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VIA EMAIL TFDE@OECD.ORG

Tax Policy and Statistics Division
Centre for Tax Policy and Administration
2, rue Andre Pascal
75016 Paris
France

Re: Mayer Brown Response to Pillar One Consultation

Dear Sir/Madam:

Mayer Brown is pleased to have the opportunity to provide comments to the public consultation document for the OECD's proposed "Unified Approach for Pillar One."

Mayer Brown is a global law firm representing clients in multiple industries around the world. We are submitting these comments in the name of Mayer Brown and not on behalf of any particular client.

Executive Summary

This document provides comments with respect to the scope of Pillar One, issues relating to nexus as well as specific comments relating to the determination of Amounts A, B and C. We also provide commentary with respect to the ancillary aspects of Pillar One that we believe must be considered as part of the Unified Approach.

Our comments are summarized as follows:

1. Scope – We support the use of a known threshold, such as the country-by-country reporting (CBCR) threshold, as the gateway threshold for determining applicability of Pillar One to a multinational enterprise (MNE). The amounts included in calculating the threshold should only be the revenues that are within scope for Amount A.

2. Nexus – We agree with the Public Consultation Document that nexus should be based on whether there is sustained and significant involvement in a jurisdiction. We also believe an objective measure should be established to enable a degree of certainty as to when the new nexus test would be applicable. In this regard, we recommend that Pillar One apply

when the MNE reaches in-scope average gross revenues of at least $50 million in a jurisdiction tested over a three year testing period.

3. Amount A:

    a. Profit Base - The relevant base for determining Amount A should be the MNE's earnings before tax (EBT) as adjusted for an agreed set of common book-tax differences. Adjustments should also be made for extraordinary items.

    b. Segmentation - At the option of the MNE, the profit base could be determined on a segmented basis to better align the scope of Pillar One with the relevant business units of the MNE. We support the ability for MNE's, who know their specific business models best, to identify the specific segments.

    c. Losses - Losses must be taken into consideration when calculating Amount A. In this regard, no Amount A should arise until there is a positive net Amount A after imputation of losses carried forward.

    d. Elimination of Double Taxation – When an Amount A is allocated to a market jurisdiction, that pool of profit is effectively surrendered by the surrender country to the market jurisdiction. To eliminate double taxation, we believe that the surrender country should allow the surrendering entity either a credit against surrendering country income taxes for income tax imposed on Amount A by the market jurisdiction or a deduction for income tax purposes for Amount A. The choice of the relieving mechanism should be left to the surrendering entity.

4. Amount B – We support the maximum use of industry based safe harbors to determine Amount B.

5. Amount C - Dispute resolution. We believe the MNE is in the best position to determine where double taxation could arise. Therefore, we believe that the MNE should have the right to identify the jurisdictions that must be included in any dispute resolution mechanism.

6. Other Issues

    a. Unilateral measures – Upon the implementation of Pillar One, all unilateral measures, including digital services taxes, equalization levies and other similar taxes, must be repealed by local jurisdictions. The agreed Pillar One package should include a list of all unilateral measures that must be repealed.

b. Ancillary Use of Amount A – Amount A should not create nexus in a jurisdiction for any purpose other than for the limited expanded nexus established by Pillar One. In particular, Amount A should not create nexus for VAT, customs duties or similar taxes and levies.

c. Compliance – Amount A will likely create a tax filing obligation for multiple entities within an MNE group. While each surrendering entity will be the relevant taxpayer, to simplify reporting, we recommend that the parent company designate a single group member to file the relevant tax declaration on behalf of the surrendering entities.

Detailed Comments

Scope

Under the proposed "Unified Approach", Amount A would focus on large businesses. We support the use of a known threshold, such as the CBCR threshold, as the gateway threshold for determining applicability of Pillar One to an MNE. Using the CBCR threshold, the relevant threshold for Pillar One would amount to €750 million in worldwide revenues (or equivalent amount under the laws of the parent company entity) and would be determined based on gross revenue as reported on consolidated financial statements.

