

November 11, 2022

Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
By email to tfde@oecd.org

Re: Business Roundtable comments on OECD public consultation on “Progress Report on the Administration and Tax Certainty Aspects of Pillar One”

Dear Sir/Madam,

Business Roundtable welcomes the OECD’s commitment to working multilaterally and with the private sector to ensure sound tax policies and straightforward tax administration, which are essential to protecting investment and economic growth.

On behalf of more than 230 chief executive officers of America’s leading companies, Business Roundtable is pleased to submit comments in response to the OECD’s public consultation document of October 6, 2022 on the administration and tax certainty aspects of Pillar One.

Introductory comment: Need for further consultation on particular issues

We note that the Progress Report mentions a significant number of issues that remain the subject of debate within the Inclusive Framework. The public should be given the opportunity to provide comments when open issues are resolved.

In addition, a number of important issues are not included in the Progress Report. For example, the treatment of withholding taxes, Amount B, Digital Services Taxes and Relevant Similar Measures, and interaction of Pillar One with Pillar Two are all critical and should be the subject of public consultation.

Administration

Need for a more centralized and standardized process to reduce compliance burdens and risks

We appreciate that the Progress Report appears to have followed through on the previously highlighted goal of a streamlined compliance process through a single entity (including

centralized filing). There seem to be broad exceptions in the Progress Report, however, that will undermine the overall objective of a streamlined process, if they are not narrow and rare. Our impression from reading the Progress Report is that there are not any guardrails that would keep countries from requiring local filings and undermining this goal. Instead, we propose a simplified filing to address both exemptions and payments.

Proposed Simplified Process

The Progress Report says jurisdictions are free to tax Amount A income in any manner they deem appropriate, and groups are required to file in every jurisdiction where there is a permanent establishment. This will result in significant uncertainty regarding the Amount A liability (including the tax rate), the Amount A that must be relieved, claims for refund, and elimination of double taxation.

More specifically, we believe there should be a single, comprehensive Amount A tax return filed with the Lead Tax Administration that includes the initial Amount A residual profits for each jurisdiction; the net Amount A for the jurisdiction after application of the marketing and distribution safe harbor, withholding taxes, and other adjustments; and the applicable tax rate and net amount A tax (or amount to be relieved) for each jurisdiction. We believe all Amount A calculations should be included in the comprehensive Amount A return rather than in individual tax returns filed with every jurisdiction where the group has a taxable presence.

Rather than provide all Amount A information to all countries, we believe the Lead Tax Administration should only provide information that is relevant and material to market jurisdictions via a separate schedule. We do not see a reason from a tax administration perspective for one market jurisdiction to be entitled to information relating only to other jurisdictions. The approach taken in the Progress Report appears to ignore relevance, taxpayer confidentiality, and competitive distortions by requiring that every Affected Party will receive all Amount A information rather than information relevant to its particular jurisdiction. Each jurisdiction should only receive the relevant information needed to calculate their respective Amount A tax due. To alleviate confidentiality concerns the entire contents of the Common Documentation Package should not be shared with each jurisdiction.

Relief entities seeking to rely on Article 19 will be required to provide evidence of the payment of foreign tax in relation to Amount A within a specific period, which will result in double taxation. We recommend that the relief payment be processed in the same timeframe required for covered groups to make payments based upon the single streamlined return, in order to meet the stated goal of “mitigate(ing) the concerns of Covered Groups and the Inclusive Framework of the potential cash-flow impact of Amount A.” Businesses should not be required to seek relief from relieving jurisdictions via the local tax return. This should be part of an Amount A comprehensive filing to minimize double taxation.

Further, registration in every jurisdiction where there is no permanent establishment seems unnecessarily burdensome. The Progress Report states that certain simplifications would be “considered,” such as requirements for resident representatives and bank accounts, but given the clearly stated policy goal of streamlined compliance, such administratively cumbersome requirements should not be permitted as they completely undermine the policies of reasonable administration and certainty. Even a formal registration requirement on a country-by-country basis is overly burdensome, when assignment of a taxpayer ID (if that is the key consideration) could be accomplished through a more simplified process, and registration could lead to further challenges by local authorities (e.g., PE challenges simply because an MNE has registered in a country).

