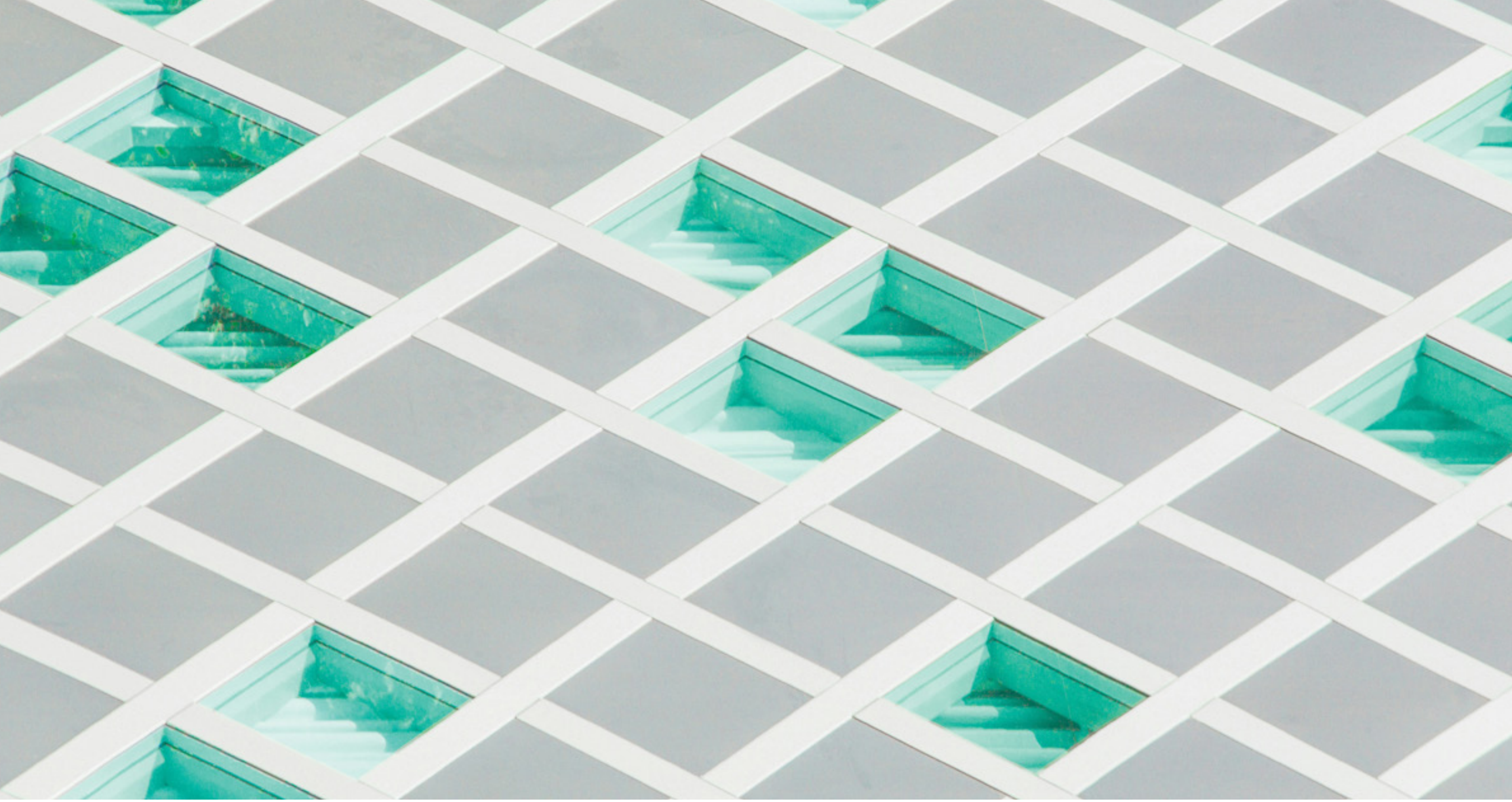
A quarter a century ago, the land in question was focusing its tax policy, particularly in the area of corporate income taxation on one key issue: unemployment. Unemployment was rampant, the country had very few domestic sources of capital and urgently needed foreign investment to speed up its development and open up new jobs. It is not difficult to understand why foreign capital was king at the time. Very soon policy makers realized that taxation was fertile ground for incentives aimed at attracting foreign investors.



Unlike more fundamental ones, such as education, development of infrastructure, improvement of legal certainty and public institutions, tax incentives warranted only simple legislative changes, the simpler the better as more complex ones usually require a sophisticated tax administration to implement (an element often lacking in developing countries). Corporate income taxation offered itself as the most obvious space to introduce them due to the fact that this fiscal form was of limited relevance for the budget whose primary sources were indirect taxes and taxes and mandatory social security contributions on the income of individuals. In 2004, Serbian politicians enabled themselves to have a slide on their presentations for potential investors in which they would boast that their country had the lowest corporate income tax rate in Europe – namely, in that year the Serbian corporate income tax rate was lowered to 10%. Furthermore, numerous tax incentives were introduced which lowered the effective rate of corporate income tax to below 5%. The ideal in heads of many Serbian tax policy makers was Ireland and they hoped that this sacrifice of potential fiscal revenues will quickly reap potent rewards. Alas, it was not to be so. However, what Serbia did succeed was in immediately starting a regional race to the bottom and in less than two years almost all of its neighbors, all very similar jurisdictions in terms of economic development, introduced a corporate income tax rate of 10%. One of them, Montenegro, took an additional step in order to be able to claim the title of being the country with the lowest corporate income tax rate in Europe. Within a year from Serbia's 10%, its legislation boasted a 9% corporate income tax rate.

The global economic crisis of 2008/2009 hit Serbia quite hard and due to irresponsible stewardship of national finances by 2012 the country was facing potential insolvency. Therefore, the government elected in the spring of 2012 had to lower spending and increase revenues. By the end of the same year, it pushed through legislation by which it had effectively tripled the effective corporate income tax rate, abolishing most of the incentives and increasing the nominal rate from 10% to 15%. This was the perfect testing ground for the dogma that low corporate income tax rates had a profound effect on the ability to attract foreign direct investment. Most Serbia's neighbors did not follow suit and kept their corporate income tax burdens intact. And yet, Serbia managed to attract more foreign investment after it had increased its corporate income tax rate than it had done at the time it was the champion of the low fiscal burden regime. In contrast, the domestic business sector lowered their investments into the home economy. There are two main reasons for the success of Serbia with foreign direct investments. Firstly, and most importantly, its government from 2012 put in real effort to show that it was foreign investor friendly and provided them a secure environment to do business. This security was not the result of a particularly well developed judiciary or sound institutional framework, but rather the political forces which had a vested interest in being good hosts to the foreign investors (as economic development and combating unemployment was the key political platform they ran on). The same treatment was not awarded to local business which





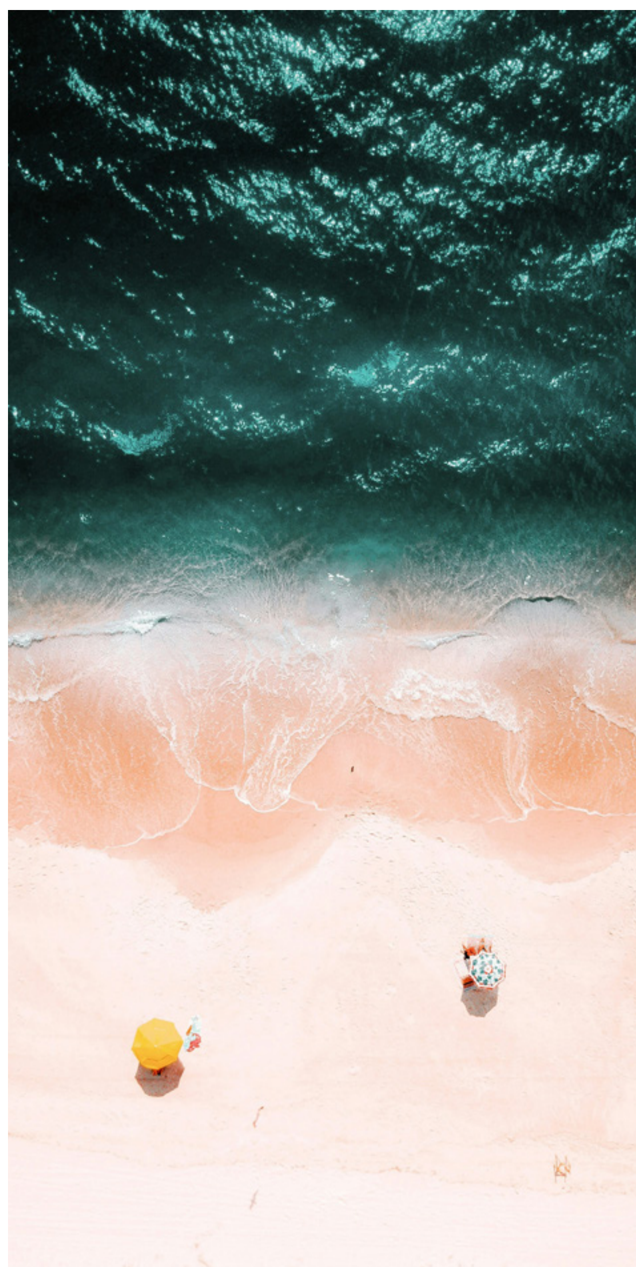
led to their feeling of insecurity and the corresponding drop in confidence in the home market. Simply, the domestic economy was not strong enough to provide the government with what it needed – quick labor intensive investments which could solve the burning issue of unemployment which by 2012 reached a staggering 26%. Secondly, the Serbian government turned to generous subsidies for attracting targeted foreign investments. From a fiscal perspective a selective number of MNEs were still receiving notable inputs from the Serbian budget, while the brunt of the increase in the burden was born by the domestic economy (which had a much more limited access to subsidies as it could not easily meet the criteria set for their granting).

