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**Public Consultation on the Reports on the Pillar One and Pillar Two Blueprints**

Dear Sir or Madam,

Thank you for the opportunity to comment on the Reports on the Pillar One and Pillar Two Blueprints (hereinafter referred to as: “the Blueprints”) issued on 12 October 2020.

The German Federal Chamber of Tax Advisers (hereinafter referred to as: “Bundessteuerberaterkammer” or “BStBK”) represents the interests of almost 99,000 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 formed a Working Group to respond to the Public Consultation. The comments made in this report are the personal opinions of the Working Group participants and should not be taken as representing the views of their firms, employers or any other person or body of persons apart from the Bundessteuerberaterkammer.

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 Blueprints in the enclosed document.

Yours sincerely,

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Encl.

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Bundessteuerberaterkammer
KÖRPERSCHAFT DES ÖFFENTLICHEN RECHTS

**Enclosure**

# Public Consultation Document: Reports on the Pillar One and Pillar Two Blueprints

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# A. Introduction

## I. General Remarks

Bundessteuerberaterkammer represents almost 99.000 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 Reports on the Pillar One and Pillar Two Blueprints (“Blueprints).

The OECD invited interested parties to provide comments focusing on the technical aspects of the Blueprint that may help to reduce cost and complexity, and improve tax certainty in the administration of Pillar 1 for both tax administrations and taxpayers alike.

Please find our detailed comments on the draft blueprints on Pillar 1 and 2 below. We would be pleased to discuss any questions you have on our comments

## II. General view on the Blueprints

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.

We acknowledge 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 1 and Pillar 2 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 1). In addition, these businesses can structure their operations and investments in a way which allows them to make profits in low tax jurisdictions (Pillar 2). 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. Pillar 1 and Pillar 2 will probably produce significant additional burden with an unclear outcome.

In a nutshell, 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.

## B. General Remarks on Pillar One

We would like to emphasise our concerns regarding the complexity that are entailed with the Amount A proposal. We acknowledge the need to reform the existing taxation system and to reallocate taxation rights in order to reflect new business models. The Amount A proposal includes a number of interesting and helpful ideas that could be developed further. However, we believe that the exertion of a taxing right that affects more than one other jurisdiction cannot be implemented in practice without leaving taxpayers with high costs for implementing the new system and for hiring legal and tax advice when applying the new system and more importantly will leave them on top with economic double taxation merely due to the fact that the relevant profits are determined in the concerned jurisdictions by different provisions (financial accounting).

We therefore would like to encourage the OECD to pick up the ideas that have already been explored in the beginning of the development of pillar 1 around the significant economic presence and combine this approach we the sourcing rules introduced in the blueprint. In detail:

Instead of choosing a multilateral approach the factors that shall lead to an Amount A taxation could be transferred to the creation of a *digital PE* or a *turnover PE.* Where an MNE exceeds certain levels of turnover, a taxation right would emerge by establishing a PE based on turnover generated in a jurisdiction. The new sourcing rules introduced in Chapter 4 of the blueprint would determine the allocation of turnover of the defined activities (ADS). The extent of the taxation right would be determined by the amount of turnover. Similar to Amount B certain de minimis TNMM could be defined for certain turnover categories, e.g. EUR 1 – 5 million = 2-3%; EUR 5-10 million = 3-5%; 10 – 20 million = 5-7% etc. Turnover would be a proxy for a deemed function and risk profile that is actually not present in a jurisdiction. The taxation right would apply to profits and not to turnover so a sensible (formulaic) approach to allocate costs would have to be determined as well, e.g. by applying the average cost quota of the MNE Group to the deemed digital PE.

This approach would ensure that market jurisdiction would participate according to amount of turnover generated in their country. The de minimis TNMM ensures that such a system could not be overcome by only installing low risk distributors as the taxation right is not based on a percentage of the profits of the transaction in the country but on an abstract profit ratio. An MNE would therefore have to ensure that the entities contracting in the services in scope generate sufficient profits in order to be able to reallocate a share to the market jurisdiction. The turnover thresholds could be adapted to the overall profitability of an MNE group in scope.

The suggested approach would allow to keep a focus on bilateral transactions and not to have multiple tax administrations involved but unlike the proposal of the UN under Art. 12B allows to also allocate taxation rights according to the new sourcing rules under Chapter 4.

## C. Questions addressed in the public consultation document

### I. The activity test to define the scope of Amount A

#### Scope

Bundessteuerberaterkammer acknowledges that the digital economy cannot be ring-fenced and that therefore the scope has been shifted from highly digitalised business models (ADS) to a larger number of business models that are able to operate remotely due to a strong, well-known brand.

However, it has to be considered that when it comes to the provision of physical goods the market entry and the access to the consumer base that is thought to be compensated with the new Amount A taxation right is usually remunerated by paying customs. In order to prevent a sort of double burden for companies selling to custom protected markets, either (and preferably) an Amount A-taxation right should not be granted to jurisdictions that levy customs for such goods or customs should be waived for goods sold that are in scope of CFB, which would reduce the scope significantly for certain jurisdictions and provide a higher level of certainty.

It also seems that most CFB businesses have a form of physical presence in the market jurisdictions where they generate relevant profits, at their disposal. It would therefore be also reasonable to limit the scope of Amount A to net sales generated with ADS above a certain threshold. Excess profits relating to CFB should be addressed by fine tuning the existing ALP system and including market benefits, group benefits or income from certain intangibles as value drivers in the current system (see logic under General remarks).

#### Activity test

The application of the activity test should be as simple and intuitive as possible to prevent lengthy disputes over the qualification of an activity. The scope should therefore not be distorted by political motives.

**aa) ADS**

Regarding ADS the positive list appears to be comprehensive and intuitive. It should not be obscured by overengineering the scope of application and by enlarging the scope to the facilitation of the internet. Such examples are addressed on *page 36* of the blueprint where it is discussed whether a price premium of a good allowing connectivity or a standardised chat function to pre-filter customer requests should be in scope of ADS or not.

We acknowledge that the digital economy cannot be ring-fenced, however, adding every good and service to the scope that includes a digital/automated element will make the new provision boundless and unworkable in practice, especially when one tries to identify the digital element when goods are sold at a lower price as a promotion. Therefore, we advocate that dual category and bundled packages should not be included in the scope of ADS unless such a category can be acquired otherwise as a standalone service and an arm's length price can be derived from third party transactions. This is also in line with the argument to exclude banking, insurance and asset management despite their digital functionality as it is considered an automated replacement of processes previously carried out by humans (please refer to para. 123).

**bb) CFB**

Regarding CFB there are chapters designated to pharmaceuticals, franchising and licensing.

