Baker McKenzie.

Legal Update

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International: Implementation of Pillar One's Amount A one step closer

Our analysis of the recently published Multilateral Convention

In brief

A text of the Multilateral Convention to implement Amount A of Pillar One ("MLC") and additional explanatory guidance was released by the OECD on 11 October 2023. The text reflects the consensus achieved so far, but has not yet been opened for signature and changes could still be made as the Inclusive Framework members work out remaining issues. A Fact Sheet was also issued shortly thereafter, highly summarizing the proposed Amount A regime. Here we cover the significant provisions, particularly new provisions compared to the July 2022 Progress Report, of the MLC in more detail and consider the implications for potentially in-scope groups.

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Key takeaways

The issuing of the MLC was a significant step in the ongoing process of bringing the Pillar One rules to fruition. Although there still remain formal objections to some provisions in the MLC by certain jurisdictions, and other jurisdictions have made it clear that there are still some open issues to be resolved from their own perspectives, there appears to be a very high level of agreement to the overall design of the rules, and a significant amount of consensus on individual provisions. However, as the MLC is not final, there is an increasingly high likelihood that the MLC will not be in place by the end of 2023. This will therefore lead to significant questions regarding the expiration of the stand-still agreement for jurisdictions not to impose new Digital Services Taxes ("DSTs"), and whether certain jurisdictions that signed joint statements with the US will extend their commitments to provide credit for historical DSTs against Amount A tax.

Other key takeaways:

1. Lower GDP jurisdictions - there are an increased number of provisions that affect jurisdictions only where profits for a Covered Group meet a *de minimis* level, for example in determining when the marketing and distribution safe harbor applies, in determining whether a jurisdiction must give Amount A double tax relief, and in allocating "tail-end" revenues. Along with provisions such as nexus which have a smaller threshold for lower GDP jurisdictions, this will allow lower GDP jurisdictions to retain a greater proportion of their direct tax take.

2. Impact for investment hubs – a number of sources have stated that it is expected therefore that investment hub jurisdictions will be by far the most significantly impacted by Amount A implementation. For example, the October 2023 Update to the economic impact assessment of Pillar One estimates that investment hubs will provide approximately 81% of total global double tax relief.

3. Double counting of profits – business has argued strongly against effective double counting of profits for tax purposes, once as residual profits recognised in jurisdiction and secondly as further allocation of Amount A. The marketing and distribution safe harbour ("MDSH") provisions have now been finalised in this respect, and take an approach to calculation and relief based on profit indicators under this measure. However, Brazil, Colombia and India have formally expressed objection to these provisions.

4. Withholding taxes – the MLC also now contains provisions which may effectively allow some relief for withholding taxes in jurisdictions where that has occurred. This is done by allowing a measure of profits on which withholding tax has been

levied to be recognised as residual profits when assessing the marketing and distribution safe harbour adjustment. However, the level of effective relief is very restricted, and although it increases over time, it starts at zero in the first two years. Again, as stated above Brazil, Colombia and India have formally expressed objections to these provisions.

5. Complexity of certainty provisions – the provisions relating to administration, obtaining certainty over Amount A outcomes and resolution of disputes with respect to related issues remain extremely complex and resource-intensive for all parties. Even with certainty provisions, many practical difficulties can still be envisaged in implementing the Amount A rules alongside multiple domestic tax regimes, for example in terms of dealing with the impacts of historical domestic disputes on Amount A.

Covered Groups

Covered Groups are multinational enterprises that for the first seven years after the implementation of Amount A have annual global revenues of at least EUR 20 billion or local equivalent and have a profit margin of at least 10%. After seven years, the revenue threshold is reduced to EUR 10 billion. This definition, as well as the prior period tests, have remained unchanged in the most recent publication.

Revenue and profits derived from Regulated Financial Services activities and Extractives activities remain excluded when applying scope tests and Amount A calculations under the MLC. In addition to these two exclusions, the MLC now introduces further exclusions in relation to "Autonomous domestic business" and Defense activities.

For Groups that predominantly (i.e. >90%) derive their adjusted profit before tax from a defense activity, a full exemption applies, otherwise the revenues and profits relating to the defense activities are carved out for Amount A purposes. This exclusion may have been argued for to preserve confidentiality in this sector, but might technically be justified similarly to the reasoning for exclusions for Regulated Financial Services.

For Groups that are predominantly domestic i.e. >90% of adjusted profits are from essentially stand-alone domestic businesses or where a >90% of revenue is derived in a single jurisdiction, with no more than 5% of revenue arising in another single jurisdiction, and where there is relatively little cross-border interaction, these Groups will not be considered Covered. If these de minimus limits are not met, autonomous business revenue and profits may still be excluded from calculations under the Amount A rules. The inclusion of this provision for exempting profits from essentially domestic businesses appears to be recognition of the relatively small impact of Amount A on such groups, but it is unclear how many otherwise Covered Groups will be able to take advantage of the exemption or exclusion.

