Trade and Investment

Commission on Taxation

ICC Comments on OECD public consultation document: Reports on the Pillar One and Pillar Two Blueprints: Tax challenges arising from digitalisation

ICC appreciates the opportunity to provide input on the OECD public consultation document on the Reports on the Pillar One and Pillar Two Blueprints, as part of the ongoing work of the OECD/G20 Inclusive Framework on BEPS (the Inclusive Framework) to address the tax challenges arising from digitalisation. ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment. ICC recognises the efforts by the OECD to enable countries, within the context of the Inclusive Framework, to work collaboratively towards the development of a consensus-based solution by mid-2021. The ICC commends the leadership of the OECD and the Inclusive Framework participating countries for their work to address these complex international tax challenges. ICC fully supports a harmonised approach to ensure that international tax rules remain relevant and consistently applicable in an increasingly digitalised global economy.

GENERAL COMMENTS

ICC welcomes the opportunity for further stakeholder consultation following the OECD's release of the Pillar One and Two Blueprints, as well as the accompanying economic impact and investment effects assessments, which are indicative of the progress made in further developing the proposed package. In view of the current economic downturn in the wake of the COVID-19 pandemic, the increased political pressure to deliver a solution has become even more prevalent.

Global co-operation to address remaining issues

Whilst it is clear that the OECD has made some significant strides in developing the technical work of the proposals, ICC notes that many of the key elements (both technical and practical) that are essential to the delivery of the package are yet to be agreed on by participating countries. These include agreement on the scope, nexus, quantum, rate, rule co-ordination, mechanisms to prevent double counting, effective and contemporaneous adoption globally, dispute resolution mechanisms as well as interaction with other reform initiatives in this context. Resolution of the remaining issues is essential in order to appropriately evaluate the impact and practicability of the proposals both from a taxpayer and tax administration perspective. A consensus agreement providing greater clarity and simplicity of the proposals is imperative in this process, particularly considering that a departure from well-established principles of international tax law towards a more complex and burdensome international tax system could otherwise lead to undesirable consequences including the continued proliferation of unilateral measures and incidence of double taxation.

ICC recognises that there are technical and complex questions regarding taxing rights and profit allocation and underlines the need for a global, collaborative effort to address the tax challenges of digitalisation, through mutual consensus, and reiterates that any solutions should be designed to be sustainable over the long-term and have broad adoption by countries to allow for seamless application for business. Unilateral disparate tax rules that introduce double or multiple standards create compliance challenges for business, undermine the consistency of the international tax system as well as create the risk of double taxation. Agreed proposals by the OECD Inclusive Framework members should require the repeal of any unilateral measures at the time of the political agreement.

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ICC encourages all participating countries in the Inclusive Framework to garner their collective efforts through a comprehensive, coherent and co-ordinated approach to move swiftly to a global consensus to deliver new rules that are administrable, do not discriminate or create competitive distortions, increase tax certainty and embed measures against double taxation.

Risks for double taxation & need for effective dispute resolution
ICC is an established arbitral institution through its International Court of Arbitration and provides other dispute resolution mechanisms through its International Centre for Alternative Dispute Resolution. In view of the OECD's on-going work, ICC would like to reiterate the importance of dispute avoidance and binding dispute resolution mechanisms.

As fundamental changes to the international tax framework are being considered, ICC stresses the importance of having required robust dispute avoidance and mandatory binding dispute resolution mechanisms in place for jurisdictions that adopt the OECD guidance. New concepts of taxing companies and allocating profits to countries may be subject to different interpretations and give rise to the increased risk of the incidence of double taxation. The risk of double taxation in such circumstances would discourage cross-border trade and investment – which would be harmful for both countries and for businesses of all sizes, and would ultimately increase costs for consumers. ICC notes that further work on both the Pillar One and Pillar Two proposals and the interactions between the two must seek in their inherent design to provide robust and efficient measures to prevent disputes, provide mechanisms for early tax certainty prior to lodgement of the self-assessment return (Amount A) as well as incorporate effective dispute resolution mechanisms post lodgement, including binding mandatory dispute resolution (BMDR).

Whilst ICC appreciates the objectives of allocating taxing rights and ensuring a minimum level of taxation, it must reiterate the importance of guarding against the risk of increased incidence of double taxation and particularly in the event that consensus is not reached. Equally, measures should not undermine the sovereign right of countries to maintain existing and introduce new appropriate fiscal incentives to stimulate innovation, investments and growth.

In this respect, ICC notes that a few key elements should be taken into account throughout the process and particularly for the outcome, notably:

- The rights of taxpayers and the confidentiality of taxpayer and customer information must be respected and ensured.
- The outcome must result in rules which are administrable and cost-effective for tax administrations and taxpayers.
- In designing the measures, the process must consider the administrative capacity of tax administrations and taxpayers alike.
- The ability of tax administrations to deal with multilateral disputes should not be overestimated or the corollary resourcing and capacity requirements underestimated.
- Agreed rules will need to assuage countries that have introduced unilateral rules or measures in order to ensure consistent and coherent implementation of the international tax rules.
- Preventing tax disputes and building international consensus on binding effects of dispute resolution is critical; the application of these rules may incur an acute increase in double taxation which will need to be addressed with effective dispute resolution mechanisms.

Elimination of Unilateral measures
As mentioned above, ICC believes that it should be a condition of adopting both the Pillar One and Pillar Two proposals that all implemented and proposed unilateral tax measures are withdrawn upon agreement of both Pillar proposals. Should unilateral measures not be repealed, ICC holds that unilateral taxes should be treated as covered taxes (which should include all taxes levied "in lieu of" income taxes).

ICC reiterates that the OECD's continued work in this area should build on internationally established tax principles to help define the contours of a suitable tax framework for the digitalised economy that encourages business activities, job creation and economic growth. Strengthening the application of internationally established tax principles in any proposed solution would contribute to building a coherent international regulatory framework for world business whilst also providing a foundation to accommodate continued rapid evolution in digitalised business models.

ICC believes that the application of internationally established tax principles, as outlined in the ICC Policy Statement on Taxation Policy for the Digitalised Economy, should underpin the work of the Inclusive Framework to ensure that international tax rules remain stable and sustainable.

PILLAR ONE – GENERAL COMMENTS

Double counting and the elimination of double taxation
It is appreciated that, under the current proposal, Amount A is not based on the Arm's Length Principle (ALP) and is to apply as an overlay to the existing nexus and profit allocation rules. However, as recognised in Chapter 7 of the Pillar One Blueprint, this course of action requires the design, adoption and implementation of one or more mechanisms to reconcile the new taxing right (calculated at the group or segment level) with the existing profit allocation rules (which operate on a single entity basis) in order to prevent and/or relieve double taxation.

