

OECD hosts public consultation on global anti-base erosion (GloBE) proposal under Pillar Two of BEPS 2.0 project

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Executive summary

On 9 December 2019, the Organisation for Economic Co-operation and Development (OECD) hosted a day-long public consultation on the consultation document entitled "Global Anti-Base Erosion (GloBE) Proposal - Pillar Two" (the [Consultation Document](#)), which was released by the OECD on 8 November 2019 in connection with the ongoing project on addressing the tax challenges of the digitalization of the economy.

The OECD received close to 200 written comment submissions on the Consultation Document. Representatives from business, labor groups, non-governmental organizations (NGOs), and academia participated in the consultation to discuss their perspectives on the specific technical issues covered in the document including: (i) the extent to which effective tax rate (ETR) computations should blend the taxes paid by a multinational entity (MNE) on a global or jurisdictional basis; (ii) whether carveouts or thresholds should be incorporated into the GloBE proposal; and (iii) whether and how financial accounts should be used as the tax base for determining an MNE's ETR. Commentators also expressed their views on other issues, including the objectives of the GloBE proposal and the lack of clarity regarding those objectives and how the elements of the GloBE proposal should be coordinated. Government officials from jurisdictions that are part of the 136-member Inclusive Framework attended the consultation in order to hear the stakeholder perspectives. EY submitted a [comment letter](#) and a global team from EY participated in the consultation.

At the opening of the consultation, the OECD Secretariat and the German government official who chairs the Inclusive Framework, addressed the Base Erosion and Profit Shifting (BEPS) 2.0 project as a whole in light of the recent exchange of letters between United States (US) Secretary of the Treasury Steven Mnuchin and OECD Secretary-General Angel Gurría regarding the US position on the project. The officials stressed that work will continue on the project, noting that the G20 Finance Ministers have pledged to move forward, but a critical upcoming meeting of the Inclusive Framework in late January may very well determine the fate of Pillar One given the change in the US position requesting that Pillar One be viewed as a safe harbor rather than a mandatory change to existing transfer pricing rules. With respect to Pillar Two, the OECD Secretariat laid out a timeline for future work on the GloBE proposal in the near term, including plans to issue an additional and more detailed consultation document on Pillar Two early in 2020. The comments made by stakeholders during the consultation session reflected clear differences in views about the GloBE proposal between the business community and NGOs

Detailed discussion

Opening

The consultation began with the OECD Secretariat and the German Chair of the Inclusive Framework providing assurances that the BEPS 2.0 project will continue to move forward, with a recently renewed commitment from the G20 Finance Ministers, following the recent communication between the US Treasury Secretary and the OECD Secretary-General regarding the US position on the project. Turning to Pillar Two, the Secretariat laid out plans for further work on the GloBE proposal, acknowledging that the Consultation Document is limited in that it focuses mainly on the so-called income inclusion rule element of the GloBE proposal and does not provide any detail on the undertaxed payment rule element of the proposal or on which of the two elements should be given priority. The Secretariat promised that a more high-level and coordinated discussion of the GloBE proposal would be provided in a future consultation document. They indicated that a draft of this more detailed document will be discussed by the 136-jurisdiction Inclusive Framework when it meets in late January 2020 and could be released in February 2020 for comment and discussion at another public consultation potentially in March 2020.

The comments during the consultation session from business representatives and NGO representatives reflected clear disagreement over key aspects of the GloBE proposal. Business representatives generally advocated simplified approaches to applying the income inclusion rule, including use of a global blending approach for determining ETRs and use of consolidated financial statement information to measure tax base. Representatives of NGOs, on the other hand, advocated application of the income inclusion rule on a jurisdictional basis, use of a bottom-up approach to calculate jurisdictional ETRs, and design of the GloBE proposal to ensure that MNEs pay top-up taxes with respect to any jurisdictions where their ETR is below the agreed minimum tax rate.

Level of blending of taxes

The OECD Secretariat and NGO representatives emphasized during the day's discussion that the minimum tax rate to be agreed should be influenced by the extent of blending of taxes in computing ETRs that is provided for in the design of the GloBE proposal. At least two participants mentioned a minimum tax rate of near 20% if global blending is to be permitted. While it was noted that blending at a more granular level could reduce that rate, NGO representatives advocated a higher minimum tax rate regardless of the level of blending. One NGO representative asserted that, because the calculation of the tax base will be "imperfect," a higher minimum rate is justified.

The US global intangible low-taxed income (GILTI) provision was cited by several speakers as an example of a form of minimum tax that should be a model for the income inclusion rule element of the GloBE proposal, and business representatives advocated for the global blending approach that is part of the GILTI provision. However, other commentators and some OECD Secretariat members suggested a jurisdiction-by-jurisdiction approach would be preferable to global blending. One business participant presented an alternative approach - one that might be thought of as a middle ground - where the initial step in determining applicability of the GloBE proposal to an MNE would be a global ETR measure. Under this idea, if the MNE's global ETR meets or exceeds the agreed minimum tax rate, the MNE would not be subject to the GloBE proposal; if the MNE's global ETR is below the agreed minimum rate, however, the GloBE proposal would apply to the MNE on a jurisdiction-by-jurisdiction basis.

