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KPMG in the US


Mark Martin and Thomas Bettge

Amounts B and B-plus?

Mark Martin and Thomas Bettge of KPMG in the US the recent amount B consensus document and the associated compliance challenges

When the OECD/G20 Inclusive Framework on BEPS (the Inclusive Framework) made a political commitment to amount B in October 2021, it laid out two goals: simplify and streamline transfer pricing compliance, which should additionally reduce the number of transfer pricing disputes involving distribution transactions. **The partially final version of amount B released in February 2024** may provide simplification, but any streamlining is difficult to discern.

A profusion of options

Instead of offering a single model for streamlined transfer pricing compliance and enforcement, the Inclusive Framework has given its members a fractured and wide-ranging menu of options from which to select.

Jurisdictions may choose to apply amount B, or they may choose not to do so. If they choose to apply it, they can apply it as it stands as of February, or they can add on an additional, optional qualitative scoping criterion. That add-on – one might call it amount B-plus – remains under development and is slated to be published in March.

Whether a jurisdiction opts for amount B-plus or the standard amount B, it can then choose whether to make the regime available at a taxpayer's election or mandatory for all in-scope transactions. Lastly, it can choose where to set the upper quantitative bound for the quantitative scoping exercise.

That is just the list of key items that the OECD envisions would be left to local preferences. After all, amount B will not be implemented through a multilateral convention, and so jurisdictions are ultimately free to depart from or add to it in any respect they choose. A country could, for instance, make amount B binding on taxpayers but provide the local tax administration with discretion to depart from it.

Even in countries that do not adopt amount B, tax auditors may look to the amount B framework in practice (e.g., to set a de facto floor for distribution returns, notwithstanding the OECD's guidance). Businesses should therefore think carefully about amount B even where it is not formally adopted.

Analysis of the February guidance on amount B

There is much to comment on in the February 2024 release, from the welcome removal of some contemplated pricing mechanisms that would have increased local returns, to the more troubling revision of the cap-and-collar mechanism.

Yet what stands out as a challenge, for taxpayers and tax authorities alike, is the enormous potential for jurisdiction-by-jurisdiction variation. A uniform amount B regime would have replaced traditional transfer pricing compliance for in-scope distribution transactions; a fractured amount B will, in many cases, merely add to the existing compliance burden and potentially create fertile ground for transfer pricing disputes involving distribution transactions, which would be antithetical to a purpose of amount B.

This is most clear with the optionality around scoping. The prospect that the upper bound of a quantitative scoping approach could vary – between a 20% and 30% ratio of operating expenses to sales – undermines consistency of application across jurisdictions. The choice between amount B and amount B-plus compounds the problem. A jurisdiction opting for the latter would presumably do so because it believes there is a material risk that the standard amount B would apply to some transactions that, in this jurisdiction's opinion, should not be covered.

From the taxpayer's standpoint, the result will be that many transactions are in scope in a jurisdiction (country X) that applies the standard amount B but out of scope in the counterparty jurisdiction (country Y) applying the more restrictive amount B-plus. In such a case, traditional transfer pricing documentation with a benchmarking analysis would generally still be needed (because the taxpayer does not qualify for the benefits of amount B in country Y). Yet if country X applies the standard amount B on a mandatory basis, that transfer pricing documentation would be superfluous there; a country X-specific amount B compliance exercise would be needed in addition to the traditional documentation.

This is a problem for tax administrations as well. The release contemplates that counterparty jurisdictions would respect amount B when dealing with low-capacity jurisdictions, but that otherwise there would be no need for a non-adopting jurisdiction (or an adopting jurisdiction with a more restrictive approach to scoping) to respect another jurisdiction's application of amount B.

If amount B is mandatory in country X and the taxpayer reports a result inconsistent with amount B on its local return, the country X tax administration may use amount B to make a transfer pricing adjustment. But if the taxpayer then invokes the mutual agreement procedure under the bilateral tax treaty between countries X and Y, the 2024 release explains that the competent authority of country X will not be able to rely on amount B to justify the adjustment. The competent authority would then be left in the undesirable position of withdrawing an adjustment that was justified under its domestic law, or of performing additional analysis to justify the adjustment through a traditional transfer pricing lens – precisely what amount B was meant to avoid.

It is encouraging that the US continues to negotiate for a strong version of amount B. Further work will be necessary to unlock the very real benefits that amount B could provide to all stakeholders and avoid a fractured landscape for compliance and enforcement.

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KPMG in the US
Mark Martin
Principal, Washington National Tax
E: mrmartin@kpmg.com

Thomas Bettge
Senior manager, Washington National Tax
E: tbettge@kpmg.com