

GloBE Rules: Public consultation on Implementation Framework Response by the Chartered Institute of Taxation

1 Executive Summary

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 We welcome the historic agreement on a two-pillar solution to address the challenges arising from the digitalisation of the economy and its key objective of stabilising the international corporate tax framework, bringing it up to date up with the challenges of the digitalised economy, as well as more transparency and fairness in the global tax environment. However, the speed at which this has been developed by the OECD/G20's Inclusive Framework on BEPS, and in particular the lack of opportunity for deep and public consultation with businesses and other stakeholders before the Global Anti-Base Erosion (GloBE) Rules were finalised – although understandable in the context of the mandated timetable – has led to significant challenges with the rules published by the Inclusive Framework in December 2021.
- 1.3 In addition, the timetable outlined by the OECD in October 2021 (that set out an aim for countries to introduce the Pillar 2 rules into the domestic law in 2022, ahead of implementation in 2023) means that the necessary detail around their implementation is coinciding with, rather than following, the development of a global implementation framework. In our view the telescoping of these two stages risks undermining the policy rationale of the very complex GloBE Rules, as well as the international alignment that is required if its purposes are to be achieved. It also exacerbates the risk of anomalous outcomes and requirements on business that are impossible, or at least very onerous, to comply with. The GloBE Rules will present a huge administrative and compliance challenge for many tax authorities as well as for taxpayers; 12 months is not long enough to successfully implement rules that are in themselves very detailed and as yet incomplete.
- 1.4 We encourage the Inclusive Framework members as a priority to reach agreement around what adaptations to the GloBE Rules should be permitted in the implementation of them, so that the end result is a multilateral set of interlocking rules that deliver the policy aims of Pillar 2 in a manner where each country's implementation is recognised from the outset to be a qualifying regime. We would like to see the Inclusive

Framework work towards reaching and implementing an agreed outcome, translating the policy principles correctly into the detail.

- 1.5 We would also support further safe harbours and other simplification mechanisms that can be developed through the GloBE Implementation Framework and would encourage the introduction of domestic minimum taxes. In our view, the introduction of domestic minimum taxes, together with an effective mechanism to have a 'pass list' of qualifying regimes, would result in an overall simplification of the Pillar 2 rules.

2 About us

- 2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

3 Introduction

- 3.1 In October 2021, the OECD/G20 Inclusive Framework reached an agreement on a two-pillar solution to reform the international tax framework in response to the challenges of digitalisation. We welcome this historic agreement which aims to bring the international corporate tax framework up to date with the challenges of the digitalising economy, as well as to introduce more transparency and fairness in the global tax environment. We have long advocated a multilateral solution to these issues as we have been increasingly facing an international tax landscape of unilateral measures (and retaliatory actions) being taken independently by countries, which lead to less alignment of tax bases globally, resulting in double taxation and a significant compliance burden for businesses and, consequently, stifling economic growth and innovation. Thus the two-pillar solution and its key objective of stabilising the international corporate tax framework is welcome.
- 3.2 The OECD published *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)* on 20 December 2021, referred to in this response as the 'GloBE Rules' or the 'Model Rules'. Capitalised terms in this response that are not defined in it, are terms as defined in Chapter 10 of the Model Rules, and references to 'Articles' are to Articles of the Model Rules. Broadly, Pillar 2 intends to deliver a minimum level of corporation tax for all multinational enterprises (MNEs) of 15% of accounting profits in all jurisdictions through the introduction of two rules in national domestic tax laws: the Income Inclusion Rule (IIR) and its backstop, the Under Taxed Payments Rule (UTPR). Pillar 2 also includes a treaty-based rule, the

Subject to Tax Rule (STTR), which allows source jurisdictions to impose limited source taxation on certain related party payments that are subject to tax below a minimum rate. The STTR is still work in progress.

