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

EBIT Response to Public Consultation Document Pillar One – Tax certainty for issues related to Amount A (27 May – 10 June 2022)

Brussels, 9 June 2022

Dear Achim,

EBIT's Members¹ thank the OECD for the opportunity to provide comments on the OECD's Public Consultation Document Pillar One – Tax certainty for issues related to Amount A 27 May – 10 June 2022 OECD. Below are a few issues and open questions that EBIT believes are important for the OECD/Inclusive Framework to consider. At the same time and in line with our previous contributions, we regret the very short timeframe allowed under the public consultation for sending in comments. We also look forward to the publication of the comprehensive package of building blocks for comment.

Given the urgency and short time frame, EBIT raises its issues and concerns with the tax certainty for issues related to Amount A in a summarising bullet point format, keeping it relatively short. At the same time, we do wish to emphasise that the listed issues and concerns in this document are not exhaustive.

I. General Comment

EBIT's Members welcome the approach of granting tax certainty for issues related to Amount A. We welcome the intention of the approach to ensure that Covered Groups have access to the mutual agreement procedure and that the tax certainty mechanism for issues related to Amount A secures its objective of avoiding the double taxation of Amount A that would otherwise result from unresolved transfer pricing and PE profit attribution disputes. We understand that there is no consensus yet on the approach, however this will be crucial as dispute resolution and certainly prevention is at the very heart of the success of the system that is being developed.

The public consultation document indicates that among other things no consensus has been reached on a qualitative materiality threshold, reservations on scope and whether the mechanism should apply in circumstances where there is no bilateral tax treaty between the relevant jurisdictions. EBIT's Members consider that the approach should be multilateral (see also below) and also be applicable to situations where no bilateral treaty exists between all countries concerned. Access to the mechanism should be made unconditional and not hampered by materiality thresholds, scope reservations or other limitations.

EBIT's Members welcome the "last-best offer" approach for the resolution panel to bring a case to rest. We are of the opinion, however, that the possibility to agree on a different resolution within a defined time-period after a dispute resolution panel weakens the "last-best offer" approach. In our view, the "last-best offer" should be the end stage and there is no need to prolong the procedure with 90 days to come to a different solution. We noticed that the term "last-best offer" is not used in the text of the draft provisions in the public consultation document. EBIT's Members consider that the term "last-best offer" should also be used in the text of said provisions. A description of what is meant by "last-best offer" can be integrated in the definitions.

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

II. A bilateral versus a multilateral approach

The tax certainty for issues related to Amount A are based on a bilateral approach. The first stage in the process is indeed inspired by the mutual agreement procedure under Article 25 of the OECD's Model Tax Convention (MTC) and is based on a bilateral solution. EBIT's Members consider that a multilateral approach would be the best way forward as the allocation of Amount A may invoke several surrendering entities as well as several receiving states. Transfer Pricing and profit allocation issues will influence the Amount A calculations of the surrendering entities. A bilateral procedure only will undoubtedly leave some gaps in the potential for resolution. Addressing the tax certainty issues related to amount A in the multilateral convention seems to be the appropriate way forward.

III. Two different mechanisms for related issues

EBIT's Members have also commented on the Public Consultation Document on Tax Certainty for Amount A. We noticed, however, that the procedures are different for Tax Certainty for Amount A and for Tax Certainty related to Amount A. The issues that may be addressed under Tax Certainty related to Amount A may impact the Tax Certainty of Amount A. We therefore stress the need for a streamlined approach for both mechanisms to avoid inconsistent outcomes.

EBIT's Members have also noticed that different information is requested under the different mechanisms. As the issues are interconnected and may influence each other, however, we also call for a more streamlined approach regarding documentation / information requested under the two mechanisms to ensure simplicity and clarity.

IV. Influence of court decisions

Article 19 (14) and (15) discuss the Relationship with decisions rendered by a court or administrative tribunal. Footnote 6 indicates that no consensus has been reached on these Paragraphs and they do not reflect the final or consensus views of the Inclusive Framework. The footnote further indicates that some members of the Inclusive Framework consider that these provisions should not use a "legally bound" standard but should also apply where a Competent Authority will not depart from the court decision as a matter of administrative policy or practice. EBIT's Members are convinced that the aim of the proceedings is to avoid and resolve double taxation related to Amount A from TP and profit allocation issues. With that aim in mind, the mechanism should be able to address any issue to the greatest extent possible.

