BUSINESS at OECD

September 1, 2023

To: Tax Treaties, Transfer Pricing and Financial Transactions Division
Organisation for Economic Cooperation and Development
Centre for Tax Policy and Administration
2 rue André-Pascal
75775, Paris, Cedex 16, France
Submitted by email: CTP.BEPS@oecd.org

Re: *Business at OECD* (BIAC)[1] comments to OECD's Public Consultation Document "Pillar One – Amount B"

Dear Secretariat Team,

Thank you for the opportunity to comment on the public consultation document "Pillar One – Amount B" (the "Document"). *Business at OECD* (BIAC) supports the work undertaken by the OECD Secretariat in developing the Amount B proposals.

We continue to believe that a well-constructed Amount B proposal could give rise to significant benefits for taxpayers and tax administrations, and we therefore welcome the efforts of the OECD Secretariat to move this project forward. We are however concerned that there appears to be a lack of consensus among members of the OECD Inclusive Framework (IF) on some of the core features of the design of Amount B, indicating that there is a continuing divergence of views.

The outcome of future deliberations amongst IF members could therefore have a material impact on the overall success and effectiveness of the Amount B project. As a number of potentially critical areas remain under discussion, we would request that another opportunity is provided for the business community to comment on the design of Amount B before it is finalized.

Our response is structured in two main appendices. In Appendix I, we have summarized the main aspects of our response and outlined the key features that we believe should be included in the final design of Amount B. Appendix II contains a detailed table of comments (consistent with the previous *Business at OECD* (BIAC) responses to Pillar One consultations).

We would also like to draw your attention to some key issues identified in our feedback:

1) ***Amount B as a safe harbor:*** We continue to strongly believe that Amount B will function best as a safe harbor. However, based on our review of the Document, it remains unclear whether

[1] Established in 1962, Business at OECD (BIAC) stands for policies that enable businesses of all sizes to contribute to growth, economic development, and societal prosperity. Through Business at OECD, national businesses and employers' federations representing over 8 million companies provide and receive expertise via our participation with the OECD and governments promoting competitive economies and better business.

the safe harbor approach will apply or if Amount B will be applied on a mandatory basis. Without this critical piece of information, BIAC members find it challenging to provide final comments on the overall architecture of Amount B.

2) ***Scope of Amount B:*** Under both Alternative A and B, a taxpayer is required to consider whether a one-sided transfer pricing methodology is appropriate (i.e., to assess the boundary between the profit split and the TNMM method). Additional filters are then applied to exclude entities from the scope of Amount B. Introducing these filters – particularly the qualitative filters – will significantly decrease the value of Amount B from a certainty and simplification perspective, which we believe will undermine the potential for Pillar One to bring stability to the international tax system. We recommend that the additional scoping filters are removed from the design of Amount B as a result.

   Where the choice is between Alternative A and Alternative B, BIAC Tax Committee members strongly favor Alternative A, as we continue to believe that the scoping tests for Amount B should be based on objective criteria to the greatest extent possible.

   In our view, the current scope of Amount B also remains overly narrow and should be expanded to cover the distribution of digital services, as well as distribution activities via retail channels.

3) ***Pricing approaches:*** Our strong preference is that a single global pricing matrix should apply for all jurisdictions. We continue to believe that any adjustments/differentiated criteria should only be applied where it can be demonstrated by data that materially different pricing outcomes arise. If data modelling exercises do not support differences in returns, Amount B should be kept as simple as possible.

   We therefore believe that it is important that the business community is afforded the opportunity to review the design of the pricing matrices presented in Section 4 of the Document. While we appreciate that there may be certain licensing issues associated with releasing the data and that the final design is linked to the outcome of scoping deliberations, providing access to the supporting data should improve the legitimacy of the project and protect against accusations that the Amount B project is relying on "secret comparables".

We thank you for the opportunity to comment. We would be pleased to respond to any questions arising from both our general and specific comments provided, and to providing further support as the Amount B Framework is developed.

Sincerely,

Alan McLean
Chair, *Business at OECD* (BIAC) Tax Committee

Cc: Hanni Rosenbaum, Executive Director, *Business at OECD* (BIAC)

Appendix I

Summary of Key Issues and Considerations

Application of Amount B

1) ***Amount B as a safe harbor:*** We continue to strongly believe that Amount B will function best as a safe harbor. However, based on our review of the Document, it remains unclear whether the safe harbor approach will apply or if Amount B will be applied on a mandatory basis. Without this critical piece of information, BIAC Tax Committee members find it challenging to provide final comments on the overall architecture of Amount B.

Scope of Amount B

We were encouraged to see some significant improvements in this version of the Document compared to the previous consultation, including leveraging normal transfer pricing practices like segmentation to broaden the scope, effectiveness, practicality and certainty of the Amount B framework. It is also welcome that the extensive range of scope exclusions that were included in the first Amount B consultation have been removed from the Document.

1) ***Alternative A v Alternative B:*** The Document presents two scoping options (Alternatives A and B). Under both options, a taxpayer is required to consider whether a one-sided transfer pricing methodology is appropriate (i.e., to assess the boundary between the profit split and the TNMM method). Both approaches then apply additional filters which can exclude entities from the scope of Amount B. Introducing these filters (particularly the qualitative filters) will significantly decrease the value of Amount B from a certainty and simplification perspective, which we believe will undermine the potential for Pillar One to bring stability to the international tax system. We recommend that the additional scoping filters are removed from the design of Amount B as a result.

   Where the choice is between Alternative A and Alternative B, BIAC Tax Committee members strongly favor the Alternative A proposal, as we continue to believe that the scoping tests for Amount B should be based on objective criteria to the greatest extent possible. In contrast, Alternative B would add significant uncertainty from a scoping perspective, given the level of subjectivity involved in assessing if an entity makes non-baseline contributions. We have also not seen data that supports the contention that Alternative B criteria are warranted to differentiate returns beyond what's otherwise provided for in the Pricing Matrix. We are therefore concerned that this appears to remain the preferred approach of many jurisdictions, undermining the initial policy intent of simplicity and enhanced administrability.

2) ***Scope exclusions:*** While we appreciate the efforts to make Amount B more practical, with changes in this Document, we continue to believe that the scope of Amount B should be expanded to include the distribution of digital services (and those services more generally that are not low value-add services commonly priced at cost plus), as well as distribution activities via retail channels. In particular, we note that the IF October 2021 mandate did not include a distinction between wholesale and retail distribution activities. In our view, the current scope

of Amount B remains overly narrow. If an expansion of the scope of Amount B is not an immediate possibility, we believe that it is important that continued efforts are made to assess how the scope of Amount B could be broadened. This work should continue now and in parallel with the completion of the initial design of Amount B.

For completeness, we note that our comments above are not suggesting that certain specific exclusions should be removed (e.g., the exclusion for commodities should be retained).

Pricing of Amount B

It would be helpful if greater levels of transparency could be provided on the design of the Pricing Matrix presented in Section 4.1 of the Document. While we appreciate that the final design is somewhat linked to Amount B scoping deliberations and that there may also be licensing issues associated with releasing the data, providing access to the supporting data should improve the legitimacy of the project and protect against accusations that the Amount B project is relying on "secret comparables".

In addition, we have the following initial observations on the proposed pricing matrices presented in the Document:

1) ***Global Pricing Matrix:*** BIAC Tax Committee members are finding it difficult to reconcile the proposed global pricing matrix with the transfer pricing studies provided by P&G (PWC) and Microsoft (KPMG) as part of our previous Amount B consultation response. While the ranges presented in the main Pricing Matrix are broadly aligned with the lower and upper limits of the ranges observed in the KPMG and PWC studies, the design of the Pricing Matrix will, by its nature, result in certain distributors being placed at the outer ranges of the matrix.

   Given the broad categories of industry groupings provided, coupled with the fact that the relevant margin to be retained in a jurisdiction will be directly linked to industry grouping categorizations, we are concerned that pricing-related disputes may continue to arise in practice. Further detailed guidance will be needed here as a result.

2) ***Modified Pricing Matrix:*** Our strong preference is that a single global pricing matrix should apply for all jurisdictions. In our view, neither the KPMG nor the PWC transfer pricing studies demonstrated sufficiently differentiated outcomes based on geography to warrant the introduction of this level of complexity. If the data exists to justify a modified pricing matrix, we believe that the underlying data should be made available to the business community for review before the mechanisms described in Section 4.2 are added to the final design of Amount B.

3) ***Adjustment for Country-Specific Risk:*** Similarly, it is rarely the case, in our experience, that an adjustment is required for higher-risk jurisdictions. Generally, any incremental risks associated with operating in a jurisdiction would be borne by the principal and not by a baseline distributor. Even in those limited circumstances, it would not be typical for an adjustment to be determined based on sovereign credit ratings. Our initial view is that the use of a different matrix, justified by a jurisdiction having a higher risk profile, does not appear justified based on

economic considerations. We would appreciate the opportunity to discuss this approach in further detail.

4) ***Local Datasets*:** We do not believe that there is a need for local datasets given the general consistency of outcomes evidenced among regions in the transfer pricing studies provided. We continue to believe that, where local comparables are identified, these should be added to the global dataset. If the use of local datasets is ultimately determined to be necessary, we appreciate the approach of providing benchmarking search criteria (Annex A) that would need to be followed, as well as the review and approval process. However, we also believe that that it is critical that "secret comparables" are not permitted and any process needs to be transparent and fully replicable. We therefore recommend that both the local dataset and local matrix are published at least a year in advance of needing to be implemented.

