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Submission File

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Organisation for Economic Co-operation and Development (OECD)
Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
2 rue Andre-Paris
Paris
France

BY E-MAIL: tfde@oecd.org

Dear Sir/Madam

COMMENTS ON TAX CERTAINTY FOR ISSUES RELATED TO AMOUNT A

1. We present our comments and submissions on behalf of the South African Institute of Chartered Accountants' (SAICA) Transfer Pricing Committee on the public consultation document 'Pillar One –Tax certainty for issues related to Amount A' released by the OECD at the end of May.
2. SAICA continues to believe that a collaborative approach is best suited in seeking solutions to complex challenges.

BACKGROUND

3. Amount A of Pillar One has been developed as part of the solution for addressing the tax challenges arising from the digitalisation of the economy. It introduces a new taxing right over a portion of the profit of large and highly profitable enterprises for jurisdictions in which goods or services are supplied or consumers are located.
4. The Inclusive Framework on Base Erosion and Profit Shifting (BEPS) has mandated the Task Force on the Digital Economy (TFDE) – a subsidiary body – to advance the work needed to implement Amount A. In particular, the TFDE has been charged with developing the Multilateral Convention (MLC) and its Explanatory Statement as well as the Model Rules for Domestic Legislation (Model Rules) and related Commentary through which Amount A will be implemented.
5. The Model Rules, once finalised, will reflect the substantive agreement of the members of the Inclusive Framework on the functioning of Amount A and will serve as the basis for the substantive provisions that will be included in the MLC. The Model Rules are also being developed to provide a template that jurisdictions could use as the basis to give effect to the new taxing rights over Amount A in their domestic legislation.

6. Jurisdictions will be free to adapt these Model Rules to reflect their own constitutional law, legal systems, and domestic considerations and practices for structure and wording of legislation as required, whilst ensuring implementation is consistent in substance with the agreed technical provisions governing the application of the new taxing rights.
7. Tax certainty is a central element of Amount A and an integral part of establishing a new, stable framework for taxing international business income. As reflected in the Statement, Pillar One will include the following components to provide tax certainty:
 - 7.1 In-scope MNEs will benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g. transfer pricing and business profits disputes), in a mandatory and binding manner. Disputes on whether issues may relate to Amount A will be solved in a mandatory and binding manner, without delaying the substantive dispute prevention and resolution mechanism.
 - 7.2 An elective binding dispute resolution mechanism will be available only for issues related to Amount A for developing economies that are eligible for deferral of their BEPS Action 14 peer review and have no or low levels of MAP disputes. The eligibility of a jurisdiction for this elective mechanism will be reviewed regularly; jurisdictions found ineligible by a review will remain ineligible in all subsequent years.
8. In addition, in-scope Groups will also benefit from an innovative [Tax Certainty Framework](#) which guarantees certainty with respect to all aspects of the new Pillar One rules on Amount A.
9. The document released for comment 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.
10. The provisions build on the main features of the dispute resolution mechanism described in the Report on Pillar One Blueprint and Inclusive Framework jurisdictions’ experience with mandatory binding dispute resolution mechanisms, notably Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the BEPS MLI).
11. The OECD seeks comments with respect to the rules described in the document released for comment with input on additional guidance that would be needed to apply the rules, as well as input on areas where the rules are incomplete or unclear being especially appreciated.

COMMENTS ON THE PROPOSALS

Overarching comments

12. There is limited tax certainty provided where a dispute on taxing rights could exist between a jurisdiction adopting Pillar One and a jurisdiction choosing to retain its own domestic provisions, such as a Digital Services Tax (DST).
13. As there has been an indication that several countries in Africa will not adopt Pillar One, the absence of dealing with such a scenario creates a significant risk of double taxation to Covered Groups with a market presence in those jurisdictions.

14. <u>Submission</u> : The disparity where a dispute arises between a jurisdiction that has adopted Pillar One and a jurisdiction that has not, should be addressed in the document and a suggested solution be provided.
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15. The status of the proposed BEPS MLI in relation to existing double tax conventions (DTCs)/lack of DTCs (many developing countries, although members of the Inclusive Framework, have not adopted the existing MLI in terms of BEPS Action 15) needs to be clarified, notably:

- 15.1 Does the BEPS MLI create a *de facto* DTC in the event the market jurisdiction does not have a DTC with the jurisdiction of the Covered Group Headquarter company?

- 15.2 If the market jurisdiction does have a DTC in force but there is no MAP Article (notably in certain developing countries DTCs), would the BEPS MLI create the existence of a MAP Article in that DTC?

- 15.3 Most African jurisdictions would fall into the elected binding resolution category. However, this makes the binding resolution subject to the relevant competent authorities agreeing to the process. As most African DTC's do not currently provide for arbitration under MAP, it is likely that the competent authorities would not agree to the process. Therefore this creates a risk of double taxation remaining unresolved.

16. <u>Submission</u> : Clarity on how double taxation issues will be resolved in these circumstances should be provided.

17. The BEPS MLI should provide for unilateral relief under such circumstances.

18. Other questions that require answering are:

- 18.1 Who will comprise the dispute resolution panel under the MLI? How are the experts on the "chosen list of experts" selected? The question of who the members of the panel are is of concern to African jurisdictions as they generally lack skilled professionals sufficiently qualified to serve on such a panel, and there is a concern that these jurisdictions will not be fairly represented in these circumstances.



- 18.2 Will a judicial decision override the MAP both prior to a MAP hearing and in the event the member of the Covered Group disagrees with the MAP and pursues litigation?
- 18.3 From a timing perspective, will timing under the MAP override existing domestic timing rules for MAP?
- 18.4 What is the interaction of the proposed BEPS MLI content with obtaining APA's around Amount A, if applicable?

19. <u>Submission</u> : Answers to the above questions would be appreciated in order to provide certainty in these areas.

Yours sincerely

Christian Wiesener
Chairperson: Transfer Pricing Committee

Dr. Sharon Smulders
Project Director: Tax Advocacy

Karen Miller
Member: Transfer Pricing Committee