Regarding pharmaceuticals the analysis to include drugs – whether they are sold over the counter or not – seems to be contradictory. As mentioned in para. 73, pharmaceuticals are bought to address illnesses und to improve well-being. The price premium for branded pharmaceuticals rather derives from the patent protection, as customers/patients are equally willing to buy generics if they show the same level of functionality. This implies that the functionality enables the sale of pharmaceuticals abroad even if the brand is unknown to the consumer.

They can therefore be considered a necessity that are a priori bought for their functionality. As outlined in the report the sustained interaction in a jurisdiction relates mostly to governments and regulatory authorities and not the consumers themselves. The relevance of the consumer itself in this procedure is only minimal.

The inclusion of pharmaceuticals into the scope of CFB because they are likely to achieve high profit margins, esp. those distributed as prescriptions in most countries, and have been subject to aggressive tax planning, is not in line with the policy rationale of Pillar 1. As outlined in para. 6 Pillar 1 seeks to adapt the international income tax system to new business models through changes to the profit allocation and nexus rules applicable to business profits. Unlike Pillar 2 the objective is not to address remaining BEPS issues. The mentioned BEPS risks have been addressed by Action 5 as well as the DEMPE approach of Action 8-10. There is no indication that these measures have not proven successful in the past or for a need to develop new measure to tackle aggressive tax planning in this area.

More importantly it has to be kept in mind that the pharma industry requires a high level of funding, shows a high risk of failure (product does not show envisaged functionality, triggers severe side effects, or competitor brings similar product to the market first) and has an extreme relevance for society (see COVID 19). Furthermore, the necessary requirements to successfully develop new drugs are not found in every jurisdiction as they require researchers with a high level of education in order to perform research and development (R&D) as well as the necessary test runs. Statistically the success rate of a new product depending on the area of application lies between 5 – 11% which means that more than 9 out of 10 trials end in failure.[1] MNEs active in the development of pharmaceuticals therefore require high levels of certainty in order to balance dry spells with high numbers of trial failures.

The inclusion of pharmaceuticals in the scope of CFB would also raise the question whether other services and products that are mainly bought for their inherent features such as raw materials, sale and leasing of residential properties, fuels and petrol or unbranded food products (salt, sugar, flower etc.) leaving aside that such products are not likely to exceed the profitability threshold (please refer to para. 109 seqq., esp. para. 111, 117) but are also ultimately used by consumers, should be in scope. Especially when reading the rationale behind carving out fuel and petrol from the scope that is bought by all consumers owning a car, a motorbike or a private jet, it is hard to understand that pharmaceuticals should be in scope as the focus of medicine is also on the inherent characteristics of the consumer and the price and not with the brand of a special pharma producer.

Also, the argument that marketing activities towards local regulation authorities and governments would create a sustained engagement with a jurisdiction is not convincing, as it is simply indispensable in a regulated environment. The same is true for banking which in para. 127 leads to the conclusion that the high level of regulation and the close cooperation with regulatory authorities are a reason to exclude the banking business from scope.

As CFB tries to incorporate the marketing intangible approach into Pillar 1, BStBK believes that pharmaceuticals should be not be in scope.

However, the pharmaceutical market is large and pharmaceutical companies are predestined to sell their products around the world (after undergoing the local regulation procedures) so that the political interest to include them into the scope of CFB is understandable. It would then from a practical point of view be desirable to exclude all products from the scope that require a prescription or cannot be applied by the customer/patient without the support of a doctor or nurse. This would avoid lengthy discussions whether a product can be sold over the counter or not, which differs in every jurisdiction, and in some jurisdictions even for the reason of application.

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[1] https://www.bio.org/sites/default/files/legacy/bioorg/docs/Clinical%20Development%20Success%20Rates%202006-2015%20-%20BIO,%20Biomedtracker,%20Amplion%202016.pdf.

## II. The design of a specific Amount A revenue threshold (in addition to a global revenue threshold) to exclude large MNEs that have a de minimis amount of foreign source in-scope revenue

**More specifically, comments are invited on what would be the best approach to define and identify the domestic or home market of an MNE group (e.g., the residence of the ultimate parent entity).** ***[Refers to paragraphs 182-184 of the Blueprint]***

### Global revenue threshold

BStBK strongly supports the approach that the new rules should have a threshold so that they only apply 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 can reach markets in jurisdictions where they have little or no physical presence. These businesses can generate significant revenues in the source state with paying no or little tax. Therefore, we believe that revenues should be the reference point for the application of the new rules.

We suggest considering a threshold of EUR 2 billion consolidated annual global revenue. This amount is chosen without any empirical basis. However, this applies equally to the currently discussed threshold of EUR 750 million. The mere fact that the obligation to file country-by-country-reporting starts at EUR 750 million is not sufficient to establish a link with future taxation under Pillar 1.

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.

It should also be considered to apply the global revenue threshold over a time period in order to apply the new rules only for MNEs that exceed the threshold for e.g. three years in a row. In this regard it should also be clarified that Amount A does not create a permanent establishment that could attract intangible assets and that therefore with the creation or loss of a taxation right under Amount A ***no exit taxation*** can be triggered.

### Specific Amount A revenue threshold

BStBK strongly supports the approach that the application of the new rules requires a further threshold relating to foreign in-scope revenue to be exceeded. The blueprint provides the example of a threshold set at EUR 250 million with a profit margin of 20%, which appears to be at the lower end of a sensible range, considering the additional administrative burden on the side of the taxpayer and the tax administrations. BStBK therefore advocates to consider an even higher threshold of EUR 500 million to have a profit of at least **EUR 100 million** that are allocable under the new rules to ensure that the extra amount of taxes reallocated actually exceed the costs stemming from the introduction and implementation of the new system.

In this regard it should be noted that the specific Amount A revenue threshold should be chosen with regard to the profits that are allocable under the new rules and not relate to the revenue. Therefore, if the relevant profit margin is set at a lower rate the revenue margin has accordingly to be set at a higher level as well.

### III. The development of a nexus rule

More specifically, comments are invited on the following points:

**The "plus factors" suggested for CFB will be examined as potential indicators which denote an engagement with the market beyond the mere conclusion of sales. In terms of compliance costs and administrability, do you have any comments on these plus factors? *[Refers to paragraphs 202-211 of the Blueprint]***

BStBK believes that the call for physical presence (whether it qualifies as an PE or not) as a plus factor for CFB introduces an additional layer of complexity into the system around the argumentation whether a certain form of presence meets the plus factor requirement or not. Furthermore, it could have the adverse effect that MNEs decide to retreat from certain markets or change to intermediary selling models. Therefore, physical presence does not seem an appropriate factor.

