OECD Unveils Further Details on Amount B Simplified Approach

On 17 June, 2024 the OECD published additional guidance on key definitions related to Amount B, the OECD's initiative to simplify and streamline the application of the arm's length principle to baseline marketing and distribution activities.

The guidance provides further details on the implementation of the approach, which were omitted from the Amount B report published by the OECD in February 2024 (see KPMG report). The most important development is that five emerging markets — Argentina, Brazil, Costa Rica, Mexico and South Africa — have indicated their intention to adopt Amount B.

The OECD have noted that work on an Amount B framework, i.e. a political agreement on which jurisdictions will implement Amount B, remains ongoing as part of the broader work on the Pillar One package. Pending the finalization and implementation of any such agreement, Amount B remains optional for jurisdictions.

KPMG observation

The publication of this guidance shows that the OECD is continuing to make progress on Amount B and that irrespective of where Amount A lands, there are several significant emerging markets that are likely to adopt Amount B.

1. Covered Jurisdictions — expanded political commitment on Amount B

The Amount B report published in February 2024 included a political commitment from Inclusive Framework ("IF") members to:

- respect the outcome determined under the Amount B simplified and streamlined approach where such approach is applied by a low-capacity jurisdiction; and
- take all reasonable steps to relieve potential double taxation that may arise from the application of Amount B by a low-capacity jurisdiction where there is a bilateral tax treaty in effect between the relevant jurisdictions.

The political commitment is subject to the "domestic legislations and administrative practices" of each IF member jurisdiction. Exactly what this caveat will mean in practice is unclear: Turkey, for instance, has indicated that it can only respect a jurisdiction's application of Amount B if it has a bilateral tax treaty with that jurisdiction.

This commitment has now evolved to require that Amount B outcomes be respected when applied by a broader set of jurisdictions, referred to as "covered jurisdictions" and extends beyond those that have low tax administration capacity. The new guidance establishes three criteria to identify covered jurisdictions:

a. Low- and middle-income IF jurisdictions using the World Bank Group country classifications by income level, excluding European Union ("EU"), OECD, and G20 member countries.

b. Extended to low- and middle-income IF jurisdictions that are OECD and G20 member countries that otherwise satisfy the first criterion and that expressed to the IF a willingness to apply Amount B by March 2024.

c. Any non-IF member that meets the first criterion and expresses to the IF a willingness to apply Amount B will be added to the list of covered jurisdictions.

The additional guidance lists over 60 covered jurisdictions, including jurisdictions such as Egypt, Malaysia, Nigeria, Thailand and Viet Nam, although it is not clear that these jurisdictions will implement or apply Amount B.

Interestingly, Argentina, Brazil, Costa Rica, Mexico and South Africa (members of the G20 or OECD respectively), have all expressed a willingness to apply Amount B and hence are included in the list of covered jurisdictions.

The first five-year period of the IF political commitment runs from 1 January 2025 to 31 December 2029 and the list of covered jurisdictions will be mechanically reviewed every 5 years to re-validate their low- and middle-income status based on the latest available World Bank classifications. Some jurisdictions have indicated they may review their political commitment as it relates to the extension to low- and middle-income OECD and G20 member countries after five years, or if such countries are not signatories of the Amount A Multilateral Convention by the end of 2025.

KPMG observation

The publication of a definition of covered jurisdictions represents a step towards implementation; however, most jurisdictions appear to be waiting for further announcements on the Amount A Multilateral Convention ("MLC") before signalling whether or not they intend to implement Amount B. It is notable that significant emerging markets, such as Brazil, Mexico and South Africa, have indicated their willingness to apply Amount B.

2. Qualifying Jurisdictions for the purposes of the operating expense cross-check mechanism — addressing concerns

The operating expense cross-check mechanism is applied as a guardrail to the Amount B pricing matrix, which sets an expected operating margin as a return on sales. Having established a tentative Amount B return based on the pricing matrix, the cross-check mechanism is then applied. Where the tentative return would lead an entity's mark-up on operating expenses to drop below 10 percent (the collar rate), its return is increased vis-à-vis the tentative return. Alternatively, where the tentative return would lead an entity's mark-up on operating expenses to exceed a cap rate its return is decreased.

The standard cap rates vary between 40 percent and 70 percent based on operating asset intensity but are increased to between 45 percent and 80 percent where the tested party is located in a "qualifying jurisdiction", which was undefined in the February report. In other words, qualifying jurisdictions have a less restrictive cap and thus where the cross-check mechanism applies would be allocated a higher return. The alternative cap rates for qualifying jurisdictions were included as a compromise to address divergent views amongst IF members about the frequency with which the mechanism should apply in low-income jurisdictions.

The OECD has now published a list of over 130 qualifying jurisdictions for the purposes of the operating expense cross-check mechanism, which includes China, India, Mexico and Turkey as jurisdictions classified by the World Bank Group as low income, lower-middle income, and upper-middle income based on the latest available 'World Bank Group country classifications by income level'.

The list is to be fixed prospectively for five years and further updates will be published on the OECD website every five years.

KPMG observation

The latest OECD release on Amount B is another reminder of the compromises that are needed to build consensus. It is clear that opinions are divided amongst Inclusive Framework members on the operating expense cross-check, which is unsurprising given the divergent views of tax administrations on the application of the Berry Ratio to distributors.

3. Data availability mechanism — accounting for limited data

The term "qualifying jurisdiction" is used in a different context, and with a different list of jurisdictions, in connection with the data availability mechanism, which provides for upward adjustments to the returns provided in the Amount B pricing matrix for jurisdictions where there is no or insufficient data in the global dataset used to set the Amount B pricing matrix for a particular tested party jurisdiction and the jurisdiction is considered a 'higher risk' jurisdiction. Sovereign credit ratings are used as a proxy to determine 'higher risk' jurisdictions and to quantify the upward adjustment.

Qualifying jurisdictions are non-EU jurisdictions with: (a) a publicly available long term sovereign credit rating of BBB+ (or equivalent) or lower from a recognized independent credit rating agency, and (b) less than five comparables in the global dataset. Jurisdictions without a credit rating from a recognized agency can qualify if they are classified as low, lower-middle, or upper-middle income by the World Bank.

The list published by the OECD contains over 130 jurisdictions and whilst there is substantial overlap with the list of qualifying jurisdictions for the operating expense cross-check mechanism, some of the larger economies, including China, India, Turkey, Thailand and Vietnam do not feature on the data availability mechanism list of qualifying jurisdictions.

The list is to be fixed prospectively for five years and further updates will be published on the OECD website every five years.

KPMG observation

In most situations where it applies the data availability mechanism will provide a relatively modest uplift to the returns a distributor would be expected to earn from a transaction in scope of Amount B. But there are exceptions and in an extreme scenario an entity could see a 7.3 percent uplift to its expected operating margin. The exclusion of countries such as China and India from the mechanism limits the materiality of jurisdictions where it will apply.

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