OECD PILLAR 2: CONSULTATION ON IMPLEMENTATION

BPF RESPONSE

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Introduction

The British Property Federation (BPF) represents the real estate sector – an industry which contributed more than £116bn to the economy in 2020 and supported more than 2.4 million jobs. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.

We are supportive of the OECD's efforts to consider the tax challenges arising from the digitalisation of the economy, and base erosion more broadly. We have previously provided comments to the OECD on the GLoBE Pillar Two blueprint and therefore welcome the opportunity to comment on the UK government's consultation on how the Pillar 2 rules should be implemented in the UK.

Our comments in response to the Consultation are set out below.

Consultation

Following the OECD Model Rules:

We welcome the commitment of the government to implement the Pillar 2 rules in the UK as closely to the OECD Model Rules as possible. Given that the Model Rules are intended to provide an international framework, it is critical that there is consistency between how different jurisdictions implement Pillar 2 so that businesses within scope are effectively applying one set of rules only. That consistency should apply not only to policy design, but also, where relevant, to defined terms. Changes should only be made where necessary to reflect specific UK tax law concepts.

Definition of Pension Fund:

In this context, in relation to "Pension Fund", we ask that the definition to be used within the UK rules is the same as that applies for the purposes of Sch 5AAA TCGA, for consistency (and in particular given that is generally understood).

Exclusion of collective investment vehicles - general:

Our comments in response to the OECD consultations were principally directed at the need to ensure that the GLoBE Pillar Two measures did not jeopardise the concept of tax neutrality for investors in funds – i.e., to ensure that those who invest collectively are able to obtain as similar tax outcome as if they had invested directly. We therefore welcome the inclusion in the definition of Excluded Entity within the OECD Model Rules (at Article 1.5) of both Investment Funds and also Real Estate Investment Entities (where, in both cases, the entity is an ultimate parent entity): both types of entity should be similarly excluded from the UK's rules for Pillar 2.

Exclusion of collective investment vehicles - specific:

We ask that, in adopting the definitions of Investment Fund and Real Estate Investment Entity, the UK provisions additionally specify (by way of "inclusion") the particular entities that are intended to be within

the scope of this exclusion. For example, for Real Estate Investment Entities, this would include a UK REIT (both a REIT that is non-close as well as a REIT that would be close but for having qualifying institutional investors) and, for Investment Fund, the definition should list the specific types of UK investment vehicle that are regarded as within the definition (including PAIFs) to provide certainty. We ask that this is prescribed for within the legislation itself, and not left to guidance, and that any "list" can be amended by statutory instrument - and so can take account of any changes to the UK funds landscape as part of the Wider Funds Review (such as the introduction of a PIF).

"Entities" owned by Excluded Entities:

The Consultation, at para 4.30, references the exclusion from Pillar 2 of "asset holding companies" within the OECD Model Rules. We note that the OECD definition in Art 1.5.2 references "Entity" (and not just company), a defined term that expressly includes "partnerships and trusts" where they prepare separate accounts. We ask that the UK rules similarly exclude asset holding entities (and not just companies) given the use of partnership and unit trusts as asset holding entities for real estate investment and also to enable entities such as LLCs to qualify within this definition (whether or not they are classified as a company for UK tax purposes).

"Covered Taxes" and REITs:

The effective tax rate (ETR) takes account of aggregate taxes, which, as per para 5.5 of the Consultation, means the aggregate of covered taxes. Para 5.30 the Consultation references that Covered Taxes will include withholding taxes which para 5.36 says will generally be assigned to the person that bears the burden of the tax, subject to an exception for dividend withholding. This exception is referenced in the description of Covered Taxes in OECD Article 4.3.2(e). Applying this to a UK REIT, we assume that withholding tax withheld on distributions by a UK REIT (that does not meet the definition of excluded entity) can, for the purposes of calculating the ETR, be regarded as a tax paid by the UK REIT (see also paras 60 and 61 of the OECD Commentary on Article 4). As the OECD Model Rules simply refer to "distributions", we assume, in relation to a UK REIT, the definition of Covered Taxes would apply to both tax withheld from property income distributions (whether attributable to the income distribution condition (and mandatory) or not) and other dividends - and we ask that the UK legislation makes this clear.

