



The OECD

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

Per mail to: tfde@oecd.org

Berne, March 4, 2022

SwissHoldings comments on public consultation document: Pillar One – Amount A: Draft Model Rules for Tax Base Determinations

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 Tax Base Determinations related to Amount A under Pillar One.

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

Introductory remarks

We welcome the efforts made to simplify the tax base determination rules under Pillar One. We believe there are valid and appropriate reasons for even further simplification.

In the spirit of transparency that underpins our collaborative efforts, we note that the proposed rules should be aligned with, and calibrated towards, the ordinary course of business as conducted by MNEs in scope as opposed to rarely occurring events. As such, we do not believe that there is a need for such complex rules addressing restatements of Consolidated Financial Statements of a Covered Group or for the, somewhat anti-abuse directed, rules addressing treatment of tax losses in case of Business Combinations.

Business alignment and simplification

All MNEs in scope are exposed to cyclicity both in terms of macro-economic impacts and capital expenditures. As such, we would strongly encourage to make no differentiation for losses to be carried forward and not to restrict such right in time.

Similarly, we believe that residual/excess profit shortfall, should be reintroduced and be allowed to be carried forward indefinitely.



When it comes to adjustments to the tax base for purposes of Amount A, it is critical to have a strong and clear policy, and principles, to determine the tax base for the Amount A in line with Pillar 1 objectives of reallocating profits to countries based on where the customers, consumers and users are, in line with the scope of the sourcing rules.

The objective would be to determine what is the on-going underlying operating and trading profit generated by the sales to those customers and consumers, in the ordinary course of the business. This would require excluding any exceptional and one-offs items or events, whether generating a profit or a loss at group level, that have no economic and business, and even geographic, connection and no nexus with those sales, such as:

- Divestitures, such as sale of equity stakes and sales of assets, that could be specific to one country, or one line of business in several countries (that could include both entities and assets), the sale of a JV interest, or intellectual properties owned and developed centrally
- Asset impairment and revaluation

Let's illustrate this by a real-life example: a parent company (PC) of a MNC in country A owns for decades (with insignificant basis) a minority interest of 30% in another MNC that operates independently. For strategic reasons, or for portfolio management to reinvest in its own businesses through M&A, the PC sells that minority interest and generates a one-off substantial gain that would increase its profitability from average yearly 12% to 25% for that given year. That increase in profitability is exceptional and has nothing to do with the sales to consumers under Pillar 1, and the value provided by those sales. The same should apply if the value of that interest has substantially decreased and PC make a loss.

Furthermore, duly classified one-off and exceptional items – whether related to sale of equity stakes or sale of assets – should systematically be excluded from the tax base because the purpose of the tax base determination is to identify residual and excess profit. Determination of profit should as mentioned be focused on ordinary course of MNEs' business where losses generally are an undesirable product of adverse business conditions. This is also important in case the tax base is used to determine the threshold of 10% for "highly profitable" MNEs. Taking into account such one-off events would distort the scoping for the application of Amount A and would bring such MNEs into scope which cannot be considered as "highly profitable" because the profit resulting from the ordinary course of MNEs' business may substantially be below the threshold.

Other

It is assumed that various accounting standards, which may even be expanded, are sufficiently alike – now and in the future - so as present a level playing field for the determination of the tax base. We respectfully question this assumption.

We would welcome the inclusion of a catalogue of numerical examples in the later issued documents so as to provide guidance on the interpretation and application of the tax base determination rules.

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 Tax Base Determinations 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



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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&2, Tax base rules for Covered Group subject to segmentation.	It is assumed that this statement refers to out-of-scope activities only and that in-scope activities will need to follow the now available draft rules for tax base determination. It is, however, not entirely clear if this is the case and how the combination of rules for such a Covered Group would work.	Clarification needed
Background, page 2, Public Consultation Instructions	As compared to the previous Consultation documents (Nexus & Revenue Sourcing), this document caveats even further the intermediary and rushed nature of the proposed.	Allocate further time to issue proposed rules in an orderly and efficiently manner.
Page 5, Article 5, 2., a., iii.	Differentiation made between sale of equity stakes and sale of assets. With due and focused regard to ordinary course business of an MNE there is no reason to differentiate.	Exclude both transaction types from the tax base.
Page 5, Article 5, 2., a., iv.	The definition does not appear to be aligned with that of Pillar Two and there is no apparent reason for why this shouldn't be the case.	Align definitions
Page 5, Article 5, 2., b. (incl. Definitions and Notes)	Restatements are relatively rare amongst MNEs in scope and should a restatement nonetheless occur, it is likely to be downwards adjustments mostly. The cap as proposed has no obvious link to revenue and is, from an NPV perspective, to the detriment of a Covered Group.	There should be no cap. If a cap is maintained it should be linked to a different basis than revenue and, regardless, allow for a shorter period of adjusting for the restatement.

<p>Page 5, Article 5, 3., a. (incl. Definitions and Notes)</p>	<p>Both the differentiation made between pre- and post-implementation losses as well as the limitation on carry-forward period do not factor in the investment cycle of MNEs or the business/macro-economic cycles. The result of applying such rules would basically not be aligned with economic reality.</p>	<p>Undifferentiated treatment of losses and unlimited carry-forward</p>
<p>Page 5, Article 5, 3., b. (incl. Definitions and Notes)</p>	<p>The loss transfer rules are complex, subjective and overly detailed. They do not reflect the regular and ordinary course type of transactions undertaken by MNEs in scope.</p>	<p>Introduce an overriding assumption on the bona fide nature of a business restructuring.</p>
<p>Page 6, Definitions</p>	<p>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.</p>	<p>Suggest to organized as one alphabetic list of definitions.</p>
<p>Page 6, footnote 7</p>	<p>UPE amongst those terms not yet defined for purpose of Pillar One.</p>	<p>Alignment with Pillar Two definitions should be sought.</p>
<p>Page 8, footnote 12</p>	<p>Treatment of gains and losses associated with disposal of equity interests, and in particular on whether gains and losses from controlling interests shall be excluded from the tax base of Amount A.</p>	<p>Gains and losses associated with disposal of equity interests, including controlling interests, should be excluded from Amount A. Amount A must be limited to profits resulting from ordinary course of business. Beside several distortive effects, it would also be very complex if not impossible to consider such gains and losses for relieving jurisdictions in a sensible way.</p>