

# 9 Tax Certainty

## 9.1. Overview

703. Securing tax certainty is an essential element of Pillar One. Providing and enhancing tax certainty across all possible areas of dispute brings benefits for taxpayers and tax administrations alike and is key in promoting investment, jobs and growth, and G20 Finance Ministers have recognised the importance of international cooperation to ensure tax certainty as an integral part of arriving at a consensus-based solution to the tax challenges of the digitalisation of the economy.<sup>1</sup>

704. The Blueprint breaks down the tax certainty dimension of Pillar One into two segments: dispute prevention and resolution for Amount A; and dispute prevention and resolution beyond Amount A.

705. With respect to Amount A, the Inclusive Framework recognises that it would be impractical, if not impossible, to allow all affected tax administrations to assess and audit an MNE's calculation and allocation of Amount A and to address potential disputes through existing bilateral dispute resolution mechanisms. That is why this Blueprint contains a clear and administrable mandatory binding dispute prevention process that would provide early certainty, before tax adjustments are made, to prevent disputes related to all aspects of Amount A. Such disputes could concern, for example, the correct delineation of business lines, allocation of central costs and tax losses to business lines, the existence of a nexus in a particular jurisdiction, or the identification of the relieving jurisdictions for purposes of eliminating double taxation. The process described in this Blueprint remains under discussion and may be revised as work continues.

706. The process is based on a representative panel mechanism that would carry on a review function and involve both a review panel and, where necessary, a determination panel to ensure that early certainty is achieved. Where an MNE accepts the outcomes of the tax certainty process, these outcomes would be binding on the MNE and tax administrations in all jurisdictions affected by the calculation and allocation of Amount A, including jurisdictions that did not participate directly on the relevant panel. Where it does not accept the outcomes of this process, an MNE group may rely on domestic measures. Where an MNE does not elect into the early tax certainty process, and disputes arise, the new approach also provides enhanced dispute resolution features. However, given the benefits of the early certainty process, the expectation is that most in-scope MNEs would make use of it.

707. Importantly, rules for dispute prevention and resolution would be embedded in the same instrument that introduces the rules for the taxation of Amount A, ensuring that the new taxing right would be linked to the availability of the new tax certainty approach.

708. To provide tax certainty beyond Amount A, the Blueprint takes an approach based on a number of main steps – from dispute prevention (Step 1) and the existing MAP (Step 2) to a new and innovative mandatory binding dispute resolution mechanism (Step 3). While ongoing work to improve and enhance the dispute prevention and resolution tools and the MAP has already been important separate from work on the tax challenges of the digitalisation of the economy, that ongoing work has gained further momentum in light of the fundamental importance of tax certainty as an element of Pillar One.

709. Inclusive Framework members continue to have different views on the scope of application of a new mandatory and binding dispute resolution mechanism beyond Amount A. Some strongly support a

mandatory binding dispute resolution mechanism with broad application, while others consider that disputes unrelated to Amount A should be resolved through the existing MAP framework and non-binding administrative tools. To bridge these different views, the Blueprint explores the following approach based around four elements:

- **In-scope taxpayers.** For MNE groups with global revenue and foreign in-scope revenue above the relevant Amount A thresholds, the approach contemplates a new mandatory and binding resolution process for all disputes related to transfer pricing and permanent establishment adjustments to any of their constituent entities. This is designed as a last resort and would follow the exhaustion of all other dispute prevention and resolution tools, which would be expanded and improved, including as part of the 2020 review of BEPS Action 14. The process would cover adjustments related to in-scope activities, but also extend to other (out-of-scope) activities of MNEs that are subject to the new taxing right, possibly subject to a materiality condition. The new process would not apply where disputes are already covered by existing mandatory and binding dispute resolution mechanisms, which would continue to apply.
- **Other taxpayers.** All other taxpayers would benefit from improvements to the MAP and other existing dispute prevention and resolution tools. For these taxpayers, the Inclusive Framework will also examine new and innovative dispute resolution mechanisms for material transfer pricing and permanent establishment-related disputes that competent authorities are unable to resolve in a timely manner through the MAP. In this regard, the next steps of this work will explore the benefits of two approaches: a mandatory binding dispute resolution process and a mandatory but non-binding dispute resolution process coupled with aspects of peer review and statistical reporting.
- **Amount B.** A key purpose of Amount B is to prevent transfer pricing disputes regarding baseline marketing and distribution activities through the use of agreed standardised returns to objectively defined activities, supported by quantitative indicators. Any disputes related to the application of Amount B (for example, whether a taxpayer falls within the definition of “baseline marketing and distribution activities”), which create risks of double taxation, would also be subject to mandatory binding dispute resolution, as a last resort and following the exhaustion of all other dispute prevention and resolution tools.
- **Developing economies with no or low levels of MAP disputes.** Where developing economies have no or almost no MAP cases in inventory and therefore limited or no experience with the MAP, it would seem disproportionate to require them to commit to and implement a potentially complex mandatory binding dispute resolution process to address a situation that in their current circumstances may not present a material risk to taxpayers or other tax administrations. Instead, for issues not related to Amount A, these jurisdictions would commit to an elective binding dispute resolution mechanism that would be triggered where both competent authorities agree that the mechanism should be used to resolve unresolved MAP issues. In determining appropriate levels of MAP inventory to be included in this category of jurisdictions, reference would be made to the principles of the Action 14 peer review process (in particular the criteria for deferral of a jurisdiction’s peer review), which considers the number of MAP cases in inventory as well as access limitations that may have prevented cases from entering the MAP process and appearing in inventory.
- The mechanisms described above could be coupled with a peer review and reporting framework to monitor the effectiveness of all elements of the new dispute prevention and resolution mechanisms.

710. Further work will be undertaken to finalise the different technical features of the tax certainty process for Amount A, including ways to minimise the resource burden and administrative costs of the process and how these costs should be borne. However, it is noted that, while there will be a cost implication of a new process, in aggregate and over time this should be significantly lower than the cost to both tax administrations and MNE groups from an un-coordinated application of Amount A by tax administrations in all jurisdictions where an MNE group has a constituent entity or a market. This work will

also consider any other issues where further practical guidance on the Amount A tax certainty process is needed for its implementation.

711. A decision on the scope of application of a new mandatory and binding dispute resolution mechanism beyond Amount A will be necessary to progress technical work on that mechanism and its implementation. Such technical work will include exploring how the implementation of Amount A could include extending the application of that new dispute resolution mechanism to circumstances in which there is not currently a bilateral tax treaty that includes a MAP article between the relevant jurisdictions (and thus no existing obligation or common legal standard that could form the substance of a dispute).

## 9.2. A new framework for dispute prevention and resolution for Amount A

712. This section contains a detailed draft outline of the approach to provide early tax certainty with respect to Amount A for MNE groups that are within scope.

713. The process comprises a number of elements and stages<sup>2</sup>, which are discussed further below.

- Development of a standardised Amount A self-assessment return / documentation package and centralised filing, validation and exchange of this information.
- Request for tax certainty by an MNE group.
- An optional initial review by the lead tax administration and determination if a panel review is needed.
- Constitution of the review panel, the review panel process and approval by affected tax administrations.
- Constitution of the determination panel and the determination panel process.
- Cases where an MNE group does not accept a panel conclusion.
- Other opportunities to provide greater certainty concerning Amount A.
- Transfer pricing adjustments and other adjustments in subsequent years.

### 9.2.1. Development of a standardised Amount A self-assessment return / documentation package and centralised filing, validation and exchange of this information

#### *Standardised Amount A self-assessment return and documentation package*

714. As described in Chapter 10, to facilitate a consistent implementation of Amount A by MNE groups and tax administrations, a standardised Amount A self-assessment return and documentation package will be developed, for use in all jurisdictions. These will be used by MNE groups irrespective of whether a particular MNE group makes a request for early tax certainty.

- The self-assessment return will set out each stage of the MNE group's determination and allocation of Amount A between jurisdictions, including identification of relieving entities. An XML schema could be developed for use by MNE groups, which should facilitate electronic filing and exchange of returns. Where an MNE group applies Amount A separately to a number of lines of business, separate self-assessment returns should be prepared and submitted together as a package in order to ensure common elements (e.g. business line segmentation and allocation of central costs) are consistent.
- The standard documentation package will be designed to contain sufficient background information and evidence to assess the MNE group's self-assessment of Amount A based on the information provided, while further information may be requested by tax administrations if needed. This will include a detailed description of the methodology and controls applied by the

MNE group to ensure the integrity of its data and processes for applying Amount A, as well as a list of jurisdictions where the MNE group has a constituent entity or revenues that meet the applicable market jurisdiction threshold in the relevant fiscal year or the prior fiscal year. Further work will consider ways to ensure that all market jurisdictions are identified.

715. The format and content of these items will be developed at a later stage, but the use of a standardised self-assessment return and documentation package should have a number of benefits for MNE groups and tax administrations, including the following.

- It would reduce the burden on MNE groups, which would be able to provide the same documentation in each jurisdiction where they have activity.
- Consistency in the application of Amount A by MNE groups would be improved, as the return would require the same specific information to be provided and calculations to be performed by each MNE group.
- It would aid tax administrations in reviewing an MNE group's determination and allocation of Amount A, as they would gain experience in working with standardised templates, which may also make it easier to identify comparable MNE groups that are taking different approaches.
- It would facilitate exchange of information and multilateral approaches by tax administrations, because competent authorities would be working with exactly the same information.
- Guidance could be developed to support MNE groups and tax administrations in completing and using standardised templates.

*Filing of the self-assessment return and documentation package by the Amount A co-ordinating entity with its lead tax administration*

716. To minimise the burden on MNE groups and ensure the same information is available to all relevant tax administrations, an Amount A co-ordinating entity within an MNE group will file a single self-assessment return and documentation package on behalf of the entire MNE group, with its lead tax administration, by an agreed filing deadline. In setting this deadline, different options will be explored but an approach could be such that jurisdictions are free to set the filing deadline up to 12 months after the end of the relevant fiscal year. This allows jurisdictions to align the filing date with their normal tax return filing deadline if they wish to do so.

717. In the majority of cases, the lead tax administration will be in the jurisdiction where the UPE of an MNE group is resident. However, there may be cases where the tax administration in that jurisdiction may be unable to act (e.g. because it is in a jurisdiction that is not a member of the Inclusive Framework or has not implemented Amount A) or where another tax administration may be more suitable (e.g. because the MNE group only has nominal activity in that jurisdiction or if the tax administration does not have the resources to act).

718. To deal with these cases, an approach will be developed to identify a “surrogate lead tax administration” for the MNE group. One option could be for tax administrations that in principle are prepared to act as lead tax administrations for these MNE groups would identify themselves and be included on a list of “surrogate lead tax administrations” that is made publicly available. Where the tax administration in the jurisdiction of an MNE group's UPE is unable to act as lead tax administration, or agrees that other tax administrations may be more suitable, the UPE may contact one of the tax administrations on this list (directly or via their UPE tax administration) to request that they act as lead tax administration. In the first instance, no tax administration would be required to agree to be lead tax administration for a particular MNE group (e.g. a tax administration may wish to decline if the MNE group has no or little activity in its jurisdiction or if its capacity is filled). However, if no tax administration agrees to act as lead tax administration for a particular MNE group, a process will be identified to ensure that every MNE group within the scope of Amount A has access to a lead tax administration. Another option would be for clear

objective criteria to be agreed (e.g. based on revenues or the location of key functions), to determine which tax administration that should act as surrogate tax administration.