As noted, the Progress Report states that cases where streamlined compliance is not available will only arise in “very limited circumstances,” but there are not sufficient guardrails provided to ensure this outcome. The Progress Report simply says that the streamlined approach is available where the Amount A obligations “have no practical interaction with other domestic income tax items,” and this determination seems to be left up to the individual jurisdictions. That broad description is at odds with the expectation that these cases will be limited. We appreciate that in certain jurisdictions group relief may be allowed for companies with Amount A liabilities, and perhaps such a policy, on balance, would justify the additional compliance burden of local filing obligations, but companies should not be forced into new compliance requirements on a jurisdiction-by-jurisdiction basis when they are not even choosing to avail themselves of local filing benefits. This would completely undermine the objective of streamlined reporting, and therefore we recommend more explicit guidelines to ensure that separate filing requirements for Amount A are rare or nonexistent.

Need to clarify interaction with enhanced certainty process

We note that the report states that jurisdictions should not implement unilateral, additional information requirements related to Amount A. However, the statement that this would not affect a jurisdiction’s right or ability to request information as part of a review or audit is quite unclear. It should be clarified that such requests must be conducted as part of the collective certainty process, not as separate audits conducted unilaterally by tax administrations. Otherwise, such requests will significantly undermine the administrability and certainty goals of the Amount A regime.

Allowing jurisdictions to audit freely outside of the certainty process would result in significant inefficient and costly controversy for taxpayers and taxing jurisdictions. Moreover, any reopening of prior years should be strictly for purposes of providing relief and must not reopen the statute of limitations or other items.

Need to address timing of filing and payment

Further consideration should be given to how best to overlay the timing of the Amount A tax return with the filing of local corporate income tax returns. In some jurisdictions, the filing of the corporate tax return can be as short as 3 months after the taxpayer's year-end. A taxpayer should not have to amend their corporate income tax return to adjust for Amount A.

The timing of payment of tax on Amount A is indeed an issue, in several respects. We believe that further consistency with Pillar Two will be needed – more specifically, under the currently proposed Amount A filing system a group would need to register a company to pay Amount A, whereas with Pillar Two a group can identify a constituent entity or a PE to fulfil its obligations. This seems even more problematic as generally a group will need to conceptually apply Pillar One first to determine the reallocation of profits to market countries and only afterwards start the computation of effective tax rates under Pillar Two. Different filing deadlines in different countries would be problematic. Without a single filing deadline, how will it be possible to achieve consistency of timing when it comes to Amount A filing, payment and relief?

Importantly, there should be no obligation to pay Amount A before receiving relief from double taxation by the relieving jurisdictions: the suspension of payment is key. This ties in with the need for tax administrations to align their filing deadlines. More specifically, if the payment is scheduled as currently designed (i.e., 12 months to file the Amount A return with the LTA, then the LTA deals with affected countries, and then 3 months after that payment is made, i.e., 18 months after filing), the sequencing creates a problem in terms of being entitled to a foreign tax credit (i.e., the group would need to wait 18 months before getting relief from the LTA).

Thus, it would be a mistake to design a process where taxpayers will be forced to seek refunds from tax authorities to achieve double taxation relief. While a few jurisdictions might handle this efficiently, it is our clear experience that seeking and obtaining refunds can be exceedingly burdensome, delayed, or ineffective. In particular, where tax administrations are understaffed and provide refunds very slowly (not as a priority), the delay in relief may be significant, leading to double taxation and cash flow issues. To avoid these significant issues, Amount A payments could be due following the conclusion of the certainty process.

If jurisdictions are permitted to require Amount A payment before the certainty process is completed, then there should not be a requirement for taxpayers to provide evidence of payment before relieving jurisdictions have an obligation to start relief measures. Liability for payment and the obligation of double taxation relief should be simultaneous to avoid the considerable cash flow issues (and risk of double taxation) highlighted in the report, and the rules should avoid delays that could result from unneeded administrative steps separating these processes. If double taxation is not timely relieved (a risk that increases with the greater flexibility given to relieving jurisdictions on process issues), there should be a corresponding right for taxpayers to

decrease future Amount A payments, until the relieving jurisdictions have met their obligations related to double tax relief, given the cash flow consequences.

