

OECD new releases on Amount A Pillar 1 and Subject-to-Tax Rule

Find out how the impact from Amount A and Subject-to-Tax Rule (STTRS) will radiate

On 11 October 2023, the OECD released several documents related to Amount A, containing a substantial body of work that reflects two years of negotiation:



A *Multilateral Convention to Implement Amount A of Pillar One* (MLC), which is 90 pages of text with 53 articles



A 23-page document, *Understanding on the Application of Certainty for Amount A of Pillar One*, which expands on the three certainty processes provided in the MLC: *scope certainty* — whether an MNE is within the rules or not; *advance certainty* — on methodology to be adopted; and *comprehensive certainty* covering substantially all aspects of the MLC



Nine Annexes covering 130 pages



A new analysis of the financial impacts of Amount A predicting that taxing rights on about USD 200 billion in profits would be reallocated to market jurisdictions each year, which, based on 2021 data, would result in global tax revenue gains of between USD 17-32 billion



An *Explanatory Statement* of nearly 640 pages comprising 2,275 paragraphs



A summary document described as an *Overview*

The release was approved by the Inclusive Framework's Task Force on the Digital Economy. The accompanying press release states that the MLC reflects the 'current consensus' of the parties. It is also noted, however, that a small number of jurisdictions still have differing views on a handful of specific items, which are noted by footnotes throughout the text.

The MLC was released in advance of the G20 Finance Ministers meeting just held in Morocco and, while not yet open for signature, the Secretary-General views the release as significant progress toward that event as it will enable jurisdictions to undertake the steps necessary to secure signature and ratification.

On 3 October the OECD released a package on the Multi-lateral Instrument (MLI) for the Subject to Tax Rule (STTR). Broadly this treaty rule seeks to raise the level of taxation to a minimum of 9 percent on certain cross-border transactions that are subject to treaty relief. Implementation of the MLI for the STTR involves a number of steps that will take a considerable amount of time. We have briefly outlined what is involved below.

1 What is Amount A?

Amount A applies to certain MNEs with global revenue greater than €20 billion and pre-tax profit margin greater than 10 percent of total revenue. This revenue threshold is due to fall to €10 billion after 7 years if a review concludes that the proposal was successfully implemented. Very limited exclusions apply for regulated financial services, extractives, defence, and certain domestically oriented businesses.

Amount A reallocates 25 percent of the profit in excess of a 10 percent profit threshold to market jurisdictions, defined as the jurisdiction where the end-user is located. This allocation is adjusted (under the so-called Marketing and Distribution Safe Harbour, discussed in Step 3, below) if the market jurisdiction already taxes a portion of the profit. A formula (described in Step 4, below) identifies the jurisdiction(s) obliged to relieve double taxation through either the exemption method or a foreign tax credit.

Amount A was originally envisaged to apply to consumer-facing businesses and automated digital services, where the MNE had revenue in excess of €750m. The current proposal contemplates a wider scope, but a narrower number of companies given the higher revenue threshold of €20 billion. Though yet to be confirmed, Amount A is envisaged to apply to approximately 100 MNEs, about 45 percent of which are based in the US and 15 percent in China, with the rest spread across more than a dozen countries.

The OECD has described a five-step approach to complying with Amount A, with each including a number of sub-steps.

▶ Step 1: Determine if you are in-scope

- 1.1 *Group and profitability test* — Revenue above EUR 20 billion and profitability greater than 10 percent. It has previously been estimated that approximately 100 groups would be in scope though the final number is yet to be confirmed.
- 1.2 *Exceptional segmentation rule* — A business segment that is separately reported in the consolidated financial statements can be in scope if it exceeds the profitability and revenue thresholds, even though the MNE, as a whole, does not meet the profitability test (due to high and low profitability segments. This is expected to apply in limited cases.
- 1.3 *Domestic-oriented businesses* — The exclusion for domestic-oriented businesses is new. It applies when (i) there are minimal deviations between where revenue is booked and the market jurisdiction to which it would be sourced under the MLC and (ii) cross-border intra-group transactions are beneath a threshold. This exclusion could be of use both to highly decentralized groups and groups operating primarily in one country, but with limited foreign sales.