719. A surrogate lead tax administration should only be used if the UPE jurisdiction is not a member of the Inclusive Framework, if the jurisdiction has not yet implemented rules for Amount A, or if the UPE tax administration agrees to the MNE group using a surrogate lead tax administration. In cases where the UPE tax administration is in an Inclusive Framework member jurisdiction that has implemented Amount A, and is able and willing to act as lead tax administration, it should do so.

720. The co-ordinating entity should also provide to its lead tax administration an agreement signed by all entities in the MNE group undertaking residual profit activities (i.e. those which could be paying entities for the purposes of Amount A), confirming their agreement to be bound by the self-assessment return, as well as any amendments to this return agreed by the co-ordinating entity, including as part of any early certainty process. Depending upon the final design of Amount A, this agreement may also need to be signed by other constituent entities in the MNE group. Where legal or practical issues mean it is not possible for a constituent entity to agree in advance to be bound by decisions of the co-ordinating entity, the process described in this Blueprint will be amended to reflect this and further work will consider how this can be done (e.g. by requiring these constituent entities to confirm their agreement before outcomes become binding). Further work will be undertaken to understand the extent to which these legal or practical issues may arise in practice and how these can be avoided. It is expected that in the significant majority of cases all constituent entities will accept the position agreed by the co-ordinating entity, which applies Amount A across the MNE group and avoids double taxation. In exceptional cases, if a constituent entity takes a position with respect to its Amount A assessment which differs from that filed by the co-ordinating entity, this is likely to have an impact on the assessment of Amount A for other entities in the group.

#### *Validation of the self-assessment return by the lead tax administration*

721. Following filing of the MNE group's self-assessment return and documentation package, the lead tax administration would be expected to conduct a validation of these items for completeness and consistency, which should be completed before the deadline for exchanging this information described below. Guidance would support lead tax administrations in performing a validation and other tax administrations in understanding the extent of the validation expected. In conducting a validation, the lead tax administration is not expected to independently confirm the accuracy of information provided by the MNE group or the application of rules for determining and allocating Amount A, but should request clarification or additional information from the co-ordinating entity where any element appears incomplete or if there is inconsistency within the information and documentation provided. In other words, this process is intended to identify obvious errors before information is exchanged with other tax administrations, but is not intended to involve any substantive review of the MNE group's self-assessment.

722. In some cases, an MNE group may be required to submit a corrected self-assessment return and/or documentation package addressing these points. In most cases, the corrected self-assessment return and/or documentation package should be provided by the co-ordinating entity in the MNE group within [one month] of receiving instruction from the lead tax administration.

#### *Exchange of the self-assessment return and documentation package*

723. The self-assessment return and documentation package will be exchanged by the lead tax administration with tax administrations in other jurisdictions where the MNE group has a constituent entity and those where it has a market that meets the applicable threshold, or did so in the previous fiscal year (jointly referred to as "affected tax administrations"). These jurisdictions will be identified by the lead tax administration using information provided by the MNE group. Jurisdictions where an MNE group had a constituent entity or a market in the previous fiscal year are included to ensure that, where the MNE group reports that it no longer has a constituent entity or a market in such a jurisdiction, these tax administrations

have the opportunity to review this and object if necessary. Later in this section a possible accelerated early certainty process is described for cases where a tax administration believes that its jurisdiction should be included on an MNE group's list of market jurisdictions, but it has not been included on the list by the MNE group.

724. The usual deadline for the exchange of CbCRs under BEPS Action 13 is 15 months after the end of the relevant fiscal year and a similar approach could be applied to Amount A information. Where the lead tax administration is awaiting a corrected self-assessment return from the MNE group, it should inform affected tax administrations and then exchange the revised self-assessment return and documentation package within [one month] of receiving it from the co-ordinating entity. Provisions may be needed within the planned multilateral instrument and/or domestic law to allow what would in effect be part of a domestic tax return to be received under exchange of information rather than directly from the relevant taxpayer and most likely at a point which is later than the deadline for filing a domestic tax return.

725. To ensure information is available to all affected tax administrations, it will be necessary for a comprehensive network for the exchange of information to be put in place (possibly under the envisaged multilateral instrument or the existing Multilateral Convention on Mutual Administrative Assistance in Tax Matters), together with up-front consent as appropriate for the on-sharing of this information to ensure tax administrations are able to discuss it with each other.<sup>3</sup> Currently, bilateral double tax conventions and tax information exchange agreements alone may not provide a sufficiently complete network for the necessary exchange and on-sharing of information. This exchange framework could be supplemented by a secondary mechanism for local filing of the self-assessment return and documentation package where exchange of information cannot or does not take place. This secondary mechanism would in principle be similar to local filing of an MNE group's CbCR, but would not be subject to some of the limits on local filing imposed under BEPS Action 13. Further work will be required to ensure that jurisdictions which have to rely on local filing are able to engage in the early certainty process, given exchange of information is a vital element.

726. These exchanges (and local filing where needed) will take place irrespective as to whether an MNE group makes a request for tax certainty (i.e. this process would be followed to ensure that consistent information is available to all relevant tax administrations in cases where an MNE group plans to rely on domestic remedies to resolve areas of disagreement). The exchange of information could potentially be simplified by the development of a central administrative platform to hold information on Amount A provided by MNE groups.

### **9.2.2. Request for tax certainty by an MNE group**

#### *A voluntary mechanism for MNE groups*

727. The approach to achieve early certainty for Amount A will be voluntary on the part of an MNE group, and triggered by a request from an MNE group's co-ordinating entity to its lead tax administration. In this context, references to "early certainty" refer to certainty before tax administrations have made any adjustments to the tax position filed by an MNE group (i.e. during the dispute prevention stage, compared with dispute resolution which is needed once a tax administration requires a tax adjustment to be made which results in double taxation). Later in this section there is a discussion on circumstances where a modified certainty process may be initiated following the request of a tax administration.

728. There are two levels with respect to which tax certainty may be requested by an MNE group:

- Whether an MNE group is within the scope of Amount A. It is likely that this certainty would only need to be provided once, or only periodically.
- Whether an MNE group's determination and allocation of Amount A is agreed, including the identification of paying entities and the relief from double taxation that should be provided by relieving jurisdictions. This certainty may be requested annually, though for some MNE groups



only a high-level review may be required. As mentioned below, after the first year(s) tax administrations may feel comfortable to provide early certainty for some MNE groups without any review by a panel, if they are confident the MNE group's processes for applying Amount A are robust and nothing material has changed since the previous review was undertaken.

#### *Submission of a request to the lead tax administration*

729. A request for early certainty will be submitted by the MNE group's co-ordinating entity to its lead tax administration, which in most cases should be in the MNE group's UPE jurisdiction. This request should be submitted by an agreed deadline, say within [six months] of the end of the relevant fiscal year end. Within [1 month] of receiving the request, the lead tax administration should send a notification to competent authorities in all jurisdictions where the MNE group has a constituent entity or a market, based on information provided by the MNE group.

730. As mentioned above, the MNE group should have provided an agreement signed by all constituent entities undertaking residual profits activities confirming that they agree to be bound by any changes to the MNE group's Amount A self-assessment return agreed by the co-ordinating entity. Depending upon the final design of Amount A, this agreement may also need to be signed by other constituent entities in the MNE group. In addition, the request for tax certainty should include confirmation from these constituent entities that:

- they agree to the suspension of time limits on domestic compliance activity for the period of the review, to the extent this is possible under each jurisdiction's law. This is to ensure that, in the event an MNE group does not accept the outcomes of a review and chooses to rely on domestic remedies, tax administrations are still able to conduct their own enquiries, and
- they understand that any binding tax certainty provided as a result of this process may fall away if
  - any member of the MNE group later pursues domestic remedies with respect to Amount A for the relevant fiscal year or
  - it is later discovered that information provided by the MNE group to tax administrations for the purposes of its review is inaccurate, incomplete or misleading.

731. If these elements are provided, the lead tax administration will inform the co-ordinating entity as soon as possible or within [one month] that its request for Amount A tax certainty is accepted. Incomplete requests will not be accepted and the lead tax administration will advise the co-ordinating entity as to any outstanding items that should be provided. In exceptional cases, where the lead tax administration is aware or is made aware (e.g. by the MNE group or an affected tax administration) that an MNE group's financial statements or other information relied on in calculating Amount A are likely to change or be re-stated and this will have an impact on Amount A, the lead tax administration may decline the MNE's request for certainty, but may agree that a request can be submitted once the final position is known. There is no other opportunity for a complete request for tax certainty from an MNE group to be declined.

732. With respect to domestic compliance processes (e.g. tax audit), affected tax administrations should not commence any compliance activity or issue assessments with respect to topics specific to Amount A for the relevant tax year pending the outcomes of the review. This does not extend to any other compliance activity or assessments (i.e. with respect to other aspects of the MNE group's taxation, including transfer pricing issues beyond Amount A, compliance activity may continue) and does not suspend the collection of Amount A tax due in accordance with the MNE group's self-assessment. Specifically, affected tax administrations are not restricted from conducting audits or other compliance activity concerning issues that may impact the level of residual profits in a jurisdiction, even though these may have a consequential effect on the identification of relieving jurisdictions and the amount of double tax relief they should provide. The interaction of these issues with an early certainty process for Amount A

is considered later in this section. Further work will be undertaken to explore how to deal with cases where a jurisdiction's law does not permit the suspension of time limits on domestic compliance activity.

### **9.2.3. An optional initial review by the lead tax administration and determining if a panel review is needed**

733. This part and the following parts of this section focus on cases where an MNE group has made a request for certainty concerning its determination and allocation of Amount A, including the identification of relieving entities. A discussion later in this section considers other occasions where the architecture described may be used to provide wider tax certainty for Amount A.

#### *Optional initial review by lead tax administration*

734. In addition to and simultaneous with the validation described above, where an MNE group has made a request for early certainty, the lead tax administration may also conduct an initial review of the MNE group's self-assessment return in order to filter out lower-risk groups, based on agreed criteria, where tax administrations may be willing to provide certainty without a review by panel. This could be a useful mechanism to reduce the overall tax administration resources needed in the first year of operating Amount A and even more so in subsequent years.

735. The extent of this review may vary depending upon, among other factors, the robustness of the MNE group's processes and controls over its application of Amount A, whether it has previously been reviewed by a panel and, if it has, the outcomes of those reviews. In conducting an initial review, the lead tax administration may request some clarification or additional information from the MNE group, but a need for significant extra information may suggest that a panel review is needed. As a result of its initial review, the lead tax administration may propose changes to an MNE group's self-assessment return which, if accepted by the MNE group, could be reflected in a revised return provided to the lead tax administration, typically within [one month]. Guidance will clarify the level of comfort that a lead tax administration should seek to achieve in conducting an initial review, and how the outcomes of that review should be presented.

