January 25, 2023

Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
Tax Treaties, Transfer Pricing and Financial Transactions Division
2, Rue André Pascal
75775 Paris, France

TFDE@oecd.org

Re: Comment Letter on the Public Consultation Document: Pillar One - Amount B

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the Public Consultation Document on Pillar One - Amount B published December 8, 2022 (the "Consultation Document").

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the OECD and the Inclusive Framework in establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations. A list of the companies comprising the NFTC Board of Directors is attached as an Appendix.

General Comments

The NFTC supports the objectives of Amount B, namely simplifying and streamlining the pricing of marketing and distribution activities in market jurisdictions. The OECD recognized early in the development of Pillar One that it would be unfair to allocate Amount A to a market jurisdiction where a taxpayer was already being taxed on an arm's length return attributable to local marketing and distribution activities. In our view, as long as a taxpayer subject to Pillar One is conducting any marketing or distribution activities in a market jurisdiction, Amount B should apply to any arm's length return.

We understand that many elements of the scope and design are still being developed. The scope and design of Amount B should be guided by its objectives, which are to simplify and streamline the pricing in this area so as to enhance certainty and avoid undue expenditures of resources by tax administrations and MNEs. In this regard, the work could be viewed as a continuation of the OECD's work promoting safe harbors, which historically has promoted reduced required documentation and analyses. The Consultation Document takes a different approach, requiring additional documentation, standardized agreements, etc. We believe this approach should be reconsidered in light of the objectives of Amount B.

Regarding scope, to most effectively achieve the objectives of Amount B, we encourage the Inclusive Framework to consider as broad a scope for Amount B as possible, without undue compliance burdens, so that tax administrations and taxpayers may benefit from the simplified and streamlined approach. In particular, it is critically important to the coherence of the Pillar One work that MNEs within the scope of

Amount A can access Amount B and that there is coordination between Amount B and the marketing and distribution safe harbor to ensure that market jurisdictions do not double tax the same income. Accordingly, we recommend that Amount B apply to retail as well as wholesale distribution functions and to the distribution of digital goods and services. Regarding design, we recommend the development of simple, transparent, and objective pricing criteria that adequately address cases for which a return on sales might not be appropriate. Importantly, for Amount B to achieve its objectives, it must be mandatory for tax administrations for cases within scope and that it acts as a safe harbor for taxpayers within its scope. As a safe harbor, each in-scope taxpayer could elect to apply or not apply Amount B. Finally, we welcome consideration of implementation through the current OECD Transfer Pricing Guidelines.

Specific Comments

Scope of Amount B (Paragraphs 18, 22-42, and Box 3.1 & 3.2)

As discussed above, the scoping criteria currently under evaluation by the Inclusive Framework would artificially restrict the taxpayers who could utilize Amount B, thereby frustrating the objectives of Amount B. The scope of Amount B should be as expansive as possible, and compliance burdens should be minimized.

Accordingly, we recommend that Amount B apply to retail as well as wholesale distribution functions. The Consultation Document seems to have an underlying assumption that "retail" distribution is functionally distinct from wholesale distributors and therefore should be outside the scope of Amount B. We disagree with this assumption. The Consultation Document appropriately does not differentiate between B2B and B2C distribution. In practice, the functions, risks, and assets of retail distribution are similar to that of wholesale, and benchmarking of comparables does not result in materially different results.

Regarding the distribution of digital goods and services, it is paramount to Amount B's goals of meaningfully increasing certainty on distribution activities and decreasing compliance costs for taxpayers and tax authorities alike that the distribution of digital goods and services[1] is included in the scope of Amount B. Failure to include digital goods will exclude a significant portion of taxpayers, including a significant share of MNEs within the scope of Amount A, from the benefits of Amount B. In addition to being unfair, the exclusion of digital MNEs from the benefits of Amount B is not warranted from a technical perspective. The returns for the distribution of digital goods and services under the transactional net margin method ("TNMM") do not materially diverge from those of tangible goods as distributors of digital goods and services typically have lower inventory costs and bear less risks (e.g., no or reduced risk of loss). In practice, benchmarked returns for distribution activities for digital goods and services are not materially higher than that of tangible goods. Often, taxpayers utilize the same or similar comparables for distribution of tangible goods and distribution of services with certain adjustments (e.g., for inventory). Many digital companies rely on financial data from distributors such as computer hardware/software/peripheral distributors for benchmarking and policy setting. Expanding Amount B to the distribution of digital goods and services aids in meeting the stated objective of simplifying and streamlining benchmarking for low-capacity jurisdictions which may not be able to do their own economic analyses, especially for digital goods. We urge the inclusive framework to include the distribution of digital goods and services within the scope of Amount B.

