

Public consultation document

Pillar Two – Tax Certainty for the GloBE Rules

20 December 2022 – 3 February 2023



Public Consultation Document – Tax Certainty for the GloBE Rules

Background

The common approach under Pillar 2 contemplates that jurisdictions that wish to introduce the GloBE rules will implement and apply their domestic law rules in a consistent and co-ordinated manner. There is still a possibility that differences could arise in the interpretation or application of such rules among jurisdictions that could give rise to divergent outcomes under the GloBE rules. Therefore, the Inclusive Framework has begun work on exploring mechanisms to provide further tax certainty with respect to the GloBE Rules.

This consultation document seeks input from stakeholders to inform the work on Tax Certainty for the GloBE Rules. Comments are sought with respect to the scenarios where differences in interpretation or application of the GloBE Rules between two or more jurisdictions may arise. Stakeholders are also invited to describe whether such disputes are limited to situations creating double taxation and whether they would suggest other mechanisms for tax certainty not being considered by the Inclusive Framework.

Public Consultation

Interested parties are invited to send their comments on this discussion draft no later than **Friday 3 February 2023**. They should be sent electronically (in Word format) by email to taxpublicconsultation@oecd.org and may be addressed to: International Co-operation and Tax Administration Division, OECD/CTPA.

Please note that all written comments received will be made publicly available on the OECD website. Comments submitted in the name of a collective “grouping” or “coalition”, or by any person submitting comments on behalf of another person or group of persons, should identify all enterprises or individuals who are members of that collective group, or the person(s) on whose behalf the commentator(s) are acting.

The views and proposals included in this document neither represent the consensus views of the Inclusive Framework, the Committee of Fiscal Affairs (CFA) or their subsidiary bodies nor prejudice the decision as to the expected implementation of the proposals, but are intended to provide stakeholders with substantive proposals for analysis and comment.

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Tax Certainty for the GloBE Rules

1. Introduction

1. Inclusive Framework jurisdictions have agreed to implement the GloBE rules through a common approach. Under the common approach jurisdictions that wish to introduce the rules will put in place domestic law rules based on Model Rules agreed by the Inclusive Framework. The Model Rules incorporate a number of mechanisms designed to ensure consistent outcomes for MNE Groups under the laws of each jurisdiction including through the correct application of the agreed rule order and allocation of top-up tax to each jurisdiction. The rule order mechanism requires determining when an IIR, a UTPR or a Domestic Minimum Top-up Tax (DMTT) will be recognised as “qualified” under the rules. These qualification conditions for an IIR, UTPR and DMTT include the requirement that the rules be implemented and administered into domestic law in a way that is consistent with the outcomes provided for under the GloBE rules and the Commentary. These mechanisms in the rules, designed to ensure consistency of outcomes, are supported by an administrative framework that provides for the development of Safe Harbours, Agreed Administrative Guidance and a common return filing and information exchange structure. The Inclusive Framework has also produced Commentary on the Model Rules and will provide Agreed Administrative Guidance to serve as an additional source of interpretation of the Model Rules. It is expected that this Commentary and Administrative Guidance will further ensure consistency in the application and coordination of outcomes under the rules.

2. Since the common approach contemplates that GloBE rules would be enacted into the domestic law of each jurisdiction and applied by the tax authorities of that jurisdiction, there is still a possibility that differences could arise in the interpretation or application of such rules among jurisdictions that could give rise to divergent outcomes under the GloBE rules. The risk of different interpretations or applications of the GloBE rules can be reduced through promulgating further Agreed Administrative Guidance. However, it is unlikely that the Inclusive Framework will be able to anticipate every possible difference in interpretation or be able to provide guidance on how to apply the rules in every situation. It remains possible 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. This difference in the interpretation or application of the GloBE rules creates uncertainty for MNE Groups (e.g. with respect to their filing positions) and could potentially result in double taxation from the application of the GloBE rules in those two jurisdictions. Stakeholders have emphasised the uncertainty and additional costs that could arise for MNE Groups in cases of inconsistent or uncoordinated application of the GloBE Rules. To ensure that the GloBE rules are applied in a consistent and coordinated manner and to ensure consistent outcomes for MNE Groups as envisaged, such issues need to be anticipated where possible and resolved in a transparent, efficient and fair manner when they arise.

