确保转让定价结果与价值创造相匹配
第 8-10 项行动计划

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本文件由郝启生、唐思亮、严海、郭思亮、毛伟、刘浩智、于宗阳、赵福栋、施振宇、朱勤、姚蕾、朱静涛翻译，
曾乐审核。
ALIGNING TRANSFER PRICING OUTCOMES WITH VALUE CREATION

FOREWORD

A standard foreword will be developed by the OECD Publication Department and added to all the reports, as it was done for the 2014 Deliverables.
确保转让定价结果与价值创造相匹配

前言

OECD 出版部为 2014 年成果准备了前言，此次也会为本报告准备前言。
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ABBREVIATIONS AND ACRONYMS

BEPS  Base erosion and profit shifting
CCA  Cost contribution arrangement
CFC  Controlled foreign company
CRO  Contract research organisation
CUP  Comparable uncontrolled price
G20  Group of twenty
HTVI  Hard-to-value intangibles
IT  Information technology
MAP  Mutual agreement procedure
MNE  Multinational enterprise
OECD  Organisation for Economic Co-operation and Development
R&D  Research and development
TNMM  Transactional net margin method
UN  United Nations
VAT  Value added tax
WACC  Weighted average cost of capital
WP6  Working party No.6 on the Taxation of Multinational Enterprises
缩略词表

BEPS  税基侵蚀和利润转移
CCA  成本分摊协议
CFC  受控外国公司
CRO  合约研发组织
CUP  可比非受控价格法
G20  二十国集团
HTVI  难以估值的无形资产
IT  信息技术
MAP  相互协商程序
MNE  跨国企业
OECD  经济合作与发展组织
R&D  研发
TNMM  交易净利润法
UN  联合国
VAT  增值税
WACC  加权平均资本成本
WP6  第六工作组
EXECUTIVE SUMMARY

Over several decades and in step with the globalisation of the economy, world-wide intra-group trade has grown exponentially. Transfer pricing rules, which are used for tax purposes, are concerned with determining the conditions, including the price, for transactions within an MNE group resulting in the allocation of profits to group companies in different countries. The impact of these rules has become more significant for business and tax administrations with the growth in the volume and value of intra-group trade. As the BEPS Action Plan identified, the existing international standards for transfer pricing rules can be misapplied so that they result in outcomes in which the allocation of profits is not aligned with the economic activity that produced the profits. The work under Actions 8-10 of the BEPS Action Plan has targeted this issue, to ensure that transfer pricing outcomes are aligned with value creation.

The arm's length principle is used by countries as the cornerstone of transfer pricing rules. It is embedded in treaties and appears as Article 9(1) of the OECD and UN Model Tax Conventions. A shared interpretation of the principle by many of those countries is set out in the OECD's Transfer Pricing Guidelines first published as the Report on Transfer Pricing and Multinational Enterprises in 1979, revised and published as Guidelines in 1995, with a further update in 2010. The principle requires that transactions between associated enterprises are priced as if the enterprises were independent, operating at arm's length and engaging in comparable transactions under similar conditions and economic circumstances. Where the conditions of the transaction are different to those between third parties in comparable circumstances, adjustments to the profits may be needed for tax purposes. The arm's length principle has proven useful as a practical and balanced standard for tax administrations and taxpayers to evaluate transfer prices between associated enterprises, and to prevent double taxation. However, with its perceived emphasis on contractual allocations of functions, assets and risks, the existing guidance on the application of the principle has also proven vulnerable to manipulation. This manipulation can lead to outcomes which do not correspond to the value created through the underlying economic activity carried out by the members of an MNE group. Therefore, the Action Plan required the guidance on the arm's length principle to be clarified and strengthened and, furthermore, if transfer pricing risks remain after clarifying and strengthening the guidance, the Action Plan foresaw the possibility of introducing special measures either within or beyond the arm's length principle.

This work on transfer pricing under the BEPS Action Plan has focused on three key areas. Work under Action 8 looked at transfer pricing issues relating to transactions involving intangibles, since misallocation of the profits generated by valuable intangibles has contributed to base erosion and profit shifting. Work under Action 9 considered the contractual allocation of risks, and the resulting allocation of profits to those risks, which may not correspond with the activities actually carried out. Work under Action 9 also addressed the level of returns to funding provided by a capital-rich MNE group member, where those returns do not correspond to the level of activity undertaken by the funding company. Work under Action 10 focused on other high-risk areas, including the scope for addressing profit allocations resulting from transactions which are not commercially rational for the individual enterprises concerned (re-characterisation), the scope for targeting the use of transfer pricing methods in a way which results in diverting profits from the most economically important activities of the MNE group, and neutralising the use of certain types of payments between members of the MNE group (such as management fees and head office expenses) to erode the tax base in the absence of alignment with value creation.
执行摘要

近几十年来，随着经济全球化的进程不断加快，全球范围内的跨国企业集团内部交易得到飞速增长。转让定价规则主要用于从税务角度确定跨国企业集团内部交易的条件（包括价格），以便在各个国家的集团成员间进行利润分配。随着集团内部贸易量和金额的不断增长，转让定价规则对企业税收管理的影响日益凸显。《税收协定和利润转移行动计划》（“《BEPS 行动计划》”）指出，有关转让定价规则的国际现行准则如被不当使用，会导致利润分配与产生利润的经济活动不匹配。《BEPS 行动计划》第 8 至 10 项行动计划的目标是针对这一问题提出相关方案，以确保转让定价结果与价值创造相匹配。

很多国家都基于独立交易原则制定了相应的转让定价规则。这一原则在众多税收协定、经济合作与发展组织（OECD）与联合国《税收协定范本》第 9（1）条中都有所体现。1979 年，OECD 首次发布转让定价指南《转让定价与跨国企业》，其中阐述了很多成员同对独立交易原则的共识。1995 年，OECD 发布修订版《经济合作与发展组织转让定价指南》（“《转让定价指南》”），并已于 2010 年进行了更新。独立交易原则要求关联企业间交易的定价应参照独立企业在类似条件和经济情况下进行的可比交易的条件。如果关联企业间的交易条件与第三方之间的交易条件不同，就可能需要从税务角度对利润加以调整。

实践证明，独立交易原则是一项实用且公平的准则，纳税人和税务机关可以根据独立交易原则评估关联交易的转让价格以及避免双重征税。然而，由于独立交易原则偏重于依据合同条款分配功能、资产和风险，这就导致现有的独立交易原则应用指南很容易被不当使用，从而使转让定价的结果与跨国企业集团成员通过从事经济活动所创造的价值不一致。因此，BEPS 行动计划要求进一步明确和加强独立交易原则的相关应用指南，如此后转让定价风险仍然存在，则预计可能要引入基于或不同于独立交易原则的特别措施。

《BEPS 行动计划》中有关转让定价的工作主要关注三大领域，由于对重大无形资产产生的利润不当分配会导致税收侵蚀和利润转移。第 8 项行动计划重点审视了与无形资产相关的转让定价问题。第 9 项行动计划考虑了合同的风险分配及相应的利润分配。这样的分配结果可能与实际发生的利润创造活动并不相符；此外，该行动计划还探讨了资本收入的跨国企业集团成员提供资金所获得的回报与其从事的经济活动不匹配的问题。第 10 项行动计划则侧重于其他高风险领域，包括不具备商业合理性的交易的利润分配（交易重新定性），利用转让定价方法使跨国企业集团的利润分配与其主要经济活动股节，以及跨国企业集团成员间造成税收侵蚀且无法与价值创造相匹配的某些款项支付方式（如管理费用和总部费用）的认定。
This report contains revised guidance which responds to these issues and ensures that the transfer pricing rules secure outcomes that see operational profits allocated to the economic activities which generate them. It represents an agreement of the countries participating in the OECD/G20 BEPS Project. For countries that formally subscribe to the Transfer Pricing Guidelines, the guidance in this Report takes the form of amendments to the Transfer Pricing Guidelines. Therefore this report also reflects how the changes will be incorporated in those Guidelines.

To achieve this objective, the revised guidance requires careful delineation of the actual transaction between the associated enterprises by analysing the contractual relations between the parties in combination with the conduct of the parties. The conduct will supplement or replace the contractual arrangements if the contracts are incomplete or are not supported by the conduct. In combination with the proper application of pricing methods in a way that prevents the allocation of profits to locations where no contributions are made to these profits, this will lead to the allocation of profits to the enterprises that conduct the corresponding business activities. In circumstances where the transaction between associated enterprises lacks commercial rationality, the guidance continues to authorise the disregarding of the arrangement for transfer pricing purposes.

The revised guidance includes two important clarifications relating to risks and intangibles.

Risks are defined as the effect of uncertainty on the objectives of the business. In all of a company’s operations, every step taken to exploit opportunities, every time a company spends money or generates income, uncertainty exists, and risk is assumed. No profit-seeking business takes on risk associated with commercial opportunities without expecting a positive return. This economic notion that higher risks warrant higher anticipated returns made MNE groups pursue tax planning strategies based on contractual re-allocations of risks, sometimes without any change in the business operations. In order to address this, the report determines that risks contractually assumed by a party that cannot in fact exercise meaningful and specifically defined control over the risks, or does not have the financial capacity to assume the risks, will be allocated to the party that does exercise such control and does have the financial capacity to assume the risks.

For intangibles, the guidance clarifies that legal ownership alone does not necessarily generate a right to all (or indeed any) of the return that is generated by the exploitation of the intangible. The group companies performing important functions, controlling economically significant risks and contributing assets, as determined through the accurate delineation of the actual transaction, will be entitled to an appropriate return reflecting the value of their contributions. Specific guidance will ensure that the analysis is not weakened by information asymmetries between the tax administration and the taxpayer in relation to hard-to-value intangibles, or by using special contractual relationships, such as a cost contribution arrangement.

The revised guidance also addresses the situation where a capital-rich member of the group provides funding but performs few activities. If this associated enterprise does not in fact control the financial risks associated with the funding (for example because it is merely a source of funds), then it will not be allocated the profits associated with the financial risks and will be entitled to no more than a risk-free return, or less if, for example, the transaction is not commercially rational and therefore the guidance on non-recognition applies.

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1 Brazil provides for an approach in its domestic legislation that makes use of fixed margins derived from industry practices and considers this to be in line with the arm’s length principle. Brazil will continue to apply this approach and will use the guidance in this Report in this context. When Brazil’s Tax Treaties contain Article 9, paragraph 1 of the OECD and UN Model Tax Conventions and a source of double taxation arises that is captured by this Treaty provision, Brazil will provide access to MAP in line with the minimum standard of Action 14.
本报告针对上述问题修改了相关的指南，确保转让定价规则的适用能将利润分配给产生利润的相应经济活动。OECD 和二十国集团（G20）于 2013 年开展的 BEPS 项目的税收协定条款交流达成一致意见。对于正式采用《转让定价指南》的国家，本报告将作为《转让定价指南》的修订内容。因此，本报告也会体现如何在现有指南中引人上述变动。

为此，本指南要求通过分析交易双方的合同关系与实际情况是否相符，来确定界定关联企业之间的交易真实性。如果合同的信息不完整或与实际行为不符，则可根据关联企业的实际行为提供补充性证明或取代相应的合同安排。此外，本指南通过结合适当的定价方法防止利润被转移至未对利润做出贡献的企业，以确保将利润分配给从事相关经营活动的企业。当关联企业之间的交易缺乏商业合理性时，本指南赋予税务机关从转让定价角度否认此类交易安排的权力。

本指南的修订对“风险”和“无形资产”这两个重要的定义做了进一步的明确。

风险是指不确定性对企业实现商业目标的影响。企业在运营过程中，为发展业务采取的每一项措施、每一笔开支或利润的发生都存在不确定性并为此承担风险。企业都追求利润，不会愿意只承担商业机会中的风险而不期待获得相应的收益。“高风险通常伴随着高收益”这一经济理念促使一些跨国企业集团借助税务筹划策略，通过合同安排对风险重新分配，但某些情况下其商业运作并未发生任何变化。为了解决这一问题，本报告指出即使合同约定当事人承担风险，但如果其实际并不能对风险实施控制或不具备承担风险的财务能力，那么相应的风险应由能实际承担风险并具备承担风险的财务能力的企业承担。

无形资产方面，本指南明确指出企业仅拥有所有权并不能使其享有利用无形资产的收益。需要通过确定界定集团关联企业间的实际交易安排来判断执行重要功能、控制重大经济风险以及转移资产的关联企业，并由此企业享有与其价值贡献相符的相应回报。本报告将提供具体的指导说明，确保不会因为税务机关与纳税人之间对难以估值的无形资产的信息不对称或采用特殊的合同安排（如成本分摊协议）而影响分析结论。

本指南还对集团中资本充足的成员企业仅提供资金但几乎不开展经营活动的情况做出了说明。如果该关联企业在实际上并不控制与提供资金相关的财务风险（例如，该关联企业仅根据要求提供资金，但对资金接放方不作任何信用评估），那么它就不应获得与财务风险相关的利润，仅应获得无风险收益。如果该交易不具有商业合理性，其转让定价安排应不予认可。

\[1\] 在此，相关法律法规及行业常识水平作为固定利润水平并认为该利润水平符合独立交易原则。报告会继续采用此种方法，并基于这一背景对本报告中的相关内容。如果本报告在其他条款中包含 OECD 与联合国《税收协定范本》第 9 条的内容，并且出现了类似适用于税收协定条款的双重征收情形，本报告将根据第 9 条内容调整的最低标准提供相互协商程序的启动途径。
Finally, the guidance ensures that pricing methods will allocate profits to the most important economic activities. It will no longer be possible to allocate the synergistic benefits of operating as a group to members other than the ones contributing to such synergistic benefits. For example, discounts that are generated because of the volume of goods ordered by a combination of group companies will need to be allocated to these group companies. As part of the report, a mandate is included for follow-up work to be done on the transactional profit split method, which will be carried out during 2016 and finalised in the first half of 2017. This work should lead to detailed guidance on the ways in which this method can usefully and appropriately be applied to align transfer pricing outcomes with value creation, including in the circumstances of integrated global value chains.

The guidance is linked in a holistic way with other Actions. As mentioned above, this guidance will ensure that capital-rich entities without any other relevant economic activities ("cash boxes") will not be entitled to any excess profits. The profits the cash box is entitled to retain will be equivalent to no more than a risk-free return. Moreover, if this return qualifies as interest or an economically equivalent payment, then those already marginal profits will also be targeted by the interest deductibility rules of Action 4. In addition, it will become extremely difficult to structure the payments to the country where the cash box is tax-resident in a way that avoids withholding taxes, due to the guidance provided on Treaty Abuse (Action 6). Finally, a cash box with limited or no economic activities is likely to be the target of CFC rules (Action 3). With that, the holistic approach provided by the BEPS Action Plan will secure that the role of cash boxes in BEPS strategies is seriously discouraged.

This holistic approach to tackling BEPS behaviour is supported by the transparency requirements agreed under Action 13. Transfer pricing analysis depends on access to relevant information. The access to the transfer pricing documentation provided by Action 13 will enable the guidance provided in this report to be applied in practice, based on relevant information on global and local operations in the master file and local file. In addition, the Country-by-Country report will enable better risk assessment practices by providing information about the global allocation of the MNE group's revenues, profits, taxes, and economic activity.

In addition to improving access to relevant transfer pricing information through Action 13, this report also contains guidance on transactions involving commodities as well as new low value-adding intra-group services. As BEPS creates additional transfer pricing challenges for developing countries and these two areas were identified by them as being of critical importance, this guidance will be supplemented with further work mandated by the G20 Development Working Group, which will provide knowledge, best practices, and tools for developing countries to use to price commodity transactions for transfer pricing purposes and to prevent the erosion of their tax bases through common types of base-eroding payments.

Transfer pricing depends on a facts and circumstances analysis and can involve subjective interpretations of these facts and circumstances. In order to address the risk of double taxation, the work under Action 14 to improve the effectiveness of dispute resolution mechanisms includes a new minimum standard providing for access to the Mutual Agreement Procedure of Article 25 of the Model Tax Convention for all transfer pricing cases. In addition, the 20 countries which have made the commitment to mandatory binding arbitration under Action 14 have specified that they will allow access to arbitration for transfer pricing cases so that double taxation will be eliminated.

The work under Actions 8-10 of the BEPS Action Plan will ensure that transfer pricing outcomes better align with value creation of the MNE group. Moreover, the holistic nature of the BEPS Action Plan will ensure that the role of capital-rich, low-functioning entities in BEPS planning will become less relevant. As a consequence, the goals set by the BEPS Action Plan in relation to the development of transfer pricing rules have been achieved without the need to develop special measures outside the arm's length principle. Further work will be undertaken on profit splits and financial transactions. Special
最后，本指南确保定价方法将利益分配给最重要的经济活动。集团协同效应产生的收益将无法再分配给未对集团协同效应做出贡献的企业。例如，集团内多家企业因集中进行采购而获得折扣所带来的相关收益仅能在上述进行集中采购的集团企业之间进行分配。未来，本报告将对交易利润分配法展开进一步的探讨，这项后续工作将在2016年开展并于2017年上半年完成。该工作会如何有效、适当地应用此方法提供详细指导，以使得在全球价值链一体化的情况下实现转让定价结果与价值创造相一致。

本指南与其他行动计划密切相关。如上所述，本指南将确保资本充分但不开展任何其他相关经济活动的企业（即所谓“现金金企业”）不享有任何超额利润，且此类企业保留的利润不应超过无风险收益。如果该项收益属于利息或其他具有利息性质的所得，则其产生的边际利润将适用第4项行动计划中的利息抵扣规则。此外，根据第6项行动计划中有关防止税收协定优惠的不当授予的规定，未来企业将难以再向“现金金企业”为居民企业的国家支付款项，并同时避免在支付地国家缴纳预提所得税。最后，仅拥有少量或没有经济活动的“现金金企业”很可能成为第3项行动计划受损外国企业设定价格的目的。总之，《BEPS行动计划》提供的整体分析法确保跨国企业集团通过“现金金企业”的安排实现税基侵蚀和利益转移的策略将无所遁形。

第13项行动计划提出的信息透明化要求也为运用整体分析法应对税基侵蚀和利益转移问题提供了有效的支持。转让定价分析的关键在于获取相关信息。第13项行动计划规定了转让定价文档的要求主体文档和本地文档中披露的企业全球和本地运营的相关信息，这使得本报告提供的指引能够在实践中应用。此外，通过国别报告可以了解跨国企业集团在全球的营业收入、利润、税金以及经济活动的分配信息，以便于更全面地进行风险评估。

除了通过第13项行动计划改善获取相关转让定价信息的途径以外，本报告还对发展中国家认为的两个重要领域——大宗商品交易以及低附加值集团内部服务提供了指导原则。由于税基侵蚀和利益转移给发展中国家带来更多的挑战，并且基于上述两个领域的重要性，G20 发展工作小组后续将对相关内容进行补充和说明，旨在为发展中国家在针对大宗商品交易进行转让定价分析时提供所需的知识、工具和最佳方法，并防止跨国企业集团通过几种常见的形式的款款支付安排发展中国家的税基。

转让定价主要依据对事实和相关情况的分析，但也有涉及对上述事实和相关情况的主观解释。为了避免双重征税的风险，第14项行动计划设定了启动《税收协定范本》第25条规定的相互协商程序的最低标准，并适用于所有转让定价案件，以提高争端解决机制的有效性。此外，已在第14项行动计划中承诺采用强制性仲裁调解方式的G20 成员国明确表示允许通过仲裁处理转让定价案件，从而可以消除双重征税的问题。

《BEPS行动计划》第8至10项行动计划将确保转让定价结果能够更好地与跨国企业集团的价值创造相一致。此外，《BEPS行动计划》从整体角度分析问题的方式也将确保资本富足但承担功能不足的企业无法再进行税基侵蚀和利益转移的筹划。因此，在无需开发独立交易原则以外的特殊措施的情况下，《BEPS行动计划》制定转让定价规则的目的得以实现。未来，《BEPS》的工作将围绕利润分割和金融交易
attention is given in the report to the needs of developing countries. This new guidance will be supplemented with further work mandated by the G20 Development Working Group, following reports by the OECD on the impact of base erosion and profit shifting in developing countries. Finally, the interaction with Action 14 on dispute resolution will ensure that the transfer pricing measures included in this report will not result in double taxation.
展开。本报告特别关注了发展中国家的需求。继 OECD 发布有关 BEPS 对发展中国家的影响报告后，G20 发展工作小组后续将对本指南进行进一步的补充和说明。最后，关于争端解决的第 14 项行动计划将与本报告密切配合，以确保本报告中关于转让定价的措施不会导致双重征税。
GUIDANCE FOR APPLYING THE ARM’S LENGTH PRINCIPLE

Revisions to Chapter I of the Transfer Pricing Guidelines

SUMMARY

The guidance set out in this chapter of the Report responds to the mandate under Actions 8-10 of the BEPS Action Plan requiring the development of transfer pricing rules which create transfer pricing outcomes in line with value creation. More specifically, Actions 9 and 10 mandate the development of:

(i) “rules to prevent BEPS by transferring risks among, or allocating excessive capital to, group members. This will involve adopting transfer pricing rules or special measures to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. The rules to be developed will also require alignment of returns with value creation.”

(ii) “rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties. This will involve adopting transfer pricing rules or special measures to: (i) clarify the circumstances in which transactions can be recharacterised.”

The guidance ensures that:

- actual business transactions undertaken by associated enterprises are identified, and transfer pricing is not based on contractual arrangements that do not reflect economic reality;
- contractual allocations of risk are respected only when they are supported by actual decision-making;
- capital without functionality will generate no more than a risk-free return, assuring that no premium returns will be allocated to cash boxes without relevant substance;
- tax administrations may disregard transactions when the exceptional circumstances of commercial irrationality apply.

In combination, the changes make a key contribution to aligning transfer pricing outcomes with the value creating activities performed by the members of an MNE group.

These revisions will update the Transfer Pricing Guidelines so that they provide guidance for taxpayers and tax administrations to follow in performing a transfer pricing analysis. The revisions emphasise the importance of accurately delineating the actual transaction between the associated enterprises by supplementing, where necessary, the terms of any contract with the evidence of the actual conduct of the parties. The transaction is not simply delineated by what is set out in a contract.

The assumption of risk by a party to a transaction can significantly affect the pricing of that transaction at arm’s length. The revisions expand the guidance on identifying specific risks and their impact, and provide an analytical framework to determine which associated enterprise assumes risk for
独立交易原则的应用指南

针对《转让定价指南》第一章的修订

摘要

本章根据《BEPS 行动计划》第 8 至 10 项的要求，阐述了有关独立交易原则的应用指南。这三项行动计划提出应制定适当的转让定价规则，确保关联企业的转让定价结果与价值创造相一致。具体而言，第 9 项和第 10 项行动计划指出：

(i) “应制定适当的转让定价规则，防止集团成员企业之间通过风险转移或过度资本分配的行为进行税务侵蚀和利润转移。这涉及通过适当的转让定价规则或特殊措施确保企业不会因合同约定的风险分配或者因提供资本而获得不合理的回报。同时，这些转让定价规则还应要求企业获得的回报应与其创造的价值相一致。”

(ii) “应制定适当的转让定价规则，防止企业通过特殊的交易安排进行税务侵蚀和利润转移。这些特殊的交易安排是指在独立企业之间不会发生或者鲜有发生的交易安排。这涉及通过适当的转让定价规则或特殊措施以 (i) 间接在何种情况下可以对交易进行重新定性。”

本章旨在确定下列事项：

- 识别关联企业间实际进行的交易，避免根据不具有经济实质的合同安排锁定转让价格；
- 合同约定的风险分配必须由实际商业决策作为支持；
- 投入资本但不执行任何职能的企业仅能获得无风险的回报，即没有经济实质类似“资金池”性质的企业不应获得额外的回报；
- 在交易不具备商业合理性的特殊情况下，税务机关可以否定相关交易安排。

上述修订内容对实现跨国企业集团转让定价结果与集团内关联企业各自的价值创造活动相符合发挥了重要作用。

新版《转让定价指南》中将体现上述修订内容，为纳税人和税务机关进行转让定价分析提供指导。这些修订强调了准确界定关联企业间实际交易安排的重要性，必要时可以通过审视合同条款是否与合同双方实际行为一致作为补充性的评估手段。应避免简单地通过合同条款所表述的内容来评估交易安排。

合同一方在交易中所承担的风险将对符合独立交易原则的交易价格产生重大影响。本章进一步说明了应当如何识别特定风险及其影响，并提供了如何确定关联企业从转让定价角度所承担风险的分析框架。
transfer pricing purposes. To assume a risk for transfer pricing purposes, the associated enterprise needs to control the risk and have the financial capacity to assume the risk.

Finally, the guidance helps to accurately determine the actual contributions made by an associated enterprise that solely supplies capital. Where the capital provider does not exercise control over the investment risks that may give rise to premium returns, that associated enterprise should expect no more than a risk-free return.

Taken together, these aspects of the revised guidance ensure that a transfer pricing analysis is based on an accurate delineation of what the associated enterprises actually contribute in the transaction, and not on contractual terms, including contractual assumption of risk, that are not in practice performed. The guidance provides a basis for any transfer pricing analysis, but in so doing it also addresses some of the key BEPS challenges: allocating risks on paper does not in itself shift profits.

Ordinarily the actual arrangements should then be priced in accordance with guidance provided in other chapters of the Transfer Pricing Guidelines. However, the revisions in this chapter reinforce the need for tax administrations to be able to disregard transactions between associated enterprises when the exceptional circumstances of commercial irrationality apply. The guidance emphasises that the mere fact that the transaction may not be seen between independent parties does not mean that it should not be recognised. Instead, the key question is whether the actual transaction possesses the commercial rationality of arrangements that would be agreed between unrelated parties under comparable economic circumstances.

In summary, the revisions respond to the mandate to prevent inappropriate returns to capital and misallocation of risk by encouraging thoroughness in determining the actual arrangements between the associated enterprises so that pricing takes into account the actual contributions of those parties, including risks actually assumed, and by authorising the non-recognition of transactions which make no commercial sense.
从转让定价角度而言，关联企业必须能够对风险进行控制并且拥有相应的财务承受能力，才能承担相应的风险。

最后，本章指南有助于准确确定关联企业在仅提供资本的情况下所作出的贡献。如果资本提供方无法对可能带来额外收益的投资风险进行控制，则该关联企业仅应获得无风险的收益。

综上所述，本章指南的修订保了转让定价分析需要对关联企业在交易安排中的实际贡献进行准确地评估，而非单纯参考合同条款的描述。本指南提供了进行转让定价分析的基础，同时也解决了一些税收侵蚀和利润转移方面的关键性难题，即单纯通过合同安排并不能避免利润发生转移。

通常，在实际情况中，对交易安排的定价需参考《转让定价指南》其他章节的指导内容。但本章节的修订强调了税务机关能够在交易不具商业合理性的特殊情况下否认相关的交易安排。此外，本章还强调不能简单因为交易安排在独立企业之间很少发生而对交易安排予以否认。判断交易是否能被认可的关键在于实际的交易安排是否具备商业合理性。即独立企业之间在可比的经济环境下是否可能达成类似的安排。

综言之，为解决和避免不合理的资本收益与风险分配，本章指南做出了相应的修改，旨在鼓励在确定关联交易实际交易安排时进行详尽的分析。定价时考量交易各方的实值价值贡献（包括风险承担情况），并赋予税务机关否认不具备商业合理性的交易安排的权力。
The current provisions of Chapter I, Section D of the Transfer Pricing Guidelines are deleted in their entirety and replaced by the following language.

D.1 Identifying the commercial or financial relations

1.33 As stated in paragraph 1.6 a “comparability analysis” is at the heart of the application of the arm’s length principle. Application of the arm’s length principle is based on a comparison of the conditions in a controlled transaction with the conditions that would have been made had the parties been independent and undertaking a comparable transaction under comparable circumstances. There are two key aspects in such an analysis: the first aspect is to identify the commercial or financial relations between the associated enterprises and the conditions and economically relevant circumstances attaching to those relations in order that the controlled transaction is accurately delineated; the second aspect is to compare the conditions and the economically relevant circumstances of the controlled transaction as accurately delineated with the conditions and the economically relevant circumstances of comparable transactions between independent enterprises. This section of Chapter I provides guidance on identifying the commercial or financial relations between the associated enterprises and on accurately delineating the controlled transaction. This first aspect of the analysis is distinct from the second aspect of considering the pricing of that controlled transaction under the arm’s length principle. Chapters II and III provide guidance on the second aspect of the analysis. The information about the controlled transaction determined under the guidance in this section is especially relevant for steps 2 and 3 of the typical process of a comparability analysis set out in paragraph 3.4.

1.34 The typical process of identifying the commercial or financial relations between the associated enterprises and the conditions and economically relevant circumstances attaching to those relations requires a broad-based understanding of the industry sector in which the MNE group operates (e.g., mining, pharmaceutical, luxury goods) and of the factors affecting the performance of any business operating in that sector. The understanding is derived from an overview of the particular MNE group which outlines how the MNE group responds to the factors affecting performance in the sector, including its business strategies, markets, products, its supply chain, and the key functions performed, material assets used, and important risks assumed. This information is likely to be included as part of the master file as described in Chapter V in support of a taxpayer’s analysis of its transfer pricing, and provides useful context in which the commercial or financial relations between members of the MNE group can be considered.

1.35 The process then narrows to identify how each MNE within that MNE group operates, and provides an analysis of what each MNE does (e.g., a production company, a sales company) and identifies its commercial or financial relations with associated enterprises as expressed in transactions between them. The accurate delineation of the actual transaction or transactions between the associated enterprises requires analysis of the economically relevant characteristics of the transaction. These economically relevant characteristics consist of the conditions of the transaction and the economically relevant circumstances in which the transaction takes place. The application of the arm’s length principle depends on determining the conditions that independent parties would have agreed in comparable transactions in comparable circumstances. Before making comparisons with uncontrolled transactions, it is therefore vital to identify the economically relevant characteristics of the commercial or financial relations as expressed in the controlled transaction.

