

## Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One

### Response by the Chartered Institute of Taxation

#### 1 Executive Summary

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 We welcome the opportunity to comment on the *Progress Report on Administration and Tax Certainty Aspects of Amount A of Pillar One* and recognise the significant ongoing work that is being undertaken by the OECD/G20 Inclusive Framework on BEPS. We support the principles, and the intentions, around streamlining processes and achieving tax certainty running through the progress report. However, the progress report also identifies numerous open issues that the Inclusive Framework has yet to agree; the work, therefore, remains ongoing and subject to change.
- 1.3 We have long advocated a multilateral solution to the tax challenges arising from the digitalisation of the economy in light of the increasing unilateral measures (and retaliatory actions) being taken by countries. Against that alternative, we have supported the work towards a multilateral solution and the two-pillar solution. However, we are concerned that the desire to reach an apparently positive outcome to a timetable is overtaking the ability to achieve the policy consensus and, where necessary, compromise that is needed to result in a genuinely stable, reformed international tax system. As things stand, Pillar One is in danger of causing a considerable upheaval of the international tax system, without achieving the initial policy objectives of re-allocation, but resulting in double taxation and a compliance burden similar to (or possibly even worse than) that which exists as a result of the unilateral measures.
- 1.4 In addition to the significant compliance burden that will be placed on multinational enterprises (MNEs), we are concerned about the resourcing burden that will be placed on tax authorities. The Pillars introduce a whole new level of complication that will place increased administrative burdens on tax authorities when many are already struggling to maintain service levels as a result of administering their own jurisdictions' tax rules.

- 1.5 The further work required on Pillar One should focus on the practicalities of any agreed solution and ensure that the rules are proportionate to the intended policy objectives. Every opportunity should be taken to simplify the rules and streamline procedures, and take businesses which will not be significantly affected out-of-scope through safe harbours and transitional rules.
- 1.6 Further work is required to ensure that Pillar One addresses issues around double (or multiple levels of) taxation. There is a recognition of the potential for double taxation and it is not yet clear how individual jurisdictions will provide double taxation relief due to the complexities in the various foreign tax credit or exemption regimes. Robust mechanisms will be required to prevent double taxation and to ensure that tax administrations and MNEs can achieve certainty as to the amounts of tax that are due.
- 1.7 The certainty reviews outlined in the progress report are welcome in principle. However, further detail is required around how tax administrations will deliver certainty through these reviews and an explanation of the mechanism for turning the outcome of a review into legal certainty. In particular, until the composition and processes of the Determination Panel are resolved, a key aspect of Pillar One remains unstable.

## **2 About us**

- 2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

## **3 Overview**

- 3.1 In the *Progress Report on Administration and Tax Certainty Aspects of Amount A of Pillar One* published by the OECD Secretariat on 6 October we recognise the significant ongoing work on Amount A of Pillar One that is being undertaken by the Inclusive Framework. The report sets out an outline for the rules that will deal with the administration process for Amount A and tax certainty aspects. It builds on the first *Progress Report on Amount A of Pillar One* published in July 2022. We understand that these two reports are intended to be read together to provide an overview of the design of the rules and their planned operation. The Inclusive Framework aims to finalise preparations of a new Multilateral Convention (MLC) for implementation of Pillar

One by mid-2023, for entry into force in 2024. Capitalised terms in this response have the meaning given to them in the progress reports.

