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GloBE Rules and Legal Certainty: When Fiscal Policies Replace Legal Principles

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This contribution aims to evaluate how Pillar Two rules comply with the requirements of the principle of legal certainty. Legal certainty works as a principle that should guide the interpretation and application of the law. Regardless of the extreme positions that deny legal certainty (American realism), the literature stresses that legal certainty requires that the rights and obligations of the citizens must be secured by law in a predictable legal environment. Since some uncertainty is inevitable in our legal systems, recourse to legal principles is crucial to guarantee a predictable legal environment and reduce the margin of indeterminacy that every legal system produces. In complex regulatory scenarios, legal principles fit better than rules to create legal certainty due to the need to be flexible and responsive to economic, social, technical, and cultural changes. Yet, the GloBE Rules respond to fiscal policy goals rather than legal principles. The GloBE Rules are unlikely to be assessed in the light of legal principles like proportionality, prevention of anti-abuse behaviours, etc. Only linguistic interpretation in combination with fiscal goals are the hermeneutic tools of legal interpreters. Hence, the judge will be confronted with interpreting divergent policy goals, thereby jeopardizing a coherent and uniform application of Pillar Two by domestic courts. Legal certainty is sacrificed for the sake of achieving policy goals.

Keywords: GloBE Rules, Pillar Two, legal certainty, hermeneutics, fiscal policies, legal principles

JEL Classification: K34

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1. Introduction

The 2021 agreement among 139 jurisdictions on a two-pillar solution is a tremendous achievement in the ongoing evolution of the international tax regime (OECD/G20 Inclusive Framework on BEPS, 2021). The two-pillar solution encompasses Pillar One (allocation of residual profit in the context of digitalized business models) and Pillar

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Two (15% minimum tax), which contains the Global Base Erosion Rules (the GloBE Rules) together with a treaty-based Subject to Tax Rule (STTR). The GloBE Rules are two interlocking top-up tax rules: (i) the Income Inclusion Rule (IIR), and (ii) the Undertaxed Profit Rule (UTPR) which operates as a backup rule for the IIR. In addition, the OECD/G20 BEPS Inclusive Framework introduced the Qualified Domestic Minimum Top-up Taxes (QDMTT), which operate as a domestic equivalent to an IIR (further guidance in the GloBE Rules: OECD/G20 BEPS Inclusive Framework, 2023).

Almost three years later, the enthusiasm and success of the two-pillar solution seems to be diluted. Not only are there clear uncertainties regarding the implementation of Pillar One, but also Pillar Two brings enormous complexity, does not achieve the desired stability, leaves the existing problems of international taxation in place, breaches the ability to pay, menace legal certainty, the principle of legality and the foreseeability of taxes (Brauner, 2023; Dourado, 2023; Haslehner, 2023; Kuzniacki, Visser, 2024; Martín Jiménez, 2021). As Collier and Vella put it, "*Pillar Two is a last-ditch attempt at saving a source-based tax system centred around the separate entity approach and the arm's length principle*" (Collier, Vella, 2024, p. 26). Despite the previous criticisms, the soft law of the GloBE Rules is being implemented by the states, for example, at the EU level, the *Pillar Two Directive* (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).

The fact that the OECD/G20 BEPS Inclusive Framework has provided two rounds of Commentaries to the GloBE Rules on February and July 2023 (i.e. both rounds of administrative guidance are consolidated in 2024) shows that there are still important open issues to discuss and solve (OECD/G20 BEPS Inclusive Framework, 2024). In discussing the national implementation of the GloBE Rules, some commentators already stress that national law-making cannot match the fast pace of the OECD's works (Grilli, Busia, Patti, 2024). That means that forthcoming rounds of commentaries on the GloBE Rules will likely make domestic rules obsolete, thereby triggering important divergences and interpretative conflicts.

Navigating this complex scenario requires enforcing tax certainty, which is one of the priorities of the OECD Forum on Tax Administration (OECD, 2024). As the OECD indicates, tax certainty benefits tax administration and taxpayers and thus promotes investments, jobs, and growth. In the need to enforce certainty in the implementation of Pillar Two, several authors have emphasized creating efficient dispute resolution mechanisms to solve the GloBE disputes and improve certainty (Danon, Gutmann, Maisto, Martín Jiménez, 2023). In this article, the approach is different, focusing on the mind of the adjudicator, i.e. the national judge in charge of solving interpretative conundrums regarding Pillar Two. The research question could be formulated as follows: How can the principle of legal certainty be reconciled with the GloBE Rules? In other words, does the principle of legal certainty offer guidance to the legal interpreter? This contribution argues that the principle of legal certainty in complex regulatory scenarios requires recourse to legal principles like proportionality, fairness, the prohibition of abuse of law, the principle of non-discrimination, the principle of effective judicial protection, etc. However, this was not the path followed by the OECD/G20 Inclusive Framework on BEPS, which designed a complex regulatory framework based on detailed technical rules to achieve two fiscal policy goals (i.e. putting a floor to tax competition and preventing profit shifting), which are not necessarily converging. As a result, this author argues that the combination of rules and fiscal policies (i) jeopardizes the application of general legal principles, (ii) triggers a high risk of judicial inconsistency among countries in solving juridical doubts/lacunae of the GloBE Rules, and (iii) breaches the principle of legal certainty.

To support the previous claim, the structure of the paper is as follows. Section 2 describes the potential legal uncertainties that a judge will face in applying the GloBE Rules. Section 3 deals with the meaning of the principle of legal certainty and its historical evolution. Today, the principle of legal certainty requires the protection of the citizen's legitimate expectations and guarantees the predictability of the legal framework. In Section 4 this author reflects on an important literature trend that supports that in complex regulatory frameworks legal principles rather than rules comply better with the legal certainty principle. Section 5 outlines the difficulties in extracting legal principles from the GloBE Rules, as well as the judges' problems in interpreting its fiscal policy goals.

2. Mapping the legal uncertainties that judges will face

It is a well-known fact that Pillar Two brings an extraordinary level of complexity to the international tax regime. In this section, based on a literature review, the author would like to briefly bundle the legal uncertainties that interpreters, especially judges, will face. The uncertainties arise in two areas: (i) interaction of the GloBE Rules with other blocks of norms and principles (accounting rules, tax treaties, principles of international taxation, investment law, and EU law); (ii) interpretation of key provisions of the GloBE Rules.

2.1. Compatibility of GloBE Rules with other legal norms, standards, and principles

The accounting standards, first and foremost the International Accounting Standards (IAS)/International Financial Reporting Standards (IFRS), constitute the starting point for applying the GloBE Rules (i.e. Art. 3 of the GloBE Model Rules, Art. 15 of the GloBE Directive). Instead of agreeing on the determination of a distinct and separate tax base, Book-Tax-Conformity (BTC), meaning that commercial accounts are authoritative for tax purposes, becomes the way forward for the OECD/G20 Inclusive Framework (Eberhartinger, 2024). The effective tax rate (ETR), adjusted covered taxes and GloBE income, the minimis exclusion, and substance carve-outs relate to individual financial statements. Conversely, the in-scope rule nexus (i.e. annual global revenue equal to or higher than EUR 750 million in at least two of the four preceding fiscal years) follows the consolidated financial statements.

