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Sent by email: cfa@oecd.org

Tax Policy and Statistics Division
OECD Centre for Tax Policy and Administration
2, rue Andre Pascal
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14 December 2020

Re: Public Consultation Document – Reports on the Pillar One and Pillar Two Blueprints - Pillar One

Dear Sir / Madam,

The International Bar Association would like to take this opportunity to comment on the Public Consultation Document entitled Reports on the Pillar One and Pillar Two Blueprints, released on 12 October 2020 (the Consultation Document).

The International Bar Association (IBA), the global voice of the legal profession, includes over 45,000 of the world's top lawyers and 197 Bar Associations and Law Societies worldwide. The IBA is registered with OECD with number 1037 55828722666-53.

We are submitting our comments on behalf of the IBA Taxes Committee which has 1,037 members from around the world. This committee formed a Working Group to respond to the Public Consultation.

The comments made in this report are the personal opinions of the Working Group participants and should not be taken as representing the views of their firms, employers or any other person or body of persons apart from the IBA Taxes Committee of which they are members.

The comments are enclosed with this letter.

Sincerely yours,

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INTRODUCTION

Just as in 2019, we very much welcome and support the continued efforts of the Inclusive Framework on BEPS and the OECD Secretariat in seeking to achieve consensus on a Unified Approach under Pillar One. The Blueprint is a highly developed and considered proposal, and the opportunity to provide comments is both appreciated and necessary to the process. We are honored to participate in this process and contribute in a small way, and look forward to the ongoing discussion.

Below we address each of the specific questions posed in the Consultation Document. As a preliminary matter, we would first like to briefly note certain general themes that recur throughout our comments.

In responding to the questions below, we are also mindful of the policy intent of Pillar One, which is to redress the limitations of traditional nexus rules, in particular the concept of permanent establishment **(PE)**, in an era where substantial economic activity can occur at a distance from the end market. If anything, the COVID-19 pandemic has demonstrated and in some cases amplified this reality. We can see the basis for considering the Pillar One effort as a means to level the playing field between digital and non-digital businesses as well as between residence and market/source jurisdictions. But we also encourage the OECD to consider the interests of jurisdictions with tax bases heavily reliant on manufacturing and services activity (i.e., the intended beneficiaries of traditional nexus, PE, sourcing and transfer pricing rules). Much of the conversation in the Blueprint focuses on the interests of resident jurisdictions, but often this means simply the jurisdiction of residence of the parent company of an international group of entities. Care must be taken to avoid excessively shifting the tax base from manufacturing and service jurisdictions to market jurisdictions.

While the Blueprint seeks to strike such a balance in its recommendation to target reallocating residual profits, we strongly believe that a Unified Approach should instead focus on incremental modification to existing tax systems and treaty networks so as to minimize the degree of change necessary for specific countries. This should, in light of the above, be done with the intention of balancing the interests of market jurisdictions against other jurisdictions. This may be the only way to build broad-based consensus. We encourage the OECD to consider the practical means that countries (in particular, the United States) may use to implement an Inclusive Framework consensus, including:

- implementing an expanded definition of permanent establishment through technical explanations to treaties, rather than requiring amendments to treaties themselves;

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- implementing and respecting non-treaty nexus rules that are based on the digitalised economy through administrative guidance (rather than legislative changes); and
- adjusting transfer pricing standards and definitions through administrative rule-making (i.e., technical explanations, regulations) rather than legislative action.

By including only necessary changes in a Unified Approach that can be implemented without or with minimal treaty amendment or legislative change, the OECD will dramatically increase the likelihood of achieving consensus that includes key residence jurisdictions. Nevertheless, we recognise that there may be limitations to the changes that can be implemented in this manner.[1] Accordingly, the best approach may be to recommend a Unified Approach reflecting the OECD's ideal solution, but to permit member countries to take steps to achieve comparable results through non-legislative means, if necessary.

Similarly, reducing compliance burdens for multinational enterprises (**MNEs**) will encourage both consensus (amongst jurisdictions) and compliance (by MNEs themselves). Accordingly, our specific comments below seek to strike a balance between flexibility within the international tax system and avoidance of undue complexity.

We also note that existing unilateral digital services taxes (**DST**) (including, in particular, France, Spain and the UK) have purposefully sought to introduce systems outside of existing income tax and VAT regimes. While the goal of introducing a tax that would not be otherwise reduced by EU VAT or tax treaty provisions was paramount in those situations, our view is that the burden imposed upon MNEs of complying with an additional tax regime should not be replicated in a Unified Approach.

Finally, we also direct the OECD to the efforts that have taken place over the last several years in the United States, particularly California, seeking to introduce concepts of economic nexus and market-based sourcing, particularly for services and profit from marketing intangibles. There the process has led to the introduction of simplifying assumptions (generally based on population) and safe harbors (e.g., allowing taxpayers to rely on customer billing addresses) that would be beneficial to include in a Unified Approach to ease the administrative burden.

Overall, we believe it would be better to work within existing arrangements than to formulate a new overlay. The purpose of any international tax "system" (including a tax treaty network) is to effectively translate between different systems. Rather than encouraging new forms of taxation or an overlay to reallocate profit, we encourage the OECD to instead focus on

[1] *See* Michael S. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, Tex. Law Rev., Vol. 87, *1064 (May 2009).

improving the means of translation (i.e., tax treaties and common concepts in domestic laws) to allow jurisdictions to expand existing domestic and treaty-based infra-structure to taxation of the digitalised economy. This would include strengthening and expanding permanent establishment definitions, updating transfer pricing rules and developing a more coherent and practical set of mutual agreement procedure (**MAP**) and dispute resolution rules. This is the path **least** likely to result in unexpected double-taxation anomalies and distortion of the OECD's goals for fairness and simplicity of administration.

Chapter I

1. **Part I. The activity test to define the scope of Amount A.** Comments are invited on the design and implementation of the proposed activity test relating to Automated Digital Services and Consumer-Facing Businesses, including any challenges and suggestions on how to address them? [Refers to paragraphs 38-170 of the Blueprint

1.1. In developing a loss regime for Amount A, we strongly support the OECD goal of simplicity of administration.

1.2. Nevertheless, we agree that it would be "*impossible to ring-fence the digital economy for tax purposes.*"[2] The Blueprint seeks to continue to attempt to do so, in a manner that creates undue complexity.

1.2.1. As a general matter, we reiterate that the approach of reallocating residual profit risks inconsistent application across companies and jurisdictions, as the amount of residual profit is necessarily a result of the application of traditional permanent establishment, nexus, sourcing and transfer pricing rules to determine the amount of profit first allocated to the locations of manufacturing and service.

1.2.2. Thus, instead we strongly encourage the OECD to consider instead incorporating concepts of market-based sourcing and transfer pricing in a manner that purposively considers the appropriate split of profit between locations of consumers, manufacturing and services.

1.2.2.1. As previously noted and further discussed below, adopting an approach that builds on existing concepts will be easier to administer and likely can rely on existing mechanisms for dispute resolution (see responses to Parts XI and XII).

1.2.3. Within the Blueprint's proposed framework, the proposal is unclear on whether Amount A includes all sales everywhere (including sales of traditional products) or if certain sales are excluded.

1.2.3.1. Revenues derived from traditional products should not be ignored. These revenues often are interrelated with (and, by some local law definitions) overlap with the definition of Amount A.

2 OECD, *Addressing the Tax Challenges of the Digital Economy*, 2014, https://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-9789264218789-en.htm

1.2.3.2. Because domestic sales are excluded, the importance of determining the concept of "domestic jurisdiction" is increasingly important.

1.2.3.3. If the OECD adopts the concepts in the Blueprint, then it will need to better address the interplay between domestic sales and the appropriate amount of residual profit allocable to a jurisdiction.

1.2.4. Sales of traditional products/services are included in the calculation of Amount A to the extent that such products/services are provided/rendered to consumers.

1.2.4.1. For example, B2B services only fall within Amount A when they can be defined as automated digital services, i.e. in scope services.

1.2.4.2. This is regardless of the fact that such sales are generally registered by a subsidiary, by a PE or by the non-resident entity acting without a PE in a market jurisdiction.

1.2.4.3. Thus, in many cases, there is already some degree of local taxation of these transactions—by adopting an overlay approach, the Blueprint indirectly increases the amount that the market jurisdiction may tax without regard to whether the underlying amount of profit allocated under traditional rules is appropriate or fair.

1.2.5. While the Blueprint's approach—structuring a system that reallocates only residual profit—might avoid shifting profit appropriately taxed by the manufacturing or performance jurisdiction, we believe this can be better achieved by expanding traditional concepts, including permitting digital permanent establishments.

1.2.6. Relying only on reallocating residual profit—rather than an up-front decision about appropriate profit split between the market jurisdiction and location of service or manufacturing—contains one fundamental flaw: the amount of residual profit in any MNE is dependent on the amount of profit already allocated to jurisdictions that are the source of manufacturing and performance of services.

1.2.7. Ignoring the inherent interplay between these traditional rules and the amount of residual profit falling into Amount A is likely to result in arbitrary and distorted differences in applying these rules to different jurisdictions.

1.3. We agree with the Blueprints' approach of excluding certain types of income and industries from the scope of the Unified Approach more generally, including, in particular income from financial services. If this were to change, however, we would welcome the opportunity to further comment on the unique aspects of specialized industries and how any Unified Approach would need to take such aspects into account.

1.4. Specific issues with the scope of Amount A:

1.4.1. Online advertising services: it is not clear whether the market jurisdiction to which Amount A is allocated is the jurisdiction where the entity paying for the advertising services is based or the jurisdiction where such advertising services are used and/or enjoyed (VAT criteria).

1.4.2. Monetising: there are many references to this term throughout the document but not a clear definition. In addition, a reference to those business models that can vary over time should also be considered, e.g. many MNEs do not monetise collection of data for a certain period of time during which they normally would register losses. However at some point they start selling data and making a profit for this.

1.4.2.1. In the different jurisdictions where a company is established (or operates) it can normally offset these losses upon "monetization" of the business model. However it is not clear what treatment is to be given to losses under Amount A and whether the fact of including a reference to monetization means the MNE only falls within the scope of Amount A once it starts making allocable profits.

1.4.2.2. In our view, the pre-monetization losses should be included in Amount A, since those losses were necessary to develop the data giving rise to the income in later periods.

1.4.2.3. However, additional consideration should also be given to the impact of basis and amortization of cost in determining the appropriate amount of profit from monetization to be included in Amount A.

