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The Grey Area of Taxation

An essay on Low Value-Adding Services in Swedish
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Summary

This essay critically examines the legal aspects of low value-adding services within multinational corporations, focusing on their treatment in Swedish tax law and the OECD Transfer Pricing Guidelines (OECD TPG). It explores the challenges and complexities involved in defining and taxing intragroup services, emphasizing their impact on profit shifting strategies. The essay provides an analysis of Swedish tax provisions, court rulings, and their alignment with the OECD TPG, highlighting areas of potential divergence and the need for clearer legal definitions and practices. The discussion gives an overview on some of the grey areas in current Swedish tax law and international soft law. Swedish tax legislation on transfer pricing is sparse and the main governing rule is found in Chapter 14, Section 19, Income Tax Act (1999:1229). It gives no further clarification other than that a price on an intragroup service must abide to the Arm's Length Principle, meaning it must be charged with a price mirroring the price that an independent company would pay for the service. The lack of specific provisions on methods and categorizations is guided by international frameworks, more precisely in Sweden the Supreme Administrative Court predominantly refers to the OECD TPG. The OECD TPG is a comprehensive document on most of the relevant transfer pricing topics. Notably, it is not binding but still upheld by the Supreme Administrative Court as a guiding tool, giving it a quite special and frankly unclear legal status.

Sammanfattning

Denna uppsats undersöker de juridiska aspekterna av lågvärdeskapande tjänster inom multinationella företag utifrån ett kritiskt perspektiv. Fokus ligger på regleringen enligt svensk skattelagstiftning och OECD:s riktlinjer för internprissättning. Den utforskar utmaningar och komplexiteten i att definiera och beskatta koncerninterna tjänster, med tonvikt på deras påverkan på strategier för vinstförflyttning inom en internationell koncern. Uppsatsen presenterar en analys av svenska regler, domstolsavgöranden och deras överensstämmelse med OECD:s riktlinjer, och belyser områden med potentiella skiljaktigheter och behovet av tydligare juridiska definitioner samt praxis. Diskussionen ger en överblick över några av gråzonerna i nuvarande svensk skattelagstiftning och internationella riktlinjer. Svensk skattelagstiftning om internprissättning är sparsam och huvudregeln återfinns i 14 kap. 19§, Inkomstskattelagen (1999:1229). Regeln ger ingen ytterligare förklaring än att priset på en koncernintern tjänst måste följa armlängdsprincipen, vilket innebär att det ska debiteras utifrån ett pris som speglar det pris ett oberoende företag skulle betalt för tjänsten. Bristen på specifik reglering för metoder och kategoriseringar, är i stället för inhemsk vägledning styrd av internationella ramverk, mer exakt hänvisar Högsta förvaltningsdomstolen huvudsakligen till OECD:s internprissättnings riktlinjer. Riktlinjerna utgörs av ett omfattande dokument som berör de flesta relevanta områden för internprissättning. Anmärkningsvärt är att riktlinjerna inte är bindande men ändå upprätthålls av Högsta förvaltningsdomstolen som ett vägledande verktyg, vilket ger det en speciell och en något otydlig juridisk ställning.

Abbreviations

| | |
|----------|---|
| BEPS | Base Erosion and Profit Shifting |
| CPM | Comparable Profit Method |
| CUP | Comparable Uncontrolled Price |
| EU | European Union |
| G20 | Group of Twenty Finance Ministers and Central Bank Governors |
| HFD | Högsta Förvaltningsdomstolen (The Supreme Administrative Court) |
| HR | Human Resources |
| IL | Inkomstskattelagen (SFS 1999:1229) (Income Tax Act) |
| JTPF | Joint Transfer Pricing Forum |
| MNC | Multinational Corporation |
| OECD | The Organization for Economic Cooperation and Development |
| OECD TPG | The Organization for Economic Cooperation and Development's Transfer Pricing Guidelines |
| OEEC | Organization for European Economic Cooperation |
| OJEU | Official Journal of the European Union |

| | |
|-------|---|
| Prop. | Proposition |
| R&D | Research and Development |
| RÅ | Regeringsrättens årsbok (The Supreme Administrative Court) |
| SFF | Skatteförfarandeförordningen (SFS 2011:1261) (Tax Procedure Ordinance) |
| SFL | Skatteförfarandelagen (SFS 2011:1244) (Tax Procedure Act) |
| SFS | Svensk författningssamling (Swedish Code of Statutes) |
| TNMM | Transactional Net Margin Method |
| VAT | Value-Added Tax |

1.Introduction

1.1 Background

The foundational principle of our economy rests on the premise that when two parties engage in a transaction¹, they each aim to maximize their own outcome. However, an issue arises when these parties lack independence from one another. In such scenarios the associated parties may not seek to optimize their own profit². Instead, they may prioritize to improve the overall profit of the Multinational Corporation (MNC)³ to which they are affiliated, for instance, by reducing its total tax liability.⁴

This phenomenon is not inherently problematic from a purely economic standpoint, as it is a matter of perspective on outcome maximization. The issue becomes problematic when considering that a company's profits often serve as the basis for taxation by national authorities. This implies that, depending on domestic tax policies, an MNC may be inclined to internally shift profits to minimize tax liabilities and thereby maximize its net profits.⁵ One method involves internal transactions with low value-adding services within the MNC. Low value-adding service being generally defined as "services performed by one member or more than one member of an MNC group on behalf of one or more other group members which are of supportive nature".⁶ Under the Organization for Economic Cooperation and Development's Transfer Pricing Guidelines (OECD TPG) these services can be sold with a standardised markup⁷, effectively transferring funds from a high-tax to a low-tax jurisdiction. This process impacts the individual profit or loss of the member company.⁸

¹ Section 2.2.

² Ibid.

³ Ibid. 2.1.

⁴ Lodin et al. (2021) pp. 558–559.

⁵ Lang et al. (2019) p. 5-6; section 2.2.

⁶ OECD TPG, (2022) p. 327, para. 7.45.

⁷ Section 2.2.

⁸ Lang et al. (2019) p. 383.

The foundational principle governing a transaction within an MNC is commonly referred to as the *Arm's Length Principle*, which can be summarized as a method for setting the correct price on an intragroup transaction (transfer pricing), which most often would be a price corresponding with the market value.⁹ In Sweden, the regulatory framework for transfer pricing is relatively sparse, comprising merely two statutes in the Income Tax Act (1999:1229), IL and a few notable court cases concerning the *Arm's Length Principle*. Additionally, there are also some administrative rules, in the Tax Procedure Act (2011:1244), SFL, and the Tax Procedure Ordinance (2011:1261), SFF. However, the predominant guidance is shaped by the decisions and rulings of the Swedish Tax Authority and courts.¹⁰ The primary challenges revolve around two major questions: when an intragroup service is rendered and what constitutes an arm's length charge for such services.¹¹

1.2 Aim

The aim of this essay is to analyse the relevant regulatory framework regarding transfer pricing in the context of intragroup services, impacting Swedish tax provisions. It will critically evaluate existing legal provisions concerning low value-adding services.