1.36 The economically relevant characteristics or comparability factors that need to be identified in the commercial or financial relations between the associated enterprises in order to accurately delineate the actual transaction can be broadly categorised as follows:
D.1 识别商业或财务关系

1.33 如第1.6段所述，“可比性分析”是应用独立交易原则的核心。独立交易原则的应用通常建立在对受控交易中的条件和可比情形下独立企业间可比交易的条件进行比较的基础上。“可比性分析”包括两个关键环节：第一个环节是通过识别关联企业间的商业或财务关系、交易条件及相关经济特征，以准确界定受控交易；第二个环节是将准确界定的受控交易的交易条件和相关经济特征与独立企业在可比交易中的交易条件和相关经济特征进行比较。《转让定价指南》第一章为识别关联企业间的商业或财务关系以及准确界定受控交易提供了指导。与第一个环节截然不同，第二个环节旨在根据独立交易原则考量受控交易的定价。《转让定价指南》第二章和第三章针对可比性分析的第二个环节提供了指导。根据本节内容确定的有关受控交易的信息与本节第3.4段中所阐述的典型可比性分析过程的第2和第3步紧密相关。

1.34 识别关联企业间的商业或财务关系、交易条件及相关经济特征需要对跨国企业集团所处行业的（如采矿业、医药行业、奢侈品行业等）以及行业内企业经营状况的相关因素进行充分理解。这来源于对特定跨国企业集团的整体了解，即跨国企业集团如何应对影响企业经营状况的相关因素（包括集团采取的经营模式、市场、产品、集团供应链以及其执行的关键功能、使用的资产和承担的重要风险）。上述信息可能会包含在第四章提及的跨国企业集团转让定价“主体文档”中，在纳税人对其转让定价进行分析时提供支持，同时这些信息也有助于考虑跨国企业集团成员之间的商业或财务关系。

1.35 继而，分析过程将细化为识别每家成员企业如何在跨国企业集团内开展经营，分析每家跨国企业的功能（如生产企业、销售公司等）并识别其与关联企业间在交易过程中发生的商业或财务关系。为了能够对关联交易的实交易行进行准确界定，需要对交易的相关经济特征进行分析，这些经济特征包括交易的条件和相关经济环境。独立交易原则的应用取决于交易条件的确定，即独立企业在可比情形下是否可能达成类似的交易安排。在与非受控交易进行对比之后，从关联企业在受控交易中形成的商业或财务关系中识别相关经济特征非常重要。

1.36 为了准确界定实际发生的交易安排，需要从关联企业间的商业或财务关系中识别以下几类相关经济特征或可比因素：
- The contractual terms of the transaction (D.1.1).
- The functions performed by each of the parties to the transaction, taking into account assets used and risks assumed, including how those functions relate to the wider generation of value by the MNE group to which the parties belong, the circumstances surrounding the transaction, and industry practices (D.1.2).
- The characteristics of property transferred or services provided (D.1.3).
- The economic circumstances of the parties and of the market in which the parties operate (D.1.4).
- The business strategies pursued by the parties (D.1.5).

This information about the economically relevant characteristics of the actual transaction should be included as part of the local file as described in Chapter V in support of a taxpayer's analysis of its transfer pricing.

1.37 Economically relevant characteristics or comparability factors are used in two separate but related phases in a transfer pricing analysis. The first phase relates to the process of accurately delineating the controlled transaction for the purposes of this chapter, and involves establishing the characteristics of the transaction, including its terms, the functions performed, assets used, and risks assumed by the associated enterprises, the nature of the products transferred or services provided, and the circumstances of the associated enterprises, in accordance with the categories set out in the previous paragraph. The extent to which any one of the characteristics categorised above is economically relevant in a particular transaction depends on the extent to which it would be taken into account by independent enterprises when evaluating the terms of the same transaction were it to occur between them.

1.38 Independent enterprises, when evaluating the terms of a potential transaction, will compare the transaction to the other options realistically available to them, and they will only enter into the transaction if they see no alternative that offers a clearly more attractive opportunity to meet their commercial objectives. In other words, independent enterprises would only enter into a transaction if it is not expected to make them worse off than their next best option. For example, one enterprise is unlikely to accept a price offered for its product by an independent commercial enterprise if it knows that other potential customers are willing to pay more under similar conditions, or are willing to pay the same under more beneficial conditions. Independent enterprises will generally take into account any economically relevant differences between the options realistically available to them (such as differences in the level of risk) when valuing those options. Therefore, identifying the economically relevant characteristics of the transaction is essential in accurately delineating the controlled transaction and in revealing the range of characteristics taken into account by the parties to the transaction in reaching the conclusion that the transaction adopted offers a clearly more attractive opportunity to meet commercial objectives than alternative options realistically available. In making such an assessment, it may be necessary or useful to assess the transaction in the context of a broader arrangement of transactions, since assessment of the options realistically available to third parties is not necessarily limited to the single transaction, but may take into account a broader arrangement of economically related transactions.

1.39 The second phase in which economically relevant characteristics or comparability factors are used in a transfer pricing analysis relates to the process set out in Chapter III of making comparisons between the controlled transactions and uncontrolled transactions in order to determine an arm's length price for the controlled transaction. To make such comparisons, taxpayers and tax administrations need first to have identified the economically relevant characteristics of the controlled transaction. As set out in Chapter III, differences in economically relevant characteristics between the controlled and uncontrolled
交易的合同条款（第 D.1.1 节）
交易各方执行功能（并考虑使用的资产和承担的风险），包括这些功能如何与所属跨国企业的集团广泛的价值创造价值链、交易价格及行业惯例（第 D.1.2 节）
交易资产或服务特性（第 D.1.3 节）
交易各方及其影响市场所处的经济环境（第 D.1.4 节）
交易各方的经营策略（第 D.1.5 节）

如《转让定价准则》第五章所述，转让定价“本地文档”应包含上述与实际交易相关的经济特征的信息，以支持纳税人的转让定价分析。

1.37 相关经济特征或可比因素分别被运用在转让定价分析的两个独立且相互联系的阶段。第一阶段旨在对受控交易进行准确界定，据上述列示的内容确定交易的特征，包括关联企业的合同条款、执行的功能、使用的资产和承担的风险、交易资产和提供服务的性质以及关联企业所处的环境。上述各项经济特征在特定交易中的经济相关程度，取决于独立企业之间在相同交易下评估相关交易条件时对上述经济特征的考量。

1.38 独立企业在评估潜在交易时，会将该交易与其他现实可行的选择进行比较。独立企业只会在未发现其可实现商业目标更具有吸引力的选择时，才会进行该笔交易。换言之，独立企业只会在某一交易不会优于次优选择时，才会进行这一交易。举例来说，如果一家企业获知其他潜在客户愿意在类似条件下为产品支付更高的价格，或者在更有利的条件下支付相同的价格，则该企业不太可能接受某一独立企业提出的购买价格。独立企业在评估各种现实可行的选择时，通常会考虑各种选择之间的经济性相关性（如风险程度的差异）。因此，识别交易的相关经济特征对于准确评定受控交易及确定交易各方所考虑的经济特征范围至关重要。这样就可将方才能够得出为实现商业目标所做的选择相较于其他现实可行的选择更具吸引力的结论。评估其他现实可行的选择不一定仅限于对于单一交易评估，而是可以考虑一系列具有经济相关性的交易。因此，对一系列交易安排进行评估可能是必要或有所裨益的。

1.39 第二阶段指《转让定价准则》第 6.1 节所提及的转让定价分析过程中对受控交易和非受控交易进行比较，以确定受控交易的独立交易价格：在此过程中，会用到相关经济特征或可比分析因素。为了进行这一比较，税务人和税务机关首先需要识别受控交易的相关经济特征。如第二章所述，在判断所比较的交易情形是否具有可比性，以及为满足可比性需要做出哪些调整时，也应当考虑到相关经济特征在受控和非受控交易安排之间的差异。
arrangements need to be taken into account when establishing whether there is comparability between the situations being compared and what adjustments may be necessary to achieve comparability.

1.40 All methods that apply the arm's length principle can be tied to the concept that independent enterprises consider the options realistically available to them and in comparing one option to another they consider any differences between the options that would significantly affect their value. For instance, before purchasing a product at a given price, independent enterprises normally would be expected to consider whether they could buy an equivalent product on otherwise comparable terms and conditions but at a lower price from another party. Therefore, as discussed in Chapter II, Part II, the comparable uncontrolled price method compares a controlled transaction to similar uncontrolled transactions to provide a direct estimate of the price the parties would have agreed to had they resorted directly to a market alternative to the controlled transaction. However, the method becomes a less reliable substitute for arm’s length transactions if not all the characteristics of these uncontrolled transactions that significantly affect the price charged between independent enterprises are comparable. Similarly, the resale price and cost plus methods compare the gross profit margin earned in the controlled transaction to gross profit margins earned in similar uncontrolled transactions. The comparison provides an estimate of the gross profit margin one of the parties could have earned had it performed the same functions for independent enterprises and therefore provides an estimate of the payment that party would have demanded, and the other party would have been willing to pay, at arm’s length for performing those functions. Other methods, as discussed in Chapter II, Part III, are based on comparisons of net profit indicators (such as profit margins) between independent and associated enterprises as a means to estimate the profits that one or each of the associated enterprises could have earned had they dealt solely with independent enterprises, and therefore the payment those enterprises would have demanded at arm’s length to compensate them for using their resources in the controlled transaction. Where there are differences between the situations being compared that could materially affect the comparison, comparability adjustments must be made, where possible, to improve the reliability of the comparison. Therefore, in no event can unadjusted industry average returns themselves establish arm’s length prices.

1.41 For a discussion of the relevance of these factors for the application of particular pricing methods, see the consideration of those methods in Chapter II.

D.1.1 The contractual terms of the transaction

1.42 A transaction is the consequence or expression of the commercial or financial relations between the parties. The controlled transactions may have been formalised in written contracts which may reflect the intention of the parties at the time the contract was concluded in relation to aspects of the transaction covered by the contract, including in typical cases the division of responsibilities, obligations and rights, assumption of identified risks, and pricing arrangements. Where a transaction has been formalised by the associated enterprises through written contractual agreements, those agreements provide the starting point for delineating the transaction between them and how the responsibilities, risks, and anticipated outcomes arising from their interaction were intended to be divided at the time of entering into the contract. The terms of a transaction may also be found in communications between the parties other than a written contract.

1.43 However, the written contracts alone are unlikely to provide all the information necessary to perform a transfer pricing analysis, or to provide information regarding the relevant contractual terms in sufficient detail. Further information will be required by taking into consideration evidence of the commercial or financial relations provided by the economically relevant characteristics in the other four categories (see paragraph 1.36): the functions performed by each of the parties to the transaction, taking into account assets used and risks assumed, together with the characteristics of property transferred or services provided, the economic circumstances of the parties and of the market in which the parties operate,
所有应用独立交易原则的方法都能与以下概念相联系：独立企业会考虑各种现存可行的选择；在对各种选择进行比较时，独立企业会考虑在不同选择之间可能会对企业价值带来重大影响的所有差异。例如，在某一特定价格购入某商品前，独立企业通常会考虑其是否能按类似的条款和条件，但以一个更低的价格从另一方购买到相同的产品。因此，正如第二章第三部分所讨论的，可比非受控价格法将受控交易与类似的非受控交易进行比较，以直接估计关联交易双方是否通过关联交易的方式而是在市场上进行交易的方式所能达成的交易价格。然而，独立企业之间的交易价格产生实质性影响的特征而言，如果这些非受控交易并非在所有方面都与受控交易具有相似性，那么该方法在独立交易原则的运用中的可靠性就会相应减弱。类似地，再销售价格法和成本加成法将企业或在受控交易中获取的毛利率与独立企业在类似非受控交易中获取的毛利率进行比较。通过比较得出独立企业中一方所为独立企业所执行的非正常功能所应获得的毛利率，进而估计出独立交易原则下该关联交易因执行这些功能而收取的另一方会愿意支付的报酬。第二章第三部分中讨论的其他方法建立在比较独立企业和关联企业净利润率指标的基础上，通过对这些比率的比较来估计关联交易中一方或关联企业双方是否与独立企业进行该交易所应获取的利润，进而估计出在独立交易原则下这些企业会要求收取的对受控交易中使用的资源进行补偿的报酬。当被比较的受控交易情况与非受控交易情况之间存在对企业比照产生实质性影响的差异时，需要就这些差异进行调整，以增强该比较的可靠性。因此，无论在何种情况下，未经调整的行业平均收益本身都不能被视作符合独立交易原则的交易价格。

有关上述因素与运用特定转让定价方法相关性的讨论，参见本章中相关内容。

D.1.1 交易的合同条款

交易是当事双方所发生的商业或财务关系的结果或意思表示。受控交易可能使用正式的书面合同，反映交易双方在合同订立之时就相关交易的意愿，通常包括对责任、权利和义务的划分、对已识别风险的承担以及相关定价安排。关联企业间的交易采用正式的书面合同时，书面合同可以作为分析的切入点，以准确界定关联交易间的实际交易以及确定合同订立之时对责任、风险及预期收益的划分。交易的条款除了会在合同中约定外，还可以从交易双方的通信记录中找到。

然而，仅凭书面合同无法提供转让定价分析所需的全部信息或有关特定合同条款的充分解释。因此，还需要考虑其他四类相关经济特征（参见第 1.3.6 段）所能提供的交易双方商业或财务关系的证据，以便进一步提供所需信息：即交易双方所执行的功能（并考虑使用的资产和承担的风险）、交易资产或服务特性、交易双方及其行业市场所处的经济环境以及交易各方所选择的经营策略。综合分析上述五类
and the business strategies pursued by the parties. Taken together, the analysis of economically relevant characteristics in all five categories provides evidence of the actual conduct of the associated enterprises. The evidence may clarify aspects of the written contractual arrangements by providing useful and consistent information. If the contract neither explicitly nor implicitly (taking into account applicable principles of contract interpretation) addresses characteristics of the transaction that are economically relevant, then any information provided by the contract should be supplemented for purposes of the transfer pricing analysis by the evidence provided by identifying those characteristics.

1.44 The following example illustrates the concept of clarifying and supplementing the written contractual terms based on the identification of the actual commercial or financial relations. Company P is the parent company of an MNE group situated in Country P. Company S, situated in Country S, is a wholly-owned subsidiary of Company P and acts as an agent for Company P's branded products in the Country S market. The agency contract between Company P and Company S is silent about any marketing and advertising activities in Country S that the parties should perform. Analysis of other economically relevant characteristics and in particular the functions performed, determines that Company S launched an intensive media campaign in Country S in order to develop brand awareness. This campaign represents a significant investment for Company S. Based on evidence provided by the conduct of the parties, it could be concluded that the written contract may not reflect the full extent of the commercial or financial relations between the parties. Accordingly, the analysis should not be limited by the terms recorded in the written contract, but further evidence should be sought as to the conduct of the parties, including as to the basis upon which Company S undertook the media campaign.

1.45 If the characteristics of the transaction that are economically relevant are inconsistent with the written contract between the associated enterprises, the actual transaction should generally be delineated for purposes of the transfer pricing analysis in accordance with the characteristics of the transaction reflected in the conduct of the parties.

1.46 In transactions between independent enterprises, the divergence of interests between the parties ensures (i) that contractual terms are concluded that reflect the interests of both of the parties, (ii) that the parties will ordinarily seek to hold each other to the terms of the contract, and (iii) that contractual terms will be ignored or modified after the fact generally only if it is in the interests of both parties. The same divergence of interests may not exist in the case of associated enterprises or any such divergences may be managed in ways facilitated by the control relationship and not solely or mainly through contractual agreements. It is, therefore, particularly important in considering the commercial or financial relations between associated enterprises to examine whether the arrangements reflected in the actual conduct of the parties substantially conform to the terms of any written contract, or whether the associated enterprises' actual conduct indicates that the contractual terms have not been followed, do not reflect a complete picture of the transactions, have been incorrectly characterised or labelled by the enterprises, or are a sham. Where conduct is not fully consistent with economically significant contractual terms, further analysis is required to identify the actual transaction. Where there are material differences between contractual terms and the conduct of the associated enterprises in their relations with one another, the functions they actually perform, the assets they actually use, and the risks they actually assume, considered in the context of the contractual terms, should ultimately determine the factual substance and accurately delineate the actual transaction.

1.47 Where there is doubt as to what transaction was agreed between the associated enterprises, it is necessary to take into account all the relevant evidence from the economically relevant characteristics of the transaction. In doing so one must bear in mind that the terms of the transaction between the enterprises may change over time. Where there has been a change in the terms of a transaction, the circumstances surrounding the change should be examined to determine whether the change indicates that the original transaction has been replaced through a new transaction with effect from the date of the change, or whether
相关经济特征，能够为判断关联企业的实际交易行为提供证据。相关证据可能会提供进一步信息，以明确书面合同中的相关内容或证明实际交易行为与之相符。进行转让定价分析时，如果合同内容本身并未对交易的经济特征进行明确或根据适用的合同解释规则进行暗示，则需通过识别这些经济特征为相关合同信息提供进一步的补充性证据。

1.44 以下案例说明了如何通过识别商业或财务关系对书面合同条款进行确认和补充。P公司是设立在P国的某跨国企业集团的母公司，S公司是P公司设立在S国的一家全资子公司。如P公司品牌产品在S国市场的代理。P公司和S公司之间的代理合同未提及任何有关双方应在S国开展的营销和广告活动。通过分析其他的相关经济特征，特别是交易双方所执行的功能，可以确定S公司为了提升品牌知名度在S国开展了大量媒体宣传活动，这些活动可被视作S公司的重大投资。根据双方的实际行为，可以推断出书面合同并未完整体现交易双方的商业或财务关系。因此，相关分析不应仅局限于书面合同条款，而应探索交易双方行为进一步证据，如S公司开展媒体宣传活动。

1.45 若交易的相关经济特征与关联企业间签订的书面合同不一致，则应进行转让定价分析中根据交易双方所反映的经济特征对实际交易进行界定。

1.46 在独立企业交易中，双方利益的一致可以确保（1）合同条款体现双方共同利益，（2）交易双方通常会以合同条款相互制约对方，以及（3）一般会以符合双方共同利益的前提下，才会允许事后对合同条款不予执行或加以修改。而关联企业之间可能存在这些利益分歧；或者关联企业通过集团内部的控制关系，而不是完全或主要通过交易合同，来协调和管理这些分歧。因此，在确定关联企业间的商业或财务关系时，重要的是考察交易双方的行为所反映出的交易安排是否与合同条款相一致。或者交易双方的行为是否表明合同条款未能得以执行。没有反映实际交易。被企业错误定性或是虚假陈述。当交易双方行为与合同条款不一致时，应实施进一步分析来识别实际交易的。当合同条款与关联企业行为存在显著差异时，应通过交易双方实际执行的功能，使用的资产以及承担的风险，并结合合同条款来最终确定交易实质并据此界定实际交易。

1.47 如果对关联企业间达成的交易存在疑惑，则有必要对交易中所有与经济特征相关的证据予以考量。值得注意的是，企业间的交易条款会不断发生变化。当交易条款发生变化时，应审慎审视与这些变化相关的经济特征。确定原交易是否在变化发生之日起已被新交易所替代，或者这些变化是否体现了交易双方在原
the change reflects the intentions of the parties in the original transaction. Particular care should be exercised where it appears that any changes may have been triggered by knowledge of emerging outcomes from the transaction. Changes made in the purported assumption of a risk when risk outcomes are known do not involve an assumption of risk since there is no longer any risk, as discussed in paragraph 1.78.

1.48 The following example illustrates the concept of differences between written contractual terms and conduct of the parties, with the result that the actual conduct of the parties delineates the transaction. Company S is a wholly-owned subsidiary of Company P. The parties have entered into a written contract pursuant to which Company P licenses intellectual property to Company S for use in Company S’s business; Company S agrees to compensate Company P for the licence with a royalty. Evidence provided by other economically relevant characteristics, and in particular the functions performed, establishes that Company P performs negotiations with third-party customers to achieve sales for Company S, provides regular technical services support to Company S so that Company S can deliver contracted sales to its customers, and regularly provides staff to enable Company S to fulfill customer contracts. A majority of customers insist on including Company P as joint contracting party along with Company S, although fee income under the contract is payable to Company S. The analysis of the commercial or financial relations indicates that Company S is not capable of providing the contracted services to customers without significant support from Company P, and is not developing its own capability. Under the contract, Company P has given a licence to Company S, but in fact controls the business risk and output of Company S such that it has not transferred risk and function consistent with a licensing arrangement, and acts not as the licensor but the principal. The identification of the actual transaction between Company P and Company S should not be defined solely by the terms of the written contract. Instead, the actual transaction should be determined from the conduct of the parties, leading to the conclusion that the actual functions performed, assets used, and risks assumed by the parties are not consistent with the written licence agreement.

1.49 Where no written terms exist, the actual transaction would need to be deduced from the evidence of actual conduct provided by identifying the economically relevant characteristics of the transaction. In some circumstances the actual outcome of commercial or financial relations may not have been identified as a transaction by the MNE, but nevertheless may result in a transfer of material value, the terms of which would need to be deduced from the conduct of the parties. For example, technical assistance may have been granted, synergies may have been created through deliberate concerted action (as discussed in section D.8), or know-how may have been provided through seconded employees or otherwise. These relations may not have been recognised by the MNE, may not be reflected in the pricing of other connected transactions, may not have been formalised in written contracts, and may not appear as entries in the accounting systems. Where the transaction has not been formalised, all aspects would need to be deduced from available evidence of the conduct of the parties, including what functions are actually performed, what assets are actually used, and what risks are actually assumed by each of the parties.

1.50 The following example illustrates the concept of determining the actual transaction where a transaction has not been identified by the MNE. In reviewing the commercial or financial relations between Company P and its subsidiary companies, it is observed that those subsidiaries receive services from an independent party engaged by Company P. Company P pays for the services, the subsidiaries do not reimburse Company P directly or indirectly through the pricing of another transaction and there is no service agreement in place between Company P and the subsidiaries. The conclusion is that, in addition to a provision of services by the independent party to the subsidiaries, there are commercial or financial relations between Company P and the subsidiaries, which transfer potential value from Company P to the subsidiaries. The analysis would need to determine the nature of those commercial or financial relations from the economically relevant characteristics in order to determine the terms and conditions of the identified transaction.
交易中的意图，尤其需要注意的是在对交易结果已能掌握的情况下产生的变化。如第 1.78 段中所讨论的，如果对于某一风险的结果是已知的，那么为了承担“所谓的风险”而发生变化并不是在真正的承担风险，因为事实上已不存在风险。

1.48 下面列举了在书面合同条款和交易双方行为存在差异时，应基于交易双方的实际行为界定交易。S 公司是 P 公司的全资子公司。双方签订书面合同，约定 P 公司授予 S 公司在业务经营过程中使用其无形资产的权利；作为补偿，S 公司同意向 P 公司支付特许权使用费。其他相关经济特征（尤其是 P 公司所执行的功能）表明，P 公司为了 S 公司的合作方与第三方公司进行协商，定期向 S 公司提供技术服务以协助 S 公司在第三方客户开发合同时的，且定期向 S 公司派遣员工以确保 S 公司能够履行客户合同。虽然合同约定相关费用支付给 S 公司，但绝大部分客户要求 P 公司与 S 公司共同作为合同的缔约方。根据商业或财务关系分析，S 公司需要 P 公司的大力支持才能向客户履行合同义务，且 S 公司并未发展自身履行合同义务的能力。根据合同约定，P 公司同意 S 公司授予使用其无形资产的权利，但实际上 P 公司控制着 S 公司的商业风险和经营结果。P 公司并没有按照特许许可安排将相关的功能和风险转移给 S 公司，P 公司更像委托而非许可方。因此，对 P 公司和 S 公司间实际交易的认定不应仅依赖于书面合同，而应根据交易双方的行为来确定结果，即交易双方实际履行的功能、使用的资产以及承担的风险与特许权协议中约定的内容并不一致。

1.49 在没有书面合同存在的情况下，需要根据识别交易相关经济特征获得的实际情况追偿实际交易。有时，某些商业或财务关系的实际结果可能未被跨国企业认定为交易，但其可能会形成重要价值的转移；此时，相应的条款就需要从交易双方的行为进行推断。例如，交易一方可能提供了技术支持，集团层面的协同行动可能创造出协同效果（参见第 D.8 节），或交易一方通过员工派遣或其他情形提供了专有技术。上述两者可能未被跨国企业识别。未在其他相关交易定价中予以反映。未采用正式的书面合同确定，且未在会计系统中予以确认。对于这些未被正式确定的交易，其各方面信息需通过可获得的交易双方行为予以确定，包括交易双方实际履行的功能、使用的资产以及承担的风险。

1.50 以下列举了在交易未被跨国企业识别的情况下如何确定实际交易。通过评估 P 公司及其子公司的商业或财务关系发现子公司从受雇于 P 公司的独立企业处接受服务。该服务费用由 P 公司支付，子公司并未直接或间接地通过其他交易定价对 P 公司进行补偿，且 P 公司无需参与子公司间的任何服务协议。因此可以得出结论，除了独立企业向子公司提供服务外，P 公司与子公司间存在商业和财务关系，涉及从 P 公司向其子公司转移潜在价值。为此，需分析交易相关的经济特征，了解其中的商业或财务关系的性质，从而确定所识别交易的条款和条件。
1.51 In transactions between two independent enterprises, compensation usually will reflect the functions that each enterprise performs (taking into account assets used and risks assumed). Therefore, in delineating the controlled transactions and determining comparability between controlled and uncontrolled transactions or entities, a functional analysis is necessary. This functional analysis seeks to identify the economically significant activities and responsibilities undertaken, assets used or contributed, and risks assumed by the parties to the transactions. The analysis focuses on what the parties actually do and the capabilities they provide. Such activities and capabilities will include decision-making, including decisions about business strategy and risks. For this purpose, it may be helpful to understand the structure and organisation of the MNE group and how they influence the context in which the MNE operates. In particular, it is important to understand how value is generated by the group as a whole, the interdependencies of the functions performed by the associated enterprises with the rest of the group, and the contribution that the associated enterprises make to that value creation. It will also be relevant to determine the legal rights and obligations of each of the parties in performing their functions. While one party may provide a large number of functions relative to that of the other party to the transaction, it is the economic significance of those functions in terms of their frequency, nature, and value to the respective parties to the transactions that is important.

1.52 The actual contributions, capabilities, and other features of the parties can influence the options realistically available to them. For example, an associated enterprise provides logistics services to the group. The logistics company is required to operate warehouses with spare capacity and in several locations in order to be able to cope in the event that supply is disrupted at any one location. The option of greater efficiency through consolidation of locations and reduction in excess capacity is not available. Its functions and assets may, therefore, be different to those of an independent logistics company if this independent service provider did not offer the same capabilities to reduce the risk of disruption to supply.

1.53 Therefore, the process of identifying the economically relevant characteristics of the commercial or financial relations should include consideration of the capabilities of the parties, how such capabilities affect options realistically available, and whether similar capabilities are reflected in potentially comparable arm’s length arrangements.

1.54 The functional analysis should consider the type of assets used, such as plant and equipment, the use of valuable intangibles, financial assets, etc., and the nature of the assets used, such as the age, market value, location, property right protections available, etc.

1.55 The functional analysis may show that the MNE group has fragmented highly integrated functions across several group companies. There may be considerable interdependencies between the fragmented activities. For example, the separation into different legal entities of logistics, warehousing, marketing, and sales functions may require considerable co-ordination in order that the separate activities interact effectively. Sales activities are likely to be highly dependent on marketing, and fulfillment of sales, including the anticipated impact of marketing activities, would require alignment with stocking processes and logistics capability. That required co-ordination may be performed by some or all of the associated enterprises performing the fragmented activities, performed through a separate co-ordination function, or performed through a combination of both. Risk may be mitigated through contributions from all the parties, or risk mitigation activities may be undertaken mainly by the co-ordination function. Therefore, when conducting a functional analysis to identify the commercial or financial relations in fragmented activities, it will be important to determine whether those activities are highly interdependent, and, if so, the nature of the interdependencies and how the commercial activity to which the associated enterprises contribute is co-ordinated.
D.1.2 功能分析

1.51 在两个独立企业之间的交易中，交易报酬通常会反映出每个企业执行的功能（并考虑使用的资产和承担的风险）。因此，在界定受控交易以及确定受控交易（或企业）与非受控交易（或企业）之间是否具有可比性时，有必要进行功能分析。功能分析旨在识别交易双方履行的重要经济意义的活动和责任，使用的资产和承担的风险，侧重于分析交易双方的实际活动及其各自的能力。这些活动和能力包括制定决策，如有关商业战略和风险的决策。为此，了解跨国企业的组织结构及其如何影响跨国企业的经营环境可能会有所帮助，尤其应重点关注跨国集团作为整体如何创造价值、关联企业执行的功能与其他集团成员企业间的相关性，以及关联企业在价值创造中的贡献。同样，也需要判定交易双方在执行其功能过程中的法律权利和义务。尽管交易一方可能比另一方从事更多的功能，但重要的是这些功能在频率、性质和价值等方面对交易双方的经济意义。

1.52 交易双方的贡献、能力和其他特性会影响交易双方所拥有的现时可行的选择。例如，某关联企业对集团提供物流服务，该物流企业需要拥有额外的仓库容量，而且在多个地点拥有仓库，以便能够随时应对某一地区出现供应中断的情况。通过整合多个仓库及减少多余仓储容量来提高整体效率的方式是不可行的。因此，当独立的物流公司不具有的能力来降低供应中断所带来的风险时，该关联企业的功能和资产可能与独立物流公司存在差异。

1.53 因此，在识别商业或财务关系相关经济特征的过程中，需要考虑交易双方的贡献。这些能力如何影响交易双方可行的选择，以及类似能力是否也反映在符合独立交易原则的潜在可比交易安排中。

1.54 功能分析应考虑所使用资产的类型（如房产、机器设备）、所使用的有价值的产品、金融机构等，以及所使用资产的性质，如年份、市场价值、所在位置、是否有产权保护等。

1.55 通过功能分析明发现，跨国企业集团可能将某些高度整合的功能分配给多个集团企业分别承担，这些分散的功能之间可能彼此密切相关。例如，在物流、仓储、市场营销和销售功能由不同法人实体承担的情况下，需要各法人实体进行充分协调，以确保各功能活动之间形成有效的互动。销售活动可能高度依赖于市场营销活动、销售的履行（包括市场营销活动的预期影响）需要依赖于仓储和物流环节的衔接。这些必要的协调活动可能需要执行分散功能的部分或全部关联企业参与，或由承担单独协调功能的母公司执行，或者采用两者相结合的模式。通过各方的共同参与可以减少风险，承担单独协调功能的企业也可能执行风险缓解活动。因此，通过功能分析从分散的活动中识别商业或财务关系时，需要确定这些活动之间的相关性、确定这些相关性的性质以及各关联企业在参与商业活动时如何相互协调。
D.1.2.1 Analysis of risks in commercial or financial relations

1.56 A functional analysis is incomplete unless the material risks assumed by each party have been identified and considered since the actual assumption of risks would influence the prices and other conditions of transactions between the associated enterprises. Usually, in the open market, the assumption of increased risk would also be compensated by an increase in the expected return, although the actual return may or may not increase depending on the degree to which the risks are actually realised. The level and assumption of risk, therefore, are economically relevant characteristics that can be significant in determining the outcome of a transfer pricing analysis.

