

9 February 2022

To: The Chair & Members of Working Party 11 on Aggressive Tax Avoidance (WP11)

c/o Pascal Saint-Amans, Grace Perez Navarro and Achim Pross  
OECD Centre for Tax Policy and Administration (CTPA)

Dear Chair and Members of WP11,

Following the release of the *October Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, the OECD released its Model Rules for the implementation of Pillar Two on December 20 2021<sup>1</sup>.

As a follow-up to our letter to you dated 6 January 2022, the BAG and the broader *Business at OECD* (BIAC) Tax Committee have identified elements in the Model Rules that – while not rising to the level of fundamental technical or policy issues – could result in implementation difficulties such as double taxation, increased controversy, increased compliance burdens, and unintended consequences on growth and investment. We would ask you to consider addressing the issues that we list below, together with potential solutions that we describe in more detail in a separate note.

There are a number of issues which we have already raised in our letter of 6 January, and while we remain concerned about those, and hope to continue to work with you to resolve them, we do not intend to repeat those issues here. Additionally, there are some policy calls which we believe will raise both political and economic issues as the interaction of the Model Rules with existing policy and legislation become clearer. Again, we do not list them in this letter as needing to be addressed in the Commentary or Implementation Guidance. Nevertheless, we hope that you will be able to consider them. To give just one example of this latter category, questions have been raised on whether the Model Rules might discourage investments in key sectors (e.g., renewable energy, research and development, investment in underdeveloped sectors/regions) by acting in conflict with related policy-driven tax incentives. This may not yet have received sufficient political attention in Inclusive Framework (IF) countries.

Finally, as we have caveated in our previous letter, while we believe the comments provided in this letter are as comprehensive as they can be as of this date, given the speed at which the Pillar Two project is moving, we will likely need to continue to raise issues on a rolling basis as they come to light.

### **Technical and Policy Issues Which May Need To Be Addressed**

Please see a list of issues we have identified below. As noted above, we will send you more details under separate cover.

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<sup>1</sup> *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)* (“Model Rules”)



1. The terminology used within the rules in relation to deferred tax liabilities raises issues. In this case, a literal interpretation of the word “paid” could result in double taxation.
2. The approach to post filing adjustments may result in top up tax even where there are no undertaxed profits.
3. Special Rules for Intra Group Financing Arrangements could result in potentially harsh outcomes for common intragroup financing scenarios in the ordinary course of business.
4. The term “Additional Tier One Capital” used in Article 3.2.10 is limited to the banking sector. But given equivalent issues, a similar approach could be appropriate for the insurance sector.
5. Filing requirements under the rules are significant and require extensive information. Every effort should be made to ensure there is not a proliferation of duplicative filing obligations.
6. It would be appropriate to develop commentary and administrative guidance on a rolling basis both now and throughout the initial years of implementation.
7. There is a need for comprehensive practical examples to clarify interpretation and calculation approaches.
8. The POPE Rules require jurisdictional blending with Constituent Entities held by the UPE but for which the POPE itself has no economic interest. The POPE may not be able to access the financial information needed to comply with Pillar Two obligations and forecast Pillar Two tax liabilities.
9. The legal basis for application of top up tax under the UTPR and the application of tax treaties should be clarified where there is no nexus between a low tax entity and the taxpayer.
10. UTPR expands beyond the scope of the IIR in certain cases where minority shareholders own a direct or indirect interest in a low-taxed constituent entity.
11. GloBE Income should be adjusted for gains arising on debt releases resulting in Pillar Two tax in excess of economic profit.
12. The requirement for Constituent Entities in different countries to apply the Arm’s Length Principle (ALP) introduces a third jurisdiction into transfer pricing disputes.
13. Foreign tax credits should be excluded from the definition of “tax credits” for the purposes of Article 4.4.1(e).
14. Current treatment of intangible assets may result in harsh outcomes for many industries inconsistent with broader public policy objectives related to innovation, decarbonization and advances in health and environmental agendas.
15. Consideration should be given to the protection of commercially sensitive information required to be obtained from a seller in order for the acquirer to undertake ongoing Pillar Two tax calculations.
16. Insurance Investment Entities should be allowed to make an election to apply the Taxable Distribution Method in respect of Article 7.6.1 on the same basis as Investment Entities to preserve tax neutrality.



17. Safe harbors will be vital to the smooth functioning of Pillar Two, and to increased tax certainty. We urge the development of these – where possible, consulting with business – as soon as possible.
18. The requirement to maintain the transferor’s carrying value in assets transferred between entities after 30 November 2021 and before the commencement of a Transition Year, could result in double taxation where tax has been paid by the transferor on the disposal.
19. “Insurance Investment Entity” and “Investment Entity” should be defined in the same way.
20. Certainty would be greatly enhanced by eliminating as much subjectivity as possible in the determination of whether a country has introduced a Qualified IIR and/or a Qualified Domestic Minimum Tax (QDMT).

## Conclusion

The *Business at OECD* (BIAC) tax committee again thanks WP11 for the opportunity to engage with it on these important issues, and fully supports the continuing work on Pillar Two. We believe that significant work is required between now and implementation, and indeed beyond implementation, to ensure that Pillar Two achieve its stated goal of implementing an administrable global minimum tax without adding double taxation burden. We look forward to working with you to advance this goal in your ongoing work, including in the upcoming public consultation on the implementation guidance.

Please let us know any questions on any of the above, and we look forward to constructively engaging with you on these important topics throughout 2022.

Sincerely,

Alan McLean  
Chair, *Business at OECD* (BIAC)  
Committee on Taxation and Fiscal Affairs

William H. Morris  
Chair Emeritus

Cc: Hanni Rosenbaum, Executive Director, *Business at OECD* (BIAC)