- How do Swedish tax provisions define and manage low value-adding services in the context of transfer pricing, and what criteria distinguish these services from other types of intragroup services?
- How does OECD TPG influence the application and interpretation of low value-adding services in Swedish tax law, and what are the potential areas of divergence?

⁹ Monsenego (2015) p. 12.

¹⁰ HFD 2016 ref. 45; RÅ 1991 ref. 107, para. 5.3; Prop. 2005/06:169 pp. 88-90.

¹¹ Petruzzi, Cottani and Lang (2021) pp. 354.

1.3 Method and Material

The methodology used to achieve the aim of this essay is twofold. Initially, to examine Swedish tax provisions, I conduct an analysis, encompassing legislation, preparatory work, legal precedents from the Supreme Administrative Court, and relevant legal literature to interpret and understand these materials.¹² The first method abides to the legal dogmatic method, a method to understand and systemize applicable law.¹³ However, due to the scarcity of materials directly addressing Swedish transfer pricing provisions, particularly concerning low value-adding services, my research incorporates a secondary method.

The second method involves examining selected case decisions from the Swedish Administrative Court of Appeal and guidelines from the Swedish Tax Authority. This approach also includes an analysis of literature and guidelines related to the OECD. Collectively, these soft law sources are relevant for understanding the legal application and interpretations of Swedish tax provisions on transfer pricing. The second method has been chosen as a complementary method to understand the relevant soft law and particularly regarding the influence of the OECD TPG. I justify the second approach with certain Supreme Administrative Court cases that establishes the OECD TPG as a guiding framework for transfer pricing in Sweden.¹⁴ Since most of the material for this method pertains to the OECD TPG, they are examined both independently, such as in the categorization of a transaction, and in relation to Swedish tax provisions, for example, noting divergences.

The court cases from the Administrative Court of Appeal concern specifically low value-adding services from the last six years and illustrate how courts and tax authorities reference the OECD TPG, thereby affirming its practical significance. The need to resort to lower courts cases is because the Supreme Administrative court does not mention or refer to low value-adding services,

¹² Kleineman (2021) pp. 33-34.

¹³ Ibid. pp. 21-22.

¹⁴ HFD 2016 ref 45; RÅ 1991 ref 107, para. 5.3.

but only the OECD and its guidelines in their entirety. The selection of cases from the last six years is based on the 2017 update to the OECD TPG and cases selected are those in which low value-adding services have been the main or one of the main subjects for the court. While the OECD TPG could be regarded as a leading source¹⁵, it is important to acknowledge that it might not fully capture the unique aspects of Swedish tax law. This potential gap necessitates the first method, which is dedicated to understanding Swedish tax law in the context of transfer pricing independently.

Legal literature concerning Swedish provisions serves as material for the first method, while literature on the OECD and international transfer pricing adheres to the second. Both are employed to clarify the applicable law in Sweden and to comprehend international guidelines, respectively. The literature is not used as applicable law but as a tool for understanding and examining it.

In conclusion, this essay employs a legal dogmatic method and a complementary method involving a legal analysis of the OECD TPG, along with relevant European and other internationally relevant soft law, as well as the select cases from the Administrative Court of Appeal. The choice of methodology is primarily driven by the limited availability of high-value legal sources, necessitating the examination of both high-value sources and soft law. Collectively, these methods aim to address the questions posed by the essay. The conclusion will offer a critical perspective to evaluate the challenges and complexities inherent in low value-adding services. Additionally, it will incorporate an analytical approach as part of the legal dogmatic approach, focusing specifically on the applicable laws governing low value-adding services.¹⁶

1.4 Delimitation

This essay will focus on Swedish law, mostly on the rule in Chapter 14, Section 19 IL, supplemented by pertinent international materials, particularly

¹⁵ Prop. 2005/06:169 pp. 89-91.

¹⁶ Kleinman (2021) pp. 35-37.

the OECD TPG. A comparative analysis or the examination of double taxations agreements will not be included. This scope is chosen to align with the essay's aim of understanding the applicable law in Sweden, specifically concerning entities liable for taxation within Sweden. Relevant aspects and topics delimited in this essay are if not otherwise stated due to length and time constraints.

Additionally, it will not include certain aspects, specifically some prerequisites for applying transfer pricing rules. The topic, "the attribution of profits to a permanent establishment"¹⁷ will not be covered. Instead, the focus will be on the subsequent stages of the process, presuming that the criteria for a transaction as stipulated in Chapter 14, Section 19 IL or as defined in the OECD TPG, are already established.

Only a general overview of specific methods suggested by the OECD TPG for calculating an arm's length price, particularly focusing on intragroup and low value-adding services will be presented. Consequently, other methods suggested by the OECD TPG, including the concept of Cost Contribution Arrangements¹⁸, will not be discussed due to their relative irrelevance to the essay's aim. An in-depth analysis of specific methods or explanations of methods not pertinent to intragroup services falls outside the scope of this essay. The focus will primarily be on the simplified approach outlined by the OECD TPG for low value-adding services. Additionally, the essay will not delve into determining the most appropriate calculations of an arm's length price for a specific service, as such determinizations are inherently case-specific.¹⁹ This also entails excluding the concept of Advance Pricing Agreements²⁰ which are relevant for specific tax consequences.

In examining how Sweden manages and how the OECD TPG influence the application of low value-adding services, this essay will provide only a general analysis. This will include aspects such as documentation

¹⁷ See further in, *Report on the Attribution of Profits to Permanent Establishments*, OECD (2008).

¹⁸ See further in, OECD TPG, (2022) Chapter VIII.

¹⁹ Monsenego (2015) p. 13.

²⁰ See further in, Chapter 33a Law on Pricing Decisions in International Transactions (2009:1289).

requirements and standardized markups to offer an overview of the legal ramifications for low value-adding services. Consequently, it will not engage in a comprehensive analysis that encompasses the full practical extent of low value-adding services. The discussion will also exclude aspects of VAT and the recent EU directive²¹ on country-by-country reporting, which are relevant to the broader topic of transfer pricing. Material from the EU will not be further examined in this essay unless relevant for understanding the OECD TPG or pertinent Swedish tax provisions.

