# 8 Amount B

## 8.1. Overview

649. Amount B aims to standardise the remuneration of related party distributors that perform “baseline marketing and distribution activities” in a manner that is aligned with the ALP. Its purpose is two-fold.

650. First, Amount B is intended to simplify the administration of transfer pricing rules for tax administrations and reduce compliance costs for taxpayers. Second, Amount B is intended to enhance tax certainty and reduce controversy between tax administrations and taxpayers. In these ways, Amount B has the potential to address certain challenges that tax administrations face in evaluating the arm’s length nature of the pricing of distribution arrangements adopted by MNE groups. Distribution arrangements constitute an area of concern for tax administrations and taxpayers alike and are a frequent focus of domestic transfer pricing controversy. They are often the subject of dispute between tax authorities, and require settlement under the MAP[1] provided for in bilateral tax treaties. For these reasons, many governments and businesses view improvements in this area as a key deliverable of Pillar One, on the presumption that the design features of Amount B are such that these key benefits may be realised in practice.

651. This chapter sets forth the framework that would enable the implementation of Amount B. It starts with a discussion of the entities and transactions that are anticipated to be in scope. Next, it proceeds to outline the way in which the in-scope baseline activities would be defined.[2] It then turns to the assessment of the quantum of Amount B and finally considers the implementation of Amount B.

652. It currently assumes that distribution and marketing activities would be identified as in scope based on a narrow scope of baseline activities, set by reference to a defined ‘positive list’ and ‘negative list’ of activities that should and should not be performed to be considered as in scope. Quantitative indicators would then be applied to further support and validate the identification of in-scope distributors. Pending further technical work to be performed, it is anticipated that Amount B could be based on a return on sales, together with potentially differentiated fixed returns to account for the different geographic locations and/or industries of the in-scope distributors. Further technical work is also required to both define the precise calculation of the return on sales and the in-scope geographic locations and industries. But given the narrow scope of Amount B, there is currently no provision for Amount B to increase with the functional intensity of the activities of in-scope distributors.[3] Finally, Amount B would not supersede advanced pricing agreements (APAs) or MAP settlements agreed before the implementation of Amount B.

653. Under one proposal, the implementation of Amount B would operate under a rebuttable presumption: namely that an entity that acts as a buy/sell distributor and performs the defined baseline marketing and distribution activities qualifying for the Amount B fixed return would render it in scope – but that it will be possible to rebut the application of Amount B by providing evidence that another transfer pricing method would be the most appropriate to use under the ALP.[4] The burden of proof for this will rest with the taxpayer. For example, the presumption would be rebuttable if a sufficiently reliable CUP was available, which under specific circumstances would be the most appropriate transfer pricing method to use. As the Amount B fixed return will be set by reference to a narrow scope of baseline activities and

determined through a benchmarking analysis based on third party comparables, it is intended to approximate results determined under the ALP [5] and hence with existing domestic and treaty law.[6]

654. While a group of Inclusive Framework members prefer a narrow approach, which is discussed in detail in this chapter, another group of Inclusive Framework members wish to have a broader scope – e.g. one that provides for standardised remuneration also for commissionaires or sales agents, or for distribution entities whose profile differs from the baseline marketing and distribution activities just mentioned. Such a broader scope would also raise issues that would require further work, including how to reconcile the fixed return profile for these activities with the ALP.

655. Further, some Inclusive Framework members have expressed an interest to see Amount B first delivered in a pilot programme, which would have the objective of evaluating whether Amount B can meet its aims of simplification and reduced disputes, would allow for monitoring of behavioural change of MNE groups in response to the implementation of Amount B, would allow for phased introduction in Inclusive Framework member jurisdictions and would entail an assessment of the ease of implementation on a phased basis. The means of implementation of Amount B and the potential implementation of a pilot programme is subject to further technical work and discussion between the members of the Inclusive Framework.

656. As a next step, the members of the Inclusive Framework will need to decide how to proceed with Amount B, in particular regards the question of using a narrow or a broader scope. In addition, further technical work will need to be undertaken to set the fixed return profiles for the defined baseline activities, including establishing the benchmark for the to-be-defined profit level indicator, and accounting for the agreed-upon regions and industries in scope. In this task, it will be possible to draw on the wider work currently undertaken by the Forum for Tax Administration (FTA) MAP Forum and the FTA.

