 Studi Tributari Europei. Vol.15 (2025)
ISSN 2036-3583

The Adaptation of Directive 2022/2523 to the Italian Legal Order*

A Critical Analysis of the Transposition of the Global Minimum Tax

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Submitted: November 17, 2025 – Accepted: December 29, 2025 – Published: July 15, 2026

L'adattamento della Direttiva 2022/2523 all'ordinamento italiano: analisi critica del recepimento della global minimum tax

Legislative Decree No. 209 of December 27, 2023, implemented the global minimum tax regime contained in Directive (EU) No. 2022/2523, adapting it to domestic law. This adaptation process, however, raises critical issues regarding the correct interpretation of the provisions therein; more substantive issues, relating to the location criteria for the companies involved; and procedural issues relating to the application of the global minimum tax. In this context, potential conflicts with the constitutional principles of the Italian legal system (such as the principle of legality, the right to a statutory basis, and taxation according to ability to pay) and with Italian corporate income tax law have been identified. Furthermore, certain issues have been identified that could raise concerns regarding the correct classification and effects of the provisions introduced by the Legislative Decree.

Il Decreto Legislativo 27 dicembre 2023, n. 209 ha recepito la disciplina della tassazione minima globale contenuta nella Direttiva (UE) n. 2022/2523, adattandola all'ordinamento interno. Tale processo di adattamento, però, solleva delle criticità, che coinvolgono la corretta interpretazione delle disposizioni ivi previste; profili più sostanziali, che afferiscono ai criteri di localizzazione delle imprese a tal fine interessate, nonché profili procedurali, relativi all'applicazione della global minimum tax. In tale contesto, sono stati individuati possibili contrasti con i principi costituzionali dell'ordinamento italiano (quali il principio di legalità, di riserva di legge e di imposizione secondo capacità contributiva) e con la disciplina italiana dell'imposizione sul reddito delle società.

Keywords: Tax law; Global minimum tax; Undertaxed profits rules; Qualified domestic top-up tax; Constitutional principles.

* This study constitutes a scholarly contribution to the national research project of interest (PRIN 2022 – 2022P23BRW) entitled: *The Common Constitutional Traditions of the European Union and their Impact on the Process of Europeanisation of Tax Law* CUP: D53D23007390006.

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1. The Global Minimum Tax and its Transposition in Italy: Introductory Remarks

It is by now well established that the primary source of the global minimum tax is found in the so-called GloBE Model Rules (hereinafter, the "Model"), prepared by the OECD and published in 2021.[1] This proposal for a global minimum tax was subsequently transposed, almost in its entirety, by the European Union through the Council Directive (EU) No. 2022/2523 of 14 December 2022 (hereinafter, the "Directive"). The intention of the European legislator was, *inter alia*, to adapt the global minimum tax in a manner that would prevent a fragmentation of the internal market or violations of the fundamental freedoms (see Recital No. 4 of the Directive). For these reasons, the framework contained in the Model was adapted to the legal order of the European Union, a circumstance that led—among other developments—to an expansion of the scope of application, to include groups of undertakings located within a single Member State.[2]

Within this context lies the Legislative Decree No. 209 of 27 December 2023 (hereinafter, the "Decree"), which transposed the global minimum tax into the Italian legal system, adapting it to national requirements and to the structure of the domestic legal order (while having preserved almost the entire text of the EU provisions). This adaptation, as well as the choices made by the legislator (within the limits permitted by the Directive), led to the introduction within the Decree itself of specific provisions and variations from what is provided for in the Directive and the Model, which affect the criteria for interpreting the rules under consideration, as well as the substantive and procedural application of certain relevant taxes.

Building on the identification of these latter points of differentiation from the Directive and the OECD proposal, this contribution aims to identify critical issues in the Decree, highlighting potential conflicts that may arise within the Italian legal order itself.

2. General Aspects: The Interpretation of Italian Rules

A first aspect worthy of attention is the provision of Article 9 of the Decree. This Article provides that the global minimum taxation is established in Italy in accordance with the common approach shared at international level, on the basis of the OECD rules adopted on 14 December 2021, *Tax*

1. See OECD (2021), *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)*, Paris, OECD Publishing.

2. More precisely, this concerns the expansion of the scope of application of the global minimum tax also to large-scale domestic groups, as provided only by the Directive in Article 1, in order to avoid—in the European legislator's intentions—discrimination between domestic and cross-border situations (see Recital No. 6 of the Directive). A more in-depth analysis on this point is found in M. Dietrich – C. Golden, *Consistency versus "Gold Plating": The EU Approach to Implementing the OECD Pillar Two*, in Bull. Intl. Taxn. (2022) 4: 183 *et seq.*; A. P. Dourado, *The EC Proposal of Directive on a Minimum Level of Taxation in Light of Pillar Two: Some Preliminary Comments*, in Intertax (2022) 3: 200 *et seq.* However, in F. Bertocchi, *The Directive on Global Minimum Taxation in Light of the Fundamental Freedoms*, Amsterdam, 2025, potential violations of primary law have been identified, in particular—*inter alia*— of the freedom of establishment and the free movement of capital.

https://doi.org/10.60923/issn.2036-3583/24126

Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two), and—quite evidently—the provisions of the Directive that it transposes (paragraph 1).

