# Valuation is biggest bugbear in OECD intangibles work

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The OECD public consultation on its recently released drafts on transfer pricing, by Working Party No 6, concluded last Wednesday in Paris. Delegates and speakers give their interpretation of the two-and-a-half day discussion.

Those who attended the OECD intangibles discussion last week will know that the public consultation was, at times, extremely convoluted and, at other times, progressive and informative.

The definition of an intangible is still a problem for the OECD to solve, along with approaches to valuation and the relevance of safe harbours and timing issues.

**Valuation**

During the debate questions were raised, by business representative, over whether the OECD should introduce types of valuation methods, but remain general in discussing their application in its guidance for the treatment of intangible assets.

The OECD asked delegates whether it is placing too much emphasis on profit split approaches.

During the consultation, Baker & McKenzie said profit split is frequently an appropriate pricing method when exploitation and further development rights are transferred because both sides to the transaction typically make unique and valuable contributions, but is inappropriate when reliable comparables exist, because it is one-sided.

The use of profit split generally requires economically complex and frequently controversial assumptions.

Baker & McKenzie recommended that the discussion draft acknowledge cases where one-sided methods are usually appropriate.

Arwed Crueger, of WTS, an advisory firm in Germany, said he was pleased to see the revival of the cost and comparable uncontrolled price (CUP) methods during the consultation.

"Both methods deserve more attention, since these are often practicable alternatives. A lot of participants have agreed to that view, but also have shown concerns about the high attention that has again) been given to valuation issues."

Cruegar said for most economists, including himself, a valuation approach is simply a certain form of CUP method or hypothetical CUP.

"Of course, some guidance about valuation techniques is surely helpful. But these valuation techniques are just a certain (but sometimes important) part of transfer pricing for intangibles."

The result of a valuation is either the view of the seller, or of the buyer, forming the lower and the upper end of the negotiation range.

"To arrive at a final value (market price), the negotiation process between the parties has to be simulated, or alternatively ignored, resulting in a range to choose from. Options realistically available will also have an impact on the bargaining behaviour, range and final result, and have to be considered in this context, but not as a new separate" pricing method."

Crueger recommends that the concept of non-recognition of transactions should be removed from the draft.

"A wrong transfer price can always be adjusted, and abusive behaviour should be treated in local tax laws, for example CFC [controlled foreign company] rules. Abusive behaviour should not have an impact on transfer pricing itself, since this would only complicate things."

**Comparables and databases**

David Jarczyk, of ktMINE, an IP (intellectual property) and data information service, thought there was a general consensus that the CUP method should be considered by the OECD for IP analysis.

"Experts should use independent licence agreements to determine the appropriate structure of IP transactions as well as to assist in determining a price for the transactions. The use of these benchmarks answers the critical questions raised by the discussion draft: how would independent parties structure an IP transaction given the tested transaction's facts and circumstances? And what price would be agreed upon given this structure?"

Some delegates wanted the OECD to document that, while the CUP is not necessarily the primary method, it should be reviewed and considered.

After the consultation, the Working Party will need to think about introducing types of methods in intangible transactions but may prefer to remain general in the application of these methods.

"Transfer pricing experts should use their skills to determine the most appropriate method and, when necessary, determine which methods act as corroborative analyses. By getting too specific regarding assumptions and applications of the various methods, we may risk setting precedents that do not adhere to the arm's-length standard," said Jarczyk.