Department of Law  
Spring Term 2017

Master's Thesis in International Tax Law and EU Tax Law  
30 ECTS

BEPS and Swedish law on transfer pricing and substance over form restructurings

- A study of the changes to the OECD Transfer Pricing Guidelines in the BEPS Final Report on Actions 8-10 and its compatibility with Swedish domestic law on transfer pricing and substance over form restructurings

Author: Viktor Nilsson  
Supervisor: Associate Professor Katia Cejie
Abstract

In 2013 the G20 and the OECD launched the BEPS-Project to change the current framework for international taxation and prevent MNEs from using gaps and mismatches in the international taxation framework to erode tax bases and shift profits. One of the objectives of the BEPS-Project was to change the transfer pricing rules to ensure that the profit allocation from transactions within a group of MNEs is aligned with where the value is created. The changes was that the OECD Transfer Pricing Guidelines shall ensure that the actual business transactions undertaken by the enterprises are identified, and the pricing of the transaction is not based on the contractual arrangements that do not reflect the economic reality of the transactions.

In Sweden, tax law follows strictly under the principle of legality and there is a strong tradition that tax law is based on the legal forms definitions found in civil law. Therefore, this thesis has the objective of analyzing the changes to the OECD Transfer Pricing Guidelines in the Report concerning substance over form restructurings and whether the changes is compatible with the domestic Swedish law on transfer pricing and law principles in Sweden, as well as making a de lege ferenda to what changes that could be necessary to implement the new application of the arm’s length principle in Swedish law.

The changes to the OECD Transfer Pricing Guidelines concerning substance over form restructurings consists of the modification of the as-structured principle. In the revised OECD Guidelines, the main rule is the accurately delineation of transaction, where the supplementing or restructuring of a transaction is possible. My conclusion in this thesis is that the accurately delineation of transactions gives the rule that the transaction should generally not be accepted according to its form, but be delineated, meaning supplemented or restructured, according to the economic substance.

The applicable rule on transfer pricing issues in Swedish law is the adjustment rule found in 14th chpt. 19 § ITA. My conclusion is that the adjustment rule leaves no room to supplement or restructure a transaction as a whole according to the
economic circumstances. I think that the law principles developed by court practices of the HFD, which I have translated to the real meaning of legal forms, cannot be used to apply the ALP in accordance with the OECD Guidelines.

Therefore, I think the substance over form approach in the revised OECD Guidelines is not compatible with the domestic Swedish law on transfer pricing and law principles in Sweden. To make Swedish law coherent with the revised OECD Guidelines I would suggest an amendment to the adjustment rule, where the focus is shifted from the conditions of the transaction, to focus on the transaction as a whole being at arm’s length, considering the economic circumstances of the parties. This would enable an accurately delineation of the transaction according to the revised OECD Guidelines.
# List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALP</td>
<td>Arm’s Length Principle</td>
</tr>
<tr>
<td>BEPS</td>
<td>Base erosion and profit shifting</td>
</tr>
<tr>
<td>Chpt</td>
<td>Chapter</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>G20</td>
<td>Group of twenty</td>
</tr>
<tr>
<td>HFD</td>
<td>Swedish Supreme Administrative Court (Högsta förvaltningsdomstolen)</td>
</tr>
<tr>
<td>KR</td>
<td>Swedish Administrative Court of Appeal (Kammarrätt)</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td>MNEs</td>
<td>Multi-national enterprises</td>
</tr>
<tr>
<td>OECD MTC</td>
<td>OECD Model Tax Conventions 2014</td>
</tr>
<tr>
<td>2010 Guidelines</td>
<td>The OECD Transfer Pricing Guidelines 2010</td>
</tr>
<tr>
<td>OEEC</td>
<td>European Economic Co-operation</td>
</tr>
<tr>
<td>ITA</td>
<td>The Income Tax Act (Inkomsttulllagen (1999:1229))</td>
</tr>
<tr>
<td>RF</td>
<td>Swedish Law of Government (Regeringsformen)</td>
</tr>
</tbody>
</table>
# Table of contents

1 Introduction
   1.1 Problem description ........................................ 1
   1.2 Objective ................................................... 2
   1.3 Delimitations ................................................ 3
   1.4 Methods & Materials ........................................ 5
   1.5 Outline ..................................................... 7

2 The Arm’s Length Principle ........................................ 10
   2.1 Introduction ................................................ 10
   2.2 The rationale behind the Arm’s Length Principle .......... 10
   2.3 Statement of the arm’s length principle in the OECD Model Tax Convention ........................................ 12
   2.4 Adjustments according to the arm’s length principle ........ 13
      2.4.1 Article 25 of the OECD MTC ......................... 15
      2.4.2 European Union Arbitration Convention ............... 16

3 The OECD Transfer Pricing Guidelines 2010 ....................... 17
   3.1 Introduction ................................................ 17
   3.2 Applying the arm’s length principle ........................ 17
      3.2.1 The comparability analysis ................................ 18
   3.3 The contractual terms in the OECD Transfer Pricing Guidelines 2010 ........................................ 19
      3.3.1 The allocation of risks ................................... 21
   3.4 The as-structured principle .................................. 22

4 The BEPS Final Report on Actions 8-10 .......................... 24
   4.1 Introduction ................................................ 24
   4.2 Background: The BEPS Project ................................ 24
   4.3 The BEPS Final Report on Actions 8-10 ..................... 25
   4.4 The changes to the application of the arm’s length principle in the OECD Transfer Pricing Guidelines concerning substance over form restructurings ........ 26
      4.4.1 Accurately delineating the transaction ................. 27
      4.4.2 Absence of commercial rationality ...................... 34
   4.5 Differences in the substance over form restructurings between the OECD Transfer Pricing Guidelines 2010 and the revised OECD Transfer Pricing Guidelines ........ 36
      4.5.1 The substance over form in accurately delineating the transaction ........................................ 37
      4.5.2 The one exception – absence of commercial rationality .................................................. 40
      4.5.3 General implications of the new substance over form approach ........................................ 40
      4.5.4 The future of the arm’s length principle ................ 41

5 The Swedish domestic law on transfer pricing .................... 44
   5.1 Introduction ................................................ 44
   5.2 “The adjustment rule” in 14th chpt. 19 § Income Tax Act .......... 44
   5.3 Important court rulings on transfer pricing in Sweden ........ 46
1 Introduction

1.1 Problem description

In the previous decades, we have seen dramatically increasing economic globalization, and the role of multinational enterprises (MNEs) in world trade has increased considerably. This growth of MNEs brings the problem of an increasingly complex taxation of these MNEs, with which tax administrations have to deal with and MNEs need to comply. Because of the international nature of these MNEs, the taxation of MNEs cannot be viewed from a domestic context, but needs to be seen from an international context.\textsuperscript{1}

One of the complex taxation issues that come with the increasing economic globalization is the pricing of intra-group transactions between MNEs. Because of the associated relationship between MNEs within a group, the group members could establish special conditions in their intra-group transactions that could differ from those that would have been established between independent enterprises.\textsuperscript{2} These special conditions could be arranged through the pricing of intra-group products and services so that profits are moved from one enterprise of a jurisdiction to another enterprise within the group, located in another jurisdiction. Moving profits to jurisdictions with low tax rate to decrease the total tax burden of the group could result in the eroding of tax bases in jurisdictions.\textsuperscript{3}

However, in 2013, the G20 and the OECD launched the BEPS-Project to change the current framework for international taxation and prevent MNEs from using gaps and mismatches in the international taxation framework to erode tax bases and shift profits.\textsuperscript{4} The OECD has stated in the BEPS Project that the current rules on \textit{transfer pricing} could be misplaced, so that the allocation of profits from transactions within a group of MNEs is not aligned with in what jurisdiction the value is created. Therefore, The BEPS Actions 8-10 had the objective to change

\textsuperscript{1} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, preface, paragraph 1.
\textsuperscript{2} Ibid. Paragraph 6.
\textsuperscript{3} Monsenego, Jérôme, \textit{Introduction to Transfer Pricing}, 2015, p.4f.
the transfer pricing rules to ensure that the profit allocation from transactions within a group of MNEs is aligned with where the value is created.\(^5\)

The changes to the transfer pricing rules in the BEPS Final Report on Actions 8-10 (hereafter the Report), was changes in the OECD Transfer Pricing Guidelines. The changes was that the OECD Transfer Pricing Guidelines shall ensure that the actual business transactions undertaken by the enterprises are identified, and the pricing of the transaction is not based on the contractual arrangements that do not reflect the economic reality of the transactions.\(^6\) The new approach that is suggested is that the pricing of transactions between MNEs within a group shall be based on the substance of the economic actions instead of the contractual form of the legal actions of the MNEs. This “substance over form approach” could be seen as a new approach to the transfer pricing issue, declaring that legal actions created under civil law could be void for tax purposes.

In Sweden, tax law follows strictly under the principle of legality and there is a strong tradition that tax law is based on the legal forms definitions found in civil law. The question arises whether this substance over form approach presented in the Report is compatible with Swedish domestic law and law principles, and if not, what consequences could arise if the changes is not compatible with Swedish law, as well as what changes would be require to make the changes in the Report compatible with domestic Swedish law.

1.2 Objective

The objective of this thesis is to analyze the changes to the OECD Transfer Pricing Guidelines in the BEPS Final Report on Actions 8-10 concerning substance over form restructurings and whether the changes is compatible with the domestic Swedish law on transfer pricing and law principles in Sweden, as well as making a *de lege ferenda* to what changes to Swedish law that could be necessary to implement the new application of the arm’s length principle.

---


To achieve this objective, the following questions will be specifically addressed:

- What are the most fundamental changes to the application of the arm’s length principle in the BEPS Final Report on Action 8-10, *Aligning Transfer Pricing Outcomes with Value Creation*, concerning substance over form restructurings?
- Is the application of the arm’s length principle in the BEPS Final Report on Actions 8-10 compatible with the domestic Swedish law on transfer pricing?
- Is there any substance over form practices developed by the Swedish courts that could be used to apply the changes in the BEPS Final Report on Actions 8-10 in Swedish law?
- What are the implications on Swedish and international tax law if the changes to the OECD Transfer Pricing Guidelines in the BEPS Final Report on Actions 8-10 are not compatible with domestic Swedish law on transfer pricing?
- Considering those potential implications, what amendments would be necessary to the Swedish law on transfer pricing to make the law coherent with the changes in the BEPS Final Report on Actions 8-10 and the new international standards for international taxation?

1.3 Delimitations

This thesis will analyze the compatibility of the changes to the OECD Transfer Pricing Guidelines with Swedish law and law principles. To achieve this, the thesis will analyze the international tax law materials on the transfer pricing area, such as and the OECD Model Tax Convention7 (The OECD MTC), and its commentaries8, the OECD Transfer Pricing Guidelines and the Report. This thesis will also analyze materials in Swedish domestic law and law principles.

In the international tax law area, the historical background of the OECD MTC and the development leading up to the international tax framework of today will not be addressed in this thesis. Nor will the role and legal value of the OECD MTC, or its commentaries, be addressed. The reader is required to have more than a

---

In this thesis the arm’s length principle (ALP) as it is set out in article 9 of the OECD MTC and in the OECD Transfer Pricing Guidelines as well as in doctrine will be presented, but there will not be a deep analysis of the ALP or how to set the arm’s length price. The reader will be presented with enough knowledge of the OECD Transfer Pricing Guidelines and the ALP to understand the changes to the OECD Transfer Pricing Guidelines in the Report, but the reader should have some knowledge of this area to fully appreciate the full content of this thesis. In addition, the legal value of these international tax law materials as well as the recognition of the ALP in the international tax community will not be analyzed. This thesis will proceed with the assumption that the Guidelines and the ALP are international standards to deal with transfer pricing.

Other work of the BEPS-Project that might affect the OECD Transfer Pricing Guidelines and the ALP will not be mentioned in this thesis. This thesis will only focus on the changes in the Report to the OECD Transfer Pricing Guidelines as a result of the BEPS-Project.

The basics of chapter I, section A and D of the OECD Transfer Pricing Guidelines before the changes proposed in the Report will be outlined, but there will not be a lengthy analyze of the full content of the OECD Transfer Pricing Guidelines, since only these parts is within the scope of the objective of this thesis.

The parts of the Report that concern the substance-over-form approach will be outlined and analyzed. The rest of the Report will not be mentioned, since this is outside the scope of the objective of this thesis.

When analyzing the Swedish law and law principles, the transfer pricing related law found in the 14th chpt. 19 § of the Income Tax Act (Inkomstskattelagen in Swedish, hereafter ITA) and law principles set out by Swedish courts connected

---

9 Which can be found in chapter 1 part A, B and D of the OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010.

10 As the OECD-members have agreed to do, see the OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010, Chapter I paragraph 1.1.

to this rules will be presented and analyzed. The principle derived from court practices of the Swedish courts, which I have translated to “the real meaning of legal forms” (rättshandlingars verkliga innebörd in Swedish) will be presented and analyzed. Other parts of the Swedish tax law code and principles that could be applicable to transfer pricing issues in special cases will not be considered.

1.4 Methods & Materials

In the area of international tax law area where there is an absence of code law, the traditional dogmatic law method is out place. Therefore, the supranational instruments of international tax law such as international treaties and guidelines will be used as the primary legal sources in the area of international tax law. Article 9 of the MTC with its commentaries, together with the OECD Transfer Pricing Guidelines, will be used as the primary source on the international tax area for outlining the state of the ALP and how to set the arm’s length price before the changes in the Report. Since these materials are thorough in their outlining of the ALP, I have used the primary sources as much as possible, analyzed the contents of those materials, and not used doctrine to any greater extent in these parts.

The Report will naturally be the primary source of information on the changes to the OECD Transfer Pricing Guidelines. Because of the recent implementation of these changes, there is very little doctrine is available on this subject, and I have found no relevant case law. I have therefore put a lot of emphasis on the primary source alone and outlined and analyzed its contents.

One rare example of doctrine that exists and that discusses the changes in the Report but also its relation to Swedish tax law is Jari Burmeister’s *Internprissättning och omkaraktärisering*. In his book, Burmeister discusses and outlines, in great depth, in what ways a transaction can be restructured according to domestic Swedish law and according to the OECD Transfer Pricing Guidelines and the Report. Burmeisters book has been a great inspiration and source to this thesis. However, I have focused my objective on a narrower question, by first analyzing the changes to the OECD Transfer Pricing Guidelines in the Report,

---

and these changes compatibility concerning substance over form restructurings in transfer pricing issues with domestic Swedish law on transfer pricing and substance over form restructurings. I have also focused on the potential implications if the changes in the Report would not be compatible with domestic Swedish law, as well as making a de lege ferenda to the domestic Swedish law on transfer pricing.

In the area of Swedish law, the traditional dogmatic legal method will be used, meaning that the legal sources will be placed in a hierarchy where the legal code will be seen as the most important legal source. After the legal code in the hierarchy comes the preparatory work of the specific law, followed by decisions by the courts and the principles set out therein, and lastly doctrine. This thesis will seek to follow this method, and analyzing the legal sources according to the legal value the legal sources have according to this hierarchy.

