



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT



**AGENDA FOR THE OECD CONSULTATION ON THE DISCUSSION
DRAFT ON THE TRANSFER PRICING ASPECTS
OF BUSINESS RESTRUCTURINGS**

9-10 JUNE 2009

Paris



CENTRE FOR TAX POLICY AND ADMINISTRATION

**CONSULTATION WITH THE ORGANISATIONS THAT PROVIDED COMMENTS ON THE
SEPTEMBER 2008 DISCUSSION DRAFT ON THE TRANSFER PRICING ASPECTS OF
BUSINESS RESTRUCTURINGS**

9TH-10TH JUNE 2009 AT THE OECD CONFERENCE CENTRE IN PARIS

1. In September 2008, the OECD Committee on Fiscal Affairs released for public comment a discussion draft on the transfer pricing aspects of business restructurings that was produced by Working Party No. 6 on the Taxation of Multinational Enterprises (“WP6”). Comments on the discussion draft were received from 37 organisations (see www.oecd.org/ctp/tp/br).

2. A consultation between WP6 and the organisations that provided comments on the discussion draft will be held at the OECD Conference Centre on **9th-10th June 2009**.

Objectives of the consultation and proposed agenda

3. The objectives of the consultation are for business commentators to be given the opportunity to orally explain some of their arguments to WP6 Delegates and for the latter to obtain clarification of the arguments raised to the extent needed.

4. Given the number of issues addressed by commentators and the variety of positions expressed on some of them, it will not be possible to discuss all the points raised in the comments received. The attached agenda was prepared with the objective of focussing the consultation on the issues that would most greatly benefit from a face-to-face discussion. The decision whether or not to include particular issues in the agenda for the consultation does not reflect any agreement or disagreement on the comments received in relation to those issues. WP6 has not finalised its views and will therefore not be in a position to provide OECD answers at the consultation.

5. For each agenda item, the Chair, a WP6 Delegate or the Secretariat will give, on behalf of the OECD, a brief introduction of the position in the discussion draft and highlight the questions on which input from business representatives is particularly sought. Depending on the sessions, designated business commentators will then be invited to explain their views as indicated in the attached agenda. Time will be kept for discussion with participants on each of the agenda items.

6. The consultation will be held in English with no interpretation provided.

**AGENDA FOR THE OECD CONSULTATION ON THE DISCUSSION DRAFT ON THE
TRANSFER PRICING ASPECTS OF BUSINESS RESTRUCTURINGS
ORGANISED BY WORKING PARTY No. 6 OF THE COMMITTEE ON FISCAL AFFAIRS**

**9-10 June 2009 at the OECD Headquarters
OECD Conference Centre
2, rue André Pascal, 75016 Paris, France**

Chair:

Mr. David Ernick, Chair of Working Party 6's Special Session on Business Restructuring

9 June 2009	
Morning: General themes	
08:30 – 09:00	Registration
09:00 – 9:20	<p>Welcome, Overview and Ground Rules</p> <ul style="list-style-type: none"> • David Ernick, Chair of Working Party 6's Special Session on Business Restructuring • Pat Ellingsworth, Chair of the BIAC Tax Committee
9:20 – 9:45	<p>Business restructuring: uncertainties and risks of double taxation</p> <ul style="list-style-type: none"> • <i>Assessing the scale of the risks of double taxation in practice</i> • <i>Lack of consensus: way forward</i> • <i>Subjective norms: how to improve the discussion draft</i> <p>Introduction on behalf of the OECD:</p> <ul style="list-style-type: none"> • David Ernick, Chair of Working Party 6's Special Session on Business Restructuring <p>Designated commentators:</p> <ul style="list-style-type: none"> • Johann Müller, Alexander Kölbl (Tax Executives Institute) <p>Questions and answers</p>
9:45 – 10:15	<p>Documentation issues</p> <ul style="list-style-type: none"> • <i>Role of transfer pricing documentation in general and for business restructurings in particular</i> • <i>Types of relevant documentation available for non-tax purposes in relation to business restructurings</i> <p>Introduction on behalf of the OECD:</p> <ul style="list-style-type: none"> • Ronald van den Brekel (The Netherlands)

