



Bundessteuerberaterkammer
KÖRPERSCHAFT DES ÖFFENTLICHEN RECHTS

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29 November 2019

Public Consultation on the Global Anti-Base Erosion Proposal ("GloBE") - Pillar Two

Dear Sir or Madam,

Thank you for the opportunity to comment on the Global Anti-Base Erosion Proposal ("GloBE") - Pillar Two (hereinafter referred to as: "GloBE proposal") issued on 8 November 2019.

The German Federal Chamber of Tax Advisers (hereinafter referred to as: "Bundessteuerberaterkammer") represents the interests of more than 97,000 certified tax advisers in Germany vis-à-vis the Bundestag, the Bundesrat, the Federal Ministries, the top echelons of the civil service, the courts and the institutions of the EU and OECD.

The objectives and competencies of Bundessteuerberaterkammer include inter alia facilitating public discussions on tax matters, analysing and giving opinions on draft tax legislation and all other legislative areas that affect the tax profession in Germany and exchanging information about tax law and professional law.

Bundessteuerberaterkammer appreciates the efforts of the Inclusive Framework on BEPS and the OECD secretariat to develop a co-ordinated set of rules to address ongoing risks from structures that allow MNEs to shift to low tax jurisdictions. However, the consultation document shows the complexities involved when taking up this challenge on a global level. Please find our detailed comments on the GloBE proposal in the enclosed document.

We would be pleased to discuss any questions you have on our comments and would welcome the opportunity to contribute to the discussion as part of the public consultation meeting on 9 December 2019.

Yours sincerely,

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Geschäftsführerin

i. A. Steffi Balzerkiewicz
Referatsleiterin

Encl.



Bundessteuerberaterkammer
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Enclosure

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

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I. General Remarks

Bundessteuerberaterkammer represents more than 97.000 certified tax advisers (*Steuerberater*) being organised as self-employed professionals or combined in partnerships or corporate entities. Same as lawyers and auditors *Steuerberater* constitute a legal profession subject to a regulatory regime especially designed for them and enacted by the parliament. *Steuerberater* form an intermediary between the state and the taxpayer. Their role is to assist the taxpayer to perform its tax obligations in compliance with the applicable law, give tax advice in accordance with tax law and defend the taxpayer rights against unjustified tax claims of the state. In this role, Bundessteuerberaterkammer is usually taking a neutral stance on questions of the economic impact of proposed new tax regimes but comments on the feasibility, consistency and adequacy of changes in law in the context of the existing tax legal system.

Our members represent German and (as far as their German tax affairs are concerned) foreign MNEs as well as SMEs in the area of tax. For all taxpayers and their advisers, a tax regime which is clear, fair and easy to follow is critical. This is more than true in the field of cross border taxation as it is the subject matter of the OECD proposal laid out in the public consultation document on the Global Anti-Base Erosion Proposal – Pillar Two (“GloBE Proposal”).

II. General view on the proposal

Bundessteuerberaterkammer welcomes that the OECD is addressing the challenges of taxation in a digitalised business world, seeking to achieve progress towards a global consensus-based solution.

Bundessteuerberaterkammer acknowledges the political will to reduce incentives for profit shifting which is not matched by a corresponding shift in real value creation factors. We endorse this goal of the GloBE proposal. We also understand that Pillar One and Pillar Two are inherently connected. Originally, the discussion was driven by the perception that the current tax regimes of international enterprises are insufficient to allow remotely offered services in particular to be taxed in way granting all states a fair share (Pillar One). In addition, these businesses can structure their operations and investments in a way which allows them to make profits in low tax jurisdictions (Pillar Two). In order to avoid (more) unilateral measures to tax digital activities and to address ongoing risks from profit shifting we support the OECD’s endeavours to find an international consensus on how to make the international tax system fit for the future.

However, we would also like to point out that taxpayers and their advisers have been confronted with a massive amount of change in relation to rules relevant for international taxation as a consequence of the OECD BEPS project: For instance, reporting obligations of businesses have been significantly expanded despite the fact that businesses had to comply with quite comprehensive reporting obligations even before the BEPS project was initiated. As a consequence, in the recent past additional complexity and compliance costs have put a

significant strain on most MNEs. The proposals will probably produce significant additional burdens with an unclear outcome.

Further, dispute resolution processes do not yet show material signs of improvement in practice that would ensure efficient coverage of the disputes arising from increased complexity and uncertainty. Therefore, we advocate to act with caution.

Further, in our view it is paramount that the new system provides for clear rules administrable for the taxpayers, their advisers, the tax administration and judicial bodies. Clear rules will assist tax authorities and taxpayers as well as their advisors facing these challenges.

It is critical that any guidance given by the OECD is workable and tax authorities in all countries and taxpayers take a consistent approach.

