

# Introducing Amount B in Transfer Pricing

## New rules for Distributors?

### Amount B and Pillar 1 and 2

On 19 February 2024, the OECD/G20 Inclusive Framework on BEPS released the "Report on Amount B of Pillar One" ("the Report").<sup>1</sup> It comes as part of the OECD's Two-Pillar Solution to address the Tax Challenges Arising from the Digitalisation of the Economy. While under Pillar Two multinational enterprises ('MNE') shall be subject to tax in each jurisdiction at a 15% effective minimum tax rate regardless of where they operate, Pillar One is about the development of subject to tax rules and an implementation framework.

### Application to distributors

The OECD's idea behind Amount B is to provide a standardized approach for establishing arm's length ranges for "base-line marketing and distribution activities" to support in particular "low-capacity jurisdictions". Drawing from existing principles in the OECD Transfer Pricing Guidelines, Amount B is supposed to give "a simplified and streamlined pricing framework that determines a return on sales for eligible distributors" and shall be incorporated into the OECD Transfer Pricing Guidelines as an Annex to Chapter IV<sup>2</sup>.

### Introduction of Amount B

Other than the rest of Pillar One, Amount B does not apply to very large MNE only. To establish the Amount B procedure from as early as 2025 on, however, first a jurisdiction has to opt in. On 17 June 2024 the OECD published a list that contains more than 60 „covered jurisdictions“, mostly „low- and middle income OECD and G20 member countries“.<sup>3</sup> So far it is not known what jurisdiction will indeed opt in and with effect from what date. For implementation the Report introduces two options:

- ▶ **Under option 1** tested parties resident within the respective jurisdiction are permitted to elect to apply the Amount B approach
- ▶ **Under option 2** a jurisdiction can require the use of the simplified and streamlined approach in a prescriptive manner by its tax administration and tested parties resident in the jurisdiction and, thus, the tax administration may specify that taxpayers should apply the simplified and streamlined approach where the scoping criteria are met and the tax administration would be bound to apply it under similar circumstances.

### Eligibility

Not all distributors are contemplated to qualify for the "Amount B approach". The distribution of digital goods, commodities and services are out of scope and in-scope distributors should, for example, not own unique and valuable intangibles nor should they assume certain economically significant risks. The simplified and streamlined approach allows in-scope distributors to perform non-distribution transactions when they can be adequately evaluated and reliably priced on a separate basis under the general principles of the OECD Transfer Pricing Guidelines. It also permits the undertaking of de minimis retail sales.

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<sup>1</sup> <https://www.oecd.org/tax/beps/pillar-one-amount-b-21ea168b-en.htm> ("Report")

<sup>2</sup> Cf. pg. 6 Report

<sup>3</sup> <https://www.oecd.org/tax/beps/statement-covered-jurisdiction-definition-inclusive-framework-commitment-amount-b.pdf>

As a rule, under the "Amount B approach" the transactional net margin method is considered the most appropriate transfer pricing method. However, determining a return on sales requires a three-step process for an in-scope distributor which provides an approximation of an arm's length result. As such the "Amount B approach" pricing framework provides as a core element a matrix of returns taking into consideration net operating asset intensity (OAS), operating expense intensity (OES) and industry groupings.<sup>4</sup>

According to the matrix a return on sales between 1.50% and 5.50% plus/ minus 0.5% can be considered "arm's length operating margins". In addition, a four-step operating expense cross-check needs to be applied (leading to adjustments if the result is outside a cap-and-collar range) and, for tested parties in qualifying jurisdictions<sup>5</sup>, modifications and a data availability mechanism may have to be applied (and may lead to further adjustments). According to the OECD all necessary data will be updated regularly.

### (Avoiding) Tax disputes

Similar to other elective approaches in the OECD Transfer Pricing Guidelines, the outcome determined under the Amount B approach by a jurisdiction that has chosen to apply this approach to qualifying transactions of its in-scope tested party is non-binding on the counter-party jurisdiction where the associated enterprise that is a party to the controlled transaction is located.

However, according to the Report, subject to their domestic legislations and administrative practices, members of the Inclusive Framework commit to respect the outcome determined under the simplified and streamlined approach to in-scope transactions where such approach is applied by a low-capacity jurisdiction and to take all reasonable steps to relieve potential double taxation that may arise from the application of this approach by a low-capacity jurisdiction where there is a bilateral tax treaty in effect between the relevant jurisdictions. The Inclusive Framework will work on the implementation of this commitment in 2024, including through the development of competent authority agreements that could be used within the context of bilateral tax treaty relationships, taking into consideration the dual objective of bilateral tax treaties to avoid double taxation, as well as to prevent double non-taxation. The Inclusive Framework will agree on the design elements and on the list of low-capacity jurisdictions within scope of this commitment by consensus in 2024.

### Assessment and next steps

It seems debatable whether the "Amount B process" will not only shift discussion with tax authorities over the results of benchmark studies to discussion with tax authorities about in-scope distributors and the calculation and application of margins to be applied. There seems to be dispute over what covered jurisdictions will adopt the „simplified and streamlined approach". India and some other jurisdictions expressed their reservations on the Report (and cannot be found in the list of covered jurisdictions), while the US wants an Amount B that has a wider area of application, is mandatory, clear and objective.

For MNE that include affiliates that are involved in significant distribution activities it seems diligent to understand whether the "Amount B process" would be applicable and, if so, what the resulting tax implications would be. Currently it cannot be excluded that the introduction of Amount B would cause additional work as MNE have to continue conducting benchmark studies for distribution entities in some jurisdictions and in parallel apply the Amount B-approach in others. Please do not hesitate to contact us, we will be happy to provide advice.

<sup>4</sup> Table 5.1, pg. 27 ff. Report while the US

<sup>5</sup> The lists of qualifying jurisdictions was published on 17 June 2024 and contains more than 130 entries, cf. <https://www.oecd.org/tax/beps/statement-qualifying-jurisdiction-definitions-section-5-2-section-5-3-simplified-streamlined-approach.pdf>

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