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Comments on public consultation on taxation: Revisions to Chapter VII of the OECD Transfer Pricing Guidelines

1. INTRODUCTION

I refer to the OECD's public consultation document entitled "*Revisions to Chapter VII of the OECD Transfer Pricing Guidelines: Special considerations for intra-group services: 1 June – 22 July 2026*" (the "**Discussion Draft**"). At page 2 of the Discussion Draft, the OECD invites stakeholders to comment on all aspects of the Discussion Draft, including the extent to which the objectives of the work have been met, by 22 July 2026.

I hereby submit my comments on selected parts of the Discussion Draft, partly on new or amended paragraphs, and partly on paragraphs which have not been amended (but where clarifications or amendments would be welcome from my perspective). The order of my comments is determined strictly by the paragraph number of the Discussion Draft to which they attach and is not intended to reflect level of importance or any other form of order.

The basis for providing comments on the Discussion Draft is my experience as a tax advisor (in the period 2002–2026) assisting clients (in various industries) on transfer pricing in general and transfer pricing and intra-group services in particular (creation of price models, drafting of intra-group agreements and transfer pricing documentation, administrative disputes, litigation and MAP APA), as well as my academic background in the area of transfer pricing.[1]

This comment letter is based on certain assumptions regarding the behaviour of associated and independent enterprises, and various other factual circumstances. These assumptions are based on personal experience. It is beyond the purpose and scope of this comment letter to verify these assumptions through collecting and presenting supporting empirical evidence.

[1] My doctoral thesis was entitled "*Arm's Length Transaction Structures: Recognizing and restructuring controlled transactions in transfer pricing*" and was published by the IBFD in 2011.

The comments presented in this letter are made in a personal capacity. The views expressed cannot be attributed to Wiersholm law firm (of which I have been a tax partner since 2013), our clients or any other physical or legal person to which I am associated.

2. CHAPTER VII.B: DELINEATION (BENEFIT TEST, ETC.)

2.1 Difference between shared services and services cost contribution arrangements (CCAs)

Both the current version of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the "**OECD Guidelines**") and the Discussion Draft draw a distinction between shared services[2] governed by Chapter VII of the Guidelines and services cost contribution arrangements ("**CCAs**") governed by Chapter VIII of the Guidelines. Hence, the Discussion Draft paragraph 7.11 states as follows:

> *Another possibility would be for members of an MNE group to obtain services through a* ***service cost contribution arrangement****, pooling resources and skills to provide services in exchange for a reasonable expectation of mutual benefits.* (**Bold** added)

Further, the Discussion Draft paragraph 7.11 footnote 1 states as follows:

> *The chapter* ***does not address, except incidentally, whether services have been provided in a cost contribution arrangement, nor, in such a case, the appropriate arm's length pricing. Cost contribution arrangements*** *are the subject of Chapter VIII.* (**Bold** added).

In practice, I have rarely (if ever) encountered services CCAs (as opposed to development CCAs, established for the joint development, production or the obtaining of intangibles or tangible assets, see OECD Guidelines paragraph 8.10). Rather, intra-group service activities with several or multiple service recipients are structured as shared services agreements, which are structured, analysed and priced in accordance with the OECD Guidelines, Chapter VII. If the shared services agreement – as is very often the case – is priced based on a cost-based TNMM, with the service provider(s) as tested party (parties), using an indirect charge method,[3] the substantive differences between such an agreement and a services CCA are not clear:

- A group company can be a CCA participant and (of course) a service recipient, without performing any part of the service activity itself.
- A group company (wholly or partly) performing the service activity can also be a CCA participant and a service recipient, if it benefits from the service activity.
- Under both arrangements, only group companies benefiting from the service activity shall pay for the service activity.
- Under both arrangements, the price is based on the cost of performing the service activity.
- Under both arrangements, an allocation key is used to allocate the costs between the benefitting recipients.

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[2] I.e. intra-group service activities undertaken to satisfy the same business need of several or many different group companies.

[3] See Discussion Draft paragraphs 7.45 *et seq.*

- Under both arrangements, a group company (wholly or partly) performing the service activity will usually be entitled to add a mark-up to the costs.[4]

Hence, the distinction between services CCAs and shared services arrangements priced based on a cost-based TNMM, with the service provider(s) as tested party (parties), using an indirect charge method, is unclear. This may create uncertainty.

The OECD should therefore consider clarifying the following issues in the final version of the revised Chapter VII of the OECD Guidelines:

- Are there any substantive differences between services CCAs and shared service arrangements priced based on a cost-based TNMM, with the service provider(s) as tested party (parties), using an indirect charge method?
- If not, the OECD should clearly state so.
- If there are substantive differences:
  - What are these differences?
  - What are the most important legal and transfer pricing consequences of these differences?

Although the Discussion Draft stresses (at paragraph 7.11 footnote 1) that Chapter VII "*does not address (…) whether services have been provided in a cost contribution arrangement, nor, in such a case, the appropriate arm's length pricing*", Chapter VII should nevertheless clearly define its own scope, so that MNE groups and tax administrations can determine whether an arrangement falls within the scope of Chapter VII or Chapter VIII.

2.2 Benefit test: Rationale and purpose – relationship to other transaction categories than services

Like the current version of the OECD Guidelines, the Discussion Draft (at paragraph 7.13) contains a benefit test:

> *The accurate delineation of intra-group services includes the assessment of whether the service has been performed. This assessment is known as the "benefit test" and requires the determination of whether* ***the activity of one group member provides another group member with economic or commercial value to enhance or maintain its business position****. This is determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by another independent enterprise or would have performed the activity in-house for itself.* (**Bold** added)

The OECD Guidelines do not establish an equally explicit benefit test for other categories of controlled transactions, governed by chapters other than Chapter VII of the Guidelines (such as e.g. transfers[5]

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[4] See Discussions Draft paragraph 7.68 ("*An independent enterprise would normally seek to charge for services to generate profit, rather than providing the services merely at cost*") and OECD Guidelines paragraph 8.26 ("*The value of the current contributions should be determined under the guidance in Chapters I-III, VI and VII. As noted in paragraph 6.79, compensation based on a reimbursement of cost plus a modest mark-up will not reflect that anticipated value of, or the arm's length price for, the contribution of the research team in all cases*.").

[5] Below the term "transfer" is generally used so as to include outright sales as well as lending, hiring out, leasing and license.

of goods, physical business assets[6] and intangible property, and lending of capital (loans)). To my understanding, this does not mean that a benefit test is not implicit in the guidance provided for other categories of controlled transactions than services. Hence, an independent party would be unlikely to pay for *any* goods, services, property or other "performances in kind"[7] that do not provide it with economic or commercial value to enhance or maintain its business position. An example: a manufacturing patent is unlikely to provide benefits to a marketing company. If such a patent was nevertheless licensed to a marketing company in a controlled transaction against a royalty, no part of the royalty amount charged would be arm's length.

