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14 September 2012

Via e-mail joe.andrus@oecd.org

Dear Joe,

On 2 June 2012, Working Party No. 6 of the Committee on Fiscal Affairs of the OECD released three discussions drafts on (i) *transfer pricing aspects of intangibles*, (ii) *timing issues relating to transfer pricing*, and (iii) *transfer pricing safe harbours.*

***A3F*** is pleased to respond to the OECD‟s request for comments on these discussion drafts.

**_A3F_ background**

***A3F*** (French Women Tax Experts Association - Association Française des Femmes Fiscalistes) was founded in 2005. A3F is a French-based network of professional women from diverse horizons representing most actors of the French and international tax system (experienced tax executives and expert tax advisors from a wide range of French and foreign companies and law firms, University professors, etc). The ever changing and rapidly evolving corporate and individual tax policies in France and around the world are a major concern for businesses. A3F provides its members with opportunities to exchange ideas and best practices, and to contribute to the shaping of tax policy through participation in public debates. A3F currently counts 90 members, all with a recognized work experience.

The president of A3F is Ms Eva Memran, Tax Director for a large French MNC. Ms Memran can be reached at +33 1 45 38 86 79 or eva.memran@accor.com.

**Conclusion**

***A3F*** appreciates this opportunity to provide its views on the transfer pricing aspects of intangibles (outlined in the following pages). These comments were prepared by an ad-hoc A3F working group chaired by Ms Laurence Delorme. We will welcome an opportunity to participate in the subsequent public consultations and related discussions.

Respectfully submitted,

***For Association Française des Femmes Fiscalistes***

**Laurence Delorme**


For clarification of any aspects of this response, please contact:

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## 1. Discussion draft on the revision of the special considerations for intangibles in Chapter VI of the OECD transfer pricing guidelines and related provisions

| A. | Identifying Intangibles |
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| ***A.1.*** | ***In general*** |
| *5.* | *"In these Guidelines, the word "intangible" is intended to address something which is not a physical asset or a financial asset, and which is capable of being owned or controlled for use in commercial activities".*<br><br>• This first paragraph, which provides for a definition of the word "intangible", should be very carefully and precisely worded, so as to avoid ambiguities generating uncertainty for taxpayers.<br><br>• We suggest to replace the term "*something*" with "*asset*" (the word "something" is too vague and reminds of the previously used "something of value" which was also too vague), and to add the words "legally" and "transferred" in the definition:<br>*"...the word "intangible" is intended to address an asset which is not a physical or financial asset, and which is capable of being legally owned, controlled or transferred for use..."*<br><br>• Question: does the reference to "*use in commercial activities*" in the definition assume there should be an objective to generate some profit from such commercial activity (profit being an indicator of some intangible value)? How about businesses operating as not-for-profit organizations such as cooperatives or other legal structures with similar tax characteristics? |
| ***A.2.*** | ***Relevance of this Chapter for other tax purposes*** |
| *1.2.* | *"The guidance ...is intended to address transfer pricing matters exclusively. It is not intended to have any relevance for other tax purposes".* Reference is then made to different definitions of *Royalties* under DTT and under transfer pricing principles. Also, indication that "*this Chapter is not intended to have relevance for customs purposes".*<br><br>• This paragraph should be made more specific and expand examples illustrating what the Chapter is NOT intending to be relevant for, e.g.:<br>- Definition of intangible assets for application of registration duties upon transfer;<br>- Accounting treatment (asset or expense) relating to payments made for the use of an intangible. |
| ***A.3.*** | ***Categorization of intangibles*** |
| *1.3.* | *"No attempt is made in these Guidelines to delineate various classes or categories of intangibles (trade vs marketing, soft vs hard, routine vs non-routine, etc).*<br><br>• We welcome this statement, as it eliminates the recourse to potentially very difficult and subjective distinctions, leading to uncertainty for taxpayer. |

