BIAC THE VOICE OF BUSINESS AT THE OECD

ACTIONS 8-10: TRANSFER PRICING

Background Documents:

OECD Discussion Draft (Intangibles):	July 30th, 2013
OECD Discussion Draft (Low value adding services):	November 3rd, 2014
OECD Discussion Draft (Profit splits):	December 16th, 2014
OECD Discussion Draft (Commodities):	December 16th, 2014
OECD Discussion Draft (Risk recharacterisation):	December 19th, 2014
OECD Discussion Draft (Cost contribution arrangements):	April 29th, 2015
OECD Discussion Draft (Hard to value Intangibles):	June 4th, 2015
BIAC Response (Intangibles):	September 30th, 2013
BIAC Response (Low value adding services):	January 14th, 2015
BIAC Response (Profit splits):	February 6th, 2015
BIAC Response (Commodities):	February 6th, 2015
BIAC Response (Risk recharacterisation):	February 6th, 2015
BIAC Response (Cost contribution arrangements):	May 29th, 2015
BIAC Response (Hard to value Intangibles):	June 18th, 2015
OECD 2015 Report:	October 5th, 2015

Last updated: 27 June 2016

TOPIC	BIAC COMMENTS	OECD RESPONSE
Low value adding services – comments on 3 November 2014 draft	1. No specific guidance on high value adding services.	Comment not acknowledged. No specific guidance provided.
	2. Recharge of routine services under the ALP should not be referred to as "Base eroding" as these are typically provided from a high tax jurisdiction and recharged at a profit in line with ALP.	Report wording amended. Final Report removes references to management fees and Head Office payments being base eroding.
	3. Absence of a concerted approach among countries regarding treatment of service charges leading to increased double taxation.	Noted in the Executive Summary that application of the ALP should prevent double taxation and report refers to work under Action 14 to resolve double taxation issues.
	4. OECD should specifically address issues relating to deductibility and WHT on intra-group recharges.	Section D.4. of chapter on low-value adding services provides limited guidance in respect of WHT. Tax administrations encouraged to levy WHT only on profit element of mark-up.
	5. The cost and efforts involved should not be disproportionate to the level of service charges seen in relation to the	Although the administrative burden placed on taxpayers is acknowledged in the Final Report, it is not adequately addressed and practical solutions are

	enterprise's revenue and profits.	not offered.
	6. Para 7.12 on "Duplication in functions" does not specifically consider regulated industries wherein the local regulatory requirements have a strong influence on how certain support functions are organized, thus have some inevitable duplication in functions.	Para 7.11 in section *B.1.3 Duplication* of the Final Report notes that some regulated sectors require control functions to be performed locally as well as on a consolidated basis and that such requirements should not lead to a disallowance on the grounds of duplication.
	7. Clear guidance required on the exception for "duplicative services that reduce the risk of a wrong business decision".	No additional guidance given (as in draft, a single example is provided).
	8. Further clarification / examples on the distinctions drawn between shareholder activities, stewardship activities and other direct and indirect services.	No additional examples provided nor any significant additional clarification.
	9. Greater emphasis that arbitrary limitations on deductibility of intra-group charges should be avoided.	No further emphasis given, although per 7.20 it is clear that charges made under the ALP should be treated by tax authorities as if between independent enterprises.
	10. In adopting the direct charge method as the default method, the DD should recognise that MNEs may be less or more able to operate direct charge methods. Thus, further guidance required on indirect charge methods and cost allocations.	Some additional guidance provided in respect of indirect charge methods. Final Report notes that in this circumstance the relationship between the service provided and the charge may be obscured and double taxation could arise.
	11. Retain the original text in para 7.43 recognising contract R&D to be a common feature in commercial relationships and points relating to remuneration to the research co.	Comment not acknowledged.
	12. Further clarity and certainty required by way of objective commentary and examples on the 'simplified method'. BIAC has made particular reference to the criteria on which clarification is needed.	Additional clarity provided, although not all of BIAC's suggested criteria included.
	13. Practical guidance on implementation of the proposals to ensure consistent application of the rules among tax administrations.	Some additional examples etc provided, however there are still some areas which could lead to inconsistent implementation.
	14. The suggestion of recharging using a mark-up within the range of 2-5% is not explained and there is no guidance on how the range should be applied.	Mark-up fixed at 5%. Percentage not justified but does simplify matters for taxpayers.
	15. Use of a narrow range of 2-5% for mark-up on low value adding	Mark-up fixed at 5% (hence narrowed even further). Although this may

