

Pillar Two – Tax Certainty for the GloBE Rules Response by the Chartered Institute of Taxation

1 Introduction

- 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 consultation on Tax Certainty for the GloBE Rules published by the OECD Secretariat on 20 December 2022 as an important step in the ongoing work in relation to Pillar Two. We recognise the continuing work on Pillar Two, which is due to come into effect from 31 December 2023 in many jurisdictions, including the UK. We welcome this opportunity to comment on the proposals for tax certainty scoped out in the consultation document. We note that these proposed rules represent the work of the OECD Secretariat; the Inclusive Framework has not reached consensus on them. The consultation document contains some welcome ideas, but the practicality and viability of any of them is currently unclear. The consultation document sets out potential avenues to prevent and resolve disputes, but it is not clear to see whether there will be consensus on solutions in the near future, nor where it would fall.
- 1.3 In light of this, and also the relatively short consultation period and the fact that we are aware that many other stakeholders (including the Big 4 accounting firms and the multinational enterprises (MNEs) that will be within the scope of the rules) are engaged with the OECD and the consultation process, and will be feeding in [examples as requested], we have limited our comments to more high level points around underlying principles and ensuring, so far as possible, that the mechanisms for tax certainty will help the GloBE Rules meet our objectives for the tax system. These objectives are that a tax system should comprise rules which translate policy intentions into law accurately and effectively, without unintended consequences. The tax system should aim to provide simplicity (so far as possible) and clarity, so businesses can understand how much tax they should be paying and why, and also to provide certainty so that businesses can plan ahead with confidence. It is also important that there is responsive and competent tax administration, with a minimum of bureaucracy.

- 1.4 As we have noted in our previous submissions to the OECD in respect of both of the pillars, effective dispute prevention and resolution mechanisms that achieve tax certainty will be critical to the success of the new rules. Robust mechanisms will be required to prevent double (or multiple levels of) taxation and also to ensure that tax administrations and MNEs can achieve certainty as to the amounts of tax that are due. In addition, it is our strong view that dispute prevention and resolution mechanisms should be binding on tax administrations.

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 General

- 3.1 It must be recognised that the scope and detail of the GloBE Rules is vastly complicated and will create an enormous administrative burden for tax administrations and MNEs alike. What is clear is that tax certainty will be very important and there will be a considerable number of points to resolve following implementation of the GloBE Rules, especially in the first few years. Our experience in the UK is that when new, complex legislation is introduced, it is very difficult to get the rules right at the first attempt. More often than not anomalies and practical difficulties only come to light when the rules are in force and businesses, and the relevant tax authorities, are seeking to apply them to real, complicated business models. This has been the UK’s experience in relation to rules that have been introduced in the UK as a result of the BEPS project, such as the Corporate Interest Restriction and the Hybrid and other Mismatch Rules, as well as domestically driven new tax rules, such as Diverted Profits Tax.
- 3.2 Therefore, we welcome the continued focus on tax certainty by the Inclusive Framework, and we suggest that resources for the mechanisms to provide tax certainty and resolve disputes will be key. As we have said previously, it is clear that the implementation of the GloBE Rules will require significant resource from national tax administrations, as well, of course, from MNEs (and the OECD). Further resource will be one of the key challenges in achieving tax certainty. Countries should be encouraged to commit to providing the additional resource that will be required. We also strongly recommend that dispute prevention and resolution mechanisms should be binding on tax administrations.

- 3.3 We agree that there are two aspects of certainty arising from the GloBE Rules. The first is around clarity of the rules, in order to prevent disputes so far as possible, and the second is around resolving disputes that will inevitably arise. We welcome the continued focus on dispute prevention as, while dispute resolution is necessary, it is not the best solution for business because of the time it takes; businesses need certainty, so far as possible, from the outset.
- 3.4 Further, now that the European Union has reached an agreement on the Pillar Two Directive, it is crucial to reach consensus on the remaining fundamental issues, like tax certainty. The difference in speed of the processes of implementation between jurisdictions could result in the risk of application of the GloBE Rules without a proper timely implemented tax certainty mechanism. This risk is significant and could result in double or over-taxation in many common fact patterns. The remedy to solve disputes among EU Member States could be found in widening the scope of the EU Arbitration Directive. However, a global solution will still be needed.

4 Dispute prevention

- 4.1 The consultation document contains suggested dispute prevention mechanisms that could be used to ensure a common interpretation or application of rules among tax administrations and taxpayers. These include the use of Model Rules, Commentary and Administrative Guidance that is agreed by the Inclusive Framework and also a multilateral review process of the qualified rule status and the ability to refer an issue to the Inclusive Framework.
- 4.2 The OECD assumes that countries will use the GloBE Model Rules, Commentary and (to be agreed) Administrative Guidance as the basis for domestic legislation and that this will reduce the risk of differing interpretations. However, it remains to be seen whether this will be the predominantly the case or whether countries will diverge from the Model Rules and to what extent. For example the EU and the United Kingdom have already demonstrated that jurisdictions will take different approaches to drafting when implementing their domestic rules, which means that some divergence in language, even if not necessarily in effect, is inevitable.
- 4.3 In any event, there are numerous question on how to interpret the Model Rules and Commentary. The agreed Administrative Guidance, the first package of which was published on 2 February, with more to follow later this year, may assist with many of these. However, several countries have already indicated that the OECD guidance will be ‘helpful’ rather than ‘binding’.
- 4.4 We agree that determining what will be recognised as a ‘Qualified’ Income Inclusion Rule (IIR), undertaxed profits rule (UTPR) or Domestic Minimum Top-up Tax (DMTT) is fundamental for ensuring the coordinated application of the GloBE Rules and welcome the focus on a review process to achieve this. 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. We suggest that developing the review process for identifying ‘Qualified’ IRRs, UTPRs and DMTTs should be given the highest priority by the Inclusive Framework going forward to ensure that domestic rules are able to be considered, and their qualified status determined, before they are implemented.