- 3.2 We welcome this opportunity to comment on the current progress report. In light of the relatively short consultation period and the fact that we are aware that many other stakeholders (including the Big 4 accounting firms and the MNEs that will be within the scope of the rules) are engaged with the OECD and the consultation process, and will be feeding in points of detail, we have limited our comments to more high-level points around underlying principles. Overall, we support the principles, and the intentions, around streamlining processes and achieving tax certainty running through the progress report. However, it is also clear that the proposals are enormously complicated and currently lack detail as to how they will be delivered from a practical perspective. We note that these proposed rules represent the work of the OECD Secretariat; the Inclusive Framework has not reached consensus on them. Therefore, they remain subject to change and the progress report identifies numerous open issues that the Inclusive Framework has yet to agree.
- 3.3 We have considered the progress report in the light of the CIOT's objectives for the international tax system. These objectives are that a tax system should comprise rules which translate policy intentions into law accurately and effectively, without unintended consequences. The tax system should aim to provide simplicity (as far as possible) and clarity, so businesses can understand how much tax they should be paying and why, and also to provide certainty so that businesses can plan ahead with confidence. It is also important that there is responsive and competent tax administration, with a minimum of bureaucracy.
- 3.4 With this in mind, our comments below focus on three broad areas:
- Tax certainty;
  - Simplification, safe harbours and transition; and
  - Relief for double taxation.
- 3.5 We have previously said that the new rules for both of the Pillars will be immensely complicated. They will result in a very substantial for all (and unprecedented for many) additional compliance burden for large MNEs<sup>1</sup>. It is also acknowledged that there will be a significant additional administrative burden for tax administrations.
- 3.6 We have a key concern around the resourcing burden that will be placed on tax authorities at a time when those resources are already stretched as a result of various recent events (for example, the Covid pandemic) and more generally as a result of the world becoming an increasingly more complex place (for example, with a growing number of transactions etc. taking place in crypto currencies and related assets). The Pillars introduce a whole new level of complication over and above the various measures that have already been introduced or adopted in recent years as a result of the BEPS project. It is not practical to continue to place increased administrative burdens on tax authorities when many are already struggling to maintain service levels as a result of administering their own jurisdictions' tax rules.
- 3.7 We suggest that the further work required on Pillar One should focus on the practicalities of any agreed solution and ensure that the rules are proportionate to the intended policy objectives.
- 3.8 We have long advocated a multilateral solution to the tax challenges arising from the digitalisation of the economy as we have been increasingly facing an international tax landscape of unilateral measures (and retaliatory actions) being taken independently by countries, which lead to less alignment of tax bases globally,

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<sup>1</sup> CIOT response to Reports on the Pillar One and Pillar Two Blueprints - [www.tax.org.uk/ref731](http://www.tax.org.uk/ref731)

resulting in potential double taxation and a significant compliance burden for businesses and, consequently, restricting economic growth and innovation. Against that alternative, we have supported the work towards a multilateral solution which is based around a reallocation of taxing rights based on profits (Pillar One) and completion of the work addressing the issues identified by the G20/OECD BEPS project (Pillar Two). Thus, in principle, the two-pillar solution and its key objective of stabilising the international corporate tax framework is welcome. However, as things stand there is a danger that the proposals for Pillar One will result in considerable upheaval of the international tax system, without achieving the initial policy objectives of re-allocation within a re-aligned, but stable system. In addition, there will be double taxation and a compliance burden similar to (or possibly even worse than) that which results from the unilateral measures.

- 3.9 We recognise that the lack of consensus at a political level as to the how the challenges should be addressed has resulted in a proposal that seeks to address the impact of several different challenges simultaneously (which may not be pulling in the same direction). The concern is that against this background, the desire to reach an apparently positive outcome to a timetable is overtaking the ability to achieve the policy consensus and, where necessary, compromise that is needed to result in an outcome that achieves the fundamental objectives of Pillar One (of re-allocation of profits) and a genuinely stable, reformed international tax system. Currently we are concerned that the outcome will not be a stable system, but, nonetheless, one with significant extra complexity.
- 3.10 Irrespective of the outcome of further discussions, both tax administrations and MNEs will undoubtedly need to commit significant resources to ensure that there are adequate numbers of people with appropriate skills and knowledge to implement the Pillars effectively.

#### **4 Tax certainty**

- 4.1 We welcome the broad principle that the Administrative Framework for Amount A will provide the mechanism for taxpayers to access the Tax Certainty reviews in the Tax Certainty Framework. Three certainty review processes are envisaged:
- A Scope Certainty Review, to provide an out-of-scope group with certainty that it is not in-scope of rules for Amount A for a period, removing the risk of unilateral compliance actions.
  - An Advance Certainty Review, to provide certainty over a group's methodology for applying specific aspects of the new rules that are specific to Amount A, which could apply for a number of future periods.
  - A Comprehensive Certainty Review to provide an in-scope group with binding multilateral certainty over its application of all aspects of the new rules for a period that has ended, building on the outcomes of any Advance Certainty applicable for the period.

