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Not Taxed, But Affected

Does the POPE Rule in the Pillar 2 Directive Restrict the Free Movement of Capital for Cross-Border Minority Owners?

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Contents

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Abstract

This thesis examines whether the partially owned parent entity (POPE) rule in the Directive (EU) 2022/2523 (P2D) creates a restriction on the free movement of capital under Article 63 TFEU, and if so, whether that restriction be justified and regarded as proportionate under EU law.

The POPE rule forms part of the EU implementation of Pillar Two, which aims to ensure a global minimum level of taxation for large multinational groups. Under Article 8 P2D, a POPE located in the EU may be required to pay income inclusion rule top-up tax where part of its ownership interests are held by persons outside the group. The thesis uses a legal dogmatic method and analyses the P2D in light of EU primary law, mainly Article 63 TFEU and the case law of the CJEU on restrictions, justification and proportionality.

The thesis concludes that the POPE rule may create a restriction on the free movement of capital. Although the rule is triggered by outside ownership rather than residence, outside minority shareholders may still be economically affected when the POPE pays top-up tax, for example through lower dividends or reduced share value.

The thesis further concludes that such a restriction can be justified in principle. The strongest justification is the balanced allocation of taxing rights within the Pillar Two system. The POPE rule is likely suitable, but its necessity and strict proportionality are less clear, especially where outside minority shareholders are not taxed directly but still be economically affected by the rule. Overall, the rule would probably be regarded as proportionate if the CJEU gives weight to the EU legislator's broad discretion, but it is less clearly proportionate if greater weight is given to the position of outside minority shareholders.

Keywords: Tax Law, Pillar Two Directive, Partially Owned Parent Entity, Income Inclusion Rule, Free Movement of Capital, Cross-Border Minority Investment, Restriction, Proportionality

Abbreviations

CFC	Controlled foreign company
CJEU	Court of Justice of the European Union
EU	European Union
GloBE	Global Anti-Base Erosion
IIR	Income inclusion rule
MNE	Multinational enterprise
OECD	Organisation for Economic Co-operation and Development
P2D	Pillar Two Directive
POPE	Partially owned parent entity
QDMTT	Qualified domestic minimum top-up tax
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UPE	Ultimate parent entity
UTPR	Undertaxed profits rule

1 Introduction

1.1 Background

Pillar Two was introduced to make sure that large multinational enterprise (MNE) groups pay a minimum level of tax.[1] In the European Union (EU), these rules were implemented through Directive (EU) 2022/2523 (hereinafter, Pillar Two Directive (P2D)).[2] The system is intended to reduce the incentive to shift profits to low-tax jurisdictions and to ensure that low-taxed income is brought within the scope of minimum taxation.[3] Under the P2D, this is done through a top-up tax, which is charged when the effective tax rate in a jurisdiction is below the minimum rate of 15 percent.[4]

In a normal case, top-up tax is collected at the level of the parent company.[5] However, the system becomes more complex when a parent entity is not fully owned by the group itself. The P2D contains special rules for a partially owned parent entity (POPE). If more than 20 percent of the ownership interest, in such an entity, is held by persons outside the group, special rules may apply.[6] In that case, the entity itself has to pay top-up tax under the income inclusion rule (IIR).[7]

This creates an interesting legal problem. The outside minority shareholders are not directly taxed under the P2D. Still, they may be affected in economic terms if the company in which they invest has to bear top-up tax. If that happens, the burden may indirectly be reflected in lower profits, lower dividends, or a lower value of the investment. The issue is therefore not only who is formally taxed under the P2D, but also who in practice bears the economic burden of the rule.

This may make cross-border minority investment less attractive. If minority investors outside the group are placed at a disadvantage because the POPE rule reduces the attractiveness of such investments, the rule may affect cross-border capital movements within the meaning of Article 63 of the Treaty on the Functioning of the European Union (TFEU).[8] Therefore, the POPE rule raises a broader EU law question about whether a rule, which is aimed at securing minimum taxation, may also restrict the free movement of capital.

[1] OECD, 'Global Anti-Base Erosion Model Rules (Pillar Two)' < https://www.oecd.org/en/topics/sub-issues/global-minimum-tax/global-anti-base-erosion-model-rules-pillar-two.html > accessed 30 March 2026.

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

[3] ibid, recital 2.

[4] ibid, arts 3(15), 3(16) and 27.

[5] ibid, arts 1(1)(a) and 5(1).

[6] ibid, art 3(22).

[7] ibid, art 8.

[8] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47, art 63. (Hereinafter, Treaty on the Functioning of the European Union [2016])

1.2 Purpose and research questions

The purpose of this thesis is to examine whether the POPE rule in the P2D may create a restriction on the free movement of capital under Article 63 TFEU. If such a restriction is established, the thesis further examines whether it may be justified and regarded as proportionate under EU law.

To fulfil the purpose, the thesis addresses the following research questions: Does the POPE rule in the P2D create a restriction on the free movement of capital under Article 63 TFEU, and if so, can that restriction be justified and regarded as proportionate under EU law?

1.3 Delimitations

The following delimitations apply to this thesis. First, although cross-border shareholdings may raise issues under both the freedom of establishment in Article 49 TFEU and the free movement of capital in Article 63 TFEU, the analysis is limited to the free movement of capital.[9] The POPE rule applies where more than 20 percent of the ownership interest in a parent entity is held, directly or indirectly, by persons outside the group.[10] That threshold does not by itself determine which fundamental freedom is applicable. According to the Court of Justice of the European Union (CJEU), the distinction between Article 49 and Article 63 TFEU depends on the purpose of the measure and on whether the shareholding gives the shareholder definite influence over the company's decisions and allows it to determine its activities.[11] In this thesis, it is assumed that the minority shareholdings fall below the threshold for definite influence and therefore fall within the scope of Article 63 TFEU, rather than Article 49 TFEU.[12] There may, however, be situations in which an individual shareholder falls within the scope of the freedom of establishment. This thesis does not examine those situations.

This delimitation is particularly relevant where the outside minority shareholder is resident in a third country, since Article 63 TFEU applies to capital movements between Member States and third countries, whereas Article 49 TFEU does not. For intra-EU situations, the outcome of the justification and proportionality analysis may often be similar under both freedoms.

Second, this thesis does not examine the legal status of later European Commission materials or later Organisation for Economic Co-operation and Development (OECD) guidance in the interpretation of the P2D. Recital 24 of the P2D states that the OECD Global Anti-Base Erosion (GloBE) Model Rules, the Commentary, the Administrative Guidance and the Safe Harbours may be used as a source of illustration or interpretation in order to ensure consistency, but only to the extent that those sources are in line with the P2D and with EU law.[13] The question whether, and

[9] Treaty on the Functioning of the European Union [2016], arts 49 and 63.

[10] Council Directive (EU) 2022/2523, art 3(22).

[11] Case C-35/11 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, The Commissioners for Her Majesty's Revenue & Customs* [2012] ECLI:EU:C:2012:707, paras 90-92.

[12] Treaty on the Functioning of the European Union [2016], arts 49 and 63.

[13] Council Directive (EU) 2022/2523, recital 24.

to what extent, later materials may influence the interpretation of the P2D is left outside the scope of this thesis.

1.4 Method and materials

1.4.1 Legal dogmatic method

The thesis applies a legal dogmatic method in order to analyse whether the POPE rule in the P2D is compatible with Article 63 TFEU. This method is understood as an analysis of the law as it currently stands, based on recognised legal sources. It involves identifying the relevant sources of law and then interpreting, analysing and systematising them in relation to each other.[14] Legal dogmatic research therefore aims to explain the principles, rules and concepts governing a particular legal field, and to analyse their relationship in order to address uncertainties in the existing law.[15] The analysis starts from EU primary law, EU secondary law and case law from the CJEU. The most important legal sources are the P2D, especially Articles 3, 8 and 9, Articles 63 and 65 TFEU, and relevant case law on the free movement of capital and restrictions.

The interpretation relies on textual, systematic and teleological interpretation. A textual interpretation is used to examine the wording of the relevant provisions, in particular the definition of a POPE and the rules on top-up tax allocation. A systematic interpretation is used to place those rules in their wider legal context, especially the relationship between EU primary law and EU secondary law. A teleological interpretation is used to examine the purpose of the rules, both in the P2D and in the Treaty provisions on free movement of capital. This combination of methods is appropriate in an EU tax law context, because the meaning of a rule often depends on both its wording and its role in the EU legal system.

1.4.2 Selection of material

The selection of material is based on the research questions and on the hierarchy of legal sources. For that reason, the thesis mainly relies on the P2D, the TFEU and case law from the CJEU. Since the thesis examines a rule in EU secondary law in the light of EU primary law, these materials form the core of the analysis.

The search process relied on legal databases and official sources. Academic articles were searched for primarily in the IBFD database, Intertax on Wolters Kluwer, and Tax Notes International, using search terms such as “partially owned parent entity” and combinations of “Pillar Two Directive” and “free movement of capital”. Case law was searched for mainly in CURIA, using search terms such as “Article 63 TFEU”, “restriction”, “justification”, “proportionate” and “Council Directive (EU) 2022/2523”. The case law search was then narrowed by prioritising cases that were closest to the research question, especially cases concerning direct taxation, cross-

[14] Sjoerd Douma, *Legal research in international and EU tax law* (Wolters Kluwer 2014) 20.

[15] Jan M Smits, ‘What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research’ (2015) *Maastricht European Private Law Institute Working Paper No 2015/06*.

border investment, shareholdings or dividends, Article 63 restriction analysis, and economic disadvantage for the investor even where the investor was not the formal taxpayer. A case law matrix was also used in order to structure and compare the selected cases on issues such as the tax rule at issue, the cross-border disadvantage, the restriction analysis, possible justifications, proportionality and the relevance of each case for this thesis.

The material was selected with a focus on relevance to the research question. Case law was selected primarily on the basis of its relevance to Article 63 TFEU, cross-border shareholdings, minority investments, restriction analysis, comparability, justification and proportionality. Academic literature was selected mainly from recent scholarly articles dealing with Pillar Two, EU law and the fundamental freedoms. Such literature is used to explain the broader legal context, identify various arguments in the debate and support the analysis where the legal position is not fully clear. Academic literature on the OECD Pillar Two framework and the GloBE rules is not treated as binding EU legal sources, but as doctrinal support when analysing the POPE rule.

1.5 Outline

This thesis is divided into seven chapters. Chapter 1 presents the background, the purpose and research question, the delimitations, and the method and materials. Chapter 2 explains the relationship between EU primary law and EU secondary law and sets out the legal framework for the later analysis. Chapter 3 then presents the POPE rule under the P2D, including its definition, the calculation of top-up tax, and its possible effect on minority shareholders. Chapter 4 outlines the free movement of capital under Article 63 TFEU. Chapter 5 examines whether the POPE rule may constitute a restriction on the free movement of capital. Chapter 6 then considers whether such a restriction may be justified and whether it satisfies the requirement of proportionality. Finally, Chapter 7 presents the conclusion.