3. This document outlines various mechanisms for achieving tax certainty under the GloBE Rules that are being explored by the Inclusive Framework on BEPS under the GloBE Implementation Framework. Those mechanisms could apply in advance of any taxation action being taken by jurisdictions (dispute prevention mechanisms) as well as mechanisms that could be relied upon once a taxation action has been taken (dispute resolution mechanisms).

2. Dispute prevention mechanisms

4. Dispute prevention mechanisms aim at ensuring a common interpretation or application of rules among tax administrations and taxpayers at an early stage in the compliance or assessment process, with

a view to avoiding disputes on such interpretation or application issues. Preventing disputes at an early stage is expected to be more efficient and save tax administration resources compared to the situation where uncoordinated audits lead to disputes with taxpayers or other jurisdictions. This section considers various mechanisms that could provide advance tax certainty to MNE Groups and prevent inconsistent outcomes in the application of the GloBE rules. These mechanisms include those provided under the GloBE Implementation Framework, such as the work on administrative guidance and the design of the multilateral review process. In addition, existing mechanisms used by jurisdictions to prevent disputes, such as common risk assessment and Advance Pricing Arrangements, could also be used for GloBE purposes and are considered further below.

2.1. Reliance on the Model GloBE Rules, Commentary and Administrative Guidance

5. As noted in the Introduction to this document, jurisdictions will introduce the GloBE Rules in their domestic law that are based on the Model Rules developed and agreed by the Inclusive Framework. In general, this will result in the GloBE Rules introduced by jurisdictions being aligned and synchronised for the most part. In addition, the Commentary to the GloBE Rules, which establishes an agreed interpretation for the Model Rules, should support consistency in the application of the rules. This agreed interpretation will result in a common approach to resolving interpretative or technical difficulties with the rules which will be valuable in the prevention of disputes. However, there may be interpretive questions that have not yet been considered or resolved at the time when the issue arises for a given MNE.

2.1.1. Qualified Rule Status (multilateral review process)

6. 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. This coordination through the agreed rule order is achieved by limiting or modifying the application of the rules in one jurisdiction where there is an applicable “qualified” rule in another jurisdiction.

7. The identification of Qualified IIRs, UTPRs and DMTTs will be done through a review process. The review process would cover all Chapters of the Model GloBE Rules and is expected to be comprehensive and rigorous while still being flexible enough to accommodate the constitutional and legislative requirements in different implementing jurisdictions. While the definitions of Qualified IIR and Qualified UTPR focus specifically on the provisions set out in Article 2.1 to 2.6 of the Model Rules, the requirement for equivalence and consistency extends in practice beyond these charging provisions to the other Chapters of the Model Rules. This is because almost any difference in the implementation of the GloBE rules has the potential to undermine the agreed rule order and the outcomes provided for under the Model Rules and Commentary. For example, a difference in the definition of the scope of the rules or in the Top-up Tax calculation made under the rules of two jurisdictions could result in a Top-up Tax being imposed in one jurisdiction but not in the other while the agreed rule order allocated any potential Top-up Tax to the latter jurisdiction.

8. However, even where the GloBE Rules in two jurisdictions have “qualified” rule status, there is still the potential that both jurisdictions could take inconsistent but nevertheless reasonable approaches to an issue which is not addressed by the Commentary or any Agreed Administrative Guidance.

2.1.2. Referral to the Inclusive Framework on BEPS

9. Since the Model GloBE Rules, Commentary and Administrative Guidance may not address specific issues of interpretation or application of the GloBE Rules that arise between jurisdictions, it would always be possible for the jurisdictions concerned to refer an issue to the Inclusive Framework on BEPS for clarification. Where the issue can be resolved by clarified through the release of Agreed Administrative

Guidance then this may assist in resolving the dispute and guidance developed under this process may also prevent similar disputes from arising in the future.