1.57 Risk is inherent in business activities. Enterprises undertake commercial activities because they seek opportunities to make profits, but those opportunities carry uncertainty that the required resources to pursue the opportunities either will be greater than expected or will not generate the expected returns. Identifying risks goes hand in hand with identifying functions and assets and is integral to the process of identifying the commercial or financial relations between the associated enterprises and of accurately delineating the transaction or transactions.

1.58 The assumption of risks associated with a commercial opportunity affects the profit potential of that opportunity in the open market, and the allocation of risks assumed between the parties to the arrangement affects how profits or losses resulting from the transaction are allocated at arm's length through the pricing of the transaction. Therefore, in making comparisons between controlled and uncontrolled transactions and between controlled and uncontrolled parties it is necessary to analyse what risks have been assumed, what functions are performed that relate to or affect the assumption or impact of these risks and which party or parties to the transaction assume these risks.

1.59 This section provides guidance on the nature and sources of risk relevant to a transfer pricing analysis in order to help identify relevant risks with specificity. In addition, this section provides guidance on risk assumption under the arm's length principle. The detailed guidance provided in this section on the analysis of risks as part of a functional analysis covering functions, assets, and risks, should not be interpreted as indicating that risks are more important than functions or assets. The relevance of functions, assets and risks in a specific transaction will need to be determined through a detailed functional analysis. The expanded guidance on risks reflects the practical difficulties presented by risks: risks in a transaction can be harder to identify than functions or assets, and determining which associated enterprise assumes a particular risk in a transaction can require careful analysis.

1.60 The steps in the process set out in the rest of this section for analysing risk in a controlled transaction, in order to accurately delineate the actual transaction in respect to that risk, can be summarised as follows:

1. Identify economically significant risks with specificity (see Section D.1.2.1.1).

2. Determine how specific, economically significant risks are contractually assumed by the associated enterprises under the terms of the transaction (see Section D.1.2.1.2).

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2 The guidance in this chapter, and in this section on risk in particular, is not specific to any particular industry sector. While the basic concept that a party bearing risks must have the ability to effectively deal with those risks applies to insurance, banking, and other financial services businesses, these regulated sectors are required to follow rules prescribing arrangements for risks, and how risks are recognised, measured, and disclosed. The regulatory approach to risk allocation for regulated entities should be taken into account and reference made to appropriate to the transfer pricing guidance specific to financial services businesses in the 2016 Report on the Allocation of Profits to Permanent Establishments.
针对商业或财务关系的风险分析

由于实际风险的承担会影响关联企业之间的交易价格和其他交易条件。因此需要对各方承担的重要风险进行识别和考查，否则功能分析就不完整。通常，在公开市场中，承担更多风险的企业也会通过预期收益的增加得到补偿，但实际回报增加与否仍取决于实际风险的实现程度。因此，在转让定价分析中，风险的程度和风险承担是需要重点考量的相关经济特征。

风险是商业活动中固有的组成部分。企业通过开展商业活动争取获利的机会，但这些机会存在着不确定性。即寻求机会所需的资源可能超过预期，也可能无法形成预期收益。识别风险与识别功能和资产紧密相关；识别风险也是识别关联企业间的商业或财务关系以及准确界定关联交易的过程中不可或缺的一部分。

是否承担某一商业机会相关的风险决定了是否能利用该商业机会在公开市场中获得利润；而如果在交易双方之间分配风险则会影响到如何按照独立交易原则通过交易定价在交易双方之间分配盈利或亏损。因此，在比较受控和非受控交易以及受控和非受控企业时，需要分析交易各方承担了哪些风险，执行了哪些与风险承担或影响有关的功能，以及哪些企业承担了这些风险。

本节为确定转让定价分析中相关风险的性质和来源提供了指导，有助于识别相关的风险。本节也为独立交易原则下的风险承担提供了指导说明：还对功能分析（包括功能、资产和风险）中的风险分析进行了详细阐述，但这并不表示转让比功能或资产更为重要。在特定交易中，功能、资产和风险的相关性需要通过详细的功能分析确定。本节对风险的深入阐述体现了实际操作中识别和分析风险的困难：交易中的风险比功能或资产更难被识别，确定交易中的风险承担由哪一关联企业承担需要进行格外细致的分析。

为了准确界定与风险相关的实际交易，本节后续部分介绍了如下针对受控交易的风险分析步骤：

i) 识别具有经济重要性的风险（参见第 D.1.2.1.1 节）

ii) 确定合同约定关联企业承担的具有经济重要性的特定风险（参见第 D.1.2.1.2 节）

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2 本节内容，尤其是本节中有关风险的指导原则并不针对任何特定的行业领域。尽管对于保险、银行及其他金融服务行业，承担风险的一方必须具备能够有效应对这些风险的能力，但这些受管制的行业还需要遵循特定的规则，包括风险的安排以及风险的识别、衡量和披露等方面的规则。同时，还应考虑受管制企业根据监管要求的风险分配。可参考《2010年香港特区利润归属性则》中针对金融服务行业的转让定价指导。
3. Determine through a functional analysis how the associated enterprises that are parties to the transaction operate in relation to assumption and management of the specific, economically significant risks, and in particular which enterprise or enterprises perform control functions and risk mitigation functions, which enterprise or enterprises encounter upside or downside consequences of risk outcomes, and which enterprise or enterprises have the financial capacity to assume the risk (see Section D.1.2.1.3).

4. Steps 2-3 will have identified information relating to the assumption and management of risks in the controlled transaction. The next step is to interpret the information and determine whether the contractual assumption of risk is consistent with the conduct of the associated enterprises and other facts of the case by analysing (i) whether the associated enterprises follow the contractual terms under the principles of Section D.1.1.; and (ii) whether the party assuming risk, as analysed under (i), exercises control over the risk and has the financial capacity to assume the risk (see Section D.1.2.1.4).

5. Where the party assuming risk under Steps 1-4(i) does not control the risk or does not have the financial capacity to assume the risk, apply the guidance on allocating risk (see Section D.1.2.1.5).

6. The actual transaction is as accurately delineated by considering the evidence of all the economically relevant characteristics of the transaction as set out in the guidance in Section D.1. should then be priced taking into account the financial and other consequences of risk assumption, as appropriately allocated, and appropriately compensating risk management functions (see Section D.1.2.1.6).

1.61 In this section references are made to terms that require initial explanation and definition. The term “risk management” is used to refer to the function of assessing and responding to risk associated with commercial activity. Risk management comprises three elements: (i) the capability to make decisions to take on, lay off, or decline a risk-bearing opportunity, together with the actual performance of that decision-making function, (ii) the capability to make decisions on whether and how to respond to the risks associated with the opportunity, together with the actual performance of that decision-making function, and (iii) the capability to mitigate risk, that is the capability to take measures that affect risk outcomes, together with the actual performance of such risk mitigation.

1.62 Some risk management functions can be undertaken only by the party performing functions and using assets in creating and pursuing commercial opportunities, while other risk management functions can be undertaken by a different party. Risk management should not be thought of as necessarily encompassing a separate function, requiring separate remuneration, distinct from the performance of the activities that optimise profits. For example, the development of intangibles through development activities may involve mitigating risks relating to performing the development according to specifications at the highest possible standards and on time; the particular risks might be mitigated through the performance of the development function itself. For example, if the contractual arrangement between the associated enterprises is a contract R&D arrangement that is respected under the requirements of this section, remuneration for risk mitigation functions performed through the development activity would be incorporated into the arm’s length services payment. Neither the intangible risk itself, nor the residual income associated with such risk, would be allocated to the service provider. See also Example 1 in paragraph 1.83.

1.63 Risk management is not the same as assuming a risk. Risk assumption means taking on the upside and downside consequences of the risk with the result that the party assuming a risk will also bear the financial and other consequences if the risk materialises. A party performing part of the risk management functions may not assume the risk that is the subject of its management activity, but may be
iii) 通过功能分析确定交易中各关联企业如何承担和管理具有经济重要性的特定风险，哪个或哪些企业承担风险控制和风险缓减的功能，哪个或哪些企业承受风险带来的有利或不利后果，以及哪个或哪些企业具备承担相关风险的财务能力（参见第 D.1.2.1.3 节）。

iv) 步骤 2 和 3 识别了受控交易中有关风险承担和风险管理的信息。下一步则需对相关信息进行解释说明，以确定合同约定的风险承担与关联企业的实际行为及其他事实情况是否一致。步骤 4 的分析包括：
（i）根据第 D.1.1 节介绍的原则，分析关联企业是否遵循了合同条款，及其（ii）根据（i）的分析，分析风险承担方在受控交易中是否对风险实施控制，并具备承担风险的财务能力（参见第 D.1.2.1.4 节）。

v) 根据步骤 1-4（i）的分析，在风险承担方没有对风险实施控制或不具备承担风险的财务能力的情况下，适用风险分配相关的指导原则（参见第 D.1.2.1.5 节）。

vi) 基于第 D.1 节的指导，在考虑交易的所有相关经济特征后对实际交易进行准确界定并定价。定价过程应当考虑承担合理分配的风险所可能导致的财务或其他方面的影响，并合理补偿风险管理功能（参见第 D.1.2.1.6 节）。

1.61 本节提及的一些术语需要进一步解释和定义。“风险管理”是指对商业活动中相关风险的进行分析和应对的功能。风险控制包含三个要素：（i）对于是否承担或转移“蕴含风险的机会”的决策能力与决策能力的实际履行，（ii）对于是否以及如何对“机会中所蕴含的风险”的决策能力与决策能力的实际履行，以及（iii）减缓风险的能力（即采取影响风险结果的措施）以及能力的实际履行。

1.62 风险控制功能可以仅由在创造和寻求商业机会中执行功能和使用资产的一方承担，也可能由交易对方承担。风险控制不应被认为是独立于其他风险优化活动的一项独立功能，从而需要获得单独的补偿。例如，无形资产的开发中可能会涉及风险减缓：在研发过程中，存在是否能以最高标准按时完成相关研发活动的风险。此类风险随着研发功能的实现可能就得到了减缓，如果关联企业间达成了合约研发安排，按照独立交易原则确定的研发服务费可能就包含了研发活动中执行的相关风险减缓功能的补偿。无论是无形资产风险本身，或是与之相关的剩余收益，均不会分配给服务提供方。参见第 1.83 段案例 1。

1.63 风险管理不同于风险承担。风险承担是指承担风险所带来的有利或不利结果，风险承担方将承受风险实施时的财务及其他后果。执行部分风险管理功能的一方可能并不承担其管理的风险，而是可能
hired to perform risk mitigation functions under the direction of the risk-assuming party. For example, the day-to-day mitigation of product recall risk may be outsourced to a party performing monitoring of quality control over a specific manufacturing process according to the specifications of the party assuming the risk.

1.64 Financial capacity to assume risk can be defined as access to funding to take on the risk or to lay off the risk, to pay for the risk mitigation functions and to bear the consequences of the risk if the risk materialises. Access to funding by the party assuming the risk takes into account the available assets and the options realistically available to access additional liquidity, if needed, to cover the costs anticipated to arise should the risk materialise. This assessment should be made on the basis that the party assuming the risk is operating as an unrelated party in the same circumstances as the associated enterprise, as accurately delineated under the principles of this section. For example, exploitation of rights in an income-generating asset could open up funding possibilities for that party. Where a party assuming risk receives intra-group funding to meet the funding demands in relation to the risk, the party providing the funding may assume financial risk but does not, merely as a consequence of providing funding, assume the specific risk that gives rise to the need for additional funding. Where the financial capacity to assume a risk is lacking, then the allocation of risk requires further consideration under step 5.

1.65 Control over risk involves the first two elements of risk management defined in paragraph 1.61; that is (i) the capability to make decisions to take on, lay off, or decline a risk-bearing opportunity, together with the actual performance of that decision-making function and (ii) the capability to make decisions on whether and how to respond to the risks associated with the opportunity, together with the actual performance of that decision-making function. It is not necessary for a party to perform the day-to-day mitigation, as described in (iii) in order to have control of the risks. Such day-to-day mitigation may be outsourced, as the example in paragraph 1.63 illustrates. However, where these day-to-day mitigation activities are outsourced, control of the risk would require capability to determine the objectives of the outsourced activities, to decide to hire the provider of the risk mitigation functions, to assess whether the objectives are being adequately met, and, where necessary, to decide to adapt or terminate the contract with that provider, together with the performance of such assessment and decision-making. In accordance with this definition of control, a party requires both capability and functional performance as described above in order to exercise control over a risk.

1.66 The capability to perform decision-making functions and the actual performance of such decision-making functions relating to a specific risk involve an understanding of the risk based on a relevant analysis of the information required for assessing the foreseeable downside and upside risk outcomes of such a decision and the consequences for the business of the enterprise. Decision-makers should possess competence and experience in the area of the particular risk for which the decision is being made and possess an understanding of the impact of their decision on the business. They should also have access to the relevant information, either by gathering this information themselves or by exercising authority to specify and obtain the relevant information to support the decision-making process. In doing so, they require capability to determine the objectives of the gathering and analysis of the information, to hire the party gathering the information and making the analyses, to assess whether the right information is gathered and the analyses are adequately made, and, where necessary, to decide to adapt or terminate the contract with that provider, together with the performance of such assessment and decision-making. Neither a mere formalising of the outcome of decision-making in the form of, for example, meetings organised for formal approval of decisions that were made in other locations, minutes of a board meeting and signing of the documents relating to the decision, nor the setting of the policy environment relevant for the risk (see paragraph 1.76), qualifies as the exercise of a decision-making function sufficient to demonstrate control over a risk.

1.67 References to control over risk should not necessarily be taken to mean that the risk itself can be influenced or that the uncertainty can be nullified. Some risks cannot be influenced, and are a general
受雇于风险承担方并根据风险承担方的指示执行相关的风险缓和功能。例如，风险承担方可能将降低产品召回风险的功能外包给另一方，后者根据风险承担方所提供的标准对特定生产流程的质量控制进行监督。

1.64 承担风险的财务能力是指为承担或终止风险，支付风险缓和功能的补偿以及承担风险实现的后果等的融资渠道。针对风险承担方的融资渠道，应考虑其拥有的可变现资产以及其他获取额外流动性的现实可行的选择。使风险承担方负担预期风险实现时可能发生的费用。评估的基础是风险承担方的经营行为与独立企业在相同情况下经营行为（以及根据本节指导原则界定的交易实质）应当一致。例如，使用能够创造收入的资产的某些权利可以为当事人带来资金。当风险承担方通过获得集团资金来满足应对接风险的资金需求时，资金提供方可能会承担财务风险，但不会仅仅提供资金就需承担应对接风险的财务风险。当企业缺乏承担风险的财务能力时，应按照第5步进一步考虑风险的分配。

1.65 风险控制包含第1.61段所定义的风险管理的前两个要素：即（i）对于是否承担、终止或规避“蕴含风险”机会的决策能力与决策能力的实际履行，以及（ii）对于是否承担、终止或规避“蕴含风险”的决策能力与决策能力的实际履行。企业无需自行开展谈判（iii）所述的日常风险缓和活动以控制风险。如第1.63段的案列所述，企业可以将日常风险缓和活动外包给其他公司。然而，在将日常风险缓和活动外包的情况下，风险控制是指企业应具备以下方面的评估和决策能力并实际履行这些能力：确定外包活动的目标、决定是否外包风险缓和活动服务供应商，评估是否完全达到目标，以及必要时决定是否与该服务提供商签订或终止合同。按照此处对于控制的定义，企业应同时具备上述能力和实际履行上述能力，才能对风险实施控制。

1.66 对于某一特定风险，具备决策能力和决策能力的实际履行需要决策者把握对风险的理解；该理解需要决策者分析相关信息，以评估该风险所带来的能够预见的有利或不利的风险后果，以及该后果对企业业务造成的影响。决策者应具备针对某一特定风险制定决策的能力和经验，并理解其决策对企业可能产生的影响。决策者应将风险缓和活动所需的相关信息，信息可以由决策者自行收集，也可以由其通过行使权力获得。为此，决策者需要具备评估和决策的能力并实际履行这些能力，以确保风险缓和活动的目标、决定是否外包风险缓和活动服务提供方、评估费用信息是否准确及所得完成的分析是否充分，必要时决定是否与该服务提供商签订或终止与服务提供商的合同。通过举行会议正式批准在其他地区做出的决策，与决策相关的董事会会议记录及相关文件签署，等方式将决策结果正式化，或者制定风险预案与环境（参见第1.76段），并不属于为了控制风险而执行的决策功能的范畴。
condition of commercial activity affecting all businesses undertaking that activity. For example, risks associated with general economic conditions or commodity price cycles are typically beyond the scope of an MNE group to influence. Instead control over risk should be understood as the capability and authority to decide to take on the risk, and to decide whether and how to respond to the risk, for example through the timing of investments, the nature of development programmes, the design of marketing strategies, or the setting of production levels.

1.68 Risk mitigation refers to measures taken that are expected to affect risk outcomes. Such measures may include measures that reduce the uncertainty or measures that reduce the consequences in the event that the downside impact of risk occurs. Control should not be interpreted as requiring risk mitigation measures to be adopted, since in assessing risks businesses may decide that the uncertainty associated with some risks, including risks that may be fundamental to their core business operations, after being evaluated, should be taken on and faced in order to create and maximise opportunities.

1.69 The concept of control may be illustrated by the following examples. Company A appoints a specialist manufacturer, Company B to manufacture products on its behalf. The contractual arrangements indicate that Company B undertakes to perform manufacturing services, but that the product specifications and designs are provided by Company A, and that Company A determines production scheduling, including the volumes and timing of product delivery. The contractual relations imply that Company A bears the inventory risk and the product recall risk. Company A hires Company C to perform regular quality controls of the production process. Company A specifies the objectives of the quality control audits and the information that Company C should gather on its behalf. Company C reports directly to Company A. Analysis of the economically relevant characteristics shows that Company A controls its product recall and inventory risks by exercising its capability and authority to make a number of relevant decisions about whether and how to take on risk and how to respond to the risks. Besides that Company A has the capability to assess and take decisions relating to the risk mitigation functions and actually performs these functions. These include determining the objectives of the outsourced activities, the decision to hire the particular manufacturer and the party performing the quality checks, the assessment of whether the objectives are adequately met and, where necessary, to decide to adapt or terminate the contracts.

1.70 Assume that an investor hires a fund manager to invest funds on its account. Depending on the agreement between the investor and the fund manager, the latter may be given the authority to make portfolio investments on behalf of the investor on a day-to-day basis in a way that reflects the risk preferences of the investor, although the risk of loss in value of the investment would be borne by the investor. In such an example, the investor is controlling its risks through four relevant decisions: the decision about its risk preference and therefore about the required diversification of the risks attached to the different investments that are part of the portfolio, the decision to hire (or terminate the contract with) that particular fund manager, the decision of the extent of the authority it gives to the fund manager and objectives it assigns to the latter, and the decision of the amount of the investment that it asks this fund manager to manage. Moreover, the fund manager would generally be required to report back to the investor on a regular basis as the investor would want to assess the outcome of the fund manager’s activities. In such a case, the fund manager is providing a service and managing his business risk from his own perspective (e.g. to protect his credibility). The fund manager’s operational risk, including the possibility of losing a client, is distinct from his client’s investment risk. This illustrates the fact that an investor who gives to another person the authority to perform risk mitigation activities such as those performed by the fund manager does not necessarily transfer control of the investment risk to the person making these day-to-day decisions.

Further guidance will be provided on the economically relevant characteristics for determining the arm’s length conditions for financial transactions. This work will be undertaken in 2010 and 2015.
1.67 风险控制并不意味着风险本身可以被消除，或者不稳定性可以被清除。某些风险属于商业活动的一般条件，会对所有进行相关活动的企业产生影响。例如，与总体经济状况或大宗商品价格周期相关的风险通常超出了跨国企业集团能够影响的范围。风险控制应被理解为企业拥有决定是否承担风险以及如何应对风险的能力和权力。例如，通过投资的时点，开发项目的风险，营销策略的设计或生产水平的设置等方式进行风险控制。

1.68 风险管理是指采取管理以影响风险结果的措施，包括降低确定性或减少事件中风险不利影响的措施。风险控制并不表示需要采取或直接影响风险的措施；评估风险时，企业可能在衡量后决定承担和面对一些风险（包括企业核心业务运营中的基本风险）的不确定性，以创造或最大化机遇。

1.69 以下案例说明了风险控制的概念。A公司是一家专业生产商，B公司为其生产产品。按照合同安排，B公司提供生产服务，而A公司提供产品规格和设计并决定生产计划，包括产品交付的数量和时间。

1.70 假设某投资者雇佣了一名基金经理代表其进行基金投资。根据投资者和基金经理之间的协议，基金经理可能被授权代表投资者以反映其风险偏好和投资要求的方式，进行日常证券组合投资，但投资价值损失的风险由投资者承担。在本案例中，投资者通过四个决策来控制风险：风险偏好及投资组合所需的利率分散程度的决策；委托某特定基金经理（或与之终止合同的决定）的决策；给基金经理投资的收益以及其制定具体目标的决策；以及委托基金经理进行资产管理的投资收益的决策。此外，基金经理通常定期向投资者汇报，以便投资者能够了解基金经理投资行为的结果。在这种情况中，基金经理提供服务并从自身角度管理其自身的商业风险（例如保护自己的利益）。基金经理的运作风险（包括客户流失的可能性）与其客户（即投资者）的投资风险不同。上述案例阐述了这样的事实，即投资者授权他人进行日常风险减缓活动

\(^{1}\)针对用于确定金融交易买卖条件的相关经济特征，将提供进一步的指导。该项工作将于2016年和2017年进行。
D.1.2.1.1  Step 1: Identify economically significant risks with specificity

1.71 There are many definitions of risk, but in a transfer pricing context it is appropriate to consider risk as the effect of uncertainty on the objectives of the business. In all of a company's operations, every step taken to exploit opportunities, every time a company spends money or generates income, uncertainty exists, and risk is assumed. A company is likely to direct much attention to identifying uncertainties it encounters, in evaluating whether and how business opportunities should be pursued in view of their inherent risks, and in developing appropriate risk mitigation strategies which are important to shareholders seeking their required rate of return. Risk is associated with opportunities, and does not have downside connotations alone; it is inherent in commercial activity, and companies choose which risks they wish to assume in order to have the opportunity to generate profits. No profit-seeking business takes on risk associated with commercial opportunities without expecting a positive return. Downside impact of risk occurs when the anticipated favourable outcomes fail to materialise. For example, a product may fail to attract as much consumer demand as projected. However, such an event is the downside manifestation of uncertainty associated with commercial opportunities. Companies are likely to devote considerable attention to identifying and managing economically significant risks in order to maximise the positive returns from having pursued the opportunity in the face of risk. Such attention may include activities around determining the product strategy, how the product is differentiated, how to identify changing market trends, how to anticipate political and social changes, and how to create demand. The significance of a risk depends on the likelihood and size of the potential profits or losses arising from the risk. For example, a different flavour of ice-cream may not be the company's sole product, the costs of developing, introducing, and marketing the product may have been marginal, the success or failure of the product may not create significant reputational risks so long as business management protocols are followed, and decision-making may have been effected by delegation to local or regional management who can provide knowledge of local tastes. However, ground-breaking technology or an innovative healthcare treatment may represent the sole or major product, involve significant strategic decisions at different stages, require substantial investment costs, create significant opportunities to make or break reputation, and require centralised management that would be of keen interest to shareholders and other stakeholders.

1.72 Risks can be categorised in various ways, but a relevant framework in a transfer pricing analysis is to consider the sources of uncertainty which give rise to risk. The following non-exclusive list of sources of risk is not intended to suggest a hierarchy of risk. Neither is it intended to provide rigid categories of risk, since there is overlap between the categories. Instead, it is intended to provide a framework that may assist in ensuring that a transfer pricing analysis considers the range of risks likely to arise from the commercial or financial relations of the associated enterprises, and from the context in which those relations take place. Reference is made to risks that are externally driven and those that are internally driven in order to help clarify sources of uncertainty. However, there should be no inference that externally driven risks are less relevant because they are not generated directly by activities. On the contrary, the ability of a company to face, respond to and mitigate externally driven risks is likely to be a necessary condition for a business to remain competitive. Importantly, guidance on the possible range of risk should assist in identifying material risks with specificity. Risks which are vaguely described or undifferentiated will not serve the purposes of a transfer pricing analysis seeking to delineate the actual transaction and the actual allocation of risk between the parties.

a) Strategic risks or marketplace risks. These are largely external risks caused by the economic environment, political and regulatory events, competition, technological advance, or social and environmental changes. The assessment of such uncertainties may define the products and markets the company decides to target, and the capabilities it requires, including investment in intangibles and tangible assets, as well as in the talent of its human capital. There is considerable potential downside, but the upside is also considerable if the company identifies correctly the impact of external risks, and differentiates its products and secures and continues to protect
（如基金经理所开展的相关活动），但并没有将投资风险管理转嫁给进行日常投资决策的人。

D.1.2.1.1 步骤 1：识别具有经济重要性的风险

1.71 风险有很多种定义，但从转让定价角度而言，风险是指不确定性对企业实现商业目标的影响。企业在运营过程中，为发展业务采取的每一项措施、每一项开支或利润的发生都存在不确定性和不可控的风险。企业可能需要投入大量资金并对其预测的不确定性，在充分考虑内在风险的情况下评估是否以及如何把握商业机会并制定合适的风险缓减策略。这与实现股东所需回报率至关重要。风险与机遇并存，风险一词本身并不必然包含负面意义。风险是商业活动中固有的组成部分，企业通过选择承担风险并采取相应的风险以获取创造利润的机会。企业需要关注，这会导致企业中不确定性的负面表现。企业可能会非常注重识别和管理具有经济重要性的风险，以便从有关的机会中获取最大的利益。企业关注的重点可能包括风险管理、产品差异化、识别市场变化趋势、预测政治和社会变化以及创造需求等。风险的重要性取决于潜在利润和损失发生的可能性和金额的大小。例如，某种口味的冰淇淋可能不会是某公司的唯一产品，开发、引进、营销该产品并不会发生重大的费用支出。只要遵守经营管理和规则，该产品的成败可能改变公司声誉的风险。此外，这可能可以将决策委托给了解本地口味的本地或区域管理层。但是，突破性的技术或创新的医疗方法可能是公司唯一或主要的产品，在不同阶段可能会涉及重大战略决策。这种产品的成败可能给公司造成重大机遇，或者建立或破坏公司的声誉。此外，还需要代表股东和其他相关利益的核心管理层进行决策。

1.72 风险有多种分类方式，但转让定价分析的框架中需要考虑引起风险的不确定性的来源。以下列出的风险来源并不详尽，未将风险划分层级，也未对风险进行严格分类（风险的种类存在复杂性）：以下示例旨在提供一种分析框架，确保转让定价分析能够全面考虑到在关联企业间商业或财务关系以及发生这些关系的背景中可能产生的各种风险的范围。为了识别不确定性的来源，本报告引用了外部驱动风险和内部驱动风险的概念。但需要指出的是，不应认为由于外部驱动风险是由企业活动直接产生，就推断其相关性较低。企业之间，企业之间以及与外部环境和外部驱动风险的能力可能取决于企业间的竞争力。有关风险企业的指导原则可以有助于识别重大风险。在转让定价分析中，界定风险或不具有独特性的风险无法用于准确评估实际发生的交易，以及交易各方实际分配的风险。

a) 战略风险或市场竞争风险（marketplace risk），此类风险大多是由经济环境、政治和监管活动、竞争、科技进步、或社会和环境变化所带来的外部风险。对于此类不确定性的评估可协助公司确定目标产品和市场以及所需具备的能力（包括对无形资产、有形资产以及人力资本的投资）。战略风险或市
competitive advantage. Examples of such risks may include marketplace trends, new geographical markets, and concentration of development investment.

b) Infrastructure or operational risks. These are likely to include the uncertainties associated with the company’s business execution and may include the effectiveness of processes and operations. The impact of such risks is highly dependent on the nature of the activities and the uncertainties the company chooses to assume. In some circumstances breakdowns can have a crippling effect on the company's operations or reputation and threaten its existence, whereas successful management of such risks can enhance reputation. In other circumstances, the failure to bring a product to market on time, to meet demand, to meet specifications, or to produce to high standards, can affect competitive and reputational position, and give advantage to companies which bring competing products to market more quickly, better exploit periods of market protection provided by, for example, patents, better manage supply chain risks and quality control. Some infrastructure risks are externally driven and may involve transport links, political and social situations, laws and regulations, whereas others are internally driven and may involve capability and availability of assets, employee capability, process design and execution, outsourcing arrangements, and IT systems.

c) Financial risks. All risks are likely to affect a company's financial performance, but there are specific financial risks related to the company's ability to manage liquidity and cash flow, financial capacity, and creditworthiness. The uncertainty can be externally driven, for example by economic shock or credit crisis, but can also be internally driven through controls, investment decisions, credit terms, and through outcomes of infrastructure or operational risks.

d) Transactional risks. These are likely to include pricing and payment terms in a commercial transaction for the supply of goods, property, or services.

e) Hazard risks. These are likely to include adverse external events that may cause damages or losses, including accidents and natural disasters. Such risks can often be mitigated through insurance, but insurance may not cover all the potential loss, particularly where there are significant impacts on operations or reputation.

