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Per mail to: TransferPricing@oecd.org

Bern, January 25, 2022

SwissHoldings comments on public consultation document: Pillar One – Amount B

Dear Madam/Sir

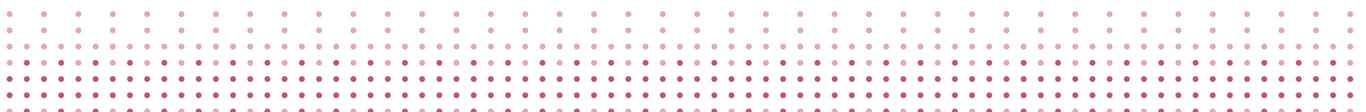
The business federation SwissHoldings represents the interests of 61 Swiss-based multinational enterprises from the manufacturing and service sectors (excluding the financial sector).

SwissHoldings would like to thank the OECD for the opportunity to comment on the Draft Model Rules for Tax Base Determinations related to Amount B under Pillar One (hereinafter also referred to as "Document" or "Consultation Document").

In the first part of this comment letter, we will provide an executive summary with the main arguments regarding the whole architecture and the approach used so far. In the second part, for each Chapter we will include our answers to the specific questions raised plus comments and proposals on specific design features aiming to increase the effectiveness of Amount B and improve its administrability.

Executive Summary

- We welcome the efforts made to simplify the tax base determination rules under Pillar One.
- We highly appreciate the transparent representation of the current status of discussion regarding the main design elements of Amount B, the implementation framework as well as the different points of view, doubts and concerns of the IF members.
- The declared aim of Amount B is "to streamline the process for pricing baseline marketing and distribution activities in accordance with the arm's length principle (ALP), thereby aiming at enhancing tax certainty and reducing resource-intensive disputes between taxpayers and tax administrations". As acknowledged in various parts of the Document itself, there is a need to strike a balance between the different goals of Amount B, and adherence to the ALP must be eased in order to achieve a meaningful simplification.
- We appreciate the simplification measures designed at increasing administrability of the ALP. Nevertheless, we believe that the current Amount B framework includes some features for which the balance is still too much on the side of the strict adherence to the ALP rather. For example, the Document constantly referring to the "requirement to accurately delineate a transaction"



under the ALP is an indication of this tendency as well as too excessive scope restrictions and exclusions.

- The scoping provisions significantly and unnecessarily narrow the scope of use cases for Amount B. This results into missed opportunities as it would not be able to bring much benefit to neither the tax administration nor the taxpayers. For example, excluding entities that also sell software or provide certain complementary services will result into the exclusion of entities from many industries. Same applies for the pharma industry, where entities distribute pharmaceutical products but also perform support services on clinical which will result in an exclusion of Amount B. Hence, in line with the ALP we need to link the scoping question with the selection of the comparables in the benchmarking process. As long as the independent comparables perform same/similar activities (e.g., regulatory activities, packaging or services) those entities should not be automatically excluded from the application of Amount B.
- Multifunction entities should not be excluded from scope. It is key to apply an activity-based approach based on a robust functional analysis instead of an entity approach when defining the scope. As done now, it can be solved with reasonable segmentation. MNEs impacted by Amount A should fall under Amount B and benefit from tax certainty.
- We find the documentation requirements excessive. Partly, they go beyond the documentation requirements under the current requirements in Master and Local File. Such excessive documentation requirements reduce the attractiveness of Amount B for MNEs as well as for tax authorities who will need to build up the resources to review the documentation.
- One important element that is missing in the current Document, is the practical difficulty to reach a certain target arm's length margin which can have various reasons (business cycle of products, duration from customer order to final delivery and invoicing, customs considerations etc.). Therefore, we recommend that the Document also addresses the possibility of so-called year-end adjustments. Without year-end adjustments it is practically not possible for many MNEs to reach the required target margin. In this regard, in order to mitigate risks, also customs compliance needs to be considered and ensured.
- We recommend that Amount B should be implemented as a safe harbor to properly mitigate tax risks of both double taxation and double non-taxation; in fact, we consider that presenting the Amount B as an interpretation of how the arm's length principle applies to baseline marketing and distribution activities would leave too much room to subjective interpretations and it would not achieve the declared objective of increasing tax certainty. Hence, the benchmarks used and Amount B to determine the profitability targets should be ideally prepared by OECD (or by a specific committee in charge for Amount B). Exceptions should be not provided (e.g., other method such as CUP, execution of comparability adjustments, etc.). For agents/commissionaires and certain buy/sell distributors (as an exception) also the application of the Berry Ratio could be considered (or a combination as proposed in 69 b). Key is clarity and simplicity.
- It must be avoided that the new target ranges (Amount B) are considered as a minimum profit level ("floor") for baseline marketing and distribution activities, which may then result into additional disputes. This is particularly important for distribution activities that will be out of scope for Amount B.
- As stated above we recommend that Amount B is provided and updated by the OECD. However, we appreciate the guidance provided in Annex A regarding the execution of reasonable benchmarking studies. More clarity in this important area is key to limit material tax disputes in future (not only for benchmarking distribution activities/functions).

