INTERNATIONAL CHAMBER OF COMMERCE
The world business organization

ICC comments in response to OECD public consultation document on the *Draft Rules for Tax Base Determinations* under Amount A of Pillar One

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide input on the OECD public consultation document on the Draft Rules for Tax Base Determinations under Amount A of Pillar One. ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment. ICC is also an established arbitral institution through its International Court of Arbitration and provides other dispute resolution mechanisms through its International Centre for Alternative Dispute Resolution.

General comments

ICC appreciates the efforts made to ensure that the tax base determinations rules have been designed to establish the profit (or loss) of an in-scope MNE that will be used for the Amount A calculations to reallocate a portion of its profits to market jurisdictions. The rules determine that profit (or loss) will be calculated on the basis of the consolidated group financial accounts, while making a limited number of book-to-tax adjustments. In this regard, ICC welcomes the opportunity to provide input on how to better adjust the developed rules to operational realities.

To this end, ICC provides the following general comments:

- In view of the current thresholds, a limited number of multinational enterprises (MNEs) will fall in scope of the new nexus rules and as such would need to calculate a tax base for Amount A purposes. However, it is clear that the same MNEs will also be subject to the Pillar Two minimum taxation rules, where a tax base will need to be determined too. For this reason, ICC believes that the adjustments to the net consolidated income foreseen in Pillar One should be kept as simple as possible, with the objective to eliminate items that are not appropriate to measure the residual economic profit of an MNE.

  ICC members believe that the rules on tax base determination should be structured to allow for consistency wherever possible in order to ensure administrability, considering the need for simplicity and workability of the new tax rules. It would also be helpful to rely on a unique set of relevant definitions for the main terms used to determine the tax base for both Pillar One and Two calculations.

- As specific rules for those Groups that are subject to segmentation for Amount A purposes have not been released yet, no feedback can be provided at this point in time. However, ICC members believe that specific rules for segmentation should be guided by the need for simplicity.

- ICC believes that maintaining a balanced compliance burden for Covered Groups should also be considered as a pertinent objective in order to limit the administrative complexity for taxpayers who are subject to an increasing number of reporting obligations.

- Complex rules for determining the tax base would be detrimental not only for the business community but also for many tax administrations who may have limited technical capabilities and resources. Lack of clarity and differences in interpretation for implementing the rules may lead to increased instances of double taxation and disputes. In this respect, ICC once again reiterates the importance of robust dispute avoidance and dispute resolution mechanisms for jurisdictions that adopt the OECD guidance. It is critical that a co-ordinated, centralised dispute resolution mechanism be put in place for all aspects of Pillar One and Two.

- The consolidated financial accounts of a Covered Group will show 100% of the revenues and profits of a consolidated subsidiary. This is also the case when the Covered Group has an ownership interest of (far less) than 100%, for example when a shareholder agreement grants the Covered Group control over the company even if it owns less than 50% of the voting capital. However, the draft does not appear to provide for any further adjustment that could be used to remove relevant revenues or profit that economically do not belong to the Covered Group.

  ICC members believe that this seems counter-intuitive, given that the Covered Group in effect seems to be paying Pillar One Amount A tax based on revenues and profits that economically do not belong to it.

  Example:

Item	UPE	Subsidiary	Consolidated	Mark
Profit	1000	100	1100	N
Covered Group share		51%		
Minority interest share of profits			-49	
Income attributed to UPE			1051	Y

  Recommendation:
  The Amount A Tax Base Determination should provide for an adjustment mechanism for cases where a Covered Group has a controlling interest but less than full (100%) ownership in one or more Group Entities. The adjustment mechanism should reflect the economic reality that not all revenue and profit (or loss) belongs to the Covered Group.

- In accordance with the OECD's overarching objective to foster innovation, it is important that all pre-regime and in-regime losses are carried forward on an unlimited basis. This approach would continue to encourage innovation and reflect the economic characteristics of industries with long investment cycles, as well as ensure symmetry. The cost for innovation would otherwise remain in the innovator countries, while only successful investments are, at least partly, taxed in other jurisdictions than the innovators. The innovators and the countries that have created the

environment for innovation would need to be attributed their fair share of the surplus. Furthermore, there should be consistency with the Pillar Two rules on utilisation of losses. Pillar Two does not provide for a time limit on losses, and the Amount A calculation should not do this either. ICC members reiterate the need for certainty and the adoption of one set of rules to enhance clarity and consistency. Pillar Two provides a transition rule to take into account losses that have been incurred prior to the effective date of the rules, and this should also be applicable under Amount A, with the losses used in future years to offset income.

Specific comments:

1. Title 9, Footnote 12 (page 8) Art. 5 (2) (a) iii sets out that, for the purpose of book-to-tax adjustments, some specified items of income will be reversed, including equity gains (or loss). Title 9 contains various definitions, including the definition of equity gains (or losses). Footnote 12 clarifies that under the current draft rules gains and losses associated with disposal of asset interests are included in the Tax Base, whereas gains and losses associated with disposal of equity interests are <u>not</u>.

