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Article 32 of the Global Minimum Tax Directive as a Dynamic Reference – Challenges in relation to the European Principle of Democracy

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Preface

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Abstract

This paper is about Article 32 of the Global Minimum Tax Directive and its compatibility with the European principle of democracy, and particularly the question of sufficient democratic legitimacy. The author understands Article 32 Global Minimum Tax Directive as a dynamic reference to agreements concluded at the level of the Inclusive Framework. To examine this legal issue, the paper identifies the main factors for ensuring sufficient democratic legitimacy, namely the participation of democratically legitimized EU institutions, transparency, participation of EU citizens and judicial review. The paper proceeds by applying those factors on the mechanism of Article 32 of the Global Minimum Tax Directive and the recently published Side-by-Side package. By doing so, it becomes clear that the decision-making process in the Inclusive Framework is not sufficiently democratically legitimized and that the connection to Article 32 and its enactment under Article 115 TFEU, allows only for minor decisions.

I. Introduction and Legal Method

EU legislation in direct taxation is increasingly intertwined with decisions and negotiations on the level of the OECD.[1] A relatively new form is the use of dynamic references in EU legislation towards decisions at the OECD level. An example is the recently published Side-by-Side Package, which used Article 32 of the Global Minimum Tax Directive[2] as a legal basis.[3]

This paper aims to examine the compatibility of such dynamic references, and in particular Article 32, with the principle of democracy and the corresponding requirement of sufficient democratic legitimacy. The paper focuses on the abstract implications of the use of Article 32 but also tries to integrate the Side-by-Side Package.

The paper begins by examining the legal nature of Article 32, then assesses the basic prerequisites for democratic legitimacy under the Treaties and then applies those findings on Article 32 and the Side-by-Side Package. The author examines this question only with the law de lege lata regarding the European Treaties.[4] In interpreting the applicable law the author relies on case law from the Court of Justice of the European Union and legal scholarship.

II. Legal Nature of Art. 32 Global Minimum Tax Directive

Article 32 of the Global Minimum Tax Directive states that “by way of derogation from Articles 26 to 31, Member States shall ensure that, at the election of the filing constituent entity, the top-up tax due by a group in a jurisdiction shall be deemed to be zero for a fiscal year if the effective level of taxation of the constituent entities located in that jurisdiction fulfils the conditions of a qualifying international agreement on safe harbours”. Paragraph 2 then continues, that “[f]or the purposes of the first paragraph, ´qualifying international agreement on safe harbours` means an international set of rules and conditions which all Member States have consented to and which grants groups in the scope of this Directive the possibility of electing to benefit from one or more safe harbours for a jurisdiction”.

Before examining the compatibility with the EU concept of democracy, it is necessary to determine the legal nature of Article 32 and the legal consequences arising from its application for the Member States. Concerning the wording and rationale of Article 32, it grants specific constituent entities, if they fall under a qualifying international agreement on safe harbours, an

[1] See for examples: Englisch, ´Dynamic References to International Soft Law Agreements: Flexibility with Limits`, EC Tax Review (2024-1), page 2.
[2] Council Directive 2022/2523, of Dec. 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union. When the author refers to Art. 32 in the following, it always refers to Art. 32 of the Global Minimum Tax Directive.
[3] OECD, Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two), Side-by-Side Package, 05.01.2026.
[4] Treaty of the European Union and Treaty of the Functioning of the European Union.

exemption from the application and computation of the Global Minimum Tax Directive´s rules with the purpose of facilitating and reducing the administrative burden.[5]

The decision on whether and to what extent a qualifying international agreement on safe harbours is established falls exclusively within the competence of the OECD`s Inclusive Framework, within which consensus must be reached among more than 140 jurisdictions worldwide.[6] Article 32 para. 2 makes clear that also all EU Member States must have consented to the particular safe harbours agreement. As a consequence, the EU legislator is no longer directly involved anymore in this decision-making process and entrusts the responsibility to the level of the OECD, a multinational, intergovernmental organization.[7] Article 32 therefore functions as a legal reference to subsequent decisions adopted within the Inclusive Framework, a framework which is in fact only capable to produce soft law.[8]

