KPMG

Memo

To Tax Treaties, Transfer Pricing and Financial Transactions Division, OECD/CTPA

From KPMG International

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Ref KPMG Comments on Public Consultation Document: Pillar One – Amount B

Professionals in the member firms of KPMG International[1] ("KPMG") welcome the opportunity to comment on the Public Consultation Document: Pillar One – Amount B, released on December 8, 2022 (the "Consultation Document").

Executive summary

We commend the decision by the OECD/G20 Inclusive Framework on BEPS (the "Inclusive Framework") to seek input from stakeholders, and specifically the business community, on Amount B of Pillar One and support its objective of simplifying and streamlining the application of the arm's length principle to in-country baseline marketing and distribution activities, with a particular focus on the needs of low-capacity jurisdictions ("LCJs"). We are concerned that the approach outlined in the Consultation Document is unlikely to deliver on this objective but consider that the document provides an initial framework that with improvement could help to simplify and streamline the application of the arm's length principle. These potential improvements are the focus of our response.

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The proposal to exclude a wide range of marketing and distribution activities from the scope of Amount B – whether based on the products or services distributed, the performance of activities other than marketing and distribution, the sale of products outside the jurisdiction where the distributor is resident, or for a variety of other reasons – will significantly limit the potential benefits of Amount B. It is our view that these scoping limitations are not necessary to comply with the arm's length principle. We recognize the current scoping may be used as an initial "proof of concept" for Amount B with the intention to augment the scope over time; however, having a limited initial scope is likely to impede the perceived success of Amount B. In addition, Amount B has always been presented and understood as part of the broader Pillar One package, including Amount A, and we are concerned that excluding the distribution of certain products, including digital goods, and entities that perform any regulatory activities from scope, will lead to many groups that are in-scope of Amount A, particularly those in the tech and life sciences industries, being excluded from the benefits of Amount B.

The design of the pricing methodology remains uncertain, making it difficult to offer final views not only on pricing, but on the other, interrelated aspects of Amount B. The proposed documentation requirements extend well beyond those recommended by BEPS Action 13, and hence could mean that taxpayers seeking to apply Amount B face more compliance costs, not less, potentially imperilling proactive adoption of the Amount B methodology by taxpayers. Finally, the discussion of tax certainty provides no indication that the Inclusive Framework is considering strengthening existing tax certainty frameworks, which we consider essential for the effective administration of Amount B.

In relation to scope, we support a broader scope for Amount B than currently proposed, extending to as many industries and activities as can feasibly be included within the scope of a standardized pricing methodology that delivers outcomes that are aligned with the arm's length principle. In our view, entities can be considered to be baseline marketing and distribution entities whilst performing various (lower value) distribution related activities and distributing a wide range of products and services. Narrowing the scope of the Amount B framework as currently proposed, in circumstances where the entity is undertaking functions that are typical for independent distributors, is not necessary to comply with the arm's length principle and will not generate the desired benefits of Amount B.

For both taxpayers and tax administrations, we support the proposal of establishing standardized contractual terms that taxpayers seeking to apply Amount B could incorporate into their intragroup contracts. These terms should be clear and as objective as possible, in order to minimise the potential for dispute. Whilst this would not prevent tax administrations asking whether a business's activities were consistent with this contract, it would limit some of the complexity that arises from the over-reliance on subjective terms (such as development, enhancement, maintenance, protection, and exploitation ("DEMPE") functions, control of risk and strategic sales and marketing activities), which, in our experience, tax administrations interpret differently.

In relation to pricing, we acknowledge that the Amount B pricing methodology remains under development. In principle, we support the proposal to build the methodology based on a standardized benchmarking framework using publicly available corporate financial information. To ensure this methodology achieves broad acceptance, transparency is vital, and hence we strongly encourage the Inclusive Framework to find a way to publish this dataset, or allow for its reliable and practical replication, notwithstanding the database licencing issues. Similarly, the econometric modelling that is being undertaken by the Inclusive Framework should also be made publicly available.

The documentation requirements should be revisited and substantially reduced. At a minimum, the requirements should be less onerous than those required under BEPS Action 13, and the Inclusive Framework should consider simplifying the local file requirement by placing greater reliance on standardized Amount B contractual terms.

Finally, the tax certainty process should be strengthened. Consideration should be given to new dispute prevention mechanisms, including short form advance pricing agreements ("APAs"), and / or an enhanced International Compliance Assurance Programme ("ICAP") to provide taxpayers with certainty over the application of Amount B. In relation to dispute resolution, an enhanced mutual agreement procedure ("MAP") should be prioritised with consideration given to expanding access to the mechanisms being developed for Amount A. These processes should also include time limitations for tax administrations to form views and resolve disputes. Without improvements to the tax certainty process, we are concerned that neither taxpayers nor tax administrations will benefit from Amount B with respect to the jurisdictions in which disputes around the pricing of marketing and distribution activities arise most frequently.

To facilitate further technical development of an Amount B solution, we recommend that the Inclusive Framework constitute a business advisory group that are widely represented in terms of geography and industry dedicated to Amount B. Consulting with such a group would allow the Inclusive Framework to benefit on an ongoing basis from businesses' and advisory firms' expertise on technical matters including benchmarking and econometric modelling. The creation of such a group should be in addition to, rather than a substitute for, further public consultation on Amount B.

The remainder of our response is split into two sections. First, we outline in more detail how we believe the design of Amount B could be significantly improved. Second, in the attached Annex we respond to each of the detailed questions included in the Consultation Document.

1. Scope of Amount B

Before discussing the scope criteria, it is important to highlight that as drafted it is unclear whether the scoping criteria are being applied to a controlled transaction (i.e., the sale of products or services between two related parties) or to an entity. For example, the criteria envisage the exclusion of an entity that performs other activities (e.g., manufacturing), but would also require a taxpayer to determine whether an entity performs risk control functions leading to the assumption of economically significant risks as they relate to a specific controlled transaction. Some of the complexity of the scope criteria may be reduced if it were clearer to what the criteria was applying.