   ICC members believe that for Amount A purposes, the tax base should be based on recurring operating activities, which should not include either share or asset transfers. Including one type of transfer and not the other in the tax base for Amount A would be inconsistent. The current local taxing rules of such gains/losses may differ across jurisdictions, but the intent of these rules is to create a uniform standard to be applied consistently across all jurisdictions.

2. Title 9 (page 8) provides the definition of "Policy Disallowed Expenses". The current definition is wider than the one under Pillar Two (including the threshold). Furthermore, the scope of fines or penalties should be limited to those fines or penalties **imposed by a government**, to also rule out that commercial contract penalties are included.

   ICC therefore suggests the following wording (in **bold**) to be added to the definition of "Policy Disallowed Expenses":
   "Policy Disallowed Expenses" means expenses, ***whether or not periodic,*** *included in calculating the Financial Accounting Profit (or Loss) of a Covered Group under a Qualifying Financial Accounting Standard for illegal payments, including bribes and kickbacks; and fines or penalties,* ***imposed by a government.***

   ICC further recommends providing additional clarification in the Commentary to limit the scope of Policy Disallowed Expenses and, in particular, to clarify that commercial contract fines or penalties are not in scope.

3. Article 5(2)(b) and 9 (page 5; 7) cover the definitions for Eligible Restatement Adjustments for the period.

   Article 2(b) of the draft Model Rules outlines the treatment of restatement adjustments in the computation of the Financial Accounting Profit (or Loss). Restatements of accounting income for prior year(s) would be reflected in the tax base for the period in which the restatement is identified and recognised.

The restatements reflected in the tax base are subject to limitations (as set out in the definition of “Eligible Restatement Adjustments”). The current draft proposes an applicable cap on the Eligible Restatement Adjustment for the Period. The level of the cap will be subject to further analysis to balance competing objectives of simplicity and avoidance of excessive single-year impacts. Input from stakeholders is requested on the restatement adjustments.

ICC notes that a basis in principle for limiting adjustments from the application of IFRS to 0.5% of revenues is not observed. From the outset, the Covered Group would normally not significantly influence (the timing of) relevant adjustments, including those arising from new or amended IFRS Standards, corrections of errors, or voluntary changes in accounting policies. All such adjustments must be made in accordance with IFRS and subject to audit. Furthermore, operationally, this is likely to result in an additional layer of complexity and administrative burden for both tax authorities and covered MNE Groups.

It seems likely that these requirements would also continue to apply for any MNE Group that would be “moving in and out” of the scope of Amount A of Pillar One. Indeed, in all these cases, an additional administrative burden and complexity would be added to control a record of adjustments separately from its GAAP books if a restatement exceeds the restatement cap (0.5% of revenues in the period) for the purpose of calculating a cumulative effect on the unrelieved net losses carry forward. This administrative burden would also arise in respect of other book-to-tax adjustments.

In this regard, ICC recommends considering removing the cap for these restatements, and the consequential administrative cost and complexity.

4. Article 5 (2)(a) (page 5) provides the definition and examples in relation to “Equity Gain or Loss”.
    - In particular, Article 5(2)(a) outlines required book-to-tax adjustments in the computation of the Financial Accounting Profit (or Loss). It states that (specified) items of income and deducted expenses must be reversed. This includes Equity Gain (or Loss).
    - The data that supports some of the required “book-to-tax adjustments” is held at country level. MNEs are at present not set up to collect this data at the Group level. As a result, implementation is likely to be challenging in the initial years, with time consuming manual adjustments and interpretation issues expected. The OECD should make some provision for these teething issues.
    - Footnote 3 further clarifies that the Commentaries will elaborate on the practical application of the exclusion of specified equity gains and losses. It further notes that this item should be excluded to ensure that the tax base of a Covered Group does not include specified gains or losses generated by another entity.

Additionally, in this regard, the following questions arise: i) How are items of Other Comprehensive Income (OCI) treated? ii) Are these brought into the calculation? If not, there will be different tax implications for items recycled/reclassified to profit or loss and those items that are not.

Whilst OCI is excluded from the definition of Financial Accounting Profit (or Loss), on page 7 of the public consultation document, ICC recommends providing further details on what exactly is defined as equity gain or loss under the rules and why, supported by examples of the practical application of the exclusion of specified equity gains and losses, including examples in respect of i) a subsidiary, ii) an associate and/ or iii) a JV. Moreover, it may be useful to include further guidance and/ or clarification as to how items of Other Comprehensive Income (OCI) are treated.

5. Article (c) (page 8) of the Equity Gain or Loss definition states that profit or loss derived from a Joint Venture (JV) should be excluded from calculating the Financial Accounting Profit (or Loss) of a Covered Group under a Qualifying Financial Accounting Standard. However, it is unclear as to why JVs and associates are treated differently when the accounting is the same.

   With respect to the distinction/Exclusion of treatment for the reversal of income/expense of Profit or loss derived from a Joint Venture (JV) - for IFRS accounting purposes, JVs are accounted using the equity method as an equity interest.

   ICC suggests removing the difference in treatment for JVs and associates, or alternatively, provide sufficient explanation/clarification.

ICC remains committed to providing knowledge and expertise on behalf of the global business community.

ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.