ICC comments in response to OECD public consultation document: Draft Multilateral Convention provisions on digital services taxes and other relevant similar measures under Amount A of Pillar One

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide input on the OECD public consultation document on the draft Multilateral Convention provisions on digital services taxes and other relevant similar measures under Amount A of Pillar One. ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment. ICC is also an established arbitral institution through its International Court of Arbitration and provides other dispute resolution mechanisms through its International Centre for Alternative Dispute Resolution.

ICC appreciates the work undertaken to develop MLC provisions that reflects the commitments with respect to the removal of all existing DSTs and other relevant similar measures and the standstill of such future measures.
Given the fact that the document is still in draft form, it is challenging for ICC members to provide detailed comments on the rules at this stage. However, based on the current version of the document, ICC members still appreciate the opportunity to share their views on the proposed rules. Furthermore, ICC members remain available to further engagement as the rules continue to be developed.

General comments on the MLC draft provisions on digital services taxes and other relevant similar measures under Amount A Pillar One

Regarding the content of the provisions, from what emerges in the current version of the document, **the scope of the definition of a DST is too narrow**, rendering ineffective the ultimate goal of this proposal.

- The general definition of what constitutes a “digital services tax or relevant similar measures” is based on three cumulative conditions referring to market-based criteria, ring-fencing to foreign and foreign-owned businesses and measures placed outside the income tax system and therefore outside the scope of treaty obligations.
- Being the definition a conjunctive “and” test, all conditions will need to be met for a measure to be considered under the scope of the definition and thus, the application threshold results to be too high.
- Moreover, with regard to the first condition, ICC members are of the opinion that the wording "or other similar market-based criteria" is too undefined.

- Existing DST legislations and proposals apply to foreign or foreign-owned groups as well as to domestic ones. Thus, according to the proposed text contained in the public consultation document, it is unclear whether DST applicable also to domestic-based groups will be considered as in scope.
- One area of particular concern is the proliferation of new nexus standards for corporate income tax (e.g., significant economic presence tests "SEPs") that are inconsistent with the OECD model treaty. The draft document would not deter this proliferation because article 38(2)(c) exempts measures that are treated as an income tax under domestic law. Compliance with SEPs require significant resources and their destabilizing effect is similar to DSTs. The draft document should be updated to include SEPs as digital services tax or relevant similar measure by removing article 38(2)(c) as a requirement for digital services tax or relevant similar measure definition and by including SEPs in Annex A as described in Article 37.
- In order to get a more balanced approach, ICC members would recommend excluding the condition that "measures are ring-fenced to foreign and foreign-owned businesses" from the conjunctive "and"- test, and formulate it as a general exception.
- Additionally, ICC members would recommend that the exception should be (further) limited to situations where the rules apply across business models and not attempt to ring-fence the digital economy, something that – at the moment – is not covered in the definition contained in the draft document for public consultation.

- To this end, ICC members would suggest amending Art. 38 (2) providing **a general definition of a "digital services tax or relevant similar measure" based on two cumulative conditions** and include measures that:

  (1) impose taxation based on market-based criteria;

  (2) are placed outside the income tax system (and therefore outside the scope of treaty obligations), unless

  (i) the measure applies across business models and does not attempt to ring-fence the digital economy (or any other specific sectors/ business models); and

  (ii) it will apply equally in all respects to both foreign-owned companies as well as residents.

- Besides this possible solution, ICC members would recommend in any case to change the wording of Art. 38 (2)(b) (ii). In the opinion of ICC members, the words "exclusively or almost exclusively" should be changed into "materially" and the words "variable rates of tax" should be included in the text in order to avoid that DST and similar measures which discriminate against non-residents via higher rates of tax applied to the non-resident would remain out of scope according to the proposed rules. Hence, the text of Art. 38 (2) (b) (ii) should be amended as follows:

  "is applicable in practice ***materially*** *~~(exclusively or almost exclusively)~~ to non-residents or foreign-owned businesses as a result of the application of revenue thresholds,* ***variable rates of tax****, exemptions for taxpayers subject to domestic corporate income tax in that Party, or restrictions of scope that ensure that substantially all residents (other than foreign-owned businesses) supplying comparable goods or services are exempt from its application;"*

- When examining whether a "digital service tax or a relevant similar measure" exists, a qualified overall assessment should also be made, which does not depend on the formal

design of the respective measure, but on the effect or the impact of the measure (effect-based approach).

