



The OECD

To : International Co-operation an Tax Administration Division
Centre for Tax Policy an Administration

Per mail to: tfde@oecd.org

Berne, February 18, 2022

SwissHoldings comments on public consultation document: Pillar One – Amount A: Draft Model Rules for Nexus and Revenue Sourcing

Dear Madam/Sir

The business federation SwissHoldings represents the interests of 61 Swiss-based multinational enterprises from the manufacturing and service sectors (excluding the financial sector).

SwissHoldings would like to thank the OECD for the opportunity to comment on the Draft Model Rules for Nexus and Revenue Sourcing related to the determination of Amount A under Pillar One, although we consider the time period to provide comments as too short for this important topic.

First, we will provide general remarks and, second, provide comments to the content of the consultation document itself.

Introductory remarks

While we appreciate the importance of solving the tax challenges arising from the digitalization of the economy, we find that the highly complex proposed rules illustrate a lack of proportionality when considering the compliance burden imposed on MNEs and, on the other hand, the in-country nature, presence and taxation of many MNEs.

For MNEs engaged in, or organized as, complex vertical and/or horizontal B2B supply chains, even outside the category of components, the likelihood of obtaining sufficiently detailed information, or even any information, will likely prove challenging and not even possible without disrupting business procedures requiring massive investments in IT and human resources. For many MNEs it may be true that B2C transactional information is available because the MNE controls the entire supply chain but for B2B transactions there could be several layers of third parties involved or cross-border transactions between such third parties happening without the knowledge of the MNE.

The Pillar One project seems to indicate a global tax landscape with tax payers transacting cross-border have to navigate between co-existing systems having to apply new rules (Pillars One and/or Two) in combination with, or as an alternative to, well-established and well-functioning rules (e.g. OECD Transfer Pricing Guidelines).



We expect more double taxation conflicts as a result of these two sets of rules, the formulaic approach to determine Pillar One and the transfer pricing rules. In favour of tax certainty and in order to reduce the burden of transition, we propose to delay the introduction of Pillar One until we have a safer base to avoid taxation conflicts. Formulaic approaches are as exposed to double taxation as transfer pricing is. The cumulation of both exposures creates additional complexity.

Information and systems

We welcome the introduced possibility of reliance on existing information within a Covered Group.

We note that while it is now an option to rely on information that is not reported for purposes of the issuance of consolidated financial statements, such other information that are collected and reported for management purposes - if available at all - will in most cases not ensure the required transaction-by-transaction information as foreseen under the proposed rules and will, as a logical consequence of being collected for other purposes than financial reporting, in most cases not reconcile with the consolidated financial statements.

As consolidated financial statements are the basis for determining Amount A, it would appear that Covered Groups would have no other choice than to enter into the costly and resource demanding task of setting up dedicated reporting systems.

For many MNEs the reality is that even for financial reporting purposes, the system architecture is very complex consisting of different types of systems, different versions of the same type of system and various degrees of availability of information at a single legal entity level or transactional level. Cost of aligning reporting system across all legal entities of an MNE, where groups of entities may have been acquired over the years, are generally not warranted by the benefits derived.

There are SwissHoldings member firms which operate through decentral and complex ERP landscapes with up to 60 differently set up of SAP systems in one Group covering the need over more than 20 global business units and thousands of different products (finished goods, components, services, projects, software, etc.) where intercompany transactions may happen between any of the more than 500 legal entities of the Group.

The proposed rules for Nexus and Revenue sourcing would require several millions Swiss Francs investments and may require the involvement of hundreds of the MNE's business and finance employees. Especially, in traditional B2B industries which largely operate through legal entities or branches in the markets they do business in, such investments are not justified.

Independent distributors

The requirement to contractually limit the territory of an independent distributor appears impossible in a competitive market environment. Such a limitation would also be against the 4 freedoms of the European Union where the right to freely move goods cannot be limited. The same is true for any obligatory information about sharing the customer base of an independent distributor and the relevant turnover. This would clearly endanger the market position of the independent distributor.

Compliance burden

We also welcome that a Covered Group may rely on "systemic-level review" in terms of how revenue is sourced for purposes of Amount A instead of "...a requirement to retain and supply information from every transaction to administrations."

While MNEs have extensive internal control systems in place, the purpose of such systems is to monitor, evidence and test certain proscribed internal standards and is, as such, not well suited for any collection of information (numerical or otherwise). Consequently, we believe that the reliance placed on existing internal control systems of a Covered Group is essentially misplaced and that a Covered Group would have to set up dedicated systems as noted above.

We further note, for the sake of prudence, a Covered Group would retain transactional information gathered and that the obligation to not, at least initially, have to file such information with a tax administration appears to ease the compliance review burden for tax administrations rather than for Covered Groups.

Dispute Resolution

We note that the many variable, and at times subjective, elements involved in the determination of Amount A are bound to lead to controversy not just between a Covered Group and a particular tax administration but also, and more importantly, between tax administrations. As such, we would stress the importance of very comprehensive and effective dispute resolution mechanisms.