In Swedish transfer pricing law, there is very little legal code applicable. This thesis will therefore focus on the rule found in 14th chpt. 19 § ITA that is applicable on transfer pricing issues. In the presentation and analysis of this rule, I will seek to follow the traditional dogmatic method. The legal code will therefore be valued the most of the legal sources in the analysis. Because of the many interest court rulings on this area, these will be highly valued in the analysis, meaning I will put more emphasis on case law than preparatory work. Preparatory work and doctrine on the area will be presented as well, but used as minor legal sources compared to the legal code and court rulings.

When it comes to the legal value of the OECD Transfer Pricing Guidelines in Swedish law, I thought it necessary to outline the principle of legality and its position in Swedish tax law, in order to fully understand the principles of the Swedish legal system. When doing this, the point of departure will be the Swedish Law of Government (Regeringsformen in Swedish). I will also use doctrine to describe the meaning of the principle of legality in Swedish tax law.

---

13 The rule found in 14th chpt. 19 § ITA is also lex specialis on transfer pricing issues, as outlined in section 5.3.2 of this thesis.
In area of substance over form restructurings in the practices of the Swedish courts, there is no legal code, so the most valued legal source is case law. Because of the international perspective of this thesis, I have not considered it within the scope of the objective to make a complete outline and analysis of the court rulings on the area of substance over form restructurings. I have therefore settled with analyzing if these court practices can be used to apply the changes to the OECD Transfer Pricing Guidelines in Swedish law. Therefore, I have used doctrine, and the different views on the court rulings in doctrine, to a great extent. I have also used collections of court rulings found in doctrine on this area. I have used these views and conclusions found in doctrine to state the principle laid down by the Swedish courts according to my perception, and analyze if this principle can be used to apply the changes to the OECD Transfer Pricing Guidelines according to the objective of this thesis.

The research position of this thesis would be to outline and analyze the recent changes to the OECD Transfer Pricing Guidelines in the Report concerning substance over form restructuring. The research value of this analysis is that the changes are very recent, and there has not been much work done on this subject yet. Also, with the analysis of the compatibility of these changes with domestic Swedish law, I hope to review the Swedish law on transfer pricing and substance over form restructuring from an international tax law perspective, with the recent changes to the international tax framework after the BEPS-Project, and also discuss what implications may arise if the Swedish law is not compatible with the international standards of international taxation, and make a *de lege ferenda* with those implications in mind.

1.5 Outline

To achieve the objective of this thesis, I thought it necessary to begin with the basics and rationale of the ALP and the issue of transfer pricing. I found it also necessary to state the issue of international double taxation that could arise in transfer pricing issues. To make a *de lege ferenda*, which is part of the objective of this thesis, I thought it necessary to present the potential implications of transfer pricing issues, which such a *de lege ferenda* would have the objective to
solve. Therefore, in chapter 2, an introduction to the ALP will be given, as is it set out in article 9 of the OECD MTC and the OECD Guidelines before the changes in the Report. In this chapter, the adjustment procedure of the ALP will also be described, and its relation to international economic double taxation.

In the follow chapter 3, the basics of the application of the ALP in the OECD Transfer Pricing Guidelines before the changes in the Report will be presented. To achieve the objective of outlining the changes to the OECD Transfer Pricing Guidelines in the Report, I thought it elemental for the understanding of these changes to also outline the application of the ALP according to the OECD prior to the changes in the Report. A larger emphasis will be put on the parts in the OECD Transfer Pricing Guidelines concerning contractual allocation of functions, assets and risks, as well as the as-structured principle, since this is what it changed in the Report and therefore within the scope of the objective of this thesis.

In chapter 4, there will be an introduction and background to the BEPS problem and the BEPS-Project. The Report and its aims will be presented. Following this, the changes to the OECD Transfer Pricing Guidelines in the Report concerning substance over form restructurings will be presented, which are the core of the objective of this thesis. In the last part of this chapter, in section 4.5, there will be an analysis of the difference in the substance over form approach between the OECD Transfer Pricing Guidelines and the Report. The implication of these changes and differences will be analyzed, as well as the future of the ALP after the changes in the Report, corresponding with the objective of this thesis to outline the changes to the OECD Transfer Pricing Guidelines in the Report, concerning substance over form restructurings.

In chapter 5, the Swedish domestic law on transfer pricing will be analyzed. Additionally, the position of the OECD Transfer Pricing Guidelines in Swedish law will be described in this chapter. The Swedish domestic law on transfer pricing and the position of the OECD Transfer Pricing Guidelines is important to understand to comprehend the problem described in the objective of this thesis. In section 5.5 of this chapter there will be an analysis of whether the changes in the Report concerning substance over form restructurings are compatible with the
Swedish domestic law on transfer pricing. This analysis is a fundamental part of achieving the objective of this thesis.

Chapter 6 will contain a statement of the relation between tax law and civil in the Swedish legal system. This statement is needed to comprehend the relation between tax law and civil law in Swedish law, and to understand the problem of substance over form restructurings in Swedish law. After this, the principles laid down by the Swedish courts concerning substance over form restructurings will be presented. These principles will lastly in section 6.4 of this chapter be analyzed if they are compatible with the revised OECD Transfer Pricing Guidelines after the changes in the Report. In this analysis, I will also analyze the implication on Swedish law as well on international tax law and international double taxation, if the changes in the Report is not compatible and implemented in Swedish tax law.

Lastly, the objective of this thesis and the questions raised there will be answered in the conclusion, found in chapter seven.
2 The Arm’s Length Principle

2.1 Introduction

In this chapter, there will be an introduction to the ALP. The understanding of the ALP is elemental for the understanding of transfer pricing issues. An introduction will therefore be given by describing the rationale behind the principle and by giving an example how associated enterprises can impose conditions that would not have been imposed between independent enterprises, and the tax consequence such conditions may have. The chapter will then proceed by stating the ALP is it is expressed in the OECD MTC, as well as describing how adjustments under the ALP are made in practice and its relation to international economic double taxation.

2.2 The rationale behind the Arm’s Length Principle

In interactions between independent enterprises, i.e. enterprises with no economic or legal connection to each other, independent enterprises are assumed acting in their own interests, trying to maximize their business profits. The enterprises are presumed to be business minded, and the market forces of supply and demand normally determine their interactions.¹⁵ This means that when two independent enterprises are acting on the market, supply and demand, as well as both enterprises interests in maximizing their profits, will automatically set a market price on the transaction.

However, when associated enterprises interact, i.e. enterprises with economic or legal connection to each other, they may not be acting in the same business minded-way because of their associated nature, and the market forces could be out of place.¹⁶ Since the enterprises are associated, they might not necessarily be acting in the interest of maximizing their profits from that transaction. This means that in the dealings between associated enterprises it is possible to impose conditions that may not have been agreed between independent enterprises.¹⁷

¹⁵ Monsenego, Jérôme, Introduction to Transfer Pricing, 2015, p.3.
¹⁷ Monsenego, Jérôme, Introduction to Transfer Pricing, 2015, p.4.
When such conditions do not reflect what would have been agreed between independent enterprises, the pricing of the transactions could be inadequate, and the business profits of the enterprises attributable to the host countries could be distorted.  

This could be illustrated by an example where Company A is a company of State A and Company B is a company of State B. Company A owns 100 per cent of the shares in Company B, making Company B a wholly owned subsidiary of Company A. This means Company A can influence the decision-making in Company B. Let us assume that Company B is a manufacturer of products that is needed in the business of Company A, and Company A wishes to acquire these products from Company B. Because of Company A’s influence in Company B, Company A could establish conditions in the transactions between the companies that would not have applied if the companies were independent, acting in their own interest and under market forces. This also means that the interest of both companies to enter the transactions does not have to be to maximize its profits from the transactions; it could also be other interests such as shifting profits from one company to the other. Because of Company A’s influence in Company B, the pricing of the transactions could be set to a higher price than what would have agreed between to independent enterprises. A diversion from the market price in the transactions between the companies will result in the profits of Company B will be higher and the costs of Company A will be higher than what the profits and costs would have been if the transaction would have occurred at market price. Consequently, the taxable business profits of Company A in State A will be lower, and the taxable business profits of Company B in State B will be higher, because the price of the transaction was set to higher than the market price.  

When associated enterprises set the prices of intra-group transactions at prices that diverts from the market price, the MNE groups could shift business profits to jurisdictions with lower on no tax rate on business profits, or even out the total tax burden of the MNE group.  

---


19 The example is inspired by the example given in Monsenego, Jérôme, Introduction to Transfer Pricing, 2015, p. 4 f.
When associated enterprises transact with each other over goods or services, it is often referred to as they transfer goods or services between themselves. Consequently, this area of tax law is referred to as *transfer pricing*. It should be pointed out however, that it could be genuine difficulty for associated enterprises to establish conditions similar to those between independent enterprises when there is an absence market forces.

To prevent associated enterprises from establishing conditions that differ from those that would have been agreed under market forces, and to prevent such conditions to erode tax bases of jurisdictions, the OECD member countries have agreed that the profits of associated enterprises may be adjusted as if those conditions would have been made between independent enterprises. To achieve this, the OECD member countries have set out a standard to establish the financial and commercial conditions that would be expected to be found between independent enterprises in comparable transactions and under comparable circumstances. The idea is that taxes on business profits should be levied in reference to a hypothetical “normal” transaction between two independent enterprises. This standard is often referred to as the ALP, which means that conditions set out between associated enterprises should be adjusted as if they were independent, acting on an arm’s length from each other.

### 2.3 Statement of the arm’s length principle in the OECD Model Tax Convention

The ALP is stated in article 9.1 of the OECD MTC. The article reads:

> “1. Where

a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

b) the same persons participate directly or indirectly in the management, control or capital of an

---

enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.”

The OECD commentaries give no guidance in how to interpret article 9 or how to apply the ALP. It is however stated in the OECD commentaries to article 9 that the application of article 9, and the different methods of setting the price according to the ALP, is found in the OECD Transfer Pricing Guidelines. Thus, the OECD Transfer Pricing Guidelines must be seen as a very integrated part of article 9 and how to apply the ALP.

2.4 Adjustments according to the arm’s length principle

In addition to the ALP stated in article 9 of the OECD MTC, the article also reads:

“2. Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.”

Article 9.2 gives the rule that if a tax administration of one jurisdiction adjusts the profits of an enterprise according to the ALP in article 9.1, the tax administration of the other contracting state where the other party of the adjusted transaction is located, shall also make appropriate adjustments of the profits of the other party of

---

24 OECD, Model Tax Convention with respect to taxes on income and on capital 2014, article 9.
25 OECD, Commentaries to the Model Tax Convention, 2010, commentaries to article 9 paragraph 1.
26 OECD, Model Tax Convention with respect to taxes on income and on capital 2014, article 9.
the transaction. This rule exists because the adjustment of profits of an enterprise could cause international economic double taxation.  

How international economic double taxation can occur from the ALP could be explained by an example where Company A is located in State A and Company B is located in State B. Company A and Company B are associated enterprises. Company A makes an intra-group loan to Company B with the interest rate of 10 per cent. Company B makes interest payments to Company A because of the loan, resulting in an increase of the taxable business profits in Company A and a decrease of the taxable business profits in Company B. The tax administration of State B thinks that the interest rate of 10 per cent is not at arm’s length, and adjusts the interest rate pursuant to the ALP to 5 %. This means that the business profits of Company B in state is increased, since deductible interest payments is adjusted to equivalent of 5 per cent interest rate.

Now, if the tax administration of State A does not make appropriate adjustments to the taxable business profits of Company A, the income from the interest payment is taxed equivalent to 10 per cent interest rate, while interest payments of Company B is only deductible equivalent to 5 per cent interest rate. Even if the enterprises are not taxed for the same income more than once, nor is the income taxed in the same state twice, the interest income of Company A is taxed at 10 per cent interest rate, while the deductible costs for Company B is at 5 per cent, meaning it is a case of international economic double taxation.  

The rule in article 9.2 states that the tax administration of State A in the example above shall make appropriate adjustment if adjustments have been made by the tax administration of State B in the example. However, the rule article 9.2 also states that the tax administrations shall consult each other in determining the adjustment. Therefore, it is important to point out that an adjustment is not automatically made in State A because an adjustment is made in State B. The tax administration of State A needs to make their own analysis of the interest rate and if it’s at arm’s length, and an appropriate adjustment will only be made in State A.

---

27 OECD, *Commentaries to the Model Tax Convention*, 2010, commentaries to article 9 paragraph 5.

28 Definition of international economic double taxation and more is found in Berglund, Martin, Cejie, Katia, *Basics of International Taxation*, 2014, p. 27f.
if the tax administration thinks the adjustment made by the tax administration of State B is justified according to the ALP.\textsuperscript{29}

2.4.1 Article 25 of the OECD MTC

When the tax administrations shall consult each other, it is not clarified which method should be used for relief of economic double taxation.\textsuperscript{30} It is only stated that the parties shall consult each other, and therefore the article leaves it open for the parties to agree on specific rules for the relief of economic double taxation. However, there are regulations in the OECD MTC about the consultation and mutual agreements of competent authorities. This is found in article 25 of the OECD MTC. Briefly put, if a person (enterprise of individual) thinks that the actions of one or both contracting States results in taxation not in accordance to the OECD MTC, that person may present his case to the competent authorities of the State where the person is a resident. The competent authorities of the contracting State shall then endeavor to resolve the case.\textsuperscript{31}

This means, in reference to article 9.2 where the competent authorities shall consult each other concerning the adjustment pursuant to the ALP, the competent authorities are encouraged to consult each other, and shall endeavor to resolve the case, but there is nothing forcing the competent authorities to come to a common conclusion, if there is an absence of an arbitration clause in the specific tax treaty.\textsuperscript{32} Therefore, the relief of international economic double taxation for MNE groups is not guaranteed under the ALP. The relief of international double taxation comes down to whether the competent authorities share the view of the adjustment made under the ALP, or whether they can agree upon an adjustment according to article 25 of the OECD MTC.

\textsuperscript{29} OECD, \textit{Commentaries to the Model Tax Convention}, 2010, commentaries to article 9 paragraph 6.
\textsuperscript{30} OECD, \textit{Commentaries to the Model Tax Convention}, 2010, commentaries to article 9 paragraph 7.
\textsuperscript{31} OECD, \textit{Model Tax Convention with respect to taxes on income and on capital 2014}, article 25.
2.4.2 European Union Arbitration Convention

Member states of the European Union (EU) are bound by the EU Convention 90/436/EEC, commonly referred to as the EU Arbitration Convention. The EU Arbitration Convention encourages the competent authorities to agree on the adjustments under ALP. In addition to that encouragement, if the competent authorities fail to conclude, an advisory commission shall be formed, and the opinion of which will be the ruling opinion if the competent authorities fail to agree even after the advisory commission.

The EU Arbitration convention is a security for EU member states when it comes to transfer pricing and international economic double taxation. However, in transactions with jurisdictions that are not members of the EU, there is no security for enterprises that the international economic double taxation that may arise from the adjustments of profits under the ALP will be relieved.

---

33 Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of transfers of profits between associated undertakings.
3 The OECD Transfer Pricing Guidelines 2010

3.1 Introduction

This chapter will outline the application of the ALP prior to the changes in the Report. An introduction will be given to the OECD Transfer Pricing Guidelines and its origins. The bases of the application of the ALP in the OECD Guidelines will be outlined. The contractual elements in the OECD Transfer Pricing Guidelines will be outlined in more depth, as well the as-structured principle, since these parts are what is to be compared and analyzed in the following chapter four.