SwissHoldings

Scope – answers and comments/proposals

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

Clarity on the accounting principles (GAAP) for financial data that is required for the quantitative analysis for the scoping criteria is key. To simplify and align with Pillar 1 Amount A and Pillar 2, financial data can be provided from reporting systems and, therefore, Pillar One Amount B shall use data prepared under the accounting principles used by the MNE for its Consolidated Financial Statement (not local GAAP), in line with the Pillar Two requirement. The level of granularity required for an accurate delineation of the transaction as described in the Document submitted for public consultation can be hardly found in Statutory Financial Statement.

3.5.3. Do you consider that the Amount B scoping criteria could reliably incorporate retail distributors as well as wholesale distributors? If so, do you consider that any modifications might be necessary to the Amount B pricing methodology being developed, in order to appropriately establish arm's length prices for accurately delineated retail distribution transactions, compared with wholesale distribution transactions?

The Amount B scoping criteria should include retail distributors as many MNEs operate directly with local distributors in the vast majority of the countries (especially in the major ones); any exclusion of retail distributors would significantly reduce the scope of Amount B and limit its practical utility.

The distinction between wholesalers and retailers is always very clear and it is generally based on the customers, but it is not representative of the difference in the activities performed, whether they are baseline or not, and in the functional profile. In certain industries it is common that the local entity of the MNE sells directly to the final customers, exclusively or not, like in the IT device or mobile phones sector while in others it is common to sell to retailers, like in the pharma industry; in both cases, the MNE is responsible for the baseline marketing (including promotion) and distribution activities.

The Amount B pricing methodology shall rather target a different profitability based on functional intensity without focusing on the formal distinction between wholesale and retail.

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

a. Do you observe in practice that there exist transactions that meet the scoping criteria in both categories of in-scope transactional structures explained in paragraph 14, and which, based on an accurate delineation of the transaction, exhibit substantially the same economically relevant characteristics? This is excepting, for the second category, any scoping criteria directly related to the taking of title and the holding of inventory and assumption of credit risks, as well as ancillary administrative functions related to the same.

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

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

In practice, target margins for sales agents/commissionaires are often derived from buy-sell distributor benchmark studies due to the lack of comparable data for sales agents/commissionaires. This may be combined with certain adjustment calculations to reflect the different functional/risks profile.

3.5.5. Do you consider that distributors that otherwise meet the scoping criteria, but which also distribute tangible products to markets other than their market of residence exhibit materially different

economically relevant characteristics than distributors that only distribute to their market of residence, such that arm's length pricing may be affected? If so, please demonstrate the reasons why you consider this to be the case.

In practice, the distribution company of an MNE may serve its market of residence and neighboring markets. The market of residence does not necessarily constitute a differentiating factor when it is about assessing baseline marketing and distribution activities. There could be cases where the functional intensity of the marketing and distribution activities of a company is different with regards to it domestic market, but the same difference can be seen between different entities in the same market; accordingly the Amount B scoping criteria should not include any limitation regarding the market, but it should rather have a mechanism to adapt the profitability to the functional intensity.

