

OECD releases Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One

14 October 2022

In brief

The OECD released for public consultation a [Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One](#) ('consultation document'), which includes the rules on the administration of the new taxing right and updated tax certainty-related provisions. Amount A of Pillar One 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.

The release of the reports, on 6 October, coincided with the 14th plenary meeting of the OECD Inclusive Framework (IF), which took place in Paris on 6-7 October. The OECD also released several other documents in tandem with the consultation document, including the [annual Tax Inspectors Without Borders report](#) and a [roadmap](#) for developing countries on international tax issues.

The OECD had previously released public consultation documents on the [Tax Certainty Framework for Amount A](#) and [Tax Certainty for Issues Related to Amount A](#) on 27 May 2022 (see our previous [PwC Tax Policy Bulletin](#)). The OECD also released a [Progress Report on Amount A of Pillar One](#) on 11 July 2022 which contained 'domestic model rules' for the different building blocks relating to the new taxing right under Amount A (including for the marketing and distribution safe harbour (MDSH) and elimination of double tax).

It is particularly important to note – yet again – that these proposed rules for the moment represent the work of the OECD Secretariat since the IF has not yet reached consensus on them. Their basic design may, therefore, be subject to change, unrelated to the consultation process. The consultation document specifically identifies numerous open issues that the Task Force on the Digital Economy (TFDE) is currently exploring and invites input from stakeholders. Extensive footnotes throughout the documents also highlight specific issues that the IF has yet to agree.

Comments on the consultation document are due by 11 November 2022. This alert provides a short overview of the proposed rules and some initial observations.

In detail

Overview

The consultation document is divided into three parts: Part I covers the administration process for Amount A (including detailed procedures of how in-scope groups will comply with the Amount A rules, from the filing of the relevant information to payment of tax and access to relief from double taxation); Part II covers the tax certainty framework for Amount A; Part III covers tax certainty for issues related to Amount A.

The OECD previously had released eight public consultation documents on Amount A. Separate responses were requested in relation to each consultation document. The first release covered the [revenue sourcing and nexus rules](#), the second release covered the rules for [tax base determinations](#), the third release covered the [general scope rules](#), the fourth release covered the exclusion for extractive industries, the fifth release covered the [exclusion for regulated financial services](#), the sixth & seventh covered [tax certainty](#), and the eighth was a [July 2022 Progress Report](#).

Observation: The consultation document states that two other public consultation documents will be released by the end of 2022: one dealing with the withdrawal and standstill of digital services taxes and other relevant similar measures, and the other one dealing with Amount B (which aims to standardise the remuneration of related party distributors that perform baseline marketing and distribution activities). It further states that the work on Amount B will proceed with a view to completing it in the first half of 2023 (which pushes back the IF's previous [commitment](#) to finalise Amount B by the end of this year).

Administration process for Amount A

Overview

The rules on administration are released for public consultation for the first time.

The consultation document includes Model Rules and Commentary for potential adoption as well as narrative on the Secretariat's ideas so far and issues that have been discussed in the IF. The OECD has stressed the importance of business input on the practicalities of different processes and on identifying issues that would remain beyond the list of items recognised as under review.

The proposed rules admittedly do not cover all the relevant issues related to the administration framework for Amount A. The report highlights several outstanding issues that will be the subject of further discussion as part of the development of the multilateral convention (MLC), the finalisation of the Model Rules and the 'Pillar One Implementation Framework.' Some of the identified outstanding issues include:

- the particulars of the Amount A Tax Return and Common Documentation Package
- guidance for applying the exemption or credit method to provide double taxation relief
- the development of guardrails in the MLC related to the rate of taxation of Amount A or ensuring penalties related to Amount A are non-discriminatory compared to penalties applied to other types of income
- the scope of using exchange of information in the administration and tax certainty frameworks for Amount A, and
- the interaction of Amount A with Pillar Two.