1.73 Determining the economic significance of risk and how risk may affect the pricing of a transaction between associated enterprises is part of the broader functional analysis of how value is created by the MNE group, the activities that allow the MNE group to sustain profits, and the economically relevant characteristics of the transaction. The analysis of risk also helps to determine comparability under the guidance in Chapter III. Where potential comparables are identified, it is relevant to determine whether they include the same level of risks and management of risks. The economic significance of risk may be illustrated by the following two situations:

1.74 In the first situation the MNE group distributes heating oil to consumers. Analysis of the economically relevant characteristics establishes that the product is undifferentiated, the market is competitive, the market size is predictable, and players are price-takers. In such circumstances, the ability to influence margins may be limited. The credit terms achieved from managing the relationship with the oil suppliers fund working capital and are crucial to the distributor's margin. The impact of the risk on cost of capital is, therefore, significant in the context of how value is created for the distribution function.

1.75 In the second situation, a multinational toy retailer buys a wide range of products from a number of third-party manufacturers. Most of its sales are concentrated in the last two months of the calendar year, and a significant risk relates to the strategic direction of the buying function, and in making the right bets on trends and determining the products that will sell and in what volumes. Trends and the demand for
场竞争风险具有相当程度的潜在不利影响，但如果公司能够正确地识别外部风险的影响，采用产品差异化竞争策略并持续巩固和保护其竞争优势，该风险同样会带来有利的影响。此类风险可能包括市场竞争趋势、新地域市场的崛起以及集中的开发投资。
b) 基础设施或运营风险。此类风险与企业经营活动相关的不确定性，可能与流程和运营的有效性相关。此类风险的影响很大程度上取决于企业的模式，即企业选择承担的不确定性。在某些情况下，产品功能可能严重危及企业的运营或损害企业声誉，甚至威胁到企业的生存；而对于风险的成功管理则会提高企业声誉。在其他情况下，产品无法按期上市，无法满足市场需求，无法符合质量标准，都会影响企业竞争力和声誉，并将竞争劣势拱手让给能够更快推出竞争产品，更好利用新产品保护（如专利）权限，更有效管理供应链及质量控制的竞争对手。一些基础设施风险是由外部因素引起的，包括交通、环保、法律法规等；而另一些基础设施风险则是由内部因素引起的，包括资产的功能性和可用性，员工能力，流程设计和执行，外包安排以及信息技术系统。
c) 财务风险。所有风险都可能影响企业的财务状况，而一些特定的财务风险与企业管理流动资产和现金流量的能力、财务能力以及信誉度相关。财务风险的不确定性可以是由外部因素引起的，包括经济冲击或信贷危机，也可以是由内部因素引起的，包括运营、投资、成本、贷款等，以及基础设施或运营风险带来的结果。
d) 交易风险。交易活动可能导致交易中提供贷款、财产或服务相关的定价和支付条件。
e) 信用风险。信用风险包括可能会造成损害或损失的不利外部事件，如市场风险和自然灾害。信用风险一般可以通过保险来降低，但保险难以覆盖所有潜在损失，特别是会对企业运营和声誉产生重大影响的损失。

1.73 在针对跨国企业集团如何创造价值、如何开展活动以获得利润以及交易的相关经济特征进行功能分析时，应确定风险的经济重要性以及风险如何影响关联交易的定价。风险分析也有助于根据《企业财务指南》第三章的指导确定可比性。在可以找到可比对象的情况下，应当确定可比对象是否也面对相同的风险以及具备相同的经济重要程度。以下两种情况描述揭示了风险的经济重要性。

1.74 第一种情况，跨国企业集团向消费者分销取消费用。相关经济特征分析表明其产品与竞争对手类似，所处市场是竞争激烈的，市场规模可以预见，同时业内企业基本不具备议价权，一般不能接受石油供应商的定价。在这种情况下，企业对利润的影响可能有限。然而，通过与石油供应商之间的关系和取得有利的信贷等级可用于周转资本，这对于分销商是否能够获取利润至关重要。因此，在分析分销功能如何创造价值时，应当着重关注风险对资金成本的影响。
products can vary across markets, and so expertise is needed to evaluate the right bets in the local market. The effect of the buying risk can be magnified if the retailer negotiates a period of exclusivity for a particular product with the third-party manufacturer.

1.76 Control over a specific risk in a transaction focuses on the decision-making of the parties to the transaction in relation to the specific risk arising from the transaction. This is not to say, however, that in an MNE group other parties may not be involved in setting general policies that are relevant for the assumption and control of the specific risks identified in a transaction, without such policy-setting itself representing decision making. The board and executive committees of the group, for example, may set the level of risk the group as a whole is prepared to accept in order to achieve commercial objectives, and to establish the control framework for managing and reporting risk in its operations. Line management in business segments, operational entities, and functional departments may identify and assess risk against the commercial opportunities, and put in place appropriate controls and processes to address risks and influence the risk outcomes arising from day-to-day operations. The opportunities pursued by operational entities require the ongoing management of the risk that the resources allocated to the opportunity will deliver the anticipated return. For example, finished product inventory risk in a supply transaction between two associated enterprises may be controlled by the party with the capability to determine the production volumes together with the performance of that decision-making. The way that inventory risk in the transaction between two associated enterprises is addressed may be subject to policy-setting elsewhere in the MNE group about overall levels of working capital tied up in inventory, or co-ordination of appropriate minimum stocking levels across markets to meet strategic objectives. This wider policy-setting however cannot be regarded as decisions to take on, lay off, decline, or mitigate the specific inventory risk in the example of the product supply transaction in this paragraph.

D.1.2.1.2 Step 2: Contractual assumption of risk

1.77 The identity of the party or parties assuming risks may be set out in written contracts between the parties to a transaction involving these risks. A written contract typically sets out an intended assumption of risk by the parties. Some risks may be explicitly assumed in the contractual arrangements. For example, a distributor might contractually assume accounts receivable risk, inventory risk, and credit risks associated with the distributor’s sales to unrelated customers. Other risks might be implicitly assumed. For example, contractual arrangements that provide non-contingent remuneration for one of the parties implicitly allocate the outcome of some risks, including unanticipated profits or losses, to the other party.

1.78 A contractual assumption of risk constitutes an ex ante agreement to bear some or all of the potential costs associated with the ex post materialisation of downside outcomes of risk in return for some or all of the potential benefit associated with the ex post materialisation of positive outcomes. Importantly, ex ante contractual assumption of risk should provide clear evidence of a commitment to assume risk prior to the materialisation of risk outcomes. Such evidence is very important part of the tax administration’s transfer pricing analysis of risks in commercial or financial relations, since, in practice, an audit performed by the tax administration may occur years after the making of such up-front decisions by the associated enterprises and when outcomes are known. The purported assumption of risk by associated enterprises when risk outcomes are certain is by definition not an assumption of risk, since there is no longer any risk. Similarly, ex post reallocations of risk by a tax administration when risk outcomes are certain may, unless based on the guidance elsewhere in these Guidelines and in particular Section D.1.2.1, be inappropriate.

1.79 It is economically neutral to take on (or lay off) risk in return for higher (or lower) anticipated nominal income as long as the net present value of both options are equal. Between unrelated parties, for example, the sale of a risky income-producing asset may reflect in part a preference of the seller to accept a lower but more certain amount of nominal income and to forego the possibility of higher anticipated nominal income it might earn if it instead retained and exploited the asset. In a without-recourse debt
1.75 第二种情况，某家跨国玩具零售商从多个第三方生产商处采购各种类型的产品。该零售商大部分销售都集中在每年的最后两个月，因此在其采购流程的前端选择产品，是否能够顺应趋势做出正确的投资决定以及确定产品采购种类和采购数量方面存在重大风险。产品趋势和需求在各个市场会有所不同，因此需要专门的知识和经验，以在本地市场做出正确的采购决定。如果该零售商同第三方生产商就某一特定产品达成长期的排他性采购协议，则会加剧其采购风险。

1.76 对交易的特定风险实施控制强调的是交易各方对交易过程中产生的该特定风险进行决策。然而，这并不意味着跨国企业集团中的其他企业不会参与制定承担和控制交易过程中产生的特定交易风险相关的政策，因为这些政策通常只在决策过程中起作用。例如，集团董事会和执行委员会可能会为集团整体设置一个或多个商业目标或可接受的风险水平，并为管理和报告经营活动中的风险划定控制框架。而各业务部门、运营实体以及功能部门的管理层可能会识别评估商业机会中所蕴含的风险，并实施合适的控制措施和流程来应对风险以及影响公司经营过程的风险结果。经营实体在寻求机会时，应为风险进行持续的管理，以确保其在可接受的范围内产生预期收益。例如，两个关联企业之间购销交易中的成本和存货风险可能由具备失控决策能力并实际履行该决策能力的一方所控制。确定两个关联企业之间交易相关风险可能会受到跨国企业集团其他成员所制定的有关政策的影响。如存货占用资本的总体水平，或者为达到战略目标所需协调维持的市场最低库存水平。然而，在上述购销交易的案例中，这种广义上的政策制定不应被视为承担、终止、规避或减少特定存贷风险的决策。

D.1.2.1.2 步骤 2：合同约定的风险承担

1.77 书面合同中可能规定了由交易一方或各方承担风险。书面合同通常规定交易各方需要承担某些特定风险。例如，合同中可能会以明示的方式约定向分销商销售给非关联客户时的应收账款风险。存货风险和信用风险。合同也可能会以默示的方式暗示某些风险的承担。例如，合同中有关向一方支付固定报酬的规定即暗示了向交易对方分配相关风险的结果（包括额外的利息和损失）。

1.78 合同约定的风险承担构成了事前协议，以承担风险的负面影响结果在事前实现时发生的部分或所有潜在费用，作为对风险的积极结果在事后实现时所能获得的部分或所有潜在利益的交换。重要的是，合同约定的在事前风险承担应当为风险结果实现前即存在有关风险承担的承诺提供明确的证据。在实践中，税务机关的税务风险评估可以在企业做出事前决策多年后并且风险结果已知的情况下进行；因此，该证据是税务机关对关联企业间财务或商业关系中的风险进行转让定价分析时的重要部分。如果对于某一风险的结果是已知的，那么关联企业承担“所谓的风险”并不是在真正的承担风险，因为事实上该风险已不存在。因此，当风险结果是已知时，除非依照《转让定价指南》的指导原则（特别是第 D.1.2.1 节的内容）进行分析，否则税务机关对于风险的事后分配也可能是不合理的。
factoring arrangement between independent enterprises. For example, the seller discounts the face value of its receivables in return for a fixed payment, and so accepts a lower return but has reduced its volatility and laid off risk. The factor will often be a specialised organisation which has the capability to decide to take on risk and to decide on how to respond to the risk, including by diversifying the risk and having the functional capabilities to mitigate the risk and generate a return from the opportunity. Neither party will expect to be worse off as a result of entering into the arrangement, essentially because they have different risk preferences resulting from their capabilities in relation to the specific risk. The factor is more capable of managing the risk than the seller and terms acceptable to both parties can be agreed.

1.80 However, it does not follow that every contractual exchange of potentially higher but riskier income for lower but less risky income between associated enterprises is automatically arm’s length. The rest of the steps set out in this section describe the information required to determine how the associated enterprises operate in relation to the assumption and management of risk leading to the accurate delineation of the actual transaction in relation to risk.

1.81 The assumption of risk has a significant effect on determining arm’s length pricing between associated enterprises, and it should not be concluded that the pricing arrangements adopted in the contractual arrangements alone determine which party assumes risk. Therefore, one may not infer from the fact that the price paid between associated enterprises for goods or services is set at a particular level, or by reference to a particular margin, that risks are borne by those associated enterprises in a particular manner. For example, if a manufacturer may claim to be protected from the risk of price fluctuation of raw material as a consequence of its being remunerated by another group company on a basis that takes account of its actual costs. The implication of the claim is that the other group company bears the risk. The form of remuneration cannot dictate inappropriate risk allocations. It is the determination of how the parties actually manage and control risks, as set out in the remaining steps of the process of analysing risk, which will determine the assumption of risks by the parties, and consequently dictate the selection of the most appropriate transfer pricing method.

D.1.2.1.3 Step 3: Functional analysis in relation to risk

1.82 In this step the functions in relation to risk of the associated enterprises that are parties to the transaction are analysed. The analysis provides information about how the associated enterprises operate in relation to the assumption and management of the specific, economically significant risks, and in particular about which enterprise or enterprises perform control functions and risk mitigation functions, which enterprise or enterprises encounter upside or downside consequences of risk outcomes, and which enterprise or enterprises have the financial capacity to assume the risk. This step is illustrated by the following examples and conclusions are drawn from these examples in subsequent paragraphs of Section D.1.2.

Example 1

1.83 Company A seeks to pursue a development opportunity and hires a specialist company, Company B, to perform part of the research on its behalf. Under step 1 development risk has been identified as economically significant in this transaction, and under step 2 it has been established that under the contract Company A assumes development risk. The functional analysis under step 3 shows that Company A controls its development risk through exercising its capability and authority in making a number of relevant decisions about whether and how to take on the development risk. These include the decision to perform part of the development work itself, the decision to seek specialist input, the decision to hire the particular researcher, the decision of the type of research that should be carried out and objectives assigned to it, and the decision of the budget allocated to Company B. Company A has mitigated its risk by taking measures to outsource development activities to Company B which assumes the day-to-day responsibility
1.79 只要在不同选择下的净现值相等，无论承担风险以期获得更高的预期收益，还是终止风险而获得较低的预期收益，两者之间从经济角度而言是中性的。例如，非关联方之间销售具有风险但能够创造收益的资产，在某种程度上可能会反映出该销售方倾向于获得较低但稳定的名义收益，而放弃其保留或利用该资产以获得更高预期收益的可能性。例如，在独立企业间不附带追索权的债务重组安排中，债务方对其应收账款的票面价值进行贴现以获得固定的收入。此举虽然降低了债务方所能获得的回报，但同时降低了不稳定性并终止了风险。债务人通常具有决定是否承担风险以及如何应对风险的能力（包括分散风险和拥有降低“机会中所蕴含的风险”并从中获益的能力）的专业机构。本质上，对于特定风险承担能力的不同而使得企业对于风险的偏好也不同，但没有企业希望签订不利于己方的合同。债务人较之债务方更擅长管理风险，财务双方可以达成双方都能接受的合同条款。

1.80 然而，这并不意味着关联企业在每次通过合同将高风险高收益与低风险低收益进行交换都符合独立交易原则。本节其他步骤概述了确定关联企业如何承担和管理风险所需的信息，并应以此为基础确定相关的实际交易。

1.81 承担风险对于确定关联企业间的独立交易价格具有重大影响，并且不能仅凭合同条款中的价格安排来判断风险的实际承担方。因此，关联企业间买卖商品或提供服务的价格被设定在某一特定水平，或根据某一特定的利润分配计算不能说明关联企业间的风险以某一特定的方式被承担。例如，某一生产企业可能称其不承担原材料价格波动的风险，因为另一家公司会考虑生产实际发生的成本对其予以补偿。这种情况下意味着另一家公司承担了该价格波动风险。补偿的价格应当与承担风险的金额相符合。正如风险分析的其他步骤所述，企业实际管理和控制风险的方式才会决定着企业的风险承担。进而决定了最合适的转让定价方法。

D.1.2.1.3 步骤 3：风险相关的功能分析

1.82 此步骤分析了与交易关联方的功能相关的功能。通过该分析可以说明关联方如何承担和管理具有经济重要性的特定风险，尤其是哪家（些）企业执行风险控制和减少功能，受到风险结果的有利或不利影响以及具备承担风险的财务能力。第 D.1.2 节以下案例和结论阐述了该步骤。

案例 1

1.83 A 公司为了寻求发展机遇，雇佣了一家专业公司 B 公司为其承担部分研发工作。根据步骤 1，该交易中的研发风险被认定为具有经济重要性；根据步骤 2，合同约定由 A 公司承担研发风险。根据步骤 3，功能分析显示 A 公司控制研发风险，能够使其实现和权力进行是否以及如何承担该研发风险的一系列决
for carrying out the research under the control of Company A. Company B reports back to Company A at predetermined milestones, and Company A assesses the progress of the development and whether its ongoing objectives are being met, and decides whether continuing investments in the project are warranted in light of that assessment. Company A has the financial capacity to assume the risk. Company B has no capability to evaluate the development risk and does not make decisions about Company A’s activities. Company B’s risk is primarily to ensure it performs the research activities competently and it exercises its capability and authority to control that risk through creating decisions about the processes, expertise, and assets it needs. The risk Company B assumes is distinct from the development risk assumed by Company A under the contract, and which is controlled by Company A based on the evidence of the functional analysis.

Example 2

1.84 Company B manufactures products for Company A. Under step 1 capacity utilisation risk and supply chain risk have been identified as economically significant in this transaction, and under step 2 it has been established that under the contract Company A assumes these risks. The functional analysis under step 3 provides evidence that Company B built and equipped its plant to Company A’s specifications, that products are manufactured to technical requirements and designs provided by Company A, that volume levels are determined by Company A, and that Company A runs the supply chain, including the procurement of components and raw materials. Company A also performs regular quality checks of the manufacturing process. Company B builds the plant, employs and trains competent manufacturing personnel, and determines production scheduling based on volume levels determined by Company A. Although Company B has incurred fixed costs, it has no ability to manage the risk associated with the recovery of those costs through determining the production units over which the fixed costs are spread, since Company A determines volumes. Company A also determines significant costs relating to components and raw materials and the security of supply. The evaluation of the evidence concludes that Company B performs manufacturing services. Significant risks associated with generating a return from the manufacturing activities are controlled by Company A. Company B controls the risk that it fails to competently deliver services. Each company has the financial capacity to assume its respective risks.

Example 3

1.85 Company A has acquired ownership of a tangible asset and enters into contracts for the use of the asset with unrelated customers. Under step 1 utilisation of the tangible asset, that is the risk that there will be insufficient demand for the asset to cover the costs Company A has incurred, has been identified as an economically significant risk. Under step 2 it is established that Company A has a contract for the provision of services with another group company, Company C; the contract does not address the assumption of utilisation risk by the owner of the tangible asset, Company A. The functional analysis under step 3 provides evidence that another group company, Company B, decides that investment in the asset is appropriate in light of anticipated commercial opportunities identified and evaluated by Company B and its assessment of the asset’s anticipated useful life; Company B provides specifications for the asset and the unique features required to respond to the commercial opportunities, and arranges for the asset to be constructed in accordance with its specifications, and for Company A to acquire the asset. Company C decides how to utilise the asset, markets the asset’s capabilities to third-party customers, negotiates the contracts with these third party customers, assures that the asset is delivered to the third parties and installed appropriately. Although it is the legal owner of the asset, Company A does not exercise control over the investment risk in the tangible asset, since it lacks any capability to decide on whether to invest in the particular asset, and whether and how to protect its investment including whether to dispose of the asset. Although it is the owner of the asset, Company A does not exercise control over the utilisation risk, since it lacks any capability to decide whether and how to exploit the asset. It does not have the capability to assess and make decisions relating to the risk mitigation activities performed by other group companies. Instead,
策，这些决策包括是否自行承担部分的的研发工作、寻求专家的建议、雇佣特定的研究人员、研究类型与研究目标以及分配给B公司的预算。A公司通过将研发活动外包给B公司降低了其自身的风险，而B公司则在A公司的控制下承担日常研发功能。B公司按照预先确定的时间表向A公司汇报工作，而A公司负责评估研发活动的进度和预定目标是否达成，并根据评估结果决定是否对项目进行持续的投资。A公司具有承担风险的财务能力。B公司不具有评估研发风险的能力，对于A公司的活动也不执行决策功能。B公司的重要风险在于确保其能够胜任该研发活动，并通过流程、专业知识以及所需资源方面的决策使其能力和权力以控制风险。根据合同的约定，B公司承担的风险和A公司所承担的研发风险是不同的。功能分析表明，A公司控制其所承担的研发风险。

案例2

1.84 B公司为A公司生产产品。根据步骤1，在该交易中的产能利用和风险和供应链风险被认定为具有经济重要性。根据步骤2，合同约定这些风险由A公司承担。根据步骤3，功能分析表明B公司按照A公司要求的规格设计和建造工厂；按照A公司提供的技术要求和设计生产产品；产品产量由A公司决定；产业链由A公司运营（包括采购部件和原材料）。A公司定期对生产环节进行质量检查。B公司建造工厂、采购和培训生产人员。但根据A公司未决定的产量进一步制定生产计划。尽管B公司发生了固定成本。但由于产量由A公司决定，B公司无法决定固定成本在生产量上的分摊，也因此不具备管理固定成本回收风险的能力。A公司还负责决定零部件和原材料相关的直接成本以及供应链的的正常运行。以上功能分析表明B公司提供生产服务。A公司负责控制与生产活动所产生的收益相关的风险。B公司负责控制其无法胜任服务的风险。两公司都具有承担其各自风险的财务能力。

案例3

1.85 A公司获得了某项无形资产的所有权，并将该资产的使用权与非关联客户签订了合同。根据步骤1，无形资产的利用风险（即对该资产需求不足无法弥补A公司所发生的成本的风险）被认定为具有经济重要性。根据步骤2，A公司与另一家独立的C公司签订了关于提供服务的合同。但合同并没有表明无形资产的所有权。A公司应承担资产利用风险。根据步骤3，功能分析表明另一家集团公司B公司通过识别和评估假设商业机会以及资产的使用期限，认为对于该资产进行投资是合适的。B公司负责商业机会提出资产在规格和特性方面的要求，并安排根据既定规格构建资产以供A公司购买。C公司则负责决定如何使用该资产，向第三方客户提供该资产的功能。与第三方客户签订合同，并确保该资产交付给第三方客户并正确安装。尽管A公司是该资产的法律所有权人，但由于A公司对是否投资某一特定资产以及
risks associated with investing in and exploiting the asset, enhancing upside risk and mitigating downside risk, are controlled by the other group companies. Company A does not have control over the economically significant risks associated with the investment in and exploitation of the asset. The functional contribution of the legal owner of the asset is limited to providing financing for an amount equating to the cost of the asset. However, the functional analysis also provides evidence that Company A has no capability and authority to control the risk of investing in a financial asset. Company A does not have the capability to make decisions to take on or decline the financing opportunity, or the capability to make decisions on whether and how to respond to the risks associated with the financing opportunity. Company A does not perform functions to evaluate the financing opportunity, does not consider the appropriate risk premium and other issues to determine the appropriate pricing of the financing opportunity, and does not evaluate the appropriate protection of its financial investment. Companies A, B and C all have financial capacity to assume their respective risks.

D.1.2.1.4 Step 4: Interpreting steps 1-3

1.86 Carrying out steps 1-3 involves the gathering of information relating to the assumption and management of risks in the controlled transaction. The next step is to interpret the information resulting from steps 1-3 and to determine whether the contractual assumption of risk is consistent with the conduct of the parties and the other facts of the case by analysing (i) whether the associated enterprises follow the contractual terms under the principles of Section D.1.1; and (ii) whether the party assuming risk, as analysed under (i), exercises control over the risk and has the financial capacity to assume risk.

1.87 The significance of step 4 will depend on the findings. In the circumstances of Examples 1 and 2 above, the step may be straightforward. Where a party contractually assuming a risk applies that contractual assumption of risk in its conduct, and also both exercises control over the risk and has the financial capacity to assume the risk, then there is no further analysis required beyond step 4(i) and (ii) to determine risk assumption. Companies A and B in both examples fulfill the obligations reflected in the contracts and exercise control over the risks that they assume in the transaction, supported by financial capacity. As a result step 4(ii) is satisfied, there is no need to consider step 5, and the next step to consider is step 6.

1.88 In line with the discussion in relation to contractual terms (see Section D.1.1), it should be considered under step 4(ii) whether the parties' conduct conforms to the assumption of risk contained in written contracts, or whether the contractual terms have not been followed or are incomplete. Where differences exist between contractual terms related to risk and the conduct of the parties which are economically significant and would be taken into account by third parties in pricing the transaction between them, the parties' conduct in the context of the consistent contractual terms should generally be taken as the best evidence concerning the intention of the parties in relation to the assumption of risk.

1.89 Consider for example, a manufacturer, whose functional currency is US dollars, that sells goods to an associated distributor in another country, whose functional currency is euros, and the written contract states that the distributor assumes all exchange rate risks in relation to this controlled transaction. If, however, the price for the goods is charged by the manufacturer to the distributor over an extended period of time in euros, the currency of the distributor, then aspects of the written contractual terms do not reflect the actual commercial or financial relations between the parties. The assumption of risk in the transaction should be determined by the actual conduct of the parties in the context of the contractual terms, rather than by aspects of written contractual terms which are not in practice applied. The principle can be further illustrated by Example 7 in the Annex to Chapter VI, where there is an inconsistency between the contractual assumption of risk and the conduct of the parties as evidenced by the bearing of costs relating to the downside outcome of that risk.
是否和如何保护其投资（包括是否处置该资产）不具有决策能力。因此，A 公司不控制该商品品种的投资风险。尽管 A 公司是该商品品种的投资者，但由于 A 公司对是否以及如何开发利用该商品品种不具有决策能力，因此，A 公司不控制商品品种利用风险。A 公司对其他集团公司的风险监控活动同样不具备评估和决策的能力。市场投资风险、商品利用风险、金融风险的有利影响和审慎风险的不利影响等均由其他集团公司承担。A 公司不控制与商品品种利用相关的具有经济重要性的风险。作为该商品品种的所有权人，A 公司的决策能力仅限于提供与商品成本相匹配的资源。功能分析进一步表明 A 公司不具有控制金融商品品种投资风险的能力和权力。A 公司对是否支付或拒绝融资条件以及是否和如何应对融资条件相关的风险不具有决策能力。A 公司不执行评估融资条件的功能，不考虑必要的风险评估及其他事项决定其融资条件的合理定价，也不评估其金融投资的保护是否适当。A 公司、B 公司和 C 公司都具有承担各自风险的财务能力。

D.1.2.1.4 步骤 4：分析步骤 1 至步骤 3

1.86 步骤 1 至步骤 3 的分析过程中包括收集受控交易中有关风险转移以及风险管理的信息。步骤 4 则是针对步骤 1 至步骤 3 所获得的信息进行分析，从而确认合同约定的风险转移是否与交易双方的实际行为及其他要求一致。步骤 4 的分析包括：(i) 分析关联企业依照第 D.1.1 节的原则是否遵循了合同条款；以及 (ii) 基于步骤 (i) 的分析结果，确认风险转移方是否对风险转移控制以及是否具备承担风险的财务能力。

1.87 步骤 4 的重要程度取决于上述分析的结果。在案例 1 和案例 2 中，该步骤可能非常简单。如果企业实际行为中遵循合同条款，承担合同约定的风险，同时对风险转移控制并拥有承担风险的财务能力，除步骤 4 (i) 和 (ii) 外无需进一步对风险转移情况分析。在上述两个案例中，A 公司和 B 公司在财务能力的保护下，均履行了合同义务并对交易中承担的风险实施了控制。因此，当步骤 4 (ii) 的分析完成后，无需进行步骤 5 以及之后步骤 6 的分析。

1.88 与合同条款篇节的讨论一样（参见第 D.1.1 节）, 步骤 4 (i) 的分析也应考量企业的实际行为是否与合同条款中对于风险转移的描述一致，企业是否未遵循合同条款，或者履行合同条款并不完整。如果合同条款中有关风险转移的描述与合同双方的实际行为存在差异，且该差别的经济影响重大，独立企业在制定交易定价中会将该差异的影响考虑在内，即基于具有一致性的合同条款，交易双方的实际行为通常应作为判断交易双方实际风险承担意图的最佳证据。

1.89 例如，某家生产企业以美元作为功能性货币。向位于另一国家的关联分销企业销售货物，后者以欧元作为功能性货币。根据合同条款，分销企业将承担所有与该受控交易相关的汇率风险。然而，如果在很长一段时间内，该生产企业均以美元（分销企业的功能性货币）向分销企业收取货物价格，则该合同条款并未反映出交易双方之间的实际商业或财务关系。应当综合考虑合同条款及交易双方的实际行为来
1.90 Under step 4(ii) it should be determined whether the party assuming the risk under the contract, taking into account whether the contractual terms have been applied in the conduct of the parties under step 4(i), controls the risk and has the financial capacity to assume the risk. If all the circumstances set out in Example 1 remain the same except for the fact that the contract between Company A and Company B allocates development risk to Company B, and if there is no evidence from the conduct of the parties under step 4(i) to suggest that the contractual allocation of risk is not being followed, then Company B contractually assumes development risk but the facts remain that Company B has no capability to evaluate the development risk and does not make decisions about Company A's activities. Company B has no decision-making function which allows it to control the development risk by taking decisions that affect the outcomes of that risk. Based on the information provided in Example 1, the development risk is controlled by Company A. The determination that the party assuming a risk is not the party controlling that risk means that further consideration is required under step 5.