A few problems may arise from the reliance on accounting standards to calculate the minimum tax (Eberhartinger, Winkle, 2023). Firstly, since accounting standards employed for individual and consolidated financial statements give an important leeway for discretion in multinationals (MNEs), managers have extraordinary flexibility in recognizing revenues and expenses under IAS to avoid being under the Pillar Two thresholds, i.e. EUR 750 million and 15% ETR. Judges would be confronted with a high degree of discretion in applying accounting standards in light of Pillar Two objectives. Secondly, Art. 10 of the GloBE Rules allows MNEs to use other acceptable accounting rules (i.e. Australian, UK, local statutory standards, and US GAAP), which could result in substantive differences with IAS. Thirdly, the GloBE Rules based on IAS/IFRS coexist with local models of computation based on traditional BTC to calculate the QDMTT, thereby leading to different computation models at stake (Baez Moreno, 2024, p. 9). As commentators have pointed out about US MNEs, the different accounting standards applicable in IP transfer transactions result in totally different GloBE implications (Yen, Chung, 2024). Fourthly, linguistic differences could arise in translating relevant accounting magnitudes for applying Pillar Two. The in-scope rule in Pillar Two Directive refers to "*annual revenue of EUR 750 000 000*" without defining the concept of annual revenue in Article 3 of the Directive. In Spain, the current legislative proposal implementing Pillar Two at the Spanish Parliament translates *annual revenue* as *importe neto de la cifra de negocios*, which is defined in the Spanish Accounting Plan (Royal Decree 1643/1990, 20 December 1990) under strict requirements: extraordinary income and subsidies are excluded, rappels and commercial discounts are deducted, etc. The reference to the *importe neto de la cifra de negocios* can make a group in-scope in Spain, and not in other EU countries, which apply a different definition of *annual revenue*.

A second source of legal conflicts will arise in the divergences between the GloBE rules and its domestic implementation. In the EU, the soft law materials produced at OECD/G20 BEPS Inclusive Framework coexist with the Pillar Two Directive. In the EU, the Pillar Two Directive substantially follows the OECD/G20 Inclusive Framework's Pillar Two materials (model rules and commentaries), but there are important divergences. Unlike Pillar Two Rules, the GloBE Directive requires the application of the IIR to the low-taxed constituent entity itself when it is located within the EU and the Intermediary Parent Entity (IPE)/Ultimate parent entity (UPE) are in a non-EU Member States that do not apply the IIR (Dietrich, Golden, 2022; Pantazotou, 2024, p. 313). As the commentator suggests, the broad scope of the IIR in the GloBE Directive would make the backstop nature of the UTPR even more remote. Section 5.2 comments on a particular divergence between the GloBE Rules and the Pillar Two Directive regarding the scope of the QDMTT. Precisely on this point, the legal design of the domestic minimum taxes, commentators foresee high room for uncertainty and discrepancy (Galendi, 2023; Noked, 2022). Two possibilities are given: either domestic minimum taxes resemble a QDMTT modeled after the GloBE rules, thereby ensuring the priority over IIR/UTP, or if not, they qualify as covered tax. Yet, the 2023 administrative guidance designed the QDMTT as a more restrictive top-up tax than IIR, which allows the home jurisdiction to collect tax revenue, and avoid the host country neutralizing the IIR (Galendi, 2023).

A third block of potential interpretative problems lies in the interplay between GloBE rules and double tax treaties. Although a detailed analysis of the frictions exceeds the scope of this contribution, this author would like to enumerate the potential conflicts: (i) a conflict with article 1 of the OECD Model Convention, which applies to single entities resident in one of the two contracting states, and the GloBE Rules applying to *MNE groups* (Bendlinger, 2023, p. 312): (ii) a conflict may arise if the IIR or UTPR adjusts profits to an amount exceeding the arm's length amount among associated enterprises under Article 9 of the OECD Model Convention (Chand, Turina, Romanovska, 2022); (iii) a potential incompatibility arises with Article 2(2) since the GloBE Rules can be classified as extraordinary taxes and thus excluded from the category of taxes on income or capital (Dourado, 2024, p. 301); (iv) a potential incompatibility arises with the non-discrimination clause in Article 24 of the OECD Model Convention since the top-up taxes fall on foreign entities or permanent establishments abroad, and are not extended to domestic groups (Dourado, 2024, p. 284). The compatibility of the GloBE Rules, especially the UTPR with treaties, yielded a fierce extensive academic debate between supporters and critics (Avi-Yonah, 2023a; Magalhaes, 2022). Not only do the controversial issues affect tax treaties, but also customary international law has been affected (Douma et al, 2023). A fourth block of conflict may arise with EU law principles, like the EU prohibition of abuse of rights, encapsulated in *Cadbury Schweppes* line of case law (CJEU, C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, 12 September 2006). Commentators examined potential conflicts since the Pillar Two Directive may go beyond the limitation of targeting *wholly artificial arrangements* as requested by the CJEU (Pantazatou, 2024). Finally, other fields of law, like investment law could also be affected by the GloBE Rules. Commentators have spotted important frictions between investment standards like Fair and Equitable Treatment, the umbrella clause, non-discrimination and non-expropriation and QDMTT (Avi-Yonah, 2023b; Kuzniacki, 2023; Kuzniacki, Visser, 2024).

2.2. Interpretation of key provisions of the GloBE Rules

As a mere illustration, this author has singled out several provisions in the GloBE Rules that yield a debate among commentators, namely (i) the treatment of the Controlled Foreign Company (CFC) under the GloBE Rules; (ii) the characterization of domestic tax incentives and (iii) the substance carve-out, well-known as the substance-based income exclusion (SBIE).

A special mention must be made to the CFC taxes and the GloBE Rules. The introduction of the *savings clause* in Article 1(3) of the OECD Model Convention (2017), which reserves a state's right to tax its residents under the rules provided in the domestic laws notwithstanding any provisions of the tax treaty, facilitated the application of the CFC in the treaty context. The GloBE Rules do not replace CFC legislation, although they are very similar (Hey, 2021). In calculating the country's ETR, the GloBE Rules take into account CFC taxes as covered taxes and allocate them to the jurisdiction where the income arises (Article 4.3 of the GloBE Model Rules). Under the special rule in Article 4.3.3. of the Model Rules, the amount of CFC taxes on passive income allocated to a CFC is limited to the lesser of the two factors set out below: a) the amount of CFC taxes attributable to the CFC's passive income, and b) the CFC jurisdiction's *top-up tax percentage* multiplied by the CFC's passive income that is taken into account in the CFC parent jurisdiction's regime. In Article 5.2.1., the top-up tax percentage equals 15% less the CFC jurisdiction's ETR (not taking into account CFC taxes treated as covered taxes). The legal discussion is on the concept of *passive income* (Article 10.1.1 of the Model Rules) since the application of the special rule has an impact on the calculation of the ETR either for the country in which the CFC is resident or for the country applying the CFC. As Arnold confirmed, "*all that matters is that the country applying CFC rules determines the character and amount of passive income of its CFCs properly in accordance with the Model Rule*s" (Arnold, 2023, Section 5). On the one hand, the Model Rules aim to be independent of the country domestic law, but on the other hand they inevitably depend on domestic law and relationships determined under domestic law. Such an interaction yields complexity and tension. The conflict may arise if one country considers that another country's CFC rules are within the scope of the Model Rules, whereas the other country may take the position that its domestic rules are not within the definition of a CFC tax regime in the Model Rules (Arnold, 2023, Section 7). This occurs for example in Brazil where the CFC legislation has a much broader scope than the GloBE Rules, thereby triggering overlaps, potential double taxation of profits and increased compliance burdens (Schoueri, Ferreira Liotti, 2024, p. 91). Similar concerns are raised regarding the lack of proper tuning between the CFC regime and the QDMTT in Belgium (Lamer, 2025). A QDMTT levied in the country of the foreign entity cannot be considered as income tax for Belgian CFC rules (low taxation).

