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

EBIT Response to OECD Public Consultation Document on Pillar One - Amount A: Draft Model Rules for Domestic Legislation on Scope - 4 April - 20 April 2022

Brussels, 20 April 2022

Dear Achim,

EBIT's Members¹ thank the OECD for the opportunity to provide comments on the OECD's public consultation document: Pillar One – Amount A: Draft Model Rules for Domestic Legislation on Scope – 4 April – 20 April 2022. Below are a few issues and open questions that EBIT believes are important for the OECD/Inclusive Framework to consider. At the same time, we regret – again and in particular during a spring break - the very short timeframe allowed under the public consultation for sending in comments.

Given the urgency and short time frame, EBIT raises its issues and concerns with the scope rules 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 comments

- The current public consultation document is the third document in a series of Amount A model rules with consensus still pending. Whilst EBIT has some understanding for the current piecemeal release and the OECD has indicated the possibility of no less than 13 specific Amount A model rules because of the highly ambitious timeframe, EBIT regrets that no opportunity appears to be foreseen for a public consultation on an OECD analysis of the interdependence between all the different subsets of rules and the comprehensive set of Amount A rules. The result of an analysis of a rule when viewed in isolation or when viewed as part of the comprehensive set of rules can be quite different. EBIT therefore strongly recommends the OECD to hold a public consultation on its analysis of the interdependence between all the different subsets of rules and the resultant comprehensive set of Amount A rules.
- As in previous public consultation drafts, EBIT notices that the draft model rules refer to the commentaries for further elaboration or clarification on the practical application of important issues such as, in the current public consultation document, the prior period test and the average test, the anti-fragmentation test, the principal purpose test, and certain definitional items. Also, the status of the commentaries referred to in the public consultation document is still unclear and interpretation thereof of their transposition into domestic legislation may or will vary among countries. For achieving certainty, it is necessary that the status of those commentaries is clarified and find its way into the domestic and international application on a common ground. As such, EBIT's Members are convinced that these elaborations or

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

clarifications in the commentaries form a substantial part of the Amount A Scope Rules and should also be open for comment.

- EBIT understands that the document is written in an attempt to approximate the format of a legislative text. It should be considered for ease of the reader and to allow for better understanding of the material to include the definitions and footnoted descriptions within the body of the text. As the document refers to topics in the body of the text and cross-references to definitions and footnotes to support the topics, the process of reviewing the cross-referenced material causes complexity in fully understanding the topic in the body of the text and dilutes the power of a potential common legislative text. EBIT suggests that the Public Consultation Document should be written in a way that the body of the text is supported by the definitions, footnotes and examples in one integrated flowing discussion.

II. Comments on the Scope Rules

II.1 Prior period test and average test

- Views are requested on whether the total revenues of a group should be subject to equivalent rules as the prior period test and the average test (which apply to profitability). For EBIT it is unclear why different approaches should be applied for determining total revenues and profitability. Equivalent rules as the prior period test and the average test should be established for determining the total revenues.
- Views are requested on whether the prior period test and average test should apply as a permanent feature of the scope rules or, alternatively, apply as an “entry test” only. Under the latter option, once a Group falls in scope of Amount A for the first time, the prior period test and average test would no longer apply, and thereafter only the total revenues and profitability of the Group in the current Period would determine whether the Group is in scope. Although the second option has the benefit of being somewhat simpler, EBIT considers that the rules should not be used as an “entry test”. The prior period test and average test will work in a formulaic way (as indicated under footnote 24 for the average calculation) and information for the calculation will already be available because such information is needed to fulfil the entry test. In other words, EBIT opines that the prior period test and the average test should be applied on a rolling basis (see also footnote 5 of the public consultation document).
- EBIT welcomes the fulfilment of the cumulative conditions to determine the pre-tax profit margin. The 10 percent threshold (profitability test) should be met only when the three threshold conditions are passed cumulatively:
 - In the period concerned;
 - In two or more of the four periods immediately preceding the period concerned; and
 - On average across the period concerned and the four periods immediately preceding the period concerned.

II.2 Anti-abuse provision / Fragmentation

- Under Article 1, § 5, subparagraph b, the model rules envisage to introduce an anti-abuse rule indicating that it is *reasonable to conclude* [emphasis added], having regard to all relevant facts and circumstances, that failing the global revenue test (20 bn Euro) was *one of the principal*

purposes [emphasis added] of the internal fragmentation. For the application of this anti-abuse provision, a ‘fragmented group’ is defined as a group, resulting from internal fragmentation, with an UPE that is owned directly or indirectly by an excluded entity, an investment fund or real estate investment vehicle with a controlling interest in the UPE. EBIT considers that the anti-abuse provision is unnecessarily broad and should be specifically targeted towards exceptional fragmentation.

- EBIT considers the definition of ‘fragmented group’ unclear and complex and could be read as forming some kind of cascading structure. Clarification or explicit confirmation that an excluded entity cannot be a UPE for pillar one amount A purposes could be helpful.
- Tax authorities should evidence that avoiding Amount A taxation was the main (or principal) purpose of the internal fragmentation. EBIT considers that the large majority of MNEs in scope of the Amount A rules will not set up fragmentation mechanisms with the principal purpose of escaping Amount A taxation but will do so only for sound economic or financial reasons.

III. Overall Conclusions

- The Amount A: Draft Model Rules on scope are also very complex and may lead to uncertainty, and confusion when different companies / countries apply the rules differently.
- The administrative compliance burden of these proposals for MNEs and tax authorities must not be underestimated and should be reduced where possible.
- The absence of a comprehensive document containing full explanation and examples of the rules, as well as the absence of consensus, increases the difficulty of commenting on these rules.
- EBIT favours the application of a prior period test and the average test.
- The anti-abuse provision is overly broad.

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

Yours sincerely,

European Business Initiative on Taxation – April 2022

For further information on EBIT, please contact EBIT’s Secretariat via Bob van der Made, tel.: + 31 6 130 96 296; e-mail: bob.vandermade@pwc.com).

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