3.2 Applying the arm’s length principle

To provide guidelines in how to interpret and apply the ALP set out in article 9, the OECD have published recommendations for MNEs and tax administrations. In creating these recommendations, the OECD took influence from the U.S transfer pricing rules. The first version of the OECD Transfer Pricing Guidelines where published in 1979. After several additional recommendation work, the OECD Guidelines were updated in 1995 and additional major updates came in the 2010 version of the OECD Guidelines (hereafter the 2010 Guidelines). The OECD Guidelines are nowadays being updated regularly, since the ALP and transfer pricing issues are constantly reviewed and discussed.

The legal value of the OECD Transfer Pricing Guidelines is debated, and they are not legally binding. However, the OECD Transfer Pricing Guidelines represent the OECD member countries agreed view on transfer pricing issues, and have the intention to seen as “internationally agreed principles”. It should be stated

---

34 Monsenego, Jérôme, Introduction to Transfer Pricing, 2015, p. 31.
35 Monsenego, Jérôme, Introduction to Transfer Pricing, 2015, p. 31.
36 Monsenego, Jérôme, Introduction to Transfer Pricing, 2015, p. 32.
38 OECD, Commentaries to the Model Tax Convention, 2010, commentaries to article 9 paragraph 1.
however, that the adjustments of a condition according to article 9.1 of the OECD MTC must be done in accordance with the domestic law of the States involved.\textsuperscript{39}

The ALP set out in article 9 of the OECD MTC could be stated as the principle of adjusting profits from transactions between associated enterprises, to profits that would have been obtained between to independent enterprises in comparable transactions and comparable circumstances.\textsuperscript{40} Therefore, the application of the ALP set out in the 2010 Guidelines follows the approach of treating each member of a MNE group as a separate entity, instead of being a part of a single business that acts in different jurisdictions. This separate entity approach can in many cases be hypothetical, because a MNE group could in reality be functioning as one single enterprise, divided into subsidiaries in different jurisdictions for strictly organizational purposes. When the members of the group have been making intra-group transactions, the transactions are more or less dealings within an entity, rather than transactions between separate enterprises.

The approach in the 2010 Guidelines focuses on the nature of the transaction between the associated enterprises and if the conditions of the transaction differ from what would have been agreed between two independent enterprises. To approach a transaction between two associated enterprises as if the enterprises were separate and compare the transaction with a transaction between two independent enterprises, a comparability analysis is needed. This comparability analysis is the core of applying the ALP.\textsuperscript{41}

3.2.1 The comparability analysis

In order to apply the ALP, the 2010 Guidelines suggest that a comparison must be made between the transactions between associated enterprises and transactions between independent enterprises. To make such a comparison, the economically relevant characteristics of the compared transactions must be sufficiently comparable; meaning the differences between the compared transactions cannot

\textsuperscript{40} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, paragraph 1.6.
be so great that the conditions being examined in the comparability analysis cannot be adjusted to eliminate the effect of any differences.\textsuperscript{42}

In finding potential comparable transactions between independent enterprises, it is important to take into account all the different economic factors that play a role in setting the price in the compared transaction. According to the 2010 Guidelines, such “comparability factors” could be the kind of property of service transferred, the functions performed by the parties of the transaction, the contractual terms, the economic circumstances of the parties as well as the business strategies of the parties.\textsuperscript{43}

This comparability analysis will therefore require to both look at the comparability factors in transaction between the associated enterprises being reviewed, and look to the same comparability factors of the transaction between independent enterprises that is being compared. Which comparability factors that are relevant will vary from transaction to transaction. What comparability factors that are relevant for the specific case also depend on what transfer pricing method\textsuperscript{44} that will be used to set the arm’s length price.\textsuperscript{45}

### 3.3 The contractual terms in the OECD Transfer Pricing Guidelines 2010

One of the comparability factors expressed in the 2010 Guidelines that may be important to find potential comparable uncontrolled transactions is the functions performed by the parties of the transaction. This function analysis seeks to identify the functions performed by the parties, the assets used to support such functions as well as the risks assumed to undertake such functions or provide such assets.\textsuperscript{46} Generally, the more important role a party plays in a transaction, the


\textsuperscript{43} OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, 2010, paragraph 1.36.

\textsuperscript{44} The different methods of setting an arm’s length price are found in chapter II of the OECD Guidelines.


more that party should be exposed to profits or losses from that transaction. Naturally, the party that does not play the more important role should be less exposed to the profits or losses from that transaction.\textsuperscript{47} If there are significant differences between the functions preformed, assets used and risks assumed between a controlled and uncontrolled transaction, the uncontrolled transaction is not comparable in order to set the arm’s length price.\textsuperscript{48}

While preforming the functional analysis, the point of departure is the contractual terms of the transaction. In the absence of a written contract in a controlled transaction, the contractual terms should be presumed by looking at the conduct of the parties, as well as the economic circumstances that applies between the parties.\textsuperscript{49}

The contractual terms of an uncontrolled transaction often express explicitly or implicitly how the functions, assets, risks as well as the benefits of the transaction are to be divided between the parties.\textsuperscript{50} In an uncontrolled transaction, the parties enter the transaction with different interests, and therefore they make contractual terms to which they both will seek to hold each other. The contractual terms of an uncontrolled transaction can only be changed if it is the intention of both parties. This does not necessarily apply to controlled transactions, where the parties could act in contrary to what is agreed in the contractual terms, since both parties could be acting in same interest. If the parties of a controlled transaction do not follow the contractual terms, a further analysis is required to determine the true terms of the transactions.\textsuperscript{51}

How such a further analysis should proceed is not specified in the 2010 Guidelines. Neither is the “true terms of the transactions” specified. In analyzing the contractual terms of a controlled transaction, the 2010 Guidelines therefore discreetly opens up for a possibility to overlook the contract if the contractual

\textsuperscript{47} Monsenego, Jérôme, \textit{Introduction to Transfer Pricing}, 2015, p. 21.
\textsuperscript{49} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, paragraph 1.52.
\textsuperscript{50} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, 1.52.
terms is not in line with the conduct of the parties, but gives no guidance in determining if the conduct differs from the contract and pursuant to which economic circumstances that analysis should be made.

3.3.1 The allocation of risks

It is also stated in the 2010 Guidelines that in the examining of risks when preforming a functional analysis, the point of departure is the contractual terms of the parties, which generally define how the risks are divided. As with the contractual terms, the allocation of risks in the controlled transaction also needs expressively to have economic substance. In this regard, the economic substance of the true allocation of risks should be the conduct of the parties.

In addition, the allocation of risks is generally connected to the party that has the more control. What controlling the risk means is to have to capacity to make decisions to take on the risk, as well as to be able to manage the risk. To have this capacity would require substance such as employees to control the risk, in addition to the financial capacity to assume the risk. Therefore, the control over the risk is another substance requirement in the allocation of risk in a controlled transaction. It is stated that in determining the control over the risk, a further analysis is required to resolve which party that controls the risk in practice. The 2010 Guidelines therefore implies that the risk could be reallocated to the party exercising the more control if the allocation by the parties lacks economic substance.

The 2010 Guidelines therefore makes an indication that in the allocation of risks the contractual terms could be overlooked if the contractual terms have not been followed, and the risks could be adjusted according to the conduct of the parties.

56 Bullen, Andreas, Arm’s Length Transaction Structures, p. 200.
Additionally, the 2010 Guidelines express that the allocation of risks needs to be supported with significant economic substance.\footnote{Monsenego, Jérôme, \textit{The Substance Requirement in the OECD Transfer Pricing Guidelines: What Is the Substance of the Substance Requirement?}, \textit{International Transfer Pricing Journal}, 2014, p. 13 ff.}

### 3.4 The as-structured principle

The general principle of the ALP as it is stated in article 9 of the OECD MTC is that “\textit{conditions} are made or imposed between the two enterprises … which differ from those which would be made between independent enterprises”. Article 9 therefore clearly points out that is the conditions of a transaction that is to be analyzed under the ALP. Therefore, to adjust not only the conditions of a transaction, but to also to adjust how the transaction is structured is far bigger action for a tax administration to pursue.\footnote{Bullen, Andreas, \textit{Arm’s Length Transaction Structures}, 2011, p. 84f.}

Generally under the ALP, tax administrations shall recognize a controlled transaction as it has been structured by the associated enterprises, using the methods found in the 2010 Guidelines under the comparability analysis. This principle is commonly referred to as the “as-structured principle”. The MNEs can therefore structure their transactions as they see fit under the ALP.\footnote{Burmeister, Jari, \textit{Internprissättning och omkaraktärisering}, p. 113.} Only in exceptional circumstances is it viable for tax administrations to disregard the transactions as they have been structured by the associated enterprises, and replace or restructure the transactions. For tax administrations to restructure or replace legitimate transactions between enterprises would be difficult and arbitrary task.\footnote{OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, paragraph 1.64.} Nonetheless, they are two exceptions to where such a restructuring could be appropriate and legitimate, according to the 2010 Guidelines.

The first of these exceptional circumstances are when the substance of a transaction differs from its form. An example where this circumstance applies is if an enterprise is making an interest-bearing debt in an associated enterprise. With the regard to the economic substance of the transaction and the parties, the
borrowing associated enterprise could not have the financial substance to take on such an investment. Instead, the transaction should be restructured as a loan between the associated enterprises, pursuant to the economic substance. Under circumstances like this, it is legitimate for tax administration to disregard the structuring of the parties and restructure the transaction according to its substance.\textsuperscript{61}

The substance of a transaction means, according to the 2010 Guidelines, all the economic and commercial facts and circumstances of the transaction, the effect from a business point of view, as well as the conduct of the parties, including the functions performed, assets used and risks assumed by the parties.\textsuperscript{62} One noticeable point about the substance requirement in the 2010 Guidelines is that it takes no account of the intention of the parties behind the structuring of the transaction. The intention of saving or evading taxes is not to be considered, even under the exceptional cases as described above. It is only the economic and commercial facts and circumstances that are to be considered as economic substance. Therefore, the structuring of a transaction with the intention to save or evade taxes could be justified under the 2010 Guidelines, as long as it has sufficient economic substance.\textsuperscript{63}

The second exceptional circumstance when it is regarded legitimate to derivate from the “as-structured principle” is when a transaction differs from what would have been agreed between two independent enterprises in a commercial rational manner. This exception applies even though the substance of the transaction is in line with the form.\textsuperscript{64} In circumstances like this, it would be legitimate for tax administrations to re-characterize the transaction in a commercially rational manner.

\textsuperscript{64} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, paragraph 1.65.
4 The BEPS Final Report on Actions 8-10

4.1 Introduction

This chapter will give an introduction to the BEPS problem and the BEPS-Project. After this, the Report and its objective will be outlined. Following this, the changes to the 2010 Guidelines suggested in the Report concerning substance over form restructurings in the application of the ALP will be outlined and analyzed, as well as making a comparison of the changes in the Report with the 2010 Guidelines in section 4.5.

4.2 Background: The BEPS Project

With the increasing globalization and integration of the world economies, the role of MNEs in world trade have increased exponentially the recent decades. The structuring and management of MNEs have been inflicted by effects of the economic globalization, such as the free movement of capital and labor, the shift of manufacturing from high-cost jurisdictions to low-cost jurisdictions, removal of trade barriers and much more. The operating models of MNEs have therefore shifted from acting on a country-specific operating model based on the origins of the enterprise, to a global operating model.65

With the growing economic globalization and integration of the world economies, the framework for international taxation, with its origins from the League of Nations in the 1920’s, have proven to not be up to date.66 MNEs working on global operating model have been using gaps and mismatches in the international tax framework, to move shift profits from high tax jurisdictions to low tax jurisdictions, which erodes tax bases of jurisdictions. This tax planning strategy has been referred to as Base Erosion and Profit Shifting (BEPS).67 These gaps and mismatches that are being used are the result of domestic tax rules and international standards not being adapted to the globalization, the lack of transparency and coordination between tax administrations and much more.

---

65 OECD, Addressing Base Erosion and Profit Shifting, 2013, p. 25.
MNEs have been able to use BEPS because of the mismatching of many rules in many jurisdictions and not by one single set of rules.⁶⁸

The issue of BEPS has become increasingly urgent. Although it is hard to measure the exact loss of tax revenue because of MNEs using BEPS to avoid taxes, the estimated figure is 4 per cent to 10 per cent of revenue on global income tax is lost because of BEPS.⁶⁹

In 2013, the OECD and the G20 jointly started an ambitious project to come with concrete actions for jurisdiction in how to deal with BEPS. The project, referred to as the BEPS Project, have presented 15 reports on measures on how to tackle BEPS. The reports contain reinforcements of the existing international standards, as well as new concrete tools for jurisdictions in how to deal with BEPS.⁷⁰

4.3 The BEPS Final Report on Actions 8-10

Because of the growing economic globalization and the role of MNEs in the global trade, the growth and volume of intra-group transaction has increased. Rules on transfer pricing, which are set out to safeguard the allocation of profits from intra-group transactions, has because of this become more important to prevent MNEs from using BEPS. It is stated in the BEPS Final Report on Actions 8-10 (the Report) that the current transfer pricing rules can be misplaced so that the allocation of profits is not aligned with where the value is created.⁷¹

According to the Report, the application of the ALP set out in the OECD Guidelines with its emphasis on the functions, risks and assets undertaken by the parties of the intra-group transaction have proven to be easily manipulated. Manipulation of the ALP can cause the allocation of profits from transactions not to be aligned with where the economic functions that creates the value is undertaken.⁷² Such manipulation mentioned in the Report could be to contractually arrange functions, risks and assets in way that according to the functional analysis the profits of a transaction is allocated to the most favorable

jurisdiction to the MNE group, and not where those functions, risks and assets are undertaken in reality. The Report therefore sets out to clarify and strengthen the OECD Guidelines and the application of the ALP, but also to look beyond the ALP if the transfer pricing risks remains.\textsuperscript{73}

The Report focuses on three areas of transfer pricing, with Action 8 focusing on issues relating to intra-group transactions involving intangibles, Action 9 on the contractual allocation of risks and the return of capital-rich MNE group members and Action 10 on high-risk areas such as re-characterization of transactions, the use of transfer pricing methods and certain payments between members of the MNE group.\textsuperscript{74} The general aim of the Report is that the transfer pricing rules will make sure that the allocation of profits from intra-group transaction is aligned with where the economic value is created.\textsuperscript{75}

4.4 The changes to the application of the arm’s length principle in the OECD Transfer Pricing Guidelines concerning substance over form restructurings

The changes in the Report were implemented in the OECD Guidelines May 23, 2016. As a consequence, Chapter 1 Section D of the OECD Guidelines, where the guidance in how to apply the ALP is found, was replaced in its entirely. The new text has many similarities with the old text, but there are also some fundamental differences connected to substance over form restructurings, which will be presented.

