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New horizons for dispute resolution under pillar one's Amount A

On October 12, the OECD released its report on the pillar one blueprint, which was approved by the Inclusive Framework on BEPS and represents the latest stage in multilateral efforts to address the tax challenges of the digitalisation of the economy. While considerable technical work remains to be completed, and the deadline for political agreement on the blueprint – along with its counterpart under pillar two – has been pushed back to mid-2021, the blueprint offers many important and innovative proposals, not least in the area of tax certainty and dispute resolution.

The focus of the blueprint's tax certainty chapter is the prevention and resolution of disputes regarding Amount A, which allocates taxing rights on a portion of in-scope companies' profits to market jurisdictions. Amount A is intrinsically multilateral: for any given multinational enterprise (MNE), profits may be allocated away from several countries and spread among a large number of market jurisdictions. The work on dispute resolution for Amount B, which would provide a standardised return for baseline marketing and distribution activities, is considerably less developed; the blueprint simply states that mandatory binding dispute resolution would apply to an Amount B dispute once existing procedures were exhausted.

The blueprint provides that Amount A would be administered through a coordinated system, in which an MNE would file a self-assessment return and documentation package with its lead tax administration, which would proceed to share the return and documentation with all affected tax administrations through an exchange of information mechanism. In the absence of any election by the MNE, all affected tax administrations would then be free to audit the Amount A return. In many cases, sorting through any disputes that arise on a country-by-country basis, or by invoking bilateral treaty relationships where they exist, could prove unworkable.

To avoid individual audits, MNEs could opt into an early certainty process under the blueprint. This involves three key stages: an optional initial review by the lead tax administration, review by an advisory review panel comprised of affected tax administrations, and a quasi-arbitral proceeding by a determination panel using a last best offer approach. Disputes could be resolved at any stage, but the inclusion of the determination panel ensures that mandatory binding dispute resolution provides a backstop to the process.

The two-tiered panel process appears intended to address the concerns of developing countries and other stakeholders regarding the use of mandatory binding arbitration. By interposing an advisory review panel comprised of a subset of the tax administrations themselves before a case is sent to the determination panel, the Amount A tax certainty process increases the likelihood that consensus may be reached without the need for an outside decision maker. While the composition of the determination panel remains to be determined, the suggestion that current or former tax officials may serve as panellists also appears likely to address some tax administrations' concerns.

By and large, the complexities baked into the process are likely necessary in view of the technical and political challenges associated with designing an appropriate tax certainty process for Amount A. Yet the success of the system will probably ultimately depend not on these intricacies, but on MNEs' and tax administrations ability to avoid them in a significant volume of cases.

This, in turn, requires that all participants approach Amount A early certainty cases with a cooperative attitude: MNEs should be prepared to make frank and timely disclosures, and tax administrations should be willing to accept the work and recommendations of their colleagues in other countries except where they have serious concerns. Given the levels of investment required by the tax administrations in panel cases, as well as the time required to conclude such cases, the optional initial review by the lead tax administration appears likely to be key to efficiently resolving lower risk cases, but that will only work if other tax administrations are willing to accept the lead tax administration's recommendations.

The Amount A tax certainty process is not perfect. More work is needed in some areas, particularly around timing. But it does offer up a new take on dispute resolution that, if approached by tax administrations and MNEs alike with the right spirit, could provide a workable and much-needed structure for handling multilateral controversies, which could have ramifications beyond the confines of Amount A.

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