Tax Certainty
ICC members consider tax certainty to be of paramount importance in the design of global solutions to the challenges of the taxation of the digitalised economy and more broadly.

With respect to Amount A, ICC encourages Inclusive Framework members to look for solutions which seek to prevent disputes from arising wherever possible thus providing greater certainty within the design of the new taxing right rather than from the application of the developed rules.

Where the design calls for the identification or quantification of certain inputs into the calculation of Amount A (such as the allocation of central costs and tax losses), then, ICC members call upon the Inclusive Framework members to develop and support early dispute prevention mechanisms (binding upon member states and MNEs alike) to provide early tax certainty.

Early dispute prevention mechanism and 'early certainty'
With respect to the early certainty mechanism as currently proposed by the Pillar One Blueprint, ICC members request consideration be given to the following:

- That in advance of the lodgement of the self-assessment return, that the Inclusive Framework members consider incorporating an *early dispute prevention* mechanism, which operates to provide:
    - Certainty prior to the lodgement of self-assessment return;
    - Tailored and consistent public guidance (for example, practical compliance guidance as produced by some tax authorities) potentially developed by a cohort or standing committee of lead and non-lead tax authorities;

    - A clear and timely framework process within which such early dispute prevention guidance can be provided with the option for more complex issues to be deferred post lodgement of the self-assessment.
- Access to any yet to be proposed early dispute prevention mechanism or the 'early certainty' process as currently proposed should not be limited. To the extent that this mechanism is designed to provide tax certainty and prevent later disputes, it is counterproductive to limit access to such mechanisms, rather, consideration should be given to the matters for which a dispute prevention mechanism and/or the 'early certainty' procedure are appropriate.
- The development of globally consistent guidance concerning risk frameworks with respect to an MNE group's processes and controls over its application of Amount A and the criteria of review should be applied by a review panel. ICC recommends leveraging off of existing MNE's financial statement control frameworks.
- Ensure that in addition to the lead tax authority, all other tax administrations with sufficiently material revenue directly at stake can also participate and have an opportunity to be heard in the proposed 'early certainty' panels so early tax certainty can be granted in jurisdictions which are materially relevant for an MNE. All tax administrations in all jurisdictions affected by the calculations should be bound by the outcome of the review panel, including those countries who may not directly participate on the relevant panel.
- Taxpayer rights and confidentiality of taxpayer information must be respected.
- Consideration and clarity of the rights of an MNE to accept and enforce or reject a binding agreement under the early certainty process.

Further, ICC members support the development of appropriate criteria to ensure the participation of the lead tax authority and identify for exclusion lower risk groups where a panel review of tax certainty determinations is not required so that relevant efforts are focused on those cases posing higher risks.

Proposal for new all-encompassing and innovative mechanism for those MNEs in-scope

ICC members are supportive of the proposal that MNEs with in-scope revenues have access to a new mandatory and binding resolution process for all disputes. However, ICC members further request that Inclusive Framework members (relevant states) consider allowing MNEs the right to elect the most appropriate dispute resolution framework in which to submit a dispute in the circumstances where there is an existing mandatory and binding dispute resolution mechanism, although appreciating that 'last best offer arbitration' is not an appropriate tool in a multilateral dispute. In this regard, Inclusive Framework members are encouraged to consider the interaction of tax treaty mandatory dispute resolution mechanisms with the EU's Tax Dispute Resolution Directive where an MNE elects which Mutual Agreement Procedure (MAP) to apply to any one dispute. However, in this respect, consideration should be given to rule clarification concerning the 'jurisdiction' for disputes concerning Amount A to be justiciable in domestic courts.

Further, ICC requests that as part of the work being undertaken concerning the FTA tax certainty agenda further consideration be given to earlier MAP engagement and coordination where an MNE considers it likely that the actions of one or more contracting states will result in taxation not in accordance with one of the international instruments. This is often referred to as "MAP Gap" being the 'gap' between domestic dispute resolution procedures and the delay in competent authority to competent authority engagement concerning disputes which have the potential ultimately to be resolved by MAP (either with or without mandatory binding dispute resolution mechanisms). Essentially this would entail the development of best practice guidelines to assist competent authorities to be 'MAP ready' in the sense of working with the taxpayer and the relevant audit team to obtain a sense of the relevant facts and position so as to eliminate duplicated effort once the MAP process begins.

Further, ICC members call upon the Inclusive Framework members to consider greater use of supplementary dispute resolution mechanisms within the context of MAP, again, either with or without mandatory binding dispute resolution mechanisms. In this respect, Inclusive Framework members are encouraged to consider the observations at paragraph 3.5.2 of the OECD's Manual on Effective MAP (published in 2007 and known as MEMAP) and paragraphs 86 and 87 of the OECD's Commentary to Article 25 of the OECD's MTC 2017. In this respect, ICC members ponder whether an MOU similar to the model MOU that form the Annex to Article 5 would be an appropriate mechanism to document the use of supplementary dispute resolution in the context of MAP.

Investment/Research & Development

Investment in research and development (R&D) is a key factor driving innovation, employment and global economic growth. As noted by the OECD in its OECD Science, Technology and Innovation Outlook 2018: "*Innovation enables countries to be more competitive, more adaptable to change and to support higher living standards. It provides the foundation for new businesses and new jobs and helps address pressing social and global challenges, such as health, climate change and food and energy security. While the opportunities for innovation are immense, they are not automatic.*"

For this reason, incentivising and providing the conditions for R&D investment ranks high on the innovation policy agenda in many OECD countries and partner economies. The OECD's overall R&D policy objective is to increase the R&D intensity – gross expenditures on R&D (GERD) as a percentage of GDP, which amounted to 2,4% in 2018. Business R&D accounted for 71% of all R&D performance in the OECD area in 2018 and as such plays an important role in achieving this goal. The R&D intensity is furthermore one of several indicators used as targets to measure progress toward achieving the UN Sustainable Development Goal (SDG) 9 on innovation.

Innovation rests on innovative companies that exist largely as a result of public investments in schools and education, innovation clusters, infrastructure and other measures to promote innovation and growth of business R&D.

It is therefore important that any changes to the tax system supports OECD's overarching objective to foster innovation. Therefore, both the innovator and the countries that have created the environment for innovation, need to have their commensurate fair share of the profits based on functions, assets, and risk. ICC believes that existing work on DEMPE should not be set aside but should be duly considered in developing the new rules for the tax system.

