

European Business Initiative on Taxation (EBIT)

**Comments on the OECD Discussion Draft on BEPS Action 8: Hard-
to-value intangibles**

EBIT's Members at the time of writing this submission: AIRBUS, BP, CATERPILLAR, DEUTSCHE LUFTHANSA, DIAGEO, GSK, INFORMA, JTI, LDC, MTU, NUTRECO, RELX GROUP, ROBECO, ROLLS-ROYCE, SAMSUNG ELECTRONICS, SCHRODERS and TUPPERWARE.

EBIT comments on the OECD's Public Discussion Draft on BEPS Action 8: Hard-to-value intangibles

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Submitted by email to: TransferPricing@oecd.org

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Dear Andrew,

EBIT is grateful for this opportunity to comment on the OECD's Discussion Draft on BEPS Action 8: Hard-to-value intangibles (the "Discussion Draft") dated 4 June 2015. EBIT has a number of concerns with the Discussion Draft which are set out briefly below.

- EBIT Members believe that the special measure proposed for hard-to-value intangibles still seems to be too broad and in an embryonic stage, and in our view needs considerably more work by the OECD to ensure it is in line with the arms' length principle and ongoing work on BEPS Action Items 8-10, before it can provide objective guidance to MNCs and tax administrations.
- In particular, paragraph 5 of the Discussion Draft departs considerably from the arm's length standard in that it offers a lot more leeway to tax administrations to ignore or re-characterise almost any transfer of intangibles on the basis of theoretical alternative pricing arrangements independent enterprises might have entered into. This open end and underdeveloped point in the Discussion Draft is a very important point for business and will create significant uncertainty and unpredictability around the overall pricing of intangibles. Also the fact that tax administrations under the proposal will be more easily allowed to re-characterise the transaction based on a mere *ex post* subjective analysis of whether potential future developments were appropriately weighted by the taxpayer at the time of the transaction, is of grave concern to MNCs. The examples provided in paragraph 15 of the Discussion Draft are not helpful. EBIT recommends that the proposed revisions to the OECD Guidelines focus on providing objective advice to MNCs rather than introducing a re-characterisation measure, which might induce tax administrations to claim the right to use *ex post* information in almost any situation dealing with intangibles that falls into the overly broad defined category of "hard-to-value" intangibles. Otherwise this could also result in unwelcome fundamental amendments to the existing transfer pricing rules of many countries and a significantly enhanced number of instances of double taxation. We recommend that the OECD also propose appropriate time limits for tax administrations to comply with for invoking the special measure.
- With regard to hindsight, EBIT believes that the Discussion Draft should also take into account the conduct of the parties subsequent to the transfer of the intangible and ensure that tax administrations recognize the respective roles of parties in developing, enhancing, maintaining, protecting and exploiting the intangible when assessing the

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differences in *ex ante* and *ex post* profit levels and whether the differences can be traced back to the functions, risks and assets used by the parties to the transaction.

- EBIT has concerns that paragraphs 9 and 10 of the Discussion Draft do not adequately rein in the powers of tax administrations to choose to invoke the use of *ex post* information, nor do they seem to impose an obligation on tax administrations to reach a conclusion in line with the arm's length principle that is satisfactory to all parties involved as proposed by paragraph 2.11 of the OECD Guidelines. To avoid instances of double taxation, EBIT urges the OECD to make sure the proposed measure meets the arm's length standard and require tax administrations to guarantee eligibility for the Mutual Agreement Procedure for the resolution of double taxation disputes, which could also fit under OECD BEPS Action 14.
- On the boundaries proposed for tax administrations to observe with regard to the appropriate use of *ex post* information by tax administrations, EBIT Members believe the proposed boundaries in the present Discussion Draft depend too much on subjective notions and whether results were "foreseeable, extraordinary or could have been anticipated." We urge the OECD therefore to offer more concrete exceptions, e.g. a safe harbour deviation between expectations and results, or a limit to the period in which tax administrations can invoke *ex post* information.

EBIT Members trust that the above comments are helpful and will be taken into account by the OECD in finalising its work in this area. We are committed to constructive dialogue and always happy to discuss.

Yours sincerely,

European Business Initiative on Taxation – June 2015

For further information on EBIT, please contact its Secretariat via Bob van der Made, Telephone: + 31 6 130 96 296; Email: bob.van.der.made@nl.pwc.com).

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