Allocation and Taxation of Profits

At a high level, the mechanism and principles for allocating Amount A profit to a jurisdiction remain as previously published.

This involves determining the relevant group profit based upon stated book-to-tax adjustments, calculating the excess group profit to be reallocated being 25% of profits in excess of 10% operating margin, and finally adjusting for double counting through the Marketing and Distribution Profits Safe Harbor ("**MDSH**") adjustment.

However, the MDSH adjustment has now been fully defined in the MLC.

Marketing and Distribution Profits Safe Harbor

The MLC continues to rely on the MDSH as the mechanism to adjust the allocation of Amount A for market jurisdictions that already have existing taxing rights over the Covered Group's residual profits. Similar to the mechanics and rationale described in the July 2022 Progress Report, if the MDSH applies to a given market jurisdiction, the residual profit allocable to that market jurisdiction under Amount A will be reduced by the MDSH amount. The rationale behind this concept is that a market jurisdiction should not receive a second taxing right of the Covered group's residual profits but should take into account what is already accounted for under the MDSH.

A new feature introduced in the MLC is a minimum profit threshold set at EUR 50 million within the relevant jurisdiction for the application of the MDSH adjustment. This new provision carries meaningful implications as it has the potential to influence the overall MDSH adjustment (impacting the total Amount A to be assumed by Relieving Jurisdictions) and reshape the allocation of Amount A to market jurisdictions.

The implications of the introduction of this minimum profit threshold are two-fold. First, it addresses concerns of administrative burden and practicality by narrowing the scope of MDSH application. Furthermore, since market jurisdictions with nexus and profitability below the EUR 50 million threshold may see an increase in their Amount A allocations, such jurisdictions will be more likely to ratify the MLC from a policy perspective. This change reflects the Inclusive Framework's reported commitment to "achieving a more balanced and equitable distribution of residual profits among participating jurisdictions, irrespective of their size, with the aim of finding an agreeable solution".

To determine the portion of residual profits already subject to taxation within market jurisdictions due to existing physical taxable presence, the MDSH calculation, as defined in the MLC, incorporates two key elements: "**Return on Depreciation and Payroll**" and "**Return on Revenues**." The MDSH mechanism then deducts the higher of these two returns from the so-called "**Adjusted Elimination Profits**" to derive the "**Adjusted Jurisdictional Excess Profits**."

An important further new provision incorporated by the MLC relates to the consideration of withholding tax and related profits as part of the measurement of profits in a Jurisdiction for MDSH purposes. This **"Withholding Tax Upward Adjustment"** is designed to allow an increase in the relevant measure of jurisdictional profits for purposes of the MDSH adjustment in the jurisdiction where the covered withholding tax is imposed (typically the jurisdiction where the payor is located). The explanatory notes to the MLC identify some limited cases where the reverse may be observed. This would occur where a tax liability determination with respect to a covered withholding tax results in a reduction in the withholding tax amount due to, for example, a tax adjustment derived from a tax audit or subsequently modified by a court determination. It is likely that the outcome of the withholding tax-related calculations will not have the same impact as, say, providing full credit for the withholding tax against Amount A tax, partly because of the non-application of MDSH to jurisdictions with lower than EUR 50 million adjusted elimination profits, but also because the upward adjustments included in the MDSH for profit related to the withholding tax are themselves reduced to zero in the first two years that the Amount A rules apply, and then only 25-50% of such profits are included in the MDSH until any future reduced revenue threshold for Amount A is introduced.