Rather, it is reasonable to assume that the lack of an equally explicit benefit test for other categories of controlled transactions than intra-group services reflects the fact that service transactions often, although not invariably,[8] possess certain features which other categories of controlled transactions do not possess, making it more difficult to determine whether the performance in kind confers a benefit to concrete group companies. Such features include (but are probably not limited to) the following:[9]

- *One single service activity may benefit many service recipients simultaneously*: One single intra-group service activity often provides benefits to a larger number of different group companies at the same time, albeit to a varying degree. Consequently, a single service activity (and the result of it) can be "transferred" to more than one group company at the same time. By contrast, an item of goods or other tangible property cannot generally be transferred to more than one group company at the same time. Similarly, an amount of capital cannot generally be lent to more than one group company at the same time. True, like services, one item of intangible property can be used by and provide benefits to more than one group company at the same time. However, the right to use intangible property is often limited by contract, e.g. geographically, which will restrict the number of group companies using the exact same interest in the intangibles simultaneously.
- *No physical delivery or other concrete delivery event*: Often services are neither delivered physically nor with any other concrete delivery event taking place. This may make it difficult to determine whether services are delivered at all. By contrast, goods and physical business assets (e.g. a machine) typically will be delivered physically to the transferee (or, in the case of goods, to its customers). Similarly, a loan is typically provided through actual transfers of capital to a particular group company's bank account (or directly to its creditors, e.g. suppliers). Intangibles

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[6] Physical business assets can take many forms and include e.g. machinery, equipment, vehicles and vessels.

[7] The phrase "*performance in kind*" (Norwegian: *naturalytelse*) refers to the *non-monetary* performance under a commercial agreement. E.g., in a service agreement the service activity performed by the service provider and the result of this activity is the performance in kind, whereas the service fee paid by the service recipient is the monetary performance. Likewise, in a sale of goods agreement, the goods delivered by the seller is the performance in kind, whereas the purchase price paid by the buyer is the monetary performance.

[8] See e.g. Discussion Draft paragraph 7.21 ("*Some intra-group services are performed to meet an **identified need of one or more specific members** of the group. In such a case, it is relatively straightforward to determine whether a service has been provided. For example, an intra-group service would normally be found where an associated enterprise repairs equipment used in manufacturing by another member of the MNE group because, ordinarily, an independent enterprise in comparable circumstances would perform the activity in-house or have the activity performed by an independent party.*" (**Bold** added)). The type of service activity described in the example contained in paragraph 7.21, which is undertaken to satisfy a unique business need of a particular group company, can be referred to as a "direct service". By contrast, service activities undertaken to satisfy the same business need of several or many different group companies, can be referred to as "shared services". The comments provided below in this subsection are generally aimed at shared services, not direct services.

[9] Below I will, to a certain extent, compare service transactions to a selection of other categories of controlled transactions, i.e. transfers of goods, physical business assets and intangible property, and loans. Service transactions could, of course, also be compared to additional categories of controlled transactions. However, it is beyond the scope and purpose of this comment letter to compare service transactions to all other categories of controlled transactions.

cannot, of course, be delivered physically, but they are often still subject to a concrete delivery event (such as e.g. the transferor granting the transferee *access* to the intangibles, or the transferee commencing its use of the intangibles).

- *Difficulty of defining service activities in detail*: Due to the high number and great variety of intra-group services provided within an MNE group, it is often difficult to clearly define all service activities in great detail. If a service activity is not clearly defined, it may be difficult to determine what kind of benefits it will create and to which group companies. By contrast, goods and physical business assets are normally easier to define, since they are tangible (physically observable) assets. Similarly, an amount of capital is normally also easy to define. Although intangibles may take various forms, the core intangibles of an MNE group may be more limited than the intra-group services provided within it, and therefore easier to define. Also, the fact that many intangibles are registered (e.g. as trademarks or patents), makes it easier to define and keep track of them.

- *Existence of benefit highly dependent on facts and circumstances*: For various reasons (some of which are mentioned below) the assessment of whether a service activity provides a concrete group company with benefits is highly dependent on the particular facts and circumstances, which may require time-consuming case-by-case assessments:

    - *Category of service activities*: In many MNE groups a large number of different intra-group services are provided. Different service activities create different types of benefits, thereby requiring separate benefit-testing of different categories of services. This challenge is normally significantly lower for other categories of controlled transactions:

        - *Goods*: In many (but, of course, not all) MNE groups a rather narrow range of goods are transferred intra-group. Further, even in MNE groups in which a broad range of goods are provided intra-group, physical delivery events normally make it fairly easy to determine whether goods have been transferred from one group company to another.

        - *Physical business assets*: Intra-group transfers of physical business assets are typically extraordinary transactions occurring infrequently. Further, even in MNE groups in which physical business assets are transferred more frequently, physical delivery events normally make it fairly easy to determine whether physical business assets have been transferred intra-group.

        - *Capital*: There are not many "categories" of capital – the primary distinction being differences in currency. Further, a concrete group company will typically only borrow money intra-group in a limited number of different currencies (e.g. certain globally important currencies such as USD and EUR, and its local currency).

        - *Intangibles*: Although MNE groups may own and use a significant number of intangibles, intra-group transfers to concrete group companies often cover a fairly limited range of significant intangibles. E.g., since product intangibles and manufacturing intangibles are typically only used by manufacturing companies, such intangibles are typically only transferred to manufacturing companies. Similarly, since core categories of marketing intangibles (such as product trademarks) are typically only used by distributors (marketing/sales companies) selling products to third parties, such intangibles are typically only transferred to distributors.

- *Duplication:* If a service activity resembles an activity which a potential recipient performs in-house or pays third parties to perform, it is necessary to determine whether the service activity is duplicative or complements the activities performed in-house and/or purchased by third parties, ref. Discussion Draft paragraph 7.32 *et seq*. This issue typically does not arise in the context of other types of controlled transactions:
    - *Goods:* Even if a group company manufactures a particular type of goods in-house, it can still benefit from buying the exact same type of goods from an associated manufacturing company (perhaps by earning a profit margin from reselling the goods to third-party customers).
    - *Physical business assets:* Even if a group company already has acquired a physical business asset from a third party, it can still benefit from buying the exact same type of physical business asset from an associated enterprise (perhaps because the new asset will increase its manufacturing capacity).
    - *Capital:* Even if a group company has borrowed MUSD 500 from a bank, it can still benefit from borrowing an additional MUSD 500 from an associated enterprise (perhaps to finance new investments).
    - *Intangibles*: Even if a group company has licensed a trademark for a particular product from a third party, it can still benefit from licensing a trademark for a highly similar product from an associated enterprise (e.g. through earning a profit margin from selling the licensed product to third-party customers).

