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STUDIO LEGALE TRIBUTARIO

Milan, 25 January 2023

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Tax Treaties, Transfer Pricing and Financial Transactions Division
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Sent via e-mail to transferpricing@oecd.org

Re: **Comments on the public consultation document titled *Pillar One – Amount B***

Dear Sirs and Madams,

We would like to thank OECD for the opportunity to provide our comments on this public consultation document, as this topic could really impact the transfer pricing world with significant simplifications.

In this respect, we would like to provide our inputs on the proposed approach to determine the so-called "Amount B". As a preliminary and general comment, Amount B should in our view represent an optional and super-simplified regime while from the public consultation document we understand that it would basically replicate a traditional transfer pricing analysis with the only exception of the benchmark (which will be provided by the OECD). Although the proposed approach has a clear advantage of providing results as much as possible in line with the arm's length principle as it was applied so far, our concern is that it would not be sufficiently effective from the simplification perspective.

We would like to draw your attention to the (limited) content of the October 2021 Statement regarding Amount B:

> "*The application of the arm's length principle to in-country baseline marketing and distribution activities will be simplified and streamlined, with a particular focus on the needs of low capacity countries.*"

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Starting from the assumption that low capacity countries may encounter similar issues in performing benchmarks and other transfer pricing analyses (so they may benefit from the proposed approach to a limited extent), we do not see any particular simplification neither from the MNEs perspective. This is due to the fact that they may only free up the resources involved otherwise in the performance of benchmark studies but are nevertheless obliged to carry out other types of analyses as follows:

- Ascertain whether they are in scope of Amount B;
- In case they are not, verify if they would prefer being in scope and what changes of the current set up are needed to be in scope;
- Review intra-group agreements and possibly adjust them to include all the necessary information;
- Collect documentation which is in some cases excessive as compared to the standard local file contents.

Therefore, in our view, it would be much preferable to further streamline Amount B, as follows:

- The regime should be optional, i.e., only MNEs can decide whether to apply it as a safe harbour;
- The scope of the regime should be broad enough to include all possible functional profiles spanning from agents to fully-fledged distributors;
- The target profitability should be defined in a single value or very narrow range (just to integrate industry, regional or functional differences);
- No business restructuring should be necessary on the first-time adoption of the regime.

The envisaged benefits of this simplification are the following:

- Very limited challenge can be raised by the tax authorities on the scope of application. This in fact basically reduces this risk to the case where in-scope distributors perform value adding functions or develop valuable IP as those listed in the scoping criteria;
- Very limited impact of possible challenges in terms of the pricing applied (while in the proposed approach the risk that a different pricing is deemed more appropriate by the tax authorities remains);
- No complex analyses to evaluate the possible restructurings needed to result in scope.

In our mind, in order to be effective, Amount B should resemble as much as possible the simplified approach for low value adding services. Even if it is evident that distribution is a core function for most of the MNEs, it is also true that trying to distinguish among the various level of functionalities and risks may jeopardize the benefits in terms of

simplification. Moreover, considering that market jurisdictions already receive a remuneration as part of Amount A, once the scope of this latter would be extended, any "residual profit" extracted from the former would be part of the reallocation. We would thus recommend to further strengthen the links between these two parts of Pillar One.

Moreover, in order to reinforce the Amount B regime, we would suggest the following measures:

- The adoption should cover all the pure distribution subsidiaries of an MNE group (unless any of them show the features that may indicate a more complex functional profile);
- Multifunctional entities (e.g., distribution and manufacturing affiliates) of an MNE group should be treated consistently (i.e., if segmented P&Ls are prepared, they should be available for all such entities);
- A full restructuring analysis should be performed in a case where an MNE decides to abandon the Amount B regime;
- Instead of indicating what is in the scope, a "negative list" of functions, risks or assets that (automatically or not) exclude from the Amount B scope should be provided. In this respect we deem that the scoping criteria already provide a good starting point.

We could also envisage a phased introduction of Amount B where it starts as a purely optional regime with a single value or range of values and then it could be adapted and possibly made mandatory in certain cases. The initial introduction as a safe harbour regime would be useful to understand the interest of MNEs in this kind of simplification and evaluate the subsequent steps.

