

South Centre Comments on the 'Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One'

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 [55 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 organization's flagship program for promoting South-South cooperation among developing countries in international tax matters. Among other contributions to understand the possible impact of the Two Pillar Solution, in October 2022 the South Centre released a revised set of country-level revenue estimates from Amount A for its [Member States](#).¹ The results are similar to the prior estimates,² indicating tax revenues that are two to five times lesser than what would be obtained from the [United Nations' solution of Article 12B](#).

The revenue estimates use an easily replicable methodology and use open source data. They have been devised to support tax administrations from developing countries in carrying their own impact assessment which can inform their decision of whether to opt for Pillar One or not.

The South Centre submits the following comments and recommendations to the OECD Inclusive Framework's Task Force on Digital Economy (TFDE) on the [Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One](#).

¹ <https://www.southcentre.int/research-paper-165-4-october-2022/>

² <https://www.southcentre.int/research-paper-156-1-june-2022/>

II. Comments and recommendations

i. Administration of Amount A

a. 18 month Payment Period

Para 38 states that where streamlined compliance is applicable, “payments by liable entities to market jurisdictions will be required within 18 months after the Period has ended.”

Recommendation: The timeline is overtly long and can be shortened to 12 months. This would also rationalize the return filing on an annual basis. Further, payment should be made at the time of filing of the common documentation package.

b. Information Filing Requirements

Two options are discussed for filing the Amount A Tax Return (“Return”) and the Common Documentation Package (“Package”). The first is where the Covered Group or MNE files the return with the Lead Tax Administration (LTA) which then distributes it to the Affected Parties and the second is where the return is directly filed with each Affected Party. The first option is cumbersome and raises concerns of how the LTA can be held accountable if not does fulfil its obligations properly.

Recommendation 1: Placing the onus on the Covered Group to directly file the return with each Affected Party is preferable to having it done through the LTA.

Recommendation 2: The ‘hybrid approach’ outlined in footnote 10 is also a suitable alternative where the Return and Package are filed directly with the Affected Party where remote filing is available.

c. Affected Party

Para 106 leaves open the question of how information will be shared with a Party that considers itself an Affected Party but is not considered so by the Group and hence does not receive the Return and Package.

Recommendation 1: If a jurisdiction believes it is an Affected Party, that should be enough to receive the Return and Package.

Recommendation 2: The Return and Package can be shared with all the Parties to the Amount A MLC. This will increase sovereign trust in the system.

d. Exchange of Information

The relevant information such as the Return and Package are envisaged to be shared through an exchange of information framework which meets data security and confidentiality requirements.

While it is important to safeguard taxpayer data, more important is that countries actually receive this data and use it to collect taxes. An excessive focus on data safety may result in high compliance costs which may have the practical result of very few developing countries being able to receive the information. This is what happened for Country by Country Reporting where after 7 years of Action 13 only three developing countries have been able to access CBC reports from abroad.³

Recommendation: The design of the Exchange of Information framework should learn from the failures of the CBC system and keep confidentiality standards as minimum as necessary so all countries can access the information easily, particularly the developing countries.

e. Identification of Liable Entities

The pros and cons of a single or multiple taxpayer approach are discussed. Overall, the multiple taxpayer approach appears to be far more complex for developing countries.

Recommendation 1: Between the two, the single taxpayer approach is more suitable for developing countries.

Recommendation 2: A third option could be a hybrid approach where, if there is a group entity in a market jurisdiction, it shall be the liable entity for the group in that jurisdiction. In all other cases, the designated group entity shall be liable.

The hybrid approach would reduce the burden on the affected jurisdiction to collect the tax, or in the case of the Multiple Taxpayer Approach to identify non resident liable entities. It would also make the processing of payments of tax faster.

³ Page 19, <https://www.oecd.org/tax/beps/developing-countries-and-the-oecd-g20-inclusive-framework-on-beps.pdf>

f. Secondary Liability for Amount A

Article 15 proposes a secondary liability on the UPE for Amount A. However, enforcement of such liabilities on foreign jurisdictions may be difficult in practice, especially when most of the Covered Groups have their UPEs in powerful developed countries.

