

Secretariat Proposal for a “Unified Approach” under Pillar One

Response from the American Chamber of
Commerce Ireland to the OECD Public
Consultation Document

November 2019

We are pleased to set out the comments of the American Chamber of Commerce Ireland (the American Chamber) with respect to the OECD Public Consultation Document on the Secretariat Proposal for a “Unified Approach” under Pillar One (“the Proposal”).

The American Chamber represents the Irish-based enterprises that form an important hub for the two-way transatlantic economy between the United States and Europe. The American Chamber is the leading international business organisation in Ireland. Membership includes the top US companies in Ireland, the Irish companies that support them, and the growing number of Irish companies with business in the US.

The American Chamber continues to be supportive of the evolution of the international tax framework, provided it ensures consistency for global businesses, and supports global trade and investment flows. The American Chamber understands the importance of the OECD’s actions on the taxation of the digital economy, given the alternative will negatively impact on business, investment and trade flows (i.e. the unilateral approach being taken by countries currently). As such, the American Chamber welcomes the substantial work undertaken by the OECD through its proposal for a “Unified Approach” under Pillar One and recognises it is an important step towards a consensus agreement.

In our earlier (March 2019) response to the OECD’S Public Consultation on Addressing the Tax Challenges of the Digitalisation of the Global Economy, the American Chamber set out certain guiding principles which remain valid in relation to the OECD’s proposals for a Unified Approach. The principles are:

- **Non-Discrimination:** All businesses are becoming digitalised in order to sustain the competitiveness of their product and service offerings. Tax legislation should ensure industry-specific neutrality and avoid special tax benefits or penalties targeted to one industry versus another. A fundamental tenet of pro-growth tax policy is that the marketplace, not the tax system, should allocate capital and resources. The current identification of ‘consumer facing businesses’ requires much more detailed guidance so that taxpayers and tax authorities have a clear understanding of what entities would be subject to the proposed Unified Approach solution. Such a definition should reflect the digitalisation of the overall global economy.
- **Multilateral Consultation and Agreement:** It is vitally important for taxpayers that the very significant changes being contemplated by the OECD are adopted on a multilateral basis. A number of countries have adopted or proposed unilateral measures to seek to tax digital businesses such as digital service taxes and also other taxes designed to sit outside double tax treaties. As part of the implementation of a consensus solution, countries must be obliged to withdraw such unilateral measures and the OECD should review and report

on countries' withdrawal efforts. In addition, achieving greater certainty and minimising disputes will need to be a key outcome of any proposed solution. This will require a Unified Approach which results in effective dispute resolution mechanisms (i.e. mandatory binding arbitration). It is the American Chamber's view that this must be a non-negotiable component of any final solution.

- **Minimise Complexity and Facilitate Compliance:** The changes contemplated by the OECD under the Unified Approach will bring further reporting requirements to business within the scope of the rules. The OECD should not underestimate the administrative burden that taxpayers will bear in complying with the new rules and, equally, that tax authorities will face in policing the system. It is critically important that the rules are designed and implemented in a way that minimises such complexity. Mechanisms to collect the tax should be designed so as to achieve simplicity, which is why the American Chamber does not support an option that withholding taxes should be considered as a means to collect. In addition, and consistent with the principle of simplicity, the system should be designed so that one tax authority (e.g., that of the parent company of the group) audits and administers the calculations required under the Unified Approach rather than every individual country tax authority where the group operates.
- **Agreed Understanding on Assigning Taxation Rights:** To obtain and retain broad support, it is important that the Proposal remains grounded in economic reality and the alignment of profit taxation with value creation. Furthermore, any agreed formula or thresholds set under the Unified Approach should be principled and evidence-based so as to remain durable over time. Such formulas should be determined primarily by the application of the arm's length principle. The application of the unified approach should not result in market access being over rewarded. It needs to also be noted that, in many cases, the market jurisdictions already receive VAT or sales taxes in respect of in-country sales.

Comments on the Unified Approach – Overall Approach

Scope Definition: We welcome the exclusion of business-to-business transactions from the scope of these proposals, but the OECD must provide significantly more detailed guidance of what is a “consumer-facing business” and provide a clear definition of the terms “consumer-facing”, “consumers” and “users” in order to provide taxpayers and tax administrations with clarity as to the scope of the rules. This is important to prevent double taxation across unrelated organizations. For example, the new profit allocation rule creates a nexus irrespective of whether there is an in-country marketing or distribution presence, or sales via an unrelated distributor. In such a case, both the party with the newly created nexus and the unrelated distributor with a traditional nexus could become subject to tax, with no way to determine whether double taxation has occurred.

Identifying sales destination: It is also important that the OECD clarify how consumer sales are defined and tracked. The American Chamber favours the use of the billing location of the customer as a practical measure. Nevertheless many businesses sell products and services to consumers through third party distributors and cross-border retailers. It is often not possible for groups to identify the ultimate destination of their products (e.g., the third-party distributor may not be required to provide that information under the terms of arrangement). From a practical perspective, it should also be the case that group should not have to independently audit or verify the data where it is provided by third parties.

