The **BEPS** Monitoring Group

COMMENTS ON THE TAX CERTAINTY FRAMEWORK FOR PILLAR ONE AMOUNT A

These comments by the BEPS Monitoring Group (BMG) respond to the public consultation document issued by the OECD Secretariat on behalf of the Inclusive Framework on BEPS, on the proposed Pillar One Amount A Tax Certainty Framework. The BMG is a network of experts on various aspects of international tax, set up by a number of civil society organizations which research and campaign for tax justice including the Global Alliance for Tax Justice, Red de Justicia Fiscal de America Latina y el Caribe, Tax Justice Network, Christian Aid, Action Aid, Oxfam, and Tax Research UK. This report has not been approved in advance by these organizations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives. It has been drafted by Jeffery Kadet and Sol Picciotto, with contributions from Abdul Muheet Chowdhary and comments from Tommaso Faccio.

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SUMMARY

The best way of achieving tax certainty is to formulate rules that are simple, clear and objective. The design of Amount A is a major step forward, since it will allocate a portion of the global consolidated profits of multinational enterprises (MNEs) by a formulaic method, in contrast with the current rules. However, Pillar One is designed as an exceptional system that would apply to only a small part of the profits of only around one hundred of the largest and most profitable MNEs, retaining the current defective transfer pricing rules for all other purposes.

For Amount A itself, the small number of MNEs likely to be in scope should make it easier to roll out the system through administrative arrangements coordinated among the tax authorities concerned. Its design makes it easier to provide certainty through administrative arrangements that could and should involve only tax officials. We support the composition suggested in this draft for Review Panels, as well as the Government-Only option for Determination Panels, which provides an appropriate balance of officials from states that would benefit and those that would lose from an Amount A allocation. It is inappropriate, unnecessary, and we believe detrimental to include non-governmental experts, who would inevitably and overwhelmingly be current or retired business advisers who could not be truly independent.

Uncertainty will nevertheless be created in the short run because of the novelty of the system. It should now be recognised that the timescale for Pillar One has been far too ambitious, and to recalibrate the process. The proposals have been developed at great speed and largely

under strict secrecy, and they require more effective participation of tax officials particularly from poorer countries, and much greater public scrutiny. A more careful process should aim to design the building blocks for a new approach to taxation of MNEs that could eventually be applied much more widely.

A. General Comments

We welcome this opportunity to comment on these important proposals, and hope that our comments will be helpful, despite the very short period allowed, especially given the length of the public consultation documents. We are also considerably hampered by being provided here with only a part of the jigsaw of the Pillar One scheme. Although some of the other parts have been released for comments, many have not. We also lack an overview of the whole picture, and how it may differ from the last full version published in the blueprint of October 2020.

The best way of achieving tax certainty is to formulate rules that are simple, clear and objective. The design of Amount A is a major step forward in this respect, since it will allocate a portion of the global consolidated profits of multinational enterprises (MNEs) by a formulaic method. This contrasts with the current rules for allocating MNE income, which require an examination of the facts and circumstances and an analysis of the functions, assets and risks of each affiliate of MNE corporate groups, all dependent on subjective judgments.

Pillar One has now been designed to apply to a very small number of the very largest and most profitable MNEs, probably one hundred or fewer in total. It would apply an exceptional system to a small number of MNEs, and for only a small part of their profits, while retaining the existing defective rules for all other purposes. The creation of such a separate and distinct regime creates problems of both principle and practice, particularly as regards ‘issues related to Amount A’, which we address in a separate submission.

As regards Amount A itself, however, the small number of MNEs likely to be in scope should make it easier to roll out the system through administrative arrangements coordinated among the tax authorities concerned. That is the purpose of this ‘tax certainty framework’. In our view these essentially administrative arrangements for Amount A itself could and should involve only tax officials. The composition suggested in this draft for Review Panels, as well as well as the Government-Only option for Determination Panels, provides a balance of officials from states that would benefit and those that would lose from an Amount A allocation. Such balanced Panels are a much more appropriate way to administer the system.

Uncertainty will nevertheless be created, in the short run because of the novelty of the system, but in the longer term because Pillar One is designed to have a limited scope and is subject to exclusions. This will create uncertainty for MNEs about whether they may even be in scope, which these proposed procedures also aim to alleviate.