2 Relationship between EU primary law and EU secondary law

EU law is divided into primary law and secondary law.[16] Before examining the POPE rule itself, it is necessary to explain the basic structure of EU law, including the relationship between EU primary law and EU secondary law. This distinction is central to this thesis because the examined rule is found in the P2D, secondary law, whereas the legal standard against which it must be assessed is laid down in the TFEU, in particular Article 63, primary law.[17]

EU primary law forms the foundation of the EU legal order and includes the Treaty on European Union (TEU), the TFEU, the Charter of Fundamental Rights of the EU and the general principles of EU law.[18] In addition, the EU may conclude international agreements with third countries or international organisations.[19] In this thesis, however, the most important source of primary law is Article 63 TFEU on the free movement of capital.[20]

EU secondary law, on the other hand, consists of legal acts adopted by the EU institutions on the basis of the Treaties.[21] Article 288 TFEU distinguishes between regulations, directives, decisions, recommendations and opinions.[22] Regulations, directives and decisions are binding legal acts, whereas recommendations and opinions are not binding.[23] In this thesis, the most important source of secondary law is the P2D, which was adopted on the basis of Article 115 TFEU.[24]

The relationship between primary law and secondary law is, in principle, hierarchical. Secondary law is adopted on the basis of the Treaties and must therefore remain in line with EU primary law.[25] This follows both from the structure of EU law and from the case law of the CJEU on primacy.[26] A directive cannot override the Treaties or the fundamental freedoms laid down in them.[27] The fact that a rule is included in a directive does not therefore prevent it from being reviewed in the light

[16] European Commission, 'Types of EU law' < https://commission.europa.eu/law/law-making-process/types-eu-law_en#secondary-law-legislative-acts > accessed 15 April 2026.

[17] Council Directive (EU) 2022/2523; Treaty on the Functioning of the European Union [2016], art 63.

[18] Consolidated Version of the Treaty on European Union [2016] OJ C 202/13 (Hereinafter, Treaty on European Union [2016]); Treaty on the Functioning of the European Union [2016]; Charter of Fundamental Rights of the European Union [2016] OJ C 202/389; European Commission, 'Types of EU law' < https://commission.europa.eu/law/law-making-process/types-eu-law_en#secondary-law-legislative-acts > accessed 15 April 2026.

[19] Treaty on the Functioning of the European Union [2016], art 216.

[20] ibid, art 63.

[21] ibid, art 288.

[22] ibid.

[23] ibid.

[24] Council Directive (EU) 2022/2523, preamble; Treaty on the Functioning of the European Union [2016], art 115.

[25] Treaty on the Functioning of the European Union [2016], art 288.

[26] ibid, art 263.

[27] Case C-6/64 *Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66, 594.

of the Treaties.[28] For that reason, the P2D is not treated in this thesis as a self-contained set of rules.[29] The POPE rule in the P2D is part of EU secondary law, but it must also be examined in light of Article 63 TFEU as a rule of EU primary law.[30]

It is also important to keep in mind how a directive works in practice. Under Article 288 TFEU, a directive is binding as to the result to be achieved but leaves to the national authorities the choice of form and methods.[31] A directive therefore has to be transposed into national law.[32] In the case of the P2D, Member States had to adopt the necessary laws, regulations and administrative provisions by 31 December 2023.[33] Once those national measures have been adopted, they too must comply with EU primary law.[34]

Furthermore, there are Pillar Two materials that are not part of the EU legal sources. OECD materials, such as the GloBE Model Rules, the Commentary, the Administrative Guidance, and the Safe Harbours, are not binding EU law in themselves.[35] However, recital 24 of the P2D states that OECD materials may be used as a source of illustration or interpretation in order to ensure consistency, but only to the extent that they are in line with the P2D and with EU law.[36] OECD materials, therefore, stand outside the binding hierarchy and can therefore only have a supporting role.

Thus, EU secondary law must remain within the limits set by EU primary law. This means that the POPE rule in the P2D must be examined not only under the directive, but also in light of Article 63 TFEU.

[28] Treaty on the Functioning of the European Union [2016], art 263.
[29] Council Directive (EU) 2022/2523.
[30] Council Directive (EU) 2022/2523, arts 3(22), 8 and 9; Treaty on the Functioning of the European Union [2016], art 63.
[31] Treaty on the Functioning of the European Union [2016], art 288.
[32] ibid.
[33] Council Directive (EU) 2022/2523, art 56.
[34] Case C-6/64 *Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66, 594.
[35] Council Directive (EU) 2022/2523, recital 24.
[36] ibid.

3 The POPE rule under the P2D

3.1 Definition

The P2D applies to constituent entities located in a Member State that are members of an MNE group or a large-scale domestic group with annual revenue of EUR 750 million or more in at least two of the four fiscal years immediately preceding the tested fiscal year.[37] This means that the P2D does not apply to all companies. It only applies to entities that are part of a group that meets this revenue threshold.

The concept of constituent entity is then defined in Article 3(2) P2D.[38] A constituent entity means any entity that is part of an MNE group or a large-scale domestic group.[39] It also includes any permanent establishment of a main entity that is part of such an MNE group.[40]

A POPE is a constituent entity that owns, directly or indirectly, an ownership interest in another constituent entity of the same MNE group or large-scale domestic group, where more than 20 percent of the ownership interest in its profits is held, directly or indirectly, by one or more persons that are not constituent entities of that group.[41] The entity must also not qualify as an ultimate parent entity (UPE), a permanent establishment or an investment entity.[42] An UPE is, in simple terms, the top entity in the group that owns a controlling interest in another entity and is not itself owned by another entity with a controlling interest.[43]

Accordingly, an entity can only be a POPE if it is a constituent entity within the scope of the P2D. If the group does not meet the EUR 750 million revenue threshold, or if the entity is not part of an MNE group or a large-scale domestic group, the P2D does not apply and the entity cannot qualify as a POPE under the P2D.

Article 3(23) P2D states that an ownership interest means any equity interest that carries rights to the profits, capital or reserves of an entity or of a permanent establishment.[44] Two points follow from this definition. First, the 20 percent threshold relates to the ownership interest in the profits of the parent entity, not to voting rights or legal title in a broad sense. Second, the rule is triggered by ownership outside the group. It is therefore aimed at situations in which part of the profit rights in a parent entity are held by persons who are not constituent entities of the same group.

[37] Council Directive (EU) 2022/2523, art 2(1).
[38] ibid, art 3(2).
[39] ibid.
[40] ibid.
[41] ibid, art 3(22).
[42] ibid.
[43] ibid, art 3(14).
[44] ibid, art 3(23).

In the following example, Company X owns 100 percent of Company Y. Both Company X and Company Y are constituent entities of the same MNE group. Suppose further that 25 percent of the profit rights in Company X are held by outside investors, while 75 percent are held within the group. In this situation, Company X is a POPE under Article 3(22) P2D.[45] This is because Company X owns an interest in another constituent entity of the same group and more than 20 percent of the profit rights in Company X are held by persons outside the group.

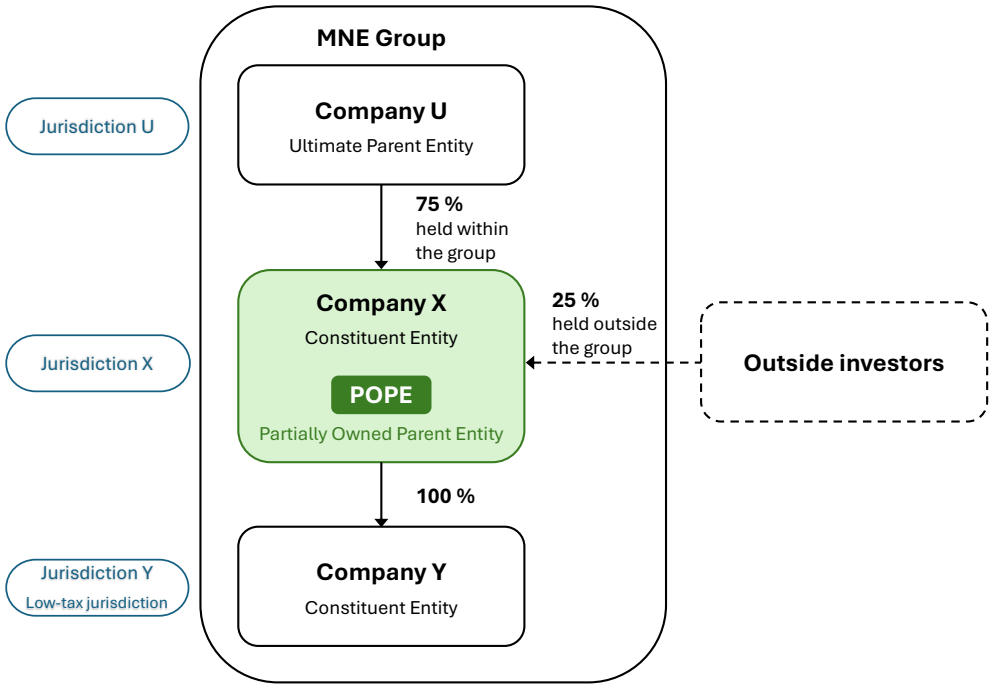

Figure 1: POPE structure

[45] Council Directive (EU) 2022/2523, art 3(22).

A different result follows if the outside investors hold only 20 percent or less of the profit rights in Company X. For example, assume again that Company X owns 100 percent of Company Y and that both companies are constituent entities of the same MNE group. If outside investors hold only 15 percent of the profit rights in Company X, Company X is not a POPE. This is because the threshold in Article 3(22) P2D is not met.[46] The outside ownership must be more than 20 percent.[47]

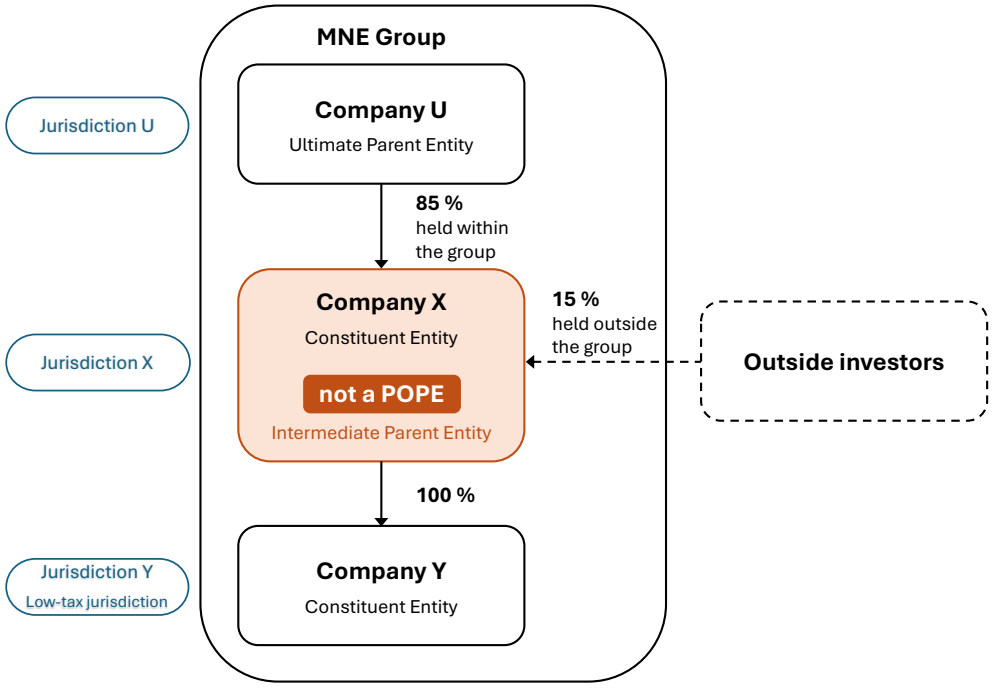

Figure 2: Not a POPE structure

A comparison between the two examples shows that the decisive factor is the level of outside ownership in the profit rights of Company X. In both examples, Company X owns another constituent entity of the same group. The difference is that, in *Figure 1*, outside investors hold more than 20 percent of the profit rights in Company X, whereas in *Figure 2* they do not. This distinction between the two examples is important for the later analysis, because the POPE rule only becomes relevant once the conditions in Article 3(22) P2D are met.[48]

