Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles

INCLUSIVE FRAMEWORK ON BEPS: ACTION 8

June 2018

OECD/G20 Base Erosion and Profit Shifting Project

Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles, BEPS Actions 8

INCLUSIVE FRAMEWORK ON BEPS

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Foreword

The integration of national economies and markets has increased substantially in recent years, putting a strain on the international tax rules, which were designed more than a century ago. Weaknesses in the current rules create opportunities for base erosion and profit shifting (BEPS), requiring bold moves by policy makers to restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created.

Following the release of the report Addressing Base Erosion and Profit Shifting in February 2013, OECD and G20 countries adopted a 15-point Action Plan to address BEPS in September 2013. The Action Plan identified 15 actions along three key pillars: introducing coherence in the domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty.

After two years of work, measures in response to the 15 actions were delivered to G20 Leaders in Antalya in November 2015. All the different outputs, including those delivered in an interim form in 2014, were consolidated into a comprehensive package. The BEPS package of measures represents the first substantial renovation of the international tax rules in almost a century. Once the new measures become applicable, it is expected that profits will be reported where the economic activities that generate them are carried out and where value is created. BEPS planning strategies that rely on outdated rules or on poorly co-ordinated domestic measures will be rendered ineffective.

Implementation is now the focus of this work. The BEPS package is designed to be implemented via changes in domestic law and practices, and in tax treaties. With the negotiation for a multilateral instrument (MLI) having been finalised in 2016 to facilitate the implementation of the treaty related measures, over 75 jurisdictions are covered by the MLI. The entry into force of the MLI on 1 July 2018 paves the way for swift implementation of the treaty related measures. OECD and G20 countries also agreed to continue to work together to ensure a consistent and co-ordinated implementation of the BEPS recommendations and to make the project more inclusive. Globalisation requires that global solutions and a global dialogue be established which go beyond OECD and G20 countries.

A better understanding of how the BEPS recommendations are implemented in practice could reduce misunderstandings and disputes between governments. Greater focus on implementation and tax administration should therefore be mutually beneficial to governments and business. Proposed improvements to data and analysis will help support ongoing evaluation of the quantitative impact of BEPS, as well as evaluating the impact of the countermeasures developed under the BEPS Project.

As a result, the OECD established an Inclusive Framework on BEPS, bringing all interested and committed countries and jurisdictions on an equal footing in the Committee on Fiscal Affairs and all its subsidiary bodies. The Inclusive Framework, which already has more than 110 members, is monitoring and peer reviewing the implementation of the minimum standards as well as completing the work on standard setting to address BEPS issues. In

addition to BEPS members, other international organisations and regional tax bodies are involved in the work of the Inclusive Framework, which also consults business and the civil society on its different work streams.

This report was approved by the Inclusive Framework on BEPS on 4 June 2018 and prepared for publication by the OECD Secretariat.

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Abbreviations and acronyms

APA	Advance pricing arrangement
BEPS	Base erosion and profit shifting
G20	Group of twenty
HTVI	Hard-to-value intangible
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS
OECD	Organisation for Economic Co-operation and Development
TP	Transfer pricing

Executive summary

Action 8 of the Action Plan on Base Erosion and Profit Shifting mandated the development of transfer pricing rules or special measures for transfers of hard-to-value intangibles (HTVI) aimed at preventing base erosion and profit shifting by moving intangibles among group members.

The outcome of that work is the approach to hard-to-value intangibles, which is found in the 2015 Final Report for Actions 8-10, "Aligning Transfer Pricing Outcomes with Value Creation" (BEPS TP Report) and it was formally incorporated into the Transfer Pricing Guidelines, as Section D.4 of Chapter VI. The HTVI approach protects tax administrations from the negative effects of information asymmetry by ensuring that tax administrations can consider *ex post* outcomes as presumptive evidence about the appropriateness of the *ex-ante* pricing arrangements. At the same time, the taxpayer has the possibility to rebut such presumptive evidence by demonstrating the reliability of the information supporting the pricing methodology adopted at the time the controlled transaction took place.

The BEPS TP Report also mandated the development of guidance for tax administrations on the application of the HTVI approach. Under this mandate, the Committee on Fiscal Affairs issued a public discussion draft in May 2017, inviting interested parties to submit comments on the proposed guidance for tax administration on the application of the HTVI approach.

