



ICC comments in response to OECD public consultation document: Tax Certainty Framework for 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 Tax Certainty Framework for 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.

ICC appreciates work undertaken to develop a Tax Certainty Framework for Amount A, which is intended to guarantee certainty for in-scope groups over all aspects of the new rules, including the elimination of double taxation. ICC welcomes any progress made to enhance tax certainty and ensure consistent application of the new rules, which is key in establishing a robust and well-functioning system that does not hamper economic growth and investment.

In this regard, ICC welcomes the opportunity to provide input with respect to the Tax Certainty Framework for Amount A.

To this end, ICC provides the following general comments:

General comments

- ICC members would like to respectively point out that a two-week consultation period is largely insufficient in order to thoroughly analyse the consultation documents and provide relevant input. Additional time would be appreciated in order to afford appropriate reflection and response. Furthermore, ICC members assume that there will be an additional opportunity to review and contribute to any further iterations of the Tax Certainty Framework. ICC members also note that likely adoption and implementation of the rules by countries has not been addressed.
- ICC reiterates the importance of designing clear rules and procedures to ensure that the application of the Pillar One rules do not result in instances of double taxation. ICC members would also appreciate a better understanding on how these rules and procedures would interact with Pillar Two.
- In this respect, ICC further notes the need for simplification of the rules to provide additional clarity, avoid differences in interpretation and facilitate consistent application across jurisdictions.

- Currently, it is challenging to determine how effectively this process will work with a significant number of tax administrations and whether the system will be applicable in practice.
- ICC highlights the need for capacity building, which will be key to ensure appropriate training and resources for all tax administrations across jurisdictions, which would limit the risk of double taxation.
- ICC members note that there are many references to a common documentation package, however, the content is yet to be determined. In view of this, it would be helpful to have more clarity on what would be included.
- ICC members suggest that there should be a materiality/relevance threshold relating to participation and sharing of documents. A materiality threshold should also be imposed based on the dollar amount material to the taxpayer.
- ICC members note the strong and repeated qualifications and reservations in the documents which indicate that no consensus has been achieved to date on the proposed mechanisms and processes. ICC respectfully recommends providing a revised version of the documents for further consultation once consensus has been established on the main features of the system, which would be useful for MNEs to better understand the global framework.
- ICC members believe that there needs to be stronger confidentiality language added throughout the document with the LTA being the funnel to ensure only relevant data is provided. Only one reference to confidentiality is currently made towards the end of the document. As currently drafted, all market jurisdictions will have access to the data.
- ICC members believe that the Advanced Tax Certainty review does not cover key features of Amount A, for which MNEs will require early confirmation. It is understood that the early review panel would only cover the scope of Amount A (whether an MNE is in or out of the scope) and the methodology used to apply the sourcing rules. The determination of the taxable base to be allocated and, essentially, the elimination of double taxation would only be reviewed as part of an ex-post comprehensive review process, which may extend to a much longer period, and that may make the guarantee of no double taxation difficult to achieve in practice..
- Furthermore, ICC members consider that there should be early advanced certainty for all Amount A methodologies (not simply for sourcing) in advance of the year in question, so agreement is made on methodologies rather than actual numbers. In effect, this approach will reduce possible disputes.
- As it is understood, the rules related to the elimination of double taxation will include the safe harbor mechanisms to address situations where the residual profit is already taxed in the market countries. ICC

members hold that it is critical that this item be reviewed from the onset (i.e., beginning of year 2024) so that in-scope MNEs can have early certainty on the implications that Amount A may or may not have on their level of taxation in each country where they operate.

