BR Business Roundtable

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December 11, 2023

Office of Tax Policy
Department of the Treasury
By email to OTP_Pillar1MLC@treasury.gov

Re: Business Roundtable comments on the draft OECD/G20 Inclusive Framework Multilateral Convention to Implement Amount A of Pillar One (Pillar One MLC)

Dear Sir/Madam,

Business Roundtable welcomes the Treasury Department's commitment to working with the private sector to ensure sound international tax policies and straightforward tax administration, which are essential to protecting investment and economic growth.

On behalf of more than 230 chief executive officers of America's leading companies, Business Roundtable is pleased to submit comments in response to the Treasury Department's request of October 11, 2023 for comments on the draft Pillar One MLC. We comment in our capacity as a business association.

General Comments

We very much appreciate the fact that the Treasury Department is consulting with the business community and other stakeholders on the draft Pillar One MLC. Good tax policy cannot be made in a vacuum or in a rush, and the consultation process is an important step in the attempt to achieve a workable outcome. Our comments are made in a spirit of constructive feedback, from the perspective of our members, who lead global businesses that in many cases will be significantly affected by the Pillar One rules.

Overall, the Pillar One MLC is one of the most complicated pieces of tax legislation that we have seen proposed. Many aspects of the Amount A calculation lack clarity on the policy or economic "anchor" that would allow for predictable or intuitive outcomes. This will complicate the assessment of the tax implications of important business decisions, for example business reorganizations, supply chain investments and acquisitions and divestitures. Additionally, the lack of a policy or economic anchor is not likely to enhance certainty or stability in the international tax system, or to solve for the theoretical tax challenges arising from the digitalization of the economy.

Further, given the complexity of this proposal, the Inclusive Framework should consider whether a substantial simplification, especially of the mechanism to identify surrendering entities, is needed in order for the Amount A regime to be sustainable in the longer term. The drafting of the MLC includes complex definitions that, in some instances, do not provide full clarity on the calculation mechanics envisioned in the document and make the overall policy goals difficult to follow. For example, it is not entirely clear under Article 5, Para 5(c) and (d) that the calculation of Adjusted Elimination Profit includes adjustments for the Marketing and Distribution Safe Harbor and the Elimination Threshold. Similarly, the MLC envisions complex carryforward mechanisms (for example, certain profit shortfalls, unrelieved tax amounts, etc.) that would be potentially difficult to track for MNEs and tax authorities alike.

Further, the various cliff effects throughout the Amount A calculation would create significant volatility in financial reporting outcomes, making them difficult to accurately predict. The Inclusive Framework should consider approaches to minimize the cliff effects found throughout the Amount A formula (e.g., within the MDSH, the Domestic Exclusion and the determination of relieving jurisdictions).

Beyond these broad policy issues and the more specific technical issues outlined below, for the Amount A regime to be workable, the Inclusive Framework needs to provide guidance in the form of examples and commentary to facilitate understanding of the Amount A formula and the MLC. Additional rounds of public consultation would be needed to ensure that all potential inconsistencies, unclear definitions and the like were identified and appropriately rectified.

Ultimately, Amount A represents a significant departure from the longstanding principles of the arm's length standard. The business community would be open to supporting a departure if this new policy were to deliver on the goals of stabilizing the tax system and providing a greater degree of certainty for taxpayers and tax authorities around the globe. As drafted, the Amount A MLC falls short of achieving these goals. We urge U.S. negotiators to continue working to address the technical issues and broader policy considerations outlined in this letter. Negotiators should ensure that Amount A, and Pillar One generally, reaches a policy outcome commensurate with the challenges the Inclusive Framework seeks to address while acknowledging the outsized impact that this substantial reform will have on U.S. taxpayers and the U.S. tax system overall.

<u>Revenue Sourcing</u>

The revenue sourcing rules as currently written would not be workable for many covered groups. There is a need for examples of how to navigate the sourcing rules in cases where data for enumerated reliable indicators is unavailable. It appears that, since many of the enumerated reliable indicators are unavailable, companies would need to work with Advance Certainty Panels to devise compliance processes that reflect the principles of the rules while allowing the use of available data. This seems unlikely to produce consistent sourcing methods for all covered groups.