9 June 2009

Morning: General themes

	<p><i>Designated commentator:</i></p> <ul style="list-style-type: none">• Pat Ellingsworth (BIAC) <p><i>Questions and answers</i></p>
10:15 – 11:15	<p><i>Members of an MNE versus independent enterprises</i></p> <ul style="list-style-type: none">• <i>Decision-making processes within MNEs versus independent enterprises</i>• <i>Reconciling group behaviour with requirements of the arm's length principle</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">• Michelle Levac (Canada) <p><i>Designated commentator:</i></p> <ul style="list-style-type: none">• Ian Brimicombe (AstraZeneca) <p><i>Questions and answers</i></p>
11:15 – 11:45	<p><i>Refreshment break</i></p>
11:45 – 13:00	<p><i>Options that would have been realistically available at arm's length</i></p> <ul style="list-style-type: none">• <i>Is the notion too subjective and if so how can the draft be improved in this respect?</i>• <i>Compliance burden</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">• Michael Mc Donald (United States) <p><i>Designated commentators:</i></p> <ul style="list-style-type: none">• Jeffrey Neuenschwander, Edward Morris (Deloitte)• Steeff Huibregtse (Transfer Pricing Associates) <p><i>Questions and answers</i></p>
13:00 – 14:30	<p>LUNCH BREAK</p>

9 June 2009

Afternoon: Arm's length compensation for the restructuring itself

14:30 – 15:15	<p><i>Business restructuring as a taxable event: causing realisation</i></p> <ul style="list-style-type: none"><i>In what cases would a restructuring be compensated at arm's length?</i><i>Examples of business restructurings that trigger a transfer of "profit potential" with no transfer of tangible assets, intangible assets or enforceable rights</i><i>At arm's length, would only legally protected intangibles be remunerated?</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">Lee Corrick (United Kingdom) <p><i>Designated commentators:</i></p> <ul style="list-style-type: none">Linda Fernandez, Steven Hannes (Transfer Pricing Discussion Group) <p><i>Questions and answers</i></p>
15:15 – 16:15	<p><i>Profit/loss potential; goodwill; on-going concern</i></p> <ul style="list-style-type: none"><i>Differences among the notions of "profit/loss potential"; "on-going concern" and "goodwill" in the discussion draft</i><i>Practical implications: discussion of two fact patterns (i) Conversion of a full-fledged distributor into a limited-risk distributor and (ii) Transfer of an activity (defined as a bundle of assets and liabilities associated with performing particular functions, including the inherent risks)</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">Michelle Levac (Canada) <p><i>Designated commentators:</i></p> <ul style="list-style-type: none">Andrew Cousins (Cadbury) <p><i>Questions and answers</i></p>
16:15 – 16:45	<p><i>Refreshment break</i></p>
16:45 – 18:00	<p><i>Indemnification of a restructured entity</i></p> <ul style="list-style-type: none"><i>Discussion of the proposal at paragraph 102 of the discussion draft regarding the circumstances to consider when determining whether an indemnification would be warranted at arm's length</i><i>How to reconcile (i) the differences in decision-making processes, options available and formalization of contracts within MNE groups compared to those of independent parties; with (ii) the view expressed by commentators that tax administrations should not deem rights or obligations, and in particular indemnification rights, unless provided for in contracts</i><i>Does the discussion draft broaden the situations where there would be indemnification at arm's length?</i>

9 June 2009

Afternoon: Arm's length compensation for the restructuring itself

- *Discussion of the examples at paragraphs 51 and 109 of the discussion draft*

Introduction on behalf of the OECD:

- [Ronald van den Brekel \(The Netherlands\)](#)

Designated commentators:

- Ian Brimicombe (AstraZeneca)

Questions and answers

10 June 2009

Morning: Issues related to risks

9: 00 – 9:30

General approach to risk allocation and risk transfers

- *Role of documentation and of comparables*
- *Cases where there are no reasonably reliable comparables: role of the notions of “anticipated financial capacity to bear risk” and “control over risk”*

Introduction on behalf of the OECD:

- [Ronald van den Brekel \(The Netherlands\)](#)

Designated commentators:

- [Clark Chandler and Christian Looks \(KPMG\)](#)

Questions and answers

9: 30 – 9:45

Anticipated financial capacity to bear the risk

- *Why the OECD regards this notion as a valid one and how to use it*
- *What should the notion encompass: financial capacity to bear the full consequences of the risk materialising or capacity for a party to protect itself from the consequences of the risk materialising (e.g. through an insurance or hedging mechanism)?*

