20 January 2023

To: Tax Treaties, Transfer Pricing and Financial Transactions Division OECD/CTPA
Organisation for Economic Cooperation and Development
Centre for Tax Policy and Administration
75775, Paris, Cedex 16, France
Submitted by email: tfde@oecd.org

Re: OECD's Public Consultation Document on Pillar One – Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures

Dear Secretariat Team,

PwC International Ltd on behalf of its network of member firms (PwC) welcomes the opportunity to share its views on the OECD's Public Consultation Document on Pillar One – Amount A: Draft Multilateral Convention (MLC) Provisions on Digital Services Taxes (DSTs) and other Relevant Similar Measures (RSMs). In view of our understanding of the nature and urgency of the request, as well as the limited turnaround time, we set out below our comments on several important design features and policy aspects for the draft MLC provisions on DSTs and RSMs (collectively "unilateral measures").

From the outset, a key impetus of the OECD/G20 Inclusive Framework's (IF) negotiations was to stop the proliferation of uncoordinated unilateral measures by replacing them with a consensus-based reallocation of taxing rights among IF members. This 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. It is crucial that removal of existing unilateral measures and the standstill of future measures is an 'integral part' of that goal.

While it is clear that some progress has been achieved, it is equally clear that considerable work remains to be done for the IF to reach agreement on defining the unilateral measures subject to their standstill and withdrawal commitment. In that regard, it is disheartening to see so many caveats and open issues in this document, including an empty Annex that is meant to identify existing unilateral measures. This makes it challenging to provide detailed feedback given many of the details are not yet known, pending significant political negotiation and further technical development.

Our comments focus on several design and policy issues that we consider critical to achieving the project's goal of stabilising the international tax architecture.

Form of the Commitment

The consultation document includes two articles: one detailing that unilateral measures will be withdrawn under Pillar One (Article 37) and the other describing the three characteristics of a DST-like tax that would result in the elimination of a part of any Amount A allocation and which, by implication, should be subject to standstill (Article 38). It also identifies several significant technical and political issues yet to be agreed, including the form of the commitment not to enact future DSTs and other RSMs (e.g., whether this is a political commitment vs. a legal obligation enshrined in the MLC) as well as their treatment under Amount A.

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In their October 2021 Statement, IF members agreed that the Pillar One MLC will require removal of existing DSTs and RSMs for all companies (presumably including those that are not in scope of Pillar One) and commit parties (i.e., signatories to the MLC) not to introduce such measures in the future. The fact that the form of the commitment is now under consideration (*see* footnote 1 in the consultation document) gives rise to concerns that these provisions in the end may not give adequate protection against DSTs or other RSMs.[1]

Article 38(1) provides that any party that maintains a unilateral measure during a period when the MLC is in effect shall not be allocated any Amount A profit (or, as suggested in a footnote, possibly part of the Amount A profit, as this is still under consideration). We agree with this approach and support full denial of Amount A allocations in these circumstances. However, in the case of a wide-ranging RSM (e.g., applies well beyond businesses in scope of Amount A), even this "penalty" might not be that much of a deterrent. In situations where a party is believed to have a unilateral measure in place, and which is not identified in the Annex of the MLC, classification of that measure should be in scope of the advanced certainty review process.

For the above reasons, it is imperative from a legal and tax certainty perspective that Pillar One be implemented through a MLC that enshrines the IF's standstill and withdrawal commitment so that it can be effectively and efficiently enforced against parties that enact unilateral measures.

Description of DST-like measures

With respect to the description of DST-like measures for standstill and elimination of Amount A under Pillar One, draft Article 38(2) provides that any tax that meets all three of the following criteria should be considered a DST or RSM: (1) the application of the tax (or the amount thereof) is determined primarily by reference to the location of customers, users, or other similar market-based criteria; (2) by its terms, the tax applies solely to nonresidents or foreign owned-businesses or, in practice, the tax applies exclusively or almost exclusively to nonresidents or foreign-owned businesses; and (3) the tax is not treated as an income tax under the Party's domestic law or is otherwise treated as outside the scope of tax treaties or other agreements.

A principles-based approach, rather than precise criteria, to identifying relevant unilateral measures is necessary to create a rational and sustainable international tax system for years to come. Existing taxes need to be assessed under these principles and decisions made as to which are DSTs and RSMs in order to provide certainty to taxpayers and governments.

The second element – application mainly to foreign-owned businesses – applies if the tax is applicable in practice (de facto) "exclusively or almost exclusively" to nonresidents. To ensure consistent application of this element, we suggest considering including a non-exhaustive list of factors to determine whether a tax is discriminatory in practice. In this respect, a broad standard would be appropriate and necessary to deter discriminatory practices (see for example Figure 5 of the UK's National Audit Office (NAO) report that examines HMRC's implementation of its DST). The term "almost exclusively" should not be defined or interpreted as excluding a tax from being considered an RSM if it includes within its scope just a small number of resident entities.

With respect to the third element, one could question whether a jurisdiction's classification of the type of tax is a credible or relevant factor. There could be situations where a tax should be considered a RSM even though it is classified as an income tax under domestic law. We therefore encourage the IF to reconsider this factor, as it remains possible that jurisdictions will seek to tailor the existing scope of transactions and types of taxes in order to circumvent the spirit of these restrictions.

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[1] *See* recent comments from the G-24 and South Centre criticising the proposal to include the standstill/withdrawal commitment in the MLC because it would hamstring their legislatures to make tax laws.

Finally, the identification of specific unilateral measures for withdrawal and standstill must remain a key element of the on-going work of the IF towards a political agreement on Pillar One.

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With this letter we thank you for the opportunity to comment and kindly invite you to take our observations into consideration during further development of the Pillar One rules. We stand ready to discuss the issues raised in this letter in more detail, if that would be helpful at any point - please do not hesitate to contact me or one of the individuals set out below.

Yours sincerely,

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