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

Characteristics of business may be very different by industry and by market (of commercialization rather than of residency) both with regards to marketing/distribution expenses and to the ancillary activities (e.g., after-sales support for cars and IT devices vs. medicines). If relatively narrow ranges and accurately low thresholds are to be applied indistinctively, many Distributors performing baseline activities risk to be excluded by the applicability of Amount B. In this case, it is paramount to differentiate the quantitative metrics by industry specific and by homogeneous markets.

A simplified and more practical approach would be to set very high thresholds and very wide ranges so to exclude only entities that are really outliers and whose main business is not distribution.

To illustrate, companies performing baseline marketing and distribution activities in the pharmaceutical industry are also engaged in regulatory activities in order to be allowed to distribute pharmaceutical products in the local market. The activities are not of "high value" but necessary in order to achieve a distribution license for pharmaceutical products. The pharmaceutical market is a regulated industry and, therefore, it is inherent that a distributor needs to perform regulatory activities to maintain its distribution activity. As a result, a threshold for registration activities may be also useful to include pharmaceutical distributors within the scope of Amount B. Otherwise, pharmaceutical MNEs may be automatically considered out-of-scope of Amount B.

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

From an MNE perspective, the Amount B provisions do not introduce any simplification or streamlining of compliance with regards to the preparation of the data, but rather the opposite as more information shall be prepared and documented when compared to what is currently included in the Local File. The benefit should come from a simplification in controls during the tax audits, a reduction of disputes and the achievement of an increased tax certainty.

Similar to Pillar Two, Pillar One Amount B should clearly state the financial data prepared under the same accounting principles used for the Consolidated Financial Statement.

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

Nowadays, software is part of the product portfolio of most industrial MNEs in the B2B area. Excluding software will significantly and unnecessarily reduce the scope of Amount B. Software is also often sold together with hardware or embedded in hardware products. In addition, functions/risks when selling software are often comparable to when selling tangible goods, e.g., sales/marketing activities, credit risk, market risk. In fact, based on OECD principles and the Model Double Tax Treaty, from a tax perspective the sale of software as copyrighted article is treated like a sale of a product.

3.5.9. Do you consider that a controlled distributor that (i) contributes to strategic marketing functions or to control of risk but does not, under the accurate delineation of the transaction, assume the associated risks, or (ii) contributes to the generation of marketing intangibles but does not, based on an accurate delineation of the transaction, assume the significant risks associated with those intangibles, should necessarily be out of scope for Amount B? Please outline the reasons why you consider or do not consider this to be the case. Moreover, do you consider that entities which do not assume economically significant risks related to development, enhancement, maintenance, protection or exploitation of marketing intangibles, but do make some contribution to risk control functions that may warrant compensation at arm's length per paragraph 1.105 of the OECD TPG, should be out of scope? If so, please outline the reasons why you consider this to be the case.

The Document does not define what is considered as a "contribute" to strategic marketing functions or to the creation of intangibles. In the lack of such a definition it is not possible to provide a clear comment on this topic as it can be subject to interpretation. The Amount B should limit the possibilities of interpretation if it aims to reduce tax disputes and introduce simplification.

As a general consideration, the complexity of the business and some industry specific regulatory requirements may potentially require a Distributor to perform certain activities at local level that are routinary in nature but ancillary and therefore a support to strategic function or to the creation of intangibles. Nevertheless, they are generally not critical and they do not justify the exclusion from the scope of Amount B, in particular when they are not material enough to justify even a separate remuneration, as it would not have an economic impact in practice.

Having in mind the aim for simplification, and similarly to what applied to ancillary activities in par. 18.h, we suggest to introduce thresholds (% of total OPEX) to determine if these expenses shall be included in the Amount B calculation. In case the thresholds are exceeded, it is still possible that the strategic activities are related only to specific products while the remaining part of the portfolio of the Distributor is not affected by them. In such a case, the Distributor should be allowed to segment its P&L and apply the Amount B to the transactions that related to the baseline marketing and distribution activities. The Amount B documentation will allow the tax authorities to control.

It should also be noted that in a global MNE certain employees with global or strategic management roles may be employed by Group entities that otherwise generally perform baseline marketing and distribution activities. The reason for such employment may for example simple be private reasons, and within the dynamic environment of most MNEs such cases may also change over time depending on the roles of the employees. The costs of such employees are often charged from such entities to other Group entities which perform the entrepreneurial activities. In such cases, the entity performing the baseline marketing and distribution activities should not be excluded from the scope.