Finally, this essay will specifically focus on intragroup services that are classified as low value-adding or those that are ambiguously situated between low value-adding and other categories. A broader analysis of all types of intragroup services would necessitate more extensive research than what this essay can accommodate.

1.5 State of Research

There appears to be a lack of research specifically on low value-adding services and transfer pricing in a Swedish context. However, a development is the recent Law on Supplementary Tax (2023:875), effective from January 1st, 2024. This is an implementation of an EU Directive regarding a global minimum tax for MNCs. It will not be further examined in this essay as it does not pertain to the specific subject of low value-adding services, but instead relevant for profit shifting in a broader perspective.²²

Current research in the field is predominantly influenced by the OECD and the Base Erosion and Profit Shifting (BEPS).²³ Notably, the OECD and BEPS are planning to revisit the framework within the OECD TPG, particularly concerning intragroup services, to reassess necessary clarifications.²⁴

²¹ Council Directive (EU) 2016/881 of 25 May 2016.

²² Prop. 2023/24:32 p. 1.

²³ Collier and Andrus (2017) p. 1.

²⁴ KPMG report (2023).

1.6 Outline

This essay comprises three main sections, preceded by a terminology section (2.) to define key terms. The first section (3.) introduces transfer pricing and the *Arm's Length Principle*, including the Swedish regulatory framework and relevant OECD material. The second section (4.) explores intragroup services, their classifications and specific transfer pricing methods. This section also examines the concept of chargeable services and markups. The third section (5.) then narrows the focus to low value-adding services, discussing their definition, markups, and documentation requirements, building upon the insights from previous sections. The essay concludes with an analysis to answer the essay's questions and is finished with a summarized conclusion (6.).

2. Terminology

2.1 Taxpayer

In this essay, a “Multinational Corporation” is described as a collective of companies with the parent entity owning or controlling all subsidiaries, including those owned by these subsidiaries, across multiple jurisdictions.²⁵ The terms “company”, “entities”, and “parties” are used interchangeably to refer to a legal person, which could be a business entity either unlimitable liable for taxation in Sweden or a foreign entity, as outlined in Chapter 6, Section 3 and 8 IL, respectively. Tax liable companies are also referred to as “taxpayers”.

2.2 Financial Terms

“Transactions” refers to any exchange of goods or services for compensation. The financial outcome for a company is termed as “profit” or “loss”, aligning with the definitions provided by the OECD²⁶, and within the Swedish provisions as detailed in Chapter 14, Section 21 IL, regarding a company’s result. “Controlled transactions” happen within an MNC, whereas “uncontrolled transactions” happen outside the MNC.²⁷ “Gross profit” is the earning from sold goods/services minus production costs. “Net profit”, on the other hand, is what remains after operating expenses, taxes and interests have been subtracted from the total revenue. “Margin” is calculated by dividing either gross or net profit by revenue. “Markup” is the percentage added to the cost of goods/services to determine their selling price and ensure profit. Regarding Swedish tax provisions, “income” refers to all revenue from business operations, and “costs” to expenses for acquiring and maintaining the income, as per Chapters 15, Section 1 and Chapter 16, Section 1 IL. “Allocation” pertains to the way income and expenses are distributed within a company, with “allocation key” being a metric used for allocation.

²⁵ OECD TPG, (2022) p. 23.

²⁶ OECD, Glossary of Statistical Terms, (2008) p. 428.

²⁷ OECD TPG, (2022) pp. 21 and 27.

3. Transfer Pricing

Transfer pricing is the practice whereby individual companies within an MNC set prices for goods or services exchanged between group companies in different jurisdictions. The mechanism of the internal pricing on these transactions, plays a critical role in taxation. From the perspectives of accounting and management, companies within an MNC may either be consolidated or report their financials individually. However, tax obligations are typically determined by domestic authorities based on each member company's financial result in that country. To optimize profits, an MNC might be inclined to allocate profits to align with varying tax liabilities, often moving funds from high-tax to low-tax jurisdictions. This profit shifting poses risks of eroding the tax base in higher-tax jurisdictions due to profit reallocation to more tax-favourable jurisdictions.²⁸

3.1 The Arm's Length Principle

The cornerstone of transfer pricing provisions is embodied in the principle, commonly known as the *Arm's Length Principle*. This principle mandates that prices set for transactions within an MNC mirror those between independent companies. Ensuring that intragroup transactions reflect market value, thereby promoting fairness and hindering tax evasion.²⁹ In Sweden the *Arm's Length Principle* comes from a precedent court case and is the guiding rule for adjusting prices according to Chapter 14, Section 19 IL.³⁰

Independent companies' prices, as assumed by the principle are determined by market forces. However, companies within an MNC may not have the same incentive to rely on market forces for intragroup transactions, thereby letting other factors determine the price.³¹ The resolution of the conflict between the interest of an MNC and the fiscal interests of countries is sought

²⁸ Lang et al. (2019) pp. 5-6.

²⁹ Collier and Andrus (2017) pp. 2-3.

³⁰ RÅ 1991 ref. 107.

³¹ Monsenego (2015) pp. 3-4.

through the application of the *Arm's Length Principle*.³² In the OECD Model Tax Convention, Article 9, Section 1, the *Arm's Length Principle* is stipulated. It establishes that the market price of a cross-border intragroup transaction should be based on the pricing of a comparable transaction between independent companies.³³ To enable tax authorities to assess whether an intragroup transaction adheres to the *Arm's Length Principle*, there is often a requirement for comprehensive documentation.³⁴

3.2 Swedish Provisions on Transfer Pricing

Swedish tax law, particularly in Chapter 14, Section 19 IL addresses transfer pricing.³⁵ Section 19, stipulates that the result of a Swedish member of an MNC should be adjusted if profits have been artificially lowered due to profit shifting to a foreign associated company, provided the MNC is covered by the definition in Chapter 14, Section 20 IL. Further, it articulates that if the financial result of a company within an MNC is reduced due to terms not consistent with those that would have been agreed upon by independent parties, then the result of that company should be recalculated. The recalculation aims to reflect what the result would have been if an arm's length term had been applied.³⁶ However, the Supreme Administrative Court of Sweden have accepted a holistic assessment of a controlled transaction, a lower price could be motivated by unique benefits, as a possible consequence of the MNC structure.³⁷ The rule in Section 19, is regarded by the Supreme Administrative Court of Sweden as *lex specialis*. This means it takes precedence over other potentially conflicting rules in the Swedish tax law.³⁸ The Court of Justice of the European Union have accepted the rule in Section 19, even though it discriminates foreign transactions, with the motivation that it promotes a fair distribution of tax liability.³⁹

³² Lang et al. (2019) pp. 12-13.

