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Global Minimum Tax and Protection of Acquired Rights and Legitimate Expectations

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This article examines whether the global minimum tax (Pillar Two) could infringe upon the principles of protecting acquired rights and legitimate expectations. It argues that implementing a top-up tax under Pillar Two might violate promises made by governments to multinational enterprises, particularly by revoking previously granted tax incentives. The article delves into the fact that the possibility of utilizing pre-GloBE deferred tax assets and the substance-based carve-out may not be enough to prevent such infringements. It explores potential legal avenues for MNEs to challenge the QDMTT, IIR, and UTPR. The article concludes by emphasizing that the lack of robust safeguards for these but also other fundamental rights in the Pillar Two Model Rules raises serious questions about the legitimacy and long-term sustainability of a global tax regime.

Keywords: global minimum tax, top-up tax, OECD model rules, Pillar Two, protection of vested rights, protection of legitimate interests, deferred tax, tax incentives, legitimate expectations, legal certainty, fair treatment

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Introduction

The global minimum tax (Pillar Two) aims to ensure that large multinational enterprises (MNEs) pay a minimum level of tax on income generated in each jurisdiction where they operate. The imposition of such taxation may result in the denial of rights previously granted to taxpayers by governments, particularly the revocation of promised tax incentives. This article examines whether the global minimum tax may infringe upon the principles of protection of acquired rights and legitimate expectations, and explores how MNEs might challenge such infringements.

The article is structured as follows. First, it provides a brief description of selected elements of Pillar Two to give the reader an essential background for further discussion. Next, the concepts of protecting acquired rights and legitimate expectations are explored. It is argued that basics of those concepts are commonly shared among legal orders and respected in the Court of Justice of

European Union judgments, international investment treaty law, as well as many domestic laws. While the details of protection may vary, its foundations and general principles seem common. Similarities in the cross-jurisdictional understanding of these principles allow for an examination, in section three, of how Pillar Two may infringe upon the general principle of protecting acquired rights and legitimate expectations without the need to refer to a particular legal order. Subsequently, the options available to an MNE group to challenge top-up taxation, if infringement is found, are discussed. The fourth section addresses challenges to the qualified domestic minimum top-up tax (QDMTT), while the fifth section deals with challenges to the income inclusion rule (IIR) and the undertaxed payments rule (UTPR). The article concludes with a brief summary of the findings.

1. Pilar Two top-up tax and its collection

The Pillar Two Model Rules (OECD, 2021) have been developed by the OECD/G20 Inclusive Framework on BEPS (further referred to as OECD IF), which comprises 147 countries. The aim of these model rules is to provide a so-called *coordinated approach* in implementing a global minimum tax. Consequently, the model rules themselves are not legally binding; instead, they require adoption and implementation through the legislative processes of individual countries. The model rules are accompanied by an extensive commentary (OECD, 2024), which is regularly updated based on administrative guidance issued by the OECD IF.

The overall objective of the model rules is to ensure that multinational enterprises (MNEs) groups are taxed at a minimum rate in each jurisdiction where they operate, irrespective of whether that jurisdiction has implemented the model rules. To achieve this, Pillar Two provides a standardized method for calculating the jurisdictional effective tax rate (ETR) and imposes a top-up tax if the 15% ETR is not met, thereby generally ensuring compliance with the 15% threshold (OECD, 2021, primarily: Articles 3–5). More details on the selected mechanisms of Pillar Two, which play a role in the protection of acquired rights and legitimate expectations, will be provided in Section 3.

Three interconnected rules for collecting the top-up tax have been designed by the OECD IF to ensure that top-up tax is collected (OECD, 2021, Article 2). Firstly, the IIR stipulates that the ultimate parent entity, or in certain cases an intermediary parent entity, of an MNE group collects the top-up tax for all its subsidiaries. Secondly, there is the UTPR, which acts as a backstop. Under this rule, any country that has implemented the model rules should proportionally collect the top-up tax not collected under the IIR, according to the so-called UTPR percentage. Finally, each country may implement a QDMTT to collect the top-up tax locally. If it does, the QDMTT is applied before the IIR and the UTPR. Tax collected under the QDMTT is credited under the IIR and the UTPR, or, if the QDMTT safe harbour applies (OECD 2024, pp. 318–320), it is assumed that the jurisdictional top-up tax is zero for purposes of the IIR and UTPR. Although some features of the QDMTT may vary from those specified in the model rules, the overall design and outcomes must align with the model rules to ensure minimum taxation within the jurisdiction.

To facilitate further considerations, it is important to recognize that these rules are structured in such a way that even if the top-up tax is not collected locally under the QDMTT, other countries that have implemented Pillar Two are obliged under the model rules to impose a top-up tax on other entities within a MNE group to account for low taxation in the given jurisdiction through the IIR and/or UTPR. Keeping in mind that the model rules provide detailed instructions for calculating the ETR and top-up tax, they operate in the way that if any country does not adhere to the model, other countries are expected to collect the remaining tax according to these rules. This means that while the model rules are not legally binding, they are designed to function as such in practice. If a country deviates from these standards, the

OECD IF expects that other nations will enforce the collection of top-up tax owed under the Model Rules.

