

ICC comments in response to OECD Progress Report on the Administration and Tax Certainty Aspects of 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 Progress Report on the Administration and Tax Certainty Aspects of 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 the work undertaken to develop a comprehensive set of technical rules of the new taxing right (Amount A) for market jurisdictions established under Pillar One. It is encouraging to see the acknowledgment by the OECD of the importance and necessity of clear administration and tax certainty rules in the context of Amount A of Pillar One. Nonetheless, there are still significant concerns regarding the proposed rules. We have noticed that some of them have already been raised by businesses in the previous public consultation on tax certainty aspects of Amount A of Pillar One but have nevertheless remained unaddressed. For this reason, we are welcoming the new public consultation on the OECD Progress Report on the administration tax certainty aspects of Amount A of Pillar One as an opportunity to reiterate our concerns in relation to some of these rules and to constructively suggest amendments aiming at a more feasible and practical implementation of those rules.

To this end, ICC provides the following comments:

Overall Comments

- The document remains in the early stage of drafting. Many aspects and elements of the rules are still unresolved and left in brackets while others are only addressed within footnotes. Moreover, a significant number of critical features of Certainty for Amount A have not been further developed and/or narrowed since comments were provided for the prior consultation.
- Key aspects such as the treatment of withholding taxes, the use of information and confidentiality protocols, Amount B, Relevant Similar Measures, and interaction with Pillar Two are not addressed in this report. In the opinion of the business community, it is critical to take into consideration these issues also from an administrability and tax certainty rules viewpoint.

Businesses would welcome a public consultation reflecting the interactions of these key aspects with the proposed tax administration and tax certainty rules.

- With reference to the Tax Administration part of the report, ICC members are highly concerned by the **complexity of the envisaged process**. Even though the Inclusive Framework (IF) Report October 2020 on the Pillar One Blueprint was expressly referring to a “*simplified administrative process to minimise the complexity, burden and cost of filing and payment*” and the IF Statement on October 8, 2021 was stating that *tax compliance will be streamlined (including tax obligations) and allow in-scope MNEs to manage the process through a single entity*, ICC members fear that the Progress Report seems to have substantially departed from this approach.
- In its current version, the document appears to be drafted from a tax authority perspective and almost all the administrative burden is placed on the shoulders of MNE, increasing the risk of double taxation. Exempting jurisdictions from infrastructure changes because considered unfeasible (as stated in section 2.3 para 14 of the progress report) while requiring these infrastructure changes from businesses appears to be inconsistent and does not promote efficiency and a streamlined approach. **MNEs will very likely need to expend significant resources in terms of FTE and service provider fees to manage this complicated process.**
- This **univocal perspective** is **counterproductive for the administrations and businesses alike**, as it creates significant additional complexity and uneven application of Amount A which will result in **additional disputes**. Thus, ICC members kindly suggest adopting a balanced approach that considers the burdens of this process also from a taxpayer perspective.

In the following comments, we would like to provide a more detailed analysis of the elements of concern from a business viewpoint and some possible suggestions on how they could be addressed.

Specific Comments on Tax Administration

As it will be outlined in the comments below, there are different concerns arising from the current version of the rules on tax administration. The current version of the rules does not seem to be in line with the overall objective of guaranteeing the streamlined and certain implementation and application of Amount A rules. More specifically, this is the case of filing a return in every country in which there is a permanent establishment and the registration requirement in each country where there is not a permanent establishment.

Filing and registration in each country requirement and a “one-stop shop” approach as a recommendable solution

The concerns arising from this requirement are many:

- a) A requirement to file in every jurisdiction where there is a permanent establishment 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. Even under the Article 19 backstop rule, there is no actual commitment or clear rules but merely a reference that relieving jurisdictions will be required to give the “*benefit of double taxation relief*”. The proposal also seems to still be quite ambiguous as it states that “*Article 19 may also need significant revisions once the rules in relation to how relief is allocated to entities within a relieving jurisdiction are agreed. Jurisdictions will then need to examine how double taxation relief will be given and the impact of the requirements of Article 19 may have on any existing or proposed double taxation relief mechanisms for Amount A.*” (p.18 para 31)

- b) In addition, **requiring a group to register for a tax identification number and possibly retain a local representative and open a local bank account in every Inclusive Framework country in which there is not a permanent establishment (PE) would not be not manageable.** Such a mechanism creates **additional administrative complexity** and burden which will result in **more**, rather than fewer, **tax disputes**.
- c) In its current version, the Progress Report raises **important concerns in terms of confidentiality**. Requiring taxpayers to file in every jurisdiction where it has a PE and providing Amount A information to every jurisdiction will result in **inappropriate disclosure of information to jurisdictions regarding activity in other jurisdictions**. This will also lead to a disproportionate compliance and administrative burden on taxpayers.
- d) Moreover, the document does **not** provide **enough insights** on how the process of sharing Amount A Documentation return **would work in practice** and **which guarantees for confidentiality protection will be put in place**. The sharing of the documentation package with all tax administrations creates a significant risk of improper disclosure or misuse of information. Conversely, **restricting access on a need-to-know basis would be able to reduce this risk**.