## 8.2. Key design features of Amount B

657. The key design features of Amount B cover: (i) scope, (ii) quantum and (iii) implementation. This section provides an update on the progress made for each of these features.

### *8.2.1. Scope*

658. As Amount B would apply to the enterprises of MNE groups that perform the defined baseline marketing and distribution activities in a market under an accurately delineated transaction[7], it is not subject to the scope limitations of Amount A. The accurately delineated transaction should consider the five comparability factors outlined in Chapter I of the OECD Transfer Pricing Guidelines. In particular, the functions performed, assets owned and risks assumed in the accurately delineated controlled transaction should be similar to those identified as being within the baseline marketing and distribution activities. Accordingly, it is necessary to define what controlled transactions and baseline marketing and distribution activities would qualify for the fixed return which is Amount B. In particular, defining the baseline marketing and distribution activities will be achieved by reference to a positive and a negative list of qualitative factors that closely relate to the performance of marketing and distribution activities, with further reference to a set of quantitative indicators that relate closely to the performance of these activities.

#### *Definition of entities and transactions covered by Amount B*

659. Amount B is the remuneration of group enterprises resident in (or in the case of a permanent establishment[8] located in) a market jurisdiction (either a subsidiary or a permanent establishments of a foreign party) that perform baseline marketing and distribution activities for the distribution of products for the MNE group (hereinafter, “distribution entity”).[9]

660. The controlled transactions in scope could consist of:

- The purchase of products from a foreign associated enterprise for resale to unrelated customers predominantly[10] in its country of residence, and the associated performance of defined baseline distribution activities; and
- The performance of the defined baseline marketing and distribution activities by the distribution entity in its state of residence, transacting or dealing with a foreign associated enterprise.[11]

661. An accurate delineation of the controlled transaction, taking into account all of the relevant comparability factors inclusive of the functional analysis on which the defined in-scope activities are based, will determine whether a distribution entity is engaged in a transaction in scope of Amount B. Accordingly, the guidance in Chapter I of the OECD TPG will be relevant for purposes of identifying entities in an MNE group that are within scope of Amount B. No assumption is made about the functional profile of a distribution entity based on how it is labelled or characterised by the MNE of which it is a member.

662. Amount B would apply to a distribution entity that, according to the accurate delineation of the transaction, performs functions, owns assets and assumes risks that would characterise it as a routine distributor at arm's length.[12]

### *Definition of baseline activities and negative indicators*

663. For simplicity of administration and to limit the potential for disputes over what is in the scope of Amount B, the in-scope baseline marketing and distribution activities are first defined by reference to a list of typical functions performed, assets owned and risks assumed at arm's length by routine distributors.[13] This 'positive list' is based on a narrow scoping definition that aims to qualitatively measure the profile of typical routine distributors. Second, a 'negative list' of typical functions that should not be performed, assets not owned and risks not assumed at arm's length by routine distributors are included to qualitatively measure the additional factors that would cause a distributor to be outside the scope of Amount B. Taken together, the positive and negative lists demonstrate the qualitative indicia of the baseline activities and risk assumption expected of a distribution entity within the scope of Amount B.

664. Certain quantitative indicators would also be used to further support the identification of in-scope activities, and are described in the next section. The qualitative factors and quantitative indicators are used together to test if a distribution entity is in scope.

665. If the accurately delineated transaction results in a characterisation of the in-market enterprise as a routine marketing or sales support service provider[14] (i.e. performing fewer functions and assuming less risk than is defined under the baseline marketing and distribution activities) then it would not fall within the scope of Amount B and the return should be measured by the ALP as it applies today.[15] In the same way, if the accurately delineated transaction results in a characterisation of the in-market enterprise as performing more than routine functions and assuming more than routine risks than are defined under the baseline marketing and distribution activities, the remuneration commensurate with such activities and risks will also be outside the scope of Amount B.

666. Typically, an in-scope distribution entity would perform at least sufficient activities for it to be characterised as a routine distributor for which the return on sales profit level indicator would be appropriate at arm's length. For this purpose, the guidance on the functional analysis in Section D.1.2 of Chapter I of the TPG will be relevant. It should be noted that the required sufficiency of functions performed, assets used and risks assumed in performing the baseline marketing and distribution to be considered as in scope is subject to refinement through further technical work, as is the definition of functions, assets and risks themselves as well as the meaning of terms such as "limited" or "routine" when referring to them.