- Moreover, in relation to the condition referring to measures placed outside the income tax systems (and therefore outside the scope of treaty obligations) Art. 38 (2) (c) states that "such tax is not treated as an income tax under the domestic law of the Party, or is otherwise treated by that Party as outside the scope of any agreements (other than this Convention) that are in force between that Party and one or more other jurisdictions for the avoidance of double taxation with respect to taxes on income." Including this as a requirement would bless measures with the same policy issues as DSTs, such as the SEPs described above. Footnote 10 further clarifies that "Consideration will be given to whether and under what circumstances the definition of digital services taxes or other relevant similar measures should cover certain measures even if they are within the scope of existing tax treaties.". As noted, SEPs and certain novel withholding taxes such as on digital services should be included in the definition of digital services taxes or relevant similar measures.
- ICC members recommend **expanding the scope of this provision to cover measures that are (potentially) within the scope of existing tax treaties**, such as article 12B UN Model Tax Convention (whether included in a (multilateral) tax treaty or in a non-treaty situation-incorporated in a jurisdiction's domestic legislation). For the same reason, the exemption for withholding taxes must be modified so the definition captures abusive, novel withholding taxes (including specifically taxes on digital services).
- In order to provide more detailed comments and fully appreciate the intent of the proposed measure, ICC members would appreciate the **possibility to review and be consulted also on the content of the so-called "Appendix A".** Furthermore, as already considered in Footnote 1, the ICC would also recommend that measures which qualify as a digital services tax or a similar measure and which are introduced after the entry into force of the Convention (future DST) should be included in Annex A. Hence, ICC members would recommend Annex A to be updated on an ad-hoc basis.
- Consideration should be given to partial denial of Amount A reallocation as discussed in Footnote 4.
- Subnational DST and similar unilateral measures should be captured in the definition of DSTs and similar unilateral measures, as indicated in Footnote 3.
- Finally, ICC believes that taxes which are listed as exempted, such as certain withholding taxes, DPT, or Maal, should be taken into account for the purposes of the Marketing and Distribution Safe Harbor to ensure residual profit is not subject to double tax. The definition of the exemption should be narrowly tailored to ensure the exception does not swallow the rule.

ICC appreciates the work undertaken to develop MLC provisions that reflect the OECD commitments with respect to the removal of all existing DSTs and other relevant similar measures and the standstill of such future measures. However, ICC members would also like to underscore the importance of fully taking into account the overall objective of the MLC Provisions on Digital Services Taxes and other relevant similar measures: the removal of DSTs and similar measures should also lead to the prevention and removal of any reactionary measures to DSTs, such as trade or any other types of commercial sanctions. This is indeed a fundamental political goal towards the stabilisation of the worldwide economic environment. Hence, ICC members would strongly welcome a statement clearly expressing this objective to be included in the text (or at the very least in the recitals) of the Multilateral Convention.

ICC comments in response to OECD public consultation document: Pillar One – Amount B

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide input on the OECD public consultation document on the design elements of Amount B under Pillar One relating to the simplification of transfer pricing rules. ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment. ICC is also an established arbitral institution through its International Court of Arbitration and provides other dispute resolution mechanisms through its International Centre for Alternative Dispute Resolution.

ICC appreciates work undertaken to develop the main design features of Amount B, whose aim is to provide for a simplified and streamlined approach to the application of the arm's length principle to in-country baseline marketing and distribution activities. Nonetheless, based on the current proposal, ICC members believe that there are still significant concerns that need to be addressed. To this end, ICC welcomes the opportunity to provide input with respect to the design elements of Amount B under Pillar One. Furthermore, ICC members remain available to further engagement as the pricing methodology under Amount B continues to be developed.

General overview and summary of comments:

Tax certainty, simplicity and administrative efficiency should be at the heart of any international tax reform and ICC has been continuously supportive of harmonised multilateral efforts aimed at ensuring that international tax rules are fit for purpose in an ever-evolving digitalised economy. However, the design features and technical aspects of Amount B Pillar One as described in the public consultation document still require additional changes and improvements in order to achieve their ultimate goal. Moreover, under the current draft, it appears that too many businesses and relevant situations will be excluded from the application of Amount B with the consequent risk of diluting the ambitious international tax reform originally planned.

Hence, ICC members would like to provide the following comments and suggestions on the proposed rules with the aim to secure the workability and overall consistency and coherence of the two-pillar reform.

- On a preliminary and general standpoint, ICC members believe that **Amount B** should be introduced as a **safe harbour**. This approach would allow companies to elect for this option and when not being able to rely on standard transfer pricing rules based on the arm's length principle, it will guarantee more tax certainty and simplification. At the same time,

companies that don't elect for Amount B should still be able to rely on the standard TP rules based on the arm's length principle.