For all these reasons, ICC members recommend that the calculation of Amount A should be on a stand-alone basis and should be included in a **comprehensive Amount A return with only relevant country schedules provided to other jurisdictions**.

In the spirit of constructive collaboration for the successful outcome this reform, the business community would like to kindly suggest the adoption of a “**one-stop shop**” approach outlined as follows.

1. A “one-stop shop” approach would be based on a **single, comprehensive Amount A tax return to be filed with the Lead Tax Administration (LTA)** that includes:
 - i) the initial amount A residual profits for each jurisdiction;
 - ii) the net amount A for the jurisdiction after the application of the marketing and distribution safe harbor (MDSH)
 - iii) Withholding taxes and other adjustments;
 - iv) The applicable tax rate and the net amount A tax (or amount to be relieved) for each jurisdiction.
2. The **LTA would then only share information that is relevant and material to market jurisdictions via a separate schedule**.
3. The **receiving countries will assess the tax due based on the allocated Amount A** indicated on the Amount A return and should issue tax collection notices after the advanced certainty

process to the entities or entity designed in the Amount A documentation return by the in-scope group.

4. There will be **no obligation to register in receiving countries if there is currently no declared Permanent Establishment (PE)**.
5. Simultaneously to the payment made by entities or entity, the **relieving jurisdiction should immediately provide a refund of tax in cash to the relieving entities based on the relieved amounts declared in the Amount A documentation return. The exemption method should be the only option available** and there should always be an **effective elimination of double taxation in any event**

ICC members believe that such a solution would simplify the process and ease the compliance burdens on MNEs while also ensuring higher confidentiality of the information to be shared.

Cross-border tax payment and elimination of double taxation

- Given the revolutionary nature of Amount A principles and the intrinsically high level of coordination they require, ICC members would have imagined a whole new approach to be also developed in relation to cross-border tax payments and the elimination of double taxation. However, it seems that the Progress Report only envisages the adoption of traditional methods which have already been proven to be ineffective in less complex frameworks.
- The business community supports **an exemption approach to relieve double taxation**. In any case, **double taxation relief** (whether through credits or exemptions) should be **prescribed under the rules for all jurisdictions**.
- In its current version, the document indicates some instances where relief is not clearly able to be availed (section 3.8 para 5). ICC members would kindly recommend that the **relief is granted without subjective limitations of each jurisdiction under an exemption system**.

Back-stop rule and timely relief

- In the opinion of the business community, the **“back-stop” provisions in Article 19 are not sufficiently specific and binding enough** to provide reassurance that double taxation will be effectively eliminated.
- According to Sections 2.4 and 3.8 the double taxation relief in relation to Amount A shall be given through the income tax base of relieving jurisdictions. The MLC envisages a back-stop rule to ensure relief is provided in a timely manner. However, **for the transitional period under which not all (potential) relieving jurisdictions will have signed and ratified the MLC, there are still some unclarities**.
- More specifically, the ICC members recommend **clarifying how double tax relief would work/can be accessed when (one or more) relieving jurisdictions haven’t ratified the multilateral convention** and how it can be ensured that relief is still provided in a **timely manner**.
- In relation to the relief payment under Section 2.4 and in order to meet the stated goal “mitigating the concerns of Covered Group and the Inclusive Framework of the potential cash-flow impact of Amount A”, ICC members would also kindly suggest that the **relief payment shall be processed in the same timeframe required for covered groups to make payments based upon the single streamlined return**.

Jurisdiction by Jurisdiction Approach

ICC members believe that **explicitly granting each jurisdiction the right to tax Amount A “in a manner they deem appropriate”** (section 2.1 para 2) is likely to **create an impractical and unworkable process**. Thus, the business community would like to recommend a streamlined approach based on uniform rules for determining Amount A via the Amount A tax return.