One of the aims of the changes to Chapter 1 Section D of the OECD Guidelines is that the new guidance in how to apply to the ALP will ensure that actual business transactions undertaken by associated enterprises are identified.\textsuperscript{76} To do so the Report introduces the important term “accurately delineating the actual transaction”. To accurately delineating a transaction according to the Report, one must look to the conduct of the parties to supplement the contractual terms of the

\textsuperscript{73} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 9.
\textsuperscript{74} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 10.
\textsuperscript{75} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 12.
\textsuperscript{76} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 13.
transaction, so that a transaction is not only delineated by what is in the contract.\textsuperscript{77}
Therefore, the one of the aims of the Report is that transfer pricing outcomes is not based entirely on the contractual terms between the parties without economic substance.\textsuperscript{78}

As a consequence, another aim of the Report is that the allocation of risk under the functional analysis are only recognized when the allocation are supported by economic substance.\textsuperscript{79} Since risks are a very important factor when it comes to transfer pricing outcomes, the contractual allocation of the risks is only recognized when enough control and financial capacity behind the allocation.\textsuperscript{80}

Moreover, another aim of the report connected to substance over form re-characterizations is that the Report set outs that the changes shall ensure that tax administration can disregard transactions if there is an absence of commercial rationality in the transaction.\textsuperscript{81} The key question when it comes to determine commercial rationality, according to the Report, is whether the conditions of the transaction would have been agreed between independent enterprises in comparable economic circumstances.\textsuperscript{82}

4.4.1 Accurately delineating the transaction

According to the revised OECD Guidelines and set out in the Report, the first step of applying the ALP is to accurately delineate the transaction by identifying the commercial or financial relationship between the associated enterprises, as well as the economically relevant circumstances.\textsuperscript{83} These economically relevant circumstances that needs to be identified in order to accurately delineate the transaction are the contractual terms of the transaction, the functions performed by the parties, including the assets and risks connected to those functions, the characteristics of the property transferred in the transaction, the economic

\begin{itemize}
  \item \textsuperscript{77} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 12.
  \item \textsuperscript{78} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 12.
  \item \textsuperscript{79} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 12.
  \item \textsuperscript{80} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 13.
  \item \textsuperscript{81} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 12.
  \item \textsuperscript{82} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 13.
  \item \textsuperscript{83} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 15, paragraph 1.33 of the revised OECD Guidelines.
\end{itemize}
circumstances of the parties and of the market they are engaged in and the business strategies.\textsuperscript{84}

The new point of departure, to accurately delineate the transaction in order to apply the ALP, is perhaps not a fundamental change to the application of the ALP, since the similar economically relevant circumstances is found in the 2010 version of the OECD Guidelines.\textsuperscript{85} Nevertheless, the notion that the transaction needs to be delineated according to the economic circumstances of the parties instead of being recognized as put out in the 2010 version brings about a new approach, that considering the economic circumstances, the transaction could be needed to be delineated from the contractual terms or from how the transaction appears too structured.

4.4.1.1 The contractual terms

One of the five economically relevant circumstances presented in paragraph 1.37 of the revised OECD Guidelines to accurately delineate the transaction is the contractual terms of the transaction. If there is a written contract for the particular controlled transaction, which reflects the intentions of the parties, the assumption of responsibilities, risk and the pricing of the transaction, such written contract should be the starting point of the delineation of the transaction.\textsuperscript{86} However, it is pointed out in the revised OECD Guidelines that the contract in a controlled transaction rarely provides all the information necessary to delineate the transaction. Therefore, the other four economically relevant circumstances presented in paragraph 1.36 will be needed to take into consideration as evidence of the actual conduct of the parties and the accurate delineation of the transaction. This evidence found in the economically relevant circumstances can clarify aspects of the written contract, but also supplement any information found in the contract.\textsuperscript{87}

\textsuperscript{84} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 15, paragraph 1.36 of the revised OECD Guidelines.
\textsuperscript{85} See comparability factors in paragraph 1.36 of the OECD Guidelines 2010.
\textsuperscript{86} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 17, paragraph 1.42 of the revised OECD Guidelines
\textsuperscript{87} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p.17, paragraph 1.43 of the revised OECD Guidelines.
The revised OECD Guidelines presented in the Report provides one example where the accurate delineation of the transaction is done with the starting point of the contractual terms, but clarified and supplemented by the other four economically relevant circumstances. In the example, Company A is an enterprise of State A. Company A has a wholly-owned subsidiary in State B, Company B. Company B acts on the behalf of Company A and sells products of Company A on the market in state B. The relation between Company A and Company B, according to the written contract between the parties, is that Company B acts as a sales agent for Company A. However, Company B also conducts marketing and advertising activities in state B on the behalf of Company A. The contract between the parties does not state anything about Company B preforming such functions. After a transfer pricing analysis of the economically relevant circumstances of the transaction, and in particular the functions preformed, it is concluded that Company B has been making significant investments in marketing activities to develop the Company A’s brand in State B. Based on this evidence of the conduct by the parties, it is clear the written contract did not show the full picture of the commercial or financial relationship of the parties. 88 This example shows that the transfer pricing analysis and the delineation of the transaction should not be based on the written contract alone.

A general principle is therefore given in the revised OECD Guidelines that the transaction should be delineated in accordance with the characteristics of the transaction found in the conduct of the parties, based on the economically relevant circumstances, if the characteristics are not in line with the written contract. 89 This rule is given because when independent enterprises transact with each other, they will both be acting in their own interests, and therefore they will seek to hold each other to what is stated in the written contract. Since this does not always apply to a controlled transaction, where the parties are associated and can derivate from the

88 Example found in OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p. 18, paragraph 1.44 of the revised OECD Guidelines.
89 OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p.18, paragraph 1.45 of the revised OECD Guidelines.
written contract, the conduct of the parties are of particular interest when delineating actual transaction.\textsuperscript{90}

An example where the conduct of the parties is not in line with the written contract is where an enterprise, Company A wholly owns a subsidiary in Company B. The enterprises have a written contract in force, where Company B licenses intellectual property from Company A. According to the contract, Company B remunerates Company A for the use of the intellectual property with a royalty. Evidence from the other four economically relevant circumstances shows that Company B also preforms activities on behalf of Company A, such as sales activities, customer support, and provide staff functions to finalize the sales. These functions performed by Company B are not pursuant to the written contract. The economically relevant circumstances shows that Company A is not capable of preforming the mentioned functions without significant support from Company B, and these functions are controlled by Company B alone without any support form Company A. According to the written contract, Company B only licenses intellectual property, but in reality they controls the business risk and outcome of the transaction to such extent that Company B acts not as a licensor but the principal\textsuperscript{91}.

Because of this, the accurate delineation of the transactions and the role of the parties should not be made exclusively on the written contract. In this scenario, the relevant economic circumstances proved that the conduct of the parties is not in line with the written contract.\textsuperscript{92}

4.4.1.2 The contractual allocation of risks

Another of the five economically relevant circumstances mentioned in article 1.36 of the revised OECD Guidelines that needs to be identified to accurately delineate the transaction is a functional analysis.\textsuperscript{93} The functional analysis shares many

\textsuperscript{90} OECD, *Aligning Transfer Pricing Outcomes with Value Creation*, 2015, p. 18f, paragraph 1.46 of the revised OECD Guidelines.

\textsuperscript{91} For transfer pricing structures and roles, such as "principal", see Monsenego, Jérôme, *Introduction to Transfer Pricing*, 2015, chapter 3.

\textsuperscript{92} Example based on the example found in *OECD, Aligning Transfer Pricing Outcomes with Value Creation*, 2015, p. 19, paragraph 1.48 of the revised OECD Guidelines.

\textsuperscript{93} The functional analysis is outlined in section D.1.2 of the revised OECD Guidelines.
similarities with the functional analysis the 2010 OECD Guidelines, and the analysis seeks to identify the economically significant functions performed by the parties, the assets used to support such functions as well as the risks assumed to undertake such functions or provide such assets. However, the functional analysis in the revised OECD Guidelines puts an emphasis on what functions the parties actually undertakes and have to capability to provide. In such an functional analysis, the revised OECD Guidelines states that the actual assumption of risks is elementary for accurately delineating the transaction, since the assumption of risks in a transaction is highly connected to expected amount of profit from a transaction.

However, the functional analysis in the revised OECD Guidelines puts an emphasis on what functions the parties actually undertakes and have to capability to provide. In such an functional analysis, the revised OECD Guidelines states that the actual assumption of risks is elementary for accurately delineating the transaction, since the assumption of risks in a transaction is highly connected to expected amount of profit from a transaction.

Due to the difficulties that can occur when identifying risks from a transaction, the revised OECD Guidelines provides a detailed guidance in how to identify the relevant risks in a transfer pricing analysis under the ALP. Article 1.60 sets out a six-step analysis to identify the risks in a controlled transaction, in order to accurately delineate the transaction in respect to risks. The analysis can be summarized as:

1. Identify the risk.
2. Determine how the specific risk is contractually allocated.
3. Make a functional analysis of the parties of the transaction.
4. Determine whether the contractual allocation of the risk is in line with the conduct of the parties, established through the functional analysis.
5. Determine whether the part that assumes the risk also exercises the control of the risks and has the financial capacity to assume the risks.
6. Price the transaction after being accurately delineated based on all the economically relevant circumstances.

96 OECD, *Aligning Transfer Pricing Outcomes with Value Creation*, 2015, p. 21, paragraph 1.56-1.57 of the revised OECD Guidelines.
When it comes to step number two of the risk allocation analysis, the contractually allocation of risks, the revised OECD Guidelines states that the allocation of risk and typically stated in a written contract between the parties. Even if some risks are explicitly allocated in the contract, there could also be risks that are implicitly allocated.\(^99\) A contractually allocation of risk should be seen as a commitment by one party to bear a certain risk before the economic outcome that is connected to that risk is known. Transfer pricing audits by tax administration are usually made years after a risk has been allocated, and the economic outcome of assuming a risk is known by that point, which makes a contractually allocation of risk before the economic outcome is known an important evidence.\(^100\) Therefore, the revised OECD Guidelines makes clear that the contractually allocation of risk before the economic outcome of that risk could be important evidence in allocation of risk analysis.

Consequently, the assuming of a risk in a controlled transaction, when the economic outcome of assuming that risk is known, is not assuming a risk at all. The revised OECD Guidelines therefore states that it is inappropriate for a tax administration to reallocate a risk after the economic outcome of that risk is known.\(^101\)

Despite stating that the contractually allocation of risk before the economic outcome of assuming the risk in known provides a good evidence in the allocation of risk, the revised OECD Guidelines states that the contractually allocation of risk does not necessarily be at arm’s length.\(^102\) Therefore, additional guidance from the following steps in the allocation of risks analysis, especially the functional analysis, is needed to determine whether the contractually allocation of risks is in line with the conduct of the parties.

After making a functional analysis of the parties in relation to the allocation of risks, the next step in the risk allocation analysis in to interpret the findings under


\(^{100}\) OECD, *Aligning Transfer Pricing Outcomes with Value Creation*, 2015, p. 28, paragraph 1.78 of the revised OECD Guidelines.

\(^{101}\) OECD, *Aligning Transfer Pricing Outcomes with Value Creation*, 2015, p. 28, paragraph 1.80 of the revised OECD Guidelines.
step one to three and evaluate if the contractually allocation is in line with the conduct of the parties, but also if the part that assumes a risk exercises control over the risk and financial capacity to do so.  

This means that under step four of the analysis, the revised OECD Guidelines tests the contractual allocation of risks against three circumstances, the conduct of the parties, and the exercise of control over the risk and the financial capacity of the party. If all three circumstances are in line with the allocation pursuant to the contract, there is no need to consider step five of the risk analysis.

When doing this test under step four of the analysis, it is clearly stated that the conduct of the parties in the context of the contract, based on the economically relevant circumstances, are the best evidence of the actual allocation risks, if this conduct is not in line with the contractual allocation. This analysis should also be made in accordance with the analysis of the contractual terms of the controlled transaction.

However, if not all of the three circumstances that needs to be tested against the contractual allocation are in line with the written contract, further analysis needs to be made under step five. Step five of the analysis contain a tiebreaker rule however, that clearly states that, unless otherwise determined, the risk should be allocated to the party that exercises the control and has the financial capacity to assume the risk. Furthermore, in cases where more than one part exercises control of the risk, the party that exercises the most control should be the party where the risk should be allocated.

Consequently, in cases where the contractual allocation of risk are not line with the conduct of the parties, and those are not in line with the exercise of control of

---

the risk, nor the financial capacity to assume the risk, the contractual allocation is overlooked and the risk allocated to the party that exercises the most control.

### 4.4.2 Absence of commercial rationality

After performing a transfer pricing analysis, by identifying the economically relevant circumstances in accordance with article 1.36, the controlled transaction should be accurately delineated in respect to the factual substance of the transaction.\(^\text{108}\) The contractual terms of the transaction should be supplemented and clarified by determining the conduct of the parties, and the contractual risk allocation have been allocated to the party exercising the most control of the risk, as described in the previous sections.

Following the accurate delineation of the transaction, a general principle is stated in the revised OECD Guidelines, that every effort should be made to determine the pricing of the controlled transaction pursuant to the transfer pricing methods\(^\text{109}\). The revised OECD Guidelines set outs that only in one exceptional case are it viable for a tax administration to disregard an accurately delineated transaction under the ALP as the parties have structured it.\(^\text{110}\) This exceptional case is when a transaction lacks commercial rationality.

Restructurings of controlled transactions by tax administration is that is an arbitrary task, an could also be contagious, and the revised OECD Guidelines states out that restructurings must not become a go-to method only because the pricing of a controlled transaction under the ALP is difficult.\(^\text{111}\) Furthermore, the restructurings of controlled transactions is also a source of double-taxation, since the corresponding restructuring may not be recognized by the tax administration of the state where the other party in located.\(^\text{112}\)

---

\(^\text{108}\) OECD, *Aligning Transfer Pricing Outcomes with Value Creation*, 2015, p. 38, paragraph 1.119-1.120 of the revised OECD Guidelines.

\(^\text{109}\) As in the 2010 version of the OECD Guidelines, the transfer pricing methods are found in chapter II of the revised OECD Guidelines.


\(^\text{112}\) OECD, *Aligning Transfer Pricing Outcomes with Value Creation*, 2015, p. 39, paragraph 1.122 of the revised OECD Guidelines, following the provision of article 9 of the OECD MTC.
If the structuring of a transaction could be seen in an uncontrolled transaction with comparable circumstances, restructuring by a tax administration cannot occur under the revised OECD Guidelines. Additionally, it is stated that associated enterprises can enter a greater variety of transaction with different structuring than independent enterprises. The fact that the structuring of a transaction has not been seen in a controlled transaction does not mean alone that the transaction has an absence of commercial rationality.\textsuperscript{113}

An accurately delineated transaction under the ALP may only be disregarded and replaced under the revised OECD Guidelines, if the structuring of the transaction, viewed in its totality, differ from those which would have been made in an uncontrolled transaction, where under comparable circumstances, the parties were behaving in a commercially rational manner. In behaving in a commercial rational manner means acting in such a way so the determining of the price would be acceptable to both parties. Another evidence of commercial rationality that is stated is whether the MNE group as a whole ends of worse from a tax point of view, since this could indicate the absence of commercial rationality is something that would not have been seen between independent enterprises.\textsuperscript{114}

The main question when it comes to restructuring transaction under the revised ALP is therefore whether the transaction holds the same economic rationality that would have applied in an uncontrolled transaction, not whether the transaction is likely to be seen in an uncontrolled transaction.\textsuperscript{115} Restructurings of transaction should, if exercised, be made as closely to the actual structuring of the transaction, with commercial rationality.\textsuperscript{116}

An example where a transaction has an absence of commercial rationality is where an enterprise, Company A, preforms research and develops intangibles based on that research. Company A enters a transaction with an associated enterprise, Company B, for unlimited use of all present and future intangibles.