1. Complexity and Secrecy

We are surprised by the excessive and verbose legality of these rules, which has resulted in a lengthy and technical document. It is a mistake to think that certainty is possible by attempting in advance to anticipate and provide for every possible difficulty, especially when designing a novel system. In practice, complex rules tend to produce confusion and uncertainty. This is especially the case for tax, where there is a great incentive for avoidance, which has become rife. Complexity also greatly adds to the difficulties for tax authorities, which are everywhere poorly resourced, and under great pressure in these crisis times. The hundreds of pages of draft legal rules now being issued for discussion make participation in this project hard for all, but virtually impossible for low-income countries, which have more

urgent priorities. These proposals will apply only to a few of the largest and most profitable MNEs, which have more than sufficient resources, but it is also important to ensure that the design of the system is easily administrable, so that it can easily be extended to a much larger number of MNEs.

With this in mind, consideration should be given to designing the proposals for both Pillars by setting out high-level principles in a short and clear fashion, supplemented by more detailed model regulations and a Commentary, accompanied by the additional resources contemplated in this draft (para. 13: 'guidance, FAQs, model templates and other practical tools').

It is significant that no agreement has been reached even in principle on key elements of the process, in particular the composition of the Determination Panels, which would be empowered to take final and binding decisions. This suggests that there is a high degree of mistrust among the negotiating parties. This is a poor foundation on which to establish a framework to achieve certainty.

This apparent high degree of mistrust in our view demonstrates the critical need for greater transparency of the process. In our view, it would be misplaced to apply the normal strict requirement of taxpayer confidentiality here. It will apply only to the largest and most profitable MNEs, whose operations have a major social impact around the world. There has been widespread publicity about the tax affairs and questionable practices of these enterprises, and particularly their ability and willingness to avoid tax by attributing income to jurisdictions in ways that are out of line with their real activities. Greater transparency is important, to build public confidence in and therefore legitimacy of the proposed system. This in turn should create more confidence and trust among the officials involved, as well as reassuring the general public that a more effective approach is truly being established.

There should therefore be transparency of significant interpretative rulings, especially those resulting in the exclusion from the scope of Pillar One of MNEs which, based on their published financial accounts, would be expected to be within scope. Transparency should therefore include at a minimum publication of lists of the MNEs to which Pillar One is being applied, as well as those that have applied for scope certainty, and the results of and reasoning applied in that process. Some information will in any case inevitably emerge, through other regulatory filings, as well as speculation, but this would create unfairness and uncertainty. It would be far better to agree a clear transparency framework commonly applicable to all.

2. Novelty and Timescale

Some difficulties will be inevitable due to the novelty of the system, particularly in the interpretation and application of the rules defining the source of income, which are innovative in many respects. The very large and highly profitable MNEs to which Pillar One will initially apply have ample resources to devote to compliance, but it is important that this is done consistently across MNEs, and with the effective involvement of all affected tax administrations. The consultation document mentions that 'two concepts are being explored which would apply for a defined, limited period' (para. 12), and that consideration is being given to 'structured engagement and feedback' as well as the provision of practical tools (para. 13).

We suggest that it would be better to recognise that the timescale for Pillar One has been far too ambitious. The proposals have been developed in a relatively short period of time, and largely under strict secrecy. They have been designed so that implementation will require a multilateral convention that will need to be approved and ratified by a large number of states

before it can come into force. This would be completely unprecedented, and it is unrealistic to think that it could take place in the timescale envisaged. The process for approval to ratify a treaty rightly requires adequate public debate in every country involved, which will inevitably take time for a multilateral convention of this prominence.

Pillar One should be seen as distinct from and very different to Pillar Two, in which the central proposal for a global minimum tax can proceed as a concerted process but without the need for a binding convention. Pillar Two is a defensive measure, to finally put a brake on the competition to cut corporate taxation. Pillar One directly addresses the central problem of the allocation of MNE income. It involves the design of the basic building blocks of what should be envisaged as a new approach, that would eventually be generally applicable.