Recommendation: If the liable entity does not discharge its Amount A liability, the secondary liability should be with any other group entity/entities in the same jurisdiction. Liability should be transferred to an entity outside the jurisdiction only after the avenues within the affected jurisdiction are exhausted.

g. Transitional Period

Article 16 provides for Amount A Transition Periods for revenue sourcing and the exclusions. These provide an “Initial Phase” which is three years and three more years, leading to a total of six years during which no adjustments are allowed. For reasons that are not provided, Extractives Groups have been given an additional three years under certain conditions, totaling to a nine-year transition period.

Countries should not be prevented from making adjustments during such an extended duration. Further, it is expected that such highly profitable in-scope Groups will be easily able to access the best technology and expertise required to comply with the rules within the Initial Phase itself.

Recommendation: The transition period can be restricted to the Initial Phase only.

h. Suspension of Payments of Amount A

The rules leave open the question of whether payments of Amount A to market jurisdictions should be suspended while a Comprehensive Certainty process is ongoing.

Para 101 contains a list of reasons why this should not be the case. To this it can be added that such a rule may perversely incentivize MNEs to opt for Comprehensive Certainty Reviews.

Recommendation: There is no rationale for suspension of payment of Amount A during the Comprehensive Certainty review.

i. "Guardrails" on the tax rate to be applied to Amount A

Para 104 on page 31 states that the Amount A MLC may develop "guardrails" in relation to the "rate of taxation of Amount A or ensuring penalties in relation to Amount A are non-discriminatory compared to penalties applied to other types of income."

The concern that an excessive rate of taxation may be applied to Amount A is understandable. Nevertheless, this touches upon a fundamental aspect of State sovereignty, which is what tax rate a country may choose to apply. It was never mentioned previously in the July or October 2021 political Statements. This must be left to jurisdictions to decide for themselves, and kept out of the Amount A MLC.

Recommendation: Countries are and should remain free to determine what tax rate will be applied to Amount A.

j. Timely Relief from Double Taxation

The rules state that relief entities will be required to provide evidence of the payment of foreign tax in relation to Amount A within a specific period.

Recommendation: The rules must ensure that relief entities provide evidence of payment of tax to comply with Article 19. The timelines for providing relief must also be set accordingly.

ii. Tax Certainty Framework for Amount A

a. Composition of Panels

The rules propose that Panel Members be randomly selected. However, the selection will only be from the pool of jurisdictions that express interest. The developed countries are more likely to express interest, resulting in Panel composition that is statistically skewed in favor of the developed countries. This can adversely affect Panel outcomes against the interests of the developing countries.

Recommendation 1: Certain seats should be reserved on the Panels for developing countries for inclusiveness.

Recommendation 2: There must be no unfilled seats. The procedure outlined in para 8(d) on page 136 for filling unfilled seats can be customized such that only developing country Affected Parties can be asked to nominate government officials.

b. Decision-Making

For the foreseeable future, the chances are high that the Panels will have a majority of developed countries represented. Following a simple majority voting method may be disadvantageous to developing countries.

Recommendation: To the extent possible, decision-making must be by special or two-thirds majority.

c. Time Limits on Governments to conduct Scope enquiries

The rules propose that jurisdictions have a 36 month time limit to conduct scope enquiries on an MNE.

Recommendation: No such time limit must be imposed on jurisdictions.

d. De Minimis threshold for amendments by Review Panel

Para 24 on page 96 proposes that a Review Panel shall not make “small” changes to an amount in a Group’s Common Documentation Package, unless there is unanimity that such changes are necessary. Given that these are highly profitable Groups with turnover in billions of dollars, even “small” changes can have disproportionate impacts on taxes due.

Recommendation: The de minimis threshold must be removed and any changes by the Review Panel must be accepted.

e. Effect of Adjustments

The rules discuss whether the effects of adjustments should be taken into account for the earlier Period to which it relates or the period in which it is made.

