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Building a better working world

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Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
Tax Treaties, Transfer Pricing and Financial Transactions Division

Sent via email: tfde@oecd.org

Subject: Comments on OECD Public Consultation Document – *Pillar One - Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures*

Ladies and Gentlemen:

We appreciate the opportunity to submit these comments on behalf of EY on the OECD's public consultation document, *Pillar One - Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures*, and to engage with the OECD on this important topic.

As a fundamental matter, we want to reiterate the point made in our comment submission on the July 2022 Progress Report on Amount A that Pillar One is aimed at preventing the spread of uncoordinated unilateral measures such as digital services taxes (DSTs) that unchecked would give rise to significant risk of overlapping taxation creating a barrier to cross-border economic activity. The proliferation of this type of uncoordinated measure, both with respect to digital services and more broadly, would lead to double or multiple taxation, inordinately high compliance burdens, and significant uncertainty for global businesses.

It is important to recognize that eliminating such measures is itself a core objective of Pillar One, independent of the objectives of Amount A related to profit allocations with respect to in-scope companies. We believe that the October 2021 agreement both to withdraw existing DSTs and other relevant similar measures with respect to all companies and to not newly enact any such measures is a central element of governments' commitments to Pillar One and an integral part of the two-pillar agreement. The full implementation of these commitments is vital.

The obligation to withdraw existing measures and not to enact new measures must be clear and definitive in the Multilateral Convention (MLC). The MLC should provide clear procedures under which other jurisdictions can bring action against any measure in a jurisdiction that is in violation of this obligation. In addition, there must be a clear and effective procedure for companies that are subject to a measure that is in violation of this obligation to bring action against the imposition of tax under such measure.

The obligation to withdraw existing measures and not to enact new measures also must be comprehensive. A measure that is in violation of this obligation should not be permitted to be applied to any company under any circumstance, consistent with the October 2021 agreement. This is the case without regard to whether the company is subject to Amount A.

In this regard, the sanction of elimination of Amount A allocations for jurisdictions that violate their obligation with respect to withdrawal or non-enactment of DSTs and similar measures necessarily is restricted in its impact due to the scope limitations for Amount A. However, the elimination of Amount A allocations for any such jurisdiction must be comprehensive and should cover its Amount A allocations in full in all cases. Moreover, it should be made clear that the elimination of Amount A allocations does not affect the jurisdiction's relief obligations under Amount A.

Both the list of existing measures required to be withdrawn and the definition of DSTs and other relevant similar measures to be applied in evaluating measures enacted in the future should be broad and should cover any form of compulsory contribution regardless of whether it is labeled as a tax, consistent with the core objective of Pillar One. In this regard, all existing measures that fall within the definition of DSTs and other relevant similar measures should be included in the list of measures required to be withdrawn – there should be no gap between the obligation to withdraw existing measures and the definition of the measures that are subject to the obligation not to enact.

Stakeholders should have an opportunity to provide relevant and practical input into the development of the list of existing measures required to be withdrawn that will be included in the MLC. Similarly, there should be a process for stakeholder input into the Conference of the Parties' determinations regarding measures enacted in the future. Such determinations must be made on a timely basis and the sanction of elimination of Amount A allocations for the enacting jurisdiction should apply from the enactment of the offending measure.

Similar to the approach used under Action 5 on harmful tax practices, to ensure transparency, consistency and accountability, a procedure should be developed for publishing reports on the review of all measures that potentially are covered by the obligation to withdraw or not to enact. Such reports should identify each measure that is reviewed and the determination made in the review (i.e., whether the measure is found to be covered or not) and should include an explanation of the rationale for such determination. The initial report should cover the review process with respect to all existing measures that potentially are covered by the obligation to withdraw and the assessment of whether each such measure is indeed covered and must be withdrawn. Future reports would cover the reviews of newly enacted measures that *potentially* meet the definition of DSTs and other relevant similar measures and the determinations made by the Conference of the Parties as to such measures; such reports also should include an update on the withdrawal status of previously reported measures.

With respect to the definition of DSTs and other relevant similar measures, it is important that the hallmarks of a measure that would fall within the definition are clearly identified and are forward-looking in order to provide certainty on whether a measure that a jurisdiction might consider adopting in the future would be covered if it were to be enacted. A clear definition will be essential to the timeliness and consistency of determinations by the Conference of the Parties in reviewing newly enacted measures.

Looking at the proposed definition included in the Consultation Document, we are concerned that the exclusion of measures that fall within income tax treaties would be inconsistent with the global objective of Pillar One and therefore believe that this exclusion should be eliminated from the definition. Measures that would otherwise meet the criteria in the definition should not be allowed to remain in place simply because they are covered by a tax treaty.

We further believe that the proposed criterion that a measure be foreign-targeted should not be applicable in situations where, as a matter of circumstance, there are no or a limited number of local companies in the jurisdiction imposing the measure that perform activities covered by the measure.

Finally, it must be recognized that the proposed exclusion of measures related to artificial avoidance of permanent establishment and nexus requirements and withholding taxes from the definition of DSTs and other relevant similar measures further reinforces the critical importance of addressing all such taxes in the rules of Amount A and incorporating an effective marketing and distribution safe harbor into Amount A.

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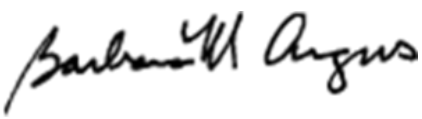
The global EY team that prepared this submission welcomes the opportunity to discuss these comments in greater detail and to continue to participate in the dialogue as the Inclusive Framework advances the work on this important project.

If there are questions regarding this submission or if further information would be useful, please contact Joel Cooper (joel.cooper@uk.ey.com), Maikel Evers (maikel.evers@nl.ey.com), Ronald van den Brekel (ronald.van.den.brekel@nl.ey.com) or me (barbara.angus@ey.com).

Yours sincerely, on behalf of EY,



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