In the following paragraphs, instead, we provide specific replies to the questions listed in the public consultation document.

Best regards,

Raffaello Fossati

SPECIFIC QUESTIONS ON SCOPE

3.5.1. Do you consider that any of the individual scoping criteria would be unlikely to be observed when reviewing the economically relevant characteristics of otherwise comparable independent enterprises on the basis that sufficiently detailed information is not available? Moreover, do you consider that such differences in observation could materially affect the ability to use those comparables in establishing arm's length prices?

External benchmark analyses always incorporate some level of approximation and information availability is by far the most relevant one. However, it is also true that the concept of baseline marketing and distribution might not be present among independent companies as for their specific nature they usually bear business risks to a full extent. We are therefore of the opinion that the benchmark analysis should serve just a general reference to approximate the arm's length margin of distributors and that the only relevant decision to be taken relates to which positioning select in the arm's length range (e.g., lower quartile or median or any other percentile) considering that there may be some ineliminable differences between MNE group entities and third party distributors.

Moreover, we would ask for a clear confirmation that Amount B should not be applicable to MNEs whose core business is represented by the pure distribution of third party products. We have experience of challenges from tax authorities claiming for the application of the TNMM to local distributors buying products (at cost) from the central procurement entity and assuming a remuneration which is in fact higher than the consolidated profitability of the group. On the opposite, such groups could serve as a guide in order to set the Amount B remuneration as their operations are much more comparable to the in-scope MNEs (e.g., in terms of economies of scale and synergies) and, if they are listed, much more qualitative and financial information is available in their consolidated annual reports, as opposed to small independent distributors.

3.5.2. Do you consider that any other financial indicators may be utilised to measure the performance of certain functions, ownership of certain assets, or assumption of certain risks relevant to the scoping criteria other than those already described above? Moreover, do you consider that any financial or non-financial quantitative metrics may be utilised in order to reliably and objectively determine if the scoping criteria are met, for example with reference to the limited assumption at arm's length of economically significant risks?

We are of the view that it is not possible to create a deterministic model able to measure the performance of functions, ownership of assets and assumption of risks. Our recommendation is to leave to the MNEs the choice of whether to adopt Amount B for their distribution entities.

3.5.3. Do you consider that the Amount B scoping criteria could reliably incorporate retail distributors as well as wholesale distributors? If so, do you consider that any

modifications might be necessary to the Amount B pricing methodology being developed, in order to appropriately establish arm's length prices for accurately delineated retail distribution transactions, compared with wholesale distribution transactions?

In our experience, retail distributors would deserve a separate treatment from the wholesalers as the functions that they perform are usually much more consumer oriented and are exposed to different risks (e.g., no credit risk). First of all, wholesale distributors usually have access to specific price lists meaning that they are able to acquire goods at a significantly lower price than retail businesses, while the ability to ship products in bulk allows them to benefit from lower fulfilment costs. Consequently, these two factors result in the overall spending being lower as opposed to retail businesses and allows wholesalers to maintain the profitability at a high level. At the same time, wholesale distributors operate based on long-term deals to supply goods in bulk for their retail distribution which allows to maintain a high inventory turnover ratio (i.e., by delivering large quantities of orders at one time). On the opposite side, wholesalers are more sensitive to risks deriving from transportation and capacity restrictions.

As it was mentioned earlier, the success of retail businesses depends highly on the ability to create strong brand identity and personal connection with customers. Although they have increased control in terms of pricing strategies as opposed to wholesalers, there a number of challenges that retail businesses face with (e.g., marketing products to different market segments having varying needs, ability to provide for fast but at the same time low-cost delivery to customers across different locations). Therefore, we deem that retail distributors require a separate and specific benchmark that will incorporate the peculiarities of the business environment in which they operate.

In addition, a further case that deserves to be approached with due care relates to the companies involved in both retail and wholesale distribution. Managing both a wholesale and retail supply chain could be extremely complicate in terms of management issues (e.g., separate accounting systems, sophisticated inventory management structures, strategic pricing mechanisms, etc.). In our view, companies operating under this business model would need to be treated in consistency with other multifunctional entities.