- ICC members therefore strongly urge the OECD Secretariat and the Task Force on the Digital Economy (TFDE) to reconsider this position and ensure that all key aspects of Amount A are reviewed from the onset as part of an early certainty process.
- The absence of any mandatory deadlines for each of the panels to deliver a final conclusion is particularly concerning, given the length of the existing MAP procedures and the resources required in order for the various panels to function effectively.
- ICC members suggest that there should be a maximum period for the panel to provide its conclusions. If no conclusion has been reached after that period, the position taken by the MNE should be deemed acceptable by the lead tax authorities and all parties interested in the Amount A allocation.
- ICC members remain concerned about the planned detailed review of the internal control and the MNE systems in place as part of the tax certainty panel. The objective of this approach is unclear and unnecessary.
- In order to release their financial statements, MNE have systems, controls and processes in place, which are already reviewed by auditors.
- As Amount A rules are based on these consolidated financial statements, existing processes and audit reports should be relied upon. It is suggested that auditors could issue a statement confirming the audit of the internal controls and systems as part of the year-end audit. ICC members strongly urge the Secretariat and the TFDE to review and amend this point, which had not previously been communicated and would increase the administrative burden as it would require unnecessary time and resources for both taxpayers and tax authorities.
- ICC members also question how many of the envisaged review and ruling processes would correspond with existing national/EU legislations/constitutions, particularly in the case of reliance upon the judgment of non-governmental experts, or when not all countries are engaged in the decision-making process. ICC members consider this to be a critical point as Amount A goes far beyond the existing international tax cooperation instruments: it will determine the level of tax revenues collected by a State for in-scope MNEs.
- The proposal recognizes that certainty is more than a discussion on technical concepts and must cover both whether the approach follows the rules AND whether it is implemented in a robust / reliable way. This is strongly supported.

The proposal explicitly recognizes the important role that an Internal Control Framework (ICF) (comprising well designed systems, processes and controls) can play in providing assurance. Again, this is strongly supported.

There is currently no single agreed tax or international standard regarding the design and operation of internal control frameworks. The proposal is not explicit regarding the scope of the ICF expert review.

ICC members believe that the proposal regarding ICF could be improved by:

- Including specific clarification that the proposed expert review should only cover those data points relevant to P1 and incremental to those data points already required elsewhere for financial reporting purposes.
 - Providing a clear frame of reference for the expert review through either 1) developing and publishing a detailed ICF design and operation blueprint or 2) designating certain existing ICF standards (such as US SOX and its equivalents in other countries) as sufficient. Option 2 is recommended as this leverages the significant body of knowledge and experience within many MNEs and only requires incremental improvements and expansion of an existing ICF rather than the operation of a second and independent ICF solely for P1 data points.
 - Requiring expert review recommendations regarding incremental P1 Data points to fit within any existing suitable ICF (such as US SOX) in order to avoid MNEs being required to run duplicate ICFs.
- The selection of the pool system is concerning, particularly with respect to confidentiality. If confidentiality is violated, then taxpayer protection is compromised. The notion of providing "observers" will provide an opportunity to lose control of taxpayer confidentiality.
 - It is unclear how the review panel and expert advisory group actually audit/review documentation and control framework.
 - With respect to sourcing, it would appear that the panel could categorize taxpayers into the global allocation key if it is impossible for the business to obtain the information required.

Specific comments:

1. Page 8 Para 11

Comparable benefits could arise from applying the same approach to some other aspects of the new rules, such as a Group's methodology for applying rules on segmentation. ICC members believe that the segmentation reportable approach should be excluded from the scope of advance certainty because portable operating segments are already disclosed in public financial statements, and therefore are already audited by independent auditors and already subject to oversight from regulators. ICC members note that this should also apply to elimination, MDSH, withholding taxes, etc.

2. Page 8 Para 12

The ideal process for administering Amount A is highly dependent on the design and successful implementation of the early certainty process. The process should be completed before the beginning of the first tax year to which it relates. ICC members believe that, at a minimum, an MNE should not be required to pay Amount A tax until the ECP is finished.

3. Page 8 Para 15

Clarifies that Advance certainty will apply for a set number of future years, so long as there is no relevant change.

Para 22 seems to suggest that outcomes of the tax certainty process apply so long as a Group:

- does not withdraw its request; or
- undertake steps outside of the multilateral process to reduce the profit before tax allocated to a Party, or
- increase the amount of relief to be provided for the elimination of double taxation, under the Convention.

However, Para 65 seems to suggest a wider variety of circumstances where an Advance Certainty Outcome ceases to apply. Relevant Changes for this section include:

- a) a change to the organizational structure, business activities (including marketing and distribution activities) or financial and tax accounting methods of the Group, or
- b) a change to the design or operation of the internal control framework of the Group that means the controls to ensure the accurate reporting of information with respect to an approach covered by an Advance Certainty Outcome may no longer be robust and reliable.