2. The concept of protection of acquired rights and legitimate expectations

Before we discuss how Pillar Two may infringe upon the protection of acquired rights and legitimate expectations, it is essential to outline the key aspects of these concepts. Some jurisdictions contrast acquired rights with legitimate expectations. The general approach tends to treat acquired rights as synonymous with *subjective rights* or, possibly, *individual rights* (Laliye, 2008, p. 151). The term *legitimate expectations* refers to assurances or promises that create a reasonable anticipation of rights being granted in the future, even though they have not yet been formally granted. In this article, I have chosen to use the terminology *protection of acquired rights and legitimate expectations*, as different legal systems employ varying terms, and this naming convention supports a broad understanding of the concept.

Regardless of naming conventions, principles of respect of acquired rights and of legitimate expectations remain ones of the most fundamental principles both of the public international law and of the municipal law of most states (ACA Europe, 2016; Garcia-Amador, 1959, pp. 4–5; Laliye, 2008, p. 146; Schønberg, 2000, cited after Potesta 2013, p. 7). They aim to safeguard the legal situation of individuals as established by laws in effect before any amendments (Laliye, 2008, pp. 150–151).

The issue of limitations on subsequent changes to laws that impact arrangements established before those legislative alterations has been a subject of legal debate since the earliest days of legal history (Broggini, 1966). While this approach has evolved over time, it continues to generate significant controversy (Fisch, 1997, pp. 1056–1057). There is a general consensus that individuals should be to a certain degree protected from arbitrary interference in their affairs due to changing laws. However, the precise scope of this protection is not clearly defined and contentious. It is also likely to vary between jurisdictions. Despite variations in specifics, the concepts of protecting acquired rights and legitimate expectations across different legal systems seem to share common foundations and key elements. This section aims to explore these foundational aspects and provide an overview of how they are addressed focusing on the EU and international investment treaties.

Starting with the theoretical framework regarding changes in the law, a fundamental distinction can be drawn between rules that are retroactive and those that are prospective. A retroactive rule is one that attaches new legal consequences to events completed before its enactment, whereas a prospective rule applies only to a conduct occurring after its enactment (Fisch, 1997, p. 1067). A fully prospective norm would not apply to any event that took place before its enactment (Fisch, 1997, p. 1067). However, most prospective norms influence the future outcomes of arrangements that were made before their enactment (Fisch, 1997, p. 1067; Kaeckenbeeck, 1936, pp. 2–3, 15). This is needed as otherwise no reform would be possible. For example, imagine if the Pillar Two minimum tax were applied only to businesses that started after its enactment. Such a rule would not only create inequalities but also undermine the whole idea of Pillar Two. Therefore, enacting norms that affect the future outcomes of events that took place before their enactment (retrospective norms) is generally accepted.

While the need to reform the law weighs on the one side of the scale, legal certainty rests on the other. This principle serves as the basis for the protection of acquired rights and legitimate expectations, as it ensures that laws are not only clear and precise but also foreseeable in their effects (CJEU, 2019, para 69; Wojciechowski, 2014, p. 26). One of the most important functions of a democratic state is to provide legal certainty to its citizens (MacCormick, 1984, p. 74, cited after Jackowski 2008, p. 20), which means such a state should not retract its obligations arbitrarily (Jackowski, 2008, p. 21). In a democratic state, the interests of individuals and the collective are meant to be balanced. Viewing the law as a social contract between the state and its people means that the state should not withdraw arbitrarily from its commitments towards individuals being the other side of that arrangement. While individuals should expect changes in the law, the principle of acquired rights and legitimate expectations pertains to the necessity of confidence not so much in the permanence of the law, but in the assurance that what has been already granted or promised will be sustained (Kaeckenbeeck, 1936, p. 3).

The principle of protection of acquired rights and legitimate expectation is seen as one of the fundamental principles of EU Law (Drabkin-Reiter, 2015; De Ambrosis Vigna, Kijowski, 2018, pp. 40–45; Lemańska, 2016, Section 1.2.1.). Based on the Court of Justice of the European Union (CJEU) jurisprudence, any person to whom an institution has given justified hopes may rely on the principle of the protection of legitimate expectations. In whatever form it is given, information which is precise, unconditional and consistent, and comes from authorized and reliable sources constitutes assurances capable of giving rise to such hopes (CJEU, 2024, para. 103; CJEU, 2019b, para. 97). However, if a prudent and alert person can foresee the adoption of a measure likely to affect his or her interests, it may be disputable whether that person can still plead the principle of protection of legitimate expectations if that measure is adopted (CJEU, 2024, para. 104).

The protection of acquired rights and legitimate expectations can also be anchored in investment treaties (Wongkaew, 2019). As Kuźniacki and Visser note, in particular the fair and equitable treatment clause may conflict with Pillar Two taxation (Kuźniacki, Visser, 2024). This is because legitimate expectations are considered one of the core elements of the fair and equitable treatment standard, even though the legal grounds for such claims seem somewhat disputable (Biggs, 2021, p. 2; SCC, 2015, p. 352; regarding doubts: Campbell, 2013; Potestà, 2013. pp. 3–7). According to prevailing views, legitimate expectations can be based both on a state's legal framework at the time of an investment and on the country's representations, whether explicit or implicit (Biggs, 2021, p. 9). While investors may not expect that the regulatory framework will remain entirely unchanged, states should enact changes with regard to the investor's legitimate expectations of legal stability (SCC, 2015, para. 359). For a breach to be identified, "*there must be a promise, assurance, or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability*" (ICSID, 2013, para. 669). Given the extensive literature (Biggs, 2021; Kałduński, 2019 with the literature cited therein; Potestà, 2013) on protection of acquired rights and legitimate expectations on ground of investment treaties, I will refrain from delving into more detail here. Instead, I will reference Kałuduński's findings, which highlight the conditions necessary for those principles to apply: (1) a representation or promise must be made by the host state; (2) the expectation must be both objective and reasonable to be considered legitimate; (3) the investor must rely on the representation made by the host state; and (4) the investor must receive a substantive benefit as a result of the representation or promise made by the host state (Kałduński, 2019, p. 238). Furthermore, the investor is required to act in good faith to claim the protection of their expectations (Kałduński, 2019, p. 238).