The definition of an MNE should be aligned with the definition of the consolidated group for financial reporting purposes as the worldwide revenues of an MNE are determined based on the consolidated financial reports.

The gateway threshold should be determined using only in-scope revenues used for purposes of Amount A.

Nexus

As discussed in the Public Consultation Document, the historical permanent establishment threshold for taxable nexus in a jurisdiction relies on physical presence of a taxpayer either directly through an office or other fixed place of business or indirectly through a dependent agent. The existing permanent establishment threshold requires that the direct or indirect presence be significant and substantial. This is reflected in the exceptions to permanent establishment nexus for preparatory or auxiliary activities and the requirement that a dependent agent must habitually act on behalf of an enterprise.

The Public Consultation Document reflects this by noting that Pillar One nexus would apply only where a taxpayer has “sustained and significant involvement in the economy of a market

jurisdiction." The Document further notes that a market country revenue threshold would be the simplest way to implement the new rule.

We support the use of an objective revenue threshold for determining Pillar One nexus provided that the threshold is an accurate proxy for "sustained and significant involvement" in a market jurisdiction. We recommend that the relevant threshold should be at least $50 million of in-scope revenue, as measured in the local currency of the parent company of the MNE group. We believe $50 million is the minimum amount that would represent significant involvement. We note that this amount is comparable to 1% of gross revenue of the smallest company in the most recent Fortune 500 listing. We believe that the revenue threshold should be indexed for inflation using the relevant benchmark in the parent company country. As the threshold will only be used to determine whether Pillar One nexus exists, we believe that gross revenue as reported on an MNE's financial statements can be used for nexus testing purposes.

Moreover, we believe that "sustained" involvement is represented by achieving an agreed revenue threshold over a period of time. We recommend using a three-year average for purposes of the gross revenue threshold.

Amount A

Profit Base:

The relevant base for determining Amount A should be earnings before tax (EBT) as reported on the consolidated financial statements. Because Amount A is an income tax measure, EBT must be adjusted for book/tax differences. Similarly, EBT should be adjusted to exclude unusual non-recurring events or extraordinary items including major transactions, asset disposals and similar items, as well as other changes in equity not recognized in calculating EBT. We support the introduction of an agreed set of book-tax adjustments for the purpose of computing Amount A.

Segmentation:

For the purposes of calculating Amount A taxpayers should have the option to segment their global financial results by line of business, regional grouping or by any other basis that best reflects their business and which can be substantiated through their ordinary books and records.

We support the ability for MNE's who know their specific business model best to propose a segmentation to the tax authorities that would be most appropriate in their specific case. Once an MNE has determined its segmentation for Pillar One purposes, the MNE would be required to use this segmentation for a certain period, absent business restructuring, mergers, acquisitions or divestitures.

The use of segmented financials should at all times be elective as many taxpayers do not have segmented data available and imposing mandatory segmentation would create unnecessary administrative complexity.

We do not support providing local countries with the ability to unilaterally determine the segmentation of an MNE's businesses. MNE's know their business best and are in the best position to identify the relevant segments. The MNE always bears the burden of proof and the surrendering countries as well as the Amount A countries are always in a position to audit the segmentation.

Losses:

Amount A is targeted at the allocation of excess profits. Accordingly, there should be no allocation of Amount A if there is a global loss in the in-scope segment. The failure to account for losses would result in an over-allocation of profits to market jurisdictions.

The MNE should be able to carryforward losses that have been accumulated in previous years (including those losses incurred before implementation of Pillar One) when determining Amount A in a particular year. The loss carryforward period would be the period used for regular income tax purposes in each Amount A country. As the effective use of losses largely depends on national legislation we would recommend that strong dispute resolution mechanisms are put in place to avoid forfeiture of losses.

