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Organisation for Economic Co-operation and Development  
Centre for Tax Policy and Administration  
Tax Treaties, Transfer Pricing and Financial Transactions Division

Sent via email: [taxpublicconsultation@oecd.org](mailto:taxpublicconsultation@oecd.org)

Subject: Comments on OECD Public Consultation Document – *Pillar Two - Tax Certainty for the GloBE Rules*

Ladies and Gentlemen:

We appreciate the opportunity to submit these comments on behalf of EY on the OECD's public consultation document, *Pillar Two - Tax Certainty for the GloBE Rules*, dated 20 December 2022, and to engage with the OECD on this important topic.

We welcome the Inclusive Framework's focus on certainty in the context of the Pillar Two global minimum tax rules. We believe these new global tax rules require a global mechanism for dispute prevention and resolution. It is essential that taxpayers have access to dispute prevention and resolution mechanisms and that they can be confident that these mechanisms will operate in a timely and effective manner to ensure appropriate and consistent results under the GloBE Rules. Given that this is fundamental to the achievement of the objectives of Pillar Two, we urge that the Inclusive Framework prioritize the work on development of a comprehensive tax certainty framework.

We begin by offering our overarching thoughts on how to achieve tax certainty under the GloBE Rules. Against that backdrop, we then provide specific comments on the dispute prevention and resolution proposals described in the Consultation Document.

### **Overarching thoughts**

We strongly believe that effective and consistent operation of the network of GloBE Rules in jurisdictions around the world requires binding global dispute prevention and resolution mechanisms that are accessible, effective and broad in scope. In our view, the key elements necessary for certainty are as follows:

- ***Strong basis for alignment of jurisdictions' implementation, interpretation and application of the GloBE Rules as the starting point***

We recognize the enormous work that was done by the Inclusive Framework to develop the GloBE Model Rules and Commentary. We also recognize the substantial ongoing work devoted to the development of agreed Administrative Guidance that provides additional detail on technical aspects of the GloBE Model Rules. Looking forward, we recognize the important work ahead for the Inclusive Framework in establishing a robust peer review process with respect to jurisdictions' implementation of the Pillar Two rules into their domestic tax laws and the actual operation of such domestic laws. These documents and processes form the bedrock for alignment across jurisdictions.

However, even where agreed models, publications and guidance exist, decades of experience shows that jurisdictions do not necessarily all implement, interpret and administer them in a consistent manner. Illustrations of this are found in the myriad reservations to the commentary to tax treaties, the experience in the European Union on transposition of tax-related directives, the growing inventory of transfer pricing and other disputes under tax treaties, and the increasing demand for existing certainty mechanisms such as Advance Pricing Arrangements (APAs).

While the GloBE Model Rules, Commentary and Administrative Guidance, together with a robust and ongoing peer review process, are absolutely essential to maximizing the alignment of jurisdictions' Pillar Two rules, they do not eliminate the need for tax certainty mechanisms to address non-alignment.

- ***The backstop of global dispute prevention and resolution mechanisms to resolve and eliminate instances of non-alignment***

Solutions based on establishment of global tax rules, such as the Pillar Two effort, require the backstop of accessible and effective global dispute prevention and resolution mechanisms to ensure consistent and appropriate implementation and application, and to avoid unintended negative impacts on global trade and investment. Here, the GloBE Model Rules, Commentary and Administrative Guidance, together with the outcomes of a robust and ongoing peer review process, can collectively serve as a common global standard on the basis of which global dispute prevention and resolution mechanisms can operate. Moreover, experience drawn from the operation of such mechanisms will provide valuable information on the areas where additional Administrative Guidance could be developed by the Inclusive Framework to help eliminate persistent sources of dispute and further enhance alignment.