Implementation / Tax Certainty

As noted in our previous response, concerns have been raised that some jurisdictions could choose to ignore the OECD TP Guidelines as they are a form of soft law, and this could greatly reduce the certainty benefits which Amount B could otherwise bring. BIAC members are also concerned that jurisdictions may start to apply Amount B in an uncoordinated manner if no clear timeline for the adoption of Amount B is agreed by IF members. We therefore believe that it would still be preferable for an MLC to be developed to coordinate the implementation of Amount B. Where it is difficult to reach an agreement on an MLC, we would recommend that a coordinated start date for applying Amount B is introduced, to avoid disputes.

Appendix II

Our detailed comments are provided in the following sections.

General comments

Section	Topic	Issue	Recommendation
Introduction Section 4.5, FN 36	Nature of Amount B	• Based on our review of the Document, it remains unclear whether Amount B should apply on a mandatory basis or if Amount B will operate as a safe harbor. • We note that FN 36 in Section 4.5 of the Document states that further work will be undertaken to determine whether Amount B should operate as a safe harbor.	• We continue to strongly believe that Amount B would operate most effectively as a form of safe harbor, whereby taxpayers could elect to apply Amount B pricing to baseline distribution activities or could use an alternative pricing methodology. • This is particularly important given the narrow range of +/- 0.5% by industry grouping provided in the pricing matrix and potential areas of disagreement regarding where an entity should sit within the pricing matrix (see our pricing section for further commentary). • For taxpayers, efficiency and certainty will be gained by applying Amount B as a safe harbor. From the perspective of Low-Capacity Jurisdictions, a widely applicable Amount B safe harbor has the potential to also result in significant simplification benefits, if the safe harbor is well-designed.
General	Method of Implementation	• It appears that Amount B will be introduced on a standalone basis as part of the OECD TP Guidelines and that Amount B could be introduced before a Multilateral Convention for Amount A is agreed.	• As an initial comment, if Amount B will operate independently from Amount A (i.e., Pillar One is no longer being considered as a package of measures), we would recommend that this is clearly stated to avoid unnecessary confusion. • As noted in our previous response, concerns have been raised that some jurisdictions could choose to ignore the OECD TP Guidelines as they are a form of soft law, and this could greatly reduce the certainty benefits which Amount B could otherwise bring.

Section	Topic	Issue	Recommendation
			• BIAC members are also concerned that jurisdictions may start to apply Amount B in an uncoordinated manner if no clear timeline for the adoption of Amount B is agreed by IF members. We therefore believe that it would still be preferable for an MLC to be developed to coordinate the implementation of Amount B. • We would also continue to recommend that the OECD works with the UN to ascertain whether the UN TP Guidelines could also be updated to include the Amount B guidance.
General	Interaction with Amount A	• Further consideration should be given to incorporating Amount B into the design of the Pillar One Amount A marketing and distribution safe harbor (MDSH).	• In previous comments provided to a number of OECD public consultations, the BIAC Tax Committee has recommended that Amount B could be used as a suitable alternative metric to the return on depreciation and payroll (RoDP) as currently proposed in the Amount A MDSH. • In our view, if a group already has a return in a jurisdiction for baseline routine distribution, the excess should reduce the Amount A allocation to that jurisdiction. • Where Amount B is implemented on a different timescale to Amount A, we recommend that the design of the MDSH is reconsidered in further detail with a view to incorporating the impact of Amount B into the calculation.
General	Timing of implementation	• In light of the complexity involved in implementing Amount B, especially considering the need to identify and incorporate new data points in our accounting systems, we believe it is crucial to draw upon the lessons learned from our recent experience with Pillar Two. Based on these insights, we anticipate that this process might require up to two years to complete, to ensure accuracy and effectiveness.	• We therefore propose that the effective starting date for the implementation of Amount B should be 2025. • Our comments here would be particularly relevant where Amount B is being introduced on a mandatory basis (i.e., Amount B would not operate as an elective safe harbor).

Section	Topic	Issue	Recommendation
General	Impact of not qualifying for Amount B	• It is clear from the Document that there is a lack of consensus amongst IF members regarding the scope of Amount B. This is clearly demonstrated by the discussion in Box 2.1 of the Document where it is noted that some jurisdictions favor scope Alternative A whereas other jurisdictions favor scope Alternative B. • Our members have significant concerns that, where an entity does not fall within the scope of Amount B, jurisdictions may assert that, for example, the TNMM is no longer applicable in a non-Amount B context or that the baseline profit margin determined for Amount B should be seen as a floor for all distributors. These concerns are particularly relevant where scope Alternative B is applied (please see our comments on scoping below for further details).	• To avoid unintended consequences, the Document should provide assurance that no inference regarding a distributor's profitability can be drawn from it falling outside the scope of Amount B and that these distributors should continue to apply general transfer pricing principles. It would be particularly useful to include this clarification as an attempt to ensure that all tax authorities operate with the same understanding. • While we recognize that this point has been mentioned in FN 16 of the Document, we strongly believe that a clarification should be included in the final version of Amount B that is added to the OECD TP Guidelines.
General	Customs implications	• We note that the Document does not contain any information on the potential implications of Amount B from a customs perspective.	• In our previous consultation response, we had noted that one of the potential outcomes of Amount B is that there could be a variation in the returns allocated to jurisdictions where group distribution entities are located. To achieve a revised pricing outcome under Amount B, the pricing of intra-group transactions between supplier and distributor may need to be updated. To the extent that a different price is nonetheless maintained for customs purposes, this would appear to diminish the goal of simplification for taxpayers and governments. • This could give rise to customs implications, particularly if the price of a transaction is reduced and a refund of customs duties becomes due. We can envisage practical difficulties arising in these scenarios. • We therefore would recommend that the Amount B price should be accepted for customs purposes. A simplified method should be provided whereby a taxpayer could opt to have

Section	Topic	Issue	Recommendation
			customs values revised to reflect the prices which should have been charged in order to get to the Amount B margin. This would involve the ability to pay / refund the difference in duty but would, importantly, not require the amendment of every individual import declaration. • At a minimum, further clarification on how Amount B and transfer pricing adjustments in general should be treated from a customs and VAT perspective would be welcomed.
General	Scope	• Application to permanent establishments.	• We would welcome clarification regarding whether Amount B should apply to permanent establishments.
General	Periodic review and engagement	• More generally, while the Document addresses reviews and updates of the pricing matrices, we would recommend that the IF should consider introducing some procedural mechanisms to introduce an initial (perhaps after year 5 of implementation) and ongoing periodic reviews of the application of Amount B, including consultations between taxpayers and tax administrations.	• This wider review should cover issues such as the potential expansion of scope for retail sales, services etc. • As noted above, we recommend continued work on possible further expansions of scope (including digital services). This work should continue now and in parallel with the completion of the initial design of Amount B and we would hope that this would be completed before the first 5-year broader review.
Definitions	Applicable accounting standard	• We note that a number of the definitions use the term '*calculated in accordance with applicable accounting standards*.' Where this means in line with the GAAP basis defined in the associated legal agreements, this could involve a variety of GAAPs across an MNE's global operation. This is likely to add significant complexity when calculating the various P&L and balance sheet ratios outlined in the document.	• Further clarity is required on the meaning of '*calculated in accordance with applicable accounting standards*'. • We recommend that, similar to Amount A, results should be based on the global accounting standard of the group (e.g., IFRS etc.) to ensure consistency of application across jurisdictions and industries and with the data of the comparables. • Alternative approaches could include allowing a taxpayer to use the global accounting standard or the local GAAP provided that the same accounting standard is applied consistently for a set time period.

Section	Topic	Issue	Recommendation
			• The approach could also be aligned with the accounting standard provisions for Pillar Two purposes.
Definitions	Financial definitions	• We note that the Document provides a high-level description for a number of financial definitions. For example, the Document provides a broad definition of net operating assets, as well as a definition of operating profit which excludes interest and tax but does not appear to allow for the exclusion of other non-operating items. • In line with our comments above, it also assumes that Gross Profit is a defined term in all GAAPs.	• It will be important that the terms are tightly defined to provide clarity as companies perform Amount B reviews and to prevent controversy. • For simplicity, items that are classified as operating expenses under the relevant GAAP or for local statutory purposes should be treated as operating expenses for the purposes of Amount B. We have provided a list of items which could be treated as non-operating expenses in Appendix III. • Consistent definitions of operating assets should be included as items like "excess cash", or "financial assets" might otherwise be captured and artificially increase the OAS ratio. We also envisage disputes arising over the calculation of the OAS ratio, which could undermine the simplification benefits that Amount B is intended to provide. • Please refer to Appendix III for our recommendations on the definition of Operating Assets for the purposes of the OAS ratio. • We would welcome the opportunity to discuss the financial definitions in more detail with delegates / the OECD Secretariat (in particular the definitions forming part of the OAS and OES metrics).

