

November 11, 2019

Tax Policy and Statistics Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development

By email: TFDE@oecd.org

Re: Business Roundtable comments on OECD public consultation document, “Secretariat Proposal for a ‘Unified Approach’ under Pillar One”

Dear Sir/Madam,

Business Roundtable welcomes the OECD’s continued commitment to working multilaterally and with the business community to promote sound tax policies and straightforward tax administration, which are essential to protecting cross-border investment and economic growth.

On behalf of nearly 200 chief executive officers of America’s leading companies, Business Roundtable is pleased to submit comments to the OECD public consultation document, “Secretariat Proposal for a ‘Unified Approach’ under Pillar One,” dated October 9, 2019. Derek Theurer, Business Roundtable Vice President for Tax and Fiscal Policy, will attend the public consultation meeting on November 21-22, and we request the opportunity to speak at that meeting.

Business Roundtable recognizes the consultation document is an initial expression of the OECD’s views and significant work remains to refine the Pillar One proposal and reach agreement among Inclusive Framework members. The comments below identify notable omissions from the consultation document, as well as areas where deviation from internationally accepted income taxation principles would undermine investment, growth and opportunity. We look forward to providing additional comments as more details on Pillar One become available.

Overview

Business Roundtable reaffirms certain principles of international income taxation as vital to a strong and growing global economy:

- Principles of the 1998 Ottawa Taxation Framework: neutrality, efficiency, certainty, simplicity, effectiveness, fairness, and flexibility (see Appendix).
- Avoidance of double taxation.
- Taxation of net business profits, not gross revenue.
- Allocation of profits among a controlled group based on the arm’s length standard.
- Consistency of fundamental income tax rules among nations globally.
- Effective dispute resolution mechanisms.
- Proportionality of compliance burden to revenue collection.

Business Roundtable is concerned the Pillar One proposal in the consultation document may deviate from these principles and create barriers to cross-border investment, which would constrain the ability of multinational businesses to expand operations, increase employment, and contribute to global economic growth and opportunity. We urge the OECD to make public a thorough and transparent economic impact assessment to enable countries and stakeholders to fully evaluate the economic consequences of the Pillar One proposal.

Specific Recommendations

1. The revised profit allocation should be anchored to principles and the rationale underlying any departure from the arm's length standard should be clearly articulated.

The consultation document proposes reallocation of some amount of global profit based on a formulary approach combined with some retention of the arm's length standard. Business Roundtable agrees with the OECD's statement that "current [transfer pricing] rules work reasonably well for most routine transactions," and that "it is also important that the new [profit allocation] rules are reconciled with existing rules." We welcome recognition of the primacy of the arm's length standard in the determination of profit, which will reduce disruption and barriers to cross-border investment.

The OECD should clarify the intersection of the revised profit allocation with international taxation rules currently in place. The OECD should also articulate the tax policy rationale behind the formulary reallocation resulting in Amount A and define the interaction among Amounts A, B, and C.

For Amount A, the consultation document suggests the "level of the deemed routine profit" and "proportion of the deemed residual profit that should go to the market [country] ... would be part of the consensus-based agreement among Inclusive Framework members." We note with concern the consultation document's lack of discussion of the principles upon which such agreement will be based.

For Amount B, the consultation document contemplates a fixed return in market countries on "assumed baseline activity" for all businesses in a defined industry group. We question replacing existing transfer pricing rules with a fixed return formula, particularly if businesses lack the opportunity to demonstrate that their *actual* return differs significantly from the fixed return.

For Amount C, we welcome the suggestion that existing transfer pricing rules should control the tax result when business functions performed in a market country go beyond the "assumed baseline activity" related to Amount B.

2. The design of Pillar One must be refined to avoid multiple layers of taxation, facilitate effective dispute resolution, and provide clear and administrable rules.

The OECD properly acknowledges the risks of double taxation and the importance of preventing and resolving disputes between countries. We are concerned, however, that the consultation document does not describe how Pillar One's design will prevent double taxation (including double-counting among Amounts A, B, and C) and how dispute resolution will work in practice.

