

January 20, 2023

Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
By email to tfde@oecd.org

Re: Business Roundtable comments on OECD public consultation on “Pillar One – Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures”

Dear Sir/Madam,

Business Roundtable welcomes the OECD’s commitment to working multilaterally and with the private sector to ensure sound tax policies and straightforward tax administration, which are essential to protecting investment and economic growth.

On behalf of more than 230 chief executive officers of America's leading companies, Business Roundtable is pleased to submit comments in response to the OECD’s public consultation document of December 20, 2022 on draft Multilateral Convention provisions on digital services taxes (DSTs) and other relevant similar measures.

The draft definition of “DST or relevant similar measure” is too narrow

The definition in draft paragraph 38(2) of the Multilateral Convention, together with the exclusions in paragraph 38(3), would permit the imposition of certain harmful unilateral measures which, we believe, would not be consistent with the intention of the Inclusive Framework in agreeing to the Pillar One, Amount A proposal. For example, the definition should be expanded to include withholding taxes on payments for digital services and taxes based on a significant economic presence (SEP) that is not a taxable presence under any other provisions of the relevant country’s tax laws. In addition, we propose that SEP taxes, withholding taxes on payments for digital services and other unilateral measures with similar effect, such as the UK tax on offshore receipts in respect of intangible property (ORIP) should be included in Annex A.

Recommended changes to the draft definition

We recommend replacing the conjunctive “and” at the end of paragraph 38(2) with “or.” Article 38(2)(c) cannot be a requirement to ensure that SEPs and novel withholding taxes are captured by this definition.

An alternative would be to strike 38(2)(c) and instead have a two-part test (which can be conjunctive). In this alternative, we would recommend certain additions to the test, i.e., paragraph 38(2)(b), as follows:

- Additional language that would capture: (1) taxes that focus on Digital Services Providers; and (2) extra-territorial and gross-revenue based taxes, for example:
 - “the scope of the tax targets a specific company or group of companies in a ring-fenced sector and/or protects certain companies by excluding them from the scope; or
 - “the tax is extra-territorial and based on gross income (i.e., the tax is applied on gross turnover or income imputed from gross turnover --such as a revenue-based tax which is only reduced by using a formulaic or deemed profit amount or which denies deductions in whole or in part in trying to get to a ‘net’ income number, or income imputed from gross revenue (or elements with similar economic effect))”; and
- Additional language that would ensure that *de facto* discrimination was covered and that the definition of DST and similar unilateral measures is a “living”/ expanding definition that will capture future unilateral measures (for example, “the tax creates an un-level playing field, for example offline versus online, domestic versus foreign; or the tax has been determined to be discriminatory under the provisions for review of such taxes under the MLC”).

The denial of Amount A re-allocation should be full in all circumstances

No consideration should be given to partial denial of Amount A reallocation as mentioned in footnote 4 of the consultation document. The denial should be full in all circumstances.

DST and similar unilateral measures imposed on a subnational level should not be excluded

Subnational DSTs and similar unilateral measures imposed at a subnational level should be captured in the definition of “DST or similar unilateral measure,” as indicated in footnote 3 of the consultation document.

The exclusion in paragraph 38(3) should be clarified

The text of draft paragraph 38(3) appears intended to exempt anti-abuse measures from the definition of DST or relevant similar measure, but it is drafted vaguely enough to potentially exempt destabilizing taxes that should be within the definition (e.g., could a “significant economic presence” rule be excluded from the definition if it purports to address “artificial structuring?”). The exclusion should have appropriate guardrails to ensure that merely describing a rule as an anti-abuse rule would not bring extraterritorial taxes targeted at digital service providers within the exception. If this paragraph continues to be included in the MLC,

we recommend that the Inclusive Framework specifically include a list of anti-abuse measures that qualify for this exclusion in order to reduce uncertainty.

Moreover, to the extent that a Covered Group is liable for taxes which are covered by the exclusion in paragraph 38(3), the taxes should be taken into account for purposes of the Marketing and Distribution Safe Harbor to ensure residual profit is not subject to double taxation.

DSTs and relevant similar measures should not be applicable to MNEs where UPE is resident in a non-Party jurisdiction

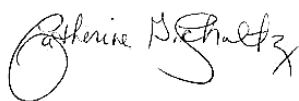
In response to footnote 2 of the consultation document, we strongly believe that all Parties to the MLC must refrain from imposing a DST or relevant similar measure to constituent entities of an MNE Group whose Ultimate Parent Entity is resident in a jurisdiction that has not signed or ratified the MLC. Any other approach would be inconsistent with the goals of the Inclusive Framework.

Need for further consultation

We note that the draft provisions in the consultation document have not been agreed upon by the Inclusive Framework, and a significant number of issues are likely to be the subject of debate within the Inclusive Framework in the coming months. The public should be given the opportunity to provide comments on a future draft of paragraphs 37 and 38 of the MLC after open issues have been discussed within the Inclusive Framework.

Business Roundtable urges the Inclusive Framework to take the above comments into account in its work on the Pillar One, Amount A rules in the MLC. We appreciate your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine Schultz". The signature is fluid and cursive, with the first name "Catherine" written in a larger, more prominent script than the last name "Schultz".

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