- Greater tax certainty in the context of Amount B will have beneficial consequences also from a Pillar Two viewpoint. **If not introduced as a safe harbor, ICC members would like to highlight the necessity to adopt an increased mandatory and binding tax certainty framework** to prevent the possible disputes.
- ICC members also strongly recommend that **companies under the scope of Amount A should necessarily and automatically benefit from Amount B**.
- In the current version of Amount B rules, there are too many qualitative or subjective cases of exclusion from Amount B. ICC members would encourage the adoption of **substantive changes to the scoping section to reduce the number of cases for exclusion and limit them to very objective situations.** At the same time, the scope should be broadened to include cloud and other services and should not be denied due to R&D and other activities.
- An additional important matter of concern is the possibility given to countries to rely on local comparables instead of the OECD's agreed benchmark. **Unless a country can demonstrate a valid reason in support for using local comparables and transparently share the detailed methodology** with the taxpayers and the other relevant jurisdictions, ICC members recommend **combining local comparables with regional comparables as is currently permitted under the OECD Transfer Pricing Guidelines**.
- ICC members would also welcome a **more consistent economic analysis with the ALP**. At the current stage, given that the pricing tool is still under development, it is arduous for ICC members to provide more detailed views, but we encourage the pursuit of certainty and simplicity also in relation to this aspect and we consider that existing methodologies to derive comparable companies should be sufficient without introducing the complexity of a pricing tool.
- Moreover, ICC members believe that the **documentation requirements** as outlined in the Amount B public consultation document **need to be lightened and MNEs be permitted to use existing documentation in lieu,** if such documentation contains sufficient transfer pricing analysis to justify Amount B or add to the existing local file without having to create an additional local file simply for Amount B. In their current version the documentation requirements exceed what is required under standard transfer pricing documentation rules, with the consequent risk that this will disincentivise MNEs to opt for amount B.

In the following sections, ICC members would like to provide more detailed remarks and suggestions with reference to the different components of the Amount B public consultation document.

Specific comments:

A. Scope of Amount B

The current **scope of Amount B is too narrow** and ICC members recommend that the **scope of Amount B should be widened as much as possible.**

It should also be clarified whether Amount B is intended to apply to MNEs widely regardless of whether these are in scope of Amount A and whether it would apply to PEs. ICC members strongly recommend that **companies under the scope of Amount A should necessarily and automatically benefit from Amount B and all companies should be within the scope of Amount B irrespective of the**

Amount A position. This would avoid unnecessary inconsistency and bifurcation of treatment of MNEs that are in and out of scope of Amount A since the limited functions underpinning Amount B should be similarly remunerated regardless of the relative turnover and profitability of the MNE.

Moreover, in relation to the **impact of the proposed rules on non-Amount B taxpayers**, ICC members kindly recommend **clarifying that no inference regarding a distributor's profitability can be drawn from it falling outside the scope of Amount B**. Including such clarification will ensure that there is a shared understanding among taxpayers and tax administration on this aspect.

Qualifying transactions and scoping criteria

- Section 3.1.18 sets out the proposed scoping criteria. In the current version of the proposal, section 3.1, para 18 includes an extensive list of 12 scoping points, with 18 further sub-points which need to be satisfied by an entity in order to fall under the scope of Amount B. However, **the underlying reasons for the number of conditions are unclear,** and ICC members recommend that the **qualification criteria should be limited to those with universal agreement or supported by robust statistical analysis of data sets.**
- According to ICC members, **scoping criteria should be more objective**. To avoid and reduce possible disputes and achieve higher simplification, ICC members recommend referring to **financial indicators** which can be readily obtained from an enterprise's financial statement rather than qualitative factors which can be more easily subject to personal judgement. Using quantitative factors, such as financial indicators, will indeed contribute towards increased tax certainty since in the case where an enterprise has elected to be in scope of Amount B, the tax authority will be able to verify whether an enterprise is correctly within scope of Amount B based on these objective factors.
- Paragraph 18 contains a "negative" list of activities. According to ICC members, it would be **preferable to have a positive list of activities** as it will provide **more clarity and certainty** when applying these rules. Conversely, the scope of application of Amount B will be subject to various interpretations, giving rise to possible controversies between the taxpayers and tax administrations. Thus, a viable solution would be conceiving a short list of FAR and other economically relevant characteristics that, if performed, will entitle a transaction to benefit from Amount B. In addition, it should be noted that adjustments on transfer prices could adversely affect customs duties and vice versa, which makes certainty on distributors' scoping and the opposability of the model to tax and custom authorities even more crucial.
- ICC members would recommend **more consistency and clarity on the definition and scope of distributor** as well as additional clarity with reference to section 3.1.14. which refers to **"wholesale distribution".** In its current version, the proposal does not define the term "wholesale", and it is unclear whether the reference is to B2B sales or sales other than to end users. This distinction is particularly relevant for the IT sector where in the case of IT hardware many sales will be B2B, but the acquiring entity will not sell the IT hardware itself as it will be for own use or used to create services that are then sold (e.g., cloud services). From the wording of this section (jointly read with 3.14.h) it would appear that the intention is to refer to B2B. However, this needs to be further clarified. Given the orientation of Pillar One towards remunerating market countries where consumers are located, we recommend that the clarification focuses Amount B on distributors to end consumers, rather than intermediate wholesale distributors who do not have contact nor data on the end consumers.
- Moreover, according to ICC members, **the scope should also be expanded to include retail distribution of tangible goods and digital/non-tangible distribution where functions, assets,**