- 4.5 We would also support the adoption of common risk assessment and a coordinated compliance as discussed in the consultation document. This would be helpful and should be encouraged. In this regard we note the contemporaneous consultation on the GloBE Information Return.
- 4.6 Binding certainty mechanisms, such as advance pricing arrangements (APAs) would also be welcome. As the consultation document acknowledges APAs are the most common dispute prevention mechanism that provides binding certainty. APAs provide tax certainty with respect to transfer pricing issues to both taxpayers and the relevant tax authorities. The consultation document explains that 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. Therefore we agree that a common standard would need to be defined for an APA-like mechanism for the GloBE rules. However, the consultation document also notes that in practice, all MNE groups within the scope of the GloBE rules may not be able to access such APA-like mechanisms. In practice access to APAs will depend to a large extent to the resource available within tax administrations to enter into these.
- 4.7 We have emphasised the need for additional resource within tax administrations in order to be able to effectively implement the two pillar solution throughout its development. We remain concerned about the resourcing burden that will be placed on tax authorities. The Pillars introduce a whole new level of complication that will place increased administrative burdens on tax authorities when many are already struggling to maintain service levels as a result of administering their own jurisdictions' tax rules.

5 Dispute resolution mechanisms

- 5.1 It is recognised that dispute resolution mechanisms will be required to resolve differences in the interpretation or application of the rules that may arise between two or more jurisdictions. Mechanisms considered in the consultation document include a multilateral conventions, the use of competent authority agreements under the Convention on Mutual Administrative Assistance in Tax matters (MAAC), reliance on existing treaties and the creation of a dispute resolution provision in domestic law.
- 5.2 The complexity of the GloBE Rules emphasises the need for a clear, strong and effective multilateral arbitration process agreed by tax administrations, and one 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.
- 5.3 The consultation document refers to the MAP provision of article 25 of the OECD Model Tax Convention as a basis for a GloBE dispute resolution mechanism. The basic elements of that provision could be used to develop a dispute resolution mechanism, separate from the existing MAP framework.
- 5.4 The consultation document sets out three possible parameters for a GloBE dispute resolution mechanism, with varying degrees of access and involvement by the MNE. The consultation document also discusses the possible scope and nature of disputes that could be covered by a new dispute resolution mechanism. The consultation document states that some elements of a dispute resolution mechanism may need to be specific to GloBE requirements like (i) the nature of disputes covered, and (ii) the basis for resolving disputes. An overly broad scope would result in too many cases being submitted, where in fact there is no actual difficulty in applying the GloBE Rules to resolve, but taxpayers will, nevertheless, often prefer certainty. Therefore the suggestion is made to narrow the scope to where the MNE group is required to apply and pay top-up tax under the GloBE rules in several jurisdictions. 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. We recognise that tax authorities may have concerns around capacity the broader the access rights that are given to taxpayers and the broader the scope of the disputes that are covered.

- 5.5 Irrespective of the mechanism chosen, the consultation document mentions the need of competent authorities to refer to a standard in order to resolve potential differences. Regarding the basis for resolving disputes, competent authorities could be empowered to eliminate inconsistent outcomes by agreeing on a common interpretation. In situations where the domestic incorporation of the GloBE rules would result in inconsistent outcomes, competent authorities may be similarly empowered to agree on a resolution of the dispute in line with the common approach (Model GloBE Rules, the Commentary and agreed Administrative Guidance) that does not result in double or over taxation.
- 5.6 The consultation document also discusses that the various mechanisms could be implemented through different legal instruments. Existing mechanisms, such as the Convention on Mutual Administrative Assistance in Tax Matters (MAAC) or tax treaties are mentioned, as well as new mechanisms such as a dispute resolution provision introduced into domestic law or under a multilateral convention.
- 5.7 With regard to a new multilateral convention (MLC), while this would be desirable, an MLC does also seem aspirational. First it likely would take some time to secure agreement by a sufficient number of countries, and if the United States status quo holds, passage through the US Senate would be difficult. We would also note that questions are raised about the compatibility of the UTPR with article 7 of the OECD Model Convention, and to what extent a jurisdictional determination of the UTPR could lead to discrimination under article 24 of the OECD Model Convention. If an MLC is considered, the Inclusive Framework could use this as an opportunity to provide certainty on these issues.
- 5.8 The MAAC is primarily intended to allow the exchange of information between competent authorities, but there are provisions that allow competent authorities to undertake consultations. However, in the consultation document it is noted that the MAAC does not provide rights for the taxpayers to request a competent authority procedure and would not provide a substantive legal basis for competent authorities to reach agreements or implement them. Therefore, the suggestion is being made that some jurisdictions may consider supplementing a competent authority agreement under the MAAC with a domestic provision to provide these rights. In this regard, we note that while the United States ratified the original MAAC, it has not ratified the protocol, which has caused problems in a number of areas, and could also do so here.
- 5.9 The consultation document also considers creating a dispute resolution provision that would be incorporated in to domestic law alongside the GloBE rules that each jurisdiction could apply on a reciprocal basis. Putting a mechanism within domestic laws would remove the known difficulties of achieving either a new MLC, or, alternatively, mass changes to tax treaties. However, it is understood that several/many countries have expressed opposition to this idea, so the likelihood of success is not clear. In addition, it is clear that further work is required to develop this concept to ensure that it could deliver the necessary reciprocity of obligations and deliver binding outcomes.
- 5.10 More generally, we look forward to the further work that will be undertaken in this area to develop the necessary dispute resolution mechanisms over the coming months.

6 Acknowledgement of submission

- 6.1 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
3 February 2023