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Confederation of Swedish Enterprise - Comments on the OECD Public Discussion Draft entitled: "BEPS Action 8 Hard-to-Value Intangibles)" 4 June 2015 - 18 June 2015

The Confederation of Swedish Enterprise is Sweden's largest business federation representing 49 member organizations and 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Discussion Draft entitled "BEPS Action 8 Hard-to-Value Intangibles" 4 June 2015 – 18 June 2015 (hereinafter referred to as the Draft).

As pointed out in the introductory paragraph of the Draft, when valuation of an intangible or rights in an intangible at the time of the transaction is highly uncertain, the question arises as to how arm's length pricing should be determined. In this situation it is of utmost importance that the integrity of the arm's length principle is maintained and that it is made clear – as is now the case in the first paragraph - that the question should be resolved, both by taxpayers and tax administrations, by reference to what independent enterprises would have done in comparable circumstances.

In our view, it is crucial that the guidance is clear and predictable and that the proposed hard-to-value approach is targeted only on exceptional cases. Regrettable, that does not seem to be the case. We believe that parts of the proposed guidance are not rooted in the arm's length principle (and not aligned with the statements in the introductory paragraphs) and find it disturbing that the Draft, effectively, introduces a "commensurate with income" type approach. In addition, we have major concerns with the implication of hindsight under the "presumptive evidence" statement introduced in paragraph 9 of the discussion draft.

In line with the arm's length principle, the intra-group transactions should not be treated differently than similar independent transactions by re-opening a valuation based on ex post information. We would like to emphasize that in most cases, transactions between independent parties do not provide for such a re-valuation.

Furthermore, for some of the examples given, e.g. on transactions regarding intangibles that have only been partially developed, there seem to be no recognition of the fact that the buyer is acquiring the ownership, including the risks attached to the intangible. The risk that the final income deviates from the forecasts is part of the transfer.

Hard-To-Value Intangibles are defined in paragraph 9 of the Draft and covers intangibles or rights in intangibles for which, at the time of their transfer in a transaction between associated enterprises,

> *(i) no sufficiently reliable comparables exist; and*
> *(ii) there is a lack of reliable projections of future cashflows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain.*

Depending on how the terms "sufficiently reliable comparables" and "lack of reliable projections of future cash flows or income" in paragraph 9 are interpreted (which is further commented upon below) the Hard-To-Value Intangibles definition could potentially cover most intangibles. Paragraph 9 then goes on to state that "*As a consequence, ex post information provides presumptive evidence as to the reliability of the information used ex ante in determining the transfer price for the transfer of such intangibles or rights in intangibles*."

In our view, the reasoning becomes almost circular and introduces an element of hindsight. If ex post result deviates from ex ante projections then the (ex ante) projections used (and/or the comparables used) were not reliable and hence an Hard-To-Value Intangible exist, in which case adjustments based on ex post profit levels can be made. If this definition is maintained, it is of utmost importance that at least safeguards are provided to guarantee that the tax administration in the other state respects an adjustment made by the tax administration in the first state. Preferably, some other form of binding conflict resolution should be introduced.

The Draft seems to pre-assume that there is a decisive mismatch in information between tax payers and tax administrations. However, it should be noted that forecasting is very difficult, and many MNE businesses struggle with it, even for an established business. Assumptions are always uncertain. The examples given in the Draft are rather extreme and the distinction between foreseen and unforeseen is very difficult to make. This difficulty of forecasting equally applies to transactions between related parties as well as independent parties.

In addition to the above we fear that the use of certain terms without providing further guidance or definitions, for tax payers and tax administrations alike, may result in an increasing number of double taxation situations. This would e.g. include; "sufficiently reliable comparables" (para 9), "lack of reliable projections of future cash flows or income", "significant" (para 13), "satisfactory" (para 14, 15), "should

have been foreseeable" (para 13), "full details" (para 14), "reasonable forseeable events" (para 14).

There is little doubt that the example in paragraph 6, whereby an enterprise transfers intangibles at an early stage of development to an associated enterprise, sets a royalty rate that does not reflect the value of the intangible at the time of the transfer, and later take the position that it was not possible at the time of the transfer to predict the subsequent success of the product, may reflect non-arm's length behavior on the part of the taxpayer.

However, the guidance contained in the Draft opens up for arbitrary use of hindsight and is likely to increase uncertainty for taxpayers. As previously stated, it is our view that the hard-to-value approach should only be applied in exceptional cases. A preferred approach would be to include guidance on the use of adjustment clauses (milestone payments etc.) recommending that such should be used when it can be expected in third party situations (and preferably give some example in relation to this) and also outline further guidance on how such clauses may typically be designed.

Furthermore, we propose to balance the burden of proof. In the current Draft, the burden of proof is with the taxpayer to evidence that the valuation assumptions were certain. However, as referred to above, projections are always uncertain. In order to avoid that the hard-to-value approach is applied to almost all situations rather than exceptional cases, we propose to place the burden of proof that assumptions were not certain on tax administrations.

On behalf of the Confederation of Swedish Enterprise

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