

10 Implementation and administration

10.1. Overview

805. The development of the implementation framework for Pillar One is at an earlier stage than other work streams. This is because the Inclusive Framework focus has been on the design and development of the key operational components of Pillar One, including: scope, revenue sourcing, nexus, tax base, elimination of double taxation and tax certainty. Implementation design is dependent on decision points in these areas and with the progress now made in these work streams, a focus of the coming months of the project is to ensure that Pillar One can be implemented swiftly, effectively, consistently and in a coordinated manner.

806. The implementation of Pillar One will require action across three different dimensions: (i) domestic law; (ii) public international law; and (iii) guidance to supplement (i) or (ii) or both.

807. It is expected that any consensus-based agreement under Pillar One must include a commitment by members of the Inclusive Framework to implement this agreement and at the same time to remove relevant unilateral actions.

808. The implementation of Amount B is covered in Chapter 8

10.2. Implementation

10.2.1. Domestic law implementation

809. The operative sections of Pillar One will need to be translated into domestic law. Although the particular form of domestic law implementation required will depend on the legal framework and the particular circumstances of each jurisdiction, domestic legislation would need to achieve the following four outcomes:

- Create a domestic taxing right consistent with the design of Amount A. This would require rules that implement the following essential elements of a taxing right: the identification of the taxpayer, object of taxation, the tax base, the tax period, and the tax rates (see (i) below);
- Provide for the relief of double taxation where a resident entity is identified as a taxpayer under the preceding section. This would authorise the elimination of double taxation and specify the method to be used (see (ii) below);
- Incorporate procedures for administering the new taxing right as well as relief from double taxation for those resident entities identified as taxpayers under the new taxing right, including measures facilitating the centralised and simplified administration system and the tax certainty process in respect of Amount A (see (iii) below); and

- Include processes to improve tax certainty beyond Amount A, notably by providing for effective dispute prevention and resolution mechanisms (see (iv) below).

(i) Determination of the essential elements of a new Amount A tax

810. A jurisdiction will first need to transpose into its domestic law the rules agreed by the Inclusive Framework that are to be applied to determine when an MNE group is subject to tax in that jurisdiction on the basis of Amount A. Without the creation of a domestic taxing right for Amount A, the jurisdiction would have no authority to impose tax on Amount A.

811. The essential elements of a new taxing right are:

- *The identification of the taxpayer and the object of taxation:* the new taxing right will be imposed on “paying entities” that are a member of an MNE group that exceeds the threshold limitations, has domestic source in-scope revenue and meets the nexus requirements (see Chapter 2 Chapter 3 Chapter 4. For the identification of the paying entity see section 7.2).
- *The tax base, the tax period, and the tax rates.* A jurisdiction will also need to incorporate into its domestic law the rules governing the calculation and allocation of Amount A (see Chapter 5 on tax base determination, and Chapter 6 on profit allocation). Determinations on the tax period and the tax rate would follow applicable domestic rules.

(ii) Elimination of double taxation

812. Jurisdictions will also need to include in their domestic law the agreed rules on the elimination of double taxation. This is to ensure that the entities that are subject to the new taxing right can benefit from the Amount A mechanisms to eliminate double taxation.

813. This will require the implementation of the rules or principles on approaches to identifying the group entities that will pay tax on Amount A (the paying entities), and the method(s) that will be applied to eliminate double taxation arising from the payment of Amount A for those entities (see Chapter 7).

(iii) Procedure, administration and Amount A related tax-certainty processes

Procedure and administration:

814. It is also essential to implement procedures to administer, levy and collect the new Amount A tax in domestic law administrative rules.

815. The simplified administration process that is currently being developed could be based on, and be explored in parallel to, the centralised and simplified tax certainty process that is discussed in Chapter 9. It would be designed to centralise the computation of Amount A and related compliance activities in a single entity, possibly the UPE as required for CbCR under BEPS Action 13. Centralising the process of applying Amount A through a single entity should generate a material reduction in compliance costs. It could also reduce the burden this process would create for tax administrations, which would be provided with a single coherent Amount A tax return, a standardised documentation package and possibly a single Amount A payment from each MNE group. Provisions may be needed within the planned multilateral instrument and/or domestic law to allow this more centralised process (e.g. to allow a domestic tax liability to be satisfied by a single tax payment made by a non-resident entity in another jurisdiction).