Unfortunately, two forces were having a far more relevant impact on the problem of unemployment than any legislative measure. Namely, high levels of emigration from the country in combination with low birth rates, supported by modest economic growth, managed to lower the Serbian unemployment rate from 26% in 2012 to 9% in 2024. The economy generated more than half a million new jobs in this period (Serbia has population of app. 6.5 million), but a very significant portion of the unemployment problem was resolved by people leaving the country. Furthermore, the demographic decline led to each new generation bringing in less new individuals into the employment pool. Serbia today has two thirds of newborns in comparison to their number 40 years ago, while its fertility rate is 1.63.

This state of affairs is shared by countries across the globe. If we compare our experimental country – Serbia, with those of the Caribbean we will find notable similarities. For example, the number of newborn Jamaicans today is only half of those which this country had in the early 80s of the XX century (the Jamaican fertility rate today in lower that that of Serbia). A similar situation will be found in Cuba and Trinidad and Tobago. In Puerto Ricco the number of newborns today is 4 times lower in comparison to the early 80s and three times lower than what it was only 20 years ago. The fertility rate is below 1. Just like Serbia the Caribbean nations are losing multitudes of their nationals due to immigration, while they are unable to attract inbound migrants flow to amend the incurred losses.

By 2018 Serbian policy makers were shifting their attention from providing incentives to investors to trying to assist them in maintaining their workforce and attracting new employees. In essence, the main goal of tax policy shifted from combating unemployment to making Serbian employers more competitive in a global work market with the main goal being how to increase available net income for employees so as to influence them not to seek their fortunes elsewhere. From a struggle to attract capital, the focus was now on how to keep and, if possible, attract talent, human capital. Furthermore, the preservation of highly skilled individuals increasingly required investments which brought with them technological and scientific advancements not to be found in the country.

Taking all of this into consideration one could be tempted to forgive Serbian policy makers for not being particularly interested in the Pillar II developments. True, there could be some space for generating additional revenue from MNEs whose effective tax rate would be below 15% by introducing a domestic top up tax, but in essence the introduction of new EU and US legislation will not effect the key drivers of Serbian tax policy.



However, some strong criticism is in order, although Serbia shares the same guilt as the majority of the world's developing countries. Serbia's fundamental international taxation sin is in its inability to suggest proposals and counterproposals which would address its interests. The sin of being placid and dormant. Also, it is failing in its ability to find common ground and create a united front on the global stage with those with whom it shares the same interests.

Pillar II is not a proposal which addresses any of the fundamental issues developing countries face. The flow from their coffers to those of MNEs will not stop but will rather change form, wherein we already have telling confirmations of this presumption. For example, Vietnam introduced its domestic top-up tax which will ensure that MNEs operating in the country pay a minimum 15% corporate income tax. At the same time this country is establishing an Investment Support Fund which will be financed by the revenue from the new top-up tax but will in essence be returning this money in the form of subsidies primarily to those companies which paid the top-up tax in the first place. One can only compliment Vietnam for this policy as at the very least they made sure that tax on the profits generated in Vietnam stayed in Vietnam and were used in line with Vietnamese policy interests. Developing countries will be pressed to find solutions how to stay competitive on the global capital market and probably most will in the end turn to subsidies. The current legal framework impacting their ability to do so is mostly found in WTO law, but this sets only modest limitations on freely tailoring their policy on providing subsidies. Some may revert to trying to introduce qualified tax credits, but this would not be very likely as the success of such policy depends on other nations accepting the respective measure as being qualified i.e., one cannot unilaterally guarantee to the beneficiary of the qualified tax credit the ultimate success of the applied mechanism.

As the global demographic decline only accelerates and the struggle for human capital becomes increasingly merciless, tax policy makers will have at their disposal personal income taxation and mandatory social security contributions as potential space to work.

In some countries the goal will be to lure in top level management, in some it will be the need to keep the skilled workforce in the country which will drive the policy development. In other words, from a tax competition focused on the lowering of the fiscal burner on corporate profits, countries may shift to a one which will enable corporations to increase their profits by lowering the overall workforce costs. For most developing countries this will as a rule mean that the focus will remain on retaining the domestic workforce, as the ability to attract foreigners is deeply connected with the quality of the public goods and infrastructure offered by a particular society (education, healthcare, safety, etc.), something which is still lacking in many of them.

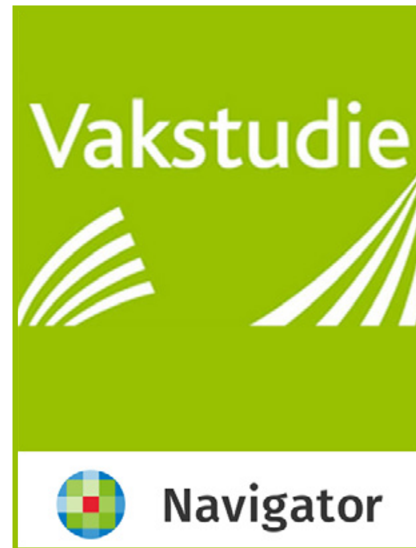
Alas, all of what we have mentioned is merely a response to measures demanded by and introduced by the developed world. Whether or not this is sound policy for them is also disputable, but what is certain is that developed countries were the ones who pushed through the minimum corporate income tax concept. What the developing countries failed to do is come up with their counter proposals. Most recently in 2023 South American countries led by Colombia voiced their dissatisfaction with the proposals emanating under the auspices of the BEPS project underlining the fact that they fail to address the concerns of developing countries. The November 2023 UN General Assembly resolution on the promotion of inclusive and effective international tax cooperation is also a very clear sign of dissatisfaction of the less affluent majority of the world's population.

In conclusion, the global tax debate is at the moment quite one sided. Some developing countries at best are managing to find adequate responses to initiatives coming out from the developed world. No initiatives are emanating from the global south (hopefully, yet). However, when we talk about the developing countries, we must realize that the majority of them are relatively small and economically irrelevant jurisdictions – like Serbia, or like the nations of the Caribbean. Unless such countries find common ground, and there is surprisingly a lot of it, and find ways in which to present a united front their voices will not be heard. If anything, the BEPS projects shows that unless we find ways to drastically increase the decibel levels of our cries, we will not be heard.

Svetislav V. Kostić

DE VAKSTUDIE – THE DUTCH CARIBBEAN ENCYCLOPEDIA

In the Netherlands, many tax professionals turn to "De Vakstudie", when it comes to looking up case law and literature on tax matters. De Vakstudie, by Wolters Kluwer, is a very extensive encyclopedia, divided into 16 different chapters. Chapter 16, the last part, but certainly not the least, contains information about Caribbean Tax Law. There is legal history, but also recent case law, commented on by a team of authors, all tax professionals who have earned their spurs in Caribbean tax law.



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THE INTERACTION BETWEEN CFC RULES AND QDMTT: A DUTCH PERSPECTIVE

By Tim van Brederode, Institute of Tax Law and Economics, Leiden Law School, Leiden University, the Netherlands.

1. INTRODUCTION

The introduction of anti-tax avoidance policy and the minimum tax in the EU appears to have significantly supported the international initiative of the Organization for Economic Collaboration and Development (OECD) addressing Base Erosion and Profit Shifting (BEPS). In December 2022, the Member States of the European Union adopted the Directive on a minimum level of taxation for multinational enterprises. Consequently, as of December 31, 2023, most** EU Member States have incorporated these rules into domestic laws, with immediate effect.[1] With the quick pace at which we are seeing implementation of the Directive, there is growing interest about the potential interactions between the new minimum-tax rules and existing corporate income tax provisions.

This paper explores one of those interactions in the context of the Netherlands. Most notably, the scenario in which a controlled foreign company (CFC) rule must be applied for corporate tax purposes in the Netherlands and the subsidiary entity applies a domestic top-up tax for minimum tax purposes that creates potential for economic double taxation. In discussing this interaction, I address the question of whether this economic double taxation is to be considered a tax policy issue.

In brief, a foreign subsidiary qualifies as a CFC for Dutch tax purposes if the entity is resident in a jurisdiction that:

- does not subject the entity to income taxes; or
- subjects the entity to tax at a statutory rate of less than 9%; or
- is listed on the EU tax list of non-cooperative jurisdictions.[2]

With regard to the final condition, being listed on the EU tax list of non-cooperative jurisdictions is a crucial factor for the application of the CFC rule in the subsequent year. As several Caribbean jurisdictions (along with other Small Island Developing States) currently appear on the EU tax list, the blacklisting of these jurisdictions holds significance for multinational enterprises operating locally, as its effects are widespread. The Bahamas serves as an exemplary case: blacklisted by the EU, it is deemed as a CFC jurisdiction and it has implemented a Qualifying Domestic Minimum Top-up Tax (QDMTT) to be applied as of January 1st, 2024. The EU Code of Conduct Group (COCG), responsible for the listing criteria, is contemplating the inclusion of the global minimum tax implementation as a requirement for jurisdictions to comply with good tax governance. The potential interplay arises from the fact that being listed on the EU tax list not only necessitates the application of CFC rules in EU Member States but, notably, may also exert pressure on jurisdictions to align with EU minimum-tax rules, should such criteria be introduced. This dual impact underscores the intricate relationship between the EU tax list, CFC rules, and the potential future implications of minimum-tax criteria. If the new criteria comes to pass, it is conceivable that, in a few years, all Caribbean jurisdictions will have implemented (at least) QDMTTs.