The fair and equitable treatment and protection of legitimate expectations also cover tax matters. In the case of Cairn Energy v. India, it was argued that guarantees of fairness within a taxation regime are consistent with the objective of encouraging foreign investment. Interpreting investment treaties to exclude tax-related measures from their scope, without explicit language to that effect, would not be consistent with the treaty's object and purpose (PCA, 2020, paras. 799–800). In this case the Tribunal held that outside of the criminal law the retroactive imposition of duties or limitation of rights may be permissible if in public interest and proportional. The judgment implies the need for balancing exercise to determine whether there has been a breach of the fair and equitable treatment standard (Kryvoi, Matos, 2021, p. 54).

The necessity of balancing various needs when considering the protection of acquired rights and legitimate expectations underscores that, based on Dworkin's distinction between rules and principles (Dworkin, 1977), the protection of acquired rights should be classified as a principle. Consequently, its application is not automatic and requires careful balancing with other principles, particularly the imperative to allow for legal reform.

In addition, in the intra-EU context, it should be noted that protection from international investment treaties seems limited due to the CJEU ruling on March 6, 2018 (C-284/16) in the Achmea BV case, which declared that investment treaties between EU countries that involve arbitration proceedings are incompatible with the Treaty on the Functioning of the European Union (TFEU).

As previously noted, the protection of acquired rights and legitimate expectations is recognized also across the domestic legal frameworks of many states, with principles similar to those presented in the international law (Aca Europe, 2016). In Poland, principles of protection of acquired rights and legitimate expectations are well established within the jurisprudence of the Constitutional Tribunal. The principle of protecting acquired rights posits that the state should not arbitrarily deprive individuals of their rights and must respect rights that arose under previous laws to the fullest extent reasonably possible (Jackowski, 2008, pp. 11–27). Meanwhile, the protection of legitimate expectations relates to situations where individuals have been led to believe that their actions will result in specific legal outcomes in the future (Staniszewska, 2024, pp. 495–500). In Germany the *Vertrauensshutz* doctrine exists (De Ambrosis Vigna, Kijowski, 2018, p. 40). This principle, grounded in the Constitution, provides legal grounds to protect individual interest which may be infringed due to amendments in the law (Schmidt-Aßmann, 1987, p. 988, cited after Staniszewska, 2024, p. 494). Similar concepts exist in many different countries, which has been outlined in the ACA Europe 2016 report (Aca Europe, 2016). The concept of protection of legitimate expectation also exists in common law countries including the UK (Potestà, 2013, pp. 5–11; Thomas, 2000) and the US (Vicente, 2020, pp. 54–69). As a result of these concepts being so widespread, some argue that these principles could be considered general principles of the law (Potestà, 2013, p. 12).

Based on the author's analysis, several general features relating to the protection of acquired rights and legitimate expectations can be identified, which seems common across legal orders. Firstly, these rules share a foundational principle: in a democratic state, there is a need to respect not only state interests but also individual interests. This implies that states should consider the impact of new laws on ongoing affairs and ensure that their intervention into existing conditions is reasonable and proportionate, potentially enacting appropriate intertemporal rules. The need to protect individuals is much stronger if a country has made any form of promise to the taxpayer, suggesting that their current actions will have certain legal consequences in the future. This is particularly true if long-term investment decisions have been made based on such promises. In such a case, a country may not unilaterally withdraw from promises made, as this could infringe upon the principle of protection of acquired rights and legitimate expectations. However, protection may be limited if the change in law was anticipated.

This above brief summary is not intended to delineate the exact scope of protection for acquired rights and legitimate expectations within a particular legal order. Rather it underscores that, although the specifics of protection may vary between legal systems, there is a general consensus that when a country enacts laws and provides assurances to taxpayers, it cannot freely withdraw from them without a just cause. As expressed by the ancient Romans, *Pacta sunt servanda* agreements must be kept. While one could argue that this civil law principle has historically been applicable only to horizontal relations, the balanced nature of relations between state interests and entities' interests, combined with the widespread principles protecting acquired rights and legitimate expectations, supports the application of this principle to relations between the state and an entity. If the government makes promises to a taxpayer, it is generally accepted that it should adhere to the obligations it has undertaken and may not withdraw arbitrarily from them.

3. Pilar Two and tax incentives promised to taxpayers before its introduction

Let us now examine how Pillar Two taxation may impact acquired rights and legitimate expectations. Countries often offer various tax incentives to attract investment and stimulate economic growth. These incentives can include reduced tax rates, tax holidays, or specific deductions that result in an effective tax rate (ETR) below the standard rates, sometimes even falling below 15%. Such incentives are designed to provide competitive advantages and foster business development within the country. Typically, the government grants these incentives if investors meet certain prerequisites, such as investing a specified amount or committing to certain employment levels. Importantly, these incentives are often long-term commitments, intended to provide stability and predictability for investors over extended periods, thereby impacting strategic business planning. From the investor's perspective, these incentives are factored into calculations of investment returns and influence decisions on where to invest. Many of these incentives should be viewed as assurances from the government to the investor. Introduction of minimum tax under Pillar Two potentially could conflict with these incentives. If a country has previously committed to a tax regime that allows for an ETR below this threshold, the imposition of a top-up tax might undermine the assurances of low taxation given to taxpayers.