III. Scope

1. Revenue thresholds & carve-outs

At the current state of discussion, it is difficult to say whether it is advisable to introduce thresholds and carve-outs to restrict the application. We think the decision depends, amongst other things on the concrete outline and complexity of the rules for determining the GloBE tax base and the effective tax rate (blending). Another aspect to consider in this regard is whether CFC rules continue to exist after the introduction of GloBE. At the moment it is difficult to envisage the recommendations that the OECD made in BEPS Action 3 and which were enacted in many jurisdictions including the Anti-Tax Avoidance Directive of the EU to be suspended or even revoked. However, if this will be eventually the case, we believe GloBE should apply to all businesses.

However, for a transitional period Bundessteuerberaterkammer suggests introducing a threshold so GloBE only applies to large businesses with a sufficient level of revenue. This is based on the notion that tax challenges raised in this context mainly relate to the fact that (large) businesses and service providers may be more sensitive to tax considerations when choosing a location for investment projects. These businesses have the means to structure their operations and investments in a way which allows them to make profits in low tax jurisdictions. Therefore, we believe that revenues should be the reference point for the application of the new rules.

Corresponding with our view on Pillar One, we suggest considering a threshold of 3 billion USD consolidated annual global revenue. This way it could be ensured that primarily those businesses driving the current discussion would be captured.

In any case, the threshold should not be less than 750 million USD consolidated annual global revenue. Businesses with a consolidated annual global revenue of 750 million USD are already subject to additional administrative rules. They would have the size, and therefore the capacity, to adopt the new rules and the additional administrative burden. We believe that a

complex system that burdens small and medium-sized businesses and their advisors is not in the best interests of the global economy.

Businesses which do not meet the threshold, for now, continue to apply the established rules.

The governing principle to determine an MNE group could follow the rules for determining which companies are subject to country-by-country-reporting as both sets of rules pursue the same overarching objective, that is fighting base erosion and profit shifting, and introducing a fair taxation. Further, an existing framework could be utilised and provide consistency in the application of international tax law.

Moreover, the application of the new rules to a limited number of businesses would allow taxpayers, their advisors and tax administrations to observe the application of the rules for a set period and, if necessary, adjust them. After a transition period the threshold could be lowered to include more businesses and eventually, be removed.

Further, Bundessteuerberaterkammer believes that the idea of introducing carve-outs for certain industries as suggested for the application of Pillar One are not essential for the application of GloBE.

We also think that substance based carve-outs should not be considered. Although it can be argued that CFC rules commonly have substance-based exclusions which could also be mirrored in GloBE. However, our understanding is that GloBE and CFC rules have differing policy rationales: The goal of GloBE is ensuring that *all* profits of internationally operating businesses are subject to a minimum rate. CFC rules on the contrary, are anti-tax avoidance rules which only apply to certain passive income. Introducing substance based carve-outs would add unnecessary complexity to GloBE and undermine its policy intent.

2. De minimis threshold

Bundessteuerberaterkammer supports the introduction of a de minimis threshold to exclude transactions or entities with a small amount of profit or related party transaction. This is in particular true in relation to the application of the subject to tax rule and the undertaxed payments rule. Otherwise the application of GloBE would be disproportionate, or in any event overly burdensome. In this regard, we would like to refer to a statement of the German Federal Fiscal Court which ruled in 1996 (BFH 11 September 1996, VII B 176/94) that a taxpayer shall only be obliged to provide the tax office with information if obtaining the information is necessary, proportionate, possible and can be reasonably expected.

Against this background and given the policy intent of GloBE we recommend to exclude transactions or entities which are insignificant.

IV. Tax base determination

Bundessteuerberaterkammer welcomes the approach that the tax base shall not be determined with reference to CFC rules, otherwise each subsidiary would have to determine its taxable income in accordance with tax rules that apply to its parent company. As stated in paragraph 14 of the GloBE proposal, such an approach would result in significant compliance efforts and, as a consequence, in high administrative costs. Further, we agree with the Secretariat's opinion that applying CFC rules would not necessarily lead to a finding of a low taxation within the meaning of the GloBE proposal.

Bundessteuerberaterkammer understands that the calculation of group profits shall be based on the accounting records and accounting profits. On the positive, this information is readily available and thus reduces efforts in the first place.

However, it needs to be considered that these accounting records were produced for different than taxation purposes in the first place. In order to align the approach between countries it does seem to be consistent using the accounting method that is applied by the ultimate parent company of the group of companies.

Further, we agree that adjustments will be necessary in order to align the different accounting standards and create a comparable starting point for all taxpayers subject to the GloBE provisions. Agreeing appropriate adjustments is critical for a fair and adequate determination of the tax base and ultimately for a fair taxation.