\textsuperscript{113} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 39, paragraph 1.121 of the revised OECD Guidelines.

\textsuperscript{114} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 39, paragraph 1.121 of the revised OECD Guidelines.

\textsuperscript{115} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 39, paragraph 1.123 of the revised OECD Guidelines.

\textsuperscript{116} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 39, paragraph 1.124 of the revised OECD Guidelines.
from Company A’s research. Since future intangibles are impossible for both parties to value, the transaction is commercially irrational for both parties. None of the parties can realistically set an arm’s length price for something that does not yet exist and therefore for something they cannot know the value. The controlled transaction should instead be replaced, in accordance with a transfer pricing analysis of the parties and the transaction, and priced accordingly.\textsuperscript{117}

An absence of commercial rationality could also exist if there is an enterprise of the MNE group that is consistently making losses, without contributing to the business of the MNE group and the MNE group as a whole is making profits.\textsuperscript{118} Such a loss making enterprise could require for a further transfer pricing analysis. Loss making that goes beyond a reasonable point could constitute for an adjustment of the losses of an enterprise by restructuring the transactions between other enterprises of the MNE group.\textsuperscript{119}

4.5 Differences in the substance over form restructurings between the OECD Transfer Pricing Guidelines 2010 and the revised OECD Transfer Pricing Guidelines

In the 2010 Guidelines, the as-structured principle set out that the way the parties have been structuring their transactions should be recognized when applying the ALP.\textsuperscript{120} Only in exceptional cases should tax administrations restructure a transaction for tax purposes under the ALP.\textsuperscript{121} My perception is that the substance requirement in the 2010 Guidelines is but an exception to the as-structured principle. I think that recognizing the form as a main rule can also be seen in other parts of the 2010 Guidelines. In chapter I part D of the 2010 Guidelines, when preforming the functional analysis, even if the 2010 Guidelines opens up for a

\textsuperscript{117} Example based on OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 40, paragraph 1.128 of the revised OECD Guidelines.
\textsuperscript{118} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 40, paragraph 1.129 of the revised OECD Guidelines.
\textsuperscript{119} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 40, paragraph 1.130-1.131 of the revised OECD Guidelines.
\textsuperscript{120} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010}, paragraph 1.64.
\textsuperscript{121} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010}, paragraph 1.65.
further analysis if the contractual terms has not been followed, the point of
depture is still to proceed the analysis pursuant to the written contract.\textsuperscript{122}

This also applies when examining the substance behind the allocation of risk. While doing this, starting point is the contractual terms, even if the substance requirement is more explicit, it is still stated that it \textit{may} be considered if the contractual allocation of risk is in line with the economic substance. It is pointed out at the conduct of the parties is the best evidence of the economic substance.\textsuperscript{123} Still, the method is the same, to start with examining the contract and to test the contract against the economic substance of the transaction, which is determined by the conduct of the parties.\textsuperscript{124}

The as-structured principle is modified in the revised version of the OECD Guidelines. Is it stated that after the transaction have been accurately delineated according to the transfer pricing analysis, it should generally be recognized as it has been delineated.\textsuperscript{125} There is one exceptional case where a restructuring of an accurately delineated transaction is acceptable, and that is if the transaction lacks commercial rationality.\textsuperscript{126} I think this is a major shift in the transfer pricing analysis and in the substance over form approach. To recognize the structuring of the parties is no longer the general principle. Instead, the substance requirement is a part of the delineation of the transaction, making it a part of the general principle, instead of the exception. The replacement of the as-structured principle may not expressively put restructurings as the go-to method in applying the ALP, but it puts restructuring as one of the options while delineating the transaction.

\textbf{4.5.1 The substance over form in accurately delineating the transaction}

The substance requirement test previously found as an exception to the as-structured principle is now found in the accurately delineation of the transaction

\textsuperscript{122} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, paragraph 1.53.
\textsuperscript{123} OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, paragraph 1.48
\textsuperscript{125} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 39, paragraph 1.121 of the revised OECD Guidelines.
\textsuperscript{126} OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 39, paragraph 1.123 of the revised OECD Guidelines.
analysis, which is the central part of the transfer pricing analysis in the revised OECD Guidelines. One of the economic circumstances stated in article 1.36 while delineating the transaction are the contractual terms of the transaction.\textsuperscript{127} As with the 2010 Guidelines, an existent written contract is still the point of departure. In the 2010 Guidelines, it is stated that if the conduct of the parties contradict the contract, a further analysis is needed to determine the true terms of the transaction.\textsuperscript{128} However, in the revised OECD Guidelines, the other relevant economic circumstances should provide evidence of the conduct of the parties, and that evidence shall supplement the content of the contract.\textsuperscript{129} I think this gives the rule that the contract should generally not be accepted according to its form, but always be supplemented according to the economic substance.

In addition to this, it is stated that the conduct of the parties is of particular interest when delineating the transaction. If the conduct of the parties should not be in line with the written contract, the general principle should then be to delineate the transaction according to the conduct of the parties, and not with the contractual form.\textsuperscript{130} I think this clearly point out that the method in how to accurately delineate the transaction in reference to the written contract is to start with determining the conduct of the parties according to the economically relevant circumstances, and test the conduct against the written contract. The written contract should then be supplemented or even replaced in accordance with the conduct of the parties. To supplement a written contract according to the conduct of the parties is to me an interpretation of the economic substance and to adjust the contract pursuant to the substance. The supplementation is therefore to adjust the contract according to its substance, and is therefore a substance over form approach.

The substance over form restructuring element in the delineation of the transaction is to me imminent, in contrast to the 2010 Guidelines, where the

\begin{footnotesize}
\begin{enumerate}
  \item OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 16, paragraph 1.36 of the revised OECD Guidelines.
  \item OECD, \textit{Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations}, 2010, paragraph 1.53.
  \item OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 18, paragraph 1.43 of the revised OECD Guidelines.
  \item OECD, \textit{Aligning Transfer Pricing Outcomes with Value Creation}, 2015, p. 18f, paragraph 1.46 of the revised OECD Guidelines.
\end{enumerate}
\end{footnotesize}
contract should be analyzed according to the conduct of the parties, but the asstructured principle still existed. Even if the possibility of substance over form approaches existed in the 2010 Guidelines, it was still an exception from the asstructured principle, and therefore in practice, making it the main rule is a fundamental change.

When making the risk analysis under the revised OECD Guidelines, the point of departure is, as with the 2010 version, the contractual terms. The substance requirement was explicit in the 2010 version. In the revised version, it is stated that the contractual allocation of risks before the economic outcome of the risk is known provides a good evidence in the true allocation of risk. It could therefore be seen as a strengthening of the form over the substance. But it is also stated that assuming a risk after the economic outcome is known is not assuming a risk at all, meaning that the contractual allocation of risk must happen before the economic outcome of the risk is known, otherwise the contractual allocation is declared void by the revised OECD Guidelines.

In addition, in the revised OECD Guidelines, the contractual allocation of risks are to be tested against the conduct of the parties, determined by the economically relevant circumstances, as well as the control over the risk and the financial capacity of the party. This is not that different from the allocation of risk under the functional analysis of the 2010 Guidelines, but the testing of the contractual form against the substance is more explicit. Furthermore, the tiebreaker rule in this risk analysis is the control over the risk, meaning that the control over the risk should be the practical go-to circumstance and not the contractual terms, since the contractual terms or the structuring by the parties is not the main rule.

131 OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p. 28f, paragraph 1.77-1.81 of the revised OECD Guidelines.
133 OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p. 28, paragraph 1.78 of the revised OECD Guidelines.
134 OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p. 31, paragraph 1.87 of the revised OECD Guidelines.
135 OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p. 32-33, paragraph 1.90.1.97 of the revised OECD Guidelines.
4.5.2 The one exception – absence of commercial rationality

The revised OECD Guidelines states that an accurately delineated transaction under the transfer pricing analysis should only in exceptional cases be restructured by a tax administration. This one exception is the absence of commercial rationality. The revised OECD Guidelines points out however that associated enterprises may enter a different variety of transaction than independent enterprises does. Just because the transaction is not similar or seen between independent enterprises does not mean it lacks commercial rationality.\(^\text{136}\) I think that this puts a high threshold for tax administrations to restructure a transaction because it lacks commercial rationality.

However, one interesting point is made about the losses of an enterprise in a MNE group. If an enterprise is continuously making losses beyond a reasonable period, while the whole MNE group is making a profit, the transactions between the enterprises within the MNE group have an absence of commercial rationality, according to the revised OECD Guidelines.\(^\text{137}\) I think that this means that the separate entity approach in this special case is lifted, and the MNE group and the profit and losses made by the enterprises within the MNE group should be considered as a whole.

4.5.3 General implications of the new substance over form approach

It is clear that when applying the ALP under the revised OECD Guidelines, a full picture view is needed for the tax administration to determine whether the transaction have been at arm’s length. A full picture was also needed in the 2010 Guidelines, but in the revised Guidelines, very little formal evidence is generally accepted, and all the economically relevant circumstances must be identified to clarify the conduct of the parties. The tax administration will then make an accurate delineation of the transaction. This will likely put an even harder strain on tax administrations to apply the ALP according to the revised OECD Guidelines. Additionally, with the exception to the accurately delineated

\(^{136}\) OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p. 39, paragraph 1.121 of the revised OECD Guidelines.

\(^{137}\) OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p. 40, paragraph 1.129-1.131 of the revised OECD Guidelines.
transaction, where tax administrations needs to review the MNE group as a whole, puts an even harder strain to fully apply the ALP under the revised OECD Guidelines.

Moreover, the accurately delineation of transaction will also require subjective interpretation of the economically relevant circumstances, to determine the conduct of the parties and to delineate the transaction. It is likely that tax administration of different jurisdictions, acting in accordance with their own legal system, will make different delineations of the same transaction. In reference to article 9.2 of the OECD MTC, where the competent authorities shall consult each other in making corresponding adjustments to transaction between associated enterprises, there is a possibility that the competent authorities will find it even harder to conclude the adjustments under the revised OECD Guidelines than under the previous version. Since there is no security for taxpayers outside the EU, without an arbitration clause in the specific tax treaty, that their international economic double taxation will be relieved, the subjective accurately delineation of transaction could give rise to more international economic double taxation. Increasing international economic double taxation could be harmful to the international trade and world economies, as well as reduce the willingness of MNEs to pay taxes and to comply with tax laws. An international taxation framework where more double taxation occurs could lead to more tax fraud and avoidance, since the MNEs could get the impression that the tax system is unfair, not neutral and lacks foreseeability.

4.5.4 The future of the arm’s length principle

The ALP set out in article 9.1 states that the conditions imposed by associated enterprises that differs from what would have been imposed by independent enterprises may be adjusted.\textsuperscript{138} In the application of the ALP, it is therefore the condition, such as the price, that is to be adjusted, but the transaction is to be recognized as a whole.\textsuperscript{139} To accurately delineate the transaction according to the economic substance is according to my perception, a different matter. The substance over form approach presented in the revised OECD Guidelines is not so

\textsuperscript{138} See section 2.3 of this thesis.

\textsuperscript{139} Bullen, Andreas, \textit{Arm’s Length Transaction Structures}, 2011, p. 84f.
much a recognition of the transaction and an adjustment of the conditions, it is a restructuring of the transaction according to its economic substance, and then to set a price on the accurately delineated transaction. The question is whether the accurate delineation of the transaction is within the scope of article 9.1 and the ALP or not. To my perception, the application of the ALP is no longer a question of adjusting the conditions of a transaction, but restructuring and pricing the transaction according to its economic substance and the economic and commercial relationship of the parties. With this, I think the application of the ALP in the revised OECD Guidelines is outside the scope of the ALP.

The changes to the OECD Transfer Pricing guidelines came from the work of the BEPS-project. The BEPS-Project must be seen as a very bold move to come up with comprehensive measures on how to deal with BEPS and international tax planning.\textsuperscript{140} The BEPS-Project was made possible because tax planning never has been so high on the political agenda as it was at the moment when the BEPS-Project started, why the project must be seen as a window of opportunity for the OECD and the G8 to come up with concrete measures for jurisdictions on how to tackle BEPS, but also to reinforce existing standards of international taxation in order to tackle BEPS.\textsuperscript{141} The actions that has come as results of the BEPS-Project must therefore, in my opinion, by seen as the conclusion of the OECD and the G8 on what needs to be done, and the how-to will come afterwards. That step is now, when it is up to jurisdictions and international organizations to come up with how to implement the measures suggested in the BEPS-Project. The actions that came from the BEPS-Project have therefore not necessarily had the objective of being within the current international standards or principles.

Therefore, if the revised OECD Guidelines would be considered outside of the scope of the ALP in article 9.1 of the OECD MTC, I think that we can expect changes to article 9.1 in the future in order to be in line with the changes presented in the Report. To me, it would be unthinkable that the measures suggested in the BEPS-Project would not be implemented in the OECD MTC because they are outside the scope of the current international standards, such as the ALP. With the harmful effects of BEPS, I think that the OECD will make the

\textsuperscript{140} See section 4.2 of this thesis.
\textsuperscript{141} See section 4.2 of this thesis.
adjustments necessary in order to implement the changes in the Report in their materials.

This would change the ALP into being something else. The focus must be shifted from the conditions of a transaction being adjusted to conditions that would have been imposed at arm’s length, to the whole transaction being adjusted to a transaction that would have been imposed at arm’s length, considering the economic substance of the transaction as well as the economic and commercial relationship between the parties. This would enable the substance over form approach in the revised OECD Guidelines in transfer pricing issues. This would also enable tax administrations to restructure a accurately delineated transaction because it has an absence of commercial reality.
5 The Swedish domestic law on transfer pricing

5.1 Introduction

In this chapter, the Swedish domestic law on transfer pricing will be outlined. This will be followed by a presentation of court rulings concerning transfer pricing and especially substance over form restructurings. The legal value and position of the OECD Transfer Pricing Guidelines in Swedish law will be described and analyzed. Lastly, the Swedish domestic law on transfer pricing will be compared with the revised OECD Guidelines concerning substance over form restructurings.

5.2 “The adjustment rule” in 14th chpt. 19 § Income Tax Act

There is one paragraph in the Swedish Income Tax Act (Inkomstskattelagen in Swedish, hereafter ITA) that expressively deals with transfer pricing related issues. It is found in the 14th chpt. 19 § of the ITA. The paragraph can be translated to:

If the result of a business will be lower due to conditions agreed upon that differ from what would have been agreed between independent enterprises, the result shall be adjusted to the amount that it would have been if such conditions do not exist. However, this applies only if:

1. As a result of the conditions an enterprise will receive a higher income and will not be taxed on this income in Sweden under the provisions of this Act or because of a tax treaty.
2. There is probable cause to believe that there is an economic interest between the parties, and
3. there are elements which demonstrate that the conditions come to reasons other than economic interests (My translation).\(^\text{142}\)

The rule found in 14th chpt. 19 § of the ITA is an expression of the ALP in Swedish internal law.\(^\text{143}\) 14th chpt. 19 § of the ITA share many similarities with article 9.1 of the OECD MTC. It targets conditions between associated enterprises that differ from what would have been agreed between independent enterprises, and provides a possibility to adjust the profits of a business where the profits have been lower due to the conditions. The rule is therefore often referred to as “the adjustment rule” (korrigeringsregeln in Swedish).

