STELLUNGNAHME

Berlin, April 11, 2022

Association of German Chambers of Commerce and Industry (DIHK)

DIHK Statement on the OECD Public Consultation on the Implementation Framework of the Global Minimum Tax

Thank you for giving us the opportunity to comment on the public consultation (hereafter "PC"). Given the short deadline and the complexity of the issues, we have only been able to provide an initial assessment in our statement. This of course is neither conclusive nor complete and primarily reflects the specificities of the traditional industries in Germany.

A. Executive Summary

From a business perspective it is of crucial importance that new Global Anti-Base Erosion (GloBE) Rules should enable MNEs to operate in a reliable manner with a high degree of legal certainty. Therefore, all regulations in connection with the levying the new global minimum tax and its administration must be very precise and must not leave room for interpretation that could lead to litigation.

The design of the new tax and the administrative mechanisms including data collection, reporting, filing, dispute proceedings must be simple and robust and must not cause high costs unless necessary. Administrative Costs and burdens for both enterprises and fiscal authorities must not be disproportionate to the purpose of eliminating unfair tax competition among jurisdictions.

The Inclusive Framework on BEPS and the OECD-Secretariat should be very aware that the new Global Minimum Taxation (GloBE) overburdens enterprises with costly demands simply because member states cannot agree among themselves on fair tax competition.

We would like to point out that covered groups within the scope of GloBE being confronted with high, complex, and costly requirements would face competitive disadvantages compared to non-covered competitors.

As a starting point for the calculation of GloBE Income, we consider it appropriate to refer to financial accounting regimes which will be subsequently modified for tax reasons. In view of the short application period (until 1.1.2023) and substantial implementation difficulties which will overstrain MNEs' capacities, we recommend, however, to do without complex tax adjustments at least for a two-year transitional period. However, it would be best to postpone the application of GloBE for at least 2 years.

From the point of view of our companies, it is necessary to ensure a constant adaptation of the GloBE regulations, be it the material provisions as well as the adminstrative procedures. This is

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even more important because GloBE introduces a completely new taxation procedure, the effects and problems of which will only become apparent in practice over time.

It would therefore make sense to set up an expert panel consisting of representatives of the tax authorities involved as well as independent experts from the business community. Independent of the fiscal interests of the IF member states, this expert panel could quickly identify any need for action that might arise and make proposals for an adjustment of the Model Rules, Commentary and further regulations.

However, MNEs within the scope of Pillar 2 may also be subject to the Pillar 1 and must comply with data collection and processing obligations there. For this reason, we call for a consistent and coordinated set of rules determining profit calculation within both pillars. A common set of rules and definitions should be created determining the key tax figures for both, Pillar 1 and 2 calculations.

B. Detailed Explanations

General Remarks

The commentary provides additional information relevant to the interpretation of the Model Rules. The commentary clarifies (e.g., definition of qualified refundable tax credits, transition and pre-Pillar 2 deferred tax attributes, currency conversion) and identifies areas of consideration (e.g., safe harbours, arm's length requirement for cross-border transactions, definition of qualified IIR). In addition, the commentary indicates that further guidance may be provided with the planned GloBE Implementation Framework. The GloBE Implementation Framework shall provide agreed administrative procedures, such as filing obligations, and multilateral review processes as well as consider the development of safe harbours to facilitate both compliance by MNEs and administration by tax authorities (release expected not until late in 2022). However, one may scrutinize whether the commentary reflects the complexity of the Model Rules and the significant implementation efforts for MNEs adequately.

The GloBE procedure is a transnational procedure involving different Member States and affecting different national tax jurisdictions. It is therefore even more important that there is a uniform understanding among all tax authorities regarding both the terms and the procedures.