**Functions**

667. The baseline marketing and distribution functions typical of the performance of distribution activities by distribution entities in scope of Amount B may include:

1. Importation of products for resale within the market[16] and customs clearance, including charge of freight, insurance and customs costs;
2. Purchase of goods for resale within the market; Development and execution of sales budgets and plans within the market, within the MNE group's guidelines and under its oversight and/or subject to the MNE group's approval;
3. Development and maintenance of local customer relationships within the market;
4. Determination or negotiation of pricing and other contract terms with third party customers, within the MNE group's pricing guidelines or price lists and under its oversight or approval where necessary (e.g. to adapt based on market demand, competition and currency, or to allow certain discounts);
5. Processing of orders and contracts with customers; Inventory: monitoring and routine management of inventory (e.g. on the books or by means of joint systems or by receiving regular updates from an entity providing storage and logistics services);
6. Management of logistics, warehousing and transportation of products to customers (which includes situations when these are outsourced to another entity);
7. General administration functions, e.g. sales invoicing, process and collection of payments, accounts, and financial and tax reporting obligations;
8. Routine input into demand planning activities undertaken by the MNE group; and
9. Marketing activities:
    a. Pre-sale services: provision of product information to prospective customers (e.g. product demonstrations);
    b. Execution of global marketing plans in local jurisdictions with no further material adaptation (advertising campaign, trade shows);
    c. Translation of marketing and advertising material and business website to local language;
    d. Market research for planning and marketing purposes, e.g. provision of input to foreign related party on trends, customers, consumers, demands, local input; and
    e. Routine after-sales services: including processing complaints, and providing non-technical support.

668. Conversely, Amount B is not intended to cover distribution entities that perform any of the following activities:

1. The performance of activities related to the development, enhancement, maintenance or protection of marketing intangibles (other than local customer lists/customer relationships). For instance, this may be exhibited by:
    a. The lack of centralised structure and control of the group's intangibles;
    b. Decision-making by the distribution entity about investments and associated investment and development costs; or
    c. Developing and taking primary responsibility for maintaining, improving the technology supporting on-line sales and interaction with customers.
2. The performance of strategic sales and marketing functions in the local market, such as:
    a. Development of strategic marketing policies;
    b. Development of pricing and negotiation of pricing outside of parameters set by the MNE group;

   c. Product development functions; or
   d. Any marketing and advertising functions that are non-routine or where expenditures are made without an arrangement with the legal owner of the intangibles for reimbursement.
3. Activities related to the assumption of entrepreneurial risks and responsibilities in the controlled transaction.
4. Activities related to the resale of products mainly to government entities or government contractors, as companies performing such activities may face different contractual terms and competition compared with companies distributing to private companies; however, some Inclusive Framework members do not consider that this should be in the negative list and consequently be out-of-scope. Further technical work will be performed to evaluate this concern.

**Assets**

669. The assets used by the distribution entity in the performance of baseline activities in scope of Amount B may include:

- Ownership/lease of offices, product display premises;
- Ownership/lease of warehousing facilities;
- Limited ownership of inventory;[17]
- Customer list/customer relationships for their own local customer relationships;
- The right to sell in a market and use product name and brands;[18] and
- Local registrations or licences for products.

670. The distribution entity should not have the ownership of valuable marketing intangibles, such as local trademarks, brands, trade names, whether or not these are included as an asset in the distribution entity's balance sheet.

**Risks**

671. The risks assumed by the distribution entity in the performance of baseline activities in scope of Amount B may include:

- Limited market risks, for example on the basis that other entities within the MNE group assume material market risks, by developing strategic marketing plans, define pricing and undertake brand development activities, but where a local distributor may assume some risk of variable sales volumes in its specific market through reduced revenues;
- Between no to limited credit risks, for example where the routine distribution entity makes sales within its market and where it develops and maintains the customer relationship;
- Between no to limited inventory risk, to the extent that the routine distribution entity holds inventory; and
- Between no to limited foreign exchange risk, where the routine distribution entity purchases products or services for resale and either resells them in a different currency or bears operating costs in a different currency.