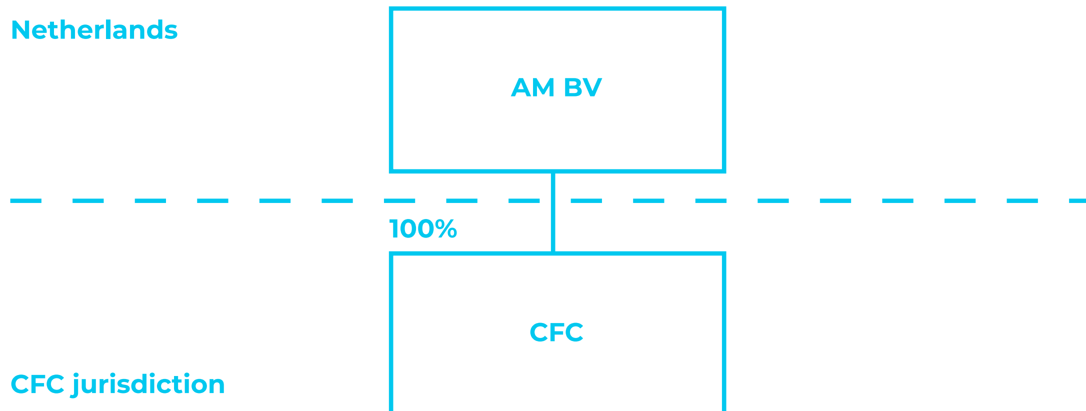
2. NAVIGATING COVERED TAXES

While the OECD's Global Minimum Tax was agreed upon in late 2021, the international actor's leading role in the ongoing coordination on the application of the rules is far from over. One particular method to clarify the interpretation of the rules and provide guidance to tax administrations is through Administrative Guidance, as published by the OECD in February 2023 ('Administrative Guidance').[3]

According to this OECD Administrative Guidance, the application of a CFC rule – including the corporate tax imposed on CFC income by the Netherlands – is not considered in calculating the effective tax rate in the CFC jurisdiction for the purpose of a QDMTT. Consequently, the corporate tax levied on the CFC income does not lead to a lower QDMTT in the CFC jurisdiction, resulting in economic double taxation.

The following case exemplifies the issue of double taxation. Company AM B.V. resides in the Netherlands and holds all shares in the CFC subsidiary (located in a jurisdiction without a corporate income tax in place).

According to Dutch CFC rules, CFC income is allocated to AM B.V. The CFC income consists of interest payments that amount to total profits of 100. The Dutch statutory tax rate of 25,8% applies to the CFC income as the latter is included in the corporate income tax base of AM B.V. in the Netherlands. Regarding the application of the QDMTT by the CFC jurisdiction, the amount of qualifying income for the purpose of the minimum tax is similar to the amount of the CFC income, as it follows the interest payments of 100 that are recorded in the financial accounts. Based on the Administrative Guidance explained earlier in this section, the taxes on the CFC income levied by the Netherlands cannot be taken into account as covered taxes in the CFC jurisdiction for the purpose of calculating the effective tax rate in the CFC jurisdiction. The absence of a corporate income tax system indicates the CFC is not subject to any tax. This would mean that the top-up tax percentage for the QDMTT is 15%. When combined with the tax on the CFC income in the Netherlands, the effective tax burden on the income of the CFC subsidiary amounts to 40,8% ((25,8+15)/100).



3. MATERIAL SCOPE: MINIMUM-TAX RULES VERSUS CFC RULES

As emphasized in the EU Directive aiming to establish a minimum level of taxation, the objective of these rules is to eliminate a significant portion of the benefits derived from shifting profits to jurisdictions with little or no taxation, and to allow jurisdictions to better protect their tax bases. Such profits are often situated in jurisdictions with either (A) no corporate income taxes or (B) very low effective rates. The minimum effective tax rate of 15% is envisioned to evolve into an international standard for corporate tax revenues, and this standard is founded on the OECD Model Rules and the Commentary accompanying them.[4]

Tax scholars have begun to point out that the characteristics of the Income Inclusion Rule (IIR) resemble those of the CFC rule but with a broader scope.[5] For anti-tax avoidance purposes, OECD-drafted CFC rules were imported into EU law through the Anti-Tax Avoidance Directive (ATAD). [6]

The ATAD mandated EU Member States to domestically tax CFC income as an inclusion in the corporate tax base.[7] The CFC income is taxed with the statutory rate, which is often higher than the effective tax rate. While the minimum-tax rules target low-taxed profits in a broad sense, the CFC rules specifically address the case of taxpayers with a controlling interest in a low-taxed foreign subsidiary. Without anti-abuse rules, the subsidiary could be used as the destination of shifted (passive) income to defer taxation.

The intentional nature of these similarities has allowed the OECD to ensure, through public consultations and academic input, that CFC rules and minimum-tax rules do not clash, preventing de facto double taxation.[8] In contrast to the application of the QDMTT, the taxes paid on CFC income by the parent entity should be allocated to the covered taxes of the entity deemed a CFC for the calculation of the IIR, thereby

increasing the effective tax rate. This ensures that the parent entity has already paid corporate tax on the CFC income, preventing the IIR from being applicable to the same income. In other words, although the operation of the IIR and CFC rules is similar, they can coexist because they have different policy objectives. However, the same safeguard does not apply to the QDMTT. The allocation of taxes paid is by exception to the principal rule not taken into account for the calculation of the effective tax rate. The mechanism of charging a QDMTT appeared in the OECD Model Rules at a late stage, effectively allowing the primacy of a jurisdiction to tax its own taxpayers. The conditions of the QDMTT are akin to the IIR – i.e., the entity is not taxed at an effective tax rate of at least 15%.[9] Although much alike, the QDMTT exhibits different characteristics in the imposition of a minimum tax on low-taxed profits. The Administrative Guidance provided the first interpretation on the design and operation of a QDMTT, instead of the Model Rules. The amount of QDMTT charged depends on various domestic factors, inter alia, a jurisdiction's corporate tax system and the implementation choices of the global minimum tax.[10]

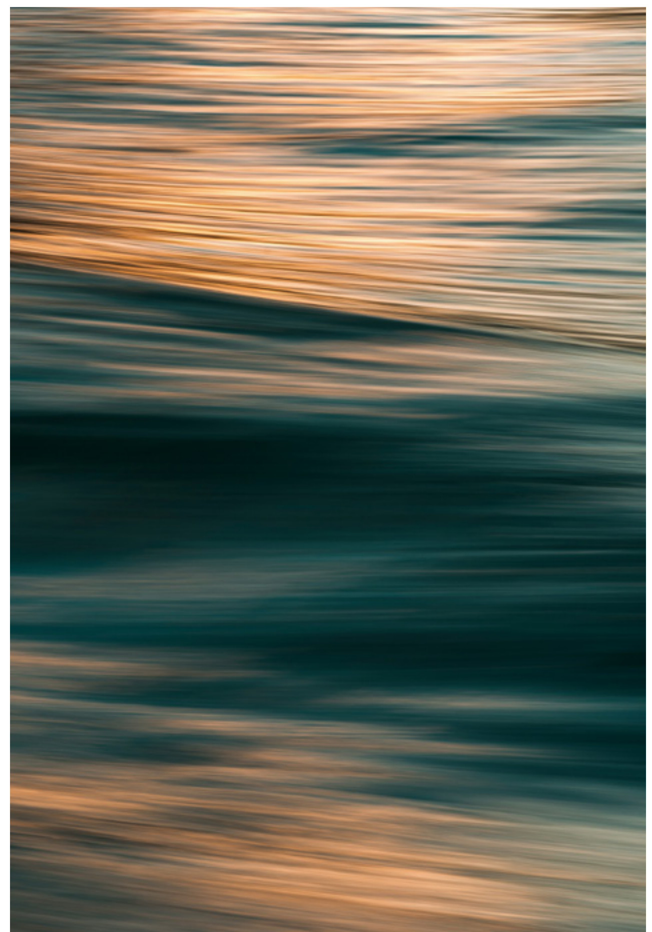
Jurisdictions have the freedom to incorporate the global minimum tax rules into their domestic laws. Some, like the United Arab Emirates, have indicated a preference for initially implementing only a QDMTT over the IIR. In other instances, jurisdictions are expected to initially adopt a QDMTT before making a final decision on implementing the other mechanisms of the global minimum tax into domestic law. Notably, a third option is not only possible, but plausible. The Netherlands anticipates that Curaçao is embracing a legal transplanted version of the Dutch Minimum Tax Act 2024 into its domestic tax legislation, aligning its tax policies with the new international standard, showcasing a commitment to a more comprehensive incorporation of minimum taxation beyond a QDMTT. This move is interesting, considering that Curaçao only opts for a legal transplant from certain measures of the Netherlands.[11]

4. SOLUTION ON THE PREVENTION OF ECONOMIC DOUBLE TAXATION

In the Netherlands, the implementation of the minimum tax involved a specific amendment to the CFC rule outlined in art. 13ab of the Corporate Income Tax Act (CITA). This amendment, drawing inspiration from the Administrative Guidance published by the OECD in February 2023 allows the offset of QDMTT charged by a foreign jurisdiction. The offset takes place via a tax credit in the CITA.