Process for identifying the taxpayer(s) and relief entities

The consultation document notes that IF members are still considering approaches with respect to the interaction of Amount A (which is calculated at the group level) with existing entity-based corporate tax regimes. While the report lays out the basic principle that Amount A income is to be included in the income tax base of market jurisdictions, it highlights the lack of agreement among IF members on the process for identifying the taxpayer(s) in market jurisdictions and relief entities in jurisdictions that are required to eliminate double taxation ('relieving jurisdictions').

Notwithstanding the lack of these important details, the report describes itself as fulfilling the objective consistent with the IF October statement of "a streamlined and coordinated [framework] to minimise the impact on tax administrations and taxpayers" that includes "removing any unnecessary duplication."

The report recognizes that the allocation of Amount A is an income taxing right, and therefore taxation of Amount A must be through an income tax regime or the equivalent of an income tax regime. Under this approach, jurisdictions will have flexibility to tax Amount A under their current income tax regimes or through a separately levied tax.

Despite the flexibility accorded to individual jurisdictions in levying an income tax on Amount A liability, the IF identified several areas where 'a harmonised administrative approach' is warranted. These include:

- Information filing requirements in relation to Amount A (Articles 12 and 13)
- Streamlined income tax filing and reporting requirements in market jurisdictions for eligible entities (Article 14)
- Secondary liability for the non-payment of Amount A related income tax liabilities (Article 15)
- Amount A transition periods (Article 16)
- Uniform currency conversion rules for purposes of Amount A (Article 17)
- Amendments due to the Tax Certainty Framework (Article 18), and
- Backstop Rule for timely relief from double taxation (Article 19).

An entity liable to tax on Amount A or eligible for double taxation relief will be required to submit an 'Amount A Tax Return and Common Documentation Package' to each Affected Party. The term 'Affected Party' is defined broadly and includes a jurisdiction whose tax administration is the Lead Tax Administration (LTA); a jurisdiction in which the Group has revenues that meet the Nexus threshold test or that is required to provide relief for the elimination of double taxation; a jurisdiction that has notified the LTA asserting that it considers itself to be an Affected Party (supported by relevant documentation); or where a jurisdiction is determined to be an Affected Party under an agreed Comprehensive Certainty Outcome. There are divergent views within the IF on whether an Affected Party should also include a jurisdiction in which a Group Entity of the Group is resident for tax purposes or a permanent establishment of a Group Entity is located (as evidenced by brackets around this text). The consultation document notes that the status of an Affected Party as such shall not by itself be relevant to the determination of whether that jurisdiction may tax profits of a Group pursuant to the MLC.

To reduce the administrative burden to taxpayers and tax administrators, the filing obligation in relation to the Amount A Tax Return and Common Documentation Package will be met in all jurisdictions if the documents are filed centrally with the LTA by the group's Coordinating Entity. This is a separate process from what is described as a 'streamlined compliance' process in Article 14, for which an entity would be eligible in a market jurisdiction under

certain conditions, i.e., it is not a resident of the market jurisdiction and has no other income tax obligations in the market jurisdiction.

Observation: Notwithstanding the guidance on how the amount A tax liability would be submitted, the report notes that the preferred approach for identifying the entity actually liable for tax under Amount A in the market jurisdictions has yet to be decided. There are similar continuing discussions to determine which entities will be the relieving entities in relieving jurisdictions.

Double taxation relief

With regard to double taxation relief, the report notes the mismatch between the timing of when

Amount A liability may be calculated for the relieving jurisdiction versus when it can actually be paid in the market jurisdiction. In this case, there is a recognition of the potential for double taxation and the fact that the relief entities may not have enough taxable income for the relevant tax years to be fully refunded for Amount A liabilities in market jurisdictions.

Given the complexities in the foreign tax credit or exemption regimes, the report leaves it to individual jurisdictions to determine how to provide double taxation relief. Double taxation relief will need to be given through the income tax base of relieving jurisdictions and therefore will have to interact with current domestic tax rules, including foreign tax regimes. In order to be eligible for relief from double tax, the entity eligible for double tax relief will be required to submit documentation to the relevant tax administration outlining the relevant calculations and additional information in relation to Amount A.