Introduction on behalf of the OECD:

- David Ernick, Chair of Working Party 6's Special Session on Business Restructuring

Questions and answers

10 June 2009

Morning: Issues related to risks

9:45 – 11:15	<p>Control over risk</p> <ul style="list-style-type: none">• <i>Definition of control: notion of responsibility; role of performance measures</i>• <i>Implications of “virtual management structures”</i>• <i>Capacity to make decisions to take on the risk and capacity to make decisions on whether and how to manage the risk: are these cumulative or alternative criteria?</i>• <i>Examples of cases where, at arm’s length, a risk that is controlled by a party is transferred to / borne by another party that does not control it</i>• <i>Capacity to assess the outcome of the day-to-day monitoring and administration functions by the service provider</i>• <i>Are different types of control exercised on different types of risks (e.g. investment risk / operational risk)?</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">• Maura Parsons (United Kingdom) <p><i>Designated commentators:</i></p> <ul style="list-style-type: none">• Chris Faiferlick, Robert Miall (Ernst & Young)• Astrid Pieron (Mayer Brown) <p><i>Questions and answers</i></p>
11:15 – 11:45	<p>Refreshment break</p>
11:45 – 12:45	<p>Can risks be re-assigned under TPG 1.27?</p> <ul style="list-style-type: none">• <i>Relationship between TPG 1.26-1.29 and TPG 1.36-1.41: theoretical framework</i>• <i>Practical consequences of risks being re-assigned under TPG 1.27 or TPG 1.37</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">• Michael Mc Donald (United States) <p><i>Designated commentators:</i></p> <ul style="list-style-type: none">• Andreas Bullen (University of Oslo)• Carol Dunahoo, Gary Sprague (Treaty Policy Working Group) <p><i>Questions and answers</i></p>
12:45 – 14:15	<p>LUNCH BREAK</p>

10 June 2009

Afternoon: Recognition of actual transactions undertaken

14:15 – 15:00	<p><i>The notion of “exceptionality” and the preference for pricing solutions</i></p> <ul style="list-style-type: none">• <i>Scope of the OECD project: exclusion of domestic anti-abuse rules</i>• <i>Does the discussion draft expand the situations where a tax administration may disregard / recharacterise a transaction?</i>• <i>Extent of recharacterisation issues in practice</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">• Michelle Levac (Canada) <p><i>Designated commentators:</i></p> <ul style="list-style-type: none">• Paul Flignor, Lyn Walker (USCIB) <p><i>Questions and answers</i></p>
15:00 – 15:45	<p><i>The notion of “economic substance”</i></p> <ul style="list-style-type: none">• <i>Meaning in the context of TPG 1.26 and TPG 1.37</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">• Lee Corrick (United Kingdom) <p><i>Designated commentator:</i></p> <ul style="list-style-type: none">• Andreas Bullen (University of Oslo) <p><i>Questions and answers</i></p>
15:45 – 16:15	<p><i>Refreshment break</i></p>
16:15 – 17:15	<p><i>The notion of “commercially rational behaviour”</i></p> <ul style="list-style-type: none">• <i>Lack of consensus in the discussion draft: way forward</i>• <i>Discussion of “commercially rational behaviour” in the discussion draft: Is the notion too subjective and if so how can the draft be improved in this respect? Examples of situations that are clearly not commercially rational</i>• <i>Should commercial rationality be tested at group or entity level?</i> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">• Michael Mc Donald (United States) <p><i>Designated commentators:</i></p> <ul style="list-style-type: none">• Joseph Andrus, Isabel Verlinden (PricewaterhouseCoopers)• Jos Beerepoot (VNO-NCW) <p><i>Questions and answers</i></p>

10 June 2009

Morning: Issues related to risks

17:15 – 17:50	<p><i>Discussion of the examples at paragraphs 214-221 of the discussion draft</i></p> <p><i>Introduction on behalf of the OECD:</i></p> <ul style="list-style-type: none">• Karen Miller (South Africa) <p><i>Designated commentators:</i></p> <ul style="list-style-type: none">• Jennifer Rhee (RSM Richter) <p><i>Questions and answers</i></p>
17:50- 18:00	<p><i>Closing remarks. Way forward</i></p> <ul style="list-style-type: none">• David Ernick, Chair of Working Party 6's Special Session on Business Restructuring