Recommendation: For administrative simplicity, it is recommended that adjustments should be considered only for the period in which it is made.

f. Time Period between Review Panels

It is proposed that Affected Parties have a five year break between their ability to use Review Panels. The proposal for “trigger events” contained in footnote 67 is welcome and would increase trust and enhance participation in the new architecture.

Recommendation: Such trigger events could include:

- A) Redrawing/Creating new Business Segments
- B) Creation of an excluded Segment
- C) Major changes in Revenue Sourcing methodology
- D) Substantial allocation of Amount A to a new jurisdiction which would in effect mean a new Affected Party
- E) Allocation of Amount A to a substantial number of new jurisdictions

g. Scope Certainty – Disclosure to Listed Parties

When a Covered Group submits a request for Scope Certainty, it must provide information to Listed and Unlisted Parties. However, Listed Parties will receive more information than Unlisted Parties.

If an Unlisted Party wants to be listed, it must send an application to the Lead Tax Administration. The LTA will review application with Covered Group’s Coordinating Entity; the implication is that the LTA has *de facto* power to decide whether a Party can be Listed or Unlisted.

Recommendation: Listed and Unlisted Parties must receive the same information; there must be no hierarchy between the two especially when this is decided by an MNE. Similarly, the role of the LTA to *de facto* decide must be removed altogether.

Accordingly, the information in para 3(a) on page 64 must be provided to both Listed and Unlisted Parties and para 3(b) and para 5 must be deleted.

h. Withholding Taxes

The impact of Withholding Taxes is to be considered under the Comprehensive Certainty Process.

Recommendation: As was mentioned in a [previous South Centre submission](#), withholding taxes must be completely removed from Amount A.

i. Composition of Determination Panel

There are three proposed options for the composition: all Independent, all Government and Mixed.

Recommendation: For reasons articulated in a [previous South Centre submission](#), the Determination Panel must consist solely of government officials.

iii. Tax Certainty Framework for Issues Related to Amount A

a. Article X: Mutual Agreement Procedure

The requirement of presentation of MAP in both jurisdictions may result in duplicity of work. It may burden developing countries, especially those who do not have much MAP experience.

Recommendation: Only residence jurisdictions should initiate the MAP notification so as to minimize the administrative and compliance burden on developing countries.

b. Article Y: MAP When No Treaty

Article Y essentially tries to give MNEs MAP access even when jurisdictions do not have a tax treaty. This encroaches upon the sovereign right of countries to enter into bilateral tax treaties. Further, there are practical difficulties involved in how differences of position between jurisdictions on various treaty articles would be addressed.

The tax certainty procedure for issues related to Amount A is an extension of the MAP process and should exist only between treaty partners that already have an existing MAP relationship.

For these reasons, Article Y is fundamentally flawed.

Recommendation: Article Y must be deleted.

c. Article Z: Definitions

In the definition of a “related issue”, it is sought to include withholding taxes and domestic anti-avoidance disputes. It is also asked whether there must be a materiality threshold and whether both potential and current impact must be taken into account. It also asked whether reservations with respect to scope must be permitted.

Recommendation 1: As mentioned previously, withholding taxes must be completely removed from the calculation of Amount A, including from the tax certainty framework.

Recommendation 2: Domestic anti-avoidance disputes must also be removed. Even some developed countries disallow MAP arbitration when anti-avoidance disputes are involved.

Recommendation 3: There must be a quantitative materiality threshold such that only high value or substantive adjustments and similar issues are in-scope. This would require quantitative criteria and one option could be the impact on the relieving liability.

Recommendation 4: “Potential” or hypothetical or theoretical impacts which have not actually happened must be removed from scope. It is difficult to identify “potential impact”. Only current and actual impact must be allowed in scope.

Recommendation 5: Reservations on scope must be allowed, similar to the provisions in the BEPS MLI.

d. *Article 19: Dispute Resolution Panel Composition*

Similar to the composition of a Determination Panel, the question is posed as to what would be the best option: all Independent, all Government, or Mixed.

Recommendation: For the same reasons as for a Determination Panel, an all Government Official panel is the best option.
