Promoting Innovation Worldwide

ITI Response to the OECD Public Consultation on Global Anti-Base Erosion Proposal (GLoBE) (Pillar 2)

December 2, 2019

The Information Technology Industry Council (ITI) hereby submits feedback to the Organisation for Economic Co-operation and Development (OECD) on its Public Consultation on Global Anti-Base Erosion Proposal (GLoBE) (Pillar 2).

ITI represents the leading information and communications technology companies from around the world. As the global voice of the high-tech and tech-enabled community, we advocate for policies that advance technology, promote innovation, open access to new and emerging markets, protect and enhance consumer choice, and foster increased global competition. ITI's member companies include wireless and wireline network equipment providers, computer hardware and software companies, Internet and digital services providers, mobile computing and communications device manufacturers, consumer electronics, and network security providers.

As we shared in our earlier submission on Pillar 1, there are a number of critical principles we would ask you to bear in mind as you contemplate reforms to the international tax rules. To summarize:

Multilateralism is key. There is widespread global recognition that elements of the system need to be modernized in addition to strong interest in pursuing reforms. As such, we strongly believe such global problems require a coordinated solution.

Unilateral measures must be removed. In recent years, unilateral measures have proliferated. The current OECD process must be explicitly predicated on removal of these measures in exchange for a global solution such as that discussed in this submission.

A principled approach that avoids double taxation is essential. As the OECD contemplates innovative approaches beyond standard transfer pricing practice, it is important that the policy outcomes be principled and focused on avoiding double, or even multiple, taxation for taxpayers.

Optionality for countries must be avoided. In the past, OECD negotiations have resulted in a menu of options for jurisdictions to choose from. Given the novel elements of these reforms, that outcome must be avoided in this context.

Certainty and administrability must be achieved. Policymakers must have an eye towards effective implementation and compliance. Some of the ideas under consideration would mandate the development of complex compliance systems for governments and businesses alike. Every effort must be made to avoid adding unnecessary complexity to the system.

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Beyond these principles, we have a few additional observations to share as you contemplate the GLoBE proposal. First, our members have a foundational question as to the interaction between Pillars 1 and 2. As you move towards a unified, comprehensive framework, we ask that you explicitly clarify how the distinct workflows will merge to create a coherent system. As a starting point to achieving coherence, ITI believes any calculations that result from Pillar 2 should occur after reallocations that result from Pillar 1.

Once again, ITI reiterates its support for the OECD as the optimal venue to contemplate reforms to the international tax system. It is essential to recognize the significant contributions to date galvanizing reforms that have limited aggressive tax planning. Significantly, the OECD's efforts on the Base Erosion and Profit-Shifting (BEPS) project have resulted in systemic changes to the taxation of multinationals. Given this success, it is curious that the GLoBE proposal is premised on a continuing need to prevent a 'race to the bottom' in corporate tax and ending so-called tax competition. In a post-BEPS world, it is not clear that there is evidence to support such a notion. Indeed, this point was acknowledged by the OECD in September 2018, when Pascal Saint-Amans stated; "While these corporate tax cuts have created some concerns of a 'race to the bottom,' most of these countries appear to be engaged in a 'race to the average".1 We would also note that there may be more pressing policy objectives. In fact, the OECD's most recent report on the outlook for the global economy (Interim Economic Outlook, Autumn 2019) called for members to contemplate "growth-enhancing" measures. The GLoBE proposal- done incorrectly- could work against this goal for many economies. To prevent such an outcome, the scope of Pillar 2 should be appropriately limited to minimize downside effects on cross-border trade and investment.

Next, countries must retain freedom to set their own tax policies. In recent years, jurisdictions moved quickly to pass BEPS reforms into law. Many of these efforts are in the early years of implementation. BEPS reforms need to be factored into the current workflow, particularly in regard to Pillar 2. To that point, a number ITI members are headquartered in the United States where a minimum tax was recently implemented- the Global Intangible Low-Taxed Income (GILTI) regime. Efforts such as GILTI must be recognized as GloBE-compliant regimes. Further, if GILTI, or similar policies, are applicable as an income exclusion rule, the other proposed rules under Pillar 2 should not be applicable. A payment cannot be considered "undertaxed" or not "subject to tax" if it is subject to a minimum level of taxation. Returning to GILTI, we would note that many of the accounting principles discussed in this consultation are not applicable to the GILTI and could create extreme compliance burdens for companies. To minimize complexity and limit incidence of double taxation, an income exclusion should be adopted so that to the extent a company is abiding by the rules of its parent-company minimum tax (for example, GILTI), the company is not subject to other minimum tax regimes.

Overall, companies should not be subject to multiple forms of taxation on the same income. As such, ordering rules should be established to avoid double, or multiple, taxation while ensuring compliance. It is essential to prevent a problem with tiering. If a higher tier parent applies the income inclusion rule, other GLoBE rules (including disallowances), should not apply to lower tier subsidiaries of that company.