1.4.3. Licensing activities: if a company licenses to a manufacturer (B2B), and the manufactures sells its product to a distributor/retailer rather than directly to consumers, the Unified Approach should take a consistent view on whether the licensor falls within the scope, while the manufacturer would fall outside.

1.4.3.1. As indicated by other commentators,[3] the Unified Approach should segregate the return on R&D in order to protect the innovator and the innovator's home country.

[3] *See* ICC Comments on OECD public consultation document: Reports on the Pillar One and Pillar Two Blueprints: Tax challenges arising from digitalization (4 November 2020).

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1.4.3.2. This will need to be taken into account when considering license activities, in particular.

1.5. Finally, in calculating Amount A, we recommend explicitly excluding revenue attributable to VAT. The portion of revenues already subject to VAT does not reflect sales value of market jurisdictions, and would over-allocate residual profit to jurisdictions collecting VAT compared to jurisdictions using sales tax systems or not collecting indirect taxation on transactions.

Chapter II

2. Part II. The design of a specific Amount A revenue threshold (in addition to a global revenue threshold) to exclude large MNEs that have a de minimis amount of foreign source in-scope revenue. More specifically, comments are invited on what would be the best approach to define and identify the domestic or home market of an MNE group (e.g., the residence of the ultimate parent entity). [Refers to paragraphs 182-184 of the Blueprint]

   2.1. The de minimis Amount A should be set high enough to eliminate small or medium sized business from the compliance burden and the risk. The threshold should be a two-part threshold—both a percentage of total sales and an absolute amount of sales must be exceeded for the new rules to apply.

   2.2. Domestic or home-market cannot be determined by the organic structure or the place where the UBO is tax resident. Domestic or home-market should be determined on a case by case basis, and should target the place where the intangible assets are developed (DEMPE analysis) or where the MNE has its largest volume of transactions.

   2.3. Without some form of substantive test of home-market, there could be distortions i.e., if holding company jurisdictions or jurisdictions where the investors/shareholders are based, are not ignored in favour of the location of a MNE's core headquarter functions.

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Chapter III

3. PART III The development of a nexus rule.

3.1. As a general matter, before responding to specific requests, we reiterate that an expanded concept of nexus would be most easily implemented and administered if it were formulated as an extension of the existing permanent establishment definitions and profit attribution rules, rather than as an overlay of an additional basis for taxation.

3.2. Nevertheless, we address the specific requests below. We believe that the concepts should equally apply to a new form of nexus or to an expanded definition of a permanent establishment to address digitalized and remote businesses.

3.3. The "plus factors" suggested for CFB will be examined as potential indicators which denote an engagement with the market beyond the mere conclusion of sales. In terms of compliance costs and administrability, do you have any comments on these plus factors? [Refers to paragraphs 202-211 of the Blueprint]

3.4. Do you consider the suggested plus factors (and hence a taxable nexus under Amount A) could be deemed to exist once a certain level of sales is exceeded? If so, what should be the criteria for establishing such level? [Refers to paragraph 212 of the Blueprint]

3.4.1. We agree that, particularly for customer facing businesses (**CFBs**), a simple formulaic revenue threshold may be inappropriate as the basis for taxation (given the broad range of CFBs and the even broader range of circumstances which may be under review) in a market jurisdiction. Further, the compliance costs may far exceed the CFB's exposure under traditional profit attribution to a permanent establishment.

3.4.2. Thus, for CFBs it may be necessary to incorporate "plus factors" establishing a higher standard for nexus than the revenue standard that might apply to an automated digital service (**ADS**), though even in the case of an ADS, some "plus factors" may be warranted for the initial finding of taxable nexus.

3.4.3. The choice of potential "plus factors" is not easy. Physical presence, for example, might appear to be a likely candidate (as it may provide elements of engagement of a MNE with a relevant market jurisdiction) but it may be indistinguishable from the permanent establishment definition in most tax treaties which would already have served to render an MNE with physical presence taxable in the jurisdiction. If physical presence is used as a plus factor income already allocated to the PE may become double counted. That might suggest that physical presence should be only treated as a neutral factor.

3.4.4. In the context of a CFB or ADS, moreover, we have concern as to how a physical presence definition would work. We are concerned that a physical presence standard that is not fully fleshed out would create additional compliance cost, as well as potential inconsistent treatments across the markets where the MNE operates. If a physical presence test was used, it should be very clearly set out and focused on a clear intention to target a specific market. For example, should a physical presence oriented toward servicing and replacing products sold into the jurisdiction (as opposed to merely soliciting sales) be considered to further exhibit an intention to build market awareness (goodwill) and exploit the market on a continuous basis for the foreseeable future, justifying market taxation.

3.4.5. In our view, an objective and easier-to-monitor plus factor, such as setting an advertising and promotion budget threshold or a higher sales threshold, should be considered. In any case, factors should be considered provide certainty for the MNE, as well as identifying specific source or market jurisdiction elements, to minimise tax compliance and litigation costs.

3.4.6. The performance of advertising and promotion within a jurisdiction is an objective indication that an MNE hopes to exploit a market. If advertising and promotion targeted to a market exceeds the annual revenue threshold, that could be a probative plus factor.

3.4.7. An even more probative example of local market exploitation might be a “super revenue threshold” such as double the revenue threshold used to establish the taxable nexus for the digital service business. Doubling the revenue threshold might suggest that such a higher level of revenue would recover the current costs of any physical presence and result in net profits of a significance resembling that of the digital service platform MNE’s. On balance, we would regard the “double revenue threshold” as a more easily monitored and more likely justified plus factor for imposing economic nexus on CFBs (see below for a discussion of a possible multi-year temporal requirement).

3.4.8. Finally, another possible “plus factor” for CFBs would be the number of discrete transactions. Several states in the United States have used this factor (often 200 transactions) as a “plus factor” in addition to a minimum gross revenue threshold to establish nexus.

3.5. Should the market revenue threshold contain a temporal requirement of more than one year? If so, what should it be? [Refers to paragraph 196 of the Blueprint]

3.5.1. We believe that if a single-year threshold is used it needs to be high enough that it does not capture a taxpayer that does not seek to avail itself of a market in a country, and has no or very limited contacts with that country in years before or after. Even a high threshold if for one year, might permit a business to avoid nexus by artificially timing its sales. Another approach would be to set a multiple-year threshold, as suggested in the Blueprint (paragraph 196). That too, however, could lend itself to distortion through bunching income in one year to minimize the number of years above the multi-year threshold.

3.5.2. To that end, we suggest the use of alternative multiple tests for nexus:

1. *Revenue within a single year above a certain (high) threshold;*
2. *Average revenue in the current year and the preceding year above a (lower) threshold;*
3. *Revenue in any 3 of the 5 years up to and including the current year exceeding the same threshold used in alternative 2;*

3.5.3. We agree with the suggestion in paragraph 199 of the Blueprint that it is appropriate to use different thresholds for ADS and CFB, with higher thresholds for a CFB. That should apply to each of the above thresholds.

3.5.4. Because in many or most cases an MNE group will not know whether it has established nexus in a jurisdiction until the end of a tax year, we suggest that any MNE group that establishes nexus in a jurisdiction solely because of the market revenue test not be subject to any penalties relating to remittance of estimated taxes or taxes for any sub-annual period with respect to that first year, providing that tax is paid with a timely-filed tax return for that period.

Chapter IV

4. PART IV. Development revenue sourcing rule

4.1. Do you have any comments with respect to the proposed sourcing rule and proposed hierarchy of indicators as the basis for the sourcing of revenue for Amount A? [Refers to paragraphs 227-321 of the Blueprint]

4.1.1. Again, we stress as a preliminary matter that any expansion of the sourcing rules should be within the context of existing, established principles (i.e., sourcing to a digital permanent establishment).

4.1.2. In principle, the proposed sourcing rules and the hierarchy of indicators contained in the Blueprint seem reasonable and well described, subject to the comments mentioned below.

4.1.3. First, it may be worth considering, as an alternative to the proposed revenue sourcing rules, a formulary apportionment method where market jurisdictions may be awarded the right to tax the MNE's residual profits. As an example, for purposes of the US state income taxation within the United States, individual states for many years have apportioned group revenues to taxing jurisdictions using apportionment methods. Those apportionment methods generally apportion group income based in whole or in part on the destination of sales without restructuring the basic rules for sourcing. This is a methodology which is already in place in some jurisdictions and provides the capability to objectively measure revenues based on sales made.

4.1.3.1. As noted in our introduction, recent efforts by United States states, particularly California, in particular, have expanded historic apportionment methodologies to apply to economic nexus and market-based sourcing for certain services and revenue from marketing intangibles.

4.1.3.2. This work demonstrates that an apportionment system can take into account location of customers in a way that is consistent with the overall goals of the Unified Approach.

4.1.4. Second, we would not completely agree with the revenue sourcing rules proposal for intermediation activities (tangible and intangible goods and services). In paragraph 343, the Blueprint states that such a distribution rule recognizes the contribution of both the market jurisdiction (purchaser) and the provider jurisdiction (seller) to the possibility of the platform to generate its revenue.

4.1.5. Our concern is that this revenue sourcing rule may be providing taxing power to the jurisdiction of the seller—which does not seem to align with the idea of granting taxing power to the market jurisdictions where the customer enjoys the service or that purchases the goods.

4.1.6. We would propose to adjust this specific revenue sourcing rule (paras 251, 256 and 261) in such a way that the market jurisdictions are given their fair share of taxes.

4.2. What factors should be taken into account in determining "reasonable steps" required to obtain information that is unavailable (such as changing contracts with third party distributors)? [Refers to paragraphs 378-387 of the Blueprint]

4.2.1. Our view is that every MNE has a reasonably accurate and comprehensive understanding and knowledge of each intended market jurisdiction in which it is engaged, irrespective of the nature of the business performed (both ADS or CFB). This may be made more difficult with a mobile workforce and VPNs that might obscure the location in which services are being used.

4.2.2. We would anticipate that a MNE group will, as a matter of course, maintain accurate records at least as to the home or principal office locations of its customers, as such information would be critical to the process of its own business planning, marketing, return on advertising and promotion expenses, consumer protection, etc.

4.2.3. In most distribution agreements, distributors are required to provide a breakdown of the sales (by country), at least for the computation of pricing. An MNE should be required to use any such information as part of its analysis.

4.2.4. But even in such a case, it is unlikely that an MNE may receive information relating to sales into certain markets. However, if sufficiently high thresholds are set, this lack of information may be irrelevant because the relevant markets are below the respective thresholds, as the Blueprint indicates (para 379, footnote 58).