Legal references to another legislative level or body are typically differentiated into static or dynamic references. Static references refer to decisions or legislation which were already adopted at the time of the enactment of the referring act and are fixed at this time, thus subsequent amendments to the referenced act have no legal effect within the referring legal order.[9] In contrast, dynamic references[10] comprise not only the referenced legal act in its version at the time of the enactment of the referring act, but also subsequent amendments thereto.[11] This leads to the incorporation of the content of the referenced legal act, in its respective version, into the normative level of the referring act.[12] This is a substantial difference from the use of a dynamic interpretation in relation to rules set by another body, such as the OECD Commentary or Administrative Guidance on Pillar 2. The application of other rules for the interpretation of an existing legal act does not in any way incorporate these rules into the legal order of the

[5] Korving, ´Side-by-Side as discordant constitutional element: what can EU Member States do?´, Kluwer International Blog, 12.01.2026; see also OECD, Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules, 2025, Annex A.3, https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/05/tax-challenges-arising-from-the-digitalisation-of-the-economy-consolidated-commentary-to-the-global-anti-base-erosion-model-rules-2025_be9651c2/a551b351-en.pdf, accessed 18.02.2026.

[6] Hohenwarter/Mayr, ´Pillar Two and BEFIT: Shocks and Opportunities for the EU Internal Market`, 64 European Taxation 10, page 443.

[7] See the Convention on the Organisation for Economic Cooperation and Development from 14.12.1960.

[8] Hemels, ´National constitutions and EU primary law limits in the case of the implementation of the Pillar 2 Directive: the legality principle and Pillar 2`, Paper, 06.06.2025, page 8; for further guidance on the meaning of soft law see: Terpan, ´Soft Law in the European Union – The Changing Nature of EU Law`, European Law Journal, Vol. 21/1, pages 70 et seqq.

[9] Englisch, ´Dynamic References to International Soft Law Agreements: Flexibility with Limits`, EC Tax Review (2024-1), page 4.

[10] In legal scholarship the term ´ambulatory reference` is also used.

[11] Stodt, ´Dynamische Verweisungen`, page 12.

[12] Ibid para 11, page 19. This is different to the sole delegation of power to other institutions, where the decisions from the latter do not become part of the delegation law. However, the author considers every dynamic reference as a form of a delegation of power, but not necessarily in the reverse case.

latter.[13] To figure out which kind of reference was intended by the EU legislator it is necessary to interpret the wording, rationale and legislative history of the law.[14]

Recital 24 of the Global Minimum Tax Directive Preamble stipulates that the Member States should use the OECD Model Rules, the Commentary to Pillar 2 released by the Inclusive Framework and the GloBE Implementation Framework, including its safe harbour rules, as a source of illustration or interpretation. The wording of Art. 32 refers to a future ´qualifying international agreements on safe harbours`, which was consented to on the level of the OECD´s Inclusive Framework. It seems questionable whether this agreement alone suffices for the incorporation into the Global Minimum Tax Directive or whether a subsequent legislative decision, reflecting the incorporation into EU law, is necessary.[15]

In the author`s view, the wording of Art. 32 clearly only refers to a future consent within the Inclusive Framework without the necessity for subsequent legislative action of the EU. Art. 32`s rationale is to function as a tool for administrative simplification[16], which would be thwarted if a time-consuming legislative process under the prerequisites of Art. 115 TFEU was required. Therefore, in this paper it is assumed that Art. 32 functions as a dynamic reference to future decisions adopted within the OECD´s Inclusive Framework, having direct effects on the application of the Directive, without the requirement of a subsequent incorporation into the Directive. This can also be supported by the fact that the Commission did not deem it necessary to amend the Directive following the Side-by-Side Package.[17] As a consequence, the Member States are now obliged to implement the agreed safe harbour rules into their domestic law.[18] Furthermore, Article 32 operates as a dynamic rather than a static reference, insofar as it incorporates not only a specific version of the ´qualifying international agreement on safe harbours` but also subsequent amendments and agreements adopted at the level of the Inclusive Framework.

[13] See Linderfalk/Hilling, ´The Use of OECD Commentaries as Interpretative Aids – The Static/Ambulatory-Approaches Debate Considered from the Perspective of International Law`, Nordic Tax Journal, page 40 et seq; Kokott, ´EU Tax Law - A Handbook`, § 1, paras 25 et seqq.

