

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:

*Enter your answer*

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 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, 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. 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)**

*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”. According to ICC members 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. Indeed, Amount B was intended to help reduce 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. For this reason, ICC members strongly support Alternative A.*

*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.*

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)**

*Enter your answer*

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)**

*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 wated as well as Helium, among the list of commodities exclusions.*

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

*Enter your answer*

**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)**

*Enter your answer*

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)**

*Enter your answer*

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)**

*ICC members would like to express their concern in relation to the fact that an adjustment to the return for a jurisdiction based on sovereign credit rating will not reliably ‘’influence” an arm’s length return attributable to baseline marketing and distribution activities. 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)**

*Enter your answer*

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

*Enter your answer*

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**

*Enter your answer*

**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. 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 design of a specific ex ante and ex post mechanism to effectively prevent and resolve any dispute arising with respect to Amount B.*

**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.

|  |  |
| --- | --- |
| Graphical user interface  Description automatically generated with medium confidence | 33-43 avenue du Président Wilson, 75116 Paris, FranceT +33 (0)1 49 53 28 28 E icc@iccwbo.org[www.iccwbo.org](file:///C%3A%5CUsers%5Clsa%5CDownloads%5Cwww.iccwbo.org) [@iccwbo](https://twitter.com/iccwbo) |