10. However, the Inclusive Framework on BEPS is a policy body and only questions of interpretation based on the Model GloBE Rules or the Commentary may be adequately dealt with in such an approach. There would be no ability for MNE Groups or jurisdictions to bring an issue concerning taxation in a specific case to the Inclusive Framework on BEPS and taxpayer information could not be shared with the Working Party. In addition, the scope of issues that are referred would need to remain broad and procedures would need to be put in place to allow timely guidance to be provided on specific issues by the Inclusive Framework on BEPS.

2.2. Common risk assessment and co-ordinated compliance

11. As the GloBE rules would be enacted and applied in a similar way across jurisdictions, MNE Groups with similar operations in the same jurisdictions are likely to have a similar risk profile in those jurisdictions for GloBE purposes. A coordinated approach to assessing risks related to the GloBE Rules could result in more consistent outcomes and could give tax administrations the opportunity to share their views before reaching a conclusion. Unnecessary actions or disputes can be avoided, while providing greater, earlier certainty to groups across multiple jurisdictions.

12. A co-ordinated programme similar to the OECD International Compliance Assurance Programme (ICAP) could be developed for GloBE purposes. Through such a programme, implementing jurisdictions could give comfort to an MNE in relation to the methodology it used for compiling the information and with respect to the accuracy of the computations it performed. The international and cross-border tax risks that may be covered by an ICAP risk assessment currently include transfer pricing risks, permanent establishment risks as well as other categories of international tax risk as agreed by the MNE group, the lead tax administration and other covered tax administrations (e.g. hybrid mismatch arrangements, withholding taxes and treaty benefits, etc.).¹ It could be explored whether tax risks associated with the GloBE Rules may be covered under ICAP or a similar programme developed for the purpose of the GloBE Rules. The current ICAP programme involves active engagement between the tax administrations and MNE Groups and this could be beneficial in the context of the GloBE Rules as well. Such an approach could be supplemented by coordinated inquiries, thereby creating a comprehensive common framework that would minimise disputes and ensure a cooperative and efficient use of tax administration resources.

2.3. Binding certainty mechanisms

13. The most common dispute prevention mechanism that provides binding certainty is an Advance Pricing Arrangement (APA). APAs give taxpayers and jurisdictions “advance” tax certainty in relation to the tax treatment of the relevant covered transaction(s) for fiscal years within a defined period. APAs supplement traditional administrative, judicial and treaty mechanisms for resolving transfer pricing disputes by preventing those disputes from occurring. APAs – especially bilateral and multilateral APAs – involve both the taxpayer and the affected tax administrations and provide comprehensive tax certainty with respect to transfer pricing issues to taxpayers in a collaborative and transparent manner.

14. 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. A common standard would thus need to be defined for an APA-like mechanism to be workable in the

¹ OECD (2021), International Compliance Assurance Programme – Handbook for tax administrations and MNE groups, OECD, Paris.

<https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf>

context of the GloBE Rules. In practice, all MNE Groups within the scope of the GloBE Rules may not be able to access such APA-like mechanism.

3. Dispute resolution mechanisms

15. The dispute prevention mechanisms detailed above may not provide tax certainty to all MNE Groups in all cases. Therefore, it is also relevant to consider dispute resolution mechanisms that may be put in place.

3.1. Substance of a dispute resolution mechanism

3.1.1. Basic elements

16. The basic elements of a dispute resolution mechanism can be derived from the MAP provision contained in Article 25 of the OECD Model Tax Convention. Those basic elements could be adapted for the purposes of developing a dispute resolution mechanism that would aim to resolve issues arising for MNE Groups based on differences in the interpretation or application of the GloBE Rules by jurisdictions. The substance of a GloBE dispute resolution mechanism could consist of the following three basic elements:

- 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.

17. Element (a) above ensures that the MNE can submit a request to competent authorities to resolve a dispute. Allowing the MNE to submit a request could be valuable to an efficient and effective dispute resolution process because it may be that only the MNE would be in a position to realise that an action of a jurisdiction may lead to uncoordinated outcomes relating to the GloBE Rules. In addition, tax certainty may be provided to MNE Groups in situations where the GloBE Rules result in unintended taxation. Therefore, MNE Groups may be given the right to file a request before a competent authority. For this purpose, a “competent authority” would need to be legally defined and authorised to conduct the process provided under a GloBE dispute resolution mechanism. Experience in the context of mutual agreement procedures (MAP) in tax treaties points to the fact that although jurisdictions can enter into general MAP agreements at their discretion to resolve issues that may arise, a greater level of tax certainty is provided to taxpayers when they are allowed to submit a MAP request.