In fact, where a MNE already has a taxable physical presence in a jurisdiction, providing CFB goods and services in such jurisdictions should not result in the application of Pillar 1 because as the profits made in from this activity have already been included in the "normal" tax base through the application of transfer pricing rules and/or have been subject to custom levies. Especially when it comes to the sale of physical goods, the market jurisdiction is participating in form of customs, VAT and the share of profits allocated to them via existing transfer pricing rules.

This would also prevent the need for the introduction of an Amount A-safe harbour, which requires MNEs to undergo the whole Amount A determination process even though they will not be subject to the new set of rules, but nevertheless have to introduce the new system along with the entailed costs (and on the side of the tax administration having to verify the process).

**Do you consider the suggested plus factors (and hence a taxable nexus under Amount A) could be deemed to exist once a certain level of sales is exceeded? If so, what should be the criteria for establishing such level? *[Refers to paragraph 212 of the Blueprint]***

Where MNEs do not maintain a physical presence it appears reasonable to only rely on a certain revenue or sales threshold in a country to determine whether a MNE has a meaningful engagement in this country. Further factors, such as a certain level of advertising and promotion will add an extra layer of complexity and open a new field for discussion.

**Should the market revenue threshold contain a temporal requirement of more than one year? If so, what should it be? *[Refers to paragraph 196 of the Blueprint]***

The market revenue threshold should definitely contain a temporal requirement of at least three to five years to demonstrate a sustainable engagement in a market jurisdiction. For tax certainty reasons the temporal element should not only apply in relation to the application of the new rules (exceeding of the revenue thresholds for three to five years in a row) but also for the non-application of the new rules.

With a view on exit taxation rules, it should also be made clear that the establishment of a new taxation right under Amount A does not create a permanent establishment in the common sense and that therefore tangible and intangible assets cannot be allocated to a market jurisdiction based on meeting a revenue threshold.

## IV. The development of revenue sourcing rules

More specifically, comments are invited on the following points:

**Do you have any comments with respect to the proposed sourcing rule and proposed hierarchy of indicators as the basis for the sourcing of revenue for Amount A? *[Refers to paragraphs 227-321 of the Blueprint]***

The nexus test is based on the sourcing rules, since an entitlement to Amount A is only given if the revenue thresholds for ADS and CFB are exceeded. Thus, the sourcing rules represent the core of the new regulations and determine whether a state has a right to tax or not. It is important that the sourcing rules are clear and consistent. Further, clear rules on the allocation of the burden of proof between the MNE and the various tax authorities need to be established.

Therefore, BStBK believes that as few exceptions as possible should exist and a uniform reporting standard should be introduced on which the sourcing rules can be based. MNE should be allowed sufficient time for collecting and retaining the required information. The information/data gathered could be held/stored in an anonymous format; alternatively, a pre-defined audit of the process could be carried out, which can be approved/certified by auditors and reviewed by the tax authorities. This requires clear rules. If random tests suggest that the provided information is not correct or the process leads to incorrect information, the MNE would have to bear the consequences. On the other hand, it is up to the tax authorities to prove that such insufficiencies exist.

Instead of imposing a hierarchy of indicators, MNEs should be given the option to choose a set of indicators that is readily available to them and should be bound to their choice for a certain period of time (e.g. five years). This would ensure that the profit allocable under Amount A cannot easily be manipulated by the choice of indicators but the MNE would have to bear the effects of the chosen factors for a relevant period of time.

**What factors should be taken into account in determining "reasonable steps" required to obtain information that is unavailable (such as changing contracts with third party distributors)? *[Refers to paragraphs 378-387 of the Blueprint]***

As outlined above, BStBK believes that MNEs should be able to choose the set of indicators that is most easily accessible to them. This would respect particularities of privacy laws that can differ in the various jurisdictions.

**What simplification measures, if any, should be considered in the revenue sourcing rules, such as safe harbours or de minimis rules? *[Refers to paragraphs 388-405 of the Blueprint]***

As correctly outlined in the blueprint (para. 389) MNEs will not be able to store the relevant data long enough to allow tax administrations to audit such data. Therefore, MNEs should only be required to implement systems that allocate revenues to the jurisdictions of sale based on the chosen indicators. Such systems could be subject to an audit procedure of a public auditor with a special IT certificate guaranteeing that the system is robust and safe from external manipulation.

Tax administrations would then only be required to audit the system, which would make the verification process administrable.

**Do you consider that VPNs and/or any other emerging technology may have an impact on the accuracy and/or reliability of proposed revenue sourcing rules? If yes, what options or design changes should be considered to eliminate or minimise such an impact? *[Refers to paragraphs 305-309 of the Blueprint]***

The application of VPN poses the abstract risk to cause distortion in the application of the sourcing rules. However, such a distortion can only be considered if a certain materiality level has been exceeded. Therefore, a certain tolerance threshold should be introduced, e.g. a fixed amount or a percentage of sales, possibly also depending on the respective activity (streaming is more likely to produce distortions than other activities).

## V. The framework for segmenting the Amount A tax base, and how it could be further developed to deliver its objectives

As a simplification, this framework includes different options to limit the need for segmentation, including calculating the Amount A tax base on a consolidated basis as a default rule (and applying it to in-scope revenues to produce a proxy for in-scope profits.). More specifically, comments are invited on the following points:

**Do you consider that hallmarks drawing on IAS 14 constitute an appropriate basis for developing a test to determine whether an MNE group is required to segment? If not, what other options should be considered to identify relevant segments for Amount A purposes? *[Refers to paragraphs 456-461 of the Blueprint]***

If segmentation is necessary, drawing on hallmarks related to IAS 14 seems to be a reliable source to test whether segmentation is required. As mentioned by the OECD, segmentation for financial reporting purposes are by no means comparable to segmentation for Amount A purposes. BStBK, therefore, expects that businesses may find it difficult to segment for Amount A. Thus, the IF should work out clear guidelines, which level of detail segmentation can be requested by MNEs. Where such segmentation requires to go beyond the given segmentation classes of IAS 14 or for businesses that have differing segmentation, a revenue based segmentation should be made available.

**Do you consider that existing segments (under financial accounting standards) should be used in the majority of cases as a basis for segmenting the Amount A tax base (for example by using a rebuttable presumption)? If not, what other options should be considered? *[Refers to paragraphs 462-463 of the Blueprint]***

As mentioned above, BStBK is in favour of allowing companies using existing segments included in their financial statements. Again, the efforts for companies should be reduced to the extent possible. We have our doubts that tax authorities will – in the foreseeable future - be in a position to actually reliably audit whether the segmentation criteria are fulfilled or not. Therefore, OECD should consider to reduce the requirements and provide clear and uniform guidance.

**Do you consider that groups should be permitted to calculate Amount A on a geographically segmented basis? If so, what should be the criteria for determining when geographical segmentation is permitted and what those geographic segments should be? *[Refers to paragraph 459]***

Such kind of geographical segmentation is in our view not in line with the overall approach and intended purpose of Amount A. Thus, to apply geographical segmentation seems not to be helpful but would add a unnecessary additional complexity.

