

South Centre Comments on Tax Certainty Framework for Amount A

I. Background

The [South Centre](#) is the intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. The South Centre has [54 Member States](#) coming from the three developing country regions of Africa, Asia, and Latin America and the Caribbean. It was established by an [Intergovernmental Agreement](#) which came into force on 31 July 1995. Its headquarters are in Geneva, Switzerland.

The South Centre in 2016 launched the [South Centre Tax Initiative](#) (SCTI). This is the organisation's flagship program for promoting South-South cooperation among developing countries in international tax matters.

The South Centre offers its comments to the OECD Inclusive Framework's Task Force on Digital Economy (TFDE) on the Tax Certainty Framework for Amount A.

II. Specific Comments

i. Excessive power and discretion with Lead Tax Administration

The framework provides excessive power and discretion to the Lead Tax Administration (LTA), which in most cases is likely to be from the developed countries where the in-scope MNEs are headquartered. It generates a potential conflict of interest, as it is in the interest of the developed countries to cede as little tax as possible to other countries. It is a zero-sum game, as less revenues for the market jurisdictions imply more revenue for the headquarter jurisdiction. Hence, if they are able to decide whether companies are in scope and how much tax they have to pay, the outcomes will likely be unfavourable to the market jurisdictions which are largely the developing countries.

Recommendation: As a matter of principle, the role of the LTA must be restricted to that of a purely coordinating entity. It must have the least amount of discretionary power possible. By default, scope certainty, advance certainty and comprehensive certainty must be decided by Review Panels rather than the LTA. Throughout the text, wherever it is mentioned "Review Panel or Lead Tax Administration", the option of the Review Panel must prevail. The power must be dispersed and distributed among

multiple actors rather than be concentrated in the very country which has the most incentive to ensure that the tax paid is as little as possible to other countries.

ii. **Unfilled Places on Scope Review and Review Panels**

Paragraphs 11 and 12 of Section I.1 and Paragraph 6 of Section II.2 state that unfilled places on the Scope Review and Review Panels will remain unfilled if no Affected Party expresses interest.

Given the great disparity in capacity between the developed and developing countries, a likely outcome of such an approach will be that the developed countries will express interest and developing countries may not always do so, with the result that the Panels may end up being dominated by the developed countries, affecting the outcome in their favour. This scenario must be avoided.

Recommendation: It must be ensured that there are no unfilled places on the Panel. If there is a shortage of Affected Parties expressing interest, a randomized selection of Affected Parties can take place, only from a pool of developing countries, to fill the slots. This is because the entire Amount A architecture is meant to redistribute taxes to market jurisdictions which, as noted, are largely the developing countries, and thus it is only fair that they be given the priority in participation in the Panels.

An added benefit is that such participation will help these countries build capacity.

iii. **Panel Composition**

The framework provides various options for the composition of the Review and Determination Panels and the Expert Advisory Group. The discussion is whether independent experts should be included or not.

Including 'independent' experts would exponentially inflate the costs, which would be prohibitive for developing countries. These processes are also likely to last years, despite efforts to minimize the time involved, and the longer it takes the more the costs would escalate. This would deter developing countries from pursuing claims and force them to give up valuable revenue. This will be an unfair advantage to the developed countries.

It would also hand over an essential element of State sovereignty to unaccountable private individuals. Further, the reality is that 'independent' experts may be biased in favour of the MNEs, on whom they may be professionally reliant. This is reflected in the rules themselves which make blatant exemptions for those who provide tax

advisory services to MNEs, such as in Paragraph 6(e) of Section III.6. (Option A) and paragraph 5(e) of Section III.6. (Option C).

By contrast, having the relevant bodies comprised only of government officials, State sovereignty can be retained over the process, and the costs will be minimized, levelling the playing field for all countries. This will bring an essential element of democratic control over the power of the mega-corporations in scope of Amount A.

Analysis by the South Centre¹ shows that Amazon's gross revenues in 2020 would make it the world's 43rd largest economy if compared to countries by nominal GDP. If the Google-Apple-Facebook-Amazon-Microsoft (GAFAM) companies are taken as a collective, they would be the 19th largest economy in the world. This asymmetry in economic power also has political ramifications, and it is hence imperative that the multilateral system strengthen democratic control over these companies through appropriate State participation.

