

**Notat**

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Kontor:

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SML

## Written comment on zero draft ToR

We thank the Secretariat and the bureau members for the work done with the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation (ToR). Please find below our general comments to the draft. We also note that comments to specific wording may also be presented during the next session in the Ad Hoc Committee.

### General remarks

Firstly, we refer to the common position on behalf of the European Union and its Member States of 25 April 2024 that was presented as a general statement during the first substantive session in New York. This position outlines our guiding principles for a UN framework convention on international tax cooperation, which we also want to see reflected in the ToR for the framework convention.

We note that our comments are based on the desire to promote an efficient and effective process at the UN level in the area of international tax cooperation that will help us to promote stability and reliability within the international tax architecture.

In this context, the ToR for a framework convention on international tax cooperation are crucial to clarify and determine the governance structure to guide future work, including high-level commitments and procedural rules. Additionally, we hope that the Ad Hoc Committee (AHC) will strive to build bridges, find common ground, and foster mutual understanding.

We support the aim set out in the Introductory Note that the ToR should provide guidance on the negotiation of the framework convention without unduly limiting flexibility for the negotiating committee.

Hence, we believe it's important that the ToR should focus on procedural elements for negotiating the framework convention and the ToR should not prejudge the outcomes of the negotiating committee.

We reiterate the importance of member states being fully involved and consensus-based decision making. This, should clearly be reflected in the terms of reference. Consensus should be required in the negotiation and adoption of the text of the framework

convention and its protocols, as well as for the work of the Ad Hoc Committee, with the objective of achieving a generally accepted result.

In general, there is a need for greater clarity on the procedures that will be followed by the negotiating committee in the terms of reference, similar to what has been done in other UN processes<sup>1</sup>.

### **Objectives**

We support the objectives set out in the Zero Draft.

Recognizing the need to respect Member State's tax sovereignty we are wondering how paragraph 7, letter b, is to be understood. Since, the objective - to our understanding - is to negotiate a framework convention not to establish a (new) global system of governance for international tax cooperation, we suggest that litra b is amended to "establish a new framework which is applicable for international tax cooperation [...]"

Regarding paragraph 7, letter c, we consider that some of the words used do not have one common understanding and are highly subjective. The risk is therefore that the wording could lead to future disputes as to their meaning. We would prefer to delete these subjective words. Otherwise, we consider it could be fruitful with a terminology section or some definitions in the ToR.

### **Principles**

We find the principles set out in the Zero Draft relevant.

As a starting point, we consider it could be beneficial to add the following wording in the beginning of the sentence in paragraph 8: "while recognizing and respecting tax sovereignty of each Member State [...]".

Furthermore, to leave flexibility for the negotiating committee we suggest amend the introduction in paragraph 9 to serve as a recommendation by substituting "should" by "could".

Regarding paragraph 9 we believe in a sustainable development and find it is key in ensuring prosperity around the world. Furthermore, in general we find it of high importance to have effective tax systems that ensure the taxation of income. Therefore, we consider that in paragraph 9(7) it would be fruitful to also make reference to transparency and exchange of information for tax purposes as key components in ensuring effective tax on income that can contribute to achieving sustainable development goals.

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<sup>1</sup> Cf. UNGA Resolution 72/249 on an International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, paragraphs 17-19.

Furthermore, in general we acknowledge and support fairness in relation to taxation. However, we find it technically difficult to quantify “fairness” in the allocation of taxing rights and hence we don’t find it appropriate to have this as a guiding principle in the framework convention in relation to allocation of taxing rights.

### **Substantive elements of the Framework Convention**

Regarding paragraph 10, we find it would be fruitful if the word “should” be replaced by “could” to ensure that the negotiating committee has the necessary flexibility. Also, as it is difficult to commit to headlines where it is highly uncertain what will be the content behind the headlines.

Furthermore, we find usage of “fair allocation of taxing rights” ambiguous and subjective. Thus, it is not clear how this statement should be understood in relationship to e.g., existing tax treaty network.

The taxation of individuals is subject to the preference of each jurisdiction.

