

PUBLIC CONSULTATION DOCUMENT

# Pillar One – Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures

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## Overview for commentators

### Introduction

Following intensive negotiations to update and fundamentally reform international tax rules, over 135 members of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) joined the [Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy](#) (the Statement) released in October 2021. The Statement sets out the political agreement on the key components of Pillar One and Pillar Two.

Amount A of Pillar One has been developed as part of the solution for addressing the tax challenges arising from the digitalisation of the economy. It introduces a new taxing right over a portion of the profit of large and highly profitable enterprises for jurisdictions in which goods or services are supplied or consumers are located.

The Inclusive Framework has mandated the Task Force on the Digital Economy (TFDE) – a subsidiary body – to advance the work needed to implement Amount A. In particular, the TFDE has been charged with developing the Multilateral Convention (MLC) and its Explanatory Statement as well as the Model Rules for Domestic Legislation (Model Rules) and related Commentary through which Amount A will be implemented.

### Draft MLC provisions on digital services taxes (DSTs) and other relevant similar measures

The standstill and withdrawal commitment for DSTs and other relevant similar measures forms an integral part of Pillar One and its objective to stabilise the international tax system. The Statement noted that:

*The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated. The IF notes reports from some members that transitional arrangements are being discussed expeditiously.*

The [Progress Report on Amount A of Pillar One](#), released in July 2022 (July Progress Report), further elaborated on the framework for the standstill and withdrawal commitment that would be included in the MLC and provided several elements for the definition of DSTs and other relevant similar measures:

*In addition to the operative provisions of Amount A, the MLC will contain provisions requiring the withdrawal of all existing digital service taxes (DSTs) and relevant similar measures with respect to all companies, and will include a definitive list of these existing measures. The MLC will also include a commitment not to enact DSTs or relevant similar measures, provided they impose taxation based on market-based criteria, are ring-fenced to foreign and foreign-owned businesses, and are placed outside the income tax system (and therefore outside the scope of tax treaty obligations). The commitment would not include value-added taxes, transaction taxes, withholding taxes treated as covered taxes under tax treaties, or rules addressing abuse of the existing tax standards. The development of the MLC will include work to further develop the definition of DSTs and relevant similar measures, and to provide for the elimination of Amount A allocations for jurisdictions imposing future measures that are within the scope of this commitment.*

The commitments with respect to the removal of all existing DSTs and other relevant similar measures and the standstill of future measures are an integral part of achieving Pillar One's goal of stabilising the international tax architecture.

This consultation document contains draft MLC provisions implementing the commitments with respect to DSTs and other relevant similar measures, including (1) an obligation to withdraw the measures listed in an Annex to the MLC and stop applying them to any company; (2) a definition of the measures the parties to the MLC will commit not to enact in the future; and (3) a mechanism that will eliminate Amount A allocations if this commitment is breached.

Specifically, the provisions to be included in Articles 37 and 38 of the MLC are the following:

- **Article 37: Removal of Existing Measures:** This Article contains the provisions requiring the withdrawal of all existing DSTs and relevant similar measures with respect to all companies and will include a definitive list of these existing measures. The Article will require each party not to apply any measure listed in an annex to the MLC (Annex A) to any company. This obligation would take effect in each jurisdiction upon the entry into effect of the MLC for that jurisdiction. The definitive list of measures in Annex A will be agreed upon by the TFDE as part of the continued negotiation of the MLC, and is not part of the public consultation.
- **Article 38: Provision Eliminating Amount A Allocations for Parties Imposing DSTs and Relevant Similar Measures:** The July Progress Report noted that development of the MLC will include work to provide for the elimination of Amount A allocations for jurisdictions that impose a future measure that is within the scope of the definition of a digital services tax or relevant similar measure. This mechanism is included in Article 38:
  - Paragraph 1 eliminates Amount A allocations for jurisdictions imposing a DST or relevant similar measure (or failing to withdraw an existing measure listed in Annex A) and also prevents the imposition of tax under the domestic law provision of that jurisdiction that implement Amount A. Because Article 38 applies to all measures that are in force in a Party and that meet the definition of a DST or relevant similar measure, an existing measure that is not listed in Annex A could also be subject to review on the same terms as future measures.
  - Paragraph 2 provides the general definition of a 'digital services tax or relevant similar measure', which, consistent with the July Progress Report, is based on three cumulative conditions and includes measures that: (1) impose taxation based on market-based criteria; (2) are ring-fenced to foreign and foreign-owned businesses; and (3) are placed outside the income tax system (and therefore outside the scope of treaty obligations). As provided in paragraph 3, it would not include, among others, value-added taxes, transaction taxes, withholding taxes that are treated as covered taxes under tax treaties, or rules addressing abuse of existing tax standards. It should be noted that measures that are not considered digital services taxes may nevertheless impact Amount A allocations, for example through the operation of the MDSH or the elimination tax base.
  - Paragraph 4 provides that the review of whether a measure falls under the definition would be conducted through the Conference of the Parties of the MLC. The operation of the Conference of the Parties, including its decision-making rules, will be developed during the course of the negotiation of the MLC.

