The Implementation of the Global Minimum Tax (GloBE):
The Need for an Effective Dispute Prevention and Resolution Mechanism

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Abstract: The successful implementation of the Global Anti-Base Erosion (GloBE) rules on a global scale cannot be achieved without an international effective dispute prevention and resolution mechanism. However, the development of a dispute prevention and resolution framework for the GloBE rules faces significant challenges. This article offers two possible options for an effective dispute prevention and resolution mechanism: a model based on reciprocal domestic legislations and the multilateral convention model.

Keywords: Global Anti-Base Erosion rules; Dispute prevention and resolution mechanism; Multilateral convention

1. Introduction

A successful implementation of the global minimum tax around the globe — the Global Anti-Base Erosion (GloBE) rules — requires an international effective dispute prevention and resolution mechanism to be added to the already existing mechanisms for coordination in the GloBE rules (i.e. Administrative Guidance, peer-reviews, etc.). It is equally recognized that the GloBE rules which are rooted in a common framework have, from a substantive perspective, all the attributes of international tax rules. The development of a dispute prevention and resolution framework for the GloBE rules faces, however, important challenges. First, GloBE disputes may be rooted not only in conflicts of interpretation between countries (i.e. differences in the interpretation or application of the GloBE rules could give rise to divergent outcomes)[1], but also in the transposition of the GloBE rules in domestic law which may not be identical in all countries. It is indeed likely that some jurisdictions may, even in good faith, slightly rephrase the GloBE Model Rules, adopt terms and expressions drawn from domestic law, and disregard or add new elements (whether taken from the Commentary or not) for simplification purposes, thereby reaching (albeit unintentionally in many cases) different outcomes.

The traditional mutual agreement procedure (MAP) embodied in Art. 25 of the OECD Model Convention (MC) and found in double taxation conventions (DTCs) around the globe is poorly equipped to deal with GloBE disputes. This is because, under Art. 25(1) of the OECD MC, taxpayers may not initiate the MAP to resolve a dispute involving the GloBE rules, mainly, because there is not "taxation not in accordance with a tax treaty". An alternative route is the consultation procedure under the second sentence, Art. 25(3) of the OECD MC which states: *"The competent authorities of the Contracting States (…) may also consult together for the elimination of double taxation in cases not provided for in the Convention."* In relation to GloBE disputes, reliance on the second sentence, Art. 25(3) of the OECD MC alone has, however, several shortcomings. First, this provision does not provide taxpayers with a right to initiate the MAP as is the case under Art. 25(1) of the OECD MC although in practice, the consultation procedure is often initiated following a request made by the taxpayer. An important piece of the dispute resolution framework which Base Erosion and Profit Shifting (BEPS) Action 14[2] has sought to reinforce would thus be missing. Second, it may be argued that the second sentence, Art. 25(3) of the OECD MC, is confined to the elimination of double taxation, while not all GloBE disputes may lead to actual double taxation.[3] Third, assuming there is a tax treaty in place including a rule modelled on Art. 25(3) of the OECD MC, the Contracting States' domestic laws may prevent them from successfully resorting to this consultation procedure. This would namely be the case if these laws do not include a proper legal basis allowing ad hoc upwards or downwards adjustments.[4] This is of course a relevant consideration insofar as the GloBE rules are not

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1 OECD. Pillar Two — Tax Certainty for the GloBE Rules, December 2022-3 February 2023 Public Consultation Document, para. 2.

2 OECD (2015). *Making Dispute Resolution Mechanisms More Effective, Action 14 — 2015 Final Report*, https://doi.org/10.1787/9789264241633-en.

3 OECD (2022). Public Consultation Document: Pillar Two — Tax Certainty for the GloBE Rules (20 December 2022-3 February 2023), para. 38.

4 See Para. 55.1 OECD Model: Commentary on Article 25 (2017); Robert Danon, Daniel Gutmann, Guglielmo Maisto, et al. (2022). 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. 14 *World Tax Journal* 3, (hereafter: Danon, Gutmann, Maisto & Martín Jiménez, The OECD/G20 Global Minimum Tax and Dispute Resolution), pp. 506.

covered by DTCs.