736. Leaving flexibility around whether an initial review is conducted is intended to allow lead tax administrations to identify lower risk MNE groups that may be provided with certainty quickly, without the need for a panel review, reducing the resources required from all tax administrations. However, an initial review does not need to be undertaken, for example where a lead administration does not have the resources or capacity to conduct an initial review, or it feels that in any case a review by panel is needed (e.g. because it is the MNE group's first year of applying Amount A and the lead tax administration believes a review conducted by a panel of tax administrations would be beneficial).

737. As the initial review is intended to be high-level and only filter out relatively low-risk MNE groups rather than deal with more complex cases, it is anticipated that in most cases a review should be completed by the time the self-assessment return and documentation package are exchanged with other tax administrations. As described above, this could be 15 months after the end of the MNE group's fiscal year. If this approach is adopted, this would mean three months for an initial review if the filing deadline in the lead tax administration's jurisdiction was 12 months after the end of the fiscal year, but the time available for the review would be longer if the filing deadline in that jurisdiction was earlier (e.g. if the lead tax administration required filing nine months after the fiscal year end, this would leave six months for the initial review).

738. Where an initial review is still underway at the point of the deadline for exchange, the MNE group's self-assessment return and documentation package will be exchanged with affected tax administrations as normal. If any revisions are subsequently required as a result of the initial review, an amended self-assessment return and documentation package will be exchanged when available. In the event that the initial review is still incomplete at the end of [three months] following the deadline for exchange (or shortly



thereafter), the initial review will end without reaching a conclusion. Work undertaken to date by the lead tax administration will contribute to any subsequent review by panel.

739. When the lead tax administration exchanges the MNE group's self-assessment return and documentation package with affected tax administrations, this will be accompanied with one of the following.

- A statement that the lead tax administration has not conducted an initial review of the MNE group's Amount A self-assessment (or an initial review was conducted which ended without reaching a conclusion) and so a review by panel is required.
- A statement that the lead tax administration has conducted an initial review and concluded that a review by panel is required. This may be accompanied by a summary of the review undertaken by the lead tax administration and particular issues it considers should be discussed by the review panel.
- A statement that the lead tax administration has conducted an initial review and, based on the outcomes of this review, a recommendation that a review by panel is not required. This must be accompanied by a summary of the review undertaken by the lead tax administration and the basis for its conclusion that each element of the MNE group's application of Amount A poses a low risk to the jurisdictions of affected tax administrations (including both market jurisdictions and relieving jurisdictions).
- A statement that the lead tax administration is in the process of conducting an initial review that is not yet complete (in which case the conclusions of this initial review, if any, should be exchanged with other tax administrations as soon as they are available).

#### *Decision as to whether a review panel is required*

740. Where the lead tax administration has conducted an initial review and recommended that a review by panel is not needed, other affected tax administrations have [three months] to consider this and submit comments, which may fall into one or more of four categories:

- A proposal to establish a panel based on concerns that could impact the MNE group's Amount A tax liability in that tax administration's jurisdiction (e.g. that there may be errors in the determination and allocation of Amount A or the identification of relieving entities that affect the jurisdiction in question). This should be accompanied by a description of the specific concerns the affected tax administration has (e.g. that aspects of the MNE group's self-assessment do not reflect published guidance or are inconsistent with the approach applied by comparable MNE groups) and, if possible, the tax impact in its and other jurisdiction(s).
- A preference that a panel be formed that is not linked to specific concerns.
- Observations that the affected tax administration would like to raise but that do not result in a proposal to form a panel. This could include technical issues with an MNE group's self-assessment that the tax administration does not consider material for the relevant fiscal year but would like to have recorded in case the issues become material in the future.
- An expression of interest to participate in any review panel that is established. In the event that a panel review is undertaken, the review panel will be drawn first from a list of tax administrations that indicated an interest in participating.

741. The issues underpinning proposals to establish a panel and observations by affected tax administrations will be discussed by the lead tax administration with the co-ordinating entity of the MNE group. If the co-ordinating entity is able to address the concerns underlying a proposal to the satisfaction of the affected tax administration, without impacting the position in any other jurisdiction, the affected tax administration should withdraw its proposal to establish a panel, and may replace this with a general preference that a panel be formed. Observations do not require any specific action on the part of an MNE

group, but it should consider taking them into account in applying Amount A in future fiscal years, if relevant.

742. A panel of tax administrations (the review panel) could be established in all cases where an MNE group has requested certainty and either:

- the lead tax administration has not conducted an initial review or did not reach a conclusion as a result of such a review;
- the lead tax administration has conducted an initial review and concluded a panel review is needed;
- any affected tax administration has submitted a proposal that a panel review be conducted together with an explanation of its specific concerns and this proposal has not been subsequently withdrawn; or
- [three or more] affected tax administrations have indicated a preference that a panel be formed (this number may be reduced where an MNE group has constituent entities in a very small number of jurisdictions). Alternatively, rather than an absolute number, this option could be based upon a minimum percentage of affected tax administrations, which may be subject to a *de minimis* number (e.g. at least five per cent of affected tax administrations subject to a minimum of three).

743. Further work will consider whether a panel should be formed in each of the above scenarios, or if modifications to these scenarios should be made. Where none of these conditions are met and a review panel is not to be established, the lead tax administration will inform the MNE group that the position set out in its self-assessment (reflecting any agreed changes) is accepted. This position is then binding on the MNE group's constituent entities and on tax administrations in all Inclusive Framework member jurisdictions. Tax administrations should undertake any steps needed in their jurisdiction to implement this assessment. Further discussions will consider issues that tax administrations may encounter in implementing the outcomes of a mandatory binding process, with domestic law issues dealt with by each jurisdiction as necessary, to ensure implementation of these outcomes. These discussions will also consider how the outcomes of the Amount A certainty process will interact with domestic court decisions or other "binding" rulings in a jurisdiction (e.g. in cases where these conflict).

744. In the event that any constituent entity in an MNE group subsequently seeks to reduce its liability to Amount A tax via domestic remedies, the tax administration in the relevant jurisdiction will inform the lead tax administration and other affected tax administrations that the MNE group is not complying with its commitments under the tax certainty process. This will be raised with the MNE group's co-ordinating entity by the lead tax administration and, if this situation is not addressed, affected tax administrations will be informed by the lead tax administration that the binding tax certainty provided to the MNE group no longer applies with respect to the relevant fiscal year.

745. It is anticipated that a significant majority of MNE groups within the scope of Amount A will submit a request for tax certainty for the first year(s) following the introduction of the rules. The approach set out in this section could include elements to limit the resources required to undertake panel reviews during this initial period. However, there is a risk that tax administrations will indicate a preference for a panel to be established in all or almost all cases, which could exceed the capacity of tax administrations to undertake these reviews. This may be a particular concern for tax administrations that are commonly lead tax administrations, given the likely concentration of the UPEs of in-scope MNE groups in a reasonably small number of jurisdictions and the need for a lead tax administration to co-ordinate the panel review. However, this situation should not limit the ability of MNE groups to obtain certainty following the introduction of new taxing rights. In light of this challenge, it may also be possible to reduce the burden on tax administrations and MNE groups by phasing in rules for Amount A, beginning with the largest MNE groups and/or initially excluding some elements of the rules such as business line segmentation.

#### **9.2.4. Constitution of the review panel, the review panel process and approval by affected tax administrations**

##### *Constitution of the review panel*

746. If a review panel is established, tax administrations participating on the panel will be drawn from the list of affected tax administrations that indicated an interest in taking part, based on criteria to be agreed.

747. The criteria for determining the constitution of a review panel could include the following elements, which may be revised as experience is gained:

- Panels should ideally comprise 6-8 tax administrations. The number of tax administrations on a particular panel may depend on the geographic spread of an MNE group (e.g. MNE groups with a very wide geographic spread may justify a larger panel than an MNE group with a narrower, localised footprint). This location of the UPE of the MNE group will not be taken into account in considering the geographic spread of an MNE. This is to ensure that market jurisdictions and relieving jurisdictions that are geographically close to the UPE jurisdiction have the opportunity to be represented on a panel.
- The profile of tax administrations participating on a panel could reflect an agreed categorisation of all jurisdictions' economies as large or small and as developed or developing, such that a panel includes broadly the following mix of tax administrations (assuming sufficient affected tax administrations from each category express an interest in participating):
  - the lead tax administration;
  - 2-3 tax administrations from other jurisdictions that provide relief for Amount A (the lead tax administration will typically also be from a relieving jurisdiction, increasing this number to 3-4); or
  - 3-4 tax administrations from jurisdictions that receive an allocation of Amount A, ensuring that at least one small economy and one developing economy are included (unless no such jurisdictions are recipients of Amount A for the particular MNE group).
- Tax administrations on the panel should broadly reflect the geographic spread of the MNE group.
- It is necessary to ensure that all tax administrations have the opportunity to participate in the panel process (though not necessarily on all panels), taking into account their interest and capacity. With respect to capacity constraints, this may be a reason for a tax administration choosing to limit the number of panels in which it participates. However, capacity building will be undertaken to ensure tax administrations from developing economies are able to participate in panels if they wish to do so.
- Where an MNE group has several business lines within the scope of Amount A, the panel should ideally include tax administrations from jurisdictions involved in each allocation, though there may be cases where this will not be possible.
- The reasons given by a tax administration for wishing to participate in a particular panel (e.g. the value of potential tax revenue at stake) and any general considerations provided, such as an overall limit on the number of panels a tax administration has the capacity to participate in, albeit that tax administration may express interest in joining a greater number of panels (anticipating that there may be cases where a panel is not formed or it is not invited to participate).

748. The agreed criteria could be applied and a review panel identified by the lead tax administration, ensuring a streamlined process in which the lead tax administration is fully involved. Alternatively, if a

secretariat is to be established, application of agreed rules and procedures by the secretariat could be viewed as more objective.<sup>4</sup> This may also better ensure that all jurisdictions have balanced representation across different panels (as the secretariat would have information on the constitution of all review panels whereas a lead tax administration may only be aware of the constitution of review panels on which it participates). Other than providing the list of constituent entity and market jurisdictions and other information required to apply the agreed criteria (e.g. sales by jurisdiction), the MNE group would not participate in identifying the review panel or agreeing its membership.

749. In the event that a panel is to be established but an insufficient number of affected tax administrations expressed an interest in participating, the lead tax administration or secretariat will inform all affected tax administrations that this is the case. Affected tax administrations will then have a further opportunity to express interest in participating. A review panel will be formed from affected tax administrations that expressed interest, reflecting to the extent possible the criteria described above (e.g. if no affected tax administrations expressed an interest in joining the panel, this category of jurisdictions cannot be reflected).

750. As mentioned above, it is critical that all Inclusive Framework members are able to participate fully throughout this tax certainty process, and in particular in the panel reviews at the heart of the process. As such, the development and deployment of tools for capacity building will be important to support developing economies. These could include, among others, the preparation of guidance and manuals, online and face-to-face training, and direct support via the OECD Tax Inspectors Without Borders (TIWB) programme.

