

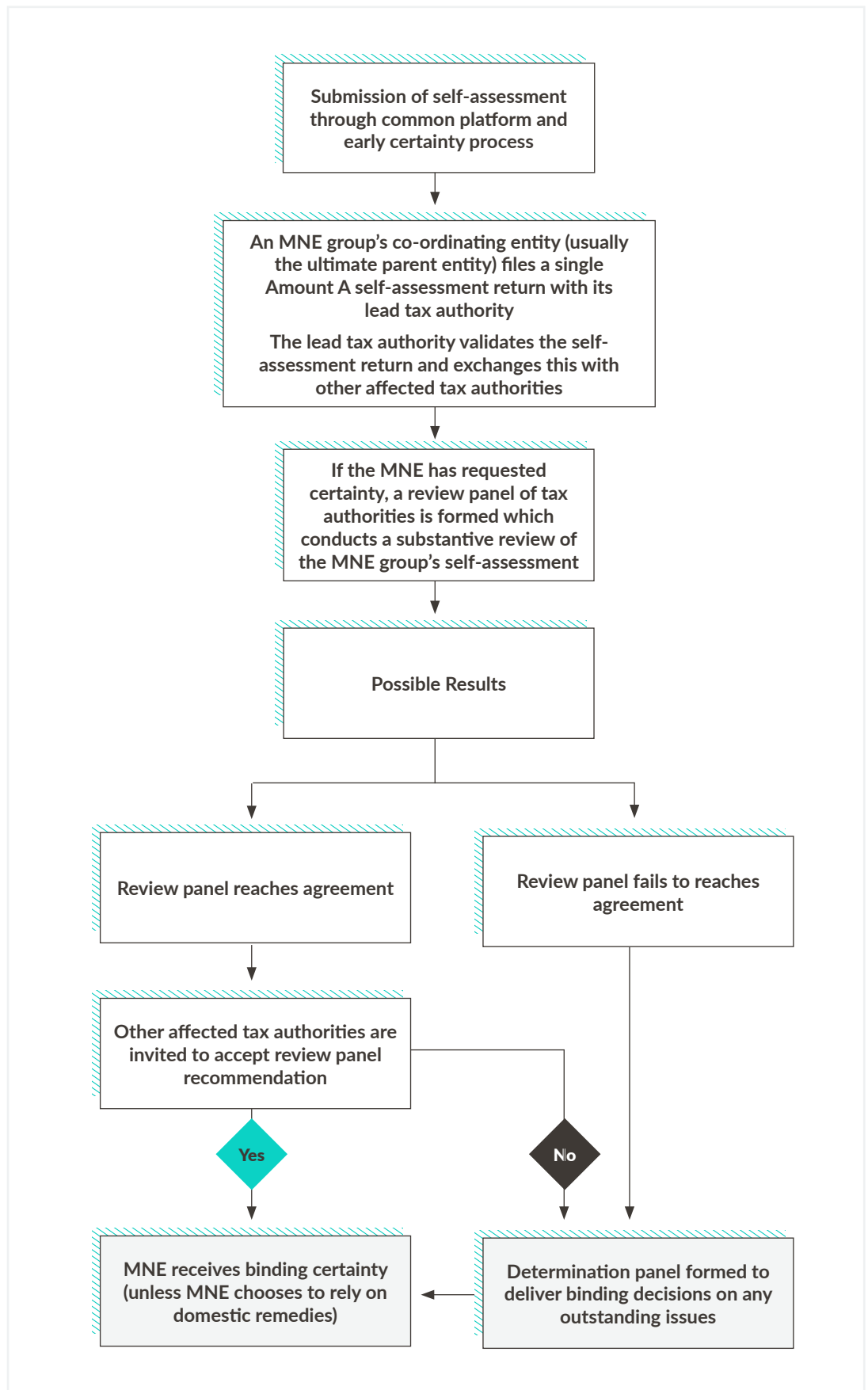
Overview of the Pillar 1 proposed tax dispute resolution process

Pillar 1 of BEPS 2.0 is made up of two parts. Amount A allocates a portion of deemed residual profits to a market jurisdiction using fractional apportionment, and Amount B, that looks to standardise compensation for certain routine marketing and distribution functions.