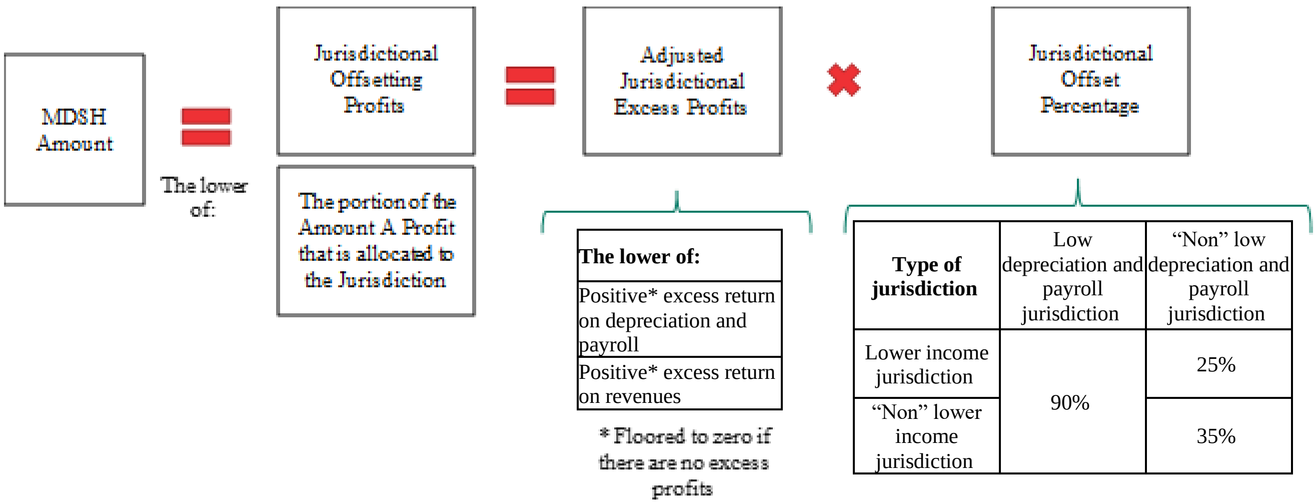
A further important development introduced in the MLC, as compared to the July 2022 Progress Report, is the inclusion of a **"Return on Revenues"** indicator as a measure of excess profits. This indicator replaces the previous minimum fixed threshold return on depreciation and payroll, which had been set at 40%. In practical terms, this means that in prominent market jurisdictions where a significant proportion of revenues are generated, whereby the Covered Group has limited physical presence (as measured by depreciation and payroll expenses), a higher threshold would apply for earnings to qualify as jurisdictional excess profits for purposes of the MDSH calculation.

To determine the final MDSH amount, the **Adjusted Jurisdictional Excess Profits** are multiplied by the "**Jurisdictional Offset Percentage**." This result establishes the "**Jurisdictional Offsetting Profits**," which serves as the basis for calculating the MDSH amount. The Jurisdictional Offset Percentage can be set at 90%, 25% or 35% depending on the level of jurisdictional depreciation and payroll to adjusted revenues and the income-level classification of the jurisdiction.

The multi-level **Jurisdictional Offset Percentage** is another novelty with respect to the July 2022 Progress Report, where it was initially framed as a single indicator irrespective of the income level or substance in a particular jurisdiction. The percentages are set at 90%, 25% and 35% respectively. The new approach tends to reduce the amount of the MDSH deductions to jurisdictions where a Covered Group has higher substance (measured through their depreciation and payroll expense), making a further distinction and reduction in the offset percentage for jurisdictions classified as "lower income". It is understood this new approach represents a political compromise.

Overall, it is reported that the refined approach within the MLC's MDSH mechanism aims to strike a balance between appropriately reallocating taxation rights trough the Amount A allocation net of MDSH and ensuring fairness in the treatment of market jurisdictions with varying levels of income-levels, market size and physical presence of the Covered Group.

The complete overview for the calculation of the MDSH amount is represented in the following chart:



Sourcing rules and nexus

Revenue sourcing rules and the nexus test (based on sourced revenue) aim at identifying market jurisdictions eligible to be allocated Amount A profit. At a high level, these rules remain faithful to the previous rules published by the OECD on this area.

Sourcing of Adjusted Revenues

Three main principles, which were already governing revenue sourcing rules under the July 2022 Progress Report, apply when determining the revenue source:

1. Source is determined separately for each category of Adjusted Revenues. The MLC lists the following categories (despite some renaming, these categories are similar to those included in the July 2022 Progress Report):
   - Finished goods;
   - Digital content;
   - Components;
   - Services;
   - Intangible property and user data;
   - Immovable property;
   - Government grants; and
   - Non-customer Revenue.

2. The category of Adjusted Revenues shall be assessed based on the ordinary or predominant character of the transactions from which they derive. This principle follows a substance-over-form approach and serves as an anti-abuse rule to ensure the Covered Groups do not manipulate categorisation (e.g. manipulation of categories could consist in bundling items that if priced separately would be categorised differently). The Explanatory Statement indicates that the “ordinary or predominant character” refers to the overall nature of transactions that are of the same type and does not call for a transaction-by-transaction testing. How transactions are aggregated depends on the Covered Group, e.g., business lines, customer base, distribution models and reporting systems. This approach which aims at avoiding burdensome testing for Covered Groups has been added sincethe July 2022 Progress Report.

3. If the Adjusted Revenues do not fall directly into one of the above-mentioned categories, it shall be determined by reference to the most analogous category. This rule is a catch-all ensuring that any type of Adjusted Revenues can be sourced.

