

OECD

Public Consultation Questionnaire

Amount B under Pillar One relating to the simplification of transfer pricing rules

*For ICC Members completion*


# **Amount B - Pillar One**

OECD Public Consultation

18 July - 1 September 2023

Members of the Inclusive Framework invite input from stakeholders on the relevant aspects of the design of the scope and pricing methodology, through 1st September 2023 with the work on those elements to be completed by year end.

**Stakeholder information**

1. Are you commenting in your capacity as a (highlight the selected answer):
* Small or medium-sized enterprise
* Multinational group
* Business organisation
* University
* Concerned individual
* Non-governmental organisation
* Advisor/agent
* Other:
1. Introduce yourself:

*The International Chamber of Commerce (ICC) is the institutional representative of more than
45 million companies in over 170 countries. Our members include many of the world’s leading companies, SMEs, business associations and local chambers of commerce. ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment. ICC is also an established arbitral institution through its International Court of Arbitration and provides other dispute resolution mechanisms through its International Centre for Alternative Dispute Resolution.*

1. Executive Summary (500 words maximum)

*ICC members appreciate the work undertaken to further develop and improve the main design features of Amount B, whose aim is to provide a simplified and streamlined approach to the application of the arm’s length principle to in-country baseline marketing and distribution activities.*

*We are encouraged by the more practical rules in the consultation paper that broaden the scope of Amount B. In particular, we appreciate the use of well established tools, such as segmentation, to resolve scoping issues for mixed function entities, which according to ICC members is a reasonable and needed update.*

*We would like to raise as a general remark that additional clarity should be provided on whether Amount B will operate as a Safe Harbour from which MNEs can opt-out and instead apply general Transfer Pricing rules.*

*Indeed, there has been positive progress on the scoping provisions. ICC members welcome the fact that entities engaged in non-distribution activities, in addition to distribution activities, are not automatically disqualified. Additionally, ICC members appreciate the better delineation of the unique and valuable intangibles, including the fact that marketing authorisations and other regulatory licenses are no longer automatically disqualifying a distributor from Amount B.*

*Nonetheless and unfortunately, despite the submission by stakeholders of substantial data supporting the expansion of scope to services during the previous public consultation process, we note that the services still remain excluded. We thus strongly recommend reconsidering the inclusion of services within the scope of Amount B.*

*Additionally, it remains unclear the reason why low-added value services providers would not be in scope under Amount B, since benchmark would be available also in this case. Moreover, while the commodities exclusion has been broadened, there are still commodities that are not included even though there is no reason for them to be excluded. Thus, we encourage further expansion of this exclusion.*

*Regarding the documentation requirements, ICC positively notes that they now largely leverage the existing local file and written agreements are no longer mandatory.*

*Nonetheless, the lack of a specific binding dispute resolution process besides existing MAP and APA mechanisms does not guarantee a sufficient and appropriate level of tax certainty.*

*Appreciative of the progress made, we welcome the opportunity to provide additional input for the improvement of the design elements of Amount B under Pillar One.*

*It should also be emphasised that, if properly defined,with broad scope and anchored in objective data, ICC members believe that Amount B can be a powerful tool to promote certainty, administrative simplification, and transparency. Amount B can be a tool that - by decreasing disputes - can help avoid wasting important resources for the benefit of tax administrations and businesses alike. However, to achieve such a goal, it is necessary to have scoping criteria that are objective and as quantitative as possible to ensure that disputes do not simply shift from current controversies to scopign controversies. By leveraging more objective and coordinated measures, Amount B can bring real added stability to the international tax system.*

*ICC members remain available as well to further engage on the points raised in their response.*

**Section 1 Definitions and Introduction (p.2)**

1. **Definitions (p.4)**

*Operating assets and/or operating expenses are not well defined. For example, it is unclear whether stock-option expenses, pension mark-to-market costs, lease assets, etc. – would be those uniformly operating. Since these are operating assets/expenses that drive the pricing matrix and define whether the company is subject to a routine return of 1.0 percent or 6.0 percent, they should better quantified and defined.*

*Moreover, applicable accounting standards that are to be used to compute return on sales or toher ratios are not well defined. ICC members would like to point out that a mix of accounting standards can produce very different outcomes and results.*