672. Typically, these entities would not be expected to assume risks that were economically significant for the MNE group as a whole. Determining whether a risk is economically significant is part of the functional analysis and the broader delineation of the related party transaction.

### *Quantitative indicators that may be used as proxies to identify entities and transactions out-of-scope of Amount B*

673. In conjunction with considering the qualitative factors highlighted above, quantitative indicators could be used to identify in-scope distribution entities.

674. These aim to provide means of ascertaining whether the distribution entity does in fact perform baseline marketing and distribution activities and has the profile of a routine distributor, or whether it performs additional activities and assumes additional risks that may render it out-of-scope. They therefore take the form of quantitative thresholds that are closely linked to typical marketing and distribution activities. Consequently, if the thresholds are exceeded, it may indicate that the distribution entity performs more than the baseline marketing and distribution activities, inclusive of owning assets and assuming risks commensurate with the profile of a routine distributor, and therefore its activities may fall within the negative list described in the section above.

675. The quantitative indicators may also help analyse the consistency between the qualitative description of the functions performed, assets owned and risks assumed and how that is represented in the financial and operating structure of the business.

676. Technical work has so far focused on identifying appropriate quantitative indicators that are associated with activities in excess of the baseline. The following indicators may constitute appropriate quantitative proxies to support the determination of what may be an in- or out-of-scope distribution entity and transaction:[19]

- For the performance of activities related to the development, enhancement, maintenance or protection of marketing intangibles (other than local customer lists/customer relationships), and for the performance of strategic sales and marketing functions in the local market:
  a. Marketing and advertising expenses exceeding a fixed proportion of the total costs of the distribution business and for the account of the business incurring the expense; and
  b. R&D costs (on the basis that such costs relate to the generation of potentially valuable marketing intangibles for the MNE group within its industry) exceeding a fixed proportion of the total costs of the distribution business (again for its own account).
- For the ownership of potentially valuable marketing intangibles: The above indicators, plus the presence of amortisation costs in excess of the total costs of the distribution business.
- For the performance of activities related to the assumption of entrepreneurial risks and responsibilities in the controlled transaction:
  a. Finished product inventory of the distribution entity is greater than a fixed proportion of the annual net sales of the distribution entity, calculated on the basis of the average inventory held on the last day of each of the four quarterly periods during the relevant taxable year of the distribution enterprise;
  b. Inventory write-downs are greater than a certain fixed proportion of total inventory; and
  c. Accounts receivable are greater than a fixed proportion of total finished product inventory.

677. Further work is required on these proxies[20], with a view to clarifying the precise quantitative indicator to be used and the basis on which each one will be applied. For example, this may set ratios or absolute levels, depending on the required measurement, and subsequently benchmarking will be undertaken to fix the level of the relevant proxies. The basis on which the indicators will apply, together with the qualitative tests, will also be further evaluated. In addition, some Inclusive Framework members have the view that the quantitative indicators should also attempt to evaluate circumstances where the required threshold of activities to be considered as being in scope has not been met. Further technical work will be performed in this regard.

678. The application of Amount B would be prospective, i.e. Amount B would not supersede MAP settlements or APAs (unilateral, bilateral or multilateral) entered into before the implementation of Amount B.

### *Amount B and multifunctional entities*

679. A distribution entity performing a controlled transaction in scope of Amount B may also perform other activities, such as R&D, manufacturing or back-office services. In those cases, it will be necessary to determine whether Amount B can still be applied to the controlled activities in scope.

680. In principle, the ALP should be applied on a case-by-case basis, and thus the application of Amount B to entities with controlled transactions in scope should be possible, even when those entities are engaged in other activities.[21] In practice, however, this determination will depend on the facts and circumstances of each case. For instance, when the additional activities do not relate to the products being distributed, the distribution entity may be able to apply Amount B, and separately determine the remuneration for the additional activities under a full transfer pricing analysis.

681. The determination may be different where a distribution entity performs other activities which relate to other aspects of the value chain of the product being distributed. In some situations, the accurate delineation of the transactions may indicate that the Amount B activities and the additional transactions are so closely linked or continuous that they may need to be considered in the aggregate.[22] In these cases, it would be likely that such transactions would be outside of the scope of Amount B, although further technical work will need to be performed to establish this.

