

OECD launches public consultation documents on Pillar One - Amount A: Tax Certainty

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In brief

The OECD released the public consultation documents on the Amount A - [Tax Certainty Framework for Amount A](#) and [Tax Certainty for Issues Related to Amount A](#) on 27 May 2022. 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. Comments on the consultation documents are due by 10 June 2022. This alert provides a short overview of the proposed approaches and some initial observations. These are the sixth and seventh in a series of public consultations, separate responses requested in relation to each, on the Pillar One Amount A Model Rules that the OECD is expected to release over the coming months, with very short comment periods, as part of a 'rolling consultation.'

The Tax Certainty Framework consultation document includes a number of elements described as being designed to (i) provide Groups with certainty (ii) minimise the risk of individual states undertaking unilateral actions and (iii) eliminate potential double taxation, in respect of the new Pillar One model rules:

- 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.

All three of these elements are supported by a binding process to resolve any disagreements that arise.

The Tax Certainty for Issues Related to Amount A consultation document contains draft provisions which 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).

It is particularly important to note – yet again – that these consultation documents for the moment represent the work of the OECD Secretariat since the Inclusive Framework has not yet reached consensus on them. The basic design may, therefore, be subject to change, unrelated to the consultation process. The consultation documents specifically identify 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 Inclusive Framework has yet to agree.

Despite their positive features, these documents will still disappoint many businesses. For example: the lack of reference to avoiding double taxation is unfortunate; some of the tax certainty only comes at the end of the process, rather than the beginning of it; there are confidentiality issues with respect to the countries with which tax information can be shared as well as in relation to the new expert panels; it is not clear what would prevent a recalcitrant country from delaying the process. These issues, of course, likely reflect a lack of agreement, and it is to be hoped that public comments will help facilitate that agreement, although there are some very difficult issues to be resolved.

In short, it seems clear that of all the un-agreed ('non-consensus') documents released so far, this has given rise to the greatest number of unresolved issues. By way of illustrating this, one major government advised stakeholders to read the footnotes more carefully than the body of the text on the basis that the disagreements are made obvious in the footnotes – and there are a lot of footnotes. This must raise questions about exactly what type of document the Inclusive Framework can produce/ release in July (even though we now know that it will not be a complete, fully-fledged multilateral convention).

In detail

Tax certainty framework

Overview

The consultation documents note that providing tax certainty is a key objective of the Pillar One agreement. Resolving resulting disputes through traditional tools such as the mutual agreement procedure (MAP) would be very complex. Therefore, the Inclusive Framework is seeking to develop an approach that would combine elements of dispute prevention and dispute resolution in a structured, binding process that provides certainty to Groups and at the same time is resource-efficient for tax administrations. The Tax Certainty Framework consultation document contains detailed descriptions of different proposed elements. These elements can be divided into:

- Certainty over whether a group is a covered group;
- Certainty over a Covered Group's application of the convention;
- A Determination Panel to resolve disagreements;
- The withdrawal of a request for certainty and certainty outcomes; and
- Other provisions.

There is a long list of terms which are defined specifically for this purpose, including 'Lead Tax Administration', 'Listed Parties', 'Affected Parties', etc. Proposals for the composition of different panels (and expert groups advising them) and the processes for submission, undertaking reviews, agreeing the outcomes and concluding disputes are

set out in detail. The draft rules also propose the creation of a 'Tax Certainty Secretariat' that will coordinate aspects of the tax certainty framework by providing administrative and clerical support to the Parties during the various aspects of the Tax Certainty Framework.

Outcomes of the tax certainty process

The consultation document provides that where a Group makes a request for certainty as to whether it is in-scope or over the calculation and allocation of profit before tax and the elimination of double taxation, and acts in a cooperative and transparent manner, it is guaranteed to be offered certainty. It also states that Parties to the Convention shall implement the outcomes of the certainty process and shall not undertake any compliance activity inconsistent with these outcomes.

This certainty shall continue to apply so long as a Group does not withdraw its request or undertake steps outside of the multilateral process to reduce the profit before tax allocated to a Party or increase the amount of relief to be provided for the elimination of double taxation.

Observations: This is a welcome statement as it enshrines the right to tax certainty, in a similar way to the right to MAP. Presumably, however, any request will have to comply with various rules on time limits and provision of information/documentation for a Group to be guaranteed an offer of certainty. Similarly, Groups need assurance that parties to the certainty process will not undertake further unilateral compliance actions. However, there are a number of unanswered questions - e.g., who will determine whether any compliance activity is inconsistent with the outcome of a Panel determination? It is also not clear whether certainty would be removed if profits are reduced / relief increased through genuine business activity.