and risks meet the distribution profile. The functions, assets, and risks of retail distribution are similar to that of wholesale distribution and there is no support in the consultation to exclude retail distribution. Moreover, as it emerges from practice, digital companies use computer hardware/software/peripheral distributors for benchmarking and policy setting. Extending the scope would also fulfill Amount B's goal to simplify and streamline benchmarking for low-capacity jurisdictions that might be unable to perform their own economic analyses.

- **Paragraph 18.b** refers to "distributor", and it is unclear whether Amount B refers to baseline distribution activities. Moreover, the same paragraph indicates that the scope is limited to a distributor selling products in their jurisdiction. However, no underlying justification for this scope limitation has been provided. Since there can be baseline distribution activities performed in different jurisdictions, ICC members kindly suggest **removing the provision or selecting a narrow percentage.**
- In relation to technical and regulatory services, ICC members recommend adopting a threshold under which these will be deemed ancillary. Often distributors and sales entities perform routine sales support functions (e.g., after-sales support, technical services in support of sales) that could hardly be moved to a separate legal entity. Similarly, **ICC members would welcome flexibility on ancillary activities, avoiding the potential artificial segmentation** that could derive from the need to otherwise meet Amount B requirements.
- At the same time, in relation to **certain ancillary activities** which are allowed to be undertaken within the following permissible thresholds, ICC members would like to express their concerns as they believe that it would be **difficult to reach an agreement on some level of expenses or expenditures** expressed as a percentage of sales that would apply to each and every sector.
- Regarding the exclusion of unrelated activities, ICC members recommend the **acceptability of segmented distribution data or the establishment of a materiality threshold for other activities**. From a practical standpoint, enterprises do not set up separate legal entities for each function as this would be costly and administratively burdensome, and taxpayers should not be penalized for this reason.
- Moreover, the definition of **"strategic"** in respect of marketing activities is **too subjective**, leaving too much room for discretion to countries in deciding whether to exclude or not distributors from Amount B.
- Under section 3.1 paragraph 18.c, "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. These disqualifying activities may include any one or a combination of the following: i. Manufacturing activities; ii. Research and development activities; iii. Procurement activities; and iv. Financing activities." However, in order to avoid having multiple legal entities in a given country, distributors usually rely on the existence of an already established company. Those companies, for transfer pricing and controlling purposes, segment their Profit and Loss account and document their roles, functions, assets and risks per segmented P&L. Therefore, ICC members recommend **not having the distributor terminology restricted to only pure distributor entities.** If a different solution was to be adopted, Amount B is likely to never find concrete application within groups or it will lead to costly restructurings for no sound policy reasons.
- Furthermore, in many cases there are activities which are separated from distribution, are remunerated separately and activities are segmented in the transfer pricing documentation (e.g., sales affiliates which play a role in conducting clinical trials). Given the fact that

segmentation is commonly applied in TP in order to appropriately price the different segments of an entity, it is unclear why that would not be acceptable for the application of Amount B. This limitation does not even seem to be consistent with other prescriptions and rules contained in the document. In fact, a segmentation of the distribution segment is expected under paragraph 38 and the documentation requirements for Amount B include an allocation schedule.