3.5.4. In your practical experience in delineating baseline marketing and distribution transactions that you judge to be within the scoping criteria outlined in this consultation document:

> ***a. Do you observe in practice that there exist transactions that meet the scoping criteria in both categories of in-scope transactional structures explained in paragraph 14, and which, based on an accurate delineation of the transaction, exhibit substantially the same economically relevant characteristics? This is excepting, for the second category, any scoping criteria directly related to the***

taking of title and the holding of inventory and assumption of credit risks, as well as ancillary administrative functions related to the same.

We agree with the inclusion of agents and commissionaires since in our practice we have observed several conversions of limited risk distributors into agents or commissionaires maintaining the same remuneration for the local entities. Similarly, we have seen conversions of legal entities into permanent establishments performing either limited risk distribution or sales agency functions with a remuneration defined by means of a TNMM analysis with the return on sales as the relevant profit level indicator ("PLI").

b. Moreover, are there other qualitative or quantitative indicators that would be useful in order to reflect those commissionaires and sales agents that do have similar economically relevant characteristics to wholesale distributors, relative to those commissionaires and sales agents that do not? If so, please explain the indicators and how they achieve the desired objective.

In our view the only item to be considered for the purposes of the Amount B scope is whether the sales agents or commissionaires perform any value adding functions in addition to their pure intermediary role.

c. In practice, to what extent do you use independent buy-sell distributors to price transactions involving sales agents or commissionaires? What are your reasons for doing so or not doing so?

In very rare cases, it is possible to identify third party agents or commissionaires by the means of external benchmarks. In fact, it happens only when there is a list of agents operating in the specific industry that can be then refined (i.e., additive approach). In all other cases (and especially with respect to tangible goods distribution) the reference to distributors represents the only viable solution. This is another reason for extending the Amount B scope to all agents and commissionaires.

3.5.5. Do you consider that distributors that otherwise meet the scoping criteria, but which also distribute tangible products to markets other than their market of residence exhibit materially different economically relevant characteristics than distributors that only distribute to their market of residence, such that arm's length pricing may be affected? If so, please demonstrate the reasons why you consider this to be the case.

In our view, this depends on the distribution structure in place and the relevance of sales in other markets: if the sales are carried out in a similar manner and sales concluded abroad do not represent the main source of revenues, then we do not see any issue in applying Amount B. On the opposite, if the group entity operates as a sort of master distributor for a specific region and avails of third party sub-distributors for concluding sales in various countries as its main business then the applicability of Amount B could be doubted.

3.5.6. In any of the quantitative metrics outlined within the scoping criteria, do you perceive that the level of thresholds set should vary based on specific criteria, e.g., the industry of the distributor, the market of residence of the distributor or other criteria, in order to be aligned with the arm's length standard? If so, please demonstrate the reasons why you consider this to be the case.

In our view, simplification should prevail on all possible nuances and deviations of specific industries that are usually very important in standard transfer pricing studies. As mentioned, introducing Amount B as an optional regime would leave freedom to MNEs to choose between simplification and preciseness of the analysis.

3.5.7. Do you consider that the derivation of the data or other information required to substantiate any of the scoping criteria outlined above would result in a meaningful simplification and streamlining of compliance activities based on what is currently required to be prepared and retained? Please demonstrate the reasons why you consider or do not consider this to be the case.

From the indications provided, we do not see any material simplification with regard to the compliance activities due to the large amount of the documents which should be collected. In order to verify the applicability of Amount B such analysis represents a new and different test as opposed to the usual update of local files. Therefore, it could represent a simplification only for the MNEs that have no transfer pricing policy or documentation in place.

3.5.8. Do you consider that the product-based exclusions outlined achieve the intended goal of excluding certain transactions in the distribution of commodities from being within the scope of Amount B? Please outline the reasons why you consider or do not consider this to be the case. Moreover, do you consider that the scope should include the distribution of software? If yes, can you please outline why you think software should be included in the scope; your explanation would require an analysis that demonstrates that the economically-relevant characteristics of the distribution of software are broadly comparable to the economically-relevant characteristics of the distribution of tangible goods.

