

OECD announces Pillar One unilateral measures consultation

21 December 2022

In brief

On the one-year anniversary of issuing the Pillar Two Model Rules, 20 December 2022, the OECD released four guidance documents related to Pillars One and Two;

1. Pillar Two [Guidance on Safe Harbors and Penalty Relief](#) (see [tax policy alert](#));
2. Pillar Two public consultation document on [Tax Certainty for the GloBE Rules](#) (comments due 3 February) (see [tax policy alert](#));
3. Pillar Two public consultation document on the [GloBE Information Return](#) (comments due 3 February) (tax policy alert coming soon); and
4. Pillar One public consultation document on the [Draft Multilateral Convention \(MLC\) Provisions on Digital Services Taxes \(DSTs\) and other Relevant Similar Measures](#) (comments due 20 January).

All of these documents are OECD Secretariat consultation documents except for the guidance on Pillar Two Safe Harbours and Penalty Relief, which was approved by the Inclusive Framework (IF) on 15 December.

The draft MLC provisions focus on Digital Services Taxes (DSTs) and other Relevant Similar Measures and they reflect the commitments with respect to the removal of all existing DSTs and other relevant similar measures and the standstill of such future measures.

The consultation document includes two articles: one detailing that DSTs will be withdrawn under Pillar One and the other describing the three characteristics of a DST-like tax which should be withdrawn.

While the OECD Secretariat released preliminary language on DSTs for comment, there are several significant technical issues yet to be agreed. The consultation document notes that stakeholder comments will assist in finalising language that will provide for the withdrawal and standstill of existing DSTs as well as the commitment not to enact future DSTs and other similar measures. Most importantly – given the increasing inventiveness of some countries, and their willingness to operate outside the tax treaty system – is the lack of any detail on what a ‘similar measure’ might be. We understand that several countries wish to restrict the application of these MLC articles to DSTs.

The work on Amount A is still planned to be completed by mid-2023, coinciding with the planned completion of the work on Amount B. The proposals outlined in the consultation document represent the work of the OECD Secretariat, however, since the Inclusive Framework (IF) has not yet reached consensus on them. Their basic design may, therefore, be subject to change, unrelated to this consultation process.

Comments on the consultation document are due by 20 January 2023. This alert provides a short overview of the proposed rules and initial observations.

In detail

Overview

The consultation document reiterates that stabilising the international tax architecture is the main goal of Pillar One and refers back to the [October 2021 Statement](#) and [July 2022 Progress Report](#) in this respect. The removal of all existing DSTs and other relevant similar measures and the standstill of future measures is an ‘integral part’ of that goal.

There are three primary issues that the MLC provisions address: (1) the obligation to withdraw existing measures that will be identified in an Annex that is not released as part of the document; (2) a definition of the measures the parties to the MLC will commit not to enact in the future; and (3) a mechanism that will eliminate Amount A allocations if this commitment is breached.

MLC language

The Draft MLC language released on unilateral measures contains two articles: one on the removal of existing unilateral measures, and another provision eliminating Amount A allocations for parties imposing DSTs and relevant similar measures. The document requires that parties shall not apply any measures listed as a defined unilateral measure as of the date the MLC “enters into effect with respect to that Party.”

The application of the MLC language to unilateral measures rests on whether the tax meets the definition of a ‘DST or relevant similar measure.’ There will be an Annex that will include a definitive list of existing measures that meet this definition. However, this list has yet to be agreed upon and is not part of this consultation.

While the list of specific existing DSTs is pending, the consultation gives three criteria that must ALL be met for a measure to be considered a DST or relevant similar measure:

- a. A **destination element**: The measure must be determined primarily by reference to the location of customers or users, or other similar market-based criteria;
- b. **Application (de jure or de facto) mainly to foreign-owned businesses**: The tax measure has to be facially discriminatory, i.e., applicable by its terms only to non-residents or entities primarily owned by non-residents; *or* discriminatory in practice exclusively or almost exclusively to non-residents or foreign-owned businesses;
- c. **Not an income tax**: The measure must not be treated as an income tax under the party’s domestic law or must be treated as a tax outside the scope of treaties other than the MLC.

While the IF has yet to identify existing measures that qualify as DSTs, there are certain excluded measures that the document identifies, such as VAT, transaction taxes, withholding taxes that are treated as covered taxes under tax treaties, or rules addressing abuse of existing tax standards. The consultation document clarifies, however, that no evidentiary inference may be made from listing or not listing a specific measure as to whether it is a DST or relevant similar measure.

Observation: The consultation document notes that consideration will be given to the form of commitment to the standstill of future DSTs or relevant similar measures, as well as their treatment under Amount A. It therefore remains possible that countries will seek to tailor the existing scope of transactions and types of taxes in light of the guidance the OECD has and will issue on the definition and parameters of unilateral measures in order to circumvent the spirit of these restrictions.

The consultation document identifies several open issues, including:

- The form of the commitment not to enact future DSTs and other relevant similar measures (e.g., whether this is a political commitment vs. a legal obligation);
- Whether any existing measure could continue to be applied against a multinational entity with an Ultimate Parent Entity located in a jurisdiction that is not party to the MLC;
- Whether and how DSTs and other relevant similar measures imposed by subnational jurisdictions should be addressed; and
- For parties that continue to impose DSTs or relevant similar measures, whether full denial of Amount A allocations is appropriate in all circumstances, or whether denial should be in some respect proportional to the scale of the offending measures (e.g., in terms of revenue raised).

Observation: These open issues reveal the disagreements between countries (especially the United States and others) and give rise to concerns that these provisions in the end may not give adequate protection against inventive new taxes.

The takeaway

According to the document, there is no consensus (yet) among members of the IF and hence, this is a document prepared by the Secretariat. This is no surprise given the lack of support for Pillar One by a significant number of developing countries, and their preference for simpler revenue raisers. The description of DST-like measures to be withdrawn under Pillar One sketches a tax that is levied at destination, is not an income tax covered by tax treaties, and importantly, discriminates against foreign-owned businesses. It is an open question whether this leaves room to governments to introduce a revenue-based tax, e.g., by introducing a measure with a low in-scope threshold so that a substantial number of domestic companies also are caught. An additional open question is whether the consultation document designs a 'blueprint' for DST-like taxes if Pillar One fails. Given the disagreement on this issue between the United States and some other large, developed countries, that could well create further trade tensions and instability.

Let's talk

For a deeper discussion about the unilateral measures consultation, please contact:

Tax policy leadership

Stef van Weeghel, Amsterdam
+31 0 88 7926 763
stef.van.weeghel@pwc.com

Will Morris, Washington
+1 202 213 2372
william.h.morris@pwc.com

Edwin Visser, Amsterdam
+31 0 88 7923 611
edwin.visser@pwc.com

Tax policy contributors

Diane Hay, United Kingdom
+44 (0) 7590 352 451
diane.hay@pwc.com

Giorgia Maffini, United Kingdom
+44 (0) 7483 378 124
giorgia.maffini@pwc.com

Stewart Brant, United States
+1 (415) 328 7455
stewart.brant@pwc.com

Tax policy editors

Phil Greenfield, United Kingdom
+44 (0) 7973 414 521
philip.greenfield@pwc.com

Chloe O'Hara, Ireland
+353 (0) 87 7211 577
chloe.ohara@pwc.com

Keetie van der Torren-Jakma, Netherlands
+31 6 1856 5973
keetie.van.der.torren-jakma@pwc.com