

Sent by email: taxpublicconsultation@oecd.org

International Co-operation and Tax Administration Division
OECD Centre for Tax Policy and Administration
2, rue Andre Pascal
75775 Paris Cedex 16
France

2 February 2023

Re: Public Consultation on Pillar Two – Tax Certainty for the GloBE Rules

Dear Sir / Madam,

The International Bar Association would like to take this opportunity to provide comments as part of the Public Consultation on Pillar Two - Tax Certainty for the GloBE Rules, released on 20 December 2022 (the “**Consultation Document**”).

The International Bar Association (IBA), the global voice of the legal profession, includes over 45,000 of the world’s top lawyers and 197 Bar Associations and Law Societies worldwide. The IBA is registered with OECD with number 1037 55828722666-53.

We are submitting our comments on behalf of the IBA Taxes Committee which has 1,037 members from around the world. This committee formed a Working Group to respond to the Public Consultation.

The comments made in this report are the personal opinions of the Working Group participants and should not be taken as representing the views of their firms, employers or any other person or body of persons apart from the IBA Taxes Committee of which they are members.

The comments are enclosed with this letter.

Sincerely yours,

Dan Luchsinger
International Organisation Liaison Officer
IBA Taxes Committee
U.S.A.
Tax Partner
Covington & Burling LLP

Wiebe Dijkstra
International Organisation Liaison Officer
IBA Taxes Committee
The Netherlands
Tax Partner
De Brauw Blackstone Westbroek N.V.

Working Group Participants:

Dan Luchsinger

Joseph Sullivan

Tax Partner
Covington & Burling LLP
U.S.A.

Marlinda Gianfrate
Of Counsel
Gatti Pavesi Bianchi Ludovici
Italy

Andrea Gallizioli
Junior Partner
Gatti Pavesi Bianchi Ludovici
Italy

Wiebe Dijkstra
Tax Partner
De Brauw Blackstone Westbroek N.V.
The Netherlands

Associate
Covington & Burling LLP
U.S.A.

Fiachra Ó Raghallaigh
Tax Associate
Simmons & Simmons
Ireland

Francesco Cardone
Tax Associate
LED Taxand
Italy

1. Introduction

- 1.1. We welcome the opportunity to provide our comments on Pillar Two – Tax Certainty for the GloBE Rules. In the following Section 1, we provide general comments on the fundamental issues in resolving disputes between participating and non-participating Countries. In

Section 2, we provide comments on dispute prevention mechanisms and in Section 3, comments on dispute resolution mechanisms. Together, these sections are intended to address the following question included in the Consultation Document:

Have you identified any other options that could be explored to achieve tax certainty for the GloBE Rules?

2. Fundamental Issues in Resolving Disputes Between Participating and Non-Participating Countries

- 2.1. The Public Consultation Document addresses tax certainty for the GloBE rules, and solicits comments on measures that may be adopted to ensure consistent application of these rules; that is, tax certainty with respect to these rules. It should be noted, however, that the GloBE rules will not exist in a vacuum. Moreover, as currently conceived, the GloBE rules would reallocate tax burden among countries. Thus, certainty with respect to the application of the GloBE rules will depend on their acceptance by, and integration with, the vast majority of countries world-wide, whether such countries specifically adopt the rules in whole or in part.
- 2.2. It now appears that many countries, who may not oppose the introduction and application of the GloBE rules generally, will not adopt them as domestic law at least in the near term. Some countries that originally agreed to the GloBE regime in principle now are skeptical that it can be effectively implemented without practical difficulty and undesirable effects on their resident companies. Other countries, including China and United States, do not appear likely to implement the GloBE rules in the next several years.
- 2.3. Given the structure of the GloBE rules, multilateral disputes regarding the proper allocation of taxing rights are likely to result between GloBE adopters and non-adopters, whether or not such non-adopters actively oppose the introduction and application of the rules. Because the GloBE rules reallocate taxing rights among countries, parties to disputes between states that have adopted the rules and states that have not adopted the rules will not be able to point to common standards, and therefore resolutions will be contrary to intended domestic law or to intended application of the GloBE rules, or both. Application of the GloBE rules in a manner wholly inconsistent with international taxation norms as reflected in existing treaties is likely to lead to arbitrary double taxation (at best), and increased opposition and anxiety toward the GloBE rules.
- 2.4. There is no easy way of resolving these disputes solely within the GloBE framework. Non-adopting jurisdictions are unlikely to agree to a multilateral instrument or to changes in domestic law that would make administration of the GloBE rules more orderly. Thus, by default, GloBE-related disputes involving non-adopting countries are likely to be decided either in MAP proceedings under bilateral tax treaties (if one exists between the countries involved in the dispute), or in domestic courts, in which treaty principles and domestic law will be applied.
- 2.5. Our prior comments on the Pillar Two Implementation Framework (dated April 11, 2022), noted the historical importance and continued relevance of income tax treaties in allocating taxing rights between jurisdictions. Tax treaties – and particularly model treaties published by several organizations, including the OECD – reflect generally accepted norms of international taxation developed over the last century. Much commentary has already been published regarding the compatibility of the GloBE rules, and particularly the UTPR, with