18. Element (b) provides that jurisdictions should allow the competent authority that receives the request to enter into discussions with the other competent authorities concerned to endeavour to resolve the case, where justified. This element ensures that competent authorities of the relevant jurisdictions agree to the resolution for the case. This resolution should be in line with a defined common standard, which is also analysed more in detail in the following section.

19. Element (c) would require that jurisdictions provide relief to the MNE and that they implement any agreement reached by their competent authorities notwithstanding domestic time limits. This would allow for an effective resolution of the case, avoiding taxation in excess of the intended outcomes of the GloBE Rules. Further consideration needs to be given as to whether assessments or adjustments under the GloBE Rules could also be limited to a reasonable period of time to ensure that extremely late adjustments do not lead to late agreements that require implementation.

3.1.2. Specific elements

20. Some elements of a dispute resolution mechanism may need to be specific to GloBE requirements. These include especially (i) the nature of disputes covered; and (ii) the basis for resolving disputes.

3.1.3. Nature of disputes covered

21. A range of GloBE disputes could be covered by a dispute resolution mechanism. As a starting point, the competent authorities would only need to resolve cases where the MNE raises a justified objection and considers that a taxation action taken by one jurisdiction results in uncoordinated outcomes for it based on differences in interpretation or application of the GloBE Rules with other jurisdictions.

22. Any difference in the interpretation or the application of the GloBE Rules between jurisdictions, in theory, could be covered by the mechanism. The MNE could submit its case to the competent authority of a jurisdiction in all situations where the jurisdiction adopts a different interpretation or applies the GloBE Rules in a different manner, irrespective of whether the MNE is even required to apply the GloBE Rules. However, this scope would be too broad and would result in too many cases being submitted, while there may be no actual difficulty in applying the GloBE Rules to resolve, apart from seeking a global alignment of all the GloBE Rules.

23. The scope of disputes could be defined more narrowly to cover those situations where the MNE Group is required to apply and pay Top-up Tax under the GloBE Rules in several jurisdictions in order for its case to be eligible for a GloBE dispute resolution process. For instance, this would result in all situations where the UTPR applies to be covered by the mechanism of any UTPR jurisdiction, in the event of differences in the application of the UTPR by those jurisdictions.

24. 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. Double taxation in this context includes economic double taxation suffered by the MNE. For instance, double taxation could occur when the MNE is made liable for Top-up Tax in multiple jurisdictions in respect of the same underlying income. Where a difference in the interpretation or the application of the GloBE Rules results in only one jurisdiction imposing an amount of Top-up Tax (although the MNE has to apply the rules in more than one jurisdiction), the dispute resolution mechanism would therefore not apply under such approach.

25. The definition of the scope for MAP under tax treaties and other instruments has raised similar issues. Prior to the development of the 1963 OECD Draft Model Convention, the Mexico Model (1943) and the London Model (1946) contained MAP provisions that allowed taxpayers to initiate a MAP case with respect to cases of “double taxation”. This definition was proposed to be included in the 1963 OECD Draft Model Convention as well, but this was changed to cases of “taxation not in accordance with the Convention”, as in the most recent version of OECD Model Tax Convention. Similarly, in the EU Directive, the draft Directive released by the EU Commission referred to “double taxation”, but this was later changed to reflect the scope of a tax treaty. There are two main reasons for that. First, under the OECD Model Tax Convention, the MAP article aims at ensuring a correct application of the principles of the Convention. Therefore, the taxpayer is entitled to make a MAP request even if it is only taxed by one of the Contracting States in circumstances where this State has no taxation right under the Convention with respect to the relevant item of income. Second, complications could arise in defining situations where “double taxation” has actually arisen (for instance, in the situation where a loss is offset by income, but no tax is due, or when there is a time lag between the taxation actions at issue).