▶ Step 2: Identify eligible market jurisdictions

- 2.1 *Revenue sourcing rules* - MNE revenues are allocated to market jurisdictions through specific sourcing rules that seek to identify where the end consumer uses the good or service. These are highly complex rules, though some simplifications are provided for a transitional period.
- 2.2 *Nexus test based on sourced revenue* — A minimum threshold of locally sourced revenue of €1 million must be met before a market jurisdiction is entitled to tax Amount A profit. This threshold is reduced to €250,000 for jurisdictions with GDP below €40 billion to ensure that smaller and developing countries can obtain Amount A allocations. Focusing only on locally sourced revenue to establish tax nexus is a key departure from the existing international tax rules that require physical presence for tax nexus.

▶ Step 3: Calculate and allocate a portion of your excess profit

- 3.1 *Determine relevant group profit* — Profit reported in the consolidated financial accounts of the MNE is subject to a limited number of book-to-tax adjustments. These adjustments are more limited than those required by the Pillar 2 GloBE calculation. Prior losses of the MNE are also taken into account, including (subject to conditions) prior losses from merged groups.
- 3.2 *Allocate a portion of profit to markets* — 25 percent of the profit in excess of 10 percent is allocated to the market jurisdictions based on the revenue sourcing determined in Step 2.
- 3.3 *Adjust for double counting* — The excess profits allocated to a market jurisdiction are capped when the market jurisdiction already taxes those profits. This adjustment is referred to as the Marketing and Distribution Safe Harbour Adjustment (MDSH).

▶ Step 4: Eliminate double taxation

Following the calculation and allocation of Amount A, double taxation is eliminated through a multi-step process that identifies those jurisdictions with profits available to 'fund' such allocations.

- 4.1 *Determine relevant jurisdictional profit* — This step involves determining the profit (with certain book to tax adjustments), level of depreciation, and payroll for each jurisdiction to determine a Return on Depreciation and Payroll or RODP.
- 4.2 *Allocate obligation to relieve double taxation* — The identification of jurisdiction(s) that must relieve double taxation is based on the relative amount of RODP, using a waterfall or tiered approach to focus the obligation on those jurisdictions with the highest RODP. To the extent there are insufficient profits in one tier, the obligation falls to the next tier. The practical result is that profitable companies with high value intangible assets are likely to be located in the relieving jurisdictions.
- 4.3 *Identify relief entities within a jurisdiction* — A further step will identify the specific entities within the jurisdiction that are entitled to relief from double taxation from the relieving jurisdiction.

▶ Step 5: File, pay and access to certainty

- 5.1 *File with lead tax administration* — A single tax return will be filed for all Amount A liabilities with the lead jurisdiction (likely where the parent entity is located) and distributed to all impacted jurisdictions.
- 5.2 *Payment from single group entity* — A Designated Payment Entity is required to pay all Amount A tax liabilities. Relieving entities are required to reimburse the Designated Payment Entity with the relieving payments being ignored for tax purposes.
- 5.3 *Claim relief for double taxation* — Relieving entities are entitled to make a claim for relief from their home tax administration, which should be granted within 90 days of making the claim or an adjustment can be made through the tax instalment system. This is designed to limit the period when an MNE has paid double tax.
- 5.4 *Access to tax certainty* — MNEs have access to a process for gaining certainty both for Amount A calculations themselves and for related issues such as transfer pricing, permanent establishment, and withholding tax characterisation. This includes a Mandatory Binding Dispute Resolution process.

2 Marketing and Distribution Profits Safe Harbour Adjustment

The MLC limits a jurisdiction's ability to tax additional excess profit through Amount A where excess profit is earned and taxed through traditional transfer pricing. The MDSH is designed to cap excess profits allocated to a market jurisdiction where excess profits are already taxed in a market jurisdiction. The MDSH operates generally as a multi-step calculation that identifies excess profits with reference to a minimum level of profit calculated as the greater of a local jurisdiction's return on depreciation and payroll based on the in-scope MNE's return on depreciation and payroll or 3 percent of the revenues sourced to a market jurisdiction per Step 2 above.

This calculation is further modified by a jurisdictional offset percentage that varies based on a jurisdiction's level of depreciation and payroll or whether such jurisdiction is defined as a Lower Income Jurisdiction.

Profits already booked locally in excess of the results of the calculation above are then available to offset the Amount A allocation to a market jurisdiction, subject to further modification for the withholding tax considerations detailed below.

There is not full consensus on the details of the MDSH at this time. A number of footnotes in the MLC highlight objections raised by some Inclusive Framework members regarding certain aspects of the MDSH.