tax treaties and the norms that they reflect, yet neither the current consultation document nor any past consultations or guidance have seriously discussed this potential incompatibility. Without further engagement on this issue, the GloBE rules are likely to result in a less stable international tax system as rules are implemented over the next several years, and increased uncertainty with respect to the application of the GloBE rules themselves. Additionally, tax treaty compatibility concerns among adopting jurisdictions will exist in the absence of a multilateral instrument implementing the GloBE rules.

- 2.6. We urge continued discussion on this issue, and hope that the OECD does not lightly discard international norms of taxation in pursuit of the GloBE. For this reason, we recommend clarification that countries party to the GloBE rules may resolve disputes with non-adopting countries consistent with treaty obligations and international norms even where it requires them to accept taxation outcomes contrary to the intention of the GloBE rules.

3. Dispute Prevention Mechanisms

- 3.1. Focusing on those countries that adopt the GloBE rules, the Public Consultation Document considers several mechanisms that could provide tax certainty under the GloBE rules at an early stage. The GloBE Implementation Framework outlines further thinking with respect to administrative guidance and the design of the multilateral review process. In this regard, we fully support the adoption of a programme similar to the OECD International Compliance Assurance Programme (ICAP), as it may promote coordination among tax administrations and support MNEs in the consistent application of the Model Rules. We also refer here to our prior comments (dated April 11, 2022), in which we proposed a method of obtaining prompt administrative guidance known as the “EAGLE” committee. We continue to believe that a simple procedure of this kind would provide helpful guidance to taxpayers, particularly before formal dispute resolution procedures are established, as discussed below in our discussion of the “transition period.”
- 3.2. In our opinion, tax certainty would also be greatly enhanced with the adoption of dispute prevention mechanisms such as APA-like and ICAP-like procedures. In order to enhance their effectiveness, we suggest that APA-like mechanisms should be featured as follows:
- (A) They should be exclusively bilateral or multilateral according to the case (the preference for these kind of instruments is also consistent with the OECD framework and BEPS Action 14).
 - (B) Their scope of application should be limited not only to those cases that give rise to double taxation or double non taxation but also to those cases relating to the quantification of taxable income, including those relating to the recognition of Qualified Rule Status to an IIR, UTPR or QDMT.
 - (C) They should compel agreement within a mandatory time-frame, which would be crucial both to build tax certainty and to avoid implementation issues due to domestic statutes of limitations.
 - (D) They should include a mechanism to facilitate the exchange of APA-like agreements among tax administrations.

4. Dispute resolution mechanisms

As noted in the Public Consultation Document, an effective and efficient, binding and mandatory, multilateral dispute resolution mechanism is essential to the operation of the GloBE rules. The Public Consultation Document considers three possibilities, which we discuss below:

4.1. Developing a Multilateral Convention

4.2. In our opinion, for all the reasons discussed below, developing and implementing a multilateral convention that both creates a common standard in international law for the GloBE rules (“GloBE convention”) and creates a common procedures and dispute resolution mechanisms is the best solution. In addition, such an approach would be consistent with the approach adopted for the implementation of the OECD/G20 BEPS Project and with the instrument which should implement Pillar One¹. And even if a GloBE convention may not achieve universal acceptance, it could still benefit those states willing to sign and ratify in it by creating a much more efficient and reliable dispute resolution mechanism available to MNEs operating within their borders.