Key observations

1. **Do you see a need for further administrative guidance as part of the Implementation Framework?**
    - Clear and coordinated timelines for implementation of Pillar 1 & Pillar 2 rules
    - Exclusion for Partially-owned Parent Entities (POPEs) wholly owned by another POPE
    - Guidance on interdependencies between Pillar 1 & Pillar 2 rules, e.g., for determination of Covered Taxes and GloBE income
    - Guidance on the interplay of US GILTI and CFC taxation in multi-level participation chains with Pillar 2 rules

- Guidance on how to comply with the arm's length requirement for cross-border transactions to mitigate double taxation (prior mutual agreements on transfer prices not usually the case)
- Need to provide administrative guidance on a rolling basis at least for a transitional period
- Phased-in approach, e.g., considering safe harbours/de minimis thresholds and uspension of penalties

2. **Do you have any comments relating to filing, information collection including reporting systems and record keeping?**
   - Alignment with Country-by-Country Reporting (CbCR) filing rules, e.g., for consolidated entities
   - Option to single filing at Ultimate Parent Entity (UPE) level – currently unclear for domestic minimum taxation, POPE locations etc.
   - Early and standardized information on filing requirements for GloBE tax return, e.g., globally aligned approach on forms, information requirements, consultation and appeal procedures/timelines, record keeping rules, etc.
3. **Do you have any suggestions on measures to reduce compliance costs for MNEs including through simplifications and the use of safe harbours?**
   - Provision of a "whitelist" for jurisdictions that provide for a qualifying Income Inclusion Rule (IIR) and an Effective Tax Rate (ETR) above 15 %
   - Introduction of relevant safe harbours and de minimis thresholds (currently only a jurisdiction specific de minimis exclusion is proposed provided the following conditions are met GloBE revenue less than EUR 10m and GloBE income less than EUR 1m)
   - Sample mapping based on IFRS reporting and alignment of the Deferred Tax Liability recapture period of 5 years with useful life applied for accounting purposes
   - No retroactive adjustments in case of tax audits, transfer pricing adjustments etc.
   - Conduct a safe harbour/simplification check based on a corporate information statement
4. **Do you have views on mechanisms to maximize rule co-ordination, increase tax certainty and avoid the risk of double taxation?**
   - Coordinated filing, appeal and conflict settlement mechanisms in all countries must be established
   - Competent Authority of the jurisdiction in which the Filing Entity is located is single point of contact and represents all other jurisdictions for binding clearance – either upfront (e.g., for APAs) or retrospective (e.g., for appeal procedures, MAPs and joint tax audits)
   - Binding rules to avoid double taxation, e.g., by way of a tax credit mechanism at the level of the UPE
   - Definite and binding alignment with US government if US tax system (GILTI) is a qualified IIR, common approach for jurisdictional blending to be considered

- Avoiding the risk of double taxation by appointing an expert panel consisting of both independent business representatives and members of tax authorities to mediate.

Additional aspect: Confidentiality of provided information (esp. in case specifically requested by tax paying entity (e.g., for individual tax information for natural persons/ families as investors) must be ensured. For example, only Competent Authority of the jurisdiction in which the Filing Entity is located receives all relevant data and confirms completeness and correctness to other participating tax authorities.

In-depth

a) Determination of Covered Taxes & GloBE Income or Loss as such

- **Observation**: The Model Rules and technical details provided in the Commentary require numerous data points in a granularity which are not yet available for financial reporting purposes. This process is very burdensome and triggers a significant additional compliance burden. The Covered Tax and Globe Income determination is complex.
- **Recommendation**: Against this background, it would – in addition to defer the application of the new rules by one year to Jan 1, 2024 – be highly appreciated if the relevant data points and/or a set of data points could be referenced to a standard IFRS financial statement. Such a reference table clarifies controversy issues and ensures a common interpretation of the Pillar 2 rules in different jurisdictions.

b) Co-existence of Model Rules with US GILTI

- **No Details on GILTI**: The commentary does not provide any guidance on the compatibility of GILTI with the Model Rules presumably due to the pending legislative progress in the US with respect to the GILTI.
- **Additional guidance** shall be provided by the Implementation Framework (see Art. 10.1 ref. no. 127).
- **Observation**: It is unclear how the risk of double taxations will be mitigated. It is also unclear how the jurisdictional blending concept under Pillar 2 will be harmonized with the worldwide blending concept under US GILTI.
- **Recommendation**: Further guidance is required to mitigate competitive disadvantages for MNEs with US operations.

c) CFC Rules

- **Observation**: The concept requires respective tracking of jurisdictional CFC impacts for each low-taxed Constituent Entity (LTCE). The re-allocation of domestic taxes under a CFC regime to the respective CFC (LTCE) generally results in an increase of the CFC's ETR. It is unclear how the ETR will be determined in case the respective LTCE generates a high amount of active income in addition to relatively low passive income (e.g., ETR < 15 % possible in case only passive income is considered?).
- **Recommendation**: A common list with a classification of CFC regimes for multiple jurisdictions is recommended. It is unclear whether the qualification of US GILTI as a CFC regime – although it is a different concept than Subpart F – can be helpful.

