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Brussels, 25 January 2023

Dear Secretariat,

EBIT's Members<sup>1</sup> thank the OECD / Inclusive Framework for the opportunity to provide comments to the Public Consultation Document Pillar One – Amount B (hereinafter 'Discussion Draft') - 8 December 2022 – 25 January 2023. Below are a few issues and open questions that EBIT believes are important for the OECD/Inclusive Framework to consider. Given the urgency and short time frame, EBIT raises its issues and concerns with the scope rules in a summarising bullet point format, keeping it relatively short. At the same time, we do wish to emphasise that the listed issues and concerns in this document are not necessarily exhaustive.

EBIT's Members understand that the main purpose of Amount B is to:

- Enhance tax certainty; and
- Reduce disputes between taxpayers and tax administrations and address the needs of low-capacity jurisdictions.

Our comments on these issues and the way Amount B will be calculated are discussed in more detail below. EBIT wishes to point out however that the suggested approach may miss its aim and risks becoming an example of how to make relatively easy and straightforward transactions enormously complex.

## Scope

Following the reading of Article 18 of the Discussion Draft, EBIT's Members note that a significant number of criteria must be respected in order to fall within the scope of Amount B. EBIT's Members are convinced that some of these criteria will lead to a significant number of exclusions and will greatly reduce the number of companies potentially falling within the scope of Article 18 and therefore able to benefit from this regime. When only a limited number of entities may be in scope of Amount B, the approach cannot remove the obstacles that Amount B is supposed to address.

We wish to highlight the following points as examples:

- First, Article 18 (a) provides that "Taxpayers must document their qualifying transactions in a written contract. Taxpayers should have freedom of contract, the ability to bargain and create the terms of their agreement as they desire without outside interference. Paragraph 87, k. of Section 5 contains more suggested guidance (a laundry list actually) of what the written contract should include. Although EBIT's Members accept that as a best practice the insertion of certain provisions in a written contract may help in understanding the transaction and its qualification, it should not be made compulsory. As paragraph 28 indicates, even in the absence of a written contract, a transaction could be a qualifying Amount B transaction; alternatively the presence of a written contract is no guarantee that the transaction is a qualifying Amount B transaction. We consider therefore that guidance on the content of the contract may be useful, but companies should not be required to qualify certain transactions in a contract.

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<sup>1</sup> EBIT's Members include Airbus Group, BP, Carlyle Carrier, Caterpillar, Diageo, GSK, Huawei, International Paper, Johnson and Johnson, JTI, PepsiCo, Pfizer, P&G, Raytheon Technologies, RELX, Schroders, SHV Group and Vattenfall. For more information on EBIT see: [www.ebit-businessstax.com](http://www.ebit-businessstax.com)

## **EBIT's comments on the Public Consultation Document on Pillar One – Amount B**

- Secondly, Article 18 (b) provides that "the distributor must distribute primarily in its market of residence". First of all, EBIT's Members consider that this notion is not clear and may hamper the business structure (model) of the MNE. In some cases, the market of residence may be the target market of the distributor, but in other cases, the market may be (much) wider than the market of the distributor, while still respecting the spirit of the Amount B approach.
- Thirdly, Article 18 (c) provides that "The distributor must not perform any economic activity for which it is, or should be, remunerated at arm's length other than its core distribution function." Different activities, such as manufacturing activities, are listed. EBIT's Members believe that these entities must be able to perform multiple functions. Indeed, performing these activities should not exclude the entity from the scope of Amount B on the condition that these other activities are remunerated at arm's length. It is not uncommon for an entity to perform different roles and have different remuneration patterns for those roles. For example, an entity could have a distribution function, a manufacturing subsidiary and a service centre which benefit from the low added value services. In this case, we can have different at arm's length remunerations taking into consideration the different functions, risks and assets. This will depend on how the business is structured. The opinion of EBIT's Members is that as long as the distribution activities can qualify as baseline marketing and distribution activities, it should be included in the scope of Amount B. The other activities should then be remunerated separately on an arm's length basis.
- The article 18 (d) indicates that the distributor will be excluded in the event that it "undertakes activities that relate to creating or obtaining the rights to distribute in the market when the creation or obtaining of such rights would itself be remunerated at arm's length". In a number of industries, such as medical device manufacturers and the pharmaceutical industry, such distribution rights are common and even compulsory, while not necessarily creating a valuable intangible.