We agree with the reasoning provided for exclusion of the transactions involving the distribution of the commodities and would like to integrate it with an additional argument based on our experience. Specifically, while analysing the transactions involving the distribution of the commodities it is necessary to consider the regulatory framework that is imposed in the country where the producer extracts the relevant products for their further distribution on the market. In particular, one should consider the existence of the Production Sharing Agreements ("PSAs"), which represent a common

type of contract signed between the government and the resource extraction companies[1] which regulates the amount of the resources to be extracted, tax regime applied (i.e., treatment of various income and cost items for the definition of the taxable profit/loss), royalties, import/export duties to be paid, etc. PSAs are the most common means for commercial involvement in the oil and gas industry amongst the developing countries. As such it is possible to view PSAs as some sort of unilateral advanced pricing agreement that regulates each step of extraction, processing and distribution of the commodity in question in the jurisdiction where the company (producer) operates. Moreover, the prices of the commodities at which they are marketed for their further distribution outside the producer country are established using indices, such as Platts. Considering that operating expenses incurred by the investors (producers) are also regulated by the PSAs it could be concluded that the transaction concerning the distribution of the commodities (where the sale takes place between the investor/producer and its distributor) remains under the control of the relevant state. As such, in our view the same transactions should be excluded from the scope of Amount B.

At the same time, specific consideration should be also given for the transactions involving the software distribution. In particular, the search for potential comparables for the software distributors needs to recognize the distinction between the customized and standard software. In case where the software in question is standardized, the functions performed by the distributor could be assimilated to those performed by the distributor of tangible goods. At the same time, in case where the transaction at stake concerns the distribution of customized software, the distributor may be involved in value-adding functions connected to its proximity to the clients, thus providing valuable inputs on the customization itself.

3.5.9. Do you consider that a controlled distributor that (i) contributes to strategic marketing functions or to control of risk but does not, under the accurate delineation of the transaction, assume the associated risks, or (ii) contributes to the generation of marketing intangibles but does not, based on an accurate delineation of the transaction, assume the significant risks associated with those intangibles, should necessarily be out of scope for Amount B? Please outline the reasons why you consider or do not consider this to be the case. Moreover, do you consider that entities which do not assume economically significant risks related to development, enhancement, maintenance, protection or exploitation of marketing intangibles, but do make some contribution to risk control functions that may warrant compensation at arm's length per paragraph

[1] Specifically, PSAs can be defined as an agreement signed by the investor (contractor or consortium) and a state that reinforces the notion that latter retains the formal ownership of its natural resources, while giving the permission to the private investors to exploit them. Therefore, the investor usually assumes most of the fiscal risks and is compensated with the share of the oil produced. Following the extraction, after paying a royalty to the state (optionally in kind), the investor receives a share of oil equal to its recovery costs (so-called cost oil). The remaining amount of oil is then divided between the state and the investor (so-called profit oil).

1.105 of the OECD TPG, should be out of scope? If so, please outline the reasons why you consider this to be the case.

In our view, to the extent that the main function of an entity is distribution it should be allowed to opt for Amount B. From one perspective, a solution could be to grant to the distributor involved in additional activities an extra return (that in our idea could also be a fixed percentage to be added to the standard remuneration). An alternative solution could be testing the value-adding marketing function by applying the cost-plus method (which obliges the company to prepare a segmented income statement). However, this approach provides for two major drawbacks: first, it does not appear to be time efficient by complicating the analysis further and second, it does not eliminate the possibility that the adopted approach will not be challenged by tax authority during the tax audit.

In the light of the above, we would endorse the possibility to opt for Amount B where distribution activities account for the company's main source of income and remunerate the additional value-adding function by a predefined add-on to the standard return on sales.

3.5.10. General views are also sought from commentators regarding the exemptions from applying the Amount B pricing methodology related to the most appropriate method and the use of local market comparables.

With respect to the most appropriate method, we do not foresee major concerns with respect to the use of the TNMM for the purposes of Amount B, yet we would leave to the MNEs the choice to apply Amount B in the presence of other possible methods. Despite some planning opportunities (which are in any case not eliminable), it is only the MNE that can decide whether it believes that an internal CUP or RPM analysis may produce reliable results or if Amount B simplification should be sought.

