



Federation of European Accountants
Fédération des Experts comptables Européens

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OECD Centre for Tax Policy and
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Email: joe.andrus@oecd.org

18 September 2012

Ref.: DTA/PRJ/PWE/ACH

Dear Mr Andrus,

Re: OECD Discussion Draft on the Revision of the special considerations for intangibles in chapter VI of the OECD Transfer Pricing guidelines and related provisions

FEE¹ (the Federation of European Accountants, www.fee.be) is pleased to provide you below with its comments on selected topics of the Revision of the special considerations for intangibles in chapter VI of the OECD Transfer Pricing guidelines and related provisions.

FEE welcomes the OECD invitation to comment on the revision of the Transfer Pricing guidelines related to intangibles as this is an issue of high practical relevance for tax practitioners.

Our comments, as set out in this letter, have been referenced with the relevant section in the OECD Discussion Draft.

Chapter VI: Special Considerations for Intangibles

Regarding the purpose of Chapter VI as outlined in paragraph 2 of the Discussion Draft, we would recommend to explicitly define that the “use of intangibles” for purposes of Chapter VI includes not only licensing of intangibles but also the contribution of intangibles to the value and consequently the transfer prices of goods and services being delivered with the use of intangibles.

¹ FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 45 professional institutes of accountants and auditors from 33 European countries, including all of the 27 EU Member States. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 700.000 professional accountants, working in different capacities in public practice, small and big firms, government and education, who all contribute to a more efficient, transparent and sustainable European economy.

A. Identifying Intangibles

A.1. In general

We agree that neither the definition of intangibles for accounting purposes nor a civil law definition of the intangibles is decisive for tax purposes in the area of transfer pricing. Nevertheless, we consider the definition provided by the draft as too broad, thus not providing sufficient guidance.

Especially the statement in paragraph 7 that separate identification and transferability is not a necessary condition for an item to be characterised as an intangible for transfer pricing purposes is not assisting in providing certainty to tax payers and tax authorities. Referring to the helpful examples provided in A.4, “goodwill” is in fact the only intangible which cannot be identified and transferred separately from other business assets. “Goodwill” can only be transferred when all or a segregated part of the assets of an operating business are transferred. Moreover, the concept of an asset capable of being owned or controlled for use in commercial activities as correctly used in paragraph 5, rather require that the intangible can be identified and transferred separately.

Therefore, we would prefer that the subject of goodwill is addressed as a special issue which is only referred to for transfer pricing purposes in case a business or part of a business is sold or transferred. In all other cases the concept of “ownership or control” should require the existence of an asset which, in principle, can be identified and transferred separately.

A.4. Illustrations

We agree with the view that - as stated in paragraphs 23 – 25, group synergies, market specific circumstances and an “assembled workforce” (even if it has specific skills and knowledge) do not represent intangibles within the meaning of section A.1 of the Draft.

Under the third case of paragraph 26 it is stated that a secondment of employees may be regarded as a transfer of an intangible (valuable know-how or trade secrets) and that therefore an arm’s length compensation for such intangible may be required. With reference to paragraph 32 it should be clarified that this may only be the case when an entity could claim compensation for unauthorised use of know-how on the grounds of e.g. unfair competition legislation or similar rules or labour law in case the respective employee(s) have been transferred to an independent new employer. The mere fact that an employee is trained and knowledgeable does not mean that an intangible has been transferred; otherwise the scope of application would be far too broad and not in line with the arm’s length principle.

B. Identification of Parties Entitled to Intangible Related Returns

In paragraph 29 it is stated that when “outsourcing” certain development activities the services rendered must be compensated on an arm’s length basis. Although this statement is correct, it is unclear what consequence it has in determining which member of an MNE Group is entitled to intangible related returns.

More specifically, not adhering to the arm's length principle regarding the remuneration for a service provided should result in a transfer pricing adjustment for the service remuneration but not in an entitlement to the intangible related returns. For example, if a certain development is "outsourced" to a related party against the payment of a cost-plus based remuneration and the "plus" is considered too low by the tax authorities under a transfer pricing analysis, the transfer price will be adjusted. However, the economic (beneficial) ownership of the intangible cannot be questioned merely due to such adjustment.

