



OECD
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Subject
Consultation - Transfer Pricing Aspects
of Intangibles

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Dear Jeffrey,

VNO-NCW is pleased to have the opportunity to provide input as solicited for on the Transfer Pricing Aspects of Intangibles. At this point in time our members have indicated that they do not (yet) face material issues regarding IP, although we do recognize that this has been different for other entities (GSK case) and that there is significant ambiguity that could lead to material issues. If the OECD is going to consider follow up, the following aspects have (at least) to be considered and unambiguously decided.

1. Definition of intangibles

Whilst it is recognized that a formal definition of intangibles may be difficult to construct, the OECD is requested to provide clarity on when an intangible is recognized. The following considerations play a role.

- **Intangibles and legal protection**
Legal protection that is registered (e.g. in the form of a patent or copyright) is not a requirement for an intangible to be recognized. Other non protected value drivers in the business, e.g. a trade secret or know how, could be recognized as an intangible.
- **Functions that lead to an intangible**
Guidance is requested on what functions or activities could lead to the creation of an intangible versus the functions or activities that will not lead to an intangible.

- **Base and incremental intangible**
Guidance is requested on when an intangible is regarded a base or platform intangible and at what point subsequent activity undertaken leads to an incremental intangible. Additionally, guidance is requested how to value both forms of intangibles. Guidance should be provided on distinction between generation technology (first or second etc) and/ or value or treatment of IP in different stages development.
 - **Elements that do not automatically constitute an intangible**
Further guidance is requested to confirm that certain elements of a MNE do not constitute IP such as Human capital, employees moving on to other responsibilities within an MNE and/or profit potential.
 - **Local marketing vs Global marketing intangibles**
Further unambiguous guidance is requested on what triggers the development of local marketing intangibles. The mere execution of a global marketing policy should not lead to a local marketing intangible.
 - **Routine Intangibles**
Guidance should be provided on what a routine intangible is. Traditionally the distinction could be made between routine (resulting in a routine remuneration that can be benchmarked) and intangible (resulting in above routine remuneration). A routine intangible appears to be “something in between”. If the concept of a routine intangible is formalized, guidance should be provided on what the difference is with routine and a “real” intangible. Furthermore, guidance should be provided on what TP methods would be appropriate to test remunerations for a “routine intangible”.
- 2. Intangibles in a MNE environment**
- A MNE has the freedom to design its own business model. No tax authorities can prescribe the structure of an organization. These structures are subject to change in reaction to changes to the external environment, shift in strategy or other factors of influence. Therefore, a MNE may choose to centralize or de-centralize its IP, choose to operate contract R&D or other business models involving IP. Guidance is required that confirms the autonomy of a MNE to structure its business as it sees fit, including IP. Furthermore, guidance is requested on when contract R&D is appropriate.

3. Transfer price/valuation of intangibles

- **Methods**

It is suggested to formalize in the Guidelines current practice on methods for valuation of intangibles such as the *income, cost and market approach*. Additionally, guidance is requested on when either method is deemed most appropriate.

- **Application of Profit Split Method (PSM)**

Clarity and/or further guidance is requested on the application of the PSM when used to set the transfer price for intangibles (e.g. guidance on appropriate allocations keys).

- **Hindsight**

In the context of valuation methodologies that use forecasted data, it is requested to reconfirm that hindsight by tax authorities is not allowed when testing a transfer price.

- **Price adjustment clause**

Clarity is requested that tax authorities cannot force the application of price adjustment clauses when testing transfer prices in case of valuation uncertainties.

- **Options realistically available**

Clarity is requested that MNEs regarding a transfer of intangibles are not expected to consider all options realistically available, given that MNEs do not operate their business in such way and this will lead to business processes being severely hindered and delayed.

4. Cost sharing

- Cost Sharing systems are widely used to develop IP/technology; however cost sharing systems are also applied to share the costs of services. In case the work on IP results in changes to chapter 8 of the OECD guidelines, it should be ensured that under OECD, the sharing of services is still specifically mentioned and supported.

5. Administrative burden

- When providing guidance on the above topics, the OECD is encouraged to additionally provide guidance on the documentation requirements as the lack clarity has proven to lead to an excessive administrative burden.

6. How could further guidance be provided?

- Guidance is probably most useful when supported by complicated, real life examples that address the complicated areas such as the process of IP/Technology development (including phases of IP development, cost incurred, and functions performed), questions on TP methods and valuations, etc
- If requested VNO-NCW is prepared to assist in developing such examples, in order to develop the most valuable guidance in the adjusted OECD chapters.

Sincerely yours,

Jos Beerepoot
Chairman of the Tax Committee
VNO-NCW

Pieter Dijckmeester
Director Fiscal Affairs
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