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OECD Centre for Tax Policy and Administration

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3 February 2023

Consultation on Pillar Two – Tax Certainty for the GloBE Rules

Dear Sir/Madam

The Irish Tax Institute welcomes the opportunity to contribute to the OECD Inclusive Framework Public Consultation on the Pillar Two – Tax Certainty for the GloBE Rules. We note that the views and proposals included in the Consultation Document¹ do not 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.

Inclusive Framework jurisdictions have agreed to implement the Global Anti-Base Erosion (GloBE) Rules² through a common approach which envisages that such rules would be implemented into the domestic law of each jurisdiction and applied by the tax authorities of that jurisdiction.

While it is expected that jurisdictions will endeavour to align their domestic legislative provisions with the GloBE Rules, variations in interpretation will undoubtedly arise which will inevitably lead to disputes. The uncertainty and additional costs that could arise in cases of inconsistent or uncoordinated application of the GloBE Rules remains a key concern for MNEs.

Therefore, we firmly believe there must be an intense focus on ensuring that the potential for disputes arising is minimised to the greatest extent possible. Where disputes do arise, there must be an effective dispute resolution mechanism in place which will resolve cases of double or over-taxation on a timely basis.

¹ OECD Public Consultation Document, Pillar Two – Tax Certainty for the GloBE Rules, 20 December 2022 3 February 2023

² OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD Publishing, Paris, <https://doi.org/10.1787/782bac33-en>

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Dispute Prevention

A co-ordinated and consistent approach to the implementation of the GloBE Rules into the domestic legislation of jurisdictions will be key to minimising the number of disputes that will occur. The Commentary on the GloBE Rules³, the guidance on Safe Harbours and Penalty Relief⁴ and the Administrative Guidance on the GloBE Rules⁵, will assist in the consistent application of the GloBE Rules.

It is anticipated that the Administrative Guidance will be updated by the Inclusive Framework on an ongoing basis. Where there are updates to the Administrative Guidance, it would be essential to ensure jurisdictions reflect these updates in a timely manner when interpreting the GloBE Rules. Otherwise, a scenario could develop where jurisdictions are using different versions of the Administrative Guidance when applying the GloBE Rules.

Qualified Rule Status

A key factor in minimising the number of disputes which will occur will be the development of permanent safe harbours and the identification of Income Inclusion Rules (IIR), Undertaxed Payment Rules (UTPR) and Qualified Domestic Minimum Top-up Taxes (QDMTT) that are considered as having qualified rule status. Clarity for both MNEs and tax authorities on whether the domestic rules in a jurisdiction are considered to have 'qualified' rule status will be fundamental to ensuring the coordinated application of the GloBE Rules.

The Consultation Document notes that the identification of rules which have qualified rule status will be accomplished through a multilateral review process (i.e. peer review). While the Administrative Guidance released on 2 February confirms that the Inclusive Framework will develop the process in 2023, there is no indication as to when that multilateral review process will be completed.

If the process is not completed before the commencement of the regime, then will a rule be deemed to have qualified status until such time as the review process is completed? Furthermore, what happens where a rule is determined to have qualified rule status but is subsequently amended by domestic legislation? It would be important to have such issues clarified in the Administrative Guidance.

³ OECD (2022), Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two), OECD, Paris, <https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two-commentary.pdf>.

⁴ OECD (2020), *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/safe-harbours-and-penalty-relief-global-anti-base-erosion-rules-pillar-two.pdf.

⁵ OECD (2023), Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar-two.pdf.

If a jurisdiction has concerns regarding the operation of a rule which has qualified rule status, this should be addressed through the multilateral review process rather than at taxpayer level. If the GloBE Rules are to function efficiently, then countries must place their trust in the multilateral review process and respect the outcome of that process.

When implementing the GloBE Rules into a jurisdiction's national laws, different terminology may be used even though the underlying definitions may be the same as that which is used in the GloBE Rules. For example, the EU's Pillar Two Minimum Tax Directive⁶ refers to the UTPR as the Undertaxed Profit Rule. Such differences in terminology, coupled with language variations, are likely to create uncertainty among taxpayers and tax administrations.

In our view, this further underlines the critical importance of the qualified rule status and the need to provide certainty to MNEs regarding the status of a rule as qualified when conforming with its GloBE compliance requirements.