One business representative commented that the level of blending should be based on the objective of the GloBE, maintaining that the objective has not been clearly stated in OECD documents to date and that therefore it is difficult to determine the appropriate level of blending. This commenter suggested that if, for example, the objective is for MNEs to pay a minimum level tax, global blending should be the rule, but that if the objective is to ensure that payments are subject to tax in the appropriate location, blending should work in a different way.

Some of the business representatives criticized the OECD for not clearly articulating the objectives and theory of the GloBE proposal. Another criticism expressed was that it is not clear if the intention is that the GloBE proposal be completely harmonized around the world or not. One company representative noted the enormous systems build that may be required by MNEs just to determine whether they are in or out of the GloBE. Another added that the potential level of complexity is extremely high, urging that the implementation process for the GloBE proposal proceed slowly.

Business commentators stressed the merits of blending on a global basis, pointing out that the use of consolidated financial statement information would match well with global blending and that only a global blending approach would preserve the investment benefits some jurisdictions provide (e.g., R&D incentives). A jurisdictional-based ETR measure would effectively eliminate such investment benefits, which was cited by NGO representatives as supporting jurisdictional rather than global blending because they viewed the provision of such preferences as burdensome for developing countries.

Carveouts and thresholds

Many participants supported the Consultation Document's suggestion that a carveout from the GloBE proposal might be appropriate for jurisdictions that are compliant with the BEPS Action 5 standards relating to harmful tax practices. Others argued for the development of a white list of jurisdictions that, because of the construct of their business tax regimes, should be viewed as GloBE-compliant, effectively carving out some jurisdictions and therefore narrowing application of the GloBE in order to simplify its implementation. There also was discussion of regimes that should be considered to be qualifying minimum tax rules for purposes of the GloBE proposal - specifically the US GILTI provision and also controlled foreign corporation (CFC) regimes more generally. In this regard, some commentators

noted that existing CFC regimes should be taken into account in determining whether companies are subject to a minimum level of tax. Some recognition of these types of current regimes may be part of the details to come in the next consultation document, but it is not clear what that might mean for the application of other components of the GloBE proposal. Specifically, concerns were raised about the scope of the undertaxed payments rule and whether a qualifying minimum tax under the income inclusion rule would prevent any application of the undertaxed payments rule. Because details on those components of the GloBE proposal are yet to come, the OECD Secretariat acknowledged it is hard to understand the full implications of a qualifying minimum tax.

Finally, commentators suggested that it would be appropriate to provide a minimum threshold, perhaps based on the country-by-country reporting threshold of US\$750 million, to exclude smaller businesses from application of the GloBE proposal and the significant accounting and compliance burden that it could impose.

Use of financial accounting information

Participants discussed technical and practical issues with the use of financial accounting to determine a group's tax base and ultimately measure the ETR relevant under the GloBE proposal. Concerns with reconciling or adjusting for different jurisdictions' measurement of taxable income were raised and led to discussions about where the data collection should start (i.e., a top-down or bottom-up approach). From a business perspective, the top-down approach was presented as a more reasonable approach that will produce the most reliable data. This is particularly true for publicly-traded companies, whose financial information is subject to stringent regulation, audit, and oversight.

Under a bottom-up approach, which was preferred by NGO representatives, it was noted that numerous adjustments would be required to coordinate the various rules of local jurisdictions. This would not necessarily (or likely) align with information reported on a group's consolidated financial statements and that could cause conflicts or disputes about the application of the income inclusion rule. Another issue identified by a business representative was the treatment of investments in subsidiaries that are not wholly owned by the MNE.

Commentators suggested ways to simplify the use of financial accounting information by (1) coordinating the measurement of group profit between Pillar One and Pillar Two, (2) limiting any requirements to make adjustments

to financial statements to reflect tax accounting concepts, and (3) providing that review of the computation of the global income tax base and tax expense of an MNE is the sole responsibility of the tax authority of the global parent's jurisdiction of residence.

Implications

The public consultation on the Pillar Two consultation document underscored the divergent views on the GloBE proposal and also the need for more details to be fleshed out. The announcement of plans to issue a more detailed document early next year and to hold another consultation session on Pillar Two was welcome news

It is important for companies to continue to follow developments with respect to Pillar Two and the larger project closely as they unfold in the coming months. Companies should consider taking the opportunity to participate in future consultations or otherwise engaging with OECD and country policymakers on the design of the new rules. Companies also should begin to evaluate the potential impact of these changes on their tax profile.

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