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Comments on the Public consultation document Pillar Two – Tax Certainty for the GloBE Rules

FAR, the institute for the accountancy profession in Sweden, takes the opportunity to respond on the public consultation document *Pillar Two – Tax Certainty for the GloBE Rules*.

Introduction

On December 20, 2022, OECD sent out the "Pillar Two – Certainty for the GloBE Rules" ("GIR") for public consultation. The deadline for delivering comments is February 3, 2023. It should be noted that our comments are based solely on the draft sent out for public consultation. All other aspects of Pillar Two have been disregarded. The draft was sent out the same day as the public consultation draft named "Pillar Two – GloBE Information Return". The current consultation document is very extensive, which implies that the consultants do not get enough time to examine both drafts. FAR believes that requesting opinions for several drafts at the same time might result in a reluctance to hand in comments or at least effect the quality of the opinions, neither of which are in the best of interest of OECD.

Dispute prevention mechanisms

The document discusses various examples of dispute prevention mechanisms. In our opinion, the single most important mechanism to prevent disputes is to have clear and concise GloBE rules. In this sense, it is also vital that the administrative guidance further clarifies outstanding questions. Basically – the clearer the rules, guidance, and commentary – the less need there is for dispute resolution tools.

In the event of conflicts, the Qualified Rule Status is a necessary instrument to deal with the conflicts. However, the review process creates a basis for an arbitrary application. Moreover, it is important that the Qualified IIRs, UTPRs, and DMTTs are reviewed and approved quickly to prevent tax uncertainty and tedious conflicts.

Another alternative discussed in the document is the ICAP. The purpose of this is for jurisdictions to identify certain risks and together conclude that there is no risk or a low risk. The ICAP tends to take a long time and involves active engagement between the tax administrations and MNE groups. Thus, the risk is that too many resources are spent on transactions with a low risk when the focus instead should be on transactions with a high risk.

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Moreover, using the APA as a dispute prevention mechanism is on one hand preferable since it provides binding certainty. On the other hand, our experience is that binding APAs usually take a long time to receive. Hence, in order for it to work effectively, advanced binding decisions have to be provided within a certain time frame.

Dispute resolution mechanisms

In FAR's view, the best alternative for taxpayers would be to implement a dispute resolution mechanism through the MAP provision contained in article 25 of the OECD Model Tax Convention. MAP provisions are a commonly used dispute prevention mechanism that operates frequently worldwide. However, the provision is time-consuming, and in most cases, companies receive their binding arbitrations when the situation in question has already appeared. Furthermore, during the preparatory work with the Model Tax Convention, there were great ambitions in implementing MAP provisions in all tax treaties. The OECD did not quite succeed at that time, and thus our concern is that the result will be similar this time around. Why turn over all the stones one more time when it did not work the last time? Moreover, in some countries, any changes made must also be implemented in every tax treaty as an MLI is not sufficient. For example, in Sweden, every tax treaty must be updated and implemented in its updated form, which is an extensive and not to mention costly process.

FAR has not yet seen any effect of MLC in different areas, which is why FAR rather prefer the MAP provisions. If all countries would sign an MLC, it would be a great dispute-resolution tool. However, since this is a scenario that most likely will not occur, FAR is of the opinion that the proposed tool is not effective.

MAAC is a great idea as a dispute prevention mechanism, but it is only a treaty which state that the countries in question will cooperate. There is no legal basis for the exchange of information and will therefore not be a solution on how to solve disputes.

Dispute resolution in domestic law is an interesting proposal and is, to our knowledge, a newer proposal. The time effort will most likely decrease in comparison to the previously described dispute-resolution tools since this is not legally binding. It would be very helpful for companies to receive guidance on various issues from several countries' tax administrations instead of filing a request in every country.

There are several possible scenarios where two (or more) jurisdictions could interpret or apply the rules in a different manner despite the GloBE rules and commentary. For example, the view on CFC companies, the treatment of tax incentives, or the view on what should be deemed as a Qualified Financial Statement. There could also be situations where several jurisdictions claim the same low-taxed income due to the interpretation of the scope (for example when there are multiple owners).

Concluding remarks

There are limitations to the various dispute prevention and resolution mechanisms outlined above. It is clear that further work is needed by the OECD in order to finalize the different alternatives for dispute prevention and resolution.

As stated above, there are several possible scenarios where two (or more) jurisdictions could interpret or apply the rules in a different manner despite the GloBE rules and commentary. Hence, it is therefore of the utmost importance that the GloBE rules are clear and concise. It is also vital that the commentary and administrative guidance clarify the complex rules.

It should be stressed that every solution or dispute resolution tool the countries in question could agree on is a positive direction. Hence, FAR encourage the countries and OECD to find a solution, big or small.

Yours sincerely

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