THE 100 GROUP

Taxation Committee

2 December 2019

International Co-operation and Tax Administration Division
Centre for Tax Policy and Administration

Taxpublicconsultation@oecd.org

Dear Sirs

OECD Public Consultation Document: Global Anti-Base Erosion Proposal ("GloBE") Pillar Two

We welcome the opportunity to respond to the OECD's public consultation document on the GloBE proposal in relation to Pillar Two.

The 100 Group is a representative body made up of large UK businesses from a variety of sectors and as such the implications of the proposals and the relative concerns of our members will vary.

We set out below our comments on the proposals in areas where we believe there is a broad consensus across our membership. In responding we would also acknowledge the response of the CBI in the UK to which many of our members will have contributed and which we also support.

Adherence to certain principles

As we have previously stated, a basic principle is that tax should be paid on profits (not revenues) once and only once. Most businesses will be willing to sacrifice some degree of tax purity and accuracy if the solution provides a simple and efficient compliance mechanism that, critically, prevents multiple layers of taxation.

As we suggested as part of our response to the Pillar One proposals, it is critical that there is a mandatory dispute resolution mechanism. We support some form of One Stop Shop and we think it is important that this proposal also forms part of the remit of a central agency that can oversee, review and mandate how these proposals would operate in practice.

This would also be the best approach in terms of ensuring consistent application of the rules in some of the more complex areas such as calculation of the tax base, treatment of losses etc.

Objectives of GloBE

Pillar One focussed on the allocation of taxing rights by reviewing profit allocation and nexus rules. Many governments and taxpayers recognise the challenges of increasing digitalisation of the economy and other issues such as non-routine profits on marketing intangibles. The need for an international consensus solution is understood, particularly as unilateral measures proliferate.

In relation to Pillar Two, however, the policy still needs to be properly articulated. It is not clear whether the objective of Pillar Two is to prevent or limit tax competition or to address BEPS issues and the use of havens.

We consider that countries should be able to set their own tax policy, including the tax rate, in such a way that it induces and supports sustainable economic growth, creates jobs and is tailored to the specific domestic needs of that jurisdiction. The impact on smaller and developing countries also needs to be considered. An invasive Pillar Two approach could limit policy options for economies that need them the most.

In order to maximise the chances of political consensus and to manage potential disruption, the minimum tax rate will either need to be set at a low rate or the proposals will need to be focussed on artificial arrangements (we believe in the context of EU law, without a carve-out for non-artificial arrangements, any proposal runs the risk of being struck out by the courts).

In relation to residual BEPS concerns, it remains unclear the extent to which BEPS issues still exist. Some of the original BEPS proposals are still in the process of being implemented and the effects have yet to be seen. We believe further BEPS actions of the type proposed under Pillar Two should be delayed until a proper assessment of the effect of BEPS 1.0 has taken place to ensure that any action is evidence based. Without this there is a severe risk that a complex international taxing framework is introduced which frustrates international businesses flows, adds complexity and introduces multiple taxation.

Interaction of Pillar One and Pillar Two proposals

These proposals are less advanced than Pillar One and significant obstacles remain before political consensus will be able to be achieved.

The document is silent on the interaction of Pillar One with Pillar Two. We believe that the interaction of Pillar One and Pillar Two is of critical importance. Reallocations under Pillar One will have implications for Pillar Two and it is not clear which would take priority. The need for them both to work together and to not produce distortions or multiple layers of taxation is clear.

At this point in time we consider that there is more of a need for a Pillar One than Pillar Two. We therefore think the Pillar Two proposals should not be included within the current timetable for having architecture in place and agreed by early 2020. Instead, the introduction of any Pillar Two proposal should take place after the impact of existing BEPS 1.0 changes have bedded in and have been properly assessed and Pillar One has been implemented. The need for any Pillar Two proposal could then be properly assessed before implementation.

