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2 December 2019

Dr. Achim Pross, Head
International Co-Operation and Tax
Administration Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation
and Development
Paris, France

Via email: taxpublicconsultation@oecd.org

RE: TEI Comments on the Global Anti-Base Erosion Proposal

Dear Dr. Pross:

The OECD launched its base erosion and profit shifting (BEPS) project in 2013. Action 1 of the BEPS project was entitled *Addressing the Tax Challenges of the Digital Economy*. The OECD published a final report under Action 1 on 5 October 2015 (the Final Report).[1] The Final Report concluded in part "because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes."[2] The Final Report noted the OECD would continue to monitor developments in this area, along with implementation of the other BEPS actions, with a view toward producing a follow-up report on the digital economy in 2020.[3]

Subsequent developments and substantial political pressure, however, have overtaken the "wait and see" approach of the Final Report. Since issuing the Final Report, the OECD has published: (i) an interim report entitled *Tax Challenges Arising from Digitalisation* on 16 March 2018; (ii) a policy note, entitled *Addressing the Tax Challenges of the Digitalisation of the Economy* on 23 January 2019; (iii) a public consultation document, also entitled *Addressing the Tax Challenges of the Digitalisation of the Economy* on 13 February 2019; (iv) a document entitled *Programme of Work to*

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1 The Final Report is available at https://www.oecd.org/tax/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm.

2 Final Report at 11 & 54.

3 *Id*. at 138.

Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy (Programme of Work), on 31 May 2019; (v) a public consultation document entitled *Secretariat Proposal for a "Unified Approach" under Pillar One* on 9 October 2019; and, most recently, (vi) a public consultation document entitled *Global Anti-Base Erosion Proposal ("GloBE") – Pillar Two* (the Consultation Document) on 8 November 2019. The OECD also held public consultations in Paris in March and November 2019.

The Consultation Document invites interested parties to comment on the technical design aspects of the GloBE no later than Monday 2 December 2019 at 18:00 (CET). I am pleased to respond to the OECD's request for comments on behalf of Tax Executives Institute, Inc. (TEI).

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 57 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 individual members represent over 2,800 of the leading companies in the world.[4]

TEI Comments

General Comments

The Consultation Document presents the OECD's preliminary approach to Pillar Two, which "calls for the development of a co-ordinated set of rules to address ongoing risks from structures that allow [multinational enterprises (MNEs)] to shift profit to jurisdictions where they are subject to no or very low taxation."[5] The Document sets forth an ambitious and complex approach for implementing a GloBE and yet leaves many questions unanswered.

The OECD is under tremendous political pressure to deliver a timely solution to the tax challenges of the digital economy and related issues, as outlined in the Programme of Work. However, implementation of a complex global minimum tax (i.e., the GloBE) addressing base erosion issues seems premature while the 15 BEPS action items addressing base erosion and profit shifting continue to be implemented. A premature approach will result in MNEs suffering double, triple (or more) taxation, particularly if the OECD delivers a "consensus" solution in 2020. TEI therefore recommends, as an alternative, an initial implementation phase where the GloBE only applies to profits received from harmful tax regimes, as defined under BEPS Action 5. This could be accomplished by listing certain jurisdictions as engaged in harmful tax practices and/or listing specific harmful tax practices subject to a

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4 TEI is a corporation organized in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

5 Consultation Document at 3. "Pillar One" addresses the allocation of taxing rights between jurisdictions and considers various proposals for new profit allocation and nexus rules.

GloBE. This preliminary approach could be revisited later to determine whether a more comprehensive GloBE is warranted, especially in light of further worldwide implementation of the BEPS action items.

TEI also has the following additional general comments:

1. All implemented and proposed unilateral tax measures (e.g., digital services taxes, multinational anti-avoidance laws, diverted profits taxes, equalization levies, and offshore receipts in respect of intangible property taxes) should be withdrawn as a condition of agreeing to the OECD's Pillar One and Pillar Two proposals. The purpose of the OECD's renewed work on the tax challenges of the digitalization of the economy would be unclear if these unilateral measures remained in place after an agreement was reached.

