



3 February 2023

To: International Co-operation and Tax Administration Division,
Organisation for Economic Cooperation and Development
Centre for Tax Policy and Administration
75775, Paris, Cedex 16, France
Submitted by email: taxpublicconsultation@oecd.org

Re: OECD's Public Consultation on Tax Certainty

Dear Secretariat Team,

PwC International Ltd on behalf of its network of member firms (PwC) welcomes the opportunity to share its views on the Pillar Two Tax Certainty rules of the project Addressing Tax Challenges of the Digitalization of the Economy. In view of our understanding of the nature and urgency of the request, we set out below our comments on several important questions in relation to optimising tax certainty in relation to Pillar Two which we believe the Inclusive Framework (IF) should address as part of its program of work.

In summary, our main messages relate to:

- The need for greater clarity around the nature, timing and public nature/transparency around the peer review process,
- The need to allow participation of the taxpayer in the various different methods used for resolution of disputes and a broader process for feedback from taxpayers,
- More details on the legal basis and commitment of countries to follow guidance, etc., and the need a mechanism for holding the countries more accountable for how they apply the principles, and
- Our preference for a multilateral solution as the optimal, but harder, route to follow. Other measures will be a positive contribution to certainty if accessible to, and done in cooperation with, taxpayers. Nevertheless, domestic, bilateral and other mechanisms (like advance pricing agreements or APAs) are unlikely to resolve issues fully.

Our detailed comments below are organised under the relevant sections of the Tax Certainty Consultation and the specific questions asked.

Dispute prevention and likely scenarios

We agree that when the rules are applied by a tax authority in one jurisdiction, the Top-up Tax liability that may arise in that jurisdiction could be based on an interpretation or application of the GloBE rules that is not shared by another jurisdiction that is also imposing a Top-Up Tax in respect of the same pool of low-taxed income.

PricewaterhouseCoopers International Limited
1 Embankment Place
London WC2N 6RH
T: +44 (0)20 7583 5000 / F: +44 (0)20 7822 4652



We have submitted comments in relation to the previous consultations on Pillar Two setting out many areas of uncertainty in the Model Rules and Commentary, where divergent interpretations by different countries could occur. To recap, some of the areas in which we see the potential for significant disputes to arise are listed below:

<ul style="list-style-type: none">• Disagreement on transfer pricing (TP) / allocation of profit with repercussion on GloBE taxation
<ul style="list-style-type: none">• Disagreement on application of a unilateral APA
<ul style="list-style-type: none">• IIR calculation is not accepted by the other jurisdiction(s), (for example, State A levies IIR for alleged State B company low taxed income, disagreement between states on calculation of low taxed income - several issues may arise)
<ul style="list-style-type: none">• UPTR calculation is not accepted by the other jurisdictions
<ul style="list-style-type: none">• UTPR taxing rights are allocated to different jurisdictions
<ul style="list-style-type: none">• IIR taxing rights are given to different jurisdictions - issue of determining a UPE or IPE in-scope
<ul style="list-style-type: none">• POPE issues (and split ownership)
<ul style="list-style-type: none">• Disagreement between jurisdictions on "GloBE II adjustments"
<ul style="list-style-type: none">• Disagreement between jurisdictions on qualified tax credits
<ul style="list-style-type: none">• IIR savings clauses in general but specifically,<ul style="list-style-type: none">○ the profits taxed are those of non-residents companies (albeit through taxation of its own resident);○ such clause does not exist in all tax treaties;○ the treaties may provide an exemption for the profits of a permanent establishment.
<ul style="list-style-type: none">• Deferred income tax accounting principles concerning top-up taxes. These have not been established yet, and it will be difficult to finalise permanent accounting standards and have them consistently audited in a short period of time

1) Qualified Rule Status and the multilateral review process

We recapped some of the issues that we've already raised earlier, but what follows are some additional points.

- Uncertainty over the peer review process, how many countries may be involved in each case/decision and how the composition would have to be determined. While there may be similarities with the mutual agreement procedure (MAP) peer review process (see further below) it doesn't appear that the [changes to the MAP review process announced 24 January 2023](#) should be especially relevant in this respect.