Interaction of the different parts of Pillar Two

The proposal set out in the paper only addresses the income inclusion rule which is the first of four proposed legs. The interaction of the different legs and, in particular, the priority of each leg is not addressed.

We consider that the primary rule should be an income inclusion rule with the other legs (undertaxed payments, subject to tax and switchover elements) only used to the extent that the income inclusion rule fails for some reason (for example, because the payment is to an entity not subject (directly or indirectly) to an income inclusion rule).

Building on existing BEPS recommendations

We believe that any Pillar Two proposal should build on existing BEPS recommendations.

Significant work was done in relation to both BEPS Action 3 and BEPS Action 5. We believe that a carve-out or safe harbour should be considered for situations where the ultimate parent is in a BEPS Action 3 compliant regime.

Consideration should also be given to providing a carve-out where a jurisdiction already has an income inclusion regime which is considered to be aligned with the OECD proposals (for example the US GILTI regime).

BEPS Action 5 provided a carve-out where an incentive regime is in compliance with the standard on harmful tax practices. A similar carve-out should be introduced here. We believe that governments should be allowed to offer incentives in the form of OECD approved packages. Without such a carve-out we are concerned that any proposal will merely push governments to switch to non-tax incentives, why are generally far less transparent.

Any proposal would also need to comply with other relevant supra-national law such as EU law. Particular concerns exist regarding the need to have a carve-out for substance without which these proposals would likely fall foul of EU law. From this perspective, an easier answer than introducing a new layer of tax complexity in the form of the Pillar Two proposals might be a change to the CFC rules (to the extent that is required, eg to build in or adjust the minimum rate of tax exemption).

Definition of 'tax'

The proposals need to define what taxes should be included when assessing whether a 'minimum tax' threshold has been met. Many countries, including the UK, have developed tax policies which have shifted the tax burden away from taxes on profits and onto taxes on other assets employed (often people and property). In a similar vein, many sectors will suffer sector specific additional taxes or levies (for example, extraction industries or financial services).

The is demonstrated in our recent 'Total Tax Contribution' report which sets out the tax contribution of 100 Group members and tracks the changing profile of tax over the last 15 years. In 2005/2006 corporation tax accounted for 50% of the total tax contributed by large businesses in the UK, now it is 25%.

Comments on specific areas

Given the further development that is still needed on the proposals the comments below are preliminary.

1. Tax base Determination

Use of financial accounts

Calculation of the tax base must be consistent and use measures that are internationally recognised. The calculation must also use information that is readily to hand and therefore does not require the preparation of additional reports or calculations as far as possible.

In our view, having a starting point of the global consolidated accounts will simplify the consequential compliance burden for businesses. The use of such financial statements would offer an advantage in that there is a positive disincentive to under-declare profits. Public companies will generally want to disclose high profits as possible for the benefit of investors and analysts rather than report lower profits to help minimise their tax burdens.

The use of global accounts does not come without risks; local accounts are more likely to be aligned with local tax bases and consolidated accounts may require significant adjustments to allow them to be meaningfully compared with cash taxes paid.

It also cannot be assumed that all group entities adopt the same financial statement and GAAP standards as the parent entity. This is often not the case. The global consolidated accounts may primarily be based on business unit data rather than an aggregation of individual subsidiary IFRS accounts.

Adjustments to the tax base

As the paper notes, there will need to some mechanism for adjustments to be made. These must be consistent to ensure distortions do not arise in the calculations. Starting with global or world-wide consolidated statements immediately helps in this respect as it removes intra-group transaction flows such as dividends.

One key area that needs some thought is the treatment of losses and unclaimed allowances (for example, tax depreciation on assets). Often these will unwind over time, but the time taken may vary significantly. The utilisation of losses or asset write-downs in the early years after a project begins to realise a profit will lead to a reduced effective tax rate. This reduced effective rate is completely appropriate but may give the appearance of something which should be counteracted under these proposals.

Long term capital intensive projects may run for many years before profits start to be recognised and businesses or sectors with longer investment cycles should not be disadvantaged by the proposals.

