



Recovery & Renewal: EMEA Tax issues

CG&R session | 29 September



Meet the team

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Agenda

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CG&R Industry Developments

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Global Tax Environment

Global tax environment

Accelerated change due to COVID-19

Pre-COVID:

Big but relatively slow changes in (international and local) Tax Policies + Increased Enforcement (EU Commission and local) + More Transparency



COVID: Diverted attention to today + Need for unprecedented financial government support + Making sure the support is well-allocated to those that suffer most



Beyond COVID: Focus on tax collection from the winners + Need to eliminate tax arbitrage (Pillar 1 and 2, Digital Tax and accelerated local introduction of new rules) + Aggressive tax audit environment

Global tax environment

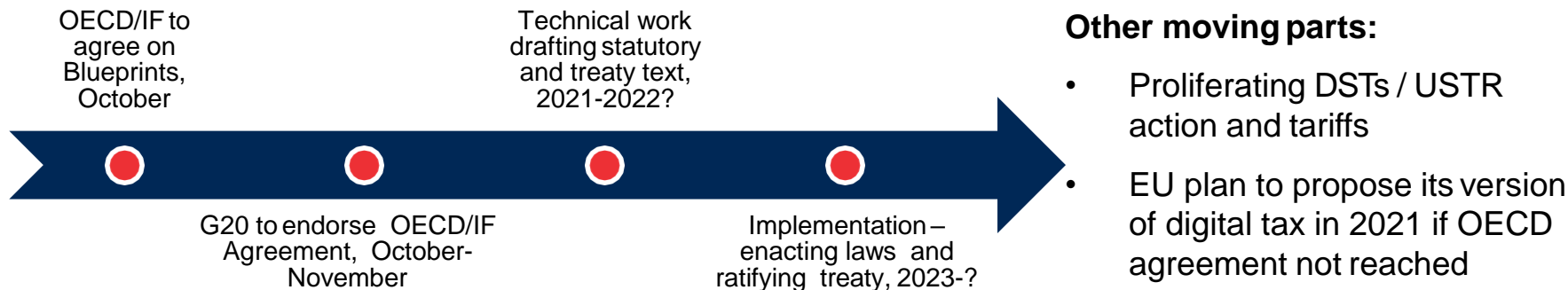
OECD Proposals

Pillar 1

- New taxing right to market/user jurisdictions, without regard to physical presence
- Formulaic approach based on group/business line profits
- No link to ALP