The tax credit, providing a reduced overall burden, alleviates the corporate income tax pressure on the allocated CFC income in the Netherlands. The QDMTT charged in a foreign jurisdiction is offset against the CFC measure, resulting in an effective tax burden on the CFC income of 25.8% (similar to the Dutch statutory tax rate). The European Commission has confirmed that the offset of the QDMTT does not interfere with the Netherlands' obligation to implement ATAD. To prevent economic double taxation, the European Commission considers it both possible and desirable to offer a credit in corporate taxation for the QDMTT paid in a CFC jurisdiction. Based on this experience, it is anticipated that other EU Member States may implement similar offset mechanisms in their CFC rules.

Despite variations in recognizing income within the corporate tax base under the Dutch CFC measure and the criteria for applying the QDMTT as per the Model Rules (wherein a comparable income is used in the previous example to illustrate the issue), the Netherlands finds it necessary to mitigate the risk of economic double taxation in such scenarios.[12] In situations where the QDMTT takes into account a lower income than that included as CFC income for Dutch corporate tax purposes, the QDMTT on the overlapping income will be considered creditable.



5. CONCLUSION

Preventing economic double taxation is a desirable tax policy choice. The OECD Inclusive Framework monitors the interaction between the QDMTT and CFC rules to ensure this interaction results in the intended outcomes under the GloBE Rules. It could be contended that, since the objective of the CFC rule is broadly addressed by the minimum tax, it is no longer necessary to strictly enforce both rules. However, it is unlikely that the EU ATAD will be changed anytime soon to prevent economic double taxation. The Netherlands has paved the way with a practical solution: a tax credit for the amount of foreign QDMTT that lowers the Dutch corporate tax on CFC income. The European Commission recognizes the issue and supports the credit.

Given the overlap in the allocation of CFC income and the QDMTT levied, it is a reasonable outcome for the EU Member States to provide a foreign QDMTT credit to ease the burden on taxpayers that are faced with the interaction of the CFC and minimum-tax rules.

Tim van Brederode

** The EU Member States that incorporated minimum-tax rules into domestic law are: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, Netherlands, Romania, Slovenia, and Sweden. While Estonia, Latvia, Lithuania, Malta and Slovakia notified the European Commission of their decision of a delayed implementation for countries with fewer than 12 companies in scope of the tax. The following EU countries have missed the transposition deadline: Republic of Cyprus, Greece, Poland, Portugal and Spain.

[1]The Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union. (OJ L 328/3, 22.12.2022, p. 5).

[2]J.J.A.M. Korving & C. Wisman, ATAD implementation in the Netherlands, 49(11) Intertax, p. 917-937.

[3]OECD, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), OECD/G20 Inclusive Framework on BEPS, (OECD, february 2023).

[4]OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD, Paris; and OECD (2022), Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti- Base Erosion Model Rules (Pillar Two), OECD, Paris.

[5]See J. Becker & J. Englisch, Implementing an international effective minimum tax in the EU, (June 23, 2021). Available at http://dx.doi.org/10.2139/ssrn.3892160; A. Dourado, Pillar Two Model Rules: Inequalities Raised by the GloBE Rules, The Scope, and Carve-Outs, 50(4) Intertax.

[6]I.J. Mosquera Valderrama, The EU Standard of Good Tax Governance in Tax Matters for Third (Non-EU) Countries, 47(5) Intertax, p. 454-467; Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, (OJ L 193/1, 19.07.2016, p. 1).

[7]The two options include: (i) Model A – the income approach that results in an annual inclusion of certain types of passive income derived by a CFC; or (ii) Model B – the substance approach that results in an annual inclusion of income that cannot be attributed to the CFC under application of the arm's-length principle, but is attributable to the EU Member State based on its functionality.

[8]See article 24(3) of the Minimum Tax Directive (or article 4.3.2. of the OECD Model Rules).

[9]For more background on the mechanisms of the global minimum tax, see T. Melendez, Global Minimum Tax, Caribbean Tax Law Journal, 2022 (1), p. 23-27.

[10]For a comprehensive analysis of the QDMTT, see R.A. (Jr.) Galendi, The Single Top-Up Tax Principle: Justification, Content and Functions upon the Design of QDMTTs, 15 World Tax J. 4 (2023), para. 4.3.1. (accessed 11 Jan. 2024).

[11]Ministry of Finance, Policy Note of 19 October 2023, p. 2

[12]NL: Parliamentary Papers II, 2023/24, 36 418, nr. 36, p. 8-9.

NEWS REPORT: THE RELEVANCE OF A QDMTT FOR CURAÇAO

By Nayarid Sanchez, HBN Law & Tax in Curaçao

1. INTRODUCTION

The profound impact of rapid digital transformation on economies and societies has sparked global discussions across legal and regulatory sectors, including international tax. In the current global economy, traditional income tax rules, initially designed for conventional physical businesses, face challenges in addressing the complexities of the digital era. While these rules were established to ensure tax certainty and prevent double taxation, digitalization has led to challenges due to intangible value creation and remote market access. This has enabled multinational enterprises (MNEs) to exploit loopholes and shift profits to low-tax jurisdictions.

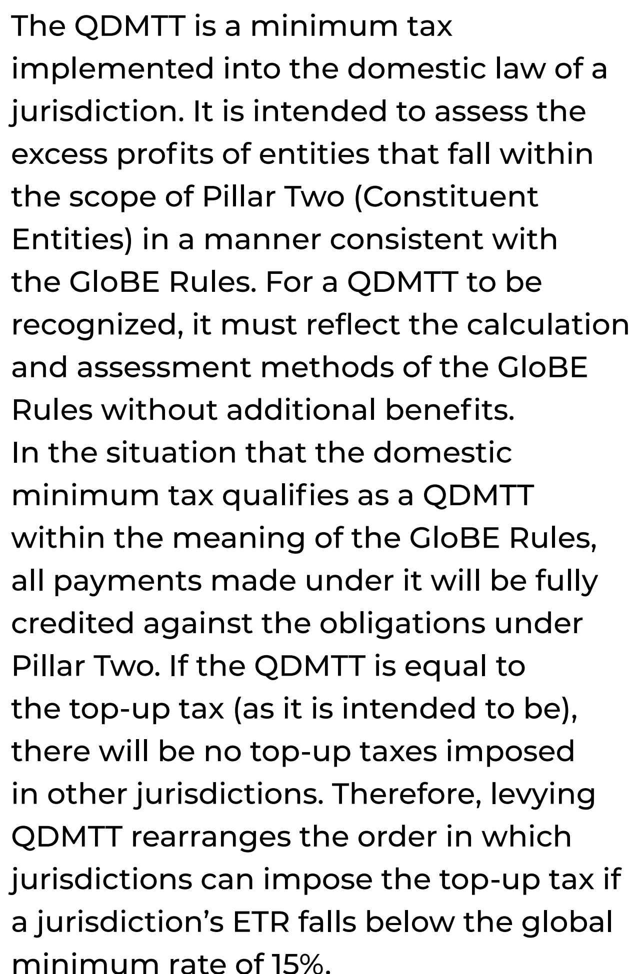
In response to these challenges, the Organization for Economic Cooperation and Development (OECD) has taken a proactive approach by introducing Pillar Two, a groundbreaking initiative to reform international tax frameworks to adapt to the realities of the digital economy. The Pillar Two model rules, unveiled in December 2021 as part of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) project, represents a crucial step towards limiting worldwide tax avoidance by imposing a global minimum effective tax rate on excess profits generated by MNEs across jurisdictions.

As a member of the OECD/G20 Inclusive Framework, Curaçao also agreed to a coordinated system of Global Anti-Base Erosion (GloBE) Rules that are designed to ensure the MNEs pay at least 15% tax on the profits arising in each jurisdiction where they operate.[1]

This news report discusses the content of Pillar Two, specifically the Qualified Domestic Top-Up Tax (QDMTT) and its relevance for Curaçao.

2. QDMTT

Pillar Two ensures a minimum Effective Tax Rate (ETR) of 15% in each jurisdiction. If the ETR calculated based on the GloBE Rules (GloBE ETR) is less than the 15% global minimum rate, the calculation of top-up tax is required. Top-up tax differs from taxes imposed by traditional income tax regimes. Traditional income taxes are generally based on specified tax rates applied to the taxable profit of an entity. In contrast, the top-up tax becomes applicable only when MNE group entities pay insufficient income taxes in a specific jurisdiction. This top-up tax may be enforced through the Income Inclusion Rule (IIR) or the Undertaxed Profits Rule (UTPR) based on the GloBE Rules. Countries also have the option to introduce a QDMTT in their jurisdiction. Based on the IIR and the UTPR, a jurisdiction other than the one with a GLoBE ETR of less than 15% is given the authority to levy up to 15%. The jurisdiction with a GloBE ETR of less than 15% can prevent the imposition of a top-up tax under the IIR or UTPR by implementing a QDMTT.



The QDMTT is a minimum tax implemented into the domestic law of a jurisdiction. It is intended to assess the excess profits of entities that fall within the scope of Pillar Two (Constituent Entities) in a manner consistent with the GloBE Rules. For a QDMTT to be recognized, it must reflect the calculation and assessment methods of the GloBE Rules without additional benefits.
In the situation that the domestic minimum tax qualifies as a QDMTT within the meaning of the GloBE Rules, all payments made under it will be fully credited against the obligations under Pillar Two. If the QDMTT is equal to the top-up tax (as it is intended to be), there will be no top-up taxes imposed in other jurisdictions. Therefore, levying QDMTT rearranges the order in which jurisdictions can impose the top-up tax if a jurisdiction's ETR falls below the global minimum rate of 15%.