However, the third paragraph warrants more careful examination. Pursuant thereto, the provisions contained in the Decree must be "interpreted and applied taking into account the Commentary to the OECD rules adopted on 11 March 2022, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)*, and subsequent amendments, and the Administrative Guidance provided for in Article 8.3 of the aforementioned OECD rules", concluding that "by decree of the Minister of Economy and Finance, the implementing provisions for the contents of the Commentary, the Administrative Guidance and their updates shall be adopted" (unofficial translation).

The principal concern, therefore, pertains to the criteria for interpretation and application of the provisions *de quibus* that should be adopted. Specifically, the analysis merits focusing on the reference that the legislator has made to sources external to the national legal order, such as OECD soft law,[3] not only in the version identified in the Decree (*i.e.*, the Commentary to the OECD rules adopted on 11 March 2022) but also to their subsequent versions.

What is provided in the Decree raises a preliminary critical issue of a general nature. Insofar as the legislator, through Article 9, refers to sources external to the legal order which are, however, necessary for interpreting and applying the provisions under discussion, there would be a potential erosion of the legislative power attributed to the Parliament.[4] Indeed, it is no longer the Parliament that determines with precision the content of a provision; rather, in such a case, an international organisation such as the OECD would significantly influence certain aspects.

The criticism is even more evident in relation to the Italian constitutional order and, therefore, in light of Article 23 of the Italian Constitution, which expresses representative democracy and provides a guarantee for the individual citizen or taxpayer.[5] *A fortiori*, Article 9 raises critical concerns if one adopts the specific perspective of tax law: there is a risk that the reference to external sources, by Article 9 of the Decree, will produce effects also and especially on the substantive rules relating to the global minimum tax, with specific reference to the taxable persons, the taxable event, and the amount of taxes due. This circumstance, which does not seem possible to exclude in the present case (in the absence of a contrary provision), must be carefully assessed pursuant to Article 23 of the Italian Constitution, to the extent that it is not the law that determines the essential elements of the levy thus imposed.[6]

Indeed, although the interpretation of Article 23 of the Italian Constitution offers broad margins of flexibility, especially when competence is constitutionally assigned to supranational or sub-state levels, such flexibility has its limits in the fundamental core of the provision, which is attributable to the protection of the democratic principle.

A further consequence of what has been highlighted above is the considerable uncertainty that could arise from the application of Article 9. The taxpayer appears to be at the mercy of interna-

3. On this point, M. Marcussen, *OECD Governance through Soft Law*, in U. Mörth (Ed.), *Soft law in governance and regulation: an interdisciplinary analysis*, Cheltenham Northampton, Edward Elgar, 2004: 103 *et seq.*, observes how the OECD acts by means of soft law instruments, that is, acts devoid of binding legal effects which however—frequently—have the same logical structure as binding legal rules, and which for this reason merit not being classified as sources of law (in this sense, R. Luzzatto, *Il diritto internazionale generale e le sue fonti*, in S. M. Carbone – Et al., *Istituzioni di diritto internazionale*, Torino, Giappichelli, 2016: 86).

4. Indeed, M. Mazziotti Di Celso, *Parlamento (princìpi generali e funzioni)*, in Enciclopedia del Diritto, vol. XXX, Milano, Giuffrè, 1981: 782, recalls how, in the modern State, the legislative function is historically proper to parliamentary institutions.

5. F. Tesauro, *Istituzioni di diritto tributario – parte generale*, Torino, Utet, 2020, 14.

6. Similarly, F. Bertocchi, *The Scope of Application of the Legality Principle in Taxation: The Case of Soft Laws and the Global Minimum Tax, from an International Perspective*, in P. Pistone (Ed.), *The Common Constitutional Tradition of the European Union and Its Impact on Tax Law*, GREIT Series, Amsterdam, IBFD, forthcoming.

tional developments and, in particular, the activities of the OECD, which, by amending the Commentary and the Guidelines on the global minimum tax, would be capable of producing, pursuant to Article 9, significant consequences for persons located within the national territory and subject to the global minimum tax.

In other words, the reference made by the Decree to the documents elaborated by the OECD would favour the emergence of significant legal uncertainty, and thus a conflict with the relevant principle of legal certainty,[7] significant within the Italian constitutional order, although not expressly provided for therein:[8] as stated by eminent scholars, "the law either is certain or it is not law at all,"[9], and the reference to external sources, especially soft law, for the purpose of applying the taxes under discussion, could generate numerous difficulties.