682. The availability of reliable segmented financial information for the different activities will also play a key role in deciding whether to price each type of activity separately or to adopt a holistic approach and consider the overall functionality of the entity.[23]

683. Further, some Inclusive Framework members have expressed the view that consideration be given to situations where related manufacturing and distribution activities are performed domestically but are fragmented, opining that such entities should be considered to be in scope. Additional technical work will continue to assess this concern.

### *Commissionaires and sales agents*

684. On the assumption of a narrow scope, commissionaires, sales agents and other businesses that perform non-baseline marketing and distribution activities[24] would not be within the scope of Amount B.[25] This is principally due to the increased breadth of the work needed if they were to be included as in scope, the additional technical complexity and specificity that their inclusion would require, and the issue that the inclusion of both of these models would render it more difficult to reach consensus. Subject to the overall direction of the work on amount B, further work would then need to be undertaken to assess the feasibility of including commissionaires, sales agents and other businesses that perform non-baseline marketing and distribution activities in scope of Amount B. If they are included in scope, it will be appropriate to determine commensurate remuneration under Amount B that is consistent with the ALP. Some members of the Inclusive Framework favour a broader scope inclusive of commissionaires and sales agents, whereas others prefer the current narrow scoping criteria. For example, some members want commissionaires and sales agents to be included within the scope of Amount B because they think that there is only a thin line that separates commissionaires and sales agents from entities that perform routine marketing and distribution activities. Further technical work will be carried out to evaluate this issue.

### *8.2.2. Quantum*

*Structure*

685. The fixed return provided to remunerate baseline marketing and distribution activities under Amount B is intended to deliver a result that approximates results determined in accordance with the ALP. The TNMM is set forth in this Blueprint as the most appropriate transfer pricing method associated with the adequate remuneration for the baseline marketing and distribution activities performed by distribution entities in scope of Amount B. For example, net profit indicators are less affected by transactional differences and more tolerant to some functional differences between the transactions being compared).[26]

686. For the appropriate profit level indicator, a return on sales could be used[27] as a fixed return for the transactions in scope and with the numerator to be defined based on further technical work (e.g. EBIT or EBT). Further work would also consider what is included in the denominators of the various profit indicators that are specified under this approach (e.g. whether revenue should include product returns and refunds and foreign currency gains and losses).

687. Under one proposal, Amount B would operate on the basis of a rebuttable presumption, namely that a distribution entity that acts as a buy/sell distributor and performs the defined baseline marketing and distribution activities qualifying for the Amount B fixed return would be in scope. But it would be possible to rebut the application of Amount B by providing evidence that another transfer pricing method would be the most appropriate to use under the ALP.[28] For example, the presumption would be rebuttable if a sufficiently reliable CUP[29] was available and under the specific facts and circumstances the CUP is the most appropriate transfer pricing method to use. As the Amount B fixed return will be determined through a benchmarking analysis based on third party comparables, it is intended to approximate results determined under the ALP[30] and hence existing domestic and treaty law.

*Differentiated returns by region*

688. The TPG explains that arm's length prices may vary across different markets even for the distribution of the same or similar products. This can be due to a number of factors, such as (i) geographic location; (ii) the size of the markets; (iii) the extent of competition in the markets and the relative competitive positions of the buyers and sellers; (iv) the nature and extent of government regulation of the market; (v) transport costs; and (vi) the level of the market (e.g. retail or wholesale).[31] There may therefore be differentiated returns by region, with further technical work being required to establish the specific regions and to understand the variance in arm's length returns by region. .

689. Accordingly, as a next step, the work may develop differentiated returns for certain defined geographic regions. Ways of measuring the appropriate return will be explored, including the use of standard reference benchmarking sets and quantitative approaches. As reference benchmarks that rely on comparables will be considered, further technical work is needed to consider how to overcome any lack of publicly available information in certain regions for purposes of identifying comparables and evaluating their financial data (see further comment in the section "Process for determining the quantum of fixed returns").

*Differentiated returns by industry*

690. The fixed return could need to vary by industry. This responds to the view that two distributors operating in different industries (for instance, the pharmaceutical industry and motor vehicle industry) may experience divergences in their remuneration for a number of reasons (e.g. the type of products sold (high value products v. commoditized products) or the intensity and effort required to perform the marketing and distribution function).