	services may prevent some countries from adopting the simplified method.	produce outcomes that are inconsistent with the ALP, having a single mark-up % is simple.
	16. Is it the intention, to make it a condition of participation in the elective method, that services that would otherwise require no mark-up to be applied, should in-fact be charged with a mark-up if the MNE decides to elect for the simplified method?	Mark-up fixed at 5% for all relevant costs, which excludes pass-throughs.
	17. It is not clear from the Discussion Draft on whether the 2-5% range is intended to provide a safe-harbour, or whether tax payers are required to evidence their point in that range using comparables.	Mark-up fixed at 5%, therefore evidence/comparables not required.
	18. Revised chapter should clearly indicate that the TNMM is still appropriate for many services, and that it should be used when it is the most appropriate method.	Report notes that cost-based TNMM can be the most appropriate according to the OECD guidelines.
	19. OECD should explicitly state whether the list of services in para 7.48 is intended to be exclusive or merely illustrative.	Comment not acknowledged.
	20. Further clarify the nature of services which are excluded in para 7.47 since services related to the implementation, running, maintenance and back office activities should not be excluded from the simplified approach.	Insufficient clarification provided.
	21. Low-risk manufacturing, distribution and R&D should not be excluded from simplified approach.	Distribution and manufacturing activities excluded, with no carve out for those which are low-risk. Some R&D not excluded (detailed in para 7.49).
	22. The non-applicability of the low value-added services guidance to services rendered to unrelated customers of the members of the MNE group should be eliminated.	Comment not acknowledged and para 7.46 still excludes the low value-added services guidance to services rendered to unrelated customers of the members of the MNE group, on the grounds that reliable comparables exist.
	23. To add a qualifier to the consistent group wide application of the simplified method such as to require consistent group wide application only "where practicable".	Qualifier added at 7.52.
	24. Further clarification required on the application of the simplified method in cases where services are bundled and include both low value adding and other services.	Comment not acknowledged.
	25. Commentary should expressly recognize that the requirement	Some additional description provided (at 7.64). Written contracts or

	for written contracts is satisfied by a contemporaneous document that properly identifies the entities and the terms without the need for formal bi-party or multi-party contracts or agreements.	agreements could take form of contemporaneous documentation identifying parties involved, nature of services and T&Cs.
	26. Clarify interaction between documentation requirements under simplified approach and amended TP guidelines as per Action 13.	Comment not acknowledged.
	27. The principle "charges that are specifically allocable to an entity should be handled in that manner" should extend to any pool of costs that relate to a discrete population of service recipients eg. regional service centres.	The Final Report clarifies that this is not the case and only costs that are charged to just one other entity are excluded.
	28. Clarify if "pass through costs" should be removed from the cost pool before applying the markup.	Pass through costs should be removed per final guidance.
	29. The service provider should be permitted to invoice service recipients without the need for an intermediary i.e. a pooling entity.	Comment not acknowledged. Specific guidance not provided on this point.
	30. Clarity on the treatment of costs of divestment or restructuring to avoid double taxation.	Comment not acknowledged. No further guidance on treatment of costs on restructuring/divestment.
	31. OECD is encouraged to provide additional practical guidance on how simplified regime would operate and bring clarity to business and tax administrations.	Additions to the guidance limited and further clarity on the application of the rules would be welcomed.
	32. Consider how the simplified method would interact with outcome of Action 7.	Comment not acknowledged.
CCAs - comments on 29 April 2015 draft	33. Clarify as to when and how a related party must have the capability and authority to control risks associated with CCA at the outset and ongoing basis. BIAC supports the view that not all parties should be obliged to "control" risks but it would be enough to merely "identify and understand" the risks.	Final Report continues to mandate that all parties can exercise "control" risks, rather than just identify and understand them. In addition, the party should have the financial capacity to assume risks and capability to respond to risks (although not necessarily perform all of these activities).
	34. What would be the outcome and appropriate TP method for services provided in a CCA where the service provider should be assumed not to bear any risk or own any assets?	They should be remunerated under the general principles of Chapters I-III (per paras 8.14 and 8.18). They are unable to join the CCA if they do not bear risk or own any assets.
	35. Clarify in para. 12 that when a participant is assigned interest in	Additional detail provided in relevant paragraph (8.12 in Final Report). The