Recommendation: It is recommended that all the bodies involved in the tax certainty framework, including the Panels and the Expert Advisory Group, comprise exclusively of government officials.

iv. **Determination Panel Composition if Independent Experts are included**

In the event that it is decided to include Independent Experts in the Determination Panel, there are many aspects of the rules which need modification.

a. Candidates for Standing Pool

Paragraph 4(i) of Section III.6. in both Option A and Option C provides, in part:

... If more than [two-thirds] of the Parties do not object to the addition of a candidate to the Standing Pool within [30] days, the candidate shall be added to the Standing Pool for a period of [five years] ...

This means even if just less than 1/3rd of the Parties have an objection, that candidate will still be added to the Standing Pool for five years. This is very problematic.

Recommendation: A better approach would be if just one Party objects to a candidate, then that candidate should be removed from the draft roster of the Standing Pool. It is crucial that all parties should have trust in all the members of this Pool. Only if confidence in the system has broken down would such a veto be used to hinder its

¹ Forthcoming South Centre Policy Brief.

operation, and it should be designed to create mutual trust, not on the assumption that this is lacking.

b. Independent Expert Status: International Organizations

Paragraph 6(f) of Section III.6. (Option A) and paragraph 5(f) of Section III.6. (Option C) refer to an unstated list of international organisations to be added to the Convention.

This poses the risk that a 'whitelist' will be created of international organizations that may not fully take into account and pursue the interests of developing countries. Their technical expertise may be used to further support the interests of developed countries in the Determination Panel, on the argument that they have been included in the Convention and have been approved by the Parties. This may also mean that a *de facto* 'blacklist' may be created and used to exclude international organizations in which the developed countries do not have decisive influence. They will be prevented from supporting developing countries in the Determination Panel.

Recommendation 1: The option of including 'independent experts' from international organisations should be removed altogether.

c. Independent Expert Status: Tax Advisors

Paragraph 6(e) of Section III.6. (Option A) and paragraph 5(e) of Section III.6. (Option C) refer to Limited Tax Advisory Services, which are defined based on whether they are less than a percentage [30 percent] of the individual's total annual income. An individual may conduct such Limited Tax Advisory Services and still qualify as an Independent Expert.

Independent Experts will seldom, if ever, be truly independent if they have previously worked for or consulted with any MNE clients.

Recommendation: Independent Experts must exclude any individual that has conducted any work for or has received any compensation during the prior five years from any MNE (whether in-scope or not), or who has been an employee of any MNE or a partner, associate or employee of a consultancy, law or accounting firm that has provided services to any MNE during that period.

d. Existence of Independent Expert Conflict

Paragraph 3(b) of both Section III.6. (Option A) and Section III.6. (Option C) include a definition to determine when an Independent Expert has a conflict of interest in relation to a particular Relevant Group. However, the rules proposed are too narrow and likely to be ineffective.

Recommendation: Any individual who has provided any services to any MNE within an extended period such as the last five years must be considered having a conflict of interest, and only those who do not meet this criterion should be considered.

v. Financial Burden of Determination Panel Participation

Paragraph 2 of Section III.6. (Option B and C) provides, in part:

The Tax Certainty Secretariat shall invite Affected Parties covered by paragraph 1 to submit an expression of interest for a Government Official nominated by an Affected Party to participate in the Determination Panel An Affected Party should only express interest in participating in a Determination Panel if the person nominated by it is committed to taking an active role on the Determination Panel and *the Affected Party concerned would apply sufficient resources to ensure this is possible.* [Emphasis added.]

Placing the financial burden on the Affected Party would be detrimental to developing countries and deter them from participating in this process. It is also unjustified, as the entire process is triggered by a MNE, which is provided a “service” in the form of tax certainty. It is unclear why the provider of the service rather than the user should pay the cost. The very foundation of the economy is that the user pays for the goods and services consumed. Thus, since tax certainty is essentially a service provided to the MNEs, the entire cost should be borne by them.