[14] Hemels, ´National constitutions and EU primary law limits in the case of the implementation of the Pillar 2 Directive: the legality principle and Pillar 2`, Paper, 06.06.2025, pages 7, 8, where the impact of the preamble is considered; Clemens, ´Die Verweisung einer Rechtsnorm auf andere Vorschriften: insbesondere ihre Verfassungsmäßigkeit`, pages 80, 81.

[15] Englisch seems to assume this. See Englisch, ´Dynamic References to International Soft Law Agreements: Flexibility with Limits`, EC Tax Review (2024-1), page 3. See also: Hohenwarter/Mayr, ´Pillar Two and BEFIT: Shocks and Opportunities for the EU Internal Market`, 64 European Taxation 10, pages 443, 444.

[16] See Weber, ´The Pillar 2 – Side-by-Side Package: A Structural Breach of EU Tax Law`, Kluwer International Blog, 08.01.2026.

[17] See Commission Notice from 12.01.2026, C/2026/253.

[18] Kellerbauer, ´The EU Treaties and Charter of Fundamental Rights: A Commentary`, Art. 288 TFEU, paras 16 et seqq.

III. Implications and compatibility with the Principle of Democracy

EU secondary law[19] must always comply with EU primary law, otherwise the CJEU will declare it null and void.[20] Thus every provision of the Global Minimum Tax Directive can be examined under the principles laid down in EU primary law. In the first section, the legal nature and effects of Art. 32 were determined, which is necessary in order to apply the principle of democracy to a specific legal act and to balance the varying requirements depending on its nature and effects. The principle of democracy with its comprehensive implications is not part of this paper, as there is still no universal definition or common understanding on this and an exhaustive overview of all possible relevant factors is not possible.[21] Instead, the author focuses on the minimum standards of democracy for the ´justification` of dynamic references and in particular Article 32. For this, it is necessary to identify the main factors for achieving democratic legitimacy in the Treaties.

1. Substance of the Principle of Democracy and Connection to Democratic Legitimacy

The principle of democracy is enshrined in Art. 2 and Art. 10 TEU.[22] Through the commitment to democratic principles, the EU aims to achieve legitimacy of Union decision making.[23] Hence, it is crucial for legislative decisions to be sufficiently legitimized by democratic processes, institutions and opportunities for participation. The CJEU also recognizes this as a prerequisite for Union legislation.[24] In general terms the principle of democracy assures, "that the people should take part in the exercise of power through the intermediary of a representative

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[19] See Art. 288 TFEU.

[20] See Art. 263 (2) TFEU; e.g. CJEU, C-11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114, para 3. See also for a more detailed explanation: Szudoczky, ´The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation`, pages 56, 57.

[21] See for the understanding of different democratic concepts: Ionescu/Eliantonio, ´Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective`, Journal of Contemporary European Research, Vol. 17, Issue 1, pages 50 et seqq.

[22] The fact that there is an existing legal principle of democracy in the EU legal order can be derived from case law and from the headline in Title II of the TEU, which states "Provisions on Democratic Principles". See as an example for case law: CJEU, C-518/07, Commission/Germany, ECLI:EU:C:2010:125, para 41.

[23] Kellerbauer, ´The EU Treaties and Charter of Fundamental Rights: A Commentary`, Art. 10 TEU, para 1; see for the difference between Democracy and Legitimacy: Schmidt, ´Europes´s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone`, page 26. The author understands the need for democratic legitimacy as an integral part of the principle of democracy.

[24] The CJEU uses both the terms "principle of democracy" and "democratic legitimacy" in the same context without distinguishing between both: CJEU, C-718/18, Commission/Germany, ECLI:EU:C:2021:662, paras 124 et seqq. See also the binding Interinstitutional Agreement between the European Parliament, The Council, and the Commission on Better Law-Making, 13.04.2026, L-123/1, para I.2; Giegerich, ´The Human Right to Democracy in Multilevel Systems at a Time of Democratic Backsliding: Global, Regional and European Union Perspectives`, pages 167, 168.

assembly".[25] Thus, the European Union is based on the construct of a representative democracy, in which decisions are taken by the peoples' elected representatives.[26]