When introducing adjustments to accounting records in order to determine the tax base we recommend focusing on eliminating variable items which are purely based on estimates and future expectations. We suggest that only profits from transactions that have been completed should be included in the tax base. The following examples illustrate balance sheet items which, in our view, require adjustments:

1. Under IFRS, shares/investments are valued at fair market value. The valuation is based on soft facts such as future expectations and can easily cause tax disputes. Further, the valuation may include unrealised and thus uncertain profit expectations. By contrast, other accounting standards - such as the German Commercial Code - are based on the historical cost principle and only allow (re-)valuation if the fair market value falls below historical cost.
2. In accordance with IFRS, certain industries, such as construction and plant engineering, apply the percentage of completion method when evaluating their unfinished goods and services (work in progress) which allows recognising unrealised (partial) profits. However, such profits should only be included in the tax base after they have actually been realised, thus after full delivery of the service/work. We believe solely the cost of completion should be included when determining the tax base.
3. Finally, provisions are good examples for variable items that require adjustments, in particular provisions for pensions. Their valuation varies greatly in different accounting standards and again when including them in tax bases.

As stated above, in a first step we suggest eliminating such variable items because they can easily cause disputes. Further, it does not seem to be fair to include unrealised profits in the determination of the tax base. Taxing unrealised profits would strain taxpayers' liquid funds and may incur additional borrowing costs.

In a second step, we propose introducing simple rules for the recognition and measurement of financial liabilities and provisions. Given the fact that GloBE intends to be a *minimum* tax at a relatively low tax rate, we believe that it should be focused on simplicity rather than determining the most "accurate" tax base. In our view, a low tax rate justifies a broad tax base.

Finally, we advocate not to completely disregard tax incentives. Often governments (including governments in developed countries and the EU) offer tax-free investment grants or favourable depreciation in order to stimulate investment in regions with a weak economy and/or infrastructure. If such meaningful tax incentives cause GloBE to kick in such economy promotion programs will be thwarted.

Overall, we believe that the questions raised in the GloBE proposal show that finding an agreement on the adjustments will be very difficult. Moreover, adjustments will lead to further administrative burdens and costs. It will be difficult to achieve tax certainty which we understand to be an overarching goal of the OECD.

Taking all the above into consideration and in order to promote simplicity **we suggest to create a "white list", which includes all jurisdictions with tax systems that tax profits sufficiently and therefore, do not require the application of GloBE.** The Inclusive Framework could agree on minimum requirements for an inclusion to the "white list". A working group could monitor international tax developments and keep the list up to date. We think it could be possible to introduce a peer review comparable to the one performed by the Global Forum on Transparency and Exchange of Information for Tax Purposes. This way the compliance burden for taxpayers and their advisers as well as for tax administrations could be manageable. Tax certainty would increase. It would also leave governments with sufficient scope for promoting regional business development through meaningful tax incentives.

V. Blending

Bundessteuerberaterkammer believes that blending should not be done on a narrow basis. Although a per entity blending would be the most appropriate approach in order to meet the overall goal of an effective minimum taxation, we believe it would cause an administrative burden for groups with complex structures that would be seen as exuberant.

We also believe that a very broad approach such as worldwide blending would not meet the policy intent of GloBE.

Blending on a jurisdictional base seems to be a workable approach, especially if we assume that GloBE will be applied by the jurisdiction of the ultimate parent company but by the jurisdiction of the direct controlling entity.

Further, we believe that it will be necessary to introduce priority rules in order to ensure that profits are not taxed more than once, especially if they have already been included in CFC rules of the same or another jurisdiction.

This shall be illustrated in the following example:

B-Co is tax resident of country B and wholly owned by A-Co which is resident of country A. A-Co pays a license fee to B-Co. Assuming the license fee taxed so low that it triggers the application of GloBE, the license fee could potentially be taxed more than once in country A: It could be subject to GloBE, to the CFC rules and to special anti-avoidance rules in relation to the deductibility of license fees (for example in Germany the so-called royalty deduction barrier ('Lizenzschranke') in sec. 4j of the German Income Tax Act (EStG)). Thus, it requires tie-breaker rules for determining which regime takes priority.

Further, the application of GloBE to multi-tiered structures, especially including fiscally transparent entities such as partnerships needs to be addressed.

This shall be illustrated in the following example:

A-Co, a tax resident of country A wholly owns B-Co, a fiscally transparent entity based in country B. B-Co. receives a license fee from its wholly-owned subsidiary C-Co, a tax resident of country C. Assuming the license fee taxed so low that it triggers the application of GloBE in country B, the license fee could potentially be taxed more than once: it could be subject to regular income tax in countries A and B, if both countries treat partnership income differently. Further, it could be subject to the Undertaxed Payment Rule in country C. Thus, it requires a tie-breaker rule for determining which regime takes priority. Also, it is necessary to specify how a taxpayer can prove that income has been sufficiently taxed in another jurisdiction.