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To: International Co-operation and Tax Administration Division, OECD/CTPA

EBIT Comments on the OECD public consultation on the Implementation Framework of the global minimum tax

Brussels, 8 April 2022

Dear Achim,

EBIT's Members¹ thank the OECD for the opportunity to provide input on the OECD's public consultation on the Implementation Framework of the global minimum tax with a deadline of 11 April 2022. EBIT's Members understand that a virtual public consultation will be held at the end of April 2022. Below are a number of issues and open questions that EBIT believes are important for the OECD to take into account. At the same time, we regret the short timeframe allowed under the public consultation for sending in input and the preparation of the public consultation despite the utmost importance of the project.

Given the urgency and short time frame, EBIT are raising their suggestions, issues and concerns with the implementation framework in a summarized bullet point format, keeping it relatively short. At the same time, we do wish to emphasize that the listed issues and concerns in this document are not exhaustive.

EBIT Members would greatly appreciate an opportunity to comment on draft implementation rules and are convinced such an approach will be beneficial for the development of the final implementation rules.

I. General comments

- EBIT's Members understand the importance of the implementation framework for all stakeholders involved: MNE Groups and tax authorities. The implementation framework should also be considered a tool to increase trust, transparency and certainty between the stakeholders. In that context, EBIT's Members consider the development of safe harbours essential in achieving this goal. Several suggestions and possible approaches are discussed further below (see question 3).
- The Commentary to the Model Rules indicates that the information required by the GloBE Information Return could be specified, expanded or restricted in accordance with the GloBE Implementation Framework (see Chapter 8, § 13). As indicated in the same paragraph, EBIT's Members are of the opinion that a standard template for the GloBE Information Return would be the best way forward. However, the content of the GloBE Information Return should be limited to giving execution of the Pillar Two measures (need to have) without going further (nice to have). The content of the GloBE Information Return should also be streamlined with the content that is already available under other information requirements such as Country-by-Country Reporting and / or the Master File.
- EBIT's Members are in favour of a one-stop shop approach under the Pillar Two rules.

¹ EBIT's Members include Airbus Group, BP, Carlyle, Caterpillar, Diageo, GSK, Huawei, International Paper, Johnson & Johnson, JTI, PepsiCo, Pfizer, Procter & Gamble, Raytheon Technologies Corp., RELX, Schroders, SHV Group and Vattenfall. For more on EBIT see: www.ebit-businessstax.com

II. Specific questions mentioned in the invite for public comments on the Comments on the Implementation Framework of the global minimum tax

II.1 Do you see a need for further administrative guidance as part of the Implementation Framework? If so, please specify the issues that require attention and include any suggestions for the type of administrative guidance needed. [This may be broad enough to mention some difficulties in the Model Rules which, while those Rules can't be changed in the short term, could be addressed by guidance.]

- EBIT's Members confirm that as much as possible administrative guidance should be made available, in particular because of the novelty of the system. At least one specific element that needs addressing is the following. According to Article 3.2.3, the Model Rules require transactions between Group Entities to be priced consistently with the Arm's Length Principle **and** recorded at the same price for GloBE purposes (symmetry) for all Constituent Entities that are parties to the transaction. In numerous cases, the arm's length principle is respected by allocating an arm's length return (and not necessarily a price). Additional guidance is needed on how the Model Rules will apply the symmetry rule.
- According to the Commentary, the Model Rules, do not seek to harmonise tax filing and payment obligations for the GloBE Rules themselves. They aim to provide core information to jurisdictions implementing the GloBE Rules information reporting requirements. Although we understand this approach from a sovereignty perspective, it cannot be the result of the reboot of the international tax system that every country may apply the rules in a different way. EBIT's Members opine that this approach in the Commentary diminishes the strength of the global agreement reached and believe that the implementation measures should be streamlined as much as possible (content, format, e-filing, data points (mandatory / discretionary, ...)).
- In order to limit the burden of separate filings under the GloBE rules in a multitude of countries, jurisdictions should be strongly encouraged to be a signatory of a qualifying competent authority agreement (or other qualifying legal instrument for the exchange of information). It goes without saying, however, that the confidentiality requirements should be met.
- It would be helpful if the implementation rules contained a detailed list per jurisdiction of the 'covered taxes' under the GloBE rules. This would lead to increased transparency from the jurisdictions concerned and lead to certainty whether a certain tax would be a 'covered tax' or not.
- The Detailed Implementation Plan to the Inclusive Framework Statement of 8 October 2021 indicated that a Model Treaty provision to give effect to the STTR would be developed. It remains unclear, however, how the IIR and the UTPR relate to the double tax treaties. Several commentators / scholars have already indicated that the IIR and the UTPR might be contrary to the principles under the tax treaties. It would therefore be useful to elaborate on that relationship between IIR and UTPR on the one hand and the principles under the tax treaties on the other. Modifying treaties as part of the Pillar Two implementation would also improve rule coordination. Since the STTR will be implemented via treaty change anyway why shouldn't treaties be modified to implement the Globe rules at the same time?