Democratic legitimacy can be achieved through input legitimacy and output legitimacy, with both concepts complementing each other.[27] Input legitimacy refers to the will and preferences of the people, which might be secured via regular elections and political debate.[28] Output legitimacy on the other hand is achieved through the decisions of the government, which effectively serve the common interest and therefore reflect the public interest, while acting only within the consented set of rules.[29]

All the factors which are necessary to achieve democratic legitimacy in EU decision-making should not be understood as rigid and inflexible, but rather as a balancing system, where the quality of one factor can compensate the lack of another.[30] In relation to EU decision-making, it is also crucial to assess the need and quality of democratic legitimacy in each individual situation. Due to the variety of EU lawmaking[31] and the different strictness, scope and consequences of the respective provisions, one cannot state one general rule applicable to every decision. Instead, a case-by-case assessment is necessary with the awareness that the relevant factors for democratic legitimacy may be evaluated differently by legal scholars or by the European courts.

2. Main factors for Democratic Legitimacy

a) Involvement of the European Parliament and other institutions

The European Parliament is the only EU institution where EU citizens are directly represented.[32] The Treaties grant the European Parliament a decisive role on the EU legislation process, dependent on the respective legislative procedures.[33] This important role in the legislation process is stipulated in Article 14 TEU, stating that the Parliament exercises its

[25] CJEU, C-138/79, Roquette Frères, ECLI:EU:C:1980:249, para 33.
[26] Kellerbauer, ´The EU Treaties and Charter of Fundamental Rights: A Commentary`, Art. 288 TFEU, Art. 10 TEU, para 3; Art. 10 (1) TEU.
[27] Smismans in ´European Union Politics`, page 340.
[28] Scharpf, ´Governing in Europe: Effective and Democratic?`, page 6.
[29] Ibid para 28, page 11. Both concepts just help to structure the requirements for legitimacy, but the author acknowledges that there are other concepts in legal scholarship. E.g. see: Schmidt, ´Europes´s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone`, who introduces the term ´throughput legitimacy`.
[30] Schmidt, ´Europes´s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone`, page 38.
[31] See Art. 288 TFEU et seqq.
[32] See Art. 10 (2) TEU.
[33] See Chalmers, ´European Union Law`, page 93.

legislative functions jointly with the Council.[34] Furthermore the Treaties underline the relevant status of the Parliament in the legislation process in Article 289, 294 TFEU concerning the ordinary legislative procedure and the control mechanisms in Article 290, 291 in relation to delegated and implemented acts from the Commission. Although the Parliament has no right to initiate a legislative proposal, which significantly differs from the autonomy of national parliaments,[35] it may request the Commission to submit a proposal for a legislative act.[36] This status was confirmed by the CJEU by claiming that the "effective participation of the Parliament in the legislative process, in accordance with the procedures laid down by the Treaty, indeed represents an essential factor in the institutional balance intended by the Treaty, since the Parliament´s function reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly".[37]

Although the Treaties and the CJEU seem to turn the European Parliament into a substantial actor in EU legislation, it is important to distinguish the Parliament´s role with respect to the different legislative procedures. In relation to Direct Taxation the legislative procedure is stipulated in Article 115 TFEU and the Global Minimum Tax Directive is based on Article 115 as the relevant legal competence.[38] In this procedure the Parliament is only consulted by the Council, resulting in an obligation to consider the Parliament`s opinion but not being legally bound to comply with it.[39] As a consequence, the status of the Parliament is weaker in comparison to its position under the ordinary legislative procedure and the consent procedure.[40] However, this needs to be aligned with the other involved EU institutions, in particular the Council, which plays the major role in the legislation process under Article 115 TFEU where it acts unanimously. According to Article 10 (2) TEU, the EU´s representative democracy is also founded on the representation in the democratically accountable members of the European Council and their the Council.[41] Thus, the European principle of democracy follows a dualistic legitimation idea with a backcoupling to the national parliaments of the Member States.[42]