More generally, the scoping criteria in paragraph 18 seem inconsistent with the objective of providing practical guidance that can be accessed by a broad range of taxpayers. In relation to disqualifying activities (e.g., manufacturing and R&D), it is not always practical or cost effective to set up multiple entities in a jurisdiction, especially if the other activity is relatively small. Additionally, with increasing

[1] The Consultation Document appears to generalize digital services as software. Our members offer a wide array of digital services including the sale of digital videos, music, eBooks, etc.

work location flexibility, distributors/sales entities may have additional functions such as R&D due to the presence of in-country personnel. The same is true with respect to regulatory activities or technical or specialized services. It is often not practical to segment these functions into a separate legal entity. Moreover, many distributors whose public financial data is used in benchmarking also provide some technical and support services. Accordingly, we recommend that greater flexibility be permitted with respect to the scoping criteria in paragraph 18. For example, the criteria could allow for segmented distribution data for entities that perform activities other than distribution activities, or establish a materiality threshold for other activities. Any quantitative threshold used as a filter should be applied over a multi-year basis so as to promote the stability and broad applicability of Amount B. Other adjustments could be used to help address any concerns, as we would expect the tested party to have additional operating expenses for these services. As most companies do not set up separate legal entities for each function, rigid scoping criteria will impose undue burdens on taxpayers. Taxpayers should not be penalized for housing multiple activities within one entity. Moreover, in certain industries (e.g., life sciences, financial services) regulatory approvals are required to sell in a particular country. Where a distribution entity in a market jurisdiction is conducting these activities, the arm's length return for that entity will necessarily include a return on the regulatory function. In many cases, these regulatory activities may be directed or controlled from outside of the market jurisdiction. As a result, it would be inappropriate to exclude these functions from Amount B. In sum, we recommend that the scoping restrictions be narrowly tailored to ensure they only impose intentional restrictions on specific activities and provide details on why that specific activity is restricted.

Pricing Methodology and Profit Level Indicator (Box 3.2 and Section 4.3)

While we agree that the TNMM with a return on sales PLI can be used in many cases, we believe that it should be supplemented in two situations: (1) where a true CUP exists, and (2) where a Berry ratio might be more appropriate. We do not believe the objectives of Amount B would be served by a local-country-comparable exception to Amount B, or by permitting tax administrations to "rebut" the results from Amount B.

If a true and reliable CUP exists, we recommend allowing taxpayers to use that CUP over TNMM. Use of a CUP can reduce disputes if the CUP is truly comparable (preferably an internal CUP), and the taxpayer should be able to demonstrate why it is preferred over the transactional net margin method. We understand that reliance on such a CUP would need to be accompanied by clear guidelines or another establishment of comparability.

In addition, we encourage the Inclusive Framework to continue to consider the Berry ratio in appropriate circumstances; for example, where volumes are relatively high as compared with operating expense. The return on sales with Berry ratio cap-and-collar (as suggested in paragraph 70) enables a more reliable and reasonable outcome as it takes into consideration where companies achieve a high volume with low margins (or scale on operating expense). We look forward to additional detail on the application of the Berry ratio, including rules on how to determine the applicable cost base.

We do not believe it is appropriate to consider an exception from Amount B where there are local market comparables. Local market comparables can be problematic in numerous aspects. First, the use of local market comps can complicate, rather than simplify, the application of Amount B. Second, these comparables may not be publicly available in sufficient volume to apply the TNMM (i.e., typically five comparables is the standard minimum, more comparables are of course better for application). Third, searches are often time consuming and require local language knowledge to review websites or annual reports for qualitative screening. Instead, we suggest reliance on broad databases such as the Orbis data used by the OECD for the Amount B technical analysis. This data is a global set that can be geographically segmented. Confirmation as to whether country or sub-region sets from Orbis differ from local database comp sets would be helpful. Consideration could be given to supplementing the Orbis data with other databases to the extent that improves reliability and acceptance,

We further suggest that if the ongoing technical analysis does identify significant profitability differences in certain countries, then the OECD can consider an exception or adjustment based on the observed profitability difference. This must be carefully weighed and supported with data as countries not getting an exception may push back.

Finally, we do not believe that the objectives of Amount B would be served by permitting tax administrations to rebut the application of the Amount B pricing methodologies (as suggested in paragraph 7 of Box 3.2). This reference should be removed as making Amount B elective for tax administrations would directly conflict with the certainty Amount B is intended to achieve.

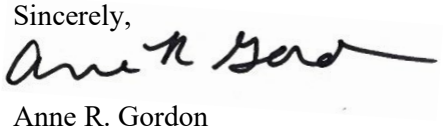
Documentation (Section 5)

Consistent with the objectives of Amount B, we urge simplification and streamlined procedures. Requiring multi-year financial data for non-taxpayer tested parties and detailed segmentation by customers is overly burdensome to prepare proactively. However, countries should be able to request multi-year financials as needed. As drafted, the written contract requirement seems to go beyond the existing requirements for intercompany agreement and as such, may be burdensome. The provision allowing taxpayers to provide supplemental agreements for terms not explicitly covered needs additional clarity. Specifically, we request details on what form the taxpayer should prepare this supplemental information (e.g., an appendix in the local file).

Conclusion

The NFTC appreciates the opportunity to comment on the proposals outlined in the Consultation Document. We look forward to continuing opportunities for constructive engagement as the feedback from the business community is incorporated into the Inclusive Framework.

Sincerely,



Anne R. Gordon
Vice President, International Tax Policy

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