

OECD: Scoping of its Future Project on the **Transfer Pricing Aspects of Intangibles**

A response from Grant Thornton UK LLP

Introduction

Grant Thornton UK LLP (Grant Thornton) welcomes the opportunity to respond to the OECD's request for comments on the scoping of its future project on the transfer pricing aspects of intangibles. The members of Grant Thornton's Transfer Pricing Group have in depth knowledge and experience of transfer pricing issues facing international businesses.

Grant Thornton welcomes the OECD's efforts in addressing some of the long-standing concerns that taxpayers and their advisers have expressed regarding transfer pricing issues arising from the ownership or development of intangibles. Furthermore, the timing of this proposed project is particularly helpful given the rapidly changing global business environment in which the role and importance of intangibles are increasing.

Our response below considers each of the four specific questions raised in turn.

Response to Specific Queries

We have set out our responses to the OECD's specific queries, using the order of questions shown in the OECD briefing document.

1. What they see as the most significant issues encountered in practice in relation to the transfer pricing aspects of intangibles.

Based on our wider experience, we consider the following points (in no particular order) to be the most significant issues we encounter in practice when advising our clients in respect of the transfer pricing aspects of intangibles:

- Consideration of when an intangible is low value and routine and what makes it high value and non-routine, with the transfer pricing implications that follow from that analysis
- The transfer pricing implications of where intangibles are provided to associated enterprises through a 'bundled' transaction with goods or services. Specifically, issues around the need, or otherwise, to 'unbundle' the pricing of such transactions in order to demonstrate that arm's length pricing has been applied
- The transfer pricing treatment of cases where one group company legally owns an intangible whilst another group company is the economic owner. Furthermore, the transfer pricing implications of where one group company (eg a parent company) legally and economically owns the intangible but say, an overseas distributor has marketed the branded products for many years in their local territory with a resulting strong local following
- The practical issues around Cost Contribution Arrangements including practical ways to calculate buy-in and buy-out payments
- The circumstances in which the provision of a service, (for example when an individual employee of one group company seconds to another group company to establish a new operation or assist in a factory set up), becomes the provision of an intangible

2. What shortfalls, if any, they identify in existing OECD guidance

Since the original drafting of the Chapters on intangibles in the OECD Transfer Pricing Guidelines, the environment in which many multi national corporations operate has changed such that the value of these businesses is now more often attributed to their intangible assets rather than their buildings and equipment. Furthermore, the trend towards

globalisation and market consolidation along with an increasing interest by tax authorities in the role of intangibles in determining arm's length outcomes, has made the need for more detailed OECD guidance in this area a top priority for many taxpayers.

We would welcome more guidance on the transfer pricing treatment of the examples in our answer to 1 above and we would also mention the following:

- Given that accounting standards typically ignore unprotected intangibles there is a need for an agreed definition of what is an intangible, particularly in respect of what are generally referred to as 'soft' intangibles. These would be intangibles that cannot be sold or traded, such as the collective quality of a workforce, the reputation of the business in the market, the relationships the business has with customers and suppliers as well as the quality and experience of the management team etc
- In our experience, tax authorities may determine when an intangible has been created and under what circumstances it is considered to have been transferred to another group company, in different ways in each country. There is a pressing need for agreed principles as to when an intangible is created and when that intangible is considered to have been transferred between related enterprises.
- Commentary on a 'commensurate with income' approach versus an ex ante approach to transfer of intangibles would also be helpful.

3. What the areas are in which they believe the OECD could usefully do further work

The brevity of Chapter VI of the OECD Guidelines is such that it cannot cover all the complexities and issues associated with intangibles transfer pricing. Whilst we do not suggest that the arm's length concept needs a different interpretation, we consider that there is a need for a much more detailed explanation of how those necessarily broad concepts can be applied in practice. Areas for further work could therefore include:

- The limited availability of good quality benchmarking data with which to test the arm's length nature of a transaction in intangibles means that meaningful benchmarking analysis is difficult to perform. Guidance from the OECD setting out what is acceptable in this regard, from a practical perspective, would be welcome.
- Given the recent approval of the Business Restructuring Chapter in the OECD Transfer Pricing Guidelines, it would be helpful to have additional guidance on the issue of intangibles in a business restructuring context. For example,
 - guidance on the treatment of intangibles where it is unclear as to whether a future business restructuring opportunity represents part of the existing goodwill of the business or a new intangible yet to be created and exploited
 - the extent to which unprotected intangibles could be treated differently from registered intangibles and the potential to treat such unprotected intangibles as separate assets from the business goodwill.

4. What they believe the format of the final output of the OECD work should be

The transfer pricing aspects of intangibles is a large and complex area and it is likely that many commentators will want to respond to the Working Party No.6's findings on this project. Given the importance of this topic and the potentially divergent views that exist in respect of the topics that are likely to be covered, we would like to see:

- a detailed scope of this project, made publicly available, to address the key concerns of those parties that have responded to this scoping consultation. If there are to be topics that are specifically excluded from the project then these should be explained in order to manage the expectations of commentators as to the final output of the project
- an initial consultation paper widely circulated for comment from interested parties including tax authorities, advisers, businesses, industry groups etc. This paper would set out Working Party No. 6's initial conclusions on the topic but would highlight areas requiring further consideration

- a revised consultation paper, in the event that there are significant divergent opinions expressed on the initial draft consultation paper. It would be helpful to see the suggested revisions to the text currently in Chapters VI and VIII to the OECD Transfer Pricing Guidelines so that these too may be commented upon
- agreed changes to the OECD Transfer Pricing Guidelines, which could involve updates to Chapters VI and VIII as well as potentially more minor updates to the sections on comparability analysis, the glossary etc.

Questions about this response can be addressed to:

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