February 3, 2023

Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
Tax Treaties, Transfer Pricing and Financial Transactions Division
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Re: Comment Letter on the Public Consultation Document: Pillar Two - Tax Certainty for the GloBE Rules

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the Public Consultation Document on Pillar Two - Tax Certainty for the GloBE Rules published on December 20, 2022 (the "Consultation Document").

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the OECD and the Inclusive Framework ("IF") in establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations. A list of the companies comprising the NFTC Board of Directors is attached as an Appendix.

General Comments

NFTC supports the overall stated objective of the Consultation Document that the implementation of the GloBE rules should include robust dispute prevention and dispute resolution mechanisms. If the design of the system does not achieve this objective, it will result in double taxation, inconsistent treatment, prolonged disputes and heavy associated compliance costs. These mechanisms need to be binding - with priority over any country's domestic law - and supported by adequate resources by the implementation date (which is currently the beginning of 2024). These objectives must be attained regardless of the specific mechanisms which are agreed upon as a result of the public consultation and any subsequent work by the OECD.

Specific Comments

Overall Framework

The GloBE rules, with the associated required data points and complex filings in multiple jurisdictions, should contain provisions ensuring and enabling efficient decisions based on clearly defined steps and timing, including efficient ratification processes. The implementing countries and the OECD have a shared interest in finding a solution that avoids double taxation or inconsistent treatment within the defined timeline. Developing an MLI supported by a quick ratification process and that is given priority

over any domestic law seems to be the most efficient mechanism that can be put in place from the beginning of the GloBE implementation process.

As a threshold matter, the framework must be in place and functional at the time of implementation. The process for determining whether an IIR, QDMTT or UTPR is "qualified" must come to definitive conclusions that are binding on or respected by all participating countries. Additionally, the set order for the stacking rule (i.e., QDMTT, IIR, then UTPR) must be respected even where there are disagreements amongst jurisdictions as to other items, such as the determination of net GloBE income (including with regard to any particular transaction), the treatment of incentive regimes, the determination of covered taxes, or the application of the substance-based exclusion. Therefore, the UTPR should not be levied by any jurisdiction where the income of a CE is subject to a QIIR, notwithstanding the manner in which the QIIR jurisdiction determines its Top-Up Tax under its interpretation and application of the GloBE rules. Similarly, neither a QIIR nor UTPR should be levied by any non-resident jurisdiction where the income of a CE is subject to a QDMTT.[1]

Local country deferred tax amounts should be respected if the local country recognizes them under its tax system, and the amount and timing of a deferred tax should not be challengeable by jurisdictions levying a UTPR. Similarly, the determination of whether payments between related parties are "arm's length" should be adjudicated by the taxing authorities in the jurisdiction(s) in which the related parties are located and should not be challengeable as part of the Pillar Two process. The OECD should discourage jurisdictions from integrating domestic law principles, anti-abuse rules, or other court-created principles into their application of the Pillar Two rules to help ensure stability and consistency. To the extent that any anti-abuse rules, or supplementary rules, are integrated into the Pillar Two framework, they should be integrated through Agreed Administrative Guidance and not added in later through domestic law.

We recognize the efforts of the IF members that are planning for an entry into force of Pillar Two within the timeframe that was originally contemplated by the Pillar Two rules. However, it is imperative that countries implement on the coordinated timeline, including the one-year gap between implementation of the IIR and UTPR, to prevent those front runners from earning unexpected tax revenues and avoid disorder and confusion in the process of executing Pillar Two.

Dispute Prevention

We appreciate the first release of Agreed Administrative Guidance on February 2, 2023. We request an opportunity to comment on that release and future releases of Agreed Administrative Guidance before it is incorporated into the commentary and becomes binding on taxpayers. Similarly, each country should follow its regular domestic law procedures to make any Agreed Administrative Guidance binding under domestic law and domestic courts.