Single- Multiple Taxpayer Approach

- Whether Amount A will use the single taxpayer or multiple taxpayer approach is foundational to understanding the effects of these rules. Nevertheless, the document does not reach a conclusion on which approach to adopt. **The business community would welcome more clarity on this matter** to provide comments which are more on point.
- ICC members would like to highlight that a multiple-taxpayer approach is a principled approach consistent with taxing norms and one where the liability is aligned with relief granted associated with that liability. Differently, **if the two approaches continue to exist, ICC members would then be recommending the possibility for MNE to choose between these two options**.
- Under the multiple taxpayer approach, the document states that certain administration obligations are proposed to be coordinated and undertaken by an agent and that the determination of the agent could be prescriptive, or groups could be given the flexibility to choose the agent with certain requirements. **ICC members recommend that MNEs should be given full flexibility to determine the agent without further restrictions or requirements**.
- The business Community would also like to underscore that in **no case should withholding taxes or other taxes or requirements apply in the case of intercompany settlement of Amount A between liable entities and payor agent**. The **contrary would not be consistent with the stated purposes of Pillar One** and may create unfair results based on each MNE's structure and footprint.

Payment in Local Currency

- According to the Progress Report, Amount A liabilities will need to be converted and paid to each market jurisdiction in the designated local currency. **Each liable entity will be exposed to the currency of each relevant market jurisdiction**.
- ICC members kindly recommend that **MNEs should not be required to employ complicated currency management practices in order to comply with Pillar One, especially for jurisdictions where they may not maintain operations**.
- Moreover, there is the risk that if the world's largest and most profitable calendar-year corporations are generally 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**. For this reason, the business community would advise **allowing payments using the reporting currency**.

Liable entity

In the case of a taxpayer having multiple entities with a jurisdiction, **the business community believes that the Group should be allowed to elect which entity in the jurisdiction is the liable entity**.

Country Audits

- According to the progress report, the tax filing process in each jurisdiction would not even prevent tax administrations from requesting further information as part of any audit or compliance activities.
- In the opinion of ICC members, **granting audit rights and/or information request rights to each jurisdiction** with respect to Amount A **despite a taxpayer's submission of a Common Documentation Package appears to undermine the reason for a Common Documentation Package in the first place.**
- Moreover, allowing jurisdictions to audit freely outside of the certainty process will result in **significant inefficient and costly controversy for taxpayers and taxing jurisdictions.**

Non-conforming year ends and reopening of prior years

- In relation to the fiscal years referred to in section 2.4 para 21, there is the **need for additional clarity for non-conforming year ends.**
- The business community also acknowledges that, as indicated in the document, further work shall be undertaken by the Inclusive Framework members which will consider whether an earlier period should be re-opened and an adjustment would be taken into account in the period to which the adjustment relates. ICC members recommend telescoping of adjustments into the current year for Amount A purposes, and believe it is critical to the administration of Amount A for taxpayers and tax administrations alike. Telescoping will reduce complexity and the need to file a potentially significant number of amended returns. Noted within the consultation document, related to domestic procedures required in order to issue relief, **ICC members believe that any reopening of prior years, if ultimately required, should be strictly for the purposes of issuing relief and must not reopen the statute of limitations or other items.**

Specific Comments on Tax Certainty for Amount A

The business community has noted that despite its previous comments, the Advanced Certainty still does not include key features of Amount A rules such as the marketing and distribution safe harbor (MDSH) and the Elimination rules, even though their complexity and unintended effects have clearly emerged from the previous consultation on the Progress Report on Amount A of Pillar One.

ICC members continue to be of the opinion that **Advance Certainty would be more durable and effective if an agreement is reached on all Amount A methodologies** (including revenue sourcing, segmentation, the marketing and distribution safe harbor, withholding taxes, and elimination) **in advance of the year in question.**

More specifically, ICC members have identified the following issues:

Confidentiality

- While the draft does provide some further detail regarding confidentiality, ICC members believe that the requirements would still need significant further development to ensure that robust and detailed protections are outlined for the participants.
- Concerns about confidentiality also arise in relation to the submission of the Common Documentation Package to numerous recipients as suggested in the progress report. The Common Documentation Package submission raises concerns also from an administration perspective as well. According to ICC members, **it would be preferable that any agreed documentation would be submitted to the LTA and a form of more limited information relevant to the local jurisdictions would be provided to Affected Parties.**
- Even in the case of the amended Advanced Certainty Documentation Package to be exchanged by the Competent Authority of the Lead Tax Administration with the Competent Authorities of the Affected Parties (p. 104 para 45), ICC members would like to highlight once again that the **documentation package should only be exchanged to jurisdictions that have a sufficient stake in the process. Conversely, taxpayer data and confidentiality would not be sufficiently safeguarded.**