**Alternatively, do you consider that MNE groups should be required or permitted in some cases to segment their profits before tax between in-scope activities (i.e. ADS and/or CFB) and out-of-scope activities? If yes, what criteria could be used to determine when this approach to segmentation should be applied as opposed to calculating the Amount A tax base on a consolidated basis? *[Refers to paragraphs 442-446 of the Blueprint]***

This goes back to the overall problem of the segmentation. Although we acknowledge the intention to reduce complexity by using a consolidated Amount A tax base, it would basically be more reliable to have separate revenues for CFB, ADS and out-of-scope activities. Under the

assumption that the consolidated profit margin could actually be used as a proxy for the in-scope profit margin in order to calculate and allocate Amount A. This requires that tax authorities in all jurisdictions apply the same methodology in this respect, which requires clear uniform guidance from the IF.

## VI. The development of a loss carry-forward regime that would ensure that Amount A is based on an appropriate measure of net profit

More specifically, comments are invited on the following points:

**Do you consider that Amount A tax base rules should apply consistently at the level of the MNE group (or segment where relevant) irrespective of whether the outcome is a profit or loss (symmetry)?** ***[Refers to paragraphs 475-476 of the Blueprint]***

The application of the Amount A tax base rules in profit and loss situations appears logical from a policy perspective (if one has the right to tax the profit, one should also carry the losses). However, from a practical perspective it might be very difficult to determine which proportion can be allocated to which jurisdiction. It might be easier to only allocate profits above a certain profit margin to market jurisdiction, however, therefore only apply the Amount A tax base rules in situations where a MNE exceeds the determined profit margin, does not incur losses or has no loss carry forwards.

Simplification:

In this regard it would be favourable to amend the order of steps to identify whether a MNE is in scope of the new rules. Where MNEs meet the size threshold and perform some activities in scope, those MNEs should be offered an "early escape" from the new rules by allowing an initial test, e.g. based on data from country-by-country-reporting, whether they are in scope from a profitability perspective and due to large amounts of loss carry forwards. In the flow chart in Annex A the identification of losses and the profitability test are only foreseen as step 5 and 7. It would be preferable to have an analysis of these figures as early as possible (e.g. step 3 or step 4 where a segmentation is required due to different business models).

BStBK suggests to apply such initial test after the introduction of Amount A as long as the MNE has never been subject to the new rules due to the fact that it does not meet the profitability requirements.

**Do you consider that the carry-forward regime should account for some pre-regime losses and, if so, are any specific rules required to ensure symmetry, limit complexity and compliance costs (e.g., time limitations)?** ***[Refers to paragraphs 477-478 of the Blueprint]***

The new nexus rules are aiming to strike a balance between the entrepreneurial risk that a MNE took and usually materialises in the home jurisdiction and the fact that high profit margins are usually only achievable where MNEs are able to exploit a large consumer base in market jurisdictions. We believe that such market jurisdictions have to accept that excess

profits are set off against pre-regime loss which were incurred when establishing the business. This is the only way for them to acknowledge the time and risk taken to create a business model that is so profitable that it falls in scope of the new rules.

Where MNEs are not required to segment there should be no restrictions on the utilisation of pre-regime losses. They should be fully recognised until used up. Otherwise Amount A creates a "good weather"-taxation right in the sense that marketing states would never have to account for any losses or profitability shortages but would disproportionally participate in the profits.

Where MNEs have several (unrelated) business models and are subject to the segmentation provisions, it could be explored how to allocate existing losses to the different segments based on available business planning and accounting information.

Ultimately, the analysis in para. 477 that the consideration of pre-regime losses would create asymmetry and that in such a scenario pre-regime profits also have to be reallocated under Amount A is economically not convincing. These losses are not distributed to the market states with the effect that they create a tax credit or tax refund but are only considered to determine the overall profitability of a MNE group. Especially in research intensive business models that are subject to high investment risks, the full use of pre-regime is indispensable as market states would otherwise always only benefit from the profits but never participate in the losses. If the conclusion is to limit pre-regime losses, the logical consequence must be that future in-regime losses are also redistributed under Amount A.

**Do you consider that losses for Amount A purposes should not be allocated to market jurisdictions (unlike profits), but instead reported and administered through a single account for the MNE group (or segment where relevant) and carried forward through an earn-out mechanism? If so, do you have specific suggestions to improve the design and administration of this approach? *[Refers to paragraphs 479-480 of the Blueprint]***

We understand the proposal to suggest that losses from activities in scope would be bundled in the group and only if the overall profitability of the group after deducting relevant losses exceeds the profitability threshold, an Amount A taxation right could be exercised. We are in favour of such a proceeding as it simplifies the process. However, if losses are not allocated to market states, then pre-regime losses also have to be taken in full consideration.

It appears to be most sensible to introduce such a loss carry forward account on the level of the UPE and to determine relevant losses under the applicable modified financial accounting provisions (instead of determining losses according to domestic tax provisions) in order to align the profit and loss determination.

Regarding the analysis of para. 484 the conclusion that losses cannot be used after a business restructuring is not necessarily convincing. The tax base for Amount A is determined by looking at the profits and losses of all entities belonging to an MNE group worldwide. Where a business model proves to be unsuccessful and only generates losses until it is abandoned or amended, the losses of such a model have created tax refunds or carry forwards within the

jurisdiction of residence. Where the Amount A loss carry forward rules on reorganisation are stricter than the applicable tax provision of the jurisdiction at stake it would lead to the outcome that resident states would always carry the entrepreneurial burden alone while market jurisdictions would only participate in the profits.

**What is your view of the proposal to extend the carry-forward regime to 'profit shortfalls'? Do you or do you not agree with the conceptual rationale behind it? *[Refers to paragraphs 488-491 of the Blueprint]***

There are good arguments for the consideration of profit shortfalls, however, the rationale is not the same as for losses and depends very much on the profitability threshold that is going to be agreed upon. If the profitability threshold is set at reasonably high percentage such as 15%, 20% or 25% then there is less need to introduce a carry-forward system for profit shortfalls. However, if the profitability threshold is only set at 5% or 10% then the volatility of the respective business model has to be taken into account in order to allow MNEs with very volatile business models to recover losses and also shortfalls to be profitable again. In this regard it might be true that the overall burden of taxation is not altered by applying Amount A taxation. However, the process is more burdensome and the risk of double or multiple taxation is higher than only applying domestic rules.

