

## UNITED STATES

KPMG US



Mark Martin and Thomas Bettge

## Open items in the OECD tax certainty consultations

Mark Martin and Thomas Bettge of KPMG in the US discuss the recent OECD public consultation documents on tax certainty for Amount A of pillar one and related issues, and review key areas that remain undecided.

On May 27, the OECD released two public consultation documents on tax certainty under pillar one, which together total over 150 pages – 87 pages on tax certainty for Amount A, and another 67 on tax certainty for related issues such as transfer pricing (TP) and permanent establishment disputes.

Given that the last official pronouncement regarding tax certainty was limited to two paragraphs in the Inclusive Framework's (IF) statement on October 8 2021, the consultation documents reflect an enormous technical undertaking.

### Unaddressed areas

Nevertheless, a significant amount of work remains to be done. For one thing, there are key items that simply are not addressed in the consultation documents, including transition rules and coordination rules. The Amount A consultation document acknowledges the need for a transitional approach to revenue sourcing and talks about a “soft landing,” but stops short of providing concrete detail. Although revised revenue sourcing rules have not yet been released, it appears the Amount A sourcing regime will be complex and difficult to apply.

A transitional approach that permits a business to apply a simplified approach during the first years it is within the scope of Amount A, while simultaneously working with tax administrations to agree on an approach to sourcing on a go-forward basis, would be very welcome. Indeed, given the number of stakeholders and the potential for disagreement, it is hard to see how Amount A could work without a robust transitional approach.

Clear coordination rules will also be vital. Amount A will not exist in a vacuum, but will interact with existing tax regimes, pillar two's global minimum tax rules, and pillar one's streamlined Amount B. The October 2021 statement promised certainty to companies within the scope of Amount A tax with respect to related

issues like TP and permanent establishments because, quite simply, those issues are related to the application of Amount A. Yet the two consultation drafts that set out the rules for Amount A and related issues say almost nothing about the relationship between the two.

Related issues can take a long time to resolve: even before kicking off the dispute resolution process described in the consultation draft, a TP audit can easily last three to five years or more. If Amount A comes into effect in 2024 and a TP adjustment related to 2024 is not finally resolved until 2031, how will that be dealt with? The simplest option would be through tele-scoping, an approach commonly used in mutual agreement procedure (MAP) cases that would carry the income adjustment for 2024 into 2031.

### Unagreed areas

Then, too, there are crucial design features that remain unagreed. These are too many to enumerate separately here, but two of the most important are the scope of advance certainty and the scope of related issues.

Advance certainty is a critical component of the certainty framework, providing efficient outcomes for tax administrations and businesses and delivering up-front certainty that can be valuable for non-tax purposes, such as financial reporting. The consultation draft contemplates that advance certainty would be available for revenue sourcing and segmentation, though it notes that the application to segmentation remains unagreed, and that the list may change as more sets of substantive rules are finalised.

Notably absent is the application of advance certainty to key areas including the elimination of double taxation and the marketing and distribution profits safe harbour. All aspects of Amount A, apart from some scope determinations, should be susceptible to advance resolution through agreement on the methodologies the business will apply. We hope that as more sets of rules are finalised, the OECD will confirm that advance certainty applies to those rules.

The handling of the scope of related issues is more troubling. The October statement delivered a clear commitment to mandatory and binding dispute prevention and resolution for related issues, such as TP and permanent establishment disputes – and 137 countries have signed on to that commitment.

Yet in a footnote to the public consultation draft, the OECD discloses that many jurisdictions wish to scale back what constitutes a related issue, by altering the qualitative definition, imposing materiality

thresholds, permitting reservations, or limiting the application of certainty for related issues to cases where there is already a bilateral tax treaty in place. This development is disheartening and threatens to undermine the October statement's historic commitment to tax certainty.

### Final thoughts

The consultation documents are in some ways a technical achievement, especially given the challenges inherent in designing mandatory and binding mechanisms that are sufficiently dissimilar to arbitration to be palatable to IF members that have long made their opposition to binding arbitration clear.

Yet many aspects of the documents also reveal the considerable technical and political work that remains to be done in this area. Amount A can deliver historic progress on tax certainty, but it will require continued commitment to detailed technical work, respect for the underlying political commitments made in the October statement, and careful consideration of the public comments on the consultation documents.

#### Mark Martin

Principal, KPMG

E: mrmartin@kpmg.com

#### Thomas Bettge

Manager, KPMG

E: tbettge@kpmg.com

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