On the opposite, local comparables would render the whole process too complicated as they might be required by the corresponding tax authorities but not accepted by the foreign ones. One aspect to consider is that in certain jurisdictions the financial data of the companies operating on their territory is not publicly available, which further impedes the use of local comparables. Therefore, the generally accepted approach is to use the financial data of the companies operating in the markets possessing similar economic characteristics to the one in question. In fact, given that return on sales is taken as an appropriate PLI, which is a relative rather than an absolute indicator (such as price), the analysis should be less sensitive to minor deviations among markets.

SPECIFIC QUESTIONS ON PRICING METHODOLOGY

4.4.1. Do you have any comments on the proposed architecture of the Amount B pricing methodology for baseline marketing and distribution entities?

Our comments on the pricing methodology are summarized above: the more simplified the methodology the more it is likely that MNEs will spontaneously opt for this regime.

Additionally, we would like to express our concern with regard to the mechanical pricing tool that, as we understood, will be based on a regression analysis. While it is true that regression analysis facilitates the determination of the relationship that exists (and its strength) between two or more variables and allows for modelling the future relationship between them, it also has some serious limitations like:

- assumes that the relationship between variables remains unchanged over time;
- demands for the right quantity of data to be used[2];
- lengthy and complicated calculation procedure;
- not capable of incorporating any qualitative criteria.

Therefore, in our view, using regression equation as a pricing mechanism for the Amount B purposes would only complicate the whole process and will undermine the reliability of the analysis. At the same time the proposed pricing matrix also does not seem to be a good alternative due to the mentioned "cliff effect".

4.4.2. Can you share your observations of arm's length results for independent baseline marketing and distribution entities and provide any available supporting analysis or market data evidencing such observations?

In general terms, we can say that the median return on sales of various benchmarks regarding distribution across different industries mainly in the European region spans from 1,5% to 6% while the first quartile from 1% to 4% approximately, with some limited exceptions (e.g., medical devices). In our view, therefore, the value or narrow range to be selected for the purposes of Amount B should be defined between 1% and 6%.

4.4.3. Recognising that the initial search criteria in Annex A relies upon keyword searches based on database business descriptions, how would you develop the search criteria further to more accurately identify baseline marketing and distribution comparables – i.e. what quantitative screens should be applied to help take account of the functional, asset and risk profile described in section 3.1?

[2] The functional relationship that was determined between two or more variables on the basis of some limited data may not hold if more and more data are taken into consideration. At the same time including too much data in the analysis could also result in the inclusion of parameters of limited significance and which would then jeopardize the reliability of the regression output.

Before entering in the analysis of the keyword searches, we would like to comment on the filters applied in the database. In our experience, relying on the websites and business overviews provided by the database may create a bias in the results since not all companies' websites are recorded in the database (or the website indicated may not be the correct one) and the business overview may be too generic (while also including activities which are not actually performed by the company). We would therefore recommend that the number of companies for the manual screening would be firstly reduced by the means of financial ratios and only after those screenings, the business overviews and company websites are carefully reviewed.

With respect to financial screening, we would like to highlight that R&D expenses are rarely available and thus, we would not advice their use as a relevant parameter for the database filtering. Alternative financial ratios could be the following:

- Ratio of intangible assets as a percentage of total assets
- Ratio of financial assets as a percentage of total assets;
- Ratio of fixed tangible assets (i.e., property, plant and equipment) as a percentage of total assets.

In addition, we noted that the financial criteria include data up to 2019 and assume that this is due to avoid Covid-19 effects on the comparables income statements. Even if we agree with such approach, we wonder whether the pre-pandemic business environment can be used as a guidance for the future years.

With respect to the keyword filtering, instead, we would like to highlight that in our experience they prove much more useful in expanding the scope of a search rather than in reducing the same. Similarly, recognising that the current analysis may involve very large numbers of companies, we would suggest that the keyword screening is made by means of so-called "positive" keywords (i.e., keywords that lead to the acceptation of a company rather than to its rejection).