4.3. We note that agreeing a multilateral convention that provides for dispute prevention and resolution mechanisms but does not harmonize implementation of the GloBE rules themselves leaves significant risks of incoherent outcomes and multiple taxation because of differences of implementation in and interpretation of relevant domestic laws. No dispute resolution mechanism, whether based on international law or domestic law, can properly address these risks. Additionally, putting aside tax treaty compatibility considerations set forth above, adopting states may not be in a position to align legislative, executive or judicial actions with those of other states.

4.4. As noted in the Public Consultation Document, the process of negotiating, drafting and ratifying a GloBE Convention presents political challenges. At present, it appears unlikely that all of the Inclusive Framework countries will fully adopt the GloBE rules, and as such, it is similarly unlikely that all the countries would sign and ratify a GloBE Convention. To date, the multilateral convention implementing the OECD/G20 BEPS Project has been successful notwithstanding the fact that not all countries have adopted it. But that convention was primarily directed at implementing taxation norms directed primarily at the interaction of domestic laws between adopting countries. As noted above, application of the GloBE rules will not be so limited. Thus, in developing a GloBE Convention consideration should be given to the interaction of the GloBE rules among adopting and non-adopting countries, the possibility of introducing certain standards and procedures present in the GloBE Convention into bilateral treaties with non-adopting countries (to the extent not addressed by changes made, if any, under the subject to tax rule), and the possibility of introducing such standards and procedures into domestic law as discussed below. And countries party to the GloBE convention should be permitted to resolve disputes with non-adopting countries even if it requires them to accept taxation outcomes contrary to the intention of the GloBE rules.

4.5. Reliance on Existing Tax Treaties

¹ OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, 8 October 2021, available via <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm>

- 4.6. The Public Consultation Document notes the MAP provisions in tax treaties are generally limited in scope to “taxation not in accordance with” the relevant treaty, and therefore would not cover disputes involving the GloBE rules. This may be true insofar as it pertains to countries that have adopted the GloBE rules, where the dispute likely would focus on the proper interpretation or implementation of the rules. But, as noted above, Double Taxation Treaties may provide the only basis for resolving disputes stemming from double taxation involving an adopting and non-adopting country – such as where one jurisdiction imposes the UTPR based on profits of a resident of a state that has not implemented the GloBE rules. Therefore, consideration needs to be given as to how the GloBE rules will interact with existing tax treaties.
- 4.7. Even among those countries that adopt the GloBE rules, the Public Consultation Document correctly anticipates inconsistencies in the drafting and interpretation of domestic legislation enacting the GloBE rules, and the inevitable controversies that will result. For this reason, compatibility issues among adopting jurisdictions may arise if treaties are not amended accordingly. Further,] as currently drafted, existing tax treaties do not provide common standards for the GloBE rules, nor do they provide a basis for determining which GloBE related issues are properly resolved on the basis of the treaty and which are not. Absent clear standards, it is unlikely that domestic courts would simply turn over dispute resolution authority with respect to their countries’ domestic laws. As such, to provide a reliable mechanism for dispute resolution, double tax treaties even among the adopting countries would need to be amended to assist competent authorities to resolve differences in enacting legislation and implementation and other incompatibility issues.
- 4.8. It has been noted that Article 25(3) of the OECD Model Tax Convention allows competent authorities to consult on cases of double taxation which are not covered by the convention. The Public Consultation Document correctly notes that this provision is entirely discretionary and does not grant any rights to taxpayers. Furthermore, Article 25(3) does not grant competent authorities the power to implement common solutions. In some countries, this in and of itself may prevent the competent authorities from implementing settlements that produce tax outcomes inconsistent with domestic tax law. Finally, not all existing tax treaties include provisions similar to Article 25(3) of the Model Treaty, and therefore, even this provision would not be available in all cases. For all of the above reasons, we do not believe that existing tax treaties provide an adequate basis for resolving disputes involving the interpretation and implementation of the GloBE rules.