- Concerning the characteristics of property section, **the current proposal does not consider the complex situation of software**. In commercial business models, this can be provided as a physical good (on a CD or memory card), as a service (through a subscription model), or as a digital property sale (one-off software download). Even though the activities of the distributor (and associated Functions Assets Risks) do not vary to any meaningful extent across these three delivery models, in the current version of the proposal it seems that only the physical goods distribution method will be within scope of Amount B. At the same time, it shall also be considered that many physical goods still require some element of software to be distributed either as an App or as updates to pre-installed software. This software distribution may be distributed without earning incremental customer revenue. The proposals would seem to treat this software distribution as disqualifying Amount B regardless of whether the software is incidental or closely linked to the supply of hardware (either at that time or at some point in the past) and making no distinction between software distributed free of charge and that earning incremental revenue. Thus, ICC members recommend **further clarification on the treatment of software, including different delivery and revenue generating models**.
- Furthermore, concerning section 5.2, in the opinion of ICC members, the **reasons why it would be necessary to deny Amount B to an MNE that has undertaken a restructuring into Amount B** (either for tax reasons or for wholly unrelated business reasons) **still need to be clarified**. ICC members recommend ensuring the same treatment for taxpayers which are in the same position whereby falling within Amount B. Consequently, ICC members invite the OECD to adopt **restrictions on the application of Amount B arising from a restructuring to be limited to cases where there is a clear abuse**. In cases where the taxpayer can demonstrate a commercial purpose to the restructuring, this should be sufficient to qualify for Amount B and taxpayers should not be disqualified on the basis of a mere restructuring.
- Moreover, **restrictions based on financial ratio should include an element of multi-year averaging** to avoid an entity "flip-flopping" between being in and out of scope.
- Some ICC members would also like to raise their concerns with reference to scoping criterium under paragraph 18.e.i according to which "*The distributors should not perform any regulatory activities that are valuable and material to the ability to conduct the distribution activity in the market*". However, there are companies operating in highly regulated markets, where local regulatory activities are necessary in order to obtain approval to distribute the products in the market. Such activities are often performed utilising centrally prepared documentation. For these cases and based on some of the possible suggestions reported in the document itself (i.e. box 3.2. paragraph 32), ICC members consider a viable solution considering these activities as ancillary services similar to those mentioned in paragraph 18 (h). Nonetheless, should the IF scope out regulatory activities because they consider them as more value adding activities, ICC members would recommend adopting one of the three following solutions to ensure that appropriate remuneration is given to these regulatory activities:

i) Assuming that the selected comparables under "medical and health" perform similar regulatory activities, the benchmarked profitability would already include the remuneration for such activities.

ii) Additional activities (such as regulatory activities) would increase the operating expense intensity of the affiliate in question.

iii) The affiliate could separate the regulatory activities from the baseline marketing and distribution activities such that Amount B could apply to the baseline marketing and distribution activities carried out by the affiliates, and the regulatory activities could be remunerated according to 'normal' arm's length practice, for example a mark-up on costs based on a benchmark study prepared by the taxpayer.

- Moreover, in relation to paragraph 18. K, it should be highlighted that in the pharmaceutical sector, distributors might have obtained marketing authorisations which could potentially be regarded as a "market access right". It is unclear why such an authorization could preclude a company from the application of Amount B.
- Finally, 18(g) states that "*None of the customers of the distributor should represent over [X]% of its net sales*". However, in some sectors the wholesale distribution might be limited to a few players on the market which may make up a considerable share of the distributor's net sales. Thus, it is unclear why the number of customers should constitute a scoping criterium which would exclude distributors that could be otherwise functionally comparable to other distributors with several, smaller customers.

Exclusions

- The extensive list of scoping points listed in section 3.1, para 18 also includes several exclusions. These exclusions will significantly limit the number of MNEs that will fall under the scope of Amount B. ICC members recommend that the **scoping criteria for Amount B should guarantee higher flexibility, guaranteeing that a wider range of taxpayers will be able to qualify under the scope of Amount B.**
- ICC members would also welcome **further clarity with reference to the terminology used in the exclusions included under para 18**.
- **Additional clarifications** would also be appreciated regarding the **procurement and financing activities that could be related to ancillary transactions**. Especially in the case where the negative list will persist, we recommend **more flexibility on this exclusion**.
- With respect to **control risk functions**, it would be important to specify that paragraph 1.105 cannot be read in isolation. Indeed, the fact that distributors perform risk control functions does not automatically lead to the assumptions of significant risk. Therefore, ICC members would encourage the **adoption of a streamlined process for allocating risks,** which would (i) identify risks, (ii) check what entity contractually assumes the risk, (iii) check whether that entity has the capacity to control those risks (iv) if the answer is yes, keep the contractual risk allocation – If the answer is not then (v) reallocate risks. This process will prevent the risk of possible situations under which both parties can control risks but only one contractually assumes those risks.
- According to paragraph 18.e.f, distributors that provide technical/specialised or marketing/strategic services to third party customers are excluded. However, there is a lack of clarity for cases in which the distributor is just a pass-through entity for these services. ICC members would welcome **clarifications on whether the distributor should be actively engaged in the provision of such services**.