### **Capacity building**

We welcome the focus on capacity building in the ToR for the framework convention. In general, we wish to contribute in the best way possible to the development of cooperation in the area taxation and we recognize that capacity building – and domestic resource mobilization (DRM) – are important means to support the countries in building a well-functioning tax system.

Furthermore, we notice that there already are existing capacity building initiatives which we are taking part of. As an example, we already have a program for support for international anti-corruption and tax efforts which supports ATAF and institutions under the UN etc.

We are also looking in to participating Tax Inspectors Without Borders (TIWB).

### **Structural elements of the Framework Convention**

We welcome the proposed outlined structural elements for the framework convention.

However, we also recognize that the relationship between the framework convention and with domestic law for some countries might be a constitutional issue.

### **Specific priority areas to be addressed in early protocols**

We stress that developing early protocols in parallel to the negotiation of the framework convention remains an open issue to be further discussed by UN Member States.

Furthermore, we recall the wording used in the report of the Secretary General on Promotion of inclusive and effective international tax cooperation at the United Nations: “*If there is sufficient agreement on certain action items, some of these protocols could be negotiated at the same time as the framework convention.*” This option was merely suggested as a possible course of

action and should be reflected as such in the draft terms of reference. We strongly prefer that only a limited number of early protocols be developed after the negotiations of the framework convention are concluded.

Therefore – and ensure that the negotiating committee has the necessary flexibility and sovereignty – we propose to amend the wording of paragraph 14 by changing the word “should” to “could”. Especially as the early protocols mentioned are merely headlines where the content behind these headlines has yet to be defined or discussed. It is therefore highly uncertain what countries would be agreeing to.

Secondly, we don’t think it will benefit the progress to negotiate early protocols simultaneously with the negotiation of the framework convention. Simultaneous negotiations will both from a resource – and a legal perspective – be rather difficult to carry out. Hence, we note that simultaneous negotiations will place excessive demands on Member States’ resources.

We recommend that the negotiation of any such protocols be completed within a reasonable timeframe after concluding the negotiations of the framework convention. The timeframe to be foreseen for the negotiations of early protocols will depend on the number of protocols and on the subjects they cover. It is in our view not recommended to have a single deadline for finalizing all substantive protocols. The topics of protocols should focus on areas with the broadest consensus and agreement, therefore, least controversial topics, avoiding issues that are already under negotiation or those with internationally agreed standards. Therefore, it is appropriate to first conduct an assessment and discuss an exhaustive analysis of a small number of issues and prioritize certain topics over others.

Furthermore, we acknowledge and participate in the work streams based on OECD Inclusive Framework on BEPS. The work constitutes a major reform of the international tax system focusing on the taxation of the digitalized global economy. Hence, we don’t think it is fruitful to start new negotiation duplicating the work that has already been done. Accordingly, we propose to consider how the work on OECD Inclusive Framework on BEPS can most effectively be leveraged in a UN Framework Convention on International Tax.

In our view the intergovernmental negotiating committee should throughout its work avoid duplicating the work of other relevant forums. It should consider potential synergies and leverage the existing tools, strengths, expertise and complementarities of the multiple institutions and processes involved in tax cooperation at the international, regional and local levels.

Finally, the commitments mentioned in the zero draft should be high-level, illustrative, and complementary to already existing commitments. Therefore, we would suggest including domestic resource mobilization, capacity building and fostering tax compliance in paragraph 14.

**Approaches and time frame for negotiation**

We support that the framework convention is negotiated and developed through inter-governmental negotiations. Hence, we support realistic timelines for the negotiations that take into account the complexities of international tax issues and the need for analysis and thorough discussions at a technical level.

Remembering that the work in OECD has turned out to be more time-consuming than first estimated, we don't believe it's fruitful that the ToR in advance limit the amount of negotiating meetings for the negotiations of the framework convention.

We also believe it's preferably not to set a specific deadline in advance for to leave sufficient flexibility for the negotiating committee to adapt its discussions to the subjects to be addressed.

Finally, we support that the ToR should also acknowledge the importance of participation by all relevant stakeholders, including non-governmental organizations.

On this backdrop we look forward to a constructive discussion and a productive Second Session in New York.