ICC comments in response to OECD public consultation documents: GloBE Information Return and Tax Certainty for the GloBE Rules

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide input on the OECD public consultation documents and welcomes the possibility to provide comments on the documents respectively addressing the GloBE Information Return and the tax certainty aspects relating to GloBE rules. 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 is also an established arbitral institution through its International Court of Arbitration and provides other dispute resolution mechanisms through its International Centre for Alternative Dispute Resolution.

ICC appreciates the work undertaken in respect to the Pillar Two GloBE rules. However, ICC members would like to emphasise the need to ensure that the GloBE Information Return (GIR) must not represent an overwhelmingly disproportionate burden for businesses. GloBE rules also require coordination and consistency which is necessary to prevent double taxation and disputes.
Thus, ICC members welcome the possibility to provide comments on the two documents for public consultation and we would be pleased to respond to any questions arising from the following comments.
We would also like to specify that the following comments do not include references to the Agreed Administrative Guidance for the Pillar Two GloBE Rules, since this document has only been released one day before the submission deadline. One day was a largely insufficient time to thoroughly analyse this additional document and while this guidance is not subject to public consultation, in the following weeks ICC members would still welcome the possibility to provide further feedback and comments to the OECD Secretariat.

Comments on the GloBE Information Return:

- From the document for public consultation, it appears that the GIR could require a breakdown of all the GloBE calculations on a constituent entity by constituent entity basis. ICC members believe that this requirement is particularly concerning. GloBE calculations will require the management of many data points and having to disclose all of them for all entities would imply that thousands of data points will need to be reported. Taking into account that the GloBE calculation's basic principle is that the ETR is computed at a country

level, when the ETR is above 15% or when there is no excess profit at country level, it is difficult to identify the objective reason underlying the requirement of a breakdown on a CE-by-CE basis. Similarly, it is unclear whether all of the datapoints would be really necessary to complete the return and the underlying reason for them to be seen by all jurisdictions (for example splitting out of deferred tax assets and liabilities rather than one consolidated number, or providing entity level data).

- Moreover, without an effective permanent jurisdiction Safe Harbour, this section will entail an excessive compliance burden completely disproportionate in light of the Pillar Two policy intent and contrary to the commitments taken by the Inclusive Framework in the October 2021 statement on the two-pillar solution. **ICC members therefore strongly request that for countries where there is no top up tax liability at stake, only country-level information should be requested in the GloBE Information Return.**

- The document for public consultation is also ambiguous regarding the alignment of computation methods. Some of the legislation drafts aimed at implementing the Pillar Two proposal started to include different terminology and requiring some additional or different datapoints. ICC would thus recommend discouraging implementing countries from requiring additional datapoints.

- Furthermore, the granularity of the information which would be shared among a significant number of countries also raises **major data confidentiality and trade secrets concerns**. GloBE data points on a CE-by-CE basis may be extremely sensitive from a business standpoint, and ICC members are very much concerned that it could be used for purposes other than GloBE.

- Additionally, ICC members would like to underscore that not all revenue authorities around the world have **strong and effective cyber security safeguards** in place which can prevent and reduce their exposure to cyber-attacks. These entail that the incredible amount of sensitive business information that will need to be reported and then shared among revenue agencies might be subject to cyber threats.

- Moreover, in relation to the exchange of GloBE information between tax administrations, it seems that this should take place in a comparable manner to the CbCR. Hence, ICC members would like to encourage taking into account some of the problems that have arisen in the context of the CbCR and that should be avoided. For instance, in cases where countries were unable to exchange CbCR information with the other jurisdictions, local filing had to be made resulting in a very time-consuming additional compliance burden. Furthermore, in the CbCR, local notifications have to be made in many different countries, with jurisdictions setting different deadlines and introducing various formalities. **ICC members would recommend preventing several local notifications, to avoid redundancy and truly make the exchange of information more efficient.**

- In relation to the presentation of the group's detailed shareholding structure and constituent entities (section 2.2.1), ICC members would like to underscore that having an overly standardized format for providing the group's chart structure may require many developments compared to MNE's existing legal reporting tools. Consequently and for the

sake of avoiding excessive compliance burdens, **ICC members strongly advise the possibility of allowing groups to provide the group legal structure based on existing tools**.

- Regarding the reporting requirement in relation to any change in the shareholding structure, ICC members would like to point out that for entities which are 100% owned directly or indirectly by the Ultimate Parent Entity (UPE), any intragroup change in the shareholding structure would not have any impact for GloBE purposes. Thus, it would be **recommendable to request the information only with respect to CE which are not fully owned by the group or cease to be fully owned by the group**.

- In order to allow a smooth filing process of the GIR, ICC members invite the OECD to work on and provide a **central application solution** to avoid a proliferation of different technical solutions among jurisdictions.