4.9. Reliance on a Competent Authority Agreements under the MAAC

Although the MAAC provides a basis for information exchange, which can be helpful in the prevention and resolution of disputes, the Public Consultation Document correctly points out that it does not provide rights for taxpayers to request a competent authority procedure. Moreover, MAAC does not create a common standard for the GloBE rules, and would not assist competent authorities in overcoming differences arising from differences in enacting legislation. Equally, it does not provide a substantive legal basis for competent authorities to implement settlements inconsistent with domestic tax laws. For all these reasons, we do not consider that the MAAC provides an adequate basis for resolving disputes involving the GloBE rules.

4.10. Creating a Dispute Resolution Provision in Domestic Law

- 4.11. The Public Consultation document considers the possibility of creating a common dispute resolution mechanism modelled on MAP, pursuant to which countries would introduce the

relevant provisions into their domestic law, either as a standalone mechanism or in tandem with either the MAAC or existing tax treaties. To the extent a universally accepted GloBE Convention is not possible (either as a single instrument or multiple bilateral instruments with common provisions), resolution of GloBE tax disputes under such a mechanism almost certainly would produce more uniformity and tax certainty than simply defaulting to domestic courts. As such, to the extent a universal GloBE Convention may not be achieved or may not be achieved in the near term, the introduction into domestic laws of common procedures and standards should be a priority. We first discuss minimum standards for such procedures, then the shortfalls of relying on such a mechanism, and finally ways to resolve disputes even in cases where domestic law dispute resolution mechanisms are not applicable.

- 4.12. Any recommended domestic law changes with respect to GloBE dispute resolution should meet the minimum standards identified by BEPS Action 14. In particular:
- (A) Countries should ensure that obligations (deriving either by a GloBE multilateral convention or by the implementation of GloBE Model Rules through domestic law provisions) related to the GloBE dispute resolution mechanism are fully implemented in good faith and that GloBE disputes are resolved in a timely manner.
 - (B) Countries should ensure that administrative processes promote the prevention and timely resolution of GloBE disputes.
 - (C) Countries should ensure that taxpayers that meet the relevant requirements can access the GloBE dispute resolution procedure.
- 4.13. The best practices identified by BEPS Action 14 should also apply to GloBE dispute resolution mechanisms, to the extent compatible. In particular, best practice 6 would have a relevant impact on the effectiveness and efficiency of the MAP process. Therefore, Countries should take appropriate measures to provide for a suspension of collections procedures during the period a GloBE dispute resolution case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.
- 4.14. We note however, that existing MAP processes and the recommendations of BEPS Action 14 each regard interpretation and application of instruments under international law, i.e. tax treaties. In contrast, in the absence of a GloBE Convention, domestically adopted GloBE rules will almost certainly include substantive and procedural differences. In order to partially address incompatibility concerns, consideration may be given to recommending "linking rules" to be implemented by adopting jurisdictions in their domestic laws, which would allow coordination as to the application and implementation of the substantive GloBE rules even in the case of incompatibilities in domestic laws.
- 4.15. As correctly identified by the Public Consultation Document, jurisdictions may face legal and constitutional constraints in implementing common procedures and standards in the absence of GloBE Convention. While the public consultation document offers the possibility of jurisdictions restricting the dispute resolution mechanism to cases where the enacting legislation is identically worded, even if achievable this would leave many important cases (including cases of double taxation) unaddressed.
- 4.16. Competent authorities could refuse to recognise as valid requests from other jurisdictions

due to differences in the enactment of the GloBE rules. Even where such differences do not impede negotiations, competent authorities may again face legal challenges in implementing solutions which lead to tax outcomes that are not consistent with domestic tax law.