A jurisdiction with a QDMTT has priority in receiving this additional tax income from entities within its borders, diverting income that would otherwise go to other countries under the IIR and the UTPR.

For MNEs, this means that the QDMTT determines where the top-up tax is paid without changing the amount of the top-up tax.

3. SHOULD CURAÇAO IMPLEMENT A QDMTT?

The Pillar Two GloBE Rules will apply to MNEs with a consolidated group turnover of EUR 750 million or more in at least two of the last four consecutive fiscal years.[2] This concerns the turnover in accordance with the consolidated annual accounts of the Ultimate Parent Entity (UPE). Companies based in Curaçao that currently submit a Country-by-Country notification will most likely fall within the scope of Pillar Two, requiring them to have a GloBE ETR of at least 15%.

The GloBE ETR is calculated by dividing the Adjusted Covered Taxes by the GloBE Income (or Loss).[3] The Adjusted Covered Taxes and the GloBE income are calculated based on the GloBE Rules, which may not be necessarily the same as the tax accounting principles currently applicable in Curaçao for determining the

ETR. Due to the discrepancies between the two calculation methods, the GloBE ETR in Curaçao can be lower than 15% even if, the effective tax rate is 15% according to the tax accounting standards applicable. For example, since the tax year 2023, Curaçao has implemented a profit tax rate of 15% on taxable income up to NAf. 500,000 (22% rate on income exceeding NAf. 500,000). Consequently, it is likely that the GloBE ETR will be less than 15% in Curaçao. Moreover, based on the territoriality regime of Curaçao only the domestic profit is taxed, with a starting profit tax rate of 15%. Plus, Curaçao has several tax regimes that qualify for a profit tax rate of 3%, along with other regimes such as the innovation box (0%). In sum, the GloBE ETR in Curaçao is quite likely to fall below 15%. Currently, Curaçao lacks specific legislation in the context of Pillar Two. Therefore, only the additional tax methods outlined in the GloBE Rules, namely the IIR and the UTPR, apply. In other words, the jurisdiction of the UPE has the right to impose the top-up tax under the IIR. In such cases, the top-up tax is levied in other jurisdictions on the excess profits of the MNE group entities based in Curaçao. In this context, the question arises as to why Curaçao does not introduce a QDMTT. In cases where the GloBE ETR of Constituent Entities is less than 15% within Curaçao, potential tax income from Curaçao will flow abroad if there is no QDMTT in Curaçao. Therefore, if Curaçao chooses to implement a QDMTT, it is crucial to have comprehensive knowledge of the calculations involved in determining the GloBE ETR and the top-up tax amount.

4. QDMTT AND CURAÇAO'S COMPETITIVENESS

Prior to Pillar Two, jurisdictions could compete without any restrictions regarding their tax rate, which is the so called "race to the bottom." For example, in a competition for inbound investments from an MNE, it was possible that this type of tax competition could lead to zero tax on profits. With Pillar Two, profit tax competition of MNEs is effectively limited to 15% of excess profit as defined by the GloBE Rules. Still, it is not expected that implementing a QDMTT will put Curaçao in a more disadvantageous competitive position than by not implementing it. In this regard, if Curaçao does not locally calculate and levy the top-up tax, the jurisdiction of the UPE will levy based on the IIR or the jurisdiction of another MNE group entity will levy based on the UTPR. That said, it remains essential to have a QDMTT in place that is calculated under the GLoBE Rules. If a calculation leads to a higher ETR than 15%, Curaçao will be in a disadvantageous competitive position. Moreover, introducing a QMTTT will not put an end to tax competition of Curaçao. For instance, entities that do not fall within the scope of Pillar Two, will still have access to tax incentives offered by Curaçao. Therefore, an appealing fiscal environment for business establishments will remain pertinent.

5. CHALLENGES AND CONSIDERATIONS

Introducing QMDTT for profit tax entails administrative complexity. This will put a burden on the tax authorities, particularly when applying the calculation methodology under the GloBE Rules. To comply effectively with Pillar Two and the GloBE Rules will not only require a comprehensive understanding of these rules, but the expertise of specialists in this area is very much needed.

This need may incur additional costs, such as training costs, for a better understanding of the GloBE Rules. Moreover, implementing a QDMTT also entails IT adjustments in the tax return portal. The tax authorities will have to adjust the tax return portal in such a way that it automatically calculates the GloBE ETR of a Constituent Entity established in Curaçao and it must also automatically calculate the QMDTT or the top-up tax in case the GLoBE ETR is lower than 15%. IT adjustments in this regard can take quite a long time. Additionally, the costs in this regard may sum up to a substantial amount. MNEs are already expected to pay a minimum tax of 15% and must, therefore, calculate the GloBE ETR in all jurisdictions where they operate. In essence, the MNE must comply with GloBE Rules, regardless of a QDMTT implementation in Curaçao.

6. BENEFITS OF IMPLEMENTING A QDMTT IN CURAÇAO

Implementing the QDMTT in Curaçao offers significant benefits beyond mere financial gains. As already pointed out, it has the potential to generate additional tax revenue by effectively taxing profits that would otherwise be shifted to different jurisdictions, thereby strengthening the financial resources of Curaçao. However, implementing the QDMTT also ensures a fair distribution of tax burdens, in line with global efforts to combat tax avoidance and to promote tax fairness by taxing MNEs based on the location of economic activities rather than where they file their tax returns. This approach prevents profit shifting and sets a minimum tax threshold, discouraging practices that undermine the tax base. Furthermore, the introduction of the QDMTT in Curaçao signals a critical step to fulfill its international tax commitment and strengthens Curaçao's international reputation as a transparent and compliant tax jurisdiction. To that end, the implementation of the QDMTT can lead to increased international cooperation by conforming to global standards, positioning Curaçao as a reliable player in the international tax landscape, and promoting collaboration with other jurisdictions, which in turn can result in mutual benefits in the field of trade, investment, and economic development. In contrast, the non-implementation of Pillar Two, particularly the QDMTT, may not necessarily benefit Curaçao directly. Without a mechanism to address profit shifting and ensure a minimum level of taxation, the jurisdiction could face challenges in maintaining a level playing field and preventing erosion of its tax base.

7. CURRENT DEVELOPMENTS

On October 30, 2023, an 'International Compliance Task Group' (the task group) was established by the Minister of Finance of Curaçao to map out the consequences for Curaçao of whether to implement Pillar Two and the possible alternatives for Pillar Two. On January 17, 2024, the task group held a first consultation meeting where various stakeholders were able to put forward their views on the introduction of Pillar Two. During the consultation round, the central question was what the possible consequences for Curaçao and the international financial sector would be if this international tax standard is introduced into Curaçao legislation. The task group will advise the Minister on taking a position on this matter. On a separate note, in the Dutch Caribbean (Bonaire, Saba, Sint Eustatius), new legislation on the minimum tax came into force on January 1, 2024. This new legislation introduces a new minimum taxation of 15% on the profits of a Constituent Entity in the Dutch Caribbean.

8. FINAL REMARKS

The decision to implement a QDMTT in Curaçao requires careful consideration of its potential impact on competitiveness, administrative efficiency, and overall economic well-being. Balancing the benefits of additional revenue and fair taxation against compliance costs and increased administrative complexities is crucial for making an informed decision aligned with Curaçao's financial goals and international tax standards. By implementing a QDMTT, Curaçao will demonstrate its commitment to international tax standards, whilst strengthening its position in the global economy, and contributing to combating tax avoidance and promoting tax fairness worldwide.

Nayarid Sanchez

[1]OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD, Paris, page 60 https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-theeconomy-global-anti-base-erosion-model-rules-pillar-two.htm .

[2]OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD, Paris, page 60 https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-theeconomy-global-anti-base-erosion-model-rules-pillar-two.htm, article 1.1

[3] In this article, we will not go into the calculation of the Adjusted Covered Taxes and the GloBE Income.

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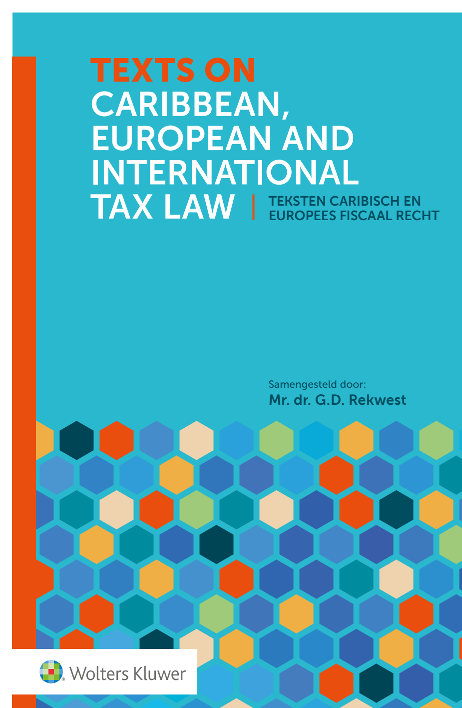


THE EU TAX LIST OF NON-COOPERATIVE JURISDICTIONS: A CARIBBEAN EXPERIENCE

By Federica Casano, PhD candidate and teacher in international and European tax law at Leiden University, the Netherlands.