Standardized contractual terms

We support the proposal, referenced in footnote 2 of the Consultation Document, that the starting point for determining whether an entity is in-scope of Amount B could be a written contract, which could include standardized terms specifying what an in-scope entity should do, i.e., purchase products and services from an associated enterprise and resell them to third parties. As set out in the OECD Transfer Pricing Guidelines ("OECD TPG"), a written contract provides the starting point for delineating the transaction and setting out roles, responsibilities, risks, and anticipated outcomes arising from the arrangement.[2]

It will be challenging for groups to implement a single standardized contract, given differences in their operations. But this challenge could be addressed by developing standardized contractual terms that a group could include in their intragroup contracts. This would provide the simplest way for taxpayers to establish that a controlled transaction and/or entity is in-scope of Amount B and the simplest way for tax administrations, particularly those from LCJs to review this claim. Where existing intercompany contracts contain terms that are materially equivalent to any Amount B standardized terms, taxpayers should be permitted to rely on their existing contracts without need for amendment.

KPMG member firms have discussed the types of standardized contractual terms that could be used to set the scope of Amount B. Terms setting out a distributor's rights, responsibilities and obligations, role in inventory and credit management, remuneration, and payment terms (including in relation to foreign exchange) could demonstrate satisfaction of the Amount B scoping criteria. We would be happy to discuss the design of standardized contractual terms in more detail with the OECD Secretariat or any interested Inclusive Framework members. We also consider that adopting this approach could enable the Inclusive Framework to simplify the proposed documentation requirements for Amount B, thereby, streamlining the application of Amount B.

In relation to the assumption of risk, we also support footnote 12, which acknowledges (consistent with the OECD Transfer Pricing Guidelines) that certain risks can be limited through contractual arrangements and as such standardized contractual terms could play a role in ensuring an entity is eligible for Amount B. For example, an entity that sells products or services on credit to third parties will assume credit risk (as there is a risk its customers will fail to pay for the relevant goods or services). In a related party context this risk can be reduced or eliminated, if another entity guarantees a distributor's return through a fixed margin, and assumes this risk, consistent with the OECD's risk control framework.

We acknowledge that there could be scenarios where the risks assumed by the distribution entity are not consistent with the contract based on the accurate delineation of the transaction (and the OECD TPG's risk control framework summarised in paragraph 1.60).[3] However this is likely to be the exception rather than the rule, and where the exception does not apply, the contract should be recognized as allocating risk in a manner that would permit the application of Amount B. We also note that including some quantitative ratios, which would be used in conjunction with the standardized terms, would further support that the activities being

[2] OECD (2022), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, paragraph 1.42.
[3] OECD (2022), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, paragraph 1.77.

undertaken align with the Amount B criteria. We recognize that the creation of a standardized contractual terms is not a panacea and that there will be challenges in designing and for some taxpayers adopting such terms. For this reason, we consider that adopting such terms should not be a mandatory, and taxpayers that do not use such terms should be permitted to demonstrate by other means that Amount B applies to their circumstances. Moreover, it is important that the standardized contractual terms are not overly prescriptive, and do not create undue administrative burdens (e.g., taxpayers should be permitted to make targeted amendments to existing contractual frameworks to comply with the requirement).

Other quantitative scoping criteria

In general, we support defining the scope of Amount B by means of certain quantitative ratios as described in the Consultation Document. For example, we recognize that it could be appropriate to use the ratio of annual operating expenses to annual net sales ("OpEx / Sales) as a screening criterion, since this could provide a proxy for the relative importance of activities performed by an entity. At arm's length, there exists a broad swathe of marketing and distribution activities that can be characterized as baseline and remunerated through a standardized pricing methodology. It would not be consistent with the arm's length principle to remunerate marketing and distribution activity above or beneath a certain threshold (i.e., high or low function entities) on this same basis.

However, the optimal solution would be to appropriately compensate such entities within the Amount B framework by a mechanism that provides for returns commensurate with their functionality, rather than to exclude them from the scope of Amount B. If it is not possible to design an Amount B pricing mechanism that provides arm's length return for high or low function distributors, then an OpEx / Sales ratio could be an appropriate scoping criterion.

We do not support the inclusion of thresholds limiting the application of Amount B to distributors that generate more than [X%] of sales from customers located in other jurisdictions, or where sales to a single customer exceed [X%]. Having customers in neighbouring jurisdictions and/or having a single large customer is likely to be particularly relevant in smaller developing jurisdictions and hence could adversely impact the LCJs, which Amount B is meant to support. Many businesses have distribution entities that sell to customers in multiple neighbouring jurisdictions, where the application of Amount B would be appropriate. Moreover, it is likely that many of the comparables identified in the benchmarking search will make cross-border sales, which in some cases will be significant, and hence it would be inconsistent to exclude entities that make cross-border sales from scope of Amount B as such activities would not be "atypical".[4] In our experience, we have not observed any significant differences in returns for independent distributors that also make cross-border sales where there are no differences in functions or activities.

Similarly, many businesses, in industries such as pharmaceutical, medical devices, defence, or consumer goods, have large customers (such as government departments, national health services or large retailers). It would be inappropriate to exclude an entity from Amount B simply because it makes a high proportion of sales to such customers. Again, it is likely that comparables identified in the benchmarking search include companies that make a significant percentage of their sales to one or a limited number of large customers.

[4] *Consultation Document* ¶ 33.

We recognize that where an entity performs marketing and distribution and material other activities, such as manufacturing, research and development, procurement, and financing, it is unlikely to be appropriate to remunerate such entities using only the standardized Amount B pricing methodology. However, as outlined below, we consider that further consideration should be given to whether the Amount B pricing methodology could be applied to part of these groups' activities, when there is a clear separation between the different activities performed by an entity and no evidence of material synergy benefits. For example, where an entity is responsible for distributing a product (e.g., an industrial tool) and manufactures an entirely separate product (e.g., a chemical).

We also consider that entities that purchase goods or services from multiple related parties should be included in scope of Amount B. In many groups, distributors will purchase goods from multiple related parties for legitimate reasons, such as following a merger or acquisition. Where the returns to such entities are set using the TNMM, taxpayers often already prepare segmented accounts that could be used to apply Amount B. Excluding these entities from the scope of Amount B creates an obvious distortion and would push groups that would otherwise be ineligible for Amount B into tax-driven restructurings, which seems both counterintuitive and inconsistent with the objectives of the Inclusive Framework.