In our view, it is time to recognise this, and to recalibrate the process. Accepting a longer timescale will allow a more careful process, with a much fuller involvement of all those interested and affected. Careful scrutiny is essential, especially as the proposals are highly complex, and would directly affect government revenues. The speed of the process has created great strains on tax authorities, which are all under-resourced, and during a period of crisis due to the pandemic. This is obviously particularly acute for low-income countries. Public consultation has also been inadequate, not only with the business advisers who will implement the rules, but also the wider concerned public. This is no way to seek to enact rules intended to be globally binding, and affecting a central element of state sovereignty.

B. SPECIFIC COMMENTS

1. Composition of Determination Panel

There are divergent views among Inclusive Framework members as regards the composition of the Determination Panel. Because of this divergence, Section III.6. of Part Two presents three options for the composition of Determination Panels.

- Option A - Independent Expert Only Panel,
- Option B - Government Official Only Panel, and
- Option C - Mixed Panel.

We strongly recommend that Determination Panels only include government personnel. ‘Independent experts’ will seldom be truly independent. They will too often for major portions of their careers have been advisers to MNEs either directly as employees or through law, accounting, or other advisory firms where they have been partners or employees. Even if they were not a paid adviser for a particular MNE Group that is the subject of an issue that is being presented to a Determination Panel, they will be judging issues that will be important to the MNEs to which they have provided advice and counsel, and may even still be doing so, under the proposed Limited Tax Advisory Services exception.

In our view, since international tax disputes are between states, and concern important issues affecting government revenue, they should be settled only between governmental representatives.If it is decided to include ‘independent experts’ through either Option A or Option C, then we believe this must strictly exclude any individual who has conducted work for or has received any compensation during the prior five years from any MNE. We comment on this further below.

2. Other Matters Concerning Determination Panels

The following comments assume that either Option A or Option C is chosen is implemented by the Inclusive Framework.

1. Candidates for Standing Pool

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

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

If we understand this correctly, this means that even if just less than [one-third] of the Parties do object to a candidate, then that candidate will still be added to the Standing Pool for five years. If this understanding is correct, this must be changed. Rather, we recommend that if just one Party objects to a candidate, then that candidate would be removed from the draft roster of the Standing Pool. It is crucial that all parties should have trust in all the members of this Pool. Only if confidence in the system has broken down would such a veto be used to hinder its operation, and it should be designed to create mutual trust, not on the assumption that this is lacking.

2. Independent Expert Status

Paragraph 6 of Section III.6. (Option A) and paragraph 5 of Section III.6. (Option C) provide required criteria for Independent Expert status. Paragraph 6(d) and 5(d), respectively, state that an individual cannot be an Independent Expert if he or she works "… for or on behalf of any tax administration or Government and was not in such a situation at any time during the previous [12 months] …"

The purpose of Determination Panels is principally to decide between alternative positions of relevant governmental Parties. Certainly, a Panel could be reviewing scope issues concerning whether a particular group is or is not a Covered Group. Even here, though, the Determination Panel is examining the differing positions of relevant Parties and not a position that is advanced by the relevant Group. Hence, there is no reason to exclude an otherwise qualifying individual because he is or was recently working for or on behalf of any tax administration or government.

Paragraph 6(f) of Section III.6. (Option A) and paragraph 5(f) of Section III.6. (Option C) refer to an unstated list of international organisations to be added to the Convention. Without knowing what is contemplated for this list, we cannot comment on whether this should or should not be a criteria for Independent Expert status. In any case, whether these paragraphs should be retained or deleted should follow the logic of the immediately preceding paragraph.

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

As indicated earlier, we believe that Option B is the only acceptable Option since Independent Experts will seldom, if ever, be truly independent if they have previously worked for or consulted with any MNE clients. However, if either Option A or Option C is chosen so that Independent Experts will be involved, then we believe that such Independent Experts must exclude any individual that has conducted any work for or has received any compensation during the prior five years from any MNE (whether in-scope or not), whether as an employee of any MNE or as a partner, associate, employee or independent contractor to any law firm, accounting firm, or other consultant that has provided services to any MNE. Individuals who might still meet this requirement could include experts who have been fully retired for at least five years and academics who do not conduct consulting work for business.