### *The review panel process*

751. To ensure a streamlined process, all engagements with an MNE group with respect to the early certainty review will be conducted via the lead tax administration. Following the establishment of the review panel, the lead tax administration will contact the co-ordinating entity of the MNE group and agree a start date for the review. In most cases this should be as soon as possible, but a short delay may be appropriate (e.g. if key staff at the MNE group are engaged in transactions, or if the lead tax administration is leading a large number of reviews and these need to be co-ordinated). The start date will also be agreed with other affected tax administrations on the review panel and, given their expression of interest in joining the panel, panel members should be as flexible as possible in agreeing to this.

752. The review panel will conduct a review of an MNE group's self-assessment, including each element of the determination and allocation of Amount A, including the identification of relieving entities. The review may also include testing factual information provided by the MNE group, to ensure the accuracy of information. This process should include a number of conference calls and email exchanges which may be co-ordinated by the lead tax administration or secretariat and chaired by the lead tax administration. Where an affected tax administration not on the panel identifies a possible concern with an MNE group's self-assessment of Amount A, it should raise this with the lead tax administration at the earliest possible opportunity. This issue will then be addressed directly by the lead tax administration or included as a specific consideration in the panel review of the MNE group's self-assessment return. This will reduce the risk of delays later in the tax certainty process where an affected tax administration raises an objection that could have been dealt with during the panel review.

753. In some cases it may be necessary for additional information or clarification to be requested via the lead tax administration, or for the MNE group to join a conference call with members of the review panel to present on specific issues (e.g. business line segmentation) and respond to questions. In a small number of cases a face-to-face meeting with an MNE group may be needed, but it is anticipated that this will not usually be the case. Any approach to achieve early tax certainty relies upon active and transparent participation by an MNE group. Wherever additional input is requested, it is critical that an MNE group endeavours to provide the information or clarification as quickly as possible, reflecting timeframes agreed with the panel (taking into account the volume and availability of the information requested). This additional

information may be provided on request to affected tax administrations not participating in the review panel, or may be made directly available to these tax administrations. Wherever possible, the panel review should be completed within [three months] from the start date.

754. If, in the view of review panel members, an MNE group is persistently late in providing information to the review panel without explanation, is acting in an un-cooperative or non-transparent manner, including by providing inaccurate or incomplete information, or where information provided proves to be unreliable or changes (or is expected to change), this issue will be raised with the co-ordinating entity by the lead tax administration. Where this issue is not resolved and where objective criteria to be developed are met, the co-ordinating entity may be informed that the review panel is not able complete the review as requested. These are the only circumstances in which an MNE group may not be provided with certainty after having submitted a request, and it should instead rely on domestic remedies. In cases where a review cannot be completed because information provided by the MNE group has changed or is expected to change, but the MNE group has acted in goodwill and informed the lead tax administration of any uncertainty it is aware of, it may be agreed that a review of the MNE group's application of Amount A may re-start once it is confident that relevant information is no longer subject to change.

755. It may be possible for information to be made available to tax administrations via a secure virtual data room maintained by the MNE group. Affected tax administrations may then download the information they require. This is based on an approach adopted in the pilots for the FTA ICAP for a co-ordinated risk assessment of large MNE groups, ensuring access to information while reducing the burden on the lead tax administration. However, it does require a tax administration to access each virtual data room to obtain information, which could be problematic if there are technical issues in accessing the data. It would also require MNE groups to establish virtual data rooms, which adds to their burden.

756. In the event that any member of the review panel is not able to reach a conclusion within [three months], the lead tax administration should inform the co-ordinating entity that more time is needed to complete the panel review, which may involve further requests for information. The overall length of time needed for a panel review will vary, but it is anticipated that in the majority of cases these will be completed within [nine months] from the start date. In particular, it is envisaged that, after the first year, in many cases an MNE group's review may be completed more quickly, as it may not be necessary to review all elements of the MNE group's determination and allocation of Amount A or such review may not need to be so detailed (e.g. a review of an MNE group's delineation of business lines and the identification of residual profit activities entities may not be needed after the first year if there have been no significant changes).

757. If at any point it becomes clear to the lead tax administration that the review panel is unable to reach agreement and this is unlikely to be resolved within the panel, it should consider ending the panel review with a conclusion that no agreement was reached. It is expected that any panel review that extends to [12 months] from the start date should be brought to an end with no agreement reached. This should provide an incentive for the review panel to reach agreement if possible and, where this is not possible, it allows the process to move on to the determination panel stage, ensuring certainty for the MNE group within a reasonable timeframe.

758. Following the panel review process, review panels may make recommendations to the MNE group for improvements to its processes and controls for applying Amount A, that may or may not be agreed by the MNE group. Where an MNE group's processes and controls appear weak, and in particular if a review panel has previously recommended changes but these were not implemented, this may mean that a more detailed review of the MNE group's determination and allocation of Amount A is needed.

759. While tax administrations on a review panel will work closely together, each may have its own view as to whether an MNE group's self-assessment is in accordance with globally agreed rules on the operation of Amount A or whether any adjustments are needed. Where these views differ, panellists should seek to understand the reason for these differences and agree a common position if possible. For example, if there are a number of possible acceptable approaches under Amount A (e.g. as a basis for the allocation of

central costs) and the majority of panellists agree as to which is most suitable, other panellists should consider if they can accept this approach even if it is not their preferred outcome. However, while tax administrations on a review panel should endeavour to reach agreement, they are not committed or required to do so.

760. At the end of the panel review, the MNE group is informed as to the result. Where the review panel has reached agreement that changes are required to the MNE group's assessment of Amount A, the MNE group will be asked to agree that these changes be made. There are therefore three broad possible outcomes from this process:

- The review panel agrees with an MNE group's assessment of Amount A, which either corresponds with the self-assessment submitted by the MNE group or the MNE group agrees to revise its self-assessment to reflect changes required by the panel (which will now be submitted to other affected tax administrations for approval).
- The review panel reaches agreement, which does not correspond with the self-assessment submitted by the MNE group, and the MNE group does not agree to revise its self-assessment.
- The review panel fails to reach agreement.

#### *Submission of assessments agreed by the review panel for approval*

761. If the review panel reaches agreement with the MNE group's self-assessment (either as filed or reflecting adjustments to the self-assessment agreed by the MNE group), this self-assessment and a panel recommendation that the self-assessment be accepted is sent by the lead tax administration to all affected tax administrations not on the panel. This is accompanied by a summary of the review undertaken by the panel and the basis for its conclusion that each element of the MNE group's application of Amount A should be agreed by affected tax administrations. The summary would be prepared by the lead tax administration, supported by the secretariat, and agreed with panel members. Affected tax administrations will also have access to any other information provided the MNE group in the course of the panel review. Depending upon the volume of such information, it may be exchanged by the lead tax administration at the same time as the panel recommendation, or a list of the information may be exchanged with the indication that the information itself is available on request.

762. In most cases the summary of the work undertaken by the review panel and the information it used as a basis for its decision should be sufficient for affected tax administrations to form a view as to whether or not they agree to the review panel's recommendation but, if needed, a tax administration may request additional information. This will be provided by the lead tax administration if it concerns information that was already supplied by the MNE group, or else may be requested by the lead tax administration from the MNE group.

763. If no affected tax administration objects to the review panel's recommendations within [three months], their acceptance is assumed and the MNE group is informed by the lead tax administration. The assessment of Amount A agreed by the review panel and approved by affected tax administrations is binding on the MNE group's constituent entities and on tax administrations in all Inclusive Framework member jurisdictions.

764. If any affected tax administration objects to the review panel's recommendation, all affected tax administrations will be informed and invited to provide any comments on these objections within [two weeks]. The review panel will have up to [two months] to consider whether an adjustment is needed to the MNE group's assessment of Amount A and discuss this with the MNE group, though this process should be completed more quickly if possible.

765. If the review panel and MNE group agree that adjustment is needed (or accepted), the lead tax administration will re-circulate a revised assessment of Amount A and recommendation reflecting this to affected tax administrations for any further objections. At this point objections should be raised within a

period of [one month] and should only concern or be consequential to elements that have changed since the previous version was circulated. This process continues, with [one month] for additional objections concerning new elements, until no objections are received. At this point, the lead tax administration informs the MNE group that the assessment has been accepted. The amended assessment of Amount A agreed by the review panel and approved by affected tax administrations is binding on the MNE group's constituent entities and on tax administrations in all Inclusive Framework member jurisdictions.

766. If the review panel is unable to accommodate objections raised by an affected tax administration, the lead tax administration will explain the reasons for this to the affected tax administration and invite the affected tax administration to withdraw its objection. If the affected tax administration accepts this explanation and withdraws its objection, assuming no other objections remain, the assessment of Amount A becomes binding on the MNE group's constituent entities and on tax administrations in all Inclusive Framework member jurisdictions as if no objection was made. If the affected tax administration does not withdraw its objection, the lead tax administration will inform the MNE group and all affected tax administrations that relevant questions will be referred to a determination panel for a conclusive outcome. The process for approving review panel recommendations will be reviewed as tax administrations gain experience.

767. In the event that the review panel reaches agreement, which does not correspond with the self-assessment submitted by the MNE group, and the MNE group does not agree to revise its self-assessment, the MNE group is treated as not accepting panel conclusions (see below).

#### *Submission of assessments not agreed by the review panel for comments*

768. If the review panel fails to reach agreement on an MNE group's self-assessment, the MNE group and all affected tax administrations will be informed by the lead tax administration that relevant questions will be referred to a determination panel for a conclusive outcome. A summary of the review undertaken by the panel identifying the elements where the panel was able to agree and those where agreement was not possible is sent by the lead tax administration to all affected tax administrations. This will be prepared by the lead tax administration, with support from the secretariat as appropriate taking into account the need for strict taxpayer confidentiality, and agreed with other panel members. As before, additional information obtained from the MNE group in the course of the review is also available to all affected tax administrations.

769. Affected tax administrations have [three months] to raise objections to the points that the review panel could agree and make comments on the points where it did not agree. This process ensures that, whether or not the review panel reaches agreement, all affected tax administrations have the opportunity to provide input before the determination panel process commences.

### **9.2.5. Constitution of the determination panel and the determination panel process**

770. If the review panel is unable to reach agreement, or if it is unable to accommodate objections by other tax administrations, relevant questions would be submitted to a second panel (the determination panel), which is obligated to reach a decision. This ensures that certainty is offered to MNE groups in all cases where it is requested and the MNE group co-operates in the process. These questions would be accompanied by relevant comments from affected tax administrations, including those that participated in the review panel and those that did not. In light of the amount of time and resource required to undertake a tax certainty process involving two panels, a possible option which will be considered in further work could be for a condition to be imposed that questions will only be put to a determination panel for a conclusive outcome if an MNE group agrees to be bound by the determination panel's decision.