For Large Customers, the draft MLC calls for the headcount allocation key to be used, which requires a different allocation to be applied for each location in which Large Customers have their headquarters. This would be extremely burdensome, as it would require taxpayers to segregate their customers into a subset of Large Customers and obtain customer-specific information as to those customers' headquarters locations (which may not be public data) that the filing group may be unable to obtain in a reasonable timeframe to permit compliance, all in order to then determine the appropriate allocation key. A requirement to look at a client file in many contexts would particularly be burdensome. Further, there is no clear linkage of such aggregated headcount data to the sourcing of services performed.

The use of three different sourcing rules (i.e., for large customers, non-large customers and resellers) would require MNEs to split revenues between direct customers and resellers, which would be administratively difficult. It would also add significant complexity as some customers are also resellers, which would require segregating out the revenues between customer revenue versus reseller revenue in order to apply the different sourcing criteria, which may be impractical or impossible in some cases. Additionally, MNEs will still be required to differentiate between large specific customers and non-large customers.

For services (cloud) sourcing, we welcome that the revised rules for "Large Specific Customer" seek to remove requirements that service providers request additional data from customers. However, we would recommend clarifying that determining the top 200 large customers based on individual account numbers where no additional information is readily available is a reasonable method and also to allow customers to affirmatively use the same allocation key method for all three cohorts where the relevant information to segregate is difficult to obtain.

The nexus thresholds would appear to have little or no practical benefit in many cases. Based upon the initial modeling of one of our members, the current thresholds would only eliminate a handful of jurisdictions from the Amount A calculation. The company in question would likely have an Amount A liability in more than 180 countries, many with a net tax due of less than $50,000. In these cases, a material increase to de minimis thresholds would help to deliver upon the certainty Amount A seeks to achieve, in particular in situation where the cost of compliance to tax authorities would far outweigh the potential re-allocation of tax revenue.

Further, we note that sourcing based on the GDP allocation key by U.S. MNEs could result in significant revenue that is economically attributable to U.S. activities being considered to arise in jurisidictions that have little or nothing to do with U.S. businesses. As a result of the mismatch between the nexus thresholds for an Amount A allocation and the 50m Euro de minimis threshold in the Marketing and Distribution Profit Safe Harbor (discussed below), it would be possible for smaller market jurisdictions in some cases to be able to tax an Amount A allocation with no possibility of an MDSH adjustment.

Marketing and Distribution Profits Safe Harbor (MDSH)

In general, several of the design elements of the MDSH lack clarity on the economic rationale for the proposed approach. For example, what is the principle behind the 10% return on depreciation chosen for the Elimination Threshold or the 25%, 35% and 90% adjustments for the Jurisdictional Offset Percentage? In our view, the Jurisdictional Offset Percentage should be 100% in all cases. While we understand that in many cases, these proposed percentages were the result of significant negotiation and compromise between Inclusive Framework members, efforts must be made to align these thresholds with a clear economic rationale.

The risk associated with formulary elements that are set as part of a political negotiation process is that they could be adjusted more easily in the future without a clear policy basis for the adjustments. This risk is enlarged by the fact that new actors like the UN are going to be part of the international tax discussion and that in those forums, decisions can be taken by majority vote. As a result, it is easy to imagine that a group of countries could get together and form a majority which wants to increase the income allocated to markets under Amount A. The political uncertainty of the MDSH formulas is shown by the fact that at this time there is not complete consensus on the MDSH design as highlighted by a number of objections mentioned in the footnotes in the draft MLC.

The threshold to apply the MDSH is 50m Euro, which is disproportionate to the nexus threshold to receive an Amount A allocation of 1m Euro/250k Euro. These thresholds should be aligned or, at least, brought closer together. The gap significantly undermines the purpose of the MDSH, in our view.