With respect to the existing Pillar One proposals, ICC would recommend that the formula in Amount A is designed so that the innovator is appropriately compensated (on an arm's length basis) for the investment and associated risk taken before any additional portion of residual profit is mechanically allocated to the market jurisdictions. This would enable innovators to recoup R&D costs and earn profits associated with the R&D activities. It would furthermore ensure that an appropriate share of the tax revenue is not allocated away from the innovator countries.

ICC also encourages the OECD to review the impact of Pillar One on highly innovative businesses and to conduct a thorough economic impact assessment in order to help countries have a clearer understanding of the impact of the proposal on innovation and the R&D intensity.

Customs considerations

ICC's October 2019 comments to the OECD consultation suggested that Pillar One be developed with consideration of the impact on customs valuation, and particularly that the manner of assessment of Amount A be developed so as not to impact the price paid for imported product under a traditional arm's length analysis. As we understand it, the current approach for Amount A is separated from any link to import transactions, and we support this separation.

PILLAR ONE SPECIFIC COMMENTS

I. ***The activity test to define the scope of Amount A****. Comments are invited on the design and implementation of the proposed activity test relating to Automated Digital Services and Consumer-Facing Businesses, including any challenges and suggestions on how to address them? [Refers to paragraphs 38-170 of the Blueprint]*

- It would be challenging to provide concrete recommendations at this juncture, given that political decisions still need to be made within the Inclusive Framework regarding scope which, as the OECD has stated, limit their ability to make progress on the appropriate technical guidance to determine the in-scope activities.
- Whilst the OECD Base Erosion and Profit Shifting (BEPS) Action 1 Report notes that it would be "*impossible to ring-fence the digital economy from the rest of the economy for tax purposes*", ICC believes that the current Blueprints appear to counter this conclusion by targeting the new tax rules to specific sectors or services in the economy. It is ICC's view that attempting to separate a taxing system for "digital" companies could be fraught with challenges that would create uncertainty and negative consequences for economic growth and cross-border trade and investment. The Blueprint discussion of possible "digital differentiation" and phase-ins would seem to increase ring-fencing.
- It is critical that the activity test can be applied equitably across all industries so as to avoid creating structural discrimination in the international tax framework.
- If an additional return is required above that of a current permanent establishment (PE), then Inclusive Framework members should agree on the principle informing this objective, the amount, and include a binding mechanism to eliminate double taxation.
- ICC suggests that care should be taken to avoid an administrative burden in allocating a small return to jurisdictions without a PE and that such allocation should not include routine returns which are properly due only to the jurisdiction in which there are functions, assets, and risk. Routine returns should only be due to jurisdictions where a taxpayer has an actual physical presence that gives rise to a PE and should be in line with existing transfer pricing.
- ICC notes that the current definition of "automated" digital services (ADS) as opposed to "bespoke interaction" could lead to uncertainty and confusion in interpretation and does not account for capital and R&D investment in creating or supporting the business. Lack of clarity of in-scope and out of scope businesses may also create competitive distortions within industries.
- Footnote 14 (definition of ADS is different than electronically supplied services in EU VAT law) notes that the proposed definition of ADS would add to taxpayers' compliance burden by creating a new definition that would have to be interpreted independently of the interpretations of definitions of similar concepts in other tax provisions. Any such definitions must be defined for all jurisdictions and subject to the dispute resolution mechanism in order to avoid different interpretations by different jurisdictions.
- There will be increased bundling of services (cloud, bespoke, standardised) and the "dual category of ADS and bundled services" will become increasingly complex and any determination of "appropriate materiality" or "substantial part" or "ancillary" will result in future controversies.
- The Blueprint's discussion of the positive and negative lists to simplify the determination of in-scope and excepted activities suggests that individual jurisdictions will be able to make unilateral changes to these lists. ICC believes that this could greatly increase uncertainty, disputes, and the potential for double taxation. (para 40-41). ICC considers that a panel approach to provide certainty as to whether a company would be in scope would be appropriate.

- Carve-outs and Exclusions – The Blueprint highlights several areas in which the activities test as drafted appears to generate burden or uncertainty in ways that are not justified by the relatively modest amount that would be reallocated by Amount A. ICC believes that the Blueprint should provide clearer and more administrable rules with respect to the application of exclusions and carve-outs from Amount A, particularly in the case of MNE groups engaged in multiple activities. Specifically, to provide simplification and ease administrative burden in the case of low-risk groups, ICC suggests that where an MNE group's revenue is derived predominantly from excluded activities, the group should be excluded from Amount A entirely. In addition, while ICC recognises that the Blueprint explicitly contemplates covering ADS activities whether they are B2B or B2C, we believe that no purpose is served by including in scope businesses whose customer base is composed predominantly of businesses. As a result, ICC recommends an addition of a carveout for MNE groups who have predominantly B2B scope.
- Dual Category/Bundled Services – The rules regarding dual category or bundled services are likely to increase complexity and generate substantial controversy. With respect to this point, ICC members agree that the dual category rules present significant challenges that do not seem to be justified by the level of risk that dual category payments present. ICC would therefore suggest modifying the draft to explicitly recommend that special dual category rules be eliminated due to the uncertainty and subjectivity they introduce into the determination of whether a particular activity is in scope.

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]*

- ICC members agree that it is important that Amount A limits the circumstance in which MNEs are required to be subject to the new rules where foreign in-scope revenue is basically limited and the corresponding part of Amount A is not significant, however ICC wishes to express caution against thresholds that result in a concentration of in-scope businesses in a particular industry or country and leave other country's local businesses exempt from application of the rules. A robust reporting and monitoring mechanism will be required to determine when MNEs exceed the de minimis thresholds.
- It would be helpful to clarify the two-step test discussed in para 184 of the Blueprint as it appears that an MNE would only have to proceed to step 2 if it was not excluded under step 1.

III. *The development of a nexus rule. More specifically, comments are invited on the following points:*

a) 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]

  - The "physical presence" plus factor suggests that "remote selling" is no longer considered as the fundamental purpose behind the work on digitalisation. Remote sales revenue booked outside a market jurisdiction above an appropriate threshold should be sufficient to be included in amount A (for both ADS and CFB) which would be a significant simplification for both tax administration and tax compliance. On this basis, the deemed threshold as reflected in the Blueprint [revenues > 15 million when certain amount of sales/ revenues are met] can be supported, to also ensure simplicity and lower compliance burden. The “physical presence” indicator remains relevant for the marketing and distribution safe harbour which should apply for all MNE’s in-scope for Amount A.