- ***Global dispute prevention and resolution mechanisms that are binding***

In order to ensure the consistent application of this common global standard, purpose-built, accessible and effective global dispute prevention and resolution mechanisms are required. We believe this requires a multilateral convention (MLC) with a Mutual Agreement Procedure (MAP) provision similar to Article 25 of the OECD Model Tax Convention that includes a form of binding arbitration. In our view, binding certainty tools are essential both for dispute prevention and for dispute resolution. An MLC is required as there are issues that could very likely arise in circumstances that would not be covered by an existing tax treaty.

As stressed above, the common global standard would form the basis for application of dispute prevention and resolution under an MLC. In situations where more than one reasonable interpretation

could arise under the common global standard, it should follow that the interpretation of the jurisdiction with primary taxing rights under the GloBE Rules would be applicable by default.

- ***Global dispute prevention and resolution mechanisms that are broadly applicable***

In our view it is imperative that dispute prevention and resolution be broadly applicable to cover all matters of potential non-alignment. The availability of such mechanisms should not be limited to instances of double taxation but should also cover instances of over-taxation that may arise, for example, in situations where a jurisdiction's computation of the amount of top-up tax is not consistent with the common global standard or where a jurisdiction does not respect excluded entity or excluded income status.

### **Comments on dispute prevention mechanism proposals**

#### ***Reliance on the GloBE Model Rules, Commentary and Administrative Guidance***

As outlined above, we see the common global standard consisting of the GloBE Model Rules, Commentary, Administrative Guidance and the outcomes of the peer review process as forming the bedrock for alignment across jurisdictions and serving as the basis upon which dispute prevention and resolution mechanisms operate.

We agree that a process for making determinations of “qualified” rule status is necessary for coordinated application of the GloBE Rules across jurisdictions. That said, it is important to ensure that this multilateral peer review process is not limited to, for example, simply ensuring that an income inclusion rule operates in the same way across jurisdictions. Instead, it should be comprehensive and cover all elements of the GloBE Rules, including the details of the GloBE computations. This process should also address definitional issues, such as “excluded entities” and “excluded income” in the same way, to minimize any risk of over-taxation where a jurisdiction does not properly apply such definitions.

To ensure effectiveness and compliance, we believe that the outcome of the multilateral review process should be binding upon jurisdictions, with meaningful consequences for non-compliance.

In addition, we encourage the Inclusive Framework to develop processes with respect to GloBE such as those that are currently in place with respect to BEPS Action 14: Making Dispute Resolution Mechanisms More Effective. This could include development and publication of a list of applicable minimum standards and establishment of a process for reporting statistics on jurisdictions' tax certainty practices with respect to GloBE. Minimum standards in this area should include, for example, establishment of GloBE dispute prevention and resolution mechanisms, ensuring access to such mechanisms notwithstanding any existing barriers that may currently exist (e.g., ensuring access even in cases of audit settlement), and allowing for submission of a case to the Competent Authority of either relevant jurisdiction.

We agree that referral to the Inclusive Framework could serve as an important process for broad issues related to the GloBE Rules. However, as the Consultation Document acknowledges, this would not be a forum for addressing and resolving specific cases. Moreover, we note that under this proposal such referral would need to be submitted by a jurisdiction's tax authority and could not be initiated by a taxpayer. In addition, consideration should be given to the level of resources that would be needed to

take on referrals and the timeline required to address referred issues through the release of additional Administrative Guidance. Furthermore, during the Inclusive Framework's consideration of the referral, tax administrations and taxpayers would face a lack of tax certainty regarding the referred issue. Consideration is also required as to how any guidance resulting from a referral would be implemented by jurisdictions, the timeline for doing so, and the consequences for failure to do so.

### ***Common risk assessment and co-ordinated compliance***

Our experience to date is that the International Compliance Assurance Programme (ICAP) has been well received by many taxpayers as an opportunity to obtain a degree of comfort as to the tax treatment and risk level of specific matters from multiple tax administrations. The potential to leverage and expand this existing program to cover GloBE related issues could be an efficient option, in comparison to developing and implementing a separate program from scratch.

