



10 June 2022

Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
Tax Treaties, Transfer Pricing and Financial Transactions Division

Sent via email: tfde@oecd.org

Subject: Comments on OECD Public Consultation Document – *Pillar One – Tax certainty for issues related to Amount A*

Ladies and Gentlemen:

We appreciate the opportunity to submit these comments on behalf of EY on the OECD's public consultation document, *Pillar One – Tax certainty for issues related to Amount A* (the Consultation Document), and to engage with the OECD on this important topic.

Similar to our previous comment letters, we provide our comments remaining mindful of the fact that the Consultation Document will not exist in a vacuum and will be impacted by the rest of the legal framework for the implementation of Amount A of Pillar One, including the rules relating to the other building blocks of Amount A on which the OECD intends to seek stakeholder input through additional consultation documents. In this regard, we again encourage the OECD to provide an opportunity for stakeholder comment on the complete set of Model Rules and related Commentary with respect to Amount A in order to obtain feedback on practical aspects of the Amount A mechanics in their entirety.

Ongoing focus on tax certainty

On the important topic of tax certainty, we encourage the Inclusive Framework to continue to work on improving the procedures available, for example by considering ways not only to ensure the resolution of disputes, but also to accelerate the provision of certainty. One approach to maintaining this focus on continual improvement could be incorporating a specific component on Pillar One certainty into the Action 14 peer review process. The peer review process should allow for input from affected taxpayers and should aim to provide greater transparency to the tax community at large on the effectiveness of the Pillar One tax certainty process.

Scope of Related Issues

As an initial matter, we would underscore the importance of clearly articulated and fully agreed rules on all aspects of Pillar One. A tax certainty process is not a substitute for clear rules. Indeed, the clarity of the substantive rules will be a significant factor in determining the effectiveness of the tax certainty process.

It will be important to carefully define what issues are considered to be related to Amount A. The Consultation Document refers to transfer pricing and profit attribution as related issues. For example, limitations on deductibility of cross-border payments that are formally or de facto applied only to related-party situations also should be considered Amount A related issues, as should withholding tax issues related to embedded royalties. Establishing a comprehensive list of related issues will not be possible until all the rules with respect to Amount A are fully crystallized. In addition, we encourage the OECD to release such a list in draft form for public consultation in order to obtain stakeholder input. Moreover, we believe that there should be ongoing review of the list of related issues as experience with Amount A is gained, to allow for expansion of the list as new potential issues are identified.

Another matter to address when defining related issues is that an issue may be clearly related to Amount A in one year, but the taxpayer may not be in scope of Amount A in one or more other years in which that issue is also under dispute. Whether a tax administration raises a transfer pricing adjustment in a year when the taxpayer is in scope of Amount A, or in a year before or after that year when the taxpayer is out of scope, should not determine whether dispute resolution is available with respect to such adjustment. Moreover, it would be impractical to have different processes applicable to resolution of the same issue depending on the year in which the issue arises. Therefore, it would be advisable to treat an issue as a related issue that is in scope of the proposed tax certainty process if it is considered a related Amount A issue in at least one year within a specified period of years (e.g., five years).

In addition, it is important to define what “directly affected” means.

Independent review of access to MAP and determination on what constitutes related issues

To ensure that access to the proposed tax certainty process is available for all eligible cases, it should be possible for businesses to obtain an independent review on matters regarding access and process, including questions on access to the MAP phase. In practice, we see many cases where access to MAP is denied or indirectly circumvented, with taxpayers having no means to question these decisions. These practices create significant uncertainty in the international tax environment. If the independent review that we propose results in a determination that there is a case for the competent authorities to consider, including a case on whether an issue is a related issue, access to the mandatory and binding dispute resolution procedure should be provided by the competent authorities. We would note that the Dispute Resolution Directive of the European Union provides for such independent reviews concerning access to MAP.

Implementation of dispute resolution panel decisions

It would be very helpful if the outcome of the proposed tax certainty process could also provide tax certainty for the coming years, for example by rolling the outcome forward.

In addition, when an issue is considered an Amount A related issue, there should be not only a binding resolution of that issue, but also a determination regarding the implications of such resolution for any recalculation of Amount A. Moreover, the rules should mandate that both decisions are implemented by all affected jurisdictions.



Interaction between tax certainty on Amount A and other available dispute resolution procedures

Prevention of double taxation is essential to the smooth operation of Amount A. If double taxation does arise, due to a transfer pricing adjustment for example, a speedy resolution should be available to avoid complicating the Amount A calculations. Given the value of timely and two-sided solutions, we suggest supplementing the proposed tax certainty process with procedures to provide early certainty, such as for example access to bilateral APA procedures or accelerated MAP and arbitration processes for those issues that are related to Amount A. Because mandatory and binding dispute resolution would be available if double taxation results, consideration could be given to including a mandatory and binding review if the competent authorities cannot agree in the APA process.

Acceleration and efficiency of the resolution of cross-border disputes are only possible if the interaction between domestic court procedures and MAP is thoroughly considered and if domestic appeals or court procedures can be suspended while MAP proceeds. We believe taxpayers should always retain access to domestic court procedures in cases where the MAP or mandatory and binding dispute resolution process does not lead to a satisfactory outcome for the taxpayer.

We believe that if multiple mandatory and binding dispute resolution procedures are available, the taxpayer should be able to choose the procedure that it considers most fitting under the given circumstances.

Role of the taxpayer

Because a decision can have far-reaching effects for the taxpayer, direct involvement of the taxpayer in the process should be considered essential. This will also help reduce the occurrence of situations where Competent Authorities spend significant time on a solution that is subsequently not supported by the taxpayer.

Therefore, we believe that the taxpayer should be given the opportunity to express its views on the case and the potential solution. With respect to the position papers by the competent authorities, the taxpayer could play a valuable role in validating the relevant facts and circumstances to reduce the potential for a decision to be made based on an incorrect reflection of the facts.

We also believe that extension of the two-year MAP period before the new tax certainty process is triggered should be allowed only if the taxpayer agrees to the extension.

Selection and independence of members of the panel

The proposed tax certainty process provides that a panel member is to be selected at random from the list of independent experts in the event that the competent authorities fail to appoint one. However, it is not clear how such random selection is to take place or who is responsible for making it. This could impact the effectiveness of the tax certainty process. A simple solution would be to specify that the taxpayer makes the selection from the list of independent experts in the event that the competent authorities fail to appoint a panel member.



We believe it would be advisable for the independence requirements for experts to be aligned to specify a period of five years since prior connection with a tax administration (or Ministry of Finance), consistent with the period since prior connection with the taxpayer. We also believe that a specific condition should be included to ensure that a panel member cannot have been involved in any examination or related activities involving the Group or any of its members in the past five years.

Moreover, we recommend publication of the requirements for the selection of panel members, as well as the professional biographies of the listed independent experts.

Transparency

We recommend that reporting specific to the proposed tax certainty process be incorporated in the annual publication of MAP Statistics, including the number of cases that are subject to this process, the issues under consideration, the jurisdictions involved, and the persons who have served as panel members.

The global EY team that prepared this submission welcomes the opportunity to discuss these comments in greater detail and to continue to participate in the dialogue as the OECD and member countries advance the work on this important project.

If there are questions regarding this submission or if further information would be useful, please contact Ronald van den Brekel (ronald.van.den.brekel@nl.ey.com), Marlies de Ruiter (marlies.de.ruiter@nl.ey.com), or me (barbara.angus@ey.com).

Yours sincerely, on behalf of EY,

A handwritten signature in black ink that reads 'Barbara M. Angus'.

Barbara M. Angus
EY Global Tax Policy Leader