Some form of recognition of deferred tax would help deal with this to a large extent. However, different accounting standards may have different rules on recognising such assets and so it is not perfect. It may require the inclusion of unrecognised deferred tax as well as recognised deferred tax assets.

Other aspects of adjustments that would need to be considered would include:

1. Capital transactions (for example material disposals). Many jurisdictions may have different tax treatments for capital asset sales and this would need to be stripped out to arrive at a true 'operational' tax base on which to base any Pillar Two calculations.

2. Matters that are accounted for through reserves which may need adjustment such as share based payments (although this may be dealt with if a kind of deferred tax approach is chosen).

2. Blending

Following on from this, blending should also be undertaken on a world-wide basis rather than even on a jurisdictional or entity basis. We believe that requiring either entity or jurisdictional blending would pose serious compliance burdens.

Whilst a global blending approach might be considered to limit the impact of the proposals, it would also mean the proposals are less likely to infringe on the tax sovereignty of individual countries. A global blending approach would also reduce the compliance burden and ease administration.

3. Carve-outs

Scope limitations

We consider that any approach needs to be proportionate and to minimise extensive overlay of new tax rules. In our view it would be sensible to provide carve-outs where certain standards have already been met. This could include the following:

- There are a lot of parallels between this proposal and Action 3 which should be leveraged. A safe harbour should be provided where the ultimate Parent Co. country has a BEPS Action 3 compliant CFC regime (recognising that CFC regimes may need to be amended to some degree, for example with a minimum tax rate and, to the extent it does not already exist, a business substance override). If this is not a practical way forward, for example because of the challenges of monitoring a standardised CFC regime, then the interaction of Pillar Two with existing CFC regimes will need to be considered to avoid multiple taxation. This would increase the complexity of compliance and lead to more disputes.

- It is also critical that the proposals do not adversely impact international trade and investment by undermining existing incentive regimes. We would therefore also recommend a carve-out for incentives which are compliant with the BEPS Action 5 standard on harmful tax practices.

- There should be a carve-out for companies with a global effective tax rate in excess of the GloBE minimum tax rate.

- Other approaches could be considered. For example, where a country has taken action to ensure that it does not fall within the definition of non-cooperative tax jurisdictions should they be given some form of a carve-out? For these jurisdictions increasing the tax rate may be particularly challenging due to the nature of their economy.

Sector specific issues

The OECD should consider whether specific sectors should be excluded or exempted from the Pillar Two proposals.

This might include industries that are subject to specific tax or regulatory regimes (often at relatively high rates of tax) such as the extractive industries or financial services.

In addition, funds and investment activity may require some specific exemptions. These industries will often locate conduit investment vehicles in low tax jusridictions. This is not to achieve an unfair tax outcome but to achieve tax neutrality. In this way a fund and its investors are taxed at the level of the business operations and at the level of the investor but with minimal tax leakage in between. This is widely accepted by tax authorities and any Pillar Two measures should not distort the investment market, which is often used by pension funds.

Thresholds

There should be a threshold below which businesses are not subject to these proposals in order to simplify compliance burdens for smaller businesses. It may be sensible to adopt the same threshold as that chosen for Pillar One for ease and administrative simplicity.

Conclusion

We trust the above comments are useful in developing the proposals further. Should you have any queries or wish to discuss the response please do contact me at chris.oshea@100group.co.uk

Yours faithfully

Chris O'Shea

Chair
Tax Committee

Who we are:
The 100 Group of Finance Directors represents the view of the finance directors of FTSE100 and several large UK private companies. Our member companies represent almost 90% of the market capitalisation of the UKFTSE 100 Index. Our aim is to contribute positively to the development of UK and international policy and practice on matters that affect our business, including taxation, financial reporting, corporate governance and capital market regulation. Whilst this letter expresses the views of the 100 Group of Finance Directors as a whole, those views are not necessarily those of our individual members.