In addition, if groups are required to pay their Amount A tax liabilities on or about the same day, a requirement to translate those liabilities into local currencies could impact currency markets. It would be preferable to allow for payments using a group's reporting currency, or alternatively US dollars. We recommend that MNEs should not be required to employ complicated currency management practices in order to comply with tax payable under the Amount A rules (particularly in jurisdictions where they may not maintain operations). More clarity is also required regarding the definition of "period" in the parts of the Progress Report dealing with filing and payment.

Regarding "telescoping" and payment (mentioned in footnote 32 of the Progress Report): if a Related Issue is resolved after a Comprehensive Certainty Outcome is agreed, adjustments will need to be made to the year to which the Related Issue originally relates. Making changes to other years could lead to distortionary results (affecting thresholds for scoping, Marketing and Distribution Profits Safe Harbor, Elimination of Double Taxation, etc.). Adjustments would be made for that issue alone, leaving all other decisions under the Comprehensive Certainty Outcome unaltered. The difference for each Party payment resulting from this adjustment would then be an adjustment in the current year. In this way, the Related Issue adjustment still has the same financial effect as if it had been made in the appropriate year, but for logistical ease, payments are only adjusted in the current year (in which the Related Issue is resolved). The calculation of these adjustments would then be reviewed in the audit for the current year.

Exemption method is better than credit method for double taxation relief

As there are numerous challenges with using the credit method to eliminate double taxation, we view the exemption method as the only viable approach if the existing tax administration system is relied upon to administer the Amount A rules.

It appears that the Progress Report gives relieving jurisdictions a choice of methods. We recommend that an exemption system be the required mechanism for double taxation relief, since too many problems and unintended consequences are likely to result from credit-based relief. In the unfortunate case that credit systems are allowed, we believe that strong requirements must be in the rules to ensure that double taxation relief is actually realized in a reasonable amount of time. Credit systems often have limitations (timing and otherwise), and bolting elimination mechanisms onto existing credit systems could lead to ineffective double tax relief or could displace other relief, resulting in less than full double tax relief to Amount A taxpayers. A credit system that does not have immediate relief (and relies on carryforwards) may lead to cash flow issues and/or double taxation (e.g., if credits keep getting carried forward because of lack of sufficient limitation or taxable income in future years). A rule could be implemented that requires a refund if credits cannot be used after a specified period of time,

although securing refunds can be a challenging process in certain jurisdictions. A rule that permits relieving jurisdictions to limit credits to taxable income, without a timeframe for guaranteed relief, is not a reasonable rule. An exemption system would be much less complex, but if a credit system remains an option, we strongly recommend that universally applicable draft rules for credit systems be published for a public consultation in the near future, so that stakeholders can ensure that these systems will meet the stated goals of double tax relief under Pillar 1 eliminations.

Single taxpayer versus multiple taxpayer approach

Most of our members support the single taxpayer approach, while some feel it is impossible to determine which approach is better without a more complete picture of the administration rules.

Those supporting the single taxpayer approach do not believe that the issue of availability of cash is a limiting issue, since proper capitalization can be managed. The multiple taxpayer approach could be variable from year to year (changing entities), leading to significant compliance logistics problems. Further, it raises many issues around identifying specific liable entities within a jurisdiction, and how relief is allocated (e.g., waterfall, pro rata, etc.) to Amount A jurisdictions. This is unnecessarily complicated and would lead to disputes and lack of certainty.

Further, the push-down of the elimination mechanism to individual entities in a jurisdiction is unnecessary. A pro-rata approach for allocating relief would be problematic if there were a large number of entities in the jurisdiction. If the single taxpayer approach is adopted, a group should have the option of selecting the most appropriate single taxpayer, and there should not be secondary liability for local entities. Payments between group entities to fund Amount A tax liabilities should not be subject to any withholding tax or indirect tax issues. In our view it should be possible to address this in the Multilateral Convention.

If the multiple taxpayer approach were used, groups should be able to elect which entity in each jurisdiction would be liable for the Amount A tax.

In our view, taxpayers should not be subject to interest on Amount A taxes, because the relieving jurisdictions, not the Covered Group, have the use of the money until payments are made.