	the intangibles, tangibles or services of a CCA, it relates to beneficial interest rather than legal.	term "beneficial interest" is not used.
	36. Clarify if a participant contributing an existing intangible to the CCA and providing financing but not contributing to future development be excluded from the CCA through an appropriate buy-out payment.	Comment not acknowledged. Section D refers to buy-out payments only in the situation where a participant disposes of its interest in the results of past CCA activity to other participants (in which case, the buy-out should be at an arm's length amount per chapters I-III and VI).
	37. Revised Chapter VIII should continue to permit the contribution of funding to CCAs, and consideration of other contributions at cost, rather than value.	Final Report allows value of current contributions (rather than pre-existing value, e.g. of patented technology) to be based on cost.
	38. There must be targeted rules for addressing concerns on "cash-box" structures.	Noted in executive summary of the need to link TP guidance with other Actions (such as 4, 6 and 3) to target "cash-box" structures.
	39. Unpacking the components of a CCA to apply TP principles goes against the reason why CCAs are adopted by MNEs in the first place.	Although it is noted that CCAs are meant to simplify arrangements (to alleviate the need for a web of complex intragroup payments for instance), the guidance in respect of analysis of CCAs remains complex and requires application of TP principles to the multiple transactions that make up the CCA.
	40. CCA transactions are not generally comparable to those outside a CCA and should be treated differently.	Comment not acknowledged. Para 8.9 states that there should be no difference in analytical framework for analysing TP for CCAs as compared to other forms of contractual relations.
	41. It is not clear how taxpayers should split CCAs between "low value" services & others, or how is this consistent with the DD on low adding value services.	Paras 8.26-8.29 provide that certain current contributions can be valued at cost, replacing concept of low-value added services in this chapter. However, this guidance applies only to "scenarios where the difference between value and costs is relatively insignificant" – this is not a clear definition.
	42. BIAC suggests deleting the text "mixture of low value and high value adding services" since requiring all contributions to CCAs to be valued will vastly increase cost and administrative requirements.	Text at 8.28 amended (removing phrase "mixture of low value and high value adding services"). However, implied requirement to value contributions to CCA in some cases remains.
	43. In para. 26, clarify the rationale behind requirements for the "control" of the CCA and the expected impact of the proposed changes to chapter I on CCAs.	Comment not acknowledged and clarification not provided.
	44. The new distinction between development CCAs and services CCAs, and expected vs. actual benefits may contribute to	Additional guidance provided in final report re Development CCAs, which often involve more risk. Further, it is noted that extra guidance may be

	disputes between taxpayers and tax administrations.	required with respect to Development CCAs in order to resolve uncertainty (and potential disputes).
	45. Frequent review of balancing payments or changes in allocation on a retrospective basis add complexity. Budget calculations should be adjusted on a look-forward basis.	Balancing payments still required where material difference between expected and actual benefits. Significantly and materially different from US cost sharing rules, which provide a safe-harbour to ensure balancing payments are not needed.
	46. Further guidance needed to explain how to evidence when independent parties would or would not have renegotiated the terms of a CCA agreement.	Comment not acknowledged. Further guidance required in respect of renegotiation discussed at 8.22 in Final Report.
	47. OECD should not rule out that cost can be an appropriate proxy to reflect value of services and be used in cases where expected benefits have not yet materialized.	Comment not acknowledged. Certain current contribution can be valued at cost, but balancing payments required if, ex-post, value is deemed to have been incorrectly determined.
	48. BIAC believes that a payment under a CSA should be treated as a reduction of deductions rather than an amount of income.	Comment not acknowledged. Para 8.41 inconsistent with US rules on treatment of payment under a CSA.
	49. CCA documentation to be aligned with Action 13.	Para 8.51 links Masterfile requirements with CCAs. The level of detail of materials prepared should be commensurate with the complexity of the CCA.
Commodities – comments on 16 December 2014 draft	50. Regarding the deemed pricing date, no unequivocal answer can be provided to identify the best date to which the quoted price should be referenced as market prices vary depending the commodities traded, geographic market, interest of parties and circumstances of the transaction.	This difficulty is recognised in Final Report. Third party behaviour and data important and can be used to allow taxpayers to defend their arrangements.
	51. Clarify what constitutes "reliable evidence" and propose that terms adopted by related parties should form the basis for agreed pricing date.	Publicly reported price data can be used provided these are widely used as reference prices in transactions between unrelated parties. Onus on taxpayer to evidence industry pricing practices. It is recognised that the outcome may well be a range.
	52. The deemed pricing date should only be used as a method of last resort (anti-abuse measure) where taxpayers have failed to provide reliable evidence.	Pricing date can only be disregarded in certain circumstances and tax authorities must suggest alternatives based on market data (not just to increase tax base).
Profit Splits – comments on 16 December 2014	53. BIAC welcomes guidance beyond the financial services sector to clearly distinguish between residual profit split, profit split and global formulary apportionment.	As a result of the consultation process the "need to reflect on clarifying, improving, and strengthening the guidance on when it is appropriate to apply a transactional profit split method" was recognised. To that end, only a scope of future work on draft guidance was prepared in the Final Report.