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Comments on Scope

Section	Topic	Issue	Recommendation
Section 2.2, para 8 - 9	Alternative A vs. Alternative B	• We note that the Document outlines two potential alternative approaches to the design of the scoping criteria for Amount B. These are described as Alternative A and Alternative B. • Under both approaches, it is already necessary for a taxpayer to consider whether a one-sided transfer pricing methodology is appropriate (i.e., to assess the boundary between the profit split and the TNMM method). In order to apply the TNMM method under existing TP rules, it is important to recognize that there is a requirement that the taxpayer must not be making unique and valuable contributions. Contributions will be deemed to be unique and valuable if, in essence, they represent a source of competitive advantage. Where this is not the case, the activities should only attract a routine return and should be benchmarkable. • BIAC Tax Committee members would question whether there is a need, in circumstances where an accurate delineation of the transaction is already being completed, for any additional filters to be added. In this regard, we note that, under both Alternative A and Alternative B, there would be a requirement for: ○ Appropriate transfer pricing processes to be applied to ensure that segmentation will be used where there are functions that are not distribution and marketing functions. ○ A review of DEMPE functions still appears to be applicable.	• Introducing additional filters (particularly qualitative filters) will significantly decrease the value of Amount B to bring certainty and simplification, which undermines the overall impact of Pillar One to bring stability to the international tax system. • In our view, the premise of Amount B is that, by using certain proxies (e.g., a matrix of results), a taxpayer can arrive at an approximated arm's length result, while availing of substantial benefits to simplification and certainty. In particular, we note that, by providing for graduated returns based on Operating Expenses and Net Operating Assets, the pricing matrix already adjusts for activities that are not 'unique and valuable'. • We are therefore concerned that the Document is suggesting that close approximations cannot be accepted – if this is the case, there is a risk that the simplification benefits of Amount B could be lost which would undermine the objectives of the Pillar One project to stabilize the international tax system through the agreement of simplifying, clear, and transparent guidelines. • To achieve a more straightforward and certain approach, we suggest keeping the accurate delineation of the transaction as currently provided by Chapter I of the OECD TP Guidelines and by both Alternatives A and B. We recommend that the Alternative A is selected eliminating paragraph 8(b). This approach would maintain the complexities of accurate delineation but limit the additional complexities of both Alternative A and B.

Section	Topic	Issue	Recommendation
		• The main issue here relates to the fact that, on top of existing transfer pricing analysis (i.e., the accurate delineation of the transaction), both alternatives are adding additional layers of complexity.	
Section 2.2, para 8	Alternative A	• Alternative A works with the existing transfer pricing approach and then adds a quantitative filter. While we have identified specific issues with this filter (see our comments below), we believe that, as it is a quantitative filter, it is more objective than Alternative B and should be the preferred approach in terms of achieving an Amount B outcome that provides simplification benefits in practice. • Alternative A also recognizes that comparability under the TNMM approach of the OECD guidelines does not require exact comparisons but recognizes that a range of companies doing similar activities achieve similar economic results.	• Notwithstanding our comments above, if the choice is between Alternative A and Alternative B, we would strongly encourage the IF to continue to develop the Amount B proposals using Alternative A.
Section 2.2., para 9	Alternative B	• Alternative B adds an additional criterion which is intended to identify where a distributor makes "non-baseline contributions". The requirement would introduce a new threshold, the baseline, which would be 'lower' than the current TNMM threshold. This would mean that there would be a new category of activities which are 'benchmarkable but above baseline'. • Alternative B is highly subjective, as reflected in paragraph 23 where it is stated that: *"Taxpayers and tax administrations should exercise judgment in evaluating whether non-baseline contributions are made under the specific facts and circumstances of the qualifying transaction, or whether the contributions that are made correctly represent non-baseline contributions."*	• The KPMG/MS transfer pricing analysis provided in the initial consultation earlier this year should be sufficient to adequately address these concerns. Specifically, that study provided benchmark results for both limited risk distributors (LRDs) and value-added distributors (VADs). While the study observed certain limited differentiated outcomes between LRDs and VADs, both datasets yield results that fall within the range specified in the pricing matrix in Figure 4.1. • Moreover, we observe that Section 4.2 of the Document provides for a mechanism to otherwise provide for a country-specific differentiated pricing matrix where certain objective criteria can be met to address individual country concerns.

Section	Topic	Issue	Recommendation
		• In our view, Alternative B would undermine any benefits of a simplified and streamlined Amount B scoping approach. Alternative B would introduce a very substantial compliance requirement to delineate baseline and non-baseline activities. • More generally, we are also concerned that Alternative B may lead to conflicts and confusion in interpreting Chapter I of the OECD TP Guidelines. Introducing an additional qualitative analysis through Alternative B might lead to the conclusion that the accurate delineation as described by Chapter I does not generally entail a comprehensive analysis of the parties' actual activities. This could potentially undermine the understanding and the interpretation of Chapter I that is at the heart of the ALP. • Proponents of Alternative B seem to contend that the exclusion of two-sided transfer pricing outcomes is insufficient to otherwise delineate pricing for non-baseline contributions, since distribution arrangements with one-sided methods can encompass a wide range of outcomes. We believe that this assertion should be grounded in data. • There is an inference in the commentary that, by accepting the existing TNMM threshold, there would be a risk of creating opportunities for base erosion and profit shifting. An alternative view would be that the BEPS project went to great lengths to define the boundary between the TNMM and profit-split approaches, and that there is nothing in the Alternative A approach which undermines this, or the ability of tax authorities to examine a taxpayer's efforts to comply. • We also observe that concerns about base erosion and profit shifting do not take into account the impact of	• We believe that the results of the KPMG study should provide sufficient comfort that pricing distinctions are already adequately covered by pricing mechanisms provided in the Sections 4.2 and 4.3 of the Document, while balancing the acknowledged trade-offs between reliability and administration. • Otherwise, we strongly believe that the introduction of incremental qualitative criteria under Alternative B will substantially undercut the stated mandate of the IF in October 2021 to simplify and streamline pricing for baseline marketing and distribution activities. • We firmly believe that, if the choice is between Alternative A and Alternative B, Alternative A should be the preferred solution.

Section	Topic	Issue	Recommendation
		implementation of Pillar Two. In particular, we note the positive behavioral effects that are expected to be addressed by Pillar Two.	
Section 2.3, para 15, FN 15	Scoping criteria	• In our view, FN 15 is very broad and not all of these marketing activities and responsibilities would lead to a two-sided (i.e., profit-split) method of allocation. However, it seems that the consequence of their presence is that a distributor would be disqualified from availing of Amount B. This is a subjective test which will be difficult to implement and would remove certainty from this process.	• We would recommend that, where this exclusion is retained, it should be clearly stated that a profit-split transfer pricing method will not be the default method where an entity fails to qualify for Amount B. We believe that a profit-split method would be inappropriate in many cases.
Section 2.3, para 16	License agreements	• We note that certain jurisdictions require an entity to obtain a license to distribute products. In these cases, an implied license included in a distribution agreement is deemed to be insufficient. • However, it is often the case that the entity is still considered to be engaging in routine distribution activities, based on an assessment of the risks, functions and remuneration structure.	• Where the license agreement only provides for the entity to bear the same risk / functions / remuneration as a distributor, we do not believe that the entity should be excluded from scope due to the mere existence of a license.
Section 2.3.2, para 17 – 19	Alternative A – specific issues	• We have identified certain aspects of the Alternative A criteria which we believe require further consideration: i) Based on the information provided, it is not clear how the 30% and 50% proposed thresholds were determined. The Document states that the screen is intended to *"remove from scope only those distributors with levels of operating expenses that may indicate anomalous or outlier results"*. However, we note that, if an entity has prepared a functional analysis and correctly delineated the transaction, an "anomalous scenario" should not exist.	• In the event that paragraph 8(b) is retained in the final Amount B document, we believe that the final document will need to clearly state that a failure to qualify for Amount B should not give rise to a presumption that a higher return is applicable. • As noted elsewhere in our response, we are concerned that, without further clarification, the quantitative ratios may be used for purposes other than transactions under Amount B (e.g., tax authorities could argue that these parameters are an indicator of high value adding contributions). This could lead to the application of two-

Section	Topic	Issue	Recommendation
		ii) The calculation of Operating Expenses will be challenging to complete. The calculation needs to be prepared on a 3-year weighted average basis and it is currently unclear what GAAP should be used to complete the calculation (and what accounting principles should be applied). We expect that this will add a significant amount of complexity for both MNEs (that will need to prepare this analysis) and tax administrations (that will need to review). Disputes are likely to arise over how these calculations have been performed. iii) Operating Expenses can be affected by intercompany transactions and therefore may vary following transfer pricing assessments / adjustments. In our view, this could lead to more administrative work / uncertainty. In particular, we are concerned about scenarios where costs included in Operating Expenses are reassessed after a number of years and, due to this assessment, the entity falls within or outside the scope of Amount B. • While paragraph 19 states that a 3-year weighted average ratio should be calculated on a year-on-year basis for the purpose of determining whether a transaction is in-scope. The use of a 3-year average may not capture longer business cycles. In industries where the launch of new products requires significant investment in the initial launch years, the Operating Expenses threshold may exclude entities that are nevertheless baseline distributors. • Paragraph 19 further states that, where the qualifying transaction has been in place for 2-years or 1-year, a 2 / 1 year	sided transfer pricing methods or comparables that present different ratios being disregarded. • We would appreciate if more clarity could be provided on how the 30% and 50% proposed thresholds were determined. In our view, 50% is a preferable upper range than the 30% range proposed for Alternative A, as it will better address the fluctuations that businesses can encounter in practice. • We recommend that the weighted average period is increased to 5-years to reduce volatility in the pricing. • In the case of new markets, some accommodation needs to be made for new entrants (e.g., a limited time-based exemption for the initial period, or explicit criteria to address the fact that there will be no historical information). • We recommend that distributors that are subject to regulated margins should still be allowed to qualify for Amount B if the only reason that they do not otherwise qualify is due to a failure to satisfy the Alternative A quantitative criteria.