| A4 | Illustrations |
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| 21-22 | *Goodwill and Ongoing Concern Value*<br><br>• This whole paragraph should be made more specific as to why it is stated that " *it is not necessary to establish a precise definition of goodwill or ongoing concern value for transfer pricing* purposes" (such statement is a source of uncertainty for taxpayers), and that " *In most instances, accounting and business valuation measures of goodwill and ongoing concern value are not relevant for purposes of transfer pricing analysis".*<br>• The clarifications should introduce the difference between consolidated financial statements, and financial statements on a legal entity basis, only the latter being directly relevant for the purpose of transfer pricing analysis.<br>• We suggest at a minimum to add the words" directly" and "consolidated" in above sentence: " *In most instances, accounting and business valuation measures of consolidated goodwill and ongoing concern value are not directly relevant for purposes of transfer pricing analysis*". |
| 26 | *Assembled workforce*<br>*"...as a factual matter, [the transfer or secondment of isolated employees] may result in the transfer of valuable know-how or trade secrets for which compensation may be required in arm's length dealings".*<br><br>• We strongly disagree with this statement which opens the door to high uncertainty for taxpayers.<br>• Even if the transferred employees have been contributing to the development of some valuable IP, their transfer or secondment cannot result in a transfer of such IP from their former employer to their new one. An employee is not an asset (within the above definition of "intangibles" under 5 above), and therefore an employee's transfer or secondment cannot be characterized as a transfer of an intangible.<br>• We suggest to consider adding a test based on common sense on this question, by reference to observed third-party practices (e.g. other than athletes transferring from one club to another, what are the cases in "real life" where a price is paid by one company for "acquiring" an individual employee working in another one?). |
| **B.** | **Identification of Parties Entitled to Intangible Related Returns** |
| | ***Business is requested to comment as to whether the formulation contained in section B successfully communicates the economic principles at issue, or whether another approach would more clearly convey the message that the determination of returns that are attributable to intangibles within an MNE group should be determined on the basis of relevant functions, assets and risks.*** |
| 29. | *"In determining which members of an MNE group are entitled to intangible related returns with respect to an intangible, the following factors should be considered: ...(ii) whether the functions performed, the assets used, the risks assumed and the costs incurred by members of the MNE group in developing, enhancing and protecting intangibles are in alignment with the allocation of entitlement to intangible related returns ..."*<br><br>• Costs are not always a relevant indicator of the value of an intangible (this is particularly true in emerging markets where assets and costs involved in establishing a market may be limited |

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| | for some players, yet the value of the associated intangible may still be very significant).<br>• We suggest including the words "if relevant" in the sentence: *"... the risks assumed and, if relevant, the costs incurred..."* |
| ***B.1.*** | ***Registrations and contractual arrangements*** |
| 30. | *"Legal registration and contractual arrangements are the starting point for determining which members of an MNE group are entitled to intangible related returns."*<br>• There may be cases were a valuable intangible has been developed which is neither legally protectable (e.g. groundbreaking ideas allowing break-through development on a new market) , nor covered under a contractual arrangement established ex-ante between the parties(e.g. it was not anticipated). The wording of this paragraph may suggest that where no protection is possible or has been anticipated through legal registration or other contractual arrangement, no right to the intangible would accrue to the developer.<br>• We suggest adding the word "existing" at the beginning of the sentence: "*Existing legal registration and contractual arrangements..."* |
| ***B.2.*** | ***Functions, risks and costs related to intangibles*** |
| *(i)* | *Functions* |
| *40.* | *It is not essential that the party claiming entitlement to intangible related returns physically performs all of the functions related to the development, enhancement, maintenance and protection of intangibles through its own employees. In transactions between independent enterprises, some of these functions are sometimes outsourced to other entities."*<br>• We welcome this reference to practices between independent enterprises when it comes to Outsourcing, and suggest that this statement be emphasized by adding more specific reference to observed outsourcing practices, and how such practices should guide the transfer pricing analysis.<br>• A first test based on common sense relates to the type of activities that are commonly outsourced between independent parties: those associated to the core business and strategic proprietary value drivers of the company are rarely outsourced to third-parties (or the company might otherwise lose its competitive advantage). Hence in most cases, outsourcing an activity should not be analysed as triggering a transfer of an intangible for transfer pricing purposes, based on this common sense test applied to the specific facts and circumstances..<br>• A second test should focus on analysing the observed practices in the specific industry sector relevant to the outsourced activity, which may provide useful guidance on terms and conditions between independent parties (scope of outsourced activities, obligations of parties, risk allocation, etc). For example, pharmaceutical entreprises frequently outsource part of their R&D activities to Contract Research Organizations, and part of their manufacturing operations such as Filling & Packing, to third-party enterprises (sometimes their competitors). Even if the existence of such "internal comparables" does not generally allow to quantify an arm's length compensation merely on the basis of existing third-party agreements, it does provide very useful guidance on terms and conditions, and more generally conduct of the parties in a comparable situation between independent parties, and recourse to this analysis should be encouraged. |