816. There are a variety of different elements that could be considered as part of a simplified administration process. These include allowing a single entity to:

- Compute Amount A on behalf of the group and file tax returns on behalf of the paying entities (including the reporting of losses);

- Manage the Amount A tax certainty process on behalf of the group, including by accepting any adjustments proposed;
- Pay the Amount A tax liability in the market jurisdictions on behalf of the paying entities (acting as an agent); and
- Assume primary liability for compliance with all aspects of Amount A in the market jurisdictions, including being the primary entity against which these jurisdictions could seek legal redress.

Amount A tax certainty process:

817. On dispute prevention and resolution for Amount A, the administrable and binding dispute prevention process will provide early certainty, before tax adjustments are made, to prevent disputes related to all aspects of Amount A. Chapter 9 provides further information on related tax certainty process.

818. Although the innovative approach is developed within a multilateral framework, jurisdictions will need to incorporate into their domestic law all necessary references to the new tax certainty process for Amount A, including the implementation of the panel decision and other procedural aspects.

(iv) Other tax-certainty processes beyond Amount A

819. The approach to tax certainty beyond Amount A spans a range of steps from dispute prevention and the existing MAP to a mandatory binding dispute resolution mechanism.

820. To benefit from the enhancements and improvements to existing dispute prevention tools, which include projects undertaken as part of the Forum on Tax Administration tax certainty agenda, jurisdictions will need to ensure that their domestic law allows for their use.

821. Similarly, features of the MAP and the new dispute resolution mechanism may need to be reflected in domestic law. As for the new dispute resolution mechanism, the domestic law would need to provide for the possibility of submitting cases to a panel of experts that would reach decisions that could be binding.

10.2.2. Public international law implementation

822. Existing tax treaties contain provisions that would generally prevent the application of Amount A, even after it has been implemented in domestic legislation. Furthermore they are unlikely to contain rules on relief of double taxation that would work for Amount A. Nor do they include rules governing the administration of Amount A, including the new rules on dispute prevention and resolution.

823. The best way to remove treaty obstacles to the implementation of Pillar One and to do so in a way that ensures consistency and certainty in the application and operation of Amount A is to develop a new multilateral convention. The multilateral convention would remove existing barriers in tax treaties to the application of Amount A and would also contain the four elements discussed in the previous section.

A. The removal of treaty barriers for the determination of a new Amount A tax

824. Even if a jurisdiction transposes into its domestic law the rules that will govern Amount A – e.g. the rule that gives a market jurisdiction the right to tax a portion of an MNE's profits in the absence of traditional physical presence – existing bilateral treaties are likely to prevent the application of those rules. That is because, for example, most existing treaties permit a market jurisdiction to tax the profits of a non-resident entity only if it has a permanent establishment in that jurisdiction. Changes to bilateral treaties are therefore necessary to allow the Amount A rules to operate as intended.

825. The implementation of rules for the determination of Amount A in an international public law instrument on tax would only strictly be necessary for those jurisdictions that have these restrictive bilateral tax treaties in force; where there is no treaty, the rules could, at least in theory, be implemented purely

under domestic legislation. However, in order to ensure consistent coherent implementation of Amount A among jurisdictions, it is recommended to include in the multilateral convention implementation rules for the determination of all aspects of Amount A for all jurisdictions irrespective of tax treaties. In other words, the multilateral convention should apply to limit the right to tax to the agreed parameters on scope, nexus, thresholds, etc., including the rules on dispute prevention and resolution for Amount A, and represent a commitment to provide double tax relief in accordance with the agreed framework.

826. However, the section of the multilateral convention that will include the rules on the determination of Amount A tax would still be relevant for those jurisdictions because it would serve as a reference for the application of the section of the convention on dispute prevention and resolution for Amount A.

827. It will therefore be necessary to implement through the multilateral convention all the essential elements of a new taxing right (the rules on the identification of the taxpayer and the object of taxation and those on the tax base, the tax period, the tax rates, etc.) consistent with the design of Amount A and domestic legislation.

828. As bilateral tax treaties would remain in force and continue to govern cross-border taxation outside Amount A, the new multilateral convention would coexist with the existing tax treaty network. But its provisions would generally supersede provisions in existing bilateral tax treaties where there was a conflict.

829. Unlike the MLI, the multilateral convention would not seek to modify the wording of existing treaty provisions (e.g. the new nexus rule would not change the existing permanent establishment definition in a particular tax treaty). Instead, new standalone treaty provisions would be developed to govern the new taxing rights and those would prevail for the taxation of in-scope MNEs.

B. Elimination of double taxation

830. Changes to the present rules on the elimination of double taxation that will operate for Amount A will be necessary. These rules will provide for the relief of double taxation where a resident entity is identified as the paying entity for the purposes of Amount A. The rules could also specify the method to be used – e.g. exemption or credit.