However, the limitations of the current ICAP must be recognized. For example, the outcome is not legally binding (giving scope for possible uncertainty and tax audit risk), there is no possibility to appeal an outcome and there is no legal obligation for the tax administrations involved to resolve potential disputes. Tax administrations are responsible for deciding whether to participate in ICAP, and currently 22 jurisdictions have confirmed ICAP participation, which is a relatively small percentage of the 142 Inclusive Framework members. Collectively, these factors mean that the process may not be efficient with respect to the GloBE Rules and that there still would be significant scope for inconsistencies in interpretations between jurisdictions. Further work would be needed on how to expand participation and make improvements to the existing program.

Therefore, while ICAP or a similar program could be helpful, this alone would not be sufficient to achieve binding tax certainty with respect to the GloBE Rules broadly. Such a program could be a good complement to an MLC with a MAP article.

### ***Binding advance certainty mechanisms***

EY has wide-ranging experience assisting clients in obtaining APAs, and we believe that bilateral and multilateral APAs can be very effective tools for avoiding international tax disputes and achieving tax certainty over extended periods. This is evidenced by the growing APA activity globally. We agree that an APA-like mechanism would be effective in providing binding certainty. Such an APA-like mechanism would operate by reference to the GloBE Model Rules, Commentary and Administrative Guidance, along with the outcomes of a robust and ongoing peer review process, as the applicable common global standard.

The limitations of an APA-like mechanism in the context of the GloBE Rules must be recognized however, in particular the timeframe to negotiate and the fact that there typically is not a guarantee that agreement can be reached. There are also practicalities that need to be considered, such as Competent Authority resources, the ability to make APA requests which depends on the coverage of jurisdictions' tax treaty networks and the inclusion of an article to allow such requests (although an MLC with a MAP article could serve as a basis) and the willingness of tax administrations to reach binding certainty agreements like APAs for rules as new and complex as the GloBE Rules. In addition, further work would be needed on ensuring broad access to an APA-like mechanism and making adaptations to the existing APA mechanism to accommodate GloBE cases.

It is also important to recognize that, while there have been significant developments and improvements in this area, including the OECD’s recently published Manual on Bilateral APAs and Manual on MAPs and APAs, not all jurisdictions have an established APA program and the level of APA experience varies across jurisdictions. In this context, the development and publication by the OECD of guidance and a procedural framework for jurisdictions to accept and process APA-like applications with respect to GloBE would be beneficial (similar to the OECD Manual on Bilateral APAs published on 28 September 2022).

## **Comments on dispute resolution mechanisms**

### ***Substance of a dispute resolution mechanism***

While we generally agree with the three basic elements for a dispute resolution mechanism as described in the Consultation Document, in our view, these could be enhanced further.

- Under the first element, the MNE would be allowed to submit a request to a Competent Authority in a jurisdiction where an action taken by such jurisdiction could result in taxation not intended under the GloBE Rules. This could be expanded to refer to situations where an action “could result in taxation not intended in accordance with the GloBE Model Rules, Commentary and Administrative Guidance.”
- Under the second element, the Competent Authority would, where justified, be allowed to resolve the case with Competent Authorities of the other jurisdictions concerned that are similarly empowered, in line with a common global standard.
- Under the third element, jurisdictions would implement any agreement between the Competent Authorities notwithstanding domestic time limits. The inclusion of this “notwithstanding” clause is important to ensuring implementation of any agreement reached. The question of which dispute resolution mechanism would be most appropriate is also interlinked – for example, jurisdictions with treaties that lack a “notwithstanding” clause should be encouraged to amend their treaties to include this or to amend domestic law provisions to overrule any statute of limitations in case of a competent authority agreement. This clause also could be broadened to “notwithstanding the limitations of any domestic laws” to clearly override any other potential domestic barriers to implementing competent authority agreements.
- As a fourth essential basic element, we strongly encourage inclusion of mandatory binding arbitration. In our experience, while MAP cases are often resolved without the need for arbitration, the possibility of arbitration focuses the participants on reaching agreement and encourages both timely resolution of cases and a principled approach to the negotiations, providing taxpayers with more confidence in the process.