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| *40.* | "*It is expected that ...the entity claiming entitlement to intangible related return will physically perform, through its own employees, the important functions related to the development, enhancement, maintenance and protection of the intangibles";*<br><br>• Despite the attempt to define in the following paragraph the terms "*important functions*", we suggest to make this definition more specific, as it may otherwise be a source of great uncertainty for taxpayer.<br><br>• Also, the terms "*physically perform*" as a test for attributing entitlement to intangible related return may not be adapted to the organization of international groups managed globally in today's world of digital communications, with management and control functions exercised by individuals located anywhere in the world, in charge of geographic and/or operational divisions spread across multiple countries, and participating in management committees where key strategic decisions are made, which take place each time in different parts of the world, or do not even take place physically but via videoconference instead. |
| *41.* | *"It is expected that ...the party ...claiming contractual entitlement to intangible related returns will exercise control over the performance of those functions and associated risks, ..."*<br><br>• We suggest to add the words "in substance", ie *" will exercise control* in substance *over the performance of those functions and associated risks"*. Indeed, it may not be sufficient for the entity claiming entitlement to intangible related return to exercise such control merely through some delegation of authority to another group entity which is the employer of the people exercising control, and which invoices the costs of these people. |
| *(ii)* | *Risks* |
| *43.* | *Particular types of risks that may have importance in considering the entity or entities entitled to intangible related return*<br><br>• The list of example should be expanded, or alternatively presented as non exhaustive. |
| *44.* | • Last sentence in paragraph is completely unclear (there seems to be a few words missing).<br><br>• Does this also include costs related to failure of a strategy on the intangibles? aside from running costs (costs of performing a function) as well as |

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| **B.3.** | ***Arm's length compensation for functions performed by associated enterprises related to the development, enhancement, maintenance and protection of intangibles*** |
| *51* | Marketing functions performed by an associated enterprise acting as a marketer/distributor, and question as to "*whether such marketer/distributor should share in any present and future intangible related returns attributable to the trademarks and related intangibles*".<br><br>• We welcome the recognition that a distributor of a branded product may, in some circumstances (illustrated with two examples), operate as an "at risk distributor" and claim entitlement to sharing in the benefits of marketing activities that increase the value of the trademarks and related intangibles.<br>• However, we suggest to add a third example (which would be an intermediary between the agency structure described in paragraph 50, and the two "at risk distributors" examples in this paragraph.<br>• This additional example should cover the case where a distributor of a branded product would NOT be entitled to trademark return, even after having incurred marketing costs for developing brand awareness on the local market, simply because under the arrangement with the supplier of the branded products, the marketer/distributor is attributed an arm's length return after incurring such marketing expenses (typical case where the TPM is TNMM, or Resale Price operated at Brand Contribution level, i.e. gross margin net of advertising expenses). |
| *52* | *Outsourcing R&D or manufacturing functions*<br><br>• Examples should be tested against evidence in third-party dealings. See comments under 40 above. |
| ***B5*** | ***Transfer pricing adjustments in cases involving entitlement to intangible related return*** |
| *54* | *In summary, for a member of an MNE group to be entitled to intangible related returns, it should <u>in substance</u>...*<br><br>• The words "*in substance*" should be defined, and illustrated with examples.<br>• See comments under 40 and 41 above. |
| *55* | "*Where relevant functions, risks and costs are in alignment with legal registration and the terms of the relevant contracts, the contractual allocation of entitlement to intangible related returns <u>should generally be respected by tax authorities</u>, and transfer pricing determinations should be made on the basis of that allocation of intangible related returns. Where such risks, functions and costs are not in alignment....., <u>transfer pricing adjustments may be appropriate</u> to assure that each member of the group is properly rewarded for its risks, functions and costs".*<br><br>• This last paragraph, which provides grounds for tax authorities to make adjustments, should make explicit reference to the arm's length principle and to adjustments, if any, being made after comparison with third-party practices, as suggested repeatedly above. |

