

# EX-POST TRANSFER PRICING OF INTANGIBLES

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### Timeframe for the project

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## OBJECTIVE

The objective of the study is to provide a *de lege lata* and *de lege ferenda* analysis of the authority to perform ex-post adjustments to transfer pricing of intangibles under the OECD Model Tax Treaty Art 9.

## OECD “HIGHLY UNCERTAIN VALUE” STANDARD

On tax treaty level, the OECD has developed authority for making ex-post adjustments to ex-ante transfer prices for intangibles. Pursuant to the OECD approach, an adjustment to an ex-ante price may be carried out, if the value of the intangible at the time of transfer was *highly uncertain*, given that *independent parties would have included a price adjustment or renegotiation clause* in the transfer agreement under similar conditions. The criteria for performing an ex-post adjustment are formulated as a question of whether the terms of the ex-ante pricing were arm's length.

## COMMENSURATE WITH INCOME STANDARD

On domestic law level, the United States Internal Revenue Code Section 482 contains the *commensurate with income standard* (CWI) for ex-post adjustments of transfer prices for intangibles, which authorises the U.S. tax authorities to adjust transfer prices for intangibles that are not commensurate with the income actually generated by the intangible in question. The provision applies regardless of whether the ex-ante price was arm's length at the time of transfer. To the extent that other countries have domestic tax law authorizing ex-post adjustments, such provisions are usually closely linked to the OECD “standard” for ex-post adjustments.

## QUESTIONS

- Should there be *absolute limits* to what distributions of benefits and risks between related parties resident in different jurisdictions are accepted for transfer pricing purposes, regardless of whether the ex-ante transfer pricing arguably was arm's length? Should such limits be based on *concepts of proportionality*, e.g. as in the US CWI standard or from international contract law, such as hardship?
- Because highly valuable and unique intangibles almost by definition will have *no comparables* and be *particularly difficult to value ex-ante*, is ex-post adjustment authority a *necessary supplement* to arm's length ex-ante pricing? In practice, unique intangibles will command the consecutive *residual income* from value chains based on the intangible, as opposed to “separate” pricing based on comparables. Does this make it more natural to perform ex-post adjustments? Should it be *relevant to distinguish* between ex-ante and ex-post pricing for such intangibles, e.g. for long term licensing agreements?
- Transfer pricing of intangibles is practical in the context of global intra-group value chains. What is the *unit for assessment* when adjusting a transfer price for intangibles in *linked or continuous transactions*, cf. 2012 GlaxoSmithKline ruling from the Canadian Supreme Court?
- Should ex-post adjustment to transfer pricing of intangibles be *symmetrically applicable*, i.e. for tax authorities (taxpayer) when the value generated by the intangible exceeds (lies below) the estimated value?
- Is *hindsight* a real problem for subsequent adjustments to transfer pricing of intangibles? Should focus lie on *current distribution* of benefits and risks among the related parties and not on whether a development was foreseeable? Is hindsight a useful criterion given the large *divide in information available to MNEs and local tax authorities*?