While qualified rule status should not be withheld due to immaterial differences in adopting language or implementing guidance, it should be withheld for jurisdictions that use the Pillar Two rules to seek additional revenue outside the scope and intent of the Pillar Two rules. In these instances, even where a rule is not given qualified status, there should be a mechanism to credit the non-qualified tax against taxes

[1] We note that mechanically under the Model Rules in Section 5.2.3., taxes paid under a QDMTT act as a reduction of top-up tax (e.g., as a credit) rather than exempting the jurisdiction from an IIR or UTPR. To simplify compliance and reduce the risk of double taxation, a QDMTT Safe Harbor should be developed such that provided the DMTT is "qualified" based on the peer review process, the income taxed by the QDMTT jurisdiction would be exempt from Top-Up Tax under the IIR or UTPR.

owed under another IIR or UTPR (e.g., it should be a covered tax allocated to a low-tax CE). Further, the administrative guidance and peer review process for the IF must ensure that jurisdictions are applying all aspects of their Pillar Two rules consistent with the agreed design, including the rules related to excluded income under Article 7, which are essential for multinational groups headed by flow-through entities (including US S corporations). Qualified status should be denied for jurisdictions that attempt to increase the rate of taxation under Pillar Two beyond 15%.

Timely dispute resolution helps to stabilize the system. As currently contemplated, the Agreed Administrative Guidance will not address issues in a timely manner for many taxpayers, particularly as it relates to uncertainties regarding related or third-party transactions. Certainty for taxpayers should be provided directly by the primary taxing authority under a QDMTT or IIR or the primary jurisdiction(s) who would be entitled to the tax under a UTPR. That certainty should be binding on or respected by all other jurisdictions to prevent double taxation or inconsistent treatment. Furthermore, an advance binding multilateral program would be helpful and should contain reasonable data requirements for the initial submissions as well as subsequent compliance.

The UTPR may conflict with some existing double tax treaties (e.g., Article 7) as well as investment treaties. Since some treaties will require updates to bring the UTPR into compliance with existing treaty obligations, an MLC is not only appropriate but is essential for an effective and successful implementation of Pillar Two consistent with existing legal obligations under treaties. The mechanisms for dispute prevention and resolution must be broadly applicable to cover any situation involving taxation that is not consistent with the OECD model Pillar Two rules and commentary. In particular, these mechanisms must cover situations where a jurisdiction does not properly apply the excluded income rules of Article 7 and therefore is seeking to impose inappropriate taxation on a multinational group headed by a flow-through entity (such as a US S corporation).

As part of the implementing MLC, multilateral MAP with binding arbitration should be considered as the current MAP procedures are not well suited to having three or more jurisdictions addressing an issue (e.g., a multi-jurisdictional UTPR assessment). Considering the potential number of jurisdictions involved, binding arbitration is necessary due to the inherent risks of Pillar Two creating double taxation or other inconsistent treatment. To the extent that there is no binding dispute resolution mechanism, the risk of double, triple, or quadruple taxation remains. As part of the development of a Pillar Two MLC, the OECD should conduct a public consultation(s) to identify issues with the UTPR (in its present form under the Model Rules and Commentary) under existing treaties and to ascertain whether and how those issues can be addressed through an MLC.

Dispute Resolution

The key design of any dispute resolution mechanisms must be to ensure that the GloBE rules do not result in double taxation or other inconsistent treatment (or, even worse; triple, quadruple, etc., taxation of the same income by multiple jurisdictions). The application of the UTPR presents the potential for many jurisdictions to apply Top-up Tax to the same income. As each jurisdiction will have its own understanding of the relevant facts, its own relevant law, and motivations, there is a large potential for multiple assessments. Any dispute resolution mechanism must not only bring each of the affected jurisdictions to the table for discussion but must contain a binding resolution mechanism for all parties to ensure a single tax is levied on any particular item of income (unless a UTPR applies, in which case the binding resolution is necessary to ensure that the multiple levies in the aggregate do not exceed the Top-up Tax owed). Non-binding multilateral MAP is unlikely to be effective as there could be too many

parties to reach a pragmatic agreement. Failure to mitigate double taxation or other inconsistent treatment will result in taxpayers considering whether continued operations in certain jurisdictions remain economically feasible and increases the likelihood of trade disputes between jurisdictions.