3 Treatment of Withholding Taxes

The MLC provides that withholding taxes (WHTs) imposed by a market jurisdiction are included in the Amount A profit determination to reduce the amount allocated to that market jurisdiction and to relieving jurisdictions. Not all WHTs are included, however. In-scope WHTs are those imposed on deductible cross-border payments to related parties, and thus exclude WHTs on dividends and capital gains. WHT on payments to out-of-scope Group entities, such as regulated financial services institution entities or extractive entities (or similarly defined segments), are also excluded.

In addition to specifically included and excluded WHT, there are special gross-up rules related to WHT to prevent double counting of profits and reliefs in specific circumstances.

There is not full consensus on taking into account WHT at this time. A number of footnotes in the MLC highlight objections raised by some Inclusive Framework members to the treatment of WHT.

4 DSTs and relevant similar measures

The MLC provides for the removal of Digital Services Taxes and relevant similar measures and outlines criteria to prevent the introduction of such measures in the future. Importantly these measures apply to all companies and not simply those that are impacted by Amount A. A breach of the rule results in a denial of Amount A revenue.

An annex to the MLC identifies a limited list of existing measures that would be withdrawn upon Amount A coming into force: the DSTs in Austria, France, Italy, Spain, Tunisia, Turkey and the United Kingdom, as well as the equalization levies on online advertising services and e-commerce in India. Future DSTs and relevant similar measures would be identified using three criteria. The first is that the tax is applied by reference to market-based criteria such as the location of users. The second is that the measure is ring-fenced to non-resident or foreign-owned businesses. These criteria may allow for some DSTs. The third is that the measure must fall outside tax treaties. A conference of parties would determine whether these criteria apply to a specific measure within 12 months.

It should also be noted that the concept of relevant similar measure excludes artificial structures to avoid traditional permanent establishments. Although the IF has also agreed not to apply nexus rules based on significant economic presence or similar concepts to entities within the scope of Amount A, they may continue to apply such rules to taxpayers outside the scope of Amount A. These nexus rules may fall outside the definition of DST or relevant similar measure, but still overlap with Amount A.

5 Tax certainty framework

► Tax Certainty for Amount A

An MNE can obtain certainty with respect to its application of Amount A by requesting a comprehensive certainty review when filing its Amount A Tax Return. As with advance pricing agreement (APA) submissions in certain countries, a request for certainty requires payment of a user fee, which has not yet been set and may vary based on the type of certainty requested.

For a limited set of issues – revenue sourcing, the application of the MNE’s internal control framework, and certain issues related to scoping exclusions – certainty can also be requested on an advance basis. Advance certainty resolutions would generally apply for three years, although this period could be extended to five years in certain cases. In addition, the MLC provides a scope certainty process for MNEs that believe they may not be within the scope of Amount A, which can also be requested on an advance basis.

The MLC contemplates that, in many cases, reviews could be carried out by the MNE’s lead tax administration (LTA) in a relatively streamlined fashion. However, this streamlined option would only be available in certain circumstances, and only after the MNE has been through a full review by a review panel (which is required periodically thereafter). For comprehensive and advance certainty requests, the review panel would comprise seven tax administrations, which generally would be the LTA, three relieving jurisdictions, and three market jurisdictions (including at least one developing jurisdiction). The panel may be supported by internal control systems specialists from various governments.

If the review does not result in an agreement, the case is escalated to a quasi-arbitral determination panel. The determination panel operates using last-best-offer (baseball-style) decision-making and provides a mandatory binding back-stop to the process, in keeping with the Inclusive Framework’s commitment in its October 2021 statement.

► Tax Certainty for Related Issues

The MLC also provides a tax certainty process for certain issues related to Amount A, namely those involving transfer pricing, permanent establishment, and withholding tax characterization. Related issues must either be material or affect the elimination of double taxation mechanics. Materiality for this purpose is defined as €3M (which will be reduced to €1.5M after a phase-in period), and therefore does not appear to impose a significant obstacle to tax certainty for large MNEs within the scope of Amount A.

Although the October 2022 Progress Report on the Administration and Tax Certainty Aspects of Pillar One laid out an elegant proposal for providing tax certainty with respect to related issues in cases not covered by existing tax treaties, the MLC does not include a similar mechanism. Therefore, Amount A taxpayers will benefit from tax certainty for related issues only with respect to cases already covered by tax treaties.