4.3. What simplification measures, if any, should be considered in the revenue sourcing rules, such as safe harbours or de minimis rules? [Refers to paragraphs 388-405 of the Blueprint]

4.3.1. The revenue sourcing rules "were designed to balance the need for accuracy with the ability of in-scope MNEs to comply, without incurring disproportionate compliance costs".

4.3.2. Ensuring that compliance costs are kept at a reasonable level and are not too burdensome is a stated aim of Pillar One. In this regard, it may be more appropriate to allow MNEs to decide themselves what the most appropriate indicator is for their circumstances rather than compel them to support a position as to why an indicator was not available or reliable. The basis for including a hierarchy of indicators in a system which is essentially self-assessing is that the first indicator will be the most accurate; however, an MNE may adopt whatever indicator is most accurate given its particular circumstances and conditional on it using that indicator consistently over a period unless its fact and circumstances change.

4.3.3. As such, allowing MNEs to determine the most appropriate indicator could potentially reduce compliance costs, while still ensuring the accuracy of the revenue sourcing rules, and providing certainty to MNEs and tax administrations as an MNE's. The choice of indicator would still be open to scrutiny. Similar to the application of transfer pricing methods, an MNE could be obliged to support the use of the indicator it has selected as the most appropriate indicator applicable to its business. This approach would simplify the application of the revenue sourcing rules and reduce the level of documentation required. It might also be an option to retain a preferred indicator. It could be the case that if an MNE uses a preferred indicator this choice would then not be open to scrutiny by the various tax administrations involved.

4.3.4. The hierarchy of indicators also ignores the possibility that an MNE may have some other indicator (not on the list) that may provide more accurate information than the most accurate indicator contained in the rules. Therefore, in retaining the hierarchy of indicators, it may be appropriate to include an option to "disapply" the hierarchy in circumstances where a MNE has a more accurate indicator available. In these circumstances the MNE should be obliged to retain documentation that evidences how its 'internal' indicator is more accurate.

4.3.5. Moreover, if the hierarchy of indicators is retained, a clear definition of what constitutes "reasonable steps" to try and obtain information is crucial. Without a clear definition as to what constitutes reasonable steps, an MNE could be burdened with unnecessary costs in attempting to obtain information that is ultimately unavailable or not relevant to establish that it has taken reasonable steps. An unclear definition on this point will not bring greater certainty to international tax affairs.

4.3.6. A de minimis amount may be appropriate for engagement by tax administrations. For example, an MNE should be able to discharge its Amount A tax liability in a market jurisdiction without concern that the local tax administration will seek to engage with the MNE where the revenue attributable to that jurisdiction is not above the de minimis threshold. This approach could ensure lower compliance costs as there would be less engagement with local tax administrations. The MNE's choice of revenue sourcing indicator would still be subject to scrutiny by the global voice of the legal profession®

the review panel – but it is important that if a review of indicators was to result in a change of appropriate indicators, the revised indicators be applied across all jurisdictions.

4.3.7. Setting safe harbours for determining priority factors as "unreliable" in certain cases could become rather burdensome (exception to the exception) when being regulated (specific rules to be adopted depending on the business).

4.3.8. Finally, we encourage the adoption of simplifying assumptions that may allow a MNE to opt into paying a safe harbour amount of tax and avoid complex calculation. For example, in apportioning certain revenues from services and marketing intangibles, California has adopted several simplifying approaches, including using the relative population of the state (compared to the population of the entire United States) as a proxy for apportionment. This type of approach would be extremely beneficial to both countries and MNEs seeking to simplify compliance costs.

4.3.8.1. For example, if the Unified Approach were to allow MNEs to determine the Amount A attributable to specific countries based on each country's proportionate population (compared to the overall population of the countries in which the MNE operates), MNEs could evaluate the relative benefits of paying this safe harbour amount against the cost of compliance.

4.3.8.2. Another possible formulation might be the percentage of customers (without regard to specific revenues attributable to such customers) with billing addresses located in each jurisdiction (compared to the overall number of customers).

4.3.8.3. For many smaller jurisdictions, MNEs may opt to pay more in tax in order to save compliance costs—benefiting both the country and the taxpayer (perhaps at the expense of advisers).

4.4. Do you consider that VPNs and/or any other emerging technology may have an impact on the accuracy and/or reliability of proposed revenue sourcing rules? If yes, what options or design changes should be considered to eliminate or minimise such an impact? [Refers to paragraphs 305-309 of the Blueprint]

4.4.1. VPNs and other emerging technology are clearly capable of affecting the accuracy of the revenue sourcing rules. The Blueprint acknowledges this.

4.4.2. Although technology such as VPNs may not be used by the majority of businesses at present, this is likely to change over time, particularly given the increasing global sensitivity for ensuring user privacy.

4.4.3. Given this context, it is important to ensure that the rules are not redundant or ineffective even before they are implemented. This raises another essential point in the analysis. As outlined above, it may be more appropriate to allow an MNE to rely on the most accurate method for sourcing revenue at its disposal rather than prescribing methods. This will be true as well in that the current list of indicators may be rendered inaccurate by current or emerging technology.

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Chapter V

5. Section V: The framework for segmenting the Amount A tax base, and how it could be further developed to deliver its objectives. As a simplification, this framework includes different options to limit the need for segmentation, including calculating the Amount A tax base on a consolidated basis as a default rule (and applying it to in-scope revenues to produce a proxy for in-scope profits.). More specifically, comments are invited on the following points:

5.1. Do you consider that hallmarks drawing on IAS 14 constitute an appropriate basis for developing a test to determine whether an MNE group is required to segment? If not, what other options should be considered to identify relevant segments for Amount A purposes?

5.1.1. IAS 14 constitutes an appropriate basis for developing a test to determine a business segment for segmentation purposes since IAS 14 considers the nature of the service or product, processes employed and risks assumed and returns, similar to the comparability factors used to identify a comparable segment for transfer pricing purposes. Perhaps those hallmarks should be expressly complemented with a functional analysis, since it is a concept that has been importantly developed during recent years and may also allow identification of specific business segments like i) market research, ii) investment costs, iii) incorporation and start of operations, iv) need for different kinds of human capital and the like.

5.1.2. The OECD should issue practical examples on the specific application of IAS 14 to encourage the results derived from the exercise of the segmentation analysis to be as consistent as possible across all MNEs and to contain creative interpretations by local revenue authorities.

5.2. Do you consider that existing segments (under financial accounting standards) should be used in the majority of cases as a basis for segmenting the Amount A tax base (for example by using a rebuttable presumption)? If not, what other options should be considered?

5.2.1. The IAS 14 approach should be used in the majority of cases as the basis for segmentation of the Amount A tax base. However, an alternative mechanism should be provided for MNE groups that fall out of the segmentation scenario. In this case, an authorization process that recognizes the MNE group's exceptional facts and circumstances should be provided. This alternative would allow the MNE group and the tax authority to agree on the segmentation method considering a functional analysis, business reasons and similar factors. A ruling procedure could also grant certainty for the segmentation hallmarks used to determine the Amount A tax base.

5.2.2. Also, clear guidelines for adjustments to the different "GAAP" regimes, should be established. For easier guidance the implementation of a positive and negative list could be considered.

5.3. Do you consider that groups should be permitted to calculate Amount A on a geographically segmented basis? If so, what should be the criteria for determining when geographical segmentation is permitted and what those geographic segments should be?

5.3.1. Geographical segmentation is a difficult issue. Even when geographical factors may affect a business segment (domestic regulations and infrastructure, country risks and market conditions to perform activities, risks, investments, etcetera), those differences should be addressed considering the other factors (i.e. functions, risks, returns, security fees, accountant or attorney fees, roads, internet access, etcetera) that may be reflected as a consequence of the geographical differences.

5.3.2. Also, if segmentation by region is made as proposed, it is not clear if the general deduction standard of the Inclusive Framework jurisdictions should apply or separate regional deductions.

5.3.3. Finally, geographical segmentation seems to be inconsistent with the nature of Amount A which is an allocation of group-wide profits.

5.4. Alternatively, do you consider that MNE groups should be required or permitted in some cases to segment their profits before tax between in-scope activities (i.e. ADS and/or CFB) and out-of-scope activities? If yes, what criteria could be used to determine when this approach to segmentation should be applied as opposed to calculating the Amount A tax base on a consolidated basis?

5.4.1. This type of option for the MNE group is justified in transparency, equity, and simplicity and could serve as a consolidated safe harbor. However, there are many different scenarios under the in-scope activities that may affect the reality of the MNE's operations and hence, the taxing rights of one or other jurisdictions. In this regard, an in-scope and out-of-scope segmentation approach should be considered as an option for the MNE, but with the possibility that the MNE may also request a ruling from the appropriate authority in the process confirming the different segments approach. This ruling should be binding on all involved jurisdictions.

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Chapter VI

6. Part VI: The development of a loss carry-forward regime that would ensure that Amount A is based on an appropriate measure of net profit.

6.1. In our view, the objective of Pillar One (and Amount A in particular) has not been drafted to deliberately increase worldwide corporate tax revenues, though the reallocation to market economies will likely have this effect in the aggregate. We accept this outcome but would encourage members of the OECD Inclusive Framework not to seek to limit appropriate loss utilization rules or to attempt to "backdate" the Pillar One adoption by incorporating pre-regime profits in order to maximize the quantum of tax revenues collected under this regime.

6.1.1. That would be going beyond redressing the deficiencies in the current PE framework and could undermine the perceived legitimacy of, and consequently support for or at least acceptance of, the effort.

6.1.2. We do recognize that in developing rules for tax loss utilization, compromise will be necessary if simplicity and fairness/neutrality are both to be observed and also if consensus is to be achieved among members of the Inclusive Framework.

6.1.3. In view of this, we offer that notwithstanding the views expressed below concerning the desirability of accounting for profit shortfalls in determining Amount A, if put to the choice, we would be strongly in favour of a tax loss mechanism that has the characteristics set out below and could accept that excluding profit shortfalls is a necessary measure.

The questions in particular are as follows:

6.2. Do you consider that Amount A tax base rules should apply consistently at the level of the MNE group (or segment where relevant) irrespective of whether the outcome is a profit or loss (symmetry)?