Section	Topic	Issue	Recommendation
		weighted average ratio should be used. It is not clear why the weighted average period should be reduced to 1 or 2 years, rather than a rolling 3-year period. An example on how this would work in practice would also be welcomed. There is similar qualification in paragraph 56 in relation to determining the relevant factor intensity classification. • For completeness, we note that some jurisdictions have regulated margins for certain products. While a distributor may meet all the criteria of a baseline distributor, it may still fail the quantitative test due to those (non-tax) regulations. • As a quantitative screen is included under both alternatives, the issues identified above are equally applicable to Alternative B.	
Section 2.3.2 – Scoping criteria (FN 18)	Pass-through costs	• The treatment of pass-through costs is critically important for both the calculation of OES and the Berry Ratio. While a narrative is provided on the treatment of pass-through costs at the bottom of FN18 on page 15 of the Document, we note that the same narrative was provided in previous consultation documents. The current language in FN18 is somewhat vague – we are concerned that this may be another area where it is proving challenging to get achieve consensus with IF members. • We believe that further work on the definition of pass-through costs is required (e.g., whether marketing execution spend by the distributor at the direction of the foreign principal company would be excluded for the calculation of the ratios). This point is fundamental to any financial analysis that must be prepared.	• When utilizing the quantitative criterion (operating expense to sales ratio), we believe that taxpayers should be able to exclude expenses and costs that do not represent value-adding distribution functions, such as pass-through costs. • In our view, the logical conclusion is that, if an entity qualifies as a baseline distributor, any spending with third parties on advertising which develops the marketing intangible of the counterparty controlling that spend must be a pass-through cost. • In our view, it is important that clarification is provided that the footnote is reaffirming the principle that pass-through costs should be excluded.

Section	Topic	Issue	Recommendation
Section 2.3.3, para 24 – 31	Alternative B examples	• While the Document provides some examples, it is noted that this is a non-exhaustive list. In particular, the Document states in paragraph 23 that *"it is not feasible to specifically and comprehensively list a set of baseline or non-baseline contributions that can be deterministically applied as scoping criteria for the purposes of the simplified and streamlined approach, given the breadth of activities and business operations undertaken by distributors".* • Example 1A in the Document illustrates this point. We already accept that scoping is around routine distribution functions, and yet there is a suggestion that "special expertise in marketing such goods" would require an uplift in a more qualitative approach. All companies strive to have effective marketing teams in distribution functions, and those teams should have expertise in marketing – such an open-ended rule could very well lead to many disputes around the effectiveness of the marketing team, and that is the opposite of the intent behind Amount B to decrease the level of disputes. • The Document suggests that, if Alternative B is chosen, technical or specialized support functions could disqualify an entity from Amount B. However, we note that some level of support functions is already seen in the comparables – this exclusion appears to be inappropriate as a result (particularly as the goal of Amount B is to achieve arm's length results in a simplified manner). To the extent that these services exceed the levels normally seen in third party relationships, we firmly believe that the issue could also be solved with segmentation. We therefore believe that this is not a reasonable distinction, further highlighting the rationale for choosing Alternative A over Alternative B.	• In our view, if Alternative B is selected, more examples are needed of the types of marketing activities which fall within the Amount B 'baseline'. This is a major area of controversy faced by many businesses in distribution audits and APAs and will continue to be so if Alternative B is selected. We are therefore concerned that the Document states that the list is non-exhaustive.

Section	Topic	Issue	Recommendation
		• We also have concerns about Example 2A, which draws a thin line between an entity falling in or out of scope of Amount B. While it appears that the example is targeted at the pharmaceutical industry, we note that it may also capture a number of broader scenarios covering, for example, basic health and beauty care products. As a result, we expect that extensive documentation would need to be maintained to support an entity's ability to qualify for Amount B. We also expect that disputes would arise which could be challenging to defend, particularly given the subjective nature of the scoping criterion (e.g., if there are language issues between the taxpayer and tax administration). The fact that Alternative B would require judgement calls to be made will limit certainty and will, in many cases, exclude regulated industries from the scope of Amount B.	
Section 2.1, para 5	Scope exclusions – retail sales	• In line with the feedback provided in the previous consultation response, we continue to note that the IF mandate from October 2021 was to simplify and streamline "baseline marketing and distribution activities". This did not include a distinction between wholesale and retail distribution activities. As such, the proposal immediately narrows the scope of Amount B to "wholesale" activities. • While we acknowledge that improvements have been made since the initial public consultation, we continue to see the scope as overly narrow and not meeting the IF's stated mandate.	• While the Document provides for a "de minimis" exception for retail distribution, we believe that this is unnecessarily overly narrowing the scope. We would also caution that excluding retail sales could inadvertently result in much lower local returns for wholesale distribution activities in the local marketplace, based on the pricing matrix and related corroborative mechanism in Section 4.3. • In addition, while much of the focus may be on services and other exclusions, we question the merits of the additional OES exclusion criteria in paragraph 8(b), in particular the exclusion where local operating expenses are less than 3% of sales. Relatedly, we note that the definition of wholesale distribution appears to exclude certain local sales support and marketing activities that do not rise to the level of local sales agency. We question the merits of these exclusions and believe them to be otherwise adequately addressed by the pricing matrix in Section 4.2,

Section	Topic	Issue	Recommendation
			as possibly modified by section 4.3. We recommend that the IF reconsider these exclusions.
Section 2.3.4, para 32	Scope exclusions – digital services	• As an overarching comment, we would like to emphasize that Amount B was (at least previously) intended to operate as part of a package of connected stabilizing policies, along with the other features of Pillar One. Companies in scope for Amount A should be in scope for Amount B, and yet an exclusion of digital services would leave a large cohort of Amount A companies uncovered by Amount B. While observers may believe that other dispute resolution provisions of Pillar One will fill those gaps, it is important to note those mechanisms only provide sufficient coverage if the MLC were to build in appropriate provisions for dispute resolution where double tax treaties are not already in place. We are concerned that such "back-up" provisions will not be in place. • While we acknowledge that there is a concern about the inclusion of locally performed services within the scope of Amount B, we continue to question the rationale for the exclusion of baseline marketing and distribution of services and, in particular, the exclusion of digital services that are not otherwise performed by the taxpayer in the country. We believe that this deserves further elaboration and we encourage the Inclusive Framework to expand the scope of Amount B to include services. • In this regard, our analysis of services distributors shows that similar activities and risks are involved in the distribution of services. We have also provided data that contains services companies, which demonstrates that similar ranges of compensation are appropriate.	• We remain disappointed to see that digital services are excluded from the scope of Amount B and strongly believe that the data that has been provided by BIAC members and other organizations throughout the consultation process substantiates that services should be in scope of Amount B. We will continue to engage further to share recommendations for how this can be accomplished. • In our view, the scoping element of Amount B should focus on the functions performed locally by entities. In this respect, we believe that there is no discernible distinction locally between marketing and distribution of a digital good versus a digital service (i.e., subscription). • While we recognize that, given the wider lack of consensus among IF members regarding the scoping tests for Amount B, it is unlikely that services will be added to the scope of Amount B initially, we believe that it is important to clarify that the scope of Amount B could be expanded to cover services at a later stage. In this regard, please refer to our general comments above and our recommendation for periodic scoping reviews and ongoing engagement with stakeholders. • We believe that further explanation of the precise concerns of IF members would also allow stakeholders to provide more constructive data to find solutions. For example: o If the concern relates to a lack of inventory risk, we believe it would be possible to demonstrate that

Section	Topic	Issue	Recommendation
		• More specifically, we note that the distribution of digital content can be classified as a "sale" or a "service" depending on the structure of the transaction. It is unclear to us why the scope of Amount B is considering including the sale of digital content but not including a subscription service of digital content, even when both are "wholesale transactions" distributed through third party digital service providers. • We believe that this distinction is inappropriate in this context, as the functions of the distributor in both scenarios are the same. In both cases, the focus of the activities of the distributor is on marketing the digital content, without regard as to whether it results in a sale or subscription. The remuneration of the distributor is the same in both cases. The differentiating factor therefore relates to the choice made by the consumer regarding how they enjoy and pay for the content. • It will likely be extremely challenging and impractical to attempt to segment an entity's P&L and balance sheet for these types of transactions, particularly in light of the fact that the functions and risks associated with both transactions are the same. • We also note that local and regional comparables are available on public databases, which our members regularly use in order to perform and update benchmarking studies.	distributors of services may resemble commissionaires in that respect. ○ If there is a concern regarding the scale of customization, we can provide more detail about our members' business models to demonstrate that many services models require minimal (if any) customization. • Even where some companies may customize their services, there are other reasonable transfer pricing approaches to value those additional services without disqualifying the more common routine functions from Amount B. Where entities are not customizing their service offerings, we believe that the activities of these entities should be able to qualify on similar grounds for Amount B. • For completeness, we note that, while the Document states that further consideration will be given to including digital goods within the scope of Amount B, it is unclear how other non-tangible goods should be treated. We would appreciate if further clarity could be provided. • Further guidance should include a rule which clarifies that business-to-business distribution should not be considered retail distribution for the purposes of applying the Amount B exclusion, regardless of whether the business is the end-customer.
Section 2.3.4, para 33 – 38	Scope exclusions – commodities	• As an initial comment, we support the overall exclusion of commodities from the scope of Amount B. However, we have some specific comments as follows: • From the information provided, among other commodities, it appears that only hydrogen derived from the processing	• In our view, "green hydrogen" should also be excluded from the scope of Amount B, as to not do so would result in a different transfer pricing treatment for the same product when it is produced in a "greener" manner.