2. The OECD should develop a general framework before diving into a further detailed discussion of implementing a GloBE under Pillar Two. Such a framework would need to have an agreement on what components of a GloBE are necessary and how they would interact with each other and with existing legislation. Similarly, criteria should be developed for determining what (if any) existing legislation, such as the U.S. global intangible low-taxed income (GILTI) regime, may be grandfathered (or deemed "GloBE-compliant") and what unilateral measures can or should be reversed before introducing any of the new GloBE components.

3. The OECD has previously stated the corporate income tax is the worst kind of tax from an economic growth perspective. Accordingly, the scope of Pillar Two should be limited and the minimum tax rate low to minimize the negative effects on cross-border trade and investment. The OECD's most recent report on the outlook for the global economy, for example, called for growth-enhancing measures.[6] The GloBE proposal would, in contrast, be a growth-depressing measure.

4. U.S. companies are subject to the GILTI regime, which imposes a minimum tax on "deemed" global intangible income (and thus encompasses far more than intangible income). The GILTI regime should be treated as an income inclusion rule under any final OECD guidance and there should be no need to impose additional rules on companies subject to GILTI.

5. The Consultation Document proposes four sets of rules: (i) an income inclusion rule; (ii) an undertaxed payments rule; (iii) a switchover rule; and (iv) a subject to tax rule. However, much of the focus of the Document, as well as this letter, is on a worldwide inclusion regime at an MNE's parent company level. A global solution of this type simplifies tax administration and compliance and should address many of the issues necessitating the implementation of the GloBE. The other three rules may encourage policies addressing the perception of low-taxed income at an intermediate holding

[6] *See* Interim Economic Outlook Handout, September 2019, currently *available at* http://www.oecd.org/economy/outlook/ (last visited 18 November 2019).

company or subsidiary level, creating additional taxes at those levels even if the MNE has an overall effective tax rate above the minimum GloBE rate.

6. Any final guidance from the OECD on the four rules set forth immediately above should include clear and consistent co-ordination and ordering guidelines to avoid double taxation. TEI recommends the income inclusion rule apply at the parent company level and take priority over the undertaxed payments and subject to tax rules. The OECD at a minimum should clearly state which rules under Pillar Two take precedence over the other rules.
7. The scope of the undertaxed payments and subject to tax rules should be limited to payments related to "mobile" income (e.g., interest and royalties). Other payments (e.g., by distributors to acquire inventory which they on-sell) should be out of the scope of these rules.
8. Although the undertaxed payments rule is limited to payments to related parties, there is no such restriction in the subject to tax rule. The scope of both rules should be limited to payments to related parties because requiring MNEs to determine the effective tax rate applied to payments received by third parties is impractical.
9. Implementation of blending on anything but a worldwide basis at the level of the parent jurisdiction would be neither practical nor administrable.
10. Robust dispute resolution mechanisms are essential to avoid controversy and provide certainty. Mandatory binding arbitration with peer review should therefore be included within the proposal.
11. The full impact of both Pillar One and Pillar Two needs to be modelled and understood before moving forward.
12. The interaction of Pillars One and Two needs to be clarified. For example, will the reallocation under Pillar One occur before the application of Pillar Two?
13. The GLoBe should only be imposed by the home jurisdiction of the parent entity of an MNE. There is no other practical method for implementing the GloBE and attempts to do otherwise would lead to multiple levels of taxation on the same income.

<u>Answers to Specific Questions in the Consultation Document</u>

1.a) Do you agree that the use of financial accounts as a starting point can provide an appropriate income base (for the computation of an effective tax rate) and would simplify and reduce the compliance costs of the GloBE proposal?

Use of financial accounts as a starting point may be the most appropriate income base, but the answer to the question depends on the primary objective of Pillar Two, on how Pillar Two is expected to interact with Pillar One, and how the various components of Pillar Two will be designed. The use of financial accounting information will certainly be helpful, for example as a simple gateway test to determine whether an MNE pays a minimum level of income taxes globally, which should also provide a general curb on profit shifting. Use of financial accounts may also serve as a helpful income base when the components of Pillar Two work on a worldwide blending basis (see our responses to Question 2 below).