The treatment of tax incentives under Pillar Two varies depending on their type. Generally speaking, all tax incentives relating to covered taxes are expected to impact the ETR negatively (Bammens, Bettens, 2023, p. 159), although the severity of this impact is likely to vary based on the type of incentive (OECD, 2022, p. 55). In particular, the Model Rules differentiate between qualified refundable tax credits and other tax credits. The former includes credits that are designed to be paid as cash or available as cash equivalents within four years after a Constituent Entity satisfies the conditions for receiving the credit under the relevant jurisdiction's laws. Under Pillar Two, these credits are treated similarly to grants, impacting GloBE income rather than covered taxes. Consequently, the negative impact of qualified refundable tax credits on the ETR is likely to be less than that of other tax credits.

Notably, the term *tax credit* is not defined in the model rules or the IFRS, a fact not yet extensively discussed in the literature. The OECD commentary suggests that tax credits include only those credits deductible directly from tax rather than those deductible from the tax base (OECD, 2024, Art. 4.4.1, Point 80). However, I am not entirely convinced that the short passage from the commentary to which I refer reflects the OECD's intention. For instance, the Polish implementation uses the term *tax incentives* instead of *tax credits*, which raises the question whether the OECD indeed intended to limit qualified refundable tax credits only to those deductible from the tax. I struggle to find a rationale behind such a differentiation. Whether the amounts are deducted from the tax base or directly from the tax itself is often merely a matter of the calculation method. Both deduction from tax and deduction from the tax base may lead to a very similar result.

Returning to the main subject, tax incentives reducing covered taxes potentially lead to a more significant negative impact on the ETR compared to, for example, government grants. Less impactful might be tax deferrals, unless recapture rules are triggered, as well as qualified refundable tax credits and tax incentives related to non-covered taxes (OECD, 2022, p. 60). The former are likely to be considered, for Pillar Two purposes, as increasing GloBE income. Overall, OECD analysis suggests that income-based incentives, tax deductions in the form of tax allowances, immediate expensing, and accelerated depreciation on other assets, as well as tax credits other than refundable tax credits, are more likely to be affected than other tax incentives (OECD, 2022, p. 37). Regardless of the type of tax incentive, if, as a result of it, the ETR drops below 15%, a top-up tax may arise. This may eliminate effectively at least part of the economic impact that these incentives have. Consequently, this situation may open a discussion on the protection of acquired rights and legitimate expectations.

The Model Rules include specific transitional provisions that may protect investors partly from top-up taxes if they received tax incentives before the implementation of Pillar Two. This mechanism is tied to the fact that pre-GloBE deferred tax is considered when calculating the ETR under Pillar Two.

Deferred tax refers to temporary discrepancies between a company's taxable income reported to tax authorities and its accounting income reported on financial statements. These discrepancies arise from differences in the recognition of revenue and expenses for tax and financial accounting purposes, governed by tax laws and accounting standards, respectively. When a company earns tax incentives that cannot be utilized fully within the current tax year, it may be permitted to record deferred tax assets. These assets reflect the expectation of reducing future tax liabilities once the incentives are applied. Upon utilizing a tax incentive, the corresponding deferred tax amount is reversed.

In the context of Pillar Two, deferred tax related to the generation and use of tax credits is generally excluded from the calculation of the ETR as per section 4.4.1(e). However, this does not appear to be the case for pre-GloBE deferred tax assets. This is because the commentary indicates that article 4.4.1(e) does not apply to pre-GloBE deferred tax assets (OECD, 2024, p. 225). Therefore, according to section 9.1.1 of the Model Rules, if these pre-GloBE deferred tax assets and liabilities have been recognized, reflected, or disclosed in the financial accounts, they need to be considered in the calculations of the ETR for the purpose of Pilar Two. This also applies if the company did not recognize deferred tax assets due to valuation adjustments or accounting recognition adjustments, as these must be disregarded based on section 9.1.1 of the Model Rules. Consequently, even if the MNE group, adhering to accounting precautionary principles, did not recognize deferred tax assets for accounting purposes, it may still be permitted to do so for the purposes of Pillar Two. For Pillar Two purposes the deferred tax assets is recalculated at the 15% minimum rate.

In practice this means that if a company undertook a pre-GloBE investment with an anticipated future tax incentive, and the relevant accounting standards permit the recognition of a deferred tax asset in such contexts for pre-GloBE periods, this deferred tax asset may also be recognized for the purposes of Pillar Two. Upon realization of the incentive, the deferred tax asset should be reversed, resulting in an increase in the effective tax rate (ETR). This increase could help offset the effects of the incentive reducing covered taxes.