3.2 Calculation of top-up tax

The P2D contains different mechanisms for charging top-up tax. The general starting point is that the IIR requires a parent entity to compute and pay its allocable share of top-up tax in respect of the low-taxed constituent entities of the group.[49] That follows

[46] Council Directive (EU) 2022/2523, art 3(22).
[47] ibid.
[48] ibid, arts 3(22) and 8.
[49] ibid, art 1(1)(a).

from Article 1(1)(a) P2D.[50] The undertaxed profits rule (UTPR) functions as a backstop where top-up tax has not been charged under the IIR.[51] Under Article 1(1)(b) P2D, it gives a constituent entity an additional cash tax expense equal to its share of the top-up tax that remains uncharged under the IIR.[52] The P2D also allows Member States to apply a qualified domestic minimum top-up tax (QDMTT).[53] Under Article 1(2) P2D, top-up tax is computed and paid domestically on the excess profit of the low-taxed constituent entities located in that Member State.[54]

Article 8 P2D lays down the special rule for a POPE in the EU.[55] Article 8(1) P2D provides that a POPE located in a Member State is subject to the IIR top-up tax for the fiscal year in respect of its low-taxed constituent entities that are located in another jurisdiction or that are stateless.[56] Article 8(2) P2D adds that, where the POPE is located in a Member State that is a low-tax jurisdiction, it is also subject to the IIR top-up tax in respect of itself and its low-taxed constituent entities located in the same Member State.[57] Article 8(3) P2D contains the exception that paragraphs 1 and 2 do not apply where the ownership interests of the POPE are wholly held, directly or indirectly, by another POPE that is subject to a qualified IIR for that fiscal year.[58]

The example in *Figure 1*, where Company X is a POPE, illustrates when Article 8 P2D becomes relevant. Assuming that Company X is located in a Member State and that Company Y is located in another jurisdiction that is low-taxed, Article 8(1) P2D requires Company X to apply the IIR in respect of Company Y.[59] The legal importance of the POPE classification is therefore that Company X is given a specific charging role under the IIR.

Figure 2 shows the opposite situation. Company X still owns Company Y, but the outside investors hold only 15 percent of the profit rights in Company X. Since the threshold in Article 3(22) P2D is not met, Company X is not a POPE and Article 8 P2D is not triggered.[60]

Article 9 P2D explains how the amount of IIR top-up tax is allocated.[61] Under Article 9(1) P2D, the IIR top-up tax due by a parent entity in respect of a low-taxed constituent entity is equal to the top-up tax of that low-taxed constituent entity, computed under Article 27, multiplied by the parent entity's allocable share in that top-up tax.[62] Article 9(2) P2D then states that the parent entity's allocable share is the proportion of the parent entity's ownership interest in the qualifying income of

[50] Council Directive (EU) 2022/2523, art 1(1)(a).
[51] ibid, art 1(1)(b).
[52] ibid.
[53] ibid, art 1(2).
[54] ibid.
[55] ibid, art 8.
[56] ibid, art 8(1).
[57] ibid, art 8(2).
[58] ibid, art 8(3).
[59] ibid, art 8(1).
[60] ibid, arts 3(22) and 8.
[61] ibid, art 9.
[62] ibid, art 9(1) and 27.

the low-taxed constituent entity.[63] That proportion is calculated by taking the qualifying income of the low-taxed constituent entity, subtracting the amount attributable to ownership interests held by other owners, and dividing the result by the total qualifying income of the low-taxed constituent entity.[64]

Applied to *Figure 1*, the starting point is the top-up tax of Company Y, since Company Y is the low-taxed constituent entity. The next question is what part of that top-up tax is allocable to Company X. Since Company X owns 100 percent of Company Y, Company X's allocable share will be 100 percent. The outside investors' 25 percent ownership in Company X does not reduce Company X's allocable share in Company Y. Instead, that outside ownership is relevant because it is what makes Company X a POPE under Article 3(22) P2D.[65] If Company U is also required to apply the IIR in respect of Company Y, the offset mechanism in Article 10 P2D may become relevant in order to prevent the same top-up tax from being charged twice.[66]

In *Figure 2*, Article 8 P2D is not applicable because Company X is not a POPE.[67] This does not mean that no top-up tax can arise in respect of Company Y. Rather, any top-up tax in respect of Company Y must be charged, if the conditions are met, under the ordinary IIR, UTPR or QDMTT mechanism. If Company U applies the IIR, its allocable share is based on its indirect ownership interest in Company Y.

In short, the difference between a normal IIR case and a POPE case is not how the top-up tax is calculated, but which entity is required to apply the IIR under the P2D. In a normal IIR case, the parent entity applies the general IIR structure. In a POPE case, the POPE itself must apply the IIR because part of its profit rights is held by persons outside the group.

3.3 Effect on minority shareholders

The outside minority shareholder is not directly taxed under the POPE rule. The tax is imposed on the parent entity under the IIR, not on the outside investor as such. However, the minority shareholder may still be affected indirectly. If the POPE has to pay top-up tax, the company will have lower profits after tax. That may affect the minority shareholder in at least three ways. First, lower profit at entity level may reduce the amount available for reinvestment or distribution. Second, lower distributable profit may lead to lower dividends. Third, lower expected returns may reduce the value of the shares.

The economic burden of a tax rule may be different from the formal tax liability. Formally, the outside minority shareholder is not the taxpayer. In practice, however, the shareholder bears part of the economic burden if the top-up tax reduces the value or return of the investment.

[63] Council Directive (EU) 2022/2523, art 9(2).
[64] ibid.
[65] ibid, art 3(22).
[66] ibid, art 10.
[67] ibid, arts 3(22) and 8.

A similar concern has also been noted in the literature. Dourado explains that split-ownership situations involving third parties and minority holdings may raise questions under the fundamental freedoms.[68] This supports the view that the problem examined in this thesis is not only hypothetical, but part of a broader EU law discussion on Pillar Two.

[68] Ana Paula Dourado, 'Pillar Two from the Perspective of the European Union' (2022) 5 *British Tax Review*.

4 Free movement of capital under Article 63 TFEU

4.1 Free movement of capital

Article 63(1) TFEU provides that all restrictions on the movement of capital between Member States, and between Member States and third countries, are prohibited.[69] Article 65(1) TFEU allows certain distinctions, especially in tax law, for example on the basis of residence or the place where capital is invested.[70] However, Article 65(3) TFEU does not give Member States a general freedom to restrict capital movements, since such measures must not amount to arbitrary discrimination or a disguised restriction on the free movement of capital.[71]

For the purposes of this thesis, the key point is that Article 63 TFEU covers cross-border capital movements such as shareholdings and dividend income. In cases concerning tax, the CJEU has treated rules affecting cross-border investment in shares or dividends as capable of falling within the scope of the free movement of capital.[72] Article 63 TFEU is therefore the relevant Treaty provision where the issue concerns the effect of a tax rule on the attractiveness of a cross-border minority investment.[73] A restriction may arise where a tax rule is liable to make cross-border investment less attractive than a domestic investment. This is relevant in this thesis, since the outside investors are minority shareholders, and not persons exercising definite influence over the company.

The third-country dimension is also relevant. Article 63 TFEU extends to movements of capital between Member States and third countries.[74] This is important in this context because outside minority shareholders may be resident outside the EU. At the same time, third-country situations are not fully identical to purely intra-EU situations, since the Treaty contains specific derogations for capital movements involving third countries.[75] Even so, the starting point remains that Article 63 TFEU is, in principle, applicable in such situations as well.

If the POPE rule is capable of making cross-border minority investment less attractive, it may be seen as a restriction on the free movement of capital. The fact that the tax is formally charged at entity level does not in itself exclude Article 63 TFEU, if the economic effect of the rule is to place a cross-border investor in a less favourable position.

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[69] Treaty on the Functioning of the European Union [2016], art 63(1).

[70] ibid, art 65(1).

[71] ibid, art 65(3).

[72] Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECLI:EU:C:2000:294, paras 26-30; Case C-319/02 *Petri Manninen* [2004] ECLI:EU:C:2004:484, para 24.

[73] Treaty on the Functioning of the European Union [2016], art 63.

[74] ibid.

[75] ibid, art 64-65.

4.2 The CJEU test

The CJEU examines Article 63 TFEU in several steps.[76] First, it must be determined whether the situation falls within the scope of the free movement of capital or not. Second, the CJEU examines whether the rule creates a restriction or a difference in treatment. Third, if there is a difference in treatment, the CJEU examines whether the situations are objectively comparable. Fourth, if the situations are comparable, the restriction may still be allowed if it can be justified by a legitimate objective. Finally, the measure must be proportionate.

4.2.1 Applicability

The first step is to determine whether Article 63 TFEU applies. Article 63(1) TFEU prohibits restrictions on movements of capital between Member States and between Member States and third countries.[77] The provision may therefore apply both in intra-EU situations and in situations involving third countries.

4.2.2 Restriction or less favourable treatment

The second step is to examine whether the rule creates a restriction or less favourable treatment. In the field of direct taxation, the CJEU does not prohibit every negative effect connected to a cross-border situation. A disadvantage may arise simply because two tax systems apply at the same time.[78] Such effects are not normally prohibited unless the disadvantage results from the tax measure of one Member State.[79]

Article 63 TFEU does not only prohibit direct discrimination.[80] It may also cover indirect discrimination or less favourable treatment where a tax rule affects cross-border investment. That is to say, it prohibits measures that are liable to dissuade non-residents from making investments in a Member State, or to dissuade residents of a Member State from investing in other States.[81] A heavier tax burden, or a rule that makes cross-border investment less attractive, may therefore constitute a restriction.[82]

4.2.3 Objective comparability

The third step is objective comparability. The purpose of the comparability analysis is to assess whether a cross-border situation is subject to a tax regime that differs from the regime applicable to a similar domestic situation.[83] So, not every difference

[76] See for example Case C-537/20 *L Fund v Finanzamt D* [2023] ECLI:EU:C:2023:339, para 46.

[77] Treaty on the Functioning of the European Union [2016], art 63(1).

[78] Martin Berglund and Katia Cejie, *Basics of International Taxation: From a Methodological Point of View* (2nd edn, Iustus 2018) 106-107.

[79] ibid.

[80] Treaty on the Functioning of the European Union [2016], art 63.

[81] Case C-537/20 *L Fund v Finanzamt D* [2023] ECLI:EU:C:2023:339, para 42.