As indicated, these are just examples and should not be considered to be exhaustive.

Two additional points are worth mentioning. First, there are regular references to thresholds that have not yet been set. However, EBIT's Members note that if they were to be either too low or too high, the measure will lose its relevance.

EBIT's Members appreciate that a bilateral or multilateral advance pricing agreement ("APA") has priority over Amount B as it is an agreement between tax authorities. As a result, the tax authorities will not be able to decide to apply Amount B if its result is more favourable to them than the result of the bilateral or multilateral APA. However, the taxpayer will also not be able to decide to apply Amount B if the result of Amount B is more favourable to it than the result of the bilateral or multilateral APA.

EBIT's Members consider that many eligible distributors will not fall within the proposed scope because of the restrictions under Paragraph 18. In addition, to determine whether they qualify for Amount B, companies will have to collect a significant amount of information. This step can be costly and time consuming, which could discourage eligible companies entering into the system. Finally, EBIT's Members believe that the criteria set out in Article 18 are not always clear about the risk of making the regime more complicated than it already is or should be. EBIT's Members believe that the objective of simplification pursued by the OECD is not close to being achieved under the suggested format.

### **Certainty for the taxpayer and tax authorities**

EBIT's Members are convinced that, although the OECD emphasises certainty for the taxpayer, it is not yet a given. This lack of certainty results in possibly only a few taxpayers being interested in the "standardised, streamlined and simplified" approach of Amount B.

## **EBIT's comments on the Public Consultation Document on Pillar One – Amount B**

- First and foremost, EBIT believes that Amount B should be an optional regime at the discretion of the taxpayer. The OECD has already developed a precedent in that respect for low value-adding intra-group services (see Chapter VII, Section D. of the OECD Transfer Pricing Guidelines).
- Secondly, EBIT believes that the Amount B could be used as a safe harbour. For example, the safe harbour could provide that when the in-scope activities, i.e., baseline marketing and distribution reach a certain threshold (for example 4-5<sup>2</sup> % operating margin or OM), the tax authorities do not challenge the OM provided that it reaches or exceeds that percentage. The threshold could also be determined on the basis of a certain percentage of the consolidated OM of the group (group level approach - for example X% of the group OM is the OM for the baseline marketing and distribution function), or the OM of the entity concerned (entity level approach). EBIT's Members believe this would create certainty for the taxpayer and simplify audits for the tax authorities for what are considered to be low risk activities.
- Thirdly, EBIT has concerns with the scope of application described in paragraph 14 of the Discussion Draft. According to the Discussion Draft, it is still under discussion whether Amount B would apply to the following intra-group transactions, where either category of tested party is referred to collectively as “distributors”:
  - Buy-sell arrangements where the tested party purchases goods from one or more associated enterprises resident in other jurisdictions for wholesale distribution to unrelated parties primarily in its local market; and
  - Sales agency and commissionaire arrangements where the tested party contributes to wholesale distribution of goods for a related party and to the extent they exhibit economically relevant characteristics similar to those outlined in the scoping criteria for Amount B.

EBIT's Members note that the Discussion Draft only addresses (physical) goods but does not mention baseline distribution and marketing activities for services (including digital services). We consider that a standardized, streamlined and simplified approach for baseline marketing and distribution activities based on the arm's length principle should also be available for service activities including digital services, given that such services can be just as routine in nature and simple to benchmark as the equivalent for physical goods.

For EBIT's Members it would seem strange that an even less complex transaction than buy-sell distributors, in this case genuine sales agencies and commissionaires, could not rely on a simplification measure. On multiple occasions, the Discussion Draft stresses the importance of the accurate delineation of the transaction. It would indeed become very confusing for groups whether or not they can apply Amount B. While there may be arguments for applying a different return for sales agencies and commissionaires than for buy-sell distributors, we fear that unnecessary distinctions would lead to the creation of more uncertainty and more disputes and litigation.

- Fourthly, in its current conception, the Amount B approach can in any case and under any circumstance be challenged by the tax authorities. This extensive power of the tax authorities does not guarantee any certainty for the taxpayer.
- Lastly, EBIT's Members consider the way Amount B is described as a hard core application of the arm's length principle and transfer pricing guidelines and would in practice not lead to any simplification for taxpayers in general and tax authorities of low capacity jurisdictions in particular.