691. Accordingly, further technical work is necessary to develop potentially different industry-based returns. These are likely to include: pharmaceutical, consumer products, automotive, and information and

communication technology (ICT), but this list may be refined and others may be included on the basis of further technical work. These industries are likely to be the most relevant for the largest number of jurisdictions.

### *Differentiation by functional intensity*

692. Under the ALP, greater functionality should generally be accompanied by a higher profit potential (or loss potential). Conversely, lower functionality should generally be accompanied by a lower but less variable profit potential. On the assumption that the narrow scope of Amount B set out here is the one used, no attempt is made to account for functional intensity, as broadening the scope of baseline activities may increase complexity and increase the areas for dispute. However, functional intensity adjustments may be required if commissionaires and sales agents are included in the scope of Amount B, as these types of entities may receive lower returns than buy/sell distributors.[32]

### *Process for determining the quantum of fixed returns*

693. Establishing the specific fixed return for the baseline marketing and distribution activities will require the preparation of reference benchmarking sets for each of the regions to which differentiated returns should apply. To finalise each reference set will also require a consistent definition to be developed for each of the industries for which a reference benchmarking set will be prepared. The development of the reference sets will proceed by locating potentially comparable independent companies within each industry and region for which a benchmarked return on sales will be calculated. This will in turn require the development of a specific search strategy to find such comparable companies, including a fixed definition of independence, the specific use of industry classification codes and other qualitative and quantitative criteria by which potentially comparable companies may be reviewed to ascertain whether or not they should be included in the reference set. Finally, the profit level indicator will be calculated (with the potential to make certain comparability adjustments which are to be defined) to establish the range of potentially appropriate fixed returns.

694. Consistency with the ALP requires that the determination of the quantum of fixed returns for Amount B be informed by benchmarking studies based on publicly available information (noting the comments above). To this end, consideration will be given to issues such as:

- Whether to use data for a single year or a weighted average of multiple years to determine the fixed return;
- The selection of the database(s) to be used for the benchmarking exercise, as there are several databases with diverse coverage and level of detail in terms of regions, financial and non-financial information;
- The selection of the search strategy, which includes the search parameters and screening criteria. For instance, identification of the relevant industry classification codes to capture the scope of Amount B; identification of the filters to be applied in the screening procedure (number of years of available financial data, independency criteria, consolidation, etc.); and
- The evaluation of necessary adjustments to enhance comparability.

695. Further work will also need to be undertaken regarding analysing how often the benchmarking will need to be updated and how often the underlying search process to develop the reference sets will need to be reviewed. The specific benchmarking with regional and industry variation will be developed alongside the current FTA MAP forum benchmarking exercise.

### *8.2.3. Implementation*

696. Implementing Amount B in a coordinated and uniform fashion will reduce the risk of double taxation and double non-taxation.

697. A narrow scope of Amount B may facilitate reaching a consensus by a large number of Inclusive Framework members as it would be easier to agree on the appropriate set of baseline marketing and distribution activities, including the qualitative and quantitative indicators according to which distribution entities may be out-of-scope, and the appropriate means to be applied to set the fixed returns. It would also provide flexibility to assess out-of-scope distribution returns according to the existing operation of the ALP. A narrow scope for Amount B could also be developed more efficiently, as it would negate the possible need to differentiate the returns based on the differing functional intensity of a broader spectrum of marketing and distribution entities.

698. On the presumption that Amount B will be implemented at the same time as Amount A, and to ensure that it can be applied in a coherent manner by all jurisdictions, it would need to be implemented in three main ways. First, implementation of Amount B may need to be effectuated under domestic law or regulation. As noted above, the narrow approach articulated in this Blueprint carries the additional benefit that, as a simplified means of establishing the arm's length remuneration to narrow baseline activities, it would more likely be consistent with existing domestic law and treaties. Second, although two jurisdictions with an existing tax treaty can resolve disputes over Amount B through that treaty, where there is no treaty in place, a new treaty based dispute resolution relationship may be required (see Chapter 9). Third, guidance to accompany domestic legislation and treaty provisions may be required, although the narrower approach to scope may again limit this requirement.