We note that it may be challenging to define or apply the permissible thresholds for certain ancillary activities, as proposed in the Consultation Document. For example, it is not clear how "packaging and assembly expenses" or "expenses related to after-sales product support" are defined. We do not consider that an entity incurs annual marketing and advertising expenses that exceed [X%] of annual net sales should be out of scope for Amount B, as this incorrectly implies that if an entity incurs marketing and advertising expenses it is performing functions, using assets or assuming risks that go beyond those of a baseline distributor. Many distributors incur third party marketing and advertising expenses, typically associated with purchasing advertising space to place centrally created marketing materials, that are then passed through to other related parties with no mark-up. In such scenarios, the marketing activities actually performed by the local entity are typically limited and subject to tight controls by a central team offshore. That said, we recognize that where an entity has a significant in-house marketing team it is likely to be appropriate to exclude such entities from the scope of Amount B, which is likely to be borne out through quantitative ratios (such as OpEx / Sales).

A challenge with quantitative thresholds is timing, i.e., if the thresholds apply to the same period in which a business is seeking to apply Amount B, the business will only be able to determine whether it is in-scope after the end of a period. There may be instances where it is appropriate to apply Amount B to entities that fall just outside the relevant quantitative threshold, particularly if an entity has consistently met such thresholds in prior years.

Other qualitative limits

We have concerns in relation to the qualitative limits being proposed in the Consultation Document, for example, that in-scope entities should not perform "any risk control functions that lead to the assumption of economically significant risks" or "strategic sales and marketing activities … that generate unique and valuable intangible assets;" or own "any unique and valuable intangible assets, including marketing intangibles."

This is not because we consider that entities in scope of Amount B should be able to perform such activities or own such intangibles, but because of the highly subjective nature of such criteria considering the stated objectives of Amount B. For example, there is currently no internationally agreed definition of "strategic sales and marketing," or "unique and valuable intangible assets" and it is not clear what these terms mean or are intended to mean. These terms are frequently used in the context of transfer pricing but are always fact specific and can be interpreted in different ways by different tax administrations, making them difficult to incorporate in a simplified and streamlined solution. Similarly, in our experience tax administrations do not have a common understanding of "risk control functions," which in many cases is the primary cause of disputes over the characterization and pricing of marketing and distribution activities.

For these reasons, we think that greater emphasis should be placed on both a standardized Amount B contract and quantitative thresholds to confirm application of Amount B, with limited qualitative criteria that establish a much clearer definition of the activities that would result in an entity being excluded from scope (including detailed examples). It is also important that there is consistency between any qualitative criteria contained and the comparables included in the benchmarking set used to set Amount B. In this regard, we note that such comparables will, at a minimum, typically bear some market, credit, and inventory risk, and hence it would be inappropriate to exclude entities from Amount B because they bear such risk. Finally, where a tax administration chooses to apply such criteria and this is disputed by a taxpayer, the dispute should be subject to an expedited MAP process (see below).

Industry limits

The starting point for the design of Amount B should be that it applies to as many industries as possible while remaining within the confines of both the arm's length principle and a standardized pricing methodology. We agree with the rationale for excluding the distribution of financial services, which could not be encompassed with a pricing methodology that covers other industries and for this reason we support the exclusion of this sector.

We also recognize the rationale for excluding the marketing and distribution of commodities, given the availability of the comparable uncontrolled price ("CUP") method to price intragroup transactions involving commodities and note that in many cases it would be inappropriate to apply Amount B to groups distributing these products. We are concerned that the proposed definition of commodities gives rise to some uncertainty over the specific products and that are covered by the exclusion, e.g., in relation to alloys, and encourage the Inclusive Framework to work with businesses from the oil and gas and mining sectors to clarify these points.

However, we are concerned about the proposal to specifically exclude the distribution of digital property and services from the scope of Amount B, as this would disadvantage groups in these industries, who face a large number of disputes over the pricing of marketing and distribution activities. We also consider that it is feasible to include groups in these industries in a standardized pricing methodology that delivers arm's length outcomes.

Similarly, we are concerned by exclusion of distributors that "perform any regulatory activities that are valuable and material to the ability to conduct distribution activities in the market." First, we note that "valuable" and "material" are subjective terms and that value of regulatory activities performed by distribution entities is

already a common area of dispute between taxpayers and tax administrations. Second, the exclusion of an entity performing "any" regulatory activities seems inconsistent with existing transfer pricing principles included in the OECD TPG. In the context of assessing the impact of a regulatory license, paragraph 1.170 of the OECD TPG states that it may be important to consider the contributions of the various parties in supplying the capabilities necessary to obtain a license.

The exclusion of distributors that perform "any regulatory activities" would likely exclude distributors in the life sciences industry, but could also affect other industries such as chemicals, cosmetics and food and beverages, which are subject to regulation in some jurisdictions. In our experience, for many groups the local distributor's regulatory activities are limited and most of the activities and contributions are normally undertaken offshore, though we recognize there are exceptions to this general trend. Furthermore, we also note from our experience that independent distributors can also undertake regulatory activities and thus it would not be appropriate to conclude that a limited level of regulatory activities would be "atypical" of independent distributors. For this reason, we consider that Inclusive Framework should revisit this exclusion and explore whether reliance could instead be placed on quantitative ratios (such as OpEx / Sales) as a more objective way to exclude entities that perform regulatory activities that are valuable and material from the scope of Amount B.

If the Inclusive Framework decides to exclude distributors from certain industries from the scope of Amount B, a product-based exclusion would be preferable to an exclusion based around the performance of regulatory activities. Though this would prevent distributors of defined categories of regulated products from benefiting from the additional tax certainty offered by Amount B, it would avoid creating additional uncertainty about whether Amount B applied to regulated sectors and the potential for inappropriate inferences to be drawn about the significance of distributors undertaking regulatory activities of a routine nature.

Functional limits

The Consultation Document proposes that distributors that perform other activities, such as manufacturing or research and development, should automatically be excluded from scope of Amount B. We consider that such exclusions are not necessary where these activities are clearly separated from the baseline marketing and distribution activities to which Amount B would apply.