3.1.4. Basis for resolving disputes

26. As the GloBE Rules are introduced in domestic law, any GloBE dispute resolution mechanism would need to address differences in the application or the interpretation of the domestic law of different

jurisdictions. Irrespective of the mechanism chosen, competent authorities would need a common standard to refer to in order to resolve those potential differences. A Qualified IIR, UTPR or DMTT is expected to be consistent with the outcomes provided for under the Model GloBE Rules and the Commentary. Therefore, the Model GloBE Rules, the Commentary and Agreed Administrative Guidance could provide such a common substantive standard for competent authorities to reach an agreement in situations where the rules introduced in domestic law result in inconsistent outcomes.

27. Inconsistent outcomes can result, for instance, from different interpretations of the GloBE Rules. Although the GloBE Rules mostly adopt a mechanical approach, a facts and circumstances test may be necessary in some cases (for instance to identify Excluded Entities under Article 1.5.2). The Commentary provides some basis for interpreting the GloBE Rules, but may allow for different interpretations when applied to specific cases. In such situations, the differing interpretations are both legitimate, but could still result in inconsistent outcomes for a given MNE. Therefore, competent authorities could be empowered to eliminate those inconsistent outcomes by agreeing on a common interpretation. In rare situations where the domestic incorporation of the GloBE Rules would result in inconsistent outcomes in spite of the peer review mechanism, competent authorities may be similarly empowered to agree on a resolution of the dispute in line with the common approach that does not result in double or over-taxation.

28. Further work would need to be done to identify how a common standard based on the Model GloBE Rules, Commentary and Agreed Administrative Guidance can be incorporated into instrument chosen for dispute resolution.

3.2. Instruments available for a dispute resolution mechanism

29. A dispute resolution mechanism for the GloBE Rules embedding the elements and considering the issues described in the previous sections could be implemented through different legal instruments. The options discussed below include relying on existing mechanisms, such as the Convention on Mutual Administrative Assistance in Tax Matters (MAAC) or tax treaties and implementing new mechanisms such as dispute resolution provision introduced into domestic law or under a multilateral convention.

3.2.1. Developing a multilateral convention

30. The detailed implementation plan attached to the October Statement on the two-pillar solution provides that the members of the Inclusive Framework will consider the merits and possible content of a multilateral convention (MLC) in order to further ensure coordination and consistent implementation of the GloBE rules. An MLC could include tax certainty mechanisms, but also address other administration issues such as exchange of information.

31. A provision that contains the elements of a dispute resolution mechanism listed above could be included in an MLC, giving the ability for an MNE to file a request where an action has led to unintended taxation of the GloBE Rules and for competent authorities to accept such requests and resolve the issue on the basis of a common standard. As discussed above, such a common standard could be the Model GloBE Rules as interpreted by the Commentary and any agreed Administrative Guidance, which would be given legal status as part of the MLC. An MLC could include a provision that could allow competent authorities to give such a common standard priority over domestic law so as to agree on a common solution and implement such solution notwithstanding domestic time limits. As in a tax treaty, an MLC would also ensure that a competent authority in each jurisdiction is empowered under its terms to undertake the consultations as envisaged under a dispute resolution provision.

32. However, developing an MLC may entail efforts on the part of jurisdictions to agree on common concepts and wording, especially concerning legal basis for common solutions within the framework of a common approach where jurisdictions have implemented GloBE Rules domestically. This would be particularly so as the development of an MLC would also require jurisdictions to consider whether other

aspects of the GloBE implementation framework should be included in such an instrument. In addition, procedural aspects like ratification of the MLC and parliamentary procedures related to international agreements should also be considered.

3.2.2. Reliance on competent authority agreements under the MAAC

33. Another instrument that may be considered in the context of dispute resolution is the MAAC.² The MAAC is primarily intended to allow the exchange of information between competent authorities. However, certain provisions in the MAAC may allow competent authorities to undertake consultations as well. For instance, Article 8 of the MAAC provides for “simultaneous tax examinations”, under which competent authorities are allowed to consult together to determine procedures for any arrangement between two jurisdictions to individually (in their own territories) examine the common tax affairs of persons where they have a common/related interest, with a view to exchanging relevant information. In addition, Article 9 of the MAAC recognises tax examinations abroad, allowing the competent authority of a jurisdiction to travel to another jurisdiction to participate in an examination in that other jurisdiction where agreed.

