



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 – A Tax Certainty Framework for 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 – A Tax Certainty Framework for 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.

We applaud the Consultation Document's quite stark depiction of the consequences of a lack of certainty: "In the event tax administrations did reach different views and proposed adjustments to a Group's tax returns, double taxation could arise involving not just two jurisdictions but potentially **every jurisdiction in which a Group sources revenue**." In this situation, mutual agreement procedure (MAP) resolution "would be **unimaginably complex**, even if ultimately certainty was assured through mandatory binding dispute resolution" (emphasis added). We would go further to state that, given that revenues for affected multinationals could be sourced in over a hundred jurisdictions, anything short of complete and administratively practical certainty would reflect an utter failure of Pillar One.

Recommendations for a streamlined approach

The OECD Secretariat should be congratulated for both articulating the foundationally critical stakes involved and recognizing the need for a sweeping solution. While the vision is appropriately bold, the proposed process has several weaknesses that we believe would interfere with achieving its laudable objectives. For example:

- There are too many cumbersome layers of review and interaction. The Consultation Document presents a conga-line of committees and subcommittees, including the involvement of various Review Panels, an Expert Advisory Group of Tax Officials, and all Affected Parties.
- The Lead Tax Administration is given a relatively small role as a coordinator, and all countries in practice participate in the determinations. We think that this approach risks bogging down the process and would be significantly improved if the Lead Tax Administration had a larger role.
- A formal Expert Advisory Group of systems specialists is unnecessary, given more practical approaches for addressing internal systems (a recommendation in this regard is discussed below). Large multinational groups are already subject to significant internal and regulatory controls (e.g., statutory auditors). Moreover, given the significant investments that are made in such systems, it can be reasonably expected that they ensure operational compliance.

Accordingly, we suggest that a more streamlined approach is warranted for both the Advance Certainty Review and the Comprehensive Certainty Review:

Step 1: Taxpayer elects to participate and submits the Amount A Common Documentation Package to the Lead Tax Authority.

Step 2: The Lead Tax Authority makes all determinations relating to Advance Certainty and Comprehensive Certainty issues.

Step 3: Any disagreements that arise from any affected tax administrations are submitted to the Determination Panel, which is itself vested with authority to resolve all issues with a determination that binds all affected jurisdictions.

Step 4: Taxpayer accepts the determination or rejects the determination with the option of pursuing an alternative approach (a recommendation in this regard is discussed below).

We appreciate that this scaled-down approach could raise concerns for jurisdictions that are not likely to be the Lead Tax Administration. We think that this stream-lined process is sufficient to secure an appropriate outcome. The Amount A determination and the related sourcing and double tax relief provisions will be primarily formulary, leaving only limited room for differing interpretations between the Lead Tax Administration and the tax administrations of Affected Parties. Moreover, the process under which the Determination Panel will work ensures discipline in the Lead Tax Administration. All else equal, the more unreasonable the Lead Tax Administration's determination, the more likely that the Determination Panel will reject it in favor of an alternative approach. This is the tax equivalent of ensuring that rivalrous epicureans fairly share a dessert: one slices and the other chooses. Accordingly, there is no need for two layers of multi-jurisdictional panel review – the streamlined process will achieve the objectives in a more practically administrable manner.

Given the need for dissemination of information to all participants in the process, confidentiality considerations, such as those reflected in exchange of information provisions in tax treaties, are vital. In

this regard, it is significant that the dissemination of information may well need to be broader than any jurisdiction's treaty network. Under the streamlined approach we propose, there would be a reduction in the layers of information sharing, reflecting the reduced processes, which would enhance taxpayer confidentiality. Moreover, sharing of information by the Lead Tax Administration is more in line with the information exchange provided for under domestic systems and would leverage to the greatest extent possible the information exchange provisions in domestic laws and tax treaties.

Additional recommendations

Advance Certainty Review

With respect to the Advance Certainty Review process, we strongly believe that there should be an option for early Advance Certainty for all aspects of Amount A, including elimination of double taxation, rather than only for sourcing (and possibly segmentation). Such comprehensive Advance Certainty Review could cover several years and be subject to specified critical assumptions, akin to those used in advance pricing agreements. Expanding the scope of Advance Certainty could significantly broaden what is mutually agreed upon up front. Moreover, a successful comprehensive Advance Certainty Review would significantly narrow the scope of future Comprehensive Certainty Reviews down to a confirmation that the critical assumptions have not been breached.

We further believe that the transitional soft-landing approach described in the Consultation Document would be equally valuable in the context of the additional issues that should be part of the Advance Certainty process.