To address differences in interpretation or application of the GloBE Rules between jurisdictions, we strongly believe that access to a dispute resolution process should be available for all potential disputes. A broad scope is needed. Eligibility should not be limited to cases of double taxation; all cases that could result in taxation not in accordance with, or not intended under, the GloBE Rules (including any instance of over-taxation) should be eligible. Scoping issues also should be eligible for dispute resolution (i.e.,

whether a taxpayer falls within the scope of the GloBE Rules). In addition, where there is uncertainty or disagreement as to whether a case is eligible for the dispute resolution process, that very issue should be able to be dealt with as part of the process.

***Instruments available for a dispute resolution mechanism***

As reflected in our opening comments, we believe that an MLC with a MAP article and binding arbitration is essential. This MLC should recognize the potential multilateral nature of GloBE disputes and be broad in its coverage. Given the time it will likely take for an effective MLC to be negotiated, signed and ratified, consideration should also be given to including provisions for retroactive effect.

It is our view that the other instruments discussed in the Consultation Document would not be an effective substitute for such an MLC. That said, with the backstop of such an MLC in place, we see benefit in making use of all other available instruments that could help in resolving disputes.

The Convention on Mutual Administrative Assistance in Tax Matters could be beneficial in that it is a basis for consultations among tax administrations. However, it is not a mechanism that taxpayers can access.

With respect to existing treaties, Article 25(3) of the OECD Model Tax Convention could potentially serve as a basis for Competent Authorities to resolve disputes in relation to the GloBE Rules, as it allows for Competent Authorities to engage with respect to any cases of double taxation not provided for in the treaty. However, this is dependent on jurisdictions' treaty networks, whether such treaties include provisions based on Article 25(3) of the OECD Model Tax Convention and whether access to MAP on this basis is available to taxpayers under domestic law. As a practical matter, reliance on existing treaties would therefore require expansion of treaty networks and both amendments to treaties to include Article 25(3) provisions and changes in domestic law to ensure access to MAP under Article 25(3) situations. Furthermore, Article 25(3) refers to matters of double taxation, and it is essential all situations of over-taxation or non-alignment that could arise under the GloBE Rules be covered by an accessible dispute resolution mechanism. Moreover, confirmation would be needed that the GloBE Rules would be considered a "covered tax" under Article 2 of treaties.

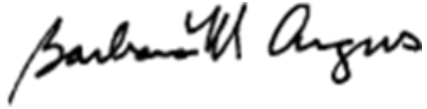
To the extent a domestic law provision could provide for binding multilateral dispute resolution, use of such provisions would be beneficial. However, there likely would be challenges in ensuring that such a provision would be applied in a consistent way. Moreover, any such domestic law provision on dispute resolution would have to override the domestic law that created the dispute or inconsistency, allow for sharing of information with other jurisdictions and operate to bind the jurisdiction whose domestic law provisions are in question. As an alternative to exploring the introduction of domestic law dispute resolution provisions separate from the GloBE Rules, consideration could be given to including such a provision within the GloBE Rules themselves (which would then be implemented through incorporation into domestic law).

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The global EY team that prepared this submission would welcome the opportunity to discuss these comments in greater detail and to continue to participate in the dialogue as the Inclusive Framework advances the work on this important project.

If there are questions regarding this submission or if further information would be useful, please contact Joel Cooper ([joel.cooper@uk.ey.com](mailto:joel.cooper@uk.ey.com)), Ronald van den Brekel ([ronald.van.den.brekel@nl.ey.com](mailto:ronald.van.den.brekel@nl.ey.com)) or Barbara Angus ([barbara.angus@ey.com](mailto:barbara.angus@ey.com)).

Yours sincerely, on behalf of EY,

A handwritten signature in black ink that reads "Barbara M. Angus". The signature is written in a cursive style with a large, stylized initial 'B'.

Barbara M. Angus  
EY Global Tax Policy Leader