831. In contrast to the rules on the determination of Amount A itself, however, implementing rules on the elimination of double taxation in an international public law instrument may not be necessary as most jurisdictions could, in principle rely on their domestic legislation (amended as necessary) to eliminate double taxation¹. However, domestic foreign tax credit regimes tend to have limitations that can sometimes result in unrelieved double taxation (for example, if the income taxed in the market jurisdiction is regarded as domestically sourced income in the relieving jurisdiction). There should not be different domestic sourcing rules that would lead to unrelieved double tax on Amount A. Therefore, it would be preferable to include in the multilateral convention those rules which would be relevant for all jurisdictions, regardless of the existence of bilateral tax treaties. This would ensure that relief from double taxation is effective and coordinated among jurisdictions. Including such a section would also ensure the effective operation of the dispute prevention and resolution processes for Amount A.

C. Procedure, administration and Amount A related tax-certainty processes

832. It will be essential to implement the new simplified administration process and the processes for dispute prevention and resolution for Amount A in the multilateral convention to ensure consistency and certainty on Amount A.

833. Unlike the sections of the multilateral convention on the determination of Amount A and the elimination of double taxation, the section on procedure, administration and the tax certainty processes would be relevant for all parties to the convention, whether or not they have an existing treaty between them. Existing bilateral tax treaties would not prevent the application of these procedures, administrative and tax certainty provisions and so the multilateral convention would not need to supersede them. For

provisions relating to the new dispute resolution mechanism beyond Amount A, it is envisaged that they would apply only in the absence of an existing mandatory binding dispute resolution mechanism, or where treaty partners had expressly agreed that the new mechanism should take priority over an existing mechanism.

D. Other tax-certainty processes beyond Amount A

834. Implementing new rules on tax certainty beyond Amount A through the multilateral convention may help ensure that the processes introduced are consistent with those that apply for Amount A. A dedicated part of the convention could likely be used, governing the different steps of the tax certainty processes beyond Amount A, including dispute prevention, MAP processes and the mandatory binding dispute resolution mechanism.

835. Further consideration needs to be given to the question how this part of the convention should apply among jurisdictions depending on whether they have an existing bilateral treaty, or if no bilateral tax treaty applies.

E. The development of a new multilateral convention

836. To remove treaty obstacles and implement the four elements discussed in the previous section, the method used must ensure coordination, consistency and certainty, and operate in a speedy manner. The best way to do this would be through a new multilateral convention.

837. The Inclusive Framework initially considered using the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI)² (or creating another instrument that works in the same way to modify existing tax treaties) to implement Pillar One, but ultimately agreed that it would not be a suitable instrument: implementing measures that need to be part of a multilateral framework would not always be feasible (e.g. multilateral dispute resolution mechanisms) nor would implementing changes and measures between jurisdictions that do not have a bilateral tax treaty be possible (e.g. the dispute prevention and resolution processes for Amount A).

838. As bilateral tax treaties would remain in force and continue to govern cross-border taxation outside Amount A, a new multilateral convention would need to coexist with the existing tax treaty network and, for its parts on the determination of Amount A tax and elimination of double taxation, supersede and prevail over existing bilateral tax treaties for the taxation of in-scope MNEs. Further work will also be required on the relationship of the multilateral convention with bilateral tax treaties concluded after its entry into force (see paragraph 851).

839. The new multilateral convention would thus operate differently than the MLI, which was used to directly modify existing provisions in tax treaties. The new multilateral convention would provide a multilateral framework to facilitate the coordinated and effective implementation that is necessary between multiple jurisdictions and would, for its parts on the determination of Amount A tax and elimination of double taxation, supersede all bilateral tax treaties in force.

840. As noted above, there would not be treaty barriers that would need to be removed between jurisdictions that currently do not have a treaty with respect to those parts and those jurisdictions could rely on their domestic legislation to apply and administer Amount A. The part of the multilateral convention that would implement the features of the new simplified administration process and the tax certainty-related processes would apply to all parties and would also close the gaps in treaty coverage. That part would also make the appropriate linkages for all signatories to the rules that govern the application and operation of Amount A.