In addition, it is unclear how the risk of double taxation can be mitigated, in particular in multiple-tier participation chains. It needs to be clarified whether the re-allocation of Covered Taxes also result in a GloBE income reduction at the level of the UPE. Also, an alignment of definition of "passive income" items in domestic CFC rules with the OCED Framework is required. If this is not the case, a tax credit mechanism needs to be implemented.

d) Interplay between Pillar 1 Amount A & Pillar 2

- **No Harmonization of Rules**: Rules for determining the tax base for Pillar 1 & Pillar 2 are not consistent (yet) and have different starting points. A harmonization of the tax bases has been discussed recently but the Commentary remains silent on this.
- **Interplay not clarified**: In addition, the Commentary does not clarify the interplay between Pillar 1 & Pillar 2. Timelines for implementing Pillar 1 & Pillar 2 not yet aligned based on OECD guidelines considering the proposed deferral of the first-time application of Pillar 2 rules according to the EU.
- **Observation**: It is unclear how the risk of double taxation will be mitigated. It was recently discussed to consider Pillar 1 Amount A as a Covered Tax for Pillar 2 purposes (but without a re-allocation of these taxes to any Constituent Entities (CEs)). In addition, it is unclear, how Pillar 1 adjustments will be reflected in Pillar 2 returns when Pillar 1 enters into force after Pillar 2 has become effective. The implementation of both Pillars triggers a significant compliance burden.
- **Recommendation**: Further guidance is required. A harmonized set of rules for Pillar 1 & Pillar 2 (e.g., aligned tax base determination and reporting unit determination, alignment with CbCR reporting principles etc.) is recommended to reduce the significant compliance burden and to better manage necessary process adjustments to gather the required data points. The timelines for implementing Pillar 1 & Pillar 2 should also be aligned under OECD guidelines. We strongly support the deferral of Pillar 2 entering into force by one year starting Jan 1, 2023, as proposed by the EU.

e) Priority Rule for several POPEs within the Participation Chain

- **Definition of a Partially-Owned Parent Entity (POPE)**: "Articles 2.1.4 to 2.1.5 apply to so-called "split-ownership structures", where some of the LTCEs have a significant (i.e., more than 20 %) minority interest holder outside the MNE Group. In this case, the GloBE Rules depart from the top-down approach and instead require a POPE to apply the IIR notwithstanding that it is in a lower-tier of the ownership chain" (Art. 2 ref. no. 7).
- **Observation**: The "wholly owned" requirement results in an MNE Group needing to file and pay Top-up Tax at every intermediate entity level that has a minority interest (even 1 %) if held underneath a (max.) 80 % POPE. This can become particularly burdensome in cases where such a POPE is located in the upper-tier participation chain underneath the UPE. This results in a large number of group entities with payments obligations and triggers additional compliance burden.
- **Recommendation**: No "wholly owned" requirement, i.e., if there are multiple POPEs in a participation chain of an MNE Group and if the POPE at the top of the participation chain is in a jurisdiction with a Qualified IIR, this upper-tier POPE (or

the UPE if Art. 8.1.2 is applicable for the upper-tier POPE and applied accordingly) applies the IIR with no lower-tier POPE being obliged to apply the IIR as well. In this context the interplay with Art. 8.1.2 is unclear, i.e., does this also refer to POPEs including the upper-tier POPE? According to Art. 8.1.2 “All Constituent Entities (including the Designated Local Entity) are discharged from the requirement to file a GloBE Information Return if the return has been filed by the UPE or by a Designated Filing Entity appointed by the MNE Group provided that the Competent Authority of the jurisdiction in which the Filing Constituent Entity is located has a Qualifying Competent Authority Agreement with the Competent Authority of the jurisdiction where the Constituent Entity is located.”

