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**Opinion Statement of the CFE Fiscal Committee on  
the OECD Discussion Draft on Transfer Pricing Aspects of  
Business Restructuring**

**Paper submitted by the  
Confédération Fiscale Européenne  
to the OECD  
in March 2009**

*This is an Opinion Statement on the OECD Discussion Draft on Transfer Pricing Aspects of Business Restructuring published on 19 September 2008<sup>1</sup>, prepared by the Fiscal Committee of the Confédération Fiscale Européenne (CFE). The CFE is the leading European association of 32 national tax advisory organisations representing over 180,000 tax advisers*

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We have restricted ourselves to some, high level, general comments on the issues raised in the OECD Discussion Draft. If we have made no comment on particular issues raised in the discussion draft that does not necessarily imply that we agree with the approach that has been taken in the discussion draft.

### ***Our overall view of the Discussion Draft***

We believe that OECD has done a very good job in setting out the relevant issues and reflecting, with some accuracy, what happens in practice in the business world.

### ***Respecting what has actually taken place***

We are very much against the potential re-categorisation of any transaction or restructuring. This will undermine the OECD rationale of limiting itself to seeking to put a different value (transfer price) to a transaction if the particular amount does not reflect the arm's length price that would have been established in equivalent non-connected situations (the uncontrolled transaction).

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<sup>1</sup> The Discussion Draft is available on the OECD website at <http://www.oecd.org/dataoecd/59/40/41346644.pdf>

If tax administrations are free to first reinvent the controlled transaction, the essential nature of the arm's length principle is subverted. The threshold for doing so is correctly and accurately stated in the existing guidelines, i.e. where proper application of the arm's length standard is impeded. One way to view this formulation is as a properly stated and focussed anti-abuse rule i.e. where the normal Transfer Pricing rules cannot properly be applied. The proposed watering down of this principle not only subverts the arm's length principle but undermines certainty and threatens the rule of law as it heightens the risk of taxation by administrative discretion and arbitrary application. It also increases the risks of double taxation requiring recourse to the Mutual Agreement Procedure. Such risks exist anyway as honest application of the guidelines can lead to different results

The document also makes no suggestion that the watering down of the standard should be restricted to "business restructuring" within the scope of the paper.

The new standard of "commercially rational behaviour" is not the same as the arm's length standard which seeks comparison with what unrelated parties do. Generally this is demonstrated by empirical evidence. This new approach appears to attempt to give tax administrations an opportunity to hypothesise what they think the behaviour ought to be.

The Transfer Pricing guidelines require a transaction to "impede" for re-characterisation, not simply "restrict" as suggested by paragraph 201. We do not believe that the general formulation in paragraph 201 is a fair reflection of what the current Transfer Pricing guidelines actually state.

### ***Restructurings can take place without transfers of assets or functions***

Paragraph 18.2 states categorically that 'business restructurings involve transfers of functions, assets and / or risks with associated profit / loss potential between associated enterprises.'

We do not believe that this is necessarily the case and restructurings do take place without always involving any associated transfers.

### ***Transfer of activity (ongoing concern)***

We believe that the fact that local intangibles may exist does not dictate that they would be compensated for in an arm's length transaction. The intangibles may not have any value. Their value may be reflected in another transaction – for instance, in the sale of goodwill. Furthermore, local intangibles, even if they exist, may not be legally owned by the local company. Tax administrations are not entitled to require compensation when independent parties would not have provided it.

We doubt that independent enterprises would view the example in paragraph 94 as the transfer of an 'ongoing concern'. In the example M2 has to build up new operations in a new legal environment, with new facilities and infrastructure. It will need new local approvals and permits, take on a partly new workforce, set up new transportation arrangements etc. The transferor is closing down its business, including closing down its infrastructure and dismissing its employees. So this can not be considered an ongoing concern with associated goodwill and the standard models for valuation of acquisition deals should not be used and the transferred assets would have to be valued individually. At paragraphs 183 – 184 the discussion draft highlights the difficulty of valuing a basket of functions, assets and risks that are lost in the restructuring, and are not transferred to another party, and this is what appears to be taking place in the example in paragraph 94. Hence our conclusion that such assets should be valued individually.

