January 20, 2023

Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
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Re: Comment Letter on the Public Consultation Document: Pillar One - Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the Public Consultation Document on Pillar One - Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures published on December 20, 2022 (the "Consultation Document").

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the OECD and the Inclusive Framework in establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations. A list of the companies comprising the NFTC Board of Directors is attached as an Appendix.

General Comments

The commitment to withdraw all existing Digital Services Taxes ("DSTs") and other relevant similar measures is crucial to the political agreement underlying Pillar One and therefore to the success of Pillar One. NFTC appreciates the explicit inclusion of removing DSTs and other relevant similar measures in Article 37 of the Multilateral Convention ("MLC"), and the denial of Amount A allocations for countries that continue to impose DSTs and other relevant similar measures in Article 38. We also welcome the framework whereby current measures to be withdrawn will be listed in Annex A.

In general, we recommend that the definition of DSTs and other relevant similar measures be expanded to include Significant Economic Presence taxes ("SEP"), virtual permanent establishments, withholding taxes on digital services, and other gross-basis taxes (such as the United Kingdom's ORIP) that are directed at digital services and are either explicitly or in practice discriminatory. While the Consultation Document advises that definitions are still being formulated, definitions are key to the effectiveness of these provisions. We therefore request a future consultation to review updated definitions prior to finalization of the MLC. As we discuss below, it is critically important to expand the definition of measures considered DSTs or other relevant similar measures to ensure that the objectives of Pillar One are achieved.

Specific Comments

Subnational Taxes

The political compromise struck by the members of the Inclusive Framework with regard to Pillar One trades a limit on state sovereignty by preventing the imposition or maintenance of certain gross-basis extraterritorial taxes, namely DSTs and relevant similar measures, in exchange for a new taxing nexus and allocation of income based on the location of customers. This agreement should apply to DSTs at both the national and subnational level to ensure the integrity of Pillar One. Accordingly, the definition of DSTs and relevant similar measures must encompass subnational taxes as suggested in footnote 3.

Consequences of Maintaining or Introducing Impermissible Taxes

Given the integral nature of the commitment to remove existing DSTs and other relevant similar measures and not introduce such measures in the future, there should be meaningful consequences for countries that fail to keep their side of the bargain. In particular, such countries should not receive any portion of Amount A. In addition to the amount collected as a tax, DSTs also impose compliance costs and complexities not captured in the sum remitted to the offending country. Thus, a partial denial, as suggested by footnote 4, is unworkable, will not deter the imposition of DSTs, and will result in a failure to stabilize the international tax system. Any action which leads to the denial of Amount A should be a full denial in all circumstances.

We would urge the TFDE to consider additional consequences, beyond simply a denial of Amount A allocations, for countries that have agreed to the MLC but fail to withdraw or impose new unilateral measures. Limiting consequences to the elimination of Amount A may not provide enough disincentive if a new DST or other measure provides more revenue than Amount A would provide, resulting in a failure to stabilize the international tax system.

Clear rules for the operation of the Conference of Parties, such as a process with a definitive timeline that allows a company (or their government) to raise concerns about a unilateral measure along with a final arbiter of these complaints is essential. Without a recourse mechanism, streamlined procedures and timely consequences for offenders, the Pillar One and the accompanying MLC will not meet its objectives. Disputes that last years, or even decades, will erode the functionality of Pillar One, confidence in the system, and the stated goals of IF member countries.

Scope of Relevant Similar Measures

In determining which provisions are relevant similar measures, we would like to stress that this should include any tax measures that are discriminatory by any measure (including by industry), act as trade barriers, or are targeted at predominately foreign multinational enterprises. The draft language should be broadened to ensure an appropriate scope. The failure to broaden the scope of taxes to be withdrawn (or not introduced in the future), while at the same time introducing the Amount A rules, would undermine the political agreement underlying Pillar One and result in the further destabilization of the international tax system.

Expanding the inclusion of discriminatory taxes based both on the text of the statute and the application as raised in prior comments is helpful in combating new discriminatory taxes. We recommend that the definition of "exclusively or almost exclusively" in Article 38(2)(b)(ii) includes measures that discriminate against foreign businesses both in the application of the law and the spirit of an agreement on Pillar One.

Applicable Test of Article 38(2)

As currently drafted, Article 38(2) sets out a three-pronged conjunctive ("and") test which limits the scope of DSTs and other relevant similar measures to taxes (1) that are based on the location of customers or users, (2) that apply exclusively or "almost exclusively" to non-residents, and (3) that are not treated as an income tax or is outside of the scope of tax treaties. The definition is too narrow to meet the objectives of Pillar One and therefore should be expanded to include other discriminatory gross-basis taxes such as withholding taxes on digital services and SEP taxes.

