BUSINESS at OECD

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To: Tax Treaties, Transfer Pricing and Financial Transactions Division
Organisation for Economic Cooperation and Development
Centre for Tax Policy and Administration
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Submitted by email: tfde@oecd.org

Re: *Business at OECD* (BIAC) comments to OECD's Public Consultation Document "Pillar One – Tax certainty for issues related to Amount A"

Dear Secretariat Team,

Thank you for the opportunity to comment on the public consultation document "Pillar One – Tax certainty for issues related to Amount A (the "Draft Rules") and its companion paper released at the same time. These two papers cover perhaps the most important area of the whole Pillar One project from the point of view of the business community along with no double taxation of income. Given the scope of the project and the novelty of many of its provisions and defined terms, along with the fact that many Tax Authorities will have to interpret and administer this in real time, it is absolutely critical to the success of the project that the provisions of tax certainty are both significant and meaningful. We have concerns that we lay out in more detail in the appendix, but in particular we call attention to the crucial points below. We look forward to commenting again on an entire package which allows us to view these proposals in context, but, of course, at any point we stand ready to work constructively with you and the TFDE in order to make Tax Certainty a reality.

Introduction: The critical importance of certainty for a broad range of Related Issues. In the October statement, over 130 countries committed to mandatory and binding "dispute prevention and resolution mechanisms… for Amount A, including all issues related to Amount A (e.g. transfer pricing and business profits disputes)." The October statement also committed to creating the requisite treaty relationships where no tax treaties currently exist. It is critical to the business community that the Inclusive Framework honors this commitment. But unfortunately, that is not made clear in the current document.

1. **Scope of Related Issues should be broad**. Profit allocation among subsidiaries and permanent establishments are the foundations on which Amount A calculations are made (e.g., MDSH, relieving jurisdictions). It is therefore critical to grant certainty on these foundational elements so that MNEs are able to proceed confidently with all of their Amount A calculations. If transfer pricing and permanent establishment are left outside the same certainty process, there will be inevitable double taxation and no reduction in controversy, as these are the main causes of tax disputes between countries. We understand one of the key goals of the two-pillar solution was to reduce controversy (particularly on distribution and in-market returns) – therefore it is very important that these elements are included in the tax

certainty process. For the same reason, there should be no ability for countries to narrow the scope of the issues related to Amount A on which certainty will be given (such as those which exist, for example, in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("BEPS MLI")), and disputes between non-treaty jurisdictions should be in scope as well.

2. **Panel composition.** We do not have a view yet on the compositions of the Dispute Resolution Panel. While some can see advantages of having independent experts on these panels, others feel that we cannot knowledgeably comment on this until the final Amount A building blocks are released. We will provide our comments on this issue once the final tax certainty documents are released as part of a comprehensive Amount A document.

3. **Confidentiality.** The Draft Rules are very light on details on preservation of confidentiality of information. More emphasis needs to be placed in this area, including the imposition of meaningful penalties arising from the release of confidential information by tax administrations and panel members. There should be a materiality/relevance threshold relating to the participation and sharing of documents.

4. **Role of MNEs in certainty processes**. MNEs appear to have little role between the initial submissions and reaching conclusion. In order to better inform the process, MNEs should be afforded certain observation rights, including the right to be informed of meetings and a summary of position papers. MNEs should also be afforded the opportunity to make presentation to the panels.

5. **The absence of any mandatory deadlines.** There is no provision of mandatory deadlines for each of the panels to deliver a final conclusion. This is a concern, given the length of the existing MAP procedures (in the case of one MNE, 9 years between the year when the tax is assessed and the year of execution of the elimination of double taxation even within the EU), and given the amount of resources which will be required for the various panels to effectively function. There should be a maximum period for the panel to provide its conclusions - *Business at OECD* (BIAC) members believe between two and four years, including any extensions by the panel. If no conclusion has been reached after that period, the position taken by the MNE should be deemed accepted by the leading tax authorities and all interested Parties without the possibility for further challenge.

We thank you for the opportunity to comment. We would be pleased to respond to any questions arising from both our general and specific comments provided, and, as we noted at the beginning of this letter, would also be pleased to work constructively with you and the TFDE in order to make Tax Certainty a reality.

Sincerely,

Alan McLean
Chair, *Business at OECD* (BIAC) Tax Committee

William H. Morris
Chair Emeritus

Cc: Hanni Rosenbaum, Executive Director, *Business at OECD* (BIAC)

Our detailed comments are provided below:

Para	Topic	Issue	Recommendation
N/A	Coordination with Amount A certainty	Having Issues related to Amount A in a separate certainty process can raise coordination and timing issues	We recommend that Issues related to Amount be part of the Amount A Comprehensive Review.
Art 19 Para 1	Approach towards mandatory and binding dispute resolution mechanism	The scope of the Amount A MLC and the resolution of disagreements by the determination panel is multilateral in nature. However, the proposed dispute resolution mechanism for issues related to Amount A is bilateral in nature, and may be restricted to existing bilateral treaties. In complex supply chains, many disputes involve more than two countries. These multilateral disputes are difficult to resolve and could benefit from a DRP process with arbitration.	Recommend to also consider an approach that deals with i) the tax certainty framework for Amount A and ii) tax certainty for issues related 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.
Art 19, Para 1 FN 3	Scope of Related Issues	Whether other types of disputes should be considered "Related Issues"... and whether the mechanism should apply in	We recommend that related issues should be broad, in order to provide the most certainty and coverage.