However, the mechanism of importing pre-GloBE deferred tax assets does not appear to mitigate fully the risk of infringing upon acquired rights and legitimate expectations. Firstly, not all accounting standards must allow for the recognition of deferred tax assets. Secondly, there is a question of what happens if the DTA has not been "*recognized, reflected, or disclosed in the financial accounts*". Thirdly, not all tax incentives promised by governments prior to the GloBE regime must result in the generation of pre-GloBE deferred tax assets. For example, consider an investment that commenced before 2022, when the GloBE directive was enacted, with the investment process spanning several years. In such cases, the investor may have been assured that their entire investment expenditures would qualify for a tax incentive leading to the ETR below 15%. However, the economic effect of the incentive may be affected by Pillar Two in relation to any investment expenditures made after Pillar Two comes into force, as no pre-GloBE deferred tax asset is expected to arise in this scenario. If certain investment expenditures are not made before the GloBE comes into force, there will likely be no grounds to recognize a pre-GloBE deferred tax asset. Similarly, no deferred tax asset will arise if the incentive does not generate tax and accounting differences in the tax base, as is the case with incentives in the form of reduced tax rates. Fourthly, the pre-global deferred tax asset for the purpose of Pillar Two is recalculated at the lower domestic or 15% rate, meaning that if the domestic tax rate is higher than 15%, the deferred tax will not fully prevent the ETR from falling when the incentive is utilized.

Another issue may arise under Article 9.1.2 of the Model Rules, which states that deferred tax assets resulting from items excluded from the computation of the GloBE Income or Loss under Chapter 3 must not be included in the computation under Article 9.1.1 if these deferred tax assets are generated by transactions occurring after November 30, 2021. Imagine that a company incurs a loss on the sale of shares after this date. Gains and losses from disposition of ownership interest, except for a Portfolio Shareholding, are generally excluded from the GloBE Income under Rule 3.2.1(c). Consequently, the company may not be able to recognize deferred tax assets for that loss on the grounds of Pilar Two. If the loss is utilized under the domestic law to offset the income that under Pilar Two is included in the GloBE income, the company's covered taxes will decrease, leading to a lower effective tax rate (ETR). Deferred tax assets will not be available, which may result in a top-up tax liability. In economic terms, this top-up tax could negate effectively the financial benefit of the loss.

The date of November 30, 2021 is used in several articles of the Pillar Two Model Rules as a threshold beyond which taxpayer protection is limited. The OECD IF established this date to limit the possibility of circumventing Pillar Two rules through operations conducted after the regulation's details could become public. Consequently, in certain cases this date also seems to serve as a timeframe for setting limits on the protections for acquired rights and legitimate expectations. In light of the previously quoted jurisprudence, which limits the protection of acquired rights and legitimate expectations when legal changes are foreseeable, it could be argued that entities should have anticipated the implementation of Pillar Two after this date, and thus, protection after it should be limited. Regardless of the fact that such view may be highly disputable, there are likely to be cases where such an arbitrary date may contravene the protection of acquired rights and legitimate expectations. In particular, the fact that an entity became aware of the upcoming changes does not negate the obligation to protect interests that were ongoing before that date.

In relation to transitional rules regarding the possibility of utilizing deferred tax assets that arose before the implementation of the GloBE in January 2025, the OECD issued another set of administrative guidelines. These guidelines explicitly state that Article 9.1 transition rules are not intended to serve as a mechanism for MNE groups or general governments to engage in transactions or provide tax attributes that produce deferred tax assets which, when reversed, will shelter effectively all or a portion of an MNE group's future low-taxed income from the GloBE Rules. Additionally, it is stated that Article 9.1.2, which limits the possibility of utilizing under Pillar Two, deferred tax assets generated after 30 November 2021, covers not only deferred tax assets from transactions but also governmental arrangements. This seems to mean that if a critical aspect of the credit or relief, such as the eligibility or amount, relied on discretion exercized by the government and was granted after November 30, 2021, the deferred assets arising from it will not be available under the GloBE. The grace period is available for arrangements made until November 18, 2024. While not entirely clear, it seems that this grace period is applicable only to selected arrangements. Additionally, the amount of deferred tax assets for transactions within the grace period is limited to the aggregate of 20 percent of the amount of each of such a deferred tax asset originally recorded and taken into account at the lower of the minimum rate or the applicable domestic tax rate. This is another area where an infringement of acquired rights and legitimate expectations may be expected.

The Model Rules provide another mechanism to reduce the tax base used for calculating the top-up tax in a given jurisdiction through a substance-based income exclusion (OECD, 2021, Article 5.3). This exclusion amount is determined by two main elements: the payroll carve-out and the tangible asset carve-out. The payroll carve-out generally constitutes a percentage of eligible payroll costs of employees and independent contractors who participate in the ordinary operating activities of the MNE group under its direction and control and perform activities for the MNE group in the given jurisdiction. The tangible asset carve-out is calculated as a percentage of the carrying value of selected tangible assets, such as property, plant, and equipment, located in that jurisdiction. According to Section 9.2 of the OECD Model Rules, the payroll carve-out exclusion amount starts at 10% in 2023 and will be gradually reduced to 5% by 2033, while the tangible asset carve-out starts at 8% in 2023 and will also be reduced to 5% by 2033.

The substance-based carve-out does not guarantee that the promises made by governments to MNE groups will not be affected adversely. Firstly, this is because the substance-based carve-out only limits the tax base for the calculation of top-up tax. Secondly, despite its standardized approach, this carve-out may inadequately align with real-world variations seen across different business sectors and even within the same sector, due to factors like economies of scale. Consequently, this could result in the carve-out not fully covering income from substantive activities in some cases, while in others, it might apply to income beyond what is directly generated from those activities (Bammens, Bettens, 2023, p. 163; Schoueri, 2021, pp. 545–547). Thirdly, based on my experience, even during the transitional period when the substance-based carve-out rates are relatively high, in selected cases the carve-out amounts are far from sufficient to cover the effects of tax incentives granted by governments. The target 5% rate is also seen by others as low (Bammens, Bettens, 2023, p. 163 footnote 64; Schoueri, p. 546).