- There is a need to define a peer review process that covers the analysis of the legislation as well as any changes that may be introduced. Jurisdictions should commit to notify any modification or interpretation of the rules.
- The peer review process should also be made to analyse the application of the rules by a jurisdiction.
- The dispute resolution mechanism available in a jurisdiction should also be designed to be assessed by the peer review process.
- The peer review process may be set to follow a similar procedure to the one used for by the Global Forum on Exchange of Information.
- Prior to any peer review, it is necessary to define a common guide applicable for the review (terms of reference) that determine both the basis for the analysis, aspects to be analysed as well as the applicable procedure.
- For EU Member States it is necessary to consider the role of the European Commission that must ensure the correct application of the EU minimum tax Directive. Improper transposition and implementation of the Directive could be addressed by the Commission taking infringement proceedings.¹
- The peer review process will not have results as from day one, so a question arises as to how to bridge the intermediate period.

2) Referral to the Inclusive Framework on BEPS

- The referral of issues to the IF might be positive in terms of raising issues for future guidance in some respects but it is unlikely to result in a timely response.
- It should be made clear as to whether this is a reference to all of the IF members or a representative group.
- It could be a useful mechanism if there is a clearly defined procedure for the reference and for the answer issued by the IF (define timelines).
- MNEs should be permitted to raise issues.
- The answers should be made publicly available, if necessary in an anonymized way.
- Public answers should be made generally applicable and binding for the tax administrations.

¹ The Commission also has specific responsibilities under the Directive which should be aligned with the OECD guidance including:

- notification by a member state of its election to apply (or revoke according to a three-year cycle) a QDMTT, the criteria for which and the peer review process for which are still to be announced by the OECD Inclusive Framework,
- notification by a member state to not apply IIR/UTPR for the first six years where no more than twelve MNEs are headquartered there, provided the Commission is satisfied that state will provide information to other countries for UTPR purposes, and
- determination of the equivalence of an IIR in a non-EU country (following an OECD assessment - although it is unclear how it might differ), after appropriate consultation and subject to Council objection.

3) Work on administrative guidance

- Agreed Administrative Guidance on certainty is yet to be published, even in draft, so there are further opportunities to limit the instances in which interpretations are likely to differ and disputes arise.
- Will countries follow it, particularly in relation to references to it being helpful but not binding (eg the EU)?

4) Common risk assessment and co-ordinated compliance

- Co-operative compliance is something most countries claim to be actively following but we see less evidence of it in practice.
- Formal initiatives like ICAP (and a similar EU Trust & Cooperation Approach) are in early stages of development, seem expensive to run and do not yet have the full confidence of taxpayers or tax administrations. The outcomes also need to be sufficiently certain.
- An ICAP-like approach may be useful if it is accepted by the majority of the IF jurisdictions and if an MNE can require the application of such an approach in relation to GloBE rules. It may be used to determine the level of risk of a particular MNE. It may also be useful for the interpretation of a particular provision applicable to an MNE.

5) Binding certainty mechanisms including Advance Pricing Arrangements

- A number of countries are reluctant to enter, or have constitutional difficulties with entering, into binding mechanisms that leave any element without involvement from their side. This narrows the range of mechanisms available.
- APAs have been very difficult and time consuming to agree in practice.
- The legal basis needs to be bilateral or multilateral.
- There is no need to incorporate the common standard on the legal instrument but there should be a clear reference to it.
- It is not clear what the outcome of the APA may be: APAs are usually used to agree on a particular TP policy but because the definition of the arm's length principle (APL) leave room for MNEs to determine how to define it. This should not be the case for GloBE as the application and interpretation should be as consistent as possible.
- Bilateral(B)/ multilateral(M) APAs are delivered at the request of the taxpayer, but at the discretion of the tax authority(ies) - this means there is no 100% guaranteed result.

Dispute resolution and whether such disputes are limited to situations creating double taxation

1) Substance of a dispute resolution mechanism

- Most facets would need to be similar to MAP, but specific adjustments are necessary in extending it to issues beyond treaty double taxation.
- Disputes are likely to arise in areas that don't concern double taxation or where it is difficult to show double taxation and the scope should be made to include these, such as where top-up tax is allocated.
- MAPs should be made available for MNEs and tax administrations and for any issue regarding the application or interpretation of the rules, via amendment of tax treaties through the MLC or otherwise.