For such cases, the MLC provides mandatory binding dispute resolution, in the form of a dispute resolution panel, as a backstop to the mutual agreement procedure (MAP). The dispute resolution panel is a quasi-arbitrary panel that differs from traditional treaty arbitration in that competent authority personnel participate in the panel process alongside independent experts. Certain low-capacity jurisdictions are not subject to the mandatory process but may choose to participate in a dispute resolution process on a voluntary basis.

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Revised revenue impact

The OECD also released revised revenue impacts of Amount A. Essentially Amount A is a zero-sum reallocation of profits that results in higher taxation as profits move from investment hubs to jurisdictions with higher rates. The paper estimates a reallocation of \$204.6b of profits per annum based on 106 in-scope MNEs. This reallocation is estimated to increase global tax somewhere in the range of \$17b to \$32b.

Using figures based on 2021, Amount A is expected to have the following impacts as a % of Corporate Income Tax for the jurisdiction.

	Upper end	Lower end
Investment Hubs (said to be a small number)	(0.5%) decline in CIT	(7.9%)
High income countries	1.4% increase in CIT	0.9%
Middle income countries	1.6%	1.2%
Low income countries	3.0%	2.5%

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EU perspective

In the European Union (EU), implementation process for Pillar Two, several EU Member States stressed the importance of ensuring that Pillar One is also implemented. To that end, the EU Pillar 2 implementing Directive, as adopted in 2022, includes a specific provision obliging the European Commission to monitor and assess Pillar One progress achieved at the OECD/G20 Inclusive Framework on BEPS and report back to the EU Council at the end of every semester. On the basis of this requirement, in June 2023, the European Commission reported to the EU Council that it welcomed the great OECD efforts and the progress made so far and urged all participants to make a final effort to reach an agreement on the MLC to implement Pillar One.

The European Commission furthermore strongly supported the OECD Secretariat's intention to finalise the MLC and the Explanatory Statement and present the package in 2023 to ensure that the MLC could be signed as soon as possible. The European Commission confirmed to do its utmost to ensure a timely and consistent implementation of Pillar One at EU level which could potentially take the form of an EU Pillar One Directive to harmonize EU law aspects of the legislation enabling to tax Amount A profit allocated to EU Member States. An open issue remains the 2021 European Commission proposal to increase EU own resources by obliging EU Member States to provide a national contribution to the EU budget based on the results of the Pillar One international agreement. In 2020, EU Member States agreed to a corona-related financial recovery package for EU Member States which is EU debt-funded with a strict multi-annual repayment plan. The EU own resource proposal includes several suggestions for financing the repayment plan including applying a uniform call rate of 15 percent to the share of residual profits of multinational enterprises re-allocated to each EU Member State based on an EU Pillar One Directive.

The same day the OECD IF released the MLC and accompanying documents, the US Treasury Department (US Treasury) announced that it was seeking public comments on the draft MLC. The release of the MLC's full text paves the way for more open and informed dialogue about the impact of Amount A in the US. As most of the in-scope MNEs are expected to be US companies, their views on the whole package will be informative to both US Treasury and US Congress. The US Treasury release notes that public input remains critical "to ensure transparency, to facilitate the resolution of several remaining open issues, and to hear whether the proposed framework would be workable for US taxpayers and other stakeholders." The ranking member of the US Senate Finance Committee also issued a statement requesting US Treasury to provide information on the impact of the proposed MLC on US companies and revenue, and also requests feedback from companies on the proposed changes. The Amount A revenue estimates have almost doubled compared to the baseline, which surely will be an area of focus for US Congress in their consideration of the MLC.

Specifically, US Treasury is interested in hearing about novel issues identified by a review of the MLC text, implementation and administrability while recognizing the balance between simplification and technical precision, and technical changes to address errors or clarify the intended operation of the MLC. Comments are requested by 11 December, which calls into question whether the OECD IF goal of releasing a final MLC for signature before the end of the year is achievable or will be pushed to early 2024. As the 12 July Inclusive Framework (IF) outcome statement (see earlier KPMG publication) conditioned the political agreement to extend the DST standstill through 2024 on the MLC being signed before the end of the year by 30 jurisdictions making up at least 60% of the ultimate parent jurisdictions of in-scope MNEs, a delay in signing will increase uncertainty on the likelihood of DST proliferation in 2024. The removal of DSTs and other similar relevant measures continues to receive bipartisan support. More recently, there has also been increased support for US retaliatory measures on jurisdictions that continue to impose or that enact DSTs.