- "*Transfers" to group companies not benefitting from service activity not economically disadvantageous to the MNE group as a whole:* An MNE group is highly unlikely to perform a service activity which (unless performed for the benefit of and against a service fee from third parties) does not provide benefits to at least one group company – otherwise the group would incur unnecessary costs and would be better off not performing the activity.[10] Further, neither the service provider nor any other group company need to undertake any particular actions to "deliver" the same service activity to another group company that will create additional costs or loss of income for the group. Hence, there are not necessarily any economic disincentives which would discourage the group from adding another group company to the list of benefitting companies. Except perhaps for intangibles, this will typically be different for other categories of controlled transactions:
    - *Goods*: An MNE group will typically have better alternatives than to transfer goods to a group company having no use for them (merely putting them in storage), e.g. to transfer the goods to third-party customers or not purchasing or manufacturing the goods in the first place.
    - *Physical business assets*: An MNE group will typically have better alternatives than to transfer physical business assets to a group company having no use for them, e.g. to dispose of the business asset to a third-party buyer.

[10] See e.g. Discussion Draft paragraph 7.3 ("*MNE groups are free to organise their operations as they see fit with the goals of maximising their profitability and enhancing their competitiveness in the market. In doing so, MNE groups aim at arranging services efficiently without incurring unnecessary costs.*").

    - *Capital*: An MNE group will typically have better alternatives than to transfer capital to a group company having no use for additional capital (merely depositing the capital in a bank), e.g. to repay external loans.

- *Future benefits*: Depending on the nature of the service activity the expected benefits may not materialise until several or many years after the activity was undertaken. This may complicate the assessment of whether the service activity provided benefits to other group companies in the year in which the service activity was undertaken. By contrast, if the performance in kind is a physical object or capital, the benefits are closely linked to the physical assets or capital itself, in the sense that a relevant benefit normally will be deemed to exist as soon as the physical asset or capital is delivered to the recipient group company. The same is true for intangible property, in the sense that a relevant benefit normally will be deemed to exist as soon as the recipient company has been given access to the intangible (provided, of course, it serves a meaningful purpose in its business).

- *Difficult to quantify*: It is often difficult to determine the "quantity" of services received by a particular group company, e.g. if the service activity is the development of a world-wide marketing strategy or another activity which cannot meaningfully be divided into separate parts, each of which benefits only a particular group company. The services received by various group companies can therefore be quantified only by approximations, typically using an allocation key. The difficulty of quantification often entails that it is also difficult to determine whether a particular group company has received any services at all. Such quantification is often much easier in other categories of controlled transactions. The quantity of goods or other physical objects transferred intra-group is the quantity physically delivered and the "quantity" of a loan is the amount actually transferred to a particular group company's bank account (or to its suppliers or other creditors).

Since other categories of controlled transactions typically possess fewer of the above features (complicating benefit-testing) than intra-group services, it makes sense that the OECD has not introduced an equally explicit benefit test for other types of controlled transactions than services.

On the other hand, it is important that the OECD acknowledges that the above-mentioned features complicate benefit-testing not only for tax administrations, but also for MNE groups. The OECD should take these challenges into account when reviewing and considering public comments on, as well as when finalising the guidance on, the substantive content of the benefit test as well as accompanying documentation requirements.

2.3 Expected benefit from high-risk service activities

The Discussion Draft paragraph 7.15d) states as follows:

> *The benefit should be both factually possible and reasonably expected from the outset, although this does not mean that it is necessarily guaranteed when the activity is performed. Thus, a service is considered to be provided if, at the time the activity is performed, the recipient reasonably expects deriving a benefit, even if it is not eventually realized as expected.*

This statement is important, since it is far from uncommon that service activities (wholly or partly) do not result in the benefits expected. In this context, it is important to distinguish between uncertainty as to (i) the *nature* of the benefit and (ii) uncertainty as to the *likelihood* of a clearly defined benefit *materialising*.

An example of (i) is early-stage research to gain fundamental knowledge and insight in a focus area, undertaken without any clear views as to the nature of the results of such research or its commercial application. If the nature of possible results is unclear, it can be difficult to determine which group company will benefit from the results (if any).

An example of (ii) is high-risk research, undertaken to achieve a particular aim (e.g. to develop an improved manufacturing process), where the intended result and benefit is entirely clear from the outset and where it is therefore entirely clear which group companies will benefit from the research if it is successful. It is, however, highly uncertain whether the research will be successful. Even if the likelihood of success is low (e.g. 10–20 %), the low likelihood of success itself does not mean that there is not a reasonably expected benefit.

The OECD should consider clarifying the distinction between uncertainty as to (i) the *nature* of the expected benefit and (ii) uncertainty as to the *likelihood* of a clearly defined benefit *materialising*, and that a low likelihood of materialisation as such does not mean there is no expected benefit, if the nature of the benefit in case of success is clear.

2.4 Market research – benefit for manufacturing companies?

The Discussion Draft paragraph 7.22 contains an example involving certain market research activities, stating that these marketing activities will not benefit manufacturing companies:

> *(…) assume an MNE group is engaged in the skincare industry and centralizes all advanced market research for the group in Company A, located in Country A. The MNE group's main markets are Countries B and C, where it has manufacturing and distribution entities. For these markets, Company A identifies which age group is most likely to purchase anti-aging creams, tests advertising materials with focus groups, analyses trends and customer preferences, and evaluates which are the influencers that consumers trust most when seeking skincare advice. Company A charges group entities in Countries B and C a service fee for the market research activities performed. The accurate delineation of the transaction shows that the activities performed by Company A provide a benefit to the group's distribution entities in Countries B and C by enabling them to target their marketing activities towards the relevant consumer segment. In contrast, the manufacturing entities in those countries perform no activities other than manufacturing and are* ***not expected to implement any changes to their production activities or pricing as a result of Company A's market research****. Accordingly, only the distribution entities in countries B and C are considered to receive a benefit from Company A's activities as those are activities for which an independent enterprise would have been willing to pay or would have performed for itself. Under these facts, there are* ***no controlled marketing services transactions between Company A and the manufacturing entities in Countries B and C****.*

In my view, the example is too categorical. Even though the manufacturing companies are not expected to implement changes to their production activities as a result of Company A's market research, the manufacturing companies may still benefit from the research. For example, their sales volumes may increase, enabling the manufacturing companies to achieve higher degrees of utilisation of their manufacturing facilities. As a result, the manufacturing companies can spread fixed costs over more units produced and earn a higher profit per unit. Further, the market research may be necessary to avoid loss of market shares and reduced production volumes.