Interactions with Pillar Two and with Amount B

Clarity is needed regarding the interaction between Amount A and Pillar Two. We understand that the Amount A rules apply before the GloBE Rules are applied in a given jurisdiction, but it is not clear how the tax on Amount A will be taken into account when applying the GloBE Rules to ensure avoidance of double taxation. Covered groups need to be able to model this in order to evaluate the effect of the rules.

The Inclusive Framework should urgently release guidance on the envisioned coexistence of the two pillars. For example, it should be confirmed that Pillar One tax should be treated as a Covered Tax for Pillar Two purposes in the relieving jurisdiction rather than the jurisdiction of the Designated Payment Entity. It should also be clarified whether any GloBE Income adjustments are necessary to incorporate the surrender effects of Pillar One calculations.

Nor is the interaction between Amount A and Amount B clear. In our view, Amount B should be applied prior to the Amount A rules in all cases. Amount B is important for certainty and preventing overtaxation of MNEs in destination markets.

Compliance Issues

Regarding compliance, more information is needed as to the mechanics of filing returns, paying tax and, perhaps most important, the confidentiality of taxpayer information.

The level of detail in the data required for calculations under the MLC is greater than under typical tax compliance rules. For that reason, there should be extra sensitivity to what is shared for Pillar One purposes. The standard of "foreseeably relevant" appears to be much too broad. While it is appreciated that the guidance warns that this should not be used for a "fishing expedition," it is unclear what guardrails are in place to avoid that. It is also unclear why there is a need to permit data to be shared for the purpose of "tax policy analysis," which appears to be permitted.

Further guidelines need to be developed to protect sensitive information and to limit what is shared to what is absolutely necessary for compliance with the MLC. Also, stronger rules need to be in place where there are breaches of confidentiality, since there is such wide variation in the protections provided among parties in their domestic law, given the more sensitive nature of the data that would be incorporated into calculations under the MLC.

The envisioned requirements of the Common Documentation Package have not yet been revealed. Without understanding the reporting framework envisioned for Amount A, it is not possible to assess the full impact of the compliance and reporting processes that will be needed. Coupled with the Pillar Two Global Information Return, this will be a significant change for all impacted parties regarding the amount of data that MNEs must produce and tax authorities must review. The Inclusive Framework should urgently release proposed formats for the Pillar One Common Documentation Package.

Double Taxation Relief

The MLC potentially undermines the competitiveness of in-scope companies by providing flexibility to countries regarding the provision of relief from double taxation. This flexibility which would place taxpayers at risk of having to bear the cost of funding the payment of regular tax and Amount A tax for several years before receiving relief after the final results of the tax certainty process have been determined. The rules should be amended to provide consistency and minimize the risk of significant delay in the provision of relief from double taxation.

The business community has consistently recommended the elimination of double taxation via exemption. The use of credits could produce unsatisfactory results. For example, in situations where relief is afforded via a three-year carryforwards of credits, there is a lack of any clarity on what happens if relief is not achieved after three years. In our view, where credits are used, credit carryforwards need to be indefinite until the relief is achieved. Also, there should not be any possible denial of other double tax relief as a result of relief being granted under the MLC.

Further guidance and commentary should be developed to ensure full relief from double taxation on any Pillar One tax liability. In particular, we await guidance from the Treasury Department on the envisioned interaction of Pillar One taxes (and Pillar Two taxes) with our existing foreign tax credit and GILTI rules.

Dispute Prevention and Resolution

Regarding Determination Panels, we are concerned that the MLC rules would permit a process that could effectively cede taxation of U.S. MNEs' profits to other jurisdictions and then permit independent panelists (without any government oversight) to determine where the profits should be taxed and where relief is provided. There is no clear oversight mechanism in the MLC, and it would be very difficult to remove an independent expert from the pool of experts (let alone a panel). This is hard to understand from a U.S. policy perspective since it has been estimated that about 60% of the profits to be reallocated under the Amount A rules belong to U.S. MNEs.

More specifically, we have comments on the following issues:

Proposals to the Determination Panel
Issue: The options that can be chosen by the determination panel do not include the compliance approach chosen by the Covered Group.
Suggestion: The Covered Group's approach should be one of the options presented to the determination panel.