In addition to the aspects recalled above, the reference made by Article 9 of the Decree to documents elaborated by the OECD poses further problems of application. First and foremost, the ways of correct and legitimate interpretation of the provisions relating to the global minimum tax. Assuming, indeed, that—as is undisputed under Article 9 of the Decree—the OECD proceeds with the elaboration of new and more updated documents relevant for this purpose,[10] it would be necessary to understand which interpretive canons are effectively applicable. Thus, whether it would be necessary to apply and interpret (see Article 9) the Decree as in force at the time it entered into force; or—as Article 9 would seem to suggest—whether it would be necessary to apply and interpret the Decree in light of the new documents elaborated by the OECD, also in relation to situations that arose prior to the publication of such soft law sources.

Invoking international law, one could characterise this problem as the application of a so-called static versus a so-called dynamic interpretation of national rules on the global minimum tax in light of OECD soft law.[11]

In any event, it would be appropriate to understand the content of the new OECD documents to assess whether they have clarified the rules at hand or modified the substantive framework of the taxes in question. In the first case, it could be—at most—a matter of interpretative documents, the legitimacy and binding effect of which in the Italian legal order would nonetheless be excluded, in light of Article 23 of the Italian Constitution and Article 1, paragraph 2, of the Italian Taxpayer's Bill of Rights (except for their transposition by the legislator, and thus not by secondary sources, as allowed under Article 9 of the Decree).

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7. Clearly, G. Alpa, *La certezza del diritto nell'età dell'incertezza*, in G. Iudica – G. Alpa (Eds.), *Costituzione europea e interpretazione della Costituzione italiana*, Napoli, Edizioni Scientifiche Italiane, 2006: 4 *et seq.*, recalls how legal certainty may pertain to the exercise of power, to the effects of power, to the possibility of exercising fundamental rights, as well as—*inter alia*—to relationships between private parties.

8. Indeed, there are numerous principles, including constitutional ones, that express the principle of legal certainty, such as the principle of legality, of non-retroactivity of the law, and of the inviolability of *res judicata*. However, R. Guastini, *A proposito di certezza del diritto*, in Analisi e diritto (2021): 184, observes how this principle is "unapplied, or in any event very imperfectly applied", also because of the plurality of sources which, according to the Author, are not always clearly ordered according to hierarchical criteria, or—as could be the case at hand—because "of the (poor) technique of drafting normative texts" (unofficial translations).

9. Unofficial translation of N. Bobbio, *La certezza del diritto è un mito?*, in Rivista internazionale di filosofia del diritto (1951): 150.

10. See precisely the recent Consolidated Commentary to the GloBE Model which, while being characterised as a document that consolidates others relevant for this purpose, introduces new clarifications [OECD (2025), *Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules*, Paris, OECD Publishing].

11. Similarly, albeit in relation to the content of the Directive with respect to OECD documents, J. Englisch, *Dynamic References To International Soft Law Agreements: Flexibility With Limits*, in EC Tax Review 33 (2024) 1: 2 *et seq.*; M. Zvonarjova, *Applicability of OECD-Developed GloBE Explanatory Materials within the Legal Framework of the European Union*, in International Tax Studies (2025) 4: 4 *et seq.* This latter could be characterised as an "evolving" interpretation, which determines the substantial and not formal modification of a rule as a consequence of a subsequent provision (see S. Romano, *Frammenti di un dizionario giuridico*, Milano, Giuffrè, 1947, 120), although—in the present case—it concerns soft law, or a source that does not produce binding effects (as already observed).

In the second hypothesis, following Article 9, OECD soft law could generate—indirectly—effects on taxes applied in Italy. In such a case, in addition to what has already been observed in relation to doubts concerning compatibility with the rule of law, a potential incompatibility with the principle of non-retroactivity of tax rules could also emerge, pursuant to Article 4 of the Italian Taxpayer's Bill of Rights as well as Article 11 of the Preliminary Provisions to the Civil Code,[12] insofar as such clarifications modified the provisions of the Model *ab origine* and were transposed—*de facto*—into the Italian legal order by virtue of Article 9 of the Decree.

In parallel, there could also arise the question of the compatibility of any activity of the Tax Administration based on Article 9 and—in light of the reference therein provided—on OECD soft law, with the principle of legality: the administrative power thus exercised would not be entirely founded on a prior rule but rather—in part—on a document devoid of binding effect, for which reason the exercise of such a power could prove partially arbitrary and therefore unlawful.[13]

In light of the foregoing, the provision under discussion requires attention, as it is liable to raise critical issues and may have significant effects on the application of the Italian global minimum tax, potentially violating the most relevant constitutional principles.[14]

3. Criteria for the Location of Undertakings: The Substantive Dimension

Shifting the analysis to the substantive aspects contained in the Decree, particular attention must be directed to Article 12, on the criteria for the location of an undertaking, while paragraph 2 is devoted to stateless flow-through entities, paragraph 3 to permanent establishments, and paragraphs 4 and 5 to cases of dual tax residence; the first paragraph governs the criterion for the location of an undertaking, as a necessary requirement for the purpose of its potential liability to the global minimum tax.