V. Composition of a dispute resolution panel.

Footnote 7 indicates that no consensus exists on how the dispute resolution panel is composed:

- Some countries favour that independent experts form the panel;
- Other countries are of the opinion that government officials should form the panel; i.a., because the dispute is between countries.

EBIT's Members consider that a mixed panel of independent experts and government officials is the preferred way forward. Such mixed panels are already used, for example, under the EU Arbitration Convention. This model would benefit from both government and non-government expertise in solving the cases and would be closer connected to the tax certainty mechanism for Amount A (see our earlier comment in that respect with regard to streamlining the approaches).

VI. Cost of the dispute resolution panel

The current text in the Public Consultation Document indicates that each Contracting Jurisdiction shall bear the fees and expenses of the dispute resolution of "its" members (i.e. appointed by the jurisdiction

or chosen at random on their behalf). According to footnote 8, however, there is no consensus on who should bear the cost of the dispute resolution panel. Some jurisdictions have indicated that for them the Covered Group should bear the cost related to the dispute resolution panel. Some jurisdictions have indicated that the obligation for the Covered Group to bear the costs related to the dispute resolution panel compromises the voluntary nature of the dispute resolution panel mechanism and the mutual agreement procedure. Yet other jurisdictions consider that it is appropriate for a Covered Group to bear the costs in these circumstances in light of the potential resource demands of the dispute resolution panel process.

EBIT's Members believe that the costs, as suggested in the Public Consultation Document, should be borne by the contracting jurisdictions, because the dispute has arisen between jurisdictions and it is they who have failed to reach an agreement during the competent authority stage of the proceedings. If the jurisdictions concerned would have reached an agreement, the costs of the dispute resolution panel would not have arisen in the first place.

VII. Role of the Covered Group in the proceedings

It would seem to EBIT's Members that the IF has not considered a larger role for the Covered Group involved in the proceedings. The role of the Covered Group is limited to making the request for MAP, requesting the dispute resolution panel, responding to questions of the competent authorities / rendering the necessary information (for example the Covered Group paper with its analysis and views of the case). The Covered Group, however, does not have a right to be heard, neither by the Competent Authorities (CAs), nor by the dispute resolution panel. Also, the dispute resolution panel has no right to request additional information from the Covered Group. EBIT's Members consider that this is an opportunity lost to involve the Covered Group more in the proceedings. We understand that the MAP / dispute resolution panel procedure is a proceeding between CAs and that the deliberations should remain limited. We suggest, however, that a right to be heard is given to the Covered Group in both the MAP and dispute resolution panel proceedings.

EBIT's Members are of the opinion that Covered Groups should also be informed of the deliberations by way of a summary or minutes of the deliberations between CAs / dispute resolution panel.

VII. Complexity of the procedure

EBIT's Members consider that the procedure (in particular the combination of tax certainty for Amount A combined with tax certainty related to Amount A) becomes very complex. Additional guidance for both the tax authorities concerned and the Covered Groups would be welcomed. Where possible, the procedure should be simplified, for example through streamlining both procedures.

VIII. Equal treatment

According to Article 19(16), the CAs may mutually agree on different rules (than the ones described in the Public Consultation Document) that will apply with respect to MAP cases that involve those two jurisdictions, *either generally or with respect to a particular case* (emphasis added). EBIT Members consider this could lead to a different treatment of similar situations depending on the procedure chosen by the CAs. In light of the multilateral character of the disputes, it would be best to streamline all procedures among CAs. For example, Country A has a dispute with Country B and Country C for the Covered Group on the same issue (for example transfer pricing remuneration for distributors in B and C). The approach advocated in paragraph 16 would mean that the procedure A – B is different from A - C, although it covers the same issue.

EBIT's Members hope these comments are taken into account by the OECD. We are always keen to engage in further discussion and public consultations that will be required if matters are to be implemented successfully.

Yours sincerely,

European Business Initiative on Taxation – June 2022

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