

Comments on the Public Consultation Document concerning Pillar One - A Tax Certainty Framework for Amount A

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Business Infrastructure Bureau, KEIDANREN

We thank you for the opportunity to submit our comments. We appreciate that the tax framework for Amount A is designed to ensure predictability for taxpayers. As the scope of Amount A is significant and the rules governing it are entirely new, it is crucial for tax authorities to comprehensively understand the rules and enforce them properly. The success of Amount A depends on taxpayer's ability to obtain tax certainty.

While we recognise the importance of each tax authority thoroughly reviewing the new rules, we also submit the following comments, which focus on helping MNE Groups prepare for implementation of Amount A, and improving understanding of the overall process. This document is submitted by the Keidanren's Business Infrastructure Bureau on the basis of discussions held by the "Corporate Liaison Group on Pillar 1 - Amount A¹". It would be desirable that further public consultations on the overall Amount A framework is launched.

1. General comments

Three elements of a possible Tax Certainty Framework are presented in the Public Consultation Document (hereinafter "the Document"); an Advance Certainty Review, a Comprehensive Certainty Review, and a Scope Certainty Review. In each case, the starting point for a request is the Coordinating Entity of an MNE Group. In deciding whether to make a request, it is essential to consider; the number of days required for each type of tax certainty review, the procedures required, and whether the requesting entity's claims will be reflected in the review in a timely and appropriate manner.

Hence, while the length of time required for each type of Certainty Review is not confirmed by the Document, we request a reduction in the time required in each case. The proper functioning of the Tax Certainty Secretariat is critical, given that each element involves competent authorities in all the Affected Parties or

¹ Please see footnote 1 of our comments on the revenue sourcing rules:

<https://www.keidanren.or.jp/en/policy/2022/018.html>

Listed Parties.

Furthermore, each Certainty Review requires submission of a Common Documentation Package. Its contents need to be specified. Once a Certainty Review has begun, enquiries made to the Coordinating Entity by Affected Parties or Listed Parties should go through the Lead Tax Administration centrally.

Currently, an MNE Group is allowed to state their opinions only when the Certainty Review goes to a determination panel. This should be changed to allow the MNE Group to make statements at each stage of the Certainty Review process.

Given that Certainty Review Outcomes are anonymised, it would be useful for guidance including those outcomes to be released publicly and provided to MNE Groups considering a request for a Certainty Review.

Finally, Tax certainty under Pillar 1 should not require additional review and audit of existing public financial statements.

2. Specific Issues

2.1 Advance Certainty Review

2.1.1 Transitional approach

We welcome the consideration of a transitional approach. According to the October Statement, a review of Amount A will take place 7 years after the agreement comes into force. Transitional measures should be valid for reasonable and sufficient periods before the review. During the transitional periods, compliance activities in each jurisdiction should be suspended and no interest, delinquent taxes or penalties should be imposed.

Firstly, it is important to define clearly the “reasonable efforts” to be made by an MNE Group in the case of the “soft landing” approach set out in Part 1 Paragraph 12 of the Document. In addition, we would like to understand the cases in which “easier access to Allocation Keys” will be permitted when implementing the revenue sourcing rules. We understand that one such case may be where Reliable Indicators are available but cannot be collected easily or in a timely manner due to system constraints or transaction practices. Conversely, additional requests for data that cannot be collected should be avoided. It should be clarified that the use of allocation keys is always permitted in the case of components.

Secondly, we note that other “non-binding ways to support Groups in complying with the revenue sourcing rules” (Part 1 paragraph 13 of the Document) include structured engagement and feedback from tax administrations. We understand that this will be equivalent to a pre-filing

consultation in an Advance Pricing Arrangement (APA) application. This should allow an MNE Group to request support in adapting to the revenue sourcing rules on a voluntary basis. For instance, a two-stage consultation model could be developed. First, the ultimate parent entity (UPE) should be allowed to consult with the Lead Tax Administration on any questions they may have, and the Group's preparation for the new rules, in an unstructured format without set requirements. In the second stage, a more formal pre-consultation system should be established, including the disclosure of specified information to tax authorities in the jurisdictions of constituent entities.

Part 1 Paragraph 14 of the Document states that "A Group's first request for Advance Certainty would be made when it files its Common Documentation Package for first year of Amount A". However, it would be preferable to complete the Review prior to filing the Amount A Common Documentation Package. The OECD should consider bringing forward the period in which an Advance Certainty request can be made.

2.1.2 Scope

Part 2, Section 2, Paragraph 10 of the Document states that the scope of a request for an Advance Certainty Review may include the Group's Revenue Sourcing approach and/or the Group's Segment Reporting Approach, as well as the Group's internal control framework.