³³ OECD, *Model Tax Convention* (2017), Article 9 (1).

³⁴ Collier and Andrus. (2017) pp. 117-118.

³⁵ OECD, *Sweden: Transfer Pricing Country Profile* (2021) No. 1-3.

³⁶ Lodin et al. (2021) pp. 559–560.

³⁷ RÅ79 1:40; RÅ80 1:59; section 2.2.

³⁸ RÅ 2004 ref. 13.

³⁹ C-311/08 *Société de Gestion Industrielle SA v. Belgium*, EU:C:2010:13:3.

A key factor in guiding the determination of a prices in accordance with Chapter 14, Section 19 IL are the guidelines provided by the OECD,⁴⁰ to which Sweden retains membership since 1961.⁴¹ Despite their non-binding nature, these guidelines, first introduced in 1979 and most recently revised in 2022, are highly influential in guiding Swedish tax authorities. The Supreme Administrative Court has stated that while these guidelines are non-binding, they provide valuable guidance on how Swedish tax authorities can regulate and assess the *Arm's Length Principle*.⁴² This approach has been further affirmed in subsequent precedential court cases and is also supported in the preparatory work, which also upholds the OECD Model Tax Convention. With particular emphasis on intragroup services, as evidenced in a case from 2006.⁴³ Regarding the application of low value-adding services, there are no precedent-setting court cases in Sweden. However, the most recent rulings from Administrative Court of Appeal indicate an adherence to the OECD TPG.⁴⁴

3.3 OECD Guidelines

The OECD was established in 1961 and evolved from the OEEC, initially focused on Western European countries but has expanded globally to 38 members.⁴⁵ In 1992, the OECD released the Model Tax Convention, with the latest update in 2017.⁴⁶ The first version of the OECD TPG appeared in 1979, marking a significant step in the standardization of transfer pricing practices internationally. These guidelines underwent a substantial update 1995, with the most recent version published in 2022. While this latest edition did not introduce significant changes concerning intragroup services, the 2017 updates, particularly those regarding low value-adding services, were influenced by the BEPS project's 2015 commentary.⁴⁷ This initiative by

⁴⁰ HFD 2016 ref. 45.

⁴¹ OECD, *List of OECD Member Countries – Ratification of the Convention on the OECD*.

⁴² RÅ 1991 ref. 107, para. 5.3.

⁴³ HFD 2016 ref. 45; Prop. 2005/06:169 pp. 88-89; RÅ 2006 ref. 37.

⁴⁴ Administrative Court of Appeal in Gothenburg, case No. 2570-2575-17, 2192—2196-18, 1823-1825-19 and 93-21; Ibid. Stockholm, case No. 9099-9102-21 and 9106-9114-21; Ibid. Sundsvall, case No. 1850-1851-21; Ibid. Jönköping, case No. 970-974-17.

⁴⁵ Griffiths (2009) pp. 2-4.

⁴⁶ OECD, *Model Tax Convention* (2017) pp. 11 and 226.

⁴⁷ OECD TPG, (2022) pp. 3-4; OECD TPG, (2017) pp. 3-4; OECD, *BEPS Action 10* (2015).

OECD and G20 countries aim to address tax planning strategies to prevent profit shifting to low-tax jurisdictions.⁴⁸

The OECD TPG is fundamentally designed to reflect the members states' perspective on Article 9 of the OECD Model Tax Convention. These guidelines serve as a detailed resource for understanding and applying the *Arm's Length Principle*.⁴⁹ They provide internationally agreed frameworks, not legal mandates, and focus on harmonizing interpretation and application across jurisdictions rather than solving specific issues.⁵⁰ The Joint Transfer Pricing Forum (JTPF), a group established by the European Commission to address transfer pricing within the EU. Recommends ways to minimize instances of double taxation within the EU, with some recommendations endorsed by the Commission; however, none of these recommendations are legally binding.⁵¹

3.4 Applying the Arm's Length Principle

The aim of the arm's length method can be regarded as the standard that all other methods strive to attain.⁵² Central to this is the *functional analysis*, which assesses the functions performed, risks assumed (potential loss of value), and assets (resource expected to yield future value)⁵³ utilized by each member company in a transaction. The extent to which a company is exposed to these elements crucially shapes its economic outcomes from the transaction. This analytical process is essential for identifying and understanding the specific roles and contributions of each party involved.⁵⁴

Complementing the *functional analysis* is the *comparability analysis*. This analysis tests the price charged within the MNC against a hypothetical price that would be charged under similar conditions by independent entities, thereby ensuring the transaction reflects market conditions. Depending on the

⁴⁸ OECD, *OECD/G20 Inclusive Framework on BEPS* (2023) p. 2.

⁴⁹ OECD, *Model Tax Convention* (2017) p. 228.

⁵⁰ Monsenego (2015) pp. 33-34.

⁵¹ *Ibid.* p. 35.

⁵² Lang et al. (2019) p. 11.

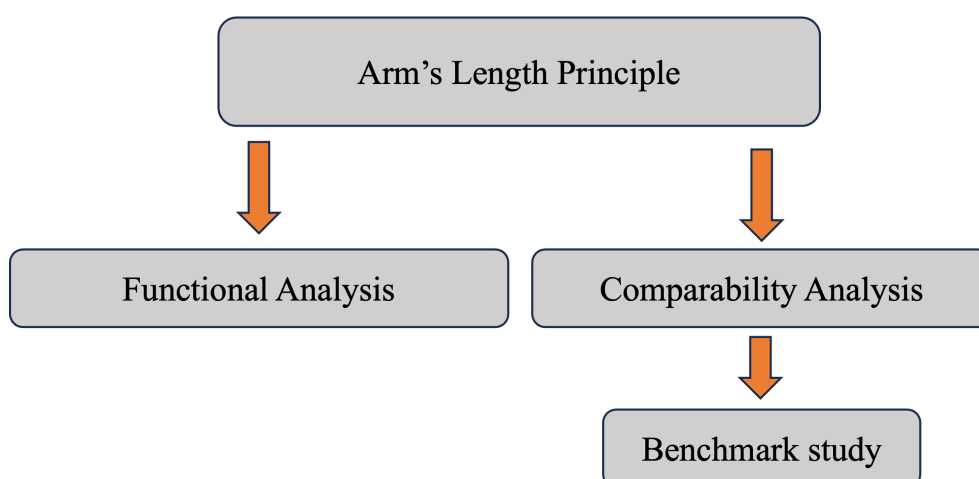
⁵³ Section 2.2.

