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Comments on the Secretariat Proposal for a "Unified Approach" under Pillar One

Executive Summary

Please find here below the summary of the comments that we delivered today to the OECD on the public consultation document "*Secretariat Proposal for a "Unified Approach" under Pillar One*" released by the OECD on 9 October 2019.

1.1 Ensure consistency with the general domestic tax systems of the adhering jurisdictions. It is our view that the Unified Approach ("**UA**") should become part of the domestic corporate tax systems of all jurisdictions willing to adopt it. This premise triggers several ramifications that the final proposal should incorporate.

1.2 Identify the taxable person. First, as corporate tax systems (as well as the OECD Model Convention)[1] are mostly based on the principle that taxable income should be determined at the level of each single entity,[2] the UA must equally provide with a specific set of rules to identify the entity(-ies) within the MNE group to which the profits taxable in the market jurisdictions (Amount A) must be attributed.

[1] OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing.
[2] As a consequence of this principle, taxable profits are imputed to each entity for the purpose of computing the tax liability. Tax rules concerning tax consolidation and joint tax liabilities are not to be considered as exceptions to this principle, as they are built thereon.

1.2.1 The imputation of Amount A to a specific entity(-ies) within the MNE group is relevant not only for the purpose of identifying the entity that should be held primarily responsible to pay the corporate tax in the market jurisdictions,[3] but also for the purpose of establishing the jurisdiction of residence which should eliminate the international juridical double taxation stemming from the taxation in the market jurisdictions of Amount A.

1.2.2 Indeed, the elimination of the international juridical double taxation, both at the domestic tax level and at the tax treaty level, necessarily requires the prior identification of the taxpayer (company) that bears it.

1.3 Identify the territoriality rules for domestic and tax treaty purposes. Second, the UA should provide for detailed connecting factors, to be adopted both at the domestic level and the treaty level, which will constitute the territoriality rules for attributing to the market jurisdictions the right to tax Amount A.

1.3.1 The territoriality rules should also include a quantitative threshold, as only taxpayers that are part of MNEs with consolidated revenues exceeding an agreed amount would fall within the scope of the market jurisdictions' taxing rights.

1.3.2 Moreover, the territoriality rules should include the list of the businesses to which the UA applies, as only taxpayers that are part of an MNE which is active in one, or more, of the listed businesses would fall within the scope of the market jurisdictions' taxing rights.

1.4 Establish the rules for income computation. Third, the UA should establish a comprehensive set of rules for computing the share of Amount A taxable by each market jurisdiction, which will need to be incorporated in the domestic legal systems and in the tax treaties of such jurisdictions.

1.5 Avoid multiple taxation. Fourth, as the UA introduces new connecting factors with the source (market) jurisdictions, it must also provide for rules aimed at avoiding double taxation of the same profits at source due to the overlap between different connecting factors. This might be the case where the MNE group already has income taxable in the market jurisdictions, e.g. since group companies receive royalties from the exploitation of marketing

[3] Joint liability systems could be also provided in this respect, in particular where the MNE had a company already established in the relevant market jurisdiction (i.e. either resident or having a permanent establishment therein).

intangibles sourced in the market jurisdictions, or due to the presence of one or more local entities or permanent establishment (“**PE**”) located in the same market jurisdiction. A similar issue could emerge as a result of the need to attribute (a share of) Amount A to a PE of the taxpayer situated in a jurisdiction other than the specific market jurisdiction, or where the royalties including a share of Amount A are sourced in a jurisdiction other than the specific market jurisdictions. In all such cases, the UA must provide for rules that eliminate double taxation at source either by means of credit or exemption taking into account the taxes payable or paid not only in the market jurisdiction and in the jurisdiction of residence, but also in third countries.

1.6 Take into account losses and investment costs. In order to ensure that Amount A does not exceed a reasonable approximation of the MNE’s profits deriving from the interaction with the consumers/customers and users, taking into account the overall profitability of the business over time, specific rules should be introduced in order to take into account (i) the losses incurred in previous years (both before the first application of the UA and current the UA) and (ii) the significant costs incurred (and not capitalized) before the introduction of the UA, which will be matched by revenues accounted during the application of the UA.

1.6.1 Furthermore, domestic rules should allow the inclusion of Amount A in the local fiscal unity, where a tax consolidation regime is provided for under the law of the relevant market jurisdiction.

1.7 Ensure a swift implementation through the MLI. Finally, to secure a swift adaptation of the tax treaty networks of the jurisdictions adopting the UA, it would be appropriate to have recourse to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“**MLI**”), which could be amended with an *ad hoc* protocol to incorporate the relevant rules of the UA.

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Please feel free to contact us at TP@maisto.it with any questions or comments concerning the above.