1. INTRODUCTION

In recent times, international taxation has been marked by the spread of tax scandals and the consequential public push to tackle tax avoidance. The Organisation for Economic Cooperation and Development (OECD) has long been the main character in the establishment of anti-tax abuse standards. Yet, since 2016, its work has been backed up by the European Union (EU). The latter established the EU tax list of non-cooperative jurisdictions to address harmful tax competition by imposing OECD and EU tax standards on non-EU countries and jurisdictions. This led to the rise of the EU as a significant actor in international taxation.

To understand the impact of the EU tax list, this paper explains the listing experience of three Caribbean jurisdictions: Aruba, Curaçao, and the Bahamas. Specific reasons stand behind their selection: Aruba and Curaçao exemplify how Caribbean jurisdictions could react differently to the EU tax list despite having similar relations to the EU (i.e. the are both Overseas Countries and Territories (OCT) under EU law (see paragraph 3.1). Meanwhile, the Bahamas exemplifies the case of a Caribbean non-OCT jurisdiction whose listing on the EU tax list is connected to the lack of a corporate income tax system. Through the experience of these Caribbean jurisdictions, reflections are made on the EU listing process. The contribution is part of a broader PhD research project carried out by this author to investigate the efficacy of the EU tax list.[1]

The paper is divided in three parts. First, the main aspects of the EU tax list are explained. Second, the inclusion of the three Caribbean jurisdictions in the list, and their experiences are discussed. Last, the third part concludes the paper.

Through the cases of the three Caribbean jurisdictions, this paper exemplifies the interactions between non-EU jurisdictions and the EU as conditioned by the EU tax list. The paper shows the impact that the EU tax list has in determining the tax policy of compliant jurisdictions. It also shows that, although their response to the EU tax list might appear similar in light of analogous reputational risks, trading and funding interests, the attitude of each jurisdiction towards compliance, as well as compliance's obstacles, may determine different listing outcomes. Lessons can be inferred and tested on other countries involved in the EU tax list to understand their reactions, the mechanisms of the EU tax list, and recent developments in international tax policy.

The contribution relies on doctrinal research and qualitative empirical methodology. Empirical data have been collected from EU documents and expert interviews.[2]

The research is based on an interpretivist epistemology which emphasizes the relevance of perceptions and interpretations of reality to create knowledge.

2. THE EU TAX LIST OF NON-COOPERATIVE JURISDICTIONS: MAIN ELEMENTS

The EU tax list is a tax initiative established by the Council of the EU (Council) in 2016. The list is an exercise of screening and scoring non-EU countries and jurisdictions. It is carried out by the Council—specifically by one of its working body, known as the Code of Conduct Group (COCG)—with the technical assistance of the European Commission.

The establishment of the EU tax list is the result of long political discussions that originated in 2012 with the publication of the Commissions' Recommendation on non-EU Tax Havens. The Recommendation suggested the coordination of Member States' tax lists by establishing common listing criteria. These criteria consisted of the implementation of OECD standards on tax transparency, as well as the abolishment of harmful corporate-income-tax (CIT) regimes in line with the EU Code of Conduct. The Recommendation brought to the establishment of the Platform for Tax Good Governance, where the European Commission, the Member States, NGOs, Trade Unions, business associations, and academia have been meeting for the implementation of the Commission's Recommendation. After multiple political discussions and negotiations, the Platform agreed on a first attempt to coordinate, at EU level, the national tax lists of Member States. However, this attempt—known as the Pan-EU list of non-cooperative tax jurisdictions—failed due to the difficulty of ensuring coordination when little power is delegated to the EU institutions. This led the Council to eventually approve the establishment of the EU tax list as a EU

instrument to fight tax avoidance and fraud, and to promote the principle of tax good governance outside the EU borders.[4]

As a political initiative, the EU seems to use the tax list to pursue multiple goals. As officially communicated by the EU, the latter aims at discouraging tax avoidance, while encouraging countries' compliance with OECD/EU tax standards. In addition, the EU tax list is used to protect Member States' tax base from erosion; to protect EU's market competitiveness; and to boost the EU role of leader in anti-tax abuse. Although the European Commission, the Council, and the EU Member States try to identify the EU tax list as a platform for dialogue and tax cooperation, non-EU jurisdictions perceive the list as a naming-and-shaming exercise that limits their tax policy decisions. This perception is elaborated in this paper through the cases of three Caribbean jurisdictions.

The EU tax list started with the selection of jurisdictions to be included in the screening. Such a selection was based on their economic ties with the EU, their institutional stability, and the importance of their financial sector.[5] Selected jurisdictions have been scrutinized under three listing criteria:

1. Tax transparency: countries should exchange information with all EU Member States by satisfactorily implementing OECD standards on Automatic Exchange of Information (AEOI) and Exchange of Information on Request (EOIR) as assessed by the OECD. Countries should participate to the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matter (MCMAA), or have enforced a network of exchange with all EU Member States.
2. Fair taxation: countries should not have harmful preferential CIT measures according to the EU Code of Conduct. Where a country has no corporate income tax system or a zero, or almost zero, nominal tax rate, it is required to impose substance requirements to its resident companies, collective investment vehicles (CIVs), and partnerships.
3. Implementation of OECD/G20 BEPS minimum standards: countries should become members of the OECD Inclusive Framework (IF), or commit to implementing the OECD/G20 BEPS minimum standards. Countries should receive positive OECD assessments on the implementation of the standards on Country-by-Country Reporting (CBCR).

Criteria 1 and 3 rely on the work of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) and OECD IF. Criterion 2 relies on the assessment of the OECD Forum for Harmful Tax Practices (FHTP) on preferential regimes. However, it equally relies on the assessments of the COCG for countries' regimes that are in the scope of the EU Code of Conduct. The latter allows the EU to assess those preferential tax regimes that are not covered by the OECD FHTP. This includes, for example, manufacturing regimes, notional interest deductions, and countries' territorial systems (known as foreign source income exemption (FSIE) regimes by the COCG).

Jurisdictions that commit to comply with the listing criteria are included in the EU grey list. To be de-listed, they generally have one year to accomplish their commitment. Jurisdictions that do not commit to comply, or do not accomplish their commitment within the deadline, are blacklisted. Blacklisted jurisdictions are subject to tax and non-tax defensive measures applied by the EU and the EU Member States in a coordinated manner.[6] Reputational damage (i.e. naming-and-shaming) is also perceived by jurisdictions when grey or blacklisted.

3. THE INCLUSION OF THREE CARIBBEAN JURISDICTIONS IN THE EU TAX LIST

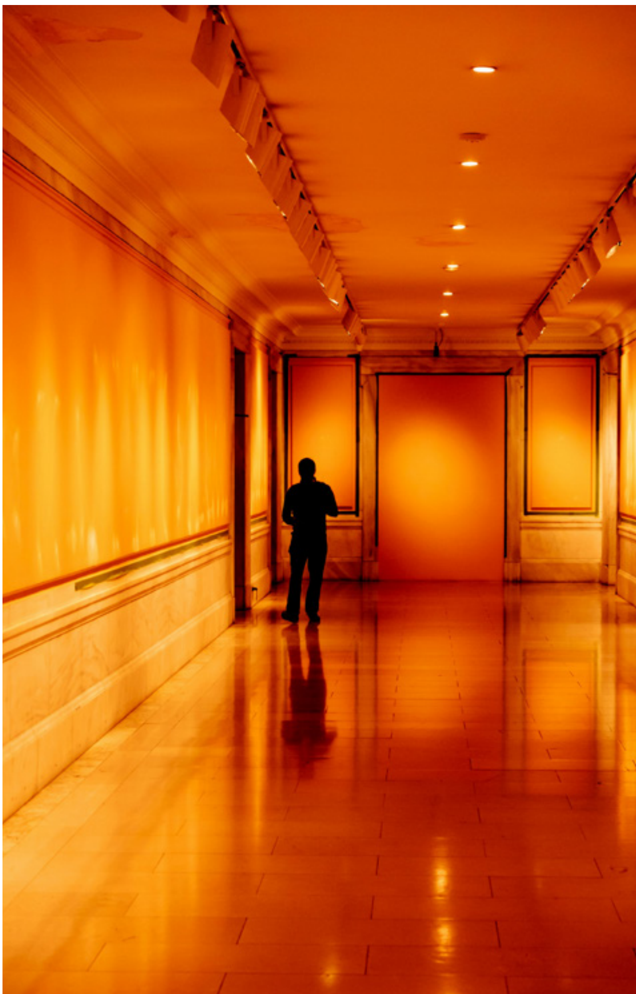
3.1. Factual analysis

The following paragraphs describe the inclusion of Aruba, Curaçao, and the Bahamas in the EU tax list. Their insertion in the geographical scope of the list was justified by the EU in light of their intensive economic ties with the EU, high level of institutional stability, and the magnitude of their financial sector.

It should be noted that, under EU law, Aruba and Curaçao are listed as OCTs in Annex II to the Treaty on the Functioning of the European Union (TFEU). This is because they are constitutionally lands of the Kingdom of the Netherlands and therefore part of a EU Member State (nevertheless, Aruba and Curaçao are neither part of the EU internal market nor of the EU territory). According to Part IV of the TFEU, the EU establishes associations with OCTs to promote their economic and social development and to establish close economic relations between them and the EU.