ICC members recommend providing further guidance on what is to be understood as a “relevant change”. In this respect it could be considered to include a materiality threshold, for instance by building on an approach similar to the one described in para 32 where a competent authority will refrain from proposing adjustments in cases where these adjustments/ impacts are less than [5 or 10] percent of PBT, relief provided, allocation of group PBT, etc.

4. Page 9 Para 17

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. ICC members do not support the creation of an expert advisory panel as it is unnecessary given that the MNE’s systems and processes are already audited.

5. Page 9 Para 19

Where **all** Affected Parties agree with this recommendation, the review progresses to the second phase or ends with certainty for the Group, as relevant. Where **one or more Affected Parties do not agree**, or if the Review Panel itself did not reach an agreement, the specific issues on which there is disagreement are referred to a Determination Panel for resolution.

ICC members believe that this will result in some countries delaying the process.

6. Page 9 Para 20

The composition of a Determination Panel is under consideration and could include independent experts, government officials or a combination of independent experts and government officials. ICC members suggest that Determination panels should be limited to government officials from the Lead Tax Administration (LTA), Surrender, and Affected Parties who are subject to oversight from their governments/legislatures and can provide continuity.

7. Page 9 Para 21

ICC members agree that a Determination Panel can only choose among options proposed to it by the tax administration. If agreement by consensus is not possible, then ICC members suggest agreement by majority.

8. Page 10 Para 25

The Framework contains an option for any number of tax administrations to cooperate and undertake a review of a Group's Amount A Common Documentation Package on a coordinated basis, although the process for this cooperation is deliberately left flexible and tax administrations may choose not to participate. ICC members question whether the LTA participates, and if so, what would be the course of action should the LTA object.

9. Page 13 Para 6

The tax administrations of **all** Listed Parties shall suspend all domestic compliance activities with respect to the application of Parts II to V and Section 1 of Part VI of the Convention to the Group for the Period specified in the request, for the duration of the Scope Certainty Process. ICC members note that nothing in this paragraph requires a Listed Party to suspend compliance activity with respect to any matters not covered by the Convention or with respect to Related Issues. In this case, ICC members question who decides should there be disagreement, and how the taxpayer would thus be protected.

10. Page 14 Para 11

The Scope review panel shall comprise of: (a) the Lead Tax Administration, and (b) [six] tax administrations other than the Lead Tax Administration, selected at random from the Listed Parties that submitted an expression of interest. ICC members would be interested in having further information on who makes the selection and how the selection is made at random. Would this be the Tax Certainty Secretariat?

11. Page 14 Footnote 4

Some members hold the view that further Scope Certainty Reviews should be undertaken by a Scope Review Panel after a specified number of years or upon a trigger event. ICC members agree, to the extent that this is reasonable.

12. Page 15 Para 12
The tax administrations in (b) and (c) shall be selected at random from the Listed Parties that submitted an expression of interest. ICC members request clarity as to whether the Secretariat would make the selection.
13. Page 16 Para 16
At any point before the Scope Certainty Review is completed, the Competent Authority of **any** Listed Party may submit to the Competent Authority of the Lead Tax Administration details of any concerns it has with respect to the application of the Convention to the Group contained in the Scope Certainty Documentation Package and propose resolutions to address these concerns. ICC members suggest considering a materiality threshold.
14. Page 24 Para 41
If the Competent Authority of one or more Listed Parties submitted written comments disagreeing with the recommendation of the Lead Tax Administration, which were not subsequently withdrawn, the issues on which there is disagreement shall be submitted to a Determination Panel for a final outcome, under Section 5. ICC members would be interested to know whether this will result in all issues being referred to the Determination Panel.
15. Page 25 and 26
For both the comprehensive and early certainty reviews, there should be distinct and clear confidentiality and information protection protocols (*limited to relevant information*). ICC members hold that TFDE members should agree that exchanged Amount A documentation package/information can be used only for the administration of the agreed Amount A certainty process and not for other tax administration purposes. If a jurisdiction is found to have improperly disclosed or misused exchanged information, the jurisdiction will be found to have breached its commitments under the MLC such that it would not be able to impose any Amount A tax and information exchange would be suspended. A jurisdiction that does not abide by its commitments to protect the exchanged information and use it appropriately will have violated the MLC, and that jurisdiction should not continue to be allowed to assert an Amount A taxing right.
16. Page 26 para 2
A request for Comprehensive Certainty shall be filed along with the Group's Common Documentation Package for the Period, including a Power of Attorney or other confirmation from the Authorised Representatives of the Ultimate Parent Entity and all Group Entities that they agree with the content of the Common Documentation Package and to any changes agreed by the Coordinating Entity". ICC members believe that this should be implied.
17. Page 27 Para 9(a)
When a Coordinating Entity submits a Group's Common Documentation Package for a Period, this may be accompanied by a request for multilateral certainty with respect to one or more of its approaches listed in paragraph