- 3.3 On 14 March 2022, the Inclusive Framework released Commentary on the GloBE Rules. The Commentary is intended to provide governments and MNEs with technical guidance on the operation and intended outcomes of the GloBE Rules. At the same time, the Inclusive Framework launched a public consultation, seeking input on the issues that should be addressed during the development of the GloBE Implementation Framework, which is intended to facilitate the co-ordinated implementation and administration of the GloBE Rules.
- 3.4 Whilst we welcome this public consultation, it is unfortunate that it comes at this late stage, and that the speed at which the policy objectives outlined in the Blueprint were developed into Model Rules gave insufficient time for any meaningful consultation by the OECD with a wide range of businesses, experts, and other stakeholders on the rules themselves or, indeed, the Commentary. The lack of deep consultation with businesses, accountants and other stakeholders throughout the development of the Model Rules in particular has led to significant challenges – both in terms of the rules seeming to depart in some areas from the stated policy aims of Pillar 2 outlined in the Blueprint and/or creating incoherent and arbitrary or illogical outcomes. Some of the most serious of these issues were identified by BIAC in their letter to the Chairs & Members of Working Party 11 on Aggressive Tax Avoidance dated 6 January 2022 (BIAC letter). Many others have since been identified by BIAC and other stakeholders and communicated to the OECD/Inclusive Framework and/or to national tax administrations. In summary, there are many aspects of the Model Rules that lack clarity and/or do not work to deliver the policy aims of Pillar 2.
- 3.5 The focus of the public consultation launched by the Inclusive Framework is on putting in place mechanisms that will ensure tax administrations and MNEs can implement and apply the GloBE Rules in a consistent and co-ordinated manner while minimising compliance costs. Our comments below address primarily two of the questions posed by the Inclusive Framework:
- Do you have any suggestions on measures to reduce compliance costs for MNEs including through simplifications and the use of safe-harbours?
 - Do you have views on mechanisms to maximise rule co-ordination, increase tax certainty and avoid the risk of double taxation?

4 Mechanisms to maximise rule co-ordination, increase tax certainty and avoid the risk of double taxation

- 4.1 We suggest that, in developing the GloBE Implementation Framework, Inclusive Framework members explore what flexibility there may be to reach agreement around what adaptations to the Model Rules should be permitted in the implementation of them into domestic laws to address the issues that have been identified. We would welcome mechanisms that allow jurisdictions, through the GloBE Implementation Framework and, possibly, further Commentary, to address the myriad of issues that arise from the Model Rules identified by businesses and other stakeholders.
- 4.2 We recognise the importance of consistency across the globe in order to ensure that the detailed and complex framework for the system of top up taxes, that is Pillar 2, works as intended. We agree that the aim should be a consistent and common interpretation of the Pillar 2 rules. We also recognise that the ‘common approach’ envisages that jurisdictions should implement and administer Pillar 2 rules in a way that is ‘consistent with the outcome provided under the GloBE Rules and the commentary on the GloBE Rules’ (paragraph 1 of the Introduction to the Commentary). However, the Commentary continues: ‘Consistency in the implementation and administration of the GloBE Rules is intended to result in a transparent and

comprehensive system of taxation that provides predictable outcomes for MNEs and avoids the risk of double or over-taxation'. There is a tension between these aims in circumstances where the wording of the Model Rules themselves produces results that either (a) are not predictable, due to ambiguity and/or a lack of clarity or detail in the rules, (b) are not predictable because of the way in which each country will assess each other's rules, and/or (c) give rise to double or over-taxation.

- 4.3 It seems to us that the common approach should be considered to be the 'end game', encompassing the Model Rules, the Commentary and the GloBE Implementation Framework. This approach, and the development of the GloBE Implementation Framework in particular, presents an opportunity for jurisdictions to agree how to resolve some of the difficulties arising from the Model Rules; and ensure that there is some flexibility permitted in the implementation of them so that the policy objectives of Pillar 2 are always met. This approach will increase tax certainty and minimise the risk of double taxation. We do not think that this approach is contrary to the overall aim of a common approach, or to the idea that the Model Rules should be the starting point for domestic rules (a template is how they are described in the Commentary); but it does mean that a departure from some aspects of them should be agreed to be acceptable by the Inclusive Framework. It is clear that there is still much work to be done in developing the GloBE Implementation Framework and that this work will have an impact on at least some aspects of the Model Rules.
- 4.4 We understand that there is a general reluctance to amend the Model Rules themselves, which are intended to reflect the political agreement that has been reached. However, there are areas where it appears that the Model Rules are incorrect (for example, where the commentary refers to the wrong Articles). In other areas, the Model Rules are not clear and it is apparent that the position must be clarified through either the Commentary or the GloBE Implementation Framework (for example, with regard to whether consolidated accounts or local accounts should be used for determining the deferred tax positions). Thus it is generally considered that the Model Rules must, at least, be supplemented by the Commentary and the GloBE Implementation Framework to make them operable in practice.
- 4.5 Notwithstanding the lack of international appetite to change the GloBE rules, it is not clear how much flexibility there is, or could be, internationally around reaching agreement to depart (or at least allow departure without being deemed a non-qualifying IIR) from some aspects of the Model Rules as jurisdictions implement their domestic rules, to make the resulting IIRs and UTPRs work better from a policy perspective, and at a practical level to iron out anomalies and ambiguities that arise from the Model Rules themselves. We would encourage these questions to be addressed at an international level during the ongoing work of the Inclusive Framework when considering how to maximise rule co-ordination, increase tax certainty and avoid the risk of double taxation. We would further encourage the Inclusive Framework in its work developing the GloBE Implementation Framework to acknowledge the defects in the Model Rules and to deal with these, so far as possible, in such a way so as to ensure that the Model Rules operate as intended and align with the Pillar 2 policy objectives.
- 4.6 In our view where a challenge in the Model Rules could be fixed by departing to some extent from the Model Rules, but remaining consistent with the Pillar 2 policy objectives, the Inclusive Framework should seek to reach international agreement that such departures are recognised and accepted by other jurisdictions; such that domestic rules that are implemented in line with this international agreement are recognised as Qualified IIRs. There is a degree to which adaptation of the Model Rules to accommodate the practical reality of the complexities of MNEs businesses will be necessary. We encourage the Inclusive Framework to explore what flexibility there may be to reach agreement around what adaptations to the Model Rules should be permitted to make them better fit for purpose and deliver the policy aims.