Further, even if the manufacturing companies will not implement changes to their pricing model as a result of Company A's market research, they may still receive higher transfer prices. Whether the transfer prices will increase depends e.g. on which transfer pricing method is used to calculate the transfer price. If the market research results in higher prices received from external customers and/or higher sales volumes, and the transfer price payable from the distribution companies to the manufacturing companies is based on the sales-based TNMM or the profit split method[11], one might expect that the manufacturing companies would receive higher transfer prices as a result of Company A's market research (presupposing the distributors' profit margin (sales-based TNMM) or profit share (profit-split method) is not increased as a result of the market research activities).

In light of the above, the OECD should consider amending the wording of the example, making it less categorical and more dependent on the particular facts and circumstances.

2.5 Shareholder activities

2.5.1 Upstream, midstream and downstream shareholder activities

Shareholder activities can be divided into the following main categories:

- *Upstream*: Activities performed by a company in its capacity of *having* shareholders. Examples of such shareholder activities are those referred to in the Discussion Draft paragraph 7.26a) ("*Activities relating to the parent company's juridical structure, such as shareholder meetings, issuing shares, stock exchange listing or costs of the supervisory board*") and several of those referred to in paragraph 7.26c) ("*Activities relating (…) to the parent company's investor relations such as communication strategy with shareholders, financial analysts, funds and other stakeholders in the parent company*").

- *Downstream*: Activities performed by a company in its capacity *of being a* shareholder (in subsidiaries). An example of such a shareholder activity is one of those referred to in the Discussion Draft paragraph 7.26c) ("*Activities relating to raising funds for the acquisition of equity interest*").

- *Midstream*: Activities performed by a company in its capacity as such, and related neither to its shareholders nor to its shareholdings. An example of such a shareholder activity is that referred to in the Discussion Draft paragraph 7.26d) ("*Activities relating to compliance of the parent company with the tax laws applicable to it*").

However, the definition of shareholder activities contained in the current version of the OECD Guidelines and in the Discussion Draft only covers downstream shareholder activities, see Discussion Draft paragraph 7.24:

> *Shareholder activities are those performed by an MNE* [group member[12]] *in its* ***capacity as a shareholder*** *(usually the parent company or a regional holding company)* ***solely because of its ownership interest in one or more associated enterprises****, and that only benefit that shareholder, i.e. they do not provide a benefit to another group member within the meaning described in paragraph 7.13.* (**Bold** added)

The OECD should consider amending the definition of shareholder activities so that it also includes upstream and midstream shareholder activities.

2.5.2 Other non-chargeable parent-company costs than shareholder costs

A parent company may incur costs, which clearly do not qualify as shareholder costs, but which can nevertheless not be charged to subsidiaries. A practical example is a parent company which, in

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[11] The profit split method could be appropriate e.g. if the manufacturing companies use valuable manufacturing intangibles and the distribution companies use valuable marketing intangibles.

[12] The term "group member" is missing in the Discussion Draft and should presumably be reintroduced.

addition to being the ultimate parent company of the group, also performs its own operational business, e.g. manufacturing or distribution activities. The operational costs incurred by the parent company for the purpose of performing its own operational business do not qualify as shareholder costs. These costs can nevertheless not be charged to its subsidiaries, since the costs are incurred for the purpose of acquiring the parent company's own operational income, not for the purpose of acquiring the subsidiaries' operational income.

Moreover, if the parent company and a subsidiary perform the same type of operational business (e.g. manufacturing activities), and the parent company's service department performs service activities beneficial to this particular operational business, a share of those service activity costs should be allocated to the parent company's own operational department (not because they are shareholder costs, but because the service activity is beneficial to the parent company's own operational business).

In my experience, the distinction between different categories of non-chargeable costs is often unclear to MNE groups, which can create various challenges, misunderstandings and erroneous classifications. The OECD should consider specifying that a parent company may incur costs, which clearly do not qualify as shareholder costs, but which can nevertheless not be charged to subsidiaries, accompanied by some practical examples.

2.6 Shareholder costs – mixed cost centres

Section B.2.1.3 of the Discussion Draft is entitled "*Costs associated with shareholder activities*". It is rather brief. A practical challenge not addressed by this section is that created by so-called "mixed cost centres" both performing shareholder activities and service activities benefitting subsidiaries. In theory, a time-writing approach could be used to split costs incurred by such cost centres between shareholder activities and service activities. However, for several reasons this may be challenging in practice. In particular, it may be administratively burdensome to make the time-writing effort necessary to split the activities of mixed cost centres between shareholder activities and service activities.

Because of these challenges, MNE groups often discretionarily assess the split based on interviews[13] with or written statements from the persons undertaking the relevant activities or the person(s) heading the mixed cost centre. Such assessments are typically done periodically, e.g. annually or once every third month, and are based on a review of activities undertaken in the relevant time period. The outcome of the assessment could e.g. be that 30 % of the total costs incurred by the mixed cost centre are classified as shareholder costs and 70 % as service-activity costs.

It would be helpful if the OECD could clarify whether the above approach could be appropriate under Article 9 of the OECD Model Tax Convention and, if so, to provide guidance on how this assessment should be undertaken and documented, as well as on the level of detail expected in the assessment.

2.7 Same group company as service provider and service recipient

It is fairly common that one single group company (e.g. a parent company) has different departments, some of which perform intra-group service activities and some of which perform operational business activities (similar to those performed by other group companies). In such a case, the relevant group company's operational department may benefit from the service activities performed by the company's

[13] Such interviews could be undertaken by the MNE group's tax- or transfer pricing personnel, which summarizes the outcome of the interviews in writing.

service department. If so, the operational department should be "charged"[14] a service fee on the same basis as other group companies benefitting from the same service activity.

An example: Let us suppose the service provider is a parent company, also performing manufacturing activities. The relevant service activity is only beneficial for the relevant MNE group's manufacturing companies. The service fee is cost based, using number of units produced as the allocation key. If the parent company's manufacturing department produces 30 % of the MNE group's total units produced in the relevant time period (e.g. a calendar year), the parent company's manufacturing department should be allocated 30 % of the costs of performing the service activity. These costs are not "shareholder costs", but operational costs related to the parent company's manufacturing business.

To reflect the above, the OECD may consider mentioning that the operational department of the service provider itself may qualify as a recipient.

