

# Dispute resolution in the context of Pillar Two

Possible differences that may arise in the interpretation or application of GloBE rules by different jurisdictions require the adoption of dispute resolution mechanisms specifically designed for Pillar Two.

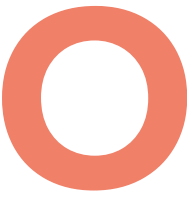
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 On 15 November 2024, the Organisation for Economic Co-operation and Development (OECD) held its sixth Tax Certainty Day, an event that brought together tax policymakers, tax authorities, business representatives and other stakeholders to discuss and advance the global tax certainty agenda. During this event, one of the issues discussed was how to prepare for and deal with disputes arising under Pillar Two.

In this regard, it should be recalled that under the *common approach* to Pillar Two, jurisdictions wishing to introduce global anti-base erosion rules (GloBE rules) must implement and apply their respective domestic legislation in a manner coordinated and consistent with the guidelines issued by the OECD. Even so, there is a possibility that differences in the interpretation or application of GloBE rules may arise between jurisdictions, which could lead to divergent outcomes under these. For this reason, it is essential

to adopt dispute resolution mechanisms specifically designed for Pillar Two.

Today, with Pillar Two GloBE rules implemented or moving towards implementation in many countries, challenges and opportunities arise:

- In terms of challenges, it is recognised that the rules are complex, that they need to be implemented in a short period of time and that they are subject to a risk of divergent interpretation by authorities in different jurisdictions.
- And, as an opportunity, it should be noted that Pillar Two is based on a set of common rules that are being put in place simultaneously and uniformly in the different countries and that mean that information is available to all authorities at the same time.

In this context, work is underway on a multilateral convention for dispute resolution under Pillar Two. There is also discussion as to whether the OECD's International Compliance Assurance Programme (ICAP) framework could be extended to address interpretation and other Pillar Two-related disputes, which is currently being explored by the OECD Forum on Tax Administration (FTA).

This being the starting point, in December 2022, the OECD published a consultation paper entitled "Pillar Two - Tax Certainty for GloBE Rules", in which it expressly recognised that the dispute avoidance mechanisms specifically considered under Pillar Two may not provide tax certainty for all multinational enterprise (MNE) groups in all cases, making it necessary to consider the dispute resolution mechanisms that can be put in place.

The basic elements of a dispute resolution mechanism could be derived from the mutual agreement procedure (MAP) provision contained in Article 25 of the OECD Model Convention, with the necessary adaptations to implement a dispute resolution mechanism aimed at resolving problems that arise for MNE groups due to differences in the interpretation or application of GloBE rules in different jurisdictions.

The content of a Pillar Two dispute settlement mechanism could comprise the following three basic elements:

1. MNE groups should be allowed to present a MAP request to the competent authority in a jurisdiction where an action taken by the same would result in taxation not provided for under GloBE rules. Experience in the context of mutual agreement procedures under double tax treaties indicates that, while jurisdictions may adopt such procedures at their discretion to resolve problems that may arise, a higher level of tax certainty is provided to taxpayers when they are allowed to request such a procedure.
2. The competent authority of one jurisdiction should, where justified, have the power to settle the case with the competent authorities of other jurisdictions involved that are equally empowered, according to a defined common standard.
3. Jurisdictions should implement any agreement reached by their competent authorities irrespective of the time limits under their domestic law.

A Pillar Two dispute resolution mechanism incorporating the elements described above could be put into operation through different legal

## The dispute resolution mechanism should integrate the basic elements identified by the OECD

instruments (or even a combination thereof) that could rely on existing mechanisms or implement new ones:

### a) Implementation of a multilateral convention

This is the line that the OECD is currently working on. This mechanism would further ensure coordination and consistent implementation of GloBE rules. As indicated, it should give the ability to MNE groups to submit requests where an action has led to undesirable taxation under GloBE rules and allow the competent authorities to accept such requests and resolve the dispute on the basis of a defined common standard. The implementation of this instrument would involve agreement by all jurisdictions and compliance with procedural aspects such as ratification.

### b) Resolution under the MAAC

Another instrument that could be considered in the context of dispute resolution is the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC). This convention could allow for the exchange of information between authorities and, in addition, a number of its provisions (e.g. Article 8 on *simultaneous tax examinations* or Article 9 allowing for *tax examinations abroad*) could allow competent authorities to consult with each other, exchange information and hold meetings with respect to a dispute con-

cerning GloBE rules raised by MNE groups. However, it would not provide a substantive legal basis for competent authorities to reach or implement agreements

and, ultimately, would not in itself create a dispute resolution mechanism to reach a common solution.

### c) Resolution under existing tax treaties

Another option could be to explore whether mutual agreement provisions in existing bilateral treaties could be used to resolve Pillar Two-related disputes. Article 25(3), second sentence, of the OECD Model Tax Convention on Income and on Capital provides that competent authorities may also consult together for the elimination of double taxation in cases not provided for in the Convention. However, relying on existing tax treaties has some limitations:

- there may be no treaty relationship between the relevant jurisdictions and there may be problems in a multilateral context;
- the aforementioned article is discretionary for the competent authorities, and MNE groups cannot present requests for such discussions to take place;
- it only allows for the resolution of double taxation cases, which may not cover all possible unintended consequences;
- jurisdictions may conclude that this provision does not enable them to enter into an agreement that deviates from their domestic law.

Therefore, depending on existing tax treaties, it could be an option used in combination with an agreement between competent authorities or a provision in domestic legislation.

- d) Introduction of a dispute resolution mechanism in domestic law

This instrument should be subject to reciprocity and be applicable only when all jurisdictions involved have the same provision in their respective domestic laws.

In short, given the uncertainty surrounding possible divergences in the interpretation or application of Pillar Two rules in different jurisdictions, it is essential to clearly establish dispute resolution mechanisms that allow for the prompt resolution of any disagreement and ensure global taxation in accordance with these rules. In this regard, there may be disputes that would not necessarily be immediately resolved by the mechanisms currently analysed. Therefore, in a constantly evolving context such as the one under Pillar Two, we should continue to pay close attention to further steps taken by the OCDE on this matter.