Further to these articles, 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). Finally, the TFDE has identified specific areas where further work is required. These areas are indicated with footnotes.

### Public consultation instructions

This public consultation is organised in the interest of transparency and consistent with the approach taken for the other building blocks of Amount A. Stakeholder input is sought by the TFDE on the technical design of these provisions.

This is a working document released by the OECD Secretariat. It does not reflect the final views of the Inclusive Framework members. The TFDE has agreed that this working version can be released on the basis that it is without prejudice to the final agreement. As such, while the document is intended to illustrate the structure and operation of the provisions on the standstill and withdrawal commitment for DSTs and other relevant similar measures, further changes may be made to the conceptual framework.

Interested parties are invited to send their comments on this discussion draft no later than 20 January 2023.

Comments on this discussion draft should be sent electronically (in Word format) by email to [tfde@oecd.org](mailto:tfde@oecd.org) and may be addressed to: Tax Treaties, Transfer Pricing and Financial Transactions Division OECD/CTPA.

Please note that all written comments received will be made publicly available on the OECD website. Comments submitted in the name of a collective "grouping" or "coalition", or by any person submitting comments on behalf of another person or group of persons, should identify all enterprises or individuals who are members of that collective group, or the person(s) on whose behalf the commentator(s) are acting.

**The proposals included in this consultation document have been prepared by the OECD Secretariat, and do not represent the consensus views of the Inclusive Framework, the Committee on Fiscal Affairs (CFA) or their subsidiary bodies.**

# Draft MLC Provisions on DSTs and Other Relevant Similar Measures

## **Article 37: Removal of Existing Measures**

1. A Party shall not apply any measure listed in Annex A<sup>1</sup> (List of Existing Measures Subject to Removal) to any company<sup>2</sup> as from the date on which this Convention enters into effect with respect to that Party.
2. Listing or not listing a specific measure in Annex A:
  - a. shall not be considered evidence as to whether or not that measure is described in paragraph 2 of Article 38; and
  - b. shall determine that measure's treatment solely for purposes of this Convention.

## **Article 38 - Provision Eliminating Amount A Allocations for Parties Imposing DSTs and Relevant Similar Measures**

1. Any Party<sup>3</sup> for which a digital services tax or relevant similar measure, or a measure listed in Annex A (List of Existing Measures Subject to Removal), is in force and in effect during a Period:

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<sup>1</sup> Consideration will be given to the form of the commitment not to enact future DSTs and other relevant similar measures, as well as the treatment of measures not included in Annex A but identified as DSTs and other relevant measures by the Conference of the Parties pursuant to paragraph 4 of Article 38. This includes the question of whether to include such measures in the Annex, and how to address existing measures of Parties that join the MLC after it enters into force.

<sup>2</sup> Consideration will be given to whether any existing measure could continue to be applied against an MNE with a UPE located in a jurisdiction that is not Party to the MLC, and to whether the commitment discussed below with respect to future measures should permit application to such MNEs.

<sup>3</sup> Consideration will be given to whether and how DSTs and other relevant similar measures imposed by subnational jurisdictions should be addressed.