*ICC members welcome the inclusion of the Berry ratio cap and collar to work as guardrails for economically principles results, However, they would like to underscore that definiting the “Berry ration cap” in relation to a Barry ration result of 1.50 is much too high.*

*In relation to the definition of “industry groupings” (p. 5 of the public consultation document), the adopted descriptive approach can lead to equivocal results. A more objective classification could be easily adopted by publishing the activity codes corresponding to the qualitative descriptios.*

1. **General comments**

*As a general remark, from the text of the public consultation document it is unclear whether Amount B will operate as a Safe Harbour from which MNE will be ablet to opt out. ICC members strongly recommend that Amount B should act as a Safe Harbour. This approach would allow that companies that do not elect for Amount B will have the possibility to to rely on standard Transfer Pricing principles based on the arm’s length principle.*

*Secondly, since no detail has been disclosed on the data findings, it results difficult to provide completely accurate comments.*

**Section 2 Transactions in scope (p.7)**

1. **General comments**

*Enter your answer*

1. **[2.1] Qualifying transactions (p.7)**

*Enter your answer*

1. **[2.2] Scoping criteria (p.8)**

*Alternative A “recognizes that operating margins for baseline distributors can vary based on certain factors, and appropriately adjusts returns for differences in operating assets, operating expenses [and] industry”. ICC members strongly support Alternative A for scoping. Alternative A is a better representation of a simplified and streamlined pricing approach especially since the qualitative review of Alternative B will be highly subjective.The objectives of Amount B have always been rooted in bringing more stability, by promoting simplification and certainty, and by helping reducing the number of transfer pricing disputes. As more qualitative factors are added, the more subjective interpretation increases and hence, leading to an increase in the number of disputes. Only objective, quantitative measures can accomplish those goals. However, the very open-ended approach under Alternative B would simply trade disputes related to methodologies and calculations for disputes over scoping. For this reason, ICC members believe that only Alternative A will provide the security that was intended as part of the design of Amount B.*

*In relation to point 8), there has been an introduction of a minimum and maximum ratio for the comparison of operating expenses of the tested party (excluding COGS) to its annual sales. However, the intent of such floor and cap as part of the scoping approach is unclear.*

*For the mandatory range of 3% to [30%/50%], ICC members would like to express their concern in relation to entities that are new entrants into a market. New entities could have very routine functions (identical to other distributor entities), but have a higher costs to sales ratio for a limited time period. Thus, we invite the OECD Secretariat and Inclusive Framework to consider the potential introduction of a limited time exemption from this rule for new entities.*

*Among the 30% to 50% options, given the fluctuations businesses experience, we would suggest to use the 50% boundary.*

*Furthermore, the consultation document suggests that, if Alternative B is chosem, technical or specialised support functions could de-scope an entity from Amount B. As some level of support functions are already seen in comparables and given the goal of achieving arm’s length results, ICC members believe that this exclusion would be inappropriate. Moreover, to the extent that these services are in excess of what is normally seen in third parties, this issue could also be solved with segmentation. According to ICC members, this would not be a reasonable distinction and would reinforce why Alternative A should be preferred over Alternative B.*

1. **[2.3.1] Scoping criterion 8.a (p.13)**

*Enter your answer*

1. **[2.3.2] Scoping criterion 8.b – Quantitative filter (p.14)**

*When utilizing the quantitative criterion (operating expenses to sales ratio), taxpayers should be able to exclude expenses and costs that do not represent value-additing distribution functions, such as passthrough costs. ICC members agree with what indicated in footnote n. 18, namely with the principle that passthrough costs should be excluded.*

1. **[2.3.3] Scoping criterion 9.a – Non-baseline contributions (p.16)**

*Enter your answer*

1. **[2.3.4] Scoping criterion 9.b – Services exclusion and commodities exclusion (p.19)**

*ICC members continue to strongly believe that there are no objective, data-driven reasons to exclude services from Amount B. The consultation document suggests that there could be significant differences in the functions, assets and risks of distributors of services. These concerns have not been explained or demonstrated in the data. Thus, we would highly appreciated if further detail could be provided on the specific concerns. Similar functions are required in the distribution of services, and the business community has provided data that relevant comparables are within similar ranges. If concerns arise from the absence of inventory risk, reasonable adjustments could be made. It is also worth noting that the risk profile may be more similar to commissionaires, which remain in scope. If the concern is, instead, that services may be customized, many businesses provide services with little or no customization, and for the subset of companies that have incremental customization services, it will likely be possible to segment those results out from the baseline distribution functions.*