The issue of multifunctional entities, such as entities that manufacture and distribute, is a relatively common transfer pricing issue. Often, in these scenarios, taxpayers segment an entity's income statement between the different activities it performs and then apply an appropriate method to set and / or test the pricing of those activities. This approach is consistent with the OECD TPG, which states that ideally the arm's length principle should be applied on a transaction-by-transaction basis.[5] It is feasible that the Amount B framework could be applied to the marketing and distribution activities performed by an entity that performs other activities, providing those other activities are subject to a separate transfer pricing analysis. There will be scenarios where it may not be appropriate to price the activities performed by an entity, such as manufacturing and

[5] OECD (2022), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, paragraph 3.9.

distribution, separately. For example, the application of Amount B should not be required if the taxpayer does not already prepare a segmentation of its financial data.

There is a risk that excluding multifunctional entities from the scope of Amount B would create distortions, where entities performing comparable marketing and distribution activities may or may not be eligible for Amount B, depending on the other activities that they perform.

Advance Pricing Agreements ("APAs")

We support the exemption from Amount B for transactions covered by bilateral or multilateral APAs. In these scenarios, taxpayer and tax administrations have reached agreement that such transactions are arm's length. It would seem inconsistent with the objectives of Amount B if it were to override such arrangements. It would also seem inconsistent with the objectives of Amount B and fundamental principles of sovereignty if it prohibited taxpayers and tax administrations from reaching agreement on future APAs, irrespective of whether the terms are consistent with Amount B.

More broadly, to ease the compliance and administrative costs faced by taxpayers and tax administrations in implementing Amount B, consideration should be given to transitional rules. For example, Amount B could initially be introduced as a safe harbour for taxpayers to elect into, before becoming mandatory after an agreed number of years.

Most Appropriate Method ("MAM") and local comparables

We are concerned by the proposal that entities may be excluded from Amount B, based on the argument that another transfer pricing method is more appropriate or due to the existence of local comparables (including comparables in a neighbouring jurisdiction).

With regard to the MAM exemption, we are concerned that this may be used by tax administrations to arbitrarily limit access to Amount B, but also that to apply Amount B groups would still need to consider whether other pricing methods were more appropriate and hence perform a full comparability analysis to demonstrate that it was in-scope of Amount B (i.e., that the exemption was not applicable). For this reason, we suggest consideration is given to an "internal comparables" exemption. This would mean that if a taxpayer or tax authority were able to reliably price an otherwise in-scope distribution transaction using internal comparable data (e.g., an internal CUP, or internal resale price method analysis) and the comparability analysis supported the conclusion that the method based on internal comparable data is the most appropriate method given the facts and circumstances, then that method would be used to price the comparable controlled transaction, but that taxpayers would not be required to determine whether other transfer pricing methods were more appropriate than Amount B.

We have similar, but more significant concerns, about the local comparables exemption. This again appears inconsistent with the objectives of Amount B to simplify and streamline the arm's length principle. It is our experience that some tax administrations rely heavily on local companies that are purportedly comparable to the tested party, including secret comparables, to argue that distributors in their jurisdiction are entitled to higher returns than those in other jurisdictions (with limited evidence of this assertion). This is already an issue

that gives rise to significant disputes that Amount B would fail to address if it included an exemption based on the existence of local comparables. As we discuss in more detail below, if the OECD establishes there are materially and sustained differences in returns across geographies, it would be preferable to address this by including agreed adjustments in the standardized pricing methodology, rather than through a local comparables exemption.

2. Amount B Pricing Methodology

Benchmarking search criteria

We support the Inclusive Framework's decision to base the Amount B pricing methodology on a standardized benchmarking search using data drawn from commercial databases, which is a common way to determine the arm's length return for marketing and distribution activities.

To ensure this methodology achieves broad acceptance, transparency is vital, and hence we strongly encourage the Inclusive Framework to find a solution to the database licencing issues it faces and find a way to publish both the benchmarking search strategy and the final comparables. Agreeing a standardized search strategy has potential benefits in other areas of transfer pricing, enabling taxpayers to prepare such standardized benchmarking searches across jurisdictions where they perform comparable activities. The accept / reject matrix may also be something that groups that are not in-scope of Amount B can consult when perform their benchmarking analyses.

Our experience is that there is little variation in returns to marketing and distribution across geographic regions or jurisdictions. We note that the OECD's analysis to date has found that "several of the country level factors in Annex A consistently show significant relationships with profitability".[6] To the extent that there are sustained differences in returns, and these are not due to functional differences in the activities performed by distribution entities, these differences should be explained by observable differences between the economic conditions of different regions or jurisdictions. For example, it could be the case that sustained differences in returns result from barriers to entry that prevent competitors entering a market and pushing down the average return. In most jurisdictions, the barriers to entry for baseline marketing and distribution activities are likely to be limited, and hence we would not expect this to result in material differences in returns across jurisdictions. A more plausible explanation of any sustained difference in distribution returns is variation in capital costs, as other things being equal, distributors operating in jurisdictions with higher capital costs would expect to earn higher returns. If the OECD establishes that there is material variation in distribution returns between regions or jurisdictions, it may be possible to incorporate adjustments, such as to account for differences in the cost of capital, into the standardized pricing methodology.

Results

The Consultation Document indicates that operating margin or return on sales are being considered as the "most appropriate net profit indicator in most instances that are within scope of Amount B." While we agree that operating margin is most commonly used to set the return due to distributors, it is important to recognize that there are situations where this would lead to non-arm's length outcomes. This is particularly likely for

[6] *Consultation Document* ¶ 57.

distributors that sell large volumes of goods or services but perform limited functions. If Amount B is to be consistent with the arm's length principle, these entities should be included in scope but addressed via a pricing mechanism that provides arm's length returns for limited functionality, e.g., by applying an alternative profit level indicator ("PLI"), such as the Berry Ratio.

In principle, we support the Inclusive Framework exploring how such entities could be included in scope of Amount B and consider that setting the Amount B return using an operating margin, but with a Berry Ratio cap-and-collar could be a good way to achieve this.

KPMG member firms adopt different approaches to comparability adjustments; some make adjustments as part of their standard practice and some adjust only in specific / limited circumstances, depending on jurisdictional norms, expectations, and / or legislation limitations. In the context of Amount B, we consider that making comparability adjustments could enhance the accuracy of Amount B. Including comparability adjustments in the pricing methodology may increase the range of entities that could be included in the scope of Amount B, while ensuring it continues to deliver arm's length outcomes.