Elimination of Double Taxation:

Amount A will reallocate income from a surrendering country into a market jurisdiction. As the Public Consultation Document notes, a mechanism will be needed to prevent double taxation of Amount A. The two logical mechanisms in this regard are (i) a tax credit in the surrendering country for the tax imposed on Amount A in the market jurisdiction or (ii) a deduction for Amount A in the surrendering country. The extent to which double taxation arises will depend in part on relative income tax rates between surrendering countries and market jurisdictions, existing methods for relieving double taxation in the surrendering jurisdictions (e.g., exemption, foreign tax credit) and the operation of controlled foreign corporation regimes. Given the lack of uniformity in these areas, we do not believe the Unified Approach should mandate a specific relief mechanism. Instead, we believe the Unified Approach should provide for alternative mechanisms and allow the surrendering entity to elect (on a consistent basis) between the two mechanisms.

Amount B

In order to strike the right balance between complexity and administrability, we support the use of industry-based safe harbors to determine Amount B. We agree that the use of fixed returns is likely to benefit taxpayer and tax administrations by reducing disputes and compliance costs, and alleviating the risk of double taxation. We emphasize that the development, and ultimate application, of the safe harbors should adhere to the sound guidance of the arm's length principle. This would include an accurate definition of routine marketing and distribution activities, setting the parameters when the safe harbors can be applied, and providing the guidance as to which fixed return (in case several are available) is the most reliable indicator for routine marketing and distribution activities taking place in a market jurisdiction. We propose that individual taxpayers be allowed to opt out of the safe harbor if they can demonstrate a more appropriate method for calculating routine returns in the jurisdiction. We recommend that any disputes that arise with regard to Amount B be included in dispute prevention and resolution mechanisms currently contemplated under Amount C.

Amount C

Pillar One is intended to reallocate global profit between jurisdictions. It is not intended to *create* additional profit to allocate to a market jurisdiction. Nevertheless, we believe that there is a high risk that double taxation will arise when Pillar One is implemented around the world. Amount C is designed to be the mechanism that will eliminate double taxation.

Amount C will only work if all the relevant jurisdictions are at the table in any dispute resolution mechanism. Since the MNE is in the best position to determine when double taxation may arise, the MNE must have the ability to identify and include any relevant jurisdiction in the dispute resolution process. The mechanics for Amount C must be designed to take this into consideration.

Other Issues

Repeal of Unilateral Measures

Upon implementation of Pillar One, all unilateral measures, including digital services taxes, equalization levies and other similar taxes, must be repealed by local jurisdictions. Where countries have already enacted such measures, the laws should ensure double taxation relief and dispute resolution mechanisms, and include sunset clauses, target abusive arrangements only and utilize revenue thresholds that are practical and appropriate to ensure compliance and non-discrimination.

The agreed Pillar One package should include a list of all unilateral measures that are to be repealed. If unilateral measures are not listed then some countries may assert that their measures

are not unilateral measures covered by the agreement and may continue to impose additional tax on MNE's.

Ancillary Use of Amount A

An allocation of Amount A will cause a surrendering entity to have nexus in an Amount A jurisdiction and be subject to local tax on Amount A. We believe that the new nexus standard should apply solely for purposes of the Unified Approach and should not create nexus in the Amount A jurisdiction for any other purpose. In particular, we believe that Amount A should not create nexus for VAT, customs duties, local levies or any other tax or non-tax purpose.

Amount A Tax Compliance

An allocation of Amount A to a market jurisdiction will create a tax filing obligation for the surrendering entity. In many cases, an MNE group will have more than one surrendering company. To simplify the tax compliance process we recommend that the composite tax returns be permitted and that the parent company of the MNE group be permitted to designate a member of the MNE group as the composite return filer. We support the introduction of a one-stop shop for Pillar One compliance.

The composite return would identify all the members of the MNE group that have an Amount A obligation in the local country and those entities would be considered the taxpayers for local tax administration purposes. The filer of the composite return would be acting simply as a filing agent and would not be considered a taxpayer unless that filer was also a surrendering entity with a local Amount A obligation.

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Thank you again for the opportunity to provide our comments to the Public Consultation Document. Please direct questions with respect to our comments to any of the following:

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Respectfully submitted,

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