Access to the dispute resolution process should not be predicated on double taxation of the same item of income. In many instances, an interpretation of a rule (such as the GloBE reorganization provisions) by one jurisdiction may result in a single instance of taxation where a transaction should have been non-taxable altogether, i.e., a single imposition of Top-up Tax where no Top-up Tax is owed. Therefore, recommendations requiring a taxpayer to demonstrate double taxation to gain access to dispute resolution, should be rejected. The approach recognized in the 1963 OECD Model Tax Convention and most bilateral tax treaties that MAP is available where a taxing state exercises a taxing right in contravention of the treaty should be applied for GloBE disputes (i.e., actions by a state in contravention of the GloBE Model Rules). Any dispute resolution mechanism must be binding.

Binding dispute resolution is a crucial component of a workable system. Of particular concern is the fact that the tax authorities have full discretion in whether to accept an issue. This may cause tax authorities unable to agree on an issue to be able to walk away and accept double taxation or excess taxation of a taxpayer without any further remedies available to the taxpayer.

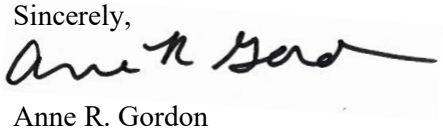
Any dispute resolution mechanism should also be implemented through the MLC. Using the existing Tax Treaty network as a mechanism has significant limitations, including absence of a tax treaty between the jurisdictions in question. Furthermore, the scope of the mutual agreement procedure may not provide for agreement on issues relating to the GloBE rules. Therefore, we do not recommend that it be used as a primary mechanism.

Finally, NFTC supports a referral process of interpretation issues to the OECD which should be made available to all in-scope MNEs. We recommend that this be reflected in updates to the GloBE Administrative Guidelines, set to be released in early 2023.

Conclusion

NFTC appreciates the opportunity to provide comments on the Consultation Document. As discussed, ensuring an operable MLI with appropriate dispute resolution is key to the success of Pillar Two. We look forward to continuing the dialogue as additional guidance is provided and the processes for tax certainty are finalized.

Sincerely,



Anne R. Gordon
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Appendix to NFTC Comments on Pillar Two - Tax Certainty for the GloBE Rules

NFTC Board Member Companies

Accenture
Amazon
American International Group
Amgen
Anheuser-Busch
Applied Materials
BP America Inc.
Caterpillar Inc.
Chevron Corporation
Cisco Systems, Inc.
Coca-Cola Company (The)
Corning Incorporated
Dentons US LLP
DHL Express (USA) Inc.
eBay Inc.
Ernst & Young LLP
ExxonMobil Corporation
FedEx Express
Fluor Corporation
Ford Motor Company
General Electric Company
Gilead Sciences, Inc.
Google Inc.
Halliburton Company
Hanesbrands Inc.
Hewlett Packard Enterprise Company
HP Inc.
IBM Corporation
Johnson Controls
KPMG LLP
Mars Incorporated
Mayer Brown LLP
McCormick & Company, Inc.
Meta Platforms
Microsoft Corporation
Mondelēz International, Inc.
National Foreign Trade Council
Oracle Corporation
Organon
Pernod Ricard USA
Pfizer International Incorporated
Philips North America LLC
Pitney Bowes
PricewaterhouseCoopers LLP
Procter & Gamble Company
Qualcomm Incorporated
Raytheon Technologies
Samsung Electronics
Schneider Electric
Siemens Corporation
Siemens Energy, Inc.
Stellantis NV
TE Connectivity
Texas Instruments
TotalEnergies
Toyota Motor North America
UPS
Visa Inc.
Walmart