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[34] Lenaerts, ´The Principle of Democracy in the Case Law of the European Court of Justice`, ICLQ, Vol. 62, page 275, speaks of a co-equal status with the Council.
[35] See e.g. Art. 76 (1) GG (Basic Law) in Germany.
[36] See Art. 225 TFEU; for further explanations see: Craig, ´The Role of the European Parliament under the Lisbon Treaty`, European Community Studies Association of Austria, Volume 11.
[37] CJEU, C-390/15, RPO, ECLI:EU:C:2017:174, para 25.
[38] The Global Minimum Tax Directive is based on Art. 115 TFEU because of Art. 114 para. 2 TFEU which exempts fiscal provisions from the scope of the EU's general approximation power in Art. 114 (1) TFEU that is exercised via the ordinary legislative procedure.
[39] Chalmers, ´European Union Law`, page 120; CJEU, Joined Cases C-643/15 and C-647/15, Slovakia and Hungary vs. Council, ECLI:EU:C:2017/631, paras 160 et seqq.
[40] Hemels in ´National Tax Autonomy and the European Union`, ´Tax Autonomy from a Member State Perspective: are we faced with a democratic deficit?´; Chalmers, ´European Union Law`, page 120.
[41] Kellerbauer, ´The EU Treaties and Charter of Fundamental Rights: A Commentary`, Art. 288 TFEU, Art. 10 TEU, paras 4, 5.
[42] Callies/Ruffert, ´EUV/AEUV`, Art. 10, paras 7, 8.

This shows that the European Parliament is a decisive factor in constituting democratic legitimization of legislative decisions through ex ante involvement, but this role is restricted especially in the process under Article 115 TFEU, where the Treaties establish a central position of the Council, which also forms part of the EU´s system of democratic legitimization.

b) Transparency

Article 10 (3) TEU states that "decisions shall be taken as openly and as closely as possible to the Citizen". This was specified by the CJEU by emphasizing that the principle of transparency "enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system".[43] Moreover the principle of transparency is further specified in Article 15 TFEU, stating that the EU´s institutions should work as openly as possible, that the Parliament and the Council are obliged to meet in public within legislative procedures[44] and that both should publish the documents in relation to legislative procedures. Transparency within the decision-making process ensures the possibility of public debate between EU institutions and citizens, based on sufficient information and facts, and thus works as a precondition for democratic legitimacy.[45]

In addition, transparency is also essential for securing an efficient ex post review for administrative proceedings from EU citizens[46] and EU institutions.[47] Therefore, the obligation of transparency in legislative procedures is recognized by the Treaties as part of ensuring democratic legitimacy. However, it is important to not apply the principle of transparency as an ultimate rule with the same standards in each case, but to carefully assess the necessary standards in relation to the specific legal act and its implications.[48]

c) Participation of citizens

The principle of transparency works as a foundation to enable the participation of EU citizens in the decision-making process. The need for an effective participation of EU citizens is expressed in Art. 10 (3) and Art. 11 TEU and is also acknowledged by the CJEU.[49] Thus, the

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[43] CJEU, C-92,93/09, Schecke, ECLI:EU:C:2010:662, para 68.
[44] See also Art. 16 (8) TEU.
[45] Borrás/Conzelmann, ´Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn`, Journal of European Integration, Vol. 29, No. 5, pages 542, 543.
[46] E.g. under Art. 263 and Art. 267 TFEU.
[47] Lenaerts, ´The Principle of Democracy in the Case Law of the European Court of Justice`, ICLQ, Vol. 62, page 277.
[48] See for a similar view: Howell, ´Is There a General Principle Requiring Transparency about How Decisions will be Taken?`, Judicial Review, Vol. 16, Issue 4, page 335.
[49] See e.g.: CJEU, C-92,93/09, Schecke, ECLI:EU:C:2010:662, para 68; Lenaerts, ´The Principle of Democracy in the Case Law of the European Court of Justice`, ICLQ, Vol. 62, page 314.

possibility for citizens to publicly exchange their views, individually or within representative associations, and to maintain an open, transparent and regular dialogue with the institutions in the legislative process serves as a vehicle for increasing the democratic legitimacy of those decisions.[50]