## VII. The scope and relevance of possible double counting issues arising from interactions between Amount A and existing taxing rights on business profits in market jurisdictions

More specifically, comments are invited on the following points:

**Do you consider that the proposed mechanism to eliminate double taxation from Amount A will have an impact on the scope and relevance of possible double counting issues? Do you have suggestions on the design of this mechanism that would improve its ability to resolve (or reduce) possible double counting issues? *[Refers to paragraphs 531-532 of the Blueprint]***

The proposed mechanism will clearly have an impact on scope and relevance of possible double counting issues. The relevance is put forward through the examples in Annex C, Box C.3 and C.4. In "straightforward" cases with a centralized business model and a reduced number of cases, the calculation under the mechanism to eliminate double taxation may well lead to a full compensation of the double counting in the market of the paying entity. In these cases, it is likely that that the paying entity is the entrepreneur of the group. This is in line with acknowledged transfer pricing concepts (cf. however, our remarks in section VIII below). Once a more decentralised business model with more than one IP owner and an increased number of entities comes into mind, the double counting may well prove much more complex.

**Do you consider that there is an interaction between withholding taxes in market jurisdictions and the taxes under Amount A? If so, how could such interactions, including double counting issues, be addressed? *[Refers to paragraphs 506, 528 and 555 of the Blueprint]***

**Where countries levy WHT on certain payments that is only subject to partial treaty protection, levying additional Amount A could increase economic double taxation. Such cases are likely to occur where a state levies WHT on license and/or franchise payments and where such payments are not in scope of a treaty or where a treaty only foresees a partial relief of double taxation. In such cases it should be further examined whether such WHT can be credited to a potential Amount A tax. What would be the most important design and technical considerations in developing a marketing and distribution profits safe harbour for MNE groups with an existing taxable presence in the market jurisdiction? For example, do you consider this approach would be effective in dealing with possible double counting issues? Do you have views on how the fixed return could be designed? How should subsequent transfer pricing adjustments be dealt with in relation to this safe harbour? *[Refers to paragraphs 533-546 of the Blueprint]***

As outlined above, where MNEs already maintain a physical presence in a jurisdiction and pay taxes on their profits, the sale of such goods and services should not be in scope of the new rules. Where a MNE generates profits from other sale channels that are not in scope of the current income provisions, such profits should only be in scope of Amount A taxation rights, if goods sold via such channels are not subject to customs.

BStBK agrees that the concept of the marketing and distribution safe harbour is based on the thesis that Amount A is only to be applied to market jurisdictions that do not receive residual profits under existing profit allocation rules. As we understand the marketing and distribution safe harbour return is set to ensure the aforementioned outcome by operating as a cap. The safe harbour return is the sum of Amount A plus a fixed return for distribution and marketing activities.

However, BStBK believes that the fixed return would not necessarily need "to replicate an arm's length return" (cf. paragraph 542). If the intention is to determine the cap by reference to the Amount A calculation plus a fixed return, it could lead to arbitrary results if the fixed return is determined without reference to an arm's length return for the particular activities. Although we do understand the logic of the safe harbour return calculation as set forth in paragraphs 541 ff, particularly in 543, we recommend applying arm's length fixed returns for the marketing and distribution activity. Otherwise we envisage inconsistencies with Amount B and – even more relevant – uncertainty in auditing the safe harbour.

The design of the fixed return should be as simple as possible, e.g. as also suggested by the IF, apply a single fixed return on sales. Obviously, it needs to consider different geographical circumstances and industry conditions. In addition, we do understand that a "one-fits-all" solution in terms of a single fixed rate applicable for all regions and industries would be the

simplest approach but would in our opinion not fit the arm length standard that we deem to be compulsory.

**Should a domestic-to-domestic business exemption be considered to exclude part of a group's business that is primarily carried on in a single jurisdiction from the calculation of the Amount A tax base? If so, do you have views on how this exemption could be designed? *[Refers to paragraphs 547-553 of the Blueprint]***

Yes, for simplicity reasons we clearly prefer to exclude domestic-to-domestic business that is primarily carried on in an individual country. In our view, the only viable option is to introduce a *threshold* under which foreign source in-scope revenue that is minimal compared to the domestic-to-domestic business. The second exemption suggested by the IF (exclude from Amount A part of the group's business that is primarily or solely carried out in a single jurisdiction) brings an extra layer of complexity. We expect that for the latter exemption delimitation problems would occur as it could be difficult to differentiate between residual profit under Amount A to be included and potential domestic profit.

**Besides the mechanisms proposed in the Blueprint, do you have any other suggestions on how to resolve the possible double counting issue?**

We refer to the question above and support a threshold solution.

## VIII. The development of a process to identify the entities in an MNE group that bear the Amount A tax liability (the paying entities) for the purpose of eliminating double taxation

More specifically, comments are invited on the following points:

**What are your views on the proposed approach to eliminate double taxation from Amount A? Do you have any suggestions to improve this approach, including any alternative approach to eliminate double taxation?**

BStBK understands and appreciates the intention of the proposed approach to eliminate double taxation from Amount A. However, it needs to be considered that the process of determining the "paying entity" as a first step and the elimination of double taxation through either exemption or credit method as a second step, creates an additional layer of complexity. From a general perspective, it seems preferable to provide the possible highest level of flexibility. That could be achieved e.g. through a higher flexibility in choosing the paying entity. Although we understand that the four-step process inter alia includes the activity and profitability test to ensure that the alleged paying entity actually contributes to the residual profit and has the capacity to pay the Amount A tax, it would certainly be helpful to grant MNEs a right to choose the paying entity. We understand that this could lead to a situation where companies would choose a "paying entity" not fulfilling all the four-step process criteria. But it would certainly reduce the administrative burden in running the process. This should not interfere with the basic principle under Amount A and given the fact that double taxation needs to be avoided anyway, it should not harm that the MNE has the flexibility to choose its paying entity.

In addition, it should be considered that the four-step process penalizes entities that are running profitable as they are maintaining their business efficiently and successfully. It is true that these entities are contributing the most to the success of the MNE and, thus, to the residual profit. In turn, these entities would have to take an obligation as a result of their success.

**Do you consider that the activities test can be developed based on existing transfer pricing concepts and documentation? If not, what additional concepts or documentation requirements would you suggest, recognising the need to retain a test that is as simple as possible? *[Refers to paragraphs 579-591 of the Blueprint]***

Assuming that the four-step process shall be applied, it seems to be coherent in using existing transfer pricing concepts and documentation. As we understand the activities test it is set to determine the entity/entities that is/are substantially contributing to generate residual profits. This concept in itself is clearly related to the transfer pricing fundamentals and is covered in the transfer pricing methods application and documentation, particularly in the function and risk analyses, etc. Therefore, existing transfer pricing input should be used. It should, however, be considered that there is a basic inconsistency between the overall approach of Amount A (formulaic determination of residual profit and allocation to market states) and the application of transfer pricing concepts and documentation. One could argue that the transfer pricing concept of Amount A is artificially construed – if the Amount A is based on the aforementioned formulaic approach. Nevertheless, we appreciate that the four-step approach – if required – would need a basis.