Another legal issue highly discussed is the characterization of domestic tax incentives, namely the distinction between qualified refundable tax credits and non-qualified refundable tax credits (Article 3.2.4. and 10.1. of the Model Rules and para. 134 through 138 of the Commentary to the Model Rules). A qualified refundable tax credit is designed in a way so that credit becomes refundable as cash within four years from when the conditions under the laws of the jurisdiction granting the credit are met (para. 135 of the Commentary to the Model Rules). If so, the qualified refundable tax credit is treated as income for purposes of the GloBE Rules, which means the credit is taken into account in the denominator of the ETR computation and is not treated as reducing a Constituent Entity's taxes in the year the refund or credit is claimed (para. 134 of the Commentary to the Model Rules). Non-qualified refundable tax credits are excluded from income but treated as a reduction to Covered Taxes in the period the refund or credit is claimed, which means they reduce the numerator of the ETR computation. Since non-qualified tax incentives reduce covered taxes, the risk is that the constituent entity's ETR in its home country is below 15%. Commentators argued that the difference in treatment is not as clear in the accounting rules as the GloBE Rules intend, so further guidance needs to be provided on the refundability criteria (Arginelli, Reboli, 2024; Herzfeld, 2022; Tomassini, Da Rosa, 2023). In addition to the previous rules, in July 2023, para. 112.1 of the Commentary to Article 3.2.4. introduced a new category of tax credits that would receive the same treatment of qualified refundable tax credits if they meet the *legal transferability standard* and the *marketability standard* in the hands of the holder. Not only does defining the categories employed yield difficulties, but also the reliance on accounting standards (IAS 12 and IAS 20) seems strict and disproportionate, and contrary to a substance-based approach in defining tax incentives: "*Moreover, the less favorable treatment of certain tax credits based on "refundability" and "marketability" criteria disregards the nature of the tax incentive and fails to enhance its purpose, creating distinctions that appear irrational in the light of the object and purpose of the very same incentives. This penalizes tax policies aimed at stimulating substantial investments that can strengthen the economy of a country and undermines the previous OECD work (completed less than 10 years ago) on tax incentives, which was rooted on a substance-based approach)*" (Arginelli, Rebelli, 2024, pp. 87–88).

Finally, the SBIE may also cast doubts. Under Article 5.3.1 of the GloBE Rules, the net GloBE income for the jurisdiction is reduced by the SBIE to compute the top-up tax. Notice that the SBIE does not affect the calculation of the ETR, but rather the amount of the payable top-up tax. The SBIE is the sum of the payroll carve-out and the tangible asset carve-out for each Constituent Entity. The calculation of the SBIE adopts a formulaic approach, basically 5% of Eligible Payroll Costs of Eligible Employees that perform activities for the MNE Group in such a jurisdiction and 5% of the carrying value of Eligible Tangible Assets located in such a jurisdiction (investment property excluded). The policy rationale of the SBIE is to exclude a fixed return for substantive activities to focus on the excess income derived from intangible-related income more susceptible to BEPS challenges (OECD/G20 BEPS Inclusive Framework, 2020, p. 15). Although the two components of the carve-out are explained in Article 10.1 of the Globe Rules, commentators have underlined the high discretion of the managers to apply the accounting standards in calculating the SBIE (Eberhartinger, Winkler, 2023), as well as certain doubts in interpreting eligible payroll costs and tangible assets (Rizzo, Das, 2024). In the literature, many authors have questioned the consistency of policy outcomes followed in designing the SBIE. Firstly, it seems that it does not follow value creation in BEPS Action 5 since the 5% is a very low threshold considering that investing in technology requires hiring well-remunerated researchers and expensive tangible assets (Schoueri, 2021). Secondly, it incentivizes less efficient businesses over more efficient ones, since the higher a business's return on payroll and assets is, the more likely it will be subject to a top-up tax (Bendlinger, 2023, p. 296). Thirdly, the combination of the SBIE and QDMTT creates incentives to decrease the CIT tax level far below 15% (Bammens, Bettens, 2023; Devereux, Vella, Wardell-Burrus, 2022).

3. What do we expect from legal certainty?

Although most scholars rooted legal certainty in the nineteenth-century German *Rechtsstaat* or the French *État de droit*, Van Meerbeeck convincingly argued that the principle of legal certainty appeared much earlier, namely the 17th century, under two conflicting logics: (i) the Cartesian, and (ii) the fiduciary (Van Meerbeeck, 2016, p. 277). Under the Cartesian logic (Descartes, Galileo, Newton, Grotius and Leibniz), the predictability of the legal system is a core feature of the system that supports the rational belief that legal consequences automatically follow legal causes. Reducing judges to *the mouth of the law* in Montesquieu encapsulates this Cartesian logic. On the contrary, the fiduciary logic (Locke, Adam Smith) introduced a notion of trust that people vest in the authorities and that they must respect. The law must be clear because citizens must know their rights, freedoms, and duties, and be safe and secure within the limits of the law (Van Meerbeeck, 2016, p. 277). The fiduciary dimension of legal certainty is to some extent present in Gribnau's notion of personal freedom as the intrinsic value of legal certainty (Gribnau, 2013). Taxes offer an excellent example of this fiduciary logic. Since taxation interferes with the right to property and economic freedoms, taxpayers want to be sure about the legal consequences of their dealings, so they can plan in advance and choose the optimal alternatives to pay the least possible amount of taxes (Gribnau, 2013, p. 80). The lack of certainty does not secure the taxpayer's personal freedom.

The Cartesian logic prevailed in the German *Rechtsstaat* and the French *État de droit* (Van Meerbeeck, 2016, p. 279–283). The codification in this period exhibited a strong belief that laws must have the precision of scientific laws and neutral mathematical language. The fiduciary logic disappeared from the legal thinking (Van Meerbeeck, 2016, p. 279). The Cartesian logic of legal certainty crumbled under Heisenberg's principle of uncertainty together with the irruption of irrationalism in philosophy (Nietzsche) and Popper's concept of science as falsification. The tendency to deny legal certainty ended with the US realist scholars. They stressed that legal certainty does not exist and mutated to *legal indeterminacy*, meaning that the law is always indefinite and never certain. Any decision is legally justifiable in any case, and the law is nothing more than politics by another name (Kress, 1989; Maxeiner, 2006; Maxeiner, 2007). The radical US legal indeterminacy makes legal certainty be perceived as infantile longing: "*It is a childhood myth that one gets over, just as one gets over one's belief in Santa Claus or in the Wizard of OZ*"(Maxeiner, 2007, p. 544).