As a large number of jurisdictions could be eligible to receive Amount A in a particular case, it is possible that a multinational enterprise (MNE) could get caught up in nexus and profit allocation disputes with many countries, potentially facing inconsistent application of rules. Pillar 1 proposes novel and complex rules for preventing and resolving disputes.

The Pillar 1 Blueprint contains a detailed draft outline of the proposed approach to provide early tax certainty with respect to Amount A from MNE groups that are within the scope of Pillar 1. The proposed process includes provision for:

1. development of a standardised self-assessment return and related documentation package with centralised filing, validation and exchange between tax authorities of that information
2. the ability for an MNE group to request tax certainty
3. optional initial review by the lead tax administration of the return and determination if a panel review is needed
4. the constitution of the review panel and the review panel process
5. the constitution of the determination panel and the determination panel process, and
6. cases where the MNE group does not accept a panel conclusion.



Standardised return and package

A standardised Amount A self-assessment return and documentation package will be developed for use in all jurisdictions. While there is yet no detail concerning the form and content of such, the return will set out each stage of the MNE's determination and allocation of Amount A between jurisdictions. It will be designed so that sufficient background information and evidence is provided to allow assessment of the MNE group's Amount A self-assessment. One member of the MNE group, the "Amount A co-ordinating entity", will file the return on behalf of the MNE group with its lead tax authority. That authority should be in the tax authority of the jurisdiction where the MNE's ultimate parent entity is tax resident. If that tax authority is unable to act as the lead tax authority (which could be the case if the jurisdiction has not adopted amount A rules), or if another tax authority is more suitable, an approach will be developed to identify a surrogate lead tax authority.

The filing of the return would be by an agreed filing date. That matter is to be explored but an approach could be to allow the filing date to be up to 12 months after the end of the particular tax period, so the filing could be aligned with domestic tax return filing dates.

The filing entity would also provide the lead tax authority with an agreement signed by all of the MNE group entities that could be Amount A paying entities, confirming that they will be bound by the return as well as any adjustments agreed by the filing entity.

The lead tax authority will carry out a validation of the self-assessed return and documentation package for obvious errors and may request clarification or additional information from the filing entity. That authority will then exchange the return and documentation package with all affected tax administrations which are in jurisdictions where the MNE group has a constituent entity and where it has market revenues meeting the applicable threshold (or did so in the previous year). It is suggested that the usual timeframe for country-by-country report exchange, being 15 months from the end of the particular tax period, could be used as the timeframe for the exchange of the Amount A return and documentation package.

The Blueprint notes that it will be necessary for a comprehensive exchange of information network to be put in place for this, as well as up-front consent for the on-sharing of the information. Current tax treaties and tax information exchange agreements may not be sufficient to provide for such a network.

Request for early certainty

An innovative approach in Pillar 1 is a voluntary procedure that allows an MNE group to seek early certainty regarding Amount A. Application is made to the lead tax authority by a particular deadline, suggested to be six months from the end of the relevant tax year. A lead tax authority cannot decline to apply this certainty procedure unless it is aware that a group's financial statements or other information relied on in calculating amount A are likely to change or be restated in a way that will affect Amount A. In that case, a request for certainty may be declined but the lead tax authority can agree that a request can be submitted once the final position is known.

Optional review and whether a review panel is needed

At the same time as carrying out the validation, mentioned above, where an MNE group has made a request for early certainty the lead tax authority may carry out an initial review of the return submitted. Such review is intended to be a high-level review only and should only filter out low-risk groups.