The Inclusive Framework will also need to consider the process for updating the benchmarking search that underpins Amount B and how potential revisions to the results will be implemented. This process should also include an agreed process for reviewing the effectiveness of Amount B after an agreed period, which could be aligned to the review period for Amount A.

We note that is important to that where an entity is not in-scope of Amount B, then the Amount B pricing methodology is not relevant for pricing the return due to such entity, which may be greater then, less than, or even coincidentally equal to the Amount B return as determined in accordance with a full transfer pricing analysis independent of Amount B. To make this clear, the final design of Amount B should include a specific statement to this effect.

Outputs

The Consultation Document suggests the outputs from the pricing methodology could either be a pricing matrix or mechanical pricing tool, with the results varying by an operating expense to sales ratio, asset intensity and / or some other variables.

In determining the output, consideration should be given to how the taxpayers should operationalize the Amount B pricing methodology, which will establish a return that an entity should achieve. This return must be delivered through the pricing of the relevant controlled transaction to which the entity is a party. Today, groups will typically set the price of controlled transactions based on forecast financials and then make year-end adjustments if the entity's return falls outside the arm's length range. It would be preferable if the Amount B pricing output set a range of acceptable returns (potentially narrower than the interquartile range typically used in benchmarking studies), rather than a single return; otherwise, taxpayers would often make post-year-end adjustments, which create additional tax and non-tax complexity.

Regardless of whether Amount B were to require a single return or a narrower range of acceptable returns, it would be necessary for all countries adopting Amount B to permit post-year-end adjustments for both tax and

financial purposes to allow for compliance with this return. If this approach were adopted, the Inclusive Framework should explore harmonizing the tax treatment of post-year-end adjustments, which can create significant challenges in some jurisdictions.

Other tax implications

In considering the operationalization of Amount B, consideration should also be given to the interactions between customs and excise duties and transfer pricing. To increase the profit allocated to a distributor a group will typically reduce the price of the goods or services purchased by said distributor. Where these sales are subject to customs and excise duty, this should reduce these costs, potentially resulting in a tax refund, but this is rarely something that customs officials accept. To address this issue, the OECD should consider developing best practice guidelines on the interaction between customs and excise duties and transfer pricing, potentially in combination with the World Customs Organisation ("WCO").

3. Documentation requirements

The Inclusive Framework mandate for Amount B requires simplification and streamlining, while the Consultation Document recognizes that the "permissible *degree* of simplification" must be carefully considered.[7] When compared to the BEPS Action 13 documentation requirements, the proposed documentation requirements do not appear to simplify or streamline transfer pricing compliance; rather, they would add substantial new burdens that are not necessary to the effective implementation of Amount B.

We agree that documenting Amount B compliance may require different items of information than a normal local file. However, the number of additional items should be kept to a minimum, while a significant number of information items otherwise required as part of a local file should not be required in the context of Amount B, allowing taxpayers and tax administrations to work with streamlined Amount B documentation.

For instance, the following local file requirements in Annex II to Chapter V of the OECD Transfer Pricing Guidelines could be eliminated for local entities that are compensated using Amount B and do not perform any additional functions that would require separate arm's length compensation.

- Management charts: in our experience, charts showing local management and reporting structures are unlikely to provide key information on baseline marketing and distribution activities that is not already provided by other required items.

- Business strategy description: in the case of baseline marketing and distribution entities that have entered into an Amount B standardized contract and document their application of Amount B, it should be clear that the entity's strategy is to carry out baseline distribution functions at the direction of a principal, and thus no business strategy description should be required. We recognize that additional documentation may be required if the scope of Amount B were extended to multifunctional entities.

[7] *Consultation Document* ¶ 9.

- Key competitors: we do not believe that information on local competitors is relevant to local entities that do not carry out entrepreneurial strategies.

- Detailed comparability and functional analysis: in the case of baseline marketing and distribution entities that have entered into an Amount B standardized contract, the required description of the fulfilment of the scoping criteria for Amount B documentation purposes should supplant the need for a separate comparability and functional analysis.

- Most appropriate method analysis: in the case of a taxpayer applying Amount B, a most appropriate pricing method analysis should not be necessary. In the event that a taxpayer otherwise within the scope or potentially within the scope of Amount B relies on the MAM-based exemption from Amount B, such taxpayer should not be required to satisfy Amount B-specific documentation requirements and should instead be permitted to follow transfer pricing documentation guidance applicable to non-Amount B taxpayers.

- Summary of assumptions; multi-year analysis; information on comparables; information on adjustments; description of rationale for concluding results are arm's length: because Amount B provides a standardized framework, these requirements are not relevant in Amount B cases.

Existing documentation requirements can therefore be materially simplified in the Amount B context. On the other hand, we believe that relatively few incremental items are necessary for the successful administration of Amount B. In this regard, we are guided by three principles: 1) the Amount B documentation regime should facilitate the Inclusive Framework mandate of simplification and streamlining; 2) all stakeholders will benefit if in-scope taxpayers proactively apply Amount B, which will require a documentation framework that is simpler than existing transfer pricing documentation obligations; and 3) Amount B documentation, like transfer pricing documentation generally, should provide tax administrations with information that will assist their review of the underlying transactions, but need not and should not provide a full package of the information that would be needed for an Amount B audit – rather, such information should be required and provided on an as-needed basis during local audits.

With these principles in mind, we believe that the following items listed in the Consultation Document should not be required as part of Amount B documentation:

- Declaration of true, accurate, and complete information: a statement, whether or not signed under penalties of perjury, representing the accuracy and completeness of the information provided is not appropriate in the transfer pricing documentation context. Such statements conventionally are not required in transfer pricing documentation, and there are no circumstances unique to Amount B that would justify a departure from convention in this context. Penalties of perjury statements are commonly required as part of local tax filing requirements, and thus are better addressed under domestic law and not as part of a multilateral documentation standard.

- Delineation of transaction and explanation of fulfilment of scoping criteria: we believe that a succinct explanation of the fulfilment of the scoping criteria should be an important element of Amount B documentation (e.g., a taxpayer could complete a standardized checklist to demonstrate

compliance). However, detailed breakdowns should not be required: e.g., it should suffice if the taxpayer represents that no customer comprised more than [X]% of its net sales, rather than requiring distributors that sell to a large number of small customers to prepare a breakdown. As discussed above, the use of qualitative criteria in scoping Amount B should be limited, and thus Amount B documentation should not require a full delineation of the transaction and functional analysis, but rather should rely on the taxpayer's representation that it performs baseline marketing and distribution activities.