841. If developing a multilateral convention is the ideal way to ensure a legal obligation to apply and administer Amount A in the same way, and better coordination and speedier international public law implementation. However, some jurisdictions may need to explore whether they could exceptionally make

all necessary treaty changes by amendments to their existing bilateral treaties and domestic law within a reasonable timeframe. Under such an approach, a jurisdiction may be able to agree with its treaty partners to bilaterally amend its existing treaties to remove obstacles for the determination of Amount A tax and elimination of double taxation and then rely on its domestic legislation to apply and administer Amount A. Allowing a jurisdiction to require a bilateral approach would, however, place an additional burden on partner jurisdictions who would be required to implement on both a bilateral and a multilateral basis. Also, it is not clear that the multilateral dispute prevention process for Amount A could be implemented other than by a multilateral convention given the need to coordinate results among multiple jurisdictions.

842. As part of this work on possible bilateral amendments to treaties, further thoughts could be given on the development of a separate instrument that would deal with the features of the new simplified administration process and the tax certainty-related processes.

10.2.3. Guidance and accompanying instruments

843. Guidance will also need to be developed for many aspects of Pillar One to support and supplement domestic legislation and provisions in public international law instruments (for example, multilateral competent authority agreements, commentary on the multilateral convention, guidelines for the determination and application of Amount A, etc.).

844. The guidance, which would serve tax administrations and taxpayers alike, will, for instance, contain detailed guidelines for the tax base determinations for Amount A, financial accounting, segmentation, and the treatment of losses.

845. The guidance could be revised or updated periodically. Some revisions or updates could be implemented without changing domestic legislation or treaties while others may require such changes. The revisions would be based upon input received and experience in the practical implementation of Amount A.

846. Further work will be required to determine which aspects can be included in guidelines as opposed to the multilateral convention or domestic law.

10.3. Removal of unilateral measures

847. As stated in the Outline, it is expected that any consensus-based agreement must include a commitment by members of the Inclusive Framework to implement this agreement and at the same time to withdraw relevant unilateral actions, and not adopt such unilateral actions in the future.³

10.4. Next steps

848. The next steps on implementation will require further work on the multilateral convention. This will include work on the architecture of the convention and its legal functioning. It will also include work to determine the core elements of the rules on the determination of Amount A and elimination of double taxation that will need to be implemented in the multilateral convention to ensure all treaty barriers are removed.

849. Once the core elements of the rules will have been identified, the Inclusive Framework will start to work on the design of the treaty provisions that will be inserted in the multilateral convention.

850. More work will also be required on different challenges that could arise in developing the multilateral convention. Those will include work on the design of the provisions on entry into force and effect to ensure that parallel and conflicting rules for the taxation of in-scope MNE groups do not arise and that the multilateral convention starts to take effect only once a critical mass of jurisdictions have fully

implemented it. This will include establishing a timeline for implementation, and clarifying the meaning of a "critical mass" of jurisdictions.

851. In order to ensure consistency with the legal framework established by a multilateral convention and to ensure that bilateral tax treaties concluded after its entry into force do not create new barriers to the exercise of the new taxing right, further work will also be required on the relationship of the multilateral convention with these later tax treaties, taking into account legal frameworks that may not permit clauses that bind future Parliaments.

852. The next steps on the "removal" of unilateral measures will require work on what constitutes a "relevant" unilateral measure that would need to be removed, and any transitional framework to do so. As noted above, members of the Inclusive Framework agree that one element of an agreement on Pillar One should be a commitment to withdraw relevant unilateral measures that would undermine the stability of the agreed framework and to refrain from introducing new ones.

853. Lastly, the implementation of Pillar One on a safe harbour basis requires continued consideration and development by the Inclusive Framework.

Notes

¹ Treaty provisions on elimination of double taxation impose an obligation on the state of residence to relieve foreign tax. They would not typically prevent a jurisdiction from taking on additional obligations to relieve double taxation – such as would be required for Amount A.

² To use the MLI, the instrument would need to be amended (pursuant to its Article 33) or supplemented by a protocol (pursuant to its Article 38). A Party to the MLI would not automatically be bound by an amendment or protocol implementing the changes in their tax treaties unless it ratified the amendment or protocol. Implementing Pillar One through the MLI would require a jurisdiction that is not currently a Signatory or Party to the MLI to join it. The MLI, which currently only covers agreements that have been specifically notified (the Covered Tax Agreements) by its Parties, may also involve requiring Parties to expand their list of covered agreements. Amendment to the MLI or the development of a protocol would establish another layer of complexity requiring matching as the changes to bilateral tax treaties would only have effect where the jurisdictions were parties to both the MLI and the amendment or protocol.

³ See paragraphs 9 and 89 of the Outline. Also, as stated in paragraph 90 of the Outline, considerations will be given to the implications of the safe harbour proposal for unilateral measures.



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