This scope should be expanded to include the application of the Marketing and Distribution Profits Safe Harbour, the method of identifying paying entities and the elimination of double taxation to ensure greater tax certainty.

Secondly, it is not realistic for MNE Groups to establish a new internal control framework specific to the requirements of Pillar 1, given the limited time available. It should be possible to use an existing internal control framework which is subject to statutory audit, based on the MNE Group's existing practices.

Part 2, Section 3, Paragraph 61 of the Document states that when agreement is reached following a request for an Advance Certainty Review, the Outcome will be valid for three years initially, and for five years following subsequent requests if the Review Panel agrees. We consider this period to be too short. The Outcome should be valid for at least five years, except in cases where taxpayers inform the Lead Tax Administration of a significant change in the facts underlying the Outcome, or if the Outcome otherwise becomes invalid. This approach could reference the transfer pricing concept of critical assumptions which must be met

in order to maintain an APA. Advance Certainty Reviews should also be renewable.

Furthermore, Part 2, Section 3, Paragraph 64 of the Document states that a “Relevant Change” will cause an Advance Certainty Outcome to cease to apply. Part 2, Section 3, Paragraph 65 then states that a Relevant Change includes “a change to the organisational structure...of the Group”. MNE groups generally undergo reorganisations at various levels on a regular basis. In light of this, it should be clarified that reorganisations with limited impact on an MNE Group (e.g., mergers, demergers, acquisitions, liquidations) do not constitute “a Relevant Change” and therefore do not cause the Outcome to cease to apply.

2.2 Comprehensive Certainty Review

Part 2, Section 2, Paragraph 2 of the Document states that the coordinating entity of an MNE Group should include “a Power of Attorney or other confirmation...from all Group entities that they agree with the content of the Common Documentation Package” in its request for a Comprehensive Certainty Review. However, some MNE Groups have well over a thousand constituent entities. Practically, it will be extremely difficult to obtain agreement from all constituent entities on the Group’s application of the Amount A rules. As the ultimate parent entity will conduct the required Amount A calculations on an aggregated basis, the coordinating entity should bear sole responsibility for the content of the Comprehensive Certainty Review request. A similar approach should be adopted when requesting a Scope Certainty Review (Part 2, Section 1, Paragraph 2 of the Document).

Secondly, following the outcome of a Comprehensive Certainty Review, Part 2, Section 2, Paragraph 32 of the Document sets materiality thresholds which should be met before a Competent Authority of an Affected Party can submit written comments that propose adjustments to amounts in the Common Documentation Package. We consider that the level of these thresholds is extremely important in avoiding unnecessary complication. We believe the thresholds in Paragraph 32 (b) (i) and (ii) should be set at 5%, and the thresholds in Paragraph 32 (b) (iii) and (iv) should be set at 10%, at least in the initial periods following the introduction of Amount A.

Furthermore, with respect to Footnote 30 of the Document, if a Comprehensive Certainty Review results in adjustments to the allocation of Amount A, the adjustment should be made in or after the period in which the issue is resolved, rather than being retrospectively applied to the earlier period in which the issue

occurred. This should reduce the complexity of conducting adjustments.

It should be noted that the filing of an amended tax return by a constituent entity of an MNE Group should not be deemed a withdrawal of a request for a Comprehensive Certainty Review, nor should a withdrawal of the request be required.

2.3 Scope Certainty Review

Part 2, Section 1, Paragraph 1 of the Document states that “At any time after [the last day of a Period], the Coordinating Entity of a Group may submit a request...for multilateral certainty that it is not a Covered Group for the Period”. There should be a set number of days in which the Scope Certainty Review process is to be completed.

The Scope Certainty Review diagram at the head of Part 2 Section 1 of the Document also states that “where there are disagreements within a Scope Review Panel or Listed Parties do not agree a recommendation, disagreements are sent to a Determination Panel for resolution.” This places the MNE Group in an uncertain position where it is not clear whether it is in-scope. Given that there are clear tests for scope and rules for exclusions, the OECD should consider establishing the principle that only the Lead Tax Administration conducts Scope Certainty Reviews to reduce the time required.

2.4 Determination Panel composition

Part 2, Section 6 of the Document sets out the composition of a Determination Panel. Prior to the Determination Panel, all Review Panels and Expert Advisory Groups will have been composed of personnel from the tax authorities of the jurisdictions concerned. Therefore, to ensure neutrality and fairness, a Determination Panel should either be composed entirely of independent experts, or have a majority of independent experts. The experts could be appointed by a neutral body, such as the tax authority of a third-party jurisdiction, and should not have any interest in the jurisdictions concerned.