Tax Certainty for Amount A

Need to Expand the Scope of the Advance Certainty Review

We believe that the scope of the Advance Certainty Review needs to be broader than only revenue sourcing and segment reporting. To achieve the goal of advance tax certainty, all methodologies involved in the Amount A computation of the Covered Group (including elimination of double taxation, the marketing and distribution safe harbor, withholding taxes,

etc.) need to be within the scope of the Advance Certainty Review, with agreement on such methodologies in advance of the year in question.

Confidentiality Concerns

As stated above, while we appreciate the Progress Report's recognition of the importance of confidentiality, we would like more clarity on the confidentiality obligations of tax administrations and consequences for breaches. Further, as noted above regarding the Amount A tax filing, the full package of documentation, covering sensitive worldwide data, should not be sent to every participating country in the world. To respect confidentiality concerns, only the data required by the jurisdiction should be sent to a particular jurisdiction. As stated above, rather than provide all Amount A information to all countries, we believe the Lead Tax Administration should only provide information that is relevant and material to market jurisdictions via a separate schedule.

The Proposed Internal Control Framework Review Is Unworkable

MNEs are already required to have systems, controls and processes in place which are reviewed by the independent external auditors of the company as part of their audit of financial accounts. Since Amount A rules are based on these consolidated financial statements, existing processes and audit reports should be relied upon.

To elaborate, the Progress Report envisions both an Advance Certainty and Comprehensive Certainty review process, each with government experts that will focus on assessing the adequacy of a taxpayer's internal control framework for Amount A: *"A Review Panel will be supported by an Expert Advisory Group of systems specialists that will provide advice as to the reliability of the Group's internal control framework."* Where the Expert Advisory Group (EAG) determines the tax control framework is unreliable, the EAG is to *"recommend changes or additional controls to be introduced for future Periods."* In such case, the EAG may also propose alternative revenue sourcing methods. If the EAG concludes that no actions can remediate the taxpayer's Amount A tax control framework, the review of the issues where the framework is unreliable shall cease. The EAG is to be comprised of *"systems specialists drawn from a pool of tax officials with experience in undertaking systems reviews of Groups, nominated by Parties to the Convention."*

We struggle to understand the rationale or need for setting up the EAG as part of the Tax Certainty Process. Few tax administrations have staff with the necessary experience or expertise to evaluate taxpayers' Amount A tax control frameworks. Understanding and evaluating tax control frameworks is not, to our knowledge, a core competency of most tax administrations. Even for those administrations that have the relevant experience, the number of qualified staff is likely to be fewer than needed to staff the reviews. The proposal that the EAG would analyze a taxpayer's *"business and financial management systems and its enterprise resource planning*

software” as part of evaluating a taxpayer’s Amount A tax control framework adds to our concern. Although a taxpayer’s overall financial control framework is critical to the reliability of the taxpayer’s Amount A tax control framework, the adoption of such language implies that the scope of the EAG’s review would be all encompassing across the entirety of the taxpayer’s financial control framework. Such a review would be intrusive and would duplicate reviews that are already carried out for non-tax regulatory purposes. Given the ongoing and extensive reviews of taxpayers’ financial control frameworks, we believe that, for purposes of determining compliance with Amount A, only the tax control framework for the application of Amount A should be subject to review. Note, however, that even with this defined scope, we believe that few tax administrations will have the resources needed to evaluate taxpayers’ Amount A tax control frameworks.

As an alternative to the above structure, we suggest requiring in-scope taxpayers to provide the Lead Tax Administration a Letter of Attestation by an independent auditing firm that evaluates the reliability and effectiveness of the taxpayer’s Amount A tax control framework. We believe that an attestation of compliance is a better means of providing the necessary comfort to tax administrators regarding the reliability of the Amount A tax control framework for in-scope taxpayers. Such an engagement could take the form of either an examination or agreed-upon procedure that would assess (i) the taxpayer’s compliance with specified laws, rules, or Advance Certainty agreements (e.g., the issues, process and revenue sourcing indicators agreed in the Advance Certainty Review) and (ii) the taxpayer’s internal control over compliance with such specified requirements.