To that end, NFTC recommends replacing the conjunctive "and" test with a disjunctive "or" test that applies to taxes and is determined primarily by reference to the location of customers or similar market-based criteria or is applicable by its terms or in practice to non-residents or foreign owned businesses. Recently, countries have sought to impose a wide array of taxes that are DSTs in all but name. Ensuring that minor technicalities in the drafting of the MLC does not create loopholes for a country to impose relevant similar measures is essential to stabilizing the international tax system.

If the conjunctive "and" test is maintained, NFTC suggests using a two-part test based on the current proposed language in Article 38(2)(a) and 38(2)(b), with two additional modifications to the second prong in Article 38(2)(b). First, taxes that apply principally to digital service providers should be treated as satisfying the de facto discrimination criteria of Article 38(2)(b). Second, taxes imposed on the gross revenues or on a similar basis on income from digital services should be treated as satisfying the de facto discrimination criteria of Article 38(2)(b). More generally, the language of Article 38(2)(b) should be broadened to ensure that situations of de facto discrimination that are counter to the letter and spirit of the political agreement underlying Pillar One are captured so as to prevent the introduction of new, destabilizing measures. In our proposed two-part conjunctive test, Article 38(2)(c) would be eliminated. Any tax that is based on the location of customers or users and that is discriminatory should not be permitted, regardless of whether or not it is treated as an "income tax" under the domestic law of the country imposing the tax.

Withholding Taxes

The use of withholding taxes as a proxy for DSTs should not be permitted. The failure to limit these extraterritorial and discriminatory taxes would permit a backdoor around the rules and objectives of Pillar One by allowing market jurisdictions to tax residual profits greater than permitted under Amount A. The Consultation Document appears to permit withholding taxes to the extent that such taxes are treated as income taxes under the domestic law of the country imposing the tax or under double tax treaties. Discriminatory taxes should not be permitted regardless of their label.

Additionally, taxes which are listed as exempted (such as certain withholding taxes, DPT and MAAL), should be taken into account for purposes of Marketing and Distribution Safe Harbor to ensure residual profit is not subject to double tax by the market country. The failure to address this issue in a principled manner will result in a proliferation of withholding taxes, destabilizing the system, and undermining the objectives of Pillar One. Direct taxes imposed on taxpayers, such as gross-basis withholding taxes, should either be accounted for in the calculation of Amount A or should be withdrawn as part of the commitment to withdraw DSTs and relevant similar measures.

Addressing Artificial Structuring – Article 38(3)(a)

Article 38(3)(a) provides an overly broad carveout for any taxes that address "artificial structuring to avoid traditional permanent establishment or similar domestic law nexus requirements that are based on physical presence." As written, it is likely that (i) certain existing measures (e.g., UK diverted profits tax) will remain in place and (ii) new provisions with a stated goal of addressing domestic law nexus or the

creation of a permanent establishment could be enacted which in effect meet the criteria of a relevant similar measure.

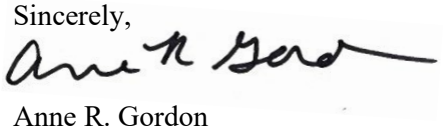
Per Unit Taxes - Article 38(3)(c)

Article 38(3)(c) carves out taxes on a per-unit or per-transaction basis from the definition of DSTs. However, taxes on these transactions could still be implemented in a discriminatory manner. It would be helpful to provide further clarity on how Article 38(3)(c) interacts with Article 38(3)(b) (VATs and similar taxes) and what additional measures are intended to be covered by Article 38(3)(c); it may be that Article 38(3)(c) is not necessary from a practical perspective. NFTC strongly believes that any transactional taxes must be connected to customer transactions and not on metrics such as user location, which present very complicated compliance issues for businesses that do not have access to such data.

Conclusion

NFTC appreciates the opportunity to provide comments and appreciates the incorporation of some of our previous comments into the Consultation Document. As discussed, certain definitions as well as the test in Article 38(2) need to be broadened to ensure the effectiveness of the document. Prior to finalization, it would be helpful to release the modified definitions and the provisions to be included on Annex A, and to be given the opportunity to propose additional measures that meet the criteria. We understand the political difficulties that exist, especially in relation to this portion of the MLC. We look forward to continuing the iterative process with the business community on the MLC, especially working to define DSTs and other relevant similar measures.

Sincerely,



Anne R. Gordon
Vice President, International Tax Policy

National Foreign Trade Council Appendix to NFTC Comments on Progress Report on Pillar One - Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures

NFTC Board Member Companies

Accenture
Amazon
American International Group
Amgen
Anheuser-Busch
Applied Materials
BP America Inc.
Caterpillar Inc.
Chevron Corporation
Cisco Systems, Inc.
Coca Cola Company (The)
Corning Incorporated
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ExxonMobil Corporation
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Qualcomm Incorporated
Raytheon Technologies
Samsung Electronics
Schneider Electric
Siemens Corporation
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Stellantis NV
TE Connectivity
Texas Instruments
TotalEnergies
Toyota Motor North America
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Visa Inc.
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