3. Existence of Independent Expert Conflict

Presently, paragraph 3(b) of both Section III.6. (Option A) and Section III.6. (Option C) include a definition to determine when an Independent Expert has a conflict of interest in relation to a particular Relevant Group. While this five-year period is consistent with our five-year suggestion in the above paragraph, this paragraph 3(b) rule regarding conflict as to just a particular Relevant Group is simply not sufficient. Even if an Independent Expert is not a paid consultant for a particular MNE Group that is the subject of an issue that is being presented to a Determination Panel, that individual will be judging issues that will be important to the other MNEs to which they have provided advice and counsel in the past and for which they are fully able to continue to do so in the present under the Limited Tax Advisory Services exception. They are not truly or sufficiently 'independent'. Only otherwise qualifying individuals who have ceased providing any services for MNEs for an extensive period, such as a minimum of five years, can be considered potentially 'independent'.

It should be added that paragraph 3(b)(ii) in both Options A and C is far too narrow. It should not be limited to those 'personally involved in providing tax services or accounting/audit services'. Rather, this should include any services for an MNE.

In addition, paragraph 3(b)(i) provides for a conflict where the individual is a 'Significant Investor' or has 'Significant Business Dealings'. Given the strong need for true independence in both fact and appearance, it is critical that there be a defined conflict in the event of *any* investment or business dealings. This must be changed.

4. Financial Burden of Determination Panel Participation

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

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

Paragraph 2 of Section III.6. (Option C) provides the same.

It is of course very understandable that an Affected Party should only nominate an official to participate if that person truly intends to take an active role. However, to place the financial burden of the official's participation on the Affected Party is wrong. It will discourage many Affected Parties from actively participating. And this will be primarily mid-sized and smaller jurisdictions.

A better solution is needed for funding each Affected Party's contribution of officials for Determination Panels and other bodies identified within this Public Consultation Document. We suggest that the Convention provide for user fees to be paid by MNEs in connection with the application of Pillar One. We note that paragraph 5 of Section V.10. does contemplate some such fees. However, it appears that these fees in paragraph 5 are not meant to cover the financial burdens of Affected Parties. This should be reconsidered.

Note that in Section III.6. (Option C), it appears that paragraph 1(b)(iii) should be labelled paragraph 1(c).

5. Make-up of Determination Panel under Option C

Paragraph 1 of Section III.6. (Option C) provides for seven members, four of which are Independent Experts and three of which are government officials. In addition, one of the Independent Experts would be appointed as the Chair.

This Determination Panel process should not be seen as something that is outside the control of the relevant tax administrations operating within the parameters of the Convention. Accordingly, Section III.6. (Option C) should be recast to provide for at least four government officials and no more than three Independent Experts. Further, the Chair should be one of the government officials.

3. Inclusion as Listed Party

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

We believe that the much better approach is that any Party that desires inclusion as a Listed Party should automatically be added. The following reasons support this approach:

- It seems doubtful that any Party that does not have some particular legitimate interest in the activities of an MNE group will want to be involved as a Listed Party.
- Making this process automatic would significantly simplify the process by eliminating any need for the Lead Tax Administration to take the time and effort to obtain the position of both sides (i.e. the Party and the Coordinating Entity) and to then make a judgment on which position is best.
- This approach is most consistent with Parties being able to exercise their national sovereignty; there is no subjecting their desire to be a Listed Party to the arbitrary authority of the Competent Authority of the Lead Tax Administration.
- The legitimacy of a Party's claim to be a Listed Party can be determined as part of the process itself, it should not be decided only by the Lead Tax Administration.

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

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

This required suspension makes good sense. However, despite the Inclusive Framework's goal that these processes should be conducted expeditiously, we imagine that the timing for some of these procedures may take much longer than expected; perhaps years. With this in mind, some automatic mechanism must be included that will also suspend each Listed Party's statute of limitations so that adequate audit checking and enforcement is possible in the event that an MNE Group withdraws its request for Scope Certainty.