These are welcomed in principle and it is also welcome that following on from previous consultation around tax certainty, greater participation by groups will be allowed in the certainty processes. However, we also note that disagreements around these reviews will be referred to a Determination Panel.

- 4.2 The proposals setting out the Determination Panel process follow closely what was proposed in the May consultation. Importantly, therefore, the progress report makes it clear that there is currently no agreement around the composition of Determination Panels. It is evident that there are still divergent views among Inclusive Framework members as to whether the composition of Determination Panels should include

independent experts only, government officials only, or a combination of the two. In any event, it seems that although greater participation by groups will be allowed in the certainty processes, a Determination Panel will not be able to accept a group's arguments unless they are supported by at least one tax administration.

- 4.3 We note that the current approach to tax certainty adopts a 'base-ball' style arbitration process (permitting only the adoption of one of the options presented) that will incorporate many of the problems with the existing system. This seems a missed opportunity to adopt a more exploratory type forum that is able to probe arguments, take representations from taxpayers and tweak proposals put to it to arrive at the best outcome. On the other hand, we recognise that this type of arbitration has the benefit of relative simplicity and is may result in a quicker resolution as a result of parties bringing a reasonable proposal to the arbitration proceedings. Achieving certainty of outcome may be considered to be preferable at this point to achieving the best outcome. We also understand that there are divergent views among Inclusive Framework members as regards the circumstances in which an MNE should bear the costs related to a dispute resolution panel proceeding. This bears on the significant costs that tax administrations, as well as MNEs, are facing to properly resource these new rules.
- 4.4 It is also clear that many aspects of the certainty reviews themselves remain outstanding – for example, how an adjustment under transfer pricing should be taken into account in the Scope Certainty review. Given that it is likely that relevant MNEs will have multiple transfer pricing adjustments that may be determined over several years, this may mean that groups that have been designated as in scope of the Pillar One rules are subsequently found to be out of scope and vice versa.
- 4.5 The scope of the Advanced Certainty Review has been extended as a result of the consultation earlier this year, which is welcome. However, there are still many aspects of Amount A that are not covered within it and where a group may be concerned about its interpretation and application of the rules once figures have been self-assessed (for example, the application of the Marketing and Distribution Profits Safe Harbour and elimination of double tax mechanism).
- 4.6 There is a lot of detail on the way in which comprehensive certainty is to be sought and potentially achieved. Our concern is around the time that could be taken, initially by the Review and then by a Determination Panel to resolve the differences which may arise. The relative success of the International Compliance Assurance Programme (ICAP)<sup>2</sup> initiative may be built on by jurisdictions in reaching agreement on multilateral dispute resolution.
- 4.7 Over and above the reviews that deal with Amount A, Part III of the progress report contains draft provisions on tax certainty for issues 'related to Amount A'. These provisions set out a mandatory and binding mechanism that will be used to resolve transfer pricing and permanent establishment profit attribution disputes that Competent Authorities are unable to resolve through the mutual agreement procedure (MAP) within two years of the presentation of the MAP case to the Competent Authorities.
- 4.8 While a considerable amount of work has been done on the binding dispute resolution process for these related issues, it is again very clear that there remains a lack of consensus on some critical issues, such as the definition of a 'related Issue' and whether resolution panels should include independent members as experts. While signing the MLC that these rules will appear in would presumably imply compliance with the timelines etc. within the MLC, experience has shown that it is very common for MAP timelines to slip. There is no apparent sanction on any jurisdiction that does not meet the required deadlines and there is a risk that

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<sup>2</sup> ICAP is a voluntary risk assessment and assurance programme run by the OECD to facilitate open and co-operative multilateral engagements between MNE groups willing to engage actively and transparently and tax administrations in jurisdictions where they have activities.

monitoring compliance by jurisdictions may become another series of expensive peer reviews. At the same time, businesses may find themselves penalised if, for example, they are late in producing information. It would therefore be helpful to see some discussion of how these rigorous processes are going to be reviewed and what rights businesses will have when they feel that the process is not working as intended despite their best efforts.