While the use of financial accounts as a starting point may in certain cases provide an appropriate income base, we note such financial accounts may in some cases exclude taxes paid with respect to such income. Some MNEs are headed by a transparent entity, such as a U.S. "S" corporation or a partnership. While taxes paid by non-corporate owners of such entities would not be reflected in the financial accounts of such entities, such taxes nevertheless should be treated as imposed on the business profits of such entities in appropriate cases. A failure to do so would result in the mischaracterization of MNEs headed by transparent entities as low taxed in their headquarters country, even though in fact the business income may be subject to high rates of tax in the headquarters country. In some sense passthrough taxation of an MNE headed by a transparent entity operating through foreign branches or transparent subsidiaries represents a pure or comprehensive income inclusion regime. That is, all the income of the parent entity would be subject to tax in the home country to the extent the owners of the parent entity are residents of the home country.

1.b) What would be the consequences of using the accounting standards applicable to the ultimate parent entity of the MNE? Would you suggest a different approach?

Using world-wide consolidated financial statements is a practical, albeit imperfect, approach as material entities within the consolidated group normally must report financial information to the parent entity using the parent entity's generally accepted accounting principles (GAAP). Use of consolidated financial statements would also be consistent with the approach under Pillar One. Companies should not be required to prepare an additional set of books under different accounting standards than those in which they maintain their records, i.e., no special accounting standard should be introduced solely to comply with Pillar Two (or Pillar One, for that matter). The costs of keeping dual or even triple accounting ledgers (e.g., one for financial accounting purposes, one for Pillar One, and one for Pillar Two) are prohibitive.

1.c) How would you recommend determining whether a financial accounting standard is an appropriate standard for determining the tax base under the GloBE proposal?

Financial accounting standards are implemented to ensure a company's financial statements are fairly stated to provide an objective picture of the company's affairs to statement users (i.e., investors). Such standards are typically "conservative" when it comes to a company's net income by booking revenue only when earned and yet booking costs even if they are uncertain. The objective of tax legislation, in contrast, is often based on the country's political and economic needs and often considers costs more cautiously while looking to include revenue as early as possible. It would be difficult to determine when a financial accounting standard would or would not be appropriate for determining the tax base under GloBE given the divergent objectives of financial accounting standards and tax policy.

Using consolidated financial statements for GloBE in an aggregate manner, however, is the only sensible way forward.

1.d) Do you have concerns that allowing more than one financial accounting standard to serve as the starting point for determining the tax base under the GloBE proposal will place some MNEs at a competitive advantage due to variations in financial accounting standards among jurisdictions?

This question implies there may be a need to develop a consistent set of financial and tax accounting standards across jurisdictions for MNEs subject to Pillar Two. Harmonizing financial or tax accounting standards on a worldwide basis would require MNEs to maintain a separate set of books and records for these new standards in addition to the records kept for reporting purposes in the MNE's parent jurisdiction. This would impose extreme compliance costs on MNEs, likely out of proportion to any GloBE tax collected. The differences in financial accounting standards are more often attributable to timing, however. Thus, the tax base would be similar enough to not place any MNE at a competitive disadvantage due to variations in financial accounting standards among jurisdictions in the long run.

1.e) There may be some instances where MNEs, particularly smaller MNEs, do not prepare consolidated financial statements for any purpose. How much of an issue do you think this is and for what types of MNEs? Where this is the case, how would you suggest the issue should be addressed?

Should the same OECD threshold used for country-by-country (CbC) reporting (i.e., annual consolidated group revenue of €750 million or more) be made applicable to Pillar Two, most (if not all) of the MNEs covered by such a rule would be required to prepare consolidated financial statements for at least some purposes. The threshold for applicability of Pillar Two could be raised (e.g., to €1 billion in group revenue or higher) to ensure this is the case.

1.f) Are there additional or different considerations that apply to the tax base determination for purposes of an undertaxed payments rule?

The undertaxed payments rule addresses payments to related parties. All intercompany transactions are eliminated from the ultimate parent entity's consolidated financial statements when they are prepared. Thus, an alternate source of information may be needed if the calculation is not done on a global consolidated basis. Such information may be found in local GAAP or statutory accounts. Yet those accounts vary by jurisdiction and often apply different rules for recognizing costs and revenues. However, using local GAAP or statutory accounts would substantially complicate the entire process of applying an undertaxed payments rule, as well as significantly increase the risk of double or triple taxation. Furthermore, related party profits are typically not tracked separately from unrelated party profits.

