

VIA EMAIL [TFDE@OECD.ORG](mailto:TFDE@OECD.ORG)

Tax Policy and Statistics Division  
Centre for Tax Policy and Administration  
2, rue Andre Pascal  
75016 Paris  
France

2 December 2019

Re: Mayer Brown Response to Pillar Two Consultation

Dear Sir/Madam

Mayer Brown is pleased to have the opportunity to provide comments to the public consultation document for the OECD's proposed "Global Anti-Base Erosion (GloBE)- Pillar Two".

Mayer Brown is a global law firm representing clients in multiple industries around the world. We are submitting these comments in the name of Mayer Brown and not on behalf of any particular client.

### Executive Summary

This document provides comments with respect to Pillar Two. Our comments are summarized as follows:

1. We support the carve-out of all regimes compliant with the BEPS substance-based standards and BEPS Action 5 on harmful tax practices. The elimination of harmful tax regimes and alignment of substance and profits already meet the goal of the GloBE proposal to avoid profit shifting to low-tax jurisdictions and ensure a minimum level of tax. Denying such carve-out would interfere with the sovereignty of countries to offer non-harmful regimes that attract innovation and investment.
2. We recommend that the Unified Approach confirm that the Global Intangible Low-Taxed Income ("GILTI") regime under the United States Internal Revenue Code Section 951A is a compliant regime and no additional measures need to be taken by the United States with respect to Pillar Two. As a compliant regime, GILTI also ensures that payments to controlled foreign corporations (CFCs) of U.S. multinationals are subject to a minimum level of taxation. Accordingly, we recommend that the Unified Approach also confirm that any Pillar Two

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measure adopted by a country recognize the taxation under GILTI of payments to CFCs of US multinationals.

3. We recommend that Pillar Two include a carve-out for a return on tangible investments.

#### 4. Detailed Comments

##### Carve-out for regimes compliant with BEPS substance-based standards and BEPS Action 5

Pillar Two seeks to address remaining BEPS challenges by ensuring that profits of a business operating internationally are subject to a minimum rate of tax. A minimum tax rate reduces the incentive for taxpayers to engage in profit shifting.

Items of the BEPS Actions Plan have significant impact on the international tax system and they will continue to with the implementation of the MLI and ATAD. In particular, BEPS Action 5 already addresses tax avoidance and the prevention of profit shifting to low tax jurisdictions by attributing taxing rights to jurisdictions where value is created. Once Action 5 is fully implemented, it should not be possible to avoid paying tax by shifting profits to low tax jurisdictions as all harmful tax regimes would be eliminated and profit aligned with substance. As a result, in order to benefit from a non-harmful regime in a certain jurisdiction there should be effective substance.

We therefore support the carve-out of regimes compliant with the substance-based standards of BEPS Actions and specifically those regimes compliant with Action 5 on harmful tax practices.

Denying such carve-out would interfere with the sovereignty of countries to offer non-harmful regimes that attract innovation and investment.

##### GILTI is Pillar Two Compliant

Pillar Two calls for a coordinated set of rules to address the risk of global base erosion from structures that allow multinational enterprises to shift profits to jurisdictions that subject them to no or very low tax. The Programme of Work directs the Inclusive Framework to ensure the final proposal is targeted and proportionate, avoids the risk of double taxation, and minimizes compliance and administration costs.

In the Tax Cuts and Jobs Act (“TCJA”) of 2017, the United States enacted the GILTI to discourage the shifting of highly mobile income to low-tax jurisdictions. Under Section 951A, a U.S. shareholder of a CFC is required to include in gross income in the current taxable year its pro rata share of such CFC’s global intangible low-taxed income (GILTI). In general, a U.S. shareholder’s GILTI inclusion is the amount of the CFC’s active business income in excess of a 10% return on tangible asset investment. A corporation can generally deduct 50% of the GILTI amount resulting in an effective U.S. rate of tax on GILTI of 10.5%. A corporation can claim a foreign tax credit for 80% of foreign taxes paid or accrued on GILTI. The effect of the foreign tax credit is that a where the CFC has been subject to an effective rate of tax of at least 13.125%, no net U.S. tax on GILTI should arise.

GILTI operates as a minimum tax regime taxing active income of a CFC where the CFC’s income is not subject to a minimum level of taxation. It should be noted that GILTI applies to virtually all income of the CFC except where the income has already been subject to full U.S. tax under other provisions of the U.S. CFC regime. Thus, GILTI ensures that virtually all income of the CFC (in excess of the 10%

return on tangible assets) will be subject to a rate of tax of at least 10.5%.<sup>1</sup> Accordingly, we recommend that the Unified Approach specifically identify GILTI as a compliant regime and confirm that no additional measures are required to be taken in the United States with respect to Pillar Two. A U.S. taxpayer subject to the complex GILTI regime should not be subject to another separate and extremely complicated minimum tax regime.

GILTI also ensures that a payment to a CFC of a U.S. multinational will always be subject to a minimum level of taxation regardless of how the CFC is taxed in its country of residence and regardless of whether a treaty reduces withholding tax on such payment. As a result, GILTI acts as an overarching mechanism to prevent base erosion. Accordingly, we recommend that the Unified Approach confirm that any Pillar Two base erosion measure enacted by a country exclude payments made to CFCs of U.S. multinationals.

#### Carve-out for a Return on Tangible Assets

Under the U.S. GILTI regime, as described above, there is a carve-out for active business income not in excess of a 10% return on tangible asset investment. We recommend that such a carve-out for active business income should be available for all taxpayers.

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Thank you again for the opportunity to provide our comments to the Public Consultation Document. Please direct questions with respect to our comments to any of the following

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Respectfully submitted,

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<sup>1</sup> As noted, under current law, a U.S. corporation receives a 50% deduction for GILTI income. Since the current U.S. corporate tax rate is 21%, the current effective tax rate on a GILTI inclusion is 10.5%. In taxable years beginning after 2025, the deduction for a GILTI inclusion is reduced to 37.5% which will raise the effective tax rate on GILTI to 13.125%.