- 4.9 An area that is not currently addressed is the question of suspension of whole or part of tax payments (and interest and penalties) pending resolution of the certainty reviews. Behavioural approaches are very different across jurisdictions, but it will be important to have an agreed position either in the MLC, or how the position will be determined in specific cases.
- 4.10 Overall, further detail is required around how tax administrations will actually deliver certainty through these reviews and an explanation of the mechanism for turning the outcome of a review into legal certainty. In particular, until the composition of and processes of the Determination Panel are resolved, a key aspect of Pillar One remains unstable.

## **5 Simplification, safe harbours and transitional rules**

- 5.1 We recognise the difficult balance between simplicity, certainty, fairness and proportionality. Pillar One is very complicated and, as noted above, the new rules will create an enormous additional administrative burden for tax administrations and compliance burden for MNEs. Clearly the global solution to the many challenges being addressed will not be simple. The fact that there are so many facets to the aims of different countries inevitably leads to further complications. However, every opportunity should be taken to simplify the rules as much as possible, and take businesses which will not be significantly affected (that is to say the amount of additional tax payable will be zero or minimal) out-of-scope.
- 5.2 In principle safe harbours are a good idea. We note that some aspects of the marketing and distribution profits safe harbour, details of which are principally given in the progress report published in July, are still under discussion, alongside how this will interact with elimination of double taxation. As a general point, in our view it is important to ensure that the processes for being able to utilise a safe harbour are less complicated and easier to navigate than the rules they are intended to stand in for; if the process to get to safe harbour is identical or worse than the actual rules, then there is no point to it. We recognise that the result of such simplification in designing safe harbours may be that a number of borderline MNEs fall outside of scope when on a strict application of the rules they would be in scope; in our view this should be accepted as the benefits of simplification outweigh any perceived downside.
- 5.3 A similar principle should apply to transitional processes. The progress report discusses a transitional process to be applied for a limited period with the following features:
- Special rules that could apply for a defined number of years (maybe the first three) that would simplify the application of Amount A, such as greater flexibility to apply allocation keys in place of Reliable Indicators and greater flexibility to rely on information reported for their Disclosed Segments.
  - A 'soft landing' could be provided under the process for Comprehensive Certainty where, provided the group took reasonable measures to reflect a correct application of the revenue sourcing rules, a request for certainty would be accepted with no changes required for the first six years, and the group would be provided with guidance as to how it could more accurately apply the revenue sourcing rules in the future.

- A similar approach to a request by a group for Advance Certainty over their revenue sourcing rules for the first six years. Provided the group took reasonable measures in the development of its approach to applying the rules, Advance Certainty would be provided with no changes required. Again, a group would be provided with guidance as to how it could more accurately apply the revenue sourcing rules in the future.

We recognise that these transitional measures are still under consideration, and there is no certainty that they will be accepted by the Inclusive Framework. However, to the extent that they are, it will be important, for example, that demonstrating 'reasonableness' will not be unduly onerous so as to render the soft landing ineffective. The development of guidance for both businesses and tax administrations will be essential.