draft		Draft guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	54. Clarity on what profit splits cover as there is a risk that Action 10 amendments could be seen as direct encouragement to use profit splits over other methods leading to unilateral and arbitrary applications of formulary approaches.	The Final Report acknowledges this is a key issue. Draft guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	55. Splitting of the residual represents a more appropriate framework, as it takes into account one-sided methods for routine or benchmarkable transactions before residual is split between unique contributions.	Guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	56. Not helpful to attribute a specific meaning to Global value chains (GVCs) due to evolving nature of GVC models.	Only reference is that "it may be helpful to distinguish between sequential integration of a global value chain".
	57. TP Analysis of multi-sided business models should not be different from that applicable to other models.	Guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	58. Retain definition of "unique and valuable intangibles" as per para 6.17 of the Intangibles report 2014 as a key reference to attribute profits for non-routine functions even in highly integrated businesses.	Guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	59. If risk can be addressed with a comparability adjustment, the fact of being shared within a GVC should not automatically result in the sharing of residual profit to that particular risk.	Guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	60. BIAC Strongly disagrees with the idea that lack of comparables could result in a quasi-profit sharing mechanism.	Acknowledged that "an appropriate method using inexact comparables is likely to be more reliable in such cases than an inappropriate use of the transactional profit split method."
	61. Modify para. 32 to develop a practical solution where perfect comparables are not available by refining allocation of profit through a one-sided approach.	Guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	62. Develop further guidance aimed towards consistent and common understanding of when profit split is most appropriately applied.	The Final Report acknowledges this is a key issue. Draft guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	63. Q.24: BIAC does not favour establishing new guidelines referring to concepts of bargaining power, options realistically	Scope of work does not refer to these concepts. Guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.

	available, RACI-type analysis as it would likely lead to formulary apportionment.	
	64. Q.26-27: BIAC recommends a principled approach, respectful of the ALP, that would not lead to pre-conceived assumptions that results should be adjusted ex-post.	Draft guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
	65. Q.29-30: Profit split method should be developed so as to apply equally well to generation of profits or losses.	Draft guidance to be developed by WP6 during 2016 and expected to be finalised in 2017. In The *Most Appropriate Method* scope, both profits and losses are referred to.
	66. Expansion of guidance on practical application of profit split method to tackle practical difficulties.	The Final Report acknowledges this is a key issue. Draft guidance to be developed by WP6 during 2016 and expected to be finalised in 2017.
Risk, Recharacterization and Special Measures – comments on 19 December 2014 draft	67. Revised TPG should contain a clear statement that they apply with effect from the date they are issued, and not retrospectively.	Clear statement not provided.
	68. Absence of accounting entries should not be the starting point for believing that the company has not recognized a transfer of value pertaining to a transaction eg. synergies, among other elements, do not translate into an accounting entry.	Clarification in respect of accounting entries not provided in para 1.49. Overall, we agree with the sentiment that outcome of commercial /financial relations may not always be recognised in pricing or formalised.
	69. Acknowledge the fact that there may be no direct charge for the services, but the service could be taken into account in the pricing of another transaction.	Example provided (at para. 8) does not acknowledge this.
	70. Requiring documentation to consider all alternative options realistically available at the time the transaction is entered into is simply not possible.	The wording is amended slightly (para. 138), so that taxpayers must only document that no other option clearly offered a better opportunity to meet commercial objectives. This change leaves room for uncertainty about how much evidence is actually required. Paragraph 89 in the Draft Report, which stated that an entity would only enter into a transaction if there was "a reasonable expectation of enhancing or protecting its commercial or financial position on a risk adjusted basis", has been removed altogether from the Final Report.
	71. Documentation requirements for options not to undertake a transaction would add to compliance burden. Guidance on materiality is welcome to ensure proportionate compliance	No guidance on materiality provided. See comment above re amended requirements.

