SwissHoldings
Verband der Industrie- und Dienstleistungskonzerne in der Schweiz
Fédération des groupes industriels et de services en Suisse
Federation of Industrial and Service Groups in Switzerland

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Via E-Mail
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OECD Discussion Draft: BEPS Actions 8 – Hard-to-Value Intangibles

Dear Mr. Hickman

The business federation SwissHoldings represents the interests of 61 Swiss based multinational enterprises from the manufacturing and service sectors (excluding the financial sector). SwissHoldings is pleased to provide comments on the OECD Discussion Draft of the Proposed Modifications to the existing guidance in Section D.3 of Chapter VI) (hereafter referred to as "the Draft").

Our comments to the Draft are as follows:

1. We would like to highlight that the valuation of intangible transfers within an MNE and the respective determination and documentation of the arm's length price is a challenging task for taxpayers. In addition, the valuation of intangibles generally includes a certain element of uncertainty with regard to valuation parameters. Nevertheless, in practice, standard valuation models have been developed and applied many times which are generally accepted by taxpayers and tax authorities for the majority of the intangible transfers.

2. Hence, in order to avoid the risks for disputes and disproportionately increase the compliance burden for MNE, the Draft should "only" focus on the development of the Transfer Pricing Guidelines as such and not on the introduction of unclear "special measures" which go beyond the arm's length principle.

3. The current draft defines hard-to-value intangibles (HTVI) broadly which could effectively lead to the introduction of the so called "commensurate with income approach" as a new standard for the evaluation of intangibles, i.e., the current Draft would make ex-post adjustments to the new rule/standard which is not arm's length in most situations. Based on our experience ex-post adjustments are the exception and not the rule. Moreover, potential ex-post adjustments are limited with regard to the applied time frame.

4. Hence, we recommend clarifying that the arm's length principle remains the leading standard. The OECD should limit the content of the Draft to the key message, i.e., when evaluating the transfer of intangibles the arm's length principle may require - in exceptional cases - the inclusion of price adjustment clauses as discussed in Par. 3 or the "renegotiation of the pricing arrangements where it is to their mutual benefit" as discussed in Par. 4 of the Draft. Further lengthy explanations or definitions or even the term "HTVI"

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are not needed as they do not solve the requirement that each intangible transfer needs to be analysed separately in light of the arm's length principle.

5. The OECD has to further clarify and state in the Guidelines that special measures like price adjustment mechanisms are only applicable in exceptional limited cases with a clear and very narrow definition of HTVI (if needed at all). The possibility of tax administrations to arbitrarily apply the HTVI regulations ex-post must be limited as much as possible to provide legal certainty for taxpayers and to minimize double taxation risks. It should not be used as an avenue by tax administrations to unduly penalise taxpayers who do not have the benefit of hindsight at the point of valuing the intangible / HTVI. As the Draft is written now, it provides tax authorities an unbalanced and one-sided right for ex-post adjustments.

6. The contractual terms (including/or excluding price adjustment clauses as an option by the taxpayer to be considered and documented ex-ante) needs to be respected by the tax authorities. The burden of proof for another treatment needs to remain with tax authorities and not be devolved to the taxpayer. A clarification on this point would be appreciated.

7. The language of the Draft is one-side. Please consider that the OECD Transfer Pricing Guidelines are the guidelines for Tax Administrations and MNEs. The Draft should be rephrased in a way that makes clear that the concept of HTVI is not a tool for tax administrations to justify ex-post and retroactive price adjustments, but mainly a valuation requirement that should be followed by taxpayers at the time of the intangible valuation when required by the arm's length principle and should be accepted by the tax administration accordingly.

8. When the intangible is evaluated the lack of information is also on the side of the taxpayer due to the nature of intangibles/HTVI. Accordingly, the Draft should highlight that the uncertainty or lack of information is not only with the tax administration, but also with the taxpayer. The taxpayer needs to determine an arm's length price which is accepted by the involved tax administrations to avoid time consuming and costly controversy as well as potential double taxation. For intangibles/HTVI there is no information asymmetry between taxpayer and tax administrations (for example as mentioned in Par. 11), but an increased uncertainty about the intangible value which is also the case for the transfer of certain intangibles between third parties.

9. The lack of information on the tax authorities' side should be addressed with appropriate transfer pricing documentation which the taxpayer has to prepare based on Chapter V of the Guidelines and not with retroactive price adjustments. When the taxpayer has provided appropriate transfer pricing documentation the burden of proof is with the tax administrations.

10. In Par. 10 it should be clearly stated that even if an intangible exhibits one or more of the listed features the intangible may not fall into the category of HTVI if third parties in similar circumstances would not have applied special measures. For example, depending on the case partially developed intangibles may allow reliable ex ante projections.

11. For MNEs price adjustment mechanisms are complex to implement and require significant administrative efforts. For example, already after a few years, financial data related to a specific intangible may not be available anymore as the MNE's financial reporting systems and processes are often not designed to capture intangible related financial data or the intangible may have been embedded or mixed with other intangibles. As the Draft is written now, it would significantly increase the compliance burden.

12. As indicated above price adjustment clauses are the exception and limited with regard to the applicable time horizon. Hence, we would appreciate if the OECD states a maximum time horizon of 1 to 3 years for which price adjustments clauses could be considered and applied by the taxpayer, unless it can be proven that third parties would have agreed on a longer time horizon. Based on our experience third parties do normally not agree on price adjustment clauses with a time horizon longer than 3 years (exceptions are observed with regard to compensation for specific "liabilities/risks" in M&A deals). Any longer time horizons will result in double taxation.

13. With regard to item (1) of the Additional Points: The Draft does generally not improve certainty for taxpayers. In fact, it does the opposite.

14. With regard to item (3) of the Additional Points: As stated above, SwissHoldings believes that the application of special measures for intangible valuations should be largely driven by the arm's length principle which requires a separate analysis in each case. Therefore, from our view the notion of "significant difference" cannot be further defined.

15. With regard to item (4) of the Additional Points: As stated above the OECD should focus on the applicable time frame for price adjustment clauses (i.e., max. 3 years) and provide further guidance on how the clause could be structured.

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We kindly ask you to take our comments and proposals into due consideration.

Yours sincerely

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