It would be helpful to understand the more specific intended processes and level of review to better comment on how the internal controls review can be streamlined, practical, and efficient. The rules state that an opinion of auditors may be considered but not conclusive. To better facilitate review, more reliance should be placed on existing auditors that have greater knowledge of taxpayers’ systems and business practices. The type of data required for analysis under Pillar 1 is unique (not generally used for tax calculations), extremely voluminous, complicated, and non-standardized. It is imperative that proper guidelines are set to ensure this process does not become a fishing expedition, get bogged down in excessive granularity, or demand an unreasonable or a disproportionate amount of resources from taxpayers. Given the granularity of data, and that relevant data concerns individual users and customers, it is also important that this process does not put confidential or otherwise non-public information at unnecessary risk. To avoid these risks and unintended consequences, we recommend that more detailed guidelines be developed for this audit process and released for public consultation, so stakeholders can collaboratively work out the most reasonable approaches.

Composition of Determination Panels

In our view, it is preferable that Determination Panels be composed of government officials only, in order to minimize the risk of confidentiality breaches, ensure oversight and accountability, and

develop a consistent approach among governments as the application of the Amount A rules is broadened over time.

In addition, if an expert advisory group is adopted, we suggest that there be a formal evaluation process to ensure candidates are qualified and meet rigorous background check specifications. There should also be a process to remove experts from the panel.

Regarding observers, we note that the report states that “an observer would be subject to the same confidentiality requirements as tax officials participating on the Review Panel, including with respect to information obtained by its tax administration under exchange of information provisions in the Convention.” We suggest more rigor be applied to ensure confidentiality. If this approach is adopted, we recommend that observers undergo a robust background screening and adhere to strict confidentiality guidelines with oversight by the tax authority which sponsors them. Further clarity is required regarding who will train these experts. Observers should only be permitted if both the Lead Tax Administration and the Covered Group consent.

Other issues

The additional details and timeline for the transition period regarding revenue sourcing (3 years of flexibility to use allocation keys and 6 years for flexibility for information reporting) are helpful for understanding the compliance requirements, and we appreciate the recognition that systems changes are costly and time consuming, so reasonable rules will take that into account. In our view, the Advance Certainty process should be completed with methodologies agreed to before the beginning of the first tax year to which it relates. At a minimum, an MNE should not be required to pay Amount A tax until the process is concluded and an extended soft-landing period should apply.

The rules should clarify that Advance Certainty for a Covered Group’s Revenue Sourcing approach also includes the type of documentation that will be required to support that approach, since that is one of the most important considerations in systems setups.

We believe that it is preferable from a policy perspective to progress the review when a recommendation has won the agreement of a supermajority of Affected Parties. This will prevent individual countries without a material stake from blocking progression of a recommendation that has substantial support among the Affected Parties. There should also be a materiality threshold to minimize the opportunity for jurisdictions with little or no revenue at stake to delay the process.

In our view, the LTA should always act as chair and oversee any review initiated where a Covered Group has not requested certainty. The LTA should also be responsible for ensuring that only relevant and material taxpayer information is provided to other Affected Parties to ensure confidentiality of taxpayer information. In addition, we suggest that relevant information be

exchanged only with the tax authorities of countries whose stake in the outcome exceeds a materiality threshold.

Regarding the timing of a request for Scope Certainty Review by the Coordinating Entity of a Covered Group, the timing contemplated in the Progress Report is too late and would lead to considerable uncertainty, including affecting the taxpayer's audited financial statements for the relevant period. This process should be made available to the Coordinating Entity well in advance of the Period(s) to which the determination will apply. Further guidance is needed in this area.

We note that the report states that a country should not propose changes inconsistent with the findings of a Scope Review Panel "unless this is necessary for the correct application of the Convention." This exception is vague and could swallow the rule, resulting in all cases going to a determination panel.

Regarding the time for preparing an updated documentation package at the request of the LTA, we note that the report recommends 90 days. We recommend that this limit be subject to the possibility of an extension agreed between the LTA and the Coordinating Entity based on the facts and circumstances. We believe that the Coordinating Entity should have a meaningful role in the process and an opportunity to provide feedback and perspective on changes requested.

We note that the report states that, in a Comprehensive Certainty Review, an LTA may undertake reviews "for up to [four] Periods most closely preceding or most closely following the Period specified in the request for Comprehensive Certainty, simultaneously with the review for that Period." We suggest that it should be for up to five years, not four.