### *Constitution of the determination panel*

771. Disputes concerning Amount A are likely to impact a significant number of jurisdictions, including those that may not have been involved in detailed discussions concerning the dispute in question (i.e. jurisdictions that were not on the review panel and that have not raised any objection to the review panel's recommendation). In light of this impact, clear, objective rules will be developed to identify members of the determination panel where it is to consider questions concerning Amount A.

772. With respect to a determination panel to consider disputes concerning Amount A only, work on the appropriate constitution of a panel focuses on a number of fundamental issues. The Inclusive Framework will address a number of issues on which members hold different views, including by considering how panels are currently constituted in other contexts. These issues include:

- Whether panellists should be serving tax officials, retired (or non-serving) tax officials or independent experts, or a combination of these groups.
- Whether panellists should be drawn from a pool with rotating membership of individuals. For example, individuals could initially be appointed to the pool for a period of either two or four years, and then for a period of four years, so that half of all pool members would be replaced every two years. This would ensure that, after an initial period, panels include members with experience in resolving Amount A disputes. If this approach is adopted, members of the pool that are serving tax officials would be appointed by members of the Inclusive Framework. A process for appointing other members of the pool will be explored.
- Whether a pool member from the lead tax administration and/or other tax administrations participating on the review panel may participate on the determination panel.
- Whether determination panellists that are tax officials should be from affected tax administrations, from non-affected tax administrations or a combination of affected and non-affected tax administrations (or, in light of the possible difficulty in adopting one approach that applies to all in-scope MNE groups, whether they should be appointed with no reference to this criterion).
- Whether small economies and developing economies should always be represented on a determination panel, to the extent these jurisdictions appoint pool-members.
- Whether a determination panel should have a Chair who is responsible for co-ordinating discussions and would have an additional vote in the event of no overall majority, to decide between two or more outcomes which otherwise have equal support. The Chair could be a named individual appointed by the Inclusive Framework (e.g. a suitable senior serving or retired tax official) or drawn from a small pool of such individuals (given that there may be a number of panels required in the first year(s) of applying Amount A).
- Whether a Chair who is a tax official should be from a tax administration that is not an affected tax administration (or, in the case of a retired or non-serving tax official, one that did not previously work for an affected tax administration).
- Whether a determination panel should include an odd number of panellists (including the Chair), which would facilitate a decision being reached by simple majority, where consensus proves impossible.

### *Determination panel process*

773. The review panel will develop specific questions for consideration by the determination panel, together with written analyses of the different positions held by members of the review panel, by affected tax administrations that raised objections to the review panel's recommendation and by other affected tax administrations (i.e. the determination panel will use a "last best offer" approach to decision-making, choosing from among these alternative responses and will not re-open elements that were already settled

by the review panel and agreed by all affected tax administrations). All affected tax administrations will have the opportunity to view and comment on the questions to be submitted. The format of these questions, and whether they deal with each objection in turn or whether they deal with a number of objections that are linked, will be determined by the review panel on a case-by-case basis. To the extent possible, interactions between questions will be identified and explained by the review panel, as will any consequences of the determination panel's choice of response to one question for other questions put to it. Further work will consider if, where possible, the review panel could also include an indication as to the level of support each objection has, but this should not by itself determine the outcome of a question. As time goes on and experience is gained in framing questions possibly involving a number of different objections and interactions, this process may be revised.

774. Where possible, the determination panel should endeavour to reach agreement on each question by consensus, taking into account the views of all panel members. Where this is not possible, a decision by simple majority on each question may be accepted. Where even simple majority does not provide a clear outcome (e.g. where there are numerous possible answers to a particular question and there is no majority view on the determination panel), the Chair of the determination panel would have an additional vote, to decide between two or more answers which otherwise have equal support. To the extent possible, the determination panel should seek to reach a decision within [six months] following referral from the review panel. The Chair of the determination panel should then prepare a short summary of its conclusions, setting out the key reasons for its decisions, which is made available to affected tax administrations by the lead tax administration.

775. In the event the determination panel confirms an approach that has already been agreed by the MNE group (i.e. the position as filed in its self-assessment return or reflecting changes agreed by the MNE group), this assessment of Amount A is binding on the MNE group's constituent entities and on tax administrations in all Inclusive Framework member jurisdictions. If the determination panel reaches any other conclusion, the lead tax administration will invite the co-ordinating entity of the MNE group to accept the outcomes of this process. If it does, the outcome becomes similarly binding. If, as a result of further work to be conducted, it is agreed that a case will only progress to a determination panel stage if the MNE group commits to being bound by the panel's decision, then the determination panel's conclusions will be binding in all cases.

776. Work will be undertaken to develop a control framework for the determination panel, setting out specific rules for the determination of the Chair and panel members, and procedures for undertaking a review and reaching decisions. This may also include the development of guidance as needed, supported by the secretariat, to promote consistency in the decisions of later determination panels considering similar issues. This guidance may also be made available to tax administrations for use in conducting panel reviews and, where appropriate, to MNE groups for use in preparing an Amount A self-assessment return. This should facilitate reviews being completed more quickly and reduce the need for questions to be referred to a determination panel which concern issues that have been dealt with previously.

#### **9.2.6. Cases where an MNE group does not accept a panel conclusion**

777. If an MNE group does not agree with the recommendations of the review panel (including any adjustments agreed by the panel based on objections raised by other tax administrations) or the conclusions of the determination panel, as appropriate, it may withdraw its request for early certainty (unless the MNE agrees in advance to being bound by the determination panel's decision). The MNE group may then rely on domestic procedures in each jurisdiction.

778. The lead tax administration will inform affected tax administrations not on the panel that the MNE group has withdrawn its request for early certainty. It will also provide these tax administrations with a copy of the review panel's recommendation (if the MNE group did not agree with the review panel's conclusions)

or with a copy of the determination panel's conclusions (if the MNE group did not agree with these conclusions).

779. With respect to cases where an MNE group withdraws its request for tax certainty after a review panel recommendation has been agreed by all affected tax administrations or after a determination panel has completed its review, further discussions will be conducted to consider whether tax administrations should still be bound by panel conclusions. As the MNE group has withdrawn its request for early certainty, it may be appropriate that tax administrations are also not bound by these conclusions. However, given they reflect an approach that has already been reviewed and that would determine and allocate Amount A between jurisdictions consistently while eliminating double tax, there may be a benefit in tax administrations still being bound by panel conclusions, unless a constituent entity in a tax administration's jurisdiction appeals the assessment to a domestic court or a tax administration is required to comply with a court decision that is different. In particular, the consistent implementation of panel outcomes by all affected tax administrations could remove the risk of double taxation and prevent disputes arising at a later point. Where an MNE group withdraws its request for tax certainty at any other point (e.g. before a review panel's recommendation is agreed by affected tax administrations or before questions are submitted to a determination panel), tax administrations are not bound and may conduct their own enquiries. However, even if tax administrations are not bound by panel conclusions, they may take work conducted by the review panel and determination panel (if relevant) into account in conducting these enquiries.

780. It is expected that in the significant majority of cases all constituent entities will accept the position agreed by the co-ordinating entity, which applies Amount A across the MNE group and avoids double taxation. If, in exceptional cases, legal or practical issues mean it was not possible for a particular entity within an MNE group to agree in advance to be bound by decisions of the co-ordinating entity, and the entity does not accept a panel conclusion, the tax certainty provided to other entities in the MNE group may also fall away, even though they have accepted panel outcomes. This will depend upon the circumstances of each case (e.g. if the entity that does not accept the panel conclusion is an Amount A paying entity vs an entity in a market jurisdiction). Further work will be undertaken to understand the extent to which these legal or practical issues may arise in practice and how these can be avoided.

### **9.2.7. Other opportunities to provide greater certainty concerning aspects of Amount A**

#### *Whether an MNE group is within the scope of Amount A*

781. Depending upon the final scope of Amount A agreed by the Inclusive Framework, a number of MNE groups may also seek certainty from tax administrations as to whether they are within or outside of this scope. However, unlike the process described in the rest of this chapter (which could be an annual process for some MNE groups), it is likely that an MNE group would only require certainty that it is within the scope of Amount A once, or periodically following any change to its business, structure, revenues or profitability. A possible approach to provide MNE groups with certainty as to whether they are within the scope of Amount A is described below.

- A specific self-assessment return and documentation package to determine whether an MNE group is within the scope of Amount A could be developed. This would focus on each element of the definition of scope.
- MNE groups that require certainty as to whether they are within scope should make a request early. Ideally this should be before the end of the first fiscal year when the MNE group could be within scope (recognising that any outcome would be dependent on information on revenue and profit levels for that fiscal year, which would not be available until after the year-end), but in all cases an MNE group should seek to make a request for certainty at least six months before the relevant filing deadline for the MNE group's Amount A self-assessment return.

- Where the UPE of the MNE group is resident in a jurisdiction that has introduced Amount A, this request should be submitted to the tax administration in this jurisdiction. Where the UPE jurisdiction has not introduced Amount A, the request may be submitted to any tax administration on a list of potential surrogate lead tax administrations.
- The UPE tax administration should conduct an initial review of the MNE group's self-assessment and the application of each element of the definition of an in-scope MNE group.
- Where the UPE tax administration does not agree with the MNE group's assessment as to whether it is in scope, this should be discussed with the MNE group to understand the different perspectives and see if agreement can be reached. The MNE group may modify its position as a result of this discussion.
- Where the UPE tax administration agrees with the MNE group's assessment as to whether it is within scope (as filed or following discussion with the MNE), the MNE group's self-assessment return as to scope and the associated documentation package should be exchanged with tax administrations in all Inclusive Framework member jurisdictions that have implemented Amount A, together with a recommendation that the MNE group's position be accepted. These items are sent to all member jurisdictions that have implemented Amount A as there is the potential for any jurisdiction to become a relieving jurisdiction or market jurisdiction in the future and the decision as to whether a particular MNE group is in scope should not change as a result of this. In other words, all member jurisdictions with Amount A rules have a potential interest in whether any given MNE group is within scope of Amount A and should be given the opportunity to comment.
- If the MNE group and UPE tax administration continue to disagree as to whether the MNE group is within scope, the MNE group's self-assessment return and documentation package is exchanged with tax administrations in all Inclusive Framework member jurisdictions that have implemented Amount A, together with an explanation as to why the UPE tax administration disagrees with this assessment and a recommendation that the UPE tax administration's position be supported.
- Tax administrations are given [12 weeks] to provide comments or objections to the UPE tax administration's recommendation. Objections should be accompanied by a clear explanation of the specific elements where there is disagreement. It is anticipated that in the significant majority of cases, if rules for the scope of Amount A are clearly articulated, tax administrations should agree with this recommendation. If no objections are received, the UPE tax administration's recommendation is approved and communicated to the MNE group.
- If one or more tax administrations object to the UPE tax administration's recommendation, the UPE jurisdiction should discuss these with the relevant tax administrations and consider whether its recommendation should be changed or if the tax administrations will withdraw their objections. In the event this does not happen, the question as to whether the MNE group is within scope should be referred to a determination panel for a conclusion.
- An MNE group is given certainty subject to a commitment that they will inform their UPE tax administration (or lead tax administration for MNE groups within scope) of any change that impacts this decision. Until such a change occurs, the certainty provided is binding on all Inclusive Framework member tax administrations. This means that:
  - MNE groups that have been given certainty they are in scope should not be denied relief from double taxation in accordance with rules for Amount A; and
  - MNE groups that have been given certainty they are out-of-scope should not be subject to penalties or compliance action as a result of not filing an Amount A self-assessment return.