f) Arm’s length requirement for cross-border transactions

- **Computation of GloBE income**: Art 3.2.3 requires transactions between Group Entities to be priced consistently with the Arm’s Length Principle and recorded at the same price for GloBE purposes for all Constituent Entities that are parties to the transaction (Art. 3.2.3 ref. no. 96).
- **Complying with this requirement**: Where all the relevant tax authorities agree that a transfer price must be adjusted to the same price to reflect the Arm’s Length Principle, the counterparties shall adjust their GloBE Income or Loss based on that price for purposes of computing GloBE Income or Loss. For example, such an instance would arise where a bilateral Advance Pricing Agreement (APA) is agreed by the competent authorities of all counterparty jurisdictions concerned.
- **Observation**: The requirement imposes a significant compliance burden on MNE Groups, e.g., upon each finalized tax audit with transfer price adjustments the GloBE tax returns for several years (and quite old years) needs to be amended. In addition, transfer price adjustments of tax auditors are not tied to distinct transactions or counterparties. In addition, the rule increases the risk of tax controversy with multiple jurisdictions due to inconsistent interpretation of the Model Rules resulting in potential double taxation. It seems easier to comply with the above if adjustments have been agreed multilaterally.
- **Recommendation**: Further guidance is required. In addition, conflict resolution mechanisms need to be implemented for multiple jurisdictions particularly if the transfer prices have been agreed upon unilaterally.

g) Post Filing Adjustments

- **Computation of Adjusted Covered Taxes**: According to Art. 4.6.1 (ref. no. 120 et seq.) post filing adjustments to Covered Taxes are recognized in the year in which adjustments are made unless the adjustment results in a decrease of Covered Taxes. In the latter case, it is required to recompute the ETR and Top-up Tax for that prior year. A EUR 1m adjustment threshold for a decrease in Covered Taxes is applicable.
- **Observation**: This required MNE Groups to track and amend returns for subsequent corrections triggering an additional compliance burden. How to treat TP adjustments which could consider both increases and decreases in the same year?

- **Recommendation**: Post filing adjustments to be recognized in the current year, i.e., in the year the adjustment is made irrespective of whether the adjustment results in an increase or decrease of Covered Taxes. Anyhow, the EUR 1m threshold for acceptable decreases in Covered Taxes under the current concept needs to be increased significantly (e.g., [x] % of the total balance sheet).

h) Recaptured Deferred Tax Liabilities (DTLs)

- **Recapture Rule for Categories of DTLs**: According to Art. 4.4.4 ref. no. 89 DTLs recorded in other categories that do not reverse within five Fiscal Years must be recaptured in the Fiscal Year in which the increase in the Recaptured Deferred Tax Liability was originally included in the Total Deferred Tax Adjustment Amount.
- **Observation**: The five-year recapture period seems to be arbitrary as there are many temporary differences to be tracked which generally have a different recapture period. Hence, "shadow determinations" are necessary resulting in significant additional compliance burden. In addition, it is unclear what categories of DTLs shall be and how these are defined.
- **Recommendation**: The determination of Covered Taxes is overly complex and requires the tracking of many items. Hence, a takeover of DTLs as recognized in the IFRS financial statement would be required not considering any deviating DTL categories and/or recapture periods. In addition, a de minimis threshold for recaptured DTLs is highly recommended to better manage any additional tracking of DTL items/categories.

i) Penalties

- **Authority to levy Penalties & Design of such Penalties**: Article 8.1.8 requires that the laws of each jurisdiction with respect to penalties, sanctions, and confidentiality of the returns (including the information in the returns) shall also apply to the GloBE Information Return. In the case of penalties and sanctions, this means that domestic penalties and sanctions would apply if the GloBE Information Return were not submitted on time or if there is any false or incomplete information. Jurisdictions are free to extend existing penalties or sanctions (as well as any penalty or sanction mitigation provisions) or to create new ones for the GloBE Information Return.
- **Observation**: Application of Pillar 2 Model Rules is a significant challenge for MNE Groups. Considering the granularity of required data points to be provided within a very short time frame, accurate GloBE tax returns are aimed at but errors due to the interpretation of the rules cannot be excluded.
- **Recommendation**: Inadequate penalties should be avoided. Penalties should be eliminated or significantly reduced (e.g., 5 % of a CE's revenues as set out in the EU Draft Directive is disproportionately high). In addition, a MNE Group should have the opportunity to correct potential errors within e.g., a 12-month period without triggering any penalties at all – at least for a certain transition period (e.g., three to five years). This allows for an appropriate adjustment/implementation of existing/new internal processes.