1.91 If the circumstances of Example 2 remain the same except for the fact that, while the contract specifies that Company A assumes supply chain risks, Company B is not reimbursed by Company A when there was a failure to secure key components on time, then the analysis under step 4(i) would show that contractual assumption of risk has not been followed in practice in regard to that supply chain risk, such that Company B in fact assumes the downside consequences of that risk. Based on the information provided in Example 2, Company B does not have any control over the supply chain risk, whereas Company A does exercise control. Therefore, the party assuming risk as analysed under step 4(i), does not under step 4(ii) exercise control over that risk, and further consideration is required under step 5.

1.92 In the circumstances of Example 3, analysis under step 4(i) shows that the assumption of utilisation risk by Company A is consistent with its contractual arrangements with Company C, but under step 4(ii) it is determined that Company A does not control risks that it assumes associated with the investment in and exploitation of the asset. Company A has no decision-making function which allows it to control its risks by taking decisions that affect the outcomes of the risks. Under step 4(ii) the party assuming risk does not control that risk, and further consideration is required under step 5.

1.93 In some cases, the analysis under step 3 may indicate that there is more than one MNE that is capable of exercising control over a risk. However, control requires both capability and functional performance in order to exercise control over a risk. Therefore, if more than one party is capable of exercising control, but the entity contractually assuming risk (as analysed under step 4(ii)) is the only party that actually exercises control through capability and functional performance, then the party contractually assuming the risk also controls the risk.

1.94 Furthermore, in some cases, there may be more than one party to the transaction exercising control over a specific risk. Where the associated enterprise assuming risk (as analysed under step 4(i)) controls that risk in accordance with the requirements set out in paragraphs 1.65-1.66, all that remains under step 4(ii) is to consider whether the enterprise has the financial capacity to assume the risk. If so, the fact that other associated enterprises also exercise control over the same risk does not affect the assumption of that risk by the first-mentioned enterprise, and step 5 need not be considered.

1.95 Where two or more parties to the transaction assume a specific risk (as analysed under step 4(i)), and in addition they together control the specific risk and each has the financial capacity to assume their share of the risk, then that assumption of risk should be respected. Examples may include the contractual assumption of development risk under a transaction in which the enterprises agree jointly to bear the costs of creating a new product.
判断风险承担情况，而非根据并未实际履行的合同条款进行判断。第六章附录中案例 7 对这一原则进行了阐释说明。在该案例中，合同约定的风险承担与交易双方的实际行为并不一致，此时可以通过由兼

承担风险的不利影响所产生成本，来判断由谁承担风险。

1.90  根据步骤 4 (i) 中对交易双方是否履行合同条款的进行，步骤 4 (ii) 中需要进一步确定合同约定的风险承担方是否对风险实施控制并拥有承担风险的财能力。案例 1 中，假设其他条件保持不变，如果 A 公司与 B 公司签订的合同中规定 B 公司承担开发风险，并且根据步骤 4 (i) 分析，没有证据表明交易双方的实际行为未遵循合同中对风险分配的约定，则虽然 B 公司在合同中作为风险承担方，但实际上 B 公司并没有能力评估开发风险且 B 公司活动的决策。B 公司不执行决策功能，无法通过决策影响风险结果来控制开发风险。根据案例 1 中的信息可知，开发风险实际由 A 公司承担。如果风险承担方不是风险控制方，则需要进一步进行步骤 5 的分析。

1.91  案例 2 中，假设其他条件保持不变，合同约定由 A 公司承担供应链风险，在未能按时获得关键零部件的情况下，A 公司未对 B 公司给予赔偿，则根据步骤 4 (i) 的分析，合同条款对供应链风险承担的描述与实际情况不符，供应链风险带来的不利后果实际由 B 公司承担了。根据案例 2 所提供的信息，B 公司对供应链风险不实施控制，A 公司才实施控制。因此，根据步骤 4 (ii) 的分析，步骤 4 (i) 分析认定的风险承担方未对风险实施控制，在此情况下需要进一步进行步骤 5 的分析。

1.92  案例 3 中，步骤 4 (i) 的分析认为 A 公司承担资产利用风险，符合 A 公司与 C 公司之间的合同约定。但是步骤 4 (ii) 的分析认为 A 公司未对其承担的资产投资和资产利用风险实施控制。A 公司不承担决策功能，无法通过利用其决策影响风险结果的方式控制资产利用风险。风险承担方在步骤 4 (ii) 的分析中被认为未实施风险控制的行为，在此情况下则需要进一步进行步骤 5 的分析。

1.93  在某些情况下，步骤 3 的分析可能表示超过一家跨国企业有能力对风险实施控制。然而，风险控制需要企业同时拥有相应的能力并执行相关功能，因此，如果超过一家企业有能力对风险实施控制，但只有合同约定的风险承担方（根据步骤 4 (i) 分析认定）同时拥有相应的能力和执行相关的功能，因而实际对风险实施了控制，则合同约定的风险承担方也是实际的风险控制方。

1.94 此外，某些情况下可能会存在超过一家企业对特定风险实施了控制。当关联企业同时承担风险（根据步骤 4 (i) 分析认定）并根据第 1.65 段和第 1.66 段的规定对风险实施控制，则在步骤 4 (ii) 中仅需对关联企业是否具备承担风险的财能力进行分析。如果上述关联企业具备承担风险的财富能力，那么即使其他关联企业对相同风险实施控制，也不会影响由关联企业承担的风险；此时不必再进行步骤 5 的分析。

1.95  两家或两家以上的企业在交易中承担了一项特定风险（根据步骤 4 (i) 分析认定），并对特定风险实施了控制并拥有承担各自风险的财能力，则可以认为该风险由上述企业共同承担。例如，
1.96 If it is established that the associated enterprise assuming the risk as analysed under step 4(i) either does not control the risk or does not have the financial capacity to assume the risk, then the analysis described under step 5 needs to be performed.

1.97 In light of the potential complexity that may arise in some circumstances when determining whether an associated enterprise assuming a risk controls that risk, the test of control should be regarded as being met where comparable risk assumptions can be identified in a comparable uncontrolled transaction. To be comparable those risk assumptions require that the economically relevant characteristics of the transactions are comparable. If such a comparison is made, it is particularly relevant to establish that the enterprise assuming comparable risk in the uncontrolled transaction performs comparable risk management functions relating to control of that risk to those performed by the associated enterprise assuming risk in the controlled transaction. The purpose of the comparison is to establish that an independent party assuming a comparable risk to that assumed by the associated enterprise also performs comparable risk management functions to those performed by the associated enterprise.

D.1.2.1.5 Step 5: Allocation of risk

1.98 If it is established in step 4(ii) that the associated enterprise assuming the risk based on steps 1-4(i) does not exercise control over the risk or does not have the financial capacity to assume the risk, then the risk should be allocated to the enterprise exercising control and having the financial capacity to assume the risk. If multiple associated enterprises are identified that both exercise control and have the financial capacity to assume the risk, then the risk should be allocated to the associated enterprise or group of associated enterprises exercising the most control. The other parties performing control activities should be remunerated appropriately, taking into account the importance of the control activities performed.

1.99 In exceptional circumstances, it may be the case that no associated enterprise can be identified that both exercises control over the risk and has the financial capacity to assume the risk. As such a situation is not likely to occur in transactions between third parties, a rigorous analysis of the facts and circumstances of the case will need to be performed, in order to identify the underlying reasons and actions that led to this situation. Based on that assessment, the tax administrations will determine what adjustments to the transaction are needed for the transaction to result in an arm’s length outcome. An assessment of the commercial rationality of the transaction based on Section D.2 may be necessary.

D.1.2.1.6 Step 6: Pricing of the transaction, taking account of the consequences of risk allocation

1.100 Following the guidance in this section, the accurately delineated transaction should then be priced in accordance with the tools and methods available to taxpayers and tax administrations set out in the following chapters of these Guidelines and taking into account the financial and other consequences of risk-assumption, and the remuneration for risk management. The assumption of a risk should be compensated with an appropriate anticipated return, and risk mitigation should be appropriately remunerated. Thus, a taxpayer that both assumes and mitigates a risk will be entitled to greater anticipated remuneration than a taxpayer that only assumes a risk, or only mitigates, but does not do both.

1.101 In the circumstances of Example 1 in paragraph 1.83, Company A assumes and controls the development risk and should bear the financial consequences of failure and enjoy the financial consequences of success. Company B should be appropriately rewarded for the carrying out of its development services, incorporating the risk that it fails to do so competently.

1.102 In the circumstances of Example 2 in paragraph 1.84, the significant risks associated with generating a return from the manufacturing activities are controlled by Company A, and the upside and downside consequences of those risks should therefore be allocated to Company A. Company B controls
合同当事方约定共同承担新产品的开发成本，进而共同承担开发风险。

1.96 如果步骤 4 (i) 的分析中被认定为风险承担方的关联企业既没有对风险实施控制也不具备承担风险的财务能力，则需要进行步骤 5 的分析。

1.97 考虑到在判断风险承担方是否对风险实施控制时可能会出现的潜在复杂性，如果可比非受控交易中存在可比的风险承担情况，则对于关联企业的风险实施控制测试应视作已被满足。为了满足风险承担的可比性要求，交易的相关经济特征也应可比。对风险控制情况进行比较时，应重点确保关联风险承担方在受控交易中执行的风险管理功能与非受控交易中执行的相关功能具有可比性。比较的目的在于说明独立企业在可比交易中承担了与关联企业可比的风险管理功能。

D.1.2.1.5 步骤 5：风险管理

1.98 根据步骤 4 (ii) 的分析，如果步骤 1 至步骤 4 (i) 认定的承担风险的关联企业没有对风险实施控制或不具备承担风险的财务能力，则该风险应被分配给实际对风险实施控制且具备承担风险的财务能力的企业。如果存在多家关联企业对风险实施控制又具备承担风险的财务能力，则该风险应被分配给对风险实施控制的关联企业或关联集团。对风险实施控制的其他关联企业也应根据所实施的控制行为的重要性予以合理补偿。

1.99 在某些特殊情况下，交易中可能出现不存在一家关联企业对风险实施控制又具备承担风险的财务能力。由于这种状况在独立交易中发生，因此需要具体分析和情况进行严格分析，以找出造成这种情况的原因和行为。税务机关可以对评估期确定需要对该交易进行的调整，以便获得符合独立交易原则的结果。必要时可基于第 D.2 节评估交易的商业合理性。

D.1.2.1.6 步骤 6：基于风险分配结果制定交易价格

1.100 依照本节指导原则，对前述界定的交易进行定价时，应当采用《转让定价指南》等章节中讨论的纳税人的行为和税务机关在转让定价工具和定价方法，并考虑风险承担导致的经济及其他方面影响，以及风险管理所应获得的补偿。承担风险应获得合理的预计回报作为补偿，风险减缓行为也应获得合理的补偿。因此，既承担风险又实施风险减缓行为的纳税人应比仅承担风险或仅实施风险减缓行为的纳税人获得更高的补偿。

1.101 在第 1.83 段的案例 1 中，A 公司既承担开发风险又对开发风险实施控制；因此，A 公司应当承担开发失败造成的经济损失和开发成功的经济成果。B 公司应就其所提供的开发服务以及承担的无法胜任开发服务的风险获得合理的补偿。
the risk that it fails to competently deliver services, and its remuneration should take into account that risk, as well as its funding costs for the acquisition of the manufacturing plant. Since the risks in relation to the capacity utilisation of the asset are controlled by Company A, Company A should be allocated the risk of under-utilisation. This means that the financial consequences related to the materialisation of that risk including failure to cover fixed costs, write-downs, or closure costs should be allocated to Company A.

1.103 The consequences of risk allocation in Example 3 in paragraph 1.85 depend on analysis of functions under step 3. Company A does not have control over the economically significant risks associated with the investment in and exploitation of the asset, and those risks should be aligned with control of those risks by Companies B and C. The functional contribution of Company A is limited to providing financing for an amount equating to the cost of the asset that enables the asset to be created and exploited by Companies B and C. However, the functional analysis also provides evidence that Company A has no capability and authority to control the risk of investing in a financial asset. Company A does not have the capability to make decisions to take on or decline the financing opportunity, or the capability to make decisions on whether and how to respond to the risks associated with the financing opportunity. Company A does not perform functions to evaluate the financing opportunity, does not consider the appropriate risk premium and other issues to determine the appropriate pricing of the financing opportunity, and does not evaluate the appropriate protection of its financial investment. In the circumstances of Example 3, Company A would not be entitled to any more than a risk-free return as an appropriate measure of the profits it is entitled to retain, since it lacks the capability to control the risk associated with investing in a riskier financial asset. The risk will be allocated to the enterprise which has control and the financial capacity to assume the risk associated with the financial asset. In the circumstances of example, this would be Company B. Company A does not control the investment risk that carries a potential risk premium. An assessment may be necessary of the commercial rationality of the transaction based on the guidance in Section D.2 taking into account the full facts and circumstances of the transaction.

1.104 Guidance on the relationship between risk assumption in relation to the provision of funding and the operational activities for which the funds are used is given in paragraphs 6.60-6.64. The concepts reflected in these paragraphs are equally applicable to investments in assets other than intangibles.

1.105 A party should always be appropriately compensated for its control functions in relation to risk. Usually, the compensation will derive from the consequences of being allocated risk, and therefore will be entitled to receive the upside benefits and to incur the downside costs. In circumstances where a party contributes to the control of risk, but does not assume the risk, compensation which takes the form of a sharing in the potential upside and downside, commensurate with that contribution to control, may be appropriate.

1.106 The difference between \textit{ex ante} and \textit{ex post} returns discussed in particular in Section D of Chapter VI arises in large part from risks associated with the uncertainty of future business outcomes. As discussed in paragraph 1.78 the \textit{ex ante} contractual assumption of risk should provide clear evidence of a commitment to assume risk prior to the materialisation of risk outcomes. Following the steps in this section, the transfer pricing analysis will determine the accurate delineation of the transaction with respect to risk, including the risk associated with unanticipated returns. A party which, under these steps, does not assume the risk, nor contributes to the control of that risk, will not be entitled to unanticipated profits (or required to bear unanticipated losses) arising from that risk. In the circumstances of Example 3 (see paragraph 1.85), this would mean that neither unanticipated profits nor unanticipated losses will be allocated to Company A. Accordingly, if the asset in Example 3 were unexpectedly destroyed, resulting in an unanticipated loss, that loss would be allocated for transfer pricing purposes to the company or companies that control the investment risk, contribute to the control of that risk and have the financial capacity to assume that risk.

\footnote{Company A could potentially be entitled to less than a risk-free return if, for example, the transaction is disregarded under Section D.2.}
1.102 在第 1.84 段的案例 2 中，A 公司对与生产活动和收益相关的重大风险实施控制。因此，A 公司应承担该风险带来的所有有利或不利的结果。B 公司对服务无法完成的风险实施控制。因此，B 公司应承担该风险的风险及购票成本。由于资产配置利用率风险由 A 公司实施控制，A 公司相当承担产能利用过低的风险。因此，A 公司应承担该风险实时的经济后果，包括固定成本无法弥补，资产闲置和停业成本。

1.103 在第 1.85 段的案例 3 中，风险分配的结果取决于步骤 3 的功能分析。A 公司未对资产投资和资产利用相关的重大经济风险实施控制，因此相关风险应由实际实施风险控制的 B 公司和 C 公司承担。A 公司的职能贡献仅限于根据开发资产和利用资产所需的成本向 B 公司和 C 公司提供相应的融资金额。此外，功能分析还证明 A 公司并不具备相应的能力和权力对金融资产投资进行控制，也不具备相应能力来决定是否接受或拒绝融资机会，或者是否有何对融资机会相关的风险。A 公司不执行评估融资机会的功能，不考虑风险的融资条件以及其他事项以决定其融资机会的合理定价，也不评估其金融投资的保护是否适当。在案例 3 中，由于 A 公司不具备控制高风险金融资产相关投资风险的能力，因此 A 公司无权获得任何高于无风险回报 4% 的利润。该风险将被分配给实际实施风险控制并具备财务能力承担金融资产相关风险的企业。在本案例中，该企业应为 B 公司。A 公司应具有潜在风险溢价投资风险实施控制。根据第 D.2 节的常规例，考虑所有事实和情况的基础上对交易的商业合理性进行评估可能是必要的。

1.104 有关提供资金相关的风险承担以及运用资金的经营活动的关系的指导原则，参见第 6.60 段至第 6.64 段。这些段落中所涉及的概念同样适用于无形资产以外的资产投资。

1.105 企业应设置能就其实施的风险控制功能获得合理的补偿。一般情况下，企业通过实施风险控制达到的风险的实现结果获得补偿。因此，企业有权享有风险所带来收益，但承担相应的成本。如果企业仅对风险实施控制但不承担风险，在对企业进行补偿时，根据其对风险控制的贡献分享或承担风险的有利和不利的结果可能混淆。

1.106 第六章第 D 节所讨论的事先收益和事后收益的差异，主要来源于与未来业务成果的不确定性相关的风险。如第 1.78 段所述，合同约定的提前风险承担应当为风险结果实现的即存在有关风险承担的承诺提供明确的证据。通过本节介绍的相关分析步骤，转头定价分析能够从风险角度准确界定相关交易（包括超过预期收益的相关风险）。在这些分析步骤中，如果当事人既不承担风险又不对风险实施控制，则将无权享有该风险带来的超过预期的收益（或承担超过预期的损失）。在案例 3 中（参见第 1.85 段），A 公

A 公司可能在交易中获得低于无风险回报的收益。例如，根据第 D.2 节的案例对相关交易予以否定。
and that would be entitled to unanticipated profits or losses with respect to the asset. That company or companies would be required to compensate Company A for the return to which it is entitled as described in paragraph 1.105.

D.1.3 Characteristics of property or services

1.107 Differences in the specific characteristics of property or services often account, at least in part, for differences in their value in the open market. Therefore, comparisons of these features may be useful in delineating the transaction and in determining the comparability of controlled and uncontrolled transactions. Characteristics that may be important to consider include the following: in the case of transfers of tangible property, the physical features of the property, its quality and reliability, and the availability and volume of supply; in the case of the provision of services, the nature and extent of the services; and in the case of intangible property, the form of transaction (e.g., licensing or sale), the type of property (e.g., patent, trademark, or know-how), the duration and degree of protection, and the anticipated benefits from the use of the property. For further discussion of some of the specific features of intangibles that may prove important in a comparability analysis involving transfers of intangibles or rights in intangibles, see paragraphs 6.116-6.127.

1.108 Depending on the transfer pricing method, this factor must be given more or less weight. Among the methods described at Chapter 11 of these Guidelines, the requirement for comparability of property or services is the strictest for the comparable uncontrolled price method. Under the comparable uncontrolled price method, any material difference in the characteristics of property or services can have an effect on the price and would require an appropriate adjustment to be considered (see in particular paragraph 2.15). Under the resale price method and cost plus method, some differences in the characteristics of property or services are less likely to have a material effect on the gross profit margin or mark-up on costs (see in particular paragraphs 2.23 and 2.41). Differences in the characteristics of property or services are also less sensitive in the case of the transactional profit methods than in the case of traditional transactional methods (see in particular paragraph 2.69). This, however, does not mean that the question of comparability in characteristics of property or services can be ignored when applying transactional profit methods, because it may be that product differences entail or reflect different functions performed, assets used and/or risks assumed by the tested party. See paragraphs 3.18-3.19 for a discussion of the notion of tested party.

1.109 In practice, it has been observed that comparability analyses for methods based on gross or net profit indicators often put more emphasis on functional similarities than on product similarities. Depending on the facts and circumstances of the case, it may be acceptable to broaden the scope of the comparability analysis to include uncontrolled transactions involving products that are different, but where similar functions are undertaken. However, the acceptance of such an approach depends on the effects that the product differences have on the reliability of the comparison and on whether or not more reliable data are available. Before broadening the search to include a larger number of potentially comparable uncontrolled transactions based on similar functions being undertaken, thought should be given to whether such transactions are likely to offer reliable comparables for the controlled transaction.

D.1.4 Economic circumstances

1.110 Arm's length prices may vary across different markets even for transactions involving the same property or services; therefore, to achieve comparability requires that the markets in which the independent and associated enterprises operate do not have differences that have a material effect on price or that appropriate adjustments can be made. As a first step, it is essential to identify the relevant market or markets taking account of available substitute goods or services. Economic circumstances that may be relevant to determining market comparability include the geographic location; the size of the markets; the extent of competition in the markets and the relative competitive positions of the buyers and sellers; the
司将不会被分配到任何超过预期的收益或损失。因此，如果案例 3 中的资产被意外破坏而产生预期外的损失，在转让定价分析中，该预期外损失会被分配给能对投资风险实施控制并具备承担该风险的财务能力的企业，这些企业将有权获得（或承担）与该资产相关的预期外的利润（或损失）。这些企业需要按第 1.103 段所述对 A 公司予以补偿。

1.107 资产或服务具体特性的差异通常或或或少导致了其在公开市场上价值的差异。因此，对这些特征进行比较可能有助于界定交易及确定受控交易与非受控交易之间的可比性。比较过程中需要考虑的主要特性包括：无形资产转让交易中的资产的物理特征、质量、可靠性、供应能力和供应量；服务交易中的服务性能和服务范围；无形资产交易中的交易方式（例如，许可权的许可和销售）、资产类型（例如，专利权、商标权和专有技术）、保护期限和程度，以及使用资产的预期收益。有关涉及无形资产或无形资产转移的可比性分析中可能需要重点考虑的某些重要特性的进一步讨论，参见第 6.116 至第 6.127 段。

1.108 根据转让定价方法的不同，对资产或服务特征这一因素应给予不同程度的重视。在《转让定价指南》第二章所描述的方法中，可比非受控价格法对于资产或服务可比性的要求最为严格。在可比非受控价格法下，任何资产或服务特征的差异都会对价格产生影响，从而可能需要考虑进行合理的调整（参见第 2.15 段）。相比之下，在销售价格加成本法下，资产或服务特征的某些差异对毛利率或销售加成本产生重大影响的可能性更低（参见第 2.23 段和第 2.41 段）。同样，资产或服务特征的差异在交易利润法下的影响要小于传统交易法（参见第 2.69 段）。但这并不表示运用利润率法时就可以忽略资产或服务特征可比性的影响。因为资产差异可能会导致或反映为与被测试方执行的功能、使用的资产和（或）承担的风险的差异。关于被测试方这一方面的讨论，参见第 3.18 至第 3.19 段。

1.109 实践中，相关产品的相似性，基于销售或净利润指标的转让定价方法进行可比性分析时更注重功能的相似性。根据具体的事实和情况，可以将可比性分析的范围扩大，包括涉及的产品不同但执行的功能相似的非受控交易。然而，是否接受这种方法取决于资产差异对比较的可比性的影响以及是否可以获取更可靠的信息。在将所受范围扩大从而包含更多执行类似功能的潜在可比非受控交易之前，应当考虑这些交易是否有可能成为可比的可比交易。

1.110 即使交易的是相同的资产或服务，不同市场上的独立交易价格也可能会不同。因此，为了满足可比性的要求，独立企业在不同的市场与关联企业所在的市场之间不应存在对交易价格产生重大影响的差异，或者这种差异可以进行合理的调整。首先，必须识别可获得的替代产品或服务的相关市场，与决定市场可比性相关的具体环境包括：地理位置、市场规模、市场竞争程度、买卖双方的相对竞争地位、替代产品和服务的可获得性（及其影响）、市场结构及特定市场内的供需水平、消费者购买力、政府控制的市场规则的性质和程度、生产成本（包括土地成本、劳动力成本、资本成本）、运输成本、市场层级（如零售或批发）、交易日期及时间等。特定的事实和环境将决定经济环境方面差异是否会重大影响，以及是否可以合理调整消除这些差异造成的影响。关于对本地市场特点（特别是会带来选址节约的本地市场特点）进行可比性分析时的重要考虑事项的详细指南，参见本章第 D.6 节。
availability (risk thereof) of substitute goods and services; the levels of supply and demand in the market as a whole and in particular regions, if relevant; consumer purchasing power; the nature and extent of government regulation of the market; costs of production, including the costs of land, labour, and capital; transport costs; the level of the market (e.g. retail or wholesale); the date and time of transactions; and so forth. The facts and circumstances of the particular case will determine whether differences in economic circumstances have a material effect on price and whether reasonably accurate adjustments can be made to eliminate the effects of such differences. More detailed guidance on the importance in a comparability analysis of the features of local markets, especially local market features that give rise to location savings, is provided in Section D.6 of this Chapter.

1.111 The existence of a cycle (e.g. economic, business, or product cycle) is one of the economic circumstances that should be identified. See paragraph 3.77 in relation to the use of multiple year data where there are cycles.

1.112 The geographic market is another economic circumstance that should be identified. The identification of the relevant market is a factual question. For a number of industries, large regional markets encompassing more than one country may prove to be reasonably homogeneous, while for others, differences among domestic markets (or even within domestic markets) are very significant.

1.113 In cases where similar controlled transactions are carried out by an MNE group in several countries and where the economic circumstances in these countries are in effect reasonably homogeneous, it may be appropriate for this MNE group to rely on a multiple-country comparability analysis to support its transfer pricing policy towards this group of countries. But there are also numerous situations where an MNE group offers significantly different ranges of products or services in each country, and/or performs significantly different functions in each of these countries (using significantly different assets and assuming significantly different risks), and/or where its business strategies and/or economic circumstances are found to be significantly different. In these latter situations, the recourse to a multiple-country approach may reduce reliability.

D.1.5 Business strategies

1.114 Business strategies must also be examined in delineating the transaction and in determining comparability for transfer pricing purposes. Business strategies would take into account many aspects of an enterprise, such as innovation and new product development, degree of diversification, risk aversion, assessment of political changes, input of existing and planned labour laws, duration of arrangements, and other factors bearing upon the daily conduct of business. Such business strategies may need to be taken into account when determining the comparability of controlled and uncontrolled transactions and enterprises.

1.115 Business strategies also could include market penetration schemes. A taxpayer seeking to penetrate a market or to increase its market share might temporarily charge a price for its product that is lower than the price charged for otherwise comparable products in the same market. Furthermore, a taxpayer seeking to enter a new market or expand (or defend) its market share might temporarily incur higher costs (e.g. due to start-up costs or increased marketing efforts) and hence achieve lower profit levels than other taxpayers operating in the same market.

1.116 Timing issues can pose particular problems for tax administrations when evaluating whether a taxpayer is following a business strategy that distinguishes it from potential comparables. Some business strategies, such as those involving market penetration or expansion of market share, involve reductions in the taxpayer's current profits in anticipation of increased future profits. If in the future those increased profits fail to materialise because the purported business strategy was not actually followed by the taxpayer,
1.111 周期的存在（例如经济周期、商业周期或产品周期）属于应当被识别的经济环境之一。在存在周期的情况下，有关数据应用，参见第 3.77 段。

1.112 地区性市场是另一种需要被识别的经济环境。识别相关市场属于事实层面的问题。对于许多行业而言，包括多个国家的大区域市场可能具有同质性；而对于其他一些行业，不同国内市场之间（甚至是同一个国内市场内部）存在着显著差异。

1.113 如果跨国企业集团在数个不同国家进行相似的受控交易，并且这些国家的经济环境实际上具有同质性，该集团可以考虑多个国家的可比性来支持其在这些国家的转让定价政策是恰当的。但是也有不少情况下，跨国企业集团在各国提供的产品或服务范围，以及（或者）在各国执行不同的功能（使用显著不同的资产、承担显著不同的风险），以及（或者）其在各国的商业策略以及（或者）所面临的经济环境显著不同。在这些情形下，采用一套包含多个国家的分析方法可能会降低分析的可靠性。

D.1.6 经营策略

1.114 在进行转让定价分析时，为了界定交易以及确定可比性，对经营策略必须加以审视。经营策略需要考虑到企业的很多方面，如企业创新和新产品开发、多元化经营程度、风险厌恶程度、对政治变动的评估、对现有及计划实施的管理法规的考虑、企业的期限以及其他影响企业日常经营的因素。在确定受控交易（如企业）与非受控交易（如企业）的可比性时，需要对这类经营策略加以考量。

1.115 经营策略也包括市场渗透计划。纳税人在试图对某一市场进行渗透或提高其市场份额时，可能会因为其商品在正常情况下可能在价格较低的情况下获胜。此外，试图进入新市场或提高其市场份额的纳税人可能会暂时地提高其市场份额的纳税水平，因而其获得的利润水平要低于在同一市场经营的其他纳税人。

1.116 在评估纳税人是否采取一项使其区别于其他潜在可比企业的经营策略时，税务机关面临的困难可能包括以下几点。在一些经营策略中，例如有关市场渗透或旨在提高市场份额的经营策略，纳税人预期未来收益能够增长并选择牺牲当期利润。如果未来因纳税人未能执行其所主张的经营策略而使得这些预期的利润增加并未实现，可能需要对纳税人进行转让定价调整以获得合理的转让定价结果。但是，法律方面的限制可能会使税务机关无法对纳税人以往税收年度的事项再次进行检查。至少部分出于以上原因，税务机关会希望对经营策略加以特别关注。
the appropriate transfer pricing outcome would likely require a transfer pricing adjustment. However legal constraints may prevent re-examination of earlier tax years by the tax administrations. At least in part for this reason, tax administrations may wish to subject the issue of business strategies to particular scrutiny.