- Para 189 notes that the new nexus rules are for the amount A income reallocation only and do not apply to other taxes, etc. ICC would suggest adding VAT to the list to be clear that these new nexus rules do not apply to VAT.
- Para 210 suggests a preferred approach to use a single self-standing group PE definition instead of relying on a PE definition in a tax treaty or domestic law. ICC believes that if physical presence is considered a sensible plus factor, a new standalone PE definition will be needed to cut across treaty definitions.

b) *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]*

ICC considers this to be the case if the proposal is limited to remote sales booked outside the market jurisdiction. If already compensating an in-market entity above the common LRD return, the affiliate is already compensating the market for a nonroutine return, and the marketing and distribution safe harbour should minimise or eliminate any incremental Amount A reallocation to the market.

c) *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]*

ICC recommends a three-year average or a revenue exclusion for non-recurring items.

IV. *The development of revenue sourcing rules. More specifically, comments are invited on the following points:*

a) *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]*

ICC members consider that the multiple simplifying changes to the hierarchy along with elevating the customer billing address indicator to a number 2 position is a positive development. The primary rule for indicators should be consistency with the information MNEs already collect. The recognition in the outline that customers/users can refuse to provide location data should push geolocation lower in the hierarchy.

In particular, even where information may be collected for some purpose within an MNE group, extracting and formatting that information for use in tax compliance may present significant operational challenges, which would be compounded to the extent that privacy laws may apply. The hierarchy of indicators should not be designed in a way that would force a taxpayer to use a particular piece of information that may be present somewhere in the MNE group, where, in their reasonable judgment in light of their particular business, the taxpayer concludes that doing so would result in unreasonable costs or a risk of violating legal constraints.

Similarly, while the Blueprint in some circumstances requires taxpayers to attempt to obtain information held by third parties, there will, in most cases, be valid business reasons for third party distributors or customers not to provide that information. ICC recommends, therefore, that a taxpayer should not be required to incur significant additional costs or modify commercial arrangements in order to obtain information in the possession of a third party and advocates for the use of data that is reasonably available and reliable for this purpose.

The revenue information collected based on revenue sourcing rule for amount A purpose should not be used for any other purpose.

Finally, the outline should also consider the impact/conflict with existing privacy rules (e.g., European General Data Protection Regulation (GDPR)).

b) 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]

ICC believes that current MNE information collection practices should be followed. ICC suggests that it would be important to consider what information could be expected to be available and/or what customers would be willing to provide.
Government privacy rules (such as GDPR) should be considered and may restrict MNE's ability to ask for information.

c) 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]

ICC suggests application of the general rule of cost to collect and administer compared to the impact on tax revenue.

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:*

b) 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]

ICC members believe that segmentation should only be required in limited cases where necessary to accomplish the objectives of Amount A and hold that the general rule should be for MNE's to use their consolidated financial statements. If segmentation is required, it should be based on MNE's segmentation reported in their public financial statements.

There are cases where the business segments within one MNE group seem different in nature/production processes, however these business segments are highly integrated (for instance, automobile and automobile related financing services). In these cases, the centralised costs can be significant, and it would be extremely difficult to objectively segment the cost. Further discussion and clarification are needed for the treatment of segmentation for highly integrated business.

c) *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]*

This option, if offered, should be at the sole discretion of the MNE and should not be a requirement imposed by individual jurisdictions on MNEs. In that instance, appropriate set of criteria or factors should be identified so as to ensure consistency in rule application.

d) *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]*

ICC reiterates that segmentation should only be required if necessary, to accomplish the objectives of amount A. As noted above, the general default rule should be for MNEs to use consolidated income as the basis for their amount A allocation computation. ICC supports the outline's expressed objective of minimising the need for segmentation to increase simplification in the application of the Amount A rules. If segmentation is necessary to achieve Amount A objectives, then it should be based on the MNE's public financial reporting segmentation.

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:*

a) *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]*

ICC members agree with this position.

b) *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]*

ICC members consider that the carry-forward regime should account only for brought forward losses that are financial losses calculated in accordance with Amount A activities and on the same basis, i.e., group financials. Overall MNE corporate income tax losses should not offset Amount A income – the regime should be kept separate. However, specific pre-regime Amount A losses should be calculated and made available to reduce future tax payments in the recipients' countries *(alt. market jurisdiction)* using Amount A principles to reduce the incidence of economic double taxation for those businesses that are in or just emerging from the investment phase of their business cycle.

c) *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]*

Specific rules related directly to the Amount A activity pools with detailed documentation of direct cost with no allocation of overhead. 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]

ICC believes that the rationale for this proposal is not clear and could result in significant complexity. ICC members would support a mechanism that contemplates losses in current and prior years (carry-forward) on a segmented basis.

The carry-forward regime should extend to Amount A profit shortfalls (in a particular segment, where relevant) given the impact that the COVID-19 pandemic has had on the profitability of MNE groups around the world. In our view, it is a core concept of Amount A that amounts that are subject to reallocation under Amount A include only a portion of profits in excess of a threshold that effectively acts as a deemed residual return. For purposes of determining whether an MNE earns such a deemed residual profit, providing a carryover only for economic loss (i.e. the extent by which expenses exceed income) would fail to address the situation in which profits in a previous year may have been greater than zero but less than a deemed routine return. If allowed, the calculation of profit shortfalls reducing the Amount A allocation should be consistent with the calculation of the Amount A allocation. Non-Amount A shortfalls should not be able to offset the Amount A income allocation.

For example, if the profit threshold for application of Amount A is set at 10%, MNE Group A earns profits of 10% each year on identical sales revenues. MNE Group B earns 5% in two years and 20% in the third. Over the course of three years, both MNE Groups earn the same total profit. Under an approach that fails to take into account the profit shortfalls in the first two years, however, Group B would be subject to Amount A in the third year, while Group A would not. To address this disparity in treatment, ICC recommends supporting the extension of the carry-forward regime for losses of a segment to include Amount A profit shortfalls. In the example above, this would permit Group B to carry forward its profit shortfall of 5% in years 1 and 2 to offset its 20% profit in year 3, which would put it into parity with Group A.