For the determination of the source of each category of Adjusted Revenues, a reliable method should be used, i.e., a method that identifies where the category of Adjusted Revenues arises using a reliable indicator shown as credible and relevant, or otherwise allocation keys when no reliable indicator is available. The MLC outlines the sourcing principles, indicators and, if applicable, the relevant allocation keys to be applied when identifying a reliable method. These sourcing principles and indicators are broadly aligned with the July 2022 Progress Report. Below is an overview of the approach retained for a few selected categories of Adjusted Revenues:

- Revenues derived from the sale of **finished goods** (either directly or through an independent distributor) are sourced from the jurisdiction where the place of delivery to the final customer is located. A reliable indicator for the place of delivery may be e.g., the customer's delivery address. The same applies to revenues derived from the sale of **components** and from the **licensing, sale or other alienation of intangible property related to finished goods or component**. For revenues derived from the sale of finished goods through an independent distributor for which the source has not been determined based on a reliable indicator, several allocation keys shall apply depending on the case at hand, e.g., regional allocation key, global allocation key or excess tail-end revenues allocation key. For similar cases relating to the sale of components, the component allocation key shall be applied.

- Revenues derived from the sale of **digital content** to an individual consumer are sourced from the jurisdiction where the service is used. The same applies to revenues derived from the **licensing, sale or other alienation of intangible property that supports digital content**. The relevant indicator may be the billing address of the customer, or for certain large customers, the jurisdiction identified in commercial contracts and documents as the place where services are used. For revenues derived from the sales of digital content for which the source has not been determined based on a reliable indicator, an aggregate headcount allocation key shall be applied for certain large customers and a service allocation key in other cases.

- Revenues derived from the **licensing, sale or other alienation of user data** are sourced from the jurisdiction where the user associated with the data is located. A reliable indicator for this location may be the user profile information or the IP address of the user's device through which the data is transferred.

As in the July 2022 Progress Report, transitional rules are provided to assess the source jurisdiction during the initial revenue sourcing transition phase.

The list of sourcing rules and indicators for the application of a reliable method is relatively comprehensive. However, in the event Covered Groups did not apply such a method or are unable to provide the information required to do so for all sources of revenue, the MLC provides for a back-stop rule, consisting of default allocation keys. Allocation keys are a formulaic proxy for revenue sourcing, generally based on macroeconomic data, and apply to different categories of Adjusted Revenues:

There are many different possible allocation keys, some allocation keys are, for example:

- **Regional allocation key** which treats Adjusted Revenues as arising in each Jurisdiction in an identified region in proportion to the ratio of its final consumption expenditure to the final consumption expenditure of all Jurisdictions in the identified region;
- **Global allocation key** which treats Adjusted Revenues as arising in Jurisdictions in proportion to their percentage share of final consumption expenditure;
- **Excess tail-end revenues allocation key which** treats tail-end revenues exceeding 5% of the total Adjusted Revenue derived by the Covered Group from the sale of finished goods through independent distributors on a pro rata basis, as arising for i) 85% are treated as arising on a pro rata basis in the Jurisdiction in which each independent distributor is located; and ii) the source of the remaining 15% is determined using the global allocation key, but excluding the Jurisdiction in which the independent distributor is located.
- **Aggregate headcount allocation key,** which treats Adjusted Revenues as arising in each Jurisdiction based on the total aggregated employee headcount as reported in the CbCR statistics. If such information is not available and under certain conditions, 50% of the Adjusted Revenues are treated as arising in the Jurisdiction of residence of the Ultimate Parent Entity of certain large customer; and the remaining 50% are treated as arising in Jurisdictions using a service allocation key.

Nexus rule

The nexus rule aims at determining whether a market jurisdiction is eligible for the allocation of a portion of Amount A profit of a Covered Group for the relevant Period, regardless of the group's physical presence. Once again, these rules are consistent with previous OECD publications, including the July 2022 Progress Report.

When a Covered Group derives an amount of Adjusted Revenues for the Period which is equal to or greater than the applicable threshold, it is considered to have nexus in that jurisdiction. Consistent with the July 2022 Progress Report, the MLC sets two thresholds depending on the jurisdiction's GDP for the Period:

- For jurisdictions with a GDP greater than or equal to EUR 40 billion, a general threshold is set at EUR 1 million;
- For jurisdictions with a GDP of less than EUR 40 billion, an alternative threshold is set at EUR 250 000.

The thresholds shall be adjusted proportionally if the Period is shorter or longer than twelve months.

Elimination of double taxation

The essential design block of the elimination of double taxation mechanism has undergone limited changes when compared to the draft wording contained in the July 2022 Progress Report.