The report notes that discussions in the IF are continuing regarding the process of identifying the taxpayers in market jurisdictions and relief entities in relieving jurisdictions. The two approaches that have been identified are a 'single taxpayer approach', where that entity would be liable for the Amount A tax in all jurisdictions, or a 'multiple taxpayer approach' where one or more entities from the relieving jurisdictions are liable for the Amount A tax and a single group entity coordinates payment on their behalf.

The Administration Framework for Amount A will provide the mechanism for taxpayers to access the Tax Certainty reviews in the Tax Certainty Framework. Covered groups may indicate their intent to participate in Advance Certainty or Comprehensive Certainty Review as part of their Amount A Tax Return.

Observation: The relief model is likely to be the same whether a single taxpayer approach or a multiple taxpayer approach is adopted. Many of the pros and cons of each are set out in the consultation document and respondents are urged to weigh the respective merits.

Revised Tax Certainty Rules

Overview

The consultation document does not include a clear 'road map' to help quickly identify what's been changed since the first iteration of these rules. But it does at least include several helpful diagrams to illustrate the process. Some important updates include: additional details on how to request advanced certainty; some specifics on what must be included in the advanced certainty documentation package; and further details on the composition of Determination Panels.

On this last point, however, it is evident from the document that there are still divergent views among IF members as to whether the composition of Determination Panels should include independent experts only, government

officials only, or a combination of the two. The document also provides further information on various timelines, transition rules, and the so-called 'soft landing approach.'

There are also divergent views among IF members as regards the circumstances in which a Covered Group should bear the costs related to a dispute resolution panel proceeding.

Tax Certainty Process for Amount A

The Tax Certainty Framework consultation document published in May 2022 introduced three Certainty review processes:

- A Scope Certainty Review, to provide an out-of-scope group with certainty that it is not in-scope of rules for Amount A for a period, removing the risk of unilateral compliance actions.
- An Advance Certainty Review, to provide certainty over a group's methodology for applying specific aspects of the new rules that are specific to Amount A, which will apply for a number of future periods.
- A Comprehensive Certainty Review to provide an in-scope group with binding multilateral certainty over its application of all aspects of the new rules for a period that has ended, building on the outcomes of any advance certainty applicable for the period.

New detailed rules on the review processes

The latest consultation retains all of three reviews as well as recourse to a binding Determination Panel process to resolve any disagreements. Part 2 of the document sets out in detail the process that will be followed if a business applies for certainty under each of these headings. Note however, that several aspects of these rules remain under discussion within the IF and where there is no clear consensus or agreement on the approach to be adopted.

Observation: It seems that, in the light of the previous consultation responses, greater participation by groups will be allowed in the certainty process, although a Determination Panel will not be able to accept a group's arguments unless they are supported by at least one tax administration.

The Scope Certainty Review

The proposed rules provide that a Scope Certainty review will be completed within 270 days (or within 360 days if certain criteria apply) from the time a group submits a request, unless additional time is needed to compensate for delays in the provision of information by the business. This timeline (and those set out below) are still in square brackets in the consultation document and subject to further review.

In undertaking a Scope Certainty Review, a Scope Review Panel or LTA will not consider whether any particular transaction has been undertaken at arm's length or what the correct arm's length price would be. Where an adjustment to the price or other terms of a transaction is necessary for consistency with the Arm's Length Principle (ALP), the Scope Review Panel or LTA shall confirm that these adjustments have been correctly reflected to the extent and in the manner required under the MLC. Where such an adjustment is made after the end of the period to which it relates, the effect of that adjustment shall be taken into account for purposes of applying the MLC in the period during which the adjustment is made and not that to which it relates.

