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To: Tax Treaties, Transfer Pricing and Financial Transactions Division OECD/CTPA

**EBIT Response to Public Consultation Document Pillar One – A tax certainty framework for Amount A (27 May – 10 June 2022)**

Brussels, 9 June 2022

Dear Achim,

EBIT's Members<sup>1</sup> thank the OECD for the opportunity to provide comments on the OECD's Public Consultation Document Pillar One – A tax certainty framework for Amount A running from 27 May to 10 June 2022. Below are a few issues and open questions that EBIT believes are important for the OECD/Inclusive Framework to consider. At the same time and in line with our previous contributions, we regret the very short timeframe allowed under the public consultation for sending in comments. We also look forward to the publication of the comprehensive package of building blocks for comment.

Given the urgency and short time frame, EBIT's Members raise their issues and concerns with the tax certainty for Amount A in a concise, summarising bullet point format, keeping it relatively short. At the same time, we do wish to emphasise that the listed issues and concerns in this document are not exhaustive.

**I. General comments**

EBIT's Members welcome the approach of developing a tax certainty framework for Amount A. We welcome the intention of the multilateral approach to ensure that Covered Groups have access to the mechanisms to receive certainty on the approach used for determining and applying Amount A, including the objective of avoiding double taxation. We understand that there is no consensus yet on the approach, but we hope that such consensus can be reached as dispute resolution and certainly prevention is at the very heart of the success of the system that is being developed.

EBIT's Members have also commented on the Public Consultation Document on Tax Certainty for issues related to Amount A. We noticed, however, that the proposed procedures are different for Tax Certainty for Amount A and for Tax Certainty for issues related to Amount A. The issues that may be addressed under Tax Certainty for issues related to Amount A may impact the Tax Certainty of Amount A. We therefore consider that a streamlined approach for both mechanisms would be appropriate as it would pre-empt to a great extent that inconsistent outcomes as a result of the differences in mechanisms are generated.

EBIT's Members have also noticed that different information is requested under the different mechanisms. As the issues are interconnected and may influence each other, we also consider that a more streamlined approach regarding documentation / information requested under the two mechanisms would be beneficial for simplicity and clarity.

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<sup>1</sup> EBIT's Members include Airbus Group, BP, Carlyle, Caterpillar, Diageo, GSK, Huawei, International Paper, Johnson & Johnson, JTI, PepsiCo, Pfizer, Procter & Gamble, Raytheon Technologies Corp., RELX, Schroders, SHV Group and Vattenfall. For more information on EBIT see: [www.ebit-businessstax.com](http://www.ebit-businessstax.com)

## **II. Scope certainty**

### **II.1 Which cases go to Scope Review Panels**

From the text of the Public Consultation Document it is not clear why Scope Review Panels would be needed but used only for exclusion cases involving extractive industries or regulated financial services leaving the Lead Tax Administration to conduct the review in other cases, for example with regard to the application of the scope rules on the global revenue test or the profitability test. EBIT's Members opine that there should at least be an option for Covered Groups to request a Scope Review Panel. Alternatively, a more simplified process omitting the Scope Review Panel could be used, as set out below.

### **II.2 Scope certainty documentation package**

A Covered Group requesting scope certainty should file a scope certainty documentation package containing (a) the definition of a Group, (b) the calculation of Total Revenues and application of the Global Revenue threshold, (c) the calculation of the Pre-Tax Profit Margin and application of the Profitability threshold, (d) issues with respect to the application of rules on Excluded Revenues, including the identification of Excluded Activities or Excluded Entities, the methodology used for the preparation of financial statements for Bespoke Segments, or the application of the exception to the requirement to prepare these financial statements based on the use of Disclosed Segments, the determination of Revenues derived from Excluded Activities or Excluded Entities, the calculation of Total Revenues after adjustment for these Revenues and the application of the Global Revenue threshold, and the determination of Profits or Losses derived from Excluded Activities or Excluded Entities, the calculation of the Pre-Tax Profit Margin after adjustment for these Profits or Losses, and application of the Profitability threshold, (e) issues with respect to the application of rules on Segmentation (yet to be determined) and (f) issues with respect to the application of rules on Internal Fragmentations, including the ownership structure of the Group, whether an Internal Fragmentation has occurred, whether the Group's Total Revenues and those of other Fragmented Groups resulting from the same Internal Fragmentation meet the Global Revenue threshold, and the principle purposes of the Internal Fragmentation.

Although EBIT's Members understand the need for the information as indicated above, we want to stress that this information should be used for scope certainty purposes only and should not be used for other taxation purposes except where this is related to determining Amount A.