The guidance contained in this report aims at reaching a common understanding and practice among tax administrations on how to apply adjustments resulting from the application of the HTVI approach. This guidance should improve consistency and reduce the risk of economic double taxation. In particular, the new guidance:

- Presents the principles that should underlie the application of the HTVI approach by tax administrations;
- Provides a number of examples clarifying the application of the HTVI approach in different scenarios; and
- Addresses the interaction between the HTVI approach and the access to the mutual agreement procedure under the applicable tax treaty.

The guidance for tax administration on the application of the HTVI approach contained in this document has been incorporated into the Transfer Pricing Guidelines as an annex to Chapter VI.

1. Introduction

1. Action 8 of the BEPS Action Plan mandated the development of transfer pricing rules or special measures for transfers of hard-to-value intangibles aimed at preventing base erosion and profit shifting by moving intangibles among group members.

2. The outcome of this work is found in Section D.4 of the Revised Chapter VI of the Transfer Pricing Guidelines, contained in the 2015 Final Report for Actions 8-10, "Aligning Transfer Pricing Outcomes with Value Creation" (BEPS TP Report) and now formally adopted as part of the Guidelines. Section D.4 addresses the treatment of hard-to-value intangibles (HTVI) for transfer pricing purposes. That Section contains an "approach consistent with the arm's length principle that tax administrations can adopt to ensure that tax administrations can determine in which situations the pricing arrangements as set by the taxpayers are at arm's length and are based on an appropriate weighting of the foreseeable developments or events that are relevant for the valuation of certain hard-to-value intangibles, and in which situations this is not the case" (paragraph 6.188). The HTVI approach protects tax administrations from the negative effects of information asymmetry by ensuring that tax administrations can consider *ex post* outcomes as presumptive evidence about the appropriateness of the *ex ante* pricing arrangements. Under the approach, the taxpayer has the possibility to rebut such presumptive evidence by demonstrating the reliability of the information supporting the pricing methodology adopted at the time the controlled transaction took place. There are a number of additional exemptions that, where the conditions governing those exemptions are met, render the approach inapplicable. Importantly, where the approach applies, a tax administration is entitled to use, in evaluating the *ex ante* pricing arrangements, the *ex post* evidence about financial outcomes to inform the determination of the arm's length pricing arrangements that would have been made between independent enterprises at the time of the transaction (see paragraph 6.192). However, the *ex post* evidence should not be used without considering whether the information on which the *ex post* results are based could or should reasonably have been considered by the associated enterprises at the time the transaction was entered into (see paragraph 6.188).

3. The BEPS TP Report mandates the development of guidance for tax administrations on the implementation of the approach to HTVI. This guidance is aimed at reaching a common understanding and practice among tax administrations on how to apply adjustments resulting from the application of the approach to HTVI. This guidance should improve consistency and reduce the risk of economic double taxation.

4. The BEPS TP Report also states that the practical application of the exemptions listed in paragraph 6.193 of the BEPS TP Report, including the measurement of materiality and time periods contained in the current exemptions, will be reviewed by 2020 in the light of further experience.

5. Tackling information asymmetry between the extensive information available to the taxpayer and the absence of information available to the tax administration, other than what the taxpayer may present, is at the heart of the reason for HTVI guidance in Section D.4 of Chapter VI of the Guidelines. When a HTVI is transferred, each of the parties involved in the transaction are likely to prepare a valuation at the time of the transaction using assumptions based on its specialised knowledge, expertise and insight into the business environment in which the intangible is developed or exploited. The problem for the tax administration is that the valuation is extremely difficult to objectively evaluate since such evaluation may be wholly based on the information provided by the taxpayer.

Such information asymmetry restricts the ability of tax administrations to establish or verify, at an early stage, the developments or events that might be considered relevant for the pricing of a transaction involving the transfer of intangibles or rights in intangibles, as well as the extent to which the occurrence of such developments or events, or the direction they take, might have been foreseen or reasonably foreseeable at the time the transaction was entered into.