In relation to the transfer of intangibles, paragraphs 87 and 88, there is the suggestion that the actual price can be adjusted if the parties did not act in 'good faith' or the valuation was 'sufficiently uncertain'. The highlighted terms are very subjective and it would be helpful to have some further explanation to reduce the risk that the terms will be interpreted in very different ways by different tax administrations.

### ***The underlying rationale for restructurings***

We believe that the discussion draft gives too great a prominence to the tax motivation behind restructurings. In any restructuring there are almost always a number of commercial

reasons why the particular restructuring is being undertaken, e.g. to improve cost effectiveness or improve quality. The tax considerations will need to be addressed before the restructure plan is finalised but they are unlikely to have been a prime motivator for it to take place in the first place.

It is also true that associated enterprises may engage in transactions that independent enterprises would not undertake (paragraph 1.10 of the OECD Transfer Pricing Guidelines). The practical difficulty of arriving at an arm's-length price in such circumstances may then be a problem but it should be attempted, as is recognised in paragraph 206 of the Discussion Draft.

### ***Functions and / or assets***

The discussion draft has a considerable emphasis on functions but it is often easier to concentrate on assets and these are more concrete and not so elusive.

### ***Role of capital***

The discussion draft needs to mirror the fact that business will need a certain amount of capital and sufficient capital to bear the risks. The discussion is sometimes overly focused on people. You need capital in order to earn profits.

### ***The need for less differences of opinion***

We note that of the other major publications produced by OECD, the Transfer Pricing Guidelines are guidelines which all the Member Organisations have signed up to and there are no printed reservations to particular statements or comments in the guidelines. This contrasts with the OECD Model Commentary where differences of opinion are reflected in the text and where individual member, and non member, organisations can include in the text 'observations' indicating where they do not agree with the 'consensus' OECD position.

We would prefer that as far as possible OECD should mirror the OECD Transfer Pricing Guidelines and strive for consensus on the major issues raised in the Business Restructuring paper. The final paper should contain, if possible, categorical statements of the principles generally accepted by the Member Countries. However, there should then be clear statements, in the document, where individual countries do not subscribe to a particular principle. That could provide a text which can give greater certainty and it would highlight, in a transparent way, where countries have reservations, or different practices, and would alert readers to the nature of those divergences.

An example of a difference of opinion on a major issue is seen at paragraph 216.

### ***Exit taxes***

If there is a recognition that countries can tax the 'value' transferred out of their jurisdiction as a consequence of a business restructuring then this could cause problems for those OECD Member Countries who are also part of the European Union. The European Union issued a Communication in December 2006 COM(2006) 825 final in the light of various cases in the European Court of Justice and ECOFIN adopted a Resolution on co-ordinating exit taxation at its meeting on 2 December 2008.

Some of the potential issues that can arise in relation to exit taxes were included in the policy statement of 16 June 2006 issued by the International Chamber of Commerce:

- 'They make it more difficult for companies to restructure and adapt to changing economic conditions in a globalized world. The taxation of phantom income may be an insuperable obstacle to commercial reorganizations that would otherwise occur.
- They withdraw liquidity and net equity by taxation of unrealized gains or by an obligation to provide adequate security for such deemed gains.
- Exit taxes create new complexity and increased burdens of compliance and administration for both companies and tax authorities. A substantial difficulty is to determine the market value of transferred assets.

- Such taxes may lead to double taxation of the same gains. In many cases, the second state simply taxes the full gain on realization with no recognition of the exit taxation previously applied. Even if the second state does provide some form of recognition, excessive taxation may remain if the states do not apply the same valuation.'