Recommendation: The entire cost of the tax certainty framework should be borne by the concerned MNE.

vi. Composition and number of members in the Expert Advisory Group

The proposal is the Expert Advisory Group (EAG) consist of the LTA and two members from the Affected Parties. However, given the important role the EAG is likely to play, this number should be expanded.

Recommendation: The EAG can consist of six members, with the LTA and five from the Affected Parties. It should be ensured that in any event at least half the

composition is from the developing countries. As mentioned earlier, EAG membership should be restricted to Government officials.

vii. **Scope of Determination Panel**

Para 7(e) of Section III.5 of the rules propose to give the MNE an opportunity to justify its position before the Determination Panel. This is unjustified and unnecessary, as the MNE has ample opportunities in the Review Panel and prior stages of the tax certainty framework to do so.

Recommendation: The MNE should not have yet another opportunity to provide additional explanations and justifications to the Determination Panel. Para 7(e) of Section III.5 should be deleted.

viii. **Inclusion as Listed Party**

Paragraph 5 of Section I.1 of Part Two and footnote 1 within that Section indicate that the Inclusive Framework has not yet reached agreement on whether a specific Party, which was not included in the Listed Parties submitted by a Coordinating Entity, can require that it be treated as a Listed Party or whether that status is subject to a determination process if the Coordinating Entity does not agree to that Party's inclusion.

Recommendation: Any Party that desires inclusion as a Listed Party should automatically be added.

ix. **Protection of Listed Parties in Event of MNE Group Withdrawal from the Scope Certainty Process**

Paragraph 6 of Section I.1 of Part Two requires all Listed Parties to suspend all domestic compliance activities with respect to the calculation and allocation of Amount A and the elimination of double taxation, as well as the administration of Amount A to the Group for the Period specified in the request, for the duration of the Scope Certainty Process.

Since the timing for some of these procedures may take much longer than expected; perhaps years, that would mean countries will have to forgo tax collection during this time.

Recommendation: An automatic mechanism must be included that will also suspend each Listed Party's statute of limitations so that adequate audit checking and enforcement is possible in the event that an MNE Group withdraws its request for Scope Certainty.

Paragraph 4 of Section II.2. of Part Two makes the same requirement of all Listed Parties in connection with a Covered Group's request for a Comprehensive Certainty Review. Paragraph 8 of Section II.2. of Part Two extends this to non-Affected Parties. The recommendation applies in these cases as well.

x. **Defined Time Periods for Required Actions – Slow or No Actions Taken**

Paragraph 14 of Section I of Part Two, for example, and numerous other paragraphs throughout the Public Consultation Document provide time periods in which certain actions must be undertaken by a Lead Tax Administration, a Scope Review Panel, etc.

Recommendation: If the applicable tax administration or other body is not timely in its actions, then there needs to be clear redress or guidance for affected persons including Affected Parties, the affected Group, etc. If the delay comes from the Group itself, there must be financial penalties on the Group for wasting the time of the involved bodies despite having initiated the request for certainty. This will also deter the Group from malicious requests aimed at delaying the eventual payment of tax.

xi. **Limitations on Competent Authority of an Affected Party Regarding Certainty Reviews**

Paragraph 32 of Section II.3. of Part Two provides materiality limitations on the Competent Authorities of Affected Parties concerning Certainty Reviews. While including materiality limitations is understandable, the present form of these limitations in paragraph 32 is problematic for many jurisdictions and will have the practical effect of silencing the voices of many developing countries and preventing them from raising objections.

Recommendation: At a minimum, Paragraph 32(b) of Section II.3 which provides the materiality limitations should be deleted.

xii. **MNE withdrawal of request and/or refusal to accept the outcome**

If the MNE withdraws its request from either the Review or Determination Panels, it would mean a massive waste of time and money. If the Panels are comprised wholly

of Government officials, as it should be, then it would also mean a waste of taxpayer money.

Recommendation: The MNE must bear the entire cost of the process with added financial penalties if it chooses to withdraw the request or refuses to accept the outcome.