2.8 Intra-group services vs. risk control framework

The Discussion Draft paragraph 7.29 states as follows:

> *The parent company of an MNE group may (…) perform activities related to the management, coordination and protection of its investments, which* ***may include decision making activities in relation to the business and operation of some or all members of the MNE group****. Where these activities are performed by a shareholder other than solely because of its ownership interest in other group members, the activities* ***should be regarded as an intra-group service*** *if they satisfy the benefit test with respect to those other group members, considering the facts and circumstances of the case, i.e. if the activities provide a benefit to other members of the group for which independent enterprises, in comparable circumstances, would have been willing to pay or perform for itself.* (**Bold** added)

Directly, the paragraph clarifies that the "*decision making activities*" described by it may qualify as a service activity rather than a shareholder activity. However, the statement may also be relevant to determine the distinction between service activities and risk control functions.[15]

To my knowledge, in several very significant transfer pricing cases still pending at the administrative level, domestic tax authorities argue that activities performed by the parent company in its capacity as service provider and involving "*decision making activities in relation to the business and operation of some or all members of the MNE group*", means that the parent company controls risks arising from the subsidiaries' operational business within the meaning of the risk control framework contained in the OECD Guidelines. As a result, the tax authorities argue, the parent company shall be attributed upside (and downside) consequences of such risks,[16] including (in particular) residual profits.

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[14] Since the service department and the operational department are parts of the same legal person, the charging would not involve an actual payment, but could e.g. take the form of the company retaining a share of the service costs.

[15] See OECD Guidelines paragraph 1.65 ("*Control over risk involves the first two elements of risk management defined in paragraph 1.61; that is (i) the capability to make decisions to take on, lay off, or decline a risk-bearing opportunity, together with the actual performance of that decision-making function and (ii) the capability to make decisions on whether and how to respond to the risks associated with the opportunity, together with the actual performance of that decision-making function.*")

[16] Ref. OECD Guidelines paragraph 1.105 ("*A party should always be appropriately compensated for its control functions in relation to risk. Usually, the compensation will derive from the consequences of being allocated risk, and therefore that party will be entitled to receive the upside benefits and to incur the downside costs.*").

However, such high-level decision-making activities do not involve "*decision making of the parties to the transaction in relation to the* ***specific risk arising from the transaction***"[17] (**bold** added) with which the risk control framework is concerned. Such activities therefore do not involve decision-making within the meaning of the risk control framework. Although they can clearly be beneficial to subsidiaries, the basis for "*decision making activities in relation to the business and operation of some or all members of the MNE group*" will normally be the type of *control* exercised by parent companies under *corporate law*, rather than control functions *contractually* allocated to the parent company. If this type of control had been sufficient to qualify as risk control within the meaning of the risk control framework, ultimate parent companies would normally control most or all of the risks arising in their subsidiaries' operational business. To my understanding, the risk control framework is not intended to create such a result. Hence, it is necessary to distinguish between:

i. a parent company's development of and decision to adopt *general rules and principles* that subsidiaries should follow when dealing with various types of risks (not risk control), and

ii. the subsidiaries' *individual decisions* (taking such general rules and principles into account) on whether to expose themselves to particular risks[18] and on how to respond to such risks[19] (risk control).

Currently, the OECD Guidelines contain limited guidance explaining the distinction between control exercised by parent companies under corporate law and control functions performed by parent companies under contracts.[20] The lack of guidance creates uncertainty and is a source of disputes. The OECD should therefore consider clarifying this distinction, by providing additional guidance explaining the concept that only decision-making activities relating to *specific risks arising from a transaction* qualify as risk control within the meaning of the risk control framework.[21]

2.9 No benefit test if no activity is undertaken – relationship to "on-call services"

The Discussion Draft paragraphs 7.37 and 7.38 contain guidance regarding "on-call services", which can be traced back to the OECD 1979 Transfer Pricing Report (paragraph 146). To my understanding, "on-call services" are characterised by being "*available at any time for the members of an MNE group*", with no service activity actually undertaken until a specific need arises.

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17 OECD Guidelines paragraph 1.76.

18 See See OECD Guidelines paragraph 1.65 ("*decisions to take on, lay off, or decline a risk-bearing opportunity, together with the actual performance of that decision-making function*). Such decisions could be referred to as "risk exposure decisions".

19 See OECD Guidelines paragraph 1.65 ("*decisions on whether and how to respond to the risks associated with the opportunity, together with the actual performance of that decision-making function.*"). Such decisions could be referred to as "risk response decisions".

20 In this regard, it is important to distinguish between a parent company's risk exposure and risk response decisions concerning (i) risks related its own provision of services to the subsidiaries (a transaction to which the parent company itself is a party), and (ii) risks related to other controlled or uncontrolled transactions undertaken by its subsidiaries (and to which the parent company is not a party). The basis for making the latter type of decisions (category (iii)) is the parent company's position as the MNE group's parent company, exercising wide-ranged control of its subseries under corporate law.

21 See, by implication, e.g. OECD Guidelines paragraph 1.76 ("*in an MNE group other parties may (…) be involved in setting general policies that are relevant for the assumption and control of the specific risks identified in a transaction,* ***without such policy-setting itself representing decision making*** *(…). The way that inventory risk in the transaction between two associated enterprises is addressed may be subject to policy-setting elsewhere in the MNE group about overall levels of working capital tied up in inventory, or co-ordination of appropriate minimum stocking levels across markets to meet strategic objectives.* ***This wider policy-setting however cannot be regarded as decisions to take on, lay off, decline, or mitigate the specific inventory risk in the example of the product supply transaction in this paragraph.***" (**bold** added)).

In MNE groups where services are provided "on-call" and the recipient pays a stand-by fee, the service provider will receive a service fee even for time periods where no service activity is actually undertaken by it. Seemingly, this is not reflected in the following statement in paragraph 7.14 of the Discussion Draft:

> *The benefit test cannot be applied when the accurate delineation indicates that no controlled transaction has occurred because **no activity** was performed by a group member.* (**Bold** added)

The OECD should amend this statement to reflect that on-call services will qualify as a service benefitting relevant group companies, even if no activity is (yet) performed by the group company offering services "on call".

2.10 On-call services vs. access-to-result services

Admittedly, I have rarely encountered the type of "on call services" described in Discussion Draft paragraph 7.37. Hence, in my experience, this does not seem like a very practical service category.

A service category that is related to on-call services, but which in my experience occurs much more frequently, is that which can be referred to as "access-to-results services". This service category is characterised by a service activity actually being performed, and that the result of the service activity can be used for an extended period of time after the service activity was performed. Examples could be a framework agreement negotiated with an external supplier (which subsidiaries can draw upon when purchasing raw materials, services, etc.) or a manual on certain operational processes (which subsidiaries may use from time to time). The challenging feature of this service category is not that the service activity is not actually undertaken (merely being provided on a stand-by basis). Rather, the challenging feature is that different service recipients typically will use the results of the service activity to a varying degree and that each individual service recipient's use of the results may vary significantly over time. Therefore, benefit-testing of this service category can be difficult. Tax administrations may request the service recipient to provide examples of its actual use of the results of the service activity and assume that the examples provided (which may be few) are exhaustive, although they are clearly not. Often, more examples are not provided because it would involve disproportionate administrative efforts to collect a large number of examples of "actual use" for a large number of service recipients.

