POLAND

Questionnaire on the Implementation of the HTVI Approach

	QUESTION	RESPONSE
1	**Has your country adopted the hard-to-value intangibles ("HTVI") approach as defined in Chapter VI of the TPG? If so, under what legal basis?**	Yes, Poland has adopted the OECD HTVI approach. The legal basis for the HTVI approach is found in § 8 in connection with § 2 p. 2 and § 3 p. 3 of the Ordinance of Minister of Finance of 21 December 2018 on transfer pricing in terms of corporate income tax (http://dziennikustaw.gov.pl/du/2018/2491/1) (hereinafter referred to as: "TP Ordinance CIT"). Similar regulation applies for personal income tax – it is contained in § 8 in connection with § 2 p. 2 and §3 p. 3 of the Ordinance of Minister of Finance of 21 December 2018 on transfer pricing in terms of personal income tax (http://dziennikustaw.gov.pl/du/2018/2502/1) (hereinafter referred to as: "TP Ordinance PIT"). Both ordinances constitute the secondary legislation issued based on the delegations contained in: • Act of 15 February 1992 on Corporate Income Tax (hereinafter referred to as: "CIT Act") http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19920210086) and • Act of 26 July 1991 on Personal Income Tax (hereinafter referred to as: "PIT Act") (http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19910800350). The ordinances constitute generally applicable law. The provisions on the HTVI approach contained in the ordinances are part of procedural law. The adopted regulation is applicable since January 1, 2019.
2	**If your country applies the HTVI approach, what are the conditions for the application of the HTVI approach?**	The HTVI approach, described in § 8 p. 2 of TP Ordinance CIT (respectively in § 8 p. 2 of TP Ordinance PIT) is applicable if both of the following conditions are met: • the intangible fulfils the definition of HTVI indicated in § 2 p. 2 of TP Ordinance CIT (respectively in § 2 p. 2 of TP Ordinance PIT) – this definition is complaint with the definition contained in p. 6.189 of the TPG, • the discrepancies between the forecast and the actual transfer price of HTVI amount to at least 20% of the forecast transfer price. When the above conditions are met, the tax authorities can take into account in assessing the taxpayers income (loss) in terms of the transaction involving HTVI, the circumstances, including comparable data, that could have not been known to its parties on the day of its conclusion and which, if had been known, could have led to a higher or lower transfer price established between related parties. However, the above approach is limited to the circumstances listed in § 3 p. 3 of the TP Ordinance CIT (respectively in § 3 p. 3 of TP Ordinance PIT) which means that the tax authorities may apply the approach only if: • unrelated entities in comparable circumstances would:

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		○ recalculate the initially determined price based on the price adjustment clause contained in the terms of the agreement, ○ renegotiate the originally agreed conditions, therein the pricing, ○ establish contingent payments for the settlement of a comparable transaction, • the taxpayer, as of the date of the transaction, had not taken into account all reasonably foreseeable circumstances, that might affect the level of the transfer price of HTVI.
3	**Are transactions falling within the scope of the HTVI approach subject to a transfer pricing analysis differing from the one established in Chapter I and VI, or to other compliance requirements specifically applicable to transfer prices (e.g. domestic anti-abuse rules)?**	There are no other specific regulations with respect to transfer pricing analysis of HTVI. The regulations on accurate delineation of the controlled transaction (Chapter I of the OECD Transfer Pricing Guidelines) and on transfer pricing analysis of intangibles (Chapter VI of the OECD Transfer Pricing Guidelines) implemented in Poland are basically compliant with the OECD Transfer Pricing Guidelines. They are also applicable to HTVI. According to art. 86a § 1 p. 13 letter h. of the Tax Ordinance Act of 29 August 1997 (http://dziennikustaw.gov.pl/du/2018/800/1) (hereinafter referred to as: "Tax Ordinance"), related party transactions involving HTVI are considered as a tax scheme and must be reported by taxpayers to the Head of the National Tax Administration. The rule constitutes implementation of the provisions of the EU Directive on Mandatory Disclosure Rules (MDR).
4	**What is the statute of limitations applicable to transactions falling within the scope of the HTVI approach in your legislation? Does this statute of limitations differ from those applicable to other transactions?**	The general statute of limitation applies which is 5 years – according to art. 70 § 1 of the Tax Ordinance the tax liability expires after five years, counting from the end of the calendar year in which the tax payment deadline has expired. There is no specific statute of limitation for transactions involving HTVI.
5	**Can taxpayers request a bilateral or multilateral advance pricing agreement ("APA") for transactions falling within the scope of the HTVI approach under your legislation?**	Yes, the APA regulations do not provide a restriction for transactions involving HTVI. The HTVI approach related to considering of the ex post outcomes (contained in § 8 p. 2 of the TP Ordinance CIT and § 8 p. 2 of the TP Ordinance PIT) cannot be applied in the case the transaction is covered by the APA.
6	**What measures exist or approaches have been adopted to avoid the use of hindsight (e.g. training of tax administrators, internal circulars/informative notes)?**	The Polish Tax Administration conducts all sorts of trainings, studies and workshops for tax auditors concerning taxation of MNEs activities, especially transfer pricing. Ensuring that hindsight is not applied is one of the points that included in those trainings and workshops.

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7	**Is it possible for your tax administration to make adjustments under the HTVI approach in open years for closed years?**	The general statute of limitation indicated in art. 70 § 1 of the Tax Ordinance applies (see answer to question 4). In this regard tax adjustments made on HTVI transactions do not differ from tax adjustments made with respect to other types of transactions.
8	**Does your domestic legislation or administrative practice allow the tax administration to make corresponding adjustments under the HTVI approach in open years for closed years?**	The practice is that, regardless of the type of the transaction, a corresponding adjustment is made with respect to the tax year it concerns. Therefore, there is no distinction between HTVI and other transactions in this regard. The following general rules apply: • According to art. 70d of the Tax Ordinance, if the ratified double tax treaty which the Republic of Poland is a party to, provides for the possibility of implementing the agreement concluded in the course of the mutual agreement procedure, irrespective of the statute of limitation period, the agreement shall be taken into account despite the expiry of the statute of limitation period. • According to 79 § 4 of the Tax Ordinance, an application for confirmation of overpayment may be submitted after the expiration of the statute of limitation period, if the existence of an overpayment results from an agreement concluded under the mutual agreement procedure on the basis of ratified double tax treaty or other ratified international agreements to which the Republic of Poland is a party to.
9	**Is it possible for your tax administration to make several adjustments for one single HTVI transaction under the HTVI approach?**	No, there is no possibility to make several adjustments for one single HTVI transaction. In this regard tax adjustments made on HTVI transactions do not differ from tax adjustment made with respect to other types of transactions. The following general rules apply: According to art. 11c of CIT Act (respectively art. 23o of PIT Act) (the arm's length principle), the tax authority determines the taxpayer's income (loss) in case when the conditions of transaction do not fulfil the arm's length principle. When the tax authority once determined the arm's length conditions of the transaction, there is no legal base to re-determine these conditions. Moreover, art. 282a § 1 of the Tax Ordinance states that in the matters resolved by the final decision of the tax authority, the tax inspection cannot be initiated again.

For further information, please see http://www.oecd.org/tax/transfer-pricing/transfer-pricing-country-profiles.htm