- 4.7 The key question that the Inclusive Framework should address is what is a Qualified IIR for the purposes of the UTPR, and how flexibility will be viewed by other countries when each jurisdiction comes to implement the Pillar 2 rules into their domestic law. It would be preferable for all jurisdictions to recognise others' domestic rules as qualifying regimes, even if they depart in some aspects from the detail of the Model Rules in order, for example, to mitigate against double taxation, but nonetheless deliver the policy objectives of the Pillar 2 rules. A mechanism that achieves this would be welcome and would serve to increase tax certainty and minimise double taxation. It would also assist with the rule co-ordination of Pillar 2, as it would be clear where and when each IIR or UTPR should apply.
- 4.8 In this regard we note that the definitions of both Qualified Domestic Minimum Top-up Tax and Qualified IIR in the Model Rules envisage rules that 'are implemented and administered in a way that is consistent with the outcomes provided for under the GloBE Rules and the Commentary', thus envisaging a purposive approach, if it is considered that these 'outcomes' should be taken to be in line with the Pillar 2 policy objectives. In our view the approach of the Inclusive Framework should be to ask the question around how much all countries can depart from the Model Rules within the constraints of the Pillar 2 policy objectives. We would welcome an end result that permitted this degree of flexibility, with jurisdictions still recognising each other's rules as Qualified IIRs.
- 4.9 In addition, we note that the GloBE Implementation Framework is defined in the Model Rules as being 'the procedures to be developed by the Inclusive Framework on BEPS in order to develop administrative rules, guidance, and procedures that will facilitate the co-ordinated implementation of the GloBE Rules'. This seems to us to provide scope for countries to agree some departure from the Model Rules in order to ensure that Pillar 2 works as intended and in line with the policy aims of it.
- 4.10 We would like to see the GloBE Implementation Framework include a mechanism of peer reviewing implementation by jurisdictions, based on clear and purposive principles that allow countries to depart in minor ways (in areas that the Inclusive Framework can agree are needed) to ensure integrity of the domestic rules and the recognition of each regime as 'qualifying'; that is to say a 'pass list' that looks at the impacts and outcomes of a jurisdiction's domestic rules, not necessarily the replication of every single word of the Model Rules into domestic law.
- 4.11 In this regard, we recognise there are challenges with amendments to the GILTI regime, but it creates challenges and distortions for everyone else to have to closely align around a different set of rules, and whatever system is designed in the GloBE Implementation Framework to ensure that countries recognise other regimes as qualifying/non-qualifying should seek to ensure that distortions are minimised.

5 Safe Harbours and Simplification

- 5.1 The public consultation also asks for views on measures to reduce compliance costs for MNEs, including through simplifications and the use of safe-harbours.
- 5.2 The safe harbours and other mechanisms that are developed during the course of 2022, and included in the GloBE Implementation Framework, will be crucial in reducing the unintended impacts of these proposals. The CIOT is supportive of any such measures that will ensure that the administration of the GloBE Rules is as targeted as possible and reduce compliance and administrative costs, particularly where these are disproportionate to the policy objectives.