Regardless of the philosophical underpinnings of legal certainty, positive law has extensively dealt with legal certainty, which can be understood in several ways. Legal certainty traditionally demanded the law be sufficiently clear to provide those subject to legal norms with the means to regulate their conduct, predict future behaviours, and protect them against the arbitrary exercise of public power (Fenwick, Wrbka, 2016). Private law scholars like Canaris or Bydlinski divide legal certainty into narrower concepts like legal clarity, legal stability, legal accessibility, legal peace, and legal enforcement (see further bibliographical references to German literature in Wrbka, 2016). In administrative law, for example, legal certainty requires that the decisions of the administration must be clear, accessible, understandable, and without any retroactive effects (Backes, Eliantonio, 2014, pp. 212–213).

Unlike in the US, Europeans do not accept *legal indeterminacy* easily. Firstly, European Constitutions make an explicit recognition of the legal certainty principle. In Spain, article 9 of the Spanish Constitution refers to the *seguridad jurídica*. In other European countries, legal certainty is translated as *sécurité juridique* in France, *rechtssicherheit* in Germany, and *certezza del diritto* in Italy. Secondly, under the auspices of the Council of Europe, in 2016 the Venice Commission elaborated the Rule of Law Checklist, which included a definition of legal certainty based on: (i) accessibility of legislation and court decisions; (ii) foreseeability of the laws (laws must be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it); (iii) stability and consistency; (iv) legitimate expectations; (v) non-retroactivity; (vi) "*nullum crimen sine lege and nulla poena sine lege principles*"; (vii) res judicata (final judgments must be respected) (Venice Commission, 2016). Thirdly, legal certainty is an EU general principle (Tridimas, 2006), which frequently appears quoted in approximately 3,778 judgments of the European Court of Justice (CJEU). The CJEU stated that the principle of legal certainty required: "*that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly*" (CJEU, C-528/08, *European Commission vs. UK*, 15 July 2010, para. 49; C-345/06, *Heinrich*, 10 March 2009, para. 44). The CJEU applies the legal certainty principle together with the principle of legitimate expectations to avoid the application of retroactive legislation: "*It argues that that interpretation is consistent with the principles of legal certainty and the protection of legitimate expectations, which preclude substan-*

tive rules of EU law from being applied retroactively to legal relationships established before the entry into force of those rules, unless it is clear from their wording, objectives or scheme that such an effect must be attributed to them" (CJEU, C-439/23, *KV*, 19 September 2024, para. 22).

Currently, no one would defend an absolute legal certainty principle that reduces the law to a neutral mathematical exercise under Cartesian logic. Such logic yields the stagnation of the law: immobilize the past to secure the future (Gribnau, 2013, p. 83; Van Meerbeeck, 2016, p. 288). The law must be flexible and responsive to economic, social, technical, and cultural changes, modifications in behaviour, needs and interests and changing values and norms (Fenwick, Wrbka, 2016; Gribnau, 2013). As Gribnau pointed out, '*in making clear the legal consequences of these changes, the law provides legal certainty*" (Gribnau, 2013, p. 83). In other words, the fiduciary logic on legal certainty should prevail to enhance the trust of citizens in the *trias politica*. Their rights and freedoms should be secured by law. The creation, application, and adjudication of legal norms should protect their legitimate expectations, and guarantee the predictability of the legal framework. In investment law, for example, the fair and equitable principle (FET) ensures the predictability of the legislation by the host country and the protection of the legitimate expectations (Kuzniacki, Van Weeghel, 2025).

Since some uncertainty is inevitable, the most difficult task is to strike the right balance between the need for clear legal rules in a predictable legal system, and the margin of indeterminacy that every legal system produces. In doing so, the next Section elaborates on the role of principles as the proper instruments to deliver legal certainty, especially in the field of taxes.

4. More principles and fewer rules to achieve legal certainty in tax matters

As a reaction to the complexity of our tax systems, tax scholars have defended the recourse to principles to achieve less detailed legislation and more legal certainty (Avery-Jones, 1996; Freedman, 2010; Gribnau, Dussarduijn, 2018). The literature distinguishes between principle-based legislation and rule-based legislation. Such a distinction traces back to the differences between rules and principles enshrined by Ronald Dworkin's hallmark book *Taking Rights Seriously*. Avery-Jones summarizes it as follows: "*The distinction is that rules are applicable in an all-or-nothing fashion, whereas principles are not. Principles can have exceptions; can conflict with one another; can, for example, apply only when conduct is reasonable; and they can give one guidance about how to deal with the points not expressly covered by the law. Rules do not conflict with each other (if they do, one of them must give and become a subsidiary rule). Principles do not conflict with rules. If a rule is clear, the rule applies and that is the end of it, even though it is an exception to the principle and therefore in conflict with it. But the real use for the principle is to determine what the rule means in the first place (and hopefully to reduce the amount of detail required in stating the rule), in which case there is no conflict*" (Avery-Jones, 1996, p. 75).

Empirical research aims to answer the question: what are the conditions in which rules will deliver us more legal certainty and what are the conditions in which principles will do so? (Braithwaite, 2002). When the type of action is simple, stable, and does not involve huge economic interests, rules regulate with greater certainty than principles; on the contrary, complex actions in changing environments would require principles (Braithwaite, 2002, pp. 52–53). In complex terrains like taxation, economic, social, and technological changes not only can it make rules obsolete but also detailed rules invite the taxpayer to search for gaps (Braithwaite, 2002, p. 55; Freedman, 2010, p. 735). An example thereof is the fight against abusive schemes. The General Anti-Avoidance Rule (GAAR) is a principle, albeit codified in the tax code, to fight against abusive schemes that cannot be closed down with Specific Anti-Avoidance Provisions (SAARs). GAARs operate as a default rule to strike down artificial schemes targeted to obtain a tax advantage that defeats the object and purpose of the law. As suggested by Braithwaite, "*tax laws can be written by setting down binding principles, then detailed rules to illustrate how the principles should be applied to perhaps a dozen common concrete commercial arrangements. If there are 1000 rare ways of setting up the kinds of arrangements covered by the law, but only a dozen are used with any frequency then these are the 12 concrete arrangements that should be fleshed out into rules*" (Braithwaite, 2002, p. 80). An appropriate mix of principles and rules should be the regulatory approach in complex legal domains like taxation.

Despite the empirical evidence on the preferred use of principles to regulate complex phenomena better, states enact more and more rules to plug loopholes and rely less and less on principles. The legislator engages in a "*cat-and-mouse legal drafting culture – of loophole closing and reopening by creative compliance*" (Braithwaite, 2002, p. 57). As Avery-Jones put it, the pursuit of certainty through more and more detailed legislation hoping to answer every question does not necessarily work (Avery-Jones, 1996, p. 65). Vann, who named this phenomenon *tax rule madness*, found the root of this problem in the common law legal culture (Vann, 1995, p. 222). Since the common law method focuses on specific cases rather than general principles, the legislator is prompted to elaborate detailed legislation aiming to clarify the rights and obligations of the taxpayers to limit the courts' discretion in adjudicating cases. Courts are thus constrained to literally interpret and apply the language in which the statute is drafted by the Parliament (semantic interpretation), thereby excluding teleological or systematic methods of interpretation. By giving less and less leeway to judges, the legal system shows a profound suspicion that judges cannot be trusted (Avery-Jones, 1996, p. 69).