MAP, Related Issues
Issue: There are open questions about how the MLC would achieve stability with respect to issues related to Amount A, where covered tax agreements are not in effect.
Suggestion: The MLC should require the use of certain transfer pricing guidelines (which could be the OECD guidelines) to cover cases where a bilateral agreement is not in effect. A solution is needed in these cases, particularly given that many companies will not qualify for any protections under Amount B given the current limiting scoping rules. In the alternative, the scope of Amount B should be broadened (e.g., to include services).

Resolution of Disputes, Related Issues
Issue: MAP competent authorities are allowed to extend the two year timeline, without a clear time limit, simply by giving notice, with no consent required by the Covered Group.
Suggestion: This extension should not be permitted without the consent of the Covered Group. If a dispute has continued for two years, parties should move toward engaging the dispute resolution panel. If, in the alternative, this provision is maintained, there should be a clear time limit that respects the overall goal of expeditious resolution.

<u>MAP, Disputes</u>
Issue: Currently MAP competent authorities can mutually agree to exclude issues from the scope of the dispute resolution panel. This is not in line with the objectives of the MLC to achieve stability and dispute resolution.
Suggestion: MAP competent authorities should not be able to sideline related issues that continue to be unagreed and are resulting in double taxation–given the stability goals of the MLC, these issues should continue to the dispute resolution panel.

<u>MAP, Dispute Resolution Panels</u>
Issue: MAP competent authorities can depart from the decision of the dispute resolution panels within 90 days of the decision. This leaves the outcome uncertain for an additional 90 days, following an already extensive timeline. It also erodes the certainty benefit of having the dispute resolution panels to bring disagreements to a conclusion.
Suggestion: This option for a renewed round of negotiation following the already long process of getting to a decision should be removed.

<u>User Fees</u>
The tax certainty user fee should not be unnecessarily burdensome. Furthermore, there needs to be a mechanism whereby reviews can be coordinated in order to have coverage of multiple items and not have the user fee charged on an issue-by-issue basis.

<u>DSTs and Other Unilateral Measures</u>

One of the purposes of the MLC is to remove destabilizing and discriminatory DSTs and unilateral measures. The provisions of the MLC in this regard need to be strengthened. Under the definition in the MLC, a country could craft an acceptable unilateral measure that would nevertheless target income of nonresident MNEs in a manner conflicting with the policy goal of the Inclusive Framework. Also, a country could ratify the MLC and subsequently enact a prohibited DST or other unilateral measure. If the new measure raised more revenue for the jurisdiction than the tax revenue from Amount A allocations, then the only penalty would be that the jurisdiction would not receive the Amount A allocations—which, in effect, would be no penalty at all.

Another issue is that a decision can be made that Amount A allocations are only denied following the date of a Conference decision. In our view, in all cases, Amount A allocations should be denied from the date a DST or other unacceptable law is enacted. Allowing for a DST to remain in effect until the long process for resolution is concluded would create bad incentives to enact these very destabilizing taxes, since negative consequences for the enacting country would not even come into effect until much later. The MLC should always require repayment of the DST revenue. At a minimum, amounts paid due to such DSTs should remain creditable against any Amount A tax owed to that jurisdiction until there is an offset.

Also, the standard of "exclusively or almost exclusively" targeting non-residents is too narrow. The current rules appear to have the effect of providing guidelines for implementing discriminatory policies, rather than discouraging such destabilizing actions outright. The current explanatory language refers to an example where "only a few percent of the taxpayers" were domestic. While this may simply be illustrative, it could be read that something more than a "few percent" may be acceptable, even if those few taxpayers represent insignificant revenue collections or a large majority of revenue collections are from non-resident companies in another party to the MLC. This does not effectively address discrimination. The standard should be broadened, so that it is clear that just having some small domestic incidence of a discriminatory tax (e.g., 10% of collections from domestic companies) is not enough to clear a discriminatory tax that could still be predominantly targeted at a particular country or industry.