\(^{142}\) 14th chapter, 19 § Inkomstskattelagen (1999:1229) (Income Tax Act)

\(^{143}\) Burmeister, Jari, *Internprissättning och omkaraktärisering*, p. 165.
Notably, the adjustment rule in Swedish tax law only targets situations where the conditions imposed have caused the income in Sweden being lowered as the result of these conditions. This is because the rule where not implemented to hinder cross-border transaction, but only to secure the Swedish tax base.\textsuperscript{144}

Rules about conditions imposed by associated enterprises that leads to inadequate pricing of transaction have existed in Swedish tax law since 1928.\textsuperscript{145} The first rule required the inadequate pricing to obvious and considerably lower in order for an adjustment to be made.\textsuperscript{146} The rule was changed and the obvious requirement was removed in 1965, so that the inadequate pricing only needed to be considerately lower.\textsuperscript{147} The change in 1965 also happened to make to rule more consistent with the rule found the OECD MTC.\textsuperscript{148} The rule was also changed materially in 1983, to its current state, where the rule applies to cross-border transactions of all kinds.\textsuperscript{149} The rule was moved to its current place in the ITA when the ITA was implemented in 1999.\textsuperscript{150}

In doctrine, the adjustment rule has been outlined as containing four requisites in order to be applicable. The first requisite is to identify the legal subject. There need to be a contractual relationship between a Swedish enterprise, which is the legal subject, and a foreign enterprise, which receives income from the Swedish enterprise because of the conditions of the contract. Second, the conditions of the contract must likely be the result of enterprises being economically associated and cannot have been the result of any other reason. Third, the income transferred from the Swedish enterprise must have been the cause of the conditions imposed in the contract differing from what would have been imposed by independent enterprises. Fourth, the business income of the Swedish enterprise has become

\begin{small}
\textsuperscript{144} Arvidsson, Richard, \textit{Dolda vinstöverföringar}, p. 76.
\textsuperscript{145} Burmeister, Jari, \textit{Internprissättning och omkaraktärisering}, p. 166, the rules were found in Kommunalskattelagen (1928:370) (Municipal Income Tax Act).
\textsuperscript{146} Prop. 1927:102, p. 53, comments to 43 §.
\textsuperscript{149} Burmeister, Jari, \textit{Internprissättning och omkaraktärisering}, p. 167, 170-171, the rule were changed through the act SFS 1983:123.
\end{small}
lower because of the conditions differing from what would have been agreed by independent enterprises.\textsuperscript{151}

5.3 Important court rulings on transfer pricing in Sweden

There has been a number of interesting court rulings from the Swedish Supreme Administrative Court (Högsta förvaltningsdomstolen in Swedish, hereafter the HFD) in Sweden concerning transfer pricing and the application of the adjustment rule, its applicability and the position of the OECD Transfer Pricing Guidelines. The most interesting court rulings for the objective of this thesis will be presented below.

5.3.1 The principle of precaution when applying the adjustment rule

As stated previously, in the previous versions of the adjustment rule, the inadequate pricing needed to be considerably lower in order for the adjustment rule to be applicable. This notion that the adjustment rule should be used with caution, and only when the inadequate pricing is considerable, have also been confirmed by court rulings by the HFD. In the court ruling RÅ 1991 ref. 107, the HFD laid down that the adjustment rule should be applied with some precaution, especially if the adjustments under the adjustment rule are small in relation to the business profits as a whole. This principle of precaution when applying the adjustment rule was also mentioned in court rulings RÅ 84 1:16 and RÅ 84 1:83.

Even if the adjustment rule has been moved to the ITA since the ruling of RÅ 1991 ref. 107, it has not been materially changed. Therefore, I see no reason why the principle of precaution when applying the adjustment rule should not apply in the present.

5.3.2 Coalition with other laws

There are other rules in the ITA that concerns transactions between enterprises that depart from the market price. This could cause a legalistic problem in which rule to be applied to the given transaction. However, in RÅ 2004 ref. 13 the HFD

stated that the adjustment rule in 14th chpt 19 § ITA held the status of *lex specialis* on cross-border transactions over other applicable laws.

5.3.3 Substance over form restructuring with the adjustment rule

The possibility to restructure a transaction from its legal form according to its economic substance with the adjustment rule has been tested by the HFD in a few court rulings.

In court ruling RÅ 1980 Aa 114, a Swedish enterprise had sold products to a Swiss subsidiary. The Swiss subsidiary had later sold the same products to an independent enterprise at a higher cost. In the case, it was made clear that the Swiss company had no economic substance other than selling the products transferred from the Swedish enterprise to independent enterprises. The money the Swiss subsidiary had received from the transaction with the independent enterprise had been placed in a bank, where interest had accrued on the capital.

The Swedish Tax Agency argued, with reference to the adjustment rule, that the conditions of the transaction between the Swedish enterprise and the Swiss subsidiary had differed from what would have been imposed between independent enterprises, and because of this difference, the taxable business profits of the Swedish enterprise had been lowered. The fact that the conditions differed from what would have been imposed between two independent enterprises was easily proven with the transaction with the independent enterprise with the same products. However, the Swedish Tax Agency also argued that the whole transaction chain should be considered a sham, and the interest income of the Swiss subsidiary should be credited the Swedish enterprise.

The Swedish Tax Agency therefore argued that, because the substance of the transaction, the transactions should be restructured as if the Swedish enterprise had made the transaction directly to the independent enterprise.\(^{152}\)

The HFD stated that the business income of the Swedish enterprise had been lowered because of the conditions of the transaction with the Swiss subsidiary,

---

\(^{152}\) Burmeister, Jari, *Internprissättning och omkaraktärisering*, p. 175f.
and the transaction had not been at arm’s length. The business income of the Swedish enterprise was therefore adjusted with the difference between the transaction between the Swedish enterprise and the Swiss subsidiary, and the transaction between the Swiss subsidiary and an independent enterprise. However, the HFD also stated that there existed no grounds to tax the Swedish enterprise for the interest income in the Swiss subsidiary. Nevertheless, the ruling from the HFD does not say much about how the court concluded that no grounds existed to tax the Swedish enterprise for the interest income.

However, a conclusion can be made that the HFD did not restructure the transaction according to its economic substance, in accordance with the urging of the Tax Agency, but looked to the form of every transaction and determined the arm’s length price pursuant to the adjustment rule on the transactions as the parties have structured them. Consequently, the interest income in the Swiss subsidiary was not adjusted to the Swedish enterprise. I think in this case, it was clear that the HFD had a strict form over substance approach to the transactions in the case while applying the adjustment rule.

In court ruling RÅ 1990 ref. 34, a Swedish subsidiary of a foreign enterprise received an intra-group loan that was very high in relation to the equity of the Swedish subsidiary. This made the Swedish subsidiary thinly capitalized. The Swedish Tax Agency considered the intra-group loan not to be at arm’s length, and adjusted the business profits of the subsidiary by not granting deductions for the interest expenses for the bank loan. The Swedish Tax Agency urged that the intra-group loan should be restructured to an addition of capital from the foreign enterprise. If restructured to an additional of capital from the foreign shareholder, no deduction would be granted for the subsidiary.

The HFD stated to begin with, in reference to the adjustment rule that in the case there was not the question of the interest rate of the intra-group loan not being at arm’s length. The key question in the case was instead whether the adjustment rule could be applied to the intra-group loan, and restructured the loan to an addition of capital. In reference to this, the HFD stated that financing between

independent enterprises does not happen through additions of capital but through loan at an arm’s length. A comparison of the conditions of the controlled transaction at hand and an uncontrolled transaction where the transaction is restructured to an addition of capital cannot take place in accordance with the adjustment rule, since that is not a transaction that would have happened between independent enterprises. The fact that the subsidiary was thinly capitalized brought no other conclusion pursuant to the adjustment rule. The HFD concluded that the adjustment rule was not applicable to the intra-group loan.

Interestingly, the Swedish Tax Agency argued that the transaction should be restructured in accordance with paragraph 1.65 of the OECD Guidelines 2010, without making such a reference. The HFD made clear that no such restructuring could be made in this case under the adjustment rule just because the receiver of the intra-group loan was thinly capitalized.154

Another court ruling where the Swedish Tax Administration argued for a substance over form restructuring under the adjustment rule is the court ruling RÅ 79 1:98. A Swedish subsidiary of a Swiss MNE group had sold their brand and other intangibles to a Swiss holding company within the group, according to the Tax Agency, without compensation. The holding company then licensed the use of the brand back to the Swedish subsidiary through royalty payments. The Swedish Tax Agency considered the trade of the brand not be at arm’s length, and argued that an enterprise would not sell their brand to an independent enterprise and license it back. With reference to the adjustment rule, The Swedish Tax Agency therefore adjusted the business profits of the Swedish subsidiary, and did not grant the subsidiary deductions for the royalty payments.

In this case, the Swedish Tax Agency taxed the Swedish subsidiary as if the trade of the brand never had existed, restructuring the transaction chain. I think the arguments of the Tax Agency can be compared to rules of the absence of commercial rationality, found in paragraph 1.65 of the OECD Guidelines 2010 and paragraph 1.121 of the revised OECD Guidelines.

The HFD stated that the key question of the case was not if the royalty payments had been at arm’s length, but if the transaction where the brand was transferred had been without any compensation. The HFD clearly lay down that using the brand that is owned by another enterprise by paying royalties is a transaction that can be found between two independent enterprises. The fact that the brand had been transferred without compensation could give rise to an increased taxation, but since adjusted profits concerned the royalties, which was not contested by the Tax Agency, the HFD did not rule for the favor of the Tax Agency. The legal formality of the trade of the brand had a big impact on the ruling of the HFD.

I think it is notable that the HFD actually addresses the commercial rationality argument in this court ruling, even if they stated that the transaction did not lack commercial rationality in this case. It would be very interesting if the transaction had an absence of commercial rationality, to see how the HFD would have reasoned in that case. Even if one can raise a question how the HFD would have addressed the urging of the transaction did have an absence of commercial rationality, I think the stating of the HFD must be viewed as the HFD opposing the urging of the Tax Agency just because it lacked substance, not because there is a possibility under the adjustment rule to restructure a transaction according to its economic substance because the transaction has an absence of commercial rationality.

5.4 The legal position of the OECD Transfer Pricing Guidelines

5.4.1 The principle of legality in Swedish tax law

In the Swedish Law of Government155 (Regeringsformen in Swedish, hereafter RF) the possibility of the Swedish State to levy taxes on a subject of Sweden is clearly stated. In 2nd chpt. 10 § RF it reads that taxes cannot be levied unless it is clearly stated in the law that applied during the time the taxable income was created. Moreover, in RF it is stated that regulations, concerning the relation between the State and individuals about obligations of the individuals or in other means that concerns the personal and economic life of the individual, must be

155 Regeringsform (1974:152)
implemented through law.\textsuperscript{156} In RF, it is also stated specifically that regulations concerning taxes must be implemented through law.\textsuperscript{157}

The principle of legality is therefore clearly stated in RF and very important in Swedish tax law.\textsuperscript{158} The conclusion one can make of what is stated in the RF is that no tax can be levied in Sweden unless the taxing right of the State is clearly stated in the law.\textsuperscript{159} A consequence of the strong position of the principle of legality in Sweden is that in interpreting tax law, other legal sources than the law, can never increase the tax liability outside the scope of the law.\textsuperscript{160}

\textbf{5.4.2 The OECD Transfer Pricing Guidelines}

In 14\textsuperscript{th} chpt. 19 § of the ITA it is stated that the result of a business could be adjusted if the conditions agreed differ from what would have been agreed between two independent enterprises. The result of the business should be adjusted as if those conditions do not exist. However, there is no guidance given in the paragraph, or any other paragraphs in the ITA, on how to determine if such conditions differs from what would have been agreed between two independent enterprises, and to determine a “normal” condition between two independent enterprises. Such guidance in Swedish law in setting the arm’s length price must be found in case law, preparatory work and doctrine.

The OECD Transfer Pricing Guidelines in itself has not been implemented in Swedish law and is therefore not legally binding in Sweden.\textsuperscript{161} However, the OECD Transfer Pricing Guidelines is an internationally agreed standard on how

\textsuperscript{156} 8\textsuperscript{th} chpt. 2 §, 1 section, 2 point, Regeringsform (1974:152).
\textsuperscript{157} 8\textsuperscript{th} chpt. 3 § 1 section, 2 point, Regeringsform (1974:152).
\textsuperscript{159} Hultqvist, Anders, Skatteundvikande förfaranden och skatteflykt, Svensk Skattetidning, 2005, p. 303 and see also HFD court rulings RÅ 1999 ref. 62 and RÅ 1999 not. 245.
\textsuperscript{160} Hultqvist, Anders, Skatteundvikande förfaranden och skatteflykt, Svensk Skattetidning, 2005, p. 303.
\textsuperscript{161} Burmeister, Jari, Internprissättning och omkaraktärisering, p. 185. Also see section 2.3 of this thesis.
to apply the ALP, and can provide guidance in how to interpret and apply the ALP for tax administrations and enterprises.\textsuperscript{162}

In court rulings, the HFD have addressed the position of the OECD Transfer Pricing Guidelines in applying the adjustment rule in Swedish law. In RÅ 1991 ref. 107 the HFD stated that the 1979 OECD Transfer Pricing Guidelines, in relevant parts, could give guidance in the interpretation of the adjustment rule now found in 14\textsuperscript{th} chpt. 19 § ITA. The 1979 OECD Transfer Pricing Guidelines have later been revised in the 1995 and 2010 version, but a conclusion can be made that also the later versions could give guidance in the interpretation of the adjustment rule.\textsuperscript{163}

An interesting note in RÅ 1991 ref. 107 is however that the HFD specifically mentions that the OECD Transfer Pricing Guidelines recommends the tax agency to recognize the transaction as it has been structured by the parties, and does not recommend restructuring the transaction in accordance with a hypothesized transaction. The HFD is referring to the as-structured principle, even if they do not make a direct reference to it. It is clear that the as-structured principle is one of the main reasons why the HFD in RÅ 1991 ref. 107 considers the OECD Transfer Pricing Guidelines be a good guidance in how to apply the adjustment rule. For the objective of this thesis, I think it is interesting that the as-structured principle now can be said to be replaced by the accurate delineation of the transaction, when the as-structured principle was mentioned as one of the main elements why the OECD Transfer Pricing Guidelines could give guidance in applying the adjustment rule.

Also, in preparatory work prop. 2005/06:169 it is stated that the different versions of the OECD Transfer Pricing Guidelines give a good a well-balanced guidance for both tax administrations and enterprises on the issues in the transfer pricing area. It is also stated that since the OECD Transfer Pricing Guidelines is an expression of internationally agreed standards, they provide valuable guidance in

\textsuperscript{162} OECD, \textit{Commentaries to the Model Tax Covention}, 2010, commentaries to article 9 paragraph 1.