The MLC continues to follow a similar approach that defines how 'Relieving Jurisdictions' will have to eliminate double taxation with respect to Amount A. This approach remains consistent with the fundamental design objectives of Amount A under Pillar One which, unlike Pillar Two, is not primarily designed to give rise to new tax revenues, but rather to seek to reallocate the residual profits of Covered Groups to certain qualifying jurisdictions. Therefore, while certain market jurisdictions are expected to gain tax revenues, Relieving Jurisdictions will be obliged to provide relief for Amount A taxation.

The mechanism to determine which jurisdictions are responsible for eliminating double taxation and for which amounts follow a dynamic **waterfall approach**. First, jurisdictions that are considered relevant for the Covered group have to be clustered based on their respective levels of **Elimination Profits** and other indicators such as their return on depreciation and payroll and applicable effective tax rate. The subgroup of jurisdiction that satisfy the screening criteria based primarily on their rank of contribution to elimination profits and other screening criteria are referred to as **"Specified Jurisdictions"**.

One particularly relevant provision in the MLC is that a jurisdiction can only be a specified jurisdiction i.e. a potential relieving jurisdiction, if it is in the smallest number of jurisdictions for which elimination profits total at least 95% of the Covered Group's profits, so giving exemption from relieving to the jurisdictions with smallest profits in the group. However, an entity with more than EUR 50 million elimination profits will always be deemed a specified jurisdiction. The aim appears therefore to allow jurisdictions with smaller economies a greater opportunity to avoid having to relieve Amount A taxation.

Specified Jurisdictions with the highest **Elimination Profits** have to be categorized into different tiers (i.e., Tier 1, Tier 2, Tier 3A and Tier 3B) according to their jurisdictional Return on Depreciation and Payroll, on a scale from high to low. Tier 1 includes jurisdictions where this return is over 15 times (i.e., more than 1500%) above the Group's Return on Depreciation and Payroll, as long as the jurisdictional return is at least 40%. Tier 2 encompasses jurisdictions with returns over 1.5 times the Group's return, insofar the jurisdictional return is at least 40%. Tier 3A includes jurisdictions where the jurisdictional return surpasses the so-called **"Elimination Threshold Return on Depreciation and Payroll"** which is a measure of routine return on depreciation and payroll for the Group. To qualify as a Tier 3A jurisdiction, the condition that should be satisfied is that the jurisdictional return is at least 40%. Tier 3B includes jurisdictions where the Return on Depreciation and Payroll exceeds the Elimination Threshold Return on Depreciation and Payroll. The amount of relief for Amount A taxation is finally determined for every Tier of jurisdictions based on a waterfall approach taking into account their Return on Depreciation and Payroll all the way until the MNE group's total **Amount A Profit** is covered.

Overall, the mechanism defined by the Inclusive Framework aims to ensure that the burden to relieve the Amount A taxation is first distributed amongst the jurisdictions with the highest excess profit available to absorb the Amount A allocations and only after such excess has been exhausted, the allocation continues to the next tiers for the remaining unallocated Amount A until the Amount A is fully relieved.

In essence, the relief mechanism delineated by the Inclusive Framework in the MLC appears to be designed to allow distribution of the burden associated with relieving Amount A taxation among those jurisdictions that possess the highest financial capacity to bear it, and specifically steers the burden away from smaller jurisdictions.

Administration and Tax Certainty

Part V of the MLC outlines the rules for the administration and tax certainty for taxpayers in scope of Amount A. Part V is divided into three sections dealing with administration and outlining the tax certainty framework for Amount A and the tax certainty process for issues related to Amount A. These are essentially the same as previously published.

Administration

The rules propose that Amount A will be assessed on the basis of an **Amount A Tax Return and Common Documentation Package** ("Amount A tax return"). A common template is yet to be prepared, and will only be prepared after the MLC has been signed by the Parties.

While it is not yet known what details would need to be included on the Amount A tax return, the following information will, at least, be required:

- The identity of the Covered Group and the Ultimate Parent Entity ("UPE");
- The identity of the **Designated Payment Entit**y ("DPE");
- Revenue and profit numbers of the Covered group;
- Relevant adjustments on a group level, or if applicable, on a segmented level;
- Revenue sourcing figures on a jurisdictional basis;
- Supporting evidence for the application of losses and the MDSH adjustment;
- Calculations supporting the application of double taxation relief rules;
- If applicable: Calculations supporting the application of the extractives and regulated financial services exclusions;
- If desired by the Covered Group: a request for an advance certainty review or a comprehensive certainty review;
- Evidence of an internal tax control framework of the Covered Group.

The Amount A tax return must be filed between 9 and 12 months from the end of the applicable fiscal period. Any Amount A tax liability must be paid within 18 months from the end of the applicable fiscal period.
The Amount A tax return must be filed by the ***Designated Payment Entity*** ("DPE"), which is the ***Ultimate Parent Entity*** ("UPE") if it is resident in a jurisdiction which is a Party to the MLC, or the intermediate parent if the UPE is not resident in a Party to the MLC. Only once the DPE has filed the Amount A tax return in accordance with the instructions of its *lead tax administration*, all Group entities are deemed to have met their filing obligation(s).