- Moreover, in the case of the **exclusion contained in paragraph 18.g, the underlying reason is unclear** as there can be cases where baseline distribution activities are performed for the benefit of one/few clients.
- ICC members also strongly recommend **not to consider pass through costs in the calculation of the threshold** as they do not add any functional/risk complexity to the baseline distribution activities.
- According to paragraph 18.h, after sales activities up to a certain level do not qualify for an exclusion. However, in the opinion of ICC members, it should be clarified whether such activities include the technical or specialized services mentioned in paragraph 18 e and in paragraph 30 (where no thresholds seem to be allowed). ICC members recommend **clarifying that all the after sales activities (including technical and specialized) up to a certain threshold do not qualify for an exclusion.**
- Under paragraph 18.k, distributors owning unique and economically valuable intangibles such as marketing intangibles, data centres, and investment in infrastructure fall outside Amount B scope. Nevertheless, the list does not appear to be exhaustive. Thus, it could give rise to subjective interpretation and therefore, can increase dispute cases. In the spirit of the simplification, ICC members would advise the **inclusion of a list of specific examples**.
- Moreover, Market Authorizations provided by the country's health authorities should not disallow a distributor from falling within Amount B scope, the entire pharmaceutical sector would otherwise be excluded from Amount B even though the Market Authorization's aim is solely to ensure that products put on the market are safe. Amount B should take into account economic characteristics specific to an industry that would be considered baseline, for example regulatory in the pharmaceutical industry when determining the scope for Amount B.
- Based on section 3.2, it is not yet clear whether in the case of an APA under negotiation, an enterprise in scope of Amount B should apply Amount B. Consequently, ICC members would welcome **further clarifications that a company in scope of Amount B should not perform the quantitative measurements and apply Amount B pricing when an APA is under negotiation (including where renewal is sought).** We consider that the terms negotiated by Competent Authorities as part of an APA should be respected and no further work on Amount B would be needed if the subject of the APA was the marketing and distribution transaction.
- Section 3.3 also contributes to the lack of clarity on how Amount B rules will effectively be applied. This section includes a positive list of activities (FAR and other relevant economic circumstances). Nonetheless it is unclear how this list interplays with the negative list of paragraph 18 and how this list will contribute to simplifying the application of Amount B. To overcome these issues, it could be evaluated whether a decision should be made on the following important points:
  A) either simply refer to chapter I of the TPG and mention that, if a transaction is considered to be "baseline market and distribution activity" based on chapter I, then amount B (i.e., Transactional Net Margin Method (TNMM) and simplified remuneration) applies; or
  B) conceive a positive list of activities that, if performed, gives access to the simplification benefits of amount B (i.e., TNMM and simplified remuneration)
- Differently from what emerges from section 3.3.1 and in light of simplification purposes, ICC members would recommend **not to qualify written contractual terms as mandatory**. A different approach would render the application of Amount B more burdensome than the current application of the ALP. As an illustration, distributors can conclude multiple spot /

non-recurring sales or purchases with multiple actors, the proposed rules would thus be creating a disproportionate administrative burden.