Certainty over whether a Group is a Covered Group

- The process of achieving scope certainty can be lengthy and the failure to seek annual confirmation could expose MNEs to challenges from tax authorities in market jurisdictions.
- For this reason, ICC members recommend that **once a tax certainty outcome has been obtained, MNEs should be given an option for this outcome to apply for a period of 5 years, subject to self-assessment by the MNE group.**
- As part of this self-assessment, the **MNE group could file an annual return** confirming amongst other things, whether or not there are **material changes in critical assumptions, and also submit its number for profitability and threshold tests.**
- Furthermore, in the case of a process for a **Scope Certainty Review**, it would be appreciated by the business community, if **MNEs would be able to get certainty from the LTA without the need for additional tax administration.**
- MNEs would also like to recommend the **drafting of a provision establishing that the outcome of the certainty review can be shared in the case of unilateral challenges** from a tax administration in other jurisdictions and that **listed parties shall respect this outcome.**
- Moreover, **if listed parties are required for the Scope Certainty Review**, the business community would like to obtain **more clarity on how/why** this would be the case. In fact, the threshold tests to determine an in-scope group and the exclusions (i.e. Extractive Group or Regulated Financial Services) can be made at the UPE level for the Group.

Transition approach and timing

- Although the number of days have only been inserted in brackets, **ICC members welcome the introduction of time limits.** Nonetheless, the business community believes that there is still scope for Affected Parties to delay the conclusion of the process.
- ICC members also continue to be convinced that the ECP process should be completed with methodologies agreed 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 ECP is concluded and an extended soft-landing periods should apply.** (p. 55 para 6)

Internal control, Expert Advisory Group, Independent Experts and Observers

- In relation to internal controls audits and the involvement of the Expert advisory group, according to ICC members the **proposed Internal Control Framework Review is unworkable**. ICC members think that **these rules could be easily misinterpreted** and lead to inefficient, extensive and intrusive audits of an MNE's internal controls.
- ICC members would like to highlight that MNEs are already required to have systems, controls and processes in place which are already 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, in the opinion of ICC members existing processes and audit reports should be relied upon and eventually modified if necessary.** (p. 57 para 14)
- Moreover, the business community is concerned that since the TFDE incorrectly assumes that the internal controls are managed at the central level in every aspect, this could lead to a **disproportioned burden of proof on the MNEs. If a group has audited internal control procedures, these should be sufficient to provide the needed assurance about the reliability of the used method for allocation.**
- In terms of **panel composition**, there are divergent views among ICC members. Some ICC members believe that the panels should include only government officials from the LTA, relieving jurisdictions, and market jurisdictions subject to oversight from their respective governments and confidentiality protocols while some other ICC members recommend using a more mixed panel as a compromise, with competent authorities as appointing authorities and subject to confidentiality protocols and oversight
- Furthermore, in the case in which an expert group is adopted (including the case of nominated specialists referred to on p. 89 para 8), the business community would like to emphasize once again that there should be a **formal evaluation process to ensure candidates are qualified and meet rigorous background check specifications**. At the same time, there should be **a process to remove experts** from the panel.
- In the case of observers, differently from the previous consultation document, the new one refers to the same confidentiality requirements as tax officials participating on the Review Panel. However, **ICC members would recommend more rigor to be applied when evaluating this process**. Observers should undergo a **robust background screening and adhere to strict confidentiality guidelines with oversight by the tax authority** which sponsored them. Observers should only be allowed if both the Lead Tax Administration and group consent.
- ICC members would also like to highlight the **unclarity of the training of these experts** and in particular, who will be in charge of such training.

Comprehensive certainty – Consensus (p. 58, para 19)

- ICC members remain of the opinion that, from a policy perspective, it would be preferable to **progress the review when a recommendation has won the agreement of a supermajority of Affected Parties**. This should prevent individual countries without a material stake from blocking the progression of a proposal that has material support among Affected Parties.
- ICC members would also **recommend the inclusion of a materiality threshold to minimize the opportunity** for jurisdictions with little or no revenue at stake **to delay the process**.