- Arbitration (or an alternative binding mechanism) must be accepted at least for those cases related to the elimination of double taxation.
- The outcome of the MAP should be made public when it is generally applicable.
- Tax administrations should accept the initiation of the MAP and follow a strict procedure.
- The IF should be able to intervene in the procedure to make sure that an agreement is reached: i.e., when one of the tax administrations has accepted the initiation of the case and the other tax administration implied has not accepted, there should be a third party deciding on acceptance. The EU's Dispute Resolution Directive has established a strict procedure, including the intervention of a tax advisory commission to be sure that the procedure is as straightforward as possible and trying to avoid cases where no agreement is reached. Some inspiration may be taken from the Directive.
- If reliance is placed on treaty mechanisms, there will be a need to provide for a dispute resolution mechanism also in the case of the absence of a treaty. A multilateral convention (MLC) would, in this instance, avoid this situation.

2) Developing a multilateral convention

- The process and time necessary to negotiate a MLC and whether all countries would sign up to it make this a questionable approach at the outset. Could this be overcome by including it in the MLC for Pillar 1 or perhaps it could be an ongoing project?
- It is the best option for a common legal basis, including the need to provide certainty on the compatibility of the top-up tax with the Business Profits Article in most double tax treaties (Article 7 of the Model Tax Convention), but should not be the only one available because of the practical difficulties of being able to agree to it.
- MLC could provide for optionality, e.g., arbitration for the willing, 'endeavour engagement' for the others - compare the approach adopted for the purpose of the BEPS multilateral instrument.
- Part of the process included in the MLC could be the use of panels to address disputes that would otherwise not result in a binding agreement, similar in nature to those proposed in relation to Pillar 1.

3) Reliance on competent authority agreements under the Convention on Mutual Administrative Assistance on tax matters (MAAC)

- While this empowers competent authorities (CAs) to discuss matters amongst themselves, there is no possibility for the taxpayer to request a resolution, so some additional rules would be required. Could this be domestic law?
- The agreements should be made publicly available.

4) Reliance on existing tax treaties

- As noted above, there are likely to be disputes in areas not involving double taxation and going beyond the scope of such treaties.
- The OECD could modify the Model Tax Convention on Income and Capital to include a provision that may be agreed by countries when negotiating new treaties.
- Reliance on existing treaties could be seen as a first step, but needs to be enhanced.

5) Creating a dispute resolution provision in domestic law

- Domestic law provisions seem only helpful to solve fully purely domestic disputes.
- Such a provision could facilitate the settlement of a dispute with another state, but very likely some form of international instrument would need to be made or adjusted before tax authorities of a different jurisdiction can contact each other (otherwise through diplomatic channels which may burden the process).
- A domestic provision may specifically be helpful in cases:
 - where some form of international agreement exists allowing tax authorities to communicate and settle cases with each other (e.g., double tax treaty, administrative cooperation agreements, etc),
 - where only an administrative agreement exists that is not ratified by the relevant Parliament, and
 - if no agreement exists, based on reciprocity (but this may not cover all cases).

Other mechanisms for tax certainty

- Joint audits and simultaneous controls. An MNE should be able to require the initiation of a joint audit or the incorporation of other jurisdictions in an audit on GloBE provisions initiated by any tax administration.
- Tax administrations should reach a common conclusion in any joint audit. The EU's DAC7 incorporates joint audits but tax administrations are not required to agree on a common outcome of the audit. This is not a desirable situation and may imply a waste of time and resources for both the tax administration and the MNE that, after the joint audit, will have to initiate a MAP to solve the pending issues.

With this letter we kindly invite you to take our observations into consideration during further development of the Pillar Two rules. We stand ready to discuss the issues raised in this letter in more detail, if that would be helpful at any point - please do not hesitate to contact me or one of the individuals set out below.

Yours sincerely,



Stef van Weeghel
Global Tax Policy Leader
stef.van.weeghel@pwc.com
T: +31 (0) 887 926 763



PwC Contacts

Name	Email Address
Will Morris	william.h.morris@pwc.com
Edwin Visser	edwin.visser@pwc.com
Phil Greenfield	philip.greenfield@pwc.com
Chloe O'Hara	chloe.ohara@pwc.com
Keetie van der Torren-Jakma	keetie.van.der.torren-jakma@pwc.com
Lili Kazemi	golaleh.kazemi@pwc.com
Stewart Brant	stewart.brant@pwc.com
Roberta Poza Cid	roberta.poza.cid@pwc.com
Stefaan de Baets	stefaan.de.baets@pwc.com
Shiraj Keshvani	shiraj.keshvani@pwc.com
Steven Kohart	steven.p.kohart@pwc.com