2. Possible Options

2.1 A Model Based on Reciprocal Domestic Legislations

In recent publications[5], the authors have argued in favor of a dispute prevention and resolution package which would be included in the domestic legislations implementing the GloBE rules and which would leverage on the principle of reciprocity generally recognized in international relations. In essence, this proposed model would include the following three elements.

First, a new interpretative model rule (i) "switching off" the domestic canons of interpretation with a view to ensuring that GloBE provisions are always and exclusively interpreted in line with the GloBE rules and their Commentary; and (ii) providing that the framework of the Vienna Convention on the Law of Treaties (VCLT) applies by analogy to the interpretation of the GloBE rules so as to streamline the interpretative exercise among the implementing jurisdictions. This new interpretative provision is designed to neutralize a dispute rooted in a conflict of interpretation of GloBE rules worded identically.

Second, a new *lex specialis* model rule providing that the GloBE Model Rules shall take precedence in case of a dispute rooted in a diverging transposition of GloBE rules in domestic law and only to the extent necessary to eliminate such dispute. This new provision would be designed to neutralize a dispute rooted in a conflict of transposition of GloBE rules which are then worded differently. As indicated, a conflict of transposition should, on the other hand, not occur where a country chooses simply to declare the GloBE Model Rules as applicable domestic law. However, implementing jurisdictions may not necessarily be able to proceed in this fashion for various reasons.

Last but not least, a domestic dispute resolution model rule applying on the basis of the principle of reciprocity. This domestic dispute resolution (i) would apply on a stand-alone basis; (ii) would incorporate an express reference to the possibility for the competent tax authorities to enter into an advance binding agreement relating to the interpretation of the GloBE rules; (iii) would rely on a complementary and underlying substantive rule included in Art. 3 of the GloBE Model Rules to enable adjustments to the determination of the GloBE Income or Loss; (iv) would also apply to situations not leading to effective double taxation (unlike under the second sentence, Art. 25(3) of the OECD MC); and (v) would use existing exchange of information tools (bilateral treaties and the MAAC[6]) to make it work.

The enactment of domestic dispute resolution mechanisms based on reciprocity has been taken into due consideration by countries facing the transposition of the Pillar Two Model Rules. For instance, the Italian Government recently approved a draft implementing legislation which includes a provision based on reciprocity, ensuring access to mutual agreement procedure with the competent authorities of other countries adopting the same domestic dispute resolution mechanism. The dispute resolution rule would also apply in the absence of a tax treaty concluded with the other State(s).[7]

5 See Danon, Gutmann, Maisto & Martín Jiménez, The OECD/G20 Global Minimum Tax and Dispute Resolution, or, more recently, Danon, Gutmann, Maisto, et al. (2023). The Global Anti-Base Erosion (GloBE) Rules and Tax Certainty: A Proposed Architecture to Prevent and Resolve GloBE Disputes. 6 *International Tax Studies* (ITAXS) 2.

6 Council of Europe/OECD, Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 Protocol ("MAAC").

7 Article 59 of the Legislative Decree 19 December 2023 relating to the implementation of the Pillar Two EU Directive in the context of the delegation law enacted by Parliament (Law 9 August 2023, no. 111).

2.2 The Multilateral Convention Model

The authors submit that a domestic dispute resolution provision would perfectly be possible in most legal orders. It is likely, however, that most tax administrations feel more comfortable with tax treaties rather than with the domestic provision as an innovative idea. As a consequence, (some) countries may indeed be inclined to believe that resolving international tax disputes (in particular, GloBE disputes) can only be achieved with a new multilateral convention. This is certainly a possibility even if signing a new mini multilateral convention on GloBE dispute resolution ("GloBE MTC") may take time until it is applicable and effective for all the signatory states (on the other hand, the procedure would be speeded up dramatically with the domestic law framework outlined above).

A dispute resolution provision in the GloBE MTC should have very similar features to the domestic dispute resolution provision, but the following elements should be included in particular (some in common with the domestic provision and others to make the most of its inclusion in an MTC):

1) It should leverage on bilateral tax treaties and exchange of tax information agreements or the MAAC for information exchange purposes.