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

With regards to the selection of the most appropriate method, we believe that the TNMM should be used to price all in-scope transactions without the necessity of considering any alternative transfer pricing methods, on the basis that Amount B represents a permissible administrative simplification. For agents/commissionaires and certain buy/sell distributors (as an exception) the application of the Berry Ratio could be considered (or a combination as proposed in 69 b).

The market differences that are reflected in the choice of local comparables should be considered in the pricing methodology, and the benchmarks should be prepared for homogeneous markets. It is an already accepted practice in many countries to use benchmark searches with comparables from various jurisdictions that are considered economically homogeneous. Any simplification measure should not introduce extra complexity, but the Document should rather promote the adoption of this

approach among all IF members. The use of domestic comparables, in some cases even hidden comparables, is indeed one of the most frequent reasons of disputes and where simplification and streamlining from Amount B would be very beneficial and welcome to increase tax certainty.

The number of groups homogenous markets should be limited to be easily administrable while the composition should be the based on economic statistical indexes that are already available and measured at OECD level. It should also be noted that the results of the comparable searches among different industries and regions are not that different. Therefore, we also propose to rather aim for simplification. i.e., apply more limited number of ranges consolidating broader regions and industries.

Additional comments and proposals on specific design features

Paragraph 14

The Document should provide a definition of what it is collectively defining as “distributors” and clear criteria to identify a wholesaler. For example, should the customer of a wholesaler must be a retailer? In case of pharma industry, what in case the customer was an hospital that is not reselling and neither using the drug but it administers it to the patient.

In addition, we believe that the restriction of the scope to the wholesalers and the exclusion of the retailers from the category of the distributors is technically not correct and it is excessively limiting the applicability of Amount B.

From a theoretical point of view, as mentioned in the answer to the question 3.5.3 above, the distinction between Wholesalers and Retailers, even when accurately defined, it is not representative of the difference in the activities performed, whether they are baseline or not, and in the functional profile.

From a practical perspective, the limitation of the scope to the wholesalers would exclude many distributors that perform similar baseline marketing and distribution activities simply because they operate in industries characterized by direct sales to the customers.

The inclusion of retailers in the scope of Amount B appears to be also more consistent with the statement in the following Par. 15 “whether a transaction is or is not within the scope of Amount B is not driven by the adoption of a specific marketing and distribution business model, but primarily by the level and type of functions performed, assets owned, and risks assumed by the parties to the controlled transaction”.

Finally, paragraph 14 misses the reference to marketing transactions as it solely refers to buy/sell, agent or commissionaire transactions. We propose to include an additional bullet on marketing to be consistent with a “distribution & marketing return”. In addition, the following pages refer to marketing without having any delineation in place what kind of marketing activities are accepted subject to Amount B.

Paragraph 18.a

The documentation of the qualifying transaction should be a recommendation and not a critical requirement. The Amount B is explicit in stipulating that “the written contract will be considered as part of the accurate delineation of the transaction… analysis will evaluate, among other things, the extent to which the written contract terms are consistent with the economically relevant characteristics of the transaction”.

Given the contract will not be decisive and is not per se the only qualifying factor, the Document acknowledges that the contract could be only a supporting document and therefore we recommend amending the text of par 18.a and replace “must” with “should”: “… taxpayers should document their qualifying transactions in a written contract…”. As an alternative to written contracts, which in complex MNEs with many transactions and counterparties can be very cumbersome to administer, it shall be allowed under Amount B to use written transfer pricing policies instead. A signed written contract must not be required.

Paragraph 18.b

We suggest removing any limitation regarding the distribution in the market of residence for the reasons explained in the answer to the question 3.5.5 above

Paragraph 18.c

We believe that Companies performing multiple functions should not be automatically considered out of the scope; when the companies are able to segment their financial accounts and isolate the Distribution business segment related to baseline marketing and distribution, they should be allowed to do so and to apply the Amount B. Otherwise the scope of companies to which Amount B could be applied is significantly and unnecessarily reduced.