- With reference to the functional analysis (section 3.3.2), the qualitative assessment there prescribed would frustrate the scope of having a simplifying measure. The functional analysis described is fully consistent with the functional analysis that has to be performed under ordinary circumstances, hence is not providing any simplification measure. The main risk deriving from a qualitative scrutiny is the potential rise in conflicting views that can result in disputes. Thus, ICC members recommend **basing the accurate delineation on more objective criteria (i.e., financial ratios) that cannot be subject to qualitative scrutiny from tax authorities and taxpayers alike**. Moreover, an approach relying on more objective criteria would be aligned with the essence of safe harbours, as outlined by the OECD in paragraph 4.108 of the TPG ("The tax administration would accept, with limited or no scrutiny, transfer prices within safe harbour parameters").
- Entirely consistent with the aim of simplification and the nature of safe harbours as clarified by the OECD paragraph 4.111 of the TPG[1] would be the assumption according to which Amount B will have an elective nature, in this case the taxpayer will be able to decide whether to apply the Amount B (if applicable) or to apply a different method (i.e., CUP – if available).
- Further clarifications would also be welcomed with reference to the **role of economic circumstances regarding Amount B scope** and more specifically, if such economic relevant characteristics will be considered by the OECD while performing benchmarking analysis under chapter 4 of Amount B.
- Concerning the inclusion of agents/commissionaire in Amount B, these are often used by MNEs and excluding them would substantially limit the scope of Amount B. In order to avoid the risks of overcompensation, ICC members recommend **performing an appropriate benchmarking analysis and adopting specific profit level indicators** (i.e., as suggested in para 70(B)). Some ICC members are supportive of the suggestion in the consultation document of a Berry ratio available as another possible net profit indicator. A Berry ratio cap-and-collar option may enable a more reliable and reasonable outcome as it takes into consideration various business models.
- In relation to certain activities (section 3.4.2), ICC members **support the view of limiting the exclusion to certain activities (see par. 18 e)) above a certain threshold of intensity to be quantified in an objective manner**. Furthermore, ICC members **recommend the use of objective parameters which would limit the discretionary interpretation**. For instance, defining activities as "essential" for the purpose of the exclusion would require a subjective judgement and the qualification of an activity as essential might not be shared from other businesses. Such a subjective qualification would also require a deep knowledge of a specific business model by the auditors. For all these reasons, ICC members doubt that this exclusion would prevent or even reduce the uncertainty and possible disputes.

B. Amount B pricing methodology

[1] "a safe harbour might require the use of a particular method when the taxpayer could otherwise have determined that another method was the most appropriate method under the facts and circumstances".

- At this stage, it is very difficult for ICC members to provide any substantive comment on the pricing tool/matrix that would be used since this is still under development. However, from what emerges in the document for public consultation, ICC members are concerned about its complexity, whereas the purpose of Amount B should be to seek for certainty and simplicity. As the pricing methodology is still under development, ICC members would welcome the possibility to further engage as the work on the pricing analysis progresses.
- ICC members would welcome concrete efforts in keeping the process as simple and transparent as possible, striking the right balance between accuracy on the one hand and simplification and certainty on the other hand.
- ICC members would also like to highlight the **difficulties in obtaining sufficient information and the time lag across jurisdictions on database inputs during benchmarking studies**. At the moment, despite not being substantiated by any technical analysis, the simplified approach for low value adding services which identified a 5% mark-up has been widely accepted by tax authorities around the world. While ICC members welcome the ongoing technical analysis being performed by the OECD, they would like to emphasise that **introducing additional layers and models to the analysis might hinder the possibility to reach an agreement among OECD members.**
- For purposes of simplification, ICC members recommend that the **TNMM should be adopted as the base case**. In presence of a true, reliable Comparable Uncontrolled Price (CUP), ICC members would advise the possibility for the taxpayer to use that over the TNMM. Using a CUP can reduce disputes if the CUP is truly comparable and the taxpayer should be able to demonstrate why it is preferred over the transactional net margin method. However, in these cases, ICC members consider fundamental to have **clear guidelines on comparability (e.g., internal CUP, high degree of product comparability, etc.).**
- Another crucial matter of concern for ICC members is the **use of local market comparables that could complicate, rather than simplify the application of Amount B**. Indeed, local market comparables may not be publicly available in sufficient volume to apply the TNMM (while typically 5 comparables would be considered a minimum, more is better for application). Moreover, finding local comparables can be time consuming and require expert knowledge of the local language to review websites or annual reports for qualitative screening. **The ability of a country to rely without any justification on local comparables rather than on the OECD's agreed benchmark is concerning**. This does not go in the direction of certainty and simplicity. Local comparables should be excluded unless a country can demonstrate that there is a valid reason for using them and transparently share the detailed methodology with the taxpayer and the other countries.
- Among the core goals deriving from the implementation of the Amount B pricing methodology, the OECD has also indicated ensuring adaptability. Hence, the Amount B pricing approach shall be aimed at providing the needed flexibility to take account of economically relevant characteristics of the controlled transaction under review such as geographic filters, industry filters or other relevant factors. ICC members would encourage addressing the local comparables issue in the same spirit by **adopting a flexible approach in the application of geographic filters.**
- ICC members acknowledge that from the ongoing technical analysis significant profitability differences in certain countries might emerge and that consequently the OECD could consider the adoption of exceptions or adjustments based on the observed profitability difference. In this case, ICC members recommend that these **adjustments shall be clearly defined for easy implementation and consistency and most importantly, supported by data**.

Conversely, if the technical analysis does not reveal any differences, ICC members strongly advise to **keep Amount B as simple as possible**.