The previous literature underscores the need for less detailed legislation construed by principles. But what do we mean by principles? Some authors (Gribnau, Dussarduijn, 2018) adopt a Dworkinian perspective to include a dimension of morality within the definition of principles (justice and fairness). Other authors distinguish purposive interpretation and principles (Freedman, 2010, pp. 722–723). While they usually go hand in hand, a legislative purpose beyond the literal meaning of the statute can be found in a variety of places (i.e. the preamble of the law, the *travaux preparatoires*, *etc*). Purposive interpretation of the statute does not always link to the application of principles.

The recognition and identification of legal principles is still an area subject to fierce controversy among legal philosophers. In defining principles, this author is inclined to a much narrower definition of legal principles more in line with Avery-Jones and Freedman's work than the one suggested by Gribnau and Dussarduijn, who introduce morality into tax law (Dworkin's approach). Either the principles are external to the statute, and likely codified in upper norms like the Constitution, or they can be inferred from the whole legal system. Principles, as non-conclusive norms, must guide the interpretation of conclusive rules (Toubes Muñiz, 1997, p. 273). This idea is also present in Alexy, who qualifies legal principles as *optimization commands* in opposition to rules that are *definitive commands*, which can only be either complied with or not (Alexy, 2000). Principles must guide the interpretation of particular statute provisions to support a consistent and systematic interpretation of the whole legal system. Yet, principles can contradict each other, the solution lies in an exercise of balancing and the application of the principle of proportionality, as interpreted by constitutional courts (Alexy, 2000). In taxation, the recurrent legal principles are neutrality (applicable in Value Added Tax – VAT), the prohibition of abuse of law, the principle of non-discrimination, the principle of effective judicial protection, etc.

The CJEU has mastered the application of principles to EU tax law under systematic and teleological methods of interpretation (Lenaerts, Gutiérrez-Fons, 2013). Although an in-depth analysis of the methods of interpretation in EU law and its extensive literature exceeds the scope of this contribution, a few examples extracted from the case law of the CJEU show that principles are crucial for filling lacunae, solving doubts regarding the semantic interpretation of the legislation (EU primary or secondary law) and giving consistency to EU law. In *Halifax*, (CJEU, C-255/02, *Halifax and others*, 21 February 2006, para. 69–70), the CJEU concluded that despite no anti-abuse provision being laid down in the VAT Directive, "*the application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law*". In interpreting VAT, the CJEU constantly applies the principle of neutrality as a way to overcome the semantic interpretation of the directive (CJEU, C-90/16, *The English Bridge Union*, 26 October 2017; CJEU, C-243/23, *Drebers*, 12 September 2024).

5. Navigating uncertainties in Pillar Two

5.1. Fiscal policies rather than legal principles

Commentators almost unanimously stress the lack of univocal aim in the GloBE Rules (Collier, Vella, 2024; Englisch, 2022; Haslehner, 2023). In analyzing the Pillar Two initial proposal in 2018, it is not clear whether the low effective tax rates applied by multiple jurisdictions created either a problem of profit shifting or tax competition: "*Profit shifting is normally regarded as involving the fight against the artificial diversion of profits away where they are properly to be regarded as generated (or where 'value is created' in the terms of the language of the BEPS project). Tax competition, on the other hand, is a broader concept, usually taken to refer to competition between states based on tax rates and base to attract any activity, including real business activities*" (Collier, Vella, 2024, pp. 7–8). The focus of the BEPS project (i.e. BEPS Action 5) in line with previous OECD works (OECD, 1998) was to eliminate unfair or harmful tax competition, but not all competition based on economic substance. Such an unexpected shift deviating from the OECD's traditional narrow goal of tackling harmful tax competition caused much perplexity in early commentators of Pillar Two (Nogueira et al., 2020). In reaffirming the profit-shifting nature of Pillar Two, some commentators admitted that the GloBE IIR is a CFC with a substance-based carve-out (Hey, 2021). If the exclusive goal of Pillar Two were to fight against profit-shifting practices, amending CFC rules would have been much simpler. However, this was not the case. In other words, Pillar Two is not simply a 'Super-CFC'. In early documents of Pillar Two, a twofold rationale emerges: on the one hand, tackling the risks of profit-shifting, and on the other stopping the race to the bottom (Nogueira et al, 2020).

Despite this initial twofold nature, Collier and Vella observed that there was an important evolution in the drafting of the policy objectives in the Pillar Two subsequent documents (Collier, Vella, 2024, pp. 12–15):

(i) The Public Consultation document released in February 2019 referred to both objectives: profit shifting and stopping a harmful race to the bottom, which undermines the tax sovereignty of the states and risks the delivery of public goods (OECD/G20 Inclusive Framework on BEPS, 2019);

(ii) The 2020 documents like the Pillar Two Blueprint introduced a new formulation to focus on multinationals paying a minimum level of tax, rather than countries not competing or engaging in a race to the bottom (OECD/G20 Inclusive Framework on BEPS, 2020). Yet, ensuring that multinationals pay a minimum tax does not automatically create floor-to-tax competition (English, 2022; Devereux, Vella, Wardell-Burrus, 2022).

(iii) The possibility for source countries to collect any eventual minimum tax themselves through a QDMTT implies a floor to international tax competition (Collier, Vella, 2024, p. 14; Englisch, 2022, p. 873).

In the GloBE Rules and Commentaries, two goals coexist. Firstly, the profit-shifting goal aims to combat tax planning schemes using low-tax jurisdictions. Some authors formulate this goal as a minimum tax on *excess profit* exceeding the substance-based carve-out (Bendlinger, 2023, p. 306; Englisch, 2022, p. 873; Sehra, Tiwari, 2023). Secondly, the goal of reducing excessive tax competition was not fully endorsed by all the members of the OECD/G20 Inclusive Framework on BEPS (Englisch, 2022). Therein lies the limited role played by the QDMTT to set a floor to tax competition. Whilst below 15% ETR the source countries can collect the minimum tax through a QDMTT, above 15% ETR it is still possible to compete (Englisch, 2022, p. 872). Countries may still compete to attract businesses due to the SBIE and the creation of incentives that target substance-based low-margin business activities together with the jurisdictional blending. Tax competition is only partially countered with Pillar Two. Some authors (Kuzniacki, Visser, 2024) have rephrased the previous two goals in a slightly different way under the umbrella of tax competition. Pillar Two aims to create a double barrier against tax competition: one barrier blocks tax planning preventing profit-shifting, and the other barrier pressures states to levy at least 15% ETR.