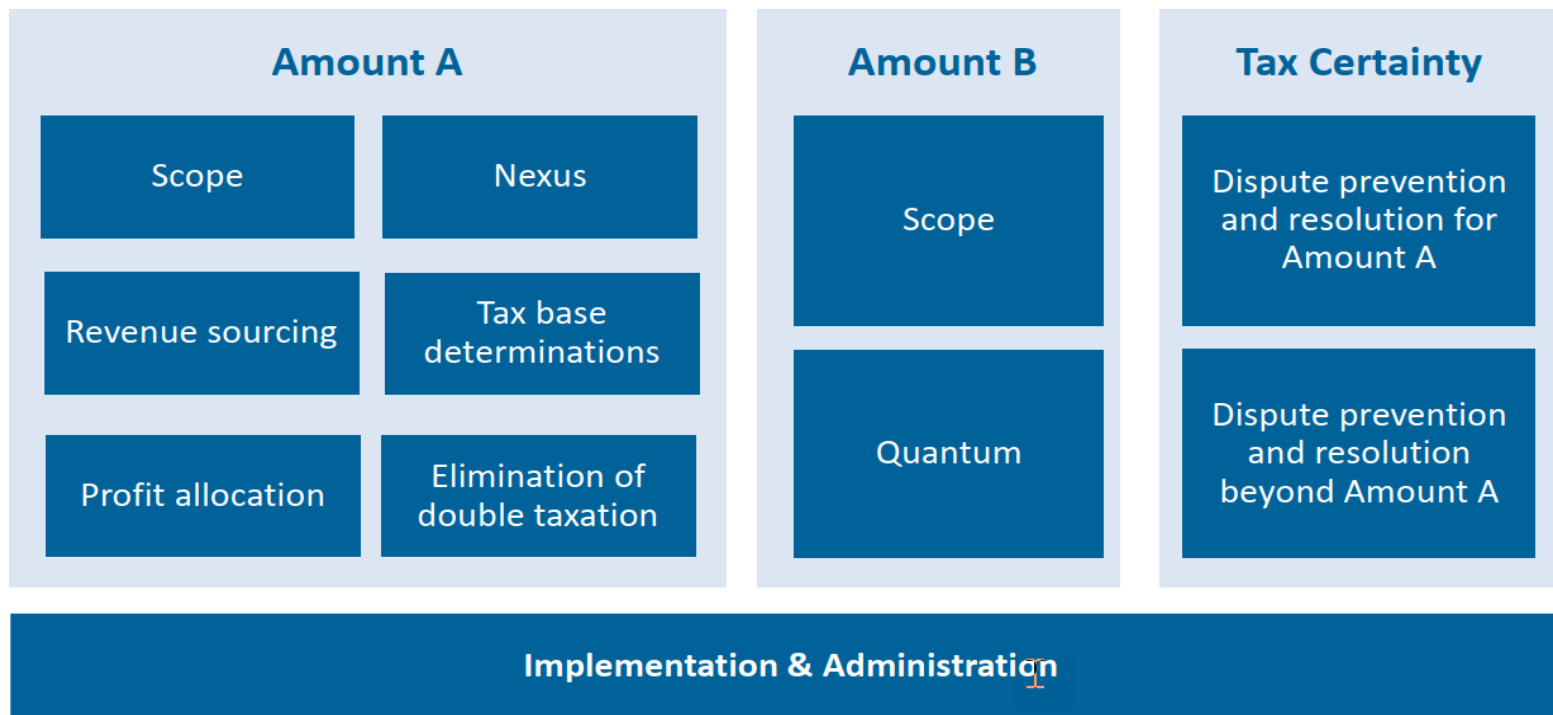
Pillar 2

- Global minimum tax proposal
- Parent country could tax income of foreign branch or sub with ETR below a minimum rate
- Source country could deny deduction or impose withholding tax on payments taxed below minimum rate



Global tax environment

Building Blocks of Pillar 1



Global tax environment

Political decisions still open

- **Scope**

- Automated Digital Services (ADS), Consumer-Facing Businesses (CFB), US safe harbor proposal

- **Quantum**

- Threshold amounts, percentage of profit to be allocated, whether to allocate some routine profit to market jurisdictions

- **Extent of tax certainty**

- Scope of mandatory binding dispute resolution

The current audit environment

The backdrop to increasingly aggressive audit challenges



Exceptional
levels of global
public spending



Unprecedented
fiscal deficits
around the world



Unilateral and
multilateral tax
policy changes



Revenue raising
measures
insufficient alone



Crackdown on tax
avoidance
inevitable



Heightened
populist
sentiment

Tax authority responses

Tools to tackle growing government deficits



Strengthening of **international and unilateral measures to combat perceived tax avoidance**: BEPS updates, ATAD, Diverted Profits Tax, Digital Services Taxes



Growth in **transparency requirements**: CbCr, disclosure of cross border arrangements (DAC6), disclosure of uncertain tax positions



Continuing expansion of **information-gathering powers**: dawn raids, third party data requests, international information exchange, erosion of legal privilege



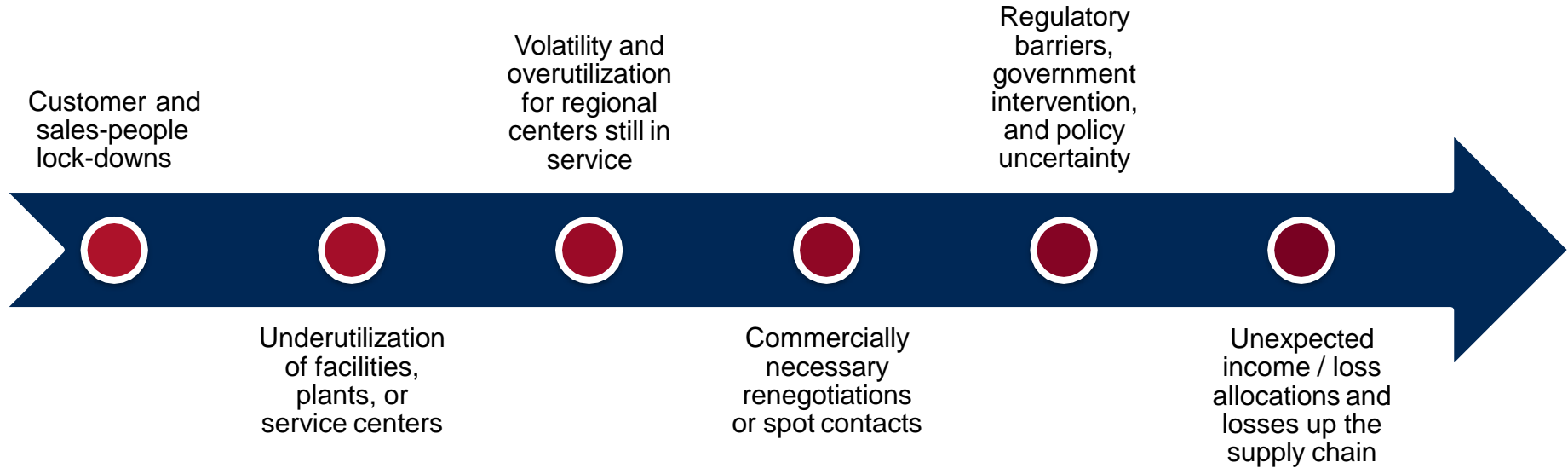
Increasing use of domestic criminal powers and sanctions in multinational cases: **criminalisation of tax**, strict liability corporate criminal offences