*It is particularly concerning that the exclusion of services would mean that a large portion of*

*companies subject to Amount A would not be in scope for Amount B. These features of Pillar 1*

*were always intended as part of a larger package of policies to stabilize the international tax*

*system. Thus, one should not be operative without the other.*

*Further, existing certainty features of Pillar 1 would not be sufficient, as currently designed*

*because they rely on bilateral treaties to resolve disputes, and there would be many cases*

*where these are not in force, unless Pillar 1 were to also establish transfer pricing principles to*

*apply to countries without existing tax treaties. It is also uncertain whether that certainty*

*approach is preferable given that Pillar 1 will already require additional dispute resolution*

*mechanisms and resources, and Amount B would provide a much quicker and less resource*

*intensive pathway to resolution. For all these reasons, the scope of Amount B should be extended to services.*

*Moreover, commodities exclusion should be broadened. Some members have pointed out that currently hydrogen produced based on the electrolysis of water using decarbonated electricity (so-called “green hydrogen”) is not excluded as in the case of hydrogen derived from the processing of natural gas which is conversely expressly excluded from Amount B. These members recommend the inclusion of green hydrogen produced through electrolysis of water as well as Helium, among the list of commodities exclusions. Indeed, Helium is a by-product of natural gas extaction. It is used as a commodity notably for the electronic industries. It is a highly volatile market, for which the benchmark panels used in the Amount B approach would not be applicable.*

1. **[2.3.5] Scoping criterion 9.b – Non-distribution activities separate from the qualifying transaction (p.21)**

*In applying the 30% threshold for the allocation of indirect operating expenses, we support the straightforward and clear approach of using the total costs of all activities performed by the distribution entity as the denominator for evaluation. However, there should be further clarification on how to identify the numerator. For instance, in cases where an entity distributes both in-scope and out-of-scope products, it should be clarified whether sales and marketing costs allocated between the two types of products should be included in the numerator and if there is any particular guidance that should be followed.*

**Section 3** **Application of the most appropriate method principle to in-scope transactions (p.24)**

1. **General comments**

*Enter your answer*

**Section 4 Determining the arm’s length return under the simplified and streamlined approach (p.25)**

1. **General comments**

*Enter your answer*

1. **[4.1] - Pricing matrix (p.25)**

*Taxpayers involved in both distribution and non-distribution activities face challenges in accurately segregating operating assets between in-scope and out-of-scope transactions, for calculation of the OAS ratio. Further, if companies have both in-scope or out-of-scope products based on these rules, they may not have any reliable data for allocated assets by product area. ICC members agree that the scope of Amount B should be expanded to include services, and this is another area where differences in rules by product will generate complexity, disputes, and potentially lack of certainty. Thus, we strongly encourage to broaden the scope. In the absence of that action, guidance should be given on option for allocated assets by product (e.g., a reasonableness standard for using allocation keys). For these reasons, OES will also be a better metric to use than OAS, and we would thus recommend eliminating OAS as a metric, given its inherenet complexities and lack of consistency as a metric. In any case, more detailed guidance will be necessary for its use.*

*ICC members also note that a number of new quantitative ratios have been inlcued in the consultation document. However, the document does not provide enough information on how to precisely calculate these rations. For instance, it would be critical to know whether local GAAP financial results will be necessary to determine the ratio. Thus, we respectfully urge the OECD to offer more comprehensive guidance and clarity on the calculation methodology for these fundamental ratios.*

1. **[4.2] - Mechanism to address geographic differences (p.27)**

*ICC members would like to underscore that the matrix for “qualifying jurisdictions” would produce outputs inconsistent with the arm’s length principles in the aggregate for all in-scope transactions. This is due to the fact that the matrix already reflects data on a globally blended set and by adjusting some, but not all, jurisdictions would skew the results away from the average/interquartile ranges.*