⁵⁴ OECD TPG, (2022) p. 46, para. 1.51.

chosen transfer pricing method, specific factors are examined. To identify comparable transactions, a process known as a *benchmarking study* is conducted, which aims to find similar independent transactions.⁵⁵

The OECD TPG recommends four comparability factors when conducting a *benchmarking study*: characteristics of the service, contractual terms, economic circumstances, and business strategies.⁵⁶ Different methods are suggested for determining an arm's length price and performing the aforementioned analysis, the ones regarded relevant will be examined in the next section.⁵⁷ The OECD also suggests that in certain complex cases, it may be appropriate to combine different methods.⁵⁸

Figure 1 The Arm's Length Principle's core elements.



⁵⁵ Collier and Andrus (2017) pp. 105-106.

⁵⁶ OECD TPG, (2022) pp. 41-50, para. 1.38-1.63.

⁵⁷ Monsenego (2015) p. 37.

⁵⁸ OECD TPG, (2022) p. 95, para. 2.11.

4. Intragroup Services

Intragroup services within MNCs often support main business activities and a primary challenge is identifying and valuing these services, as they are intangible, unlike goods. The difficulty lies in verifying the existence of a service and assessing its purpose and benefits, which is crucial for determining its deductibility.⁵⁹ In Sweden, revenue from services must be declared as income by companies under Chapter 15, Section 1 IL. The general rule in Chapter 16, Section 1 IL allows deduction of expenses related to acquiring and maintaining income, as costs, and even if they do not directly generate income but are intended to.⁶⁰ The transfer pricing aspect mainly pertains to the pricing of these services. Due to the absence of specific provisions regarding intragroup services in IL, guidance is sought from the OECD TPG, aligning with the approach of the Swedish tax authority.⁶¹

While there is no internationally agreed-upon definition of intragroup services, the OECD, through its guidelines, attempts to outline the most important aspects and considerations.⁶² The main categories include administrative, technical, financial, and commercial services. Larger, integrated MNCs often rely more on these services in-house (conducted within the MNC) rather than outsourcing them.⁶³ The guidelines delineate *managerial and administrative services*, typically low-profit and routine, from *core business services* essential for profitability and market position, like R&D, financial transactions, and *senior management*. Notably, *management services* may be exempt if classified as low value-adding services.⁶⁴

The method for setting and assessing an arm's length price for intragroup services is described in the OECD TPG, as a four-step analysis. 1) identifying

⁵⁹ Petruzzi, Cottani and Lang (2021) pp. 354-355.

⁶⁰ RÅ79 1:37; section 2.2.

⁶¹ Skatteverket, *Vägledning* (2023).

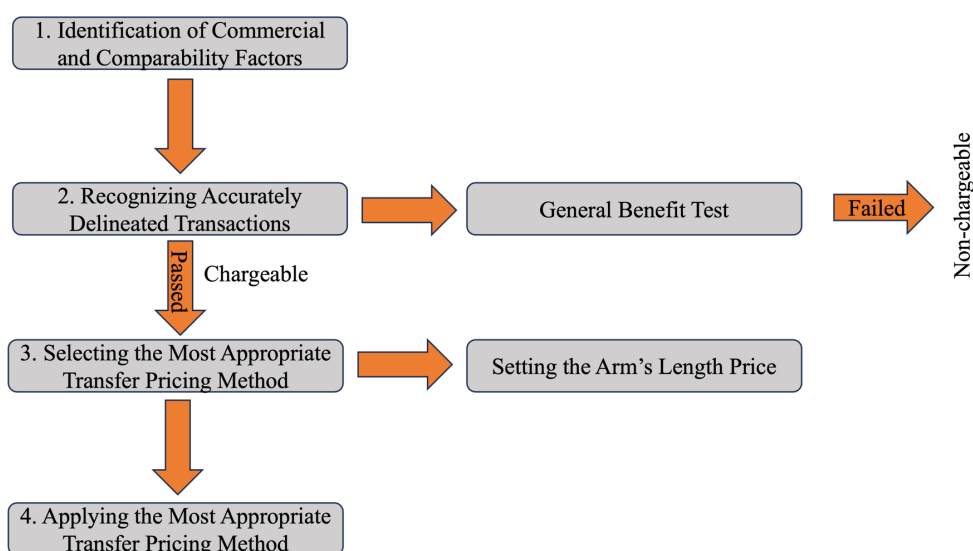
⁶² Lang et al. (2019) p. 334.

⁶³ OECD TPG, (2022) p. 313, para. 7.2.

⁶⁴ Petruzzi, Cottani and Lang (2021) p. 357.

commercial relationships and comparability factors; 2) recognizing accurately delineated transactions, including a *benefit test* for commercial rationale;⁶⁵ 3) selecting the most appropriate transfer pricing method; and 4) applying this method (for an overview see figure 2 below).⁶⁶

Figure 2 The OECD TPG suggested four-step analysis.



4.1 Recognizing accurately delineated transactions

The purpose of the second step of the suggested analysis is to determine if a service can be charged or not. In practice it refers to if a sold service in this case is deductible for the receiving party, hence lowering its profit. Chapter 16, Section 1 IL is as mentioned what in general determines this for a Swedish taxpayer⁶⁷, although it does not provide any specifics on what intragroup services are deductible. The OECD TPG is referred to as guidance for determining if an expense is related to acquiring and maintaining income, thereby deductible.⁶⁸

⁶⁵ Petruzzi, Cottani and Lang (2021) p. 363; OECD TPG, (2022) p. 314, para. 7.6.

⁶⁶ Petruzzi, Cottani and Lang (2021) pp. 363 and 365.

⁶⁷ Section 2.1.

⁶⁸ HFD 2016 ref. 45; Petruzzi, Cottani and Lang (2021) p. 364.

4.1.1 Non-chargeable Services

Intragroup services deemed non-chargeable according to the OECD TPG fall into three categories: *shareholder activities*, *duplicated services*, and *incidental benefits*. These categories stem from failing the *benefit test* in the analysis, which pertains to assessing the commercial rationale of a transaction.⁶⁹

Shareholder activities, often performed by the parent company in an MNC, are provided to multiple members or the entire group. Distinguishing these from *managerial and administrative services* presents a recognized challenge. The OECD TPG provides several examples of services that might be considered *shareholder activities* but are excluded from this term. These include planning for certain operations, *emergency management*, and, in some cases, *day-to-day management*. Examples of what constitutes *shareholder activities*, includes the reporting obligations of the parent company, fund-raising, and *corporate governance*.⁷⁰ In the literature, a guideline is provided which suggests looking at who performs the activity. If it is performed by the board of the parent company, there is a high likelihood that it could be classified as a *shareholder activity*. Conversely, if the activity is carried out by a global manager, it is more likely to be considered chargeable.⁷¹ However, it has been suggested that clarification may be suitable regarding certain types of services such as managerial services especially regarding the difference of *emergency management* and *corporate governance*, and regarding characterization of who performs a service.⁷² The Swedish statute in Chapter 16, Section 8 IL could determine if a parent company's *shareholder activities* are deductible but gives no further guidance on how it could be charged a foreign subsidiary.

