ICC Global Taxation Commission



ICC comments in response to OECD public consultation document on the *Draft Rules for Tax Base Determinations* under Amount A of Pillar One

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide input on the OECD [public consultation document](https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-tax-base-determinations.pdf) on the Draft Rules for Tax Base Determinations under Amount A of Pillar One. ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment. ICC is also an established arbitral institution through its International Court of Arbitration and provides other dispute resolution mechanisms through its International Centre for Alternative Dispute Resolution.

**General comments**

ICC appreciates the efforts made to ensure that the tax base determinations rules have been designed to establish the profit (or loss) of an in-scope MNE that will be used for the Amount A calculations to reallocate a portion of its profits to market jurisdictions. The rules determine that profit (or loss) will be calculated on the basis of the consolidated group financial accounts, while making a limited number of book-to-tax adjustments. In this regard, ICC welcomes the opportunity to provide input on how to better adjust the developed rules to operational realities.

To this end, ICC provides the following general comments:

* In view of the current thresholds, a limited number of multinational enterprises (MNEs) will fall in scope of the new nexus rules and as such would need to calculate a tax base for Amount A purposes. However, it is clear that the same MNEs will also be subject to the Pillar Two minimum taxation rules - where a tax base will need to be determined too.
* Within the context of this scenario, ICC members believe that the underlying principles and specific rules to calculate the tax base should be the same, particularly as it would not be justifiable to have two separate systems for Pillar One and Pillar Two, considering the need for simplicity and workability of the new tax rules. Furthermore, the possibility of lowering the thresholds in the future should not be overlooked, which would essentially broaden the scope of companies falling under the Pillar One rules, that would need to apply two different set of rules.
* ICC believes that it is therefore essential that common rules on tax base determination for the purposes of Pillar One and Pillar Two should be fully aligned to the extent possible. This does not appear to be the case at the moment; with several differences already identified. It would also be necessary to rely on a unique set of relevant definitions for the main terms used to determine the tax base for both Pillar One and Two calculations.
* Current work on Pillar Two is more advanced than that on Pillar One, as the Model Rules on Pillar Two were released in December last year and the commentary is expected in the coming weeks. A significant amount of reflection and attention has been given to issues related to the tax base, which undoubtedly would be of benefit to consider in the context of the current Pillar One process. The tax base determination is a relatively complex and technical exercise, which has benefited from input and expertise from the Business Advisory Group on Pillar Two, to ensure that the final model rules are workable and align with business practices. In this respect, ICC holds that the main principles agreed for the Pillar Two tax base determination should also be considered for Pillar One: namely consolidated financial statements should serve as starting point for calculation (as already considered in the public consultation document), certain adjustments, treatment of joint ventures, etc.
* As specific rules for those Groups subject to segmentation for Amount A purposes have not been released yet, no feedback can be provided at this point in time. However, ICC members believe that an integrated approach should be followed and specific rules for segmentation should be integrated in the general principles designed for tax base determination, undermined by the need for simplicity.
* ICC also believes that maintaining a balanced compliance burden for Covered Groups should also be considered as a pertinent objective in order to limit the administrative complexity for taxpayers who are subject to an increasing number of reporting obligations.
* Complex rules for determining the tax base would be detrimental not only for the business community but also for many tax administrations who may have limited technical capabilities and resources. Lack of clarity and differences in interpretation for implementing the rules, could lead to increased instances of double taxation and disputes. In this respect, ICC once again reiterates the importance of a robust dispute avoidance and dispute resolution mechanisms for jurisdictions that adopt the OECD guidance. It is critical that a co-ordinated, centralised dispute resolution mechanism be put in place for all aspects of Pillar One and Two.
* The consolidated financial accounts of a Covered Group will show 100% of the revenues and profits of a consolidated subsidiary. This is also the case when the Covered Group has an ownership interest of (far less) than 100%, for example when a shareholder agreement grants the Covered Group control over the company even when it owns less than 50% of the voting capital. However, the draft does not appear to provide for any further adjustment that could be used to remove relevant revenues or profit that economically do not belong to the Covered Group.

ICC members believe that this seems counter- intuitive, given that the Covered Group in effect seems to be paying Pillar One Amount A tax based on revenues and profits that economically do not belong to it.

**Example:**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Item** | **UPE** | **Subsidiary** | **Consolidated** | **Mark** |
| Profit | 1000 | 100 | 1100 | N |
| Covered Group share |  | 51% |  |  |
| Minority interest share of profits |   |   | -49 |  |
| **Income attributed to UPE** |  | **1051** | **Y** |

Recommendation:

The Amount A Tax Base Determination should provide for an adjustment mechanism for cases where a Covered Group has a controlling interest but less than full (100%) ownership in one or more Group Entities. The adjustment mechanism should reflect economic reality that not all the revenue and profit (or loss) belongs to the Covered Group.

**Specific comments:**

1. Title 9, Footnote 12 (page 8) Art. 5 (2) (a) iii sets out that, for the purpose of book-to tax adjustments, some specified items of income will be reversed, including equity gains (or loss). Title 9 contains various definitions, including the definition of equity gains (or losses). Footnote 12 clarifies that under the current draft rules gains and losses associated with disposal of asset interests are included in the Tax Base, whereas gains and losses associated with disposal of equity interests are not.

ICC members put forward a few observations in this regard:

* There is no further background information as to why an equity transaction is handled differently compared to an asset deal.
* Many business transfers take the form of asset deals rather than share transactions for a variety of reasons, including the common situation where a particular business division does not comprise a separate holding company and subsidiaries, but shares its corporate structure with other divisions either entirely or in part, or situations where there may be contingent liabilities attaching to the historical corporate entities, which a purchaser would not wish to assume.