- a. shall not be allocated any profit<sup>4</sup> under [the MLC provision allocating Amount A] with respect to that Period; and
  - b. shall not impose tax with respect to that Period under any domestic law provision implementing the provisions of [the MLC provision allocating Amount A].
2. For purposes of this Article, the term “digital services tax or relevant similar measure” shall mean any tax imposed by a Party, however described, if it meets all of the following criteria and is not described in paragraph 3:
- a. the application of such tax, or the amount of tax imposed, is determined primarily by reference to the location of customers or users, or other similar market-based criteria;
  - b. such tax either:
    - i. is applicable by its terms solely to persons that:
      1. are not residents<sup>5</sup> of that Party (“non-residents”); or
      2. are primarily owned,<sup>6</sup> directly or indirectly, by non-residents of that Party (“foreign-owned businesses”); or
    - ii. is applicable in practice exclusively or almost exclusively<sup>7</sup> to non-residents or foreign-owned businesses as a result of the application of revenue thresholds, exemptions for taxpayers subject to domestic corporate income tax in that Party, or restrictions of scope that ensure that substantially all<sup>8</sup> residents (other than foreign-owned businesses) supplying comparable goods or services are exempt from its application<sup>9</sup>; and
  - c. such tax is not treated as an income tax under the domestic law of the Party, or is otherwise treated by that Party as outside the scope of any agreements (other than this Convention) that are in force between that Party and one or more other jurisdictions for the avoidance of double taxation with respect to taxes on income.<sup>10</sup>
3. The term “digital services tax or relevant similar measure” shall not include:
- a. a rule that addresses artificial structuring to avoid traditional permanent establishment or similar domestic law nexus requirements that are based on physical presence (including both direct physical presence and the physical presence and activity of an agent);

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<sup>4</sup> Consideration will be given to whether full denial is appropriate in all circumstances, or whether denial should be in some respect proportional to the scale of the offending measures (e.g., in terms of revenue raised). This work will also examine the situation in which a Party adopts a measure that has only de minimis impact.

<sup>5</sup> Work is ongoing to define resident for this purpose.

<sup>6</sup> Work is ongoing to define “primarily owned,” e.g. as owned more than 50% by aggregate vote or value.

<sup>7</sup> Work is ongoing to examine whether the meaning of “exclusively or almost exclusively” can be further clarified.

<sup>8</sup> Work is ongoing to examine whether the meaning of “substantially all” can be further clarified.

<sup>9</sup> Consideration will be given to clarifying how this clause applies when the relevant jurisdiction does not have residents supplying comparable goods and services, making it difficult to evaluate whether restrictions of scope ensure that a measure will apply to foreign-owned companies rather than residents.

<sup>10</sup> Consideration will be given to whether and under what circumstances the definition of digital services taxes or other relevant similar measures should cover certain measures even if they are within the scope of existing tax treaties.

- b. value added taxes, goods and services taxes, sales taxes, or other similar taxes on consumption; or
    - c. generally applicable taxes imposed with respect to transactions on a per-unit or per-transaction basis rather than on an ad valorem basis<sup>11</sup>.
4. A Party shall be considered to have a digital services tax or relevant similar measure in force and in effect<sup>12</sup> if:
  - a. it is determined by the Conference of the Parties<sup>13</sup> to have enacted a measure described in paragraph 2; and
  - b. the Conference of the Parties has not determined that the Party has withdrawn that measure or otherwise terminated its application with respect to all companies.
5. The definition of 'digital services tax or relevant similar measure' in paragraph 2 and any determination under paragraph 4 shall apply solely for purposes of this Convention.

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<sup>11</sup> Consideration will be given to expanding this category to include certain types of transaction tax that may be calculated on an ad valorem basis.

<sup>12</sup> Consideration will be given to timing issues created by this rule, e.g. when a measure applies in year 1, but the Conference of the Parties does not reach a conclusion on that measure's treatment until a subsequent year.

<sup>13</sup> The procedures for evaluation of new measures by the Conference of the Party will be developed as part of the MLC negotiation process, alongside the work to develop the overall rules on the operation of the Conference of the Parties.