We acknowledge that the suggestion set forth in para. 579, 582 of the blueprint is generally covering the DEMPE process as initially introduced through action items 8-10 of the 2015 BEPS report. Again, we need to point out that this means an increase in complexity and compliance burden for the MNEs. As of today, for example German law does not contain the DEMPE analysis concept.

**Do you consider that the profitability test should be calculated as a return on payroll and assets or should alternative approaches be considered? Could the profitability test apply instead of, rather than in addition to, the activities test? *[Refers to paragraphs 592-598 of the Blueprint]***

We refer to our introductory statement on the determination of the paying entity. Thus, in essence it should be considered to leave the decision open to the MNE to select the paying entity. Certainly, the mere reduction of the four-step process by eliminating the activities test reduces complexity and the compliance burden as outlined in our answer to the previous question.

A test on a combined return on payroll and assets seems to be preferable to a single application of either factors.

**Do you consider that a market connection priority test should form part of the process to identify a paying entity? Why or why not? *[Refers to paragraphs 599-607 of the Blueprint]***

Yes, there should be a connection priority between the paying entity and the taxing market jurisdiction, as this notably reduces the number of paying entities in practice. Waiving this nexus puts MNEs in the situation of having to conduct reimbursement procedures in a large number of states. This is not practicable and would lead to a number of lengthy procedures for tax administrations and MNEs. Against this background, we would like to promote to the idea of a modified profit split, which could be implemented in the form of true ups at the end of the year (please see below).

## IX. The issue of scope of Amount B and definition of baseline marketing and distribution activities

More specifically, comments are invited on the following points:

**Do you consider that Amount B should be narrow in its scope or should it take on a broader scope? What are the advantages or disadvantages of a narrow or broader scope? *[Refers to paragraph 659 of the Blueprint]***

We understand that the proposal regarding Amount B would not only comprise MNEs in scope of Amount A but all MNEs that are operating in more than one jurisdiction.
It is sensible to start the Amount B approach with a narrow scope and to enlarge its scope step by step to other activities that can be qualified as routine. In general, taxpayers and advisors welcome the introduction of safe harbour rules as they enhance tax certainty and allow for faster dispute resolution between jurisdictions in ongoing MAPs.

It should however be guaranteed that the Amount B safe harbours are designed as a rebuttable presumption and that taxpayers have the possibility to demonstrate that the activities performed by them are not routine and therefore should not fall in scope of Amount B. Otherwise the Amount B rules could hamper business developments.

**Do you consider the baseline activities outlined in the positive and negative list achieve the narrow scope definition examined in the Blueprint? If not, what changes should be considered? What changes to these lists would be required if a broader scope was adopted? *[Refers to paragraphs 664-673 of the Blueprint]***

We understand that Amount B is targeting routine activities as defined in Chapter I subchapter D of the TPG 2017. In this regard it should be noted that activities relating to the protection of IP and marketing intangibles are usually considered to be low value adding routine functions as further described in Chapter 7 of the TPG 2017 para. 7.49. Legal protection of marketing intangibles can be easily outsourced and therefore performing simple protection activities like the registration of IP in local registers or hiring external advisors to pursue infringements in accordance with the group's standard should not have the consequence to be out of scope for

Amount B. Surveying the compliance of local IP protection is usually located with the local entities.

**Do you consider that quantitative indicators or thresholds should be used when establishing whether or not entities are in the scope of Amount B? Why or why not, and if not what other factors should be considered? *[Refers to paragraph 674-679 of the Blueprint]***

Meeting quantitative thresholds can be an indicator for determining whether certain baseline distributing or marketing activities are routine or not. However, in many cases and depending on the concerned jurisdictions, certain transfer prices might also only reflect years of transfer pricing conflicts and not the actual function and risk profile. Exceeding certain thresholds should therefore not exclude such MNEs to be in scope when the activities performed would fit the description of Amount B activities. Where an MNE wishes to be in scope of Amount B, the concerned tax administrations should agree on a phase down of the existing transfer prices in order to allow the MNE into the safe harbour rule and achieve certainty for the future.

BStBK suggests that tax administrations open a procedural way into the safe harbour. Such procedures could be peer reviewed by the OECD (similar to MAP – how many applications, how long did it take the concerned tax administrations to agree on a phase in etc.).

**Do you consider that multifunctional entities (i.e. entities that perform baseline marketing and distribution and other activities) should be eligible for Amount B? *[Refers to paragraph 680-684 of the Blueprint]***

As outlined in the blueprint, the application of Amount B remuneration for multifunctional entities must be subject to a case to case analysis. Where the remuneration for baseline marketing and distribution activities can be clearly distinguished from other activities that entitle the entity for a higher compensation, then Amount B should be available for the baseline activities. However, in order to avoid lengthy discussions between MNEs and tax administrations, clear guidance should be developed and it might be useful to provide a sort of early tax certainty procedure for MNEs interested to be in scope of Amount B taxation in order to provide them with certainty whether they qualify or not.

**Do you consider that Amount B will be effective in reducing disputes? If not, why? *[Refers to paragraph 664-673 of the Blueprint]***

The effectiveness of Amount B in reducing tax disputes will rely mostly on the concrete design and the implementation within the jurisdictions and the application of the tax administrations. Regarding the design, there should be as little exceptions as possible and clear guidance on who is eligible or not. Amount B-taxation should be implemented as a procedure that MNEs can apply for by providing the relevant information that the respective entities have the eligible function and risk profile. A peer review process and an official complaint channel would support the willingness of local tax administrations to introduce the Amount B taxation in a speedy and efficient way.

## X. The appropriate profit level indicator for calculating Amount B, and how it should be calculated assuming Amount B is based on a narrow scope

More specifically, comments are invited on the following points:

**What the appropriate profit level indicator should be, for example whether a return on sales set at the (potentially adjusted) EBIT or PBT level should be used? *[Refers to paragraphs 686-688 of the Blueprint]***

BStBK believes that return in sales is the appropriate level indicator for a distribution entity focusing on the EBIT margin cleaned by results stemming from currency fluctuations. EBT also contains financial results that make the outcome to volatile.

Regarding the rebuttable presumption it would be preferable if such a presumption could only be rebutted by the MNE, not by tax administrations. Allowing tax administration to rebut the application of Amount B that has been determined by benchmarking analysis would jeopardise the effectiveness of the whole approach as the level of uncertainty would be the same in an audit without being subject to Amount B. Therefore, instead of letting tax administrations rebut the Amount B taxation in individual cases they should only have the possibility to amend the applicable profit margin as such and to renegotiate with the relevant jurisdictions that higher (or lower) margins (as the case maybe) are more appropriate. This would ensure that a taxpayer that opts into the Amount B taxation has upfront certainty instead of applying for an APA. This would shift the risk of the inabilities of tax administrations to agree on a case in a MAP or an APA from the taxpayers to the tax administrations themselves.