d) Reviewability

The need for reviewability of legislative decisions stems from the ideal of accountability of power holders. In simple terms, the latter implies that every decision from an EU institution entails an obligation to be accountable to those affected.[51] As the concept of accountability is multifaceted and too broad to be addressed here,[52] the author only stresses the necessity of an effective judicial review in order for an EU act to be sufficiently democratically legitimized. An effective judicial review ensures the legality of Union legislation in harmony with the Treaties and protects the citizens from arbitrary and unlawful decisions.[53] Although the concept of judicial review derives from the rule of law[54] and is specified in Article 47 of the Charter of Fundamental Rights,[55] it is also connected with the democratic legitimacy of legislative decisions. The acceptance of legislative decisions by the European people, which essentially provides democratic legitimacy, is only secured when there are existing mechanisms of judicial control and review.[56] This judicial review is not reserved only for EU citizens but can also be initiated by other Union institutions to provide an effective judicial review. In relation to dynamic references, it is therefore necessary to examine and validate possible judicial reviews of the decisions of the other law-making body. To sum up, the author considers the reviewability of legislative decisions, and especially of dynamic references, through judicial review from the Court of Justice to be a prerequisite for democratic legitimacy.[57]

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[50] See for further explanation: Lopez, ´The Lisbon Treaty´s Provisions on Democratic Principles: A Legal Framework for Participatory Democracy`, European Public Law, Vol. 16, Issue 1; Boddenberg, ´Europäische Öffentlichkeit – Konzeptionen und unionale Gestaltungsoptionen`, ZEuS, Vol. 28, Edition 1, pages 93 et seq.
[51] Olsen, ´Democratic Accountability, Political Order and Change`, page 1.
[52] See for an approach: Olsen, ´The Institutional Basis of Democratic Accountability`, West European Politics, Vol. 36, No. 3.
[53] CJEU, C-743/19, Parliament/Council, ECLI:EU:C:2022:569, para 35.
[54] Enshrined in Art. 2 TEU.
[55] Which is also part of EU primary law according to Art. 6 (1) TEU.
[56] Ionescu/Eliantonio, ´Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective`, Journal of Contemporary European Research, Vol. 17, Issue 1, page 59, 60.
[57] Similar: Peters, ´The Legitimacy of the OECD`s Work on Pillar Two: An Analysis of the Overconfidence in a ´Devilish Logic``, Intertax, Vol. 51, Issue 8 & 9, page 567; Schmidt, ´Europes´s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone`, page 43, who also explains other forms of accountability in relation to democratic legitimacy, which are not discussed in this paper.

IV. Application to Article 32 as a dynamic reference

After evaluating the key factors for achieving democratic legitimacy in legislative decision-making, the paper continues by applying those factors to Article 32, which dynamically references to the decisions of another body, the OECD Inclusive Framework.[58] At this point it is important to distinguish between the two legislative levels. On the one hand is Article 32 of the Global Minimum Tax Directive, adopted under the special legislative (consultation) procedure of Article 115 TFEU, and on the other hand, the reference to the OECD Inclusive Framework and its agreements, which has already been used in the form of the Side-by Side Package.

There is no question that the procedure under Article 115 TFEU for the adoption of Article 32 complied with all the requirements of the Treaties. Therefore, the author does not doubt the democratic legitimacy of Article 32 as such. The question is whether this democratic connection suffices to legitimize the decisions of the Inclusive Framework, which Article 32 enables it to make or whether the elaborated factors of democratic legitimacy are even adequately followed in the Inclusive Framework.

To start with the latter, it is at least highly questionable whether a consent in the Inclusive Framework on a ´qualifying international agreement on safe harbours` does comply with the prerequisites of democratic legitimacy according to the Treaties.[59] In the decision-making within the Inclusive Framework the European Parliament has no right to participate and there is no obligation to inform or consult the European Parliament prior to any agreements. Thus, the only democratic legitimization is through the elected governments of the Member States, which are part of the Inclusive Framework and who need to consent to those agreements. Considering that the Inclusive Framework consists of more than 140 jurisdictions worldwide, that connection seems rather weak.[60] Furthermore the deliberations and the decision-making process in the Inclusive Framework lacks transparency. The negotiations are not open to the public, and the negotiation documents are not published. This leads to decisions being made without EU citizens or EU institutions, such as the Parliament, having any effective chance to follow the decision-making process.[61] As a consequence there is also no vital participation of

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[58] The author does not attempt completeness and is aware that democratic legitimacy contains vast factors, which are not mentioned in this paper.

[59] Again it is not possible to provide a full overview on how the Inclusive Framework works, as it would exceed the scope of this paper.