Scope Certainty Review

We agree that it is important to have a separate process on the matter of scope that allows for up-front certainty and avoidance of unilateral compliance actions. Moreover, if a taxpayer takes a reasonable position that it is not in scope of Amount A and thus does not apply for tax certainty, but is subsequently challenged on this by a jurisdiction, we believe the taxpayer should be allowed to initiate the scope certainty process at that point.

In addition, further clarification regarding the burden of proof is needed. The Consultation Document seems to imply that the burden of proof is on the taxpayer to show that it is not in scope. We believe as a matter of sound tax policy that the burden of proving a taxpayer is in scope should be on the tax authorities. We recommend that this be explicitly provided.

Taxpayer participation in the overall certainty process

We strongly believe that there should be a more significant role for taxpayers in the tax certainty process. For efficiency, the Ultimate Parent Entity (UPE) or Surrogate UPE should be allowed to represent all members of the group as it relates to global determinations, including sourcing and elimination of double taxation. The taxpayer should have the opportunity to make representations in all phases of the process. Thus, the taxpayer should be allowed to present its own position to the Determination Panel, in addition to the tax administration's presentations of their positions. This direct participation is essential given the nature of the issues involved in this process.

Review where a Group has not made a request for certainty

The Consultation Document provides an option for tax administrations to undertake a review of a Group's Amount A Common Documentation Package on a coordinated basis in situations in which the taxpayer has not applied for certainty in advance or rejects the outcome. The Consultation Document leaves it to the tax administrations to choose whether to participate in this process.

We believe a taxpayer should have the choice of applying for certainty or not. A taxpayer should not be penalized for not having applied for certainty in advance. If the taxpayer does not apply for certainty, and one or more tax administrations adjust the taxpayer's Amount A, the taxpayer potentially will be confronted with double taxation, even if the taxpayer makes use of any available domestic rights to appeal or bilateral MAP procedures. Therefore, we believe the taxpayer should have the right to apply for the review process described in the Consultation Document even where it did not apply for certainty in advance, and tax administrations should be required to participate and would be bound by the outcome.

Documentation Packages

We note that the contents of the Common Documentation Package and the Scope Certainty Documentation Package are not yet defined. Because these are key components of the certainty process, we encourage the OECD to provide an opportunity for feedback on the content by releasing draft descriptions of the packages for public consultation once those descriptions are developed.

Confidentiality

As discussed above, the proposed tax certainty framework relies on significant information exchange between tax authorities, including sharing the Scope Certainty Documentation Package and the Common Documentation Package. The Consultation Document does not explain the mechanisms under which this information will be exchanged. It is essential that appropriate protocols that ensure the same protection as the information exchange standard under bilateral tax treaties are applicable to all exchanges of information under the tax certainty framework.

Internal controls and systems

We believe an appropriate and practical alternative to the involvement of an Expert Advisory Group of systems specialists would be to allow for a certification of taxpayers' internal controls by independent systems auditors. As noted above, we think that the development of appropriate internal systems will be self-policing, as it is in the interest of taxpayers to ensure that their systems comply with legal requirements. An independent certification would provide further confirmation if that were viewed as needed.

Timing

It is important to be clear about the overall duration of the steps that need to be completed under the tax certainty framework. This overall timeline should be linked with the timing for tax return submission in the relevant jurisdictions, as well as the timing for the filing of the Amount A Documentation Package,

which will be the basis for the tax return in the various jurisdictions. The timeline should also take into account the interaction with the GloBE return to be submitted under Pillar Two.

Consistent international interpretation and peer review process

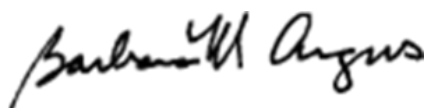
In order for Pillar One, including the tax certainty framework, to succeed, consistent interpretation of the Amount A provisions is essential. Consistency will reduce the number of challenges raised by the tax administrations of Affected Parties and allow for a more focused resolution of issues by the Tax Certainty Panels. An ongoing process for developing agreed interpretations will be essential. Moreover, the legal status of these agreed interpretations must be made clear, including their status in domestic court proceedings.

In addition, there should be a robust peer review process with respect to the implementation of the tax certainty framework itself, focused on review and determinations regarding any jurisdiction practices that are viewed as potentially non-conforming. The peer review process must be timely and efficient, and the review of the consistency of each jurisdiction's implementation of the framework should be conducted as soon as possible. Further, a robust ongoing peer review process is needed to ensure that the outcomes reached under the tax certainty process are applied appropriately by jurisdictions and that jurisdictions are delivering on their commitments as to the binding nature of the tax certainty process.

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 Ruiters (marlies.de.ruiter@nl.ey.com), Mike McDonald (michael.mcdonald4@ey.com) or me (barbara.angus@ey.com).

Yours sincerely, on behalf of EY,



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