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| ***C*** | ***Transactions involving the use or transfer of intangibles*** |
| ***C1*** | ***Transactions involving the use of intangibles in connection with sales of goods or services*** |
| *60* | • This example is worded ambiguously.<br>• It should be made clear that, while the patents used in the manufacturing may affect the value of the cars, there is no reason to believe that they should also affect the transfer price to the associated distributors, given that these do no acquire any rights in the manufacturer's patent. |
| | • We suggest the inclusion of a new paragraph at the end of section C.1, aimed at preventing tax authorities from attempting to artificially separate a deemed royalty from a "bundled" product price, for the sole purpose of assessing withholding taxes or other taxes on the deemed royalty.<br>• For example, in case of a distributor involved in the purchasing of branded products for resale on the local market, the transaction on goods may be priced by the brand-owner/supplier at a price including an implicit license to use the intangible (i.e. brand) for distributing the product on the market. Tax authorities should be encouraged to respect the contractual arrangement, conduct of the parties and selected transfer pricing methodology for the product transactions (in this case, resale price or TNMM) when these do not separate the licence through a separate royalty flow. |
| ***C2*** | ***Transactions involving the transfer of intangibles*** |
| *(ii)* | *Transfers of combinations of intangibles* |
| *70* | *"...it is important to identify situations where taxpayers or tax authorities may seek to artificially separate intangibles which, as a matter of substance, cannot be separated".*<br>• Reference should be made to third-party dealings in the relevant industry. |
| *(iii)* | *Transfer of intangibles in combination with other business transactions* |
| *70* | • See also comments at the end of paragraph C1 above. |
| *73* | "*Business franchise arrangement*" involving the provision of a "*combination of services and intangibles to an associated enterprise for a unique fee*".<br>• It should be stressed that even in case where no reliable comparables can be identified for the entire service/intangible package, segregating the various parts of the package of services and intangibles for separate transfer pricing considerations may not be possible and may therefore be purely artificial if the services and intangibles are too closely connected and inter-related, and if the "Business Franchise arrangement" is so unique that it cannot be compared to third-party practices. |