**Do you consider that Amount B should account for variation in returns to baseline marketing and distribution activities by industry and/or region? If yes, what industry and/or regional variations should be considered? Are there any other differentiation factors that should be considered? *[Refers to paragraphs 690-693 of the Blueprint]***

Yes, in order to achieve acceptable results the applicable profit margin under Amount B should consider different industries and markets. Regarding the differentiation between industries NACE codes used in benchmark databases could be a starting point.
Regarding different markets, risk indicators used by the world bank or the IMF (such as for currency risk and/or inflation) could be used as a starting point to indicate where higher margins would be justified and required in order to take the risk and invest in such markets.

## XI. The development of an early tax certainty process to prevent and resolve disputes on Amount A

More specifically, comments are invited on the following points:

**What do you consider will be the key challenges in the early tax certainty process described in the Blueprint and how do you think would they best be addressed?**

**aa) General remarks**

We understand that the early tax certainty process foresees that the envisaged panels (review panel and determination panel) are composed of members of tax administrations of different jurisdictions, and that it is not foreseen for the panel processes to be public procedures but rather "closed-door" procedures similar to other Competent Authority procedures (APA and MAP). This is unfortunate for 2 reasons:

- It prevents the rules from being applied in an even manner and from building – similar to the jurisprudence of the ECJ – a comprehensible jurisprudence that can be considered by MNEs when going through the self-assessment procedure;
- There is little "control" of how decisions are taken and therefore acceptance will be lower than when implementing a transparent procedure that can be subject to open discussion and feedback.

It is also bewildering to foresee a review process for the application of the new rules that only involves members of tax administrations and is not subject to a review by an independent panel, e.g. an international tax court. Thus, the taxpayer practically will always rely on the tax administration procedure, as following domestic court procedures in several different countries is not likely to achieve satisfying results. In our view the early tax certainty procedure in its current designs causes serious concerns regarding its conformity with the guarantee of access to justice. It would therefore be preferable to establish a separate independent body to judge over the application of the new rules to ensure the separation of power between legislative, executive and judicative instances.

We therefore suggest to either establish a mandatory review process that could entail tax administration but has an international tax court reviewing the findings of such panels if the taxpayer applies for such a review or to leave the review of the application directly to an international fiscal court in order to develop a steady and uniform application of the new rules.

**bb) Specific remarks**

Regarding the proposed early tax certainty process, we think that it is essential

- to define a process that determines the composition of the panel,
- that the decisions of the review panel can be reviewed by a court
- that the national tax authorities are bound by the decisions of the review panel.

It is therefore necessary to define whether the panel procedure is independent from national and international legal procedures, should be integrated or stands above them.

The Amount A rules cannot be administered unilaterally. It should therefore be compulsory that all states wishing to apply Amount A rules must introduce a Tax Certainty Procedure and a binding multilateral dispute resolution mechanism.

**Do you consider that there are circumstances where an MNE group's ultimate parent entity would not be the most suitable constituent entity to be the group's co-ordinating entity? If so, which constituent entities in an MNE group are likely to be more suitable. *[Refers to paragraph 718 of the Blueprint]***

With regard to Pillar 2 there might be cases where an MNE restructures its UPE into a jurisdiction with a robust income inclusion rule in order to avoid the application of the UTP rule. In such cases (and maybe in other cases as well), the relevant staff with the relevant knowledges would not be placed in the jurisdiction of the UPE, which would make a tax certainty process more challenging as there might be language barriers with the tax administration of the UPE and less knowledge about the laws in such jurisdictions. In such cases it could be favourable to allow an MNE to treat the second level (provided that there is only one entity on the second level) as the UPE for the application of the early tax certainty process to ensure that the relevant staff is available.

**Are there any features that could be incorporated into the Amount A tax certainty process to encourage participation by MNE groups? Do you see any features in the proposed design that could discourage participation by MNE groups? *[Refers to paragraphs 728-729 of the Blueprint]***

BStBK strongly believes that the review process should be mandatory and should not only be available upon request. This would ensure that tax administrations would have to build capacities right away instead of evaluating first how many MNEs would actually apply for the procedure. This is because in our opinion the new rules around Amount A cannot be applied unilaterally but only if all tax administrations involved apply the new rules in a coherent manner.

In order to provide tax and legal certainty there should be clear rules for taxpayers and tax authorities on how the new rules around Amount A work and which process has to be passed before applying the new rules, as Amount A rules should only be applied once this panel has presented its findings and all concerned tax administrations and the taxpayer have given their approval.

We therefore advocate for the establishment of a mandatory review panel.

**Do you consider that a separate process to determine whether an MNE group is within scope of Amount A would be beneficial, or that in practice this is unlikely to be used? *[Refers to paragraphs 729 and 782 of the Blueprint]***

A process to give MNEs certainty whether they are in scope or not is definitely helpful in order to avoid that MNEs undergo an annual process even though the new rules would not apply. The *in-scope-process* should not be limited to the exercise of applicable activities such as ADS or CFB but also to factors such as meeting the profitability threshold or making use of

carry forward losses that prevent a reallocation of taxation rights under Amount A. For the latter the lead tax administration could pronounce a holiday from application of the new rules for a number of years, e.g. three to five years and come back to the MNE after that period to verify whether facts and circumstances have changed and whether the new rules would apply in the future. This would allow MNEs to get prepared for the new rules without having to undergo a lengthy process every year despite not even being subject to the new taxation right.

## XII. The introduction of new approaches to provide greater certainty beyond Amount A

**More specifically, recognising that Inclusive Framework members continue to hold different views as to the extent to which Pillar One should incorporate new tax certainty approaches beyond Amount A, what are your views on the four-element approach explored in the blueprint? What other suggestions and ideas do you have that would take into account these different views and help advance tax certainty beyond Amount A? [Refers to paragraphs 710 and 801 of the Blueprint]**

Greater tax certainty has been discussed even before the work on the taxation of the digital economy has been picked up again. The numbers of MAP procedures are rising from year to year and outside of the EU, where finding a common solution became mandatory, there is no obligation for the negotiating Competent Authorities to achieve such a solution leaving the taxpayer behind with double taxation.