Section	Topic	Issue	Recommendation
		of natural gas is expressly excluded from Amount B. However, we note that hydrogen can also be produced from the electrolysis of water using decarbonated electricity (also referred to as "green hydrogen"). • We note that helium does not appear to be explicitly listed in the exclusions. Helium is a gas that is mostly obtained as a by-product of natural gas extraction and is used as a commodity by different businesses (e.g., electronics). The market for the distribution of helium is a specific and volatile market for which standard distribution benchmarks would not be appropriate. • Further clarification on the commodities exclusion would also be welcomed in three areas: o The treatment of non-physical commodities. o Whether non-tangibles such as carbon credits are within scope? o While it is clear that rough format gemstones would be included in the exclusion (e.g., rough diamonds), it is unclear whether gemstones which have been cut or polished are included in the exclusion.	• We also recommend that helium is specifically referenced in the exclusions. • We believe that the same reasons that led to the exclusion of physical commodities from Amount B are equally applicable to non-physical commodities. In particular, as the global economy transitions towards renewable energy sources, it is essential to ensure that tax policies remain technologically neutral and equitable. • Excluding non-physical commodities such as electrons generated through wind and solar from Amount B would uphold the principle of treating all commodities consistently, regardless of their physical or non-physical nature. Such an approach fosters fairness and avoids potential distortions in the market for renewable energy, encouraging a level playing field for all energy sources. We would therefore recommend eliminating the word Physical from paragraph 34(a). We would also recommend that the words "sun and wind, including carbon and energy (including renewable energy) certificates and carbon credits", after the word water. Additionally, we would suggest adding "carbon and energy certificates and carbon credits" to paragraph 37.
Section 2.3.5, para 39 – 48	Scope – Segmentation	• We are supportive of the approach of allowing an entity to segment non-distribution activities from the qualifying transaction. The inability to segment entities was a key concern raised in our previous consultation response and we welcome that some accommodation of our concerns has been provided. • However, we note that there are some considerable hurdles included which might force companies into expensive restructurings in order to obtain certainty.	• While we support the ability to segment results, we believe that further clarification of what segmentation requires and what allocations and/or apportionments will be viewed as "reasonable". Otherwise, entities could be excluded from Amount B where jurisdictions assert that the segmented financials were not "accurate". • The Document provides some examples of when different activities can be segmented. It would be useful to have an example where a single entity manufactures and sells this

Section	Topic	Issue	Recommendation
		• Paragraph 42 discusses excluding transactions from scope where the indirect Operating Expenses allocation is more than 30% of total costs. We note that the definition of total costs is unclear. The rationale for this guardrail is also unclear as the allocation methodology is considered to be suitable for wider TP purposes. • We also believe that more guidance is required on how the practical allocation of revenues, costs and assets to distribution activities would be accomplished. For example, in cases where an entity distributes both in-scope and out-of-scope products, it should be clarified whether sales and marketing costs allocated between the two types of products should be included in the numerator and if there is any particular guidance on allocation methods that should be followed. • We are concerned that many MNEs will face a particular challenge with respect to segmenting the balance sheet for legal entities that perform multiple activities. While a segmented P&L is more commonplace, there is rarely a requirement to segment the balance sheet and there are no established processes for this. We expect that the OAS metric will be challenging to calculate in practice – please refer to our comments on Section 4.1, para 53 - 55 for additional commentary.	product in its market (as well as importing finished goods). In this regard, would Amount B only apply to the import of finished goods or could an Amount B return also be applied to the distribution component of the goods manufactured for domestic consumption? • We suggest that the exclusion should be limited to transactions that cannot be analyzed separately following the guidance of para. 3.9 – 3.12 of the OECD TP Guidelines. As a result, we would recommend that the additional guardrails in para. 42 of the Document are removed. The inclusion of a 30% threshold for the allocation of indirect operating expenses will add unnecessary complexity and is contrary to the long-standing approach applied in other aspects of transfer pricing. We also note that a similar allocation threshold has not been included for assets. • In the event that the threshold for allocating indirect Operating Expenses is retained, more guidance is needed is needed on how to calculate this 30% threshold. This is particularly relevant as paragraph 48 of the Document notes that tax administrations will require "*various information to assess the reliability of the allocation or apportionment of revenues, costs and assets*". • We recommend that acceptable simplification rules are included for the segmentation of balance sheets (e.g., the use of an allocation key for assets and liabilities which are challenging to separate).

BUSINESS at OECD

Comments on Pricing

Section	Topic	Issue	Recommendation
General	Pricing methodology	• We appreciate that the OECD has made efforts to try to achieve a certain degree of precision in identifying the most appropriate value depending on the industry, intensity of the activities performed, and risks related to the jurisdictions where the activities are performed. • However, BIAC Tax Committee members have some difficulty in reconciling the proposed pricing matrix with the transfer pricing studies provided by P&G (PWC) and Microsoft (KPMG) as part of our previous Amount B consultation response. Please refer to our previous comments for further details. • While the studies apply differing approaches to identifying search comparables, we note that the conclusions reached are broadly consistent. In particular, both studies suggest that there are not, generally speaking, material differences in benchmark returns across geographies, industries, or even in cases where profit margins diverge for the business as a whole. o The 2020 KPMG analysis shows that arm's length returns to sales, marketing and distribution functions are very consistent (with a median 2.5% return for limited risk distributors (LRDs) and a 3.6% value-added return) across geographies and industries and do not increase as industry profitability increases. o The report prepared by PWC also found that results across the industries modelled displayed relatively limited variability[2], using both return on sales and Berry Ratio profit level indicators.[3] The study was also prepared using two	• We would encourage the OECD to provide equivalent levels of transparency to the business community to afford it the opportunity to review and understand the data supporting the proposed pricing matrix, before any definitive conclusions are reached on pricing. We recognize that a final matrix is dependent upon reaching a conclusion on scoping, however, the business community should nevertheless be afforded the opportunity to see the underlying data before the pricing matrix is finalized. • We also recognize that there are limitations in the data that the IF can publish due to database restrictions. However, we strongly believe that greater transparency is required to ensure the international legitimacy of Amount B and to avoid the criticism that it is being developed using "secret comparables". • It is also worth recognizing that, as more complexity is added to the pricing criteria, this will have a corresponding impact on the risk of disputes arising down the line. In light of the fact that the intent of Amount B is to reduce complexities and disputes (which the Document recognizes are currently mostly pricing-related), we recommend that continuing efforts should be made to reduce the level of complexity in the pricing calculation wherever possible.

[2] The PWC transfer search strategy excludes retail distributors.
[3] The inclusion of the Berry Ratio is in keeping with the commentary in the OECD Transfer Pricing Guidelines (para 2.107) on situations where the Berry ratio might be appropriate. This includes situations in which "the value of the functions performed in the controlled transaction is proportional to operating expenses" and is "not proportional to sales".

Section	Topic	Issue	Recommendation
		geographic regions and the results across both regions were largely consistent. o While the PWC study did identify a variation in results when working capital levels (particularly working capital as a percentage of turnover) were considered, the impact of other potential comparability adjustments was observed to have a negligible effect. • While the ranges presented in the Pricing Matrix are broadly aligned with the lower and upper limits of the ranges observed in the KPMG and PWC studies, the design of the Pricing Matrix will, by its nature, result in certain categories of distribution activities being placed at the outer ranges of matrix (these categories of entities will therefore be quite removed from the median results observed in the studies provided as part of our previous consultation response).	
General	Pricing methodology	• In light of the comments above, we believe that the design of the industry groupings for the purposes of the Pricing Matrix requires further analysis. In this regard, we note that the rationale and economic analysis for selecting the industry sector groupings should be provided to business for review. • We note that the OECD has not used recognized industry classifications. Further information will be important as a result.	• We recommend that greater levels of transparency are provided regarding the selection of the industry grouping classifications. • In addition, guidance is required for products that could fall within certain broad categories such as "healthcare" and "household consumables" and the approach that should be taken if a distributor sells in multiple categories that fall within different industry groups. Please refer to our comments on Annex B for further detail. • In the absence of additional guidance, we are concerned that disputes will arise with tax administrations over which industry grouping should apply, as this will have a direct impact on where an entity sits within the Pricing Matrix and,