The STTR rules were set out in the Inclusive Framework (IF) July releases (see earlier KPMG publication). STTR relaxes the tax treaty restrictions which would otherwise apply to source jurisdiction tax on certain connected party payments. This permits countries to apply their domestic law taxing provisions to bring the nominal corporate income tax rate on such payments up to a minimum of 9 percent.

The newly released MLI, open for signature from 2 October, facilitates updates across the global network of bilateral tax treaties, without the need to re-negotiate and update each treaty individually (though countries can still use the latter option instead). Where two IF jurisdictions have each signed up to and ratified the MLI, and both have also notified the OECD that they wish to update their bilateral treaty, an STTR Annex will be added to the treaty, functioning as a treaty amending protocol.

The MLI contains the specific STTR provisions on scope, covered income, tax rate, materiality threshold, etc., as set out in the July release. It also includes specific provisions dealing with tax systems that impose corporate income tax on an alternative basis (e.g., on net equity) or at point of distribution (e.g., Estonia). It further provides for optional provisions on pension funds, and the circumstances where a treaty party ceases to be a 'developing country' as defined. The entry into force and entry into effect rules are also set out.

Looking ahead, key questions remain on when, and to what extent, updates to treaties for STTR will be seen. In terms of timing, it seems likely that the earliest point in time that treaties would have the STTR in effect is from 2026, with many not seeing update until 2027. Based on experience with the earlier BEPS 1.0 MLI, we would expect jurisdictions to nominate treaties for update at the same time as they sign the MLI. Where domestic ratification procedures are required, it may then be several months (or longer) before the instrument of MLI ratification, acceptance or approval can be deposited with the OECD. Entry of bilateral treaty updates into force will take place three months after the second of the two countries has deposited their instrument with the OECD.

The treaty STTR updates would then enter into effect from start of fiscal year beginning at least six months after the entry into force. Even before the first step (signing of the MLI and nomination of treaties) occurs, countries will need to analyse and discuss which treaties are eligible for 'obligatory' update – the OECD plans to support developing countries with this analysis. Taking all of these steps into account, STTR would appear to take time to become a feature of the tax landscape.

In terms of the extent of the STTR updates, the key consideration is the political agreement set out in the October 2021 IF Statement. IF jurisdictions, that apply nominal CIT rates below 9 percent to in-scope payments, committed to bring the STTR into their bilateral treaties with developing IF members, when requested to do so. Neither the July nor September releases further elaborated on what this entails.

It stands to reason that, insofar as the STTR compares the 9 percent rate to an 'adjusted nominal rate', taking into account the specific tax regimes and preferences applying to payment recipients, the assessment underlying this commitment would equally do so. It is not known, though, whether other factors would be taken into account. For example, if there is even the theoretical possibility that an adjusted nominal rate less than 9 percent applies to covered payments between two jurisdictions, is this enough to warrant treaty update? Or would a more risk-based assessment be applied? It remains to be seen what approach is taken and consequently how many tax treaties stand to be ultimately updated for STTR.

10 What CTOs need to consider

While Amount A will impact only 100 or so MNEs, CTOs should be mindful of the impact that its adoption or non-adoption by a critical mass of jurisdictions will have on the international tax environment. In particular, the potential proliferation of DSTs and similar measures in the absence of Amount A is likely to provide an unstable tax environment that could lead to retaliatory trade responses.

MNEs that are directly impacted by the potential ratification of Amount A will need to consider the current rules, set forth in more than 800 pages, in great detail. They may consider making a submission in the consultation process outlined above.

CTOs will also need to consider the STTR's impact on their business structures, including any potential additional tax liability and whether current arrangements will continue to be optimal. This may involve a review of certain concessions and how the STTR may apply to partly or fully negate the benefit of the concession.

Last but not least, the impact from Amount A and STTR, once enacted, will likely be far-reaching to various aspects of the group operations. These range from whether to embark on a new business model/market, to revisiting the efficiency of the existing ones. CTOs will need to have these new implications factored in, not only from the group level but also from the perspectives of each Constituent Entity involved.

Webcast

The Global Tax Policy Leadership group will hold a webcast: **Where are we on BEPS 2.0 — and update** on Thursday, 9 November 2023. Expect the topics presented in this report and more to be discussed in deeper detail.

This webcast will be offered twice on 9 November 2023. Please visit the [KPMG Future of Tax & Legal Webcast series](#) to register.

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