In particular, it is therein provided that an undertaking (other than a flow-through entity) shall be considered located in the State in which it is "resident for income tax purposes, on the basis of the criterion of the location of the place of effective management, the place of incorporation, or similar criteria" (unofficial translation). In other words, according to the Explanatory Report and Technical Note to the Decree, an undertaking is subject to the top-up tax in the country in which it is located pursuant to Article 12.

On the merits, it is appropriate to note that this framework does not appear to be fully compliant with what is stated in Article 10.3.1 of the Model and Article 4, paragraph 1, of the Directive, which provide for this purpose the existence of tax residence in a jurisdiction by reason of the "place of management," "place of creation," or "similar criteria" (unofficial translations) [15]

Notwithstanding the foregoing, the Commentary to the Model clarifies that the rules therein provided are relevant only for the purpose of identifying the location of undertakings, and thus for

12. On interpretation in tax law, F. Tesauro, *Istituzioni di diritto tributario – parte generale*, 39 *et seq.*, recalls how interpretative provisions (even if not being, *stricto sensu*, those hypothesised above, *i.e.*, soft law) always produce retroactive effect, whereas, also pursuant to Article 4 of the Italian Taxpayer's Bill of Rights, modifying provisions of substantive rules (even if not being, *stricto sensu*, those just hypothesised) affecting the tax are applicable from the taxable year following that in progress at the date of entry into force of the provisions that provide for them.

13. In this sense, on the principle of legality, G. Rolla, *L'organizzazione costituzionale dello Stato*, Milano, Giuffrè, 2010, 225 *et seq.*, which reconstructs its constitutional foundation from Articles 97, 101, 103, and 113 of the Italian Constitution.

14. Similarly, P. Pistone, *L'europeizzazione del diritto tributario e la riforma fiscale italiana: dall'adattamento all'adeguamento al diritto europeo*, in Diritto e pratica tributaria internazionale (2024) 2: 380, according to whom an insurmountable rift could also arise with the common constitutional traditions within the European Union, with particular reference to the principle of democratic representation underlying the principle of legality.

15. On this point, *Ibidem*, 383 *et seq.*, observes how the legislator's choice to depart from the provisions of the Directive is difficult to understand and requires correction.

https://doi.org/10.60923/issn.2036-3583/24126

calculating the global minimum to be collected in the relevant State. For this reason, the Commentary highlights that such rules do not determine any effect on national or treaty laws in force regarding the tax residence of such entities or source taxation.[16] Indeed, the criteria indicated "are non-exhaustive examples of criteria typically used by jurisdictions in their domestic tax residency rules," given that "whether a Constituent Entity is a resident of a jurisdiction depends on the domestic law of each jurisdiction."[17]

Notwithstanding what is provided by the Commentary,[18] adopting a literal interpretation of Article 12 of the Decree, one could also argue that the rule at hand provides that, for the purposes of the global minimum tax, a given undertaking is located in a jurisdiction if it is resident there for tax purposes "on the basis of the location of the place of effective management, the place of incorporation, or similar criteria" (unofficial translation), and not based on other criteria, such as—for example—on a presumptive basis (pursuant to Article 73, paragraph 5-*bis*, of the Italian Corporate Income Tax) or by reason of the registered office or other criteria not similar to those first recalled.[19]

Indeed, Article 12 of the Decree not only states that an undertaking is considered—for the purposes of the global minimum tax—as located in the jurisdiction in which it is tax resident. Rather, it localises undertakings in States in which they are resident there—however—by reason of the existence therein of the place of effective management, the place of incorporation, or similar criteria. Article 12 of the Decree, if interpreted literally, would thus appear to impose two cumulative conditions for determining the country of location of undertakings: namely, that the entity be tax resident and that such circumstance depends on the presence in that jurisdiction of the place of effective management, the place of incorporation, or similar criteria.

Even if one interprets the concluding formula "other similar criteria" as open-ended, and thus capable of accommodating every possible connecting factor employed by States for the purpose of determining the tax residence of the entities at hand,[20] it is nonetheless possible to observe a potential misalignment already within the Italian legal order—in particular, between what is provided in Article 12 of the Decree and in Article 73, paragraph 3, of the Corporate Income Tax. On the one hand, the existence, for the greater part of the taxable year, of the registered office, the place of effective management, or the principal place of management is required in Italy; on the other, Article 12 requires the existence of tax residence by reason of the presence, in a given jurisdiction, of the place of effective management, the place of incorporation, or similar criteria.