The second type of non-chargeable service is the *duplication of a service*, where an associated company performs an activity already executed by

⁶⁹ Petruzzi, Cottani and Lang (2021) p. 365.

⁷⁰ OECD TPG, (2022) pp. 315-316, para. 7.9-7.10.

⁷¹ Lang et al. (2019) p. 347.

⁷² TEI, *Comments on BEPS Action 10* (2015) p. 66.

another within the same MNC.⁷³ Such a service is non-chargeable as an independent entity would not pay for the same service twice, failing commercial rationale.⁷⁴

The third category involves *incidental benefits*, where a member of an MNC passively gains from another member's activities.⁷⁵ These benefits, despite possibly having economic value, are not chargeable on the basis that an independent company would not pay for passively received benefits, without active involvement or a direct request for the service.⁷⁶

4.1.2 Chargeable Services

Chargeable services, as defined in the OECD TPG, include centralized and on-call services. Centralized services, both low and high value, are chargeable based on their necessity and the willingness of an independent company to pay for them. The guidelines provide several examples, primarily referring to administrative services such as, financial advice, accounting, legal, *managerial*, marketing, and HR.⁷⁷

The second type of chargeable services are “on-call” services, essentially a subscription to centralized services. These are structured through retainers, which are also common in independent companies, and are typically chargeable. The key criterion for chargeability is whether an independent company would be willing to pay for such a service.⁷⁸

4.2 Most Appropriate Method

When setting transfer prices for intragroup services, the aim is to achieve an arm's length price, as dictated by Chapter 14, Section 19 IL, though it does not provide specific suggested methods for determining such a price. The OECD TPG suggests three methods for intragroup services: *the Comparable*

⁷³ OECD TPG, (2022) p. 317, para. 7.11.

⁷⁴ Petruzzi, Cottani and Lang (2021) p. 367.

⁷⁵ OECD TPG, (2022) p. 317, para. 7.12.

⁷⁶ Petruzzi, Cottani and Lang (2021) p. 369.

⁷⁷ OECD TPG, (2022) p. 318, para. 7.14.

⁷⁸ OECD TPG, (2022) p. 319, para. 7.16-7.17; Lang et al. (2019) pp. 359-360.

*Uncontrolled Price method (CUP), the Cost-plus method (CPM), and the Transactional Net Margin Method (TNMM).*⁷⁹ The CUP methods involves setting the price of a controlled transaction based on the price of an uncontrolled transaction.⁸⁰ The CUP method is suitable for when a service already exists between independent companies. The CPM involves selling goods or services at a price corresponding to its gross margin⁸¹, plus a profit markup. The TNMM, similarly to CPM, is where the price is set, not based on the gross margin, but rather on the net margin, therefore including operating expenses.⁸² The CPM and TNMM are alternatives when the CUP method cannot be used.⁸³

Applying cost-based methods (CPM and TNMM) involves: 1) assessing the costs of performing the service, excluding non-chargeable services; 2) choosing between direct charging (associating costs with specific services) or indirect charging (using allocations keys⁸⁴ to allocate costs proportionally within an MNC); and 3) deciding on whether to add a profit markup.⁸⁵ A Swedish court case involving a subsidiary and its Swiss parent company highlights the indirect charging approach, where the court allowed the deduction of allocated costs, and additionally approved a 10% profit markup.⁸⁶ After applying a transfer pricing method a company should be able to determine the potential markup.

⁷⁹ Petruzzi, Cottani and Lang (2021) p. 377.

⁸⁰ Ibid. pp. 75 and 79-80.

⁸¹ Section 2.2.

⁸² Monsenego, (2015) pp. 44-48.

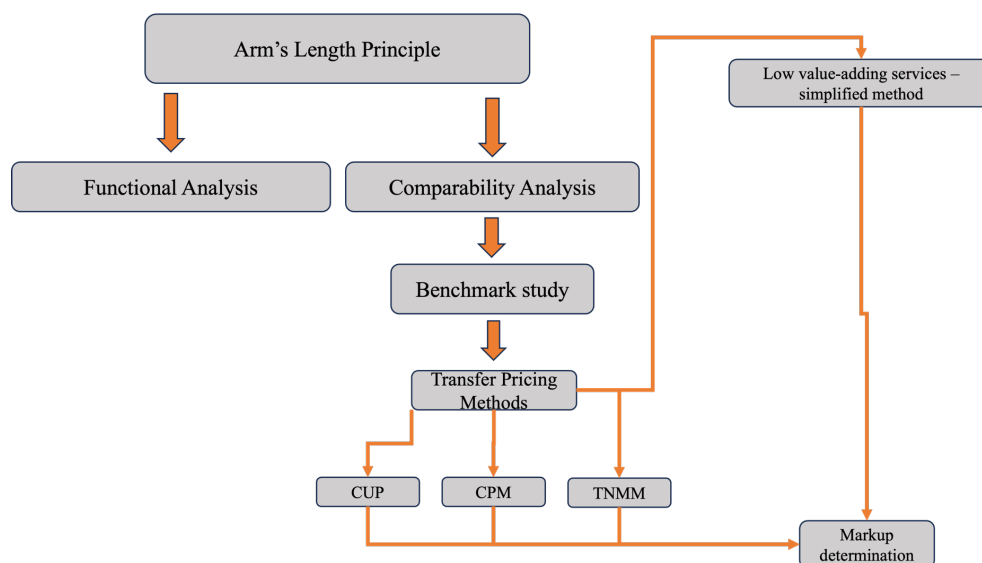
⁸³ OECD TPG, (2022) pp. 323-325, para. 7.31-7.37; Petruzzi, Cottani and Lang (2021) p. 378.

⁸⁴ Section 2.2.

⁸⁵ OECD TPG, (2022) pp. 320-322, para. 7.21-7.26; Petruzzi, Cottani and Lang (2021) pp. 379-380.

⁸⁶ RÅ 2006 ref. 37.

Figure 3 Graphic overview of setting the arm's length price.