- 5.4 The progress report notes that the Inclusive Framework is still considering approaches with respect of the interaction of Amount A (which is calculated at the group level) with existing entity-based corporate tax regimes. Whilst there is a general principle that Amount A income is to be included in the income tax base of market jurisdictions, there is a lack of agreement on the process for identifying the taxpayers in market jurisdictions and relief entities in jurisdictions that are required to eliminate double taxation. This leads to some uncertainty around the compliance and filing obligations for MNEs. We welcome the suggestions around streamlined compliance. These should be adopted to the greatest extent possible; we support efforts to streamline and simplify the administration and compliance processes for Amount A.
- 5.5 Separately to this, however, having to register in each jurisdiction (Tax Identification Number) for payment of tax (or to receive relief) would also be onerous, and have non-tax implications, especially in the transition period if use of general revenue allocation keys result in attribution to a jurisdiction where the MNE, in fact, has minimal market presence. It would be helpful if this process could also be streamlined in some way.
- 5.6 We have previously suggested that even a temporary raising of thresholds would mean dealing with a smaller number of MNEs for the first, say, five years of the operation of the new rules. This level of MNEs within the rules may be sufficient to 'test' the resources of many tax administrations. It should also be considered whether a 'trial run' could take place between some tax administrations and taxpayers before the rules enter into force, given how difficult and time consuming it will be to change the multilateral convention once it is in effect. As mentioned above, we are concerned about the burden on tax administrations and one way to reduce the administrative burden would be to increase the thresholds at which these rules would apply.

## **6 Double taxation relief**

- 6.1 It remains as important as ever that Pillar One addresses issues around double (or multiple levels of) taxation and contains robust and effective dispute resolution mechanisms. Robust mechanisms will be required to prevent double (or multiple levels of) taxation and also to ensure that tax administrations and MNEs can achieve certainty as to the amounts of tax that are due. These mechanisms are discussed in relation to tax certainty above.
- 6.2 With regard to double taxation relief, the report notes the mismatch between the timing of when Amount A liability may be calculated for the relieving jurisdiction versus when it can actually be paid in the market jurisdiction. There is a recognition of the potential for double taxation and the fact that the relief entities may

not have enough taxable income for the relevant tax years to be fully refunded for Amount A liabilities in market jurisdictions.

- 6.3 The progress report says that, due to the complexities in the foreign tax credit or exemption regimes, it will be for individual jurisdictions to determine how to provide double taxation relief. Double taxation relief will need to be given through the income tax base of relieving jurisdictions and therefore will have to interact with current domestic tax rules, including foreign tax regimes. However, we suggest that it should be made clear in the MLC that jurisdictions cannot adversely discriminate against Amount A in the extent to which it is taxed. In order to be eligible for relief from double tax, the entity eligible for double tax relief will be required to submit documentation to the relevant tax administration outlining the relevant calculations and additional information in relation to Amount A.
- 6.4 As mentioned above, the process of identifying the taxpayers in market jurisdictions and relieving entities in relieving jurisdictions has not yet been agreed. The two approaches that have been identified are a 'single taxpayer approach', where that entity would be liable for the Amount A tax in all jurisdictions, or a 'multiple taxpayer approach' where one or more entities from the relieving jurisdictions are liable for the Amount A tax and a single group entity coordinates payment on their behalf.
- 6.5 It is suggested that the relief model will be the same whether a single taxpayer approach or a multiple taxpayer approach is adopted. There are clearly pros and cons of each approach, and these are set out in the progress report. Whichever option is ultimately decided upon, it is likely to provide more effective double taxation relief for some MNEs than for others. However, on balance the single taxpayer approach seems to be the more practicable for MNEs and for tax administrations.
- 6.6 In addition, regardless of whether a single or multiple taxpayer approach is taken, there is also a lack of clarity around how payments that will be made between entities, for example, to 'true-up' the position as between group entities, will be treated. Will these be required to be made? Will they be subject to withholding taxes? It may also be necessary to address any potential manipulation of such payments, particularly if there is an element of choice as to whether or not they are required to be made.
- 6.7 We welcome the suggestion of a backstop rule in relation to double taxation relief in order to put a time limit on resolving issues, such that relieving jurisdictions will be required to give the benefit of double taxation relief within a certain timeframe (to be in Article 19 of the Model Rules). However, it would be unhelpful if such a provision was tempered by restrictions such as those suggested around evidence of payment. This seems to be an unnecessary requirement that would be difficult to operate in practice.

## **7 Acknowledgement of submission**

- 7.1 We would be grateful if you could acknowledge safe receipt of this submission.

The Chartered Institute of Taxation  
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