- 4.17. Further, it should be considered to extend the scope of existing regional dispute resolution mechanisms to resolve GloBE disputes where applicable.
- 4.18. In the case of the European Union, we consider the following aspects of particular relevance, appreciating that these comments are more directed towards the EU institutions than the OECD/Inclusive Framework. First, the Arbitration Convention and Tax Dispute Resolution Mechanism ("TDRM") require competent authorities in member states to resolve disputes by arbitration if they do not reach a consensus within two years. The period may be extended by up to one year at the request of a competent authority of a member state. Although the TDRM currently only applies to tax disputes involving the Arbitration Convention and Double Tax Treaties, its application could be extended to GloBE disputes.
- 4.19. Second, dispute resolution in courts of law of GloBE disputes between taxpayers and Member States of the European Union could be centralised within the EU. This would ideally involve a tax chamber of the General Court becoming competent to decide on the full merits of tax cases, with the possibility of appeal to the CJEU on points of law at the very least. Such a procedure would provide s increased certainty and harmony of decisions. Additionally, such a procedure could save time and costs. A benefit with respect to the EU, compared to disputes involving non-EU adopting jurisdictions, is that implementation of Pillar 2 in the European Union, including the substantive rules, is effected and coordinated through (supranational) EU law in the form of a Directive. As a result, some of the deficiencies caused by the absence of a supranational basis should not apply or be easier to address with respect to disputes involving EU jurisdictions. However, it should be noted that, while a Directive is binding on Member States as to the result, Member States have discretion as to choice of form and methods of implementation. Therefore, it is important that the EU restricts this discretion as much as possible by setting detailed rules that allow no or little room for differences in implementation.
- 4.20. Taxpayers can litigate tax disputes regarding EU directives before domestic courts of Member States, which can refer preliminary questions regarding the interpretation of EU law, including EU Directives, to the Court of Justice of the European Union ("CJEU"). Hence, existing EU law already provides for a form of centralised application and interpretation of domestic laws of EU Member States that implement an EU Directive, and this will apply equally to the "Pillar 2 Directive". However, experiences over the past decades has also shown the limitations of this preliminary questions mechanism. Please refer paragraph 5.4 of our commentary on the EU BEFIT consultation.² Hence, further centralisation as set forth above is preferred, provided that capacity of the CJEU is sufficiently expanded.

4.21. Transitional Period

- 4.22. Ultimately, a dispute resolution mechanism within a GloBE Convention is the best solution. However, the ratification process of such a convention would require time. The BEPS multilateral convention, for example, was signed in June 2017 and still needs to be ratified

² [Feedback from: International Bar Association \(europa.eu\)](https://www.eurobar.org/en/feedback-from-international-bar-association-europa.eu)

by more than twenty jurisdictions.³ Disputes will arise, and will need to be resolved, during the transition period between adoption of the GloBE rules by the various countries, and the introduction and implementation of dispute resolution procedures in a GloBE convention.

- 4.23. For all of the reasons discussed above, existing procedures for dispute resolution will fall short, either on timing, consistency, or both. On the other hand, it likely is the case that some combination of procedures will provide better and quicker outcomes than simple reliance on domestic courts. In this regard, a multi-pronged solution based on Article 25(3) of the OECD Model Tax Convention, which was proposed in 2022 by prominent scholars⁴, may provide a path forward. According to this proposal, GloBE disputes may be resolved without the need for a multilateral convention through (i) an enhanced interpretation of article 25(3) second sentence of the OECD Model Tax Convention; (ii) a domestic dispute resolution mechanism in line with such provision, which could be included in the GloBE Model Rules and adopted with other domestic law changes and (iii) the exchange of information provisions under the MAAC. As indicated, the proposed mechanism remains a suboptimal solution compared to a mandatory dispute resolution mechanism introduced by a GloBE Convention.
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³ Signatories and Parties (MLI Positions) as of 16 December 2022, available via <https://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf>.

⁴ R. Danon, D. Gutmann, G. Maisto and A. M. Jiménez, The OECD/G20 Global Minimum Tax and Dispute Resolution: A Workable Solution Based on Article 25(3) of the OECD Model, the Principle of Reciprocity and the GloBE Model Rules, in World Tax Journal, pp. 489-515, August 2022.