10, to commence from a future Period specified in the request (Advance Certainty). The request shall be in a format set out in [to be agreed] and shall include agreement by the Coordinating Entity, (a) to the exchange of the following information by the Competent Authority of the Lead Tax Administration with Competent Authorities of Affected Parties. ICC members note that this suggests that the common document package should only be provided to relevant tax authorities with a materiality threshold. The same applies with (b) on page. 28.

18. Page 28 para 10

The early certainty process should also cover marketing and distribution profits safe harbor (MDSH), elimination, and payor entity mechanisms.

“Note: A request for Advance Certainty shall also include the Group’s internal control framework to ensure the correct application of the approaches re: sourcing and segmentation (including allocation of costs) and the reliability of information reported. A request shall be accompanied by an Advance Certainty Documentation Package with content set out in [to be agreed]. Parties may agree to add further approaches to those in this paragraph, to enable Advance Certainty to be requested across more aspects of the Convention and related controls.”

19. Page 28 Footnotes 11

Fn. 11 – provides that: some members hold the view that the need for a process to provide Advance Certainty over a Group’s Segment Reporting Approach is not clear. ICC members would be interested to know how the internal control framework would actually be reviewed in practice. ICC members respectfully suggest being able to rely on controls review by independent auditors.

20. Page 29, par 1d)

Para 1 (d) seems to indicate that Comprehensive Certainty relates to a longer period of at least [five] years (footnote 12 and 13 giving further clarification)

ICC members support Comprehensive Certainty relating to a longer period of time, for instance for a period of at least [five] years.

21. Page 29 Footnotes 12 and 13

Some members hold the view that a Comprehensive Certainty Review should be undertaken by a Review Panel of Affected Parties more frequently or upon trigger events.

“During a transitional period, a process will be coordinated to randomly allocate approximately the same number of Covered Groups to four batches, based on anonymised data on the Covered Groups filing a Common Documentation Package for the first Period that rules apply. In order to avoid a concentration of Review Panels in a single year, Affected Parties will be able to propose a second review by a Review Panel if a Group submits a request for Comprehensive Certainty either two years, three years, four years or five years after the first Review Panel review, depending upon which batch the Group belongs to. Thereafter the [five]

year period specified in paragraph 1(d) shall apply.” ICC members would be interested to know whether the taxpayer has certainty during this period, if not in the first batch. Furthermore, who would randomly select the covered groups?

22. Page 30 Para 5

A Review Panel shall comprise of: (a) the Lead Tax Administration, (b) the tax administrations of [three] Affected Parties not in (a) that, based on information in the Common Documentation Package, are required to provide relief for the elimination of double taxation, and (c) the tax administrations of [three] Affected Parties not in (a) or (b). 6. The tax administrations in (b) and (c) shall be selected at random from the Affected Parties that submitted an expression of interest. ICC members note that surrender jurisdictions should be included based on materiality (not random) and there should be a materiality threshold for the affected parties. Furthermore, clarity should be provided on who randomly selects as well as the random selection process.

23. Page 30 para 6

“The tax administrations in (b) and (c) shall be selected at random from the Affected Parties that submitted an expression of interest. Where the number of Affected Parties from either of these categories that expressed interest in participating on the panel is lower than [three], the remaining places on the Review Panel shall be filled by tax administrations from other Affected Parties that submitted an expression of interest, selected at random. Where the total number of Affected Parties that expressed interest in participating on the panel is lower than [six], the remaining places shall remain unfilled.” ICC members believe that all times payor and market jurisdictions should be equal in number.