699. There is interest by some Inclusive Framework members in exploring the feasibility of broadening the scope of Amount B, e.g. through an evaluation of how the remuneration may be standardised for commissionaires and sales agents, or distribution entities that have a profile wider than the narrow scope marketing and distribution activities set out in this Blueprint. This raises issues that will need to be further explored, to ensure that the fixed return profile for such activities is set in a manner that approximates results determined under the ALP.

700. In particular, should a broader scope to Amount B be implemented, in addition to the above considerations (and depending on the extent of scoping additions) this may also require further amendment to Article 9 of the OECD Model Tax Treaty and for this to be implemented in bilateral tax treaties, which would further complicate the implementation of Amount B. Finally, as there is some interest to explore the feasibility of implementing Amount B through a pilot programme, further discussions will occur to evaluate this.

## 8.3. Next steps

701. The next step will require a decision by the members of the Inclusive Framework on what scope and within which context the work on Amount B should be advanced and implemented.

702. In addition, further technical work will need to be undertaken and will include:

- Finalising the determination of the profit level indicator to be applied, including what should be incorporated into in the numerator and denominator for the calculation of the return on sales;
- Identifying what baseline marketing and distribution activities should be in the positive list, what activities, functions and risks should be in the negative list, and the quantitative indicators and specific thresholds that may indicate activities below or in excess of the baseline;

- If sales agents and commissionaires are to be in scope, the definition of equivalent baseline marketing and distribution activities, an appropriate negative list, quantitative indicators and profit level indicators to use to set the fixed returns;
- Determining the regions and industries to which differentiated returns should apply;
- Considering the risk of double non-taxation as a result of divergence between the fixed Amount B and a lower amount taken into account in the jurisdiction(s) of the other party(ies) to the transaction;
- Conducting the benchmarking to set the required returns using the agreed basis;
- Establishing and articulating the process to implement Amount B, including developing the implementation requirements through a multilateral instrument and a specific Amount B guidance document, including processes to resolve disputes and the process by which the benchmarks will be completed and periodically updated;
- Considering the impact of other intercompany transactions for an entity that may be in the scope of Amount B, inclusive of the treatment of multifunctional entities and how to address the effects of potential transfer pricing adjustments for out-of-scope transactions, where the entity in scope for Amount B is the recipient entity, for example services; and
- Considering the merits and objectives of a potential pilot programme.

## Notes

[1] In the past, these concerns led to the work on business restructurings, which provides tax administrations and MNE groups with a framework to analyse and price arrangements resulting from the restructuring of an MNE group's operations. OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017,* Chapter IX "Transfer Pricing Aspects of Business Restructurings"

[2] A 'narrow scope' would standardise the return for a more limited and narrower range of baseline marketing and distribution activities and would not seek to address the standardisation of the remuneration for distributors performing other activities, whether performing more value-add activities, assuming greater risks or (in particular) undertaking less than sufficient baseline activities. Several Inclusive Framework members favour a broader scope, including a broader range of marketing and distribution activities. Further technical work will be performed to address this concern.

[3] In this regard, it should be noted that some Inclusive Framework members are of the view that even narrowly defined routine distributors may have differing levels of functional intensity and that may require differential levels of return. Some Inclusive Framework members have suggested that analysis be performed to measure this.

[4] Some Inclusive Framework members do not support the use of a rebuttable presumption, as they believe it to undermine the simplification benefits of Amount B. Because this is a relatively recent proposal, other Inclusive Framework members have requested additional explanation of how the rebuttable presumption would work (including whether the taxpayer and the tax administration would have the ability to rebut) where they assess that another transfer pricing method would be the most appropriate method under the arm's length principle. Further discussion will occur on this matter.

[5] Meaning that the TNMM and the return on sales should represent the most appropriate transfer pricing method and profit level indicator respectively, and be consistent with the operation of the ALP under the existing transfer pricing guidelines.

[6] This approach is consistent with the approach in the OECD Transfer Pricing Guidelines. That is, the Amount B fixed return could be applied as the most appropriate method, but potentially rebutted where a CUP may be applied as the most appropriate method.

[7] A comparison of all the economically relevant characteristics of the transaction is relevant to establish comparability of the controlled transaction with the relevant uncontrolled transactions used to fix the return for Amount B purposes, to retain its consistency with the arm's length principle. This determination is subject to further technical work.