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:*

a) *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]*

ICC believes that, to the extent Inclusive Framework members consider that the relief of double taxation and/or double counting should apply between the new taxing right Amount A and the existing nexus and profit allocation rules in bilateral tax treaties, a mechanism to eliminate double counting and double taxation by imposing a cap on the Amount A re-allocation is a critical component of any Inclusive Framework agreement, however more refinement is required.

b) *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]?*

ICC holds that to the extent that withholding taxes relate to the (in-scope) revenue generating profits in the local market jurisdiction, they should be applied against local tax on the Amount A re-allocation. A withholding tax on royalties (and in-scope dividends) by definition is a return in the market and should be exempted from/reduce profit reallocation amounts under Amount A by the amount which is subject to withholding tax.

c) *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]*

ICC reiterates that it is essential to eliminate double counting and clarify the point at which the marketing and distribution profits safe harbour applies to limit or eliminate Amount A. One approach would be to compare the value-added marketing and distribution return (Amount B) to the profit allocated to the marketing and distribution affiliate under the ALP. If the ALP allocation exceeds the marketing and distribution fixed return (Amount B), then the excess reduces/eliminates the Amount A allocation. Another approach would be to limit Amount A to no more than the sum of the Amount B allocation for the local market jurisdiction affiliate/PE and the MNE group's Amount A formulaic re-allocation. If the ALP allocation is less, then there would need to be a top-up. If the ALP allocation is equal or more, then there would be no additional Amount A reallocation. There should be binding agreement from Inclusive Framework members on a clear set of rules including the scope of Amount A and Amount B.

d) *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]*

ICC believes that if a de minimis foreign revenue exception is in place this should be clearly stipulated rather than create uncertainty regarding the definition of "primarily".

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:*

a) *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?*

ICC believes that acceptance by Inclusive Framework members of a binding agreement requiring the paying entities to surrender their taxing rights on the applicable Amount A reallocation is of paramount importance. Para 570 recommends that both the exemption and credit method may be used which will create confusion. ICC recommends that the exemption method should be adopted. This would also better reflect the fact that the new taxing right is allocated to the market jurisdiction and is not shared between the market and residence jurisdiction.

b) *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]*

Para 582 notes that the OECD Transfer Pricing Guidelines already identify a series of factors that may entitle an entity to participate in the residual profits generated by an MNE group for transfer pricing purposes that will also be relevant for identifying the paying entities. It goes on to note that the activities of the paying entity will likely consist of the performance of some or all of the important functions related to DEMPE of intangible assets of the MNE group that are specific to the MNE group's profits. This language in para 582 results in the Amount A reallocation overriding the agreement regarding DEMPE in the BEPS project. ICC suggests that the Inclusive Framework should prioritise the use of current transfer pricing concepts with additional documentation requirements as necessary for this new purpose.

In this respect, consideration must be given to the significant trade-off here which, as currently drafted, results in substantial compliance and administrative burden for MNEs and tax authorities, alike. Inclusive Framework members are encouraged in the interests of preventing disputes to either impose a cap on the Amount A re-allocation (as noted in response to VII. (a), above) and in respect of withholding tax, allow an exemption for/reduce profit allocations under Amount A by the amount which is subject to withholding tax (see response to VII. (b), above).

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:*

a) *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]*

ICC notes that if the purpose of the Amount B fixed return for marketing and distribution functions is certainty and simplification, then Amount B should be consistent with the ALP in a manner that is sufficiently broad to capture all current marketing and distribution-related functions' ALP returns and minimise the likelihood of market jurisdictions asserting more revenue due to additional marketing and distribution-related functions being performed in the market that are not included in the Amount B scope.

To be fit for purpose, the Amount B scope should cover the vast majority of local country marketing and distribution affiliates which is also important for an effective marketing and distribution safe harbour.

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

ICC members believe that Amount B will be effective in reducing disputes only if the scope is increased in a manner consistent with the ALP and that there is consensus on the scope of Amount B. Otherwise, market jurisdictions will assert additional revenue due to additional functions which will result in more, rather than less disputes.

It is worth noting that in the Blueprint "the treatment of multifunctional entities and entities with very low system profits" is not touched upon, whilst this topic was included as part of the remaining work in the "*Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*" approved by the OECD/G20 Inclusive Framework on BEPS on 29-30 January 2020. Amount B would have significant impact on these low system profit MNEs. If the fixed return under amount B consists mostly of the system profit, the home jurisdiction would have very little taxing rights over that MNE's profit. In extreme cases where fixed return is even higher than the system profit, MNEs would be forced to pay taxes based on a profit that is higher than the group total profit. It may increase disputes, instead of reducing it.

It should also be noted that empirical data finds that sales, marketing, and distribution returns consistent with the arms-length standard are low across industries, regions, and profitability levels for both value added activities and for limited risk distributors.[1] While low margin businesses necessarily must have reduced distribution returns, such empirical data demonstrates that there is a ceiling for returns to sales, marketing, and distribution functions, even where an industry segment is highly profitable. It will also be important to consider the potential impact of Amount B on low margin businesses. For example, if an MNE has profits below the Amount B fixed marketing and distribution return, it would have no profits left to remunerate its other activities such as manufacturing, etc. This would inevitably lead to double taxation for low margin businesses. As such, the level of profits allocated through Amount B should to some degree consider the system profit of the MNE to avoid such situations from arising. Therefore, ICC believes that the PLI should be determined in accordance with principles under the OECD Transfer Pricing Guidelines.

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:*

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[1] See KPMG transfer pricing analysis

a) *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]*

ICC members believe that an appropriate profit level indicator will need to be taken into consideration as regional and industry related differences exist. A fixed operating profit margin will unduly impact lower margin industries.

b) *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]*

The Amount B fixed returns are intended to approximate application of the ALP so industry segments should be in line with benchmarking of comparable companies. Transfer Pricing data is also available for certain regions but will add complexity and increase the potential for disputes over the appropriate segmentation data to use. As noted above, empirical data finds that arms-length sales, marketing, and distribution returns consistent with the arms-length standard are low across industries, regions, and profitability levels for both value added activities and for limited risk distributors.

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:*

a) *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?*

One of the key challenges is that the 'early certainty' process is designed to apply only after an MNE group has lodged its self-assessment return. Consideration should be given to the development of an 'early dispute prevention' mechanism which provides a framework for the resolution of potential disputes prior to lodgement with any unresolved matters dealt within the process presently referred to as 'early certainty'. In this respect, it is observed that the 'early certainty' process, through the operation of the review and determination panels is much more akin to a 'joint audit' and less akin to an early tax certainty procedure.

Further, regard should be had in respect of all the proposed mechanisms and procedures to the rights of taxpayers. In this respect, further consideration should be given to the right of an MNE group to enforce a binding determination against one or more jurisdictions.

c) *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]*

ICC recommends that the process is conducted in a confidential manner with strict limitations on the use of data which may not be used for other purposes given the reporting for Pillar One is drawn on an entirely different basis than that applicable on a single entity approach.

