Confederation of Danish Industry

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Mr Jeffrey Owens
Director, Centre for Tax Policy & Administration
Organisation for Economic Co-operation and Development
2, rue André Pascal
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France

Via e-mail: jeffrey.owens@oecd.org

Dear Mr Owens,

The Confederation of Danish Industries (DI) is grateful for the OECD's invitation to comment on the scoping of its future project on the Transfer Pricing Aspects of Intangibles (the Project).

Introduction

Starting at the backend, some of the consequences of this Project will be a heightened global awareness of intangibles, potentially leading to more tax disputes; more deemed transfers and more anti abuse measures. Potentially any open ends in definitions and qualifications will also lead to different interpretations and ultimately double taxation. This effect could be worsened if the outcome of the Project is not supported by non-OECD members or the UN[1], e.g. because of (perceived) complexity and/or a limitation on source taxation. DI supports a project aimed at mitigating such effects.

The overarching mandate of the CFA includes "the development of effective and sound tax policies and guidance that will foster growth"[2]; this mandate is an extension of the work of the Organisation for European Economic Co-Operation's Fiscal Committee, which was created because it was considered that "double taxation creates obstacles to the development of international trade and payments"[3]. Simultaneously, DI acknowledges the tax governance required by the Guidelines for Multinational Enterprises as annexed to the Declaration on International Investment and Multinational Enterprises[4]. Finally, we refer to the Recommendation of the Council on the Determination of Transfer Pricing between Associated Enterprises

[1] See in this regard the UN rejection of the "Authorised OECD Approach" of Allocation of Profit to Permanent Establishments.
[2] Resolution of the Council on the Mandate of the Committee on Fiscal Affairs [C(2008)147 and CM(2008)20, item 285], Decision 1 i) a).
[3] Resolution of the Council of the Organisation for European Economic Co-Operation, creating a Fiscal Committee, as adopted by that Council at its 321st Meeting on 16th March, 1956.
[4] Declaration of the "Adhering Governments" on International Investment and Multinational Enterprises of 27 June 2000 – C/M(2000)17.

and in particular its consideration of the need for consistency in the determination of income and expenses[5].

OECD Questions

The OECD invites input on:

- the most significant issues encountered in practice on intangibles and transfer pricing;
- identifying shortfalls in existing OECD guidance;
- areas in which the OECD could do useful further work; and
- the format of the final output of the Project.

DI's comments pertain to first three bullets in general.

DI's comments

DI supports the comments other industry groups, such as BIAC and TEI, are making on the need to identify intangibles, need to identify the owners of intangibles for tax purposes, and on the wish for further guidance on the valuation of intangibles. In addition, DI believes that this Project should make the avoidance of double taxation just as much a priority as the avoidance of non-taxation.

Before it is possible to expand on the avoidance of double taxation, it is necessary to make an additional comment on the valuation of intangibles.

Valuation of intangibles

DI believes that a discussion on the valuation of intangibles needs to be preceded by the (more difficult?) question of the allocation of income to intangibles. Once the income allocable to an intangible has been identified, the valuation of that intangible should be an easier exercise. It is more in line with the fundamentals of the arm's length principle to allocate the income/benefit first, before determining a price/value. For example, if A transfers an intangible to B, why would B pay the cost price of 100 of that intangible, when the (future) income allocable to that intangible is not expected to exceed 50.

This seemingly logical approach does have consequences. One is the possible elimination of different valuation methods between "low value" and "high value" intangibles.

Elimination of double taxation

It will be fair to say that taxpayers should generally not mind where they pay tax, as long as they pay it once only. This requires the Project to produce clear guidance on the taxation of intangibles, which does not lead to differences in determining:

- what an intangible is;
- who benefits from the income from an intangible (ownership) and who should pay for acquiring/using an intangible; or
- what the value of that intangible or the use of that intangible should be.

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[5] Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises as amended through 28 October 1999 – C(99)138.

In addition there should be a backup mechanism bringing tax authorities to an agreement on any difference on the above, rather than to settle for partial double taxation and the objectionable acceptance of obstacles to the free movement of goods, services and capital between countries[6]. We invite the Project to explore simple, practical means of achieving this, such as suggesting informal face to face meetings between both the authorities involved and the taxpayers involved to get all facts and concerns above the table. Where none of the parties involved have hidden agendas, such meetings will prove to be powerful and efficient solutions.

What an intangible is

What intangibles are can be determined both by definition (positive or negative), or by a description of typical case studies. DI's observations in this regard are:

- the more inclusive the Project scope is, the more useful the guidance will be;
- unless they help in identifying intangibles, categorising intangibles does not make sense, if the categories are treated the same for tax purposes[7];
- an essential part of identifying intangibles for tax, will be identifying their transferability: Both taxpayers and tax authorities need to know if, and when intangibles can be sold/moved.

Who benefits and who pays

Governments need to agree on who receives income from intangibles and who pays for those intangibles. Not only should the amount (deemed to be) received match the amount (deemed to be) paid, but, as a rule, the treatment of those receipts/payments should be mirror images of each other: One should be taxable and the other tax deductible/depreciable. DI does not agree to any notion that the treatment of these payments is a matter of national (anti-abuse) taxation outside the scope of the CFA, as such a notion has the effect of easily rendering toothless all previous OECD mandates, considerations and decisions mentioned in this paper. This is not aligned with the good faith the Vienna Convention on the Law of Treaties[8] requires.

The value of intangibles

We discussed the allocation of income to intangibles above. In addition, we suggest the following related reality check to minimise the risk of double taxation. The income allocated to different intangibles of members of a group need to be related to the actual income accumulated by that group to ensure that the allocated income does not exceed the real income generated. This approach implies two different exercises: First, it requires that <u>all</u> the intangibles of the relevant group members involved are identified, in order to be certain that the income allocated to those intangibles does not exceed 100% of the realised income; second, it requires that the

[6] Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises as amended through 28 October 1999 – C(99)138, fourth paragraph.

[7] See in this regard Chapter VI of the 2009 Edition of the Transfer Pricing Guidelines, which discusses the differences between commercial intangibles, trade intangibles, marketing intangibles and know-how and trade secrets, without necessarily giving clear guidance on how these should be treated different for transfer pricing purposes.

[8] Vienna Convention on the law of treaties, conclude 23 May 1969 in Vienna, articles 26 and 31.

relevant income and costs of the group members be consolidated and allocated to the different value drivers (such as labour, marketing, etc.) to do the check. We believe that such an approach would be in line with the current OECD guidance given on (residual) profit split methods and the treatment of unique intangibles[9].

DI would be happy to discuss any of the above in further detail, should this be desired. Please contact Mr Johann Müller at +45 3363 4374 (or johann.muller@maersk.com) or the undersigned at +45 3377 3563 (or lni@di.dk).

Yours sincerely,

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Legal Advisor

[9] Chapter III B i) of the 2009 edition of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.