6. The HTVI guidance aims at providing a tool for tax administrations to address this problem. In the case of intangibles which fall within the definition of HTVI found in paragraph 6.189, and under certain conditions, tax administrations are entitled to consider *ex post* outcomes as presumptive evidence about the appropriateness of the *ex ante* pricing arrangements. Where, the actual income or cash flows are significantly higher or lower than the anticipated income or cash flows on which the pricing was based, then there is presumptive evidence (from the perspective of the tax administration) that the projected income or cash flows used in the original valuation should have been higher or lower, and that the probability-weighting of such an outcome requires scrutiny, taking into account what was known and could have been anticipated at the time of entering into the transaction involving the HTVI.. However, it would be incorrect to base the revised valuation on the actual income or cash flows without also taking into account the probability, at the time of the transaction, of the income or cash flows being achieved.

7. This evaluation of the *ex ante* pricing arrangements based on the *ex post* outcomes will necessarily consider the guidance contained in Chapters I-III and, in particular, the guidance in Chapters VI and VIII of these Guidelines.

8. In performing such evaluation, tax administrations may consider not only the *ex post* outcomes taken as presumptive evidence (within the limits of Section D.4 of Chapter VI of these Guidelines) about the appropriateness of the *ex ante* pricing arrangement, but also any other relevant information related to the HTVI transaction that becomes available to the tax administrations and that could or should reasonably have been known and considered by the associated enterprises at the time the transaction was entered into (see Section B.5 of Chapter III).

9. Importantly even if the HTVI approach is not applicable to a particular transaction, an adjustment may still be appropriate under other parts of these Guidelines, including other sections of Chapter VI.

10. Any application of the HTVI approach should be done in a manner that promotes tax certainty for taxpayers, and reduces the risk of double taxation resulting from a primary adjustment, considering the jurisdiction's domestic law (for example, the applicable statute of limitations) and treaty framework. Tax administrations should identify and act upon HTVI transactions as early as possible.

11. The nature of the approach to HTVI inevitably requires some consideration of timing issues. In some cases, the elapsed time between the transfer of the HTVI and the emergence of *ex post* outcomes may not correspond with audit cycles or with administrative and statutory time periods. This problem may be more acute where an adjustment is appropriate under the HTVI approach in transactions involving intangibles qualifying as HTVI under paragraph 6.189 that have a long incubation period – that is, the period after the transfer and before the intangible can be exploited commercially and income can be derived (see paragraph 6.190).

12. The impact of timing issues should not be overstated since there is already a time lag in typical audit cycles. For example, assume an audit of Years 1-3 is carried out in

Year 5; during the course of the audit, the tax administration may identify not only a transfer of a hard-to-value intangible in Year 1 but also *ex post* outcomes of that transfer that may be evaluated during the audit process. Tax administrations are encouraged to identify transfers of potential HTVI, to evaluate the assumptions made by the taxpayer in valuing the intangible, and to seek information about developments that lead to *ex post* outcomes which may call into question those assumptions, even when those outcomes arise in years subsequent to those under audit, in order to be in a position to consider the appropriateness of the *ex ante* pricing.

13. Tax administrations should apply audit practices to ensure that HTVI transactions are identified and acted upon as early as possible. However, it should be kept in mind that in some cases it may be difficult for tax administrations to perform a risk assessment at the time of the transaction, or even shortly thereafter, to evaluate the reliability of the information on which pricing has been based, or to consider whether the transfer is priced at arm's length. Such analysis may only be possible some years after the transaction. Under the HTVI approach, the tax administration may, in particular circumstances, use *ex post* outcomes to consider the reasonableness of the projections and probability weightings taken into account in the valuation at the time of the transaction.

14. This guidance for tax administrations on the application of the HTVI approach should not be used to delay or bypass normal audit procedures. In fact, it remains important to identify transfers of HTVI as early as possible and to act on presumptive evidence promptly as a matter of good administrative practice, and in order to avoid running into difficulties with administrative or statutory time limits for audits and reassessment. Nothing in this guidance changes those time limits, which are a matter of sovereignty of countries.

15. To enhance tax certainty for taxpayers and reduce the risk of double taxation, it is desirable that the HTVI approach be applied consistently. However, some countries may encounter difficulties in applying the HTVI approach due, for example, to short audit cycles or a short statute of limitations. This guidance does not require countries to adopt legislation aimed at overcoming such difficulties, but it does not prevent countries from considering targeted changes to procedures or legislation (such as the introduction of a requirement to notify promptly the transfer or licence of an intangible falling within the HTVI definition, or amendment of the normal statute of limitations).

