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Amount B and the quest for tax certainty

Mark Martin and Thomas Bettge of KPMG in the US discuss the latest consultation document on Amount B, which aims to simplify transfer pricing for baseline distribution activities and reduce disputes.

In October 2021, more than 130 members of the OECD/G20 Inclusive Framework on BEPS committed to a plan of work that included Amount B, which aims to streamline and simplify the application of the arm's length standard to baseline marketing and distribution activities. A central aim of Amount B is to reduce disputes around routine wholesale distribution issues and to promote tax certainty. In December 2022, an initial consultation document was released on Amount B, and on July 17, a second consultation document followed. The current consultation period closes on September 1, and the Inclusive Framework aims to conclude work on Amount B and incorporate it into the OECD Transfer Pricing Guidelines in January 2024.

At the heart of Amount B is a tension between certainty and consistency with the arm's length principle. The extent to which the current proposal achieves the latter aim is beyond the scope of this article, and in any event would require a review of more data than has yet been published on the OECD's benchmarking analysis. With respect to certainty, however, it is possible to make some initial observations.

A key question in assessing the success of Amount B

Tax certainty is relevant to Amount B in two ways.

First, there are explicit rules around dispute resolution and prevention for Amount B. Because Amount B is slated to be implemented through adoption into the OECD Guidelines without the need for a multilateral convention, there is relatively little that can be done in this area. The document explains the Amount B cases would be eligible for the mutual agreement procedure under applicable tax treaties, and that existing advance pricing agreements (APAs) would be respected, but it does not address whether competent authorities could agree to future APAs covering Amount B, or indeed departing from Amount B where that was considered appropriate.

Second, and more importantly, if the overall design of Amount B is to be successful, it must operate in such a way that it is relatively clear (i) if a given transaction falls within the scope of Amount B and (ii) what represents an arm's length return for in-scope transactions. Absolute certainty is not achievable; it seems inevitable that some subjectivity will remain in making these determinations. From a tax certainty perspective, Amount B should be considered a success if it materially reduces transfer pricing uncertainty. A central question for the public consultation is whether Amount B achieves this.

One-sided versus two-sided methods

The July consultation document poses a choice between two scoping approaches. In both cases, the first step is to undertake a transfer pricing analysis to determine whether a one-sided method (i.e., the transactional net margin method, or TNMM, which is analogous to the comparable profits method in the US) can reliably be applied to the in-scope transaction, which involves a number of subjective considerations. This step sets up a dichotomy between cases that can potentially be resolved via Amount B and cases that require a two-sided method (i.e., a profit split).

Another rule would provide a potential exemption from Amount B pricing for cases in which the comparable uncontrolled price method can be applied using internal data. Fundamentally, then, the Amount B analysis would retain much of the subjectivity of transfer pricing, but would reduce the number of available methods for most wholesale goods distributors. For transactions priced using the Amount B mechanism, Amount B would prescribe a return on sales – subject, of course, to numerous judgement calls in the application of the TNMM.

A balancing act

The July consultation document shows significant progress, and reflects the vast energies that many tax authorities have poured into the project since the prior consultation. Amount B aims to strike a difficult balance between certainty – which is essential if the project is to benefit tax administrations and taxpayers alike – and arm's length outcomes, which are necessary in order to allow for implementation through the OECD Guidelines and to preserve the integrity of the transfer pricing system. The extent to which the proposal succeeds in striking that balance will be an important item for comment during the consultation period.

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