To this purpose, Curaçao and Aruba receive cooperation and development aids.[7] Furthermore, although OCTs control their own fiscal policies and are not bound by EU law, they have been subject to the application of the EU Code of Conduct for the scrutiny of national preferential tax regimes (see paragraphs 3.2.1 and 3.2.4).[8]

It is plausible that the inclusion of Aruba, Curaçao, and the Bahamas in the scope of the EU tax list is related to the numerous trading and funding agreements that the EU has with the Caribbean jurisdictions.[9] Indeed, one of the functions of the EU tax list is to avoid that its financial aids are abused by addressing countries that facilitate tax avoidance. For this reason, one of the EU non-tax defensive measures consists in prohibiting indirect aids when channelled through blacklisted countries.



3.1.1. Aruba

Under the EU tax list, the EU required Aruba to abolish harmful tax regimes and join the OECD IF. Since Aruba committed to satisfy both demands, the country was greylisted by the EU in 2017, and granted one year to accomplish its commitments.

With regards to OECD IF, Aruba had previously withdrawn its membership from that forum. Yet, due to the request of the EU and the threat of being blacklisted, Aruba was forced to rejoin the OECD IF.

In relation to the harmful regimes, Aruba did not manage to rollback all identified regimes within the one-year deadline. Albeit Aruba had informed the European Commission of the procedural issues causing the delay, ultimately the latter was the direct cause of Aruba's blacklisting until the reform of the regime was approved in 2019.

Afterwards, the screening of Aruba did not raise issues. However, in 2023, following Aruba's low rating on AEOI at the OECD Global Forum, the EU greylisted Aruba again in light of its commitment to solve the issue. [10]

3.1.2. Bahamas

The EU screening of the Bahamas was postponed of one year due to the hurricane's damages that the country faced in 2016-2017. Once the screening started, the EU required the Bahamas to solve tax transparency issues on AEOI and the MCMAA; to introduce substance requirements in its tax system; to commit to the OECD/G20 BEPS minimum standards.

Thanks to the Bahamas' cooperation, none of the identified issues led to the blacklisting of the country, except for the implementation of substance requirements. Indeed, the COCG deemed the Bahamas' commitment as lacking specific words referring to substance. Since the COCG considered this insufficient, the Bahamas were temporarily blacklisted.
Issues were raised again in 2022 as the OECD FHTP's assessment of Bahamas's enforcement of substance requirements was negative. This eventually led to the blacklisting of the country since it failed to take all necessary actions to solve the issue.[11]

3.1.3. Curaçao
The EU requested Curaçao to solve tax transparency issues on AEOI and EOIR, and to rollback harmful tax regimes. As the country committed to such requests, it was greylisted in 2017. Curaçao was already a member of the OECD IF by that time.

In relation to its harmful regimes, Curaçao was subject to the revision of both the OECD FHTP and the COCG due to the different assessment scope of the two fora. This forced the country to review the same regime[12] at least two times, creating confusion at Curaçao's Parliament. Further, Curaçao was one of those countries whose 'exemption of foreign income' regime (introduced to replace previously abolished measures) was negatively assessed by the COCG, pushing Curaçao to amend it.

Issues of tax transparency (AEOI) raised again in the end of 2022 following a negative conclusion from the OECD Global Forum's review. As Curaçao committed to address the issue, it has been greylisted since February 2023.

3.2. REFLECTIONS

3.2.1. Aruba vs. Curaçao
The first reflection draws a comparison between Aruba and Curaçao. The two jurisdictions are similar in their relations with the EU since they both have the OCT status. However, the latter has been reflected in the EU tax list more in the case of Aruba than Curaçao. An example is the intermediation of the Netherlands in the assessment of certain Aruban preferential regimes, which allowed Aruba to eliminate harmful features before being assessed for listing.[13] This does not seem to have occurred with Curaçao. One of the reasons could be a different predisposition of Curaçao's administration, compared to the Aruban one, to rely on (or ask for) Dutch tax support.

3.2.2. Obstacles to compliance
Aruba faced obstacles to compliance. It had procedural issues[14] that did not allow the country to abolish or amend the regimes by the one-year deadline. This led to its blacklisting. This has not happened to Curaçao, which has always been greylisted as a cooperative country. Nevertheless, greylisting for Curaçao did not come without consequences as it impacted its reputation. This is shown, for example, in the lack of willingness of other countries to sign Double Tax Conventions (DTCs) with Curaçao as it is greylisted by the EU.

Obstacles to compliance are observed in Bahamas' case too. The first time that the country was blacklisted was due to the EU's misunderstanding on the seriousness of Bahamas' commitment. This was an obstacle to compliance which, despite not being attributable to the country, penalized the latter. The Bahamas remedied by intensifying its communication with the European Commission, which then led to the greylisting of the country.

3.2.3. Categorization of compliance responses

Although all three jurisdictions are overall cooperative, their responses report different types of compliance and related obstacles. In Curaçao's response, 'reluctant compliance' can be observed, i.e. a type of cooperation that stresses the wrong-doing of the EU. The assessment of Curaçao's 'exemption of foreign income' regime exemplifies one of the most relevant issues in the EU tax list: the EU criticism towards foreign-income tax exemptions, which led to the assessment of FSIE regimes—i.e. source-based taxation. This is an issue that has involved not only Caribbean jurisdictions (Curaçao, Saint Lucia), but also jurisdictions in Latin America (Panama, Uruguay, Costa Rica), Asia (Hong Kong, Malaysia, Qatar), and Africa (Seychelles, Mauritius). Jurisdictions reacted differently, more or less cooperatively, towards the request of solving the harmful features of such regimes. Curaçao decided to comply with the EU demands—to avoid blacklisting—but it also stressed the wrong-doing of the EU in deeming general features of a tax system as harmful.[15] Although it did not materialize as such, Curaçao's reluctancy to understand the EU criticism to its regime could have represented an obstacle to its compliance. A similar type of compliance is observed in other countries (e.g., in Latin America) which complied with the EU requirements while stating the traditional relevance of source-based taxation for net capital importing countries, as well as the international acceptance of the source principle.

They blame the EU for abandoning the multilateral and international table of negotiations on tax standards.[16]

Curaçao also exemplifies another type of compliance: 'foresighted compliance'. Having rolled back its regimes according to the EU demands, Curaçao kept close contact with the European Commission to ensure that future changes to its tax law are in line with the EU Code of Conduct.[17]

In relation to Bahamas, 'minimal compliance' can be identified. The Bahamas has long had the reputation of 'tax haven'. Nonetheless, the country has shown cooperation with the EU since the establishment of the EU tax list.[18] Bahamas' cooperation is dictated by the willingness to improve its international-tax image. This has been confirmed by conversations with NGOs, which define Bahamas' compliance with OECD standards as a strategy of passing the minimum threshold to be assessed as cooperative. This trend is confirmed in Bahamas' cooperation with the EU. Indeed, Bahamas' lack of effective enforcement of substance requirements shows that the fulfilment of EU demands on the matter had been kept to the minimum—i.e. the introduction of substance requirements in the law, without actual enforcement. This case raises questions on the merit of EU listing criteria demanding the mere implementation of standards in the law. Letting countries being de-listed on the basis of the mere introduction of requirements in the law may imply appreciating a country's tax policy although the lack of enforcement of those requirements may lead to a different conclusion.

3.2.4. Impact of the EU tax list on countries' tax policy ntr

Aruba, Bahamas, and Curaçao confirm that the EU tax list impacts jurisdictions' tax policies. Nevertheless, they experienced the impact differently. Aruba was subject to the Code of Conduct already before the EU tax list as an OCT. Therefore, the EU Code is not a new imposition on Aruban preferential regimes. Yet, the list limited Aruba's free choice to join the OECD IF. This resulted in the imposition of further limitations on Aruba's preferential regimes as the membership in the OECD IF made the country subject to the OECD FHTP's assessments.

The Bahamas' choice to implement the BEPS minimum standards was presumably not pushed by the EU tax list since the country had committed to such standards before being assessed by the EU. Nevertheless, Bahamas' tax policy was limited by the EU tax list as the country was forced to introduce substance requirements and new specific mechanisms to exchange related information. This also implied subjecting the Bahamas, for the first time, to the review of the OECD FHTP (which adopted the same substance requirements as the EU) to assess the effectiveness of the requirements.

Curaçao's exposure to the impositions of the EU tax list are also evident. Although it was already a member of the OECD IF, and therefore subject to the OECD FHTP's peer review, Curaçao was vulnerable to the different scope of regime-assessment between the COCG and the OECD FHTP.

The difference forced Curaçao to reform the same regime two times, causing confusion at the Parliament of Curaçao about the necessity of double reforms and double international standards. As previously mentioned, the EU tax list also pushed Curaçao to rollback its 'exemption of foreign income' regime despite Curaçao's doubts on the appropriateness of the EU's assessment. Finally, the EU tax list influenced Curaçao's tax policy to the extent of inducing the country to consult the European Commission on compliance with the standards of the EU Code of Conduct for upcoming preferential regimes.

3.2.5. Problematic effects of the EU tax list

The EU tax list had the effect of increasing the OECD IF membership.[19] Consequently, more jurisdictions are subject to the review of national preferential regimes under the OECD FHTP, and are required to implement the OECD/G20 BEPS minimum standards. Although this could be perceived positively as more jurisdictions are subject to international standards, questions are raised on the merit of forcing small countries like Aruba to standards that may not be a priority for them. The same issue emerges with regard to small countries in Latin America, Asia, and Africa, especially when they are developing countries and have limited participation to the development of the standards imposed upon them. Ultimately, even the COCG questioned the relevance of the OECD/G20 BEPS minimum standards for the Bahamas. [20]

Furthermore, the country-cases analysed in this article show that instances of misalignment between the OECD FHTP and the COCG are problematic for cooperative jurisdictions, especially when they are required to rollback regimes that are in line with internationally accepted principles—i.e. the source-based taxation. At the level of the jurisdiction, this creates worries as the multiplication of standards between the EU and the OECD increases jurisdictions' workload. It also gives the impression that the EU is leaving the OECD table of discussion to create its own (higher) standards to be imposed on all jurisdictions, although the EU is not an international organization and such

higher standards are not internationally agreed. It creates frustration since the criticism of FSIE regimes implies the criticism of a general principle of taxation that could constitute a traditional and general feature of the system itself; as well as fear that the EU criticism may lead to the end of source-based taxation if such a standard is brought to the OECD table.