- Measures will be considered to ensure that an MNE group informs its UPE tax administration (or lead tax administration, as appropriate) in a timely manner. This could include, for example, an annual reporting requirement to confirm whether any changes have occurred, a periodic review by tax administrations, or penalties for late or incomplete notification of changes. Following a change that impacts a decision as to whether an MNE group is within scope, an MNE group may request a new review, which will benefit from work undertaken in the earlier process.

*Whether a jurisdiction is a market jurisdiction of an MNE group*

782. As mentioned above, an MNE group will be required to provide to its lead tax administration a list of all Inclusive Framework member jurisdictions that are market jurisdictions. For these purposes, a market jurisdiction is defined as a jurisdiction in which the MNE group:

- had pro-rata in-scope revenue equal to the threshold for an allocation of Amount A in the most recently ended fiscal year or in any fiscal period ending in the prior 12 months (i.e. in most cases this will mean the most recent fiscal year and the one before that); and
- any “plus factor” described in chapter 3, as appropriate.

783. This approach should ensure that Inclusive Framework member jurisdictions where an MNE group is likely to have in-scope revenue close to the threshold for an allocation of Amount A receive a copy of the MNE group’s Amount A self-assessment return and documentation package. The tax administrations in these jurisdictions can then review these to determine whether the in-scope revenue is above the applicable threshold.

784. An issue remains however, where an MNE group does not include a particular jurisdiction on its list of market jurisdictions in circumstances where the tax administration in that jurisdiction takes the view that it should be a market jurisdiction. A possible approach to address this concern is summarised below.

- An MNE group will be required to provide to its lead tax administration a list of its market jurisdictions, which will be made available to tax administrations in all Inclusive Framework member tax administrations. Therefore, tax administrations that believe they are in a market jurisdiction can review this list and confirm if their jurisdiction is included.
- Where a tax administration sees that its jurisdiction is not included on the list, it may contact the lead tax administration with any evidence it has to support its position that the MNE group has in-scope revenues (and, if applicable, a relevant constituent entity) in its jurisdiction such that it should be included in the list, and request that it be added to the list. The deadline for this request should be no later than [9 months] after the end of the relevant fiscal year, in order that this process may be completed prior to the exchange of the MNE group’s self-assessment return and documentation package with affected tax administrations.
- The lead tax administration will share this information with the co-ordinating entity of the MNE group and invite the co-ordinating entity to update its list of market jurisdictions, or to provide a response to the other tax administration’s comments.
- If the MNE group is willing to include the jurisdiction on its list of market jurisdictions (noting that the jurisdiction will only receive an allocation of Amount A if it has in-scope revenues above the applicable threshold and not simply by reason of being included on the list), this will address the tax administration’s concerns.
- If the MNE group is not willing to include the jurisdiction on its list of market jurisdictions it should provide an explanation as to why this is the case (e.g. provide information on the level of in-scope revenues in that jurisdiction to illustrate they are lower than 75% of the threshold and, if applicable, the nature and activities of constituent entities in the jurisdiction). If the tax administration accepts this explanation it should withdraw its request.

- If the MNE group and the tax administration continue to disagree on this issue, a determination panel may be formed including the tax administration, the lead tax administration and the Chair of the determination panel (or a Chair where there is more than one). This panel will consider information provided by the tax administration and the MNE group and reach a conclusion as to whether the tax administration's jurisdiction should be considered a market jurisdiction. This decision will be reached by majority, so if either the lead tax administration or the Chair supports the tax administration's position, its jurisdiction will be considered a market jurisdiction. It is suggested that the Chair of the determination panel should be included in these discussions even if it is already clear that the lead tax administration supports the tax administration position.
- If the panel supports the tax administration position, the MNE group is informed and the tax administration will be included as an affected tax administration for the purposes of exchanging the MNE group's Amount A self-assessment return and documentation package, as well as for any Amount A early certainty process for the relevant tax year. If the panel supports the MNE group's position, the tax administration will not be included as an affected tax administration for the relevant fiscal year.

*Whether an MNE group's self-assessment of Amount A is correct in the absence of a request for tax certainty*

785. This chapter describes a process to provide early certainty over the operation of Amount A to MNE groups on request. There are also advantages in a process for tax administrations to jointly consider the application of Amount A to a particular MNE group, even if the group has not requested certainty and the outcomes of this review are not binding on it.

- Even where an MNE group does not make a request for early certainty, its Amount A self-assessment return and documentation package will still be filed with its lead tax administration and exchanged with other affected tax administrations.
- The lead tax administration and affected tax administrations could be given the opportunity to propose that a panel review of an MNE group's application of Amount A be undertaken. Affected tax administrations may also express an interest in participating on such a panel.
- Whether or not the lead tax administration proposes the panel, it may agree to co-ordinate a multilateral review of the application of Amount A by any MNE group. Where the lead tax administration is not willing to co-ordinate the panel review, or does not have the resources to do so (e.g. taking into account its commitment to co-ordinate panel reviews where an MNE group has made a request for certainty), another affected tax administration may offer to co-ordinate the review. The lead tax administration may join the panel even if it does not co-ordinate the review, and it is noted that the participation of the lead tax administration (which will often be in the MNE group's UPE jurisdiction) will typically benefit the review process for all tax administrations.
- An MNE group could be informed that the review panel will be constituted and given the opportunity to submit a late request for tax certainty. This would benefit tax administrations as the MNE group would then be engaged in the process, which should aid the review. It would also benefit the MNE group, as it would obtain tax certainty as a result.
- The review panel would be conducted largely consistent with the process described in this chapter. An MNE group should provide information requested for use by a panel even if it does not choose to make a request for early certainty.
- At the end of the panel review, the panel's recommendation that the MNE group's self-assessment (or elements of its self-assessment) are acceptable, and any changes that it



proposes, are shared with affected tax administrations for their comments and agreement. Any comments from affected tax administrations may be taken into account by the panel.

- Where tax administrations are unable to reach agreement, the review panel could in principle refer questions to a determination panel for a conclusive answer. As this could prove useful in specific situations it is suggested that this possibility is left open, but it is expected that, unless an MNE group has agreed to submit a late request for tax certainty, affected tax administrations will typically not wish to take this step if, in any case, the end result is not binding.
- Where an MNE group agrees to submit a late request for tax certainty, the potential outcomes are as described earlier in this chapter. Where an MNE group does not submit such a request, there are a number of potential outcomes from this process:
  - Where tax administrations agree that all or parts of an MNE group's self-assessment are acceptable, may not be binding on them, but could be agreed and implemented by each tax administration within their domestic framework without undertaking significant further work, minimising duplication of work across affected tax administrations. Alternatively, it could be agreed that, if tax administrations agree that an MNE's self-assessment of Amount A is acceptable, this should be binding on tax administrations even where an MNE has not requested certainty, unless a constituent entity in a tax administration's jurisdiction appeals the assessment to a domestic court or a tax administration is required to comply with a court decision that is different.
  - Where tax administrations agree that changes should be made to an MNE group's self-assessment, these could be proposed to the MNE group. The MNE group may be willing to accept these changes to avoid double taxation that could arise if changes were proposed unilaterally by tax administrations in some jurisdictions.
  - Where tax administrations do not reach agreement or wish to undertake their own review they are free to do so, but their future enquiries may benefit from work undertaken by the panel.

*Whether an MNE group can seek dispute resolution in cases where it did not submit a request for early certainty*

786. Connected with the previous issue, there may be cases where an MNE group does not make a request for tax certainty and subsequently is subject to tax adjustments with respect to its self-assessment of Amount A in one or more jurisdictions. In these cases, an MNE group may seek to address this through domestic processes, or may seek to rely on MAP if available. However, given the likely complexity of a MAP involving potentially all jurisdictions where an MNE group has constituent entities or a market, it may be preferable from a tax administration perspective to rely on a panel process.

787. To recognise the resource commitment of tax administrations to the panel process and encourage MNE groups to seek early certainty, later requests for tax certainty could be subject to the agreement of affected tax administrations. In other words, complete requests for early certainty should always be accepted, whereas there may be cases where a late request for certainty is not accepted, and an MNE group that did not request early certainty is required to rely on domestic remedies to deal with any disputes that arise. However, it is anticipated that, in the majority of cases, a request would be accepted and further work will be undertaken to explore how MNE groups can be encouraged to seek early certainty. For these cases, work will be undertaken to consider how the experience and positions of tax administrations that have already undertaken enquiries domestically may be taken into account (e.g. by participation on a review panel, or by providing the results of their enquiries to the review panel).



### 9.2.8. *Transfer pricing and other adjustments in subsequent years*

788. The process for providing early tax certainty described in this section includes identification of an MNE group's relieving jurisdictions (i.e. those where double tax relief will be provided to compensate for Amount A allocated to market jurisdictions). The process to determine these jurisdictions under Pillar One will be based wholly or in part on the level of profit attributed to each jurisdiction under the ALP.

789. As mentioned above, a request for certainty with respect to Amount A does not prevent tax administrations from commencing compliance activity with respect to an MNE group's other tax matters, including transfer pricing issues. There is therefore a risk that any material transfer pricing adjustments made after an MNE group has been provided with early certainty with respect to Amount A could require the identification of relieving jurisdictions, and the amount of relief they should give, to be re-considered.

790. Until the design of Amount A is agreed, it is not possible to fully finalise an approach to address this issue. One option to reduce (though not remove) this risk could be if an MNE group is able to request a co-ordinated risk assessment of its transfer pricing and permanent establishments in key jurisdictions under the ICAP. This would allow an MNE group to help identify the jurisdictions where it is most likely to be subject to a transfer pricing adjustment, taking into account the nature of its activities and previous experience. Work will progress on other solutions to address this issue, which will also link to tax certainty beyond Amount A.

## 9.3. **Dispute prevention and resolution beyond Amount A**

791. As noted above, Inclusive Framework members continue to have different views on the scope and nature of new approaches to provide greater certainty beyond Amount A, and in particular the application of a new mandatory and binding dispute resolution mechanism to these issues. To help bridge those differences this Blueprint uses an approach that is built around four elements, which are described in more detail below. Discussions of the scope of mandatory and binding dispute resolution beyond Amount A will continue in the Inclusive Framework, with a view to achieving a balance that provides greater certainty to MNE groups where it is needed most while recognising the concerns, challenges and constraints of a number of members.

792. Work on tax certainty beyond Amount A has not, however, focused solely on mandatory and binding dispute resolution. The approach to tax certainty beyond Amount A comprises a number of main steps – from dispute prevention (Step 1) and the existing MAP (Step 2) to mandatory binding dispute resolution (Step 3). While ongoing work to improve and enhance dispute prevention tools and the MAP has already been important separate from work on the tax challenges of the digitalisation of the economy, that ongoing work has gained further momentum in light of the fundamental importance of tax certainty as an element of Pillar One. This part of the chapter describes these four steps and how a novel dispute resolution mechanism would apply to different categories of disputes and jurisdictions.