[8] Several members of the Inclusive Framework have highlighted that including in-scope permanent establishments located in jurisdictions where the Authorised OECD Approach in the 2010 report on the "Attribution of Profits to Permanent Establishments" is not followed may entail inconsistencies in the application of Amount B and create implementation challenges. Further technical work will be required to address this concern, including the determination of whether PE's would be in scope. Further, some Inclusive Framework members have highlighted the need to consider situations where both an in-scope PE and distribution entity is within a market jurisdiction. Further technical work will be required to address whether returns in such situations are aggregated or measured separately.

[9] The same rules will apply to a local permanent establishment of a foreign enterprise. It is not a resident, but for simplicity the analysis in this chapter refers only to local resident entities.

[10] The term "predominantly" would require that at least [50%] of the products be sold in the state of residence of the distribution entity.

[11] There may be situations where the first test is met, but the distribution entity does not perform a sufficient level and/or breadth of marketing and distribution activities to warrant it being in the scope of Amount B. In such circumstances remuneration based on the existing ALP will be appropriate.

[12] As noted, this may have different functional intensity and the appropriate fixed remuneration under Amount B in such circumstances is being considered in further technical work. In particular, some Inclusive Framework Members consider that routine distributors have sufficiently variant functional profiles such that different return levels may be warranted. The ongoing technical work will further consider this concern.

[13] For definitional purposes, this may refer to distribution entities performing routine functions that use routine assets in the course of their distribution operations, and assume routine risks. Further work needs to be undertaken to clearly define these terms, to clarify the in-scope activities and to clarify the meaning of a routine distributor or limited risk distributor, noting the views of some Inclusive Framework members that these are not considered to be the same in character and return profile.

[14] Or, potentially, a distribution entity that would perform functions more akin to logistics services to which a return based on the return on sales profit level indicator may not be appropriate.

[15] As Amount B is currently intended to operate on the basis of a narrow scope, applying the positive and negative lists outlined in this chapter, certain types of entities may not typically be included in scope. One example would be commodity marketing hubs, depending on the nature of the activities performed by the hub.

[16] Noting that Amount B will apply for entities where up to [50%] of the products distributed may be to customers outside the market where the distribution entity is resident (or where the PE is situated).

[17] Including on a flash title basis for Routine Distributors that may be classified as Limited Risk Distributors, but not limited to this – entities that assume routine inventory risks and own routine levels of inventory may also fall within scope.

[18] Under an accurately delineated distribution arrangement.

[19] Further technical work is required to establish and benchmark these proxies.

[20] One Inclusive Framework member suggests a proxy as follows: entities that in the 3 years prior to the adoption of Amount B have reported a profit level for in-scope activities that is above the highest fixed return determined under Amount B (considering the relevant region, industry and functionality level). This and other proxies will be subject to further discussion and evaluation.

[21] See para. 3.9 TPG.

[22] See para. 3.9 TPG.

[23] See para. 2.74 and 3.37 TPG.

[24] Other marketing and distribution activities might include other service providers that do not take title to the goods or businesses that do take title but perform marketing and distribution functions different than the baseline.

[25] This may also be relevant for other entities that perform a more limited set of marketing and distribution activities that collectively fall below the required set of baseline marketing and distribution activities to be considered in scope.

[26] See para. 2.68 and 2.69 TPG.

[27] See para. 2.96 TPG.

[28] There are divergent views between some Inclusive Framework members on the scope and operation of the rebuttable presumption – including whether it should be included in any form – which will be subject to further discussion.

[29] This approach is consistent with the approach in the OECD TPG. That is, the Amount B fixed return could be applied as the most appropriate method, but potentially rebutted where a taxpayer seeks to apply a CUP as the most appropriate method.

[30] Meaning that the TNMM and the return on sales set at the EBIT level should represent the most appropriate method and PLI respectively, and be consistent with the operation of the ALP under the existing transfer pricing guidelines.

[31] See paragraph 1.110 TPG.

[32] It may also be required in other circumstances where an accurately delineated transaction may be a distribution relationship and where Amount B may apply on the basis that the deemed distribution entity performs the baseline marketing and distribution activities. The correct profit level indicator in areas where functional intensity differs will also be considered in further technical work.


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