6.2.1. We agree that the Amount A tax base rules should generally be applied consistently, regardless of whether a business earns profits or incurs losses in a particular taxation period and whether the segmentation framework applies or not. We consider symmetry to be an important element that should be observed and emphasized in the application of the Amount A tax base rules in this particular instance. The principle of symmetry is an integral component of a harmonious and fair tax system and is closely tied to principles of neutrality, whereby failing to observe symmetry in this particular instance may create distortions that can result in the need for additional resources in order to achieve appropriate financial results.

6.2.1.1. We also agree that taking into account losses on manufacturing or service activities overall should be incorporated when sourcing and pricing value to market jurisdictions, even if this is done, as is suggested above, in an alternative formulation to what has been proposed in the Blueprint.

6.2.1.2. In other words, if a more traditional approach is taken (i.e., expanding the definition of PE and adjusting principles of nexus, source and transfer pricing), the value attributable to a market jurisdiction should still consider overall profit. While this may naturally occur if a profit split method is adopted as an appropriate transfer pricing methodology, we believe that the below comments support such an outcome.

6.2.2. Additionally, having different regimes for the application of the Amount A tax base rules based on whether the particular MNE group is in a profit or loss position is likely to add considerable complexity to the Pillar One regime. Considering this avenue in the context of additional contemplated exceptions for business reorganizations and special requirements for inter-segment transactions (as discussed in section 5.4.4 and paragraph 454, respectively), as well as the potential differentiation mechanisms that may apply in calculating amount A (as discussed in section 6.3), using different regimes is likely to result in significant additional administrative and compliance costs that may not be justifiable when compared to the benefits.

6.2.3. Finally, failing to apply the Amount A tax base rules consistently in the case of profit and loss periods can produce absurd and unintended results. For example, depending on the different methods adopted, the calculations of Amount A when there is a profit position in a particular taxation period may not necessarily match the Amount A calculation when there is a loss position in another period, although the economic profit and loss amounts may be identical as between the two particular taxation periods. Accordingly, this could then result in double taxation whereby MNE entities are not able to fully offset profits subject to Amount A by the losses subject to Amount A, although the economic amounts may be equivalent. Additionally, ensuring the matching of profit and loss amounts when there is economic equivalency (but different regimes for applying the Amount A tax base rules) may present further complexity. To this end, there do not appear to be any pressing policy or practical considerations which should dictate why the same method cannot simply be used to apply the Amount A tax base rules in both cases.

6.3. Do you consider that the carry-forward regime should account for some pre-regime losses and, if so, are any specific rules required to ensure symmetry, limit complexity and compliance costs (e.g., time limitations)?

6.3.1. We agree that the loss carry-forward regime should account for pre-regime losses, preserving certain losses and allowing their deduction against Amount A in future years on the same basis as in-regime losses. Proceeding on this basis would adhere to the principle of neutrality and mitigate against distortions caused by the introduction of the new taxing rights in the Pillar One regime, while allowing MNE groups to recover the costs of investments undertaken prior to the introduction of Amount A.

6.3.2. To disallow the carry-forward of pre-regime losses would disproportionately affect MNE groups in early stages of development, whereby significant start-up costs incurred by such groups prior to the introduction of Amount A would not be accounted for as losses against Amount A. Similarly, businesses that have cyclical profit patterns could be asymmetrically taxed, if the Pillar One regime is implemented in a "peak" year without recognition of corresponding “down" years that may have transpired immediately prior and contributed significantly to the profit earned in the current year. Therefore, the treatment of MNE groups may transgress principles of fairness if pre-regime losses are not carried forward.

6.3.3. We understand that some OECD members have taken the position that allowing the carry-forward of pre-regime losses should not be accommodated unless pre-regime profits are also brought forward for distribution and subject to Amount A. While this might perhaps better align, generally, with principles of symmetry in this particular case, the carry-forward of pre-regime profits would give rise to considerable problems. In particular, the carry-forward of pre-regime profits would effectively be giving the Pillar One regime retroactive effect. This could be particularly problematic if the elective "safe harbour" regime, as proposed by the United States, is adopted. Many MNE groups would be unlikely to voluntarily adopt a regime that brings into taxable income profits realized prior to the introduction of the regime. Additionally, bringing forward past profits may necessitate amendments of prior year's financial statements and tax reporting and may necessitate reconsiderations of profit distributions and management and business decisions taken based on the financial position of the particular MNE group at the particular time.

6.3.4. To mitigate the practical challenges in respect of identification and calculation of Amount A losses, we agree that a time limit within which pre-regime losses may be brought forward should be imposed. Given that domestic losses will not be deductible against Amount A and will be kept separate from the Pillar One regime generally (except in limited circumstances in the context of preventing double taxation in identifying paying entities, as discussed in paragraphs 564 and 572), this time limit should not be tied to domestic statute loss carry-forward periods or periods in domestic statutes of limitations.

6.3.5. Lastly, in order to mitigate against additional complexity and compliance burdens in the carry-forward and treatment of pre-regime losses, consistent application of the Amount A tax base rules whether a business earns profits or incurs losses, as discussed in [1.1], should also be pursued.

6.4. Do you consider that losses for Amount A purposes should not be allocated to market jurisdictions (unlike profits), but instead reported and administered through a single account for the MNE group (or segment where relevant) and carried forward through an earn-out mechanism? If so, do you have specific suggestions to improve the design and administration of this approach?

6.4.1. We agree that reporting, pooling and administering Amount A losses (including pre-regime losses) in a single account will reduce administrative complexity and the compliance burden associated with Amount A. Doing so will also likely promote symmetry and fairness, as the allocation of losses to different market jurisdictions can produce inequitable results and double taxation. An example of this is considered in paragraph 479, where profits are allocated to new markets that an MNE group has entered but those losses have already been incurred in and allocated to other jurisdictions. They should not therefore be used to shelter the Amount A profits in the new jurisdiction.

6.4.2. Using a single pooled account for administering losses is also in accordance with allowing group tax consolidation of losses, which is a regime pursued by many OECD member countries (whether through formal tax loss transfer methodology or tax consolidation). Other OECD countries that do not provide for such group tax loss consolidation often allow for limited loss transfer transactions between entities in related corporate groups, whether through administrative fiat or otherwise. In either case, making the use of losses fluid and available between related entities in an MNE group promotes equity and efficiency and therefore administering Amount A losses through a single account is a favourable course of action that is in line with these objectives.

6.4.3. Important elements to be considered in the design and administration of this approach include the consideration of whether time limitation periods for loss carry-forwards will apply. If so, the complexities this may cause in the use of a single pooled account of losses may be substantial. Some sort of method or metric should be adopted to provide for an ordering rule, such as an attribution of losses to taxation periods in which they were realised.

6.4.4. Additionally, consideration should be given to the mechanics of restoring losses in the pooled account in the event of subsequent adjustments of Amount A pursuant to the elimination of double taxation measures discussed in Section 7 as well as any such adjustments resulting from the resolution of tax disputes. As well, following in the footsteps of jurisdictions that allow group tax loss transfer and consolidation, consideration should be given to whether the pooled loss account operates on an automatic "earn-out" basis (whereby losses automatically apply to Amount A liability realized within the group to the extent available) or whether MNE groups have the ability to apply less than the entire amount of available losses in any particular period, allowing flexibility in group tax loss consolidation.

6.5. What is your view of the proposal to extend the carry-forward regime to 'profit shortfalls'? Do you or do you not agree with the conceptual rationale behind it?

6.5.1. We agree with the conceptual rationale behind extending the loss carry-forward regime to include "profit shortfalls" and thereby reducing Amount A by the amount of Amount A profits falling below the agreed profitability threshold. We see this as being in line with the principles of symmetry, neutrality and tax fairness, whereby the "pivot point" for carryovers in the Amount A regime should be the residual profit threshold (replicating the principles of fairness of the regimes in domestic tax loss carry-forward systems, to the extent applicable). Allowing the carryover of these amounts in the same fashion as other Amount A losses will also promote simplicity and efficiency. Accordingly, we are in agreement with the statements expressed in paragraphs 488-489. We note, however, that accounting for "profit shortfalls" and treating them in the same manner as losses will require certain changes to the ordering in the steps in the Pillar One process, as summarized in the process map in Figure 1.2.

6.5.2. We understand that some OECD members consider that allowing the carry-forward of "profit shortfalls" introduces unnecessary complexity. We disagree and note that treating these amounts in the same fashion as other loss carry-forwards allows the assimilation of this regime into the mechanics of loss carryforwards that already must be present in Pillar One. Doing so merely moves the aforementioned "pivot point" from the zero-profitability threshold up to the agreed Amount A profitability threshold and therefore should not entail any considerable additional complexity as a result.

6.5.3. These same members also argue that loss carry-forward regimes are designed only to enable taxpayers to recoup losses reflecting costs of their earlier investments and that, as profit shortfalls do not reflect such costs, they should not be accounted for in determining Amount A liability. We disagree with this perspective as well, noting that the policy rationale for accounting for losses in domestic tax systems (which are designed to address domestic tax implications from a net revenue perspective, where the costs of investment are the paramount consideration) is somewhat distinct from the policy rationale under Amount A and Pillar One in general (being the re-allocation of residual profit from in-scope activities, above a certain threshold, to market jurisdictions). Accordingly, the principles of neutrality and fairness here require not only that losses that represent costs of investment are accounted for, but that any amounts that do not meet the agreed profitability threshold are as well.

6.5.4. With respect to the argument that disregarding "profit shortfalls" has little impact on the tax burden of the taxpayer (and hence on neutrality), as only allocation of profit is affected, we disagree as well. The re-allocation of profit and possible change of jurisdiction where the particular taxpayer is liable for income tax, and the purpose behind Amount A and Pillar One in general, is precisely to ensure that MNE groups "pay their fair share" of tax. To this end, the OECD Impact Assessment estimates that taxing rights on approximately USD 100 billion of profit could be reallocated to market jurisdictions and this would lead to a modest increase in global tax revenues. Additionally, the consideration of sufficient additional tax revenue (that is not outweighed by corresponding administrative costs) also appears to be behind certain aspects of the design of Pillar One. One example of this is the exemption of smaller MNE groups, with global revenue below an agreed amount, from the application of these rules on a segmented basis (as discussed in paragraphs 451-454). Accordingly, disallowing the counting of "profit shortfalls" as losses will have an impact on the tax burden of taxpayers subject to Amount A, and therefore neutrality as well.

6.5.5. As an additional reason for accounting for "profit shortfalls", it should be noted that this would be an attractive feature to MNE groups and would therefore promote voluntary agreement with Pillar One in the event that the U.S. driven elective "safe harbour" approach is adopted.