As outlined earlier, such 'early certainty' should not be limited and MNEs should be entitled to seek certainty in order to prevent later disputation.

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]*

- *In-scope taxpayers*: Could provide important relief to partially offset the additional burden imposed by Amount A and could limit tax authorities' ability to seek other profit reallocation adjustments beyond the scope of Amount A. ICC requests that clarification be provided as to whether this would apply to Amount B issues as well as the marketing and distribution safe harbour. ICC notes, however, that the "last resort" prioritisation would significantly delay the application of this tool, reducing its effectiveness. Therefore, it should be made available at the option of the in-scope MNE.

- *Other taxpayers*: The dispute avoidance/resolution panels for Amount A and the mandatory binding dispute resolution (MBDR) extension for amount A taxpayers will place significant burden on dispute resolution mechanisms – limiting resources available for this element – especially if the commitment for Amount B MBDR goes before this element.

- *Amount B*: same comments as above for other taxpayers.

- *Developing countries with no or little MAP experience*: ICC members agree that electivity is important for developing countries, but they should not have to go through a multi-year MAP first which will leave few resources available for MBDR.

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PILLAR TWO GENERAL COMMENTS

ICC supports the work of the OECD to combat tax evasion and aggressive tax planning and the implementation of the BEPS initiative, one of the premises of which is to ensure taxation where value is created. ICC recognises that addressing tax avoidance is a key political issue for many countries, but respectfully recommends that new policies should take into account the degree to which recent policy changes, such as BEPS and the US tax reform have already addressed this issue. ICC strongly recommends a simplification of measures to drive design and implementation and that any proposals under Pillar Two should avoid creating an additional layer of rules, which would increase complexity and complicate administrability of the international tax system. The interaction of the GloBe proposal with other existing international and domestic tax rules is an essential consideration in this regard.

The global economy has been severely impacted as a result of the COVID-19 pandemic. As economies seek to rebuild and recover, the need for pro-growth tax policies is ever more prevalent. Previous OECD reports have indicated that corporate taxes are the most harmful for growth, followed by personal income taxes, and then consumption taxes. Accordingly, ICC believes that the scope of Pillar Two should be limited and the minimum tax rate should be reasonable in order to minimise any negative implications on cross-border trade and investment. Furthermore, as the minimum tax rate is fundamental to Pillar Two, ICC believes that it is a key element that should be subject to broader consultation.

ICC believes that before implementing provisions that could prove to be more burdensome, it would be helpful if the OECD could provide an updated Economic Impact Assessment report taking into account current data that would provide a more insightful evaluation on the further effects of the BEPS Action Plan and US tax reform implementation.

Certainty, simplification measures and administrability
Considering the different technical profile and capacity of tax authorities, it is clear that countries will be more willing and able to adopt a proposal that is relatively simple to implement. In this respect, complex, costly and burdensome approaches would be less favourable or likely to succeed. Accordingly, ICC strongly supports the application of simplification measures in the development of the proposals.

The current methodology included in the Blueprint remains excessively complex and will be burdensome and costly for companies to implement and for tax authorities to administer. The provision of certainty and elimination of double taxation requires that all tax authorities interpret the Pillar Two rules consistently. However, interpretation in many aspects such as profit/loss calculation, adjustments application, jurisdictional allocation of profits and taxes, etc, will inevitably increase the likelihood of double taxation where inconsistent approaches are taken between jurisdictions. ICC reiterates that to avoid disputes and provide certainty, it is essential that dispute prevention be developed within the technical rules to reduce disputes arising in the first instance and supported by appropriate binding dispute resolution mechanisms (BDRM).

It is critical to ensure that domestic measures by implementing countries do not result in a patchwork of rules (meaning complexity, uncertainty, double/multiple taxation and disputes). Any final framework should therefore clearly articulate the key parameters of the GLoBE rules and what deviations, if any, would be allowed, with such departures based on clearly articulated principles. Clear principles should also be elaborated with respect to the co-existence of existing GLoBE / GLoBE-type rules, such as the US GILTI / BEAT and other rules that touch on aspects of the GLoBE rules e.g., Germany's license barrier rule, the UK's taxation of offshore receipts in respect of intangible property, Mexico's UTPR and the Netherlands' withholding tax on interest payments and royalties to low tax jurisdictions. Insofar as existing UTPRs are concerned, one of the principles should be that the operation of such rules should be limited so that they do not apply in respect of payments to entities that are subject to the IIR.

The Blueprint suggests the use of administrative guidance as a simplification measure in those jurisdictions with a tax base similar to the Pillar Two provisions and a sufficiently high rate. ICC welcomes the proposed simplification which is similar to a "whitelist" of jurisdictions and further recommends that consideration be given as to whether administrative guidance could also be extended to cover the Subject to Tax Rule.

ICC expressly notes that the subject to tax rule represents a departure from long-established principles for profit-based taxes advanced by the OECD, as it would levy a gross basis withholding tax on a wide range of payments.

With respect to the calculation of the ETR, careful consideration should be given to the following factors:

Covered taxes: ICC welcomes the broader approach adopted by the Inclusive Framework on the definition of what is considered as covered taxes in weighing the form and intention of the tax before any legal or technical analysis. However, ICC believes that this definition should not be limited to taxes on profits, but rather expanded to cover taxes on gross amounts, including digital services taxes, and avoiding the “in lieu of” test, as in practice, many MNEs are taxed on both gross and net amounts, which necessarily affects their final results. In various countries, businesses are subject to taxation on profits, revenues, production or even assets, which are linked to some extent to their profitability. The definition of covered taxes should also include such parts of taxation. Failing to consider such parts of taxation may risk causing certain projects in often highly taxed countries to fall foul of criteria, add taxation and make local tax systems uncompetitive despite high government take, if it comes under a different denomination.

Whilst important, ICC believes that it is incorrect to conclude that a company’s corporation tax payments represent the total of its direct tax contributions to a government. Accordingly, ICC recommends that it would be preferable to link the ETR to the concept of “taxes borne” which refer to all the taxes levied on a company and impact the company’s financial results. These include corporate income tax and any other tax on revenues and not only on profits, as considered in the current version of the Blueprint. It is ICC’s view that the taxes borne are a more complete and accurate measure of a company’s direct contribution to tax revenues and it is therefore more aligned with the objective of minimum taxation pursued by the GloBE rules.