- ICC members would also like to underscore that selecting the MAM and the performing of specific comparability adjustments will increase the reliability of the application of Amount B. Nonetheless, this seems to be in contrast with the ultimate objective of Amount B which is achieving a higher level of simplicity and certainty.
- Moreover, considered that the objective of Amount B is to simplify benchmarking for baseline marketing and distribution activities, ICC members are of that opinion that **using TNMM results on an industry and geography basis (possibly in a matrix) would represent a simpler approach.**
- In relation to selecting the most appropriate point in the range (sec. 4.3.2 para 73), ICC members would like to highlight that **targeting a point or narrow range may be difficult or require year-end adjustments.** Thus, they would welcome **clarification on whether multi-year analysis can be considered.**
- Several of the topics addressed in the paragraphs relating to the section on the pricing methodology appear to correspond to the ones that under the ordinary application of the ALP already create complexity and uncertainty. Their inclusion in Amount B would eliminate the potential benefits in terms of simplification that could derive from the new rules. For this reason, if those nuances are maintained under the application of Amount B, ICC members kindly recommend that the OECD ensures the **application of those nuances is as easy as possible and limiting as much as possible the possibility - for both taxpayers and tax administrations - to choose among the different options (such as different point in range, different adjustments).**
- Finally, the regression analysis currently underway will likely provide helpful insights to better understand the relationships among industry, geography, and other factors; it is likely to be more complex to implement. However, for the moment there is no clear guidance on how either of these pricing models will be updated and who is responsible for managing assumptions. Thus, ICC members would welcome **further clarification on these aspects in order to provide more substantive comments.**

C. Documentation Requirements

- According to ICC members, **the documentation requirements associated with Amount B are far too excessive, much more burdensome than standard transfer pricing documentation requirements.** The proposed documentation requirements under Amount B go in the opposite direction to a Safe Harbor approach, and will likely disincentivize MNE from using Amount B hindering the achievement of Amount B objective of increased simplification and certainty. Hence, in the view of ICC members, there should not be more documentation requirements than the ones already existing in the countries involved and the existing local file could be expanded, if necessary, to include any additional Amount B information required rather than creating a new Amount B local file.
- The **proposed requirements also appear to be in conflict with the compliance relief description provided by the OECD with respect of safe harbours** (see paragraph 4.107 of the TPG "*properly designed safe harbours may significantly ease compliance burdens by eliminating data collection and associated documentation requirements*").
- Although written contracts facilitate the analysis of the transactions, a mandatory

requirement would also represent an additional administrative burden on MNEs, especially in cases where written contracts are not the industry practice for certain distribution activities (nor are required by the relevant legal framework). Consequently, ICC members recommend suggesting that **the existence of written contracts would facilitate audit activities instead of including "must" in the wording**.

- Additionally, it shall be noted that **mandatory written contracts** would also **make the application of Amount B rules more burdensome** than other transactions falling under the application of the ordinary ALP (where written contracts are not mandatory, as clarified also in footnote 2).
- Furthermore, while paragraph 87.k notes that the taxpayer can supplement agreements for terms not explicitly covered, ICC members would welcome **additional clarity on the form in which supplemental information is requested** (e.g., an appendix in the local file).
- For all these different reasons, ICC members recommend a **significant reduction of the documentation requirements, by limiting the obligation to the elements** (possibly to solely or mostly quantitative requirements) that would allow for the eligibility of taxpayer for Amount B. Further, MNEs should be permitted to use existing documentation in lieu if such documentation contains sufficient transfer pricing analysis to justify Amount B.

D. Tax Certainty

- The current structure of Amount B does not seem to increase the level of tax certainty. **Amount B heavily relies on subjective and qualitative criteria that can be easily subject to different interpretations and contrasting views, increasing the possibility of disputes**.
- Additionally, the public consultation document only confirms that an APA is theoretically available. However, ICC members are concerned that this will not guarantee sufficient tax certainty and prevent disputes from arising. Thus, some of the ICC members kindly suggest **taking into account the possibility to adapt the Amount A advance certainty framework and including a mandatory arbitration or resolution requirement to ensure that an entity is within or outside the scope of Amount B**. In such a case, they recommend doing so on a globally consistent basis so that where an MNE carries out the same functions in each of their distributors their Amount B qualification analysis will reach the same conclusion in each country.
- However, ICC members would like to underscore if well-designed, the scope of Amount B would be applicable on an objective basis and consequently, Amount B could effectively prove itself to be a useful dispute prevention tool. Thus, we welcome further developments in the design of the rules in this direction.