On the basis of what has been recalled, therefore, the Italian global minimum tax framework would not appear to be aligned with that provided therein for purposes of the tax residence of companies. If such misalignment between the regimes governing tax residence relevant for corporate taxation

16. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules*, 314, where it is further clarified that "the principle underlying the rules is to follow the treatment under local law."

17. *Ibidem*, 315.

18. This is a source, at most, of soft law, which clarifies the content of the OECD Model and facilitates its correct interpretation (see C. Sacchetto, *Diritto tributario (convenzioni internazionali)*, in *Enciclopedia del Diritto*, vol. *Annali* I, Milano, Giuffrè, 2007: 539).

19. On this point, see R. Ismer, *History and Emergence of the Corporate Residence Concept in Europe: A Comparative Approach*, in E. Traversa (Ed.), *Corporate Tax Residence and Mobility*, Amsterdam, IBFD, 2019: 43 *et seq.*; F. Bertocchi, *La disciplina della residenza fiscale: i criteri dell'iscrizione anagrafica e della sede legale e il loro formalismo, alla luce dell'evoluzione tecnologica e dei nuovi modelli di attività economiche*, in Diritto e pratica tributaria (2021) 2, 682: 702 *et seq.*, where the criteria adopted by many States to determine the tax residence of companies are identified. As clarified therein, some countries determine tax residence "according to the circumstances," in the case of the Netherlands; or by reason of the place where the "effective" management seat is located, in the Spanish case. For a broader and more updated examination of the criteria adopted at international and European Union level in this field, see J. F. P. Nogueira, *Residence for Corporate Income Tax Purposes – General report Subject 1*, Amsterdam, IFA, 2025, 31 *et seq.*

20. See, again, the survey proposed by J. F. P. Nogueira, *Residence for Corporate Income Tax Purposes – General report Subject 1*, 31 *et seq.*

vis-à-vis the “special” regime provided for the global minimum tax emerges within the Italian legal order, *a fortiori*, such a problem could also emerge in relation to other jurisdictions.[21]

One could, indeed, hypothesise the undesirable scenario in which Italy applies the global minimum tax considering an undertaking, which is tax resident for direct tax purposes (pursuant to national or treaty law) in a given State, as not being resident therein by reason of the criteria provided by Article 12 of the Decree. The consequence would be, for example, that an undertaking would be subject to worldwide taxation in the first State but would be subjected to the global minimum tax in another jurisdiction, namely Italy.

Such latter hypotheses and, therefore—more generally—this issue, do not appear to have been taken into consideration by the Italian legislator. Indeed, the Decree intervened to resolve only situations in which, following the application of the criteria identified above, an undertaking is considered “located in two jurisdictions” (and not also in the case where a misalignment might emerge between residence for direct tax purposes and location for the purposes of the global minimum tax). In such a case, pursuant to Article 12, paragraphs 4 *et seq.* of the Decree, reference should be made to the bilateral treaty in force or to the autonomous criteria for resolving the dual location situation.

Based on the foregoing, it seems possible to state that a dual framework exists for determining taxable persons for the purposes of direct taxes and the global minimum tax, a circumstance that would lead to difficult coordination between the two regimes as well as greater uncertainty (in addition to raising—at least within the Italian legal order—a potential concern regarding the compatibility of this framework with Article 53 of the Italian Constitution).[22]

To confirm the uncertainty surrounding the content of the provision *de qua*, it is useful to note that Article 12, paragraph 1 of the Decree provides that where, following the application of the provisions of the first sentence, “the undertaking is not located in any jurisdiction, it shall be considered located where it was incorporated”; whereas the Explanatory Report states that “if the location of a foreign entity cannot be determined on the basis of these criteria, it shall be considered located in the jurisdiction in which it was incorporated” (unofficial translations).

In other words, pursuant to Article 12, the residual criterion (*i.e.*, the State of incorporation) for determining the location of an undertaking for global minimum tax purposes appears to be invocable only in the event that, by virtue of the criteria indicated and already cited, the undertaking is not located in any jurisdiction; whereas the Explanatory Report would appear to provide for the application of such residual criterion in the event that the location of an undertaking is not determinable following the application of the first criteria.

Article 12 of the Decree, therefore, appears criticisable because it is likely to generate litigation.

4. Procedural Aspects of the Italian Global Minimum Tax

Shifting the attention to more procedural aspects, relating to the application of certain relevant taxes, the following may be observed.

Specifically, analysing the framework of the Qualified Domestic Minimum Top-Up Tax (or QDTT, an acronym deriving from Article 11 of the Directive) and the Undertaxed Profits Rule (or UTPR,

21. G. C. Croxatto, *L'imposizione delle imprese con attività internazionale*, Padova, Cedam, 1965, 108 *et seq.*, recalls how the taxing power of the State may—generally—apply to undertakings “whenever there exists the connecting factor … of residence” (unofficial translation), in its various manifestations depending on the taxable person.