While the DPE carries the primary tax liability, other group entities, i.e. *relief entities* or *local entities*, may carry a limited secondary tax liability, if a Party to the MLC elects to implement this option.

Tax Certainty Framework for Amount A

In summary, the Tax Certainty Framework for Amount A contains the three previously published options to obtain binding certainty over the issues arising out of the application of the Amount A rules.

1. **Scope certainty:** The DPE of a potentially Covered Group can request certainty over whether the MNE Group is in scope and is a Covered Group, 365 days after the MLC has entered into force. The request for certainty must be accompanied by a payment of a ***tax certainty user fee***. The request must be submitted on or after the last day of the applicable fiscal year, but no later than the deadline for the filing of the Amount A tax return, (which is 9 to 12 months after the end of the fiscal year), or within 90 days after receipt of a notification from a Party to the MLC that the Group is a Covered Group. In principle, the scope certainty review will be completed by the *lead tax administration*, unless certain conditions are met. In that case, a review by a **Scope Review Panel** is required.
2. **Advance certainty:** can be obtained on scope, as well as on a limited list of topics, such as the methodology used for the application of Amount A rules. A request for advance certainty must be submitted to the *lead tax administration*, accompanied by an ***advance certainty documentation package*** and the ***tax certainty user fee****.* An advance certainty review is performed by a **Review Panel**.
3. **Comprehensive certainty:** The taxpayer can also request a ***comprehensive certainty review*** on the application of Amount A rules in the relevant jurisdictions that are Parties to the MLC. A request for ***comprehensive certainty*** must be submitted at the same time as the Amount A tax return and must be accompanied by a ***tax certainty user fee.*** If the request for *comprehensive certainty* is not submitted at the same time as the Amount A tax return, it must be submitted within 30 days after the DPE is advised that at least two Parties to the MLC will commence a multilateral tax examination on the Covered Group's Amount A tax liability. The request for *comprehensive certainty* must be submitted to the *lead tax administration*. Certainty can be obtained for the Period defined in the request for *comprehensive certainty*, but will generally be for a period of three years, although it can be extended to five years under certain circumstances.

It is envisaged that the *lead tax administration* will conduct most reviews. If the *lead tax administration* cannot handle the review, or it is the first review requested by the Covered Group, a **Review Panel** is required. The **Review Panel** consists of seven tax administrations, including the *lead tax administration*, three representatives from relieving jurisdictions, and three representatives from market jurisdictions. The outcome of the review process can be a confirmation or a recommendation for taxpayers to treat certain aspects differently. If agreement cannot be achieved, a binding **Determination Panel** process is established. The **Determination Panel** consists of seven members, including three independent experts, three government officials, and a Chair, chosen by consensus among the six previously selected independent experts and government officials. The final outcome of this latter process is based on consensus or overall majority voting. If no agreement is reached at this stage, the final outcome will be selected based on ranked voting. Tax certainty for the taxpayer is thus guaranteed. However, if the taxpayer acts in an uncooperative or non-transparent manner, the review process may conclude without any outcome.

Tax Certainty for Issues Related to Amount A

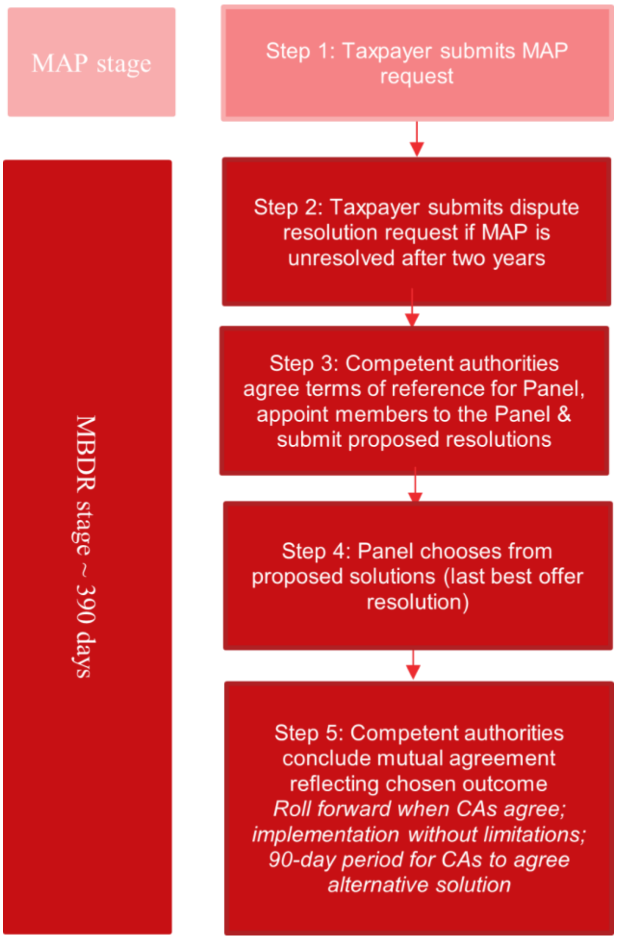
As previously set out in the relevant OECD papers and in summary, Amount A will co-exist within the existing international tax treaty framework. The primary goal of the proposed dispute resolution is to build on already existing dispute resolution mechanisms, and to apply existing mechanisms to Amount A. An Amount A "related issue" means an issue that is covered under the provisions of an existing tax treatment based on either articles 5 (permanent establishment), 7 (business profits) or 9 (associated enterprises) of the OECD Model Convention, or the equivalent in the UN Model Convention.