Chapter VII

7. Part VII: The scope and relevance of possible double counting issues arising from interactions between Amount A and existing taxing rights on business profits in market jurisdictions. More specifically, comments are invited on the following points:

7.1. Do you consider that the proposed mechanism to eliminate double taxation from Amount A will have an impact on the scope and relevance of possible double counting issues? Do you have suggestions on the design of this mechanism that would improve its ability to resolve (or reduce) possible double counting issues? [Refers to paragraphs 531-532 of the Blueprint]

7.1.1. We again reiterate that incorporating increased rights to tax by market jurisdictions into existing systems would materially limit the incidence of double counting and double taxations identified throughout this and subsequent sections. Fundamentally, without considering the value ascribed to a market jurisdiction up front and instead assuming that all such value defaults to the residual profit residing in the parent company, does not comport to economic reality.

7.1.1.1. Value attributable to markets necessarily is spread across locations of manufacturing, service, ownership of intangibles and global goodwill.

7.1.1.2. Accordingly, a market jurisdiction may already be compensated in part for access to its market in the form of revenues from other activities. And the flip is also true, that some amount of the value derived from market jurisdictions may be allocated to the location in which the intangible property is held or the manufacturing and service activities are conducted.

7.1.1.3. For these reasons, the best approach would be to revert to a system more fully integrated with the existing tax regime on business profits more generally.

7.1.2. We agree that the proposed mechanism aimed at eliminating double taxation has an impact on double counting issues. The application of the method to relieve double taxation from Amount A and the consequent "netting-off" effect is, in principle, able to eliminate or reduce the risks of double counting where an entity of the MNE is identified as a "paying entity" for the purposes of both eliminating double taxation and Amount A.

7.1.3. We also agree that the "netting off" effect of the method to eliminate double taxation would work for the purpose of eliminating double counting issues in centralised business models where the residual profit

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allocated under existing rules to the market jurisdiction will be reduced by the method used to relieve double taxation from Amount A. On the other hand, in cases of decentralised MNEs that realise residual profits in a large number of entities and jurisdictions, the double counting issue would not be solved or would at least be extremely complex to address.

7.1.4. Considering the fact that one of the goals of the OECD Pillar One is clearly that of minimising the complexity of the actual application of Amount A, reducing compliance and administrative burden for MNEs, we believe that, in order to avoid the system being excessively burdensome and complex to apply, it is preferable that the elimination system be only applied to centralised businesses where it is comparatively easy to identify the paying entities. For a decentralised business, the issue would be better addressed by the safe harbour mechanism and the application of the existing ALP-based profit allocation rules.

7.2. Do you consider that there is an interaction between withholding taxes in market jurisdictions and the taxes under Amount A? If so, how could such interactions, including double counting issues, be addressed [Refers to paragraphs 506, 528 and 555 of the Blueprint]?

7.2.1. We acknowledge that the interactions between Amount A and some withholding taxes could give rise to double counting. This may occur in particular where an intra-group profit (e.g. royalties) is subject to a withholding tax and, at the same time, is included in the computation of residual profits under Amount A. In this case, we are of the opinion that double counting may arise and the issue should be consequently addressed with an ordering rule.

7.2.2. Further, as noted above, the means of calculating Amount A needs to take into account amounts collected under VAT regimes to avoid over-allocating profit to jurisdictions utilizing VAT (as compared to jurisdictions without indirect tax systems or jurisdictions utilizing sales tax systems).

7.3. What would be the most important design and technical considerations in developing a marketing and distribution profits safe harbour for MNE groups with an existing taxable presence in the market jurisdiction? For example, do you consider this approach would be effective in dealing with possible double counting issues? Do you have views on how the fixed return could be designed? How should subsequent transfer pricing adjustments be dealt with in relation to this safe harbour? [Refers to paragraphs 533-546 of the Blueprint]

7.3.1. We understand that a marketing and distribution profits safe harbour is just a "cap" to the allocation of Amount A to market jurisdictions that already have taxing rights over an MNE group's profits. It would the global voice of the legal profession®

consider the income taxes payable in the market jurisdiction under existing tax rules and adjust the quantum of Amount A taxable in that market jurisdiction, reducing it where the residual profit of the MNE group is already taxed in that jurisdiction as a result of the existing profit allocation rules.

7.3.2. We are of the opinion that the marketing and distribution profits safe harbour may be a valid and efficient system to address the double counting issue in association with the mechanisms to eliminate double taxation. It may be particularly relevant for decentralised businesses that realise residual profits in a large number of entities and jurisdictions, where it is conceptually challenging to identify the paying entity for Amount A and where the application of mechanisms to eliminate double taxation may be difficult.

7.3.3. As to how the return should be computed and in order to avoid the difficulties arising in determining the base where a margin or a mark-up would need to apply, we support the application of the simplest approach where the agreed return on sales is applied to in-scope locally sourced revenue.

7.3.4. We agree that the fixed return would not be consistent with the ALP, but for the sake of certainty and simplicity, we support the view that there should be a single fixed rate applicable across all regions and industries.

7.4. Should a domestic-to-domestic business exemption be considered to exclude part of a group's business that is primarily carried on in a single jurisdiction from the calculation of the Amount A tax base? If so, do you have views on how this exemption could be designed? [Refers to paragraphs 547-553 of the Blueprint]

7.4.1. We agree that a "domestic business exemption" might in principle reduce or eliminate double counting issues if it is applied in combination with another system addressing the same issues. We also acknowledge that there are at least two different types of exemption that may actually work.

7.4.2. We understand that the domestic business exemption is actually efficient in domestically-focused businesses with a minimal level of foreign income where it could be easy to isolate profits within the business activity of MNEs that clearly derive from the sale of goods and services in a very restricted number of jurisdictions.

7.4.3. We agree that only a limited number of MNE groups would meet these characteristics considering that the majority of MNE groups that will be subject to Amount A perform their business activity in multiple jurisdictions. We understand that, in these cases, the application of the domestic business exemption can be extremely difficult. This may

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increase compliance costs and administrative burden giving rise to a high level of uncertainty and consequent risk of litigation.

7.4.4. In light of the above, we believe that the domestic business exemption should not be taken into account as a tool to avoid the risks of double counting.

7.5. Besides the mechanisms proposed in the Blueprint, do you have any other suggestions on how to resolve the possible double counting issue?

7.5.1. No comments.

Chapter VIII

8. Section VIII: What are your views on the proposed approach to eliminate double taxation from Amount A? Do you have any suggestions to improve this approach, including any alternative approach to eliminate double taxation?

8.1. MNEs as potential taxpayers under Pillar I long for tax security and tax certainty. Therefore, one of the key issues of implementing Pillar I will be how to address double taxation and how to develop a mechanism to avoid especially economic double taxation. This is important as Amount A will apply as an overlay to the existing tax systems and profit allocation rules.

8.2. Section 7 of the OECD proposal focuses on how to prevent double taxation. It seems that more thought must be put into the question of which mechanism will be used to avoid double taxation. The specific comments and questions asked refer mainly to component 1 (identifying the paying entities). In our view, component 2 (methods to eliminate double taxation) is of crucial relevance not only for the potential MNE groups but for the success of the whole project.

8.3. Our view is that the exemption method has significant advantages over the credit method in eliminating double taxation, especially if taxation in the market jurisdictions is to be increased. On the one hand the exemption method does not disadvantage MNE groups in the jurisdiction where its operations are conducted. On the other hand, the exemption system does not carry with it the administrative burden of the credit method (to add to other administrative requirements contained in the Pillar One rules) Nor does it suffer from the limits which will undoubtedly add to the overall tax burden of the MNE group when the variations in tax base and tax rates payable in all jurisdictions involved are considered. From our perspective a 100% exemption rule as the mechanism to avoid double taxation should be the main goal.

8.3.1. But despite the described advantages of the exemption method it must be considered that some countries, especially the US, already utilize the credit method to eliminate double taxation. Since the participation of the US is of particular importance for the success of the entire project, it seems necessary that the system around double taxation fits into the legal circumstances of the participating countries, especially of the US.

8.3.2. Therefore, we recommend that an exemption method be recommended as part of the Unified Approach, but that a country may use its existing credit framework if it can show that it achieves comparable results as a complete exemption.

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8.4. Currently, jurisdictions apply either the exemption method (e.g., Article 23 A of the OECD and UN Models) as the standard method or the credit method (e.g. Article 23 B of the OECD and UN Models) as a specific method to eliminate international juridical double taxation. As all jurisdictions are familiar with the operation of both, it should be possible, in the case of the Amount A, to provide a separate regime which assures the exemptions system will apply. For foreign income received under the traditional regime, the rules applicable in jurisdictions would continue to provide either credits or exemptions as is currently the case.

8.5. From a practical and efficiency perspective, it is reasonable to use existing material and documentation to identify the appropriate paying entity. Especially, by using the transfer pricing master files and other transfer pricing documentation which are prepared by MNE groups to evaluate and identify the paying entity seems appropriate.

8.6. From our perspective, the profitability test should not be included to identify the paying entity. The OECD Pillar I proposal under Section 7.2.3 states that a potential profitability test would ensure that the potential paying entity has the capacity to bear the Amount A tax liability. In our view the paying entity, which is defined under the activity test, should qualify as the paying entity in all cases. In most cases the paying entity thus defined will have the capacity to bear the Amount A tax liability. In those cases, where the paying entity under the activity test is not able to bear the Amount A tax liability, the amounts may be contributed by other group members. The payment and receipt of tax amounts should have no effect either on the tax position of the paying or the contributing entities. This will require some further thought if amounts are transferred from and to different jurisdictions in this process.

8.7. In general, it might be helpful to determine within a group a paying entity of last resort for elimination of double taxation under the OECD Pillar I proposal. It should be factors of economic reality that determine the appropriate entity, not arbitrary concepts (e.g., the ultimate parent entity).

8.8. Do you consider that the activities test can be developed based on existing transfer pricing concepts and documentation? If not, what additional concepts or documentation requirements would you suggest, recognising the need to retain a test that is as simple as possible?

8.8.1. Under the activities test the paying entities within an MNE group should be identified by the performance of activities that make a material and sustained contribution to the MNE group´s ability to generate residual profits. From a corporate perspective, the particular MNE group in general knows the entities within the MNE group that make material and sustained contributions to residual profits. Guidelines to assist in this process would assist to identify the particular paying entity. As in other cases discussed herein, recognising that the MNE group is going to know its entities better than any tax administrator, it may be simpler to permit the MNE group to nominate the paying entity, subject to review as is considered appropriate, and taking account of the fact that there is a need to simplify the administrative burdens for both MNE groups and tax authorities under Pillar One.