\textsuperscript{163} Burmeister, Jari, \textit{Internprissättning och omkaraktärisering}, p. 178.
the interpretation and application of the ALP for the Swedish Tax Agency and for enterprises. Therefore, despite not being legally binding in Swedish by itself, the OECD Transfer Pricing Guidelines have both in court rulings of the HFD and in preparatory work been mentioned as well balanced and valuable guidance in applying the adjustment rule in 14th chpt. 19 § ITA for both the Swedish Tax Agency and enterprises. The conclusion one can make is that the OECD Transfer Pricing Guidelines holds the legal status as doctrine, which provides good guidance in how to interpret the adjustment rule. But in reference to the strong position of the principle of legality in Swedish tax law, with the legal status of doctrine, the OECD Transfer Pricing Guidelines can never widen the interpretation of the adjustment rule, only provide guidance in applying the rule as it is stated in the ITA. Consequently, if the guidance provided in the OECD Transfer Pricing Guidelines is too far from the scope of the adjustment rule, its position as valuable interpretation doctrine could be lost.

In practice, both MNEs as well as the Swedish Tax Agency, is using the OECD Transfer Pricing Guidelines in transfer pricing issues. I think this is the consequence of the lack of other relevant and thorough guidance in transfer pricing issues and interpreting the adjustment rule. Especially for MNEs, I think the OECD Transfer Pricing Guidelines can work as an important tool to apply the adjustment rule in practice, and to try to stay within the limits of the law. A thorough and reliable interpretation tool for the application of the adjustment rule is elementary for MNEs to create foreseeability in applying the ALP. The fact that the OECD Transfer Pricing Guidelines have a big role in the practical daily life when working with transfer pricing issues have been stated clearly in doctrine. The OECD Transfer Pricing Guidelines is also often referred to in courts.

\[\text{164 Prop. 2005:06:169 p. 89.} \]
\[\text{165 Burmeister, Jari, } \textit{Internprissättning och omkaraktärisering}, p. 194 and section 5.4.1.} \]
\[\text{166 Burmeister, Jari, } \textit{Internprissättning och omkaraktärisering}, p. 194.} \]
\[\text{167 Burmeister, Jari, } \textit{Internprissättning och omkaraktärisering}, p. 194 f.} \]
\[\text{168 Burmeister, Jari, } \textit{Internprissättning och omkaraktärisering}, p. 194 f, see also for example, RÅ 1991 ref. 107, RÅ 2006 ref. 37 and court ruling from the Swedish Administrative Court of Appeal (Kammarrätt in Swedish), KR 2400-11.} \]
Even if its legal position is clear, in practice, I think it is likely that the OECD Transfer Pricing Guidelines have a very important role as interpretation material for MNEs and the Tax Agency, and be seen as the most important legal material for applying the adjustment rule after the wording of the rule in 14th chpt. 19 § ITA and case law. Moreover, the wording of the law and case law does not provide such detailed guidance provided in the OECD Transfer Pricing Guidelines. I think this also stresses the importance in Swedish law that the guidance in the OECD Transfer Pricing Guidelines is within the scope of the adjustment rule.

5.5 Substance over form restructurings under the adjustment rule compared to revised OECD Transfer Pricing Guidelines

The adjustment rule stated in 14th chpt. 19 § ITA gives the rule that the conditions of a transaction may be adjusted, if they have not been at arm’s length, to what would have been agreed by independent enterprises. The adjustment rule clearly states that it is the conditions of the transactions that may be adjusted. I think this is important in the application of the adjustment rule and is something that has been proven in court rulings, that the transactions are to be recognized as the parties have structured them, and it is only the conditions that may be adjusted.\textsuperscript{169}

However, when applying the ALP with the revised OECD Guidelines found in the Report, the key element is to accurately delineate the transaction according to its economic substance.\textsuperscript{170} To accurately delineate a transaction could be to not only supplement the transaction as the parties according to its economic substance have structured it, but in some cases also restructure it according to its economic substance. I think that the wording of the adjustment rule in 14th chpt. 19 § ITA gives no possibility to restructure a transaction and not even a possibility to supplement it according to its economic substance, and to set an arm’s length price to the restructured transaction. I think the wording of the adjustment rule is clear, that the transaction, as the parties have structured it, shall be recognized, and that the conditions of the transaction, such as the price, can be adjusted.

\textsuperscript{169} See court rulings RÅ 1980 Aa 114 and RÅ 1990 ref. 34.
\textsuperscript{170} OECD, Aligning Transfer Pricing Outcomes with Value Creation, 2015, p. 16, paragraph 1.36 of the revised OECD Guidelines.
In addition to the wording of the adjustment rule, also in court rulings, a principle has been laid down that the adjustment rule should be used with caution.\(^{171}\) I think this gives another incentive to why the delineation of transactions, as proposed in the revised OECD Guidelines, is not in line with the adjustment rule. If adjusting the conditions of a transaction should be made with caution, it is hard to see how the restructuring of transactions, which is greater measure for the Swedish Tax Agency to undertake than adjust conditions, could be in line with the adjustment rule.

In court rulings of the HFD, the possibility to restructure a transaction according to its economic substance has been addressed. In RÅ 1980 Aa 114 and RÅ 1990 ref. 34, the Swedish Tax Agency argued for a restructuring according to the economic substance, in much similarity to the exception to the as-structured principle previously found in paragraph 1.65 of the 2010 OECD Guidelines. In both cases, I think the circumstances was quite clear that the economic substance was not consistent with the form of the transactions. In both cases, the HFD approached the issue with recognizing each transaction according to its form, and adjusting the price according to the adjustment rule, if applicable. I think it is very interesting that the approach the Tax Agency argued for is now part of the main approach to the ALP in the revised OECD Guidelines when accurately delineating the transaction and shows how far the application of the ALP in the revised OECD Guidelines is from the application of the adjustment rule in Swedish court decisions.

The adjustment rule in 14h chpt. 19 § ITA has not been materially changed since 1983, and with the legal position of the OECD Transfer Pricing Guidelines of doctrine, it is unlikely that the rulings of the HFD would have had a different outcome today. Additionally, at the time of the court rulings, the as-structured principle exited in the OECD Transfer Pricing Guidelines. The as-structured principle have also been mentioned as being one of the reasons why the OECD Transfer Pricing Guidelines could be a good guidance in how to interpret the adjustment rule. With the removal of the as-structured principle, and the introduction of the accurate delineation of transaction, I think the position of the

---

\(^{171}\) RÅ 1991 ref. 107.
OECD Transfer Pricing Guidelines as valuable guidance in applying the adjustment rule could be in doubt.

With the changes to the OECD Transfer Pricing Guidelines in application of the ALP found in the BEPS Report on Actions 8-10, I think the position as valuable guidance in applying the adjustment rule is in danger of being lost. Certainly, other relevant parts of the OECD Transfer Pricing Guidelines could still be valuable, but not the application procedure as a whole. I think this brings a practical problem in Swedish law, where the lack of other relevant and thorough guidance on the transfer pricing area could create a lack of foreseeability for MNEs in the interpretation of the adjustment rule. In addition, if the Swedish Tax Agency should be using the revised OECD Guidelines in the application of the adjustment rule, they could also find themselves outside the scope of the adjustment rule. This would not be in line the principle of legality in Swedish tax law.
6 Substance over form in Swedish law

6.1 Introduction

In this chapter, principles laid down by the HFD concerning substance over form restructurings will be outlined and analyzed. To achieve this, there will also be an introduction to the discussion in Swedish law between civil law and tax law. After that, the principles established from court rulings of the HFD will be outlined and the different view in doctrine will be presented. I will then conclude my perception of the principles established by the HFD, and analyze whether those principles can be used to apply the revised OECD Guidelines in Swedish transfer pricing law.

6.2 The connection between civil law and tax law in the Swedish legal system

Legal forms and its definitions in Swedish tax law have in very large extent been taken from civil law and the meaning given there. This is likely the case because civil law describes and defines an economic reality from a legal perspective. Since this economic reality is what is taxed under tax law, it is natural that the legal forms and the definitions given in civil law is also used in tax law.

This could give the view that civil law, and the legal forms and definitions therein, prevail over tax law. This view has been represented in doctrine and explained as the legal forms and definitions found in civil law should be used with the same meaning in tax law. There are situations in tax law however, where the definitions in civil law is not clearly applicable to the tax law situation. The

---

method in these situations should be to interpret and apply the definition given in civil law into the situation in tax law.\(^{177}\)

In other words, legal forms and its definitions should be provided from civil law when interpreting tax law in all cases, and legal forms should not have a separate meaning in tax law. Also, it has been stressed that it is important to define the legal form according to civil law in neutral way, regardless of the desired outcome, in order to create a coherent legal system where definitions of legal acts is not fundamentally different in civil law and tax law.\(^{178}\) To create a coherent legal system, where legal forms are defined similarly in civil law and tax law in order create foreseeability in the tax system, has been presented as the most important argument for the view that definitions used in tax law should be taken from civil law.\(^{179}\)

Because of definitions of legal forms in tax law being taken from civil law is that in civil law the parties can decide the legal form freely.\(^{180}\) This means that individual and companies can control the tax consequence of their transactions, by deciding the legal form according to civil law.\(^{181}\) This creates foreseeability for tax subjects in how their dealings will be taxed, but also creates the opportunity of tax planning, where legal forms are placed in a way to achieve a desired tax consequence.\(^{182}\)

Another view that has been presented in doctrine is the view that legal forms should have a separate meaning in tax law, separated from any definitions found in civil law.\(^{183}\) The point of departure is still the definition found in civil law. However, in situations where the legal forms found in civil law is not in line with

the economic substance of the situation, a separate tax law definition should be applied to the legal form according to the economic substance.\textsuperscript{184}

The main argument for this view is that legal forms should be defined differently in tax law than in civil law because it is tax law that is to be applied to the given situation, not civil law. In tax law, there are other interests and factors than in civil law, such as the States interest of tax subjects paying their taxes.\textsuperscript{185} Although, those who argue that legal forms and definitions in tax law should be separated from civil law is a minority in the Swedish legal community.\textsuperscript{186}

6.3 The real meaning of the legal forms

The relation between legal form and its definitions in civil law and its relations to tax law have been dealt with in a number of court rulings of the HFD over the years.\textsuperscript{187} The subject became frequently debated in the Swedish tax law community since around year 2000, due to a number of decisive court rulings by the HFD. In court ruling RÅ 1998 ref. 19, and later confirmed in court ruling RÅ 2004 ref. 27, the HFD laid down that:

“Generally, taxes shall be levied on the basis of the real meaning of legal forms, regardless of the form given. Such an assessment may relate not just a single legal form, but also the overall meaning of several legal documents. This also includes that contracts who is a sham shall not be the basis for the taxation (my translation).”

This principle stated in the court rulings of the HFD has been referred to as “the real meaning of the legal forms” (rättshandlingars verkliga innebörd in Swedish).\textsuperscript{188} The real meaning of the legal forms could be described as a substance over form assessment, where the economic substance of a transaction is tested against the legal form given by the parties. There have been a big debate however, whether the practices of the HFD have developed a principle of substance over form restructurings for tax purposes in Swedish law, or whether

\textsuperscript{184} Gäverth, Leif, Skatteplanering och kapitaliseringsfrågor, p. 19 f and Burmeister, Jari, \textit{Verklig innebörd}, p. 71.

\textsuperscript{185} Möller, Lars, \textit{Genomsyn av rättshandlingar}, Skattenytt, 2011, p. 529.

\textsuperscript{186} Pålsson, Robert, \textit{Kringgående av inkomstskattelag - en resa utan slut}, Skattenytt, 2016, s. 105.

\textsuperscript{187} For a collection of court rulings on the subject and a thorough exposition of the court rulings, see Burmeister, Jari, \textit{Verklig innebörd}.

\textsuperscript{188} The terminology of the principle have been discussed, but the term I refer to is the one that has been used by the HFD. See Burmeister, Jari, \textit{Verklig innebörd}, p. 53.
the assessment in the real meaning of the legal forms is only to determine the legal form under civil law, according to its economic substance, but not to restructure or ignore the legal forms given. The different views in doctrine on the principle of the real meaning of legal forms will be presented below.

6.3.1 The real meaning of the legal forms according to civil law

In doctrine, one view is that HFD in their practices have been interpreting the legal forms according to its definition found in civil law.\textsuperscript{189} The view is that it is only natural to make an interpretation, according to the economic substance, whether the legal form given is line with the economic substance, or another legal form given in civil law should be applied to the situation.\textsuperscript{190} One examples of this is a transaction that has been given the legal form of a lease, but the economic substance of the transaction resembles a credit purchase. In this situation, according to the view in doctrine, it a question of giving the transaction the real meaning according to civil law, not to give the transaction a separate meaning for tax law purposes.\textsuperscript{191} By this view, with the principle of the real meaning of the legal forms gives no possibility, except in cases where the legal form is an obvious sham, to restructure a transaction according to its economic substance. The real meaning means assessing the definition according to civil law.\textsuperscript{192}

6.3.2 The real meaning of the legal forms according to tax law

A different view from the one stated above have been found in doctrine, where the real meaning of legal forms have been described as a possibility to restructure, or ignore, legal forms because the economic substance is not in line with the definition of the legal form found in civil law.\textsuperscript{193} The real meaning of a legal form as stated by the HFD should therefore be interpreted as the real meaning for tax

\textsuperscript{191} Bergström, Sure, Regeringsrättens lagtolkningsprinciper, Skattenytt, 2003, p. 13.
\textsuperscript{192} Hultqvist, Anders, Skatteundvikande förfaranden och skatteflykt, Svensk Skattetidning, 2005, p. 306.
\textsuperscript{193} See for example: Gäverth, Leif, Skatteplanering och kapitaliseringsfrågor, Möller, Lars, Regeringsrätten och genomsynsmål, Skattenytt, 2003, p. 574 and Möller, Lars, Genomsyn av rättshandlingar, Skattenytt, 2011, p. 533
purposes according to the economic substance, not the real meaning according to civil law.\textsuperscript{194}

The view is that the real meaning of the legal forms give rise for a method where the legal form of the transaction is interpreted according to its definition in civil law, but because the interpretation happens in tax law, the economic substance, as well as the tax consequence of the legal form given, is tested against the legal form.\textsuperscript{195}

\textbf{6.3.3 Conclusion on the real meaning of the legal forms}

The view that the principle of the real meaning of legal forms derived from the court rulings of the HFD could give rise to a separate meaning of legal forms in tax law has received criticism.\textsuperscript{196} Even if some court rulings from the HFD could give rise for such an interpretation\textsuperscript{197}, I think the HFD have made clear that the principle of the real meaning of legal forms should be interpreted as trying to find the real legal form according to the definition found in civil law, considering the economic substance of the situation.\textsuperscript{198}

Even if the interpretation of the principle could be considered unclear, it is safe to say that the real meaning of legal forms is not a clear principle in Swedish law where it is possible to restructure, supplement or ignore legal forms according to the economic substance. Only in obvious and special cases, or where the legal acts are a sham, could this be done.\textsuperscript{199} In addition, it is also clear from the court rulings of the HFD that the tax consequences of the legal forms given cannot be considered as substance or gives rise for a restructuring of the transaction.\textsuperscript{200}

\textsuperscript{194} Gäverth, Leif and Möller,Lars, \textit{Har Regeringsrätten frångått genomsyn?}, Skattenytt, 2007, p. 652 ff. The authors refers to court rulings RÅ 2004 ref. 1, RÅ 2004 ref. 4 och RÅ 2004 ref. 27 in support of their view.


\textsuperscript{197} For example: RÅ 1999 not. 18, RÅ 1989 ref. 31 and RÅ 2014 ref. 54.

\textsuperscript{198} RÅ 2004 ref. 27 and RÅ 2008 not. 169.

