



ICC comments in response to OECD public consultation document on Extractives Exclusion 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 Extractives Exclusion 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 recognises that the Extractives Exclusion approach reflects the policy goal of excluding the economic rents generated from location-specific extractive resources that should only be taxed in the source jurisdiction, while not undermining the comprehensive scope by limiting the exclusion in respect of profits generated from activities taking place beyond the source jurisdiction, or later in the production and manufacturing chain.

To this end, ICC provides the following general comments:

- ICC members share the policy objective of protecting sourcing countries' tax base.
- ICC appreciates the step-by-step approach as an ordered methodology to address the application of the exclusion.
- ICC also notes that the current drafting of the document is quite complex and burdensome for MNEs, particularly for the application of Step 3. ICC therefore underscores the importance of developing simplification measures for the application of the Extractives Exclusion, as indicated in paragraph 5. However, the simplification measures should apply not solely to Step 2, but equally to Step 3 as well. ICC members also suggest that commentary with implementation guidance should also be released for public consultation in order for stakeholders to provide their input and views.
- ICC members strongly support the adoption of an initial transition period in view of administrative costs as well as the learning curve necessary to apply these rules.
- ICC members note that the exclusion should be simple to administer and based on clear, objective and standardised gateway tests.
Notably:
 - The exclusion should be based as much as possible on [already] publicly available information, keeping adjustments to such information at a minimum.

- The precise terminology should be used with no room for ambiguity or multiple interpretations.
- ICC members believe that the principled approach should govern the exclusion.
 - The source jurisdiction creates a significant part of the extractives taxable value by granting the right to extract the resource. The profit margins belonging to the resource owning country should not be reallocated to the market jurisdiction.
 - The processing following extraction is mainly essential in preparing the resource, which is unusable in its extracted state, for movement to market and objective value determination.
 - Commoditised goods, such as metals, minerals, oil, natural gas are homogeneous and fungible. Such products are traded on international markets and products are sold based on indexed prices. Throughout the value chain leading to the ultimate consumer, the margins for these resources are dictated by external global market forces, such that the enterprises engaged in these extractive activities have no control over them.
- ICC members believe that application rules and relating dispute resolution mechanisms should be standardised and centralised. Attention in this regard should also be given to the legal instrument implementing these rules.

Specific comments:

1. Step 1 refers to a “disclosed segment (where the exceptional segmentation rules apply)”. ICC is of the view that “exceptional segmentation rules” should not apply to the Extractives industry.
2. Step 2 (par 11-31) aims at identifying Extractives Activities and applying the Revenue Threshold to in-scope revenue.

ICC members agree that due to the nature of the definition of “Extractive Activities” the delineation point will in many instances (most notably where para 27(b) apply, but also where 27(c) or (d) apply) be at a point where there is no third-party revenue.

ICC members agree that a ‘shortcut’ which enables the group to proceed directly to Step 3 is a useful simplification mechanism to remove the additional compliance associated with Step 2 for those groups which will not meet the threshold for Step 2 and will need to proceed to Step 3 in any event. In this respect, ICC proposes that this shortcut should be an annual elective option made available to large groups, regardless of whether or not a group has third party extractives revenues. ICC members also agree with the comments made in para 15 on the consequences that would arise if the group was required to identify revenues at the granular level.

For many/most groups they will have a number of delineation points which will likely be a mix of delineation points where there are third party revenues (i.e., because the delineation point is at the sale to a third party) and where there are not third party revenues.

Para 14 appears to suggest that where a group has a delineation point at either 27(b), (c) or (d), the group would proceed to Step 3 where a group has no third-party revenue at any of the relevant delineation points. In members' experience, there would be very few instances in practice where this would be relevant in our experience. As noted above, it is more likely to be the case that the group will have a mix of delineation points where there is both third party revenue and no third-party revenues. Clarity is therefore required on the circumstances in which a group can move straight to Step 3.

Depending on the fact pattern of the relevant group, a group may have sufficient third party revenue at the delineation point such that an application of Step 2 results in satisfaction of the Step 2 threshold – i.e., there is no need to proceed to Step 3. This may be the case even where there are additional delineation points relevant to the group where there are no third party revenues (e.g., the majority, but not all, of delineation points for that group involve third party revenue).

Significant simplification could be achieved in this scenario if groups can apply Step 2 even if they have some delineation points which do not involve third party revenue (e.g., under 27 (b-d)). The simplification comes from the removal of the requirement to apply Step 3 if the Step 2 threshold can be met. On the other hand, a group which has a weight of delineation points that do not involve third party revenue will receive simplification benefits from being able to skip Step 2 and proceed directly to the more granular, and arguably more accurate, analysis under Step 3.

This approach would provide significant simplification benefits.

In addition, simplification can be achieved if the large groups with non-extractive turnover consistently exceeding revenue threshold could proceed straight to Step 3 based on, for example, one-off election.

Finally, some groups may already be required to separately report oil and gas producing activities (e.g., oil and gas companies listed on NYSE have an obligation regulated by the SEC and the FASB to disclose revenue and profit before tax information related to their oil and gas producing activities in their 20-F). We would welcome a simplification that would allow groups to electively use this as an alternative approach by leveraging other such publicly reported data as a proxy for their relevant excluded vs in-scope revenues and profits, where this data aligns with the policy objectives.