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

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

Paragraph 14 of Section I of Part Two, for example, and numerous other paragraphs throughout the Public Consultation Document provide time periods in which certain actions must be undertaken by a Lead Tax Administration, a Scope Review Panel, etc. If the applicable tax administration or other body is not timely in its actions, then there needs to be clear redress or guidance for affected persons including Affected Parties, the affected Group, etc. If the delay comes from the Group itself, there must be financial penalties (maybe labelled as additional user fees) on the Group for wasting the time of the involved bodies despite having initiated the request for certainty. This will also deter the Group from malicious requests aimed at delaying the eventual payment of tax.

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

Paragraph 32 of Section II.3. of Part Two provides materiality limitations on the Competent Authorities of Affected Parties concerning Certainty Reviews. While including materiality limitations is understandable, the present form of these limitations in paragraph 32 is problematic for many jurisdictions. For example, paragraphs 32(b)(iii) and (iv) include 5% limitations on the quantum of effect on an Affected Party. For smaller and mid-sized jurisdictions, a 4.9% or lower effect may still be very material to that jurisdiction.

Given the need for fairness for smaller and mid-sized jurisdictions, we suggest that paragraph 32 limitations be completely eliminated. This would effectively deal with the likely many situations where information is not yet available to determine a percentage limitation amount. In the alternative that paragraph 32 is retained, the limitations must be changed so that each limitation in the paragraph is based on the lower of a relatively low absolute amount or a percentage limitation. For example, the paragraph 32(b)(iii) limitation should be amended to read:

> … an adjustment to an amount in a Group's Common Documentation package which … if the adjustment concerns the allocation of a Group's Profit Before Tax, would change the allocation to that Affected Party by less than the lower of [absolute amount] or [two percent]

A relatively low absolute amount must be used to deal fairly with smaller and mid-sized jurisdictions.

7. Clarification of Timing for Determining Alternative Selection Approach

Paragraph 9 of Section III.5 of Part Two and the accompanying box, which provides examples of approaches to select an outcome amongst more than two alternative outcomes, does not make any mention of the timing for determining the approach that will be used. As the examples in the box show, the approach chosen can affect the outcome selected by the Determination Panel.

Hence, and given the need not to have an approach chosen based on the selected outcome that it will generate, the decision on approach must be made prior to the Panel Members being asked to rank all alternative outcomes in order of their preferences. Only in this manner can the outcome not be potentially gamed.

8. Unfilled Places on Panels

Paragraphs 11 and 12 of Section I.1 and Paragraph 6 of Section II.3 provide that unfilled places on the Scope Review and Review Panels will remain unfilled if insufficient Affected Parties express interest.

Given the great disparity in capacity between the developed and developing countries, the likely outcome of such an approach will be that developed countries will more often express interest and developing countries will seldom do so, with the result that the Panels will be dominated by developed countries. Understandably, this will affect outcomes and bias Panel decisions.

To avoid this, it must be ensured that there are no unfilled places on the Panel. If there is a shortage of Affected Parties expressing interest, a randomized selection of Affected Parties can be taken only from developing countries to fill the slots. This will help them 'learn on the job' and build capacity. This will respond to the reality that some, if not many, developing country tax administrations may hesitate to express interest, fearing that they may not be able to meet the expectations. Further, as the entire Amount A architecture is meant to redistribute taxes to market jurisdictions, which are largely the developing countries, it is only fair that they be given the priority in participation in the Panels.

9. Trigger for Review Panels

In general, the framework gives far too much discretion to the Lead Tax Administrations, which are likely to be mainly the developed countries where the MNEs are headquartered. This is especially the case for the critical issue of scope, or which MNE will have to pay the tax. Accordingly, the framework must reduce the discretion of the LTA by allowing countries to directly request a Review Panel without it having to go through the filter of the LTA.

10. MNE's justification before Determination Panel

The rules presently state in paragraph 7(e) of Section III.5. that the MNE can justify its position before the Determination Panel. Since the MNE will have had far more than ample opportunities to do so before things reach the Determination Panel, this option should be removed.

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

If the MNE withdraws its request from either the Review or Determination Panels, it would mean a massive waste of time and money. If the Panels are comprised wholly of Government officials, as it should be, then it would also mean a waste of taxpayer money. For this reason, the MNE must bear the entire cost of the process if it chooses to withdraw any request or refuses to accept the outcome.