



Implementation and Administrative Feasibility of Amount A for Developing Countries

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THREE BROAD PERSPECTIVES

- TAX CERTAINTY
- LEGAL FRAMEWORK
- JURISDICTIONAL SOVEREIGNTY

Malaysia Position on Amount A

The Malaysia Position

- ❑ As of November 2023:
 - ✓ the text of the MLC is still under review; and
 - ✓ More time is needed by some countries to evaluate the decision to sign the MLC;
- ❑ Thus, signing ceremony would be carried out at a later date.
- ❑ The extension of the DST freeze seems unfeasible. Unless further agreements are made, countries could introduce a DST or other unilateral measures as of 1 January 2024.
- ❑ If Amount A fails, some countries such as the United Kingdom, Austria, France, Italy, Spain, India, Tunisia, Turkey, Kenya and, more recently, Canada and New Zealand either adopting or proposing unilateral measures to tax MNEs in the digital sector in the form of either DSTs or similar measures.

The Malaysia Position

- ❑ IRBM will remain in discussion with the OECD working party to finalise the Amount A – MLC. And monitor the important progress such as:
 - ✓ The finalisation and agreement of the MLC document;
 - ✓ The participation of the United States to sign and rectify the MLC; and
 - ✓ Other countries' practices, especially from developing countries, in enacting or implementing DST
- ❑ Malaysia will continue to monitor international developments before any final decision is taken.

The Malaysia Position

- ❑ In the near future, Malaysia may consider having its own DST legislation by analysing the extent of the application and the implication of Malaysia's existing domestic law (vis a vis section 15A of the Malaysia Income Tax Act 1967 (which currently exempts services performed outside Malaysia)).
- ❑ Alternatively, broadening the application or proposing a new DST legislation in Malaysia (if Amount A is not materialised).
- ❑ A comparative studies might be taken soon between Section 15A, ITA1967 and other countries' DSTs, such as the UK, France, Canada, and India. If Amount A is not materialised, Malaysia will have alternatives to tax digitalised businesses.
- ❑ Malaysia may also engage with other international organisations, such as the South Centre, in evaluating whether (1) Section 15A as in its current domestic law is sufficient to tax digitalised businesses, (2) any further amendment should be made to Section 15A, or (3) enacting a new DST legislation to tax the digitalised businesses.

15A DERIVATION OF SPECIAL CLASSES OF INCOME IN CERTAIN CASES

“15A. Gross income in respect of-

- (a) amounts paid in consideration of services rendered by a person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such person;
- (b) amounts paid in consideration of any advice given, or assistance or services rendered in connection with the management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;
- (c) rent or other payments made under and agreement or arrangement for the use of any moveable property -

shall be deemed to be derived from Malaysia-

- (i) if responsibility for payment of the above or other payments lies with the Government, a State Government or a local authority;
- (ii) if responsibility for the payment of the above or other payments lies with a person who is a resident for that basis year; or
- (iii) if the payment of the above or other payments is charged as an outgoing or expense in the accounts of a business carried on in Malaysia.”

Latest Developments on Pillar One – Amount A

Amount A – Overview

- ❑ To create a new taxing right for market jurisdictions, independent of the physical presence requirement and determined using a formulaic approach.
- ❑ In parallel to the multilateral negotiations on Pillar One, many countries continue to impose or propose unilateral measures to tax digital businesses. These measures show various country's dissatisfaction with Amount A or their scepticism about its potential success.
- ❑ In comparison to Amount A, unilateral measures consist of Digital Service Taxes (DSTs), equalisation levies or new nexus-based levies in case of a significant economic presence of non-resident businesses in market jurisdictions.
- ❑ In July 2023, most IF members agreed to extend a freeze on new DSTs and similar measures for one year beyond its December 2023 expiration date or until the MLC enters into force.
 - ✓ Condition → requires the critical mass of jurisdictions (at least 30 jurisdictions accounting for at least 60% of the UPEs of in-scope MNEs) to sign the MLC before the end of 2023.
 - ✓ If such critical mass (which necessarily requires the United States (US) to be on board considering its allocated points) is not reached by 31 December 2023, then the DST freeze will expire.