	burden.	
	72. BIAC believes that it would be impossible to document how facts and circumstances may directly or indirectly impact creation of value elsewhere in the value chain.	Guidance amended and wording re understanding all interdependencies has been removed. Still necessary to understand functions performed and how they generate value for wider MNE group, rather than just contractual terms of a transaction.
	73. Suggestion that market price cannot be applicable to a related party transaction due to diversification is contrary to ALP.	This suggestion (para 18 of the draft) has been omitted from the Final Report.
	74. Thoeritical assumption that "it generally makes sense for 3rd parties to be allocated a greater share of risks over which they have relatively more control" can only be a starting point in the risk analysis.	This section is amended, noting that risks are harder to identify than functions or assets. Para. 1.60 sets out steps for analysing risk in controlled transaction.
	75. On allocation of Fx risk, BIAC believes that it is incorrect to conclude that a deviation between contract and functional currency be viewed as an example where the contract must be ignored.	Para 1.89 of the Final Report includes a provision that FX should be ignored in the case that the written contractual terms of an agreement do not reflect the actual risk allocation between parties per their conduct.
	76. Same observation as above on allocation of inventory risks. Also, suggest deleting reference to inventory write downs in the accounting books as accounting standards typically do not consider allocation of risks.	Reference to inventory write-downs deleted. Noted at 1.77 that contractual assumption of inventory risk is very important as sets out ex ante agreement to bear costs and not further referenced as an example where deviation from contract is likely to distort TP outcome.
	77. Careful scrutiny of certain types of parties rewarded on a risk-free basis, would lead to extended investigations with little resuting revenues. Clarification that such risk allocations be acceptable as long as they are appropriately aligned with control & capabilities to assume the risks.	Reference to additional scrutiny removed. Risk-free return only permitted in case that entity lacks capability to control the risk associated with investment (it may be entitled to a less than risk-free return if, for example, it is disregarded under D.2).
	78. Clarify the types of decision making functions that are required to be able to manage, control and thereby assume risks from a TP perspective.	Additional guidance provided.
	79. Clearly distinguish what is meant by risk management & control of risk and why these 2 concepts, which in practice seem very similar, should be treated differently.	Para. 1.65 in Final Report differentiates them: control over risk does not require day to day mitigation capabilities. Examples also provided.
	80. Clarify the level to which a TP analysis should go as line management level analysis in every entity is not feasible.	Not clarified precisely. Emphasis placed on delineating transactions and clear expectation that this guidance will create an additional compliance burden.

		Language in report (para 1.76) could be interpreted to mean a line management level analysis is required. Para 1.56 of section D.1.2.1 notes that "a functional analysis is incomplete unless the material risks assumed by each party have been identified and considered since the actual assumption of risk would influence the prices and conditions of of transactions between the associated enterprises".
	81. Confirm that risk analysis should be through a global analysis of the main risks pertaining to the business, rather than a risk analysis per transaction.	Transfer pricing analysis to be carried our within context of all MNE's value creating opportunities.
	82. Confirm that in the right circumstances (eg. insurance), ex-ante pricing is acceptable and that an adjustment to ex-ante prices should not be considered in all cases.	Noted in Final Report (e.g. para 1.78) that ex ante contractual assumption of risk should be treated as evidence of commitment to assume risk prior to materialisation of outcomes. Insurance sector not specified, but can infer it would fall into this category.
	83. Additional guidance on the role of contribution to economic value made by capital.	Provision of funding alone without control does not entitle funder to anything above a risk free return. Examples provided of functions which do not evidence control (e.g. formal approval for decision made in other locations).
	84. Acknowledge that non-recognition should be used only as a last resort and provide threshold guidance on what constitutes non-recognition as opposed to re-pricing of transactions.	Acknowledged that it is a last resort (para 1.122). Re-priced (or replaced by alternative transaction) if that reflects the economic substance of the transaction.
	85. Pricing adjustments should be the preferred option over non-recognition & before non-recognition is imposed, imposing & corresponding tax authority should have preliminary MAP/Treaty to ensure double tax issues can be resolved under MAP.	Section D.2 sets out the exceptional circumstances under which transactions can be disregarded for TP purposes. However, D.2 contains no references to preliminary MAP/Treaty processes to avoid double taxation.
	86. Recognise that most MNEs do not engage in fragmentation merely to obtain a particular TP outcome, but other commercial factors also dictate the organisation and structure of MNE groups.	Final Report amends language in respect of fragmentation and does not imply that MNE's fragment their activities to obtain a certain TP outcome.
	87. Further guidance on how MNEs are expected to "exhibit" fundamental economic attributes	Reference to exhibiting fundamental economic attributes removed from Final Report.
	88. Typical examples of a business restructuring transaction	Examples amended and used to demonstrate situations where the

	should not be viewed recharacterization and is inconsistent with Ch IX of OECD TPG on Business Restructuring	contractual terms of an arrangement are not sufficient to understand the economic substance of the transaction.
	89. We do not see the post-tax result of the group as a relevant factor in determining the price of the transaction.	Reference to post-tax results removed.
	90. Without detailed and considered analysis, there is a risk that the insertion of highly theoretical economic concepts such as moral hazard into the Guidelines could have unknown and unintended consequences.	The concept of moral hazard has been removed from the Final Report.
	91. Related party transactions that relate solely to transfer of risk (such as intra-group reinsurance, hedging activities and related party guarantees) should be recognised as under the ALP.	Moral hazard concept omitted from Final Report.
	92. Existence of special measures, in addition to non-recognition, creates further uncertainty for taxpayers and are not required.	Special measures omitted from Final Report. Executive summary explains that aims of the BEPS Actions 8-10 can be achieved without the need for special measures outside of the ALP.
	93. If special measures are to exist, then there must be a clear and consistently applied set of criteria, an unambiguous gateway for entry into them and sequencing rules to determine when they should apply in the place of the broader Guidelines.	Special measures omitted from Final Report.
	94. One criteria for applying special measures must be that all efforts under the existing TPG have been exhausted by taxpayers & tax administrations. A second criterion would be that the matter has been referred to Competent Authorities, but they have been unable to resolve the issue through a MAP.	Special measures omitted from Final Report.
	95. If special measures are to be implemented, one of the requirements should be that resulting cross-border disputes are granted priority by tax administrations.	Special measures omitted from Final Report.
	96. Financial Services sector should be excluded from the measures focused on capital – Framework 9.	Special measures omitted from Final Report.
	97. If Option 1 "Hard to value intangibles" is considered	Special measures omitted from Final Report.