22. Some criticisms regarding the compatibility of the global minimum tax with the ability-to-pay principle have been formulated in F. Bertocchi, *Profili critici dell'istituto della soggettività tributaria nel contesto della direttiva unionale in materia di global minimum tax: brevi riflessioni*, in A. Guidara (Ed.), *Soggettività e situazioni tributarie*, Napoli, Edizioni Scientifiche Italiane, 2023: 440 *et seq.*, where it was observed that taxable persons for the global minimum tax—at times—are not the persons who express the relevant ability to pay.

pursuant to Articles 12 *et seq.* of the Directive) contained in the Decree, it is possible to understand the manner in which such taxes have been transposed and adapted to the Italian legal order. However, these aspects—it will be argued—could generate significant issues.

By way of preliminary observation, it is appropriate to recall that both are taxes applied in the hands of undertakings located (see *supra*) in Italy and forming part of an in-scope group (identified in Article 10 of the Decree).[23] The QDTT, more specifically, constitutes an additional tax applied only on undertakings located in Italy, that benefit therein from an effective tax rate below 15% (see Article 18 of the Decree),[24] whereas the UTPR constitutes an additional tax which—differently—is collected from undertakings located in Italy in case an amount of top-up tax, owed by the group of which these entities are members, remains to be paid (*ex* Articles 19 *et seq.* of the Decree).[25]

4.1. Joint and Several Liability for the Payment of Taxes

In this context, a first aspect worth highlighting is provided in Article 18, paragraph 7, Article 19, paragraph 1, and Article 20, paragraph 1, of the Decree.

In particular, it is therein provided that undertakings located in Italy, forming part of the relevant multinational or large-scale domestic groups, are jointly and severally liable for the payment—respectively—of the QDTT and the UTPR that may be due in the jurisdiction. As noted, these provisions adapt the framework provided in the Directive to the Italian legal order, respectively in Articles 11, 12, and 13, which contain no such provision.

In this regard, it is appropriate to examine the nature of the legal instruments introduced by the Italian legislator. From a systematic reading of the global minimum tax, these could be situations of derivative (or *dependent*) joint and several liability, in which there are co-obligors alongside the undertaking that realises the taxable event and that—consequently—manifests the relevant ability to pay.[26] Such a conclusion might appear particularly apt in the case of liability arising from the payment of the QDTT, pursuant to Article 18, paragraph 7, of the Decree: the tax would find its primary application on the undertakings that are located in Italy and that have benefited therein from an effective tax rate below 15%, with other undertakings potentially existing as co-obligors on a derivative basis.

However, the conclusion could change if one were to adopt a literal interpretation of Article 18. In such a case, one could argue that what is therein provided introduces a situation of joint and several liability on an equal basis, a circumstance in which the taxable event is realised by multiple persons who thereby become co-debtors.[27] Indeed, it is therein provided that "if in a fiscal year the effective tax rate … is below the minimum tax rate, a qualified domestic minimum top-up tax is due

23. According to P. Pistone, *L'europeizzazione del diritto tributario e la riforma fiscale italiana: dall'adattamento all'adeguamento al diritto europeo*, 381, the global minimum taxes would qualify as surtaxes, given that they would be additional in character to those ordinarily applied on corporate income.

24. See more extensively A. Marinello, *L'Imposta Minima Nazionale*, in A. Giovannini (Ed.), *La riforma fiscale – I diritti e i procedimenti*, Pisa, Pacini, 2024: 129 *et seq.*; C. Garbarino, *La imposizione minima globale*, Torino, Giappichelli, 2024, 343 *et seq.*

25. Reference is made to the more exhaustive analysis of the tax formulated in F. Farri, *Lo schema di funzionamento dell'imposta minima integrativa e dell'imposta minima supplettiva*, in A. Giovannini (Ed.), *La riforma fiscale – I diritti e i procedimenti*, Pisa, Pacini, 2024: 143 *et seq.*

26. Similarly, E. Potito, *Soggetto passivo d'imposta*, in Enciclopedia del Diritto, vol. XLII, Milano, Giuffrè, 1990: 1227. In this context, indeed, M. Miccinesi, *Solidarietà nel diritto tributario*, in Digesto, Disc. priv., sez. comm., Torino, Utet, 1997: ¶ § 4, observes how forms of derivative joint and several liability are possible that differ from the traditional institution of the "person liable for the tax" (*responsabile d'imposta*) but have characteristics similar thereto. On the principle of solidarity in law, see G. Alpa, *Solidarietà: un principio normativo*, Bologna, Il Mulino, 2022. From the perspective of tax law, reference is instead made to the studies of A. Fantozzi, *La solidarietà nel diritto tributario*, Torino, Utet, 1968.

27. As defined in E. Potito, *Soggetto passivo d'imposta*, 1251.

equal to the top-up tax relating to all of the aforementioned undertakings and entities" (unofficial translation).