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COVID-19 Impact Transfer Pricing

COVID-19 impact

Pressure along your Supply Chain



COVID-19 impact

Transfer Pricing Themes

- COVID-19 potentially has an impact on all intercompany arrangements (manufacturing, sales, services, financing etc.) as it fundamentally changes the surrounding economic circumstances
- Temporary shutdowns
 - Revisions to intercompany pricing, supply quantity, or service-level terms
 - Should a temporarily shut-down entity only receive cost reimbursement?
- Realignment of supply chains
 - Prevent single sourcing and diversify sourcing
- Costs of restructuring
 - Who should bear the costs – the shut-down entity or other entities?

COVID-19 impact

Losses in Supply Chain

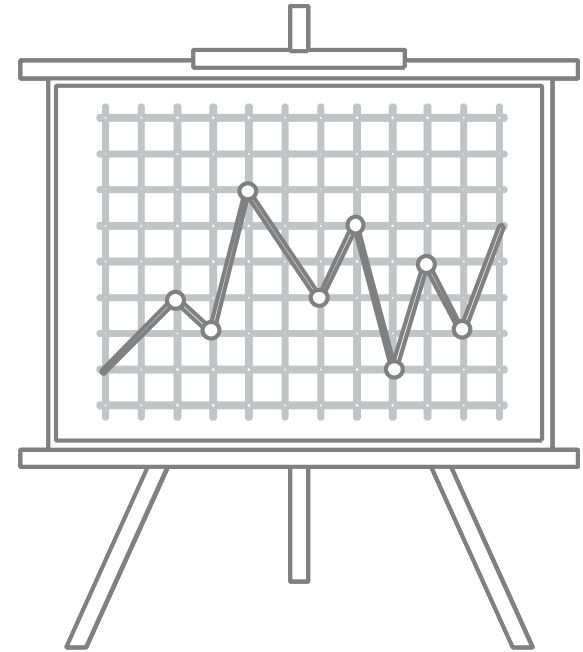


Is it appropriate for losses to be shared among the MNE group? This depends on the nature of the losses, the contractual arrangements in place, and the functions performed, assets owned and risks managed by each member.



The **key** to defend losses shared among the MNE group for TP purpose → establishing that losses refer to the extraordinary circumstances of COVID-19. By doing so:

- Companies should demonstrate how COVID-19 is changing the commercial circumstances of the business.
- How? Incorporate a detailed industry analysis in the annual TP documentation (including examples of challenges faced by the industry, the impact across markets, etc.).



COVID-19 impact

A Time of Lower Values?

- Current environment has resulted in losses or lower profitability
- Projections may also be significantly lower, resulting in lower IP value
- An IP outbounding now results in recognition of lower US gain / IP income than only a couple months ago
 - Opportunity to share losses between US and still-profitable foreign jurisdictions
 - Opportunity to repatriate cash

COVID-19 impact

Transfer Pricing Recommendations



Adjustments to the TP policy → one of the fundamental issues to be addressed is to consider what adjustments should be made to the transfer pricing policy in order to bring it into line with the current situation.



Liquidity management through intra-group financing → there will be impacts not only on existing intra-group funding but also necessary to consider new transactions to distribute funds.