Scope certainty over whether a group is a covered group

The consultation document mentions that in the first years of applying rules on Amount A, there is a need for Groups to be able to obtain binding certainty. This risk can occur, for example, when the Group has total annual revenues above the threshold in its published financial statements, before application of rules on excluded revenues. Groups which are in fact not in scope can still be subject to enquiries in different jurisdictions by tax administrations that believe they may be in-scope. In that case, a Group could submit a request for a scope review to its Lead Tax Administration as soon as it has sufficient information to support its case, which may be shortly after the release of its financial statements for the year. The request should include a list of those parties to the multilateral convention from which the Group is seeking certainty and which will be asked to agree whether the Group is in scope (other parties can request to be added).

The request must be accompanied by a Scope Certainty Documentation Package. This package contains information on the application of rules on Amount A relevant to determining whether a Group is within scope. The request will be reviewed by the Lead Tax Administration except where it relates to rules on excluded revenues or segmentation, which will be addressed by a Scope Review Panel. On the other hand, the package doesn't have to include any information needed to apply other aspects of Amount A, such as rules on revenue sourcing or the elimination of double taxation. Simpler documentation requirements may apply in subsequent periods once a Scope Review Panel has found a Group is not in-scope.

The Lead Tax Administration will share the outcome with the tax administrations in all Listed Parties. Any disagreements would be sent to a Determination Panel for a final outcome. The consultation document notes that the composition of a Determination Panel is under consideration but could include independent experts, government officials or a combination of independent experts and government officials.

The Framework also contains an option for any number of tax administrations to cooperate and undertake a review of a Group's Amount A Common Documentation Package on a coordinated basis, if the Group does not come

forward itself. This is also the check to limit a Lead Tax Administration deciding by itself that a Group is not in scope.

Observation: Groups which are in fact out of scope face an administrative burden and still have to apply parts of the Amount A rules, for example, where the accounting revenues/profitability levels are close to or exceed the thresholds they will need to review the revenues/profitability in light of the Amount A rules to confirm the scope position. Furthermore, the consultation document is not clear which rules should be taken into account and only gives examples. The suggested timelines appear challenging, particularly if a Group is found to be in-scope at the end of the certainty process and is therefore required to prepare an Amount A return.

Advance certainty

The consultation document mentions that the new rules on sourcing revenues to market jurisdictions are very important for the identification of which jurisdictions have a taxing right (based on a revenue threshold) and for the determination of the amount of profit before tax to be allocated to those jurisdictions (using a formula based on the source of its in-scope revenues). Both the Group and the Tax Administration benefit from ensuring the Group's methodology is reliable. However, given the challenge Groups face when applying the new rules, the Inclusive Framework is considering a transitional approach for providing advance certainty with respect to revenue sourcing. Two concepts are being explored.

One is a 'soft landing' provided under both the process for Advance Certainty (and Comprehensive Certainty, below). This would mean that under the assumption that the Group made reasonable efforts to reflect a correct application of the revenue sourcing rules, the filing would be accepted with the comfort that no changes would be required. The Group would be provided with guidance in this transitional period as to how it could more accurately apply the revenue sourcing rules in the future. Furthermore, providing the ability for a Group to have easier access to Allocation Keys in the short-term is also being explored.

Secondly, ways of providing non-binding certainty are being explored. This would mean that Groups are being supported in complying with the revenue sourcing rules even in advance of Amount A coming into effect and until the first filing of Amount A Common Documentation. This could include structured engagement and feedback from tax administrations on areas of uncertainty or where support is needed, as well as guidance, FAQs, model templates and other practical tools.

Where a Group's proposed approach is accepted, certainty will apply for a set number of future years, so long as there is no relevant change in those periods. Where the Review Panel does not reach agreement, or where an agreement proposed by the Panel is not accepted by the Competent Authority of any Listed Party, disagreements will be referred to a Determination Panel for a final outcome in a similar manner as for Scope Certainty.

Observation: There have been extensive calls for guidance and help in transitional years in addition to the soft-landing approach. The consultation document provides some indications that these have been heard and that engagement, feedback and other support will be encouraged with Groups as well as between tax administrations and with the Tax Certainty Secretariat. However, it is clear that divergent views remain within the Inclusive Framework based on the limited scope of issues covered by the proposed advance certainty Framework. This proposal requires considerable 'infrastructure' to be developed – not just the rules for the Panels but guidance for Groups and tax administrations, templates, etc. As regards the Expert Advisory Group, there are a number of open issues: Who will set the criteria for this Group? How will they work and under whose direction? Only experts in systems reviews and controls? What would be a 'relevant change' that would impact certainty? Who will judge if sufficient improvements have been implemented?

Comprehensive certainty over the calculation and allocation of profit before tax and the elimination of double taxation

The first time a Group makes a request for Comprehensive Certainty, the review would be conducted by a Review Panel of tax administrations. A Review Panel will be supported by an Expert Advisory Group of 'systems specialists' that will provide advice as to the reliability of the Group's internal control framework.