Disqualifying activities also exclude distributors from the applicability of Amount B without considering the intensity of these functions and impact in practice on the profitability of the Distributor. In consideration of the simplification purpose of Amount B and bearing in mind the limited utility in practice of treating these activities separately, we recommend introducing thresholds for exclusion similarly to what foreseen for the ancillary activities in Par. 18.h.

This change is even more necessary when considering that the distinction between the so defined disqualifying activities and the ancillary activities can be very blurred and sometime they may be the result of an accounting representation rather than of a real functional difference. For example, at what point packaging and assembly expenses would be considered manufacturing? Pharmacovigilance Phase 4 study would qualify as R&D or rather as after sales product support? Would an intercompany loan already be considered as a separate segment/activity resulting to the exclusion from the Amount B scope?

Paragraph 18.e

The reason of this scoping criteria is not clear. According to the provision of this article the activities related to obtaining the rights to distribute should be excluded when they would represent a specialised service that could be separately remunerated if rendered to a third-party customer; if this was the ratio then all the baseline marketing and distribution activities should be excluded as well as they could be subject of a separate transaction if extracted from the distribution business and rendered as a service. There are many examples of companies rendering distribution services as well as marketing or selling services.

In the Pharmaceutical industry, for instance, the regulatory authorities require the companies to file a marketing authorisation request and to present studies to support it; the local entities may be involved in filing the request and when needed to present the studies performed by other group entities or third parties: these activities are routine and administrative activities. The activities related to obtaining the commercialization rights are ancillary to the Distribution business; for this reason, we recommend amending this paragraph and to establish permissible thresholds as considered in par. 18.h.

Excluding entities that perform services will result into the exclusion of whole industries, similar to the exclusion of entities that also sell software. In the industrial goods industries it is very common that the MNEs' distribution entities also provide certain services which can be commissioning, warranty and repair service and other after-market services. Although the primary role of the distribution entities is the distribution, such services are required to be able to sell products as distributors because of customer demand. Also the comparable companies that are used in benchmark studies provide such services.

Paragraph 18.f

The Document excludes distributors performing strategic sales and marketing activities from the scope of Amount B. The OECD secretariat is kindly requested to provide a clear definition of what "strategic" means and what sales and marketing activities are considered strategic as well as in what they differ from the baseline ones. We reserve the right to further comment on this paragraph once the definition will be provided the baseline ones.

Paragraph 18.g

It is not clear why the number of customers or how much of the Distributors sales are coming from a single customer should have an impact on the type of activities performed and whether they qualify as baseline or not. The OECD secretariat is kindly requested to provide clarification.

Paragraph 18.h

As explained in the answer to question 3.5.6 above, all the thresholds and ranges must be made flexible and determined per industry and homogeneous market and not as one fits all or many companies performing activities completely comparable in nature would be excluded because of quantitative criteria defined too rigidly. The OECD Secretariat shall also revisit the thresholds and ranges periodically

Finally, one special consideration must be made with regard to the year on year variation of these ratios at the tested party and some flexibility must be allowed to isolate and exclude from the ratio certain extraordinary events when they can be documented. This would be automatically possible if the Amount B would explicitly allow for segmentation of the P&L for complex entities in order to isolate only the baseline distribution business

i. Since our recommendation is to include both wholesalers and retailers in the scope of Amount B, we recommend eliminating this criterion regarding sales to end customers for consistency

ii. Considering the declared scope of Amount B is to price and remunerate the baseline marketing and distribution activities, it is unclear why marketing appears in this paragraph as an ancillary activity. We recommend to remove it as marketing expenses are already covered in Par 18.i

Paragraph 18.i

The range of OPEX on Sales ratio must be set differently by industries and homogeneous markets.

SwissHoldings

Pricing methodology – answers and comments/proposals

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

In general, the proposed architecture seems reasonable considering, however, comments made above concerning the possibility of year-end adjustments. We would also suggest to allow for multi-year simple averages (as already applied in several jurisdictions, e.g. the United States) so as to avoid that a "very narrow range" or a specific point estimate cause distributors to be in a non-compliance position.

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

There is a large number of practical experiences from current benchmark study best practices as well as from many APAs in all industries from which standard ranges could be derived. Based on the experience of our member firms the arm's length results for independent baseline marketing and distribution entities do not significantly differ by industry, markets or years in scope.