1.117 When evaluating whether a taxpayer was following a business strategy that temporarily decreased profits in return for higher long-run profits, several factors should be considered. Tax administrations should examine the conduct of the parties to determine if it is consistent with the purported business strategy. For example, if a manufacturer charges its associated distributor a below-market price as part of a market penetration strategy, the cost savings to the distributor may be reflected in the price charged to the distributor’s customers or in greater market penetration expenses incurred by the distributor. A market penetration strategy of an MNE group could be put in place either by the manufacturer or by the distributor acting separately from the manufacturer (and the resulting cost borne by either of them), or by both of them acting in a co-ordinated manner. Furthermore, unusually intensive marketing and advertising efforts would often accompany a market penetration or market share expansion strategy. Another factor to consider is whether the nature of the relationship between the parties to the controlled transaction would be consistent with the taxpayer bearing the costs of the business strategy. For example, in arm’s length transactions a company acting solely as a sales agent with little or no responsibility for long-term market development would generally not bear the costs of a market penetration strategy. Where a company has undertaken market development activities at its own risk and enhances the value of a product through a trademark or trade name or increases goodwill associated with the product, this situation should be reflected in the analysis of functions for the purposes of establishing comparability.

1.118 An additional consideration is whether there is a plausible expectation that following the business strategy will produce a return sufficient to justify its costs within a period of time that would be acceptable in an arm’s length arrangement. It is recognised that a business strategy such as market penetration may fail, and the failure does not of itself allow the strategy to be ignored for transfer pricing purposes. However, if such an expected outcome was implausible at the time of the transaction, or if the business strategy is unsuccessful but nonetheless is continued beyond what an independent enterprise would accept, the arm’s length nature of the business strategy may be doubtful and may warrant a transfer pricing adjustment. In determining what period of time an independent enterprise would accept, tax administrations may wish to consider evidence of the commercial strategies evident in the country in which the business strategy is being pursued. In the end, however, the most important consideration is whether the strategy in question could plausibly be expected to prove profitable within the foreseeable future (while recognising that the strategy might fail), and if a party operating at arm’s length would have been prepared to sacrifice profitability for a similar period under such economic circumstances and competitive conditions.

D.2 Recognition of the accurately delineated transaction

1.119 Following the guidance in the previous section, the transfer pricing analysis will have identified the substance of the commercial or financial relations between the parties, and will have accurately delineated the actual transaction by analysing the economically relevant characteristics.

1.120 In performing the analysis, the actual transaction between the parties will have been deduced from written contracts and the conduct of the parties. Formal conditions recognised in contracts will have been clarified and supplemented by analysis of the conduct of the parties and the other economically relevant characteristics of the transaction (see Section D.1.1). Where the characteristics of the transaction that are economically significant are inconsistent with the written contract, then the actual transaction will have been delineated in accordance with the characteristics of the transaction reflected in the conduct of the parties. Contractual risk assumption and actual conduct with respect to risk assumption will have been examined taking into account control over the risk (as defined in paragraphs 1.65-1.69) and the financial capacity to assume risk (as defined in paragraph 1.64), and consequently, risks assumed under the contract.
1.117 在评估纳税人是否采用了以暂时性的利润下降为代价换取更高的长期利润这种经营策略时，应当对几个因素进行考量。税务机关应当考察交易各方的实际行为是否与其所主张的经营策略相一致。例如，作为市场渗透策略的一部分，生产商将产品以低于市场价格的水平销售给关联分销商。那么对于分销商而言，所节约的成本可能体现在客户的产品售价上，或体现在所发生的大量市场渗透费用上。跨国企业集团的市场渗透策略可能由生产商或仅由销售商的分销商实施（由此导致的成本也由其中一方承担），或者由双方协商实施。此外，不寻常的大量市场营销和广告宣传的资金，将与市场渗透或提高市场份额的策略相关发生。另一个需要考虑的因素是受控交易双方之间关系的性质是否与纳税协议承担经营策略相关成本的情况一致。例如，在独立交易中，如果一家企业仅作为销售代理人，不参与或几乎不参与长期市场的开发，则通常不会由其承担市场渗透策略的成本。当一家企业以自购的用的方式对市场开发活动，并由此提高了产品的价值（通过商标或品牌体现）或增加了与产品相关的商誉，这一情况应在确定可比性的功能分析中予以反映。

1.118 另一个需要考虑的因素是是否可以合理预期采用某一经营策略产生的回报将足以证明企业在某一时间段内发生的成本是合理的，并且该时间段在独立交易安排下是可以被接受的。应由承运经营策略（如市场渗透策略）有可能会失败，但并不能因为失败就在转让定价分析中忽视该策略。然而，如果这一预期结果在交易安排的实践中不具说服力，或者经营策略并不成功但仍被继续执行，以至于超出了独立企业所能接受的程度，那么该经营策略是否符合独立交易原则这一点就值得怀疑并可能导致转让定价调整。在确定独立企业所能接受的时间段时，税务机关可以考虑所在国家与该经营模式有关的商业策略的明显证据。最后，最重要的考量是是否可合理预期所考察的经营模式在可预见的未来是可行的（尽管该策略有可能失败）以及在这样的经济环境和竞争条件下，独立企业是否愿意牺牲类似一段时期内的盈利能力。

D.2 对准确界定的交易的确认

1.119 运用上一章节的相关指导原则进行转让定价分析，可以得出关联企业间商业或财关系的实质，并且通过分析相关经济特征可以准确界定实际发生的交易安排。

1.120 进行转让定价分析时，税务机关可以通过书面合同以及交易双方的实际行为来推断实际发生的交易。
may have been allocated in accordance with the conduct of the parties and the other facts on the basis of steps 4 and 5 of the process for analysing risk in a controlled transaction as reflected in Sections D.1.2.1.4 and D.1.2.1.5. Therefore, the analysis will have set out the factual substance of the commercial or financial relations between the parties and accurately delineated the actual transaction.

1.121 Every effort should be made to determine pricing for the actual transaction as accurately delineated under the arm's length principle. The various tools and methods available to tax administrations and taxpayers to do so are set out in the following chapters of these Guidelines. A tax administration should not disregard the actual transaction or substitute other transactions for it unless the exceptional circumstances described in the following paragraphs 1.122-1.125 apply.

1.122 This section sets out circumstances in which the transaction between the parties as accurately delineated can be disregarded for transfer pricing purposes. Because non-recognition can be contentious and a source of double taxation, every effort should be made to determine the actual nature of the transaction and apply arm's length pricing to the accurately delineated transaction, and to ensure that non-recognition is not used simply because determining an arm's length price is difficult. Where the same transaction can be seen between independent parties in comparable circumstances (i.e. where all economically relevant characteristics are the same as those under which the tested transaction occurs other than that the parties are associated enterprises) non-recognition would not apply. Importantly, the mere fact that the transaction may not be seen between independent parties does not mean that it should not be recognised. Associated enterprises may have the ability to enter into a much greater variety of arrangements than can independent enterprises, and may conclude transactions of a specific nature that are not encountered, or are only very rarely encountered, between independent parties, and may do so for sound business reasons. The transaction as accurately delineated may be disregarded, and if appropriate, replaced by an alternative transaction, where the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner in comparable circumstances, thereby preventing determination of a price that would be acceptable to both of the parties taking into account their respective perspectives and the options realistically available to each of them at the time of entering into the transaction. It is also a relevant pointer to consider whether the MNE group as a whole is left worse off on a pre-tax basis since this may be an indicator that the transaction viewed in its entirety lacks the commercial rationality of arrangements between unrelated parties.

1.123 The key question in the analysis is whether the actual transaction possesses the commercial rationality of arrangements that would be agreed between unrelated parties under comparable economic circumstances, not whether the same transaction can be observed between independent parties. The non-recognition of a transaction that possesses the commercial rationality of an arm's length arrangement is not an appropriate application of the arm's length principle. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured. It should again be noted that the mere fact that the transaction may not be seen between independent parties does not mean that it does not have characteristics of an arm's length arrangement.

1.124 The structure that for transfer pricing purposes, replaces that actually adopted by the taxpayers should comport as closely as possible with the facts of the actual transaction undertaken whilst achieving a commercially rational expected result that would have enabled the parties to come to a price acceptable to both of them at the time the arrangement was entered into.

1.125 The criterion for non-recognition may be illustrated by the following examples.

Example 1
书面合同中的正式条件可以通过分析交易双方的行为以及其他相关经济特征（参见第 D.1.1 节）进一步明确和补充。当具有重大经济影响的交易特征与书面合同不一致时，需要根据交易双方实际行为中所反映的交易特征来界定实际发生的交易。评估合同约定的风险承担和实际的风险承担行为时，应同时考虑风险控制（参见 1.65-1.69 段定义）以及承担风险的财务能力（参见 1.64 段定义）。最终，依照 D.1.2.1.4 和 D.1.2.1.5 节中阐述的受控交易风险分析过程的第 4 和 5 步。合同约定的相关风险可能根据交易双方的实际情况以及其他事实情况进行分配。因此，转让定价分析将可以判定企业间商业或财务关系的实质，并准确界定实际发生的交易情况。

1.121 应当尽可能根据独立交易原则，为已明确界定的关联交易确定价格。《转让定价指南》后继续为税务机关和纳税人提供了各种转让定价工具和方法。除下文第 1.122-1.125 段所述的特殊情况外，税务机关不应将否定实际的交易情况或用其他因素替代实际的交易。

1.122 本节针对转让定价中关联交易经确定后可予以否认的情形作出了说明。对于关联交易的否认可能会引发争议并造成双重征税，因此应尽量确定交易的实质，并为已明确界定的交易确定独立交易价格，确保不会简单化为难以确定独立交易价格即否认该关联交易。当独立企业在可比情况下也会发生同样的交易时（即除了发生交易的双方是关联企业外，交易的所有相关经济特征均与受控交易的相同），税务机关不应否认关联交易。值得注意的是，独立企业间可能会发生类似交易这一事实本身，并不意味着税务机关可以据此否认这些关联交易。相反，独立企业，关联企业间可以制定出更多的合理的交易安排，也可能出于合理的商业理由达成特定性质的交易，而这些性质的交易在独立企业间可能不存在或极少存在。对关联交易进行确认后，如果税务机关认为该关联交易中的相关安排从整体上判断，与企业在可比情况下符合商业合理性的安排不同，并因此无法根据双方各自的利润及其交易时其他可行的选择在双方都可接受的价格时，税务机关可以否定该关联交易，在适当情况下还可用其他交易替代实际交易。此外，税务机关还应考虑跨国企业集团整体通过相关交易安排是否会使税前利润的减少，这也可能表明该交易安排整体上缺乏独立企业之间安排的商业合理性。

1.123 转让定价分析的关键问题在于，关联交易是否具有独立企业在可比经济情况下可能达成的交易安排的商业合理性，而并非独立企业间是否也存在类似交易。如果某一交易具有独立交易安排相同的商业合理性，则对该交易予以否认并不符合独立交易原则。对正当商业交易进行重新构造是完全可取的做法；如果其他筹划税务机关就应如何构造该交易持不同观点而引起双重征税，还会加剧这一不公平的现象。需要重申的是，独立企业间可能发生类似交易这一事实本身，并不意味着这些关联交易安排不具备独立交易的特征。

1.124 在转让定价分析中，税务机关用于替代纳税人实际交易安排的交易结构需要与实际发生的关联交易的相关实际情况尽可能一致。这一构架下所得的合理的商业结果应能够促使交易双方在交易发生时达成双方均可接受的交易价格。

1.125 以下案例进一步说明了对关联交易予以否认的相关标准。
1.126 Company S1 carries on a manufacturing business that involves holding substantial inventory and a significant investment in plant & machinery. It owns commercial property situated in an area prone to increasingly frequent flooding in recent years. Third-party insurers experience significant uncertainty over the exposure to large claims, with the result that there is no active market for the insurance of properties in the area. Company S2, an associated enterprise, provides insurance to Company S1, and an annual premium representing 80% of the value of the inventory, property and contents is paid by Company S1. In this example S1 has entered into a commercially irrational transaction since there is no market for insurance given the likelihood of significant claims, and either relocation or not insuring may be more attractive realistic alternatives. Since the transaction is commercially irrational, there is not a price that is acceptable to both S1 and S2 from their individual perspectives.

1.127 Under the guidance in this section, the transaction should not be recognised. S1 is treated as not purchasing insurance and its profits are not reduced by the payment to S2; S2 is treated as not issuing insurance and therefore not being liable for any claim.

Example 2

1.128 Company S1 conducts research activities to develop intangibles that it uses to create new products that it can produce and sell. It agrees to transfer to an associated company, Company S2, unlimited rights to all future intangibles which may arise from its future work over a period of twenty years for a lump sum payment. The arrangement is commercially irrational for both parties since neither Company S1 nor Company S2 has any reliable means to determine whether the payment reflects an appropriate valuation, both because it is uncertain what range of development activities Company S1 might conduct over the period and also because valuing the potential outcomes would be entirely speculative. Under the guidance in this section, the structure of the arrangement adopted by the taxpayer, including the form of payment, should be modified for the purposes of the transfer pricing analysis. The replacement structure should be guided by the economically relevant characteristics, including the functions performed, assets used, and risks assumed, of the commercial or financial relations of the associated enterprises. Those facts should narrow the range of potential replacement structures to the structure most consistent with the facts of the case (for example, depending on those facts the arrangement could be recast as the provision of financing by Company S2, or as the provision of research services by Company S1, or, if specific intangibles can be identified, as a licence with contingent payments terms for the development of those specific intangibles, taking into account the guidance on hard-to-value intangibles as appropriate).

D.3 Losses

1.129 When an associated enterprise consistently realizes losses while the MNE group as a whole is profitable, the facts could trigger some special scrutiny of transfer pricing issues. Of course, associated enterprises, like independent enterprises, can sustain genuine losses, whether due to heavy start-up costs, unfavourable economic conditions, inefficiencies, or other legitimate business reasons. However, an independent enterprise would not be prepared to tolerate losses that continue indefinitely. An independent enterprise that experiences recurring losses will eventually cease to undertake business on such terms. In contrast, an associated enterprise that realizes losses may remain in business if the business is beneficial to the MNE group as a whole.

1.130 The fact that there is an enterprise making losses that is doing business with profitable members of its MNE group may suggest to the taxpayers or tax administrations that the transfer pricing should be examined. The loss enterprise may not be receiving adequate compensation from the MNE group of which it is a part in relation to the benefits derived from its activities. For example, an MNE group may need to produce a full range of products and/or services in order to remain competitive and realize an overall profit, but some of the individual product lines may regularly lose revenue. One member of the MNE group might
案例 1
1.126 S1 公司主要从事生产业务，拥有大量存货并对厂房及设备进行了大量投资。S1 公司拥有的商业
财产所在地近年来洪涝灾害频发频繁，而第三方保险公司因此面临着高潜的潜在大额索赔风险，导致在地
方设有第三方保险公司提供财产保险业务。S2 公司作为 S1 公司的关联企业，为 S1 公司提供保险服务，而
S1 公司每年需要向 S2 公司支付相当于其存货、财产以及所有物总值的 80%作为保险费用。在这一案例中，
因潜在的索赔风险极高而不存在相关财产保险业务的公开市场，且延或不投保可能对 S1 公司而言是有
更吸引力的现实可行的选择，所以 S1 公司和其关联方达成的交易不具备商业合理性。由于缺乏这种商业
合理性，在这一交易中不存在 S1 公司和 S2 公司从各自角度都能接受的价格。
1.127 根据本节的指导原则，税务机关可以否认 S1 公司与 S2 公司之间的关联交易。S1 公司不应被视为
没有购买保险，其向 S2 公司支付的保费不能在税前扣除；S2 公司不应被视为没有为 S1 公司提供保险服务，
不应受 S1 公司的索赔承担相关责任。
案例 2
1.128 S1 公司开展无形资产研发活动，并使用这些无形资产创造自产自销的产品。S1 公司与其关联企
业 S2 公司约定，向 S2 公司转让未来 20 年内 S1 公司所有研发活动产生的无形资产的使用权。S2 公司
向 S1 公司一次性支付转让费用。这一交易缺乏商业合理性，因为交易双方都无法确定 S1 公司在 20 年
期限内会进行怎样的研发活动，同时也完全无法确定待开发研发成果的价值，因而无论是 S1 公司还是 S2
公司都无法通过合理的方法确定 S2 公司向 S1 公司一次支付的价格是否反映了所转让的无形资产权利的恰
当价值。根据本节指南，在进行转让定价分析时，应对纳税人采用的交易架构（包括付款方式）进行调整。
假设架构需要符合 S1 公司和 S2 公司之间商业或财务关系的相关经济特征，包括交易双方执行的功能、使
用的资产、承担的风险。对以上因素进行考量有助于缩小可选替代架构的范围，以找到最符合实际情况的
交易架构（例如，根据上述案例中的具体情况，相关关联交易安排可以被重新构造为 S2 公司提供融资，
或 S1 公司提供研发服务，或者如果能识别出具有独特性的无形资产，则根据基于难以估算的无形资产的
相关指导原则，相关交易安排可以被重新构造成为 S1 公司和 S2 公司达成了一项采用浮动付款方式的特许权交
易）。
D.3 亏损
1.129 当一家关联企业长期处于亏损，但其所属的跨国企业集团整体却盈利时，可能引发税务机关对
该企业的关联交易安排的重新审视。当然，无论是出于过高的开办费用，不计的经济条件、低下的效率或
者其他合理的商业原因，关联交易也可能像独立企业一样遭受损失。但是，独立企业不会容忍亏损长期
地持续下去。经历重复亏损的独立企业会最终选择停止在原有条件下开展业务。相比之下，如果该业务对
于跨国企业集团整体是有利的，发生亏损的关联企业可能会继续开展该业务。
1.130 跨国企业集团内有一家与集团内盈利的成员企业有业务往来的亏损企业，这一事实可能暗示纳税人
或税务机关需要对相关的转让定价安排进行审查。亏损企业可能并未从其所在的跨国企业集团取得与该
活动所产生的收益相匹配的充分补偿。
realize consistent losses because it produces all the loss-making products while other members produce the profit-making products. An independent enterprise would perform such a service only if it were compensated by an adequate service charge. Therefore, one way to approach this type of transfer pricing problem would be to deem the loss enterprise to receive the same type of service charge that an independent enterprise would receive under the arm’s length principle.

1.131 A factor to consider in analysing losses is that business strategies may differ from MNE group to MNE group due to a variety of historic, economic, and cultural reasons. Recurring losses for a reasonable period may be justified in some cases by a business strategy to set especially low prices to achieve market penetration. For example, a producer may lower the prices of its goods, even to the extent of temporarily incurring losses, in order to enter new markets, to increase its share of an existing market, to introduce new products or services, or to discourage potential competitors. However, especially low prices should be expected for a limited period only, with the specific object of improving profits in the longer term. If the pricing strategy continues beyond a reasonable period, a transfer pricing adjustment may be appropriate, particularly where comparable data over several years show that the losses have been incurred for a period longer than that affecting comparable independent enterprises. Further, tax administrations should not accept especially low prices (e.g. pricing at marginal cost in a situation of underemployed production capacities) as arm’s length prices unless independent enterprises could be expected to have determined prices in a comparable manner.

D.4 The effect of government policies

1.132 There are some circumstances in which a taxpayer will consider that an arm’s length price must be adjusted to account for government interventions such as price controls (even price cuts), interest rate controls, controls over payments for services or management fees, controls over the payment of royalties, subsidies to particular sectors, exchange control, anti-dumping duties, or exchange rate policy. As a general rule, these government interventions should be treated as conditions of the market in the particular country, and in the ordinary course they should be taken into account in evaluating the taxpayer’s transfer price in that market. The question then presented is whether in light of these conditions the transactions undertaken by the controlled parties are consistent with transactions between independent enterprises.

1.133 One issue that arises is determining the stage at which a price control affects the price of a product or service. Often the direct impact will be on the final price to the consumer, but there may nonetheless be an impact on prices paid at prior stages in the supply of goods to the market. MNEs in practice may make no adjustment in their transfer prices to take account of such controls, leaving the final seller to suffer any limitation on profit that may occur, or they may charge prices that share the burden in some way between the final seller and the intermediate supplier. It should be considered whether or not an independent supplier would share in the costs of the price controls and whether an independent enterprise would seek alternative product lines and business opportunities. In this regard, it is unlikely that an independent enterprise would be prepared to produce, distribute, or otherwise provide products or services on terms that allowed it no profit. Nevertheless, it is quite obvious that a country with price controls must take into account that those price controls will affect the profits that can be realized by enterprises selling goods subject to those controls.

1.134 A special problem arises when a country prevents or “blocks” the payment of an amount which is owed by one associated enterprise to another or which in an arm’s length arrangement would be charged by one associated enterprise to another. For example, exchange controls may effectively prevent an associated enterprise from transferring interest payments abroad on a loan made by another associated enterprise located in a different country. This circumstance may be treated differently by the two countries involved: the country of the borrower may or may not regard the untransferred interest as having been paid, and the country of the lender may or may not treat the lender as having received the interest. As a general
例如，跨国企业集团为了保持市场竞争力并实现整体盈利，可能需要在多系列的产品和服务中保持领先地位。某些个别产品线可能处于亏损状态，但其他家族成员企业可能依赖于该产品线来实现盈利。因此，解决这类转让定价问题的一个方法是认定那些亏损企业应获得独立企业在相同情况下按照独立交易原则所应获得的报酬。

1.3.1 在分析亏损时，需要考虑的一个因素是跨国企业集团拟议的营业策略可能因各类历史、经济以及文化原因而存在重大差异。在某些情况下，为实现市场渗透的目标而设定特别低的价格这一营业策略可作为在一段合理期限内发生持续亏损的正当理由。例如，一个生产企业为了打入市场、提高市场份额，引入新产品或服务或迫使潜在竞争者退出市场，可能会降低其产品的价格，尽管短期内发生亏损。然而，特别低的价格只有在有限的时期内可能产生，且是为了实现长期战略目标这一特定目的。如果低价策略的执行超出了合理的时间跨度，尤其是当多年可比数据显示持续亏损的时间超过了可比独立企业所能接受的水平时，进行转让定价调整可能是恰当的。此外，税务机关不应接受过低的销售价格（如在生产能力并未得到充分利用的情况下，按照边际成本定价），除非独立企业在相同情况下可能以同样的方式来制定价格。

D.4 政策影响

在某些情况下，跨国企业集团应考虑对独立交易价格做出调整以反映政府干预的影响。例如价格控制（甚至降价）、利率管制、服务费或管理费支付控制、特许权使用费支付控制、特定行业补贴、外汇管制、反倾销关税等政策。一般而言，这些政府干预应被视为独立企业的市场条件。在评估纳税人如何在转让定价时应予以考虑，随之而来的问题是，考虑到这些条件，关联企业间的交易与独立企业间的交易是否一致。

1.3.3 由此引发的一个问题是确定价格控制在哪些阶段影响产品或服务的价格。受价格控制直接影响的产品是销售给最终消费者的最低价格，但在此阶段供应链条的阶段所支付的价格也有可能受到影响。在实际操作中，跨国企业集团可能并不会就价格控制带来的影响调整其转让价格，而是由最终销售商来承受价格控制对利润的限制。或者跨国企业集团可能设定这样一个转让价格，使所影响的利润在最终销售商和中间环节供应商之间分担。应考虑独立的供应商是否愿意分担价格控制带来的成本，以及独立的供应商是否会选择其他可行的产品线或商业机会。对于独立企业是否在无法获益的条件下生产、分销或提供产品或服务，很显然，实行价格控制的国家必须考虑到这些价格控制将会影响到销售受管制产品的企业的利益。

1.3.4 当一国阻止或“阻碍”一家关联企业向另一家关联企业支付所欠款项，或一家关联企业向另一家关联企业收取或提供交易款项时，会带来一个特殊的转让定价问题。例如，外汇管制可以有效阻止一家关联企业向另一家境外关联企业支付贷款利息。
rule, where the government intervention applies equally to transactions between associated enterprises and transactions between independent enterprises (both in law and in fact), the approach to this problem where it occurs between associated enterprises should be the same for tax purposes as that adopted for transactions between independent enterprises. Where the government intervention applies only to transactions between associated enterprises, there is no simple solution to the problem. Perhaps one way to deal with the issue is to apply the arm's length principle viewing the intervention as a condition affecting the terms of the transaction. Treaties may specifically address the approaches available to the treaty partners where such circumstances exist.

1.135 A difficulty with this analysis is that often independent enterprises simply would not enter into a transaction in which payments were blocked. An independent enterprise might find itself in such an arrangement from time to time, most likely because the government interventions were imposed subsequent to the time that the arrangement began. But it seems unlikely that an independent enterprise would willingly subject itself to a substantial risk of non-payment for products or services rendered by entering into an arrangement when severe government interventions already existed unless the profit projections or anticipated return from the independent enterprise's proposed business strategy are sufficient to yield an acceptable rate of return notwithstanding the existence of the government intervention that may affect payment.

1.136 Because independent enterprises might not engage in a transaction subject to government interventions, it is unclear how the arm's length principle should apply. One possibility is to treat the payment as having been made between the associated enterprises, on the assumption that an independent enterprise in a similar circumstance would have insisted on payment by some other means. This approach would treat the party to whom the blocked payment is owed as performing a service for the MNE group. An alternative approach that may be available in some countries would be to defer both the income and the relevant expenses of the taxpayer. In other words, the party to whom this blocked payment was due would not be allowed to deduct expenses, such as additional financing costs, until the blocked payment was made. The concern of tax administrations in these situations is mainly their respective tax bases. If an associated enterprise claims a deduction in its tax computations for a blocked payment, then there should be corresponding income to the other party. In any case, a taxpayer should not be permitted to treat blocked payments due from an associated enterprise differently from blocked payments due from an independent enterprise.

D.5 Use of customs valuations

1.137 The arm's length principle is applied, broadly speaking, by many customs administrations as a principle of comparison between the value attributable to goods imported by associated enterprises, which may be affected by the special relationship between them, and the value for similar goods imported by independent enterprises. Valuation methods for customs purposes however may not be aligned with the OECD's recognised transfer pricing methods. That being said, customs valuations may be useful to tax administrations in evaluating the arm's length character of a controlled transaction transfer price and vice versa. In particular, customs officials may have contemporaneous information regarding the transaction that could be relevant for transfer pricing purposes, especially if prepared by the taxpayer, while tax authorities may have transfer pricing documentation which provides detailed information on the circumstances of the transaction.

1.138 Taxpayers may have competing incentives in setting values for customs and tax purposes. In general, a taxpayer importing goods may be interested in setting a low price for the transaction for customs purposes so that the customs duty imposed will be low. (There could be similar considerations arising with respect to value added taxes, sales taxes, and excise taxes.) For tax purposes, however, a higher price paid for those same goods would increase the deductible costs in the importing country (although this would
涉及的两个国家处理这一问题的方式可能不同。借款方所在国可能会也可能不会要求该未付利息已由借款方支付。而贷款方所在国可能会也可能不会认为贷款方已收到对应的利息。一般而言，如果政府干涉（在法律上和事实上）适用于关联交易和独立交易，出于税务的目的，应对关联交易和独立交易采取同样的解决手段。当政府干涉仅适用于关联企业间的交易时，该问题不会存在简单的解决方案。可能的处理方式是运用独立交易原则，将政府干涉视同为影响交易条款的一个条件。税收协定中对这种情况下协定各方可采用的方法可能存在特别说明。

1.135 这类分析的难点是如果付款会被阻挠，独立企业通常不会进行交易。独立企业有时也可能会碰到这样的交易安排，最可能的原因是在交易开始之后政府才进行类似干预。但是，独立企业不太可能会在存在重大政府干预的情况下进行某项交易以至于使自身遭受无法收回销售产品或提供服务对应款项的重大会计风险。除非尽管存在可能影响付款的政府干预，独立企业计划的经营策略所产生的预期内部回报率足够使其获得一个可接受的回报率水平。

1.136 由于独立企业往往不会从事受政府干预的交易，在这类问题中如何应用独立交易原则尚不明确。可能的处理办法之一是假设独立企业在类似情况下会愿意以其他方式进行支付，那么应当视同该款项已在关联企业间进行支付。这种方法将交易中的被欠方视为向跨国企业集团提供了服务。在某些国家可行的另一种办法是视同纳税人的收入及相关费用的确认；换言之，应支付这一受阻款项的一方在支付完成前，不得抵扣费用（如额外的财务费用）。这种情况下，各国税务机关主要关注的是其各自的税基。如果一家关联企业在计算税基时列支了支付受阻的款项，那么另一家关联企业就应确保存款的收入。在任何情况下，对于分别从关联企业和非关联企业收取的支付受阻的款项，纳税方不得采用不同的处理方法。

D.5 海关估价的应用

1.137 一般而言，很多海关部门将独立交易原则作为一项准则，用于比较关联企业进口货物的价格（该价格可能会受关联企业间特殊关系的影响）和独立企业进口类似货物的价格。然而，海关所用的估价方法与 OECD 所认可的转让定价方法可能并不一致。换言之，海关估价可能有助于税务机关评估关联企业间受控交易转让定价是否符合独立交易原则，反之亦然。特别是海关部门可能掌握可用于转让定价分析的交易相关的同期信息（尤其在信息由纳税人准备的情况下），而税务机关则掌握了对关联交易情况进行详细说明的转让定价文档。

1.138 出于海关和税务的不同目的，纳税人在设定产品价格时很会有人工的动机。一般而言，进口货物的纳税人可能会出于设定较低的交易价格以少缴关税（对增值税、营业税和消费税也会有类似考量）的目的，将货物关税估价偏低。
also increase the sales revenue of the seller in the country of export). Cooperation between income tax and customs administrations within a country in evaluating transfer prices is becoming more common and this should help to reduce the number of cases where customs valuations are found unacceptable for tax purposes or vice versa. Greater cooperation in the area of exchange of information would be particularly useful, and should not be difficult to achieve in countries that already have integrated administrations for income taxes and customs duties. Countries that have separate administrations may wish to consider modifying the exchange of information rules so that the information can flow more easily between the different administrations.

D.6 Location savings and other local market features

1.139 Paragraphs 1.110, 1.112 and 6.120 indicate that features of the geographic market in which business operations occur can affect comparability and arm’s length prices. Difficult issues can arise in evaluating differences between geographic markets and in determining appropriate comparability adjustments. Such issues may arise in connection with the consideration of cost savings attributable to operating in a particular market. Such savings are sometimes referred to as location savings. In other situations, comparability issues can arise in connection with the consideration of local market advantages or disadvantages that may not be directly related to location savings.