24. Page 30 para 7&8

Para 7 clarifies that whenever a Review Panel is established to undertake a Comprehensive Certainty Review or Advance Certainty Review, an Expert Advisory Group of systems specialists is established to undertake a review of a Group’s relevant internal control framework and provide advice to the Review Panel as to whether this framework is reliable or if any improvements are needed in order for it be considered reliable.

Para 8 sets out that an Expert Advisory Group shall comprise:

- a. one systems specialist selected by the Lead Tax Administration from the Main Systems Specialist Pool, who will act as Chair of the Expert Advisory Group, and
- b. [two] further systems specialists from different Affected Parties, selected from the Main Systems Specialist Pool at random.

Page 31 (box) clarifies that criteria that nominated specialists are expected to meet shall be agreed by the Parties, but it is for each Party to determine whether its nominated specialists meet these criteria.

ICC members recommend building in safeguards as needed to ensure that system specialists in practice meet the relevant criteria.

25. Page 31

Expert Advisory Group: “An Expert Advisory Group shall comprise of: (a) one systems specialist selected by the Lead Tax Administration from the Main Systems Specialist Pool, who will act as Chair of the Expert Advisory Group, and (b) [two] further systems specialists from different Affected Parties, selected from the Main Systems Specialist Pool at random.” ICC members believe that if an expert advisory group approach is adopted, at all times payor and market jurisdictions represented should be equal in number.

26. Page 31

Expert Advisory Group: “An Expert Advisory Group shall comprise: (a) one systems specialist selected by the Lead Tax Administration from the Main Systems Specialist Pool, who will act as Chair of the Expert Advisory Group, and (b) [two] further systems specialists from different Affected Parties, selected from the Main Systems Specialist Pool at random.” Once again, ICC members hold that if an expert advisory group approach is adopted, at all times payor and market jurisdictions represented should be equal in number.

“...Criteria that nominated specialists are expected to meet shall be agreed by the Parties, but it is for each Party to determine whether its nominated specialists meet these criteria.” ICC members consider that there should be a formal evaluation to ensure candidates are qualified.

“There is no limit to the number of nominations a Party may make, but a maximum of [three] specialists from a particular tax administration, shall be added to the Main Systems Specialist Pool. Other specialists from the same tax administration shall be added to the Substitute Systems Specialist Pool. Members of the Substitute Pool may participate on Advisory Groups where a selected member of the Main Pool is not available.

Where a Party has no or a limited number of tax officials that it considers meeting these criteria, it may put forward a number of officials as observers. Observers could benefit from specific training in conducting a review of a Group’s internal control framework and also participate in one or more reviews as an observer to a review for which the tax official’s tax jurisdiction is an Affected Party, to gain experience.”

ICC members believe that there needs to be taxpayer protections for observers and requests further information on who will train the observers.

“Where a Party has no or a limited number of tax officials that it considers meet these criteria, it may put forward a number of officials as observers. Observers could benefit from specific training in conducting a review of a Group’s internal control framework and also participate in one or more reviews as an observer to a review for which the tax official’s tax jurisdiction is an Affected Party, to gain experience.” ICC members note the need for strict and enforceable confidentiality protocols and NDAs if this

approach is adopted. ICC members also consider that a review of the internal control framework is unnecessary.

27. Page 31 Footnote 15

“This does not reflect the final or consensus views of the Inclusive Framework with different views held by members with respect to the composition and number of experts in the Expert Advisory Group, as well as criteria for the nomination of systems specialists to the Main Systems Specialist Pool and the Substitute Systems Specialist Pool.” ICC members do not agree with the creation of this pool.

28. Page 33 para 11

“Where a Scope Certainty Review or Follow-Up Scope Certainty Review for the same Period concluded with an agreed Scope Certainty Outcome, an Affected Party, including a member of the Review Panel, that was a Listed Party for that Scope Certainty Review, should not propose changes that are inconsistent with that Scope Certainty Outcome unless this is necessary for a correct application of the Convention, in which case this shall be explained.” ICC members believe that this is vague and threatens the credibility of the process if not further elaborated with taxpayer protections.