It appears that the impact of the carve-out on covered taxes is the subject of ongoing discussion. From ICC’s perspective, an MNE group that claims the benefit of the carve-out should not be required to make a corresponding and proportional adjustment to the covered taxes. The reasons for this are (a) that this would more appropriately recognise underlying substantive activities and (b) that given that the carve-out only approximates the outcomes it is designed to achieve, there is a risk that failure to credit the full amount of taxes levied on the income could ignore the true tax burden on that income.

The substance based carve-out is an important measure as it recognises the return for the payroll component and the tangible asset components. As previously mentioned in the general comments, investment in research and development is a key factor driving innovation, employment and global economic growth, and considering the R&D activities assume significant risk, ICC suggests that the carve-out ratio on R&D related payroll and tangible asset should be set at a higher level.

Use of losses: Particularly in the current economic context, the issue of losses is all the more relevant. ICC welcomes the fact that the Blueprint expressly acknowledges that GloBE losses are not expected to tack local tax losses as well as the losses arising within the GloBE regime are carried forward indefinitely. However, it is yet unclear the extent to which pre-GloBE losses would be admitted. It should also be clarified that the losses allowable should be those calculated in line with whatever GloBE methodology is agreed – not just accounting losses.

In line with the two previous statements as well as the aim of the measures, ICC believes that a broad period should be considered (e.g. +10 years or applying local tax regimes of each concerned jurisdiction) in order to allow for seamless and coherent implementation for businesses with long business cycles.

Similarly, ICC welcomes the proposal in the Blueprint that allows an IIR tax credit to be offset against top-up tax liabilities arising in any jurisdiction, which is also consistent with the purpose of the GloBE rules.

With respect to tax controversy and dispute resolution, the interpretation of the Blueprint measures may give rise to questions with tax authorities as to the calculation of the ETR, covered taxes definition, jurisdictional allocation, etc. In light of this, it is imperative that effective early tax certainty procedures are developed which are supported by appropriate BDRM and are put in place immediately to resolve disputes. Any ex-ante approaches that allow tax certainty (such as the panels suggested in the Blueprint of Pillar One) would also be welcomed in order to navigate the uncertainty that these rules may create.

Tax base

The Blueprint proposals require that the net income of each constituent entity be calculated using the financial statements drawn up under the accounting standard of the parent entity. These financial statements would then be adjusted for a number of items (e.g. dividends, stock-based compensation, adjustments to take account of Pillar One, etc) to arrive at the Pillar Two tax base. ICC notes that this could be administratively onerous to implement for those MNEs operating globally with a large number of entities.

ICC members remain concerned that the implementation issues still remain unresolved and hold that the use of a multilateral instrument to include these measures in the local legal frameworks could be theoretically feasible, with the objective of consistent adoption by all the IF members. However, it should not be overlooked that five years on, the adoption of the MLI in connection with the BEPS Action Plan measures is still very much a work in progress.

Timing differences

ICC notes a further key point related to timing differences, particularly for capital intensive businesses with long life cycles. Modelling suggests that a deferred tax methodology is the only real way to deal with this issue on a wide range of material timing differences, including particularly all fixed asset timing differences, including depreciation, interest related to fixed assets (which is deductible for tax only when paid) and revaluations. If deferred tax is not to be leveraged in such cases it is imperative that true GloBE losses are taken into account (using the relevant mechanisms identified to deal with these issues in the regime opening balances) as well as a carry back and carry forward mechanism.

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PILLAR TWO SPECIFIC COMMENTS

1) *Chapter 1: Introduction and Executive Summary*

a) GILTI co-existence. [Refers to paragraphs 25-28 of the Blueprint]

ICC holds that MNEs should be permitted to follow the existing rules of jurisdictions that have adopted a minimum tax regime where they are headquartered (i.e. the US GILTI regime should be considered compliant with Pillar Two). Alternatively, ICC believes that a parent entity's consolidated financial accounts could be used as a basis in instances where jurisdictions have not adopted a minimum tax regime.

1. *Do you foresee any other technical implications of GILTI co-existence - in addition to those already identified in the Blueprint that should be taken into account?*

ICC notes that clarity will be needed on how the GILTI regime co-exists with the Pillar Two proposals. In particular, it would be important to understand how the undertaxed payment and subject to tax rules are applied to companies subject to GILTI. MNEs whose parents are subject to GILTI should be exempt from the application of the GloBE provisions – which would provide significant administrative and compliance simplification for those MNEs and tax administrations with no loss of tax revenue. Where GILTI is payable at the level of an intermediate US holding company in a non-US headed group, consideration for how any GILTI can be credited against the GloBE liability is necessary to ensure effective elimination of double taxation.

3) *Chapter 3: Calculating the ETR under the GloBE Rules*

c) *Rules to adjust for accelerated depreciation. [Refers to paragraphs 220-225 of the Blueprint]*

1. *What are the technical issues that need to be considered in developing a rule that will minimise the instances of a tax charge under the GloBE rules and a corresponding IIR tax credit due to accelerated depreciation or immediate expensing of assets capitalised in the financial accounts?*

   Many jurisdictions have prolonged due dates for tax returns or statutory financials for subsidiaries included in a consolidated financial statement. Each jurisdiction has different rules for depreciation reportable on its local statutory financials versus tax returns. However, taxes under Pillar One and Pillar Two may be due sooner than local statutory financials and tax returns are due. Considering all the above factors, ICC notes that it may be easier to administer OECD IF rules that allow, whenever possible, application of local depreciation rules.

   ICC notes that in some instances this could lead to perverse outcomes, where a group has already realised the accelerated tax deductions and thus the tax base is inflated without appropriate backward-looking accounting for previous tax deductions and losses accrued. In this case, ICC suggests that it may be useful to consider allowing deferred tax on all fixed asset movements (including interest and revaluations of such assets which could be material in capital intensive businesses), coupled with appropriate loss carry forward (including pre-regime loss carry forward) in relation to these deductions.

2. *How can these issues be addressed in the design of a rule that minimises compliance and administration costs? Should the rule be based on deferred tax accounting, or rather allow the GloBE tax base to be computed by reference to tax depreciation instead of financial accounting depreciation?*

   ICC suggests that consideration should be given for full deferred tax or a recognition that pre-regime losses are allowable/calculated on the same basis and carry forward and back of excess tax credits is permitted.

3. *Can you identify any other overall simplification measures that could be explored by the Inclusive Framework or potential simplifications to the design or application of specific elements of the IIR or the UTPR that would not undermine their objective or effectiveness?*

   ICC members hold that if the ETR of an MNE on a consolidated basis is above a certain threshold, the Pillar Two provisions should not apply, as the objective of ensuring an appropriate level of taxation would be already met. This could also be seen as an additional simplification measure.