II.2 Do you have any comments relating to filing, information collection including reporting systems and record keeping? In particular do you have any views on how the design of the information collection, filing obligations and record keeping requirements under GloBE could be designed to maximise efficiency, accuracy and verifiability of information reporting while taking into account compliance costs?

- As already indicated in the general comments, the GloBE information requirements should be streamlined with the information that is already available under, for example, Country-by-Country reporting and / or the master file. For example, as an illustration, the following table

contains the information requested under the GloBE rules and the source where this information is already communicated to the tax authorities. Information that is already available with the tax authorities should not be requested twice.

GloBE information	Also available in other sources
(a) identification of the Constituent Entities, including their tax identification numbers (if they exist), the jurisdiction in which they are located and their status under the GloBE Rules	Country-by-Country report
(b) Information on the overall corporate structure of the MNE Group including the Controlling Interests in the Constituent Entities held by other Constituent Entities	Master File
(c) the information necessary to compute: i. the Effective Tax Rate for each jurisdiction and the Top-up Tax of each Constituent Entity under Chapter 5; ii. the Top-up Tax of a member of the JV Group under Chapter 6; iii. the allocation of Top-Up Tax under the IIR, and the UTPR Top-Up Tax Amount to each jurisdiction, under Chapter 2	New or targeted GloBE information
(d) a record of the elections made in accordance with the relevant provisions of the GloBE Rules; and	New or targeted GloBE information
(e) other information that is agreed as part of the GloBE Implementation Framework and is necessary to carry out the administration of the GloBE Rules.	Unknown at the time of commenting what other information will be required. Care should be taken not to duplicate information already available to the tax authorities.

- From the above, it is clear that certain information is already available in the hands of the tax authorities and should not be requested twice or more.
- EBIT’s Members want to indicate that the data or information collection should be limited as much as possible. The IF members surely understand the complexity of the exercise in gathering the data points and this not only from a data collection perspective but also from applying the necessary changes to the MNEs reporting systems and the resources it will take. EBIT’s Members welcome the development of simplified reporting procedures (see § 22 of the Commentary). In particular the use of a safe harbour (for example based on Country-by-Country reporting) could be helpful in selecting the MNE groups that could make use of the simplified reporting (lesser risk of not meeting the minimum threshold of 15 % ETR).
- According to Article 8.1.7 of the Model Rules, a tax authority may modify the information, filing and notification requirements in respect of the GloBE information where this is agreed as part of the GloBE Implementation Framework. As delivering the data and information towards all tax authorities on a consistent basis is key, the implementation framework should provide that such modifications should be limited to the absolute minimum and disallowed to the maximum extent. Country-by-Country reporting experience has demonstrated that the different formats, language, etc., place a significant additional compliance burden on companies, not to mention the additional uncertainty and complexity that result from minor differences to form which are essentially “nice to have” from the countries’ perspectives.

- EBIT's Members call for clarity from IF governments on how adjustments between consolidated financial statements (CFSs) and final GloBE calculations should be prepared when MNE groups are not in a position to use their CFSs to prepare accurate and complete calculations. We expect this to become a mainstream problem because of for instance:
 - the existence of group entities which are constituent entities for the purpose of the Pillar II rules but are below the materiality threshold for the purpose of preparing CFS. The CFS may not contain a measure of financial accounting net income or loss as a starting point for these entities; and
 - adjustments arising in the CFS process that are not posted at the constituent entity level but which relate to a constituent entity's results for the period (examples may include bonus accruals, or intra-group recharges of costs or valuation adjustments, and the associated covered taxes, all of which can arise late in the CFS process and are often posted as consolidation adjustments as a result).