1. **[4.2.1] - Modified pricing matrix for qualifying jurisdictions (p.27)**

*ICC members would highly appreciate the opportunity to review the data supporting the modified pricing matrix, as well as the possibility to comment on the results once they are ready to be publicly available. In the view of ICC members, differentiated results are not necessary and data does not show meaningful geographic differences. Regardless, if uplifts will be applied for certain countries, presumably based on higher results demonstrated in the data, then comparable for those countries should also be removed from the general data set.*

1. **[Figure 4.2] - Modified pricing matrix (return on sales %) for tested parties located in qualifying jurisdictions (p.28)**

*Enter your answer*

1. **[4.2.2] - Data availability mechanism for qualifying jurisdictions (p.28)**

*It is unclear why a “riskier” country should automatically result in a higher return to the tested party, particularly when such risks are generally borne by the principal/IP owning entities or regional hub entitie, and not the local distributor entities. Such adjustments should not be necessary in order to identify an appropriate arm’s length return for in-scope activities, which should be based on the functions, assets, and risk.*

 *Adjusting the return for a particular jurisdiction would skew the aggregate results from those results in the benchmarking analysis.*

1. **[4.2.3] - Application of the simplified and streamlined approach using a qualifying local dataset (p.29)**

*ICC members remain of the opinion that comparables data does not support the presences of meaningful geographic differences in profitability. Opening the possibility of local data sets creates greater complexity, and it will be more difficult to ensure consistent processes around data. ICC members would thus recommend against the use of local comparables, and instead recommend a more consistent, standardised approach.*

*Should the use of local comparables be absolutely necessary, ICC members would appreciate the establishment of a review and approval process, as well as subjecting data to similar filers. Concerns persist since it is hard to imagine that sufficient data would be lacking from large commercial databases and it is to be assumed that other sources will have sufficient objective, transparent data.*

1. **[4.3] - Corroborative mechanism to address low and high functionality (p.30)**

*ICC members support the use of corroborative methods, and specifically the Berry ratio cap and collar. This is an appropriate way to guard against unintended outcomes, particularly for low margin businesses.*

*Given that the Berry ratio could generate controversy over classification of costs between operating expenses and cost of goods, it is worth considering if a more straightforward corroborate mechanism could be based on the operating margin/profi (e.g. return on costs, or cost plus).*

1. **[4.4] - Periodic updates (p.31)**

*Enter your answer*

**Section 5 Documentation (p.31)**

1. **General comments**

*Enter your answer*

**Section 6 Transitional issues (p.33)**

1. **General comments**

*ICC members appreciate the reaffirmation that companies should be able to structure as they fit, including any restructuring to better meet the requirements of Amount B. This will allow for a more level playing field, so that application of Amount B does not depend on coincidence of how a company had previously organised its operations. However, confusion arise from the comment raising concerns on artificial restructuring, More clarity would be welcomed on what is the point of concern, given that open-ended anti-abuse provisions will only create more disputes around the scope.*

**Section 7 Tax Certainty (p.34)**

1. **General comments**

*From the text of the public consultation document, it emerges that disputes around Amount B would only be addressed through existing procedures: APA or MAP. It is also acknowledged that while some countries might resolve economic doublt taxation through unilateral corresponding adjustments, most would only be able to do so under MAP procedures. However, MAP is not always available (either because of a lack of an in-force treaty or decisiosn of one of the MAP jurisdictions). As the main objective of Amount B is to reduce the amount of time and resources currently devolved for APAs and MAPs, ICC members would encourage the development of more binding or coordinated agreement and procedure to relieve economic double taxation. Greater certainty could be achied by including Amount B in the MLC and/or through the design of a specific ex ante and ex post mechanism to effectively prevent and resolve any dispute arising with respect to Amount B.An additional option for consideration could be* an accelerated MAP process, with mandatory deadlines after which the use of Amount B is deemed to be accepted by all parties if it was the MNE's choice

**Annex (p.36)**

1. **Annex A - Relevant benchmarking search criteria (p.36)**

*Enter your answer*

1. **Annex B - Industry groupings (p.38)**

*Enter your answer*

1. **Annex C - Background to modified pricing matrix (p.39)**

*Enter your answer*

**About the International Chamber of Commerce**

The International Chamber of Commerce (ICC) is the institutional representative of more than
45 million companies in over 170 countries. ICC’s core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach
 to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world’s leading companies, SMEs, business associations and local chambers of commerce.

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