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[1] (http://www.oecd.org/tax/tax-reforms-accelerating-with-push-to-lower-corporate-tax-rates.htm

Below are key elements that should be considered in designing a minimum tax regime as outlined in the proposal.

Use of Financial Accounts

To mitigate compliance burdens and address structural differences in the calculation of the tax base, the consultation document contemplates starting with relevant financial accounting rules with potential for adjustments as necessary. The paper contemplates how to adjustment the rules for both permanent differences as well as temporary differences. To the latter category, the paper proposes three basic approaches to addressing temporary differences—carry forward of excess taxes and tax attributes, deferred tax accounting and a multi-year average effective tax rate. The Secretariat further notes that elements of the three approaches could be combined.

ITI members believe the GLoBE should be based on world-wide consolidated financial statements and that the OECD should accept all acceptable standards regularly used by security regulators. In general, a consistent standard is essential to reducing disputes and avoiding double taxation. It is important to note that the approach to calculating global income will be inconsistent among ITI members, and the global business community, depending on where headquartered and the financial accounting regime used. As different countries apply different accounting principles, companies need to be able to utilize a consistent presentation basis for the starting point of calculations and use a single methodology for any appropriate tax adjustments. Companies should not be required to prepare an additional set of books under different accounting standards to that in which they maintain their records. We would also note companies may have minority interests, partnerships, and other unconsolidated investments which will require mechanisms to properly adjust the income base as the tax liabilities of these types of assets are shared by unrelated companies. Specific clarification should be provided for those circumstances.

The actual effective tax rate should be calculated based upon the global Financial Statements of the group without removing the impact of deferred tax accounting. Timing differences, by their nature, relate solely to the timing of taxation rather than whether the item will be subject to tax. We believe, for simplicity, no adjustment to the tax base should be made in respect of them and accrued taxes should be used rather than cash tax paid.

If deferred tax accounting is used to provide greater accuracy, the mechanism must be adjusted to remove the cumulative effects of discrete deferred tax events (e.g. changes in the tax law or changes in valuation allowance) to remove distortive deferred tax items. While a multi-year averaging approach to measure the effective tax rate could provide more stability (for example "smoothing out" the effect of one-off items), its adoption could add additional complexity and potentially increase opportunity for abuse. Applying the minimum tax computations at the worldwide consolidated level and prioritizing the income inclusion rule will reduce the impact of these issues.

Blending

The consultation contemplates the extent to which a taxpayer can mix low-tax and high-tax income within the same entity or across entities. The Secretariat notes that blending can be done in a narrow or a broad basis. Three different options are discussed—worldwide, jurisdictional and entity blending.

A worldwide blending approach that includes all income- both foreign and domestic- should be adopted. Without worldwide blending, it will be difficult and costly to accurately determine the correct tax base. Further, as discussed above, worldwide blending ensures that some level of tax sovereignty is maintained. In contrast, the jurisdictional or entity blending approaches would remove the ability of sovereign nations to establish appropriate policies to incentivize investment and economic growth. Such an outcome seems antithetical to the OECD's mission, which is to ensure adoption of fair economic principles that facilitate appropriate competition among member nations. Beyond these reasons, a worldwide approach will also help to prevent incidence of double taxation, which is a pressing concern of ITI members in both the Pillar 1 and 2 contexts.

We would also offer comments on use of country-by-country reporting data. When contemplating methods of allocating income between branch office versus head office, it is essential to note that the country-by country reporting regime was designed and implemented as a high-level risk assessment tool and the reported information is prepared on this basis. Were country-by country data to be used to comply with the GLOBE proposal, it's likely that a number of material adjustments would be required to the data before it would be meaningful. Accordingly, we believe country-by-country data to be problematic. It should not be used for these purposes.

Carve-outs

The paper contemplates possible carve-outs as well as thresholds and exclusions along a number of lines.

Overall, the GLOBE provisions should only apply to those companies above the CBCR threshold. Furthermore, we believe you should contemplate an exemption for companies that report a reasonably high global effective tax rate and set that rate as anything in excess of the minimum rate under the GLoBE regime. Additionally, as stated above, many ITI members are subject to the GILTI regime, which imposes a minimum tax on global intangible income. ITI believes GILTI should be 'white-listed' and considered an appropriate income inclusion rule. As a result, companies subject to GILTI should be excluded from the scope of Pillar 2.

Lastly, countries should have the ability to establish compliant regimes aimed at encouraging positive externalities in their individual countries, such as innovation and development. Carve-outs should be provided for preferences such as R&D incentives which most nations have developed to influence this positive behavior. In addition, BEPS Action 5 allows for substance-based carveouts for payments of interest and royalties. The undertaxed payments rule should be similarly limited. A carve-out should also be available for non-routine transactions, such as the disposition of a business line, either through a stock or asset disposition.

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Thank you for your consideration of our comments. Please do not hesitate to reach out for any additional information or questions to Jennifer McCloskey, Vice President, Policy at jmccloskey@itic.org.