j) Safe Harbours

- **Design**: The Model Rules note that the design of any safe harbours will be included in the GloBE Implementation Framework.
- **Observation**: The development of broad, simple and administrable safe harbours is essential for MNE Groups to manage the complexity and the significant compliance burden resulting from the application of the Pillar 2 rules in a very short time frame.
- **Recommendation**: Further guidance is awaited. Every effort to include de minimis thresholds/safe harbours is welcome, in particular a "whitelist" for jurisdictions not in scope of Pillar 2 since their nominal tax rate is above the 15 %-threshold and the tax base is sufficiently broad.

k) Administrative Guidance

- **Design**: Article 8.3.1 ref. no. 40 contemplates that further guidance on the interpretation or application of the GloBE Rules may be agreed and published by the Inclusive Framework. It is ensured that when such guidance is issued, it is applied in a coordinated way. This may also consider a coordinated solution based on a collaboration of several tax administrations potentially resulting in Agreed Administrative Guidance (Art. 8.3.1 ref. no. 41).
- **Observation**: A consistent interpretation and application of the Pillar 2 rules needs to be ensured to meet the purpose of a global minimum tax regime to not result in competitive disadvantages. Thus, any effort to provide further administrative guidance for multiple jurisdictions is appreciated. However, it is unclear how long it will take to agree on questions involving several tax administrations. Hence, a simple and lean decision and acceptance procedure is important. In addition, since the rules are overly complex, it is expected that many specific interpretation questions will arise when implementing the Pillar 2 concept. Thus, continuous guidance is necessary at least for a transition period.
- **Recommendation**: Further guidance is required. This refers to providing a list of Covered Taxes per jurisdiction to ensure a consistent application of Pillar 2 rules, a list of accepted qualified Domestic Top-up Tax regimes per jurisdiction for Pillar 2 purposes, a list of jurisdictions with accepted CFC regimes under Pillar 2 rules, a list of qualified tax credits per jurisdictions for Pillar 2 purposes. In addition, appropriate conflict resolution mechanisms need to be implemented also considering multiple jurisdictions. It is unclear whether or not a respective "council of important jurisdictions" for an MNE may have the authority to make decisions bounding also other jurisdictions which are not part of such a council. Thus, the broad acceptance of such decisions agreed upon needs to be ensured. Moreover, it is unclear which jurisdiction will be the responsible party to discuss Pillar 2 findings in tax audits (e.g., the jurisdiction of the UPE?). Any discussion of Pillar 2 findings with additional jurisdictions than the UPE's state of residence makes the process overly complex and hardly administrable. Besides, it needs to be ensured that all jurisdictions consider aligned and standardized information requirements for Pillar 2 purposes. Also, confidentiality of provided information (esp. in case specifically requested by tax paying entity (e.g., for individual tax information for natural persons/families as investors) must be ensured. For example, only

Competent Authority of the jurisdiction in which the Filing Constituent Entity is located receives all relevant data and confirms completeness and correctness to other participating tax authorities.

C. Contact Persons with Contact Data

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D. DIHK – Who we are

The 79 Chambers of Commerce and Industry (IHKs) have jointly founded the Association of German Chambers of Commerce and Industry (DIHK). Our common target: the best conditions for successful economic activity.

At the federal and European level, DIHK represents the interests of the entire commercial sector vis-à-vis policy makers, the administration, and the public.

Several million companies from the trade, manufacturing industry and service sectors are legal members of a CCI – from kiosk owners to Dax corporations. Thus, DIHK and the IHKs are a platform for the many and varied concerns of companies. We bundle these through a defined procedure based by a legal basis into common positions of the business community and thereby contribute to the participatory debate on economic policy.

Moreover, the DIHK coordinates the network of the 140 German Chambers of Commerce Abroad, delegations and representative offices of the German economy in 92 countries.

It is enrolled in the European Commission's Register of Interest Representatives (No. 22400601191-42).