Regarding the "negative" keywords listed in Annex A we assume that the presence of any of these words in the business overview is sufficient to reject a company. However, it is not completely clear to us why in some cases more than one word is listed in each row (in one case with the connector and included in the "" and in one case not).

As a possible extension of the "negative" keywords the following could be considered:

- "produce";
- "producing";
- "processing";
- "extract*";
- "refin*".

4.4.4. What commercial databases do you use for performing transfer pricing analysis?

In our practice, we normally use either Orbis or TP Catalyst databases.

4.4.5. A limitation of using any global database is the absence of uniformity in information collected because of divergent financial reporting standards across jurisdictions. This impacts the types and effectiveness of the quantitative screens used in data analysis. What are your suggestions to overcome this limitation?

As mentioned, our view is that this global benchmark exercise should just guide the definition of a single value (or very narrow range) so differences in reporting standards should not represent a showstopper for this purpose. It is also worth to mention that the financial data provided by the Orbis database are generally standardized to a certain degree which decreases the impact of eventual differences due to accounting standards.

4.4.6. In terms of giving further consideration on how and what to disseminate to tax administrations and taxpayers to facilitate the application of the Amount B pricing methodology, as well as to consider the impact of possible restrictions on publication of company data, what is the minimum level of comparable data or benchmarking audit trail information that is needed in order for taxpayers to administer and rely on the Amount B pricing methodology, explaining the implications of not having access to such information?

We believe that if simplification should guide the Amount B application it would be much easier to define a single value or range for all industries, products and functional profiles. No further documentation should be needed in terms of benchmark support.

4.4.7. Taking into account the objectives of Amount B to simplify and streamline the application of the arm's length principle for baseline distribution, and the breadth of financial and other characteristics of potentially in-scope taxpayers, do you think there are circumstances whereby application of alternative net profit indicators should be considered? If so, please provide an outline of those circumstances, the appropriate net profit indicator, and the rationale.

We believe that other possible indicators should be considered only outside the scope of Amount B. MNEs should thus be free to remain out of Amount B if they deem that a different indicator would better fit their situation.

4.4.8. Recognising the objective of achieving simplification and tax certainty while maintaining accuracy in outcomes, in what circumstances do you consider comparability adjustments (if any) are needed for Amount B?

Starting from the assumption that transfer pricing is not an exact science and that Amount B represents a simplification exercise, no comparability adjustments should be needed in our view.

4.4.9. With reference to the discussion above in Section 4.3.4, what are your views on the proposal to use allocation keys in terms of the practical application of Amount B in cases where the baseline distributor is involved in in-scope controlled transactions with multiple related party suppliers?

We agree with the proposed approach.

SPECIFIC QUESTIONS ON DOCUMENTATION

5.3.1. Do you think the proposed documentation approach for the application of Amount B strikes the right balance between the additional burden for taxpayers and the need to ensure that tax administrations obtain the necessary information to evaluate the taxpayer's application of Amount B?

In our view the proposed documentation approach is too burdensome and does not provide for the desired simplification in terms of information collection for the taxpayer. We strongly believe that the supplementary documentation provided initially by the taxpayer to demonstrate compliance with the Amount B regime should be concise and efficient both in terms of the information to be provided and time needed to gather the same. Tax authorities could ask for additional information during tax audits.

5.3.2. In relation to the specific items of information to support the application of Amount B listed in paragraph 87 please indicate if:

> ***a. There are items of information which are not relevant for purposes of evaluating the taxpayer's compliance with Amount B. If your answer is yes, please elaborate why such items of information would not be relevant.***

One example of this redundancy in the information to be collected concerns the request to provide annual financial statements for three/five fiscal years prior to the first fiscal year in which the taxpayer adheres to the Amount B regime (and the corresponding financial statements of the tested parties in case the taxpayer is not the tested party). In our view, the applicability of Amount B regime for the taxpayer should be judged based on the transaction effectively carried during the year of adherence and considering the economic conditions of that particular year with no relevance of the conduct of the taxpayer during the prior years.

