

The OECD public consultation on Transfer Pricing Matters

The OECD Conference Centre, Paris

12-13 November 2013

Revised Discussion Draft (« RDD ») on Intangibles
Treatment of ***Group Synergies***

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Group Synergies in RDD

Section D.8. Paragraphs 18 to 33 (and 63)

Treatment of group synergies	Business comments
<p>(18) Existence of MNE group synergies · qualified as comparability factors · often favourable to the group as a whole · may be negative</p> <p>(19) In cases of synergistic benefits or burdens incidental to group membership (i.e. not resulting from deliberate concerted group action), no need for separate compensation or specific allocation (TPG Paragraph 7.13)</p> <p>(20) In cases where a structural advantage or material synergistic benefit or burden can be clearly identified and is attributable to deliberate concerted group actions, a comparability adjustment is likely to be warranted</p> <p>(22) Need to determine the nature and the amount of the benefit or detriment provided, and how it should be divided among members of the group</p> <p>(23) Benefits of such synergies should generally be shared by members of the group in proportion to their contribution to the creation of the synergy</p>	<ul style="list-style-type: none">• Group synergies are clearly qualified as comparability factor => paragraph 63 (Chapter VI, section A.4. “(vii) Group Synergies”) should also be moved under this section D.8. on “MNE Group Synergies”. Current presentation ambiguous.• Focus of section D.8. and examples is on positive effects (sharing synergistic benefits), but silent on how to address negative effects resulting from group membership. <p>Guidance and examples are needed in order to address separately (by reference to arm’s length conditions) the issues of:</p> <ul style="list-style-type: none">- competitive inefficiency affecting the entire group (e.g., an inefficiency caused by group scale) vs- inefficiency suffered by a single member created by its forced conformity with the rest of the group. <p>These issues create considerable factual and conceptual disagreement among countries.</p>

Group Synergies in RDD

Section D.8. Paragraphs 18 to 33 (and 63)

Examples	Business comments
<p>(21) <i>Examples of deliberate concerted group actions</i></p> <ul style="list-style-type: none">• <i>Centralised purchasing in a single company: YES</i>• <i>Centralised procurement for the group: YES</i>• <i>Supplier unilaterally offering one group member a favourable price in the hope of attracting other group members: NO</i> <p>(23) <i>In case of deliberate concerted actions to consolidate purchasing activities to take advantage of economies of scale resulting from high volume purchasing, the benefits of those large scale purchasing synergies, after an appropriate reward to the party coordinating the purchasing activities, should typically be shared by the members of the group in proportion to their purchase volumes.</i></p> <p>(28-29) <i>Examples 3 & 4 Central purchasing function</i></p> <ul style="list-style-type: none">• <i>Operating as a Buy-Sell entity, or as a procurement services provider</i>• <i>To be compensated with service fee (cost+), and remaining benefit to be shared among group members</i> <p>(30) <i>Example 5 Volume discounts to be allocated consistently among group members (based on purchase volumes)</i></p>	<ul style="list-style-type: none">• Unclear how these examples relate (or not) to Section F of Chapter IX (para. 9.154 to 9.160), which also provides examples of central purchasing function in a business restructuring context.• Prescriptive conclusion that<ul style="list-style-type: none">(i) “synergistic benefits should be shared”(ii) “in proportion to purchase volumes”.- Need to start with functional analysis, contractual terms and conditions and identification of potential third-party comparable transactions- Functional analysis in relation to the contribution of the central purchasing entity to value creation and risk taking will vary depending on facts and circumstances (not necessarily a mere risk-free service provider)

Group Synergies

Business comments - General

- **Overly-symplistic treatment**

- Fails to link the discussion to the arm's length principle and to comparable third-party conduct
- **Group synergies are difficult to consider under the arm's length principle, since comparable companies are not groups.**
- Therefore, the focus should be on whether there are economic factors within the group
 - (i) that are potentially analogous to third-party situations and/or
 - (ii) which depend purely on shareholding.

- **Clarifications needed**

The distinction between **passive "scale" synergies** and synergies which are an **effect of "deliberated concerted group actions"** could be a matter of disagreement. It is unclear how the principles of the section would be applied to a number of scenarios not covered under examples, e.g.

- **Procurement activities** (including vendor selection, product specifications, quality checks, and price negotiation based on minimum order quantities) => **more than just scale synergies**
- Inconsistencies in RDD on Treatment of Prices paid in Acquisitions, and Treatment of Group Synergies
 - Example 18: *"It should generally be assumed that value does not disappear, nor is it destroyed, as part of an internal business restructuring"*: analysis ignores the impact of assets owned by the acquiring company
 - In a number of cases, the price paid in the acquisition is irrelevant in reaching the right conclusion for the treatment of group synergies
- **More examples needed so that RDD reflects diversity of situations in a less prescriptive manner**