Group revenue threshold: Given that the Proposal will result in a significant additional compliance burden for taxpayers, the American Chamber would welcome the introduction of a revenue threshold to exclude smaller Groups. Such a threshold should certainly be set at the €750 million threshold used for the Country-by-Country-Reporting requirements, at a minimum, and consideration could be given to a higher threshold. The OECD will need to provide clarity on whether such thresholds should refer to the “consumer-facing” revenues of a group or total revenues. The American Chamber would recommend the former.

Market jurisdiction threshold: Whilst recognising the policy objective to provide greater taxing rights to market jurisdictions, the American Chamber favours a minimum market jurisdiction threshold across countries as a measure to mitigate administrative complexities.

Consistent implementation: To avoid the risk of double-taxation and tax disputes, and as a consensus agreement emerges in relation to the Unified Approach, the OECD must provide much greater guidance to taxpayers on how to comply with the rules as well as tax administrations on how to implement and audit the rules. Detailed guidance is required given the novel nature of the proposals and also to ensure uniform adoption of the measures.

Collection mechanism: The American Chamber does not support the use of withholding tax as a means to collect any additional tax due under the Unified Approach. The use of withholding tax regime would be particularly challenging, especially for Groups operating across many countries, given the complex registration and refund procedures. Any delays to refund procedures could for example potentially lead to liquidity issues for taxpayers.

Impact on other taxes: The OECD must confirm that the Unified Approach (and, in particular, Amount A) relates solely to the re-allocation of global income and that there should be no impact to other taxes, regulations, or to duties such as VAT and customs.

Comments on the Unified Approach – Amount A

Calculation of amount A: Any recommended percentage relating to the allocation of the residual profit to a market should be modest, reflecting the concept of value creation and recognising non-market related value drivers and risk assumption. In determining Amount A, it should be clearly stated that trade intangible returns are out of scope and excluded from the simplified formula. In order to facilitate efficient relief from double tax, the jurisdiction surrendering the taxing rights reallocated under amount A should be clearly identified.

Accounting standards: The American Chamber supports the use of IFRS or US GAAP as accounting standards for the relevant calculations on the basis these are widely recognised and used. Taxpayers should not be subject to new or modified standards that require adjustments for the purpose of complying with the Unified Approach.

Flexibility for taxpayers: With regards to determining the “consumer-facing” group profits by business line, the American Chamber is in favour of referring to publicly available Group financial information where available. In the cases where financial reporting mechanisms are not structured in a way that allows clear identification of consumer facing business line(s), Groups should have flexibility to determine such segments. Taxpayers should have the option of using consolidated worldwide profits, which is the starting point for the Amount A allocation in the Unified Proposal.

Treatment of losses: The OECD must provide a clear and simple proposal that deals with how losses should be treated such as “claw-back” or “earn out” mechanisms. Whilst further work is required, in principle, the American Chamber would support a proposal whereby no Amount A is due where the group does not make sufficient profits or makes losses. Any proposal to recognise losses will need to also take account of historical losses (i.e., prior to the implementation of the Unified Approach).

Auditing of Amount A: To mitigate the administrative and audit complexities for both taxpayers and tax administrations, the American Chamber supports a “one-stop-shop” mechanism for filing and auditing of profit allocation calculations as well as assisting in the collection of taxes due on Amount A where the taxpayer does not have any presence in a country.

Comments on the Unified Approach – Amount B

Baseline activity: It is important the OECD explicitly define exactly what “baseline” activity means in order to avoid the risk of disputes. The objectives of the proposal will not be met if the activities in Amount B are not clearly defined such that the many disputes on this issue

(which the OECD itself notes) will continue. The OECD may also consider whether it will be feasible to reach consensus on Amount B.

Target returns: the American Chamber is in favour of the introduction of specific “safe harbour” percentages for Amount B. Careful consideration should be given to whether different percentages should apply for different industries and/or regions based on the economic evidence. In order to ensure uniform implementation/interpretation of the rules, the OECD should mandate a specific percentage or percentages (and not provide a range of possible returns which may lead to dispute).

Comments on the Unified Approach – Amount C

Effective dispute resolution: The American Chamber recognises the significant efforts of the OECD -such as the MAP peer reviews and the provision of better reporting statistics – to improve resolution procedures. However, the current MAP procedures continue to be time consuming for both taxpayers and tax authorities. As such, securing consensus on the implementation of legally binding arbitration mechanisms across all jurisdictions is the best means to achieve effective dispute resolution.

Interaction with Amount A: In cases where the activities in-country give rise to Amount C (i.e., the local activities are in excess of the baseline identified for Amount B), this should be taken into account in calculating Amount A. In other words, Amount A should be the guaranteed minimum that a country can expect for in-country sales. If a business already operates in a particular country and pays Amount B and Amount C, at or in excess of the Amount A guaranteed minimum, no additional return will be allocated to the market. There should be no double counting with amounts B and C.

Conclusion

We are pleased to set out the American Chamber’s observations with respect to the OECD Public Consultation Document on the Secretariat Proposal for a Unified Approach under Pillar One. Our members understand that current initiatives seek to further modernise tax codes to reflect the transformation that digitalisation is bringing to the global economy. The American Chamber remains strongly supportive of multilateral consultation and agreement to address BEPS related matters.