If the lead tax authority concludes that a review by panel is not needed, other affected tax authorities have a certain period (suggested to be three months) in which to consider this and submit comments to the lead tax authority. That may include requesting a panel review of specific perceived issues or expressing a preference for a panel review. A panel review request should be accompanied by a description of the affected tax authority's specific concerns, which the lead tax authority will discuss with the filing entity to see if they can be addressed without harming the position of any other affected jurisdiction. If adequately addressed, the objecting tax authority should withdraw its request for a panel review. If an affected jurisdiction's concerns cannot be resolved, or if an undetermined number of

affected jurisdictions express a preference for review, a review panel could be formed. A panel could also be formed if the lead tax authority does not conduct an initial review of the self-assessment return or determines a panel review is needed. If none of the conditions are met and a review panel is not to be established, the MNE group will be informed by the lead tax authority that the position set out in its self-assessment return (reflecting any agreed changes) is accepted. That position is then binding on the MNE group's constituent entities and on tax authorities of all inclusive framework member jurisdictions.

Constitution of the review panel and review panel process

If a review panel is required the tax authorities that will participate on the panel will be taken from a list of affected tax authorities that have indicated an interest in taking part. Ideally the panel should comprise 6 – 8 tax authorities, including the lead tax authority, 2 – 3 relieving jurisdictions, and 3 – 4 Amount A recipient (i.e. market) jurisdictions. The MNE group not be involved in establishing the panel. The panel could be set up by the lead tax authority or a secretariat which could be established to assist with that process.

The review panel will conduct a review of the MNE group's self-assessment return, including each element of the determination and allocation of Amount A. The review may also include testing factual information provided by the MNE group so as to ensure the accuracy of the information. All engagements with the MNE group will be conducted via the lead tax authority. The MNE may be asked to participate in conference calls and email exchanges, and it may be asked to set up a virtual dataroom to allow information to be available to the relevant tax authorities.

At the end of the panel review process the MNE group will be informed of the result. There are generally three possible outcomes from the review:

- » the panel agrees with the MNE group's self-assessment of Amount A, or the group agrees to amend its self-assessment
- » the panel reaches agreement, it does not correspond to MNE group's self-assessment and the group does not agree to amend its self-assessment, or
- » the panel fails to reach agreement.

Where the review panel agrees with the MNE group's self-assessment, the leading tax authority makes the recommendation to all affected tax authorities that are not on the panel, that the self-assessment be accepted. If no affected tax authority objects to the review panel's recommendations within three months, acceptance is assumed and the MNE group is informed of that by the lead tax authority. The agreed and approved assessment is binding on the MNE's constituent entities and on tax authorities in all inclusive framework member jurisdictions.

If there is objection to the review panel's recommendation by any affected tax authority, and that objection cannot be resolved, the leading tax authority informs the MNE group and all affected tax authorities that relevant questions will be referred to a determination panel for a conclusive outcome. It is notable that just one affected tax authority can cause the review panel process to fail, even though possibly 100 or more affected tax authorities may agree with the panel recommendation.

If the MNE group does not agree to revise its self-assessment to conform to the panel's view, or if the group withdraws from the process, the early certainty process is complete. In that case the MNE group will need to rely on domestic remedies to resolve any Amount A disputes.

Constitution of the determination panel and determination panel process

If the review panel fails to reach an agreement, the case will move to a determination panel. The determination panel is required to reach an agreement on the Amount A position.

The composition of the determination panel remains to be determined. The review panel will develop specific questions for consideration by the determination panel, with all affected tax authorities having the opportunity to view and comment on the questions to be submitted. The review panel will also provide the determination panel with written analyses of the different positions held by the members of the review panel. The determination panel will use a "last best offer" approach to decision making, by choosing from those alternative responses. It will not re-open elements already settled by the review panel and agreed by the affected tax authorities.

The determination panel's decision should be made within six months. A short summary of the decision will be provided to the leading and affected tax authorities. The panel's final determination will be binding on all inclusive framework members.

Cases where the MNE group does not accept a panel conclusion

Where an MNE group withdraws its request for tax certainty after a review panel recommendation has been agreed by all affected tax authorities or after a determination panel has completed its review, it remains to be determined whether tax authorities would still be bound by the panel decisions. The Blueprint notes that it is expected that in the significant majority of cases all the MNE group constituent entities will accept the position agreed by the co-ordinating entity. While further work on the matter is needed, if a particular entity in an MNE group does not accept a panel decision, the tax certainty provided to other entities in the MNE group may also fall away even where they have accepted the panel outcomes.

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