Amount A - MLC

- ❑ On 11 October 2023, the Multilateral Convention (MLC) package to implement Amount A was released. The package consists of :
 - ✓ the text of the MLC, an Explanatory Statement (ES), and an Understanding on the Application of Certainty (UAC).
- ❑ This reflects the consensus achieved so far among IF members on the technical architecture of Amount A, with some reservations from certain jurisdictions.
- ❑ In turn, the ES clarifies the provisions of the MLC, and the UAC contains further details on how aspects of the Amount A tax certainty framework will operate in practice.
- ❑ Several countries (e.g., India, Colombia and Brazil) have included reservations to some provisions of the MLC text, which are expressed in footnotes and mainly refer to:
 - ✓ the marketing and distribution safe harbour – MDSH (allocated too few additional taxing rights);
 - ✓ the treatment of withholding taxes.

The MLC sets out the substantive features of Amount A, including:

1. The scope of the taxing right covers MNEs with revenues above EUR 20 billion and profitability above 10% and applies to 25% of the profit, which is more than 10% of revenue. (Targeted exclusions apply to enterprises in the extractives, regulated financial services and defence sectors);
2. The revenue sourcing rules, which determine the allocation of Amount A between market jurisdictions;
3. The mechanisms for relieving double taxation;
4. The processes to ensure tax certainty for Amount A and issues related to Amount A;
5. The commitment to remove specified measures (listed in Annex A of the MLC) and not to introduce DSTs or relevant similar measures once Amount A is in effect;
6. The measures relating to the administration of Amount A, which feature rules for streamlined compliance and rely on a single entity of each covered group to make payments to market jurisdictions;
7. The arrangements regarding the MLC's entry into force, which will occur on a date decided by contracting jurisdictions after at least 30 jurisdictions accounting for at least 60% of the ultimate parent entities (UPEs) of in-scope MNEs, have ratified.

The MLC also includes several provisions designed to address the unique circumstances of developing countries.

Next Steps

- ❑ According to the OECD, the MLC to implement Amount A will be signed by the end of 2023 to enable its entry into force in 2025.
- ❑ If signature (not ratification) by the required critical mass of jurisdictions is achieved by the end of 2023, the DST freeze will be extended until 31 December 2024 or the entry into force of the MLC. Otherwise, the freeze will expire and unilateral measures (including DSTs, equalisation levies, expanded withholding taxes on digital services, non-traditional nexus-based levies, etc.) might proliferate.
- ❑ Several countries (including the US) have indicated that they need additional time for internal processes before they can decide on whether they can sign the MLC or not. Recent statements of the US Treasury Secretary and the US public consultation opened on this matter (which runs until 11 December 2023) confirm that – at least for the US – such a process will run into 2024. Since the US alone accounts for almost 50% of affected MNEs, the fate of Amount A and the DST freeze is in this country's hands.
- ❑ It remains to be seen whether the agreements entered by the US with several countries about the treatment of existing DSTs (which also expire on 1 January 2024) will be extended or not.

Pillar One – Amount A

Basic Legal Framework

Basic Legal Framework of the MLC:

The purpose of the MLC is to enhance stability in the international tax system by:

1. Coordinating a reallocation of taxing rights (Amount A) for market jurisdictions over a portion of the excess profit of the largest and most profitable multinational enterprises (MNEs) operating in their markets, with a corresponding obligation to relieve double taxation;
2. Providing tax certainty to in-scope MNEs with respect to both Amount A disputes and other tax disputes on existing rules;
3. Preventing the imposition of digital services taxes (DSTs) and other similar measures on all companies (whether or not they fall under the scope for Amount A).

To comply with Amount A, MNEs will have to follow a set of rules that can be distilled down to the following five steps:

Step 1: Determine whether you are in scope

A group revenue test, along with profitability tests, must be conducted in order to determine whether a MNE is in scope. These quantitative and objective thresholds apply to ensure that only the most profitable MNEs fall within scope. The MNE's revenue must be above €20 billion and the profitability must be greater than 10 percent.