8.8.2. Generally, this choice should be supported by existing documentation (e.g. group´s master files, relevant local files, Country-by-Country reports, and other transfer pricing documentation) to identify the paying entity. Both, the activities test and the profitability test focus on information which can be received from existing documentation. The indicia which should be used to identify the paying entity under the activities test are the functions, asset and risk profile of an entity, an entity´s characterisation for transfer pricing purposes and the transfer pricing method.

8.8.3. Especially, as already stated in the Blueprint, the OECD Transfer Pricing Guidelines identify a series of factors that might be helpful to identify the paying entity.

8.8.4. As an example the Country-by-Country Report in general includes information for every tax jurisdiction in which the MNE group does business on the amount of revenue, the profit before income tax, the income tax paid and accrued, the number of employees, the stated capital, the retained earnings and the tangible assets. All this information can be used by the MNE to select the appropriate paying entity and to support that choice. Especially, the transfer pricing concepts (transfer pricing master file and relevant local files) should be used to identify the entities that should bear the Amount A tax liability. This approach would also prioritise simplicity, as these existing documents are already collected and reported by taxpayers. Also, tax administrations are familiar with those documentations and have already reviewed them. Furthermore, the information under transfer pricing concepts are comparable from country to country and therefore suitable to identify the paying entity.

8.8.5. But it needs to be recognised that at present this documentation (group´s master files, Country-by-Country reports and other transfer pricing documentations) may not be available in all jurisdictions that would be impacted by Amount A. This needs to be addressed further by the OECD. If the MNE Group was permitted to make the first selection, it will have all of the relevant documentation and can produce it as required and subject to protection of confidential information caveats in support of its selection to the relevant authority. To simplify the process, there should be a process to approve the selection which is then binding on all jurisdictions involved.

8.9. Do you consider that the profitability test should be calculated as a return on payroll and assets or should alternative approaches be considered? Could the profitability test apply instead of, rather than in addition to, the activities test?

8.9.1. Concerning the general task of identifying the paying entity it seems helpful to use payroll and tangible assets both as indicators of substantive activities because these factors are in general less mobile and less susceptible to tax induced distortions. In addition, IP that has been developed in the jurisdiction in question (and has not merely been transferred to it) may also be used as a factor. Furthermore, a combined test of these factors would consider the varying substance profiles of different types of entities, including labour-intensive and asset-intensive businesses. These elements could be used under the activity test as described above.

8.9.2. In our view the profitability test should not apply instead of the activities test. We assume that in most cases the profitability test and the activities test will lead to the same outcome. Therefore, we recommend that the profitability test should not be used to determine the paying entity.

8.10. Do you consider that a market connection priority test should form part of the process to identify a paying entity? Why or why not?

8.10.1. There will be instances in which there are only a limited number of market jurisdictions claiming taxing rights over Amount A. The Blueprints suggest a market connection priority test, whereby, in the first instance an Amount A tax liability for a given market jurisdiction would be relieved against the profits of a paying entity that performs, in relation to a given market, the activities identified as part of the activities test.

8.10.2. Under the market connection priority test for each market jurisdiction asserting taxing rights on Amount A, an MNE group will be required to determine which of the potential paying entities identified has a sufficient connection to be identified as the paying entity for that market jurisdiction.

8.10.3. From our point of view, the market connection priority test might be useful in instances where neither the activities nor the profitability test clearly identify a paying entity within an MNE group. In these cases, it will be helpful to have a market connection priority test. Furthermore, for many groups it will be relatively straight forward to identify the paying entity connected to the market jurisdictions. In those cases, MNE groups may have a legal entity structure and legal agreements that clearly state which entity in the group has the right to exploit specific intangible assets in and receive residual profits from specific markets.

8.10.4. From the point of view of the administrative burden, it would be helpful to determine the criteria “sufficient connection”.

Chapter IX

9. Part IX: The Issue of scope of Amount B and definition of baseline marketing and distribution activities.

9.1. Do you consider that Amount B should be narrow in its scope or should it take on a broader scope? What are the advantages or disadvantages of a narrow or broader scope? [Refers to paragraph 659 of the Blueprint]

9.1.1. From an administrative perspective, and in ensuring alignment with the Amount B objectives of (a) simplifying the administration of transfer pricing rules for tax administrations, (b) reducing compliance costs for taxpayers, (c) enhancing tax certainty and (d) reducing controversy between tax administrations and taxpayers, the 'narrow' approach currently recommended by the OECD is preferred.

9.1.2. Based on experiences in Australia with the Practical Compliance Guidance 2019/1, even with a 'narrow' scope, there will still be considerable complexities in defining 'industries' within the framework. From a practical perspective, it would be too burdensome to take a broad view, as it would require another layer of variations (see also our comments to point X.b. below).

9.1.3. The issues raised by proponents of the 'broad' view can be mitigated by clear instructions as to how the 'narrow' approach under Amount B will work in conjunction with the arm's length principle **(ALP)**.

9.1.4. Although we realize that by applying a narrow scope to the definition of baseline marketing and distribution activities, more marketing and distribution activities will be considered "out of scope" with the risk of continued transfer pricing disputes, we hold the view that reaching consensus now on a narrow scope is more important than no consensus at all.

9.2. Do you consider the baseline activities outlined in the positive and negative list achieve the narrow scope definition examined in the Blueprint? If not, what changes should be considered? What changes to these lists would be required if a broader scope was adopted? [Refers to paragraphs 664-673 of the Blueprint]

9.2.1. The proposed outline of the baseline marketing and distribution activities is very helpful. As recognized by the OECD, the challenge with any qualitative assessment is providing enough guidance to allow the taxpayer or the tax administration to accurately interpret and characterize what is on the positive and negative lists.

9.2.2. Additional guidance may be helpful with respect to "management of logistics" (p. 6 of the "positive list") and what kind of "investments and associated investments" are being referred to in point 1.b. of the negative list. We see some value in further guidance on the difference (if any) where the distributor 'directs and controls' activities rather than performing more of an 'execution' role.

9.3. Do you consider that quantitative indicators or thresholds should be used when establishing whether or not entities are in the scope of Amount B? Why or why not, and if not what other factors should be considered? [Refers to paragraph 674-679 of the Blueprint]

9.3.1. The quantitative indicators introduced in the draft Blueprint seek to provide an additional means (beyond the qualitative factors) of ascertaining whether the distribution entities do in fact perform 'baseline market and distribution activities' and have the profile of a 'routine distributor'. The quantitative proxies and thresholds currently considered as part of the draft Blueprint include set ratios to ensure that the costs incurred by the distributor do not suggest that they are undertaking DEMPE activities, do not own valuable marketing intangibles and do not assume entrepreneurial risks and responsibilities.

9.3.2. These proposed quantitative indicators are helpful in establishing whether entities are within scope of Amount B and may be less likely to lead to disputes than other (more subjective) qualitative analysis. In determining how tax authorities will apply the qualitative tests, it will be important to establish and define the parameters of each set of tests. We suggest further consideration should be given to questions such as:

9.3.2.1. What order should the indicators be applied in? For example, is one set of indicators applied initially and then the other applied to cross-check? Or will the quantitative analysis only be applied in the event that the characterisation of an entity is in dispute after applying the qualitative assessment? Or alternatively, will both sets of indicators be considered holistically to establish whether the entity is in scope?

9.3.2.2. Does one set of indicators take priority over the other? For example, if the qualitative indicators are considered first, does an inconsistent outcome based on the application of the quantitative factors trump the earlier outcome established based on the qualitative factors?

9.3.2.3. Are the quantitative tests outlined rebuttable presumptions, allowing the taxpayer to provide an explanation of the numbers? Or will a more rigid approach be taken?

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9.3.3. The Blueprint asserts that if thresholds are exceeded, it may indicate that the distribution entity performs more than baseline marketing and distribution activities. It will be important to define the repercussions of an MNE exceeding the thresholds (i.e. is falling within the prescribed benchmarking akin to a 'safe harbour'? Will exceeding the benchmarking indicate that further tax authority compliance resources will be applied?).

9.3.4. We note that it will be important for the OECD to publish the benchmarking relied on for this quantitative analysis, and there may need to be flexibility between different industries/geographic locations. Although the draft Blueprint acknowledges that further work is required to establish and benchmark these proxies, the transparency of this process will be key in ensuring the successful adoption and application of this framework. Furthermore, we propose that it may be appropriate for the quantitative indicators to be assessed on a weighted average basis (to reflect different stages of the business lifecycle).

9.3.5. Although there is additional technical work to be undertaken, on balance the proposed quantitative indicators will be helpful in establishing whether entities are within scope of Amount B. They are also less likely to lead to disputes than an isolated qualitative analysis.

9.4. Do you consider that multifunctional entities (i.e. entities that perform baseline marketing and distribution and other activities) should be eligible for Amount B? [Refers to paragraph 680-684 of the Blueprint]

9.4.1. In line with our preference for a narrow scope for the Amount B application, we are also in favor of a pragmatic approach. Multifunctional entities should in our view therefore be eligible for Amount B where possible. Certainly, where the additional activities do not relate to the products being distributed, it should not be complicated to apply Amount B to the baseline marketing and distribution activities and determine the remuneration for the additional activities under a separate transfer pricing analysis.

9.5. Do you consider that Amount B will be effective in reducing disputes? If not, why?[Refers to paragraph 664-673 of the Blueprint]

9.5.1. We consider that Amount B could be effective in reducing disputes, though it will not eliminate disputes. Even if the OECD approach is implemented by individual jurisdictions relatively consistently, there are still likely to be disagreements regarding whether entities are in scope and inconsistencies in the application of the approach in some instances.

9.5.2. An allowance for consideration of the full value chain of the multinational enterprise would assist in reducing disputes further. The approach as currently outlined does not take into account global value chain profits / losses and as such may result in disagreements between

MNE groups and tax authorities, and between tax authorities, particularly where there are overall losses across the whole value chain.

9.5.3. An approach similar to the Amount B approach has been applied by the Australian Tax Office **(ATO)** as a risk assessment framework for distributors PCG 2019/1. Whilst this differs from OECD Amount B, as it is a risk assessment tool rather than a prescriptive framework for determining a profit level or price, some useful learnings can be taken from its application in the Australian market.