- Annual financial accounts: for purposes of showing compliance with Amount B, only the tested party's financial accounts will be relevant, and therefore the financial accounts of the taxpayer should not be required in cases where the taxpayer is not the tested party, especially as such accounts frequently will not shed any light on the correctness of the application of Amount B. Financial accounts should only be included for the fiscal years concerned; financial accounts for prior years may be appropriate to request on audit, but ought not to be included in Amount B documentation.

- Copies of APAs: this requirement should be limited to a requirement to provide information on any relevant APAs, rather than copies of the APAs themselves (which could be requested during an audit, when appropriate).

Without significant further simplification, we believe that the Amount B documentation architecture – which adds a copious number of new documentation items to the already robust standards applicable to local files – will disincentivize taxpayers from applying Amount B. While we recognize that eliminating the need for an economic analysis is a simplification measure, the benefit of that simplification, standing alone, does not offset the additional burdens. This is particularly the case for taxpayers that already have robust economic analyses that they can refresh or roll forward, as such taxpayers may find it simpler, easier, and cheaper to simply continue with their existing approach for an appropriate number of years, rather than overhaul their documentation to arrive at what is likely a similar distribution return under Amount B. To ensure that the simplification benefits of Amount B are available in practice, jurisdictions adopting Amount B should not require that local Amount B documentation contain more information than the agreed Amount B documentation package. We also noted, as highlighted above, that including standardized contractual terms in the Amount B scoping criteria could help to simplify the documentation requirements.

4. Tax Certainty

A key aim of Amount B is "preventing disputes around the application of the arm's length price to controlled transactions involving baseline distribution activities" and ensuring that double taxation does not arise in connection with such transactions.[8] Providing for a robust certainty framework will be necessary to the achievement of that aim. We welcome the Consultation Document's recognition that both existing and future bilateral and multilateral APAs will override Amount B, allowing tax administrations and taxpayers to agree to an arm's length result for a specific transaction.

[8] *Consultation Document* ¶ 19.

Some existing unilateral APAs may prescribe results for transactions within the scope of Amount B that will not accord with the results provided by the Amount B pricing methodology, potentially giving rise to double taxation. This issue may warrant the development of transition rules.

In addition to allowing conventional bilateral and multilateral APAs to override Amount B, the Inclusive Framework should work on a short-form multilateral APA mechanism for multinational enterprises that believe their distributors are within the scope of Amount B. Multinational enterprises commonly use the same distribution structure across multiple jurisdictions in which they operate, and a short-form multilateral APA would provide an avenue for the group to achieve upfront certainty on the application of Amount B, while tax administrations would benefit from the use of pooled resources to determine compliance with Amount B. This could be in the form of a simplified pro-forma application and approval process delivering taxpayers and tax administrations the certainty of a traditional APA, but in a shorter timeframe and with reduced compliance and administrative costs. We believe that short-form APAs would provide significant certainty benefits in borderline cases, but that the design of Amount B ought to be such that, in the vast majority of cases, no APA should be needed to obtain reasonable certainty with regard to the application of Amount B. Amount B is intended to be a simplification and hence there should not be a mandatory requirement for taxpayers to enter into a short-form APA if they do not desire this additional certainty. Alternatively, or in addition, the OECD could also explore how ICAP could be used to provide additional certainty to groups applying Amount B.

Resolving Amount B disputes through existing tax treaty mechanisms will likely be difficult in some cases due to the potential for disagreement among tax administrations on key qualitative criteria. This risk would be reduced if the use of qualitative criteria were limited, but some scoping disputes are likely to persist. Consideration should be given to an enhanced MAP process (with time limitations). This could be based on the dispute resolution mechanism being developed for Amount A, which has the support of over 138 members of the Inclusive Framework. Separately, guidance on Amount B should confirm that Amount B disputes will qualify as disputes related to Amount A for taxpayers within the scope of Amount A.

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Annex

1. Scope of Amount B

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?

Comparables drawn from commercial databases are commonly used in benchmarking analyses, and hence, there is general acceptance that these comparables can be used to establish the arm's length price of controlled transactions using the TNMM. We recognize the challenges of comparing the tested party to these comparables but consider that these challenges can be overcome by applying quantitative and qualitative review criteria.

We note that there will be few, if any, third party distributors that do not assume some credit or inventory risk. Therefore, if the scope of Amount B were limited to entities that did not bear such risks, it would be difficult to identify third parties operating in comparable circumstances. As noted above, for this reason we do not support the suggestion that an in-scope entity could not bear risks, such as credit or inventory risk.

We also note that there may be limits or inconsistencies in the financial information included in commercial databases, which limit the extent to which some screening criteria can be applied reliably. When looking to the Orbis database, and specifically the "Global Standard" information format, there may be differences between the reporting requirements for public and private entities within a given country but also between the countries themselves. Similarly, there may be differences in accounting practices across industries and in the way information providers gather and standardize the information on behalf of Moody's Bureau van Dijk ("BvD"). A common example of where differences arise is the detailed asset line items. Differences in reporting should not prevent the application of a particular measure or screen but means such measures must be applied with appropriate care.

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

The list of financial indicators included in the Consultation Document is very comprehensive. Consideration could be given to adding ratios such as Inventory Turnover and Expense breakouts, for the reasons discussed below.

Quantitative or financial screens have been used as proxies for assessing whether or not an entity assumes economically significant risk, examples of these are listed below. Note, however, that the relevance of these proxies may depend on the design of any standardized Amount B contract and the extent to which it allocates these risks.

- Inventory Turnover – measure of inventory risk and obsolescence risk.

- Expense breakouts: Research and Development, Sales and Advertising, and Intangible Amortization expenses could be used with respect to development or recognition of intangibles. However, the way that intangibles, in particular, are accounted for creates challenges, as self-generated intangibles are typically not shown on the balance sheet.

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?