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<sup>2</sup> From experience, these amounts are more than double the return seen in practice for low risk distribution activities. These figures should not be used or construed as a benchmark or minimum return.

## **EBIT's comments on the Public Consultation Document on Pillar One – Amount B**

### **Simplification for the taxpayer and the tax authorities**

In addition to certainty, EBIT's Members welcome the importance given to purportedly greater simplicity for the taxpayer along with the need to assist low-capacity jurisdictions.

- EBIT's Members opine that Amount B could potentially result in cost savings and time savings for the taxpayer. However, as indicated already above, due to the way Amount B is constructed it would very likely result in a loss of efficiency instead of creating efficiency gains and tax certainty.
- Paragraph 18 of Amount B, sets out a number of criteria that must be met in order to fall within the scope of Amount B. Although some of these criteria are appropriate to take on board, the granularity of the scoping exercise loses its effectiveness and may lead to only very few enterprises being in scope.
- EBIT's Members consider that the scoping criteria would not be simple to apply. It will be burdensome for groups to collect the required data and to keep it up to date over time. To put it to the extreme, instead of applying Amount B, it will probably be easier in the case of low risk activities such as baseline marketing and distributors to apply the arm's length principle based on the OECD Transfer Pricing Guidelines than the Amount B approach.
- The Discussion Draft seems to allow under certain circumstances and for certain countries the use of local comparables. As certain studies<sup>3</sup> in the past have already indicated, the differences between local comparables searches and international comparables searches are negligible. Also in the case of low capacity jurisdictions, the use of local comparables may give a distorted view of the acceptable return for baseline marketing and distribution. All this combined with the lack of certainty will probably not make the Amount B approach more attractive than the application of the arm's length principle of the OECD Transfer Pricing Guidelines. On the contrary, as the application of local market comparables gives rise to transfer pricing disputes currently, we believe that allowing for a local market comparable exclusion will import these disputes into Amount B. Our recommendation would therefore be to eliminate this exception.

### **How to calculate Amount B**

EBIT's Members note that the OECD / Inclusive Framework is discussing common benchmarking criteria and will also attempt to conduct econometric analyses to determine whether certain independent variables have a statistically significant impact on the profitability of distributors.

- EBIT's Members consider that developing a statistically reliable econometric model will be extremely difficult. We do not have any knowledge of the existence of such an econometric model or that an attempt to create such a model has been made. EBIT's Members welcome such an attempt of course - if data and results are open to tax authorities and taxpayers - but have doubts on its feasibility. We do have some concerns on transparency if the econometric model and its parameters are not published or made available. Taxpayers would need to have access to the data and the analysis performed to avoid the use of secret comparables.
- It may not always be appropriate to rely on the company description or the applicable NACE codes, but a more detailed consultation of the potential comparables website should then be carried out. The OECD suggests rejecting loss-making companies. In our opinion, the rejection of a company on the basis of its lack of profitability alone is not correct and would distort the reliability of the

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<sup>3</sup> Is Europe One Market? A Transfer Pricing Economic Analysis of Pan-European Comparables Sets and Study on Comparable Data used for transfer pricing in the EU – EU JTPF Final Report: [https://taxation-customs.ec.europa.eu/system/files/2016-09/europe\\_one\\_market\\_white\\_paper\\_feb18.pdf](https://taxation-customs.ec.europa.eu/system/files/2016-09/europe_one_market_white_paper_feb18.pdf)

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OECD econometric analysis from a statistical point of view. Loss-making enterprises can be appropriate comparables as has been recognized in the OECD's Transfer Pricing Guidelines.<sup>4</sup>

As already mentioned, according to the Discussion Draft, "Amount B needs to simplify and streamline the pricing of in-country baseline marketing and distribution activities, while ensuring outputs consistent with the arm's length principle for all in-scope transactions".

EBIT's Members believe is that this project has great potential and could be beneficial to both taxpayers and tax authorities. However, Amount B as presented in the current Discussion Draft is still far from reaching its goal.

We trust this contribution is helpful to you. EBIT is always ready to dialogue and engage.

Yours sincerely,

**European Business Initiative on Taxation – January 2023**

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<sup>4</sup> See 21.3.64 and 21.3.65 of the OECD Transfer Pricing Guidelines.