To justify a (temporary) change to the terms of intercompany arrangements or TP → look out for comparable uncontrolled transactions, check potential customs and indirect tax consequences and **prepare strong evidence / defense files**



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COVID-19 Impact Corporate Tax

COVID-19 impact

Travel restrictions | Limited Guidance

- OECD advice 3 April 2020
- HMRC Internal Manuals INTM261010 / INTM120185 will act in accordance with OECD advice, but leaves room for interpretation
- ATO / New-Zealand will not attract tax residency due to management operating from Australia / New-Zealand due to temporary COVID-19 travel restrictions
- Jersey will not dispute substance in Jersey, if board meetings cannot be held in Jersey due to COVID-19... ;-)

COVID-19 impact

Travel restrictions | Permanent Establishments (“PE”)

■ PE creation:

- e.g. team management is performed by the team lead from its home in Belgium?
- e.g. project duration exceeds tax treaty time limitation for the creation for a project PE
- e.g. permanent representative in NL on behalf of Belgian BVBA, who would normally only represent BVBA in Belgium, but now works from home in the Netherlands?

■ PE termination, if COVID-19 forces expats to work at head office location, instead of the PE location? And if so, would this lead to potential exit taxation due to the termination of the PE.

COVID-19 impact

Travel restrictions | Tax Residency

- **Tax residency:** e.g. board meetings all virtual from another country, instead of physical in (aimed) residency country. And if this could lead to a tax residency shift, would this lead to potential exit taxation due to the "migration"?
- **Tax group / Fiscal Unity** requires tax residency in a certain country: Topholding heavily financed with debt, to reduce taxable operating profits of Target company (typical PE acquisition structures). Local inspector aims to deny the interest deductibility and now claims that the topholding's tax residency has shifted to another country. How **temporary** is still acceptable to avoid such discussions?

COVID-19 Impact

Travel restrictions | APA/ATR

- Eligibility for **APA/ATR request** in Netherlands is linked to Dutch nexus: As long as this lack of nexus is only temporary, this should not lead to non-eligibility. But what is still temporary? How long will this be acceptable?
- **Assumptions in APA/ATR**: e.g. managing risks used to occur abroad, but can now be said to have moved to the Netherlands, due to working from home.
- **Assumptions in BAPA** possibly even worse, because two countries may disagree on the impact of such factual change in the facts and assumptions?

COVID-19 impact

Travel restrictions | Compliance

- Impact of travel restrictions on compliance
 - Tick the box in tax returns that substance requirements are met?
 - Compliance with critical assumptions for specific tax regimes / holidays?
 - Track records (before and after COVID-19) will become more important (defense files)

COVID-19 impact

Review of Deferred Tax Assets

- For instance, where there is more than a 50% chance (more likely than not) that some portion of the DTA will not be utilized, a **valuation allowance** must be created under **US GAAP**. Under **IFRS**, a DTA is recorded if it is probable (i.e., greater than 50% likelihood) that it will be realized in the future.
- Consider potential government intervention to extend the life of DTAs and/or allow for their use in carryback periods.
- To avoid increased valuation allowances in certain companies:
 - Consider changes to TP policies; or
 - Other actions taken such as deferring tax reliefs to increase the taxable income of the relevant entities.

COVID-19 impact

Inter Company Debt Arrangements

- Breach of covenants (e.g. borrower's financial ratios breach)
- Realistic alternatives:
 - Possibility for certain borrowers to take advantage of significant lower rates.
 - Consider realistic alternatives as tax authorities may assert that the debt should have been refinanced.
- Availability of market benchmarks
- Debt capacity analysis
 - Compute various financial ratios
 - Take longer horizon for the look-back period can help make data more reliable
- Consider parent guarantees to support subsidiaries' borrowing

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Brexit | Customs Impact

Brexit | Customs impact

Trading in EU Single Market vs. Deal (FTA) or No Deal (WTO) Brexit



Single market

- Goods in free circulation move freely within single market



FTA

- Preferential duty rates* only available for goods which meet origin rules
- **Customs declarations required and import VAT payable**
- Possible simplifications?
- UK trade does not benefit from EU FTAs



Fallback (WTO)

- No preferential treatment*
- **Customs declarations required and import VAT payable**
- UK trade does not benefit from EU FTAs

* only of concern for dutiable products

Brexit | Customs impact

Additional Burdens for Trade between EU and UK



Baker McKenzie Brexit Resources

- Brexit Blog - <https://brexit.bakermckenzie.com/>

- **Trade-focused Brexit Webinar**

Wednesday 7 October 2020 at 2.00 - 3.30 pm BST.

[Click here](#) for a copy of the invitation for this webinar which is scheduled as part of our Annual Compliance Conference.