Step 2: Identify the eligible market jurisdictions

To allocate the revenue of MNEs to the market jurisdictions, specific revenue sourcing rules must be applied. The purpose of these revenue sourcing rules is to identify the exact jurisdiction where the end customer consumes or uses the goods or services provided by the in-scope MNE. In addition, a quantitative threshold must be met in order for the market jurisdiction to exercise taxing rights. The quantitative thresholds for a market jurisdiction is a) €1 million of sourced revenue and b) €250,000 sourced revenue for jurisdictions with a GDP below €40 billion.

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

The initial reference point is the profit as reported in the financial accounts of the MNE after applying a certain but limited amount of book-to-tax adjustments and taking into account any prior losses sustained by the MNE. After determining the group profit of the MNE, a formula is applied to determine 25 percent of the MNE's profit in excess of 10 percent of the MNE's revenue. This defined portion of excess profit is then allocated to the market jurisdictions using a revenue-based allocation key. To prevent double counting, the allocated profit is adjusted downwards. This mechanism of preventing double counting is referred to as the **Marketing and Distribution Safe Harbour Adjustment (MDSH)**.

To comply with Amount A, MNEs will have to follow a set of rules that can be distilled down to the following five steps: (cont.)

Step 4: Eliminate double taxation

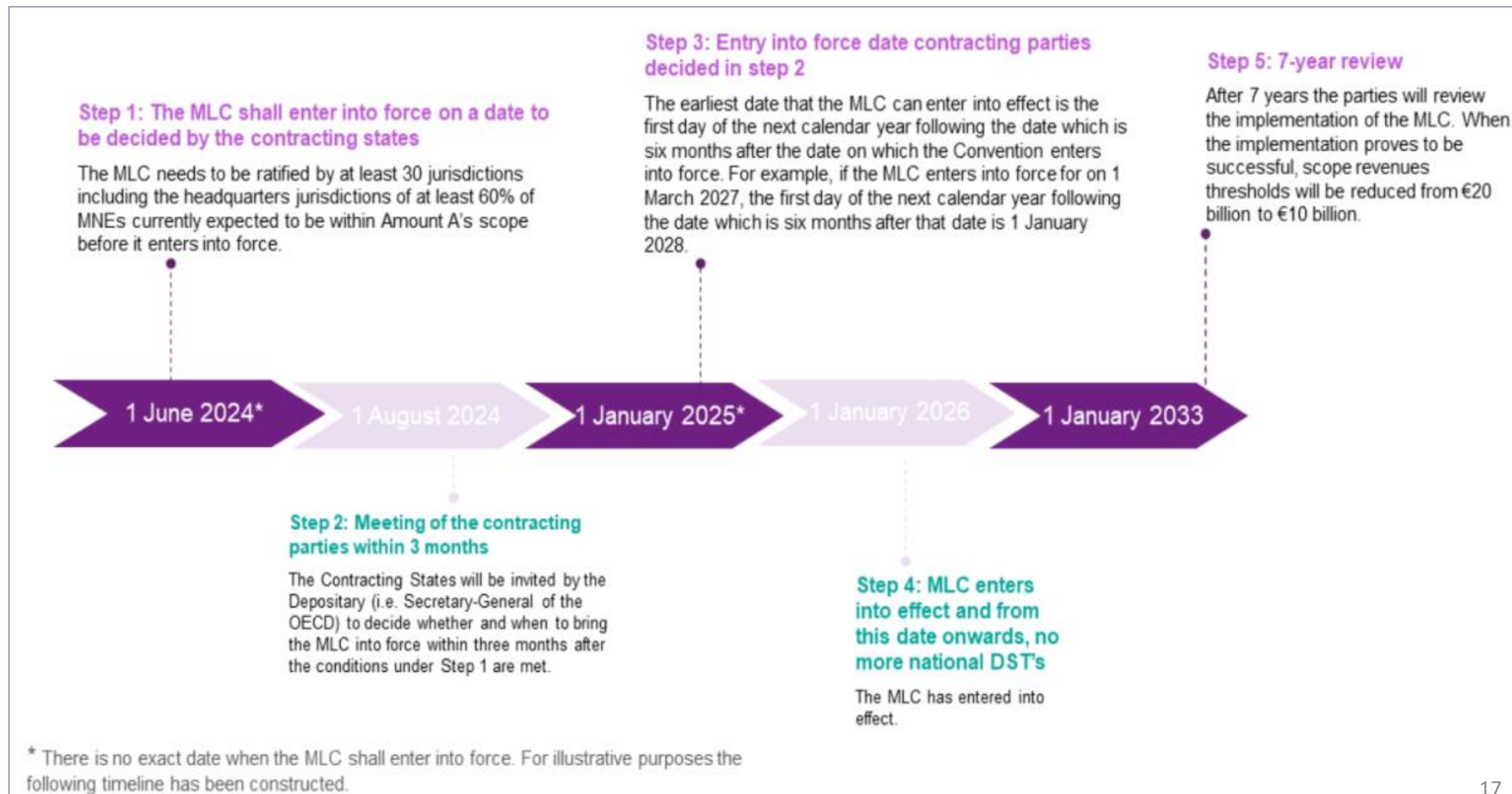
- The MNE first calculates its profit in each jurisdiction by summing the accounting profit (or loss) of each entity in the jurisdiction and making several book-to-tax adjustments. It then determines its depreciation and payroll (**D&P**) in each jurisdiction on a similar basis, and expresses the jurisdictional profit as a **return on depreciation and payroll (RODP)**.
- A tiered approach, determined by the RODP of each jurisdiction, is used to allocate the obligation to relieve double taxation at the jurisdictional level. Those obligations are allocated first to the jurisdictions with the highest RODP, often jurisdictions with high levels of asset ownership. Furthermore, specific rules must be applied to identify within each relieving jurisdiction the entities of the MNE that are entitled to claim relief from double taxation.