We therefore highly welcome the proposal to introduce mandatory binding dispute resolution mechanisms for every TP and PE issue. However, such a procedure should not be limited to large MNEs but should especially focus on smaller and medium enterprises as such companies often do not have the resources and means to engage in a MAP with an open ending. They are therefore more likely to refrain from certain markets as they are not capable of bearing the potential double taxation. The argument that tax administrations have to focus their resources on the large cases cannot prevail. Introducing mandatory binding dispute resolution mechanisms to all sizes of taxpayers will also lead to a re-education of tax administrations thus leading to better, more realistic tax assessments.

## D. Comments on Pillar 2

### I. General remarks

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 1 and Pillar 2 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 1). In addition, these businesses can structure their operations and investments in a way which allows them to make profits in low tax jurisdictions (Pillar 1). 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, it also needs to be kept in mind 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: As a consequence, in the recent past additional complexity and compliance costs have put a significant strain on most MNEs. Now GloBE will produce significant additional burden with an unclear outcome.

Corresponding with our remarks on Pillar 1, we would like to emphasise again that it is paramount that the new system provides for clear rules administrable for the taxpayers, their advisers, the tax administration and judicial bodies. It is critical that any guidance given by the OECD is workable and tax authorities in all countries and taxpayers take a consistent approach.

In relation to Pillar 2 our comments focus on general issues which we consider to be particularly important and which should be reconsidered.

### II. **Scope of the GloBE rules**

#### 1. Revenue threshold

We would like to emphasise again that the new rules should have a threshold so they only apply to large businesses with a sufficient level of revenue.

The reason provided concerning a threshold for Pillar 1 also applies to Pillar 2. We believe 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.

Corresponding with our view on Pillar 1, we suggest considering a threshold of EUR 2 billion 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 EUR 750 million consolidated annual global revenue. Businesses with a consolidated annual global revenue of EUR 750 million 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.

To provide consistency in the application of the new rules and allow businesses that "grow" into scope of application we suggest that only businesses which exceed the threshold continuously are subject to the new rules. We think it is conceivable, for instance, that the new rules only apply to businesses which exceeded the threshold in 2 consecutive years or three out of the previous 4 years.

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.

### 2. Carve-outs

Further, BStBK believes that the idea of introducing carve-outs for certain industries as suggested for the application of Pillar One1 is not essential for the application of GloBE.

However, based on the assumption that there will be a revenue threshold we also advocate that a carve-out for partnerships for a transitional period. The application of the new rules to partnerships adds another level of complexity to a set of rules which is not straight forward to apply in the first place. Therefore, we the application of the new rules should first be observed – and if necessary adjusted. After a transition period, the GloBE would also apply to partnerships.

We believe that such a carve-out would not give room for tax planning in form of reorganisations to escape the application of GloBE. If a revenue threshold is introduced the new rules will solely apply to very big businesses. A great portion will be listed or their shares are widely held. A reorganisation could not easily be realised. In addition, it would not be feasible if the transition period is limited to a few years and the application of the new rules would be compulsory eventually.

## III. Calculating the ETR under the GloBE rules

### 1. Determining the tax base

Bundessteuerberaterkammer supports the approach to use to international accounting standards and local GAAP as a starting point to determine the tax base, as we believe that this also includes the German annual financial statements under commercial law. Nevertheless, we advocate that the German GAAP are explicitly mentioned as an acceptable accounting standard. Germany is not just Europe's largest economy but also the strongest. On the global scale, it is the fourth-largest economy in terms of nominal GDP. We believe that there should be no doubt, that German local GAAP are explicitly accepted.

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

When introducing adjustments to accounting records 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:

- 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.

- 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.

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 is not in line with taxation principles. It is internationally recognised that unrealised profits are not chargeable to tax, notwithstanding that they have been recognised in the taxpayer’s financial statements in accordance with international accounting standards. Otherwise, taxpayers’ liquid funds would be strained and additional borrowing costs may incur.

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 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. Therefore, we suggest to accept tax incentives which either meet certain predefined criteria or have been approved by a supranational institution like the EU.

## 2. Blending

Blending on a jurisdictional base seems to be a workable approach, especially if a white list of jurisdictions with respect to which no ETR test is needed because they do not normally accord a tax treatment leading to effective tax burdens below the minimum rate, is introduced.

If the IF cannot agree on a white list it should be reconsidered whether CFC rules and the so-called licence fee and interest cost deduction barrier continue to exist after the introduction of GloBE. In particular, CFC rules are designed to achieve the same objective as the IIR. The co-existence of a GloBE income inclusion and traditional CFC income inclusion would increase the complexity of international tax law for cross-border businesses. Abolishing the above-mentioned rules would promise a real benefit for the businesses in scope without compromising the overarching policy.

## 3. GILTI co-existence

Finally, the US GILTI regime (26 USC § 951A) or other similar regimes should not be recognized as a proper implementation of the income inclusion rule. The US GILTI regime is based on worldwide blending. Recognising it as a proper implementation of the IIR would give MNE which apply the US GILTI regime unjustified advantages. They could still benefit from profit shifting to jurisdictions which offer an ETR below the GloBE level, as long as the overall ETR remained above the minimum threshold. Further, those MNE would not bear the additional administrative burden and related costs. Such a difference in treatment could also lead to less acceptance of the new rules amongst the remaining states and in particular MNEs.

As a compromise, we suggest accepting the US GILTI regime for a transitional period for say 3 years. Eventually, the UTP could be applied to MNE groups with a UPE based in the USA.

However, if the abolition of CFC regimes is not considered and US GILTI regime is permanently grandfathered the IF should reconsider its preference for jurisdictional blending. To create a level playing field for all international MNE groups, it will be inevitable to fall back to global blending.

## III. Simplification options

### 1. Tax administrative guidance

Bundessteuerberaterkammer strongly supports the idea of introducing simplification through tax administrative guidance.

The primary policy objective of Pillar 2 is to reduce artificial manipulation of economic relationships to allow income to escape taxation worldwide. Such a goal aims, in part, to combat the use of controlled foreign corporations to shelter income earned in low tax jurisdictions. Thus, if the source jurisdiction does, in fact, impose an acceptable MTR on the income, there should be no need from a policy perspective to impose a second level of tax in the jurisdiction of the ultimate parent entity.

To promote simplicity, we suggest creating 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 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.

### 2. De minimis profit exclusion

Bundessteuerberaterkammer supports the introduction of a de minimis profit exclusion to exclude transactions or entities with a small amount of profit or related party transaction. This is, in particular, true concerning 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.

A de minimis profit exclusion could reduce administrative burden, particularly for MNE Groups operating in very large numbers of countries considerably. However, this is only true if a simple computation of pre-tax profits would be acceptable. It could be based on the data included in Country-by-country-reports. If unadjusted Country-by-country-reporting data is used an increased “safety margin” could be included in a fixed de minimis threshold.

However, if the computation of pre-tax profits is based on the “regular” GloBE determinations the amount of simplification it would provide seems relatively limited.