	necessary, very clear and objective criteria need to be developed to determine how and when the rule should apply.	
	98. In considering inappropriate returns for capital (option 2 & 3), the special measure does not appear to take account of potential losses.	Special measures omitted from Final Report.
	99. The measure "inappropriate returns for capital" should not apply to MNEs in Financial Services sector groups as capital is a key component of their business.	Special measures omitted from Final Report.
	100. Option 2 "independent investor approach" appears to be rather subjective and leaves much opportunity for differing views.	Special measures omitted from Final Report.
	101. The starting point for option 3 "thick capitalisation option" appears to be an arbitrary capital ratio that may be based on a group ratio.	Special measures omitted from Final Report.
	102. Neither option 2 nor 3 takes account of potential JV agreements, or production sharing agreements where debt financing is not permitted.	Special measures omitted from Final Report.
	103. In option 2 & 3, consideration also needs to be given to territories that have adopted Sharia law, where interest is not recognised.	Special measures omitted from Final Report.
	104. Work on Options 2 and 3 should be co-ordinated with Action 4.	Special measures omitted from Final Report.
	105. if MNEs must establish financing entities to manage their interest deductions (as per act.4), then those entities must be permitted to earn a time value of money return regardless of whether they are considered "minimally functional" (Option 4 - MFEs).	Special measures omitted from Final Report.
	106. Option 5 "Ensuring appropriate taxation of excess returns" falls outside Transfer Pricing.	Special measures omitted from Final Report.
	107. The discussion of risk in the DD is too general in nature to apply to the insurance sector, where risk and risk transfer are the core of the business.	One example specific to the insurance sector provided. It is noted that in the analysis of risks for regulated entities, including those in insurance, that reference should be made as appropriate to the transfer pricing guidance

		specific to financial services businesses in the Report on the Attribution of Profits to Permanent Establishments (OECD, 2010).
	108. Operating in a regulated sector, insurance MNEs do not have the freedom to control their capital and legal structures.	It is noted that in the analysis of risks for regulated entities, including those in insurance, that reference should be made as appropriate to the transfer pricing guidance specific to financial services businesses in the *Report on the Attribution of Profits to Permanent Establishments* (OECD, 2010).
Hard to value Intangibles – comments on 4 June 2015 Draft	109. BIAC recommends to expand and clarify the concept of "reliable comparables"	Concept not clarified.
	110. In addition to the case of one-sided methods based on comparables described in para 9, OECD should also address the case where profit split is used.	Comment not acknowledged.
	111. The requirements in para 14 (to provide satisfactory evidence) appear unnecessarily onerous and requires to demonstrate a higher standard of analysis than unrelated parties.	Requirements amended in the Final Report (reliable rather than satisfactory evidence) of not just unforeseen but also improbable outcomes. This is an improvement of the draft report but the analysis will still be onerous for taxpayers to produce.
	112. In para.14, significant details of ex-ante projections should suffice (suggest to replace 'full details' with 'significant details').	The Final Report at 6.193 requires only details, rather than full details.
	113. Guidance in para.14 should prevent oversimplified challenges translating into extremely burdensome justifications to be developed by taxpayers.	The report does not specifically address taxpayer burden. However (per comment above), it is the case that requirement less onerous per Final Report than discussion draft.
	114. The timeframe within which retrospective adjustment could be possible should be established with reasonable certainty. BIAC recommends a short time frame and exclude years that are statute barred.	Comment not acknowledged.
	115. Introduce additional exemptions from requirements in para.14 to (i) HTVI's priced indirectly using one-sided methods; (ii) HTVI's for which a profit split method has been adopted (iii) HTVI's which did not have the nature of HTVI at the outset (iv) HTVI's whose value remains hard to value also ex-post	Some additional exemptions provided including in the cases where the HTVI is covered by a bilateral or multilateral HTVI and where a commercialisation period of 5 year has passed for which outcomes were broadly in line with projections (could be described as not having nature of HTVI at outset).
	116. BIAC recommends that if the ex-post results (from a multi year perspective) are within a range of the ex-ante projections, then no adjustment should be required.	Additional exemption provided in the case that ex-post results do not increase or decrease compensation for the HTVI by more than 20%.