"Joint Venture" REITS:

There can be cases where a UK REIT is used as a form of joint venture vehicle (given the adaptation of the close company condition where there are certain institutional investors). Such a REIT is unlikely to be consolidated with any of its investors. In such a case, we would anticipate that the joint venture REIT would itself be an Ultimate Parent Entity and so able to qualify as an Excluded Entity (and as such cannot a Joint Venture as defined in the OECD Model Rules). As above at para 3.1, we ask that the UK rules align as closely to the OECD definitions as possible in this context to ensure that (as a result of the interaction of these definitions) Art 4.3.2(e) is not applicable to withholding tax on dividends paid by the REIT - and so any such withholding tax is a Covered Tax of the investors.

Reporting and Payment:

We support the stated preference for reporting to be made through the GLoBE return (with HMRC taking relevant data from that return rather than requiring a separate UK-specific Pillar 2 filing). We also agree with the proposal that any tax due as a result of Pillar 2 should be payable annually (rather than by instalment) and ask that payment dates be aligned with the GLoBe reporting timetable (and not just the UK corporation

tax cycle). However we question whether joint and several liability is appropriate: we consider that GLoBE debts under the IIR should be assessed on the parent entity only.

Timetable:

We agree that, given both the complexity of the Model Rules, it is right to consult on the proposals at as early stage as possible. However, it is unfortunate that it is only towards the end of the allotted timetable for consultation that the OECD published its Commentary on the Model Rules (on 14 March 2022) given the importance of that Commentary to the interpretation of the Model Rules. We note that the government currently intends to publish draft legislation in Summer 2022 and anticipates that legislation will be included within Finance Act 2023 (and be in force from April 2023). This timetable means that there will only be opportunity for one substantive consultation on the draft legislation given the Finance Bill timetable (and limited opportunity for amendments once the Bill is introduced to Parliament). We acknowledge that the policy design is settled but nevertheless are concerned that the current timetable does not allow sufficient time for engagement with stakeholders on legislating for what is a fundamental change to international taxation. In particular, we contrast the Pillar 2 timeline with that which applied to BEPS4/CIR in 2015-2017. We therefore ask that the government reconsider the proposed timetable, and in particular consider deferring commencement until later in 2023 - basically to allow two consultations on proposed draft legislation - and also to provide affected businesses with sufficient time to prepare for the new rules once UK legislation is final and, as importantly, the OECD work itself is closer to completion (including publication of the implementation framework addressing administrative matters).

UK domestic minimum tax:

We agree that any UK DMT should be limited in application to groups within the scope of Pillar 2 (i.e., with over €750m of global consolidated revenue).

Uncertainty:

We anticipate that, notwithstanding the Commentary and (we assume) HMRC guidance on the UK's Pillar 2 rules, there will be areas of uncertainty about how the rules apply in the initial reporting cycles. We would therefore ask that tax due under Pillar 2 is excluded from the notification of uncertain tax treatment provisions for a minimum two year period - to allow businesses time to understand the rules, working with CCMs as required, without having to identify whether any lack of clarity as to scope/effect means that they have am uncertain treatment reporting obligation.

Post Pillar 2/BEPS review:

Work at the OECD to address base erosion and profit shifting in recent years have resulted in significant changes to the UK tax rules. In general, this has led to the UK adopting new rules, whilst maintaining pre-existing rules also intended to provide protection to the UK tax base. This has added complexity to the UK corporation tax system. Noting para 13.17 of the Consultation, we ask that, once Pillar 2 has bedded in (say, after 3 reporting cycles), the government carry out a review to determine the extent to which pre-existing rules are still needed - or whether they can be repealed and/or modified in light of the OECD-based measures introduced since 2016.