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| ***D*** | ***Determining Arm's Length Conditions in Cases Involving Intangibles*** |
| ***D1*** | ***Conducting a comparability analysis in a matter involving intangibles*** |
| *(i)* | *In general* |
| *81* | *"A one-sided comparability analysis does not provide a sufficient basis for evaluating a transaction involving the use or transfer of intangibles".*<br><br>• This statement should be explained and illustrated with examples. See also comment under 83 below. |
| *83* | *Realistically available options*<br><br>• It should be emphasized that there may be other counterparts/benefits for the transferor/transferee to be taken into consideration when assessing whether the outcome is less favourable that its realistically available option |
| *(ii)* | *Intangibles as a comparability factor in transactions involving the use of intangibles* |
| *86*<br><br>*87* | • How in practice is it possible to get into such a level of details when conducting the comparability analysis (i.e. considering "*development of customer list and customer relationship, advantageous logistical know-how and software and other tools that it uses in conducting its distribution business*")???<br><br>• Next paragraph 87 acknowledges that "*in many cases, parties to comparable uncontrolled transactions will also have the same types of intangibles at their disposal".*<br><br>• Only tax authorities (but not taxpayers) may have access to such type of detailed information through their tax audit experience of other taxpayers, but in such a case they would be using secret comparables which are to be discouraged. |
| *(iii)* | *Comparability of intangibles and rights in intangibles* |
| *90* | *"...it is essential to consider the unique features of the intangibles and the specific terms of the transfer...".*<br><br>• Because each intangible is unique, and because of the difficulties in conducting a comparability analysis with regard to a transfer of intangibles or rights in intangibles, it should be accepted by tax authorities that such comparability analysis will only provide an arm's length range, not a specific price.<br><br>• Transfer pricing is not an exact science, and this is particularly true for intangibles. |
| *(e)* | *Stage of development* |
| *98* | *In conducting a comparability analysis involving partially developed intangibles, it is important to evaluate the likelihood that further development will lead to commercially significant future benefits.*<br><br>• This example should be developed and clarified, notably as to its implications on the transfer pricing analysis |

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| *(v)* | *Comparability adjustments with regard to intangibles* |
| *103* | *"If reliable comparability adjustments are not possible, it may be necessary to select a transfer pricing method that is less dependent on the identification of comparable intangibles or comparable transactions."*<br><br>• Given that identification of reliable and relevant comparable intangibles or comparable transactions in relation to intangibles is often extremely difficult because of the unique features of the intangibles, we suggest to encourage more explicitly the use by taxpayers and acceptance by tax authorities of more than one transfer pricing method for testing and documenting compliance with arm's length pricing in intangibles-related transactions.<br><br>• The use of several transfer pricing methodologies may provide a combination of "converging hints" proving useful in reaching a conclusion on arm's length pricing (range), instead of sticking to e.g. a single analysis of unsatisfactory comparables. |
| *(vi)* | *Section D.1.(iv) intangibles* |
| *105* | • This paragraph should be clarified, as the practical implications of such "Section D.1.(iv) intangibles" category are unclear. |
| ***D2*** | ***Selecting the most appropriate transfer pricing method in a matter involving the use or transfer of intangibles*** |
| *(i)* | *In general* |
| *108* | *"The functional analysis should identify other factors that contribute to value creation, which may include risks borne, specific market characteristics, location, business strategies, and MNE group synergies among others. The transfer pricing method selected and any adjustment incorporated in that method based on the comparability analysis, should appropriately reflect all of the relevant factors materially contributing to the creation of value, not merely reflect intangibles and routine functions".*<br><br>• Examples would be welcome to illustrate this statement, which is not clear in its practical implications. |
| *(ii)* | *Use of valuation techniques* |
| *110* | *"Valuations of intangibles contained in Purchase Price Allocations performed for accounting purposes are not relevant for transfer pricing purposes."*<br><br>• This statement should be further developed and illustrated (perhaps again by reference to the difference between consolidated financial statements and legal entity financial statements). PPA is recorded only in consolidated accounts, and as such may indeed not be directly relevant for transfer pricing purposes.<br><br>• Conversely, there may be cases where valuation of intangibles for PPA purposes in the consolidated accounts may be entirely relevant for transfer pricing purposes. For example, in case of an acquisition of a business including a brand (which is legally owned by the acquired legal entity). If such brand is fully amortized for PPA purposes in the consolidated accounts of the acquiring MNE, it may be consistent with the fact that no brand royalty is paid to the legal entity owning such brand by the brand users. Conversely, if some value is recognized to the brand in the consolidated accounts, it does not mean that the full brand value should be attributed to the brand legal owner, as there may be other legal entities contributing to the brand value and entitled to brand related return. |