The GloBE Rules do not reference the goal of eliminating aggressive tax planning practices of multinationals. Indeed, there is no explicit mention of the artificial diversion of multinationals in the GloBE Rules and Commentaries. It seems that Pillar Two rules apply in a rather automatic manner when certain quantitative thresholds are met, no matter if multinationals are performing real economic activity. Hence, across the GloBE Rules, there are only mentions of avoidance/abuse by escaping to the top-up liability: (i) 1.1.3 and 1.5 of the GloBE Rules (paragraph 12 of the Commentaries to Rule 1.1) enable excluded entities to qualify as a group entity for purposes of determining the revenue threshold to the extent its income is consolidated with the rest of the group; (ii) paragraph (e) of 4.1.3. of the GloBE Rules (paragraph 17 of the Commentaries) states a reduction of the covered taxes to calculate the ETR if the constituent entity does not intend to pay the tax within three years of the last day of the fiscal year. Such a temporary threshold of three years prevents a constituent entity from asserting that it does not intend to pay the tax in a year where the constituent entity is well over the minimum rate, and then subsequently paying the tax liability in a year in which it is below the minimum rate; (iii) 9.1.2 of the GloBE Rules (paragraph 118.49 of the Commentaries) is an anti-abuse rule to prevent a taxpayer from triggering tax losses that would be excluded from the GloBE base in a pre-GloBE year and then carrying the deferred tax benefit of such loss carry-forward into the GloBE regime; (iv) 9.3.1. in combination with 9.3.5 of the GloBE Rules (paragraphs 27-28 of the Commentaries) prevents a multinational from placing an ultimate parent entity in a non-GloBE jurisdiction on the initial phase of the international activity (transition rules). These scattered references to abuse/avoidance show that the tax planning opportunities are linked to escape from Pillar Two scope.

Assuming the twofold nature of Pillar Two, profit shifting and curbing tax competition (albeit partially), one may wonder how these policy goals will influence the legal interpreter's task. As discussed by Freedman, this author distinguishes purposive interpretation from resorting to legal principles.

5.1.1. Teleological/purposive interpretation

Regarding the teleological/purposive interpretation of Pillar Two, the challenge for the judge consists of assessing fiscal policies in judicial adjudication. In the author's view, the creation of a minimum tax on excess profit exceeding the substance-based carve-out, i.e. the profit-shifting goal, is the prevailing goal of Pillar Two. Putting pressure on states to levy the QDMMT (i.e. the second barrier to tax competition in Kuzniacki and Visser's contribution) is not the primary focus of the GloBE Rules. Firstly, if states refrain from levying the QDMTT, another jurisdiction steps in and taxes it. Secondly, Pillar Two not only does not limit tax competition but even promotes it by reducing the nominal CIT to zero at least for profits covered within the SIBIE (Devereux, Vella, Wardell-Burrus, 2022). Thirdly, the statistical predictions published by the EU Tax Observatory confirm that profit-shifting will decrease (Soong, 2025). Yet, the OECD/G20 Inclusive Framework on BEPS neither clarifies the aims of Pillar Two nor introduces a hierarchy of goals.

This goal of profit-shifting is highlighted by Wilkie, "*The unique force in Pillar Two is fiscal. Tax law is an enabler of fiscal policy, not the end in itself, and not the other way around*" (Wilkie, 2023, p. 503). Pillar Two has a fiscal objective, which is to mitigate the outflow of industrial activity from residence countries where multinationals reside to lower tax jurisdictions. Strikingly in Pillar Two, fiscal policy aiming to prevent profit shifting is an enabler of tax law or even the policy end in itself. On the contrary, we are used to witnessing the other way around with regulatory taxes. In the literature there has been a clear distinction between *pure taxes*, namely taxes implemented to raise revenue for the government to pay for public services and public infrastructure, and *regulatory taxes* (tax expenditures), taxes whose main purpose is not to raise revenue but rather to correct market failures, promote/disincentivize and reduce negative externalities (Avi-Yonah, 2011). An example of regulatory taxes is environmental taxes, which are designed to tax a behaviour that damages and pollutes the planet. Under the principle "*those who pollute must pay higher taxes to compensate for the damage*", the primary goal of an environmental tax is to prevent behaviours jeopardizing our environment and to compensate for the damage caused by unfriendly environmental actions. An environmental tax is an instrument of a particular fiscal policy that aims to prevent the pollution of the planet and mitigate climate change.

Conversely, to prevent profit-shifting and to limit tax competition, a tax law was enacted. In other words, the drafting of Pillar Two cannot be considered instrumental to achieve any particular goal, but rather the policy itself. That important assertion drives the interpreter into the unknown territory of applying fiscal policies to interpret legal provisions. Although one may argue that the profit-shifting goal prevails over the goal of limiting tax competition, the OECD/G20 Inclusive Framework on BEPS has not clarified whether there is a hierarchy between different concurrent goals. As the examples in Section 5(2) show, the interpreter could arrive at different interpretations depending on the weight given to the goals.

5.1.2. Legal principles

Regarding the existence of legal principles that may guide the interpreter in dealing with Pillar Two, the GloBE Rules do not mention them. Under the Pillar Two framework, only accounting principles are mentioned. No references are made to legal principles like ability-to-pay, neutrality, prevention of the abuse of law, non-discrimination, etc. which are recurrent in tax law. Despite not being mentioned, legal principles can be inferred from the whole legal system. Some commentators have argued that the GloBE Rules infringe legal principles like equality and ability-to-pay, which have constitutional recognition (Dourado, 2023; Schoueri, Ferreira Liotti, 2024). Due to the hierarchy of legal sources and the prevailing role of the Constitution over other legal sources, the potential conflicts should be solved by the constitutional courts and eventually will result in the expulsion of the norms contrary to the Constitution. As such, the GloBE Rules do not present any peculiarity since their implementation in domestic law must respect the hierarchy of legal sources laid down in the domestic Constitution.

Aside from the previous issues of incompatibility, the relevant question for this contribution is whether legal principles may complement/guide the interpretation of conclusive GloBE Rules. Judges are used to balancing legal principles under a proportionality analysis. This analysis is well-known in applying fundamental rights. Alexy refers to a balancing exercise to determine the priority of rights regarding the collision of principles (Alexy, 2000). On the question of whether a trial must be suspended in the case that the accused person is in danger of suffering a heart attack owning to the stress of the trial, the basic right has greater weight and takes priority over the principle of a functioning system of criminal justice (Alexy, 2000, p. 296).

In Pillar Two, it is hardly difficult to imagine how legal principles that inform our tax system may play a role in guiding/complementing the interpretation of the GloBE Rules. For example, the principle that prevents the abuse of the law cannot be applied regarding the Pillar Two in-scope rules. Since accounting standards give a broad margin of discretion in recognizing revenues and expenses, multinationals can easily circumvent the Pillar Two thresholds. Provided that the accounting rules are correctly applied, this author does not see sufficient reasons to resort to the GAAR. The legal principle of proportionality, which in EU law and fundamental rights plays a crucial balancing role, is not relevant in the calculation of the ETR or the qualification of refundable tax credits. In other words, the *rule-madness* of the GloBE Rules thwarts the recourse of legal principles that may guide the interpreter. The adjudicator exclusively relies on the wording of the GloBE Rules to enforce two policy goals: preventing profit shifting together with putting a minimum floor to tax competition.

How do policy goals influence the interpreter's legal reasoning when no legal principles are at stake? There is a body of literature on the interplay between policy and principles in private law, namely in common-law countries. In this discipline, whilst policy depends on the interest of the community in improving its economic, political, and social features, principles rely on the interest of the individual before the court to enforce fairness and protect their rights (Plunkett, 2016, pp. 371–372). The mainstream literature has predominantly stressed that: (i) the principle-based produces a more coherent and unified body of private law than the policy-based approach; (ii) the policy-based approach requires judges to point out community welfare, therefore balancing 'incommensurables'; (ii) judges are not qualified to rely on policy-based considerations due to the lack of political legitimacy and in doing so, violate the rule of law. Since policy-based reasoning is subject to criticism in private law, some authors adopt a pluralist position that gives priority to arguments based on principles without ignoring arguments based on policy (Plunkett, 2016).