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Par 17-18 - Definitions of “Extractive Activities” and “Extractive Product”.

ICC members note that there does not appear to be anything in the paper which suggests that a group which is undertaking Extractive Activities, but which also purchases material from another party (related or non-related –

e.g., either for blending or per the JV example provided below) as an input into that activity is required to bifurcate revenues.

e.g., What is the outcome in relation to blending where a group may purchase third party material to blend with its own material to create, for example, a grade which is more marketable to customers?

What is the outcome where there is a UJV where each JV partner takes title to their share of the extracted material however one JV party (A Co) chooses to sell its share of its material to another JV party (B Co) who may own, for example, the processing facility for the next stage of the process? In this instance, the delineation point for A Co is the sale to B Co. Is the revenue earned by B Co on the sale of the material to the end customer eligible for the carve out (subject to the tests in para 25)? This point is similar to the blending point above.

ICC members believe this is appropriate and note that to do so would involve a significant compliance burden and likely unintended consequences. Material purchased in these circumstances is merely an input cost to processing one's own product. An integrity rule based on volume or costs could be considered however we don't believe this could not reliably be used to split the revenues into excluded / in-scope.

3. Step 3 (par 32-52) aims at identifying excluded and in-scope profits.

Paragraph 5 notes ongoing work related to simplification where the in-scope profit margin is consistently below the 10% profitability threshold. This paragraph also notes the possibility of an initial transition period to enable Groups to adjust systems.

The extractives industry is in a unique position in respect of the Pillar One rules in that not only will it have the base complexity relevant to the Pillar One rules, but it will also have additional complexity associated with the fact that the industry will be required to bifurcate its accounts between excluded and in-scope revenue/ profits/ costs etc. ICC members believe that every effort should be made to find simplification solutions, particularly with respect to Step 3. Compliance with the requirements will necessitate extensive systems changes which are both time consuming and very costly. A transition period will provide much needed time for extractive groups to implement the rules in an orderly, accurate and auditable manner. ICC members recommend a [2 year] transition period in which no penalties, interests or adjustments are imposed by tax authorities as long as MNEs show their best efforts to apply these rules.

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Paragraph 33 refers to the determination of profit margin where delineation involves an intragroup transaction (i.e., 27 (b)).

ICC members agree it is important there is an accurate identification of profits and profitability of non-Extractives Activities to ensure the threshold in Step 3 is not breached as a consequence of inflated profit margins

produced by the mathematical formulas, and that any resulting reallocation is not likewise inappropriately inflated. Where this is not achieved, residual profits from Extractives Activities will be allocated to market jurisdictions under Amount A. As noted in para 33, this will be of vital importance to Groups which perform activities across the extractives value chain.

In determining the relevant profit margin under Step 3, the result for a Group which undertakes an integrated value chain should not differ in principle from the outcomes that would be relevant to Groups that are not engaged in Extractives Activities but are engaged in the same processing activities.

Where the determination of in-scope revenue under Step 3 takes total revenue and then subtracts the excluded revenue, the profit margin will be artificially inflated compared with a standalone refining business.

The commentary in para 35 appears to recognise this point by indicating that in the determination of outcomes under Step 3 for a “downstream” segment which predominantly derives revenue from manufacturing products purchased from the upstream segment must not remove the extractives revenue from the downstream segment.

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Entity-level Approach application

Paragraph 34 indicates that "First, the Group must identify its in-scope profits, using either the Disclosed Operating Segment approach or, where this approach is not applicable (either because the Group does not have Disclosed Operating Segments or where it cannot reliably attribute revenue and costs as described below), the Entity-level approach. Once the in-scope profits are identified, the profitability test is re-applied."

Similarly, later Paragraph 44 states that, when identifying excluded profit in Step 3, where a Group is not able to reliably allocate expenses across segments and calculate segment profits or otherwise cannot meet the conditions for using the disclosed operating segments, the Group must use the Entity-level Approach.

It follows from this that the rules prioritize the Disclosed Operating Segment Approach over the Entity-level Approach.

However, groups who carry out activities related to Extractive Product may not break up / disclose their segments in a way following the definition and Delineation Point of Extractive Activities in the Draft Rules. Instead in certain cases it may be more reasonable and require less compliance / administration cost for a Group to apply the Entity-level Approach.

In this regard, ICC recommends allowing groups to select the Entity-level Approach directly according to their actual situation without a need to test and prove the Disclosed Operating Segment Approach which in the first instance is not applicable.

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- ICC notes that the proposed “Disclosed Operating Segment Approach” poses much more technical and practical challenges than those admitted in the document. The allocation on “unallocated costs” to come up with the in-scope profit introduces a level of subjectivity and complexity which could also increase difficulties to audit such calculations and lead to potential disputes. Groups should therefore be able to rely on segmental accounting rules in determining how costs should be allocated, and where costs remain ‘unallocated’ under segmental accounting rules, objective and clear criteria should determine how they are to be allocated across disclosed operating segments.
- ICC also notes that if the product is not going to be exported, any additional revenues achieved in the country where the product is extracted, should also be excluded from the application of Amount A rules.

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.