We also call in particular for clarity as to whether an MNE group's local statutory accounts would be a valid starting point for any GloBE calculation.

- In light of the novelty of the tax system to be introduced, it is highly recommendable that - at least in the start-up phase - the principle of 'no fault' penalties could be introduced.

II.3 Do you have any suggestions on measures to enhance tax certainty and reduce compliance costs for MNEs including through simplifications and the use of safe harbours?

- According to § 30 of the Commentary on the GloBE Model Rules, the GloBE Implementation Framework will seek to explore the development of GloBE safe harbours. EBIT's Members are convinced that the use of safe harbours are meaningful tools to increase tax certainty for both taxpayers and tax authorities, to reduce the complexity of the GloBE Model Rules and to reduce the compliance cost.
- There are several ways in which a safe harbour could be constructed, for instance:
 - Use of Country-by-Country reporting data: jurisdictions with an ETR higher than X % (for example 15 % plus an extra margin) would fulfil the GloBE ETR. The extra margin is added to increase the certainty on the use of the safe harbour. The narrower the extra margin, the less reliable the safe harbour may become. EBIT's Members consider an extra margin of some 3 % a solid buffer. For example, jurisdictions reported in the Country-by-Country reporting with an ETR of 18 % (15 % ETR + extra margin of 3 %) would not apply the GloBE rules. Important to note, however, that this safe harbour would not allow the tax authorities to actually levy the top up tax as the Country-by-Country report can only be used as a high-level risk assessment tool. With granting the safe harbour to a qualifying MNE group, the purpose of the Country-by-Country reporting (high level risk assessment) is still respected.
 - Similar to a safe harbour based on Country-by-Country reporting, MNEs that are in scope of the Model Rules could draft a list of jurisdictions where there is no danger of falling under the minimum ETR threshold. A similar system analogous to the Country-by-Country safe harbour (adding an extra margin to the minimum ETR) could be considered.
 - Challenging the safe harbour should only be possible under exceptional circumstances to increase the tax certainty warranted under the safe harbour. Challenging the safe harbour would remain possible in cases of wilful intent to harm or in case of fraud or tax evasion.

- Another form of safe harbour could consist in averaging the ETR over a period of time (e.g., 3 or 5 years), for example based on CbCR data. This would avoid one off audits and corrections for GloBE purposes.
- The GloBE implementation rules could be supplemented with a white list of jurisdictions where the jurisdictions that meet and apply the GloBE rules in due form are mentioned. The white list could be regularly updated on the basis of the domestic legislation and practices from other jurisdictions and experience with the jurisdiction involved. This approach could, for example, be supplemented by a peer review process, although this could prove more challenging because of the *ex post* analysis. An *ex ante* analysis of the jurisdiction's GloBE rules may be needed, in addition to an *ex post* peer review examining also the practical implementation of the rules.
- The default position should be that constituent entities located in jurisdictions indicating it has introduced a qualifying GloBE regime, are not challenged. Based on this assertion, jurisdictions should refrain from levying top up tax until a peer review indicates otherwise. This could also mean (like in the previous bullet) that an *ex ante* peer review of the different GloBE regimes should be organised. Such an approach would however increase the tax certainty from the perspective of both tax administrations and taxpayers.
- The election for the GloBE safe harbour would be made on an annual basis (see § 33 of the Commentary). The implementation rules should mention that if no material changes occur compared to the previous years (for example two years), the safe harbour can be reconducted by means of a communication to the tax authorities involved confirming that no material changes have occurred.

II.4 Do you have views on mechanisms to maximise rule coordination, increase tax certainty and avoid the risk of double taxation? [This might include provisions on preventing or resolving disputes.]

- As indicated above, the use of safe harbours is an efficient tool to increase tax certainty.
- Rule coordination could be enhanced through a potential *ex ante* peer review of the transposition of the GloBE rules in jurisdictions, giving it a label of a qualifying GloBE rule.
- Disputes should be resolved through the normal (domestic and international) dispute mechanisms, including possible arbitration, as the GloBE rules are intended to change the international landscape.
- Solidifying the political agreement reached on 8 October 2021 through a multilateral convention which would incorporate the key aspects of the GloBE rules would maximise rule coordination. Such a multilateral convention could also contain a mechanism for multilateral dispute resolution.