Regardless of a detailed analysis of these criticisms in the area of private law, which exceeds the scope of this contribution, the GloBE Rules exacerbate the role of policy-based considerations (prevention of profit shifting and to a lesser extent setting a floor for tax competition) beyond legal principles, which is quite unknown in our field. Interpreting the GloBE Rules in light of policy goals puts the judge in the position to decide which legal interpretation matches policy goals better. As the next Section shows, such policy-based reasoning may yield divergent outcomes depending on how policy goals are weighed and balanced.

5.2. Some examples of legal consequences derived from policy-based reasoning in Pillar Two

The commentators narrow down the role of the legal interpreter to the semantic/linguistic interpretation of the GloBE Rules (Collier, Vella, 2024, p. 15; Haslehner, 2023, p. 636). The *rule-madness* trend in Pillar Two gives a false impression that only rules will solve all the potential interpretative conflicts. This is not true. As stated in Sections 3 and 4, this author argues that legal principles bring more certainty to complex environments like taxation and align legal certainty with the predictability of legal outcomes. The lack of legal principles will be translated into a broad margin of maneuver at the hands of the judges to go beyond the literal wording rules in applying the fiscal policy goals resulting from Pillar Two. In this Section, this author selects a few uncertainties already signaled by commentators, to illustrate how judges will be confronted with the policy goals of the GloBE Rules. In doing so, important divergences between judges coming from different jurisdictions may arise.

5.2.1. QDMTT: interplay of the GloBE Rules with the Pillar Two Directive

The GloBE Rules produced in the OECD/G20 OECD/G20 Inclusive Framework on BEPS are the soft law. As stated, there will be frequent problems of compatibility between the soft law and the domestic implementation of Pillar Two. Commentators (Hrdlicka, 2024, p. 612) have detected some discrepancies between the Pillar Two Directive and the GloBE Model Rules about the QDMTT, since the Directive was enforced before the second round of comments to the GloBE Rules in July 2023. Consequently, the domestic minimum tax (DMTT) in the Directive is not equivalent to the QDMTT in the GloBE Rules approved by the OECD/G20 after the second round of comments. If so, it cannot be qualified as a top-up tax to be credited against the IIR and UTPR. Hrdlicka applied teleological interpretation to permit interpreting the Directive under Pillar Two soft law to solve this discrepancy. He gave several arguments to overturn the literal wording of the Directive based on its Preamble and the political statement of the Council of the European Union that declared the compatibility of the two rounds of Comments to the GloBE Rules with the Pillar Two Directive (Council of the European Union, 2023). Firstly, both the Preamble and political statement reflect the goal of the EU to implement Pillar Two in line with the GloBE Rules. Secondly, applying the Directive in light of the soft law will result in higher taxation for EU Member States.

This reasoning presents several problems. The main obstacle comes from the difficulties in replacing the wording of the EU secondary law with soft law, which is even not produced within the EU. The hierarchy of norms in the EU law cannot be easily sidestepped to go beyond the literal wording of the secondary law. Such an approach would undermine the autonomy of the EU legal order heralded by the CJEU in many Opinions (i.e. Opinion 2/13, EU Accession to the ECHR, 18 December 2014). In addition, one of the most controversial issues regarding the EU Commission's Proposal for a Council Directive on Transfer Pricing is the incorporation of the OECD Transfer Pricing Guidelines into the European Union law. In the author's view, such an attempt will jeopardize the EU's autonomous legal order by transforming the OECD's soft law into the binding EU law.

There is an additional problem to justify the recourse to teleological interpretation. Such a hermeneutic technique requires that the legislation has clear goals that can be induced. The references in the Preamble of the Pillar Two Directive (recitals 2 and 3) reproduce the well-known goals of the GloBE Rules, which consist of "*putting a floor to tax competition*" and "*putting an end to tax practices of MNEs that allow them to shift profits to jurisdictions where they are subject to no or very low taxation*", as well as showing the commitment of the EU to support the OECD/G20 Inclusive Framework on BEPS. Recital 33 stresses the need for a common approach to preventing the fragmentation of the internal market. Recital 6 imposes the duty upon the Member States to implement the OECD Model Rules agreed by the Member States in a way that remains as close to the global agreement as possible. The political statement of the Council of the European Union on the compatibility between the two rounds of comments and the Pillar Two Directive, as Hrdlicka recognizes, is not true.

In the author's view, the recitals of the Directive and the statement of the Council of the European Union show a political commitment to align the Pillar Two Directive to the GloBE Rules. Is the purpose of the Pillar Two Directive that EU Member States collect more taxes, so the DMTT must be interpreted in line with the QDMTT in the GloBE Rules? One may argue that the QDMTT is a defensive rule to safeguard/shield tax revenue within an overall complex top-up liability under the IIR and UTPR. If the DMTT in the Pillar Two Directive is not qualified as the QDMMT, other jurisdictions will tax the excess profit of constituent entities in the EU with CFC rules or the IIR/UTPR. The non-qualified domestic top-up tax is covered tax but cannot be credited in the GloBE Rules.

The weight that the judge will allocate to the policy goals of Pillar Two will be decisive in solving the potential conflict between the GloBE Rules and the Pillar Two Directive. Two possible contradictory solutions may arise. If the DMTT in Pillar Two Directive aims to put a floor to tax competition (15%) as a policy goal, it may be possible to argue a *contra legem* interpretation of the DMTT in the Pillar Two Directive to match the GloBE Rules. However, if the prevailing goal is the prevention of profit shifting to low-tax jurisdictions, EU countries can maintain the non-qualified DMTT in the Directive and increase their covered taxes (i.e. corporate income tax), so the duty will be ultimately equal to 15% effective tax rate under the Pillar Two tax base (Hrdlicka, 2024, p. 604). In this scenario, there is no need to overturn the literal wording of the Directive to embrace the GloBE Rules. The Pillar Two Directive does not pursue that Member States collect more taxes. The top-up liability chain in Pillar Two makes other states tax what other states do not tax ("*I'll tax if you don't*" – As De Wilde and Wisman put it (De Wilde, Wisman, 2019)). This example shows the difficulties of having policy goals rather than legal principles to interpret the GloBE Rules. The judge must assess which legal interpretation matches the policy goals better.

5.2.2. Qualified refundable tax credits and *no benefit requirement*

As discussed in Section 2, qualified refundable tax credits (10.1. of the GloBE Rules) receive favourable treatment since they are included in GloBE income or loss (denominator of the fraction to calculate the ETR). The Administrative Guidance of July 2023 granted the same treatment to *marketable transferable tax credits* (rule 109.1 of the Commentaries to Article 3.2.4 of the GloBE Rules). In paragraphs 112.1–114.1 of the Commentaries to the GloBE Rules, the meaning of marketable transferable tax credit requires to meet two standards: (i) legal transferability standard; (ii) marketability standard. Conversely, non-qualified refundable tax credits and non-marketable transferable tax credits reduce the covered taxes in the numerator of the fraction to calculate Pillar Two, thereby increasing the risks of falling below 15% ETR. Policymakers need to assess their incentives to prevent being washed out by the the GloBE Rules (Theophilou, Loucaidou, 2024).