Section	Topic	Issue	Recommendation
			in turn, the target margin that should be retained locally in the relevant jurisdiction.
Section 3, para 52	Pricing methodology	• We welcome the fact that the Transactional Net Margin Method has been identified as the most appropriate method to price transactions within the scope of Amount B. This will help to limit pricing-related disputes. • For completeness, we would like to re-iterate our comments above that the requirement to accurately delineate a transaction to ensure that a one-sided transfer pricing method is appropriate should also provide the data needed to fully address any questions about whether an entity qualifies for Amount B. Additional functional based scoping-criteria should not, in our view, be required.	• If Amount B ultimately does not operate on an elective basis, it would be important to allow for the possibility of applying a CUP where applicable.
Section 4.1, para 53 - 55	Pricing matrix	• We note that various qualitative screens were performed including website reviews which are subjective, time consuming, difficult to replicate and reduce transparency. In our experience these reviews are unlikely to change the outcome of the range and so can be eliminated making it easier for the sets to be replicated and updated on a regular basis. • Based on our review, it appears that the baseline distribution pricing matrix is primarily being driven by OAS intensity and industry grouping, with OES being a smaller driving factor. While it may be the case that OAS has been identified as the primary driving factor in the analysis performed by the OECD Secretariat / IF members, it is difficult to comment fully on this aspect of the pricing matrix without having access to the underlying data. • As mentioned previously, BIAC members would strongly welcome the opportunity to engage further with the OECD Secretariat in relation to Amount B modelling. Where a greater	• We recommend that website reviews are eliminated from the process as this will make it easier for datasets to be replicated and updated on a regular basis. • We believe that a greater level of transparency would be required in order to achieve buy-in regarding the baseline distribution results. • We believe that OES is a better metric to use than OAS and suggest eliminating OAS as a metric given its inherent complexities and lack of consistency as a metric. • If, despite our recommendations, OAS is retained as a metric, we recommend that more guidance is provided on how to reasonably allocate assets within entities, including guidance on allocating assets between in-scope and out-of-scope product areas.

Section	Topic	Issue	Recommendation
		level of transparency is provided, business will be able to provide targeted input to assess whether the observations reflect their experience in practice. This could include testing the assertion that OAS has a more pronounced impact than OES. • In this regard, a number of aspects of the pricing matrix currently remain unclear based on the description provided in the Document. For example, it is unclear: o How the thresholds within the matrix have been determined and whether, for example, there are a similar number of observations within the global dataset within each segment of the pricing matrix or whether there were distinct jumps in the global dataset at certain points etc. o How the industry groupings have been determined (please refer to our comments on Annex B for more detail). • As mentioned above, a number of our members expect that the calculation of OAS will give rise to material levels of complexity in practice. If Amount B is to provide simplification benefits, it is important that calculation metrics (e.g., OAS) do not lead to additional disputes. • On this basis, a number of our members observed that OES would be a preferable method to OAS, which creates complexity and calculation problems. Concerns were noted that factor intensity zones A, B and C are defined based only on OAS intensity. • In particular, as noted above, taxpayers involved in both distribution and non-distribution activities will face challenges in accurately segregating operating assets between in-scope and out-of-scope transactions for the calculation of the OAS ratio.	• If OAS is retained, we also believe that OES should be given a more prominent role in the Pricing Matrix.

Section	Topic	Issue	Recommendation
Section 4.1, para 56	Pricing matrix calculations	• Similar to our comments on scope above, we believe that the design of the pricing matrix is likely to result in new challenges and disputes with tax authorities, shifting the discussions from what is the right comparable to other topics. For example: ○ Challenges regarding how accounting principles have been applied in order to calculate to OAS and OES. ○ Where intercompany costs are included in operating expenses or asset values. ○ Identification and treatment of pass-through costs. • Paragraph 56(b) also discusses the use of 3-year weighted averages for the OES and OAS ratios. While this may appear to be a reasonable approach in theory, we expect that the requirement to calculate the ratios (particularly balance sheet ratios) on a consistent and segmented basis for all entities will represent a significant administrative burden.	• Further guidance is required to address these points more explicitly, to avoid a shift in disputes / challenges from tax authorities. The guidance should make clear that these criteria are applicable only to transactions that are within the scope of Amount B. •
Section 4.1, para 57	Pricing approach	• Paragraph 57 of the Document discusses testing the price-setting as part of completion of the tax return at year-end. Given the complexity of the suggested process (e.g., in terms of segmenting financial data, potentially on a local GAAP basis), it may be practically difficult to prospectively set distributor prices to achieve the targeted return. For example, segmented net operating assets is not currently forecasted by many MNEs and could significantly change the target distributor margin. • The simplified and streamlined approach was supposed to create certainty. With the requirement to apply and test the actual outcome on an *ex-post* basis, taxpayers will face uncertainty again. As noted elsewhere in this response, if the outcome does not reflect the proposed ranges in the Pricing Matrix, a true-up adjustment will be required.	• If the requirement to test actual outcomes of in-scope transactions on an *ex-post* basis is retained, it is important that a corresponding provision is introduced that requires tax authorities to accept downward profit adjustments for all Amount B qualifying transactions. Please also refer to our comments on the need for binding tax certainty mechanisms later in this response. • We would also strongly recommend that the acceptable range is amended from +/-0.5% to +/-1% for each section of the Pricing Matrix, as we believe that this would create a more effective target pricing range and reduce the need to post-year-end true-up adjustments.

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		• We expect that this complexity will naturally lead to more significant post year-end adjustments as the appropriate ROS is calculated based on the local GAAP balance sheet and P&Ls. This seems to be contrary to the original proposal of a simplified and streamlined approach to create certainty. • There could also be related customs duties and VAT implications. In certain jurisdictions, year-end transfer pricing adjustments are refused if those adjustments result in a reduction of profit, even in a recognized limited risk distributor. The implications from a Pillar Two perspective will also need to be considered / catered for.	• Where taxpayers can demonstrate that the price-setting process was robust, consideration could also be given to forgoing the requirement for a true-up adjustment entirely. Otherwise, we believe that the ranges provided could be quite challenging for taxpayers to satisfy each year and would require taxpayers to have very good levels of operational transfer pricing. • As noted above, we recommend that Amount B should be accepted for customs purposes. A simplified method should be provided whereby customs values could be revised to reflect the prices which should have been charged in order to get to the Amount B margin. This would involve the ability to pay / refund the difference in duty but would, importantly, not require the amendment of every individual import declaration.
Section 4.1, para 58	Pricing adjustments	• We note that paragraph 58 states that "*when the margin reported by the taxpayer falls outside the arm's length range… tax administrations should use the midpoint of the… range to adjust the margin of the controlled transaction*".	• We would recommend that the adjustment should be to the nearest point within the range (as the underlying assumption is that results within the relevant range are reflective of arm's length pricing outcomes).
Section 4.2	Mechanism to address geographic differences	• According to the Document, the concept of a modified pricing matrix has been introduced to ensure that the simplified and streamlined approach takes account of geographic differences in accordance with the arm's length principle. However, the list of qualifying jurisdictions is not known yet. It will be published and periodically updated on the [OECD website]. It is unclear on the specific criteria to be used by OECD to determine the qualifying jurisdictions. • We would appreciate an opportunity to review the modified pricing matrix for qualifying jurisdictions once numbers are available. It would also be helpful to see the countries that are qualifying jurisdictions (to be listed in Annex C), so that we can better understand how the data is driving those decisions. Any	• Our strong preference would be for there to be a single global pricing matrix with no exceptions. As an overarching comment, we note that neither the KPMG nor the PWC transfer pricing studies provided as part of our previous consultation response demonstrated sufficiently differentiated outcomes to warrant the introduction of this level of complexity. • If the data exists to justify a modified pricing matrix, we believe that the underlying data should be made available to the business community before the mechanisms described in Section 4.2 are added to the final design of Amount B.

Section	Topic	Issue	Recommendation
		choice to have a differentiated outcome must be supported by the data in the public dataset (e.g., from commercial databases). • In addition, we believe that there is a risk that, if a tailored pricing matrix was created for specific territories, there would not be enough observations to accurately populate all segments of the pricing grid or there would be some obvious outlier results due to small sample sizes in particular segments of the grid. The OECD should provide guidance to ensure that the data sets used are large enough to be reliable. Otherwise, the global dataset should be the default.	• However, if the addition of a modified pricing matrix is necessary to get consensus, there must be clearly laid out criteria for when a country qualifies for a modified pricing matrix. To qualify the observable results of individual territories should be large enough data sets to be statistically significant in their own right, and significantly different from the global set over a sustained period of time. • They should not be capable of explanation by reference to geographic differences in operating expenses and asset intensity, which would be accommodated in the grid. It would also be optimal for the jurisdictions themselves to offer an economic rationale for the observed difference. • There should be similar exceptions if the returns are materially lower for a country, not only if the local results are higher versus the global set. • To the extent these countries have their own pricing matrix, we believe that these comparables must be excluded from the global set otherwise their results are double counted and will impact the results of other markets.
Section 4.2, paragraph 66	Jurisdictional Adjustment	• We would also appreciate the opportunity to consider the evidence supporting the need for a jurisdictional adjustment based on sovereign credit ratings. Our initial view is that the use of a different matrix, justified by a higher risk profile of the country, does not appear justified based on economic considerations. • Based on the information available, it is unclear how the OECD developed the formula for making the risk-based adjustments. However, we note that the formula could result in an	• We recommend that the proposal for a country-risk adjustment is not included in the final design of Amount B. • If a jurisdictional-risk profit target is introduced as part of Amount B, we believe that it would be important to make clear that any restructuring or other local costs must be adjusted from the results to ensure that risks are not compensated twice by the entrepreneur and losses are retained locally. In the absence of this clarification, it is likely that the entrepreneur in the supply chain will be