- 5.3 In particular, we would welcome a safe harbour based on CbCR data and suggest that the design of this should follow as closely as possible the information already included in the CbCR return with any necessary calculations being based on this information and being made as straightforward as possible.
- 5.4 We are also generally supportive of domestic minimum taxes (DMT). In our view if all Inclusive Framework countries were to introduce minimum tax rules into domestic law this would significantly reduce the compliance costs for businesses, provided the DMT rules do not themselves introduce an additional set of rules for MNEs to comply with. Subject to this, the simplification aspect of DMTs will be welcomed by MNEs.
- 5.5 We would like to see work towards a ‘pass list’ of jurisdictions with DMT’s (possibly through a mechanism of peer review, as discussed in paragraph [4.10] above. Part of this should be an encouragement that DMT rules should be aligned so far as possible with the Pillar 2 rules, so that two sets of calculations by MNEs are not required. This will reduce the pressure on taxing ‘other jurisdictions’ profits through either IIR or UTPR and will make tax administration much simpler for MNEs and tax administrations.

6 Other aspects of the further work by the Inclusive Framework

- 6.1 We note that work is progressing on Pillar 1 and that the intention is that a multilateral convention will be available for signature in 2022, with the aim of these rules also becoming effective in 2023. Previous statements and the Blueprint have been clear on the interaction of Pillar 1 and Pillar 2. That clarity is not found in the final Model Rules. There should be clarity as to whether any profits reallocated under Pillar 1 are also reallocated for Pillar 2 purposes and whether Pillar 1 tax is a Covered Tax for Pillar 2. We suggest that this should be addressed by the GloBE Implementation Framework.
- 6.2 As discussed above, the common approach is intended to result in consistency in the implementation and administration of the GloBE Rules in all jurisdictions. This is important if they are to achieve their intended objectives and be fair. In this respect, in particular, we suggest that the effects of GILTI grandfathering (and coexistence) on the overall implications of Pillar Two, and ensuring that there is a level playing field, warrant further consideration. It is accepted that GILTI grandfathering is necessary for the US to agree to Pillar 2, and we understand that to mean that GILTI will be treated as a Qualified IIR. However it remains unclear as to how GILTI grandfathering would operate in practice and how precisely it would ‘coexist’ as a Qualified IIR and interact with the GloBE Rules more precisely. We suggest that there should be clarity that GILTI grandfathering will remain under review and that the option retained to withdraw grandfathering if the US amends the GILTI rules in the future, resulting in a regime that is materially divergent from the IIR rules.
- 6.3 Further in relation to the US rules, we suggest that the operation of BEAT should be limited in respect of payments to entities that are subject to a Qualified IIR. Specifically, payments made to foreign connected parties who have a relevant Parent Entity in a jurisdiction that has implemented a Qualified IIR should be excluded from being considered as base erosion payments for the purposes of BEAT. If this is not politically feasible, then BEAT should clearly be made a Covered Tax.
- 6.4 We welcome the continued focus on dispute resolution. We suggest that the complexity of Pillar 2 emphasises the need for a clear, strong and effective multilateral arbitration process agreed by tax administrations which is binding on them. The timing and process of the mandatory multilateral arbitration system should also be clearly established to address the current delays that taxpayers currently face in resolving multilateral tax disputes. This will take on further importance if, as seems to be the case, disputes around Amounts B and C under Pillar 1, and any liability under Pillar 2, will have to be determined before the calculation and allocation of Amount A can be finalised.

6.5 Finally, we understand the reasons for the introduction of the STTR in conjunction with the GloBE Rules and can see its merit to address the risk of mobile income being shifted to jurisdictions with very low or zero nominal tax rates. However, there is a serious concern that the STTR would give rise to double taxation. It is important that the nominal rate that will trigger an STTR withholding tax liability is set at a low rate since it is applied to gross payments. As a stand-alone gross basis tax, the STTR will set an unwelcome precedent. Gross basis taxes generally have negative impacts (and compliance costs) and often give rise to a very high effective rate of tax. This would be contrary to the objectives of the GloBE proposals.

7 Interaction with existing BEPS measures

7.1 It is our view that a condition of benefiting from the new taxing rights under the Pillars (and Pillar 1 in particular) should be the repeal of unilateral measures, such as digital services taxes (DSTs). Having DSTs and the Pillars operating simultaneously will be both highly complex and have potentially very significant negative impacts on business and investment. At the very least in the meantime, Covered Taxes should include DSTs.

7.2 We note that the Pillar 2 rules are designed to sit alongside existing anti-avoidance rules, such as controlled foreign company regimes, including those that have been introduced as part of the wider reforms arising from BEPS. We welcome that the intention is that taxes charge under these anti-avoidance rules are generally treated as Covered Taxes. However, we suggest that there should be a review in, say, five years' time to see whether the Pillar 2 rules are operating in such a way that these other BEPS rules are no longer required.

8 Acknowledgement of submission

8.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

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