[60] Similar: Hohenwarter/Mayr, ´Pillar Two and BEFIT: Shocks and Opportunities for the EU Internal Market`, 64 European Taxation 10, page 443, who additionally underlines, that not all Member States are part of the Inclusive Framework and that the Member States usually delegate experts to the Inclusive Framework, with the consequence that not even the elected governments are represented in the decision-making process.

[61] Similar: Hemels, ´National constitutions and EU primary law limits in the case of the implementation of the Pillar 2 Directive: the legality principle and Pillar 2`, Paper, 06.06.2025, page 6.

EU citizens individually or through associations in public debate about the decisions being made on the level of the Inclusive Framework.

By contrast, the judicial review of the agreements in the Inclusive Framework under the reference in Article 32 does not appear to be affected. It has not yet been decided by the CJEU, but because the content of the dynamic reference, here the ´qualifying international agreement`, gets incorporated into the Directive and thus forms part of EU law,[62] it is consequently possible to review it before the CJEU under the procedures in Article 263 and Article 267 TFEU.[63] In the author´s view the Side-by-Side Package does constitute a measure having binding legal effects for the Member States concerning the implementation or amendment of the Global Minimum Tax Directive, due to its legal character as a referenced legal act.[64] Therefore, the Parliament, as a privileged applicant pursuant to Art. 263 (2) TFEU, could also challenge any agreements made under Article 32 and in particular the Side-by-Side Package. However, the time limit according to Article 263 (6) TFEU has already expired.[65] But this does not prevent the CJEU from reviewing the Side-by-Side Package in a reference procedure (Art. 267 TFEU). Therefore, to sum up, the Inclusive Framework and its decision-making processes reveal substantial flaws in basic factors of democratic legitimacy.[66]

Nevertheless, the democratic legitimization generated from the enactment of Article 32 under the procedure according to Article 115 TFEU and the democratically reached consensus in the Council after the consultation of the Parliament could be sufficient to legitimize the agreements in the Inclusive Framework and in particular the Side-by-Side Package, all the more since Article 32 specifically requires the consent of all the EU Member States. In the author´s view this depends on the substance and essentiality of the referenced law. In order to specify technical details or minor formalities, the democratic legitimacy may be of a weaker nature to ensure the effective functioning of the law.[67] However, if the referenced decision concerns an essential part of the referred law, the EU legislator must not hand over the decision to other law-making bodies, whose procedures are not sufficiently democratically legitimized.

The determination of what is essential for a law must always be a case-by-case decision taking into account all circumstances. In the case of the Global Minimum Tax Directive the decisions

[62] See the explanation under II.

[63] Different opinion on judicial review: Weber, ´The Pillar 2 – Side-by-Side Package: A Structural Breach of EU Tax Law`, Kluwer International Blog, 08.01.2026.

[64] Lenaerts et al., ´EU Procedural Law`, para 7.11.

[65] The Side-by-Side Package was released on January 5, 2026.

[66] See for a more detailed analysis on how the OECD/IF works: Peters, ´The Legitimacy of the OECD`s Work on Pillar Two: An Analysis of the Overconfidence in a ´Devilish Logic``, Intertax, Vol. 51, Issue 8 & 9; Fung, ´The Questionable Legitimacy of the OECD/G20 BEPS Project`, ELR, Vol. 10, Issue 2.

[67] Englisch, ´Hardening International Soft Law Standards Through EU Law: From Greater National Autonomy to a Legal Straitjacket?`, Paper, 30.04.2024, pages 24, 25.

concerning the scope of the Directive, the rules on tax liability, the main mechanisms and the principal formal obligations must always be taken by the EU legislator to ensure democratic legitimacy.[68] The Side-by-Side Package, however, deviates from this approach. In brief, it allows US-parented MNE groups to refrain from applying the main mechanisms of the Global Minimum Tax Directive, namely the IIR and UTPR, because the US is considered as a Safe Harbour. Additionally, it introduces measures to reduce compliance complexity by establishing more safe harbours for Substance-Based Tax Incentives, for a simplified Effective Tax Rate and an extension of the Transitional Country-by-Country Reporting.[69]

At least the safe harbour for US companies concerns an essential part of the Directive and therefore should have been decided by the EU legislator, as it effectively reduces the scope of the Global Minimum Tax Directive. Also, the lack of democratic legitimacy cannot be restored by a Commission notice[70] or a statement from the Council,[71] which welcomes the application of the Side-by-Side Package. Neither instrument is legally binding, nor can substitute for compliance with the requirements of the special legislative procedure laid down in Article 115 TFEU, particularly the mandatory consultation of the European Parliament.[72]

However, to fully examine the essentiality and substance of the Side-by-Side Package, it is necessary to distinguish between each measure. The scope of this paper does not allow a detailed analysis of each measure in relation to the need of sufficient democratic legitimacy.