The OECD should consider providing additional guidance on this service category. In particular, it would be helpful if the OECD could make clear:

- that the assessment should take a wider time perspective and consider each recipient's use of the results of the service activity over a period of several years,[22] and
- that the assessment should take a "package deal perspective" and, thus, not consider the use of the results of each individual service activity separately, but consider the use of the results of several service activities together (provided such service activities have some level of connection).

2.11 Know-how agreements vs. service agreements

The Discussion Draft paragraph 7.41 states as follows:

[22] This would be the same approach as that proposed for "on-call services", see Discussion Draft paragraph 7.38 ("*Services "on call" may vary in the extent to which they provide benefits from year to year. Thus, the benefit conferred on an MNE by the "on-call" arrangements could be considered by looking at the extent to which the services have been used over a period of several years rather than solely for the year in which a charge is to be made.*").

> *(…)* ***it may be difficult to distinguish between the transfer of intangibles or rights in intangibles and the provision of services****. For example, assume MNE Group X acquires MNE Group Y. Following the acquisition, Parent Co, the parent company of MNE Group X, provides strategic advice and information to the new subsidiaries using its proprietary know-how, frameworks and methodologies such as unique market entry models, risk assessment tools or pricing frameworks. As a consequence, the new subsidiaries may gain the ability to independently apply and adapt Parent Co's know-how, effectively resulting in a transfer of know-how to the new subsidiaries.*

An important factual background for considering the situation and issue addressed by this paragraph, is that the provision of intra-group services within MNEs typically requires the use of a relatively high degree of know-how and experience by the service provider. Further, it is inevitable that a service provider providing services to service recipients to smaller or greater extent will share its knowledge and know-how with the service recipients. This is true, regardless of whether the service provider and the service recipient are associated or unrelated.

The fact that the service provider inevitably will share its knowledge and know-how with the service recipients, therefore does not mean that there is a true transfer of intangibles. To this end, the distinction between know-how agreements and service agreements explained in the Commentaries on Article 12 of the OECD Model Tax Convention (at paragraph 11.3) is helpful:

> *11.3 The need to distinguish these two types of payments, i.e. payments for the supply of know-how and payments for the provision of services, sometimes gives rise to practical difficulties. The following criteria are relevant for the purpose of making that distinction:*
>
> *— Contracts for the supply of know-how concern information of the kind described in paragraph 11 that already exists or concern the supply of that type of information after its development or creation and include specific provisions concerning the confidentiality of that information.*
>
> *— In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by that supplier, of special knowledge, skill and expertise but not the transfer of such special knowledge, skill or expertise to the other party.*
>
> *— In most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material. On the other hand, a contract for the performance of services would, in the majority of cases, involve a very much greater level of expenditure by the supplier in order to perform his contractual obligations. For instance, the supplier, depending on the nature of the services to be rendered, may have to incur salaries and wages for employees engaged in researching, designing, testing, drawing and other associated activities or payments to sub-contractors for the performance of similar services.*

This paragraph of the OECD Commentaries (on Article 12) addresses the same issue as the Discussion Draft paragraph 7.41. It is difficult to see why the distinction between know-how agreements and service agreements should be governed by different criteria under Article 9 and Article 12 of the OECD Model Tax Convention. The OECD should therefore consider amending the Discussion Draft paragraph 7.41 and introducing into it the same distinction as that established by the Commentaries on Article 12 of the OECD Model Tax Convention.

3. CHAPTER VII.C: ARM'S LENGTH CHARGE

3.1 Preference for cost-based methods

Paragraph 7.31 of the current version of the OECD Guidelines states as follows:

> *The method to be used to determine arm's length transfer pricing for intra-group services should be determined according to the guidelines in Chapters I, II, and III.* ***Often****, the application of these guidelines will lead to use of the* ***CUP or a cost-based method*** *(cost plus method or cost based TNMM) for pricing intra-group services.* (**Bold** added)

This statement is removed in the Discussion Draft. Instead, paragraph 7.7 of the Discussion Draft states as follows:

> *There should* ***not be a presumption*** *that a service transaction exhibits economically relevant characteristics that mean it can be reliably priced using a one-sided method. Equally, when a one-sided method is applicable, there should* ***not be a presumption*** *that either the service provider or the service recipient is the tested party. Instead, such determinations should be made after performing an accurate delineation, having considered the economically relevant characteristics of the controlled transaction.* (**Bold** added).

Further, the Discussion Draft paragraph 7.52 states as follows:

> *The most appropriate transfer pricing method should be determined according to the guidance in Chapters I-III. It should* ***not be assumed*** *that a particular transfer pricing method such as a cost-based method (cost plus method or cost-based transactional net margin method)* ***is always preferred*** *for intra-group services.* (**Bold** added)

In my experience, the statement in paragraph 7.31 of the current version of the OECD Guidelines still holds true. Hence, in the absence of CUPs, a cost-based method (the cost-based TNMM rather than the cost plus method in most cases) *is* often the most appropriate method to price intra-group services, with the service provider as tested party. Further, it is often difficult to apply other transfer pricing methods. Although there should (of course) be no non-rebuttable presumption that the cost-based TNMM with the service provider as tested party is the most appropriate method, this is still very often the case. Therefore, the OECD should consider not removing paragraph 7.31 of the 2022 version of the OECD Guidelines, but rather combining paragraph 7.31 of the 2022 version with paragraph 7.7 of the Discussion Draft.

Further, the simplified method used to price low value-adding services (Discussion Draft Chapter VII.E) clearly resembles a cost-based TNMM with the service provider as tested party (albeit with a standardised mark-up). For such services, there is not only a presumption that the cost-based TNMM is the most appropriate method. It is *the* recommended method. The OECD should consider reflecting this in the final revised version of Chapter VII of the OECD Guidelines.

3.2 Allocation keys

3.2.1 Selection directive – not based on comparables

The directive for selection of allocation keys is worded as follows in the Discussion Draft paragraph 7.48:

> *The determination of an allocation key should be based on an appropriate measure of the usage and the expected benefit of the service. MNEs should use allocation keys that are measurable, relevant to the type of service, easy to verify and, where possible, readily available. The basis of allocation must be practical enough to be administrable yet also*

sufficiently accurate to avoid significant disparities between the expected benefits and the intra-group charges.

As worded, the selection directive does not suggest that allocation keys should be selected based on a comparison with the allocation keys *actually* used by independent enterprises (*empirical* arm's length test).[23] Rather, the approach is to select the allocation key that the associated enterprises would be *expected* to use had they been unrelated, taking into account the selection criteria established by the Discussion Draft paragraph 7.48 (*hypothetical* arm's length test). In order to reflect the above, the OECD may consider stating that the selection of allocation keys is generally not based on comparables.