The consequences for acting in a "non-transparent" or "uncooperative" manner (including incomplete information) are very significant – losing protections of the Review Panel process – so the relevant failures should have to be material before these consequences ensue. Also, we propose that all panel members must agree that a material failure has occurred (not just two thirds of the panel). If a Covered Group's behavior is sufficiently unacceptable to warrant removal of certainty protections, that should be clear to all panel members.

While there may be interest in exploring how all interested IF members can participate in the panel process (as referenced in footnote 69), the most important focus should be on getting to certainty in an administrable manner, so any compromises to allow for greater involvement cannot undermine the overall objective.

We have previously provided comments on the de minimis thresholds of 1% and 5% that were set for any Review Panel requests to change amounts in a Covered Group's documentation. Since those recommendations were not accepted, we reiterate that these thresholds are too low, and recommend that they be increased to at least 5% and 10% respectively.

We appreciate the clarification that a Review Panel will not propose a different revenue sourcing methodology for a prior year without confirming first that proposed methodology data is actually available.

Given the overall length of time for resolution, a Covered Group may have entities that are required under local laws to file amended returns for a year under review, so it would be helpful to have guidance on how that should be managed (e.g., notification of changes to the Lead Tax Administration), to ensure full transparency and to avoid any disruption of the process of reaching certainty determinations.

Finally, we are not in favor of the creation of a Tax Certainty Secretariat. We suggest that the activities indicated to be performed by the Tax Certainty Secretariat should instead be performed by the LTA.

Tax Certainty for Issues Related to Amount A

In our view, having issues related to Amount A dealt with in a separate certainty process from the Amount A certainty process could raise coordination and timing issues. Issues related to Amount A should therefore be part of the Amount A Comprehensive Review.

We strongly support the addition of Article [Y], and are encouraged that the drafters responded so constructively to comments highlighting gaps for cases not currently covered by bilateral tax treaties. It is critical for the proper functioning of the certainty framework to maintain and reinforce this necessary article.

Domestic anti-avoidance rules should be covered under these rules to ensure that they are not used to over allocate profit to a jurisdiction, while bypassing the certainty process or undermining other aspects of Pillar One. More broadly, we believe that issues beyond transfer pricing and attribution of profits to a PE should be considered “Related Issues.”

Notification to the Covered Group alone should not permit Competent Authorities to continue to reset the MAP timeline for resolution beyond two years. It would be preferable to allow the Covered Group to decide if the new proposed time frame is reasonable for resolution, which if accepted would ensure an extension of time. It is appreciated that the report notes that any delay should be short, given the objective is timely resolution, although it would also be helpful to have rules or more explicit timing guidelines to reinforce that objective.

A Covered Group should not be required to demonstrate the specific quantitative impact that resolution of the Related Issue would have, especially since this would not be certain in any case before completion of other certainty processes. It should be sufficient to explain why it is the type of issue that could have an impact on the application of Amount A rules.

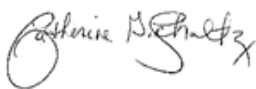
Given that the dispute resolution process uses a last-best offer approach to decision making, the subsequent ninety-day period to decide to agree to a separate proposal is unnecessary, and deters from the overall objective of accelerating resolution and certainty. As noted, the chosen proposal would be from one of the Competent Authorities, so that Competent Authority should already believe it is a supported solution. Assuming another round of negotiations would prolong resolution and introduce a sort of gaming of the dispute resolution mechanism to bargain in negotiations. This does not seem to align with the objectives of these rules.

Under these rules, Competent Authorities are permitted to extend timelines when they agree the Covered Group failed to provide additional material information requested by either Competent Authority. It is appreciated that the rules note it must be “material,” although it is important that this exception is not overused by making repeated, unusually burdensome, or late requests that unfairly prolong timelines.

Finally, for panels on issues relating to Amount A, as for panels on Amount A, it is important that panelists ensure confidentiality and there is government oversight over the panelists.

Business Roundtable urges the Inclusive Framework to take the above comments into account in its work on the administration and tax certainty aspects of Amount A. We appreciate your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine Schultz". The signature is fluid and cursive, with the first name "Catherine" written in a larger, more prominent script than the last name "Schultz".

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