This latter sentence could lead one to consider that, once the tax due in Italy has been calculated, it must be discharged by the undertakings located therein, who would thereby be jointly and severally liable on an equal basis: as is known, joint and several liability on equal basis exists whenever there is a single justifying title to tax, which corresponds to the joint and unitary manifestation of ability to pay, attributable—in its entirety—to each co-obligor.[28]

In light of what has been highlighted above, however, it does not appear straightforward to identify the nature of the legal institution provided by the Decree, *i.e.*, whether it is a case of equal or derivative joint and several liability, particularly in light of the fact that the distinguishing criterion for this purpose is represented by the attribution of ability to pay,[29] an aspect that—as noted—does not appear settled. Nevertheless, as will be highlighted shortly, the correct interpretation of the provision under discussion makes it possible to identify the significant consequences for co-obligors located in Italy.

Turning attention to the Undertaxed Profits Rule (UTPR), and thus to Article 19, paragraph 1, and Article 20, paragraph 1, of the Decree, the same doubts already highlighted in relation to the QDTT would appear to arise. Indeed, it is therein provided that all undertakings located in Italy are jointly and severally liable for the payment of the tax attributed to the jurisdiction. Again, the objective of the legal rule under review does not appear to be straightforward; thus, whether Articles 19, paragraph 1, and Article 20, paragraph 1, of the Decree are intended to reconcile the uniqueness of the manifestation of ability to pay with the plurality of persons to whom it is imputable, or whether they are intended to ensure the protection of the public interest in the collection of taxes.[30]

Interpreting Articles 18, 19, and 20 of the Decree as provisions introducing derivative *versus* equal joint and several liability makes it possible to identify the consequences for co-obligors, who—otherwise—would find themselves in a situation of profound uncertainty. Indeed, if it were possible to reach the conclusion that the provisions under discussion introduce cases of derivative joint and several liability, the right of recourse would exist for whoever has paid the tax, for its entire amount—a circumstance that would be excluded in cases of equal joint and several liability (where recourse exists only *pro rata*). Moreover, in the first case, the accessory (*rectius*, derivative) obligation would exist only as long as the principal obligation still existed.[31]

Furthermore, if one were to conclude that these are cases of derivative joint and several liability, the Tax Administration would be required to notify co-obligors of an appropriate tax assessment (as well as a collection notice) separate and distinct from that directed to the principal obligor. Those liable on a derivative basis would not, then, be bound by the tax assessment becoming final for the principal obligor, thereby being able also to challenge its basis via independent proceedings.[32]

What is provided by the Decree, however, does not appear to furnish sufficient clarification in this regard, leaving taxpayers in uncertainty as to the burdens and responsibilities incumbent upon them.

28. Similarly, M. Miccinesi, *Solidarietà nel diritto tributario*, cit., 2.

29. In this sense, A. Marcheselli, *Manuale di diritto tributario*, Milano, Giuffrè, 2024, 80.

30. Similarly, D. Coppa, *Responsabile d'imposta*, in Digesto, Disc. priv., sez. comm., vol. XII, Torino, Utet, 1996, 379–396: ¶ § 2 *et seq.*

31. In this sense, A. Fantozzi, *Solidarietà tributaria*, in A. Amatucci – E. Gonzales – W. Schick (Eds.), *Trattato di diritto tributario*, Padova, Cedam, 1994: 465.

32. In this way, extensively, D. Coppa, *Responsabile d'imposta*, cit., 6; F. Albertini, *Solidarietà nel diritto tributario*, in Digesto, Disc. priv., sez. comm., Torino, Utet, 2009, 6.

4.2. The Person Responsible for the Payment of the Qualified Domestic Top-Up Tax and the Undertaxed Profits Rule and the Amounts Transferred Within the Group for Recharging Purposes

A further aspect of the adaptation of the global minimum tax to the Italian legal system worthy of attention is represented by what is provided in Article 18, paragraph 8, Article 19, paragraph 3, and Article 20, paragraph 4 of the Decree. In particular, it is therein stated that a group, falling within the scope of the global minimum tax, has the "option"[33] to identify an undertaking responsible for the payment of the QDTT (pursuant to Article 18, paragraph 7, of the Decree) or of the UTPR (pursuant to Article 19, paragraph 2, and Article 20, paragraph 3, of the Decree) due in the jurisdiction, and may also proceed to determine the manner of apportionment of the relevant burden among the undertakings located in Italy.

In such cases, moreover, the amounts paid by an undertaking to the one designated for payment, and—consequently—the amounts received by the latter "in respect of the recharging of the tax" (unofficial translation) to the former undertaking, are fiscally irrelevant (see Article 18, paragraph 8, of the Decree, as regards the QDTT; see Article 19, paragraph 3, and Article 20, paragraph 4, of the Decree, as regards the UTPR).