2.a) What are the material permanent differences between financial accounting income and taxable income that are common across jurisdictions and that you think should be removed from the tax base without undermining the policy intent of the GloBE proposal?

Material permanent book-tax differences vary by country, industry and company. An MNE's ultimate parent entity should be given the flexibility to determine which permanent differences to adjust instead of the OECD specifying such permanent differences.

TEI also submits certain "undertaxed payments" should be carved-out from the undertaxed payment rule, notably when an "undertaxed" payment is the result of OECD-sanctioned tax incentives, such as patent boxes or R&D credits. OECD-sanctioned tax incentives should be considered acceptable permanent differences when determining the tax rate.

2.b) Do you have views on the methods that could be used for dealing with permanent differences?

We recommend using the worldwide blending approach.

2.c) Do you have any comments on the practicality of making adjustments for permanent differences?

See our response to 2.a) above.

2.d) Do you think any other adjustments to the financial accounts require attention?

See our response to 1.a) above – it depends on Pillar Two's objective.

3.a) Do you have any comments on the use of carry-forward of losses and excess tax as a mechanism for addressing temporary differences under the GloBE proposal?

"Temporary differences are differences in the time for taking into account income and expense that are expected to reverse in the future. . . . Assuming no changes to local tax law, *these temporary differences will not affect the total amount of local taxes the entity will be required to pay over its lifetime*."[7] By their described nature, temporary differences can, however, create significant fluctuations in the amount of taxes reported on a year-over-year basis.

Temporary differences should be accounted for in a GloBE system as they will reverse over time. Worldwide blending will generally limit the impact of temporary differences to a large extent, although such differences may create an additional tax burden under a GloBE in cases of an unexpected global revenue or cost disruption. The effective tax rate for GloBE purposes, in certain cases, will be overstated or understated in any particular year if there is no adjustment for temporary differences. Furthermore, the GloBE minimum tax paid in an understated year would never be recoverable absent some sort of carry forward mechanism. Using deferred tax accounting would be one method of adjusting for these differences, but it would be burdensome. Alternatively, any taxes paid in excess of the minimum tax rate in a year could be carried forward and credited against potential minimum taxes due in a subsequent

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7 Consultation Document at 12 (emphasis added).

year in which the effective tax burden falls below the minimum tax rate. A third alternative would be the use of an accounting loss carry-forward concept.

3.b) Do you have any comments on the use of deferred tax accounting as a mechanism for addressing temporary differences under the GloBE proposal?

See our response to 3.a) above.

3.c) Do you have any comments on the use of a multi-year approach to measure the average effective tax rate as a mechanism for addressing temporary differences under the GloBE proposal?

A multi-year approach to measuring the average effective tax rate for addressing temporary differences would present substantial compliance and administrative difficulties and therefore we do not recommend such an approach.

3.d) Do you have any comments on what limitations (if any) should be imposed on the normal financial accounting rules for deferred tax assets and liabilities and the practicalities of imposing those limitations?

The financial accounting rules for deferred tax assets and liabilities already have their own complexities requiring many MNEs to train their workforce on the skillset necessary to comply with the financial accounting tax rules. Companies may face further compliance and training costs should the OECD devise layer on another set of standards on top of the current financial and tax rules. Moreover, the use of deferred tax accounting would create significant measuring, reporting, and verification challenges for tax authorities, especially in developing countries.

3.e) Do you see opportunities for potential abuse in any of the approaches for addressing temporary differences described above? Do you have suggestions for designs to prevent those abuses?

MNEs do not abuse the tax system merely because their business operations result in temporary book-tax differences. An MNE will, at some point, pay the deferred taxes and therefore it is unclear why it is necessary to adjust for temporary differences at all so long as an MNE's effective tax rate in a particular year includes deferred taxes.

3.f) Do you have any suggestions for alternative mechanisms for dealing with temporary differences?