A Comprehensive Certainty Review involves two phases. However, it is noted that sometimes both phases can be reviewed simultaneously. The consultation document provides the example of determining the quantum of a Group's profit before tax as phase 1 and as phase 2 the application of the allocation formula to determine how much of that profit before tax should be allocated to a particular market jurisdiction. At the end of a review, or at the end of each phase, a Review Panel or Lead Tax Administration will share the outcomes and a recommendation that the Group's application of rules on Amount A be accepted or that changes be required. In case of disagreement, the request will be referred to a Determination Panel for resolution.

Observation: As a reminder, the October [2021 Inclusive Framework agreement](#) stated that for MNEs in-scope for Pillar One, 25% of residual profit (defined as profit in excess of 10% of revenue) will be considered to be the Amount A profits. This will be allocated to market jurisdictions with nexus using a revenue-based allocation key, according to that agreement. The references to 'profit before tax' in the tax certainty model rules should be considered in light of this overarching rule, and also considering the rules on [tax base determination](#), which provides that the profit before tax amount will need to be adjusted in order to arrive at the Amount A profit.

Determination panels

Any disagreements that arise between tax administrations must be resolved by referring issues and alternative outcomes to a Determination Panel. This is required to reach a resolution by choosing from among the alternative outcomes put to it by the Lead Tax Administration, Scope Review Panel Members, Review Panel Members and Affected Parties.

The composition of a Determination Panel is not yet agreed and could include independent experts, government officials or a combination of independent experts and government officials.

A Determination Panel can only choose among options proposed to it - this ensures that the approach chosen must be one that was proposed by a tax administration. The Determination Panel must endeavour to reach agreement on each issue by consensus including all members but, where this is not possible, it must choose the outcome that is supported by an overall majority.

Where there are more than two alternative outcomes for a particular issue put to a Determination Panel to resolve, an outcome will be chosen by ranked voting.

Observation: We can see some of the principles of 'baseball arbitration' used in the first MLI applying here in that only an outcome suggested by a tax administration can be put to the Determination Panel - the Determination Panel will not be able to come to any different conclusion of their own. There are clearly considerable concerns across the Inclusive Framework about independent experts both being on a Determination Panel or producing a solution, hence the different options suggested in the document.

Issues related to Amount A

Mandatory and binding processes are discussed in relation to access to mutual agreement procedures (MAP) as regards issues related to Amount A, particularly transfer pricing and permanent establishment allocations. The consultation document also sets out additional mandatory and binding processes that might be applied irrespective

of whether there is any existing bilateral treaty in place. It notes the different views of Inclusive Framework members in this regard. If approved, this could be an elective regime for developing countries which are eligible for deferral of the MAP recommendations in BEPS Action 14.

These additional processes might cover the use of a Dispute Resolution Panel to determine whether matters are related to Amount A, as well as the usual prevention and resolution of disputes. The consultation document notes that there is a lack of agreement on whether such Panels should comprise independent experts or government officials or both.

Observation: The 67 pages of narrative in the consultation document sets out in detail the way the Panels would operate, in very similar fashion to the recommendations made in relation to the review of MAP under Action 14 - which suggested the last-best offer approach. A contentious issue remains as to whether a Group would be allowed to make a presentation to a Panel in support of its position. The consultation document also notes that the scope of the 'related' issues is still being discussed. Inclusive Framework members disagree on "whether other types of disputes should be considered 'Related Issues,' whether the scope definition should include a quantitative materiality threshold, whether reservations with respect to scope should be permitted, and whether the mechanism should apply in circumstances where there is not a bilateral tax treaty between the relevant jurisdictions."

'Rolling' public consultations

These are the sixth and seventh in a series of public consultations on the Pillar One Amount A Model Rules that the OECD is expected to release over the coming months. Separate responses are 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](#), and the fifth release covered the [exclusion for regulated financial services](#).

The takeaway

It is appropriate for the OECD Secretariat and Inclusive Framework to look at new and innovative ways to prevent the risk of double taxation. However, the complexity of participating in the proposed certainty framework is evident from the releases, augmented by the amount of new terms and processes that will be necessary to achieve the required certainty.

Although the final design of the Tax Certainty Framework for Amount A remains to be settled, what is clear is that both tax administrations and Groups will need to commit significant resources to ensure that there are adequate numbers of people with the right skills and knowledge to operate the model effectively. The administrative burdens that will be placed on tax administrations either to provide the required levels of certainty (as a Lead Tax Administration), or in policing the taxing rights allocation (as a non-Listed Party) will be significant.

Let's talk

For a deeper discussion of how the draft Model Rules might affect your business, please contact:

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