4. QDMTT as a potential infringement of acquired rights and legitimate expectations

It has been shown that Pillar Two potentially may infringe upon the protection of acquired rights and legitimate expectations. Therefore, it is important to consider what recourse taxpayers may have to challenge such an infringement. I will begin with an analysis based on the QDMTT in this section, followed by an analysis of the IIR and UTPR in the next section.

A taxpayer who believes that the QDMTT infringes upon protection of acquired rights and legitimate expectations may resort to various measures to challenge the QDMTT. Firstly, the domestic law may provide a basis for the challenge. Secondly, protection may be sought under international investment treaties, as the premature revocation of promised tax incentives could be viewed as a violation of fair and equitable treatment (Kuźniacki, 2023). Thirdly, within the context of the EU, the protection of acquired rights and legitimate expectations is recognized by the CJEU as one of the European Union fundamental legal principles.

Even if an entity challenges successfully the QDMTT on domestic grounds, this may prove ineffective when considering the MNE Group globally. This stems from the fact that the OECD seems to recognize the risk that the implementation of Pillar Two may lead to disputes in this area. In the administrative guidance of July 2023 it states that "*there may be cases where a QDMTT jurisdiction is prevented or restricted from applying the QDMTT to a Constituent Entity located in the jurisdiction due to constitutional provisions or tax stabilization agreements (or similar agreements between the QDMTT jurisdiction and the MNE Group)*" (OECD, 2023, p. 74). Commenting on this, the OECD reminds that any tax payable pursuant to a Qualified Domestic Minimum Top-up Tax gives full credit in the IIR and UTPR computations (OECD, 2024, p. 149). However, based on the OECD this should not be the case if (a) the MNE group directly or indirectly challenges in a judicial or administrative proceeding or (b) the tax authority of the jurisdiction has determined it is not assessable or collectible based on constitutional grounds or another superior law or based on a specific agreement with the government of the QDMTT jurisdiction limiting the MNE group's tax liability, such as a tax stabilization agreement, investment agreement, or a similar agreement (OECD, 2024, p. 149). As a result in such a case the QDMTT will not be creditable under the IIR and UTPR.

Similar rules are applicable in case of the QDMTT safe harbour. If the group claims that it is not liable for the QDMTT in whole or in part based on legal grounds outside the QDMTT or the GloBE Rules, the QDMTT safe harbour is not applicable (OECD, 2023, p. 75, p. 230). Note that such a rule does not apply if interpretive or factual issues arise under the QDMTT, such as where the MNE group claims that they meet an exception to the scope of the QDMTT, a particular provision of the QDMTT does not apply based on their facts, or a rule should be interpreted in its favour. This suggests clearly that if a taxpayer challenges the QDMTT on the grounds of infringing upon acquired rights and legitimate expectations, the OECD's intention is for other countries to impose the top-up tax according to the IIR and UTPR principles.

What is more, the definition of a Qualified Domestic Minimum Top-up Tax includes a so-called *no-benefit* clause. This clause stipulates that the domestic minimum top-up tax will be deemed qualified, and thereby creditable under the IIR and UTPR, only if the jurisdiction refrains from providing any benefits related to the introduction of the QDMTT. The OECD highlighted this point to Vietnam when the country considered compensating for the effect of top-up tax with grants (Ridder, 2023, p. 1). Consequently, countries seem to have limited flexibility to provide compensation for breaches of acquired rights and legitimate expectations.

The fact that challenging the QDMTT on domestic grounds may prove inefficient, as other countries under the Model Rules should in such cases impose the IIR and UTPR, leads to the necessity of verifying the potential consequences of imposing the IIR and UTPR under the principles of protecting acquired rights and legitimate expectations.

5. IIR and UTPR and protection of acquired rights and of legitimate expectations

While under the QDMTT challenging the infringement of the protection of acquired rights and legitimate expectations remains possible, it is much more difficult under the IIR and UTPR. This is because the IIR and UTPR generally lead to the collection of top-up tax in jurisdictions other than those where the ETR threshold is not met.

Generally speaking, the protection of acquired rights and legitimate expectations applies between the country that made the promise to its taxpayers and the taxpayers themselves. It seems quite reasonable to argue that a country may not be bound by promises made by different jurisdictions. Therefore, at least at the first glance, countries other than the one that made promises may collect top-up taxes from their residents freely, even if this tax is in fact intended to ensure that taxation in a low-tax jurisdiction meets the threshold imposed by the GloBE, contrary to the protection of acquired rights and legitimate expectations stemming from that jurisdiction's legal order.

In my view, however, the issue warrants more in-depth consideration because Pillar Two extends far beyond the standards of international legislation to which we are accustomed. Pillar Two represents the first international arrangement among countries aimed at introducing global tax. As already mentioned, while the Model Rules are not law *de jure*, they function as such *de facto*. They have been structured to ensure that the OECD/IF maintains full control over the application of these rules, resulting in taxes being imposed based on the interpretation of the OECD/IF. Outgoing OECD Tax Chief Executive Pascal Saint-Amans referred to this in 2022, speaking admirably of Pillar Two as possessing 'devilish logic,' while Claus Staringer of the Vienna University of Economics and Business described Pilar Two as 'diabolical engineering' (Manson, 2022, p. 1391). The emergence of this new type of international law should prompt us to examine thoroughly how to safeguard fundamental rights. This is particularly important as Pillar Two poses threats not only to the protection of acquired rights and legitimate expectations but also to other fundamental legal principles, such as the rule of law, legal certainty, and the right to an effective remedy (De Wilde, 2024; Haslehner, 2023, p. 636, together with the authors cited there; Kondej, 2025). It also raises concerns around the compliance with the EU primary and secondary law (Brokelind, 2021, pp. 218–219; Nogueira, 2020, pp. 495–496), international tax law and tax treaties (amongst other: Chand, 2021; De Wilde, 2022; Debelva, 2022; Dourado, 2022, pp. 388–395; Soong, 2024; VanderWolk, 2022; see, however: Masuda; 2024; OECD 2020, pp. 173–177). Therefore, it is crucial to ensure that no 'devilish' logic is allowed to undermine fundamental rights, as their protections must remain steadfast and uncompromised, even in the face of new complex international arrangements.