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| *112* | *"Financial valuation techniques based on the cost of intangible development should usually be avoided".*<br><br>• This statement is not true in all circumstances.<br>• For example, marketing development costs (in the form of advertising expenses, as well as sales promotions) incurred over time by brand-owner and/or brand-user may be a relevant indicator, absent any meaningful comparables. At a minimum, they may provide an indication of a minimum level of return which would be expected by the licensor and/or licensee. |
| *113* | *Use of transfer pricing methods based on estimated cost of reproducing or replacing the intangible. Case of "development of non-unique intangibles used for internal business operations (e.g. internal software system)"*<br><br>• We note that internal software system recognized as an intangible, however this seems to be the only place in the report where there is a reference to such type of intangible.<br>• An example is provided to illustrate the provisions of this paragraph, and the difficulties faced by MNEs in dealing with the arm's length allocation of expenses and intangible related returns associated to internal development of software systems such as ERPs and other costly and complex information systems developments). |
| 114 | *Use of more than one method*<br>"*The principles set out in paragraphs 2.11, 3.58 and 3.59 regarding the use of more than one transfer pricing method apply to matters involving the use or transfer of intangibles".*<br><br>• The use of more than one transfer pricing method (providing a combination of "converging hints") should be more strongly encouraged when it comes to matters involving the use or transfer of intangibles, as it is sometimes the only way of approaching arm's length pricing (esp. when no meaningful comparables can be identified because of the uniqueness of the intangible). |
| 116 | *Application of rules of thumb*<br>*"...application of a rule of thumb to divide intangible related returns between, for example, a licensor and a licensee, is discouraged".*<br><br>• Rule of thumb may be a useful practical way of testing reasonableness of the split in intangible related returns arrived at through complex valuation models, which often are highly sensitive to a number of assumptions each individually hard to justify. As such, rule of thumb may be a practical and useful "sanity check".<br>• Depending on facts and circumstances, rule of thumb may validly be included in the suggested combination of "converging hints" (see above 116) proving useful in reaching a conclusion on arm's pricing, instead of sticking to analysis of unsatisfactory comparables. |
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| ***D3*** | ***Determining and arm's length price for transactions involving the use of intangibles in connection with sales of goods or services*** |
| *(i)* | *Situations where reliable comparables exist* |
| *(ii)* | *Situations where reliable comparables do not exist* |

| ***D4*** | ***Determining and arm's length price for transactions involving the transfer of intangibles or rights in intangibles*** |
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| *(i)* | *Transfer pricing methods where comparable independent transactions can be identified* |
| *135* | *"Valuation of intangibles on the basis of mark-ups on development costs is unlikely to provide an accurate measure of value and is discouraged".*<br><br>• This statement may not be true in some circumstances, e.g. marketing development costs or new product launch costs may in some circumstances provide a good indicator of respective contributions to the development of marketing intangibles (see comments on paragraphs 112 and 113 above)<br><br>• This method a valuation by reference to development costs may be a method of "last resort" (used in combination with other methods) in cases where no meaningful comparables can be identified. |

## Additional Example #1

**Example** to illustrate considerations for intangible property regarding an asset (internal software) developed and shared through an Agreement of Costs Distribution (ACD)