29. Page 34 Para 12(g)

“Jurisdiction-level financial statements for the purposes of applying rules on [the Marketing and Distribution Profits Safe Harbor and the Elimination of Double Taxation.” ICC members stress the need for confidentiality.

30. Page 34 Para 13

“Where the Expert Advisory Group identifies aspects of this internal control framework that may not be robust or reliable it shall discuss its findings with the Review Panel to obtain evidence to determine whether the framework is in fact robust and can be relied upon.” ICC members question how the Expert Advisory Group will do this in practice and who controls the documents to ensure confidentiality.

31. Page 34 Para 14

“Future Comprehensive Certainty Reviews will consider whether changes or additional controls recommended by the Expert Advisory Group and accepted by the Review Panel have been introduced.” ICC members believe that the LTA should ensure that all recommendations are practical, reasonable, and that the benefits exceed the costs of change.

32. Page 34 Para 18

“The Review Panel and Expert Advisory Group may test factual information contained in the Common Documentation Package or provided by the Coordinating Entity, to verify its accuracy.” ICC members request clarity on how this would be implemented.

“Unless otherwise agreed, all engagement with the Group throughout the Comprehensive Certainty Process shall be conducted by the Lead Tax Administration through the Coordinating Entity.” ICC members agree with this approach.

“Where a need for additional information or clarification is identified for the purposes of this review, it shall be required from the Coordinating Entity by the Lead Tax Administration. In general, the Coordinating Entity should be required to provide this information or clarification within [30 days], unless the Coordinating Entity provides a reasonable explanation as to why more time is needed.” ICC members believe that this time limit is not reasonable.

33. Page 34 Para 19

“At any point before a review by the Review Panel and Expert Advisory Group is completed, the Competent Authority of any Affected Party not participating on the Review Panel may submit to the Competent Authority of the Lead Tax Administration details of any concerns it has with respect to the application of the Convention to the Group reflected in the Common Documentation Package and propose resolutions to address these concerns.” ICC members believe that this should be limited to relevant material.

34. Page 35 Para 21

“The Review Panel should not propose a recommendation that is inconsistent with earlier agreed Comprehensive Certainty Outcomes for the same Group unless this is necessary for a correct application of the Convention, in which case an explanation of the reason for this shall be included in the summary of outcomes of the review”. ICC members consider that this is vague and threatens the credibility of the process if not further elaborated with taxpayer protections.

35. Page 36 & 49 Para 26 and 3

“If, in the view of the Review Panel, the Coordinating Entity is persistently late in providing information to the Lead Tax Administration without explanation or is acting in an un-cooperative or non-transparent manner, including by providing inaccurate or incomplete information, this issue shall be raised with the Coordinating Entity. Where this issue is not resolved, a majority of Review Panel members may conclude that a Comprehensive Certainty Outcome cannot be provided. The Coordinating Entity shall be informed of this outcome by the Lead Tax Administration and the Comprehensive Certainty Process shall be brought to an end without an agreed Comprehensive Certainty Outcome.” ICC members believe that similar language should be applied to allow for taxpayer protections in cases where the affected parties/review panel are not acting in good faith. Panel members acting in bad faith should result in the MNE’s positions accepted as filed.

36. Page 39 Footnote 18

“Members hold different views as to whether a materiality threshold should apply to the adjustments proposed by an Affected Party, and as to the appropriate level of a threshold if one did apply. Members also hold different views as to whether such a materiality threshold should apply to adjustments proposed by the Review Panel when undertaking a Comprehensive Certainty Review under this Section.” ICC members agree that there should be a materiality threshold.

37. Page 40 Para 36

“The Lead Tax Administration shall require the Coordinating Entity to prepare and file an amended Common Documentation Package within [90 days] reflecting these changes.” ICC members recommend an amount of time agreed with the LTA.

38. Page 4 Para 37

“If the Coordinating Entity does not agree to prepare an amended Common Documentation Package it shall be deemed to have withdrawn its request for Comprehensive Certainty after a Comprehensive Certainty Outcome had been agreed: (a) with respect to issues covered in the first phase of the review, or (b) with respect to issues covered in both phases of the review.” ICC members consider that the approach needs to provide more balance regarding taxpayer protections.