With regard to the other points indicated on the pp. 40-42 we would like to draw your attention to the following[3]:

[3] We would also like to draw your attention to the possible typo that we noted in point k (vii) in the sentence: "The description of responsabilities, obligations and rights of the supplier and the distributor, which should be consistent with the information porvided in item (a)…". As we understand, such reference should be substituted with item b in the information list.

- point b. requires a "*breakdown of (i): financial information by key customer type*" which seems to be already included in the other items of the same point b. and does not seem to provide any relevant information for the purposes of the Amount B scoping and application. In addition, please consider that information regarding the key five products of the MNE in terms of the turnover is usually provided in the Masterfile as well as the indication/description of the most relevant markets in which the MNE operates;
- with respect to point h., it is not clear to us whether the intention of this request was to provide the segmented income statement and to reconcile it with the general income statement of the tested party or to indicate only the financial items within the general income statement which include the transaction subject to the Amount B regime (e.g., revenues or cost of goods sold);
- point k. item x. states that, in case the transaction at stake does possess a written agreement which does not incorporate certain conditions provided in the information request, the taxpayer is allowed to modify it in order to adjust for the missing aspects. However, we would like to clarify that the subsequent changes to the contract should not give a ground for a restructuring as per Chapter IX of the OECD TPG but rather should be viewed as a measure to be taken by the taxpayer to assure the transaction's compliance with the information requirements of the Amount B regime;
- with respect to point l., we do not understand the purpose of providing any unilateral/multilateral APAs and other tax ruling to which the tax jurisdiction in the question is not a party, but they are related to in-scope transaction. Specifically, it is not clear to us whether the concept of "related" includes similar transactions carried out with other group entities or other transaction types that are linked to distribution activities (e.g., procurement or manufacturing transactions).

Given the considerations presented above, we would like to highlight that with the current pro forma of the information request we do not envisage any benefit for the taxpayer to adopt the Amount B regime, since the requested supplementary documentation is almost equal (if not exceeding) the one needed for the preparation of a local file. Thus, if the idea of the Amount B regime was to simplify as much as possible the testing and documentation of baseline marketing and distribution activities, the approach presented in the present public consultation document does not seem to target that goal.

b. There are items of information currently not listed in paragraph 87, which should be incorporated to the Amount B specific items of information in the local file. If your answer is yes, please elaborate why such items of information are relevant and should be part of the local file.

As mentioned above, the current version of the information request seems to us excessive so we would not add further items.

SPECIFIC QUESTIONS ON TAX CERTAINTY

6.3.1. Do you think the current tax certainty framework described in this section is sufficient to prevent or address potential disputes arising in relation to the applicability and/or operation of Amount B?

In our view, reference to APA and MAP should not be relevant for the purposes of Amount B as this should be implemented as a safe harbour regime with no involvement of the relevant tax authorities. Indeed, if the idea of introducing the Amount B was to simplify and streamline the pricing of baseline marketing and distribution activities then the necessity to conclude APAs to reduce the possibility of receiving a challenge from tax authorities results only in the further complication of the process.

In addition, if a different approach should be defined, we would highlight that companies opt for concluding APAs when the transaction at stake is not only sophisticated (e.g. in terms of functional profiles of the entities involved) but also is of a significant amount, which could indeed be the case for distribution intended as the final step of the value chain of an MNE. At the same time, we would ask for additional clarifications on why par. 102 of the public consultation document refers to MAPs as a dispute prevention mechanism. Does it implicate that the introduction of Amount B as a mandatory regime might represent a reason to start a MAP or that MAPs might represent the legal basis for bilateral and multilateral APAs?

6.3.2. Is there any other approach that could supplement this framework to enhance tax certainty and reduce the risk of double taxation and/or double non taxation arising from the application of Amount B, subject to a jurisdiction's availability of resources? For instance, should the work on Amount B include, for interested jurisdictions, the design of an elective early certainty program to provide a specific early (pre-audit) certainty (e.g. streamlined APA-type process) or an indication of the compliance risk inherent to controlled transactions regarding the application of Amount B and its pricing methodology?

As mentioned above, we do not consider standard APA procedures and MAPs as valid tools to accommodate the introduction of Amount B. Other solutions should be identified as those mentioned in the question and any other solution explored within the Amount A context.