Observation: How an adjustment under transfer pricing should be taken into account - including whether this is in the year in which the adjustment is made or the year to which it relates - is still under consideration. Given the likelihood that some groups will have multiple transfer pricing adjustments that will be determined over several years, this may mean that groups that have been designated as in scope, are later found not to be in scope.

The Advance Certainty Review

The first request by the Coordinating Entity of a group is to be completed within 360 days after it commences, reducing to 270 days for subsequent years, unless additional time is needed.

The revised rules on the Advanced Certainty Review provide some clarity on the extent of the review to cover revenue sourcing, including the categorisation of revenues and choice of reliable method. In light of the previous consultation responses, the Advanced Certainty Review also was extended to cover the exclusions for qualifying extractives and regulated financial services.

It should be possible to obtain certainty about the methodology a group will apply for a number of years (provided critical assumptions continue to apply) ahead of the first period to which the rules will be relevant.

Analysis of relevant aspects of a group's internal control framework (ICF) continues to be highlighted to ensure the correct application and reliability of the proposed revenue sourcing approach and any relevant exclusions. It is now specifically stipulated that a review of the ICF will be strictly limited in scope to those elements that are relevant, with some narrative on what that means.

The review will generally be carried out by a panel of tax administrations of Affected Parties (the Review Panel). An Expert Advisory Group of systems specialist will carry out the ICF review.

Observation: While the extension of the Advanced Certainty Review is welcome, there are still many aspects of Amount A that are not covered and where a group may be concerned about its interpretation and application of the rules once figures have been self assessed (e.g., the application of the MDSH and elimination of double tax mechanism).

The Comprehensive Certainty Review

The Coordinating Entity can request Comprehensive Certainty from the LTA alongside filing the group's Common Documentation Package for the period, including an explanation of the approach it has taken in applying key aspects of the MLC. These documents would then generally be exchanged with the Competent Authorities of Affected Parties within 30 days (or less).

The first request by the Coordinating Entity of a group should be completed within 480 days after it commences (300 days and 180 days on each phase), unless additional time is needed. Each phase is reduced by 60 days for subsequent requests. The first phase covers scope and revenue sourcing, the second phase covers other things like the nexus thresholds, the jurisdictional allocation of profit and the elimination of double taxation.

The review will generally be carried out by a Review Panel assisted by an Expert Advisory Group in the same way as for an Advance Certainty Review. Where a Coordinating Entity submits both a request for Comprehensive Certainty for a period and a request for Advance Certainty for a future period, the same Review Panel will undertake both reviews. In the same way as for a Scope Certainty Review, the Review Panel is not to consider the ALP, etc.

A Comprehensive Certainty Review may include one or more multilateral meetings or calls with the Coordinating Entity at the behest of any member of the Review Panel or the LTA.

Observation: There is a lot of detail on the way in which comprehensive certainty is to be sought and potentially achieved, although there is a concern that a lot of time could be taken by the Review before a Determination Panel finally steps in to resolve the differences which may arise. The relative success of [the International Compliance Assurance Programme](#) (ICAP) initiative holds out some hope for jurisdictions reaching agreement on multilateral dispute resolution.

The Determination Panel process

The proposals setting out the Determination Panel process follow closely from what was proposed in the May consultation.

As a Determination Panel can only choose among options proposed to it, the approach chosen must be one that was proposed by a tax administration (and not by an independent expert). The Determination Panel must endeavour to reach agreement on each issue by consensus. Where this is not possible, it must choose the outcome that is supported by an overall majority. Where there is no overall majority, the document proposes a number of alternative voting approaches that could be employed to arrive at an acceptable outcome.

The composition of Determination Panels is still not yet agreed. The document suggests that Determination Panels will consist of five individual members, comprising one Independent expert nominated by the jurisdiction in which the Ultimate Parent Entity (UPE) is resident for tax purposes and four Independent experts nominated by the remaining jurisdictions. Members will be chosen by random selection. Three options are presented by which stakeholders can provide input, although none of them represent final or consensus views of the IF.