See our response to 3.a).

Additionally, when taking temporary differences into account, clear rules should be made on the treatment or exclusion of valuation allowances. Certain deferred taxes on e.g., purchase accounting entries, may never trigger any effective reduction or increase in effective taxes. These items should be disregarded.

3.g) Do you have any additional comments on Section 2, including comments based on experiences with existing regimes that you suggest should be adopted or avoided?

The introduction of the various BEPS action items and accompanying legislation/tax treaty changes, along with the proposed OECD Pillar One rules, creates a high risk of an MNE being double, triple or quadrupled taxed not only across jurisdictions but even within the same jurisdiction due to overlapping rules. TEI recommends the OECD explore applying Pillar Two to profits attributable to harmful tax regimes only as there is a low chance of any material income going untaxed or taxed at a nominal tax rate due to the ongoing implementation of the 15 BEPS action items.

4.a) How would you assess the general compliance costs and economic effects of a GloBE proposal that is based on either an entity, jurisdictional or worldwide blending approach?

True worldwide blending, including domestic income and taxes as well as foreign income and taxes, would likely be the least costly of the three approaches, with the jurisdiction and entity approaches being much more expensive and complicated for both compliance and administration purposes.

Worldwide blending requiring an MNE to aggregate its total foreign income and the total foreign tax on such income would introduce many complexities. A clear definition of foreign income and foreign tax would be required. Does foreign income, for example, only include income of foreign subsidiaries or does it include income earned on sales to foreign jurisdictions, whether related or unrelated? How would expenses be allocated between foreign income and domestic income? Information regarding the income of foreign subsidiaries and the related taxes paid may be more readily available than information on income earned on sales to foreign jurisdictions whether related or unrelated. Consolidated financial statements eliminate related party income and MNEs do not necessarily track income by geography unless it is required for segmented reporting.

The GloBE, as noted under 3.a) and 3.c) above, should not penalize an MNE for not paying the minimum tax within a certain period of time because of temporary differences since the MNE will pay those taxes at some point. Similarly, an MNE should not be penalized (by paying a GloBE tax) for having business operations in any particular country if the blended tax rate of their international affiliates is at or above the minimum rate.

5.a) In the absence of any of the approaches for addressing temporary differences discussed in Section 2, do you consider that a worldwide approach would be effective at managing the volatility issues discussed above?

The effective tax rate based on accounting income (i.e., current taxes plus current year deferred tax accruals, which yields to accounting income adjusted for permanent differences) is typically more stable than the effective tax rate based on current taxes paid in the current period on current year taxable income.

6.a) Assuming that the MNE's income for purposes of the GloBE proposal would be determined by reference to financial statements (adjusted as necessary) and assuming further that an MNE already *prepares consolidated financial accounts, what are likely to be the compliance implications for MNEs in (i) separating the income and taxes of their domestic and foreign operations under a worldwide blending approach, (ii) separating the income and taxes to a jurisdictional level, or (iii) breaking down income and taxes to an entity level?*

See our response under 4.a) above.

In addition, an MNE may not have the necessary information for all entities in certain cases. Examples include: (i) if there is sub-consolidation level, the ultimate parent entity may not have the detail for entities below the sub-consolidation level; (ii) an MNE may only have limited information on non-material subsidiaries; and/or (iii) multiple accounting systems may be used due to a merger, acquisition, *etc.*, and therefore, subsidiaries may only report certain information needed for consolidated reporting and not what may be required for Pillar Two.

6.b) How would these compliance implications change if the income for purposes of the GloBE proposal was determined by reference to the rules used for calculating the tax base in the shareholder jurisdiction?

Each entity would have prepared tax returns based on local GAAP/local tax rules; therefore, substantial compliance costs would be incurred to calculate the tax based on the parent entity's tax rules. If an MNE operates in 50 countries it would have to prepare tax returns under local GAAP/local tax rules as well as under the parent GAAP/parent tax rules 50 times (assuming no state/provincial taxes apply). Therefore, TEI recommends determining global taxable income by aggregating all jurisdictional tax returns, as computed within the laws of each taxing jurisdiction, along with a mechanism eliminating any tax duplications.