4.2.1 Services Chargeable with No Markup

While the primary objective of companies, including MNCs, is to generate profit by charging more than the production cost of the services, the *Arm's Length Principle* may sometimes necessitate not making a profit on certain services within an MNC. This could occur in cases where other interests, like maintaining confidentiality or strategic considerations, take precedence over profit-making, as seen in services that are kept in-house despite being loss-making.⁸⁷

4.2.2 Services Chargeable with Markup

Services within MNCs charged with a markup can be classified as generating either low value or high value based on their contribution to the company's operations, according to the OECD TPG. Low value-adding services, while necessary, offer limited value.⁸⁸ However, it is important to note that a service not qualifying as low value-adding does not necessarily generate high value. Instead, it may still produce limited value, but with the arm's length price determined by methods mentioned earlier (see Figure 3), hence not a simplified method.⁸⁹ High value-adding services, in contrast, are integral to

⁸⁷ OECD TPG, (2022) p. 323, para. 7.34; Petruzzi, Cottani and Lang (2021) pp. 380-381.

⁸⁸ Petruzzi, Cottani and Lang (2021) p. 382.

⁸⁹ OECD TPG, (2022) p. 328, para. 7.48.

an MNC's core business and often of non-supportive character, and often command a higher markup.⁹⁰ In practice, determining the price of a high value-adding service is conducted using the previously mentioned methods (see Figure 3).⁹¹

Conclusively, to shift profits, it is therefore necessary that 1) a service is chargeable and 2) that it can be charged with a markup. Without a markup, the billed service-fee would, in theory, only cover the costs of producing the service and not provide the seller a net profit on the sold service, consequently not effecting the company's financial results.

⁹⁰ Lang et al. (2019) p. 374.

⁹¹ Ibid. pp. 374-375.

5. Low Value-Adding Services

Low value-adding services in an MNC are supportive services that are not part of the main business. Additionally, they do not involve the exploration or creation of significant intangibles, substantial economic risk, or generate substantial value.⁹² The categorization of certain services as low value-adding is intended to facilitate a simplified method for determining the arm's length price. Meaning the MNC is exempt from having to prove that a markup reflects the *Arm's Length Principle* and involves a simplified *benefit test*. The OECD TPG acknowledges several types of services that are likely to meet the definition of low value-adding. These include HR, accounting, general in-house legal services, and *general managerial and administrative services*.⁹³ Conversely, services like manufacturing, R&D, marketing, financial transactions, *strategic management*, and *corporate senior management* do not qualify as low-value adding.⁹⁴ Another factor that may disqualify a services as low value-adding is if an arm's length price can be easily determined by methods like the CUP method, the low value-adding service approach is in that case considered a secondary option.⁹⁵

The OECD TPG serve as a template for simplifying transfer pricing methods, aimed in aiding shaping domestic tax laws.⁹⁶ However, it has been recognized that clarification on certain services could be beneficial, particularly in categorizing *management services* as either “corporate senior” or “general managerial”. This ambiguity stems from the lack of clear qualifications and definitions regarding *management*. The determination necessitates in turn a definition of what level of *management* is seen as “corporate senior” and what is “general”, and it is unclear how deciding factors like the level of *management* and its origin should be.⁹⁷

⁹² OECD TPG, (2022) p. 327, para. 7.44.

⁹³ OECD TPG, (2022) p. 328, para. 7.49; COM(2011) 16 final, Annex 1.

⁹⁴ OECD TPG, (2022) p. 327, para. 7.47; Lang et al. (2019) p. 369.

⁹⁵ OECD TPG, (2022) p. 327, para. 7.46.

⁹⁶ Petruzzi, Cottani and Lang (2021) p. 383; JTPF/020/REV3/2009/EN, (2010) p. 3, para. 8.

⁹⁷ TEI, *Comments on BEPS Action 10* (2015) p. 66.

The OECD's Transfer Pricing profile on Sweden confirms that the Swedish approach towards transfer pricing of intragroup services follow the guidelines set out in the OECD TPG. Concerning low value-adding services, Sweden has reported that they adopt a simplified approach for services defined as low value-adding, aligning with the methods outlined in the OECD TPG.⁹⁸

5.1 Simplification Measures

For a low value-adding service to be chargeable, it must pass a *benefit test* in accordance with the second step of the OECD TPG suggested analysis regarding intragroup services. A common issue with low value-adding services is that these types of services often are either difficult to assess or require substantial administrative effort to meet a general *benefit test*.⁹⁹

Consequently, the OECD has developed a template for a simplified method. Firstly, this method includes calculating total costs incurred in performing these services annually, excluding costs for in-house activities that only benefit the performing company and *shareholder activities*, and then removing costs specific to services performed exclusively for one associated company, isolating genuine low value-adding service costs.¹⁰⁰ Secondly, is determining the cost pools (aggregations of various individual costs), these should encompass all direct and indirect costs originating from a provided service.¹⁰¹ The final step involves allocating the calculated costs using allocation keys, akin to the indirect charging mechanism described in section 4.2. This aims to ensure a fair distribution of service costs across the MNC.¹⁰² The simplified *benefit test*, as utilized in the context of low value-adding services, assesses services based on their category rather than on a specific charge base.¹⁰³ The process aims to pinpoint the total cost of low value-adding services provided to an MNC's member companies.¹⁰⁴

⁹⁸ OECD, *Sweden: Transfer Pricing Country Profile* (2021) No. 15-17.

⁹⁹ TEI, *Comments on BEPS Action 10* (2015) p. 65.

¹⁰⁰ Petruzzi, Cottani and Lang (2021) p. 384.

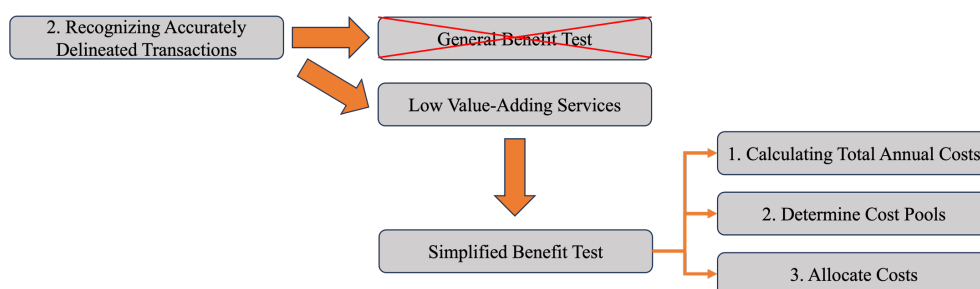
¹⁰¹ OECD TPG, (2022) pp. 332-333, para. 7.56-7.58.