[82] Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECLI:EU:C:2000:294, para 35; Case C-319/02 *Petri Manninen* [2004] ECLI:EU:C:2004:484, para 23.

[83] Federico Bertocchi, *The Directive on Global Minimum Taxation in Light of the Fundamental Freedoms* (IBFD 2025) 94-95.

between a domestic and a cross-border situation is automatically prohibited. It must first be examined whether the two situations are comparable.

Article 65(1)(a) TFEU allows Member States to apply tax rules that distinguish between taxpayers who are not in the same situation with regard to their residence or the place where their capital is invested.[84] However, Article 65(3) TFEU limits this possibility.[85] Such rules must not amount to arbitrary discrimination or a disguised restriction on the free movement of capital.[86] This means that Article 65 TFEU does not give Member States a general right to treat cross-border situations less favourably.

4.2.4 Justification

If a restriction exists and the situations are objectively comparable, the restriction may still be allowed if it can be justified by an overriding reason in the public interest.[87] In tax cases, the CJEU has accepted certain justifications, such as the need to preserve the balanced allocation of taxing powers between Member States, the prevention of tax avoidance, and the coherence of the tax system. The balanced allocation of taxing powers may justify a restriction where a tax rule is designed to protect the division of taxing rights between Member States.[88] The prevention of tax avoidance may also be relevant, especially where the rule targets wholly artificial arrangements or conduct intended to avoid tax.[89] The coherence of the tax system has also been accepted as a possible justification, but it requires a direct link between a tax advantage and a corresponding tax burden.[90]

4.2.5 Proportionality

The final step is proportionality. Even if a restriction can be justified, the measure must still be proportionate. The measure must therefore be suitable for achieving the objective and must not go beyond what is necessary to achieve that objective.[91] This follows from the principle of proportionality under Article 5(4) TEU.[92]

The proportionality test can be divided into three parts.[93] First, the measure must be suitable. This means that it must be capable of achieving the objective pursued. Second, the measure must be necessary. This means that the same objective could

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[84] Treaty on the Functioning of the European Union [2016], art 65(1)(a).

[85] ibid, art 65(3).

[86] ibid.

[87] ibid, art 65(1)(b).

[88] Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECLI:EU:C:2005:763.

[89] Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECLI:EU:C:2006:544.

[90] Case C-204/90 *Hanns-Martin Bachmann v Belgian State* [1992] ECLI:EU:C:1992:35; Case C-157/07 *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* [2008] ECLI:EU:C:2008:588; Case C-322/11 *K* [2013] ECLI:EU:C:2013:716.

[91] Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECLI:EU:C:2005:763, para 35.

[92] Treaty on European Union [2016], art 5(4).

[93] EUR-Lex, 'Principle of proportionality' < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:proportionality > accessed 18 May 2026.

not have been achieved by a less restrictive measure. Third, the measure must be proportionate in a broader sense. In other words, an overall proportionality test.

5 Does the POPE rule restrict the free movement of capital?

5.1 Introduction

The previous chapters have, among other things, shown that the rule in Article 8 P2D allocates top-up tax to a POPE in respect of its low-taxed constituent entities, and that the burden of that tax may, in economic terms, also be borne by minority shareholders outside the group.[94] Furthermore, it has presented the legal framework under Article 63 TFEU and the steps normally used by the CJEU when assessing whether a measure is compatible with the free movement of capital.[95] This chapter applies that legal framework to the POPE rule in the P2D. The aim is to answer the first part of the research question, namely whether the POPE rule creates a restriction on the free movement of capital. The analysis is mainly carried out from the perspective of the outside minority shareholder.

This chapter follows the same structure as the CJEU test. It first examines whether Article 63 TFEU is applicable to a cross-border minority investment in a POPE situation. It then considers whether the POPE rule creates a restriction in the form of less favourable treatment. After that, the chapter examines whether the relevant situations are objectively comparable. The chapter ends with an interim conclusion on restriction, which forms the bridge to the next chapter on justification and proportionality.

5.2 Applicability

The first step is whether the situation falls within the scope of Article 63 TFEU.[96] Article 63(1) TFEU prohibits restrictions on the movement of capital between Member States and between Member States and third countries.[97] Cross-border holdings of shares and the receipt of dividends are well-established categories of capital movement under the Treaty. In its case law, the CJEU has confirmed that tax rules affecting such investments may fall within Article 63 TFEU.[98]

For the POPE rule, the key point is that the analysis concerns a minority holding in a constituent entity of a MNE group, where the holding falls below the threshold for definite influence and therefore outside the freedom of establishment.[99] As confirmed in case law, the distinction between Article 49 and Article 63 TFEU depends on whether the shareholding allows the holder to determine the activities of

[94] Council Directive (EU) 2022/2523, art 8.

[95] Treaty on the Functioning of the European Union [2016], art 63.

[96] ibid.

[97] ibid, art 63(1).

[98] Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECLI:EU:C:2000:294, paras 26-30; Case C-319/02 *Petri Manninen* [2004] ECLI:EU:C:2004:484, para 24.

[99] Treaty on the Functioning of the European Union [2016], art 49.

the company, with minority holdings without such influence falling under Article 63 TFEU.[100]

Two further points should be made on applicability. First, the P2D is a harmonising directive adopted under Article 115 TFEU.[101] Although the P2D is implemented through national law, the POPE rule is set out in the P2D itself and leaves Member States limited room to change its substance. The analysis therefore concerns the compatibility of the POPE rule with EU primary law, not only the national rules that implement it. This is consistent with the literature, which describes the P2D as a form of exhaustive harmonisation.[102] Under that approach, national implementing rules are assessed against the P2D, while the P2D itself may be assessed against EU primary law.[103] It is therefore appropriate to examine the POPE rule in light of Article 63 TFEU.

Second, the third-country dimension is also of importance. Article 63 TFEU extends to capital movements between Member States and third countries.[104] The POPE rule applies whenever more than 20 percent of the profit rights in the parent entity are held by persons outside the group, irrespective of whether those outside persons are resident in the EU or in a third country.[105] Articles 64 and 65 TFEU may affect the assessment when third countries are involved.[106] They allow certain exceptions and tax distinctions, but they do not remove the general starting point that Article 63 TFEU applies to capital movements between Member States and third countries.[107]

5.3 Restriction or less favourable treatment

The second step is to examine whether the POPE rule creates a restriction or a less favourable treatment within the meaning of Article 63 TFEU.

Under Article 3(22) P2D, the POPE definition is met when more than 20 percent of the ownership interest in the profits of the parent entity is held by persons that are not constituent entities of the group.[108] The rule therefore focuses on ownership outside the group, not on whether the minority shareholder is resident or non-resident. For that reason, the POPE rule is unlikely to constitute direct discrimination on the basis of residence.

The more relevant question is instead whether the rule may still create an indirect economic disadvantage for cross-border minority investors. Under Article 8 P2D, the top-up tax is imposed on the POPE itself, not on the outside minority

[100] Case C-35/11 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, The Commissioners for Her Majesty's Revenue & Customs* [2012] ECLI:EU:C:2012:707, paras 90-92.

[101] Council Directive (EU) 2022/2523, preamble; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47, art 115.

[102] Robbe Basteleurs, Benjamin Beer and Giuseppe Moramarco, 'The Compatibility of the UTPR with Fundamental Rights: A Critical Assessment' (2025) 17(4) *World Tax Journal*.

[103] ibid.

[104] Treaty on the Functioning of the European Union [2016], art 63.

[105] Council Directive (EU) 2022/2523, art 3(22).

[106] Treaty on the Functioning of the European Union [2016], arts 64-65.

[107] ibid, art 63-65.

[108] Council Directive (EU) 2022/2523, art 3(22).

shareholder.[109] However, the shareholder may still be affected in economic terms. If the POPE has to pay top-up tax for a low-taxed constituent entity, the company's profits after tax may be reduced. This may leave less profit available for reinvestment or dividend distribution. It may also reduce the expected return on the investment and, as a result, the value of the shares.

Pesiri makes this point explicit.[110] In his analysis of split-ownership cases under the P2D, he observes that Article 8 shifts the levy of top-up tax from the UPE to the POPE itself, and that this shift brings the economic burden closer to the minority participation.[111] The minority shareholder, although not a taxpayer, is the party whose return on investment is reduced when the POPE pays top-up tax in respect of low-taxed group income located in another jurisdiction.[112]

A similar point can be seen in case law where both resident and non-resident companies paid withholding tax on dividends.[113] However, if a resident company made a loss, it could get the withholding tax back. A non-resident company in the same situation could not get the tax back. The CJEU held that this was a restriction under Article 63 TFEU, because the non-resident company was taxed immediately and definitively, while the resident company received at least a cash-flow advantage.[114] The case confirms that the restriction analysis under Article 63 TFEU is concerned with the economic effect of the rule on the cross-border investor, not only with its formal structure.

In another case, German rules concerned the calculation of a foreign tax credit.[115] As a result of that calculation, taxpayers with foreign income did not receive the full benefit of personal and family allowances.[116] The CJEU held that this placed taxpayers with foreign income at a disadvantage compared with taxpayers who received all their income in Germany.[117] The rule was therefore likely to discourage residents from investing their capital in companies established in another Member State or in a third State, and constituted a restriction under Article 63 TFEU.[118]

Applied to the POPE rule, the relevant disadvantage is the additional top-up tax at the level of the parent entity. In a purely domestic structure, no IIR top-up tax arises in respect of a foreign low-taxed constituent entity. In a POPE structure, however, the parent entity may have to pay top-up tax under the IIR because it owns a low-taxed constituent entity in another jurisdiction. Although the tax is not imposed directly on the outside minority shareholder, it may reduce the profits available in the POPE and thereby affect dividends, expected returns and share value. This may make an investment in such a POPE less attractive than a comparable domestic

[109] Council Directive (EU) 2022/2523, art 8.
[110] Stefano Pesiri, 'Pillar Two: Status Quo, Subject-to-Tax Rule and the Impact on Third-Party Investment in MNEs' (2023) 63(11) *European Taxation*.
[111] ibid.
[112] ibid.
[113] Case C-601/23 *Credit Suisse Securities (Europe) Ltd v Diputación Foral de Bizkaia* [2024] ECLI:EU:C:2024:1048.
[114] ibid, para 42.
[115] Case C-168/11 *Manfred Beker, Christa Beker v Finanzamt Heilbronn* [2013] ECLI:EU:C:2013:117.
[116] ibid.
[117] ibid.
[118] ibid.

investment. This points towards an indirect economic disadvantage rather than direct discrimination.

5.4 Objective comparability

The third step is whether the cross-border and domestic minority investors are in objectively comparable situations. The comparability assessment is to be made in light of the aim, purpose and content of the legislation.

5.4.1 Identifying the comparator

The relevant comparator is not an ordinary IIR situation without split ownership. Such a comparison is useful for explaining what the POPE rule changes technically, but it is less useful for the Article 63 TFEU analysis. In an ordinary IIR situation, there is no comparable outside minority investor whose economic position is affected by the allocation of top-up tax to a POPE.