We are also concerned about how the "effect of insulating domestic businesses" standard is described. It appears that a tax could have a clearly discriminatory impact, but be explained away by reference to stated "policy objectives." This rule could encourage legal games, not stability. Further, it seems to create a requirement to prove discriminatory intent, and that would not be a reasonable standard, since policy makers who intend to enact destabilizing measures would not be explicit about their discriminatory intent. This prong of the definition should be deleted, or explained in substantially different terms, since it would open the door to blatant discrimination and destabilizing measures that are too permissible under these narrow standards.

Further, the MLC does not deny Amount A allocations for countries in which subnational governments impose DSTs. This leaves wide flexibility for destabilizing measures to be implemented at subnational levels. The only requirement of countries is to report what they have done to achieve removal of the measure. There is no requirement, however, to take any action, and there is no mechanism to alleviate the impact of the destabilizing measure. In our view, amounts imposed by subnational governments should reduce the Amount A allocation of the relevant country, regardless of whether they control the subnational legislation. Otherwise, there would be no features to mitigate the impact of these destabilizing measures, and little incentive to take effective action to cause the removal of the destabilizing measure. All of the DST-related problems that the Inclusive Framework wishes to mitigate through this framework could simply shift to more local government contexts.

We note that, although the Inclusive Framework has also agreed not to apply nexus rules based on significant economic presence (SEP) tests or similar concepts to entities within the scope of Amount A, the draft MLC contemplates that the SEP concept may continue to apply to taxpayers who fall outside the scope of Amount A. On this point, we recommend that the Inclusive Framework clarify that SEPs are not endorsed and that the MLC signatories are against the proliferation of tax measures of this nature.

Finally, while the MLC would "turn off" Amount A allocations for jurisdictions imposing DSTs on a prospective basis, we note that the existing bilateral agreements between the U.S. and DST–

imposing countries allow for a credit against Amount A taxes in the amount of all DST revenue for 2022 and 2023. We encourage Treasury to work to extend these bilateral agreements to match any DST standstill extension that may result from its signing of the MLC.

<u>Other issues</u>

Stock-based compensation

Tax stock-based compensation (SBC) is taken into account in Elimination Profit (MLC Annex B, Section 4(2)), but not in Adjusted Profit Before Tax (MLC Annex B, Section 2(1)). This inconsistency is not explained and does not seem to have a policy rationale.

Domestic exclusion

In general, the domestic exclusion is an important addition to the MLC, but it could be improved to provide more sustainability and certainty in the overall Amount A compliance and calculation processes. In particular, the cliff effect of breaking either the 15% revenue threshold or 15% expense threshold in the domestic exclusion rules would be excessively costly and is therefore worrisome.

We suggest consideration of a second threshold at <20% where the MNE would have achieved an exclusion of 80% of that jurisdiction's income. Alternatively, an averaging approach based upon a trailing average of prior year results could be considered.

Another possibility would be to provide relief if an MNE did not meet the expense/revenue thresholds in a given year due to a change in business facts for that year. Such relief has been created for revenue sourcing but not for the revenue/expense tests in the domestic exclusion provisions.

Transitional segment rule

The MLC includes a new unfavorable provision that would apply to MNEs subject to segmentation. The rule would require an MNE to calculate Amount A on the basis of a segment in year 2, and not as a Covered Group in year 2 (even if it meets the profit threshold for being in-scope as a Covered Group in year 2) to the extent that (i) in year 1, the segment, but not the Covered Group, meets the profit threshold; and (ii) the calculation of Amount A for the segment in year 2 would result in a larger Amount A reallocation than would result from a calculation for the entire Covered Group.

There is no sound policy basis for this transitional rule and we recommend that the revised MLC disregards the segmentation approach in year 2 if the Covered Group is otherwise in-scope. As a fallback, we suggest that if this provision is included, then there should be a corresponding

provision that reduces the Amount A allocation for the year following that in which a Covered Group falls out of scope.

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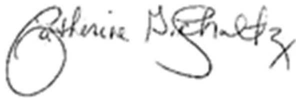
Business Roundtable urges the Treasury Department to take the above comments into account in its work on the Pillar One, Amount A rules in the MLC. We appreciate your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,



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