39. Page 46 Para 58

“The Competent Authority of the Lead Tax Administration shall exchange the amended Advance Certainty Documentation Package with the Competent Authorities of the Affected Parties, and the review shall conclude with an agreed Advance Certainty Outcome.” ICC members suggest that the documentation package should also only provide information specific to that market jurisdiction or payor jurisdiction.

“If the Coordinating Entity does not agree to prepare an amended Advance Certainty Documentation Package it shall be deemed to have withdrawn its request for Advance Certainty.” ICC members note that in this case the coordination entity should have every opportunity to explain its position. Furthermore, changes to the documentation package should be practical and have impact commensurate with the costs of implementation.

40. Page 48 Para 62

“Where paragraph 58 applies and the Review Panel accepts that the Group does not have or will not have data available for it to apply the agreed approach for the first Period covered by Advance Certainty, the Advance Certainty Outcome may agree that the Group can use an alternative approach for this Period. The Group shall be required to collect the information necessary to use the agreed approach for future Periods.” ICC members would be interested to know whether there is a way to adjudicate in the event that the taxpayers believe this is impossible.

41. Page 48 Para 66

“Where a Group anticipates or becomes aware of a Relevant Change, the Coordinating Entity should inform the Lead Tax Administration of this fact. The Competent Authority of the Lead Tax Administration shall then share this information with the Competent Authorities of Affected Parties. When the Coordinating Entity next submits the Group’s Common Documentation Package for a Period that has ended, it may also submit a new request for Advance Certainty under Section.” ICC members request further clarity in this regard.

42. Page 49 Para 2

“The Lead Tax Administration may undertake the reviews for up to [three] Periods most closely preceding or most closely following the Period specified in the request for Comprehensive Certainty, simultaneously with the review for that Period.” ICC members suggest considering a period of five years.

43. Page 50, 51

“Within [30 days] of a determination under Section 1 that one or more issues considered as part of a Scope Certainty Review or Follow-Up Scope Certainty Review will be submitted to a Determination Panel for a final outcome, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of **all** Listed Parties.” ICC members note that the term “all” is also used in other situations and note the need to provide a materiality threshold /relevance test.

44. Page 53, para 7(e)

Page 53, para 7(e) clarifies that the Lead Tax Administration shall provide members of the Determination Panel any explanation provided by the Coordinating Entity as to the position it took with respect to any item on which the Listed Parties or Affected Parties have not reached agreement, even where this position is not one of the alternative outcomes supported by the Scope Review Panel, Review Panel, Lead Tax Administration, or one or more Listed Parties or Affected Parties and presented to the Determination Panel for it to choose between.

ICC members support the view that an MNE should be able to provide an explanation to the Determination Panel as to the position it took, including a position that is not one of the alternative outcomes put to a Determination Panel to choose between, in addition to the alternative outcomes presented by the Parties

45. Page 53 Footnote 22

“Some members hold the view that any explanation by the Coordinating Entity as to the position it took, including a position that is not one of the alternative outcomes put to a Determination Panel to choose between, should not be provided to the Determination Panel as, in their view, this would be inconsistent with the resolution mechanism.” ICC members believe that a coordinating entity should have an opportunity to make its perspective known and understood as the Coordinating Entity is in the best position to understand its business and factors impacting the calculation.

46. Page 54 Footnote 23

“The approach to be used by a Determination Panel to choose between more than two alternative outcomes where there is no overall majority support for one outcome is to be agreed. The examples included here are illustrative only and their inclusion does not suggest that one of these approaches will be adopted nor that an alternative approach will not be adopted.” ICC members believe that this presents an overly complex ranking system.

47. Page 56 Para 11

“As described in Section 6, the composition of a Determination Panel is not yet agreed. To the extent necessary, measures would be put in place to ensure the confidentiality of information provided by Groups and exchanged by the Lead Tax Administration with members of the Determination Panel for the purposes of this section.” ICC members believe that the Determination Panel should be limited to governments, including the LTA, surrender jurisdictions, and market jurisdictions.