	117. The special measure should not apply retroactively.	The special measures concept is not included in the Final Report. Although we understand that the new guidance is not intended to apply retroactively, it is not explicitly stated in the Final Report and we are aware that it is being applied retroactively in some jurisdictions.
	118. Critical to ensure a global consensus on offsetting adjustments i.e. to recognise the symmetry of price adjustments to avoid double taxation.	Noted in para. 6.195 of the Final Report that "it is important to permit resolution of cases of double taxation arising from application of the approach for HTVI through access to the mutual agreement procedure under the applicable treaty". However, there is still insufficient protection against the risk of double taxation.
Intangibles - comments on 30 July 2013 Draft	119. OECD should move away from defining an intangible as a "something" and instead use "an asset".	Definition unchanged in final report. Commentary etc. mainly refers to intangible asset.
	120. Legal and accounting concepts and contractual arrangements should be relied upon in view of what could have been agreed upon between independent parties for a comparable transaction.	As in the discussion draft, it is acknowledged the characterisation of an intangible as an asset may inform whether it is recognised for transfer pricing purposes, but accounting concepts and contractual arrangements should not be relied upon.
	121. In regard to para.41-42, to clarify how a "something" can be "owned" (which is one of its three core characteristics) if it does not benefit from legal or other protection against those who might claim "ownership" of the same "something".	The Final Report does not directly address this (in 6.7 and 6.8). However, some examples are provided (expensed R&D, advertising cost, the enhancement to value that may arise from the complementary nature of a collection of intangibles when exploited together) which provides some clarification.
	122. If "protection" is not appropriately addressed, concern is that concept of "know-how" when not legally protected (eg. Notion of "assembled workforce") may re-emerge.	Comment not acknowledged. Assembled workforce concept in Final Report (revision to section D.7 of TP guidelines).
	123. Assembled workforce and its related concept of "implicit know-how" should not be viewed as intangibles.	Will be viewed as intangibles in some circumstances per revision to section D.7 of TP guidelines in Final Report.
	124. Provide guidance on how to practically identify and draw the line between when a workforce creates an intangible and when it does not.	Some examples provided in D.7 although clear guidelines not provided.
	125. Business attributes like goodwill, on-going concern value, synergies etc. are not themselves intangibles, which can be owned, controlled or separately transferred and should be removed from definition.	The Final Report states at 6.28 that "it is not necessary for purposes of this chapter… to define when goodwill or ongoing concern value may or may not constitute an intangible." It is noted that group synergies will not fall in the definition of intangibles as they are not owned or controlled by an

		enterprise.
	126. Implying that legal ownership is not important in determining compensation at arm's length could result in attributing greater returns to more companies, leading to significant complexity in matching future income and historic costs.	Greater emphasis placed on the legal owner's importance in the Final Report. The Final Report states that "the legal owner will be considered to be the owner of the intangible for transfer pricing purposes" and at 6.34 it is noted in transactions involving intangibles a " special emphasis" should be placed on determining legal ownership when analyzing the transaction.
	127. Formulate a distinction between routine activities and those which may, at arm's length, command an interest in the intangible value so that all functions associated with intangibles don't require evaluation of their contribution to anticipated value.	No distinction provided, although additional examples in the Final Report may assist business in determining how to correctly apply the guidance.
	128. Clarify that Recharacterisation be undertaken in extreme circumstances only.	Comment not fully acknowledged, for example 6.91 of Final Report retains unhelpful language. However, the report does affirm the exceptionality of recharacterisation and notes that recharacterisation will not be required unless conduct differs from contractual arrangements.
	129. The implication of including "reputational value" as intangibles is that it can lead to creating "hypothetical" TP transactions by tax authorities that may / could not have taken place at arm's length.	Comment not acknowledged, for example 6.95 of Final Report retains unhelpful language which doesn't clearly differentiate between goodwill and reputational value.
	130. Allowing everyone to claim a 'slice of the pie' (split ownership of intangibles) for TP purposes should be avoided as it is not in line with the ALP.	Examples remain which suggest that returns attributable to intangibles might be divided around the group based largely on who performs the people functions.
	131. BIAC recommends that guidance on transactions involving the use of intangibles in connection with the sale of goods or the provision of services should apply to all transactions involving intangibles.	Guidance in respect of the sale of goods or provision of services is supplemental to main guidance (at D.5).
	132. BIAC Recommends further work to create simple and practical guidance, supplemented, where necessary, with additional detailed direction (and, if possible, practical examples) for complex cases.	The Final Report does include additional examples and provides an analytical framework for identifying risk. Further, the OECD has identified this as an area where additional work may be required.
	133. Rethink prescriptive statements discouraging the use of methods based on comparability in paras 156 & 164.	Final Report does support use of comparables, however the statement in para 156 remains (now 6.138).