Certainty Review Request and suspension of payments to market jurisdictions

- According to ICC members, the **timing of the request for the Scope Certainty Review by the Coordinating Entity** as suggested in the Progress Report is **too late and leads to considerable uncertainty**, including the possibility of affecting the period's audited financial statements.
- ICC members ask for **further guidance** in this area to minimize this risk and **recommend that this process is made available to the Coordinating Entity well in advance of the Period(s) to which the determination will apply.** (p. 55 para 9)
- As for the relevant information to be exchanged, ICC members would like to underscore that this **information should be confidentially exchanged only with relevant tax authority over a materiality threshold.** (p. 84 para 9a)
- In the case where there is **no request for certainty**, 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.** ICC members remain of the view that the **LTA should always act as chair and oversee any review initiated where a Group does not request certainty.** (p. 59 para 25)
- In the opinion of the business community, the **LTA should also be responsible for ensuring that only relevant and material taxpayer information is provided** under conditions of confidentiality to other relevant parties to ensure the confidentiality of taxpayer information.
- Finally, **businesses have welcomed the suspension of payments to market jurisdictions until the tax certainty review has been completed** so as not to unnecessarily increase the financial burden that double taxation would place on in-scope MNE groups.

Proposal of Changes inconsistent with the findings of the Review Panel (p. 91, para 11)

- According to the progress report 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. However, as in its previous version, the text still includes the exception “unless this is necessary for a correct application of the Convention”.
- ICC members would like to reiterate that **this guidance is too vague and could potentially swallow the rule with the unintended consequence that all cases will be going to the determination panel.**

Updated Documentation Package

- In its current version, the Progress Report does not include the possibility of the Coordinating Entity to provide input in preparing the amended Documentation Package.
- However, according to the opinion of ICC members, **the Coordinating Entity should be given a more meaningful role in the process and an opportunity to provide feedback and perspective on the changes requested.** (p. 103 para 41)
- As for the timeline, the progress report now recommends 90 days. Nevertheless, **ICC members strongly suggest the possibility of extending this limit based on facts and circumstances to be agreed between the LTA and the Coordinating Entity.** (p. 103 para 40)

Covered Periods for reviews by the Lead Tax Administration

According to the wording of the progress report, the Lead Tax Administration may undertake the 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. (p. 111 para 2). **ICC members would kindly suggest at least five years.**

Tax Certainty Secretariat and its funding

- ICC members believe that the **activities** indicated to be performed by the Tax Certainty Secretariat should instead be **undertaken by the LTA**, without the need to set up a Tax Certainty Secretariat
- Should the TFDE still be willing to set up this secretariat, ICC members strongly recommend that **the Secretariat should be funded by fees payable by the jurisdictions and not by Groups presenting the requests for certainty**. This would be 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.

Scope Certainty Review and Transfer Pricing Adjustments (p. 71 para 19 and p. 94 para 18)

- Given that some transfer pricing adjustments may be significant and such adjustments may potentially influence whether a group would be in or out of the scope of Amount A in the period for which the adjustment relates, ICC members would like to recommend that **MNEs shall be provided with the flexibility to reflect transfer pricing adjustments in the period they relate or when the adjustment was made and that MNEs document the approach taken in the Scope Certainty Documentation Package**.
- Moreover, treated when it comes to the Scope Certainty Review for Amount A and where there is **an ongoing transfer pricing audits/litigation**, ICC members believe that the **rules should also cover how this situation would be treated**.

Specific comments on Tax Certainty for Issues Related to Amount A

- ICC members recommend considering an **approach that deals with the tax certainty framework for Amount A and the tax certainty issues to amount A in a similar streamlined multilateral manner** to ensure consistent outcomes in terms of scope, timing and to further reduce MNEs' compliance burden.
- Ideally, issues related to Amount A would be part of the Amount A Comprehensive Review. **Having issues related to Amount A in a separate certainty process can raise coordination and timing issues.**
- Moreover, the scope of the Amount A MLC and the resolution of disagreements by the determination panel is multilateral in nature and broader than the existing networks of bilateral tax treaties. However, **the proposed dispute resolution mechanism for issues related to Amount A is bilateral in nature, and restricted to existing bilateral treaties.**
- ICC members strongly encourage **the inclusion of the language in square brackets in paragraph 1 (a) (i) Article 19** to ensure that the scope of the **mandatory and binding dispute resolution mechanism** for issues related to Amount A is not limited to parties that are linked by

way of existing bilateral Tax Agreements but can be operated in respect of any party to the Multilateral Convention. (p. 162 ft 115-117 and p. 169 ft 126).

- For issues relating to Amount A, it is essential that **panelists ensure confidentiality** and there is government oversight over the panelists. (p. 179 para 15.g)
- In the case where a local court decision of one of the contracting jurisdictions holds that the dispute resolution panel decision is invalid, the progress report establishes that the request for a dispute resolution panel under paragraph 2 shall be considered as not to have been made and the disputes resolution panel process as not to have taken place (p. 171 para 2b.ii). ICC members would like to underline that **these circumstances shall be limited and very clearly defined. Differently, there is the risk of undermining the credibility of the Dispute Resolution panel process.**