2) It should be drafted to allow the resolution of disputes on interpretation and application of the GloBE rules as well as disputes regarding conflicts of transposition. In order to achieve this objective, a "priority rule" would be needed in the GloBE MTC so that it is clear that the competent authorities of the GloBE MTC can put aside their domestic rules deviating from OECD's GloBE rules and give priority to the latter in order to provide a solution to the disputes.

3) Entities affected by the GloBE disputes should have the possibility of presenting their case to any of the competent authorities concerned and not only to that of its State of residence.

4) It should make clear that not only bilateral but also multilateral dispute resolution procedures are regulated and available, so that a uniform solution applies to all countries involved in the GloBE dispute. These multilateral procedures should be allowed to proceed even if one of the States opts out and withdraws from the procedure for whatever reason, but still the other competent authorities believe that partial solutions are possible.

5) It should regulate procedural issues beyond Art. 25(2) of the OECD MC (2017) so that the solution to the dispute can be enforced, regardless of either domestic time

limits or any other procedural obstacles. Likewise, it should be foreseen that the collection of the tax to be paid should be suspended for the duration of the GloBE dispute resolution procedure, especially if the same income has already been included in the tax base (GloBE rules or corporate taxes) in another country.

6) It should foresee the possibility of arbitration in case the competent authorities of the GloBE MTC cannot reach a solution without any blocking power by the tax administrations concerned.

7) It should regulate how this provision is linked with other similar dispute resolution procedures. It could be the case that a GloBE dispute involves both signatory and non-signatory States of the GloBE MTC (or States where the MTC is already in force and others where it is not yet in force), or that the dispute resolution procedure is eventually regulated in some countries in domestic legislation (e.g. Italy) or in the EU in a directive and, as a consequence, is implemented in domestic implementing legislation. A "linking provision" should be foreseen to allow the application of the GloBE MTC dispute resolution provision in connection with the legislative MAP (the second sentence, Art. 25(3)) of a tax treaty in force with States where the GloBE MTC is not yet in force for whatever reason (if they will use the second sentence, Art. 25(3) of the OECD MC to address GloBE disputes) or those which have a domestic dispute resolution provision in their domestic law.

This will expand the geographical scope and reach of the solution to the dispute, which may also be needed if, from the very beginning, it is clear that some relevant States may not join the GloBE MTC.

Furthermore, the linking approach should also have a "priority rule" to avoid duplication and overlap of dispute resolution mechanisms which have proliferated overtime in connection with tax treaties due to the multiple tools adopted at the regional (e.g. EU) or global level.

8) Regardless of the linking approach outlined above, it would be desirable to regulate the interaction of the dispute resolution provision of the GloBE MTC with MAPs or arbitration procedures initiated in the context of existing tax treaties, Directive 2017/1852 or Convention 90/436/EEC that could affect its outcome.

In short, if it is decided to regulate the GloBE dispute resolution procedure in a GloBE MTC, several connected issues could be dealt with to improve the position of the taxpayers and tax administrations as well as the interconnection with other relevant procedures.

A special attention should be paid to the relations between countries belonging to different regions and to constraints derived from such regional membership or to the difficulties of synchronized implementation derived from the different regional legal and tax backgrounds or lack of permanent cooperation between competent authorities. These difficulties could be handled through the setting up of joint regional dispute resolution boards which might provide guidelines on the application of dispute resolution mechanisms adopted by domestic legislations based on reciprocity. A similar experience may be found in the EU Joint Transfer Pricing Forum, which was set up by the EU Council to provide guidance on interpretation and application of the OECD Transfer Pricing Guidelines, and included tax officials of the competent authorities of the EU member states and experts from the private sectors and academia. At the very least, regional organisations such as the BRITACOM could set up a platform retrieving, compiling and disseminating information relating to the Pillar Two implementation. The role of the regional body would be to support the MLC. Although a Conference of the Parties could be the right solution, a regional effort could be more efficient and realistic: fewer countries, same legal culture, geographical proximity, closer relations between CAs, specificity and common issues. The Conference could then contribute to avoid overlap and discrepancies between regional efforts.