Observation: There remain divergent views among IF members as regards the composition of Determination Panels, particularly whether this should include independent experts only, government officials only, or a combination of both. Until this is resolved a key aspect of Pillar One remains unstable.

Observation: In addition to the lack of agreement on significant aspects related to each aspect of the tax certainty process, note that this will require a level of senior tax authority involvement (and calendar/diary coordination), which may not be easily achieved.

Tax Certainty for Amounts related to Amount A

Part III of the consultation document 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.

Article [X]¹ of the proposed rules applies where there is an existing bilateral tax treaty with a MAP Article. In essence Article [X] functions as a backstop to the MAP provisions of an existing treaty where there is a Related Issue. It sets out clear priorities for MAP claims that are already subject to a request under the EU Arbitration Convention of the EU Dispute Resolution Directive that would take them out of Article [X]. In the case of new claims, a member of the group can choose which MAP process to request. Similarly, in the case of arbitration, where there is an arbitration process under the existing treaty, groups are expected to use that process unless the Competent Authorities agree to use the new MLC.

Article [Y] applies in cases where there is no existing bilateral treaty and provides an OECD/ UN style MAP process in cases where there is a Related Issue.

Article [Z] defines the meaning of a 'Related Issue' as one which has a current or potential impact on the application of Amount A by the Covered Group. There are a number of exclusions relating to regulated financial institutions and extractive entities. The current definition will be revisited as appropriate once the design of other Pillar One building blocks is finalised. There is also no agreement among IF members as to if and to what extent a potential impact on Amount A can be within the scope of 'Related Issues.' Some issues that may have an impact on Amount A have also not been agreed (e.g., the consideration of withholding taxes).

Article 19 covers the request for a dispute resolution panel and the procedures that would follow in setting up such a panel. These largely follow the current process for arbitration under existing bilateral tax treaties, although only 'final or last best offer' arbitration is allowed, unless the Competent Authorities decide an alternative resolution within 90 days of the panel's decision. However, there is no consensus over the inclusion of independent experts on a panel, even if they are not in the majority.

Finally, Article 20 sets out the rules for determining whether a jurisdiction is eligible for the elective binding dispute resolution procedure on the basis of four objective criteria, for example, jurisdictions that are eligible for deferral of their BEPS Action 14 peer review and those that have no or low levels of MAP disputes. Eligibility for this elective mechanism will be reviewed regularly.

Annex IIIA provides a helpful process map which summarises all the different parts of the procedure and the expected time period. As with most existing MAP provisions, the Competent Authorities have two years to resolve the case by mutual agreement. The remaining steps of the process (Steps 4 to 9) are designed to take another 390 days after which a solution should be agreed and the dispute should be resolved. Altogether the process from the date of the MAP claim by a Covered Group member would take in excess of three and a half years, assuming only one round of information is requested after the claim is submitted.

Observations: While a considerable amount of work has been done on the binding dispute resolution process, it is again very clear that there remains a lack of consensus on some critical issues, such as the definition of a Related Issue and whether resolution panels should include independent members as experts.

While signing the MLC would presumably imply compliance with the timelines included in these Articles, experience has shown that it is very common for MAP timelines to slip. There is no apparent sanction on any jurisdiction that does not meet the required deadlines and there is a risk that monitoring compliance by jurisdictions may become another series of expensive peer reviews. At the same time, businesses may find themselves penalised if, for example, they are late in producing information. It would therefore be helpful to see some discussion of how these rigorous processes are going to be reviewed and what rights businesses will have when they feel that the process is not working as intended despite their best efforts.

Other issues: Suggested Transitional Processes

The IF is also considering a transitional process to apply for a specific limited period to support groups with applying the new rules where a group has taken reasonable measures in its approach to specific topics. The transition process recognises the challenges that Groups are likely to face in building new systems to comply with Amount A.