There are arguments for and against applying Amount B to both retail and wholesale distribution. In some scenarios, wholesalers and retailers may have different functional, asset and risk profiles, for example, a retailer may be more likely to own valuable marketing intangibles, while a wholesaler may be more likely to assume credit risk. However, in other scenarios the functional, asset and risk profiles of retailers and wholesalers may be comparable; indeed, there are numerous examples of businesses that sell on a retail and wholesale basis from the same premises.

As noted above, if retail distribution is excluded from the scope, where an entity performs both wholesale and retail distribution, this should not prevent it from applying Amount B to its wholesale distribution activities, providing it prepares the segmented accounts required to facilitate the application of Amount B. In addition, we support the suggestion included in the document that where the retail distribution sales of an entity fall below a de minimis level, then the entire entity should be eligible for Amount B.

To assess whether Amount B could be applied to both wholesale and retail distributors, the Inclusive Framework could undertake a search using the 47.00 Group of NACE codes (which are not included in the current search criteria). The results of this search could be compared to the results obtained for the Wholesalers search in the Annex. If there is significant overlap in the two searches and their ranges of profit, a practical solution may be to combine all companies in the search and have one suggested profit measure for Amount B for both Wholesale and Retail activities. Alternatively, to broaden the application of Amount B, the Inclusive Framework could use a separate Retail benchmarking analysis to set an appropriate Amount B return for baseline retailers.

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.

The primary difference between a buy-sell distribution and a sales agent or commissionaire is that a distributor takes title, holds inventory, and typically assumes inventory and credit risk, while an agent or commissionaire does not.

Though there are exceptions, in most industries, it is significantly easier to identify comparables that act as buy-sell distributors than sales agents or commissionaires. There are some industries where agency arrangements are more common, such as financial services and commodities markets, such as those for metals and grains, or other raw materials. However, we note that the current scoping criteria would likely exclude distributors of such products from scope of Amount B.

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.

As outlined above, because sales agents and commissionaires do not take title, hold inventory, or assume inventory and credit risk, there are differences in the functions performed, assets used, and risks assumed, when compared to a buy-sell distributor. There are also differences in the characteristics of property transferred or services provided, as buy-sell distributors buy products or services and resell them to third parties, whereas agents or commissionaires provide marketing and sales services to another group entity.

In some instances, it may be appropriate to remunerate agents or commissionaires in line with a buy-sell distributor, but in other instances this will not be appropriate. It is difficult to identify objective indicators that could be consistently relied upon to make this important distinction.

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?

The lack of comparable data means it is relatively common to price transactions involving sales agents or commissionaires by reference to returns due to independent buy-sell distributors. In many jurisdictions, working capital adjustments are typically performed to place those buy-sell distributors on a cash accounting basis to represent the lack of inventory risk or other financial risk. Alternatively, in place of the working capital adjustments, it is not uncommon that the targeted return may be set towards the bottom of the arm's length range to reflect the comparatively limited functional and risk profile of the sales agent or commissionaire.

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.

Provided the other scoping criteria are met, we do not believe that, as a general rule, the distribution of tangible products outside the market of residence gives rise to materially different economic characteristics, such that it would not be appropriate to apply Amount B. For example, it is common for distributors in certain larger markets to sell to other neighbouring markets. As outlined above, excluding these types of distributors from Amount B would likely disadvantage LCJs, where it is particularly common for distributors to sell products in neighbouring jurisdictions.

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.

It is difficult to envisage how the quantitative metrics used to establish where an entity is in-scope of Amount B should vary depending on the industry or market of residence of the distributor. This would also make the application of a quantitative test more subjective, for example, if it were necessary to determine which industry a distributor operated in, to select which quantitative metric should be used. As outlined above, we consider that further consideration could be given to working capital adjustments, as a way to account for differences in the functions performed, assets used, and risks assumed by different distributors.

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.

As noted above, the proposed scoping criteria would likely require businesses to collect more, not less data, than they are currently required to for annual transfer pricing compliance and reporting purposes. Hence, as a practical matter it is difficult to see how Amount B as currently outlined could simplify or streamline a taxpayer's compliance requirements, beyond removing the need to perform a benchmarking study.

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

We agree that as drafted the product-based exclusions will exclude the distribution of commodities from the scope of Amount B. The exclusion is broadly drafted and covers commodities that have undergone different

forms of processing. For further clarification, it may be helpful to include a non-exhaustive list of commodities that are excluded.

We consider that the distribution of digital goods, such as software, should be included in scope of Amount B, because these businesses should be able to benefit from the simplification and streamlining that Amount B is intended to deliver. Irrespective of whether or not the economically relevant characteristics of the distribution of digital goods and tangible goods are broadly comparable, it is difficult to justify why the distribution of tangible goods should be covered by Amount B, but the distribution of digital goods should not.

Moreover, Pillar One has always been presented as a package, with Amount A allocating more profit to market jurisdictions and Amount B providing greater certainty to taxpayers. The proposed scope of Amount B will result in many of the groups in-scope of Amount A being excluded from the benefits of Amount B.

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.

From a practical perspective, we are concerned that seeking to build Amount B using subjective terms, such as "strategic sales and marketing activities," will lead to disputes about whether or not a certain sales and marketing activity is strategic, or a certain risk is significant. These are the very disputes that Amount B should be seeking to avoid.

From a conceptual standpoint, we agree that there is a point where the functions performed, assets used, and risks assumed by a distributor are such that it should no longer be eligible for Amount B. However, we do not consider that the way the Consultation Document seeks to draw this distinction is conceptually sound.

For example, the definition of a marketing intangible included in the OECD Transfer Pricing Guidelines is broad and specifically identifies customer lists, customer relationships and customer data as marketing intangibles. Generally speaking, distributors will have access to, and may be responsible for maintaining, this type of data. This will also be the case for entities included in publicly available databases that will be used as comparables to set the Amount B pricing methodology. However, it is unclear from the Consultation Document whether owning a customer list or customer relationships would be sufficient for an entity to be excluded from Amount B.

"Data centers" are tangible assets, so we were surprised to see this referred to as a "marketing intangible".[9]

[9] *Consultation Document*, p. 12.

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.

As outlined above, we have concerns about the inclusion of both the MAM and local market comparables exemption. In particular, we are concerned that some tax administrations will use the local market comparable exemption to prevent taxpayers from accessing Amount B.