1. A MNE group is constituted by 9 subsidiaries (S1 to S9) based in 9 different countries. Company A is in charge of services functions for the Subsidiaries. The teams of IT maintenance are employed by S and are in charge of the group IT maintenance as well as internal consulting for the subsidiaries.
2. **The Group decides to develop an IT community project which development will spread out over 2 years**. The project is developed by S1 with the assistance of A. Since the beginning, S2, S3 and S4 decide to join the project in order to use the software when developed.
3. Under this circumstances, the 4 subsidiaries formalize through an ACD the sharing of the costs, the right granted to each of them, the consequences if the project is not finalized, the conditions to get out of the ACD before the ending contractual period, the rules if a new subsidiary decides to join the ACD in order to use the software in its territory.
4. During the development phases, the gross costs of A are recharged to S1 (ie subsidies or R&D tax credit received are not deduced from the total costs). Then the total cost, on a yearly basis are partially recharged to S2, S3 and S4 based on the agreement. Those costs are classified in each company books as current fixed asset.
5. The year the software is being operational, each subsidiary becomes an "economic owner" of the software, having the right to use the software for no further consideration. No transfer of intangible is being identified, as the funders have a free right of users in counter part of their financial contributions in the development of the software. S1 is the legal owner. Therefore S2, S3 and S4 are not holding a license right, instead they obtain a free access to the software.
6. During the normal use of the software, S5 express its intention to use the software in its territory. S5 will pay to the funders an entrance fee which corresponds to its contribution to benefit from a technology which was developed before. S5 does not assume any risk. This entrance fee shall be equal to the value of its part of the economic intangible it acquires.
7. During the normal use of the software, one of the funder decides to stop using the software in its territory. The other members of the ACD will buy back to him a part of the intangible. This member will have to take out of its book the intangible.

**Questions raised by this example and not treated in the Discussion draft** :

- The R&D costs are not relevant to decide of the value of the intangible created. What shall be considered in the circumstances: market value ? accounting value ? How to treat the difference in the company who has the legal ownership?
- Which indicator shall be decided in order to share the costs ? (turnover ?, operational result ?, number of stores ? …)
- New user, user getting out the ACD : how to qualify the transfer of the intangible ? what is the legal qualification of the entrance fee ?

## Additional Example #2

1. X is the trademark owner of a renowned brand for consumer goods.
2. Historically, these consumer goods were distributed in Europe by X.
3. 20 years ago, X was willing to penetrate the Asian market and has used the services of Y acting as a regional distributor for the trademark, thereby purchasing from X the goods and reselling them to local distributors in each of the Asian countries. Y applies OECD transfer pricing methodology with its local distributors: TNMM. This TNMM is not questioned by local Asian countries
4. X has been over the years behaving as a passive trademark owner, most of the operations except manufacturing and creation, being performed at regional level by Y.
5. The role of Y was to build up a market recognition in Asia for the trademark and to suggest appropriate distribution channels, train local personnel, advertise and enhance the trademark reputation and notoriety.
6. To this end Y has incurred some costs but these costs, due to location savings, proved to be quite reasonable as compared to cost generally incurred by X to market its products in the European territories.

**Questions raised by this example and not treated in the Discussion draft** :

- Based on these facts, did company Y become entitled to intangible related returns by virtue of the functions, risks and costs it has assumed? Is there, aside from the trademarks and know-how, some other intangibles that have been developed by Y?
- Can resources allocation and general knowledge of the region, the markets and the purchasers be recognized as know-how under the OECD definition?
- Is Y the economic owner of some of these intangibles?
- Should it be compensated when Asian clientele developed thanks to its input, is travelling to Europe? In other words, is Y entitled to a share of profits derived by X in its own European market on purchases made by Asian travellers? Should Y be compensated with a commission on such sales?

**Tentative response :**

- Intangibles developed by Y should not be recognized as such, but should be factored in Y remuneration when setting TP on products sold by X to Y.
- However, in respect of profits made by X out of purchases by the mobile Asian clientele travelling in Europe, X should compensate Y for :
  (i) the loss of revenues suffered by Y in respect of travelling Asian customers ;
  (ii) investments made by Y to develop brand awareness with these Asian customers.
- In an ever increasing globalized environment, to the extent IP rights are territorially restricted, **profits derived from travelling clients** should be reallocated to the company which has developed intangibles in the **home country of the client**.

## 2. Discussion draft on proposed revision on safe harbours in Chapter VI of the OECD transfer pricing guidelines

## 3. Discussion draft on timing issues relating to transfer pricing