The consultation document discusses the following potential features of such a process:

- Special rules that could apply for a defined number of years (maybe the first three) that would simplify the application of Amount A, such as greater flexibility to apply allocation keys in place of Reliable Indicators and greater flexibility to rely on information reported for their Disclosed Segments.
- A 'soft landing' could be provided under the process for Comprehensive Certainty where, provided the group took reasonable measures to reflect a correct application of the revenue sourcing rules, a request for certainty would be accepted with no changes required for the first six years, and the group would be provided with guidance as to how it could more accurately apply the revenue sourcing rules in the future.
- A similar approach to a request by a group for Advance Certainty over their revenue sourcing rules for the first six years. Provided the group took reasonable measures in the development of its approach to applying the rules, Advance Certainty would be provided with no changes required. Again, a group would

be provided with guidance as to how it could more accurately apply the revenue sourcing rules in the future.

In addition, the document includes a list of other action items and guidance for the IF. This includes ongoing engagement and consultation with stakeholders, the development of further guidance, FAQs, model templates, and other practical tools that could help groups apply the new rules. Guidance may also be developed for tax administrations as to how to undertake a Scope Certainty Review, Advance Certainty Review, and Comprehensive Certainty Review.

Observation: While the focus on helping groups apply these rules as well as the suggestion of including 'soft landing' periods is welcomed, these transitional measures are clearly still under consideration and there is no certainty that all IF members will endorse them. The development of guidance for both businesses and tax administrations will be essential.

Other issues: Multilateral review where a group has not made a request for certainty

The consultation document recognises that there may be cases where a group may choose not to request certainty (as all elements of the certainty process remain voluntary on the part of groups). In these cases, tax administrations could undertake their own separate enquiries under their domestic law to determine whether the group's application of the new rules is correct. This might involve significant duplication of work on the part of tax administrations, and could result in an inconsistent application of rules on Amount A and consequent double or multiple taxation. Therefore, the Tax Certainty Framework now contains an option for tax administrations to cooperate and undertake a review of a group's Amount A Common Documentation Package on a coordinated basis.

Where this process is used, a group is given a window of opportunity to make a late application for Comprehensive Certainty, which will allow the group to benefit from a binding certainty outcome including all Parties to the Convention rather than just those that agree to participate.

Observation: While it was always the position that tax administrations might undertake their own enquiries, including the suggestion of a 'joint audit' by some, but not necessarily all, the tax administrations involved in the Tax Certainty Framework is likely to push groups, whether they wish it or not, to apply for Comprehensive Certainty. Groups will need to be confident that a late application for Comprehensive Certainty will be dealt with favourably and swiftly and that any coordinated action by tax administrations will stop with immediate effect once the application is accepted.

Other issues: Extending MAP agreements into future years

The consultation document also proposes (in its commentary on new Article [X]) that where both Competent Authorities agree, they may extend the outcome of a MAP case to cover subsequent taxable periods, in particular where the facts and circumstances of the relevant transactions or activities remain unchanged. This would facilitate the resolution of recurring issues that could otherwise give rise to multiple and duplicative MAP cases.

Observation: While somewhat hidden in this document, this is a very helpful proposal for businesses faced with the prospect of new MAP cases arising because a new audit cycle is underway at the same time, or even before a MAP case arising from a prior cycle is resolved. Of course, both Competent Authorities have to agree.

The takeaway

The final design of the Administration Framework and Tax Certainty Framework for Amount A remains to be settled. Efforts to ensure a streamlined approach are clear, but the practicalities could benefit further from business

input. This consultation document appears to hold out an 'olive branch' to request help and ideas. Irrespective of the outcome of further discussions, both tax administrations and covered groups will undoubtedly need to commit significant resources to ensure that there are adequate numbers of people with appropriate skills and knowledge to carry out these provisions effectively.

Let's talk

For a deeper discussion of how these new administration and tax certainty proposals might affect your business, please contact:

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¹In this section of the document, certain treaty articles are labelled X, Y and Z, while others are numbered 19 and 20.