

# OECD announces Pillar Two tax certainty framework consultation

21 December 2022

## In brief

On the one-year anniversary of issuing the Pillar Two Model Rules, 20 December 2022, the OECD released four guidance documents related to Pillars One and Two;

1. Pillar Two [Guidance on Safe Harbors and Penalty Relief](#) (see [tax policy alert](#));
2. Pillar Two public consultation document on [Tax Certainty for the GloBE Rules](#) (comments due 3 February)
3. Pillar Two public consultation document on the [GloBE Information Return](#) (comments due 3 February) (tax policy alert coming soon) and
4. Pillar One public consultation document on the [Draft Multilateral Convention \(MLC\) Provisions on Digital Services Taxes \(DSTs\) and other Relevant Similar Measures](#) (comments due 20 January) (see [tax policy alert](#)).

All of these documents are OECD Secretariat [consultation documents](#) except for the guidance on Pillar Two Safe Harbours and Penalty Relief, which was approved by the Inclusive Framework (IF) on 15 December.

This tax policy alert will consider the tax certainty release.

## In detail

### Tax Certainty for the GloBE Rules

Given the complexity of the Pillar Two rules and the differences that could arise in the interpretation or application of the rules among jurisdictions, the OECD started working on exploring mechanisms to provide further tax certainty with respect to the GloBE rules. This public consultation on Pillar Two – Tax Certainty for the GloBE Rules seeks input from stakeholders with respect to the scenarios where differences in interpretation or application of the GloBE rules between two or more jurisdictions may arise.

**Observation:** Yet again, the public consultation document is a non consensus document which means that the views and proposals included in the document do not express the agreed position of the Inclusive Framework. For the moment, therefore, the consultation document represents only the work of the OECD Secretariat.

The OECD assumes that because countries will use the global model rules and the subsequent agreed administrative guidance as a basis for their domestic legislation, the risk of differing interpretations will be significantly reduced. How realistic this expectation is, and the extent to which countries may subtly – or not so subtly – diverge from the model rules remains to be seen. However as the European Union and United Kingdom have already shown, some divergence seems inevitable.

**Observation:** There are numerous questions on how to interpret the model rules and the commentary. The agreed administrative guidance, which will be published next year, could indeed shed light on those issues, but several countries have already indicated that OECD guidance will be ‘helpful,’ rather than ‘binding.’ In that case, the model rules may well end up being interpreted by national courts, or by the Court of Justice of the European Union, in different ways, and with different outcomes according to national practices and precedents.

The consultation document describes various mechanisms for achieving tax certainty before (prevention mechanisms) and after (dispute resolution mechanisms) a taxation action has been taken.

## **Prevention Mechanisms**

### ***Reliance on the Model GloBE Rules, Commentary and Administrative Guidance***

The consultation document notes that the recognition of a ‘qualified’ rule status for an IIR, a UTPR or a DMTT is a fundamental mechanism for ensuring the coordinated application of the GloBE rules. The identification of Qualified IIRs, UTPRs and QDMTTs will be done through a review process and would cover all the chapters of the Model GloBE Rules.

Furthermore, jurisdictions can refer issues of interpretation and application of the GloBE rules that arise between jurisdictions to the Inclusive Framework which could lead to Agreed Administrative Guidance, although the binding nature of this is not clear. However, issues concerning taxation in a specific case and taxpayer information could not be shared.

### ***Common risk assessment and coordinated compliance***

Based on the assumption that MNE groups with similar operations in the same jurisdictions are likely to have a similar risk profile, a co-ordinated programme similar to the OECD International Compliance Assurance Programme (ICAP) could be developed for GloBE purposes. A coordinated approach to assessing risks could give tax administrations the opportunity to share their views before reaching a conclusion.

**Observation:** The personnel required to staff ICAP is quite considerable, and while this idea is welcome, whether it is practically achievable might be questioned.

### ***Binding certainty mechanisms***

The consultation document acknowledges advanced pricing agreements (APAs) as the most common dispute prevention mechanism that provides binding certainty. APAs provide tax certainty with respect to transfer pricing issues to both taxpayers and the relevant tax authorities. The consultation document explains that jurisdictions typically rely on tax treaties as a legal basis to undertake bilateral/multilateral APAs and the objective of APA discussions is usually to align with a common standard, the arm’s length principle. Therefore a common standard needs to be defined for an APA-like mechanism for the GloBE rules. However, regarding this option, the

consultation document notes that in practice, all MNE groups within the scope of the GloBE rules may not be able to access such APA-like mechanism

## **Dispute Resolution Mechanisms**

### ***Substance of a dispute resolution mechanism***

The consultation document refers to the MAP provision of article 25 of the OECD Model Tax Convention as a basis for a GloBE dispute resolution mechanism. The basic elements of that provision could be used to develop a dispute resolution mechanism, separate from the existing MAP framework. The consultation document sets out three parameters for a GloBE dispute resolution mechanism:

- a. The MNE should be allowed to submit a request to a competent authority in a jurisdiction where an action taken by such jurisdiction could result in taxation not intended under the GloBE rules;
- b. The competent authority should, where justified, be allowed to resolve the case with competent authorities of the other jurisdictions concerned that are similarly empowered, in line with a common standard; and
- c. The jurisdictions should implement any agreement between the competent authorities notwithstanding domestic time limits.