As noted above, the OECD should articulate the rationale behind any departure from existing international taxation rules and provide a clear explanation of the interaction among Amounts A, B, and

C. Clear rules, implemented consistently across countries, can curtail disputes resulting from multiple countries claiming the right to tax the same profit. When disputes arise between two or more countries, mandatory and speedy dispute resolution mechanisms should be followed, with the result applied reliably in subsequent years. Members of the Inclusive Framework must assent to such mechanisms as part of an agreement on Pillar One.

The consultation document introduces several concepts for which there is no precedent in international taxation, and which may be very difficult to administer. Thus, the formulation of new rules must be as unambiguous as possible. Consolidated financial statements, for example, have not been relevant to tax reporting. There must be clear agreement on when and how financial reporting will be utilized for profit reallocation purposes, including proper adjustments for items like permanent differences. The consultation document introduces the concept of “consumer-facing businesses”; we agree with the need for appropriate exceptions and urge the OECD to clearly delineate the scope of “consumer-facing.” Similarly, any segmentation by business-line must be defined in clear terms. With each of these concepts, it is important the OECD (a) not impose burdensome new reporting and compliance regimes and (b) not create further ambiguity leading to additional disputes, either among countries or between tax authorities and taxpayers.

3. An agreement on Pillar One must include a commitment to repeal existing unilateral measures and refrain from imposing any new unilateral measures aimed at profit reallocation or the digital economy.

Business Roundtable is aligned with the OECD’s recognition that “uncoordinated unilateral tax measures ... would damage global investment and growth.” Notwithstanding that recognition, the consultation document does not describe the need for Pillar One to supersede unilateral tax measures targeted at profit reallocation or the digital economy. Concurrent with agreement on Pillar One, members of the Inclusive Framework must make a clear commitment to repeal existing unilateral measures and refrain from imposing any new unilateral measures.

4. The new nexus rule must have no legal effect beyond the revised profit allocation.

The OECD proposes a new nexus rule—not dependent on physical presence or permanent establishment—for the revised profit allocation. The OECD suggests a “standalone rule – on top of the permanent establishment rule – to limit any unintended spill-over effect on other existing rules.” Recognition of potential unintended effects is welcome, but the narrow scope of the new nexus rule must be unequivocal. Nexus for income taxation purposes often carries significant consequences for business beyond income taxation, including registration and payment of indirect taxes and customs duties, as well as obligations under non-tax legal or regulatory regimes in the local country. The OECD should make clear that the new nexus rule has no legal effect beyond the revised profit allocation.

5. Withholding tax is not an appropriate mechanism for collecting tax on Amount A.

The OECD suggests it is “worth exploring whether a withholding tax would be an appropriate mechanism for the collection of [tax on] the designated Amount A.” Business Roundtable views a withholding tax applied to gross payments as an inappropriate collection mechanism for tax on Amount A, and we encourage the OECD to focus on other possible methods.

In the view of the Business Roundtable, a careful examination of the issues raised in the Pillar One consultation document, followed by work to agree on technical details and implementation, may require exceeding the year-end 2020 timeline for a final report. We urge policymakers to set as priorities sound tax policy and long-term economic stability, rather than nominal deadlines.

Business Roundtable appreciates your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Yours sincerely,

A handwritten signature in blue ink that reads "Joshua Bolten". The signature is fluid and cursive, with a large initial "J" and a stylized "B".

Joshua Bolten
President & Chief Executive Officer

Appendix

Ottawa Taxation Framework Conditions – Principles

Neutrality

i) Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.

Efficiency

ii) Compliance costs for taxpayers and administrative costs for the tax authorities should be minimised as far as possible.

Certainty and simplicity

iii) The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted.

Effectiveness and fairness

iv) Taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimised while keeping counter-acting measures proportionate to the risks involved.

Flexibility

v) The systems for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments.

(OECD, *Implementation of the Ottawa Taxation Framework Conditions: The 2003 Report*, p. 13)