



### Comments to the OECD Discussion Draft on BEPS Action 8 “Hard to value intangibles”

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, welcomes the opportunity to provide comments on the Discussion Draft on BEPS Actions 8 which sets out proposals to modify chapter VI of the OECD Transfer Pricing Guidelines (the “Guidelines”) in relation to “hard to value intangibles” and proposes revisions to the guidance in Section D.3 of the 2014 BEPS Report “Guidance on Transfer Pricing Aspects of Intangibles”.

ICC agrees with two principles which are stated, respectively, in paragraph 1 and paragraph 4 of the discussion draft:

(1) “When valuation of an intangible or rights in an intangible at the time of the transaction is highly uncertain, the question arises as to how arm’s length pricing should be determined. The question should be resolved, both by taxpayers and tax administrations, by reference to what independent enterprises would have done in comparable circumstances to take account of the valuation uncertainty in the pricing of the transaction.”

(4) “Also, independent enterprises may determine to bear the risk of unpredictable subsequent developments”.

The principle stated in paragraph 1 seems to be limited in its applicability by the introduction of special measures to protect tax administrations against the negative effects of information asymmetries (as well as lack of specialised knowledge, expertise and insight into the business environment in which the intangible is developed or exploited).

While understanding concerns regarding information asymmetry, ICC observes that this will probably be mitigated by the new rules on transfer pricing documentation. In this regard, in order to preserve consistency with the arm’s length principle, ICC believes that the special measures should not go beyond refutable presumptions, in the sense that the taxpayers should be allowed to use any possible information to support the arm’s length nature of the transactions, even if such information becomes available after the time of setting the prices.

ICC also observes that special measures should not be applied retroactively and urges the OECD to make a clear statement on this.

The principle stated in paragraph 4 seems to be disregarded in the following sections of the discussion draft, which focus on:

- whether or not ex-ante projections were accurate and comprehensive enough in considering reasonably foreseeable events and other risks; and
- whether or not any significant difference between the financial projections and actual outcomes is due to unforeseeable or extraordinary developments or events occurring after the determination of the price that could not have been anticipated at the time of the transaction.



ICC recommends the completion of the guidance with a description of conditions under which an ex-ante decision of excluding any renegotiation of the pricing should be respected and consistent with arm's length dealings.

ICC also observes that reference to “whether the guidance on non-recognition applies”, at the very beginning of paragraph 1 gives the impression of emphasizing non- recognition instead of considering it an exceptional circumstance.

ICC would like to highlight that the draft guidance puts a significant burden on taxpayers - requiring detailed, accurate and comprehensive ex-ante documentation. This raises particular concerns in relation to developing countries. First of all in relation to the burden on taxpayers, but also on tax administrations which will have the responsibility to review and assess such documentation. Moreover, similar concerns will most notably apply to small and medium enterprises (SMEs). ICC therefore recommends that the OECD explicitly mentions in its guidance the fact that a number of hard-to-value intangibles can be more easily priced using one-sided methods when comparables can be used to set the remuneration of the simplest party in the transaction.

The approach to transfer of hard to value intangibles (HTVI) is said (in par. 14) to not apply where the taxpayer:

1. provides full details of its ex ante projections used at the time of the transfer to determine the pricing arrangements, including how risks were accounted for in calculations to determine the price (e.g. probability-weighted), and the comprehensiveness of its consideration of reasonably foreseeable events and other risks; and
2. provides satisfactory evidence that any significant difference between the financial projections and actual outcomes is due to unforeseeable or extraordinary developments or events occurring after the determination of the price that could not have been anticipated by the associated enterprises at the time of the transaction.

ICC believes that the second element should be subject to a condition of “or” instead of “and” as unforeseeable and extraordinary events may occur also in case of intangibles that are not HTVI by nature.

In the case of transfer of rights, ICC recommends acknowledging that the parties will first monitor results that are significantly different from what was anticipated in order to assess whether the change is permanent or temporary: this may take quite a long time. In addition, independent parties are more likely to modify pricing prospectively rather than retroactively.

Finally, ICC observes that ex-post adjustments initiated by a tax authority are likely to raise double taxation concerns in the absence of mechanisms that would ensure corresponding adjustments on the other side. ICC therefore strongly encourages the OECD to take actions in the direction of developing a global consensus on how to facilitate offsetting adjustments.



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The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.