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		circumstances where there is not a bilateral tax treaty between the relevant jurisdictions”	
Art 19 Para 1 and 2(a)(i) & FN 4	Whether the mandatory and binding dispute resolution mechanism should apply in circumstances where there is not a bilateral tax treaty between the relevant jurisdictions.	Considering that the scope of the Amount A MLC is multilateral in nature, and broader than the existing networks of bilateral tax treaties, it's equally important that the proposed (bilateral) dispute resolution mechanism for issues related to Amount A should (in any case) apply in circumstances where there is not an existing bilateral tax treaty between the two jurisdictions in place.	Recommend Including the language of paragraph 2(a)(i) in square brackets to ensure that 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. We are seeing more cases, especially in situations where an intermediate holding company is making the investment into a country, where the entitlement to a tax treaty is being disputed if there are no employees of the company, even where there are employees in country employed administratively by a service entity that does work for the entity in question. Also, in the case of the IP company charging a royalty to the operating companies there will be scenarios where there is no tax treaty in place. And due to the need to align substance with legal ownership, it may not be possible to have the IP substance in a tax treaty jurisdiction. Non-treaty country exposure should not be considered merely a theoretical risk. The U.S. does not have tax treaties with Brazil, Taiwan, Hong Kong, Singapore, and much of LATAM for example. Even within the EU, for a long time the France-Denmark Tax Treaty has been repealed for many years. To ensure proper functioning of the certainty framework, in cases where bilateral tax treaties do not already provide guidance, certain baseline treaty provisions should be included (e.g., exchange of information, confidentiality, and transfer pricing).
Art 19, Para 5.b).ii) and Para 26	Local Court Decisions	Local court decisions can invalidate the dispute resolution result. This can threaten the credibility of the process.	We suggest that these circumstances be limited and very clearly defined.

Para	Topic	Issue	Recommendation
Art 19, Para 7 & FN 5	Definition of "the information necessary to undertake substantive consideration of the case"	Differing view among IF members	Recommend to include an express definition of specific items of information (such as the list of information and documentation contained in the BEPS Action 14 Peer Review Documents).
Art 19, Para 14 & 15; FN 6	Relationship with decisions rendered by a court or administrative tribunal	Footnote 6 (page 13) clarifies that some IF members consider that these provisions should not use a "legally bound" standard but should also apply where a CA will not depart from the court decision as a matter of administrative policy or practice.	Recommend to use a "legally bound" standard, in order to ensure resolution of any unresolved issue to the widest possible extent, with a view to securing the objective of avoiding the double taxation of Amount A that would otherwise result from unresolved TP and PE profit attribution disputes.
Art 19, Para 16.j)	Significant investor	Significant investor threshold should not be too long to exclude passive investors.	In setting the threshold for what is a "Significant Investor", this should be set high enough or with appropriate exceptions to ensure that individuals who may happen to passively hold investments in Group companies through mutual funds, index funds, exchange-traded funds, or other similar funds that are managed by money management professionals, are not inappropriately disqualified, since this could raise challenges where Group companies may be regularly included in such funds.
Art 19, Para 20, 28, 95, FN12	Covered Groups Position	Divergent views as regards the usefulness of a presentation of the Covered Group's analysis and views of the case to the dispute resolution panel process.	We strongly believe it is critical for transparency and better decision making to allow the Covered Group to make a presentation to the DRP on its facts and its position on the correct treatment of the Related Issue. The Covered Group will have the most accurate and complete view of the facts involved and should be able to present its own position. The DRP should have a full picture from all stakeholders in making its decision.
Art 19, Para 29	DRP Conclusion	It is unclear why the CAs should be able to hear the	Given that the dispute resolution process uses a last-best offer approach to decision making, the subsequent ninety-day period to decide to agree to a separate proposal is unnecessary,

Para	Topic	Issue	Recommendation
		conclusion of the DRP and then have 90 days to begin negotiations again to reach a different result.	and deters from the overall objective of accelerating resolution and certainty. The chosen proposal would be from one of the CAs, so that a CA should already believe it is a supported solution. Assuming another round of negotiations would prolong resolution and introduce a sort of gaming of the dispute resolution mechanism to bargain in negotiations. This does not seem to align with the objectives of these rules.
Art 19, Para 30(b), FN 8	Costs of dispute resolution panel proceedings	Divergent views on when it would be appropriate for a Covered Group to bear the costs related to a dispute resolution panel proceeding.	Recommend to reconsider/ refrain from an obligation for the Covered Group to bear these costs in the circumstances described in paragraphs 30(b)(i) and 30(b)(iv), on the basis that this would compromise the voluntary nature of both the dispute resolution panel mechanism and the mutual agreement procedure.
Art 19, Para 70	Non-disclosure by Taxpayer	The rule states that the DRP process will stop if the taxpayer discloses any information received (other than the final decision) to a third party.	This rule will cause problems with the financial audit as reserves and provisions are to be based on anticipated final outcomes based on all information available. Thus, if indications are that an outcome is likely, this must be used in the taxpayer's judgment in its provision and such information must be disclosed to the financial auditor for it to audit to determine if it is a sufficient basis for taxpayer's estimate. In addition, taxpayers may be using outside advisors to support their efforts in the TP dispute and the MAP process. The advisors also must have access to information to be able to appropriately assist the taxpayer.
Art 19, Para 101	Covered Group Member Agreement Required	The provision requires all impacted Covered Group members to sign agreement within 30 days or it is a deemed rejection.	Given how many members could be potentially impacted by the agreement, this process needs to be streamlined and centralized. In the initial power of attorney, power to agree should be given to a Coordinating Entity.
Art 19, Para 104, FN 14	Roll-forward	Divergent views on whether roll-forward should be expressly authorised.	We believe that roll-forward is practical, logical, and would result in time and cost-savings for all involved parties.
N/A	Interaction with APA	It is also unclear how DRP interacts with ongoing APA obligations.	N/A