9.5.4. One area in which difficulties in the application of this approach have been identified in Australia is in relation to the broad scope of the definition of entities to be covered by the PCG. For example, PCG 2019/1 covers distribution entities within the 'motor vehicle and parts industry', however under this broad scope, a wide variety of motor vehicle distributors are included, such as

- Simple vehicle distributors;
- Simple parts distributors;
- Marketer distributors;
- Marketer distributors that also perform financing; and
- Marketer distributors, who may be making losses on motor vehicle sales, but overall are profitable due to financing and parts distribution segments.

9.5.5. In each of the examples above, although all are considered 'motor vehicle distributors', the expected return for each distributor will vary greatly, based on their assumed risks and functions. In some instances, there is therefore disagreement between taxpayers and the ATO as to whether particular entities should be included in scope.

9.5.6. In order for the approach to Amount B to be effective and useful, the scope will need to include a large number of specific industries and distribution activities so as to include a large number of distributors. However, this may ultimately result in disputes where MNE's and tax authorities disagree about whether an entity is included in scope. It is likely that no matter how clearly defined the scope of Amount B is, some disputes will still occur.

9.6. General comments on application of APAs

9.6.1. We agree with the OECD that the application of Amount B should be prospective and not supersede MAP settlements or APAs.

9.6.2. PCG 2019/1 introduced the concept of a pre-qualified APA, which in theory should reduce disputes for eligible routine distributors. We have seen some examples of this being effective in assisting taxpayers and the ATO to reach agreement, and therefore the proposed pre-qualified APA is likely to ultimately reduce disputes. The pre-qualified APA intends to provide taxpayers certainty if they achieve a certain distribution margin. Under the PCG, if a taxpayer falls within the 'green' risk zone, they will be eligible to request a pre-qualified unilateral APA process. This is a significant advantage and benefit to taxpayers.

Chapter X

10. Part X: The appropriate profit level indicator for calculating Amount B, and how it should be calculated assuming Amount B is based on a narrow scope

10.1. What the appropriate profit level indicator should be, for example whether a return on sales set at the (potentially adjusted) EBIT or PBT level should be used? [Refers to paragraphs 686-688 of the Blueprint]

10.1.1. The TNMM is set forth in the Blueprint as the most appropriate transfer pricing method associated with the adequate remuneration for the baseline marketing and distribution activities performed by distribution entities in scope of Amount B. The Blueprint proposes that for the appropriate profit level indicator (**PLI**) a return on sales (**ROS**) could be used as a fixed return for the transactions in scope and with the numerator to be defined based on further technical work (examples given are EBIT or EBT).

10.1.2. The ROS is driven by sales price and volume. This has an advantage as revenue authorities may be more likely to accept this PLI, than, for example, the Berry Ratio, which is driven by operating expenses (and is therefore more sensitive to classification between gross direct variable costs versus operating indirect fixed costs). There are advantages with EBIT as the profit level indicator, to not distort the impact of financing on the Amount B activity.

10.1.3. We are of the view that the PLI should be presented in a range (lower quartile, median and upper quartile) and profit level indicators for each identified industry/location. This detail should be publicly available to allow participating jurisdictions and participating MNE to determine the suitability of these fixed routine profits in Amount B, if potential disputes occur under Amount C

10.1.4. Furthermore, we are of the view that relevant information that evidences and underpins the profit markers used for Amount B should be made public and published on a frequent basis. In addition, we suggest that some meaningful and regular form of consultation take place in determining and updating the benchmarks, and that jurisdictions are required to provide clear confirmation that they are adopting the Unified Approach, so that taxpayers have appropriate levels of certainty.

10.2. Do you consider that Amount B should account for variation in returns to baseline marketing and distribution activities by industry and/or region? If yes, what industry and/or regional variations should be considered? Are there any other differentiation factors that should be considered? [Refers to paragraphs 690-693 of the Blueprint]

10.2.1. We agree with the OECD's proposal to distinguish between industries and geographic regions in determining baseline returns under Amount B. Distributors and marketers vary in the extent to which they undertake economically significant activities across different industries, which will impact on their contribution to the overall value chain, and as such would generally be expected to correlate to their expected returns.

10.2.2. While this may be to the detriment of administrative simplicity, we believe there is a sound and reasonable motivation for publishing industry specific outcomes under Amount B. This is because a method that doesn't take into account functional differences is more likely to result in double taxation and increased tax disputes.

10.2.3. The OECD should adopt a multiple year weighted average approach when assessing profit markers. There should be some flexibility for MNE groups to adopt a multiple year average or a weighted average to suit different ranges of business life-cycles (2 to 5 years, or potentially longer).

10.2.4. It should also be ensured that the data points reflect commercially reasonable levels of profit. This could in part be mitigated by a mechanism by which global value chain profits / losses are taken into account. In Australia for instance, the profit markers used in the PCG are universally considered to be on the high side of what is observed in the general market, and in some cases represent a disproportionate share of the total global value chain profit.

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Chapter XI

11. PART XI. The development of an early tax certainty process to prevent and resolve disputes on Amount A. More specifically, comments are invited on the following points:

11.1. What do you consider will be the key challenges in the early tax certainty process described in the Blueprint and how do you think would they best be addressed?

11.1.1. We applaud the OECD on its assertion in the Blueprint on Pillar One of the absolute necessity of tax certainty as an integral part not only of the process of arriving at a consensus-based solution of the tax challenges of the digitalisation of the economy but also to the viability of any proposed solution. The concept of an early tax certainty process through which an MNE group may exercise its right to obtain that tax certainty from all interested jurisdictions which would apply to its global operations and all of its members would seem, on its face, to afford both prevention and resolution of disputes among participating tax administrations and to provide a process to allow a MNE group to identify and address controversial issues or areas of its operations and to fully anticipate its consequent additional tax cost. We suggest, however, that the pragmatic viability of such an early tax certainty process will depend on overcoming key challenges including:

11.1.2. Resources. Both MNE groups and tax administrations costs will increase substantively. Pillar One will introduce an entirely new taxing right which is separate and distinct from (and will operate in parallel to) the existing international regime based on the ALP and current transfer pricing norms. The introduction of BEPS has already led to an increase in competent authority (MAP & APA) activity and a backlog of cases in many jurisdictions. Tax authorities will need to recruit and train staff extensively in order to be in a position to participate in an entirely new tax certainty process in respect of Amount A. If tax administrations are not adequately resourced, this will lead to delays, making the process inefficient for taxpayers.

11.1.3. Phasing-in. Given that the expectation is that at least some of the participating tax administrations will request a panel review in most cases (which may, often, lead to a determination panel subsequently being formed), phasing in of rules for Amount A seems highly advisable to allow time for more efficient processes to be developed, training, resourcing etc.

11.1.4. Self-Assessment Preparation/Lead Tax Administration. Taxpayers will be expected to prepare self-assessment returns/documentation packages which will be filed centrally, validated and transmitted through exchange

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of information by the lead tax administration. This will require the UPE of the MNE groups and/or possibly other group members to allocate significant resources to this process (in addition to their ongoing case load of tax compliance, disputes / litigation). The Blueprint already anticipates that the return and document package will be standardised and that this will avoid a MNE group being required to provide different documentation to various jurisdictions. The Lead Tax Administration will then assume the responsibility to validate and exchange the information with all participating jurisdictions. Some suggestions to alleviate these burdens might include:

11.1.4.1. The provision of a clear, concise and detailed set of guidelines/ or a toolkit which address all elements of Amount A and this process and leave little room for varying interpretations by participating jurisdictions – updated regularly based on recent decisions / common issues which are identified as giving rise to disputes.

11.1.4.2. Publication of anonymised determinations (of all determination panels)

11.1.4.3. The imposition of strict timelines for each step of the process enforceable through an identifiable judicial process with appropriate jurisdiction over the parties.

11.1.4.4. A simplified process for designating the Lead Tax Administration with all steps being taken to ensure only limited replacement options and to allow the MNE group to participate in the process of determining a replacement if no other possible alternative is available. Implicit acknowledgement of the importance of protection of MNE group rights to privilege and confidentiality and protections of privacy of information divulged from competitors and to other recourses in the event that the early certainty process does not arrive at a satisfactory conclusion.

11.1.5. Multiple Jurisdictions. Too many tax administrations wanting to be involved in the tax certainty process leading to unwieldy negotiations (the Blueprint anticipates 6-8+ tax administrations participating on each review panel) – is it essentially a prospective (rather than retrospective) multilateral MAP negotiation?

11.1.6. Interface between Pillar One Tax Certainty Process Results and Tax Adjustments under Traditional International Tax Regime. How is it intended that the tax certainty process will be impacted by subsequent transfer pricing adjustments (impacting on residual profit allocation in jurisdictions in which credit is to be granted) – it is incumbent upon the

OECD to devise a clear mechanism to deal with this scenario in order to maintain the effectiveness of the tax certainty process.

11.1.7. Non- Involvement of MNE Group.

11.1.7.1. MNE group should be invited (but not obliged) to offer comments at each stage of the process including feeding into comments / questions for the determination panel [should be offered the same degree of input as tax administrations at each stage, other than a seat on the review panel].

11.1.7.2. Implementation of guidelines to ensure both fairness and transparency in relation to In-scope MNE Groups and business operations through UPE or designated alternative representative.

11.1.7.3. MNE group should also have the ability to request the formation of a determination panel if it does not accept the review panel conclusions (rather than being confined to "domestic" remedies).

11.1.8. Impact of Domestic Court Decisions. Interaction of binding process with domestic court decisions in any affected jurisdiction needs further consideration (if one jurisdiction does not accept a binding determination, this impacts on all other jurisdictions).

11.1.9. MNE Group Recourse. The MNE group (UPE or other designated representative) should not be required to accept the determination panel's decision in order to be able to trigger the process – it will be in the best interests of all parties if the MNE group is able to accept the results of the early tax certainty process if at all possible but for that to occur, the MNE group representatives must have greater input into this process and an ability to ultimately reject the outcome. Where the MNE group disagrees with the recommendations of the review panel or the conclusions of the determination panel, its only recourse at that point is a "domestic" remedy. This is likely to be a highly unsatisfactory route. (Query the ability of "domestic" courts in any one jurisdiction to deal effectively with Amount A disputes with any efficiency and the likelihood of other jurisdictions accepting the decision of another jurisdiction's judiciary as the basis to allow double tax relief based on the outcome). As a result, there is, currently, a very strong (perhaps even undue) economic incentive to encourage an MNE group to accept the determination panel's decision in all cases (possibly even when it manifestly disagrees with the consequences).