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COVID-19 Impact DAC6

COVID-19 impact

DAC6 filing delays

Country	Delay granted?
Austria	3 months
Belgium	6 months
Croatia	6 months
Cyprus	6 months
Czech Republic	6 months
Denmark	6 months
Estonia	6 months
Finland	No delay granted yet
France	6 months

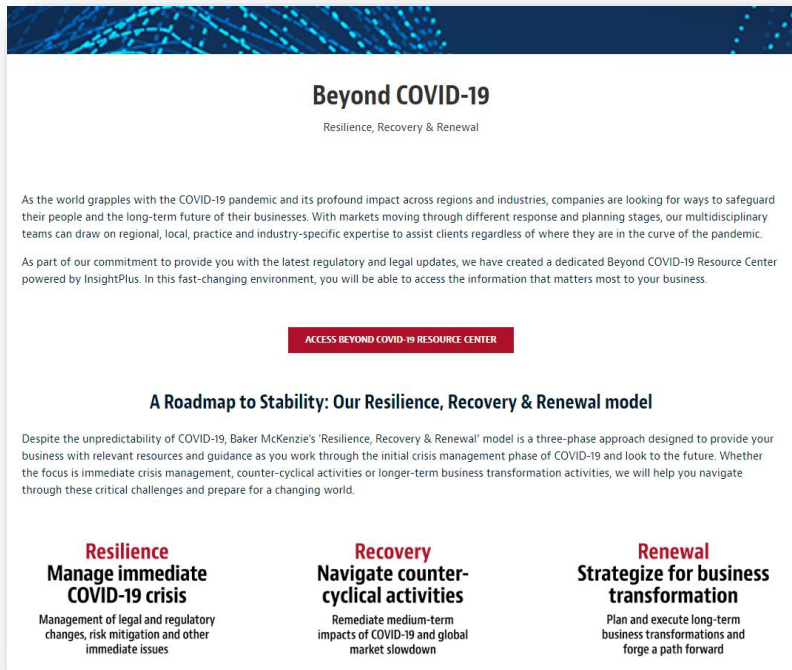
Country	Delay granted?
Germany	No delay granted yet
Greece	6 months
Hungary	6 months
Ireland	6 months
Italy	6 months
Latvia	6 months
Lithuania	6 months
Luxembourg	6 months
Malta	6 months

Country	Delay granted?
Netherlands	6 months
Poland	Reporting obligations are suspended
Portugal	6 months
Romania	6 months
Slovakia	6 months
Slovenia	6 months
Spain	Draft legislation has a 6 month delay built into the lookback period
UK	6 months

Beyond COVID-19 Resource Center

Resilience, Recovery & Renewal

Baker McKenzie COVID-19 Resources



Beyond COVID-19
Resilience, Recovery & Renewal

As the world grapples with the COVID-19 pandemic and its profound impact across regions and industries, companies are looking for ways to safeguard their people and the long-term future of their businesses. With markets moving through different response and planning stages, our multidisciplinary teams can draw on regional, local, practice and industry-specific expertise to assist clients regardless of where they are in the curve of the pandemic.

As part of our commitment to provide you with the latest regulatory and legal updates, we have created a dedicated Beyond COVID-19 Resource Center powered by InsightPlus. In this fast-changing environment, you will be able to access the information that matters most to your business.

ACCESS BEYOND COVID-19 RESOURCE CENTER

A Roadmap to Stability: Our Resilience, Recovery & Renewal model

Despite the unpredictability of COVID-19, Baker McKenzie's 'Resilience, Recovery & Renewal' model is a three-phase approach designed to provide your business with relevant resources and guidance as you work through the initial crisis management phase of COVID-19 and look to the future. Whether the focus is immediate crisis management, counter-cyclical activities or longer-term business transformation activities, we will help you navigate through these critical challenges and prepare for a changing world.

Resilience Manage immediate COVID-19 crisis Management of legal and regulatory changes, risk mitigation and other immediate issues	Recovery Navigate counter-cyclical activities Remediate medium-term impacts of COVID-19 and global market slowdown	Renewal Strategize for business transformation Plan and execute long-term business transformations and forge a path forward
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The Beyond COVID-19 Resource Center site includes materials to help you understand, prepare and respond quickly to the significant challenges COVID-19 poses.

Resources include a variety of client alerts, publications and webinars that cover pressing issues, including employer obligations, force majeure claims, contractual obligations, product safety and liability, corporate government and tax, data privacy concerns and liabilities for supply chain disruptions, among other concerns.



Please visit the Beyond COVID-19 Resource Center site [here](#).

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