D.6.1 Location savings

1.140 Paragraphs 9.148 – 9.153 discuss the treatment of location savings in the context of a business restructuring. The principles described in those paragraphs apply generally to all situations where location savings are present, not just in the case of a business restructuring.

1.141 Pursuant to the guidance in paragraphs 9.148 – 9.153, in determining how location savings are to be shared between two or more associated enterprises, it is necessary to consider (i) whether location savings exist; (ii) the amount of any location savings; (iii) the extent to which location savings are either retained by a member or members of the MNE group or are passed on to independent customers or suppliers; and (iv) where location savings are not fully passed on to independent customers or suppliers, the manner in which independent enterprises operating under similar circumstances would allocate any retained net location savings.

1.142 Where the functional analysis shows that location savings exist that are not passed on to customers or suppliers, and where comparable entities and transactions in the local market can be identified, those local market comparables will provide the most reliable indication regarding how the net location savings should be allocated amongst two or more associated enterprises. Thus, where reliable local market comparables are available and can be used to identify arm’s length prices, specific comparability adjustments for location savings should not be required.

1.143 When reliable local market comparables are not present, determinations regarding the existence and allocation of location savings among members of an MNE group, and any comparability adjustments required to take into account location savings, should be based on an analysis of all of the relevant facts and circumstances, including the functions performed, risks assumed, and assets used of the relevant associated enterprises, in the manner described in paragraphs 9.148 – 9.153.

D.6.2 Other local market features

1.144 Features of the local market in which business operations occur may affect the arm’s length price with respect to transactions between associated enterprises. While some such features may give rise to location savings, others may give rise to comparability concerns not directly related to such savings. For example, the comparability and functional analysis conducted in connection with a particular matter may
然而，出于税务目的，更高的进口价格将增加在进口国可税前列支的成本（尽管这样也会增加出口方在出口国的销售收入）。一国所得税管理部门和海关管理部门之间在转让定价评估方面的合作愈发普遍。这有助于减少税务机关无法认可海关估价的情况，反之亦然。双方在信息交换方面的进一步协作将尤其有益。这的合作在已整合所得税和关税管理部门的国家应当不难实现。两个管理部门分立的国家可以考虑改善信息交换机制，从而促使不同部门间的信息交流更为流畅。

D.6  选址节约和其他本地市场特征

第1.110、1.112以及6.120段说明企业经营所在的地域市场的特征会影响可比性和独立交易价格。在衡量不同地域市场的差异并确定合理的可比性调整时可能会存在一些难题，例如在评估特定市场经营所带来的成本节约时。这类成本节约有时也被称为选址节约。在其他情况下，与选址节约不直接相关的本地市场优势或劣势也可能会带来可比性问题。

D.6.1  选址节约

《转让定价指南》第9.148-9.153段讨论了企业在重组背景下选址节约的处理方法。这些条款中提及的原则不及针对企业重组，而普遍适用于所有存在选址节约的情形。

根据《转让定价指南》第9.148-9.153段的指导原则，在确定两家或以上关联企业如何分享选址节约时，需考虑（1）选址节约是否确实存在，（2）选址节约的金额，（3）选址节约在何种程度上被保留在跨国企业集团的一方或多方，或者转嫁给独立的客户或供应商以及（4）如果选址节约并未完全转嫁给独立的客户或供应商，独立企业在相似情形下会保留多少选址节约金额。

如果功能分析显示选址节约并未转嫁给客户或供应商，并且可以找到处于本地市场的可比企业和交易，这些可比对象为如何在两家或以上关联企业间分配选址节约金额提供了最为可靠的参考。因此，若能找到可靠的本地市场可比对象从而确定独立交易价格，则无需对选址节约进行特殊的可比性调整。

当不能找到可比的本地市场可比对象时，对于评估和确定是否存在选址节约，如何在集团成员企业间分配选址节约以及由于选址节约所需进行的任何可比性调整，应参照《转让定价指南》第9.148-9.153段的指导原则并基于对所有相关事实和情况（包括关联企业执行的功能、承担的风险以及使用的资产）进行分析。

D.6.2  其他本地市场特征

企业经营所在的本地市场特征可能会影响关联企业间的独立交易价格。
suggest that the relevant characteristics of the geographic market in which products are manufactured or sold, the purchasing power and product preferences of households in that market, whether the market is expanding or contracting, the degree of competition in the market and other similar factors affect prices and margins that can be realised in the market. Similarly, the comparability and functional analysis conducted in connection with a particular matter may suggest that the relative availability of local country infrastructure, the relative availability of a pool of trained or educated workers, proximity to profitable markets, and similar features in a geographic market where business operations occur create market advantages or disadvantages that should be taken into account. Appropriate comparability adjustments should be made to account for such factors where reliable adjustments that will improve comparability can be identified.

1.145 In assessing whether comparability adjustments for such local market features are required, the most reliable approach will be to refer to data regarding comparable uncontrolled transactions in that geographic market between independent enterprises performing similar functions, assuming similar risks, and using similar assets. Such transactions are carried out under the same market conditions as the controlled transaction, and, accordingly, where comparable transactions in the local market can be identified, specific adjustments for features of the local market should not be required.

1.146 In situations where reasonably reliable local market comparables cannot be identified, the determination of appropriate comparability adjustments for features of the local market should consider all of the relevant facts and circumstances. As with location savings, in each case where reliable local market comparables cannot be identified, it is necessary to consider (i) whether a market advantage or disadvantage exists, (ii) the amount of any increase or decrease in revenues, costs or profits, vis-à-vis those of identified comparables from other markets, that are attributable to the local market advantage or disadvantage, (iii) the degree to which benefits or burdens of local market features are passed on to independent customers or suppliers, and (iv) where benefits or burdens attributable to local market features exist and are not fully passed on to independent customers or suppliers, the manner in which independent enterprises operating under similar circumstances would allocate such net benefits or burdens between them.

1.147 The need for comparability adjustments related to features of the local market in cases where reasonably reliable local market comparables cannot be identified may arise in several different contexts. In some circumstances, market advantages or disadvantages may affect arm's length prices of goods transferred or services provided between associated enterprises.

1.148 In other circumstances, a business restructuring or the transfer of intangibles between associated enterprises may make it possible for one party to the transaction to gain the benefit of local market advantages or require that party to assume the burden of local market disadvantages in a manner that would not have been possible in the absence of the business restructuring or transfer of the intangibles. In such circumstances, the anticipated existence of local market advantages and disadvantages may affect the arm's length price paid in connection with the business restructuring or intangible transfer.

1.149 In conducting a transfer pricing analysis it is important to distinguish between features of the local market, which are not intangibles, and any contractual rights, government licences, or know-how necessary to exploit that market, which may be intangibles. Depending on the circumstances, these types of intangibles may have substantial value that should be taken into account in a transfer pricing analysis in the manner described in Chapter VI, including the guidance on rewarding entities for functions, assets and risks associated with the development of intangibles contained in Section B of Chapter VI. In some circumstances, contractual rights and government licences may limit access of competitors to a particular market and may therefore affect the manner in which the economic consequences of local market features are shared between parties to a particular transaction. In other circumstances, contractual rights or
某些本地市场特征会带来选择显著影响。其他的可能会造成与选择显著不直接相关的可比性影响。例如，针对特定项目和功能分析可能表明产品生产或销售所在地市场的相关特征。当地的市场、家庭购买力和产品偏好、市场是在增长还是萎缩、市场的竞争程度以及其他因素都会对市场的价格产生影响。同样，针对特定项目的可比性和功能分析也可能表明本地市场基础设施的配备、训练有素或受过教育的工人的数量、与盈利市场的距离以及经营所在地市场的其他特征可能会带来市场优势或劣势。对此应予以分析。如果能够进行合理的、可靠的调整以提高可比性，则应进行调整以消除这些因素的影响。

1.145 在评估是否需要对本地市场特征进行可比性调整时，最可靠的方法是参照对本地市场中执行类似功能、承担类似风险并使用类似资产的独立企业间的可比非受控交易的数据。这些交易的市场条件和受控交易一致，因此，当可以找到本地市场的可比交易时，无需对本地市场特征进行特殊调整。

1.146 当无法找到可靠的本地市场可比对象时，对本地市场特征进行可比性调整需要考虑所有相关的事实和情况。与选择可比的分析相间，无法找到可靠的本地市场可比企业的情况下，需要考虑（1）是否存在市场优势或劣势；（2）与其他市场相比，本地市场中其他企业的收入、成本或利润的增加或减少的金额；（3）本地市场特征带来的利益或损失在何种程度上转嫁给独立的客户或供应商；（4）当存在由本地市场特征带来的利益或损失且未完全转嫁给独立的客户或供应商时，独立企业在类似条件下会保留多少净收益或损失。

1.147 无法找到可靠的本地市场可比对象而需对本地市场特征进行可比性调整可能在多种情形下发生。有时，市场优势或劣势可能会影响关联企业间转让商品或提供服务的独立交易价格。

1.148 在另一些情况下，当关联企业进行企业重组或转让无形资产时，交易的一方可能会获得本地市场优势或承受本地市场劣势。而这些优势或劣势在没有发生企业重组或无形资产转让的情况下并不存在，且预期存在市场优势或劣势会影响企业重组或转让无形资产的独立交易价格。

1.149 在进行转让定价分析时，应区分本地市场特征以及开发市场所需任何合同权利、政府许可或专利技术等。前者是无形资产，后者是无形资产。取决于具体情况，这些无形资产可能具有重大的商业价值，应根据报告第六章的指导原则（包括第六章第 B 节中对于企业在开发无形资产过程中执行的功能、使用的资产以及承担的风险进行补偿的指导原则）在转让定价分析中对其予以考量。
government licences to access a market may be available to many or all potential market entrants with little restriction.

1.150 For example, a country may require a regulatory licence to be issued as a pre-condition for conducting an investment management business in the country and may restrict the number of foreign-owned firms to which such licences are granted. The comparability and functional analysis may indicate that qualifying for such a licence requires demonstrating to appropriate government authorities that the service provider has appropriate levels of experience and capital to conduct such a business in a reputable fashion. The market to which such a licence relates may also be one with unique features. It may, for example be a market where the structure of pension and insurance arrangements gives rise to large cash pools, a need to diversify investments internationally, and a resulting high demand for quality investment management services and knowledge of foreign financial markets that can make the provision of such services highly lucrative. The comparability analysis may further suggest that those features of the local market may affect the price that can be charged for certain types of investment management services and the profit margins that may be earned from providing such services. Under these circumstances, the intangible in question (i.e. the regulatory licence to provide investment management services) may allow the party or parties holding the licence to extract a greater share of the benefits of operating in the local market, including the benefits provided by unique features of that market, than would be the case in the absence of the licensing requirement. However, in assessing the impact of the regulatory licence, it may be important in a particular case to consider the contributions of both the local group member in the local market and other group members outside the local market in supplying the capabilities necessary to obtain the licence, as described in Section B of Chapter VI.

1.151 In a different circumstance, the comparability and functional analysis may suggest that a government issued business licence is necessary as a pre-condition for providing a particular service in a geographic market. However, it may be the case that such licences are readily available to any qualified applicant and do not have the effect of restricting the number of competitors in the market. Under such circumstances, the licence requirement may not present a material barrier to entry, and possession of such a licence may not have any discernible impact on the manner in which the benefits of operating in the local market are shared between independent enterprises.

D.7 Assembled workforce

1.152 Some businesses are successful in assembling a uniquely qualified or experienced cadre of employees. The existence of such an employee group may affect the arm's length price for services provided by the employee group or the efficiency with which services are provided or goods produced by the enterprise. Such factors should ordinarily be taken into account in a transfer pricing comparability analysis. Where it is possible to determine the benefits or detriments of a unique assembled workforce vis-à-vis the workforce of enterprises engaging in potentially comparable transactions, comparability adjustments may be made to reflect the impact of the assembled workforce on arm's length prices for goods or services.

1.153 In some business restructuring and similar transactions, it may be the case that an assembled workforce is transferred from one associated enterprise to another as part of the transaction. In such circumstances, it may well be that the transfer of the assembled workforce along with other transferred assets of the business will save the transferee the time and expense of hiring and training a new workforce. Depending on the transfer pricing methods used to evaluate the overall transaction, it may be appropriate in such cases to reflect such time and expense savings in the form of comparability adjustments to the arm's length price otherwise charged with respect to the transferred assets. In other situations, the transfer of the assembled workforce may result in limitations on the transferee's flexibility in structuring business operations and create potential liabilities if workers are terminated. In such cases it may be appropriate for
在某些情况下，合同权利和政府许可会限制竞争对手进入某一特定市场，进而可能会影响本地市场特征所带来的经济结果在特定交易当事方之间的分配。在另一些情况下，许多甚至所有潜在市场进入者都可以获得进入某一市场的相关合同权利或政府许可，对此几乎没有限制。

1.150 例如，某国可能要求企业在该国开展投资管理业务首先获得相关的监管许可，并且可能会限制获得该许可的外资企业的数量。可比性和功能分析显示为了具备获得相关许可的资质，企业需要向政府机关证明自身信誉良好且具备提供相关服务的经验和资金。需要许可进入的市场也可能具有独特性。举例来说，在某一市场中，退休金和保险计划的运作会带来规模庞大的资金池，进行全球多市场化投资的必要性以及由此产生的对优质投资管理服务和海外资本市场知识的高需求会使得提供相关服务获利甚丰。可比性分析可能进一步显示本地市场的这些特征会影响某些投资管理服务的收费以及从中获得的利润水平。在这种情况下，相关无形资产（即允许提供投资管理服务的政府许可）会使获得许可的企业相对于在无需政府许可的市场中运营获取更多的利益（包括本地市场的独特性所带来的利益）。然而，在评估该监管许可的影响力时，根据第5章第B节的指导原则，应重点考虑为了获得相关许可，本地企业和非本地的集团内关联企业各自所做出的贡献。

1.151 在其他情况下，可比性和功能分析可能显示，即使政府颁发的营业执照是在特定地域市场提供某种服务的先决条件，但对符合条件的申请人而言都可轻松获得营业执照且不会因此限制市场中竞争者的数量。此时，相应的许可要求并不构成具有重大影响的市场壁垒因素，并且拥有相关许可也不会使得独立企业本地市场运营中获得明显的利益。

D.7 集合劳动力

1.152 有些企业能成功培育具备独特资质和经验的骨干员工。这些员工的存在可能会对其所提供的服务的独立交易价格、其所在企业提供服务或生产产品的效率产生影响。转让定价的可比性分析通常需要考虑这些因素。当可以判断相比潜在可比交易中的劳动力，独特的集合劳动力所带来的利益或损害时，可能需要进行可比性调整以反映集合劳动力对于产品或服务独立交易价格的影响。

1.153 在一些企业重组或类似交易中，集合劳动力作为交易的一部分可能由某一关联企业向另一关联企业转移。此时，受让方可能因集合劳动力和其他企业资产—并转让节省了招聘和培训新劳动力的时间和费用。根据评估整体交易的转让定价方法，可能可以通过对转让资产的独立交易价格进行可比性调整来体现这一时间和费用的节约。
the compensation paid in connection with the restructuring to reflect the potential future liabilities and limitations.

1.154 The foregoing paragraph is not intended to suggest that transfers or secondments of individual employees between members of an MNE group should be separately compensated as a general matter. In many instances the transfer of individual employees between associated enterprises will not give rise to a need for compensation. Where employees are seconded (i.e. they remain on the transferor’s payroll but work for the transferee), in many cases the appropriate arm’s length compensation for the services of the seconded employees in question will be the only payment required.

1.155 It should be noted, however, that in some situations, the transfer or secondment of one or more employees may, depending on the facts and circumstances, result in the transfer of valuable know-how or other intangibles from one associated enterprise to another. For example, an employee of Company A seconded to Company B may have knowledge of a secret formula owned by Company A and may make that secret formula available to Company B for use in its commercial operations. Similarly, employees of Company A seconded to Company B to assist with a factory start-up may make Company A manufacturing know-how available to Company B for use in its commercial operations. Where such a provision of know-how or other intangibles results from the transfer or secondment of employees, it should be separately analysed under the provisions of Chapter VI and an appropriate price should be paid for the right to use the intangibles.

1.156 Moreover, it should also be noted that access to an assembled workforce with particular skills and experience may, in some circumstances, enhance the value of transferred intangibles or other assets, even where the employees making up the workforce are not transferred. Example 23 in the Annex to Chapter VI illustrates one fact pattern where the interaction between intangibles and access to an assembled workforce may be important in a transfer pricing analysis.

D.8 MNE group synergies

1.157 Comparability issues, and the need for comparability adjustments, can also arise because of the existence of MNE group synergies. In some circumstances, MNE groups and the associated enterprises that comprise such groups may benefit from interactions or synergies amongst group members that would not generally be available to similarly situated independent enterprises. Such group synergies can arise, for example, as a result of combined purchasing power or economies of scale, combined and integrated computer and communication systems, integrated management, elimination of duplication, increased borrowing capacity, and numerous similar factors. Such group synergies are often favourable to the group as a whole and therefore may heighten the aggregate profits earned by group members, depending on whether expected cost savings are, in fact, realised, and on competitive conditions. In other circumstances such synergies may be negative, as when the size and scope of corporate operations create bureaucratic barriers not faced by smaller and more nimble enterprises, or when one portion of the business is forced to work with computer or communication systems that are not the most efficient for its business because of group wide standards established by the MNE group.

1.158 Paragraph 7.13 of these Guidelines suggests that an associated enterprise should not be considered to receive an intra-group service or be required to make any payment when it obtains incidental benefits attributable solely to its being part of a larger MNE group. In this context, the term incidental refers to benefits arising solely by virtue of group affiliation and in the absence of deliberate concerted actions or transactions leading to that benefit. The term incidental does not refer to the quantum of such benefits or suggest that such benefits must be small or relatively insignificant. Consistent with this general view of benefits incidental to group membership, when synergistic benefits or burdens of group membership arise purely as a result of membership in an MNE group and without the deliberate concerted
在其他情况下，集合劳动力的转移可能会限制受让方对企业运营进行调整的灵活性，并使受让方负担终止劳动合同对应的潜在义务。此时，可能可以在企业重组支付的对价中考虑对受让方承担的潜在义务和限制进行补偿。

1.154 上述段落意味着跨国企业集团中员工个人的转移或派遣需要进行单独补偿。在很多情况下，关联企业间的员工个人的转移并不会伴随相应的补偿。当企业派遣员工时（即是派遣员工的薪酬仍由转让方支付，但派遣员工为受让方工作），在很多情况下，唯一需要支付的款项就是被派遣员工所提供的服务的价值。

1.155 然而需要注意的是，根据具体的事宜和情况，一个企业在转移或派遣时可能会造成具有重大价值的专有技术或无形资产从一个关联企业向另一关联企业转移。例如，A 公司向 B 公司派遣的员工可能拥有 A 公司所有的一项保密配方的相关知识，这样 B 公司就有可能在该商业运营中使用该知识。同样，当 A 公司向 B 公司派遣员工并获 B 公司设立工厂时，B 公司有可能将 A 公司的生产中专有技术用于自身的商业运营。如果员工的转移或派遣使得另一企业可以获得专有技术或其他无形资产，D.8 跨国企业集团协同效应

1.156 此外，当企业可以使用具体的技术和经验的集合劳动力时，在某些情况下即可构成集合劳动力的员工并未实际转移，也会提升已转让的无形资产或其它资产的价值。第六章附录二的部分案例 23 对于转让定价分析中可能需要重点考虑无形资产和使用集合劳动力的相互作用进行了举例说明。

D.8 跨国企业集团协同效应

1.157 跨国企业集团的协同效应也可能会带来可比性问题，并可能需要进行可比性调整。某些情况下，跨国企业集团及其下属关联企业可能从集团成员间的内在联系或协同效益中获益，而在独立企业间几乎不存在类似的内在联系或协同效益。举例来说，跨国企业集团的协同效益可能通过以下途径获得：集中购买力或经济规模效应、整合计算机和通信系统、整合管理功能、消除重复活动、提升借款能力以及众多其他相似的因素。这种协同效益通常对集团整体有益，可以提高集团成员获得的合并净利润，但要取决于预期的成本节约是否能够实现以及相关的竞争条件。在其他情况下，协同效益也可能会带来负面影响。例如，企业会由于其规模和业务范围过大而带来小型或更具灵活性的企业无法面对的官僚制度障碍；或者为了实现集团的统一标准，某一部分业务使用了非最高效率的计算机或通讯系统。

1.158 《转让定价指南》第 7.13 段指出，如果关联企业仅仅是由于其作为跨国企业集团的一员而获得附带性收益，不应被视为接受了集团内部服务或需要为此支付任何费用。附带性收益是指仅由于集团的关联关系而产生，且没有与任何集团层面上的协同行动或交易有关的收益。附带性一词并未指收益的金额，也不表示相关收益金额较小或不重大，对于集团成员的获得的附带性收益的一般观点是，当单独因为企业作为跨国企业集团的一员而产生协同效益时，集团成员间未就采取协同行动。提供任何服务或执行任何功能时，该协同效益或负担无需单独进行补偿或在特定的集团成员间进行分配。
action of group members or the performance of any service or other function by group members, such synergistic benefits of group membership need not be separately compensated or specifically allocated among members of the MNE group.

1.159 In some circumstances, however, synergistic benefits and burdens of group membership may arise because of deliberate concerted group actions and may give an MNE group a material, clearly identifiable structural advantage or disadvantage in the marketplace over market participants that are not part of an MNE group and that are involved in comparable transactions. Whether such a structural advantage or disadvantage exists, what the nature and source of the synergistic benefit or burden may be, and whether the synergistic benefit or burden arises through deliberate concerted group actions can only be determined through a thorough functional and comparability analysis.5

1.160 For example, if a group takes affirmative steps to centralise purchasing in a single group company to take advantage of volume discounts, and that group company resells the items it purchases to other group members, a deliberate concerted group action occurs to take advantage of group purchasing power. Similarly, if a central purchasing manager at the parent company or regional management centre performs a service by negotiating a group wide discount with a supplier on the condition of achieving minimum group wide purchasing levels, and group members then purchase from that supplier and obtain the discount, deliberate concerted group action has occurred notwithstanding the absence of specific purchase and sale transactions among group members. Where a supplier unilaterally offers one member of a group a favourable price in the hope of attracting business from other group members, however, no deliberate concerted group action would have occurred.

1.161 Where corporate synergies arising from deliberate concerted group actions do provide a member of an MNE group with material advantages or burdens not typical of comparable independent companies, it is necessary to determine (i) the nature of the advantage or disadvantage, (ii) the amount of the benefit or detriment provided, and (iii) how that benefit or detriment should be divided among members of the MNE group.

1.162 If important group synergies exist and can be attributed to deliberate concerted group actions, the benefits of such synergies should generally be shared by members of the group in proportion to their contribution to the creation of the synergy. For example, where members of the group take deliberate concerted actions to consolidate purchasing activities to take advantage of economies of scale resulting from high volume purchasing, the benefits of those large scale purchasing synergies, if any exist after an appropriate reward to the party co-ordinating the purchasing activities, should typically be shared by the members of the group in proportion to their purchase volumes.

1.163 Comparability adjustments may be warranted to account for group synergies.

Example 1

1.164 P is the parent company of an MNE group engaging in a financial services business. The strength of the group’s consolidated balance sheet makes it possible for P to maintain an AAA credit rating on a consistent basis. S is a member of the MNE group engaged in providing the same type of financial services as other group members and does so on a large scale in an important market. On a stand-alone basis, however, the strength of S’s balance sheet would support a credit rating of only Ban. Nevertheless, because

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5 In light of differences in local law, some countries consider a deliberate concerted action to always constitute a transaction, while others do not. However, the consensus view is that, in other scenarios, a deliberate concerted action involves an associated enterprise performing functions using assets or assuming risks for the benefit of one or more other associated enterprises, such that arm’s length compensation is required. See, e.g. Example 5 at paragraphs 1.170-1.175.
在某些情况下，协同效益或负担可能是因为集团层面的协同行为而产生，并且为跨国企业集团带来了可清晰辨识的重大结构性优势或劣势。因此，市场上可比交易中的独立企业在不具备这些优势或劣势。这些结构性优势或劣势是否存在，协同效益或负担的性质或来源是什么，以及协同效益或负担是否通过集团层面的协同行为产生等问题，只有通过完整的功能和可比性分析才能得出结论。5

例如，如果一个跨国企业集团积极采取措施将采购功能集中于某一成员企业，该企业将至少有采购优势。该成员企业将采购的产品再销售给集团内的其他成员企业。那么可以认定该跨国企业集团采取了集团层面的协同行动来获得集团采购优势。同样，如果母公司或其区域管理中心的一名采购经理与某集团成员企业采购经理共同谈判，与供应商就集团整体采购折扣进行协商；此后集团成员企业应从供应商处以协商后的折扣进行采购。尽管集团成员间没有发生实际的采购或销售交易，也应视作发生了集团层面的协同行动。当供应商单方面地向某一集团成员提供优惠价格，而该价格又低于其他集团成员与其交易时，不应视为发生了集团层面的协同行动。

当集团层面的协同行为所产生协同效益确实为跨国企业集团的成员带来了重大优势或负担，并且这种优势或负担对可比独立企业而言并不常见时，就有必要考虑：（1）优势或劣势的性质；（2）收益或负担的金额；以及（3）收益或负担如何在跨国企业集团内分摊。

如果存在重要的跨国企业集团协同效益，并且效应是由集团层面的协同行动所产生，则应当根据各成员企业对于该协同效益的贡献比例在各成员企业间进行合理分配。例如，如果集团成员企业通过集团层面的协同行动来整合采购活动，以获得大采购带来的经济规模效应，那么大采购带来的协同效益如果在对协调采购活动的企业进行了恰当的补偿后还有剩余，则应在集团企业间根据各企业的采购量进行分摊。

对跨国企业集团协同效益可能需要进行可比性调整。

案例 1

P 公司是某一从事金融服务的跨国企业集团的母公司。得益于集团合并资产负债表的出色表现，P 公司可以长期获得 AAA 级的信用评级。

5 基于各地法规的差异，一些国家认为集团层面的协同行为往往构成交易，而另一些国家则持相反态度。但所有国家的共识是，在上述任何情况下，若集团层面的协同行为中至少有一家关联企业为了一家或多家关联企业获取而执行功能、使用资产及承担风险，则需考虑根据独立交易原则对该行为进行补偿。参见第 1.170-1.173 案例 5。
of S’s membership in the P group, large independent lenders are willing to lend to it at interest rates that would be charged to independent borrowers with an A rating, i.e., a lower interest rate than would be charged if S were an independent entity with its same balance sheet, but a higher interest rate than would be available to the parent company of the MNE group.

1.165 Assume that S borrows £50 million from an independent lender at the market rate of interest for borrowers with an A credit rating. Assume further that S simultaneously borrows £50 million from T, another subsidiary of P, with similar characteristics as the independent lender, on the same terms and conditions and at the same interest rate charged by the independent lender, (i.e., an interest rate premised on the existence of an A credit rating). Assume further that the independent lender, in setting its terms and conditions, was aware of S’s other borrowings including the simultaneous loan to S from T.

1.166 Under these circumstances the interest rate charged on the loan to T to S is an arm’s length interest rate because (i) it is the same rate charged to S by an independent lender in a comparable transaction; and (ii) no payment or comparability adjustment is required for the group synergy benefit that gives rise to the ability of S to borrow from independent enterprises at an interest rate lower than it could were it not a member of the group because the synergistic benefit of being able to borrow arises from S’s group membership alone and not from any deliberate concerted action of members of the MNE group.

Example 2

1.167 The facts relating to S’s credit standing and borrowing power are identical to those in the preceding example. S borrows £50 million from Bank A. The functional analysis suggests that Bank A would lend to S at an interest rate applicable to A rated borrowers without any formal guarantee. However, P agrees to guarantee the loan from Bank A in order to induce Bank A to lend at the interest rate that would be available to AAA rated borrowers. Under these circumstances, S should be required to pay a guarantee fee to P for providing the express guarantee. In calculating an arm’s length guarantee fee, the fee should reflect the benefit of raising S’s credit standing from A to AAA, not the benefit of raising S’s credit standing from Baa to A. The enhancement of S’s credit standing from Baa to A is attributable to the group synergy derived purely from passive association in the group which need not be compensated under the provisions of this section. The enhancement of S’s credit standing from A to AAA is attributable to a deliberate concerted action, namely the provision of the guarantee by P, and should therefore give rise to compensation.