2. Amount B Pricing Methodology

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

As outlined above, we support the Inclusive Framework's decision to base the Amount B pricing methodology on a common benchmarking search using data drawn from commercial databases, though we have some reservations about aspects of the pricing methodology.

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?

We are happy to discuss our experience and observations of benchmarking returns for baseline marketing and distribution entities with the OECD or Inclusive Framework members.

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

The initial search criteria presented in the Annex were generally sufficient for an initial exploration into the types of criteria being considered and what criteria had not been included.

There are many individual settings, sub-settings, and selections that can significantly impact which companies are identified for further review. For this reason, it would be helpful if the OECD provided, the exact naming of the criteria used, along with their ordering and Boolean, as presented in the TP Catalyst Online tool.

We have set out above quantitative screens that we consider the OECD should further explore.

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

Different KPMG member firms use different commercial databases. In broad terms, for transfer pricing analyses of marketing and distribution activities, we use the following databases in the following regions:

- North America: Compustat NA, Capital IQ
- Latin America and South America: Compustat NA
- Europe, the Middle East and Africa: Orbis Europe,
- Asia: Orbis Asia, Osiris
- Oceania: Orbis Asia, Company 360, Osiris

Our experience is that different databases will have different strengths (in terms of depth of company data) in different regions. For example, our experience suggests that there are hundreds of additional, potentially comparable companies available in Compustat for the North American region. Our experience suggests there are hundreds of potentially comparable companies available in Compustat and similar public company focused databases. Combining other databases with the results from Orbis would increase the number of comparables from jurisdictions that are underrepresented in Orbis and hence has the potential to increase the reliability of the search.

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?

Though there are limitations in global databases there is broad acceptance by taxpayers, practitioners, and tax administrations that such databases are sufficiently reliable to be used in benchmarking studies. Standardization work is performed by most database providers, such as BvD, and we suggest that the OECD discusses potential data limitations with such providers. In addition, it may be appropriate to exclude outliers from the benchmarking search being undertaken by the OECD, such as entities with operating profit margins in excess of 100%.

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?

As outlined above, we consider that the OECD should publish any benchmarking studies underpinning the Amount B pricing methodology in full. This will ensure that there is full transparency and is consistent with the widely held view that secret comparables should not be used in transfer pricing analyses and will provide tax

authorities and taxpayers with confidence that the types of companies identified by the benchmarking search criteria are aligned with the Amount B scoping criteria.

If the OECD is not able to publish the benchmarking studies in full, we would strongly encourage the OECD to publish sufficient information that third parties can reproduce in full the benchmarking searches prior to the finalization of Amount B, so that stakeholders have visibility into, and can offer informed comments on, the details of the benchmarking on which Amount B will rely. For example, the OECD should publish the search strategy including the Boolean operators, the exact database used to perform the search (including the month of release), the number of comparables that are excluded under each step, the final number of comparables and a list of those comparables (e.g., a list of BvD identification numbers). It would also be helpful to publish other aggregated data, such as the number of comparables by NACE code or jurisdiction, where this is permitted by the OECD's database licences.

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.

As outlined above, we consider that in some circumstances it is more appropriate to price marketing and distribution activities using alternative PLIs, including the Berry Ratio, rather than based on an operating profit margin.

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

KPMG member firms adopt different approaches to comparability adjustments; some make adjustments as part of their standard practice and some adjust only in specific / limited circumstances, depending on jurisdictional norms, expectations, and / or legislation limitations. This in part reflects the view of local tax administrations on the relevance of comparability adjustments, but also issues such as data availability.

In the context of Amount B, we consider that making comparability adjustments could enhance the accuracy of Amount B and help to achieve consensus. Including comparability adjustments in the pricing methodology may increase the range of entities that could be included in the scope of Amount B, while ensuring it continues to deliver arm's length outcomes.

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?

As outlined above, we support entities that meet the criteria for Amount B and enter into in-scope controlled transactions with multiple related party suppliers being included within the scope of Amount B. We recognize that in such scenarios, it may be necessary for taxpayers to prepare segmented financial data to show that

each controlled transaction is arm's length. There are scenarios where it may be appropriate to use allocation keys to prepare such data, but there may be other scenarios, where taxpayers have other information that means they do not need to rely on allocation keys. We do not think that the Amount B rules need to be prescriptive about the methodology that taxpayers should use to prepare segment financial data, but merely provide that an "appropriate method" is used to prepare segmented financial data.

Additionally, we note that if the Inclusive Framework is willing to accept that segmented financial data can be used to apply Amount B where a distributor transacts with two or more related party suppliers, it is unclear why a similar approach could not be applied where an entity performs marketing and distribution activities that are in-scope of Amount B and other activities that are not within scope.

3. Documentation

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

As described in detail in the body of this document, we believe that the proposed documentation requirements are onerous and could undermine the successful administration of Amount B.

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.

As described above in the body of this document, we believe that items a (declaration of true, accurate, and complete information), f (prior year financials for taxpayer), and g (prior year financials for tested party) should be eliminated, while the proposed scope of items b (delineation of transaction and explanation of fulfilment of scoping criteria) and i (copies of APAs) should be curtailed. Items d and e (current year financials for the taxpayer and tested party, respectively) should apply in the alternative, rather than concurrently.

Please refer to the discussion above for an explanation of why these items should not be required, as well as an explanation of what items currently included in the local file requirements should not be required for Amount B purposes.

We also note that we have proposed eliminating a number of the scoping criteria, which would in and of itself reduce the documentation required to demonstrate that an entity was in-scope.

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.

Consistent with the mandate of Amount B to provide simplification and streamlining, there are no additional items that we believe should be included.

4. Tax certainty

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

As noted in the body of this document, we welcome the Consultation Document's discussion of APAs, but believe that further technical work is needed to develop a robust tax certainty framework for Amount B.

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?

We believe that a robust Amount B tax certainty framework should also include short-form APAs, ICAP and time limitations, and an enhanced MAP process with consideration given to expanding access to the dispute resolution mechanisms being developed in connection with Amount A, as discussed in the body of this document.

It is important that the tax certainty framework is not limited to interested jurisdictions, but rather is a minimum standard for the implementation of Amount B. We remain concerned that jurisdictions where disputes around the pricing of marketing and distribution activities most frequently arise could opt out of a tax certainty process, thereby undermining the certainty benefits that Amount B is intended to deliver.