Keeping this in mind, it needs to be recognized that Pillar Two departs from the traditional entity-to-entity treatment and instead views the multinational enterprise (MNE) group as a whole. The general idea behind top-up tax collection methods (IIR/UTPR) is clear: the specific country or entity from which the tax is collected is irrelevant, as long as the MNE group ultimately pays the top-up tax. The IIR and UTPR are merely methods for collecting tax that is due based on the activities of entities in low-tax-jurisdictions other than the actual taxpayer (Brauner, 2023, p. 270). This raises the question of whether we should also consider the protection of acquired rights on a group basis rather than an entity-to-entity basis if Pillar Two adopts a group-level approach to taxation. Although this seems reasonable, finding legal grounds for such an approach is not an easy task. However, the fact that the doctrine of the protection of acquired rights and legitimate expectations is a commonly recognized fundamental legal principle provides grounds to ask at least two questions:

(1) Can countries, even if they did not participate in making assurances to the taxpayer, freely enact legislation aimed at depriving the taxpayer of assurances made by another country?
(2) Can the country that granted rights freely, without consequences, participate in and support the adoption of a global minimum tax regime that may lead to denial of benefits promises to taxpayers?

I will begin by examining the first question within a cross-EU context. As already mentioned, the CJEU recognizes the protection of acquired rights and legitimate expectations as stemming from the primary law. Based on the established CJEU jurisprudence, prospective changes in legislation should take into account the need for the protection of legitimate expectations (CJEU, 2004, para. 82). An individual cannot rely on there being no legislative amendment whatsoever but can question the arrangements for the way of implementation of such an amendment. The legislature should take into account the particular situations of traders and provide, where appropriate, adaptations to the application of the new legal rules (CJEU, 2005, para. 81; CJEU, 2009, para. 70).

Based on Article 4 of the Treaty on the European Union, the Union and its Member States are obliged to mutual loyalty (see also: Roest, 2023). This means not only that Member States should respect the European Union interest but also vice versa. To my mind, this indicates that the Council Directive (EU) 2022/2523 of 14 December 2022, aimed at ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the European Union, should have taken into account the promises made by countries prior to its implementation. This is particularly important given that regimes providing such promises were common within the EU (see, amongst others: OECD, 2022, pp. 14–15). Particularly more than 50% of EU countries provided incentives in form of tax holidays and 40% of them have used preferential tax rates (OECD, 2022, p. 15).

The EU legislation should also respect international obligations that its Member States have, including those in investment treaties. The obligation to respect these obligations is clearly reflected in the intertemporal provisions of Article 351 of the Treaty on functioning of the European Union, which does not suspend international obligations contrary to EU Treaties, but only requires Member States to renegotiate such obligations. If the Treaty underscores the need to respect the international obligations of a Member State, then the secondary legislation should adhere to this principle even more closely.

Therefore, in my opinion, if the IIR or the UTPR is applied within the EU under the Directive in a way that infringes upon the rights or legitimate expectations granted to a multinational enterprise group by an EU Member State, recourse to the CJEU should remain possible. Should the court find that Pillar Two infringes upon the protection of acquired rights and legitimate expectations, it could provide national courts with a basis to shield the MNE group from such infringements. Alternatively, although far less likely, the court might determine that the aspects of Pillar Two legislation which infringe upon those rights are inconsistent with EU primary law, and as a result, could annul those provisions.

In the context of relations between states outside the European Union, to my mind asserting Pillar Two infringes on the protection of acquired rights and legitimate expectations present considerable challenges. As already mentioned, it is clear that one state is not legally obliged by the commitments of other countries. However, if the imposition of a top-up tax in a particular jurisdiction results solely from a multinational enterprise group successfully contesting the QDMTT in other countries, this may prompt concerns under legal principles like fairness and proportionality. In addition, as mentioned earlier, Pillar Two departs from the traditional entity-to-entity approach and instead treats the MNE group as a whole. This creates room to argue that, from a domestic perspective, when considering the applicability of top-up tax a jurisdiction should take into account not only the promises it has made but also any other commitments made worldwide.

While this factor alone might not be sufficient to convince a court, it could support efforts to challenge the IIR and UTPR under non-compliance with tax treaties and the customary international tax law. Nonetheless, this would necessitate initiating disputes in each jurisdiction where the multinational enterprise group is active and the IIR or UTPR is applicable (Avi-Yonah, 2024, p. 880). This highlights the 'devilish logic' of Pillar Two, which leads to significant obstacles to challenging its effects.