	134. Disconnection between draft wording of Chp VI (Para. 2.109) and Chp II where comparables appear to be an element of the Profit Split analysis (where possible), rather than an alternative.	The inconsistency is repeated in the "Current guidance on transactional profit split method and public consultation". Work on the transactional profit split method is ongoing and so it remains to be seen whether the final guidance will include comparables as an element of the analysis.
	135. Encourages a balanced approach based on quantum of the transaction(s), size of the multinational group, availability of information and complexity to reduce administrative burden.	The compliance burden taxpayers face not adequately considered.
	136. Clarification on the definition of a "marketing intangible".	Clarification provided. "Marketing Intangible" does not have to be customer facing.
	137. Para 59 seems to state that all licenses are intangibles, however grant of a license does not trigger the transfer of the underlying intangible from the licensor to the licensee, nor any split in the ownership of the intangible.	Comment not acknowledged and para. 56 (6.26 in Final Report) unchanged.
	138. BIAC considers that goodwill, ongoing concern and reputation value are not intangibles itself due to their non-transferable nature but are concepts to be taken into account in a TP analysis of transfer of the underlying intangible.	The Final Report states at para. 6.28 that "it is not necessary for purposes of this chapter… to define when goodwill or ongoing concern value may or may not constitute an intangible." It is noted that group synergies will not fall in the definition of intangibles as they are not owned or controlled by an enterprise. These concepts form part of the analysis of transfer of underlying intangible.
	139. Recommends deleting explicit statement in para 47 that contents of the intangibles TP guidance is not relevant for other purposes (e.g. Article 12).	Comment not acknowledged. Statement made in Final Report at 6.13.
	140. Assertion that "legal ownership by itself does not confer any right to retain any return" contradicts comment that marketing activities undertaken by a licensee may affect the value of the underlying intangible legally owned by another party.	Comment not acknowledged. Statement made in Final Report at 6.42.
	141. Wide use of "anticipated value" causes confusion. Eg. A statement saying legal owner remits to other group companies remuneration reflecting the "anticipated value" of their contributions; is unlikely if those contributions are routine.	Comment not acknowledged.

	142. Para 89. does not reflect arm's length behaviour since it requires the legal owner to perform all important functions, provide all assets, and bear and control all risks, to be entitled to all returns.	Amended such that the legal owner is "entitled to all of the anticipated, ex ante, returns derived from the MNE group's exploitation of the intangible" (para. 6.71). Noted other entities providing functions should be compensated on arm's length basis.
	143. In determining whether a distributor should bear the cost and risks of marketing activities, analysis should focus on the extent to which the distributor controls the risks associated and performs important control functions.	Wording amended at para. 6.78 of the Final Report to remove some references to incurring cost, placing greater emphasis on controlling risk functions.
	144. Licence of a portion of the worldwide rights is not the same as a sale and hence suggest to remove eg in para.107 which indicates otherwise or reword "license" as "perpetual exclusive licence".	Amended at 6.89 to refer to a perpetual exclusive licence.
	145. Paras.113 & 114 appear to provide contradicting advice as one recommends identification of goodwill separate from trademarks and the other refers to how such a separation can be viewed in disagreement with ALP as one would not observe 3rd parties separating such intangibles.	Inconsistency remains between paragraphs 6.95 and 6.96 in the Final Report.
	146. Transactions should not be disregarded or substituted simply because it is difficult to find comparable transactions between independent parties.	It should be considered whether there should be non-recognition of transactions in some cases (per para. 6.114). However, the report does not advocate for non-recognition of transactions except in specific, pre-defined circumstances.
	147. Methods should not be rejected out of hand if they represent how unrelated parties would approach the valuation of a transaction involving intangibles.	Comment not acknowledged. The Final Report asserts that transfer pricing methods based on the cost of intangible development should usually be avoided, as in the Draft Report.
	148. BIAC strongly disagrees that projections prepared for non-tax purposes are likely to be more reliable than projections prepared exclusively for tax purposes.	Comment not acknowledged. Assertion made in the Final Report at 6.164.
	149. BIAC believes that the OECD should provide more complete guidance on how location savings can be properly determined and allocated.	Framework for determining how location savings are to be shared between two or more entities provided.
	150. Would be helpful if assembled workforce, noted as "ordinarily" a transfer pricing comparability matter, is	Comment not acknowledged.

	specifically stated as not being an intangible in its own right.	