In summary, compliance with the requirements of democratic legitimacy according to the Treaties depends on the substance of the agreements being made under Article 32. Technical details can be referenced to the level of the Inclusive Framework, but essential contents of the law must always remain within the competence of the EU legislator in order to comply with the need for democratic legitimization. Additionally, decisions at the level of the Inclusive Framework lack the basic elements of democratic legitimacy as required by the Treaties. Consequently, those decisions are unable to satisfy the requirements of democratic legitimacy by themselves.

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[68] Similar: Englisch, ´Dynamic References to International Soft Law Agreements: Flexibility with Limits`, EC Tax Review (2024-1), pages, 4, 5; Hohenwarter/Mayr, ´Pillar Two and BEFIT: Shocks and Opportunities for the EU Internal Market`, 64 European Taxation 10, page 443.

[69] See for a comprehensive overview of the content of the Side-by-Side Package: Russo/Vernola, ´The Side-by-Side Package and the fate of the Global Minimum Tax`, Kluwer International Blog, 30.01.2026.

[70] See Commission Notice from 12.01.2026, C/2026/253.

[71] Council Statement to the Permanent Representatives Committee, 30.10.2023, 14732/1/23, REV 1, Annex I point IV.

[72] CJEU, C-226/11, Expedia, ECLI:EU:C:2012:795, para 29; also the statement from the Council was published before the Side-by-Side Package was announced.

V. Conclusion

There are still many open questions in relation to Article 32 of the Global Minimum Tax Directive and the implications on democratic legitimacy. Although the court decided in the Danish cases that there is no problem with democratic legitimacy in the case of a dynamic interpretation of the OECD Model Tax Convention, this argumentation applies only to a limited extent to Article 32.[73] The author considers Article 32 as a dynamic reference with the consequence that decisions at the level of the Inclusive Framework are directly, without any subsequent act of incorporation from the EU legislator, legally binding for the Member States in their implementation of the Directive.

This is a significant difference from the Danish cases, where the court only ruled on the use of a dynamic interpretation of OECD soft law.[74] Nevertheless it can be seen as a trend-setting decision from the Court that concerns about the democratic legitimacy of decisions on OECD level are only of secondary importance.

Furthermore, it is not even clear how the Court of Justice would classify Article 32. As mentioned above, the author argues that there is no need for subsequent incorporation of the decisions of the Inclusive Framework into EU law, as this would contradict the purpose of a dynamic reference, namely to ensure the efficiency and adaptability of the law. However, it seems also possible to demand an incorporation into EU law either by using the procedure under Article 115 TFEU or by simply accepting a Commission notice or Council statement, to ensure sufficient democratic legitimacy from the EU institutions.

By contrast, the author considers Article 32 and its dynamic mechanism to be insufficiently democratically legitimized. The decision-making in the Inclusive Framework does not comply with the presented factors of democratic legitimacy under the Treaties. Furthermore, the democratic connection of Article 32, as a legal act under the procedure of Article 115 TFEU, does not suffice to transfer decision-making power on the Inclusive Framework in relation to substantial provisions of the Global Minimum Tax Directive. However, decisions on technical details or minor formalities are compatible with the requirements of democratic legitimacy, as they are legitimized by the EU legislator under Article 115 TFEU and are justified by the need to ensure the effectiveness of the law.

The distinction between substantial contents of the law and technical or formal details needs to be evaluated carefully with regard to the wording, systematic and rationale of the law. In the

[73] CJEU, C-115/16 et al., N Luxembourg 1 et al., ECLI:EU:C:2019:134, paras 90 et seqq.

[74] See also the dissenting opinion of the AG Kokott: C-115/16, N Luxembourg 1, ECLI:EU:C:2018:143.

next step, the decisions should be carefully balanced with the need for sufficient democratic legitimacy.

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