

COMMENTS ON THE SCOPING OF THE PROJECT ON THE TRANSFER PRICING ASPECTS OF INTANGIBLES

For clarity purpose, these comments will follow the order of the four questions raised by the invitation of the OECD.

- *Most significant issues encountered in practice in relation to the TP aspects of intangibles*

Among the obvious issues already mentioned in the invitation (definition, identification and valuation) we believe that the starting point of the project should be the definition of intangibles (or more precisely of “intangible assets”) from a Transfer Pricing perspective.

As the concept of intangibles is extensively utilised in quite various areas, such as e.g. accounting standards, financial reporting, business research, commercial law, tax law etc. with very different perspectives and purposes, there is a large range of definitions of intangibles. Then arises the question : which references might be used, if any, and which ones should be excluded for determining the most consensual definition of intangible assets for Transfer Pricing purposes ? Currently we can see that various trends influence definitions that are included in some tax regulations. Typically Section 482-4 of the IRC already enlarges the concept by incorporating some items generally analysed in the field of business research, and this trend is probably expanding with discussions around “soft intangibles” such as “human capital” or “organisational capital”. In other jurisdictions, tax rules and definitions continue to be in line with the prevailing accounting standards, often more conservative in their conception of intangibles. In our view a consensus should be searched around the current definition of intangibles of § 9.80 of the new Chapter IX of the OECD TP guidelines, maybe with further precisions concerning the limits of this definition.

- *Shortfalls, if any, in the existing OECD guidance*

The new Chapter IX of the OECD TP guidelines has introduced useful developments on the transfer of intangibles (and more generally on the transfer of “something of value”) in Part II, specifically (but not exclusively) in Section D. Although introduced in the context of TP aspects of Business Restructurings, most of these developments could be relevant as well in all TP issues relating to intangibles. To a certain extent they are superior to the existing provisions of Chapter VI, because either they are clearer and more practical, or they cover additional issues of obvious interest (e.g. transfer of activity, outsourcing, termination of existing inter company arrangements). In comparison Chapter VI contains certain developments that are sometimes a little obsolete, redundant or useless, suggesting that they could be updated or even deleted. Also a better consistency between some principles mentioned in the two chapters could be achieved to avoid any confusion or misinterpretation (e.g. § 6.18 and § 9.14).

- *Areas in which the OECD could usefully do further work*

One serious concern of MNEs is that, despite the huge work of OECD to reach consensus on guidelines permitting to avoid or minimise risks of double taxation in the field of Transfer Pricing, not all jurisdictions, even members, ancient or new, of the OECD, incorporate these guidelines in their local regulations, and some of them may significantly deviate from the guidelines. Recognising the Arm's Length Principle is not sufficient and international guidelines, effectively endorsed by OECD members, are really needed to apply this principle in an efficient manner. This is a serious issue, particularly concerning transfer pricing aspects of intangibles.

Our suggestion would therefore be that the OECD actively continue and re-enforce the monitoring process, initiated some years ago. Although we recognise that OECD is not entitled to take binding measures against jurisdictions that may deviate from the guidelines, an active monitoring based on pedagogy and political conviction might be very beneficial to avoid some disputes.

A specific attention should be given to the importance of being compliant with the guidelines during the discussions with jurisdictions that are candidates to the OECD membership. And there is an actual time pressure for this action, as emerging countries are particularly sensitive to Transfer Pricing issues (often even more than some developed countries). They have very quickly understood what is at stake with transfer pricing and are well-advanced in the knowledge of its functioning and techniques, and finally they seem to be firmly decided to use this knowledge to serve their interests at the best. Trying to convince them that achieving a consensus on this topic should not be detrimental for them, but beneficial to the global economy, and should guarantee their fair part of the global revenue, should be a priority.

If no progress is made rapidly, we are at risk of seeing a multiplication of unilateral initiatives, possibly in contradiction with the consensus in progress. As an example the Indian authorities have on their short term agenda normative rules for valuation of intangibles, probably including services like market development. Even if they recognise the Arm's Length principle, there is no certainty that these regulations will be in line with the current, and of course future, transfer pricing guidelines.

In both cases, intensification of multilateral discussions on this hot topic might be the best and possibly unique way to minimise future huge transfer pricing disputes. And the OECD is certainly the most effective organisation to achieve significant results in that area.

- ***Format of the final output of the OECD work***

Besides the monitoring and discussion process mentioned above, and regarding the two first questions, the format of the output might be limited to a rewriting of Chapter VI by importing and merging elements of the new Chapter IX in a consistent manner, subject of course to the conclusions of this project, and assuming that current provisions of Chapter IX regarding intangibles would not be substantially modified in a new direction, but rather completed, if necessary. In that case current provisions concerning intangibles in Chapter IX could be quite shortened or even replaced by references to new Chapter VI. In this manner Chapter IX would also be more focussing on the transfer pricing aspects specific to business restructurings.