The better comparison is instead between two minority investors who are outside the MNE group and who hold profit rights in a comparable parent entity. In the cross-border situation, the minority investor holds an interest in a POPE that may have to pay IIR top-up tax because it owns a low-taxed constituent entity in another jurisdiction. The domestic comparator should be a minority investor in a comparable split-ownership structure, where the investment is not exposed to the same cross-border IIR charge. In this way, the comparison focuses on the cross-border element, while keeping the split-ownership position of the minority investor constant.

5.4.2 Aim and purpose of the rule

The comparability assessment must be made in light of the aim, purpose and content of the legislation.[119] The CJEU has stated that only the relevant distinguishing criteria laid down by the legislation should be taken into account.[120] Academic literature supports the same approach and explains that comparability must be assessed by reference to the objective pursued by the rule.[121]

The aim of the POPE rule is to secure minimum taxation in split-ownership cases. The rule prevents the ordinary IIR mechanism from leaving part of the low-taxed income outside the effective reach of the minimum tax merely because a share of the profit rights in the parent entity is held by persons outside the group. In this sense, the POPE rule is a technical allocation rule.

The rule is not aimed at taxing minority investors as such. Nor is it aimed at distinguishing between domestic and foreign minority investors. The decisive criterion in Article 3(22) P2D is instead whether more than 20 percent of the

[119] Opinion of AG Kokott in Case C-545/19 *AllianzGI-Fonds AEVN v Autoridade Tributária e Aduaneira* [2021] EU:C:2021:372, para 69.

[120] Case C-545/19 *AllianzGI-Fonds AEVN v Autoridade Tributária e Aduaneira* [2022] ECLI:EU:C:2022:193, para 54.

[121] Ariane Brohez and Jorn Steenbergen, 'Tax Challenges for Real Estate Investment Trusts Operating and Investing in Europe' (2026) 27(1) *Finance and Capital Markets*.

ownership interest in the profits of the parent entity is held by one or several persons that are not constituent entities of the same group.[122] The relevant legislative distinction is therefore between group ownership and outside ownership, not between resident and non-resident investors.

This is important for the comparability assessment. If the purpose of the rule is to protect the functioning of the IIR in split-ownership cases, then the residence or cross-border position of the minority investor does not change the nature of the problem addressed by the rule. A domestic outside investor and a cross-border outside investor create the same split-ownership issue from the perspective of the POPE rule.

5.4.3 Comparability in the POPE context

In light of that aim, the minority investors should be regarded as objectively comparable. Both are outside the MNE group. Both hold profit rights in a parent entity. Both are economically exposed to the financial result of that entity. Both are also affected only indirectly, since the top-up tax is imposed at the level of the POPE and not directly on the minority investor.

The fact that the POPE rule is triggered by outside ownership rather than by investor residence does not make the investors incomparable. Rather, it supports the view that residence is not relevant to the purpose of the rule. The P2D treats all persons outside the group as part of the same relevant category. A cross-border minority investor is therefore not in a different legal or economic position in relation to the aim of the POPE rule merely because the investment crosses a border. The relevant minority investors should therefore be regarded as objectively comparable in the POPE context.

5.5 Interim conclusion on restriction

The POPE rule does not constitute direct discrimination based on residence. However, when assessed under Article 63 TFEU, it may still make cross-border minority investment less attractive than a comparable domestic minority investment in a similar split-ownership situation.

On this basis, and in light of the CJEU's approach to indirect economic disadvantages, the POPE rule constitutes a restriction on the free movement of capital. The analysis must therefore proceed to whether such a restriction can be justified and regarded as proportionate.

[122] Council Directive (EU) 2022/2523, art 3(22).

6 Justification and proportionality

6.1 Introduction

The previous chapter concluded that the POPE rule constitutes a restriction on the free movement of capital. This chapter addresses the second part of the research question, namely whether that restriction can be justified and regarded as proportionate under EU law.

6.2 Justification

In order to assess whether a possible restriction linked to the POPE rule can be justified, three grounds commonly relevant in the CJEU's tax case law are examined: the balanced allocation of taxing rights, the prevention of tax avoidance, and the coherence of the tax system.[123] In addition, the objective of securing a global minimum level of taxation is considered as a possible justification for the POPE rule in the specific context of the P2D.

In the CJEU's tax case law, several justifications may be considered together, but adding more grounds does not automatically make the restriction easier to justify.[124] In some cases, one justification may be enough, while in others the CJEU has considered several grounds cumulatively.[125] As Lazarov explains, some justifications overlap, especially balanced allocation, territoriality and coherence.[126] The following analysis therefore examines the possible justifications separately, while also considering whether they support each other in the context of the POPE rule.

6.2.1 Balanced allocation of taxing rights

The balanced allocation of taxing rights is the justification ground that most naturally supports the POPE rule. In *Marks & Spencer*, the CJEU accepted that a restriction may be justified where it preserves the allocation of taxing powers between Member States, especially by preventing companies from choosing where losses are used.[127] In *K*, which concerned Article 63 TFEU, the CJEU confirmed that this justification

[123] Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECLI:EU:C:2005:763; Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECLI:EU:C:2006:544; Case C-204/90 *Hanns-Martin Bachmann v Belgian State* [1992] ECLI:EU:C:1992:35; Case C-157/07 *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* [2008] ECLI:EU:C:2008:588; Case C-322/11 *K* [2013] ECLI:EU:C:2013:716.

[124] Ivan Lazarov in Lang et al (eds), *Introduction to European Tax Law on Direct Taxation* (8th edn, Linde Verlag 2024), 92-93; See also Case C-484/19 *Lexel AB v Skatteverket* [2021] ECLI:EU:C:2021:34.

[125] See for example Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECLI:EU:C:2005:763; Case C-231/05 *Oy AA* [2007] ECLI:EU:C:2007:439; Case C-337/08 *X Holding BV v Staatssecretaris van Financiën* [2010] ECLI:EU:C:2010:89.

[126] Ivan Lazarov in Lang et al (eds), *Introduction to European Tax Law on Direct Taxation* (8th edn, Linde Verlag 2024), 92-93; See also Case C-484/19 *Lexel AB v Skatteverket* [2021] ECLI:EU:C:2021:34.

[127] Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECLI:EU:C:2005:763, paras 43-46.

protects the symmetry between the right to tax profits and the right to deduct losses.[128] These cases show that the justification is not only about protecting tax revenue, but about preserving the link between taxing rights and corresponding tax consequences.

This reasoning is relevant for the POPE rule because it shows that the balanced allocation of taxing powers concerns the connection between the right to tax income and the obligation to take corresponding losses into account. Applied to the POPE rule, the question is whether Articles 8 and 9 P2D allocate the top-up tax to the entity with the relevant economic connection to the low-taxed income. Article 8 charges the IIR top-up tax at the level of the POPE, while Article 9 links the amount to the parent entity's allocable share.[129] The rule can therefore be understood as a mechanism for making the IIR work in split-ownership structures.

This argument becomes stronger when the POPE rule is seen as part of the internal logic of Pillar Two. In a structure where a parent entity is partly owned by outside minority shareholders, the UPE may only have an indirect and partial economic interest in the low-taxed income. At the same time, part of the profit rights may belong to persons outside the group. Charging the top-up tax at the level of the POPE therefore helps the tax burden follow the ownership structure more closely. In this way, the POPE rule supports the allocation of the right to collect the top-up tax.

There are, however, limits to this argument. In *Beker* and *XY*, the CJEU made clear that balanced allocation requires a clear link between the restriction and the protection of a Member State's taxing jurisdiction.[130] In both cases, the justification was rejected because the Member State had not shown that allowing the relevant deduction or allowance would require it to give up part of its taxing jurisdiction.[131] This link is less obvious for the POPE rule. Article 8 P2D does not mainly protect the ordinary domestic tax base of the Member State where the POPE is located.[132] Instead, it allocates top-up tax within the Pillar Two system, including in relation to low-taxed income arising in another jurisdiction. This makes balanced allocation relevant, but less direct than in cases concerning profits, losses or deductions within a Member State's own tax system.

This concern is also supported by De Wilde and Wisman, who argue that the existing CJEU justifications do not fit easily with the top-up tax mechanisms in the P2D.[133] In their view, justifications such as territoriality, coherence and balanced allocation are normally linked to the protection of a Member State's own tax base.[134] This makes the argument less clear for the POPE rule, since Article 8 P2D is mainly

[128] Case C-322/11 *K* [2013] ECLI:EU:C:2013:716, paras 50-55.

[129] Council Directive (EU) 2022/2523, arts 8-9.

[130] Case C-168/11 *Manfred Beker, Christa Beker v Finanzamt Heilbronn* [2013] ECLI:EU:C:2013:117, para 56-57; Case C-394/20 *XY v Finanzamt V* [2021] ECLI:EU:C:2021:1044, para 70.

[131] Case C-168/11 *Manfred Beker, Christa Beker v Finanzamt Heilbronn* [2013] ECLI:EU:C:2013:117, para 56-57; Case C-394/20 *XY v Finanzamt V* [2021] ECLI:EU:C:2021:1044, para 75.

[132] Council Directive (EU) 2022/2523, art 8.

[133] Maarten de Wilde and Ciska Wisman, 'Why all top-up tax variants in the EU Pillar Two Directive collide with the EU's fundamental freedoms (and how to solve this)' (*Kluwer International Tax Blog*, 16 June 2025) < https://legalblogs.wolterskluwer.com/international-tax-law-blog/why-all-top-up-tax-variants-in-the-eu-pillar-two-directive-collide-with-the-eus-fundamental-freedoms-and-how-to-solve-this/ > accessed 7 May 2026.

[134] ibid.

concerned with allocating top-up tax within the Pillar Two system rather than protecting the ordinary domestic tax base of the Member State where the POPE is located. At the same time, the POPE rule forms part of a harmonised EU directive and a coordinated system for minimum taxation. Balanced allocation is therefore not a perfect justification, but it is stronger in the specific context of the P2D than it would be for a purely unilateral tax rule.

Overall, balanced allocation can support the justification of the POPE rule, but the argument is not fully settled. It is strongest when the POPE rule is understood as a technical rule for allocating top-up tax within the P2D. It is weaker if the CJEU's existing case law is applied strictly, since that case law usually requires a clear link to the protection of a Member State's own taxing jurisdiction. For that reason, balanced allocation should preferably be read together with the broader objective of securing effective minimum taxation under the P2D.

6.2.2 Prevention of tax avoidance

The prevention of tax avoidance is another possible justification for the POPE rule. Recital 2 P2D states that the aim is to reduce profit shifting to jurisdictions with no or very low taxation and to protect tax bases.[135] In that sense, the POPE rule may be seen as part of a system which is designed to prevent low-taxed income from escaping top-up taxation. The more difficult question is whether this is enough under the CJEU's case law, where prevention of tax avoidance has required a more targeted anti-abuse rule.

Although *Cadbury Schweppes* concerned the freedom of establishment, it is relevant here because it sets out the CJEU's general approach to prevention of tax avoidance as a justification.[136] A restriction cannot be based only on the fact that a company is established in a lower-tax Member State. It must specifically target wholly artificial arrangements that do not reflect economic reality.[137] The same approach was confirmed in *K* under Article 63 TFEU, where the CJEU rejected a general presumption of tax avoidance.[138]

This makes prevention of tax avoidance a weak standalone justification for the POPE rule. Article 8 P2D applies automatically when the POPE conditions are met.[139] It does not require artificiality, abuse or an intention to avoid tax. Outside minority ownership may exist for ordinary commercial reasons, for example through institutional investors, joint venture partners or other third-party investors. Their ownership does not, by itself, show that the structure is artificial or aimed at avoiding tax.