- In terms of technical solutions, ICC members would also like to suggest the creation at OECD level **of a database that specifies which country applies a Qualified Domestic Minimum Top-up Tax (QDMTT), an income inclusion rule (IIR) and/or the undertaxed payments rule (UTPR)**. All jurisdictions should be relying on this database with the consequent benefit that such a system would simplify compliance by not requiring each group to make such a clarification and monitor the different states on individual basis.

- ICC members would also like to underscore the importance of ensuring a level of compliance and administration which is manageable for both taxpayers and tax administrations. It should be noted that for many MNEs, GloBE liability will only raise in a very limited number of jurisdictions, due to either the operation of a safe harbor or a local effective rate which is higher than the minimum one. In these cases, requiring the same type of disclosure across all countries without taking into account a GloBE liability would result in excessive compliance levels of compliance for taxpayers and administrations alike on top of the data confidentiality concerns which were previously raised. In order to enhance further simplification, **ICC members would like to recommend differentiating disclosures in the GIR based on whether a GloBE top up tax liability is relevant.**

- ICC members positively welcome the introduction of the Transitional Safe Harbours. They represent an important simplification for complex MNEs, especially given the fact that the new GloBE Rules will entail a considerable compliance burden even in cases where the nature of the business and the tax system of the relevant jurisdictions do not pose any risk.

- However, in relation to the information used to review the application of the transitional Safe Harbour (see section 3 and section 3.2.1), the indicators do not seem to refer to the Substance-Based Income Exclusion (SBIE) whereas it is required for the simplified routine profit transitional Safe Harbours. **In the opinion of ICC members, the amount of SBIE and routine profit test should also be included, ensuring more consistency in the different compliance requirements.**

- Moreover, ICC members would like to convey their concerns on the "once out, always out" approach adopted for the Transitional Safe Harbours, under which if an MNE Group has not applied the transitional CbCR safe harbor with respect to a jurisdiction in a fiscal year in

which the MNE Group is subject to the GloBE rules, the MNE Group cannot qualify for this safe harbour for that jurisdiction in a subsequent year. ICC members would like to underscore that there may be situations in which, due to a temporary and legitimate situation, a jurisdiction may not qualify for the Transitional CbCR Safe Harbour during a given year but qualify during others. In these cases, ICC believes that **access to the Safe Harbour should be granted in the following year/years if the Transitional Safe Harbour Tests are met.**

- ICC members urge the Inclusive Framework to work on **more permanent effective Safe Harbours**, which would allow MNE and tax authorities to focus on countries where there is an actual top up tax at stake, which are in a very limited number for most MNE. This is fundamental to ensure that the Pillar Two project stays targeted and in line with policy intent, as outlined in the October 2021 statement of the Inclusive Framework on a two-pillar solution. **ICC members are convinced that the transitional Safe Harbour based on the CBCR profit/loss could be adapted in order to be used more permanently without any risk of revenue loss for the countries**.

  In support of this proposal and as far as the simplified ETR calculation is concerned, ICC members would like to present the following observations:

  i) The CBCR profit/loss could still be used as a proxy for the GloBE income. The CBCR profit is generally based on the consolidated pre-tax profit, which is an extremely scrutinized, audited and reliable number used to calculate the published ETR of a group. Moreover, many GloBE adjustments are actually downwards rather than upwards. For these reasons, ICC members believe that the CBCR profit is rather conservative as opposed to generous as far as the SH are concerned, and can be thus safely used as a proxy. ICC members would also agree to tighter CBCR guidelines being released by the OECD to ensure consistent CBCR data across the IF jurisdictions.

  ii) Concerning the covered taxes used for the simplified ETR calculation, ICC Members would be willing to agree on some adjustments: e.g., elimination of uncertain tax positions and undistributed reserves, recasting of DTL at 15% and elimination of categories of DTL which could be subject to the recapture rules.

  iii) Finally, the rate of the simplified ETR calculation should remain at 15% given the adjustments above.

  Based on the above points, **ICC members are strongly convinced that Permanent Safe Harbours could be designed without any risk of any material top up tax not being captured**.

- ICC members would also like to point out that the most important definitions related to the De Minimis Test, ETR Test, and Routine Profits Test of the Permanent Safe Harbours are not yet developed. It is necessary that the definition and the guidance on permanent Safe Harbors is soon completed in a clear fashion in order to be able to navigate from the transitional period to the permanent regime and also to allow taxpayers to correctly assess the impact that the GloBE Information Return compliance will have on internal systems and processes.

- Furthermore, the consultation is actually ambiguous with respect to how the Safe Harbours will interact with the GIR. While the document for public consultation implies that no computations will be required for jurisdictions that qualify for Safe Harbours, ICC members would like to receive confirmation on the fact that no data will need to be included in the GIR.