B.1. Registrations and contractual arrangements

In paragraph 40, a "substance over form" approach is proposed to adjust cases where the mere legal ownership is with an entity which is not capable of fulfilling the main functions to develop, enhance, maintain and protect the intangible. On the other hand, it is rightfully accepted that an entity may outsource parts of the activities giving rise to the intangible against an arm's length consideration to related entities. However, it is then stated that the entity claiming entitlement to the intangible will "physically perform, through its own employees the important functions". Furthermore, budget control and decisions regarding defence and protection of intangibles are mentioned as indicative examples of "important functions". We doubt whether carrying out these functions through own employees or seconded employees or third parties (such as accountants or patent lawyers) are relevant in deciding the economic (beneficial) ownership of an intangible for tax purposes. In practice unrelated parties do not only use their "own employees" for the mentioned functions.

Paragraph 41 rightfully requires an arm's length remuneration for services rendered in performing functions outsourced to associated enterprises. Such remuneration will be based on the functions performed, the risks and costs borne as well as other circumstances. Any transfer pricing adjustment due to inappropriate transfer pricing for services rendered in relation to outsourced functions will not influence the allocation of economic (beneficial) ownership of the intangible for tax purposes (see our comment above on Section B, paragraph 29).

The comment made for paragraph 41 above applies for paragraph 46 as well.

C. Transactions involving the use or transfer of intangibles

C.2. Transactions involving transfers of intangibles

In our opinion, the approach used in paragraph 73 regarding business franchise arrangements is not practical. Even if under certain circumstance it might be difficult to identify comparables for a franchise fee, the solution should not be to try to unbundle the transaction into various services and intangibles and identify a price for each one. A business franchise arrangement is based on a whole business concept, a bundle, which can only be valued as a whole. Therefore, in our opinion, it is preferable to conclude on the value of such business concept by comparing the profitability of the franchisee with competitors not using such concept. Moreover, we believe that especially regarding franchising, comparables are often available.

D. Determining Arm's Length Conditions in Cases Involving Intangibles

D.1 Conducting a comparability analysis in a matter involving intangibles

We fully agree with the statement in paragraph 82, that the perspective of both parties involved in a transaction should be considered when conducting a comparability analysis. All available options for both parties to a transaction need to be properly taken into account in a comparability analysis. We believe that a more precise definition may be required for some of the comparability features mentioned in this section. For instance, the definition of useful lifetime during which an intangible can be used or expected to provide market advantages, which is a fundamental feature in a comparability analysis, is unclear and vague.

D.2. Selecting the most appropriate transfer pricing method in a matter involving the use or transfer of intangibles

In paragraph 107 it is stated that the performance of services using intangibles may have similar economic consequences to a transaction involving the transfer of an intangible or the transfer of rights in the intangible. We do not believe that this statement is completely accurate. The transfer of an intangible or the transfer of the right to use the intangible has a long-term effect to the entity using the intangible. On the other hand, the provision of a service may be valuable due to the knowledge of the service provider but it usually does not create a long-term benefit to the recipient comparable to the transfer of the intangible (or the rights to use the intangible).

As stated in paragraph 112, the use of cost-based methods is rejected for the determination of the arm's length price for intangibles. Although this may be the case generally, there are still cases where such methods can be a useful if not the only practical approach. For example, where a development at an early stage is transferred under an agreement to another unrelated party, simply because the entity that initiated the development does not have the resources to complete and further exploit the development on its own. In such cases, unrelated parties may tend to base the remuneration on a cost-plus based approach.

D.4 Determining arm's length prices for transactions involving the transfer of intangibles or rights of intangibles

In this section, detailed valuation techniques are described to determine the value of an intangible if no comparables can be found. Whether an OECD guideline should be of such detail is a matter that should be further considered. However, it would be helpful also to refer to methods used by civil courts or professional arbitrators to determine a fair license fee e.g. when an entity has made unauthorised use of intangibles of another entity. These court decisions or arbitration rules may be based on unfair competition laws or similar laws protecting the rights of the owner of the intangible. Such decisions could provide an unrelated party approach, as civil courts and arbitrators aim to identify a "fair" license fee. We would recommend drawing on court cases in OECD member states or methodology recommended by professional arbitration bodies in order to get an indication on whether the detailed valuation techniques described are not in contradiction to those rules applied in practice.



Thank you for the opportunity to comment on the Discussion Draft and for the extension of the deadline.

For further information on this letter, please contact Mrs Petra Weymüller, FEE Senior Manager at +32 (0)2 285 40 75 or via email at petra.weymuller@fee.be.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Philip Johnson', with a long horizontal flourish extending to the right.

Philip Johnson
FEE President