### 9.3.1. *Step 1: Improvements to dispute prevention processes*

793. The most effective approach to dealing with tax disputes is to prevent them from arising in the first place. This section considers a number of enhancements and improvements to existing dispute prevention tools, including existing projects undertaken as part of the FTA tax certainty agenda. These would sit alongside and complement new dispute resolution mechanisms.

- **ICAP.** The ICAP is a voluntary programme for a co-ordinated risk assessment of potentially all of an MNE group's transfer pricing and permanent establishment risk by tax administrations in a number of jurisdictions where the MNE group has activity, including its headquarter jurisdiction. ICAP does not provide an MNE with legal certainty as may be achieved, for

example, through an advance pricing arrangement (APA), but does give comfort and assurance where tax administrations participating in an MNE's risk assessment consider a covered risk to be low. Where an area is identified as needing further attention, this may be addressed through a defined "issue resolution" process within the programme or, if needed, work conducted in ICAP can improve the efficiency of actions taken outside the programme. First launched in 2018, ICAP is currently in a second pilot including tax administrations from 19 jurisdictions. Following the conclusion of this pilot, the programme could be widened to include more tax administrations and MNEs. This could be particularly beneficial to MNE groups within the scope of Amount A, given the possible interactions between an MNE group's transfer pricing and permanent establishment issues and Amount A (see below). A multilateral ICAP-like mechanism could also be used to facilitate greater certainty and a more consistent outcome as to whether an MNE group's activities in a number of jurisdictions represent baseline marketing and distribution functions (and so are within the scope of Amount B) or go beyond this.

- **Joint audits.** Early co-ordinated intervention in the form of a joint audit may be more effective than having several tax administrations each perform their own transfer pricing audits of an MNE group, with the resulting potential for inconsistent positions and disagreements between tax administrations. Work is currently being done within the FTA to support greater use of joint audits and this could be a useful addition to support tax certainty for MNE groups within the scope of Amount A, again given the possible interactions between transfer pricing disputes and Amount A.
- **Improved processes for bilateral and multilateral APAs.** Multilaterally co-ordinated risk assessment and assurance (through ICAP) could be coupled with enhanced bilateral and multilateral APAs to provide advance certainty and avoid potential transfer pricing disputes. Work on bilateral and multilateral APA processes is currently being undertaken by the two FTA Focus Groups (on Improving the APA Process and on Multilateral MAP and APAs).<sup>5</sup>
- **Use of standardised benchmarks in common transfer pricing situations.** The use of standardised benchmarks in common transfer pricing situations between jurisdictions has the potential to improve tax certainty for MNE groups in a number of ways, either for dispute prevention (where benchmarks used at the risk assessment or audit stages allow MNE groups to be de-selected from further enquiries) or for dispute resolution (to resolve MAP cases more quickly). The FTA is currently undertaking work to explore how this work can be supported in key areas that give rise to the greatest tax uncertainty and MAP.
- **Time limits to make transfer pricing and permanent establishment adjustments.** The January 2020 *Outline* provided that Inclusive Framework members could explore limiting the time during which any adjustments with respect to transfer pricing issues could be made. The Inclusive Framework is currently exploring such limits and their scope, as well as the conditions under which they could apply.
- **Suspension of tax collection.** The *Outline* also provided that jurisdictions could explore the limitation or suspension of tax collection for the duration of any disputes. Further work would be required to define and agree the conditions under which such a suspension would be available. As recognised in the Report on Action 14, the requirement to pay tax for MAP access may create significant financial difficulties for taxpayers. Such a requirement may also make it more difficult for a competent authority to enter into good faith MAP discussions in circumstances where that competent authority could likely have to refund taxes already collected as a result of any compromise reached through the MAP. The proposals to strengthen the Action 14 minimum standard being considered in the context of the 2020 review of the standard include a proposal under which it would be explored whether it could be possible to suspend tax collection for the duration of the MAP process under the same

conditions as are applicable under domestic rules. Work on suspension of collection on this basis will thus be continued as part of the 2020 review.

### **9.3.2. Step 2: Improvements to the MAP**

794. Although enhancements and improvements to the existing dispute prevention framework should reduce the number of disputes, bilateral and multilateral MAPs will continue to be necessary to resolve the disputes that do arise. The ongoing implementation and peer review of the Action 14 minimum standard will contribute to the continual strengthening of existing MAP infrastructure and processes.

795. The 2020 review of Action 14 will also provide a vehicle to advance the broader tax certainty agenda through the consideration of additional options to enhance the robustness and effectiveness of the MAP. In particular, in the context of the 2020 review, the FTA MAP Forum and Working Party 1 are exploring the addition of a number of proposed elements to the Action 14 minimum standard, including the following:

- Introduce the obligation to establish a bilateral APA programme for jurisdictions with more than 10 transfer pricing MAP cases per annum over the past three years.
- Introduce the obligation to roll-out the Global Awareness Training Module or a similar training programme.
- Provide criteria for determining whether access to MAP should be given as well as to define what information taxpayers (as a minimum) should include in their MAP requests. Jurisdictions should reflect both items in their MAP guidance.
- Introduce the obligation that tax collection is suspended during the period a MAP case is pending, under the same conditions as are available to taxpayers under domestic rules.
- Jurisdictions should ensure that penalties/interest charges are aligned in proportion to the outcomes of the MAP process.
- Jurisdictions should ensure that all MAP agreements can be implemented notwithstanding the expiration of domestic time limits.
- Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayers which are within the time period provided for in the tax treaty for the multiyear resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

796. The implementation of a mandatory and binding dispute resolution mechanism beyond Amount A should itself contribute to more effective MAP processes. While the effects of mandatory and binding dispute resolution mechanisms such as MAP arbitration may be difficult to separate from the effects of other initiatives to improve competent authority operations, experience has generally shown that the adoption of mandatory and binding dispute resolution mechanisms has contributed to more constructive competent authority collaboration, with the result that competent authorities are generally able to reach agreement within a timeframe that avoids triggering those mechanisms. A mandatory and binding dispute resolution mechanism beyond Amount A should reasonably be expected to produce a similar effect – that is, the broader dispute resolution mechanism should be expected to provide competent authorities with strong incentives to bridge their differences to reach agreement and should accordingly be triggered only exceptionally.

797. The options explored will include broader support for low-capacity jurisdictions' MAP programmes through the ongoing work of the FTA MAP Forum. Such support could include an adapted form of the Tax Inspectors Without Borders (TIWB) programme to provide technical assistance to these jurisdictions'

competent authorities as well as training and other capacity building activities delivered through the Inclusive Framework and other international organisations such as the United Nations.

798. Work to improve the MAP as it relates to issues beyond Amount A will be carried out within the overall framework of the continuing relevant work streams of the FTA MAP Forum, given that body's broad mandate to work collectively to improve the effectiveness of the MAP to meet the needs of both governments and taxpayers in the global tax environment.

### 9.3.3. Step 3: A binding dispute resolution mechanism beyond Amount A

#### *The scope of dispute prevention and resolution beyond Amount A*

799. As already noted, there remain differences in the views of Inclusive Framework members as to the extent to which Pillar One should incorporate new tax certainty approaches beyond Amount A. Some strongly support a mandatory binding dispute resolution mechanism with broad application, while others consider that disputes unrelated to Amount A should be resolved through the existing MAP framework and non-binding administrative tools.

800. To bridge these different views on the scope of dispute prevention and resolution beyond Amount A, the Blueprint explores the following approach based around four elements:

- **In-scope taxpayers.** For MNE groups with global revenue and foreign in-scope revenue above the relevant Amount A thresholds, the approach contemplates a new and innovative mandatory and binding resolution process for all disputes related to transfer pricing and permanent establishment adjustments to any of their constituent entities. This is designed as a last resort and would follow the exhaustion of all other dispute prevention and resolution tools, which would be expanded and improved including as part of the 2020 review of BEPS Action 14. The process would cover adjustments related to in-scope activities, but also extend to other (out-of-scope) activities of MNEs that are subject to the new taxing right, possibly subject to a materiality condition. The new process would not apply where disputes are already covered by existing mandatory and binding dispute resolution mechanisms, which would continue to apply.
  - This approach to in-scope taxpayers is motivated principally by the potential impacts of transfer pricing and permanent establishment disputes on Amount A. Although Amount A's approach to allocating part of an MNE group's residual profits to market jurisdictions does not use traditional transfer pricing techniques, disputed transfer pricing adjustments may have effects on the application of Amount A, in particular when identifying paying entities and determining the amount of double tax relief available in relieving jurisdictions. In addition, depending upon the final design of the rules, questions as to whether or not there is a permanent establishment in a jurisdiction may be relevant in determining if there is nexus in that jurisdiction. As such, while the approach described earlier in this chapter will provide MNE groups with certainty regarding their assessment of Amount A, this certainty could be undermined if a subsequent transfer pricing or permanent establishment dispute means that the underlying assumptions upon which Amount A is based for a particular fiscal year are changed.
  - This approach to in-scope MNE groups also recognises that they will be required to implement new processes and controls to comply with innovative new rules, and to engage with new approaches to demonstrate their compliance. This implies a burden for in-scope MNE groups that is on top of any additional tax paid to market jurisdictions that cannot be relieved against existing taxes (e.g. because of differences in tax rates between market jurisdictions and relieving jurisdictions). Broader certainty beyond Amount A could be viewed as a possible *quid pro quo* for these MNE groups. If rules for Amount A are to be phased in, this could also imply a phased approach to the introduction of new tax certainty rules in step with the rules for

Amount A, giving jurisdictions time to gain experience before potentially applying them more widely in the future.