The proposed tax certainty process for issues relating to Amount A thus enhances and expands on existing dispute resolution mechanism and introduces a mandatory binding dispute resolution ("MBDR") process when such issues are not resolved through a Mutual Agreement Procedure ("MAP").

Unresolved issues can be referred to a **Mandatory Dispute Resolution Panel**, which will consist of representatives from the two competent authorities involved, two independent experts (selected by the respective competent authorities) and an independent expert Chair. The MBDR is binding and mandatory for Parties to the MLC, however it is elective for jurisdictions with a low capacity, such as low-income, lower-middle-income or upper-middle-income economies by reference to their GDP, as calculated by the World Bank, or jurisdictions that are not members of the OECD or G20.

It is also important to note that while the MBDR enhances the dispute resolution options for Covered Groups, it will only be available if there is an existing bilateral tax treaty in place between the respective jurisdictions. MBDR is not available for issues related to Amount A arising in jurisdictions that do not have an existing bilateral tax treaty. In short, if a MAP is not available, the MBDR is not either.

In short, the MBDR follows the below process:



DSTs and Other Measures

In line with the express goal of Amount A, the MLC also provides rules on the treatment of DSTs and similar measures. Broadly speaking, the MLC provides for (i) a removal and standstill clause and (ii) a provision how to deal with measures captured by a douof ble tax treaty. These MLC provisions represent a refinement of previously published papers, but now provide a definitive list DSTs and related measures.

Removal and Standstill Clause

The MLC would force the signatories to completely remove the relatively limited number of DSTs currently in force in Austria, France, Italy, Spain, Tunisia, Turkey and the UK as well as the India equilization levies on online advertisement services and on e-commerce. Jurisdictions that have a *digital services tax* or *relevant similar measure* in place shall not be allocated an Amount A and shall not impose a tax under the domestic provisions implementing the Amount A taxation.

In broad terms, a *digital services tax* or *relevant similar measure* is a tax that (i) is determined primarily by applying market-based criteria, such as the location of customers or users or similar criteria; (ii) is applicable by its terms solely to non-residents or foreign owned businesses or applies scope restrictions, such as revenue thresholds, that *de facto* lead to the tax being applicable (almost) exclusively to non-resident or foreign owned businesses with the effect of insulating domestic businesses from this tax; and (iii) is treated by the imposing party as outside the scope of any applicable double tax treaty.

Measures in Scope of Tax Treaties

Any measure that would be a *digital services tax* or *relevant similar measure* but for the fact that it is treated by the imposing party as within the scope of existing double tax treaties shall not be applied, provided its application depends on thresholds based on the economic activity of the Group Entity or the Covered Group in the respective country without requiring a local presence or a payor in the country, but ties the income to criteria such as local sales, number of users or targeting of a domestic audience. This provision targets taxes based on a significant economic presence levied by, for example, India. However, a measure remains permissible if its application is covered in a double tax agreement between the country levying the tax and the country of residence of the respective Group Entity.

Taxes not in Scope

The MLC explicitly excludes taxes levied based on rules that address the artificial structuring to avoid traditional permanent establishments (e.g., anti-fragmentation rules) or nexus requirements based on physical presence (e.g., commissionaires as dependent agent). Per the Explanatory Statement this would also take domestic measures out of scope that target arrangements or transaction that have as one of their principal purpose the avoidance of nexus requirements based on physical presence, which would cover taxes, such as the UK's diverted profit tax. Further, value added taxes and similar goods and services taxes as well as taxes imposed with respect to transactions on a per unit or per transaction basis are equally out of scope.