This brings me to my second question: Can the MNE group, instead of contesting the IIR and the UTPR in each country, seek compensation from the country that made a promise, if that country supported Pillar Two in the OECD/Inclusive Framework or supported the adoption of the Pillar Two Directive in the EU? It is generally reasonable to argue that if a country made promises to the taxpayer, thereby giving rise to the protection of legitimate expectations, it should refrain from taking any action that could undermine those promises. The country's support for the implementation of Pillar Two, without demanding the inclusion of intertemporal rules to account for promises made, may be seen as contravening this obligation.

This situation can be more clearly illustrated with a simpler example, where two countries have made promises to an MNE group operating within their jurisdictions, yet they collude to evade these commitments by agreeing that the other country will impose taxes on the taxpayers of the other and then transfer obtained funds to the other country. Such an agreement, made in bad faith would clearly give rise to the responsibility of each agreeing state for breaching their promises. In the context of Pillar Two this scenario is more complex, as the framework is said to be implemented with good intentions, making it challenging to demonstrate bad faith. However, the example underscores that a country's responsibility for participating in an arrangement leading to the denial of fundamental rights should not be overlooked.

Consequently, one might consider whether the country, under the principle of protection of acquired rights and legitimate expectations, should not only be prohibited from collecting the top-up tax but also, if it supported the implementation of Pillar Two, be obliged to provide compensation for any damage caused by the global implementation of Pillar Two. Theoretically, this could entail an obligation for the country to compensate the MNE group for any top-up tax collected abroad, with such a compensation grossed-up to account for any taxes due on that compensation. However, such a claim would be a purely domestic issue, and its feasibility may vary between countries. In many jurisdictions, a country is liable for damage caused by its unlawful activities. However, to receive compensation, often the causal relationship between the cause (support for Pillar Two implementation) and the effect (collection of top-up tax by other countries) needs to be established. While it might be apparent that Pillar Two would not have been implemented without widespread international support, proving that the support of a country that made promises directly caused the collection of top-up tax in other countries could be difficult, especially since the Model Rules are not a legally binding act. In this context, proving a causal relationship would be much easier within the EU, where unanimous Council consent was necessary to adopt the Pillar Two Directive. The EU's adoption of Pillar Two has provided significant momentum for its global implementation. Therefore, it could be argued that the approval of each EU country was essential for imposing the taxation within the EU. An objection by any EU Member State would have resulted in Pillar Two not being implemented within the community.

Still the above consideration leads to the conclusion that the Pilar Two Model Rules are indeed acts of "diabolical engineering". The absence of intertemporal rules to protect legitimate expectations raises significant questions under fundamental legal principles. However, identifying an effective avenue to address these issues remains challenging.

This concern leads to another issue with the Pillar Two regime: it does not guarantee the right to an effective remedy. Since the Pillar Two Model Rules are implemented domestically and applied formally independently by each country, and given the UTPR principle allowing any uncollected top-up tax to be collected in another jurisdiction, domestic courts control becomes ineffective. It is striking that Pillar Two, as the first global-level tax intended for coherent application across countries, lacks regulations ensuring independent oversight over countries and the OECD IF interpretation of the Model Rules. This essentially positions the OECD IF not only as the *de facto* legislator but also leaves its interpretations virtually indisputable, as even if one country chooses not to adhere to them, others will likely collect tax under the UTPR. The question whether the OECD IF possesses sufficient democratic legitimacy and transparency to hold such a role is a matter that needs to be addressed separately. Still, emergence of a new type of international legislation, symbolized by the Pillar Two Model Rules, necessitates a reevaluation of how to ensure that fundamental rights continue to be protected.

6. Conclusion: potential infringement of protection of acquired rights and legitimate expectations as a blow to OECD legitimacy

In summary, while the exact scope of protection for acquired rights and legitimate expectations may vary between legal systems, the foundational principles appear to be common. Although a country may change its laws, any legal change should consider the need to protect pending interests. This is particularly important if the government has made promises to entities based on which they have made long-term decisions. In such cases, breaking these promises is likely to infringe upon the protection of acquired rights and legitimate expectations.

The Pillar Two Model Rules provide important safeguards against infringements of acquired rights and legitimate expectations. These safeguards primarily include the recognition of pre-

GloBE deferred tax assets and the substance-based carve-out, which may limit the risk of infringements. However, these mechanisms appear insufficient to protect fully taxpayers who were promised tax incentives before the introduction of Pillar Two. The risk of infringement is particularly probable in situations where an investor was promised incentives based on future investments, and those investments are partially completed while Pillar Two is already in place. In such cases, the top-up tax may render the future incentives ineffective. Meanwhile, an investor who has already commenced an investment may not be in a position to halt it.

The limitations of Pillar Two safeguards for acquired rights, as detailed previously, extend beyond mere insufficiency. The OECD IF has engineered mechanisms that appear to undermine deliberately the protection of acquired rights and legitimate expectations. The concept of the *QDMTT payable* illustrates this pointedly. When a Qualified Domestic Minimum Top-up Tax is challenged on the basis of pre-existing agreements like tax stabilization treaties or investment contracts, its non-creditable status under the IIR and UTPR compels effectively other states to collect the top-up tax. This essentially renders moot any legal victory secured by a taxpayer against one state, as another will simply take its place as the enforcing entity. This not only removes a potential avenue for redress but also indicates a clear intent by the OECD IF to prioritize the imposition of the global minimum tax over respecting previously granted promises.

The stark contrast between the OECD's stated commitment to tax certainty and the risk of eroding acquired rights and legitimate expectations through these regulations is quite striking. This discrepancy raises serious questions about the legitimacy and long-term sustainability of a global tax regime that allows for the circumvention of these fundamental legal principles.

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