- **Other taxpayers.** All other taxpayers would benefit from improvements to the MAP and other existing dispute prevention and resolution tools. For these taxpayers, the Inclusive Framework will also examine new and innovative dispute resolution mechanisms for material transfer pricing and permanent establishment-related disputes that competent authorities are unable to resolve in a timely manner through the MAP. In this regard, the next steps of this work will explore the benefits of two approaches: a mandatory and binding dispute resolution process; and a mandatory but non-binding (advisory) dispute resolution process coupled with aspects of peer review and statistical reporting. A mandatory and non-binding mechanism could increase some jurisdictions' familiarity and comfort with the processes involved and, together with a complementary review and reporting framework, would monitor progress in resolving both the disputes that are submitted to the mandatory non-binding process and those that are not.
- **Amount B.** A key purpose of Amount B is to prevent transfer pricing disputes regarding baseline marketing and distribution activities through the use of agreed standardised returns to objectively defined activities, supported by quantitative indicators. Any disputes related to the application of Amount B (for example, whether a taxpayer falls within the definition of "baseline marketing and distribution activities"), which create risks of double taxation, would also be subject to mandatory binding dispute resolution, as a last resort and following the exhaustion of all other dispute prevention and resolution tools. Mandatory binding dispute resolution is needed to protect the benefits of Amount B, which will be undermined if certainty is limited to the remuneration of baseline activities and there are unresolved disputes as to whether or not particular arrangements or structures are within the scope of Amount B.
- **Developing economies with no or low levels of MAP disputes.** In the course of the Action 14 peer review, more than 50 developing economies were identified that had no or only a very small number of MAP cases in inventory. Given these jurisdictions' lack of MAP experience, the limited capacity of their competent authorities and the circumstance that other jurisdictions did not identify areas of these jurisdictions' MAP regimes that required improvements, the peer review of these jurisdictions was deferred. For these developing economies, their small or non-existent MAP inventories would not justify the creation of the infrastructure for mandatory binding dispute resolution for issues not related to Amount A. Requiring these jurisdictions to commit to and implement a potentially complex dispute resolution process to address a situation that currently does not appear to present a material risk could be considered disproportionate:
  - These jurisdictions would, however, commit to an elective binding dispute resolution mechanism that would be triggered when their competent authorities were unable to resolve a MAP case within an agreed defined period. The mechanism would reflect the features of the mandatory binding mechanism developed for disputes beyond Amount A but would be triggered only where both competent authorities agreed that the mechanism should be used to resolve unresolved issues in a specific case. The mechanism would increase these jurisdictions' familiarity and comfort with the processes involved.
  - In determining appropriate levels of MAP inventory to be included in this category of jurisdictions, reference would be made to the principles of the Action 14 peer review process (in particular the criteria for deferral of a jurisdiction's peer review), which considers the number of MAP cases in inventory as well as access limitations that may have prevented cases from entering the MAP process and appearing in inventory.
- The mechanisms described above could be coupled with a peer review and reporting framework to monitor the effectiveness of all elements of the new dispute prevention and resolution mechanisms.



*The mandatory and binding dispute resolution mechanism for disputes beyond Amount A*

801. The new and innovative dispute resolution mechanism would apply for those MAP cases that remain unresolved after an agreed period and within the context developed above. It is recognised that the exploration of a mandatory binding dispute resolution mechanism represents a significant step for a number of Inclusive Framework jurisdictions that have historically opposed their use to resolve tax matters. Some Inclusive Framework jurisdictions take the view that the new and innovative dispute resolution mechanism should be separate and distinct from the mechanism and framework to provide tax certainty with respect to Amount A and, in particular, reflect the primarily bilateral nature of most MAP cases.

802. The mechanism for disputes beyond Amount A itself would operate in a broadly similar manner regardless of whether it was mandatory and binding, mandatory and non-binding, or elective and binding.<sup>6</sup> The mechanism would become part of the existing MAP infrastructure and, in general terms, would have the following features:

- As now, taxpayers would set in motion the MAP with respect to transfer pricing and profit allocation disputes through a request for competent authority assistance within the deadline established by the MAP article of the applicable tax treaty. The ongoing peer review of the Action 14 Minimum Standard will ensure that taxpayers have access to MAP in all appropriate cases.
- The dispute resolution mechanism would then be triggered if the competent authorities were unable to reach an agreement to resolve a MAP case after a defined period. The Inclusive Framework would agree on the defined period after which the dispute resolution mechanism would be triggered. In such cases, only the issue or issues that competent authorities were unable to resolve by mutual agreement would be submitted to a panel of experts (a determination panel) who would reach a decision.
- There is agreement that existing mandatory binding dispute resolution mechanisms (such as MAP arbitration provisions in bilateral treaties or the EU tax dispute resolution directive) should apply by default and that a new dispute resolution mechanism should only apply in the absence of an existing mandatory binding dispute resolution mechanism, or where treaty partners expressly agreed that the new mechanism should take priority over an existing mechanism. Ongoing technical work is addressing the relationship between the determination panel and existing mandatory binding dispute resolution mechanisms, including related implementation issues (which may be different depending on whether the relevant mechanism is provided for by a tax treaty or some other legal instrument such as EU law).
- Discussions are ongoing regarding the constitution of the determination panel. Different considerations will apply in the selection of members of a panel that resolves primarily bilateral transfer pricing disputes, as compared with the determination panel described above that would resolve disputes related to Amount A with potential effects in dozens of market and/or relieving jurisdictions. Parties to a bilateral dispute (or a multilateral dispute involving a small number of jurisdictions) will generally not accept a process in which they are not permitted to name at least one member of the determination panel. The development and design of the determination panel is thus exploring how the jurisdictions involved in a MAP case should be represented on a determination panel. Work to design a framework for the constitution of the determination panel is addressing issues that include:
  - Whether some or all members of the determination panel should be serving tax officials, recognising the importance of impartiality and independence to robust decision-making by the panel.
  - Whether members of the determination panel could be chosen from a sitting pool of potential members agreed by the jurisdictions involved in the MAP case, as well as how the determination panel could be selected from such a pool (for example, at

- random, based on objective criteria or based on nominations by the jurisdictions involved).
  - The number of members on a determination panel, which should reflect the decision-making process used by the panel (for example, a determination panel that made decision by majority should have an odd number of members). The size of a determination panel should also seek an appropriate balance between representation, effectiveness and resource and administrative burdens associated with the panel.
  - Clear agreed deadlines for competent authority designation of determination panel members, including robust default rules to ensure that members of a determination panel are designated in the absence of competent authority action within the agreed deadline.
- The determination panel would resolve the specific issue or issues that prevented a competent authority agreement to resolve the MAP case. Two main issues are being addressed in the ongoing technical work regarding the decision-making process used by the determination panel:
  - First, how the panel would make its decisions. While most Inclusive Framework members prefer decision-making by majority, the work is exploring other possible decision-making models (such as consensus or consensus-minus-one decision-making). This work will develop agreed default rules to deliver an outcome in circumstances in which the determination panel would be deadlocked or otherwise unable to decide. The work will also explore models that, where necessary, would be suited for multi-jurisdiction disputes with multiple possible outcomes (such as a transfer pricing dispute involving an integrated series of transactions between associated enterprises in three jurisdictions); such models could include a voting system in which determination panel members ranked possible outcomes.
  - Second, the authority of the determination panel to decide. A majority of Inclusive Framework members favour a last-best offer approach in which the determination panel chooses between alternative outcomes submitted by the jurisdictions involved in the MAP case as the default rule, unless the competent authorities agree that a different approach should be used. Work is exploring a number of subsidiary issues, which include how to accommodate some jurisdictions' preference for independent opinion decision-making and whether the determination panel should provide a rationale for its decisions.
- Work on the determination panel process will also establish clear agreed deadlines for the determination panel to deliver its decision, including robust default rules to deliver an outcome in circumstances in which the determination panel fails to reach a decision within the agreed deadline.
- The decision of the panel would generally be binding on the competent authorities (including in circumstances where the proposed elective dispute resolution mechanism applicable to developing economies has been triggered). Where the panel process was binding, its outcomes would be implemented through a competent authority mutual agreement in the same way as any other resolution through the MAP. As noted above, the work is also exploring the benefits of a mandatory non-binding (advisory) dispute resolution mechanism for taxpayers outside the scope of Amount A.
- A mandatory non-binding dispute resolution mechanism would be coupled with statistical reporting on the results of this process to provide information on whether the panel opinion was followed and/or whether double taxation was otherwise addressed. The effectiveness of this mechanism could then also be subject to peer review.



- It is contemplated that the determination panel process would interact with domestic remedies under the same general principles that apply in any other MAP case resolved by competent authorities through a mutual agreement, according to which:
  - In many jurisdictions, a taxpayer cannot pursue simultaneously the MAP and domestic legal remedies. Where domestic legal remedies are still available, competent authorities in these jurisdictions will generally either require that the taxpayer agree to suspend these other remedies or, if the taxpayer does not agree, will delay the MAP until these remedies are exhausted. For jurisdictions that have adopted MAP arbitration, however, that form of mandatory binding dispute resolution is not available if a decision on the relevant issues has been rendered by a court or administrative tribunal of either jurisdiction.
  - Where the MAP is first pursued and a competent authority agreement has been reached, the taxpayer and other persons directly affected by the case are offered the possibility to reject the agreement and pursue any domestic remedies that had been suspended. Conversely, if these persons prefer to have the agreement apply, they will have to renounce the exercise of domestic legal remedies as regards the issues covered by the competent authority agreement.
  - Where the domestic legal remedies are first pursued and are exhausted in a jurisdiction, a number of Inclusive Framework members will only allow a taxpayer to pursue the MAP to obtain relief of double taxation in the other jurisdiction. Once a legal decision has been rendered in a particular case, most members would not override that decision through the MAP and would therefore restrict the subsequent application of the MAP to trying to obtain relief in the other jurisdiction. Mandatory binding dispute resolution would thus not be available as part of the MAP process in these circumstances.
- Ongoing work is exploring how a binding outcome can be achieved, with some Inclusive Framework members favouring the creation of a legal obligation on competent authorities to implement the determination through a mutual agreement (in the international law instrument used to adopt the new dispute resolution mechanism).

## 9.4. Next steps

803. As a next step, further work will be undertaken to finalise the different technical features of the tax certainty process for Amount A, including how to implement a binding outcome in jurisdictions, as well as to consider any other issues where further practical guidance on the Amount A tax certainty process is needed for implementation.

804. A decision on the scope of application of a new mandatory and binding dispute resolution mechanism beyond Amount A will be necessary to progress technical work on that mechanism and its implementation.

## Notes

<sup>1</sup> See the Final Communiqué of the G20 Finance Ministers & Central Bank Governors Meeting, 22-23 February 2020, Riyadh, Saudi Arabia (available at: <https://g20.org/en/g20/Documents/Communique%CC%81%20Final%2022-23%20February%202020.pdf>).

<sup>2</sup> Throughout this chapter, draft timeframes have been included as estimates of how long each stage of the process is likely to take. However, these are currently included in square brackets and will be revised as work progresses. In any case, any process is likely to take longer in the first years of operation until experience is gained and efficiencies are identified. However, it is useful to have some measure of how long the process is expected to take and to retain reasonably challenging target timeframes where appropriate, recognising that in some cases more time will be needed. Based on the approach in this Blueprint, a simple case where no panel review is needed could be completed in as little as [6-9 months] following the filing of an MNE group's Amount A self-assessment return, whereas a complex case could take [two years] from the establishment of a review panel to a final decision by a determination panel. It is likely that that complex cases with longer timeframes should reduce over time as processes become more efficient and both MNE groups and tax administrations gain experience in applying rules consistently year on year.

<sup>3</sup> Inclusive Framework members will consider whether these information exchange mechanisms will need to take into account the information needs of sub-national jurisdictions that levy taxes on corporate income.

<sup>4</sup> In all cases, work undertaken by a secretariat in supporting a tax certainty process for Amount A will only be where appropriate and will respect strict tax confidentiality.

<sup>5</sup> This work includes the exploration of a possible APA-equivalent for non-transfer pricing issues.

<sup>6</sup> See paragraph 801 for a description of how the mechanism would apply to different categories of disputes and jurisdictions.



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