[135] Council Directive (EU) 2022/2523, recital 2.

[136] Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECLI:EU:C:2006:544.

[137] ibid, paras 51 and 55.

[138] Case C-322/11 *K* [2013] ECLI:EU:C:2013:716, paras 60-63.

[139] Council Directive (EU) 2022/2523, arts 3(22) and 8.

This view is also supported by Nogueira, who argues that the Pillar Two[140] applies to both genuine and non-genuine situations and therefore does not fit easily within the CJEU's targeted anti-abuse case law.[141] Dourado similarly warns against treating Pillar Two as a general abuse rule, since that would normally require proof of abuse or a possibility for the taxpayer to rebut such a presumption.[142] Although her analysis concerns the Commission's Proposal to the P2D rather than the final P2D, her reasoning is still relevant because it addresses whether Pillar Two rules can be justified by reference to aggressive tax planning or abuse.[143] She also explains that if abuse were used as a general justification for the P2D, the application of the rules would normally require proof of abuse on a case-by-case basis or allow the taxpayer a possibility to rebut the presumption of abuse.[144]

Moramarco and Beer support this cautious approach from another angle.[145] They argue that the Pillar Two system should not be regarded as an anti-avoidance regime in the strict sense.[146] Although it may affect profit shifting, they describe its main function as a coordination mechanism aimed at ensuring a level playing field in international tax competition.[147] They also point out that much of the Pillar Two architecture is designed to preserve the coherence of the jurisdictional effective tax rate computation and the allocation of top-up tax, rather than to counter specific avoidance schemes in the classic sense.[148]

This is relevant for the POPE rule. Article 8 P2D is not framed as a rule against artificial ownership structures.[149] It is a charging rule that decides where the IIR top-up tax is collected when a parent entity is partly owned by persons outside the group.[150] The rule may reduce opportunities to avoid top-up taxation, but its main function is to make the charging mechanism work in split-ownership structures. This supports the view that the POPE rule is better understood as a technical allocation rule than as a targeted anti-abuse rule.

For these reasons, prevention of tax avoidance is a weak standalone justification for the POPE rule. It may support the rule in cases where a split-ownership structure is deliberately used to avoid the collection of top-up tax. However, Article 8 P2D is not limited to such cases. It may also apply to genuine ownership structures where outside minority shareholders have commercial reasons for investing and no role in the low-tax outcome. The better view is therefore that prevention of tax avoidance can support the POPE rule only to a limited extent.

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[140] Nogueira uses the term "GloBE rules". In this thesis, the terms "Pillar Two rules" and "GloBE rules" are used synonymously. GloBE stands for Global Anti-Base Erosion and refers to the rules on global minimum taxation.

[141] João Félix Pinto Nogueira, 'GloBE and EU Law: Assessing the Compatibility of the OECD's Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market' (2020) 12(3) *World Tax Journal*.

[142] Ana Paula Dourado, 'Pillar Two from the Perspective of the European Union' (2022) 5 *British Tax Review*.

[143] ibid.

[144] ibid.

[145] Giuseppe Moramarco and Benjamin Beer, 'Abuse in GloBE: Legal and Policy Challenges' (2026) 18(2) *World Tax Journal*.

[146] ibid.

[147] ibid.

[148] ibid.

[149] Council Directive (EU) 2022/2523, art 8.

[150] ibid.

6.2.3 Coherence of the tax system

The coherence of the tax system is another possible justification, but it is difficult to apply to the POPE rule. The CJEU first accepted coherence of the tax system as a possible justification in *Bachmann*.[151] The case did not concern Article 63 TFEU in its current form, and the CJEU did not find that the Belgian rule was contrary to the Treaty rules, of that time, on capital movements and payments.[152] However, the case is still important because the CJEU accepted that a restriction on other fundamental freedoms could be justified by the need to preserve the coherence of the tax system.[153] In *Bachmann*, that coherence was based on a link between the deduction of insurance contributions and the later taxation of the insurance payments.[154] The tax advantage granted at one stage was therefore connected to a corresponding tax burden at a later stage.[155] Later case law, including *Krankenheim* and *K*, also confirms that this justification normally requires a direct link between a tax advantage and a corresponding tax burden, concerning the same taxpayer and the same tax.[156]

This principle is relevant when assessing the POPE rule, because it shows that coherence requires more than a general claim that the tax system should work effectively. There must be a direct link between a tax advantage and a corresponding tax burden. That link is difficult to identify in relation to the POPE rule, since the outside minority shareholder does not receive a tax advantage under the P2D and the top-up tax is imposed on the POPE, rather than on the shareholder.

The academic literature on Pillar Two helps to explain the difference between internal coherence within the P2D and coherence as a CJEU justification. Kratzlmeier explains that the IIR places the tax liability on a parent entity, even though the low-taxed profits are generated by another group entity.[157] The parent entity may still have an economic link to those profits, for example through dividends or an increase in the value of its shares.[158] This helps explain why the POPE rule has an internal logic within Pillar Two. Article 8 P2D also places the top-up tax at the level of a parent entity, namely the POPE, which has an ownership link to the low-taxed constituent entities.

The minority shareholder perspective points in another direction. Kratzlmeier explains, in the context of the UTPR, that minority shareholders may bear part of the economic burden of minimum taxation through a lower value of their shares, even though they do not participate in the low-taxed profits that trigger the minimum

[151] Case C-204/90 *Hanns-Martin Bachmann v Belgian State* [1992] ECLI:EU:C:1992:35.

[152] ibid, paras 34-35.

[153] ibid, para 28.

[154] ibid, para 21.

[155] ibid, paras 22-23.

[156] Case C-157/07 *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* [2008] ECLI:EU:C:2008:588, para 42; Case C-322/11 *K* [2013] ECLI:EU:C:2013:716, para 66-70.

[157] Fabian Kratzlmeier, 'Shareholders, Creditors, and GLOBE: A New Perspective' (2024) 116 *Tax Notes International*.

[158] ibid.

tax.[159] Douma, Kardachaki, Kofler, Bräumann and Tumpel make a similar point.[160] They note that top-up tax may indirectly increase the burden on minority shareholders, even though the tax is not formally levied on the investors or on distributions to them.[161] Basteleurs, Beer and Moramarco also discuss how formulaic top-up tax mechanisms may create collateral effects for minority shareholders where an entity is charged even though the relevant low-taxed income is generated elsewhere in the group.[162]

These arguments are relevant by analogy to the POPE rule. The POPE rule is different from the UTPR, because the POPE has an ownership link to the low-taxed constituent entities. Still, the position of the outside minority shareholder is similar in one important respect. The shareholder is not the taxpayer under Article 8 P2D. The top-up tax is imposed on the POPE at company level. Any burden on the shareholder is indirect, through lower profits, lower dividends or reduced share value.

This weakens coherence as an independent justification. The POPE rule may be coherent in a broad Pillar Two sense, because it helps the IIR work in split-ownership structures. It places the top-up tax at a level that reflects the ownership structure more closely. However, the CJEU's coherence test is narrower. It requires a direct link between a tax advantage and a corresponding tax burden. That link is difficult to identify here. The outside minority shareholder receives no deduction, exemption or comparable tax advantage under the P2D, and the top-up tax is not imposed on that shareholder.

The better view is therefore that coherence can support the internal design of the POPE rule, but only to a limited extent as a justification under the fundamental freedoms. The rule is systemically coherent within Pillar Two, but it does not easily satisfy the CJEU's stricter requirement of a direct link between a tax advantage and a corresponding tax burden.

6.2.4 Securing global minimum taxation

A further question is whether the objective of securing a global minimum level of taxation can support the justification of the POPE rule. This is a more uncertain ground than the traditional justifications discussed above. The CJEU has not yet clearly recognised global minimum taxation as an independent overriding reason in the public interest. However, the idea has some support in EU law discussion. In *AllianzGI-Fonds*, Advocate General Kokott suggested that securing a minimum level of taxation may be capable of constituting an overriding reason in the public interest.[163]

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[159] Fabian Kratzlmeier, 'Shareholders, Creditors, and GLOBE: A New Perspective' (2024) 116 *Tax Notes International*.

[160] Sjoerd Douma, Alexia Kardachaki, Georg Kofler, Peter Bräumann, and Michael Tumpel, 'The UTPR and International Law: Analysis From Three Angles' (2023) 110 *Tax Notes International.*

[161] ibid.

[162] Robbe Basteleurs, Benjamin Beer, and Giuseppe Moramarco, 'The Compatibility of the UTPR with Fundamental Rights: A Critical Assessment'(2025) 17(4) *World Tax Journal*.

[163] Opinion of AG Kokott in Case C-545/19 *AllianzGI-Fonds AEVN v Autoridade Tributária e Aduaneira* [2021] EU:C:2021:372, para 96-97.

The objective is relevant in the context of the P2D, because it is based on a coordinated system for minimum taxation of large groups. The POPE rule should be understood as a part of the mechanism for collecting top-up tax in split-ownership structures. Its purpose is to reduce the risk that part of the top-up tax is not collected because of the group's ownership structure.

Englisch and Becker show that the policy rationale of minimum taxation is broader than classical tax avoidance.[164] They explain that an international minimum tax can reduce the incentive to shift profits to low-tax jurisdictions, limit tax competition and improve the international allocation of capital.[165]

This is also supported by Debelva and De Broe.[166] They argue that Pillar Two cannot simply be compared with CFC rules.[167] In their view, CFC rules can be explained by the prevention of abusive arrangements, while Pillar Two goes further because it places a floor on tax competition through a 15 percent minimum tax.[168] They also note that taxing one legal entity on income earned by another entity is difficult to justify where there is no abusive arrangement.[169] This supports the view that prevention of tax avoidance is too narrow as the main justification for the POPE rule.

At the same time, the objective of Pillar Two is not fully settled. The literature notes that there was disagreement during the negotiations between the members of the Inclusive Framework about whether Pillar Two should mainly target profit shifting or also limit tax competition over real activity.[170] It is also explained that the final design goes beyond profit shifting, but does not fully end tax competition.[171] Additionally, Englisch explains that a specific exclusion rule reflects a compromise between different views on the purpose of the global minimum tax.[172] Since the rules still leave room for some tax competition, the objective should be defined carefully.[173]

Global minimum taxation may support the justification of the POPE rule, but only as an additional and still uncertain ground. It fits the structure and purpose of the P2D better than a narrow tax avoidance justification. However, since the CJEU has not yet recognised global minimum taxation as a separate overriding reason in the public interest, it should not be treated as a complete justification on its own. Even if accepted, the POPE rule must still satisfy the proportionality test.

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[164] Joachim Englisch and Johannes Becker, 'International Effective Minimum Taxation – The GLOBE Proposal' (2019) 11(4) *World Tax Journal*.

[165] ibid.

[166] Filip Debelva and Luc De Broe, 'Pillar 2: An Analysis of the IIR and UTPR from an International Customary Law, Tax Treaty Law and European Union Law Perspective' (2022) 50(12) *Intertax*.