34. Where an MNE considers that there may be unintended consequences arising from the application of the GloBE Rules in jurisdictions that are Parties to the MAAC, the MAAC in general could allow for the exchange of information with respect to the relevant domestic procedures and in particular, Articles 8 and 9 could allow the jurisdictions to consult together to determine procedures connected to the examination of this issue individually and to exchange information in that regard. Article 24 of the MAAC also allows Parties to the MAAC to enter into a competent authority agreement to agree how a jurisdiction would interpret and or apply the MAAC.

35. Accordingly, the competent authorities of Parties to the MAAC may enter into a competent authority agreement to allow them to consult each other, exchange information and have meetings with respect to the respective domestic tax examinations with regard to a dispute concerning the GloBE Rules raised by the taxpayer under these provisions. However, while a competent authority agreement under the MAAC could allow the competent authorities of jurisdictions to have consultations, it would not provide rights for the taxpayers to request a competent authority procedure and would not provide substantive legal basis for competent authorities to reach agreements or implement them. Apart from facilitating simultaneous and coordinated domestic examinations, the MAAC does not create a dispute resolution remedy in itself for a common solution where there are differences in the interpretation or application of the GloBE Rules among different jurisdictions. Therefore, some jurisdictions may consider that it would be possible to supplement a competent authority agreement under the MAAC with a domestic provision (as discussed below) to create a dispute resolution mechanism that allows for the acceptance of MAP requests (under domestic law), consultations and exchange of information (under the MAAC) and the entering into and implementing an agreement on a common basis (under domestic law).

3.2.3. Reliance on existing tax treaties

36. Typically, bilateral tax treaties contain MAP provisions that allow the resolution of disputes between jurisdictions concerning the application or interpretation of the treaties. One option could be to explore whether such provisions included in existing treaties could be used for resolving GloBE disputes. However, provisions based on Article 25(1) of the OECD Model Tax Convention only allow taxpayers to initiate a MAP case where there is “taxation not in accordance with” a tax treaty owing to actions of one or both of the concerned jurisdictions. Further, provisions based on Article 25(3), first sentence of the OECD Model Tax Convention allow competent authorities to discuss and resolve, at their discretion, questions of interpretation or application of the tax treaty itself. Since the GloBE Rules are not likely to questions

² See paragraph 713 of the Pillar Two Blueprint that discusses this option.

connected to existing tax treaties, these remedies would not be available in case of disputes concerning the GloBE Rules.

37. Article 25(3), second sentence of the OECD Model Tax Convention provides that “[Competent Authorities] may also consult together for the elimination of double taxation in cases not provided for in the convention”. Jurisdictions that have bilateral tax treaties containing this provision may discuss and resolve double taxation arising in cases involving the GloBE Rules if they wish to do so. Jurisdictions may also rely on the exchange of information provisions contained in tax treaties in such cases.

38. However, relying on existing tax treaties has some limitations. First, there may be no treaty relationship between the relevant jurisdictions and there may be issues in a multilateral context. Second, Article 25(3), second sentence is discretionary and cannot be accessed by MNE Groups. This means that CAs can decide whether to address an issue at their discretion and MNE Groups are not allowed to submit requests for such discussions to take place. Third, the provision only allows resolution of cases of “double taxation”, which may not cover all unintended consequences. Finally, jurisdictions can take the view that this provision does not give them the authority to reach an agreement that would depart from their domestic law, as allowed under the Commentary on Article 25 of the OECD Model Tax Convention.³ Relying on existing treaties could be an option used in combination with a competent authority agreement⁴ and/or a domestic law provision.