Rules to Comments beyond questions raised: 3.3.7. Treatment of government grants and *tax credits*

- Over the last 10 years, there has been a shift in governments' R&D support policy mix towards a greater reliance on tax versus direct support measures. ICC believes that countries should remain free to choose if and how they incentivise R&D activities (i.e. whether through direct government grants, tax incentives or a combination of both) within the limits of BEPS Action 5, and that MNE groups should not be treated differently for GLoBE purposes depending on the choice made by individual governments. The GLoBE rules effectively put a limitation on the use of R&D tax incentives, in favour of expenditure-based tax incentives that provide relief to payroll taxes or social security contributions; government grants; and qualified refundable R&D tax credits. Apart from the different accounting treatment, it is unclear what the rationale for this is, both from an economic and BEPS perspective, particularly for expenditure-based R&D incentives, e.g., an R&D super deduction. ICC proposes that a permanent difference adjustment be made to the tax line for R&D super deductions.

- It is critical that the Pillar Two regime does not negatively impact innovation and incentives to invest in innovation and the infrastructure that supports it and to this end ICC is supportive of the proposed approach, acknowledging the accounting treatment, and aligning the treatment of refundable tax credits to government grants. This produces a sensible outcome as such tax credits are independent of profitability and tax profile. However, the rationale for providing additional criteria for a refundable tax credit to be "qualified" is unclear and the proposed adjustments required in respect of "non-qualified refundable tax credits" would seem only to further complicate an already complex set out of rules without there being an underlying issue to address.

- As noted in paragraph 234, investment tax credits typically relate to direct investment in property, plant, equipment or R&D. For the latter, the credits are generally in respect of payroll costs or items consumed in R&D. All of these investments are substance-based and there would therefore be minimal, if any, BEPS risk associated with these types of investment tax credits. The proposal to differentiate investment tax credits which are accounted for as income on the, what would appear to be rather arbitrary, basis of whether they are refundable within four years, seems only to add complexity to the rules without any clear rationale.

- Furthermore, it could further drive unwanted behaviours – motivating countries to incentivise investment through grants and similar initiatives, instead of through tax credits which, by virtue of being administered through the tax system are more transparent to all.

- The accounting requirement to recognise a refundable credit as income is a high threshold and, in light of this fact ICC suggests that it would be simpler to align the treatment under the GloBE proposals with the accounting treatment, thereby removing the need for additional adjustments in the calculation and helping to drive simplicity.

4) *Chapter 4: Carry-forwards and carve-out*

b) Formulaic substance-based carve-out. [Refers to paragraph 332-370 of the Blueprint]

- The rate of return for the carve-out should be sufficiently high in recognition of an MNE group's underlying substantive activities. It may be appropriate to give consideration to providing a higher percentage mark-up for different categories of payroll costs, including for example strategic management and R&D.

- Where a carve out arises in respect of substantive investment made in a year, to the extent this is unutilised, it should be carried forward and be available in future years at the point a return on that investment is generated. This will ensure that the policy objective of ensuring that a group's routine operations are not inadvertently negatively impacted is achieved, even in industries with long investment lifecycles.

- Modern R&D practices often involve engaging with third party providers. Such third-party expenditure is integral to the R&D activities carried out by an entity and inextricably linked to the substance of these activities and should be incorporated into the carve out. A check could be put in place by capping the amount of third-party R&D expenditure included in the carve out by the amount of payroll and fixed asset expenditure, so as to ensure it is commensurate with substance.

- The carve out should also include a measure of intangible assets, given the important role these play in a modern, digital economy. This should include both intangible assets used by the employees in their activity (e.g. computer software).

c) *CbC Report ETR Safe Harbour. [Refers to paragraphs 381-390 of the Blueprint]*

The Blueprint indicates that the Inclusive Framework is considering a simplification measure based on the Country-by-Country Report (CBCR). The CBCR report is solely a high- level risk assessment tool and the information included is prepared on this basis. ICC notes that use of the CBCR data would not necessarily reduce compliance costs or efficiencies and expresses concern that the data may be used beyond what was intended in the report and could therefore lead to increased disputes.

The use of the CbCR effective tax rate (ETR) safe harbour could be seen as an interesting option, as only MNEs subject to CbCR will be subject to the GloBE rules. The OECD has already provided significant guidance on the relevant calculation; in particular, the income tax accrued reported data must include accrued current tax expenses recorded on taxable profits or losses of the year of reporting. Income tax accrued data, as defined by the OECD for these purposes, do not include deferred taxes or provisions for uncertain tax liabilities.

Establishing a CbCR safe harbour for GloBE purposes would create the need for expanded CbCR reporting that would not otherwise be necessary. This would have the non-intuitive result of increasing overall complexity and compliance burden for the ostensible purpose of simplifying GloBE compliance.

5) *Chapter 9: Subject to tax rule*

a) *Covered payments and low-return exclusion. [Refers to paragraphs 617-620 of the Blueprint]*

If an STTR is to be part of the Pillar Two framework, ICC believes its scope should be targeted at "interest" and "royalties" between related parties (using the definitions of Articles 11(3) and 12(2) OECD Model for the sake of consistency and tax certainty), and the top-tax rate should be set at a moderate level (well below that for GLoBE purposes) to prevent over-taxation. A wider scope opens the door to “expansive” WHT provisions and challenging WHT tax refunds.

6) *Chapter 10: Implementation and rule co-ordination*

Comments beyond questions raised:

Paragraph 658 of the Blueprint indicates that “further consideration will be given to whether it would be appropriate for jurisdictions to agree to stagger the implementation of the GLoBE rules, allowing the IIR to come into effect first and only activating the UTPR after a specified number of years following the finalisation of Pillar II”.
ICC supports the notion that jurisdictions should be given sufficient time to introduce an IIR before countries’ UTPR would be activated, given the complexity of the UTPR and the greater risk of disputes when it applies. A previous draft version of the Blueprint suggested that a “critical mass of jurisdictions be reached” before the UTPR would be activated. ICC members support this suggestion. Compliance with the GLoBE rules will entail a significant administrative burden for MNEs; careful consideration should be given to whether imposing such a burden could be justified where no “critical mass” of adopting jurisdictions is reached.

Conclusion

ICC recognises that further work is needed to further develop the existing proposals. ICC remains committed to providing knowledge and expertise on behalf of business with a view towards determining a long-term global solution to address the tax challenges of digitalisation.

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