

To: TFDE@oecd.org

Tax Treaties, Transfer Pricing and Financial Transactions Division OECD/CTPA

Brussels, 20 January 2023

Dear Secretariat,

EBIT's members¹ thank the OECD / Inclusive Framework for the opportunity to provide comments to the Public Consultation Document Pillar One – Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures - 20 December 2022 – 20 January 2023. Below are a few issues and open questions that EBIT believes are important for the OECD/Inclusive Framework to consider.

Given the urgency and short time frame, EBIT raises its issues and concerns with the scope rules in a summarizing bullet point format, keeping it relatively short. At the same time, we do wish to emphasize that the listed issues and concerns in this document are not exhaustive.

EBIT's members understand that the Discussion Draft is written as draft articles in the Multilateral Convention (MLC). Although we understand that the provisions could likely be interpreted as stand-alone provisions with regard to the withdrawal of digital services taxes (DSTs), we find it regrettable that no opportunity is given to analyze the provisions in the framework of the full MLC. Nevertheless, based on the draft provisions, EBIT's Members are concerned that the provisions are drafted too narrowly and could allow jurisdictions to work around the conditions / hallmarks proposed and introduce or maintain DSTs or measures which have a similar effect.

Removal of existing measures (proposed Article 37)

EBIT's members welcome the provision on the removal of the existing measures. We regret, however, that no provision is proposed that explicitly disallows parties to the MLC to introduce new DSTs – there merely being a statement that “the MLC will include a clear commitment not to enact any DSTs or other relevant similar measures, as defined by Article 38 (the standstill commitment)”..

It is further unclear what the effect is of DSTs or similar measures to be (or not) mentioned on the list of measures in the so-called Annex A. It is stated that a specific measure listed (or not listed) *shall not be considered evidence as to whether or not that measure is described in paragraph 2 of Article 38*, in other words is or is not considered a DST or similar measure. EBIT's members find that the wording of the proposed Article 37 leaves considerable room for interpretation and hence creates uncertainty. After all, it is the Conference of the Parties that will decide, but it is unclear on how the Conference's decision will be made public and what it will apply to.

¹ EBIT's members include Airbus Group, BP, Carlyle Carrier, Caterpillar, Diageo, GSK, Huawei, International Paper, Johnson and Johnson, JTI, PepsiCo, Pfizer, P&G, Raytheon Technologies, RELX, Schroders, SHV Group and Vattenfall. For more information on EBIT see: www.ebit-businessstax.com

Eliminating Amount A allocations for parties imposing DSTs (proposed Article 38)

EBIT's members note that this provision provides that no Amount A profit will be allocated to countries that have a DST or similar measure in place. We wonder how this provision can be construed as being in line with the Inclusive Framework Statement of 8 October 2021 requiring the removal of those measures. Apparently, parties to the MLC have the (tacit) option of not removing the DST and forsaking Amount A profit allocation, or removing the DST and being allocated Amount A profit. It allows jurisdictions to evaluate which measure (Amount A or DSTs) would generate most revenue, but does not allow predictability as does the (non) existence of a DST. Such an approach will lead to chaos. Taxpayers will have to consider multiple situations:

- Jurisdictions that have not signed / ratified the MLC (and could have a DST);
- Jurisdictions that have signed / ratified the MLC but apparently opted for not having a part of Amount A (and hence maintain or introduce a DST);
- Jurisdictions that have signed / ratified the MLC and are allocated part of Amount A (and hence have renounced DST)

EBIT's members note that the proposed Article contains certain conditions or 'hallmarks' to identify whether a measure could be construed as a DST or similar measure. We find, however, that the conditions or hallmarks are too narrowly defined and leave room for introducing measures that technically do not meet one or more of the conditions or hallmarks but that could be considered DSTs in spirit or at least have the same effect (such as significant economic presence rules). In particular, the conjunctive nature of the three conditions or hallmarks under the proposed Article 38(2) renders the definition extremely narrow.

For example, a country may decide to replace its existing DST with a "withholding tax on digital services" that *technically* falls within the scope of tax treaties, but where in practice the country has few or no relevant tax treaties that would apply. In this case the former DST would be replaced by a measure that – in practice – has exactly the same effect as the old DST, but would technically fall outside the scope of the definition of Digital Services Taxes and other Relevant Similar Measures.

EBIT suggests that the criteria or hallmarks listed under Article 38(2) to constitute a DST or similar measure be specified in broader terms in relation to a market-based condition or being discriminatory toward foreign or foreign-owned businesses. It is also unclear at present how 'digital' any other unilateral measure would have to be in order to be regarded as similar.

EBIT's members also suggest expanding the nature of any treaty inclusion to cover measures that are (potentially) within the scope of existing (bilateral or multilateral) tax treaties to encompass for example Article 12B of the UN Model Tax Convention or a similar Article. The OECD / Inclusive Framework should also address the situation where a similar measure would be included in the domestic legislation outside a treaty context.

The proposed Article 38(3), contains three conditions that do not trigger a DST or similar measure. EBIT's members can understand the rationale for excluding measures to tackle artificial structuring to avoid PE and related issues. EBIT's members consider, however, that the exceptions under Article 38(3) b., and c., are too broad and leave room for introducing DSTs carrying a different name or flag and this would be against the spirit of the Inclusive Framework Statement of 8 October 2021. Also, withholding taxes should not be used to apply a disguised DST and this should also be addressed in the draft provisions.

EBIT's members are convinced that if the proposed Articles are accepted unchanged, this will lead to uncertainty for taxpayers and offer ways for tax authorities to circumvent the prohibition under the MLC to apply DSTs or similar measures. If DSTs (or taxes that in substance have the same effect) continue to exist, or even proliferate, it is inevitable that countries will take retaliatory action, including legislation for tariffs and other trade sanctions, with adverse consequences for world trade and the global economy. Hence it is critical that a fair and sensible approach is taken to ensure the withdrawal of current unilateral measures and prohibition of future such taxes, rather than the excessively narrow and cautious approach proposed in the paper.

EBIT's comments on the OECD/IF Public Consultation Document Pillar One – Amount A, Draft Multilateral Convention Provisions on DSTs and other Relevant Similar Measures

EBIT's members trust this contribution is helpful to you. EBIT is always ready to dialogue and engage.

Yours sincerely,

European Business Initiative on Taxation – January 2023

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