7.a) How would you suggest to apportion the income of an entity between the branch and the head office and do you think it should follow what is done for tax purposes?

The consolidated financial statements typically would not have a branch to head office allocation. Following what is done for local tax purposes would needlessly complicate the process and prove unworkable for administration and compliance. One way to approach this issue would be for the ultimate parent entity to make an election to track and apportion these expenses on a GAAP basis. The amounts so calculated should account for any Pillar One adjustments. MNEs would incur additional costs, however, to develop processes to allocate branch and head office income using parent company GAAP.

7.b) What are the compliance implications of such an allocation under a worldwide, jurisdictional and entity blending approach?

The above approach would be inconsistent with the worldwide blending approach. The approach under 7.a) above should work for both the jurisdictional and entity blending approach. Under the jurisdictional blending approach, an MNE should combine all the branches in the same jurisdiction.

7.c) *Is the compliance impact smaller for those MNEs that are subject to CbC reporting requirements and that are already required to report the income of a branch and head-office separately even where no such requirement exists under financial accounting rules?*

The CbC reporting requirements currently provide leeway to MNEs to allocate the income of a branch and head office (e.g., a "top down" or "bottom up" approach). The CbC report, however, is solely to be used as a high-level risk assessment tool for transfer pricing purposes and the information included is prepared on this basis. Were the CbC data to be used to comply with the GloBE proposal, a number of adjustments to the data would need to be made before it would be meaningful. Accordingly, CbC data should not be used for allocating income between a branch and head-office.

8.a) *How would you suggest to apportion the income of a transparent entity and do you think it should follow what is done for tax purposes?*

Consolidated financial statements already include transparent entity income and to the extent the partners of those entities are part of the consolidated group the taxes associated with such income would also be included in consolidated financial statements. Therefore, there is no need to treat the income of a transparent entity separately. In fact, if it were to be adjusted separately, consolidated financial statement income and taxes would need to be adjusted to carve out the income and related taxes paid by the partners.

Additionally, as noted in our response to question 1.a), where an MNE is headed by a transparent entity, it is important to consider the taxes paid by the non-corporate owners of such entity in determining the extent to which the income of such entity is subject to an adequate rate of tax.

8.b) *What are the compliance implications of such an allocation under a worldwide, jurisdictional and entity blending approach?*

See our response under 4.a) above.

8.c) *Is the compliance impact smaller for those MNEs that are subject to CbC reporting requirements and that are already required to report the income of a transparent entities separately even where no such requirement exists under financial accounting rules?*

The current CbC reporting requirements may result in MNEs reporting a transparent entity's income multiple times (e.g., by the transparent entity/partnership and also by each of the partners). If transparent entities are to be treated separately, the OECD should devise rules to address the resulting multi-layered income.

9.a) *How would you suggest dealing with attributing taxes that arise in another jurisdiction or entity under a jurisdictional or entity blending approach?*

TEI agrees if an MNE already pays taxes and is meeting the minimum tax in one jurisdiction it shouldn't be required to pay an additional minimum tax in another jurisdiction. Applying the minimum tax down to the jurisdictional/entity level creates significant complexity, substantially increases the cost to comply, and increases the risk of double or triple taxation. TEI recommends the tax authority of the parent entity administer the minimum tax and the worldwide blending approach be used.

9.b) What comments, if any, do you have on the practicality of crediting taxes paid in an intermediate jurisdiction or entity, such as under a CFC rule, against income of the subsidiary or branch?

Tracking taxes by type of income and/or entity is exceedingly complex and costly and thus impractical.

10.a) Assuming that the starting point for calculating the income of the MNE under the GloBE proposal is based on the financial accounts do you have any comments on the practicality of dealing with taxation of dividends under worldwide, jurisdictional and entity blending approaches?

The entire income of an MNE's subsidiaries would already be part of the MNE's consolidated income if the starting point is the MNE's consolidated financial statements. If dividends are treated separately then an MNE's consolidated income would have to be adjusted by the amount of the dividends. Such an approach would increase complexity where dividends are paid in a different year from when the income was earned. Any taxes paid on the dividend would normally be added to the MNE's total tax expense to the extent not creditable.