[167] ibid.

[168] ibid.

[169] ibid.

[170] Michael Devereux and John Vella, 'The Impact of the Global Minimum Tax on Tax Competition' (2023) 15(3) *World Tax Journal*; Werner Haslehner, 'The Costs of Pillar 2: Legitimacy, Legality, and Lock-in' (2023) 51(10) *Intertax*.

[171] Michael Devereux and John Vella, 'The Impact of the Global Minimum Tax on Tax Competition' (2023) 15(3) *World Tax Journal*.

[172] Joachim Englisch, 'GloBE Rules and Tax Competition' (2022) 50(12) *Intertax*.

[173] ibid.

6.3 Proportionality

If a justification is accepted, the POPE rule must still be proportionate. This requires examining suitability, necessity and proportionality in the strict sense.

Before assessing proportionality, it should be noted that the POPE rule is part of an EU directive. The proportionality test is therefore applied to the EU legislator, not only to a national tax measure. De Broe and Massant argue that the proportionality test under the fundamental freedoms has a much lower threshold when the measure is adopted by the EU legislature than when it is adopted by a Member State.[174] They explain that the EU legislator has broad discretion in tax matters, especially where political, economic and social choices are involved.[175] As a result, an EU measure will normally be unlawful only if it is manifestly inappropriate, manifestly goes beyond what is necessary, or creates disadvantages that are manifestly disproportionate to its objectives.[176] Kofler and Schnitger make a similar point in relation to the P2D.[177] They argue that the P2D is subject to review under primary EU law, but that the chance of invalidation is low because the CJEU is likely to give the EU legislator a broad margin of discretion in this area.[178]

This does not mean that the proportionality test disappears. Szudoczky explains that the CJEU has sometimes carried out a more detailed proportionality analysis when reviewing tax directives, especially when examining whether a less restrictive alternative would be equally effective.[179] She also notes that the CJEU may be more willing to accept restrictions in secondary law than in national law, but that this does not remove the need to examine proportionality.[180] This means that the POPE rule is still subject to review, but the proportionality assessment must take into account the broader discretion given to the EU legislator.

6.3.1 Suitability

The suitability analysis asks whether the measure is "appropriate for securing the attainment of the objective which it pursues".[181] In direct tax cases, the suitability step is usually not the most demanding part of the proportionality test. A measure will normally be suitable if there is a clear connection between the rule and the objective relied on. In *National Grid Indus*, the CJEU held that immediate taxation of unrealised capital gains was appropriate for preserving the balanced allocation of taxing powers, because the gains had arisen while the company was taxable in the

[174] Luc De Broe and Mélanie Massant, 'Are the OECD/G20 Pillar Two GloBE-Rules Compliant with the Fundamental Freedoms?' (2021) 30(3) *EC Tax Review*.

[175] Luc De Broe and Mélanie Massant, 'Are the OECD/G20 Pillar Two GloBE-Rules Compliant with the Fundamental Freedoms?' (2021) 30(3) *EC Tax Review*; Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECLI:EU:C:2010:321, para 52.

[176] Luc De Broe and Mélanie Massant, 'Are the OECD/G20 Pillar Two GloBE-Rules Compliant with the Fundamental Freedoms?' (2021) 30(3) *EC Tax Review*; Federico Bertocchi, *The Directive on Global Minimum Taxation in Light of the Fundamental Freedoms* (IBFD 2025) 212-214.

[177] Georg Kofler and Arne Schnitger, 'Does "Initial Phase Relief" Make the EU Minimum Taxation Directive (2022/2523) Invalid?' (2023) 63(5) *European Taxation*.

[178] ibid.

[179] Rita Szudoczky, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation* (IBFD 2014), section 8.3.5.3.

[180] ibid.

[181] Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECLI:EU:C:2005:763, para 35.

Member State of origin.[182] However, the CJEU has also rejected measures at the suitability stage where the rule does not match the objective. In *Huijbrechts*, which concerned Article 63 TFEU, the CJEU held that a territorial condition for a tax exemption was not appropriate for achieving an environmental objective, because sustainable forest management could also concern woodland situated in another Member State.[183] Both cases show that a measure must be logically connected to the objective it claims to pursue.

Applied to the POPE rule, the suitability requirement is likely met. Recital 10 P2D shows that the rule is directed at a specific split-ownership situation.[184] Where a POPE is located in the EU and more than 20 percent of its profit rights are held by persons outside the group, that entity must apply the IIR up to its allocable share of the top-up tax.[185] Article 8 P2D gives effect to this by charging the IIR top-up tax at the level of the POPE.[186] Article 9 P2D then links the amount of tax to the parent entity's ownership interest in the qualifying income of the low-taxed constituent entity.[187]

This makes the rule suitable for its objective. Without Article 8 P2D, the ordinary top-down IIR structure could fail to collect top-up tax properly in split-ownership structures. Part of the low-taxed income may be economically connected to ownership interests outside the group. By charging the POPE for its allocable share, the rule helps ensure that this part of the top-up tax is not left outside the IIR. The offset mechanism in Article 10 P2D also supports the suitability of the rule, since it reduces the risk that the same top-up tax is charged twice.[188]

The Commission's proposal also supports this conclusion.[189] It explains that, where a POPE is located in the EU, the primary taxing right may lie with the Member State of that POPE.[190] The proposal also describes the rule as a bottom-up method, starting from the lowest-tier POPE and moving upwards, with a credit for top-up tax due by a lower-level POPE.[191] This shows that the POPE rule was designed to make the IIR work in split-ownership structures, while reducing the risk of double counting.

The POPE rule therefore has a clear connection to the objective of effective minimum taxation. Unlike the measures in *Huijbrechts*[192], it does not work against its stated aim. It targets the specific gap created by split ownership and the top-down structure of the IIR. The suitability requirement should therefore be satisfied.

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[182] Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam* [2011] ECLI:EU:C:2011:785, paras 46-48.

[183] Case C-679/17 *Vlaams Gewest v Johannes Huijbrechts* [2018] ECLI:EU:C:2018:940, para 34.

[184] Council Directive (EU) 2022/2523, recital 10.

[185] ibid.

[186] ibid, art 8.

[187] ibid, art 9.

[188] Council Directive (EU) 2022/2523, art 10.

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

[190] ibid, 7.

[191] ibid.

[192] Case C-679/17 *Vlaams Gewest v Johannes Huijbrechts* [2018] ECLI:EU:C:2018:940.

6.3.2 Necessity

The necessity analysis asks whether the same objective could have been achieved through less restrictive measures.[193] This is a more complex question than suitability.

The CJEU's case law shows that a tax rule may be suitable, but still go further than necessary.[194] In *DMC*, the CJEU held that a Member State may determine the tax due on unrealised capital gains when its power to tax those gains comes to an end.[195] However, the CJEU also stressed that the collection of that tax must be proportionate.[196] It therefore accepted a system where the taxpayer could choose to pay the tax immediately or spread the payment over five years, since this did not go beyond what was necessary to protect the balanced allocation of taxing powers.[197] The same approach was confirmed in *Verder LabTec*, where staggered recovery of tax over several years was accepted as a proportionate way to deal with unrealised gains.[198] These cases show that the CJEU looks at the design of the rule, not only at the legitimacy of the objective.

The same approach can be seen in more recent case law under Article 63 TFEU. In *Credit Suisse*, the CJEU accepted that withholding tax may be an appropriate way to secure the taxation of non-residents.[199] However, it held that granting loss-making non-resident companies reimbursement of the withholding tax and a possible deferral of taxation would not undermine the objective of effective tax collection.[200] The CJEU made a similar point in relation to the balanced allocation of taxing powers, finding that deferral would not require the source State to give up its taxing right, since the dividends could still be taxed once the non-resident company became profitable.[201] The relevance for the POPE rule is not that the factual situation is the same as in the case law. The point is that the CJEU asks whether the tax objective can be protected by a more precise mechanism, such as deferral, reimbursement or another form of adjustment.

Applied to the POPE rule, the first possible alternative is a credit or refund mechanism for outside minority shareholders. Such a mechanism would not need to stop the POPE from paying top-up tax. It would instead reduce the economic effect on minority shareholders who are not responsible for the low-tax outcome.

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[193] See for example Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECLI:EU:C:2005:763, para 35; Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam* [2011] ECLI:EU:C:2011:785, para 42.

[194] See for example Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECLI:EU:C:2005:763, paras 53-55; Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam* [2011] ECLI:EU:C:2011:785, paras 73-74.

[195] Case C-164/12 *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte* [2014] ECLI:EU:C:2014:20, para 60.

[196] ibid, para 61.

[197] ibid, paras 62-64.

[198] Case C-657/13 *Verder LabTec GmbH & Co. KG v Finanzamt Hilden* [2015] ECLI:EU:C:2015:331, paras 51-52.

[199] Case C-601/23 *Credit Suisse Securities (Europe) Ltd v Diputación Foral de Bizkaia* [2024] ECLI:EU:C:2024:1048, paras 59-60.

[200] ibid, paras 61-62, 66.

[201] ibid, para 75

Kratzlmeier's analysis supports this concern.[202] He argues that Pillar Two's group approach may disregard the interests of minority shareholders and creditors, because the entity that bears the tax may not be the entity that generated or benefited from the low-taxed income.[203] He also discusses possible compensation mechanisms to protect minority shareholders from bearing the cost of minimum taxation.[204] This supports the view that a refund or credit mechanism would be more targeted than simply leaving the indirect burden with the outside minority shareholder. The weakness is that such a mechanism would be administratively complex and difficult to apply uniformly across Member States.

A second possible alternative would be a more targeted POPE rule. Article 8 P2D applies once more than 20 percent of the profit rights in the POPE are held by persons outside the group.[205] The rule does not require any further assessment of whether the outside ownership actually creates a material risk that top-up tax will not be collected. A more targeted rule could have combined the 20 percent threshold with an additional condition, for example that the ordinary IIR would otherwise leave a material part of the top-up tax uncollected.

This alternative is supported by the structure of the P2D. Article 8(3) P2D already switches off the POPE rule where the POPE is wholly held by another POPE that is subject to a qualified IIR.[206] Article 10 P2D also contains an offset mechanism to reduce the risk that the same top-up tax is charged twice.[207] These provisions show that the EU legislator was able to adjust the rule where an additional IIR charge was not needed. This supports the argument that the rule could also have been designed more carefully in relation to outside minority shareholders.

A third possible alternative is a QDMTT-first approach, at least where the low-taxed entity is located in a jurisdiction that applies an effective QDMTT. If that jurisdiction collects the top-up tax itself, the residual top-up tax to be collected under the IIR is reduced and may disappear. The tax is then collected closer to the low-taxed income, instead of being shifted to the level of the POPE.

Bertocchi makes this argument in relation to the IIR more generally.[208] He argues that a QDMTT can reduce the free movement problem because the top-up tax is collected at the level of the low-taxed constituent entity, instead of at the level of the parent entity.[209] The same reasoning is relevant by analogy to the POPE rule. If the low-tax jurisdiction already collects the top-up tax, the need for Article 8 P2D is weaker.

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[202] Fabian Kratzlmeier, 'Shareholders, Creditors, and GLOBE: A New Perspective' (2024) 116 *Tax Notes International*.