Summary conclusion

In conclusion, we find that the compliance burden placed on Covered Groups to be extreme due to the following non-exhaustive factors:

- The scope is not limited to digital non-presence type activities, rather even more traditional MNEs with in-country presence through legal entities and branches and limited cross-border transactions will be in scope
- The materiality threshold for Nexus is very low considering the value and number of transactions typically undertaken by MNEs
- The absence of transactional materiality thresholds after nexus has been established

Consequently, SwissHoldings urges to rethink the overall approach of the Nexus and Revenue Sourcing Rules and would welcome:

- More, and more reliance on, allocation keys
- A domestic business exemption covering revenues without cross-border connection
- Higher thresholds for Nexus including multiple year considerations
- Introduction of materiality thresholds
- The usage of already existing data from the **financial** systems of the MNE that can be reconciled with the consolidated financial statements without asking for a completely new dataset which does not exist so far and disrupting relationships with customers in particular in the area of B2B industries. Information gathering should be stopped at the level of sales from the MNE to third parties whatever the role of the third party is
- Transition periods for implementation allowing simplification measures until final rules get enforced



Reservation

As the consultation on Pillar One components happens according to a rushed and staggered approach, we reserve the right to revert with further comments on the Nexus and Source Rules once all components and the related commentaries are published.

We kindly ask you to take our comments and proposals into due consideration.

Yours sincerely,

SwissHoldings

Federation of Industrial and Service Groups in Switzerland

A handwritten signature in black ink, appearing to read "Dr. Gabriel Rumo".

Dr. Gabriel Rumo
Director

A handwritten signature in black ink, appearing to read "Martin Hess".

Martin Hess
Senior Policy Manager Taxation,
Certified Tax Expert

Cc:

- SwissHoldings Transfer Pricing Subgroup

Document Reference	Topic / Issue	Comment / Recommendation
General	Multiple references to subsequent Commentary	Reserve the right to revisit
Background, page 1	<p>It is an arduous task of data sourcing put on an MNE and a significant burden of proof is allocated to the MNE (categorization, Reliable Indicator, B2B Customer data etc.). Penalties may apply and final allocation to low-GDP countries may happen while reliance is placed on sources like CbC data and the empowerment of country tax administrations (Lead Tax Administration).</p>	<p>Introduce materiality thresholds and domestic business exemption.</p>
Background, page 2	<p>A distinction is made between the detailed record-keeping requirements and the review, and, on the other side, the retention and filing of detailed transactional information.</p>	<p>It would appear to rather reduce the burden for tax administrations than for MNEs in scope as there is no material difference between designing systems that enable Revenue Sourcing to the transaction-by-transaction level required and the retention/filing of same. It is anyway assumed that data would need to be retained for a certain period.</p>
Background, page 2	<p>It is stated that the Consultation Document has been issued according to consensus within the TFDE regarding procedure but not on substance.</p>	<p>The distinction made suggests that changes to substance elements as already contained in the Document may change.</p>
Page 5, Article [X]: Nexus Test	<p>Thresholds of EUR 1 million / EUR 250 thousand depending on GDP <> EUR 40 billion</p>	<p>Given the value of transactions naturally occurring at the level of MNEs potentially in scope as well as the geographical footprint of MNEs, nexus is likely to be established in a majority, or even all, market jurisdictions. Recommended to significantly increase thresholds.</p>
Page 5, Footnote 2	<p>Currency denomination undecided.</p>	<p>Volatility in exchange rates may cause MNEs and nexus jurisdiction to shift between being in/out of scope.</p>
Page 9	<p>Transaction types span from the very generic to the very specific.</p>	<p>Unclear why some very specific transactions with, presumably limited number of revenues, are named.</p>

Page 9, Part 1, A,	Highly subjective tests for determining the nature of transactions: <ul style="list-style-type: none">• ordinary or predominant,• substance over form, and• most analogous.	Need for objectivity and/or comprehensive catalogue of examples.
Page 10, Part 2	The use of the term "Method" is most commonly associated with transfer pricing and could cause confusion.	Suggest renaming to "Reliable Indicators & Allocation Keys".
Page 10, note 9, 4th bullet point and note 10	Billing address not a reliable indicator in all cases.	In B2B situations but also in B2C situations to a certain extent, not using billing address means foregoing a source of already existing information (e.g. VAT compliance).
Page 11, 3., b., iv.	Functionally equivalent Indicator.	It is unclear what this term refers to and how the test, standalone, may be satisfied.
Page 11, 5.	Consistent use of Indicators.	Operating models of MNEs, and of MNEs themselves, are frequently and increasingly disrupted likely requiring flexibility.
Page 11, 6., b.	Reasonable steps.	Need for objectivity and/or comprehensive catalogue of examples.
Page 11, 6., c. & page 27, Definitions	Knock-out Rule in accordance with knowledge and reasonable steps taken to achieve knowledge.	Need for objectivity and/or comprehensive catalogue of examples.
Page 12, note 14, 7th bullet point	Assumption that NGOs, like governments, are usually located in its own jurisdiction.	Questionable assumption considering the often international scope of NGOs.
Page 13, B, 3. b.	Allocation of Tail-End Revenues	The rationale for allocating up to [5] percent to Low Income Jurisdictions is unclear at best.
Page 14, C	Subsection for Digital Goods	Cross-references to a subsequent section (Part 5) is not helpful. Recommend repeating content rather than to refer to.

Page 15, Part 4 A	Revenues of Components	The same product may be sold as a component, semi-finished product or finished product. In addition, seller may regard product as finished product and the buyer as component. Often, seller does not know what third party buyer does with the product (integrating into another product, using or on-selling).
Page 26, Definitions	Definitions are organized with reference to different parts of the Document. This way of ordering dilutes the principle objective of a Definitions Section which is to create an easily accessible overview.	Suggest to organize as one alphabetic list of definitions.
Page 34, Part 6	-	Subject to the recommendation to organize in one list, the order should be 59, 57, 58 so as to go from the generic to the specific.
Page 34, Part 8	Grants are very broadly defined.	Recommend more specific examples.
Page 34, Part 8	While Governments are defined, international organisations are not despite the term "NGO" is used elsewhere in the Document (page 12).	Recommend a separate definition of International Organisations including how that may differ from an NGO.