To be competitive in the aftermath of the implementation of Pillar Two, some countries like Singapore and Vietnam announced to compensate multinationals with direct investments in the country by granting subsidies, which will be qualified refundable tax credits (Den Ridder et al., 2023; Sullivan, 2024). This is the case of Singapore refundable investment credit that lists a wide range of qualifying expenditures (capital expenditure, professional fees, materials, and consumables, etc.) in which companies can receive up to 50% of refund of costs (Sullivan, 2024, p. 996). Such refundable tax credits aim to compensate the entire burden of the QDMTT imposed by Singapore.

To prevent this outcome, there is a specific provision in the GloBE Rules. Article 10.1. of the GloBE Rules concerning the implementation of the QDMTT states that jurisdictions cannot provide any benefits that are related to such rules (the so-called *no benefit requirement*, NBR). The effect of this NBR is the denial of the QDMTT. Commentators are unclear on interpreting the causality link in the NBR, i.e. what are the circumstances that would push the benefits over the line into disqualification because they 'are related' to the QDMTT? (Den Ridder et al., 2023, p. 4; Kuzniacki, Visser, 2024; Sullivan 2024, p. 995) Do 'benefits' include incentives, subsidies or grants, or advantages? De Ridder et al. propose two possible interpretations (Den Ridder et al., 2023, p. 6; Sullivan, 2024, p. 996). Under a more narrow meaning, the phrase 'related to' is understood as a very strict, direct, and explicit relationship between the benefit provided and the top-up tax collected, for instance, some explicit language connecting the two in the relevant legislation. Under a more extensive interpretation, the phrase 'related to' requires a loose relationship between the incentive and the top-up tax (i.e. a benefit is enacted in legislation after the QDMTT was enacted, and the benefit computed without reference to the QDMTT can be related to the QDMTT and therefore disqualifying). Sullivan conveyed a pessimistic view on both interpretations (Sullivan, 2024, p. 996). While the strict interpretation is easy to circumvent by the country, the extensive interpretation precludes all benefits (refundable tax credit, accelerated depreciation, etc.). Kuzniacki and Visser make a parallelism between this ambiguity in interpreting NBR (the broad economic-factual versus narrow legal approach) and the concept of beneficial ownership.

In the Commentaries to Article 10 of the GloBE Rules (definitions) about the qualified IIR (paragraphs 123–127), OECD/G20 BEPS Inclusive Framework adopts a broad interpretation of incentives to "…*cover any kind of advantage provided by a jurisdiction, including tax incentives, grants, and subsidies and the phrase "related to such rules" is intentionally drafted with broad language to take into account different mechanisms through which the benefit is provided*". Paragraph 124 stated: "…*it provides a tax credit equivalent to a portion of the tax paid under the IIR to be used against other taxes. In this case, the jurisdiction has not adopted a Qualified IIR*". Although this interpretation is not connected expressly to the QDMTT, it gives the impression that "related to" must be interpreted in quantitative terms: an equivalent quantity granted by the tax credit and the QDMTT.

As Sullivan shows in this example below (Sullivan, 2024, p. 998), the Singaporean refundable tax credit seems to be a good economic policy in line with economic substance. There is no indication of a harmful tax practice. Likewise, Pillar Two allows for refundable tax credits. However, the fact that the credit granted amounted to roughly the taxes levied under the QDMTT may violate the NBR, and thus automatically disqualify the QDMTT.

	Singapore
Taxable base	100
ETR (5%)	5
QDMTT (10%)	10
Capital expenditure and employee compensation	140
Refundable tax credit (7%)	9.8

Source: own work.

The interpretation of the NBR demonstrates again the difficulties of going beyond the linguistic interpretation of the provisions of Pillar Two, as well as the problems of relying on rules rather than legal principles. Shall we interpret the NBR in quantitative terms in support of a broad interpretation? Shall we narrow down the interpretation of the NBR to require an explicit relationship between the benefit and the QDMTT? Equally to the example in Section 5.2.1., the judges are the ones to re-interpret the fiscal policies behind Pillar Two to shed light on certain provisions like the NBR. The outcome could be contradictory. If one argues that the policy goal of the QDMTT is to put a floor to tax competition at 15%, a narrow interpretation of the NBR could be defended. Only in case there is an explicit connection between the benefit and the QDMTT, the NBR would apply. The narrow interpretation protects the states levying their QDMTT. Conversely, a broad interpretation matches better Pillar Two's goal of preventing profit-shifting. Applying broadly the NBR means the disqualification of the QDMTT and ensuring that 'someone else' will tax the excess profit under an IIR or UTPR.

6. Conclusion

This contribution aims to evaluate the principle of legal certainty in light of the GloBE Rules. Legal certainty works as a principle that should guide the interpretation and application of the law. Regardless of the extreme positions that deny legal certainty (American realism), the literature stresses that legal certainty requires that the rights and obligations of citizens must be secured by law in a predictable legal environment. In other words, the legislator needs to make clear the legal consequences of the law. Since some uncertainty is inevitable in our legal systems, recourse to legal principles is crucial to guarantee a predictable legal environment and reduce the margin of indeterminacy that every legal system produces. Legal principles must guide and complement the interpretation of rules, as stated in this contribution.

In complex regulatory scenarios, the literature stresses that legal principles fit better than rules to create legal certainty due to the need to be flexible and responsive to economic, social, technical, and cultural changes. Yet, the GloBE Rules do not adhere to this logic. Under a *rule-madness* scenario (two rounds of the Comments to the GloBE Rules so far), the wrong assumption is that more rules will bring certainty.

The OECD/G20 BEPS Inclusive Framework adheres to a Cartesian logic of legal certainty rather than a more contemporary fiduciary dimension of the principle of legal certainty. The GloBE Rules curtail the recourse to legal principles such as proportionality, prevention of abuse, etc. that can guide the interpreter. Whilst instrumental tax legislation aims to achieve certain goals (i.e. protection of the environment), Pillar Two is the instrument itself. Hence, the GloBE Rules: (i) compel the interpreter to rely exclusively on the linguistic interpretation of the provisions and, (ii) put excessive weight on adjusting fiscal policy goals, which are not easy to reconcile. Putting a floor to tax competition and preventing profit shifting are policy goals that can lead to different interpretative solutions, as the examples in Section 5(2) show. Judges are thus confronted with the need to re-calibrate divergent fiscal policy goals to overcome the interpretative linguistic lacunae Pillar Two triggers (i.e. NBR). A uniform interpretation of the GloBE Rules by domestic judges seems utopian despite the non-stop proliferation of the Commentaries to the rules.

In conclusion, the *rule-madness* in Pillar Two fails to comply with the basic understanding of the principle of legal certainty, as presented in Section 3. It is not clear how Pillar Two provisions are going to be interpreted by different judges since this hermeneutic exercise will depend on the weight given by the adjudicator to the different policy goals. If so, taxpayers cannot predict future behaviours based on the GloBE Rules and they are not sufficiently protected against an arbitrary exercise of public power. The heavy reliance on policy goals in Pillar Two introduces important tensions in the interface of tax law and politics. Legal certainty is sacrificed to achieve specific policy goals. Is it worth doing it?

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