[203] ibid.

[204] ibid.

[205] Council Directive (EU) 2022/2523, art 8.

[206] ibid, art 8(3).

[207] ibid, art 10.

[208] Federico Bertocchi, *The Directive on Global Minimum Taxation in Light of the Fundamental Freedoms* (IBFD 2025).

[209] ibid, 217-218.

Dourado supports this point in a more policy-oriented way.[210] She explains that the QDMTT can help avoid revenue shifting from the source jurisdiction to the jurisdiction of the parent entity.[211] This is relevant for necessity because it shows that the P2D itself contains a less intrusive way of collecting top-up tax in some cases. Where an effective QDMTT is applied, the tax is collected in the jurisdiction where the low-taxed income arises, which reduces the need for a POPE-level IIR charge. This supports the view that a QDMTT-first approach is more closely connected to the low-taxed income.

However, the QDMTT cannot fully replace Article 8 P2D. The EU legislator cannot assume that every low-tax jurisdiction, especially outside the EU, will adopt an effective QDMTT. For that reason, the QDMTT is not a complete alternative to the POPE rule. It is better understood as a less restrictive solution in cases where it actually applies.

Overall, the necessity assessment is more uncertain than suitability. The POPE rule targets a real issue in the IIR structure, but possible alternatives, such as a refund or credit mechanism, a more targeted POPE rule, or a QDMTT-first approach, show that the indirect burden on outside minority shareholders could potentially have been reduced.

6.3.3 Proportionality in the strict sense

The final step is proportionality in the strict sense. This can be understood as an overall proportionality assessment. The main issue is whether it is acceptable that an outside minority shareholder bears part of the economic burden, even though that shareholder is not the taxpayer under Article 8 P2D and did not cause the low-taxed profits or the low effective tax rate.

The strongest argument against the POPE rule is the position of the outside minority shareholder. The shareholder does not decide where the MNE group locates its low-taxed constituent entities. The shareholder also normally has no control over the tax position of those entities or over the distribution policy of the POPE. Still, when the POPE pays top-up tax under Article 8 P2D, the economic return on the minority investment may be reduced. The burden is indirect, but it is linked to the shareholder's investment.

Kratzlmeier's analysis supports this concern.[212] As discussed above, he shows that Pillar Two may place an economic burden on minority shareholders even where they did not benefit from the low-taxed income.[213] This supports the view that the indirect burden on outside minority shareholders should be taken into account when assessing proportionality in the strict sense.

[210] Ana Paula Dourado, 'Pillar Two from the Perspective of the European Union' (2022) 5 *British Tax Review*.
[211] ibid.
[212] Fabian Kratzlmeier, 'Shareholders, Creditors, and GLOBE: A New Perspective' (2024) 116 *Tax Notes International*.
[213] ibid.

Dourado adds a more specific ability-to-pay perspective.[214] She explains that ability-to-pay normally means that the tax burden should correspond to the income or economic capacity of the taxpayer.[215] Pillar Two creates a different situation, because top-up tax may be imposed on a group entity even though the low-taxed income was earned by another entity.[216] She illustrates this with a POPE example, where one POPE may have to pay top-up tax connected to the profits of a constituent entity in which it has no ownership interest and with which it has no transactions.[217] She argues that this outcome is difficult to reconcile with the ability-to-pay principle.[218]

Even though ability-to-pay is not itself the legal test under Article 63 TFEU, Dourado's analysis is relevant for the final proportionality assessment. Article 8 P2D places the legal tax burden on the POPE.[219] Article 9 P2D limits that burden to the POPE's allocable share, and Article 10 P2D reduces the risk that the same top-up tax is charged twice.[220] These provisions make the rule more targeted. However, they do not remove the indirect economic effect on outside minority shareholders. The question is therefore whether the POPE and, indirectly, its outside minority shareholders have a sufficiently close connection to the low-taxed income to make that burden acceptable.

Basteleurs, Beer and Moramarco also provide useful guidance, although their analysis concerns the UTPR.[221] They examine the UTPR under the Charter of Fundamental Rights of the EU.[222] They do not argue that the UTPR necessarily violates those rights.[223] Their analysis rather shows that Pillar Two rules may raise proportionality concerns where the tax is imposed on one group entity, while the low-taxed income was earned by another entity.[224] This is relevant by analogy to the POPE rule. The POPE rule is less far-reaching than the UTPR, because the POPE has an ownership link to the low-taxed constituent entity. Still, in both situations, the legal taxpayer and the person who bears the economic burden are not always the same.

There are also strong arguments in favour of the POPE rule. The rule is not unlimited. It applies only where the POPE threshold is met, the tax is limited through the allocable share mechanism in Article 9 P2D, and Article 10 P2D reduces the risk of double counting.[225] These features show that Article 8 P2D is designed to make the

[214] Ana Paula Dourado, 'Pillar Two and the Principles of Ability-to-Pay, Legality, and Symmetry' (2023) 51(6) *Intertax*.

[215] ibid.

[216] ibid.

[217] ibid.

[218] ibid.

[219] Council Directive (EU) 2022/2523, art 8.

[220] ibid, arts 9-10.

[221] Robbe Basteleurs, Benjamin Beer and Giuseppe Moramarco, 'The Compatibility of the UTPR with Fundamental Rights: A Critical Assessment' (2025) 17(4) *World Tax Journal*.

[222] Robbe Basteleurs, Benjamin Beer and Giuseppe Moramarco, 'The Compatibility of the UTPR with Fundamental Rights: A Critical Assessment' (2025) 17(4) *World Tax Journal*; Charter of Fundamental Rights of the European Union [2016] OJ C 202/389, arts 15-17 and 20-21.

[223] Robbe Basteleurs, Benjamin Beer and Giuseppe Moramarco, 'The Compatibility of the UTPR with Fundamental Rights: A Critical Assessment' (2025) 17(4) *World Tax Journal*.

[224] ibid.

[225] Council Directive (EU) 2022/2523, arts 8-10.

IIR work in split-ownership structures, rather than to impose an unlimited burden on outside shareholders.

This matters for the final proportionality assessment. The POPE rule addresses a real problem in the IIR structure. Without Article 8 P2D, part of the top-up tax may not be collected at the level that reflects the ownership structure of the group. The OECD examples also show that the POPE rule and the IIR offset mechanism are designed to coordinate the collection of top-up tax where both a POPE and a higher parent entity may otherwise apply the IIR.[226]

At the same time, the safeguards in Articles 9 and 10 P2D mainly protect the system against over-collection and double counting.[227] They do not directly protect the outside minority shareholder. There is no refund or credit mechanism for a minority shareholder who suffers an economic loss through reduced dividends or share value. The 20 percent threshold in Article 3(22) P2D is also automatic.[228] Once the threshold is met, the rule applies without asking whether the outside minority shareholder had any influence over the low-taxed structure or whether the shareholder benefited from it.

The final assessment is therefore difficult. The POPE rule pursues an important objective and has a clear place within the Pillar Two system. It is also more closely connected to the low-taxed income than the UTPR, since the POPE has an ownership link to the low-taxed constituent entity. These points support the proportionality of the rule. However, the outside minority shareholder may still bear an indirect and uncompensated burden without having caused the low-taxed profits or having control over the group's tax position. The lack of a specific protection for such shareholders makes the rule harder to defend in the final assessment. So, the POPE rule is not clearly disproportionate, but it remains vulnerable in proportionality in the strict sense.

6.4 Interim conclusion on justification and proportionality

The analysis shows that the POPE rule can be justified in principle, but the justification is not equally strong under all grounds. The balanced allocation of taxing rights provides the strongest support, especially when the POPE rule is understood as a mechanism for allocating top-up tax within the Pillar Two system. Prevention of tax avoidance gives only limited support, since Article 8 P2D is not limited to artificial or abusive arrangements. Coherence of the tax system is also weak, because there is no clear direct link between a tax advantage and a corresponding tax burden in relation to the same taxpayer. The broader objective of securing a global minimum level of taxation may support the justification, but only as an additional and still uncertain ground.

[226] OECD, 'Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two) Examples' (2025) < https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-minimum-tax/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-erosion-model-rules-pillar-two-examples.pdf > accessed 17 May 2026, Example 2.3.2-1.

[227] Council Directive (EU) 2022/2523, arts 9-10.

[228] ibid, art 3(22).

The proportionality assessment is more difficult. The POPE rule is likely suitable, since it addresses a real gap in the IIR structure. However, necessity and proportionality in the strict sense are less clear. Possible alternatives could have reduced the indirect burden on outside minority shareholders, and Articles 9 and 10 P2D do not directly protect those shareholders. Overall, the POPE rule would probably be regarded as proportionate if the CJEU gives weight to the EU legislator's broad discretion, but it becomes harder to defend if greater weight is given to the lack of control, benefit and compensation for outside minority shareholders.

7 Conclusion

This thesis has examined whether the POPE rule in the P2D creates a restriction on the free movement of capital under Article 63 TFEU, and if so, whether that restriction can be justified and regarded as proportionate under EU law.

The POPE rule constitutes an indirect restriction on the free movement of capital. The rule does not expressly distinguish between resident and non-resident minority shareholders. It is triggered by outside ownership, not by the residence of the shareholder. However, the rule may still make cross-border minority investment less attractive. An outside minority shareholder is not the taxpayer under Article 8 P2D, but may be economically affected when the POPE pays top-up tax. This effect may arise through lower distributable profits, lower dividends or a reduced share value. For that reason, the POPE rule falls within Article 63 TFEU and constitutes an indirect restriction on the free movement of capital.

The restriction can be justified in principle, but the justification is not equally strong under all grounds. The balanced allocation of taxing rights provides the strongest support, especially when the POPE rule is understood as a mechanism for allocating top-up tax within the Pillar Two system. Prevention of tax avoidance gives weaker support, since Article 8 P2D is not limited to artificial or abusive arrangements. Coherence of the tax system is also a weak justification, because there is no clear direct link between a tax advantage and a corresponding tax burden in relation to the same taxpayer. The broader objective of securing a global minimum level of taxation may support the justification, but only as an additional and still uncertain ground.

The proportionality assessment is more uncertain. The POPE rule is likely to satisfy the suitability requirement because it addresses a real issue in the IIR structure by ensuring that top-up tax can be collected in split-ownership situations. Articles 9 and 10 P2D make the rule more targeted and reduce the risk of double counting, but they do not directly protect outside minority shareholders from an indirect economic burden. Possible alternatives, such as a refund or credit mechanism, a more targeted POPE rule, or a QDMTT-first approach where such a tax applies, show that the burden on those shareholders could potentially have been reduced.

The overall conclusion is therefore that the POPE rule creates a restriction on the free movement of capital under Article 63 TFEU. That restriction can be justified in principle, but its proportionality is not fully clear. The rule would probably be regarded as proportionate if the CJEU gives weight to the EU legislator's broad discretion and the objective of effective minimum taxation. However, if greater weight is given to the position of outside minority shareholders, especially their lack of control, lack of benefit and lack of compensation, the rule is less clearly proportionate. The proportionality of the POPE rule therefore depends on how much weight the CJEU gives to the position of the outside minority shareholder: not taxed directly under Article 8 P2D, but still economically affected by the rule.

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