Administrative Certainty

The MLC also provides for a review and ruling process to determine whether a measure already in place at the time the MLC was open for signature or a measure that is planned to be implemented after the enactment would be considered a DST or relevant similar measure. The review process can be initiated by the jurisdiction applying an existing or planning to enact a future measure ("enacting party") and, for existing measures, also by any other jurisdiction ("requesting party"). Decisions shall be made by the Conference of the Parties without giving a vote to the enacting and, where applicable, the requesting party and require consensus. Where no consensus can be reached, an ad hoc advisory panel shall send a recommendation casted by simple majority to the Conference of the Parties, which shall be deemed to be adopted unless a simple majority of the Conference of the Parties decides against the recommendation.

Contracting States

When the MLC is released, it will include a date on or after which any State may sign. Upon the satisfaction of local law implementation requirements, a Contracting State will then deposit an instrument of ratification, acceptance or approval with the Depositary. This instrument must be received before the entry into force provision is triggered.

Upon signature, depositing of instrument, or any time thereafter, a State may also deposit a declaration regarding a territory for whose international relations it is responsible and to which the MLC will apply. Whether the MLC treats a territory as an entity separate from the State is determined on a provision-by-provision basis. States may specify in the declaration, however, whether the territory, rather than the State, is to perform a self-assessment or serve on an ad hoc advisory panel related to DSTs and other similar measures.

Entry into force and entry into effect

The MLC will enter into force on a date to be decided by the Contracting States only after (1) 13 States sign the MLC and (2) the signing States represent 60% of or more of the worldwide Gross Domestic Product (600 points as set out in Annex I). The points allocated to a territory are considered together with the points allocated to the State responsible for its international relations.
With its allocation of 486 out of 1000 possible points, the United States must therefore deposit its instrument of ratification, acceptance or approval for the MLC to enter into force. On 16 October 2023, US Treasury Secretary Janet Yellen stated that the United States will not sign the MLC by the end of 2023, projecting that the resolution of issues important to the country will stretch into 2024.

When the two threshold conditions above have been met, the OECD's Secretary-General, as Depositary of the MLC, must convene a meeting of the Contracting Parties within three months to decide whether and on what date to bring the MLC into force. Meetings will be held every six months until consensus is reached.

Conference of the Parties

Interpretation and implementation of the MLC's provisions is to be decided by the Conference of the Parties with the assistance of a dedicated Secretariat assigned by the OECD. Decisions of the Conference of the Parties will be made by consensus (absence of objection), unless otherwise provided in the MLC or by decision of the Conference of the Parties.
The MLC provides specific examples of the decisions vested in the Conference of the Parties. For example, this group will review the implementation process seven years after the MLC enters into force to determine if it has been successful. If so, the in-scope

revenue threshold will automatically lower from Euro 20 billion to Euro 10 billion. Upon successful implementation, the Conference of the Parties will also be responsible for periodically evaluating and reallocating points between States.

Withdrawal and termination

A Party must wait five years after the MLC's entry into force to withdraw. Then the Party must notify the OECD's Secretary-General, as Depositary of the MLC, of its intention to withdraw. A Conference of the Parties may be called. Nonetheless, the withdrawal will not have effect until the beginning of the calendar year following a 12-month waiting period.

The Parties may terminate the MLC by consensus. The withdrawal of a Party may also cause termination if the total of remaining points drops below 550. Finally, the MLC will terminate if written objections prevent implementation within a certain amount of time of the review process. All the provisions of the MLC will cease to have effect with respect to any Period of a Covered Group beginning on or after the first day of the next calendar year that begins on or after the termination date under the given circumstance of termination.

Depositary

The OECD's Secretary-General, as Depositary of the MLC and any subsequent protocols, will maintain publicly available lists of the Parties for which the MLC has entered into effect and notify the Parties within one month of any communications relating to the MLC, including:

- the deposit of any instrument of ratification, acceptance or approval
- the date implementation is deemed successful after the review process
- any proposed amendment to the MLC
- a decision regarding entry into force
- any notification of withdrawal
- any event resulting in termination of the MLC.

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Contact Us

Richard Fletcher
Principal Tax Advisor
richard.fletcher@bakermckenzie.com

Imke Gerdes
Partner
imke.gerdes@bakermckenzie.com

Vladimir Zivkovic
Counsel
vladimir.zivkovic@bakermckenzie.com

Laura Nguyen-Lapierre
Counsel
laura.nguyen-lapierre@bakermckenzie.com

Alejandro Zavala Rosas
Legal Director
alejandro.zavala-rosas@bakermckenzie.com

Eline Gueudre
Jurist
eline.gueudre@bakermckenzie.com

Nienke van Etten
Tax Knowledge Lawyer
nienke.vanetten@bakermckenzie.com

Elizabeth Boone
Senior Knowledge Lawyer
elizabeth.boone@bakermckenzie.com

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