10.b) Do you have any comments on how the taxation of dividends should be dealt with under the GloBE proposal?

No separate adjustments for dividends should be made if the consolidated method is followed. If a jurisdictional or entity method is used, dividends should not be included as taxable income as the income generating the dividend would have already been taxed in the originating jurisdiction.

10.c) Are they any other issues that you wish to highlight regarding worldwide, jurisdictional or entity blending?

There is a high probability MNEs will incur double, triple, or quadruple taxation in multiple jurisdictions under the approach in Pillar Two. Current dispute resolution mechanisms are not equipped to deal with complex multilateral tax issues in a timely manner. More robust dispute resolution processes and tax treaty changes are necessary to avoid double (or greater) taxation. In addition, Pillar Two should be calculated after any allocations under Pillar One.

11.a) Do you have any comments, based on your own experience, as to the preferred design of a carve-out taking into account factors such as simplicity, compliance costs, certainty, incentives and behavioural impacts?

Given the complexity of the rules and compliance costs, there should be a dollar threshold for applying Pillar Two at least as high as the €750 million consolidated revenue threshold for the application of CbC reporting and preferably higher. Furthermore, MNEs with an effective tax rate for accounting purposes greater than some percentage of the Pillar Two minimum tax rate should be allowed to make a simplified filing with its parent entity jurisdiction (e.g., certifying its accounting effective tax rate is x percent greater than the minimum tax rate). Thus, a more detailed filing would only be required if the MNE's accounting effective tax rate is the lower than x percentage of the minimum tax. This would simplify and reduce costs for low risk MNEs and allow tax authorities to focus on the higher risk MNEs.

U.S. companies are subject to the U.S. GILTI regime, which imposes a minimum tax on global intangible income, as noted above. GILTI should therefore be "white-listed" as an appropriate income inclusion rule, and companies subject to GILTI should be excluded from the scope of Pillar Two.

The Undertaxed Payments rule should be limited to payments of mobile income such as interest and royalties. Application of a substance-based carve-out would also be appropriate for such payments, reflecting the principles stated in the BEPS Action 5 final report on harmful tax practices.

Finally, there should be a carve-out for MNEs with a global effective tax rate in excess of the GloBE minimum tax rate.

11.b) Are there any technical or compliance considerations that would make you concerned about a particular type of carve-out (i.e. based on facts and circumstances or on a formulaic approach), or suggest that there should be no carve-outs at all? If so, please explain based on your own experience.

No. See our response to 11.a) above for potential carve-outs.

11.c) Would you favour thresholds based on the size of the taxpayer? If so, please give your reasons and suggest a metric that you think should be used.

Yes. See our response to 11.a) above.

11.d) Would you favour any de minimis carve-outs? If so, what type of carve-out do you consider would result in the right balance between compliance costs and benefits?

Yes. See our response to 11.a) above.

11.e) Would you favour a carve-out for specific sectors or industries? If so, please state the sector or industry, explain your reasons and share thoughts on how such a carve-out could be operated with as little compliance cost and uncertainty as possible.

Should the proposal fail to adjust for temporary differences and instead require a minimum amount of cash tax paid within a certain period of time, many MNEs would be unfairly penalized (e.g., MNEs with tax losses, capital intensive entities, R&D intensive entities). TEI recommends that if consolidated financial statements are used, only material permanent differences be taken into account and no minimum cash tax pay period be put in place.

11.f) Do you have any additional comments on carve-outs, including comments based on experiences with existing regimes that you suggest should be adopted or avoided?

See our "General Comments" at the beginning of this letter.

TEI appreciates the opportunity to comment on the GloBE. TEI's comments were prepared under the aegis of its European Direct Tax Committee, whose co-chairs are Kris Bodson and Giles Parsons. Should you have any questions about our comments, please contact Ms. Bodson at +32 2 746 36 01 or kbodson@its.jnj.com, Mr. Parsons at +44 793 921 5554 or gilesparsons55@gmail.com, or Benjamin R. Shreck of TEI's legal staff at +1 202 464 8353 or bshreck@tei.org.

Respectfully submitted,
TAX EXECUTIVES INSTITUTE

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