### **II.3 Confirmation that a group is (not) in scope**

The Amount A rules are supposed to be determined on a multilateral basis. Although differences in interpretation on the rules may occur between countries, their application should however be to a very large extent similar. In other words, every signatory country to the multilateral convention implementing Amount A, should have a similar interpretation.

EBIT's Members are therefore concerned that even for determining whether a MNE is within the scope or not of Amount A, a two-tier mechanism would be presented comprising the following approach:

- the creation of a scope review panel (in some cases) to perform a scope certainty review; and
- if disagreement exist in the review panel, a determination panel will intervene in the mechanism.

EBIT's Members are concerned that the suggested mechanism is very complex, very burdensome and too lengthy for scope purposes.

In light of the fact that all signatories to the MLC should have a similar interpretation of the rules, a possible simplified way forward could be that the decision whether a group is (not) in scope of Amount A could be taken by the Lead Tax Administration, preferably after only one-time consultation with the other countries.

## **II.4 Listed Parties**

According to § 5 (p 12), the coordinating entity should provide an updated list of Listed Parties including any new Listed Party as identified by the Lead Tax Administration, or otherwise should inform and explain to the Lead Tax Administration that it does not intend to include a country as a Listed Party.

EBIT's Members consider that the explanation on why not to include a country as a Listed Party may prove to be quite burdensome on the Covered Group in particular when no physical presence is available in the country concerned and sales in that country are performed through an unrelated party. The issue is that the Covered Group must explain or justify that they have no economic presence in the country. In other words, the MNE must evidence the negative (you can demonstrate that you are present somewhere, but you cannot demonstrate that you are not present somewhere). In such cases, it should be sufficient that the group indicates that no physical presence is available and that sales are only made through independent parties.

## **III. Advance Certainty**

### **III.1 Meaning of “Relevant Change”**

On several occasions, the Public Consultation Document refers to “Relevant Change”. EBIT's Members understand that if there are material changes that the advance certainty can no longer be relied upon. Nevertheless, it is unclear to us what is meant by the term “Relevant Change” as it does not appear as part of the definitions.

We therefore suggest further guidance on what is considered a “Relevant Change”, for example, by introducing a materiality threshold. Such a threshold could be based on, for example, impact on relief, impact on profit before tax, impact on surrendering entities, etc.

### **III.2 Time limits**

It would seem that the period needed to receive advance certainty can be quite long (even up to or exceeding one year) and the period can even be extended. In EBIT Members' view, it would seem appropriate that the time limits should be binding upon the tax authorities involved in the procedures. An extension should only be granted on justified grounds, such as additional requests for information, and with the consent of the Covered Group.

### **III.3 Composition of the Expert Advisory Group**

The Review Panel is assisted by an Expert Advisory Group (EAG). The members of the EAG are selected from a pool of tax officials with experience in undertaking systems reviews of Groups, nominated by Parties to the Convention (see p. 31 of the Public Consultation Document). EBIT's Members suggest that the composition of the pool of specialists would be more balanced and would comprise experts from both tax administrations and the private sector. In the composition of the EAG, at least one private sector member ought to be present in order to guarantee a balanced approach.

### **III.4 Composition of the Determination Panel**

EBIT's Members consider that a mixed panel of independent experts and government officials may be a good way forward. Such mixed panels have been used already, for example, under the EU Arbitration Convention. See also our comment in the previous section as well as on a similar issue in EBIT's Comments on Tax Certainty for Issues related to Amount A.

## **IV. Comprehensive Certainty**

### **IV.1 Period covered**

The Public Consultation Document seems to indicate tentatively that Comprehensive Certainty could be given for [five] years. See for example article 3, § 1, (d). EBIT's Members welcome a 'longer' period of Comprehensive Certainty such as the suggested five-year period, which in turn may lead to a reduction in compliance burden and costs, and complexity.

### **IV.2 Time limits**

It would seem to EBIT's Members that the period needed to receive comprehensive certainty can be quite lengthy and can even be extended. It would seem appropriate that the time limits should be binding upon the tax authorities involved in the procedures and that an extension can only be granted on justified grounds, such as additional requests for information.

### **IV.3 Composition of the Expert Advisory Group**

The Review Panel is assisted by an Expert Advisory Group (EAG). The members of the EAG are selected from a pool of tax officials with experience in undertaking systems reviews of groups, nominated by Parties to the Convention (see p. 31 of the Public Consultation Document). EBIT's Members suggest that the pool of specialist would be more balanced if it would comprise experts from both tax administrations and the private sector. In the composition of the EAG, at least one representative of the private sector should be a member in order to guarantee a balanced approach (see also our comment on the composition of the EAG for Advance Certainty).