3.2.2 Examples

In Box 3 (after paragraph 7.51), the OECD invites comments on the proposed guidance regarding allocation keys:

Comments are invited on:

1. Would it be useful to provide further guidance on the application of allocation keys for certain intra-group services?

2. What are the allocation keys appropriately applied in practice to specific intra group services?

In my experience, the selection of allocation keys is often an area of debate and discussion between MNE groups and tax authorities. In my view it would therefore clearly be useful if the OECD provides further guidance on the application of allocation keys for certain intra-group services. Such guidance could e.g. take the form of a matrix (which could be included in a new Annex to Chapter VII), listing a selection of service categories which are commonly provided within MNE groups accompanied by one or more allocation keys that are often appropriate to allocate the costs of each of these service categories.

However, such a list should be illustrative, and not mandatory. Depending on the specific sub-category of services, various allocation keys may be appropriate. Also, there is often not one single allocation key which is the most appropriate one – several allocation keys could potentially provide equally reliable results depending on the specific sub-category of services.

3.2.3 Accounting or other numerical figures on which allocation keys are based – reference period

An allocation key is typically based on an accounting figure or other numerical figure, such as e.g. turnover (sales income), OPEX, CAPEX or number of employees. An issue is the year from which the numerical figure should be taken. An example: Let us assume the most appropriate allocation key is OPEX. To allocate the cost of services delivered in 2026, should the allocation be based on:

a) *Past figures*: The service recipients' OPEX in a previous year, e.g. the average OPEX of 2023–2025 or the OPEX in 2025?

b) *Present figure*: The service recipients' OPEX in 2026?

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[23] Presumably, an important reason for this is that independent parties typically do not enter into comparable service transactions, under which service costs are shared based on an allocation keys. Hence, it would be difficult to identify relevant comparables.

c) *Future figures*: The service recipients' estimated OPEX in a future time period?

Depending on the facts and circumstances, future figures may not be "*easy to verify*" and, if so, seem to be discouraged by the directive for selection of allocation keys provided by the Discussion Draft paragraph 7.48. Further, present figures are not known before the end of the income year and are therefore not "*readily available*" during the income year, ref. Discussion Draft paragraph 7.48. By contrast, past figures will both be "*easy to verify*" and "*readily available*" and may therefore be preferable from an administrative perspective. If the relevant figure (e.g. the recipients' OPEX) is relatively stable over time, the use of past figures will also provide reasonable coherence between the expected benefits and the intra-group charge.

In light of the above, the OECD may want to consider clarifying whether past figures could be used as a basis for allocation keys, and, if so, under which circumstances and whether past figures should equal a multi-year average or the past figure for the year preceding the year in which the services were delivered.

3.3 Definition of "*operating expenses of the enterprise as a whole*"

In my experience, MNE groups often find it difficult to distinguish between indirect costs and "*operating expenses of the enterprise as a whole such as supervisory and general administrative expenses*", ref. Discussion Draft paragraph 7.58. The OECD may want to consider providing a list of practical examples illustrating the definition of the latter cost category.

3.4 Stock and share-based compensation: Significance of amounts (values)

After paragraph 7.58, the Discussion Draft invites commentators to provide their views on relevant considerations regarding the treatment of stock or share-based compensation in the context of intra-group services. At a general level, the OECD invites comments on whether it would be beneficial if it includes additional guidance in relation to stock or share-based compensation in the revised Chapter VII of the OECD Guidelines. In my view, it clearly would.

Besides this, I will confine myself to provide one concrete comment on this issue. In practice, stock or share-based compensation granted to a service provider's employees can be very significant. If included in the cost base,[24] such compensation could increase the service charges very significantly. However, the *amount* of the compensation cannot in and of itself be an argument against including such compensation in the cost base at full value/cost. If the service activity had been performed in-house by the service recipient using its own employees, share-based compensation would generally be deductible (provided general deductibility criteria are met), even if the compensation is very significant. The amount of compensation payable to employees is a commercial decision, which should not be questioned by tax authorities. There is no reason why share-based compensation should be dealt with differently merely because it is paid to a service provider's employees rather than to the service recipient's own employees. In light of the above, the OECD should consider specifying that the *amount* of the stock or share-based compensation cannot in and of itself be an argument against including such compensation in the cost base at full value.

3.5 Pass-through costs

According to the Discussion Draft paragraph 7.63 (and 7.64) the classification of a cost as "pass through cost" should be based on comparables:

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[24] My comment presupposes the services are priced based on a cost-based transfer pricing method.

The appropriate treatment of a cost under a transfer pricing method as either recharged at cost without a markup (i.e. a pass-through cost) or recharged with a mark-up in addition to the cost is determined on a ***case-by-case basis****. As outlined in paragraph 2.99 of Chapter II, the over-arching principle in making such determinations is to* ***observe their treatment in comparable arm's length circumstances.*** (**Bold** added)

However, it may be very difficult to identify relevant comparables on pass-through costs. First, independent enterprises use a cost-based method to determine a price far less often than associated enterprises do. It is therefore often not possible to verify whether or not the price charged in uncontrolled transactions is meant to provide the service provider with a mark-up on various cost categories. Secondly, comparables used to classify costs as pass-through costs would need to be based on detailed information of the pricing structure adopted by independent parties.

The OECD may therefore consider providing additional guidance applicable to the (presumably frequently occurring) situations where comparables cannot be identified. Such guidance could e.g. include the following elements:

- *Definition of pass-through costs*: Such a definition could focus on characteristics which one would expect could induce independent parties not to charge a mark-up, e.g.:
    - that the costs relate to functions not performed by the service provider itself (but a sub-contractor),
    - that the costs relate to assets that are not used by the service provider for the purposes of performing its service activity (such as e.g. goods or business assets purchased by the service provider from unrelated suppliers and subsequently transferred to the service recipient); and/or
    - that the service provider does not otherwise add value to the function or asset to which the cost relates.
- *Examples of pass-through costs*: Such a list could include examples of costs which often (although not invariably) will qualify as pass-through costs.

3.6 Profit-split method

Apparently, to a greater extent than the current version of the OECD Guidelines, the Discussion Draft suggests that the profit-split method could be the most appropriate method to determine the price for intra-group services. More specifically, paragraph 7.67 of the Discussion Draft states that the profit-split method can be applied

> [1] *where both parties to a transaction make unique and valuable contributions,* [2] *their operations in relation to that transaction are highly integrated or* [3] *there is a shared assumption of economically significant risks or a separate assumption of closely related economically significant risks.*

It cannot of course be ruled out that the service activity possesses the features described above. However, often this is not the case. Often the service activity is provided by a distinct service centre removed from the service recipients' operational business. Further, the fact that the service provider is skilled and knowledgeable in the area in which it provides services cannot in and of itself mean that it makes unique and valuable contributions within the meaning of paragraph 7.67 of the Discussion Draft, see comments in section 2.11 above.