Advance Certainty Mechanism

The Consultation Document considers that it would be possible for jurisdictions to refer an issue regarding the interpretation of the GloBE Rules or the Commentary to the Inclusive Framework for clarification. However, MNEs or jurisdictions would not be able to refer an issue concerning taxation in a specific case to the Inclusive Framework, meaning its remit would be restricted to high-level questions of interpretation.

Furthermore, it would also not be possible for the Commentary and the Administrative Guidance to deal with every potential issue that may arise in practice and their legal status is likely to vary across jurisdictions. Considering these shortcomings, it is essential that the OECD establishes an appropriate mechanism that would be adequately resourced, to address the complex and detailed questions regarding the application of the GloBE Rules, which are likely to arise in the circumstances of individual taxpayers. This is particularly important as we believe the existing mechanisms for seeking tax certainty in many jurisdictions are already operating at full capacity.

The Consultation Document notes that a co-ordinated programme similar to the OECD International Compliance Assurance Programme (ICAP) could be developed for GloBE purposes. It also suggests that an Advance Pricing Arrangement (APA) type arrangement could work if a common standard could be defined.

While there is some support for ICAP, our members have highlighted it is very resource intensive and that the programme would need to be amended to work in the context of the

⁶ Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

GloBE Rules. There is also support among our members for an early binding certainty process similar to an APA, although it is unclear how such a process would work in the context of the UTPR.

UTPR

As the UTPR operates as a backstop to the IIR, applying only in specific circumstances where the top-up tax is not brought into charge under an IIR, we would expect that the UTPR will have limited application in the operation of the GloBE Rules. However, the application of the UTPR is the key area where taxpayers anticipate disputes are likely to arise. In our view, it would be crucial to have a co-ordinated mechanism for the operation of the UTPR to ensure disputes regarding its application are minimised and provide the necessary certainty to business.

Concerns have been raised by jurisdictions regarding the compatibility of the UTPR with the OECD Model Convention. We believe that these concerns need to be addressed by the Inclusive Framework so that MNEs can have certainty regarding the application of the UTPR.

Dispute Resolution

It is essential that an effective dispute resolution mechanism will be agreed by all jurisdictions, to resolve issues arising for MNEs based on differences in the interpretation or application of the GloBE Rules by jurisdictions. It should not be the case that countries are left to resolve disputes regarding double or over-taxation between themselves, whether through a Mutual Agreement Procedure (MAP) type mechanism or otherwise, as inevitably such an approach will lead to divergences in the application of the GloBE Rules.

If a dispute resolution mechanism is agreed, it is unclear whether the mechanism would be reflected in the Model GloBE Rules, the Commentary to the GloBE Rules or the Administrative Guidance. It is vital that taxpayers are given a clear understanding of how disputes regarding double taxation will be resolved, when the dispute resolution mechanism will be put in place and the expected timeframe for the resolution of disputes.

Adapting elements of MAP for a dispute resolution mechanism

The Consultation Document notes that elements of the MAP provision contained in Article 25 of the OECD Model Tax Convention could be adapted to develop a dispute resolution mechanism.

In developing a MAP-type dispute resolution mechanism, it would be important to ensure that the scope would not be overly broad. Otherwise, the MAP system could become

overloaded. In our view, the scope should be carefully defined to ensure that the resolution mechanism is reserved for more complex cases.

Our members have highlighted that the outcomes in MAP cases can vary significantly across taxpayers whereas it is imperative that the GloBE Rules are applied consistently. In addition, where a dispute is resolved, the outcome could be reflected in the Administrative Guidance to ensure future consistency in the application of the GloBE Rules.

Potential instruments for a dispute resolution mechanism

The Consultation Document also considers a number of instruments through which a dispute resolution mechanism could be implemented, including a multilateral convention (MLC), the Convention on Mutual Administrative Assistance in Tax Matters (MAAC), bilateral tax treaties and implementing a dispute resolution provision into domestic law.

While our members would be supportive of a MLC, concerns have been raised regarding the prospect of all jurisdictions ratifying the MLC. Regarding the proposal to implement a dispute resolution provision into domestic law, we believe this may create difficulties for MNEs seeking to rely on such provisions.

Conclusion

As stated, MNEs are concerned about the uncertainty and additional costs that are likely to arise due to inconsistent and/or uncoordinated application of the GloBE Rules. We urge members of the Inclusive Framework, together with the CFA, to devise a dispute resolution mechanism which will be effective and can be agreed by all jurisdictions.

Please contact Anne Gunnell of this office at agunnell@taxinstitute.ie if you require any further information in relation the above matters.

Yours sincerely



Colm Browne
Institute President