Step 5: File, Pay and have access to tax certainty

A single tax return with a standardized documentation is filed in order to comply with the MNEs Amount A tax liabilities across the globe. This Amount A tax return must be filed with the lead tax administration that is typically the parent jurisdiction of the MNE. A **Designated Payment Entity (DPE)** within the MNE handles all payments related to the Amount A tax obligations, and other entities within the MNE are obligated to make compensatory payments to finance the DPE.

MLC Entry into Force and Entry into Effect

(No exact date when MLC shall enter into force. This diagram is for illustrative purposes only)



Pillar One – Amount A Tax Certainty

Improving Tax Certainty under the MLC

The Amount A tax certainty framework consists of the following three mechanisms to provide certainty relating to certain items of Amount A:

1. An advance certainty review provides MNE with a binding multilateral certainty that is methodology for applying provisions of the MLC is accepted.
2. A scope certainty review provides an out-of-scope MNE with the confirmation that it is not in-scope of Amount A.
3. A comprehensive certainty review provides an MNE with a binding multilateral certainty over its application of the rules on Amount A in jurisdictions that have implemented the MLC.

Pillar One – Amount A

Tax Sovereignty

Issue on Tax sovereignty – Removal and standstill of DSTs and other similar measures

- ❑ Signing the MLC requires a country to remove existing DSTs, which creates a standstill on the implementation on taxes that are similar to DSTs (Relevant Similar Measure). This applies to all companies, not only the in-scope MNEs. Countries that do not agree with this removal and standstill forfeit their right of allocation of Amount A in the period they levy DSTs or Relevant Similar Measures.
- ❑ Any future measures will be evaluated to determine if they qualify as a DST or as any other Relevant Similar Measure. Three criteria are used to assess this matter:
 1. The tax is based on market criteria (e.g., users, customers, and location).
 2. It is focused on foreign-owned businesses or non-residents.
 3. It is outside the scope of tax treaties.
- ❑ The parties to the MLC will decide whether a measure is considered a DST or Relevant Similar Measure.