III. Other elements

III.1. Anticipated huge impact on both Tax Authorities and MNE groups in practice

Based on a sample of information provided by 7 EBIT Members on

- a) in how many countries they have a taxable presence,
- b) what the total number of legal entities in the group is, and
- c) what proportion of countries / legal entities they estimate (in percentages) will be subject to top-up tax under the Model Rules.

it was found that the 7 MNEs that participated in this sample on average are present in more than 70 countries, with an average of over 400 entities spread over those 70 countries. The number of entities

that are estimated to be subject to the top-up tax under the GloBE Rules are mostly situated between 0 to 5 %. This sample already clearly demonstrates the anticipated huge impact in terms of administrative burden the OECD's proposed GloBE Rules will have on MNE groups and also Tax Authorities in practice.

III.2 Additional points

- Clarity is needed on the interaction between the Model Rules, the Commentary (in particular its status) and the implementation framework (in particular its status). EBIT's Members understand that the Model Rules have the status of a Common Approach. There is a substantial risk of having different degrees of legality within the regulatory framework and as a result compliance risks may arise finding their origin in the way countries will transpose or have transposed the Model Rules, Commentary and implementation framework in domestic law. For example, one country could introduce the Model Rules into domestic law, with the Commentary used to draft the explanatory memorandum to the law and the implementation framework as administrative guidance. Other countries could view the commentary and implementation guidance as administrative guidance only. EBIT's Members consider it is crucial to avoid as much as possible the risk of different interpretations and transpositions. Further, EBIT's Members want to point to the danger that some countries may go further than the Model Rules, leading to an even greater compliance complexity. In order to strive for maximum compliance, the rules must be kept as simple as possible and introduction into domestic law should happen as streamlined as possible. Complexity in the transposition will lead to more unforced errors made from both ends.
- Article 8.2.2(b) of the Model Rules provides that the tax administration that wishes to challenge the use of a GloBE safe harbour should notify the relevant constituent entity(ies) within 36 months (or 3 years) after the GloBE information return is filed. The filing period of the GloBE information return of 18 months combined with the period of 36 months (or 3 years) mentioned in the above cited Article, leads to a challenge period of 54 months (or 4.5 years) after the filing of the GloBE information return. This is a long period for challenging a tool that should enhance tax certainty and simplicity. A shorter time frame for challenging the safe harbour could perhaps be envisaged (for example challenging the use of a GloBE safe harbour one year after the GloBE Information Return is filed). Clarity should also be provided with respect to the circumstances under which safe harbours can be challenged.
- Article 8.1.6 of the Model Rules allows MNE Groups to file the GloBE Information Return and the notifications with the relevant tax administrations up to 15 months after the last day of the Reporting Fiscal Year. Reporting under Country-by-Country reporting should be done within 12 months from the last day of the Reporting Fiscal Year of the group. IF members could consider extending the reporting for Country-by-Country purposes by 3 months to align with the reporting requirements under the GloBE rules.
- According to the Inclusive Framework Statement of 8 October 2021, Pillar Two should be brought into law in 2022 in order to become effective in 2023, with the UTPR coming into effect in 2024. The latest draft EU GloBE Directive Council Presidency Compromise proposal discussed in the EU's March and April 2022 ECOFIN Council meetings set the transposition period already at 31 December 2023. In order to address the complexity in transposing the GloBE Model Rules and the assorted compliance risks, IF Members might consider extending the implementation timeline also with one year.

IV. Overall Conclusions

- The introduction of safe harbours is essential to reduce the burden for both tax administrations and taxpayers and at the same time enhance tax certainty.
- Implementing the GloBE rules via multilateral treaty to maximize rule coordination will avoid concerns about the rules not being compatible with existing treaties.
- The status of the different instruments developed (Model Rules, Commentary and Implementation Framework) should be made clear and guarantee as much as possible a streamlined application of GloBE.
- EBIT's Members wish to draw attention to the resulting massive exercise in terms of data collection and changing existing reporting systems for MNE groups as well as to the resultant very significant extra burden on Tax Authorities in processing the information, which will stretch their limited available resources in implementing these measures.

EBIT's Members hope these comments are taken into account by the OECD. We are always keen to engage in further discussion and public consultations that will be required if matters are to be implemented successfully.

Yours sincerely,

European Business Initiative on Taxation – April 2022

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