Section	Topic	Issue	Recommendation
		adjustment of up to 7.3% (85% OAS * 8.6%) which is a significant uplift and is unjustified where the risk is being passed-back to the foreign counterparty. • In our experience, it is rarely the case that a material adjustment is required and, even in those limited circumstances, it would not be typical for an adjustment to be determined based on sovereign credit ratings. • In these cases, the baseline distributor would be a "low-risk" entity and country-risk would affect the entrepreneur in the supply chain that is making the investment in that country. Moreover, it would not make business-sense to be required to put more profits into a high-risk jurisdiction thus subjecting the entrepreneur into even higher levels of risk-taking. • The only jurisdictional adjustment we have seen is where local borrowing costs are extremely high, and the local distributor has cash flow impact (and thus increased working capital financing needs) as a result of the importation process. Such interest costs would not be reflected in operating income and therefore a normal distributor return would not cover such extraordinary costs. Thus, an increase in operating margin return is necessary to cover the increased financing costs when compared to other distributors. • We would therefore appreciate the opportunity to discuss the economic considerations driving the design of the jurisdictional adjustment in further detail.	compensating for that risk twice (i.e., firstly via the increased target margin and additionally when the risk results in a loss and the distributor is topped up to the target margin). • We also believe that the ranges would need to be expanded to allow for the possibility of the distributor making a loss (i.e., that the ranges are not only increased at the upper-end but also at the lower-end to reflect the additional risks taken by the distributor. We also believe that risk-taking loss entities should be included within the comparable set.
Section 4.2, para 68 - 71	Local dataset and pricing matrix	• As an initial comment, we were encouraged to see that the possibility of a general local comparables opt-out has been removed where jurisdictions have an acceptable level of representation in the global dataset.	• While the local dataset will be reviewed by the OECD IF members and the local matrix will be published, we believe that additional protections for business are required.

Section	Topic	Issue	Recommendation
		• However, we note that the Document allows for the use of local databases where countries are not covered in the global dataset. In our view, there should not be a need for local datasets given the general consistency of outcomes evidenced among regions. • If this is ultimately considered to be necessary, we appreciate the approach of providing benchmarking search criteria (Annex A) that would need to be followed, as well as the review and approval process. This will be critical for ensuring transparency, certainty, consistency and principled outcomes. • However, we still have some significant concerns. If a robust commercial database did not have sufficient local comparables, we would question whether other credible, commercial or public databases exist that will be more successful. If these are private or "secret" comparables, there will not be an effective way to apply the search criteria that will ensure objective results. For that reason, it would be very helpful to understand more details around the verification process.	• In particular, we believe that it is critical that "secret comparables" are not permitted and any process needs to be transparent and fully replicable. • We therefore recommend that both the local dataset and local matrix are published at least 12 months before they have to be implemented. • For completeness, we continue to believe that it would be preferable for any local sample produced to be added to the global dataset instead of creating standalone datasets for a specific market.
Section 4.3	Berry Ratio	• We were encouraged to see that the corroborative mechanism of the Berry ratio cap and collar will be adopted. This will help guard against unusual and uneconomic results, including the allocation for some companies of a large portion of their entire systems profits to routine functions. • The recognition of the usefulness and relevance of the Berry ratio is a welcome addition to the Amount B framework and the cap and collar appear to be set at a level which would only catch extreme cases (rather than becoming the primary profit level indicator). • In this regard, we note that the utility of the cap is significantly diminished by the scoping criteria of paragraph 8 which	• While it appears that both the cap and collar will have limited application, we nevertheless recommend that the Berry ratio cap and collar mechanism be retained as additional, supplemental safeguard in pricing for local baseline marketing and distribution returns. • We support the use of berry ratio as a cap and collar pricing methodology to avoid that the application of ROS, without looking at the functionality of the distributor / agent leads to unreasonable results. • A corroborative mechanism will be important, particularly to avoid uneconomic results with respect to low margin businesses. However, given the fact that the Berry ratio could

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		eliminates from scope those situations in which the tested party has local operating expenses <3% or greater than 30/50% of sales. ○ For example, Figure 4.1 provides that a taxpayer with local operating expenses of 9% or less would have a local return ranging from 1.5%-1.75%-2.25% (+/-0.5%), depending upon industry grouping. At 9%, the Berry ratio cap would be 4.5% of sales, whereas at 3% operating expenses, the Berry ratio cap would be 1.5%, essentially in line with the pricing matrix results for industry group 1. Thus, the Berry ratio would have a more meaningful application only where an entity's operating expenses are less than 3%. • Similarly, the collar would appear to have very limited application. At 30% and 50% local operating expenses, the pricing matrix would provide for 3.25%-3.5%-4.5% returns and 3.5%-5.25%-5.5% local returns, respectively. The Berry ratio collars at 30% and 50% would be 1.5% and 2.5%, respectively, a level which is well-below the results suggested by the pricing matrix. • We also note that the Document is based on an assumption that gross sales data exists to calculate ROS, OAS and OES. However, it is not possible to calculate gross sales for sales agency / commissionaire transactions where commissions are determined on a volume basis or on a packaging quantity basis. • According to FN 11, if a company does not include gross sales data in its financial statements, it could use the sales data of related parties. However, the accuracy of amounts that are not included within a taxpayer's own financial statements could be disputed. In addition, we note that there are sales agent and commissionaire cases where commissions are generated according to the volume of transactions and profits are earned	generate controversy over classification of costs between operating expenses and cost of goods sold, some of our members also suggested that it could be worth considering if a more straightforward corroborative mechanism could be based on the operating margin / profit, (e.g., return on costs).

Section	Topic	Issue	Recommendation
		based on operating expenses (i.e., not necessarily based on the sales). Therefore, there is a concern that simplification to a single ROS index using OAS and OES may lead to taxation that is not aligned with the underlying transaction conditions for certain sales agents and commissioners.	
Section 4.4., para 76 – 77	Timing of updates	• According to the consultation paper the analysis supporting the determination of arm's length ranges referenced in section 4.1 (Pricing Matrix (return on sales %) derived from the global dataset, section 4.2.1. (Modified pricing matrix for qualifying jurisdictions) and section 4.2.3. (a qualifying local dataset) will be updated every five years unless there is a significant change in market conditions that warrants an interim update. • It is also stated that the financial data and other datapoints referenced in section 4, including the net-risk adjustment percentage (section 4.2.2) and the Berry Ratio cap-and-collar range (section 4.3) will be updated annually.	• We also recommend that the OECD clarify how a significant change in market conditions would be assessed, along with providing some examples. • We believe that, unless the event which alters market conditions is extraordinary, the updates should be fixed at 5-year intervals in the interests of simplification and certainty. Where an event occurs which necessitates an update in a shorter timeframe, it would be important that the OECD provide further guidance and transitional provisions to allow taxpayers adapt to this change of approach. • We further believe that, in order to avoid the potential for double taxation, adjustments that need to be made to bring results in compliance with Amount B need to be made during the financial year. We do not believe that it would be possible for adjustments to be made only in a tax return and after an entity's books are closed. In this scenario, the other side of the transaction may not be able to make the corresponding adjustment on a timely basis or in some cases at all under local domestic rules. We therefore recommend that it should be clarified that the update will be a prospective update (e.g., at the beginning of the year 2025, there will be an update to the Berry Ratio cap and collar range, but this update will be applicable from / for the year 2026, etc.). This would provide taxpayers with sufficient time to prepare for the new compliance requirements.

Section	Topic	Issue	Recommendation
			• For completeness, we note that removing the requirement for website reviews would make it less onerous to produce a new dataset.

Other Issues

Section	Topic	Issue	Recommendation
Section 5, para 80 – 89	Documentation	• As an initial comment, we note that the updated documentation requirements are consistent with existing OECD TP Guidelines. We therefore welcome that a requirement for mandatory written contracts has been eliminated. • However, we note that the level of detail which is currently included in Local File documentation may not be sufficient in light of the financial data and allocation schedules that have been introduced as part of the revised Amount B scoping requirements. For example, the Local File may not show what proportion of expenses are allocated via indirect allocation keys. We therefore have some concerns that Amount B will ultimately result in a significant increase in documentation / compliance burdens. • We also note the reference in paragraph 89 to a first-time notification procedure for taxpayers seeking to rely on Amount B. There is also a reference to tax administrations being able to require taxpayers to provide written contracts signed prior to the occurrence of the qualifying transaction. It is unclear how extensive the documentation requirements and administrative burden associated with this notification requirement will be in practice.	• While we welcome the fact that documentation requirements have been streamlined compared to the previous Amount B consultation, we are concerned that additional documentation requests will arise in practice. • We therefore recommend that (i) the final Amount B documentation requirements are kept as streamlined as possible and (ii) there is a binding agreement (e.g., an MLC) to make adherence to these documentation requirements binding on jurisdictions. • While we would recommend that a notification requirement is not added to Amount B (as a notification requirement does not exist for other safe harbors in the OECD TP Guidelines), if such a notification requirement is added to the Amount B provisions, we would strongly recommend that this requirement is kept as straight-forward as possible. • We would also recommend that it is clarified that, where a taxpayer decides not to opt for Amount B for its distribution activities, the taxpayer will not be required to make a notification / disclose the reasons for not choosing to apply the Amount B safe harbor.
Section 6, para 90 – 93	Transitional Issues Restructurings and anti-abuse rules	• As an initial comment, we welcome that the Document has been updated to clarify that MNEs can restructure operations as needed. This will avoid distortions and will allow companies to benefit on a level playing field with other MNEs that qualify for Amount B.	• Given the fact that Amount B is intended to provide simplification benefits for taxpayers as well as tax administrations, we believe that there should be a presumption that both parties want Amount B to be available for companies (as opposed to an effort to limit the scope of Amount B). It is challenging to see what the