3.2.4. *Creating a dispute resolution provision in domestic law*

39. Another new mechanism that may be considered is the introduction of a dispute resolution mechanism into domestic law. Subject to domestic law requirements, a common dispute resolution provision could be introduced alongside the GloBE Rules into the domestic law of each jurisdiction and could apply on a reciprocal basis (i.e. applicable only where all jurisdictions concerned have the same provision in domestic law).

40. 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.

41. A common solution in such a situation could be based on a common standard defined under domestic law of each jurisdiction that would adopt the reciprocal provision. Such a common standard could derive its status from domestic law, which could expressly establish it as the legal standard applicable for the specific purpose of the dispute resolution mechanism. In line with the *lex specialis* principle, this common standard could overrule the general domestic GloBE implementing legislation in case of a dispute resolution process and only to such extent.

³ See paragraph 55.1 of the Commentary on Article 25.

⁴ A competent authority agreement may be entered into pursuant to the equivalent of Article 25(3), first sentence of the OECD Model Tax Convention in a tax treaty, concerning the interpretation or application of the equivalent of Article 25(3), second sentence of the OECD Model Tax Convention.

42. Where such provisions can be enacted, the requirement for reciprocity and the design of the provision may *de facto* achieve the same effect as a mechanism authorised by an MLC. However, jurisdictions may face legal or constitutional constraints in defining competent authorities that would accept requests, empowering them to enter into discussions and allowing these competent authorities to agree on a solution based on a common standard that may depart from the GloBE Rules enacted in domestic law. Therefore, jurisdictions may consider restricting the availability of such a provision to issues of interpretation, where the GloBE Rules in multiple jurisdictions are worded identically, but are interpreted differently.

4. Further input and public consultation

43. The GloBE Implementation Framework already includes a number of mechanisms for preventing inconsistent outcomes in the application of the GloBE rules. These include the Peer Review requirements and the ability to develop Administrative Guidance. The Inclusive Framework could also consider whether existing dispute prevention methods such as common risk assessment and binding certainty mechanisms could also be adapted to improve tax certainty mechanisms for MNEs. However, these dispute prevention mechanisms may not provide tax certainty to all MNEs in all cases. The possibility remains that implementing jurisdictions may adopt differing interpretation or application of domestic GloBE rules which could result in the risk of double or over-taxation.

44. Stakeholders have emphasised the uncertainty and additional costs that could arise for MNE Groups in cases of inconsistent or uncoordinated application of the GloBE Rules and have called for the development of a dispute resolution mechanism to address this. A dispute resolution mechanism for the GloBE Rules could be implemented through an existing legal instrument such as a tax treaty of the Convention on Mutual Administrative Assistance in Tax Matters (MAAC) or through new mechanisms such as new multilateral convention or under domestic law

45. In this context, Inclusive Framework members will initiate work on a possible framework for developing a multilateral convention that could cover, among others, a mechanism for addressing the risk of disputes under the GloBE Rules. Inclusive Framework members will also continue to explore the benefits that the options outlined in this document could provide in light of the challenges they may raise. Accordingly, Inclusive Framework members are seeking public input to inform the work that will be done to further explore the options outlined in this document. Questions that stakeholders may wish to address include:

- a. Have you identified possible scenarios where two (or more) jurisdictions implementing the GloBE Rules could interpret or apply the rules in a different manner, despite the Model GloBE Rules, Commentary, future agreed Administrative Guidance and the multilateral review process (qualified rule status)? If yes, could you describe such scenarios?
- b. Double taxation could arise when two implementing jurisdictions impose Top-up Tax with respect to the same item of GloBE Income because of different interpretations or applications of the GloBE Rules. Have you identified any instances where different interpretations or applications of the GloBE Rules should be addressed by a dispute resolution mechanism, even if the MNE Group has not suffered double taxation?
- c. Have you identified any other options that could be explored to achieve tax certainty for the GloBE Rules?

46. Obtaining stakeholder input on these questions will assist the Inclusive Framework's in developing dispute prevention and resolution mechanisms under the GloBE Rules. The ultimate objective of this work will be to develop an effective set of tax certainty mechanisms that are applied in a consistent and

coordinated manner and to ensure consistent outcomes for MNE Groups and the resolution of disputes in a transparent, efficient and fair manner when they arise.