Therefore, from a business perspective, there seems no good reason to treat an equity transaction and an asset deal differently for Amount A/ tax purposes. Nonetheless, the 4 October Amount A draft rules for Nexus and Revenue Sourcing already specify “returns from and gains on the disposition of assets” as an element of Non-customer Revenues (Part 9 (para 62) –page 34). In addition, from the outset, it seems relatively simple to present any disposition of (intangible or tangible) assets as a disposition of an ownership interest – just by setting up/ using a shell Company. It might be quite difficult to sufficiently delineate cases, particularly in the absence of any core principle underpinning the policy approach.

ICC members suggest treating a disposal of asset interests no different froma disposal of equity interests for Amount A/ tax purposes. Any difference in treatment should be based on a core principleunderpinning the policy approach.

1. Title 9 (page 8) provides the definition of “Policy Disallowed Expenses”. The current definition is wider than the one under Pillar Two (including the threshold). Furthermore, the scope of fines or penalties should be limited to those fines or penalties **imposed by a government**, to also rule out thatcommercial contract penalties are included.

ICC therefore suggests the following wording (in **bold**) to be added to the definition of “Policy Disallowed Expenses”:

*“Policy Disallowed Expenses” means expenses included in calculating the Financial Accounting Profit (or Loss) of a Covered Group under a Qualifying Financial Accounting Standard for illegal payments, including bribes and kickbacks; and fines or penalties, whether or not periodic****, imposed by a government.***

ICC further recommends providing additional clarification in the Commentary to limit the scope of Policy Disallowed Expenses and, in particular, to clarify that commercial contract fines or penalties are not in scope.

1. Article 5(2)(b) and 9 (page 5; 7) cover the definitions for Eligible Restatement Adjustments for the period.

Article 2(b) of the draft Model Rules outlines the treatment of restatement adjustments in the computation of the Financial Accounting Profit (or Loss). Restatements of accounting income for prior year(s) would be reflected in the tax base for the period in which the restatement is identified and recognised. The restatements reflected in the tax base are subject to limitations (as set out in the definition of “Eligible Restatement Adjustments”). The current draft proposes an applicable cap on the Eligible Restatement Adjustment for the Period. The level of the cap will be subject to further analysis to balance competing objectives of simplicity and avoidance of excessive single-year impacts. Input from stakeholders is requested on the restatement adjustments.

ICC notes that a basis in principle for limiting adjustments from the application of IFRS to 0.5% of revenues is not observed. From the outset, the Covered Group would normally not significantly influence (the timing of) relevant adjustments, including those arising from new or amended IFRS Standards, corrections of errors or voluntary changes in accounting policies. All such adjustments must be made in accordance with IFRS and subject to audit.

Furthermore, operationally, this is likely to result in an additional layer of complexity and administrative burden for both tax authorities and covered MNE Groups.

It seems likely that these requirements would also continue to apply for any MNE Group that would be “moving in and out” of the scope of Amount A of Pillar One. Indeed, in all these cases an additional administrative burden and complexity would be added to control a record of adjustments separately from its GAAP books if a restatement exceeds the restatement cap (0.5% of revenues in the period) for the purpose of calculating a cumulative effect on the unrelieved net losses carry forward. This administrative burden would also arise in respect of other book to tax adjustments.

In this regard, ICC recommends considering removing the cap for these restatements, and the consequential administrative cost and complexity.

1. Article 5 (2)(a) (page 5) provides the definition and examples in relation to “Equity Gain or Loss”.
* In particular, Article 5(2)(a) outlines required book-to-tax adjustments in the computation of the Financial Accounting Profit (or Loss). It states that (specified) items of income and deducted expenses must be reversed. This includes Equity Gain (or Loss).
* Footnote 3 further clarifies that the Commentaries will elaborate on the practical application of the exclusion of specified equity gains and loss. It further notes that this item should be excluded to ensure that the tax base of a Covered Group does not include specified gains or losses generated by another entity.

Additionally, in this regard, the following questions arise: i) How are items of Other Comprehensive Income (OCI) treated? ii) Are these brought into the calculation? If not, there will be a different tax impact of items recycled/reclassified to profit or loss and those items that are not.

ICC recommends to providing further details as to what is exactly is defined as equity gain or loss under the rules and why, supported by examples of the practical application of the exclusion of specified equity gains and loss, including examples in respect of i) a subsidiary, ii) an associate and/ or iii) JV. Moreover, it may be useful to include further guidance and/ or clarification as to how items of Other Comprehensive Income (OCI) are treated.

1. Article (c) (page 8) of the Equity Gain or Loss definition states that profit or loss derived from a Joint Venture (JV) should be excluded from calculating the Financial Accounting Profit (or Loss) of a Covered Group under a Qualifying Financial Accounting Standard. However, it is unclear as to why JVs and associates are treated differently when the accounting is the same.

With respect to distinction/Exclusion of treatment for reversal of income/expense of Profit or loss derived from a Joint Venture (JV) - for IFRS accounting purposes JVs are accounted using the equity method as an equity interest.

ICC suggests removing the difference in treatment for JVs and associates, or alternatively, provide sufficient explanation/clarification.

ICC remains committed to providing knowledge and expertise on behalf of the global business community.

About The International Chamber of Commerce (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC’s core mission is to make business work for everyone, every
day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition
to providing market-leading dispute resolution services. Our members include many of the world’s leading companies, SMEs, business associations and local chambers of commerce.