16. In applying the HTVI approach contained in Section D.4 of Chapter VI, tax administrations may make appropriate adjustments, including adjustments that reflect an alternative pricing structure that differs from that adopted by the taxpayer but reflects one which would have been made by independent enterprises in comparable circumstances to take account of the valuation uncertainty in the pricing of the transaction (for example, milestone payments, running royalties with or without adjustable elements, price adjustment clauses, or a combination of these characteristics). See paragraph 6.185 and 6.192. Since hard to value intangibles are intangibles for which no reliable comparables exist, tax administrations cannot be expected to substantiate adjustments to the pricing structure by referring to uncontrolled transactions involving comparable intangibles.

17. Some of the practical ways in which the approach to HTVI can be applied are illustrated in the examples in the following section. The application of the approach to HTVI should be underpinned by the following principles:

- Where the HTVI approach applies, tax administrations can consider *ex post* outcomes as presumptive evidence about the reasonableness of the assumptions of the *ex ante* pricing arrangements.
- The *ex post* outcomes inform the determination of the valuation that would have been made at the time of the transaction; however, it would be incorrect to base the valuation on the actual income or cash flows without taking into account whether the associated enterprises could or should reasonably have known and considered, at the time of the transfer of the HTVI, the information related to the probability of achieving such income or cash flows.
- Where a revised valuation shows that the intangible was transferred at an undervalue or overvalue compared to the arm's length price, the revised price of the transferred intangible may be assessed to tax taking into account price adjustment clauses and/or contingent payments, irrespective of the payment profiles asserted by the taxpayer, consistently with paragraph 16.
- Tax administrations should apply audit practices to ensure that presumptive evidence based on *ex post* outcomes is identified and acted upon as early as possible.

2. Examples[1]

18. The following examples are aimed at illustrating the practical application of a transfer pricing adjustment arising from the application of the HTVI guidance. The assumptions made about arm's length arrangements and transfer pricing adjustments determined in the examples are intended for illustrative purposes only and should not be taken as prescribing adjustments and arm's length arrangements in actual cases or particular industries. The HTVI guidance must be applied in each case according to the specific facts and circumstances of the case.

19. These examples make the following assumptions:

- The transaction involves the transfer of an intangible (or rights therein) meeting the criteria for HTVI in paragraph 6.189, that is (i) no reliable comparables exist; and (ii) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible, are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
- The exemptions to the application of the HTVI approach contained in paragraph 6.193 are not applicable unless specifically discussed.
- As a result, the HTVI guidance is applicable and the tax administration may consider *ex post* outcomes as presumptive evidence about the appropriateness of the *ex ante* pricing arrangements.

[1] Please note that the fact that these examples are focused on the pharmaceutical sector should not be interpreted as limiting the application of the HTVI approach set out in Section D.4 of Chapter VI of the Guidelines or this guidance to this particular industry. The HTVI approach contained in Section D.4 of the Guidelines and this guidance are applicable to transactions involving intangibles qualifying as HTVI under paragraph 6.189, irrespective of the industry or sector in which they take place.

- A transfer pricing adjustment is warranted for the transaction.

20. In addition, the examples make reference to valuation techniques using the discounted value of projected income or cash flows derived from the exploitation of the transferred intangible. Neither this application guidance nor the examples below are intended to mandate the use of valuation techniques using the discounted value of projected income or cash flows for determining the arm's length price of transactions involving HTVI. Therefore, references to such a valuation technique should not be interpreted as implying conclusions about the appropriateness of the technique in a particular case. The guidance on applying methods based on the discounted value of projected cash flows is contained in Chapter VI paragraphs 6.153-6.178, and this application guidance should be applied in a manner that is consistent with other relevant guidance contained in the Transfer Pricing Guidelines.

Example 1

21. Company A, a resident of Country A, has patented a pharmaceutical compound. Company A has concluded pre-clinical tests for the compound and has successfully taken the compound through Phases I and II of the clinical trials. Company A transfers in Year 0 the patent rights to an affiliate, Company S, a resident of Country S. Company S will be responsible for the Phase III trials following the transfer. In order to determine the price for the patent on the partially developed drug, the parties made an estimation of expected income or cash flows that will be obtained upon exploitation of the drug once finalised over the remaining life of the patent. Assume the price so derived at the time of the transfer was 700 and that this was paid as a lump sum in Year 0.