Further, it would often be difficult to apply the profit split method in typical shared service scenarios, in which there is a large number of service recipients in different jurisdictions and in which the service activity (although complex and important) constitutes a relatively modest share of the total input factors in the service recipients' operational business (since the service recipient itself often performs most of the functions and uses most of the assets serving as input factors in its own operational business). In such scenarios, it will presumably be difficult to isolate the profits to be shared and to determine a reliable allocation key to split the profits.

In light of the above, it would be useful if the OECD could also provide some practical examples of situations where the profit-split method would normally *not* be the most appropriate method.

4. CHAPTER VII.D: DOCUMENTATION

4.1 Benefits documented by agreement on scope of services

The Discussion Draft paragraph 7.72 (third bullet) states that the following contemporaneous evidence can be useful and relevant to demonstrate that the benefit test is met:

> *Communications, e.g. between provider and service recipient, **relating to the decision on the scope, provision and uptake of the service** (e.g. minutes from relevant meetings, email correspondence between entities involved, internal approval documents).*

In my experience, the scope, provision and uptake of shared services are typically not individually agreed between the service provider and each service recipient. There is a significantly higher level of trust and flow of information between *associated* services providers and recipients than between independent enterprises. An associated service provider will therefore often possess the information necessary to determine which service activities would benefit the service recipients, without needing to retrieve information from service recipients on a case-by-case basis. Also, an associated service provider is highly unlikely to perform service activities not benefitting service recipients simply to earn a higher service fee, since non-beneficial service activities will produce unnecessary costs for the MNE group as such. In practice, the service provider itself therefore often decides the scope, provision and uptake of shared services. The services are delivered accordingly, without being "ordered" in a normal sense.

In this regard, it is worth reiterating paragraph 9.174 of the 2010-version of the OECD Guidelines:

> *What is being tested is whether the outcome (the arrangement adopted) accords with what would result from normal commercial behaviour of independent enterprises; it is **not a behaviour test** in the sense of requiring the associated enterprises to actually behave as would independent enterprises in negotiating and agreeing to the terms of the arrangement. Thus, whether the associated enterprises actually engaged in real bargaining or simply acted in the best interests of the MNE group as a whole in agreeing to a restructuring does not determine whether the arrangement would have been adopted by independent enterprises behaving in a commercially rational manner or whether arm's length pricing has been reached.* (**Bold** added)

Hence, the question is whether the service activity provides the recipient with a benefit, not whether the scope, provision and uptake of services was agreed between the provider and the recipient in the same way as they would have been between independent enterprises.

The OECD should consider amending the Discussion Draft paragraph 7.72 (third bullet point) to reflect the above.

4.2 Benefits documented by examples of deliverables

The Discussion Draft paragraph 7.72 (fifth bullet) states that the following contemporaneous evidence can be useful and relevant to demonstrate that the benefit test is met:

> *Deliverables or output from the activities such as a report, document, advice, memo, sample of the IT tickets, etc., to the extent that the activity resulted in a distinct deliverable.*

In shared service scenarios, where the service provider provides a large catalogue of different services to multiple service recipients, it will be very time consuming to collect examples of a large number of individual deliverables. Also, without disproportionate efforts, it will be impossible to provide something even remotely close to an exhaustive list of individual deliverables.

The OECD should therefore consider making clear that domestic tax administrations should refrain from requiring exhaustive lists of deliverables and that the provision of *examples* of deliverables would normally be sufficient to satisfy the benefit test. Further, the OECD should make clear that MNE groups cannot be expected to provide exhaustive lists of deliverables for the purpose of documenting the quantity of services received by each service recipient.

5. CHAPTER VII.E: LOW VALUE-ADDING SERVICES

5.1 General services of an administrative or clerical nature

Paragraph 7.80 of the Discussion Draft provides examples of services that would likely meet the definition of low value-adding services provided in paragraph 7.76. The last example mentioned is "*general services of an administrative or clerical nature*". This category is described in very general terms. The OECD should consider providing a list of services falling within this category.

5.2 Benefit test documented by examples of deliverables: low value-adding vs. ordinary services

The Discussion Draft paragraph 7.86 states as follows:

> *In evaluating the benefit test, tax administrations should consider benefits only by categories of services and not on a specific charge basis. Thus, the taxpayer need only demonstrate that assistance was provided with, for example, payroll processing, rather than being required to specify* ***individual acts undertaken that give rise to the costs charged****.*

By "*individual acts undertaken that give rise to the costs charged*" is presumably meant concrete functions performed by the service provider, i.e. the concrete deliverables. Hence, the quoted part of the Discussion Draft paragraph 7.86 addresses the same issue as the Discussion Draft paragraph 7.72 (fifth bullet), commented upon in section 4.2 above.

The OECD should specify that the Discussion Draft paragraph 7.86 cannot be interpreted *a contrario* for "ordinary" services (not qualifying as low value-adding services), in the sense that the taxpayer must generally *"specify individual acts undertaken that give rise to the costs charged*". Reference is made to the comments provided in section 4.2 above.

5.3 Standardised mark-up: Net margin

Like the current version of the OECD Guidelines (at paragraph 7.61), the Discussion Draft (at paragraph 7.92) states that a standardised mark-up of 5 % shall be added to the cost base used to determine the service charge for low value-adding services:

In determining the arm's length charge for low value-adding intra-group services, the MNE provider of services shall apply a profit mark-up to all costs in the pool with the exception of any pass-through costs as determined under paragraphs 2.99 and 7.63-7.65. The same mark-up shall be utilised for all low value-adding services irrespective of the categories of services. The mark-up shall be equal to 5% of the relevant cost as determined in Section E.2.2.

The standardised mark-up of 5 % is added to a *broadly defined* cost base. The method used to determine the service charge for low value-adding services therefore resembles a cost-based TNMM (*net* margin method) rather than a cost-plus-method (*gross* margin method). Hence, the standardised mark-up is a net margin mark-up, not a gross margin mark-up. However, this is neither explicitly stated in the current version of the OECD Guidelines nor in the Discussion Draft, which in my experience may give rise to some confusion for MNE groups.

The OECD should therefore consider explicitly stating that the standardised mark-up of 5 % is a *net* margin mark-up as opposed to a *gross* margin mark-up.

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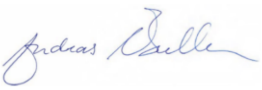
Yours sincerely



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