\textsuperscript{199} Burmeister, Jari, \textit{Verklig innebörd}, p. 144, and the court rulings refered to there.

\textsuperscript{200} Burmeister, Jari, \textit{Verklig innebörd}, p. 148 ff, and the court rulings refered to there.
However, there are specific definitions of legal forms for taxes purposes found in the ITA.\textsuperscript{201} In situations where the legal forms of these dealings are disputed, the court rulings of the HFD has showed that where a specific definition is given in tax law, that definition prevails over any definition found in civil law.\textsuperscript{202} It also applies where there is a dispute over the definition of a legal form according to civil law and a general tax law principle. Also in these situations, the tax law principle prevailed over any definition found in civil law.\textsuperscript{203}

I would conclude the principle of the real meaning of the legal forms as the assessment of, according to the economic substance, trying to find and apply a legal form according to civil law to the given situation. In these cases, civil law definitions prevail over tax law. Unless, there is a specific definition of the legal form given in tax law or a general tax law principle that applies to the situation. In these cases, the tax law definition and principles prevail over any legal form given according to civil law. Consequently, the real meaning of legal forms, and the possibility to restructure a transaction according to its economic substance, depends largely on the situation and the economic circumstances, and cannot in my perception be said to be a principle of restructuring transaction from its legal form according to the economic substance.

With reference to the objective of this these, in transfer pricing issues, it is most of the time a question of legal forms clearly defined in civil law, such as legal contracts. These legal contracts describes a transaction of different kinds, such as a purchase, a loan or a lease. Therefore, it is not likely that any legal form in transfer pricing issues would have a specific tax law definition in Swedish law. Neither is any general tax law principle likely to create a situation that could give rise to a substance over form restructuring.

\textsuperscript{201} Such as intra-group contributions (koncernbidrag in Swedish), found in 35\textsuperscript{th} chpt. ITA.
6.4 The principle of the real meaning of legal forms compared to revised OECD Transfer Pricing Guidelines

In the principle of the real meaning of legal forms, derived from the court rulings of the HFD, the legal form of the transaction given by the parties should be tested against the economic substance of the transaction, and defined under civil law. Therefore, if the legal form of the transaction is not in line with economic substance, the legal form of the transaction could be restructured and given a different legal form. A situation where this would apply is where a transaction given the legal form of a lease, but the economic substance resembles more of a credit purchase. In other words, it is the civil law definition that is replaced by another, not the case of ignoring one or several legal forms for tax purposes.

The ALP, found in article 9.1 of the OECD MTC, opens up for the possibility to adjust conditions of a transaction according to conditions that would have been imposed at an arm’s length. These conditions are likely to be found in written contracts. The legal form in question in transfer pricing issues is therefore written contracts, if existent. In the revised OECD Guidelines, the application of the ALP consists of accurately delineating these transactions, which are generally given the legal form of written contracts. The accurately delineation of transactions are therefore not the assessment of replacing the legal form with a different legal form according to the economic substance, it’s the assessment of supplementing the transaction or even restructuring it. The legal from is constant in the assessment of accurately delineating the transaction, it is still a question of a contract, and it is the substance of the transaction that is delineated or restructured.

With this, I think the principle of the real meaning of legal forms cannot be used in transfer pricing issues to apply the ALP in accordance with the revised OECD Guidelines. To supplement or restructure a transaction according to its economic substance is not in line with the principle developed by HFD. In the revised OECD Guidelines, it is the conditions or the content of the transaction that is restructured, while the legal form remains. In the principle of the real meaning of

\[\text{footnote}{\text{204} \text{ See section 6.3.3 of this thesis.}}\]

\[\text{footnote}{\text{205} \text{ See section 6.3 of this thesis.}}\]
legal forms, the HFD restructure legal forms according to their economic substance into a different legal form. The conditions or the content of the legal form remains however.

Again, with the example with the lease between two parties, with the principle of the real meaning of the legal forms, the conditions and content of the transaction remains the same, but the legal form is changed, which affects the tax consequence of the transaction. In the revised OECD Guidelines, the transaction would still be have the legal form of a lease, but the conditions and content of the transaction could be changed according to the accurate delineation of the transaction. This would affect the pricing of the transaction when determining the arm’s length price, if the parties where associated. This would in turn affect the profits of the enterprises involved.

6.4.1 Implication on international economic double taxation

Since the OECD Transfer Pricing Guidelines is an internationally agreed standard on how to apply the ALP, there is a possibility that other jurisdictions will apply the revised OECD Guidelines to transfer pricing issues, if applicable under domestic law. Additionally, if the ALP is changed in order to comply with the revised OECD Guidelines, it could constitute a new international agreed standard, and many jurisdictions could implement the new standard in their domestic laws.

If other jurisdictions with which Sweden has a tax treaty would apply the ALP in accordance with the revised OECD Guidelines, and adjust the business profits of enterprises according to article 9.1 of the OECD MTC, Sweden must make corresponding adjustment according to article 9.2, in order to avoid international economic double taxation of MNEs. If the adjustments of the other State were made according to the substance over form assessment in the revised OECD Guidelines, which according to this thesis is not in line with the Swedish law on transfer pricing and substance over form restructurings, Sweden would find

---

206 OECD, Commentaries to the Model Tax Convention, 2010, commentaries to article 9 paragraph 1.
207 See section 4.5.4 of this thesis.
208 See section 2.3 and 2.4 of this thesis.
themselves in a position where a corresponding adjustment cannot be made according to internal law. 209

Additionally, under the European Arbitration Convention, Sweden would be forced to come to an agreement with the other State on how make adjustments under article 9.1 of the OECD MTC. This could create an interesting collision between EU law and domestic law, where EU law would prevail.

The general objective of the BEPS-project in its changes to transfer pricing rules was to make sure that the allocation of profits from intra-group transaction is aligned with where the economic value is created. 210 The report on BEPS Action 8-10 states that the current application of the ALP is easily manipulated through contractual arrangements that are not in line with the economic relationship between the associated enterprises. 211

As analyzed in this thesis, I think that the application of the ALP in the revised OECD Guidelines in not in line with the domestic law on transfer pricing and substance over form restructurings in Sweden. In Swedish law, the legal forms given by the parties prevail in most cases over the economic substance of the parties. This applies especially to transfer pricing issues. If this remains, and other OECD-members change their domestic transfer pricing law to be more conform with the revised OECD Guidelines, Sweden could be one of those States that recognizes contractual arrangements in transfer pricing in a way that the transfer pricing rules becomes easily manipulated, and the allocation of profits is not aligned with where the economic value is created.

The OECD has made the changes to the OECD Transfer Pricing Guidelines to create tools for States to tackle BEPS. If Sweden where to give contractual arrangements as great value as today, Sweden could become a state where you can contractually allocate functions, risks and assets in transfer pricing, in order to shift profits to or from Sweden. This would endanger the tax base of Sweden, as

well as creating gaps and mismatches in the international taxation framework, of which MNEs could take advantage.

6.4.2 De lege ferenda on Swedish transfer pricing law

The ambitious BEPS-project had the objective to come up with concrete measures as well as reinforcing the international standards for international taxation in order for jurisdictions to tackle BEPS.\(^{212}\) One of these standards that has been reinforced is the ALP, through the Report on Action 8-10, and the new revised OECD Guidelines is a measure to make sure that the allocation of profits are aligned with where the economic value is created.\(^{213}\) The revised OECD Guidelines and the application of the ALP found in there is therefore the measure that the OECD and G8 thinks needs to be implemented by jurisdictions in order to tackle BEPS, which has grown to a global economic problem.\(^{214}\) In order to prevent aggressive international tax planning and BEPS, the actions suggested in the BEPS-project needs to be implemented harmonized across the world. Otherwise, the gaps and mismatches in the international taxation framework will remain, and problem of BEPS will remain as well.

As discussed in section 4.5.5 of this thesis, the ALP in article 9.1 of the OECD MTC could be changed in a near future. If a change to the ALP will be necessary, I think it is likely it will come. Sweden, as an EU and an OECD member state, and therefore well within the global economic community, will need to comply with the changes to the international taxation framework in their domestic law. This to prevent the usage of BEPS, but also to relief international economic double taxation of MNEs.

The changes necessary to the Swedish domestic laws on transfer pricing would be a slight amendment to the adjustment rule found in 14\(^{th}\) chpt. 19 § ITA. As discussed under section 4.5.5, the amendment needed would be a change to the wording that would enable the Swedish Tax Agency to supplement or restructure the substance of the transaction, without changing its legal form, according to the economic circumstances of the parties. I think where the adjustment rule focuses

\(^{212}\) See section 4.2 of this thesis.
\(^{214}\) See section 4.2 of this thesis.
on the conditions; I think the wording should be on the transaction as a whole. I would suggest that the new wording of the 14th chpt. 19 § ITA would be:

If the result of a business will be lower due to a transaction of any kind, that differ from what would have been agreed between independent enterprises, the result shall be adjusted to the amount that it would have been if the parties of the transaction where independent from each other or if such transaction do not exist.

I think that this suggested wording changes the focus from the conditions of a transaction to the entire relationship between the parties. In the revised OECD Guidelines, the economic circumstances of the parties that is analyzed, in order to accurately delineate the transaction. My opinion is that this gives the opportunity the accurate delineate the transaction according to the economically relevant circumstances of the parties, as well as restructure the transaction according to the economic substance. This would also create the possibility to restructure a transaction that has an absence of commercial rationality.
7 Conclusion

The objective of this thesis was to analyze the changes to the OECD Transfer Pricing Guidelines in the Report concerning substance over form restructurings and whether the changes is compatible with the domestic Swedish law on transfer pricing and law principles in Sweden, as well as making a de lege ferenda to what changes that could be necessary to implement the new application of the ALP in Swedish law.

The changes to the OECD Transfer Pricing Guidelines concerning substance over form restructurings consists of the modification of the as-structured principle, which said that a transaction should generally be recognized the way the parties have structured it, into the accurately delineation of transactions. The accurately delineation of transactions means that a transaction should be delineated from how it has been structured by the parties, according to five economic circumstances. The transaction should then be recognized when it has been accurately delineated. The method is that the point of departure is examining the written contract, and then test the written contract against the economic circumstances. The written contract is then to be supplemented or restructured according to the economic circumstances.

This differs from the 2010 Guidelines where the as-structured principle existed. A transaction should only be restructured from the way the parties have structured it if the substance of the transaction differed from its form or the transaction lacked commercial rationality. The main rule was however the as-structured principle.

In the revised OECD Guidelines, the main rule is the accurately delineation of transaction, where the supplementing or restructuring of a transaction is possible. I think the accurately delineation of transactions gives the rule that the transaction should generally not be accepted according to its form, but be delineated, meaning supplemented or restructured, according to the economic substance.

This also applies when allocating risks while applying the ALP under the revised OECD Guidelines. The point of departure is the contractual terms, as with the 2010 Guidelines. However, the contractual allocation of risks are to be tested
against the economic circumstances, as well as the control over the risk and the financial capacity to assume the risk. The testing of the contractual form against the substance is therefore more explicit in the revised OECD Guidelines. Additionally, while testing the economic circumstances against the written contract, the tie-breaker rule is which party has control over the risk. Therefore, I think that the control over the risk should be the practical go-to circumstance and not the contractual terms, since the contractual terms or the structuring by the parties is not the main rule in the revised OECD Guidelines.

The statement of the ALP in Swedish law and the applicable rule on transfer pricing issues in Swedish law is the adjustment rule found in 14th chpt. 19 § ITA. I think that the adjustment rule clearly states that the conditions of a transaction may be adjusted, if they have not been at arm’s length. Therefore, I think the wording of the adjustment rule leaves no room to supplement or restructure a transaction as a whole according to the economic circumstances. In addition, I think the court practices of the HFD have shown that the adjustment rule is to be applied to the conditions of a transaction, not to the transaction as a whole.

My conclusion of the law principles developed by court practices in Sweden referred to as “the real meaning of legal forms”, allows the restructuring of the legal form of a transaction, according the economic circumstances, to a different legal form. In transfer pricing issues, the legal form remains a written contract. In the application of the ALP in the revised OECD Transfer Pricing Guidelines, the accurately delineation of transactions is not the assessment of replacing the legal form with a different legal form according to the economic circumstances. It is the assessment of restructuring the substance of the transaction according to the economic circumstances, but the legal form remains the same. With this, I think the real meaning of legal forms cannot be used in transfer pricing issues to apply the ALP in accordance with the revised OECD Guidelines. Therefore, I think the substance over form approach in the revised OECD Guidelines is not compatible with the domestic Swedish law on transfer pricing and law principles in Sweden.

Considering the potential implications that could arise if the revised OECD Guidelines would not be compatible with the Swedish domestic law on transfer pricing that has been discussed in this thesis, the Swedish domestic law would be
needed to be amended. To make the Swedish law on transfer pricing compatible with the revised OECD Guidelines, I would suggest the adjustment rule in 14th chpt. 19 § ITA to be amended to focus not only the conditions of the transaction, but on the transaction as a whole being at arm’s length, considering the economic circumstances of the parties. This would enable an accurately delineation of the transaction according to the revised OECD Guidelines. I would suggest that the new wording of the 14th chpt. 19 § ITA would be:

If the result of a business will be lower due to a transaction of any kind, that differ from what would have been agreed between independent enterprises, the result shall be adjusted to the amount that it would have been if the parties of the transaction where independent from each other or if such transaction do not exist.
Bibliography

**Laws**

Regeringsform (1974:152)

Kommunalskattelag (1928:370)

Inkomstskattelagen (1999:1229)

Lag (2015:666) om skatteavtal mellan Sverige samt Storbritannien och Nordirland

**Preparatory work**

Prop. 1927:102

Prop. 1965:126

Prop. 1999/2000:2

Prop. 2005/06:169

**Official research by the Swedish government**

SOU 1962:59

**Conventions of the European Union**

Convention 90/436/EEC

**Litterature**


Berglund, Martin & Cejie, Katia, *Basics of international taxation – From a Methodical Point of View*, Uppsala, 2014


Möller, Lars, Genomsyn av rättshandlingar, Skattenytt, 2011, p. 529-535

Påhlsson, Robert, Principer eller regler? Legalitet och likabehandling i beskattningen, Skattenytt, 2014, p. 554-570

Wiman, Bertil, Beskattning av företagsgrupper, Stockholm, 2002

Wittendorff, Jens, Transfer Pricing and the Arm's Length Principle in International Tax Law, Alphen aan den Rijn, 2010

Sources from the Internet


Court rulings

KR 2400-11

RÅ 79 1:98

RÅ 1980 Aa 114

RÅ 84 1:83
RÅ 84 1:16
RÅ 1989 ref. 62
RÅ 1989 ref. 31
RÅ 1990 ref. 73
RÅ 1990 ref. 34
RÅ 1991 ref. 107
RÅ 1993 ref. 86
RÅ 1994 ref. 56
RÅ 1995 ref. 33
RÅ 1995 ref. 35
RÅ 1998 ref. 58
RÅ 1998 not. 195
RÅ 1998 ref. 19
RÅ 1999 not. 245
RÅ 1999 not. 18
RÅ 1999 ref. 62
RÅ 2001 ref. 66
RÅ 2004 ref. 27
RÅ 2004 ref. 1
RÅ 2004 ref. 4
RÅ 2004 ref. 13
RÅ 2006 ref. 37
RÅ 2008 not. 169
RÅ 2014 ref. 54