The consultation document states that some elements of a dispute resolution mechanism may need to be specific to GloBE requirements like (i) the nature of disputes covered, and (ii) the basis for resolving disputes. Different scopes of disputes are discussed. An overly broad scope would result in too many cases being submitted, where in fact there is no actual difficulty in applying the GloBE Rules to resolve, but taxpayers will, nevertheless, often prefer certainty. Therefore the suggestion is made to narrow the scope to where the MNE group is required to apply and pay top-up tax under the GloBE rules in several jurisdictions. An even narrower approach could be to require the MNE to demonstrate that the difference in the interpretation or the application of the GloBE rules resulted in double taxation for the MNE.

Irrespective of the mechanism chosen, the consultation document mentions the need of competent authorities to refer to a standard in order to resolve potential differences. Regarding the basis for resolving disputes, competent authorities could be empowered to eliminate inconsistent outcomes by agreeing on a common interpretation. In situations where the domestic incorporation of the GloBE rules would result in inconsistent outcomes, competent authorities may be similarly empowered to agree on a resolution of the dispute in line with the common approach (Model GloBE Rules, the Commentary and Agreed Administrative Guidance) that does not result in double or over-taxation.

### ***Instruments available for a dispute resolution mechanism***

The consultation document makes clear that the previously mentioned mechanisms could be implemented through different legal instruments. Existing mechanisms, such as the Convention on Mutual Administrative Assistance in Tax Matters (MAAC) or tax treaties are mentioned, as well as new mechanisms such as a dispute resolution provision introduced into domestic law or under a multilateral convention. The consultation document sets out four options.

#### **1. Developing a multilateral convention**

The consultation document refers to the October statement on the two-pillar solution of IF members to consider an MLC to ensure coordination and consistent implementation of the GloBE rules. An MLC could include tax certainty mechanisms, but could also address other administrative issues such as exchange of information. For this option,

taxpayers should pay attention to procedural aspects like ratification of the MLC and parliamentary procedures related to international agreements.

**Observation:** While desirable, an MLC does also seem aspirational. First it likely would take some time to secure agreement by a sufficient number of countries, and if the US status quo holds, passage through the US Senate would be questionable.

**Observation:** Questions are raised about the compatibility of the UTPR with art. 7 of the OECD Model Convention, and to what extent a jurisdictional determination of the UTPR could lead to discrimination under art. 24 of the OECD Model Convention. If an MLC is considered, the IF may wish to use that opportunity to provide certainty on the issues mentioned above.

## 2. Reliance on competent authority agreements under the MAAC

The MAAC is primarily intended to allow the exchange of information between competent authorities, but there are provisions that allow competent authorities to undertake consultations. However, in the consultation document it is noted that the MAAC doesn't provide rights for the taxpayers to request a competent authority procedure and would not provide a substantive legal basis for competent authorities to reach agreements or implement them. Therefore, the suggestion is being made that some jurisdictions may consider supplementing a competent authority agreement under the MAAC with a domestic provision to provide these rights.

**Observation:** While the United States ratified the original MAAC, it has not ratified the protocol, which has caused problems in a number of areas, and could also do so here.

## 3. Reliance on existing tax treaties

The consultation document mentions the option to explore whether MAP provisions could be included in existing treaties for resolving GloBE disputes while acknowledging the existence of current limitations with reference to articles article 25(1) and 25(3) of the OECD Model Tax Convention and the possible absence of bilateral treaties between jurisdictions.

## 4. Creating a dispute resolution provision in domestic law

This option contains a common dispute resolution provision introduced alongside the GloBE rules into the domestic law of each jurisdiction and could apply on a reciprocal basis.

The consultation document provides some elements of this provision. This provision could, for each jurisdiction:

- a. allow an MNE to file a request before a competent authority defined under its domestic law where an action of that jurisdiction has led to unintended consequences;
- b. authorise this competent authority to accept the request where justified and where it cannot find a solution itself, initiate discussions with the other competent authorities involved to find a common solution;
- c. authorise its competent authority to also enter into discussions where a similar request is filed before another jurisdiction implementing this provision to find a common solution in line with a common standard;
- d. implement the agreed common solution notwithstanding domestic time limits.

**Observation:** This idea of matching national laws is an attempt to bypass the known difficulties of achieving either a new MLC, or, alternatively, mass changes to tax treaties. However, it is understood that several/many countries have expressed opposition to this idea, so the likelihood of success is not clear.

**Observation:** Now that the European Union has reached an agreement on the Pillar Two Directive, it is crucial to reach consensus on the remaining fundamental issues, like tax certainty. The difference in speed of the processes could result in the risk of application of the GloBE rules without a proper timely implemented tax certainty mechanism. This risk is significant and could result in double or over-taxation in many common fact patterns. The remedy to solve disputes among EU Member States could be found in widening the scope of the EU Arbitration Directive. However, a global solution would still be needed.

## The takeaway

Given that the Pillar Two rules have recently been agreed by the EU Member States and we expect to see the rules adopted in other countries early in the new year, MNE groups will be turning their attention to questions on the practical application of the rules. This simplification and tax certainty guidance from the OECD contains some welcome ideas, but the practicality and viability of any of the ideas is still currently quite unclear. The consultation document – for the moment – is not more than a stock taking of the potential avenues to prevent and resolve disputes, and consensus on solutions seems unlikely in the near future.

## Let's talk

For a deeper discussion of how the proposals made in the tax certainty framework consultation document might affect your business, please contact:

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