Section	Topic	Issue	Recommendation
		• It would be helpful to understand better the concern described in paragraph 92 that suggests that companies may "*artificially reorganize their arrangements*". This reference to anti-abuse rules is, in our view, too broad. We believe that a better approach would be to identify the specific issues that are a causing concern, and which would bring any restructurings into question. Examples of appropriate or inappropriate restructurings would be informative. • We would also question why the reference to a restructured distributor with built-in losses is included in the Document. The inference from this paragraph is that these losses should be disallowed. However, we note that the Document does not address any other aspects of tax legislation that may be affected by Amount B. We would recommend that paragraph 93 is deleted as a result. • In the case of once-off items, we also believe that it should be clarified that a taxpayer can still avail of Amount B where the once-off item is adjusted out of the entity's P&L for the purposes of testing.	concern is here, so more information / examples could be instructive. • We also believe that it is important that Amount B does not force companies into costly restructurings due to over-complexity and increased compliance burdens.
Section 7, para 94 – 98	Tax certainty	• The Document clarifies that agreed APAs should be upheld subject to the critical assumptions not being breached. We welcome the inclusion of this reference in the Document as a positive step towards providing certainty. It is also important that taxpayers still have the opportunity to agree new APAs with tax administrations after Amount B becomes effective. • However, we are disappointed by the fact that no additional certainty mechanisms were included in the updated Document.	• As noted in our previous consultation response, we believe that, where Amount B operates as a safe harbor, this should lead to a reduction in disputes with tax administrations. We note that this concept has been recognized in the existing OECD TP Guidelines at para 4.108 where it states that "*another advantage provided by a safe harbour is the certainty that the taxpayer's transfer prices will be accepted by the tax administration providing the safe harbour, provided that they have met the eligibility conditions of, and complied with, the safe harbour provisions*". In our view, this supports our feedback in this response that Amount B would most appropriately be applied as a safe harbor, as a well-designed

Section	Topic	Issue	Recommendation
		• As the provision of increased levels of tax certainty is the stated aim of Amount B, we would have expected that a larger part of the Document would be devoted to dispute resolution mechanisms. However, we note that only 5 paragraphs out of 98 relate to tax certainty (two of which deal with pre–Amount B APAs and MAPs). The Document therefore does not address existing issues with double taxation relief mechanisms, including the length of time it takes to achieve a resolution. • While we acknowledge that some jurisdictions may resolve economic double taxation through unilateral corresponding adjustments, it is likely the case that most jurisdictions would only be able to do so under MAP procedures. We therefore have concerns as we note that MAP is not always available (e.g., due to the lack of an in-force treaty or decisions of one of the MAP jurisdictions). It is well understood that many tax administrations (including tax administrations in OECD and non-OECD jurisdictions) lack the adequate resources needed to maintain robust MAP/APA mechanisms. • For completeness and in line with our comments above, we also note that Document does not address how Amount B will interact with other tax areas, particularly from a Pillar Two and a customs duty perspective (e.g., whether the Amount B pricing process would be accepted as a valid way of pricing for customs duty purposes). Further guidance would be helpful.	and broadly applicable Amount B proposal could, in and of itself, operate as a useful dispute prevention tool. • It is also important that it is clarified that, once Amount B becomes effective, it should only be applied prospectively and should not be applied retrospectively to re-open previous assessments / disputes. • For the application of Amount B itself, we also believe that it could be possible to expand the concept of using memoranda of understanding for Competent Authorities to establish bilateral safe harbors to cover Amount B scoping issues, as outlined currently in Annex I to Chapter IV of the OECD TP Guidelines. • If Amount B is not designed as a safe harbor, we continue to believe that there will be a much greater need for tax certainty mechanisms to be available for Amount B related issues. In this regard, Amount B would be greatly complimented by the addition of an early certainty mechanism, to allow taxpayers to clarify if they qualify for Amount B. This would be particularly important if Alternative B is selected as the preferred scoping approach. As noted above, we believe that Amount B should be structured in a way that limits to the maximum extent possible the chances disputes arising – our comments on the design of Amount B's scope and pricing mechanism are framed in this context. • In terms of delivery, Amount B could seek to leverage the Scope Certainty process being proposed for Amount A. However, as the implementation of Amount A and Amount B has now been separated (i.e., it is unlikely that Amount B certainty provisions will be incorporated into the Amount A MLC), we believe that a separate binding certainty mechanism is required for Amount B. • In our view, tax certainty can only be achieved if there is a timely, binding, effective and efficient dispute resolution

Section	Topic	Issue	Recommendation
			process. Our strong preference would be for an MLC to be designed which would outline those rules and procedures. • This section summarizes the ordinary tools available to obtain tax certainty MAP / APA, etc..). It does not introduce any additional double taxation remedy. We acknowledge that adding double taxation remedies would entail dealing with broader and more complex issues (such as modifying tax treaties). We therefore believe that Amount B should be structured in a way that limits disputes to the maximum extent possible (in this regard, see above comments regarding scope and pricing for simplification purposes). • Consideration could be given to adapting and applying Article 9(2) of the OECD Model Tax Convention which contains addresses when appropriate adjustments should be made.

BUSINESS at OECD

Comments on the Annexes

Section	Topic	Issue	Recommendation
Annex A	Relevant benchmarking criteria	• Our members have observed that certain parts of the Annex A search strategy differ to how they would typically perform benchmarking. While these differences may have limited impact on the results, the differences make it challenging to stress-test the process without additional transparency on the benchmarking approach. The more notable differences include: o A lack of a screen for IP; o A lack of clarity regarding whether the 50% ownership rules include ownership by individuals; and o An observation that some of the rejection words could be quite broad (e.g., 'finance'). • Members also queried the age of the data being used, as the data appears to be somewhat outdated.	• We would appreciate the opportunity to engage further to allow business to better understand the approaches taken during the benchmarking process.
Annex B	Industry groupings	• The industry grouping definitions provided in Annex B are unclear, both in terms of: o ***Groupings:*** It is challenging to understand how the boundaries of the industry groupings have been determined – the description of the term '*statistically significant relationships to level of returns*' is vague. o ***Categories within Industry Groupings:*** In our view, some of the category descriptions are broad and open to interpretation / controversy. ▪ For example, we believe that the categories "Household consumables, mixed goods, health and wellbeing, miscellaneous supplies" all need	• We would appreciate being provided with more information about how these groupings were determined to ensure that the process is transparent and to afford our members the ability to comment on whether the groupings are reasonable. • To avoid more complex segmentation, we would welcome the inclusion of a de minimis threshold which would allow an entity to fit fully within a single industry grouping. For example, could an allowance be provided for a company to elect to be fully in Group 1, if the entity has less than 25% of its sales in Group 3?

		to be clearly defined with examples of specific products covered. ○ This is particularly important for Group 3 products with such a significant uplift in the returns, as there could be a risk that tax authorities classify as many activities as possible in this category. ○ ***Multiple Product Lines:*** We note that some MNEs sell multiple product lines which could fall into different groups.	

Appendix III

1. Proposed definition of Operating Assets for purposes of the OAS calculation

Current Assets

- Include (segmented to just distribution portion):
  - Inventory
  - Accounts Receivable
  - Intercompany Receivable (excluding financial receivables e.g., loans and cash pool deposits)
  - VAT and other indirect tax Receivable
  - Prepaid Expenses
  - Other Current Assets (excluding Income Tax and debt related items – see below)
- Exclude:
  - Cash and cash equivalents
  - Intercompany cash pool receivable
  - Income Tax receivable
  - Current Loans receivable
  - Current financial investments

Current Liabilities

- Include (segmented to just distribution portion):
  - Accounts Payable
  - Intercompany Payable (excluding loans and cash pool)
  - Advances received
  - VAT and other indirect tax payables
  - Accrued expenses (including marketing, employee compensation, rent, insurance etc.)
  - Other current liabilities (excluding Income Tax and debt related items – see below)
  - Current leasing liabilities
  - Withholding tax payable (excluding dividends and financing transactions)
- Exclude:
  - Intercompany cash pool payable
  - Income Tax payable
  - Current Loans payable
  - Withholding tax payable on dividends and financing transactions

Non-Current Assets

- Include (segmented to just distribution portion):
  - Property, Plant & Equipment
  - Leased Assets
- Exclude:
  - Goodwill and other intangible assets
  - Deferred tax assets
  - Non-current financial investments
  - Intercompany investments
  - Other non-current assets

Non-Current Liabilities

- Include:
  - Pension & Other benefits
- Exclude:
  - All other non-current liabilities

2. Proposed definition of Non-Operating Expenses for the purposes of the OES calculation

Non-operating expenses

- Include:
  - interest (including on pensions),
  - foreign exchange gains / losses on non-distribution activities,
  - disposal of investment assets,
  - fines and penalties due to negligence (e.g., anti-trust fines)