11.1.10. Membership of the Determination Panel. There should be a clear process as in the international arbitration area, for the appointment of the determination panel and for the procedures to be followed by that panel. Among other suggestions:

11.1.10.1. Panelists should be international tax experts with specific training and accreditation.

11.1.10.2. Membership should not be confined to serving tax officials or retired tax officials.

11.1.10.3. All panels should be made up of experts drawn from different backgrounds.

11.1.10.4. Panels should be required to conclude their review within appropriate time limits.

11.1.10.5. Panels should produce a decision in writing which is publicly available and contains a detailed support for the findings.

11.1.11. <u>Domestic Legislative Implementation</u>. The implementation of Pillar One and in particular the consequential additions to infrastructure in each participating member of the Inclusive Framework in respect of the tax certainty process will also require amendment to domestic legislation in most, if not all, Inclusive Framework member jurisdictions. This will be a significant undertaking for governments that may result in (i) additional capacity constraints on resourcing in both tax legislative and administrative branches of government and (i) substantial time delays in many jurisdictions. There will also be a need for some form of central coordination and support to ensure uniform results both in implementation and application of resulting legislation.

11.1.11.1. For this reason, we highly recommend that the OECD consider amending its approach to more closely utilize and build on existing frameworks, including the use and expansion of permanent establishment and nexus concepts.

11.1.11.2. It is possible that the minimum key aspects of a reallocation of rights to tax to market jurisdictions can be achieved through interpretive and administrative guidance issued by tax administrations, rather than through formal legislative changes.

11.1.11.3. While this is a non-trivial variable across the laws of different jurisdictions, the choice made in the Blueprint to shift away from existing and common concepts will force all jurisdictions into a legislative, rather than interpretive, process.

11.1.11.4. This will dramatically decrease the likelihood of achieving consensus and inclusion.

11.2. Do you consider that there are circumstances where an MNE group's ultimate parent entity (UPE) would not be the most suitable constituent entity to be the group's co-ordinating entity? If so, which constituent entities in an MNE group are likely to be more suitable. [Refers to paragraph 718 of the Blueprint]

11.2.1. Yes. Some examples may include those referred to in the OECD Blueprint, such as:

11.2.1.1. Where the MNE group has limited operations and/or limited qualified personnel in the UPE jurisdiction.

11.2.1.2. In the case of listed companies where the UPE is an SPV specifically created for a listing process. A number of listed tech companies have capital SPVs for listing purposes at the top of their structures which have no cross-over with the actual business operations. These can often be haven entities (further referenced below).

11.2.1.3. Where the UPE jurisdiction is not an Inclusive Framework member.

11.2.1.4. The UPE jurisdiction may be an Inclusive Framework member that does not impose tax (e.g., Cayman / BVI appear to be IF members) –these jurisdictions may not have the familiarity / experience to act as lead tax administration in respect of tax certainty proceedings?

11.2.1.5. The UPE jurisdiction may not have the resources to act in that capacity – this could be due to it being a jurisdiction with a high concentration of UPEs with in-scope MNEs and a tax administration that has not yet had the opportunity to resource itself to the extent necessary.

11.2.2. Further consideration should be given to possible options in the approach that is identified for appointment of the designate representative of the MNE group (coordinating entity)

11.2.2.1. Involvement of the MNE group in the process.

11.2.2.2. Consideration should be given to both (i) assuring protection of confidential business information for the MNE group and insuring that the coordinating entity actually has access to all of the information required to prepare the document package and self-assessed return for the MNE group and provide it to its lead tax administration, practically and legally under the laws of its jurisdiction. A subsidiary question will be whether the information exchange laws of the relevant jurisdiction will permit the lead tax jurisdiction under its domestic laws and treaty arrangements to exchange that information with all of the participating jurisdictions.

11.3. Are there any features that could be incorporated into the Amount A tax certainty process to encourage participation by MNE groups? Do you see any features in the proposed design that could discourage participation by MNE groups? [Refers to paragraphs 728-729 of the Blueprint]

11.3.1. The following are features that we would suggest to be built into any tax certainty process:

11.3.1.1. Refund mechanism if amount of self-assessment paid is too high (paragraph 733)

11.3.1.2. Mechanism to pause domestic audits on unrelated issues on application of MNE while request for certainty is pending to streamline any ensuing domestic audit processes (paragraph 733)

11.3.1.3. Inadvertent error correction procedures (732 provides some in advance of certainty determination, but what if something is discovered after? See paragraph 745)

11.3.1.4. Allow some flexibility if an agreement is near, but not reached, at the end of 12 months' review of an initial review panel (for good faith / good will, etc.) particularly in the early years where the panel review process is being developed (758)

11.3.1.5. Allow for a review panel decision by simple majority or 2/3 of the panelists (rather than requiring unanimous agreement) if in-scope revenue for an affected jurisdiction is below a certain threshold in order to reduce the timeframe for a given case (760)

11.3.1.6. Process to roll a subsequent year into an ongoing certainty process if it remains open / pending

11.3.1.7. Option for greater MNE group involvement (see comments at (a) above).

11.3.1.8. Ability of MNE group to request the formation of a determination panel.

11.3.1.9. Streamlined and efficient process with strict time limits (e.g. guarantee certainty in X months).

11.3.1.10. Downside risks of not participating appear significant in any event due to limited options for a multilateral solution outside of the tax certainty process. However, if the jurisdiction in which the MNE group recognises residual profit currently is either (i) not an Inclusive Framework member; or (ii) is a zero tax jurisdiction, benefits of process (e.g. potential for double tax relief) may be eroded.

11.3.2. Here are various factors that will discourage MNE participation in tax certainty processes and self-reporting systems:

11.3.2.1. The processes are likely to be resource intensive and may not end with an outcome acceptable to MNE. The costs of audits and settlement in multiple jurisdictions would be lower than participation in the certainty process if certainty is not reached (as the possibility of several audits remains on the table).

11.3.2.2. The lead tax administration may not be the jurisdiction where the UPE is domiciled if that jurisdiction declines to implement Amount A or is not a member of the Inclusive Framework (718); this may result in serious risks of compliance or leak of confidential of business information which override any tax certainty consideration.

11.3.2.3. A review panel can be established if three or more affected tax administrations request it (or a minimum percentage), even if they have no specific concerns and in spite of the resource-intensive nature of the process (743).

11.3.2.4. Time intensive—may stretch out up to 24 months and result in more than one year being put through the early certainty process at a given time (714, 775).

11.3.2.5. That the MNE group may be foreclosed from rejecting the determination panel's conclusions (776).

11.3.2.6. If a particular entity within an MNE group cannot be bound by decisions of the coordinating entity, tax certainty may not be provided to other entities within the MNE group (781). In addition, the OECD Blueprint does not define "constituent entity."

11.3.2.7. An MNE group may also be foreclosed from rejecting a determination panel's conclusion as to whether a jurisdiction should be deemed a market jurisdiction of an MNE group. (785)

11.4. Do you consider that a separate process to determine whether an MNE group is within scope of Amount A would be beneficial, or that in practice this is unlikely to be used? [Refers to paragraphs 729 and 782 of the Blueprint]

11.4.1. Yes, a separate process to determine whether an MNE group is within scope of Amount A would be beneficial and likely, in practice, to be used.

11.4.1.1. Rules are novel and complex and application of additional "plus factors" for CFBs may complicate this further.

11.4.2. There is significant scope for disagreement on this issue among Inclusive Framework members themselves (in addition to any controversy between the MNE group and relevant tax administrations) which could result in jurisdictions refusing to grant relief for double taxation on the basis that the MNE group business or segment of a business is not deemed by that jurisdiction to be within scope of Amount A.

Chapter XII

12. Part XII. The introduction of new approaches to provide greater certainty beyond Amount A. More specifically, recognising that Inclusive Framework members continue to hold different views as to the extent to which Pillar One should incorporate new tax certainty approaches beyond Amount A, what are your views on the four-element approach explored in the blueprint? What other suggestions and ideas do you have that would take into account these different views and help advance tax certainty beyond Amount A? [Refers to paragraphs 710 and 801 of the Blueprint]

12.1. Comments on four element approach:

ICAP: generally, experiences from ICAP participants have been positive and expectation is that it would, over time, increase tax certainty. However, as it is designed to cater for low risk scenarios, its application is somewhat limited. It also does not offer legal certainty for taxpayers.

12.1.1. Improved processes for bilateral and multilateral APAs are strongly recommended. It is expected that there will be much greater demand for multilateral APAs in the future. Some suggestions to achieve this:

12.1.1.1. Consider expanding the scope of APAs beyond transfer pricing issues.

12.1.1.2. A framework outside of tax treaties will be needed to take in all Inclusive Framework members.

12.1.2. Improvements to MAP are strongly recommended including greater taxpayer involvement in the process.

12.1.3. Mandatory binding dispute resolution (**MBDR**):

12.1.3.1. For in-scope MNE groups: MBDR could provide important relief to partially offset the additional burden imposed by Amount A and could limit tax administrations' ability to seek other profit reallocation adjustments beyond the scope of Amount A. It would be helpful to clarify whether this would apply to Amount B issues as well as the marketing and distribution safe harbour. The "last resort" prioritisation would significantly delay the application of this tool, reducing its effectiveness. Therefore, it should be made available at the option of the in-scope MNE group.

12.1.3.2. Other taxpayers: the dispute avoidance/resolution panels for Amount A and the MBDR extension for amount A taxpayers will place significant burden on dispute resolution mechanisms - limiting resources available for this element -

especially if the commitment for Amount B MBDR goes before this element.

12.1.3.3. Developing countries with no or little MAP experience: electivity is important for developing countries, but they should not have to go through a multi-year MAP first which will leave few resources available for MBDR.

12.1.3.4. Further consideration should be given to using this opportunity to work towards a MBDR process in all circumstances: if it is not possible to implement immediately, a set timeframe should be adopted for all Inclusive Framework members to work towards implementation (in exchange for getting the benefit of a new taxing right).

12.2. Other recommendations to address challenges in achieving certainty and predictability:

12.2.1. The overall system for dispute prevention and resolution requires central coordination which could take in:

12.2.1.1. Training (for tax administrations and taxpayers) to ensure that the system is applied on a uniform basis.

12.2.1.2. A framework to assist developing countries in building experience so that all Inclusive Framework members can work towards the long term aim of MBDR within an agreed timeframe.

12.2.1.3. Publication of guidance / toolkits and anonymised determinations / opinions of determination panels.

12.2.1.4. Accreditation of panel members (see comments under Part XI above).

12.2.1.5. Oversight of the dispute resolution and tax certainty mechanism.

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