However, critical issues arise regarding the manner of application of the framework under discussion. For this purpose, it does not seem possible to recall the content of the Directive, which provides nothing in Articles 11 and 12 regarding the identification of an undertaking responsible for the payment of taxes or the relevance of amounts potentially transferred between undertakings located in Member States.[34]

On this matter, it is possible to reiterate that the provisions at hand introduce a specific framework relating solely to the payment of the tax,[35] allowing it to be carried out by a single undertaking among those located in Italy. Furthermore, Articles 18, 19, and 20 of the Decree provide that, once the undertaking obliged to pay the QDTT and UTPR has been identified, the relevant tax burden may be apportioned among the undertakings located in the jurisdiction.

Adopting a literal interpretation, one could argue that the Decree introduces—on the one hand—the option to identify an undertaking obliged to pay the relevant taxes, and—on the other—the option, separate from the former, to provide for the apportionment of the relevant burden among the undertakings in Italy. In such a case, there could arise the unsatisfactory circumstance in which undertakings located in Italy and obliged to pay the QDTT and the UTPR proceed—pursuant to Articles 18 *et seq.* of the Decree—to identify the entity charged with the payment of the taxes, without providing the possibility of apportioning the burden among the co-obligors.

Such a situation would allow one to reach the conclusion that such a levy would be liable to violate the principle of ability to pay: the designated entity would be called upon to pay a tax not proportionate to its ability to pay (since the tax would, originally, be owed by multiple persons), in the absence of an obligation to apportion the relevant burden among the interested parties.

From a different perspective, such a taxation mechanism could prove capable of producing expropriatory effects, in potential violation of Article 42 of the Italian Constitution, but also of Article 17

33. So states the Explanatory Report to the Decree, in relation to paragraphs 8 and 9 of Article 18, to paragraph 2 of Article 19, and not explicitly—therefore, by analogy, and in any event assuming a literal or teleological interpretation of the text under discussion—to paragraph 3 of Article 20.

34. Nor does the Model so provide in Articles 2.5 and 10.

35. Indeed, see the cited Explanatory Report to the Decree in relation to paragraphs 8 and 9 of Article 18. In particular, it is provided that such a framework, applicable to the QDTT, is similar to that provided for the UTPR. Since in this latter case it was clarified, by the same Report, that the Decree introduces an option for "the group to identify the undertaking located in Italy responsible for the payment" of the UTPR (unofficial translation), it is possible to conclude that, although for the purposes of the QDTT the term "person liable for the tax" (*responsabile d'imposta*) is used, Article 18, paragraph 8, must be interpreted as an option for the group to identify an undertaking located in Italy that is responsible for the payment of the levy.

of the Charter of Fundamental Rights of the European Union and Article 1 of Protocol No. 1 to the European Convention on Human Rights and Fundamental Freedoms: the taxable person would be called upon to bear a burden clearly exceeding its own ability to pay, with such a levy being of a great amount as to become—potentially—an unlawful expropriation.[36]

In the absence of clarifications from the Italian legislator and in light of the provisions under discussion, the Italian global minimum tax framework raises significant critical issues, to the detriment of taxpayers.

5. Brief Conclusions

The reflections set forth above have highlighted significant critical aspects of the Italian global minimum tax and, for this reason, further endorse the reformist calls raised by some scholars.[37]

The Decree could also be criticised in light of the Law No. 111 of 9 August 2023, which had called upon the legislator to "transpose Directive (EU) 2022/2523 of the Council, of 14 December 2022, also following the common approach shared at international level on the basis of OECD technical guidance on global minimum taxation" (unofficial translation of Article 3, paragraph 1, letter e), Law No. 111/2023), and not also to make a reference to documents of soft law for the purpose of their (full) transposition, or to introduce provisions rather divergent from the Directive.

Similarly, the legislator had been delegated to "rationalise and simplify the tax system" (unofficial translation of Article 2, paragraph 1, letter d), Law No. 111/2023) as well as to enhance the principle of legal certainty (Article 4, paragraph 1, letter b), Law No. 111/2023), objectives that do not appear to have been fully achieved in relation to the global minimum tax framework.

Some of the critical issues highlighted above may, in any event, not be encountered in the short term, due to the effectiveness of those rules intended to simplify the application of the global minimum taxation (so-called Safe Harbour), provided for in Article 39 of the Decree.

36. See G. Falsitta, *Manuale di diritto tributario – parte generale*, Padova, Cedam, 2015, 165.

37. See, in particular, P. Pistone, *L'europeizzazione del diritto tributario e la riforma fiscale italiana: dall'adattamento all'adeguamento al diritto europeo*, 383 *et seq.*, who advocates a corrective intervention by the delegated legislator on part of the framework under discussion, while formulating an overall positive assessment on the recent tax reform, within which the Decree is situated.