22. In particular, the taxpayer assumed sales would not exceed 1,000 a year and that commercialisation would not commence until Year 6. The discount rate was determined by referring to external data analysing the risk of failure for drugs in a similar therapeutic category at the same stage of development. Even if the tax administration of Country A had been aware of these facts relating to the transfer of the patent rights in Year 0, it would have had little means of verifying the reasonableness of the taxpayer's assumptions relating to sales.

Scenario A

23. In Year 4, the tax administration of Country A audits Company A for Years 0-2 and obtains information that commercialisation in fact started during Year 3 since the Phase III trials were completed earlier than projected. Sales in Years 3 and 4 correspond to sales that were projected, at the time of the transfer, to be achieved in Years 6 and 7. The taxpayer cannot demonstrate that its original valuation took into account the possibility that sales would arise in earlier periods, and cannot demonstrate that such a development was unforeseeable.

24. The tax administration uses the presumptive evidence provided by the *ex post* outcome to determine that the valuation made at the time the transaction took place did not consider the possibility of sales occurring in earlier years. The taxpayer's original valuation is revised to include the appropriately risk-adjusted possibility of earlier sales resulting in a revised net present value of the drug in Year 0 of 1,000 instead of 700. The revised net present value also takes into account the functions performed, assets used and risks assumed in relation to the HTVI by each of the parties before the transaction and reasonably anticipated, at the time of the transaction, to be performed, used or assumed by each of the parties after the transaction. Therefore, assume for the purposes of the

example that the arm's length price anticipated in Year 0 should have been 1,000. Note that the value of 1,000 is not necessarily the net present value of the transferred rights based solely on the actual outcome (see paragraph 6 of this guidance).

25. In accordance with the approach to HTVI, the tax administration is entitled to make an adjustment to assess the additional profits of 300 in Year 0.

Scenario B

26. The tax administration uses the presumptive evidence provided by the *ex post* outcomes to determine that the valuation made at the time the transaction took place, did not consider the possibility of sales occurring in earlier years. The taxpayer's original valuation is revised to include the appropriately risk-adjusted possibility of sales occurring in earlier years resulting in a revised net present value of the drug in Year 0 of 800 instead of 700. Therefore, assume for the purposes of the example that the arm's length price anticipated in Year 0 should have been 800. Note that the value of 800 is not necessarily the net present value of the transferred rights based solely on the actual outcome (see paragraph 6 of this guidance).

27. In accordance with the approach to HTVI, the tax administration is entitled to make an adjustment to assess the additional profits of 100 in Year 0. However, in this example, the exemption provided by item (iii) in paragraph 6.193 applies since the adjustment to the compensation for the transfer is within 20% of the compensation determined at the time of the transaction.

Example 2

28. The facts are the same as in paragraphs 21-22. Based on those facts, assume that in Year 7, the tax administration of Country A audits Company A for Years 3-5 and obtains information that sales in Years 5 and 6 of the product to which the patent relates were significantly higher than those projected. In the original valuation, the taxpayer had not projected sales any higher than 1,000 in any year, but outcomes in each of Years 5 and 6 show sales of 1,500. The taxpayer cannot demonstrate that its original valuation took into account the possibility that sales would reach these levels, and cannot demonstrate that reaching that level of sales was due to an unforeseeable development.

29. The tax administration uses the presumptive evidence provided by the *ex post* outcomes to determine that the possibility of higher sales should have been taken into account in the valuation. The taxpayer's original valuation is revised to include the appropriately risk-adjusted possibility of sales occurring in earlier years, resulting in a revised net present value of the drug in Year 0 of 1300 instead of 700. The revised net present value also takes into account the functions performed, assets used and risks assumed in relation to the HTVI by each of the parties before the transaction and reasonably anticipated, at the time of the transaction, to be performed, used or assumed by each of the parties after the transaction. Therefore, assume for the purposes of the example that the arm's length price anticipated in Year 0 should have been 1300. Note that the value of 1300 is not necessarily the net present value of the transferred rights based solely on the actual outcome (see paragraph 6 of this guidance).

30. In accordance with the approach to HTVI, the tax administration is entitled to make an adjustment to assess the additional profits of 600. Assume for the purposes of this example that none of the exemptions listed in paragraph 6.193 of Chapter VI of the Guidelines applies.

