

OECD's Effort to Simplify Transfer Pricing Is an Important Step

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The latest OECD guidance on Amount B, which covers baseline marketing and distribution activities, is intended to make transfer pricing rules simpler. Three experts from KPMG discuss whether it hits the mark.

On July 17, the OECD [released](#) a new consultation document on part of its global tax deal known as Amount B. The project aims to fulfill a commitment made in 2021 on base erosion and profit shifting to simplify and streamline the application of the arm's length principle to baseline marketing and distribution activities.

The document includes the actual return on sales results that distributors in scope of Amount B would earn. This release shows substantial progress from the Organization for Economic Cooperation and Development's December 2022 consultation but doesn't yet reflect consensus.

The consultation period, which closes Sept. 1, offers perhaps a final, unique opportunity for companies to reflect on

how Amount B would and should apply to them and to provide comments before the projected finalization of Amount B in January 2024.

The inclusion of Amount B within Pillar One—part of the OECD/G20 Inclusive Framework two-pillar effort to address the tax challenges of the digitalization of the economy—is somewhat misleading, given that Amount B will apply to a wide range of companies across industries.

The Inclusive Framework is considering applying Amount B to wholesale distribution of digital goods; however, the distribution of digital services wouldn't be covered. Given the difficulties inherent in distinguishing between digital goods and digital services, the possible piecemeal inclusion of one but not the other seems unlikely to offer a satisfactory or stable solution. Amount B is now clearly on a different track than Amount A (which isn't slated to take effect before 2025) and can be adopted into the OECD transfer pricing guidelines without the need for a multilateral convention.

The scoping of Amount B has broadened considerably since the December release, which attracted negative comments for proposing a relatively narrow scope. Amount B, as currently defined, would apply to wholesale baseline distribution of goods, but not services or commodities, and not to retail activities above a de minimis threshold. In addition to buy-sell distributors, sales agents and commissionaires would be covered, and multi-function entities would be included if their non-distribution activities can be

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reliably segmented and priced separately.

The new consultation document proposes two options for defining baseline, and it's tempting to take the two alternatives as presenting a choice between quantitative scoping (Alternative A) and qualitative scoping (Alternative B). Closer consideration, however, reveals that both alternatives have a strong qualitative component. The threshold inquiry in either case is a transfer pricing analysis of whether a one-sided method—the transactional net margin method—can be used reliably.

That inquiry encompasses sometimes subjective questions regarding the functions performed, risks assumed, and assets used by an entity. Alternative B would add a second qualitative component—whether the tested party makes non-baseline contributions—but it's not clear how much this would expand the discretion that a tax administration would have to dispute the application of Amount B on qualitative grounds, which may be quite broad even under Alternative A.

The document presents a global pricing matrix with return on sales results from 1.5% to 5.5%, with a 0.5% tolerance band on either side, depending on a distributor's industry, asset intensity, and operating expense intensity.

Yet it also presents several ways a jurisdiction can receive results that differ from those provided for in the global matrix: a modified pricing matrix for certain jurisdictions with observed divergences from the global set, a country risk adjustment mechanism for certain other jurisdictions, and the ability to substitute in their own local dataset, subject to verification by the Inclusive Framework. The jurisdictions that could avail themselves of these alternatives are unspecified.

One troubling omission from the consultation document is whether Amount B should be implemented as a safe harbor or on a prescriptive basis. While Inclusive Framework members apparently believe it's premature to determine this while the substantive aspects of Amount B are undecided, the corollary is also true: It's difficult to adequately provide substantive comments while the fundamental nature of Amount B remains undecided.

The OECD and Inclusive Framework members deserve credit for their continued efforts to simplify transfer pricing rules, yet more is needed to deliver an Amount B that is a meaningful and sustainable simplification. In this regard, the current consultation period should prove particularly fruitful.

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