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

For Europe and Asia the regional specific version of BvD's Orbis is used. For US and Pan-American searches Compustat and OneSource are used. Some other databases are used for country specific searches for, e.g., India, Russia and South Korea. For the African and LATAM region benchmark studies from other regions are used due to the lack of databases and comparables in the African and LATAM region.

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

Global providers like BvD use reclassification to harmonize the original data and the different reporting structure. TNMM accommodate for some differences in the reporting standards and when using a simple and generic PLI like Operating Margin we consider the outcome to be reliable and there is no need for additional correction. Moreover, generally differences between international standards and local GAAP are mostly temporary; therefore, any difference tends to be absorbed by using multiyear BM searches and over the time. Adopting TNMM and using the Operating Margin as a PLI is not just providing reliable data but it has also the benefit of mitigating the potential issues related to divergent reporting standards across jurisdictions.

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

The benchmarks used to determine the profitability targets should be ideally prepared by OECD (or by a specific committee in charge for Amount B) by industry and by homogeneous markets.

If instead the searches must ultimately be prepared by the taxpayers, it is paramount to receive clear and strict searching criteria already approve by the IF members and not subject to further discussion during audits. The guidance should include all the criteria required to perform the search, included but not limited to:

- The independency status
- The percentage of control

- Unavailable data (e.g., for just one period out of three)
- Comparables with losses (for one or multiple years and with an average loss or profit for the 3 years period)
- Etc.

The lack of these information would just maintain the current situation of tax uncertainty and would not achieve the declared goals of Amount B

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

The TNMM is the most appropriate method and the Operating Margin the most appropriate indicator in most instances; on the basis that Amount B aims to introduce simplification, the Operating Margin should be used for all in-scope transactions. For agents/commissionaires and certain buy/sell distributors (as an exception) the application of the Berry Ratio could be considered.

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

We consider that comparability adjustments are generally not materially impacting the final Interquartile ranges while they can be complex to perform and often the required data in the DB are not complete or not consistent across the comparables and must be further elaborated to be used. In light of the simplification that Amount B aims to achieve and their marginal impact, we are against the use of comparability adjustments.

If finally decided to implement them, the exact type of adjustments and detailed calculation must be agreed by IF members and provided to the taxpayers as guidance not to be further discussed in the audits.

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

First of all, the Document should make clear what is the intended definition of single and multiple controlled transactions. The related Party supplier is not necessarily the entity that is responsible for ensuring the correct profitability to the Distributor, but it could in turn supply the goods under a Contract manufacturing or Contract Supply agreement with the related party entrepreneur (the IP Owner or the Commercial Principal). This can be valid as well for products purchased from Third Parties that are appointed by the related Party entrepreneur. Also, in this case the Distributor performs baseline marketing and distribution activities in a controlled transaction and the related party entrepreneur is the one in charge of ensuring the target return, even if the latter is not the entity supplying the goods. In scope of Amount B there are indeed only entities performing baseline activities while those owning IP and entrepreneurial risks are excluded.

In the documentation, the taxpayer should segment the Distribution P&L the in-scope controlled transactions by related party entrepreneur and document that each segment is receiving the target return.

For example, a distributor is selling two products whose commercial rights belong to a related party entrepreneur and one product belonging to another one. The taxpayer will create two segments and document that each one is receiving the correct remuneration. Creating such segments may require certain allocations. Those should be applied in a consistent manner and documented like already in the Local Files today.

Additional comments and proposals on specific design features

Paragraph 56.b

The use of benchmarks for homogeneous markets should solve the issue related to the different reporting requirements across jurisdictions. If companies' data is not publicly available in a jurisdiction, this should not prevent the implementation of Amount B, as there will be comparables from other homogeneous jurisdiction that for the reason of being homogeneous shall be considered equally reliable. The nationality of the comparables should not be relevant but their comparability and the comparability of the markets in which they operate.