- In relation to section 2.2, in cases where a Group Entity (other than UPE) or a member of a JV Group is resident in a state which applies a Qualified Domestic Minimum Top up Tax (QDMTT), **ICC members would recommend the possibility to specify right on top of the questionnaire** (e.g. as an additional line in cipher 2.2.1, concerning the jurisdiction/applicable rules) **if the jurisdiction in which the company is resident applies the QDMTT.** Moreover, if this were the case, none of the subsequent questions in the questionnaire should need to be answered.

- ICC members would also like to suggest that the GIR should be showing in a clear way whether the individual items/adjustments on page 8 and 9 must be added or subtracted by mentioning a "+" or "-" in front of each position.

  Furthermore, ICC members would like to recommend that in cases where a tax consolidation exists in a jurisdiction and the MNE has elected to disregard the transactions within the tax group as per the GloBE rules, the tax group should be treated as one single CE for the purpose of Section 4 of the GloBE Information Return.

Comments on Tax Certainty for the GloBE rules:

- ICC Members strongly support a thorough and effective certainty process for P2. **GloBE rules require coordination and consistency**. This is not just necessary to avoid double taxation and disputes, but also to avoid the extreme complexity of having to deal with multiple inconsistent regulations all over the world.

- As it emerges from the opening remarks of the document for public consultation, there is currently no consensus within the Inclusive Framework on any of the proposals described. **This lack of consensus is concerning,** given the importance of tax certainty as part of a balanced and targeted Pillar 2 implementation.

- ICC members strongly support the **release of clear guidelines and processes** to make sure that the **rules are implemented in a consistent manner across jurisdictions**.

- While the document for public consultation is almost entirely focused on disputes involving multiple implementing jurisdictions, ICC members believe that there will also be an increasing number of disputes involving MNEs and one single tax authority. This would be the case of disputes over the interpretation and administration of the GloBE rules by UPE jurisdictions in applying the income inclusion rule (IIR). Thus, ICC members recommend putting in place **appropriate disputes prevention and resolution mechanisms which can provide tax certainty also in cases where disputes arise between MNEs and single tax authorities.**

- A particular point of concern for ICC members relates to the notion of "Qualified Domestic Minimum Top up Tax" (QDMTT). Most of the countries implementing Pillar Two have announced that they will also introduce a QDMTT. ICC members urge the QDMTT to accurately reflect the mechanism of the GloBE rules and incorporate any GloBE and Safe Harbour simplification on a mandatory basis. The QDMTT shall be computed under the same rules of the top up tax, with no exception. Conversely, there is a high risk for Pillar Two to fail to meet its objective of introducing a common minimum corporate income tax, leading to increasing complexity. **ICC members would like to underscore that it is vital that the introduction of a QDMTT shall not jeopardize any safeguards or reporting simplification.**

- In order to avoid disputes, **ICC Members believe it is critical that the ordering rule (i.e., QDMTT, IIR, then UTPR) is respected**. It is also important to clarify that existing minimum taxes (e.g., the US GILTI) should be treated as CFC taxes allocated to those constituent entities that give rise to them, and offset in priority to the QDMTT, IIR, UTPR and Subject to Tax rule. To ensure consistency between taxpayers, the GILTI amount to be taken into account should be the current cash tax amount for the year in question.

- ICC members would also **welcome the release of OECD guidance aimed at ensuring that the rules are interpreted and implemented consistently across jurisdictions**.

- Moreover, in order to provide certainty on interpretative issues, ICC members would **recommend the adoption of a list of QIIRs, QUTPRs and QDMTTs which should provide clarity to both MNEs and revenue agencies on which jurisdiction's framework is applicable**. Currently, there is no specific information on what the peer review process will consider, when it will commence and when it will be completed in order to review each jurisdiction's legislative proposals. ICC members would welcome an expedited initial review of all legislation before these will enter into force, followed by a second review analysing the implementation of such legislations.

- According to ICC Members, **an Advance Certainty process is also required**. This process would be of added value to both MNE and tax authorities in agreeing in advance on key features and methodologies of the GloBE computation and potential simplifications. The process should take place unilaterally with the Lead Tax Authority of the UPE if it has implemented Pillar Two and other top up tax collecting countries if there are Partially Owned Parent Entities (POPEs). This lead tax authority should provide a "one stop shop" for in-scope MNE, managing the audits and the information requests from other countries.

- In relation to the proposed tax certainty rules, ICC members would like to underscore that the approach consisting of relying on existing tax treaties for resolving GloBE disputes might not be sufficient and that adjustments should be considered, taking into account the following points:
  i) In many cases, permanent establishments have no treaty access because branches are not considered resident for the purpose of the applicable tax treaty.
  ii) All tax treaties would have to be adjusted, which can take a very long time.
  iii) Finally, not all jurisdictions which will apply GloBE have tax treaties between each other.

- Finally, as far as dispute resolution is concerned, **we support a multilateral instrument** to ensure binding dispute resolution processes among Inclusive Framework countries. If that instrument is not available in the short term, we strongly encourage IF countries to develop reciprocated domestic provisions allowing for such mechanism in practice.