¹⁰² OECD TPG, (2022) p. 333, para. 7.59-7.60; COM(2011) 16 final p. 15, para. 48 and 51.

¹⁰³ OECD TPG, (2022) p. 331, para. 7.54.

¹⁰⁴ Petruzzi, Cottani and Lang (2021) p. 384.

Figure 4 Graphic overview of the simplification measures for low value-adding services.



5.1.1 Safe Harbours

A safe harbour rule is a predefined markup that, when applied, eliminates the obligation to prove it is at arm's length. With the advantages of reducing the administrative burden on both the taxpayer and the tax authority. However, it also carries the risk of double taxation, as a fixed markup may vary between jurisdictions, leading to inconsistencies in tax obligations across different jurisdictions.¹⁰⁵ The OECD's safe harbour for low value-adding services, as set in the OECD TPG, sets a fixed 5% markup.¹⁰⁶ The JTPF suggests a range of 3% to 7%, but there is no clear influence of this on Sweden's approach regarding low value-adding services, other than it has been influential to the OECD TPG.¹⁰⁷

5.1.2 Simplified Documentation

The simplified method for low value-adding services has led the OECD to recognize the need to suggest specific documentation requirements. These requirements are designed to enable tax authorities to effectively assess low value-adding service transactions and also lessen the administrative burden on the company.¹⁰⁸ The Swedish tax provisions, in line with OECD standards, require proper transfer pricing documentation, as outlined in Chapter 39, Sections 15 to 16f SFL.¹⁰⁹ Documentation is crucial for interactions between

¹⁰⁵ Ibid. p. 391.

¹⁰⁶ OECD TPG, (2022) p. 334, para. 7.61; Lang et al. (2019) p. 371.

¹⁰⁷ COM(2011) 16 final p. 17, para. 65; OECD, *Sweden: Transfer Pricing Country Profile* (2021) No. 26-27.

¹⁰⁸ Petruzzi, Cottani and Lang (2021) p. 384.

¹⁰⁹ Prop. 2016/17:47 p. 1.

the taxpayer and the tax authority.¹¹⁰ Additionally, a European codex by the European Council provides a framework for transfer pricing requirements for an MNC tax liable in a member-state.¹¹¹

Swedish documentation requirements, aligned with the OECD TPG, include both group-wide and individual company documentation as per Chapter 39, Section 16b SFL.¹¹² Section 16c SFL outlines a rule regarding transactions that are deemed non-essential and are therefore exempt from the requirement for individual company documentation.¹¹³ This rule represents a partial implementation of the OECD's recommendations for simplified documentation obligations, for certain services.¹¹⁴ The specific content of what the Swedish tax authority demands be documented is outlined in the Swedish Tax Agency's guidelines.¹¹⁵ Notably, Sweden's criteria for a simplified documentation approach is based on the total sum of transactions to a foreign associated company, rather than on the categorisation of the service, as is the case in the OECD TPG.¹¹⁶

¹¹⁰ Lodin et al. (2021) p. 562.

¹¹¹ European Council, code of conduct on transfer pricing documentation for associated enterprises in the European Union, OJEU 2006 C 176/1, p. 1.

¹¹² OECD TPG, (2022) pp. 231-233, para. 5.18-5.23.

¹¹³ Further in-depth instructions of content of the group and company specific documentation are found in SFS 2011:1261, Chapter 9.

¹¹⁴ Prop. 2016/17:47 pp. 41-42.

¹¹⁵ SKVFS 2007:1.

¹¹⁶ OECD TPG, (2022) p. 335, para. 7.64; Prop. 2016/17:47 p. 41.

6. Analysis

6.1 Swedish Provisions on Low Value -adding Services

Swedish tax law does not explicitly classify services as either low-value or high-value. In the absence of domestically regulated methods and categories, Swedish tax authorities and courts often refer to the OECD TPG. Swedish legislation neither expressly permits nor prohibits a simplified pricing method for low value-adding services, leaving the pricing of intragroup services largely unregulated. It could be argued that, for the time being, the concept of low value-adding services as outlined in the OECD TPG, including the 5% markup and the exemption from proving the arm's length nature of such a markup, is implicitly recognized but not codified in Swedish tax law. This recognition could be seen as inferred from the authorities' frequent references to the OECD TPG.

6.2 The OECD TPG's Influence

The precedent case RÅ 1991 ref. 107 is probably the most significant case on transfer pricing in Sweden. It establishes the *Arm's Length Principle*, as well as, suggesting the OECD guidelines be used as guidance for the Swedish legal application regarding transfer pricing. This statement was restated in HFD 2016 ref. 45. However, it is stated that the OECD TPG "could" provide guidance. This according to me implies that a clear stance on what transfer pricing rules are applicable in Sweden is not clearly established. Nonetheless, the OECD's TPG clearly has a strong influence on the Swedish application and interpretation, as Swedish provisions do not include any details regarding methods and categorization. This seems to also include the aspect of low value-adding service, even if not directly addressed by the Supreme Administrative Court, it is part of the Swedish application of transfer pricing, as supported by the soft law from the Administrative Court of Appeal. However, I refrain from stating that the OECD TPG can be regarded as applicable law in Sweden and instead infer that it is as of now can be used as guidance, even if unclear how "guiding" it is meant to be.

The direct incorporation of the OECD TPG into Swedish tax law could be impractical as the Swedish legislation focuses on the aim to achieve an arm's length price and care less for how it is done. Nevertheless, adopting domestic rules for categorization, as the OECD TPG suggests, might be suitable to domestically clarify the challenge in classifying different types of *management services*.

As suggested by the OECD TPG, there exists a distinction between services that are appropriately chargeable and those that are not. A domestic clarification specifically addressing *shareholder activities* could be beneficial, as these encompass distinct service types, including but not limited to, certain types of *management services*. This is particularly relevant when determining the permissible scope of charging a markup, especially considering that the simplified method for low value-adding services includes examples of *managerial services*.

Contrastingly, while the OECD TPG base documentation requirements on the service's nature, SFL bases its corresponding requirements on the transaction's actual value. This approach could reflect the OECD's intention for the TPG to guide rather than bind, possibly justifying the divergence in Swedish practice.

6.3 Conclusion

In conclusion, a company that is part of an MNC and tax-liable in Sweden can utilize the low value-adding services approach as outlined in the OECD TPG, mainly due to the absence of specific transfer pricing provisions in Swedish tax law. However, specific provisions, on categorizing intragroup services based on transaction value, could be appropriate. A balance between clarity and flexibility in pricing according to Chapter 14, Section 19 IL can be achieved, especially considering it is already in some way existing in the Swedish documentation requirements.

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