Pricing Matrix and Technical tool

Both solutions seem practical and would be appreciated. It is important at the same time that the IF members will agree on, and the Amount B Document shall mention the possibility of implementing Year End adjustments. There are several practical aspects that prevent a company to achieve the target results simply through pricing, and taxpayers shall be allowed everywhere to implement TP adjustment to reach the Amount B target (also considering customs aspects). Such year-end adjustments must also work in both directions, i.e., also in case the profit of an entity that performs baseline marketing and distribution activities downwards. If this is not possible, alternative solution shall be identified in the Amount B final document.

Moreover, to simplify the administrability of Amount B and avoid tax disputes for immaterial differences, a narrow range of profitability target per industry and homogeneous market should adopted rather than a single point.

Documentation requirement – answers and comments/proposals

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

The documentation requirements are excessive, and they would bring more complexity rather than simplification. For taxpayers that are not the tested party there may be a huge number of counterparts which are the tested parties for Amount B. The number of reconciliation tables to be included and financial statements to be attached in the transfer pricing documentation is potentially enormous and in many cases regarding transactions that are not material for the specific taxpayer.

For the sake of simplification and to ease the administrability, we recommend eliminating certain requirements as part of the documentation that can be provided at a later stage upon request; when not possible or acceptable we recommend to adopt a more pragmatic approach and require detailed information about the counterparts only with regards to the most relevant transactions (e.g. Top 5), similarly to the approach adopted in the Master File.

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

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

   In par. 87.b it is requested to provide:

   - financial information by key customer type – what information other than Sales? What is the purpose if our recommendation to include Retailers will be accepted? And how are this information supposed to impact the remuneration of the baseline activities?
   - Sales to associated and third-party customers – isn't this redundant being already included in the requirement above?
   - sales to end-customers and wholesalers/retailers – isn't this redundant being already included in the requirement above?

   In paragraph 87.i it is requested to explain the application of the Amount B Pricing methodology; since this is expected to be defined and dictated by the final Amount B document, including the PLI, a profitability matrix or even a profitability calculator, it is not clear what else should the taxpayer document and for what purposes.

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

   N/A

Additional comments and proposals on specific design features

Paragraph 87.e and g.

A taxpayer that is not the tested party may have numerous counterparts to document and therefore many financial accounts to collect and attach.

We strongly recommend removing this requirement since it is not a simplification and the SFS are available upon request in the course of an audit. If finally not removed, considering the limited materiality of some the tested parties for the taxpayer preparing the documentation and bearing in mind the simplification goal of Amount B, we recommend the request of the counterparts financial statements to be limited to the Top x (5?), in line with other information requirements in the Master File.

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Before including this requirement in the final version, the OECD Secretariat and the IF Members must consider that it could be impossible to meet in some cases; due to different deadlines across countries between TPD and SFS it is not infrequent that the financial statement of a Counterpart has been not finalized yet at the moment when the TPD must be submitted by the taxpayer. In such a case, the IF member shall accept a draft version if available or skip the request to a later moment during a possible tax audit.

Paragraph 87.i

This requirement is not clear, and we would appreciate if the OECD Secretariat would provide a clarification. Considering the pricing methodology is expected to be provided by the OECD and enforced by the tax authorities, what would be the taxpayer requested to explain? Being the delineation of the in-scope transaction and the fulfilment of the scoping criteria already requested at the letter b), what else should be provided?

Paragraph 87.k

The written contract could potentially not include all the required information as for instance it could potentially not include the product list or other information. The written contract could potentially not even exist and be deemed concluded by facts, circumstances and acts.

We recommend this information to be requested to be provided as part of the documentation despite the reference to the written contract. This is to avoid that a contract where part of this information is missing could render the documentation not compliant. See also above comment about the transfer pricing policy.

Paragraph 87.l

In general, a copy of APAs cannot be shared between countries which are not subject to the APAs. These agreements are specifically negotiated between the contracting states and normally they include a confidentially clause.

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Specific questions on tax certainty for public commentators

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

Not yet, according to us there are still some unclear scoping conditions, BM approaches and documentation requirements that leaving too much uncertainty on the final utility of Amount B in terms of both scope coverage, actual administrability and tax certainty.

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

N/A

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We kindly ask you to take our comments and proposals into due consideration.

Yours sincerely,

SwissHoldings
Federation of Industrial and Service Groups in Switzerland

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Director

Martin Hess
Senior Policy Manager Taxation,
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Cc:

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