## **V. Documentation packages**

The Public Consultation Document mentions respectively a Scope Documentation Package (for scope review), an Advance Certainty Documentation Package (for the advance certainty mechanism) and a Common Documentation Package (for the comprehensive certainty). It would seem to EBIT's Members that the precise content of the different packages has not been determined. More guidance needs to be developed on what the three documentation packages should contain and it should not be left at the discretion of the relevant Listed Parties in the mechanisms to determine the content of the documentation packages. A well-defined documentation package would reduce compliance costs and enhance certainty. Additional information / documentation can always be requested if need be.

## **V. Role of the Covered Group in the proceedings**

EBIT's Members notice that the IF has not considered a large role for the Covered Group involved in the proceedings. The proposed role of the Covered Group is limited to making the request for scope / advance / comprehensive certainty, and for rendering the necessary information (for example, the documentation packages). The Covered Group, however, does not have a right to be heard.

EBIT's Members consider that the proposed approach would be a missed opportunity to involve the Covered Group more and their right to be heard in the proceedings. EBIT appreciates that the mechanisms, as currently designed, are primarily intended to be a proceeding between tax authorities and to ensure that the deliberations remain restricted to the tax administrations involved or the different panels. EBIT's Members strongly suggest, however, that a right to be heard is given to the Covered Group in order to create a more cooperative environment, in particular as the proposed process appears to contain features of ICAP.

EBIT welcomes the fact 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 countries involved have not reached agreement. We also welcome that this applies even where this position is not one of the alternative outcomes supported by the different panels, the Lead Tax Administration, or countries involved, and presented to the determination panel for selection

of the approach. Importantly, we believe that in these cases as well, a larger role for the MNE concerned is necessary and possible, for example by giving the MNE the right to present its case to the different panels or exercise a right to be heard.

## **VI. Certainty outcomes**

It is unclear from the Public Consultation Document whether the certainty outcomes will have precedential value. In one way, such precedential value could be defended to create a level playing field for all similar cases or approaches. In such a case, care should be taken to assure that the precedent is developed transparently for all stakeholders involved (for example through publication of the precedent). This would mean that the same information is shared regarding the appropriate and correct application and understanding of the rules in a particular case. Publication could be done on an anonymised basis and be collectively shared.

Footnote 30 (p 75) indicates that One issue where IF 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

## **VII. Internal Control Framework**

The tax certainty procedure is based on an in-depth knowledge of the internal control framework (ICF) (hence the creation of the EAG as well as a specialist team) and the certainty discussion involves more than just a discussion on technical aspects. EBIT's Members can support the use of a robust and reliable ICF for tax certainty purposes as well as the important role it can play in providing assurance to tax authorities. We note that this is in line with the approach adopted to ICAP, which may have served as a basis for introducing the ICF concept in the tax certainty discussion. The ICF should be both robust and reliable and the ICF concept may be used in a broader context than only Tax Certainty for Amount A.

Although EBIT's Members favour the use of the ICF, its use should remain the discretionary right of the MNE involved also in terms of whether it chooses or not to use it for other purposes.

## **VIII. Complexity of the procedure**

EBIT's Members consider that the proposed procedure, in particular the combination of tax certainty for Amount A combined with tax certainty for issues related to Amount A, becomes very complex. Additional guidance for both the tax authorities and the Covered Groups concerned is required and would be welcomed. Where possible, the procedure should be simplified, for example through streamlining both procedures. They should be informed of the deliberations by way of a summary or minutes of the deliberations between tax authorities in the different panels.

## **IX. Fees related to the procedures**

The current text in the Public Consultation Document leaves the issue open whether the tax certainty framework including the tax certainty secretariat shall be funded by fees payable by the parties (countries) or by the groups making a certainty request (see § 5 p. 80). EBIT's Members suggest that the fees should be borne by the tax authorities involved. This is in line with EBIT's Members' position on tax certainty on issues related to Amount A.

EBIT's Members hope these comments are taken into account by the OECD. We are always keen to engage in further discussion and public consultations that will be required if matters are to be implemented successfully.

Yours sincerely,

## European Business Initiative on Taxation – June 2022

For further information on EBIT, please contact EBIT's Secretariat via Bob van der Made, tel.: + 31 6 130 96 296; e-mail: [bob.vandermade@pwc.com](mailto:bob.vandermade@pwc.com)).

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