31. One way to implement the adjustment is to re-assess the price paid in Year 0. However, the significant revision of the lump-sum payment highlights the risks posed by the high uncertainty in valuing the intangible and gives rise to consideration, in light of this significant uncertainty, of whether adjustments consistent with an alternative payment structure might be more consistent with what unrelated parties would have done (see paragraph 16 of this guidance and paragraph 6.183 of Chapter VI of the Guidelines).

32. Evidence of pricing arrangements for the transfer of intangibles in comparable circumstances to address high valuation uncertainty may point to appropriate alternatives to making the adjustment in Year 0. For example, assume that in the pharmaceutical sector it is common to transfer patent rights to independent parties through a combination of an initial lump sum payment and additional contingent payment arrangements based on the successful completion of development phases or regulatory approvals in a particular market. In this case, assume that the first market approvals were obtained in Year 3. The tax administration may, therefore, determine that it is consistent with arm's length practices in comparable circumstances to recover the underpayment through a further payment in Year 3. Note that this paragraph is not intended to, and does not, imply that modification of the payment form can only occur when there is a common practice in the relevant business sector regarding the form of payment for the transfer of a particular type of intangible.

33. The principles illustrated by this example apply irrespective of whether the tax administration in fact carries out an audit for Years 0-2 and then a second audit for Years 3-5, or whether it audits only for Years 3-5. In both scenarios, a revision to the original valuation is justified based on *ex post* evidence emerging in Year 7, and, subject to any treaty or domestic law limitations, the undervaluation may be recovered based on the HTVI approach contained in Section D.4 of Chapter VI (see paragraph 6.192).

3. Dispute prevention and resolution in relation to the HTVI approach

34. The purpose of this guidance is to improve consistency in the application of the HTVI approach by jurisdictions, thus reducing the risk of economic double taxation. In addition to this guidance, there may be other tools at the disposal of taxpayers to avoid instances of double taxation and enhance tax certainty in HTVI transactions.

35. In particular, Chapter IV of these Guidelines discusses in detail advance pricing arrangements (APAs), which if concluded bilaterally or multilaterally between treaty partner competent authorities provide an increased level of certainty in the jurisdictions involved, lessen the likelihood of double taxation, and may proactively prevent transfer pricing disputes. Recognising the role of APAs in preventing double taxation and providing certainty to taxpayers, paragraph 6.193 of these Guidelines prevents the application of the HTVI approach when the transfer of the HTVI is covered by a bilateral or multilateral APA in effect for the period in questions between the jurisdictions of the transferee and the transferor.

36. In this regard, the Final BEPS Report for Action 14 "Making Dispute Resolution Mechanisms More Effective" (BEPS Report on Action 14) recommends as a best practice the implementation of bilateral APAs, as soon as a jurisdiction has the capacity to do so (Best Practice no. 4). Furthermore, one of the elements of the BEPS Report on Action 14 is that countries with bilateral APA programmes provide for the rollback of APAs in appropriate cases, subject to the applicable time limits where the relevant facts and

circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.

37. In the event that the application of the approach to HTVI leads to double taxation, the guidance in paragraph 6.195 states that it would be important to permit resolution of such cases through access to the mutual agreement procedure under the applicable treaty. Accordingly, this guidance should be read in conjunction with Article 25 and its Commentary and the commitment made in the Final BEPS Report on Action 14. That Report describes the minimum standard on dispute resolution to which the OECD and G20 countries have committed, which consists of specific measures to remove obstacles to an effective and efficient mutual agreement procedure.

38. In the context of the HTVI approach it is especially relevant that under Article 25 the mutual agreement procedure “can be set in motion by the taxpayer without waiting until the taxation considered by him to be not in accordance with the Convention has been charged against or notified to him. To be able to set the procedure in motion, he must, and it is sufficient if he does, establish that the actions of one or both of the Contracting States will result in such taxation, and that this taxation appears as a risk which is not merely possible but probable” (see paragraph 14 of the Commentary to Article 25 of the Model Tax Convention). This possibility under the applicable tax treaty may alleviate some of the concerns arising in relation to timing issues and reduce the instances of unresolved double taxation.

39. Finally, one of the best practices recommended in the BEPS Report on Action 14 and that is relevant for HTVI transactions is that, subject to the requirements of paragraph 1 of Article 25, countries implement appropriate procedures to permit, in certain cases and after an initial tax assessment, taxpayer requests for the multiyear resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

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