48. Page 57 Para 16

“Where the Coordinating Entity submitted a request for Comprehensive Certainty under Section 2, and the decisions of the Determination Panel with respect to issues referred to it following a review under Section 3 or Section 4 require changes to the Group’s Common Documentation Package, the Coordinating Entity shall be given [90 days] to prepare an amended Common Documentation Package reflecting these decisions as well as changes previously agreed by Affected Parties, and to file this with the Lead Tax Administration. If the Coordinating Entity does not agree to make the changes described in this paragraph, it is deemed to have withdrawn its request for Comprehensive Certainty after a Comprehensive Certainty Outcome.” ICC members believe that a realistic timeframe is needed and would be interested to know if there is any recourse, if it is arbitrary.

49. Page 57 Para 17

“Where: (a) paragraph 16 applies, (b) the Group is required by a decision of the Determination Panel to source one or more categories of revenue using an alternative indicator to that used in the Common Documentation Package, and (c) the Group does not have access to information for the alternative indicator to be a Reliable Indicator for the Period, the Group may use the relevant default allocation key for the purposes of sourcing this or these categories of revenues for the Period.” ICC members question whether it would be constitutional if there is no relation to the business.

50. Page 59 Composition of a Determination Panel

ICC members consider that the composition of the Determination Panel should be made up only of affected government officials. Furthermore, there should be an equal number of market jurisdictions and payor entity jurisdictions represented.

51. Page 59, footnote 24

Page 59, footnote 24 describes that there are divergent views among jurisdictions as regards the composition of the Determination Panel, particularly as to whether the composition should include independent experts only or Government officials only, or a mix, three options are presented for the purpose of receiving input from stakeholders.

There are divergent views amongst ICC members. Some ICC members would recommend Option C: Mixed Panel consisting of three Independent Experts nominated to the Standing Pool and Three Government Officials.

52. Page 60

ICC members do not support the creation of a standing pool, Tax Certainty Secretariat, or Screening Committee. It appears that it would require 1/3 + 1 of the Screening Committee to block someone – if there is a breach, is there a process for removal? ICC members express concern that there is no oversight or accountability to participating countries.

53. Page 75

Section 8 describes the Certainty Outcomes, which in part can also rely on the recommendations of an Expert Advisory Group.

ICC members recommend that where the outcome of the proceedings is precedent setting, it should ideally be available in a transparent manner for all relevant stakeholders globally. This to ensure that the benefits of having the same information regarding the correct application of the rules is available for everyone, on an anonymised and collective basis.¹

54. Page 75 footnote 30

One issue where members hold differing views is the approach that should be taken where a Related Issue is resolved **after** a Comprehensive Certainty Outcome is agreed for the Period to which the Related Issue relates. Some members hold the view that any adjustment to the allocation of profits between jurisdictions as a result of the Related Issue being resolved should be treated as arising in the Period in which the issue is resolved and should **not affect the Comprehensive Certainty Outcome** provided for the earlier Period. Other members hold the view that **any adjustment should be taken into account in the Period to which the Related Issue relates**, in particular if the Parties granting or the Group Entities claiming relief for the elimination of double tax have changed since that Period or if the Group is no longer a Covered Group.

ICC believes that the best approach is to treat any adjustment to the allocation of profits between jurisdictions as a result of the Related Issue being resolved as arising in the Period in which the issue is resolved and should not affect the Comprehensive Certainty Outcome provided for the earlier Period (“telescoping”).

Should an alternative be required, instead of telescoping the income adjustment into the current year, taxpayers should be able to elect calculating the tax liability from an Amount A adjustment as if all affected tax returns had been amended and telescope the resulting tax liability into the current year.

55. Page 79

Para 5 clarifies that The Tax Certainty Framework, including the Tax Certainty Secretariat, shall be funded by [annual fees payable by Parties / fees payable by Groups making a request for certainty [to be agreed]]. ICC members consider that the activities indicated to be performed by the Tax Certainty Secretariat should be undertaken by the LTA. A Tax Certainty

¹ As an example, reference can, for instance, be made to the Esma process:
https://www.esma.europa.eu/sites/default/files/library/esma32-63-1224_26th_extract_of_eecs_decisions.pdf

Secretariat should not be formed. The Tax Certainty Framework should be funded by Affected Parties.

ICC members recommend that the Secretariat should be funded by fees payable by parties and not by Groups making requests for certainty. This is in line with the approach set out in the tax Certainty approach for issues related to Amount A where each Contracting Jurisdiction bears the fees and expenses of the members of the dispute resolution panel.

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.