4. CONCLUSIONS

Through the analysis of three Caribbean jurisdictions, the paper explains the working mechanisms of the EU tax list and their impact on compliant non-EU countries. It also reflects on jurisdictions' responses to the EU tax list.

Even though jurisdictions may have similar interests in cooperating with the EU, and therefore similar responses to the EU tax list, their listing outcome may differ. Such a difference may be caused by jurisdictions' specific features—e.g., policy culture, administrative capacity—that impact their type of compliance and create obstacles to their cooperation.

The type of compliance identified in this paper are three: reluctant, foresighted, and minimal. They exemplify jurisdictions' strategies in international relations, and their possible responses to coercive triggers.

The EU tax list has an impact on the tax policy of compliant jurisdictions. This impact is allowed mainly because of their fear of reputational damage and loss in EU funding and trading relations. Consequently, jurisdictions' compliance highlights the coercive nature of the EU tax list, rather than a cooperative one. Finally, the cases highlight some of the problematic aspects of the EU tax list, such as the misalignment between OECD's and EU assessment-scope of preferential tax regimes. For non-EU jurisdictions, the misalignment creates workload issues, institutional complaints, and a harm in international tax relations.

Federica Casano

[1] The PhD research investigates the efficacy of the EU tax list by analysing its underneath goals and political dynamics, its coercive vs. cooperative nature, and the reactions that non-EU countries have had to the EU tax list. The PhD research also aims at showing the impact of the EU tax list on countries' tax policy and latest diplomatic and tax trends deriving from the EU tax list.
[2] The doctrinal research is based on the analysis of relevant literature and legal texts. The qualitative empirical research is based on the collection of empirical data via EU official documents—some of which are publicly available, while other were obtained via freedom-of-information (FOI) requests—and interviews. The data was coded and analysed to identify patterns and trends. The interviews used for this paper include formal and informal conversations with stakeholders involved in the EU tax list (i.e. stakeholders from the EU, Caribbean and small Latin American countries, international tax fora, and NGOs). Due to privacy concerns, the identity of the interviewed stakeholders cannot be disclosed.
[3] European Commission, Recommendation of 6.12.2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, doc. OJ L 338/37 (2012). Council, Conclusions, doc. 9549/13 (2013).
[4] Council Conclusions, doc. 9452/16 (2016); Council Conclusions, doc. 14166/16 (2016).
[5] European Commission, First step towards a new EU list of third country jurisdictions: Scoreboard (2016).
[6] Council Conclusions, doc. 9452/16 (2016); Council Conclusions, doc. 14166/16 (2016); Council Endorsement, Code of Conduct Group: Report to the Council, Annex IV, doc. 14114/19 (2019); Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, OJ L 193 (2018); Regulation (EU) 2017/2396 of the European Parliament and of the Council, OJ L 345 (2017).
[7] European Commission, International Partnerships: Aruba (available at https://international-partnerships.ec.europa.eu/countries/aruba_en); European Commission, International Partnerships: Curaçao (available at https://international-partnerships.ec.europa.eu/countries/curacao_en).
[8] Council Conclusions, doc. OJ 98/C 2/01 (1997), paragraph M; M. Nouwen, The geographical scope of the Code, in Inside the EU Code of Conduct Group: 20 years of tackling harmful tax competition, IBFD Doctoral Series (2021).
[9] European Commission, International Partnerships: Americas and the Caribbean (available at: https://international-partnerships.ec.europa.eu/countries/americas-and-caribbean_en); EU External Actions, Latin America and the Caribbean (available at: https://www.eeas.europa.eu/eeas/latin-america-and-caribbean_en); European Commission, Trade: Caribbean (available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/caribbean_en); European Parliament Think Thank, EU trade with Latin America and the Caribbean: Overview and figures (available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2019)644219); Ajit Niranjan, EU to invest €45bn in Latin America and Caribbean, The Guardian (2023) (available at: https://www.theguardian.com/world/2023/jul/19/eu-to-invest-45bn-in-latin-america-and-caribbean); Caribbean Export, European Union (available at: https://carib-export.com/our-work/partnerships/european-union/).
[10] Latest update of Aruba's listing status: January 2024. On Aruba's factual analysis: see Council, Compilation of letters seeking commitment, doc. 6671/18 (2018); Council, Information, doc. 13890/17 (2017); Council Conclusions, doc. 15429/17 (2017). The preferential regimes that Aruba had to roll back under EU requests were: the 'Special Zone San Nicolas' regime: companies located in San Nicolas, and carrying out activities aimed for more than 75% on export and hotels, could benefit from a reduced 10% tax rate on their profit (Council, Final description and assessment, doc. 7518/19 (2019)); and the 'Transparency' regime: taxable corporations in Aruba could opt for treatment as a transparent entity for Aruban tax purposes by filing a request to the Aruba Tax Authorities. The treatment as a transparent entity implied that the company is exempted from Aruba profit tax, dividend withholding tax, and income (Council, Final description and assessment, doc. 9646/19 (2019)).
[11] Latest update of Bahamas' listing status: January 2024. On Bahamas' factual analysis: Council Conclusions, doc. 15429/17 (2017); Council, Report by the Code of Conduct Group to the Council, doc. 8304/1/18 (2018); Council Conclusions, doc. 7441/19 (2019); Council Conclusions, doc. 13092/22 (2022); Council, Code of Conduct Group (Business taxation): Report to the Council, doc.14674/22 (2022); Council Conclusions, doc. 6375/23 (2023); Council Conclusions, 13879/23 (2023); Council, Report by the Code of Conduct Group to the Council, doc. 15757/23 (2023). Regarding the lack of sufficient commitment on substance requirements, the COCG did not deem Bahamas' commitment sufficient as it did not use specific words (Council, Compilation of commitment letters received from jurisdictions, doc. 6972/18 ADD 45 (2018)). As the Bahamas perceived its blacklisting with surprise, the country started a direct dialogue with the European Commission, which led to a renewed commitment on fair taxation. The country was therefore greylisted until it implemented, by the 1-year deadline, substance requirements and related exchange of information in its national law.
[12] Reference is made to the 'e-Zone' regime, which was modified by Curaçao in 2018 under the request of the OECD FHTP, and then in 2019 under the request of the EU. The latter assessed the manufacturing activities under the 'e-Zone' regime since they are excluded from the scope of the OECD FHTP's analysis. In relation to Curaçao's factual analysis, see: Council, Compilation of commitment letters received from jurisdictions, doc. 6972/18 ADD 26 (2018); Council Conclusions, doc. 15429/17 (2017); Council, Final description and assessment, doc. 7423/20 (2020); Council, Final description and assessment, doc. 7424/20 (2020); Council, Report by the Code of Conduct Group to the Council, doc. 15757/23 (2023). Latest update of Curaçao's listing status: January 2024.
[13] The first assessment of Aruba's preferential regimes was in 1999 (Council, Overview of the preferential tax regimes, doc. 7915/21 (2021)). In 2017, just before the Commission's final assessment for listing purposes, the COCG required Aruba to rollback the 'Imputation Payment Company' regime. The request was made through the Netherlands. Interestingly, the latter was deemed an intermediary between the COCG and Aruba, although Aruba is a fiscal autonomous country (as stressed by the Netherlands: Council, Report by the Code of Conduct Group to the Council, doc. 14750/16 (2016); European Commission, Meeting Report Code of Conduct Group, doc. Ares (2016) 4429918 (2016)). Thanks to the intermediation, Aruba managed to amend its regime before the Commission's final assessment for listing purposes. Once the work of the COCG on the EU tax list progressed, the Dutch intermediation stopped and direct contact took place between Aruba and the European Commission, who reported to the COCG. No evidence is known to this author on the intermediation of the Netherlands between Curaçao and the COCG.
[14] The EU documents do not specify the nature of the procedural issues. It can be supposed that such issues might include: difficulties in reaching an agreement within the government for the design of the reform proposal; difficulties in Parliament's discussions; delays in the collection of public stakeholders consultations.
[15] Council, Commitment letters by some jurisdictions, doc. 6097/19 ADD 5 (2019).
[16] A. Riccardi, Is Latin American and Caribbean Tax Policy in the Hands of the European Union? A Three-Country Case Study: The Source Principle under Attack, 77 Bulletin for International Taxation 9 (2023).
[17] Council, Progress Report – Curaçao, doc. 5361/20 (2020).
[18] Despite Bahamas' blacklisting, the country has been appreciated (especially until 2022) for its high level of dialogue and collaboration with the COCG, which once allowed the country to postpone its compliance deadline—although the postponement was also justified by new hurricanes hitting the country (doc. 5580/20 EXT1).
[19] M. Collin, Does the threat of being blacklisted change behavior? Regression discontinuity evidence from the EU's tax haven listing process, Brookings Global Economy and Development Working Paper 139 (2020).
[20] Council, Compilation of letters seeking commitment, doc. 6671/18 (2018).

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