Example 3

1.168 Assume that Company A is assigned the role of central purchasing manager on behalf of the entire group. It purchases from independent suppliers and resells to associated enterprises. Company A, based solely on the negotiating leverage provided by the purchasing power of the entire group, is able to negotiate with a supplier to reduce the price of widgets from $200 to $110. Under these circumstances, the arm’s length price for the resale of widgets by Company A to other members of the group would not be at or near $200. Instead, the arm’s length price would remunerate Company A for its services of coordinating purchasing activity. If the comparability and functional analysis suggests in this case that in comparable uncontrolled transactions involving a comparable volume of purchases, comparable coordination services resulted in a service fee based on Company A’s costs incurred plus a mark-up equating to a total service fee of $6 per widget, then the intercompany price for the resale of the widgets by Company A would be approximately $116. Under these circumstances, each member of the group would derive benefits

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*Example 2 should not be viewed as providing comprehensive transfer pricing guidance on guarantee fees in respect of financial transactions. Further guidance will be provided on transfer pricing for financial transactions including identifying the economically relevant characteristics for determining arm's length conditions. This work will be undertaken in 2016 and 2017.*
S公司是该跨国企业集团的一员，从事与集团内其他成员相同的金融服务，并在重要的本地市场大规模开展业务，根据其自身的资产负债情况，S公司仅能获得Baa的信用评级。尽管如此，由于S公司是P集团的一员，独立的大型借款机构愿意以高信用评级为A级的独立借款企业提供利率向S公司贷款，即S公司获得的利率比具有相同资产负债情况的独立企业所能获得的利率更低，但比该跨国企业集团内其他公司所能获得的利率要高。

1.165 假定S公司以与信用评级为A级的独立企业所能获得的利率从独立借款机构获得一笔5,000万欧元的贷款，进一步假定S公司也从T公司以同样条件和利率获得一笔5,000万欧元的贷款（即假设使用信用评级A级的利率）。T公司是P公司的另一子公司。T公司与独立借款机构性质类似。再进一步假定，独立借款机构在设定其向S公司提供贷款的条款及条件时，充分了解S公司其他所有的借贷情况，包括S公司向T公司申请的贷款。

1.166 在上述条件下，T公司对S公司收取的利率符合独立交易原则，因为（1）该利率与独立借款机构在可比交易下向S公司收取的利率一致；（2）无需为S公司获得的集团协调效益支付费用或进行可比性调整，S公司能够以较低的贷款利率（低于其不作为P集团成员的情况下适用的贷款利率）向独立企业借款，是因为S公司是P集团的成员企业，而非得益于某些集团层面的协同行动。

案列2

1.167 在本案例中，假定S公司的信用评级和其借款能力与上述案例中一致。S公司自A银行获得3,000万欧元的贷款。分析显示，A银行愿意以信用评级为A级的企业提供的利率向S公司提供贷款且无需正式的担保。但P公司同意向A银行提供担保，以期A银行能以信用评级为AAA级的企业提供的利率向S公司提供贷款。在这种情况下，S公司应该向P公司支付担保费。在计算交易担保费用时，应反映P公司与S公司信用评级由A级提升至AAA级的费用。如果A级是由于独立的关联关系所产生的集团间协同效益。根据本节的原则，不需要对各信用等级的提升进行补偿。而S公司信用评级由A级提升至AAA级是由于集团层面的协同行动，即P公司为S公司向A银行提供担保。因此P公司需获得补偿。

案列3

1.168 假定A公司系被委派为集中采购的管理方，负责集团整体的采购活动。A公司向独立供应商采购部件，继而转售给关联企业。A公司仅依靠集团整体的采购议价能力，与供应商协商的采购单价由200美元降低至110美元。此时，A公司向关联企业销售部件的符合独立交易条件的价格并不应当为200美元或接近200美元。该独立交易价格应体现A公司在协调采购活动中做出的贡献。

案列2并非针对金融交易中的担保费用提供全面的转让定价分析指南。有关金融交易的转让定价分析（包括识别相关经济特征以确定独立交易条件），将提供进一步的指导。这项指导会在2016及2017年进行。
attributable to the group purchasing power of approximately $84 per widget. In addition, Company A would earn $6 per widget purchased by members of the group for its service functions.

Example 4

1.169 Assume facts similar to those in Example 3, except that instead of actually purchasing and reselling the widgets, Company A negotiates the discount on behalf of the group and group members subsequently purchase the widgets directly from the independent supplier. Under these circumstances, assume that the comparability analysis suggests that Company A would be entitled to a service fee of $5 per widget for the coordinating services that it performed on behalf of other group members. (The lower assumed service fee in Example 4 as compared to Example 3 may reflect a lower level of risk in the service provider following from the fact that it does not take title to the widgets or hold any inventory.) Group members purchasing widgets would retain the benefit of the group purchasing discount attributable to their individual purchases after payment of the service fee.

Example 5

1.170 Assume a multinational group based in Country A, has manufacturing subsidiaries in Country B and Country C. Country B has a tax rate of 30 percent and Country C has a tax rate of 10 percent. The group also maintains a shared services centre in Country D. Assume that the manufacturing subsidiaries in Country B and Country C each have need of 5,000 widgets produced by an independent supplier as an input to their manufacturing processes. Assume further that the Country D shared services company is consistently compensated for its aggregate activities by other group members, including the Country B and Country C manufacturing affiliates, on a cost plus basis, which, for purposes of this example, is assumed to be arm's length compensation for the level and nature of services it provides.

1.171 The independent supplier sells widgets for $10 apiece and follows a policy of providing a 5 percent price discount for bulk purchases of widgets in excess of 7,500 units. A purchasing employee in the Country D shared services centre approaches the independent supplier and confirms that if the Country B and Country C manufacturing affiliates simultaneously purchase 5,000 widgets each, a total group purchase of 10,000 widgets, the purchase discount will be available with respect to all of the group purchases. The independent supplier confirms that it will sell an aggregate of 10,000 widgets to the MNE group at a total price of $95,000, a discount of 5 percent from the price at which either of the two manufacturing affiliates could purchase independently from the supplier.

1.172 The purchasing employee at the shared services centre then places orders for the required widgets and requests that the supplier invoice the Country B manufacturing affiliate for 5,000 widgets at a total price of $50,000 and invoice the Country C manufacturing affiliate for 5,000 widgets at a total price of $45,000. The supplier complies with this request as it will result in the supplier being paid the agreed price of $95,000 for the total of the 10,000 widgets supplied.

1.173 Under these circumstances, Country B would be entitled to make a transfer pricing adjustment reducing the expenses of the Country B manufacturing affiliate by $2,500. The transfer pricing adjustment is appropriate because the pricing arrangements misallocate the benefit of the group synergy associated with volume purchasing of the widgets. The adjustment is appropriate notwithstanding the fact that the Country B manufacturing affiliate acting alone could not purchase widgets for a price less than the $50,000 it paid. The deliberate concerted group action in arranging the purchase discount provides a basis for the allocation of part of the discount to the Country B manufacturing affiliate notwithstanding the fact that there is no explicit transaction between the Country B and Country C manufacturing affiliates.
如果可比性和功能分析显示，在采购数量可比的可比非受控交易中，可比协商服务的收费为基于 A 公司所发生的实际成本加上一定的加成率，最终等同于每个部件 6 美元，那么 A 公司向关联企业销售部件的价格应为 116 美元。此时，各方企业成员通过集团采购议价能力的收益约为每个部件 84 美元。此外，A 公司应将其向各集团成员提供的服务，赚取每个部件 6 美元。

案例 4
1.169 假定所有的事实情况与案例 3 中一致，不同的是 A 公司并不参与实际的部件采购和再销售，A 公司作为集团代表与供应商协商折扣，关联企业自行到供应商采购。此时，假定可比性分析显示，A 公司应收取的代表其他集团成员进行协商的服务费等于每个部件 5 美元。（相较于案例 3，案例 4 中假定的服务费较低，体现了 A 公司在案例 4 中因不实际采购或拥有存货，从而承担更高的商业风险的事实情况。）采购部件的集团成员应保留在向 A 公司支付服务费后由于集团采购折扣带来的利益。

案例 5
1.170 假定一家位于 A 国的跨国企业集团，在 B 国和 C 国拥有生产企业。B 国的企业所得税税率为 30%，C 国的企业所得税税率为 10%。同时，该集团在 D 国设立了共享服务中心。假定位于 B 国和 C 国的生产企业都需要向独立供应商采购其生产的 5000 个部件。进一步假定位于 D 国的共享服务中心长期以成本加成的方式向其他集团成员（包括位于 B 国和 C 国的生产企业）收取提供服务的补偿。在本案例中，假定位于 D 国的共享服务中心所获得的补偿根据服务的等级和性质判断符合独立交易原则。
1.171 独立供应商以每个部件 10 美元的单价进行销售；如果采购数量超过 7500 件，供应商还会提供额外的 5%的折扣。位于 D 国共享服务中心的一名采购人员与供应商进行了联络，并确定如果 B 国和 C 国的生产企业各自采购 5000 个部件，即达成总计 10000 个部件的集团采购，那么 B 国和 C 国的生产企业都可以就这一集团采购享受 5%的折扣优惠。供应商承诺，向跨国企业集团以 95000 美元的价格销售 10000 个部件；B 国和 C 国的生产企业可以就各自的采购享受 5%的折扣优惠。
1.172 共享服务中心的采购人员就部件的采购下达了订单，并要求供应商向 B 国的生产企业销售 5000 个部件，开具 50000 美元的发票；向 C 国的生产企业销售 5000 个部件，开具 45000 美元的发票。供应商收到采购人员的要求，因为对于供应商而言，协商的结果就是销售 10000 个部件并收取 95000 美元的货款。
1.173 在这种情况下，B 国的生产企业应付给 2500 美元的转让定价调整，以降低其采购成本。该转让定价调整是合理的，因为采购人员要求的付款安排没有合理分摊采购相关的跨国企业集团协商利益，尽管 B 国的生产企业依靠自身的采购量无法满足低于 50000 美元的金额采购部件。尽管 B 国和 C 国的生产企业之间没有明显的交易，有关获取采购折扣的集团层面的协同行动依旧为 B 国的生产企业获得折扣提供了合理的基础。
COMMODITY TRANSACTIONS

Additions to Chapter II of the Transfer Pricing Guidelines

SUMMARY

This chapter of the Report contains new guidance in respect of commodity transactions, to be inserted immediately following paragraph 2.16 of the 2010 Transfer Pricing Guidelines.

Action 10 of the BEPS Action Plan instructs the G20 and the OECD countries to develop transfer pricing rules to provide protection against common types of base eroding payments. Under this mandate, the G20 and OECD countries have examined the transfer pricing aspects of cross-border commodity transactions between associated enterprises ("commodity transactions"). The outcome of this work is an improved framework for the analysis of commodity transactions from a transfer pricing perspective which should lead to greater consistency in the way that tax administrations and taxpayers determine the arm’s length price for commodity transactions and should ensure that pricing reflects value creation.

Chapter II of the Transfer Pricing Guidelines has been amended to include new guidance especially applicable to commodity transactions. These provisions draw from some of the main elements and experience of countries that have introduced domestic rules aimed at pricing commodity transactions. The new guidance includes:

- Clarification of the existing guidance on the application of the comparable uncontrolled price ("CUP") method to commodity transactions. The new guidance states that (i) the CUP method would generally be an appropriate transfer pricing method for commodity transactions between associated enterprises; (ii) quoted prices can be used under the CUP method, subject to a number of considerations; as a reference to determine the arm’s length price for the controlled commodity transaction; and, (iii) reasonably accurate comparability adjustments should be made, when needed, to ensure that the economically relevant characteristics of the controlled and uncontrolled transactions are sufficiently comparable.

- A new provision on the determination of the pricing date for commodity transactions. This provision should prevent taxpayers from using pricing dates in contracts that enable the adoption of the most advantageous quoted price. It allows tax authorities to impute, under certain conditions, the shipment date (or any other date for which evidence is available) as the pricing date for the commodity transaction.

The guidance developed under other BEPS Actions is also relevant in dealing with issues relating to commodity transactions. In particular, the revised standards for transfer pricing documentation (Action 13 BEPS Action Plan) and the guidance in the Chapter "Guidance for Applying the Arm's length Principle" (Action 9 BEPS Action Plan).
大宗商品交易

针对《转让定价指南》第二章的补充

摘要

本章为新增内容，旨在为大宗商品交易提供指南。相关内容将增补至《转让定价指南》第 2.16 节之后。

《BEPS行动计划》第 10 项行动计划要求 G20 和 OECD 成员国制定相应的转让定价规则，防止关联企业间通过尚未采用可比非受控价格法的方式支付侵害税基。根据该项要求，G20 和 OECD 成员国对关联企业间跨境大宗商品交易（“大宗商品交易”）的转让定价进行了审查，并进一步完善了大宗商品交易转让定价分析的框架结构，以增强税务机关及纳税人对独立交易价格方面的一致性，确保定价方式真实反映了价值的创造。

《转让定价指南》第二章的修订内容包含新增适用于大宗商品交易的相关指南，主要借鉴并总结了相关国家推行的大宗商品交易转让定价相关的主规则及其经验。新指南主要包含以下内容：

- 明确现有指南规定的可比非受控价格法如何运用到大宗商品交易。新指南指出（1）可比非受控价格法通常是适用于分析关联企业间大宗商品交易的合理的转让定价方法；（2）在满足一系列条件的情况下，市场价格可以在可比非受控价格法下作为确定受控大宗商品交易的独立交易价格的参考；以及（3）在适当的情况下应做出合理的可比性调整，确保受控和非受控交易的相关经济特征具有充分的可比性。

- 针对如何确定大宗商品交易定价日做出新的规定。此项规定旨在防止纳税人在合同中选用具有最有利市场报价的日期作为定价日。在某些情况下，税务机关可以使用发货日期（或其他可被证明的日期）作为大宗商品交易的定价日。

针对其他 BEPS 行动计划制定的指南中也涉及到大宗商品交易的问题，其中修订后的转让定价文档标准（第 13 项 BEPS 行动计划）以及“独立交易原则的应用指南”（第 9 项 BEPS 行动计划）均涉及到大宗商品交易。
This new guidance will be supplemented with further work mandated by the G20 Development Working Group, following reports by the OECD on the impact of base erosion and profit shifting (BEPS) in developing countries. The outcome of this work will provide knowledge, best practices and tools for commodity-rich countries in pricing commodity transactions for transfer pricing purposes.
继OECD发布有关BEPS对发展中国家的影响报告后，G20工作组将对其进行进一步补充和说明，这将为大宗商品资源丰富的国家提供针对相关交易进行转让定价分析时所需的知识工具以及最佳方法。

OECD（2014年），《G20发展工作小组报告：BEPS对低收入国家的影响》，巴黎。
The following paragraphs are added to Chapter II of the Transfer Pricing Guidelines, immediately following paragraph 2.16.

2.16A Subject to the guidance in paragraph 2.2 for selecting the most appropriate transfer pricing method in the circumstances of a particular case, the CUP method would generally be an appropriate transfer pricing method for establishing the arm's length price for the transfer of commodities between associated enterprises. The reference to "commodities" shall be understood to encompass physical products for which a quoted price is used as a reference by independent parties in the industry to set prices in uncontrolled transactions. The term "quoted price" refers to the price of the commodity in the relevant period obtained in an international or domestic commodity exchange market. In this context, a quoted price also includes prices obtained from recognised and transparent price reporting or statistical agencies, or from governmental price-setting agencies, where such indexes are used as a reference by unrelated parties to determine prices in transactions between them.

2.16B Under the CUP method, the arm's length price for commodity transactions may be determined by reference to comparable uncontrolled transactions and by reference to comparable uncontrolled arrangements represented by the quoted price. Quoted commodity prices generally reflect the agreement between independent buyers and sellers in the market on the price for a specific type and amount of commodity, traded under specific conditions at a certain point in time. A relevant factor in determining the appropriateness of using the quoted price for a specific commodity is the extent to which the quoted price is widely and routinely used in the ordinary course of business in the industry to negotiate prices for uncontrolled transactions comparable to the controlled transaction. Accordingly, depending on the facts and circumstances of each case, quoted prices can be considered as a reference for pricing commodity transactions between associated enterprises. Taxpayers and tax administrations should be consistent in their application of the appropriately selected quoted price.

2.16C For the CUP method to be reliably applied to commodity transactions, the economically relevant characteristics of the controlled transaction and the uncontrolled transactions or the uncontrolled arrangements represented by the quoted price need to be comparable. For commodities, the economically relevant characteristics include, among others, the physical features and quality of the commodity; the contractual terms of the controlled transaction, such as volumes traded, period of the arrangements, the timing and terms of delivery, transportation, insurance, and foreign currency terms. For some commodities, certain economically relevant characteristics (e.g., prompt delivery) may lead to a premium or a discount. If the quoted price is used as a reference for determining the arm's length price or price range, the standardised contracts which stipulate specifications on the basis of which commodities are traded on the exchange and which result in a quoted price for the commodity may be relevant. Where there are differences between the conditions of the controlled transaction and the conditions of the uncontrolled transactions or the conditions determining the quoted price for the commodity that materially affect the price of the commodity transactions being examined, reasonably accurate adjustments should be made to ensure that the economically relevant characteristics of the transactions are comparable. Contributions made in the form of functions performed, assets used and risks assumed by other entities in the supply chain should be compensated in accordance with the guidance provided in these Guidelines.

2.16D In order to assist tax administrations in conducting an informed examination of the taxpayer's transfer pricing practices, taxpayers should provide reliable evidence and document, as part of their transfer pricing documentation, the price-setting policy for commodity transactions, the information needed to justify price adjustments based on the comparable uncontrolled transactions or comparable uncontrolled arrangements represented by the quoted price and any other relevant information, such as pricing formulas used, third party end-customer agreements, premia or discounts applied, pricing date, supply chain information, and information prepared for non-tax purposes.
以下段落将增补至《转让定价指南》第二章第2.16段之后。

2.16A 《转让定价指南》第2.22段指出应根据案例的实际情况选择最适当的转让定价方法。基于这一原则，可比非受控价格法通常是确定关联企业间大宗商品交易独立交易价格的适当的转让定价方法。这里的“大宗商品”应当指在市场中独立交易方在非受控交易定价时所参考的使用市场价格的物理商品。

可比非受控价格法是市场中独立交易方在非受控交易定价时所参考的使用市场价格的物理商品。市场定价是指在相关时期从国际或国内大宗商品交易市场获取的大宗商品价格。此外，市场报价还包括从公开可得的价格报告及统计机构或政府定价机构获得的报价，这些价格指数被非关联方用作交易定价的参考。

2.16B 在可比非受控价格法下，可参考可比非受控交易以及市场报价所反映的可比非受控安排来确定大宗商品交易的独立交易价格。大宗商品市场报价通常体现了市场中独立的买方和卖方在某一时期根据某一特定的交易条件或某一特定种类及其数量的大宗商品所达成的价格安排。判断某一特定大宗商品的市场报价是否适用于确定受控交易的独立交易价格时，应重点考虑在行业一般情况下，该市场报价是否经常被作为参考价格用于可比非受控交易的价格谈判。因此，根据具体的事例和情况，市场报价可以作为关联企业间大宗商品交易定价的参考价格。纳税人和税务机关应在选择和使用适当的市场参考价格上保持一致。

2.16C 为了在大宗商品交易中可靠地运用可比非受控价格法，受控交易与非受控交易或市场报价所反映的非受控安排中的相关经济特征应具有可比性。大宗商品交易相关的经济特征包括大宗商品的物理特征及质量；受控交易的合同条款，例如交易的数量、安排的期限、交付的时间及条款、运输、保险以及汇率等。然而对大宗商品而言，某些经济特征（如即期交付）可能导致大宗商品价格或折价出售。如果市场价格被用作确定独立交易价格或价格区间的参考，还可能需要考虑相关的标准合同，标准合同中规定了大宗商品在交易所交易的具体条件以及相应的市场报价。当受控交易的条件与非受控交易确定大宗商品市场报价的条件有差异并且会对受控大宗商品交易的价格产生实质性影响时，需要进行合理的可比性调整，以保证可比交易与受控交易的相关经济特征具有可比性。供应链中其他企业根据其执行的功能、使用的资产及承担的风险所做出的贡献应按照《转让定价指南》中的相关指引原则进行补偿。

2.16D 为了协助税务机关在获取充分信息的情况下对纳税人的转让定价安排进行审查，纳税人应通过转让定价文档提供可靠的证据及文件。大宗商品交易的定价政策，基于可比非受控交易或市场报价所反映的可比非受控安排对价格进行合理调整所需的证据以及其他相关信息。例如所使用的价格计算公式。第三方终端客户的协议，溢价或折价、定价日、供应链信息以及非税务目的的准备的相关信息。
2.16E A particularly relevant factor for commodity transactions determined by reference to the quoted price is the pricing date, which refers to the specific time, date or time period (e.g. a specified range of dates over which an average price is determined) selected by the parties to determine the price for commodity transactions. Where the taxpayer can provide reliable evidence of the pricing date agreed by the associated enterprises in the controlled commodity transaction at the time the transaction was entered into (e.g. proposals and acceptances, contracts or registered contracts, or other documents setting out the terms of the arrangements may constitute reliable evidence) and this is consistent with the actual conduct of the parties or with other facts of the case, in accordance with the guidance in Section D of Chapter I on accurately delineating the actual transaction, tax administrations should determine the price for the commodity transaction by reference to the pricing date agreed by the associated enterprises. If the pricing date specified in any written agreement between the associated enterprises is inconsistent with the actual conduct of the parties or with other facts of the case, tax administrations may determine a different pricing date consistent with those other facts of the case and what independent enterprises would have agreed in comparable circumstances (taking into considerations industry practices). When the taxpayer does not provide reliable evidence of the pricing date agreed by the associated enterprises in the controlled transaction and the tax administration cannot otherwise determine a different pricing date under the guidance in Section D of Chapter I, tax administrations may deem the pricing date for the commodity transaction on the basis of the evidence available to the tax administration; this may be the date of shipment as evidenced by the bill of lading or equivalent document depending on the means of transport. This would mean that the price for the commodities being transacted would be determined by reference to the average quoted price on the shipment date, subject to any appropriate comparability adjustments based on the information available to the tax administration. It would be important to permit resolution of cases of double taxation arising from application of the deemed pricing date through access to the mutual agreement procedure under the applicable Treaty.
2.16E 在根据市场报价确定大宗商品交易的价格时，需要特别考虑的因素是定价日。定价日是指交易双方选择用以确定大宗商品交易价格的特定时点、日期或时间段（例如，根据某一特定时间段确定平均价格）。当纳税人能够提供可靠的证据证明受控交易中关联企业在交易达成之日约定的定价日（例如，交易意向书及承诺、合同或经公证的合同，或者列明协议条款的其他文件都能构成可靠证据），并且与交易双方的交易行为或其他事实和情况相符，则根据《转让定价指南》第一章第 D 节有关准确界定实际交易的相关指导原则，税务机关应当参考关联企业约定的定价日确定大宗商品交易的价格。如果关联企业间任何书面约定记录的定价日与交易双方的交易行为或其他事实和情况不符，税务机关可以根据其他事实和情况以及独立企业在可比情形下的可能做法（考虑行业惯例）重新确定定价日。如果纳税人不能提供可靠的证据证明受控交易中关联企业约定的定价日，且税务机关也无法根据《转让定价指南》第一章第 D 节的指导原则通过其他方法重新确定定价日，税务机关可以根据所能掌握的证据为相关大宗商品交易推定一个定价日，如提货单或其他运输单据中注明的发货日。这意味着税务机关会参考发货日的平均市场价格，并根据掌握的信息和可比性调整来确定被交易的大宗商品的价格。对于因推定的定价日产生的双重征税问题，应当允许在适用的税收协定下通过相互协商程序加以解决。
SCOPE OF WORK FOR GUIDANCE ON THE TRANSACTIONAL PROFIT SPLIT METHOD

SUMMARY

Action 10 of the BEPS Action Plan invites clarification of the application of transfer pricing methods, in particular the transactional profit split method, in the context of global value chains.

In order to determine the matters relating to the application of the transactional profit split method for which clarification would be useful, the OECD released a discussion draft on 16 December 2014, which raised a number of questions based on scenarios developed from the use of profit splits encountered in practice by some delegates to Working Party No. 6. That discussion draft did not include revised guidance. Comments on the discussion draft from interested parties extended to around 500 pages, and a public consultation on 19-20 March 2015 attracted considerable interest.

Some of the key themes emerging from the consultation process and subsequent discussion within WP6 included the need to reflect on clarifying, improving, and strengthening the guidance on when it is appropriate to apply a transactional profit split method and how to do so, since experiences indicate that this method may not be straightforward for taxpayers to apply, and may not be straightforward for tax administrations to evaluate. Nevertheless, the consultation process confirmed that transactional profit splits can offer a useful method which has the potential when properly applied, to align profits with value creation in accordance with the arm's length principle and the most appropriate method, particularly in situations where the features of the transaction make the application of other transfer pricing methodologies problematic.

Improved guidance needs to clarify the circumstances in which transactional profit splits are the most appropriate method for a particular case and to describe what approaches can be taken to split profits in a reliable way. The guidance on transactional profit splits also needs to take into account changes to the transfer pricing guidance in pursuit of other BEPS Actions, including changes in relation to the guidance on applying the arm's length principle in the section on performing a robust functional analysis and identifying and allocating risks, in the section on synergies; and to the guidance on intangibles. The guidance should take into account the conclusions of the report on Addressing the Tax Challenges of the Digital Economy, developed in relation to BEPS Action 1, which noted that attention should be paid to the consequences of greater integration of business models as a result of the digitised economy, and the potential role for profit splits to account for such integration. In addition, the guidance should reflect further work being undertaken to develop approaches to transfer pricing in situations where the availability of comparables is limited, for example due to the specific features of the controlled transaction; and clarify how in such cases, the most appropriate method should be selected. This concerns work mandated by the

OECD (2015), [insert reference to final report of the Task Force on the Digital Economy Chapter VI paragraph 51 of 21 July draft].
交易利润分割法指南的工作范围

摘要

《BEPS 行动计划》第 10 项行动计划要求进一步说明各种转让定价方法在全球价值链背景下的应用，尤其是交易利润分割法的运用。

为了确定交易利润分割法在应用过程中需要明确的事项，OECD 于 2014 年 12 月 16 日发布了一份针对交易利润分割法应用的讨论稿。这份讨论稿并未对相关指南进行修改，而是基于第六工作组成员提供的交易利润分割法的实际应用案例，提出了多个问题。各方针对讨论稿提出的意见共有 300 多条，2015

年 3 月 19 日至 20 日举行的讨论会也备受关注。

公众意见征询及后续的小组内部讨论确定了一些关键议题，包括进一步明确、完善和加强相关指导原则，以更好地说明在何种条件下可以合理使用交易利润分割法以及如何使用该方法。经验表明，对于税收人而言，该方法的运用可能并不简便；对于税务机关而言，可能很难评估该方法应用的合理性。尽管如此，公众意见征询的结论表明如果交易利润分割法运用得当，有可能在独立交易原则的框架下有效地匹配利润分配与价值创造。而在特定的情况下，交易的某些特征使得其他转让定价方法无法被运用，此时交易利润分割法可能是最合适的分析方法。

修订后的指南应明确交易利润分割法作为最合适的转让定价分析方法的具体情形，并说明用于可靠分割利润的具体方法。此外，还需考虑根据 BEPS 行动计划对其他转让定价指南所做的修改，包括“独立交易原则的应用”中有关纳税的功能分析、风险的识别和分配，以及集团协同效应等相关章节；同时还需考虑无形资产的相关指南。修订后的指南应考量《BEPS 行动计划》第 1 项行动计划成果《关于数字经济面临的税收挑战的报告》的结论，关注数字化经济下商业模式进一步整合的影响，以及利润分割在这种模式下的应用。再者，修订后的指南还应说明后续工作将围绕在可比公司数量有限（比如由受控交易的特征所引起）的情况下制定相应的转让定价方法，并且说明在这些情况下应如何选择最合适的分析方法。

OECD（2015），[插人相关工作组编写关于数字经济的最终报告]，7 月 21 日讨论稿第六章段落 51。
G20 Development Working Group, following reports by the OECD on the impact of BEPS in developing countries, including the development of a toolkit for low income countries to address challenges these countries face due to the lack of comparables.

The clarification and strengthening of the guidance on transactional profit splits, set out in this report, together with the development of useful illustrations of the situations in which transactional profits splits can reliably be applied and how they can be applied to produce arm's length outcomes, requires proper consideration of the matters raised during the initial consultation and further consultation on draft guidance. This paper sets out the proposed scope of that work.

This report will form the basis for draft guidance to be developed by WP6 during 2016 and expected to be finalised in the first half of 2017. A discussion draft of guidance will be released for public comments and a public consultation will be held in May 2016.

继 OECD 发布有关 BEPS 对发展中国家的影响报告后，这方面的工作将由 G20 发展工作小组负责，其中包括为低收入国家开发一系列分析工具，帮助后者有效应对严肃税少可比数据所带来的挑战。

为了进一步明确和完善转移定价的相关指南，具体说明该方法适用的情形以及如何应用才能获得符合独立交易原则的结果，有必要对修订讨论稿首轮和次轮公众意见征询中提出的问题进行适当的考量。本报告由此提出了相关的工作范围建议。

本报告将构成指南讨论稿的基础，预计第 6 工作组将于 2016 年完成讨论稿，并于 2017 年上半年定稿。修订讨论稿将于 2016 年 5 月发布征求公众意见，届时也会进行公众意见征询。

9 OECD（2014 年），《G20 发展工作小组报告：BEPS 对低收入国家的影响》，巴黎。

PART 1: CURRENT GUIDANCE ON TRANSACTIONAL PROFIT SPLIT METHOD AND PUBLIC CONSULTATION

Current guidance

1. The current guidance on the application of the transactional profit split method in Chapter II, Part III, Section C of the Transfer Pricing Guidelines indicates that the main strength of the method is that it can provide solutions for highly integrated operations for which a one-sided method would not be appropriate, such as global trading of financial instruments. The current guidance also states that transactional profit split methods may be found to be the most appropriate method in situations where both parties to the transaction make unique and valuable contributions, for example in the form of unique intangibles (see paragraph 2.109).

2. The guidance makes the point that where each party makes unique and valuable contributions, reliable comparables information may be insufficient to apply another method. The guidance stresses that the selection of a transactional profit split method should be determined in accordance with the overall guidance for method selection at paragraph 2.2 of the Guidelines (see paragraphs 2.109 and 3.39).

3. While the guidance on splitting profits provides a number of examples of potential allocation keys, it focuses on asset-based and cost-based allocation keys (see paragraphs 2.134-139). There is tentative mention of an approach which splits profits so that each party achieves the same return on capital (paragraph 2.145).

4. Chapter VI of the Transfer Pricing Guidelines, Special Considerations for Intangibles, makes a number of references to the transactional profit split method and to situations where the current guidance on its application may need to be clarified. For example, the guidance suggests:

- In some cases profit splits or valuation techniques may be useful for evaluating arm's length allocations of profit in situations involving the outsourcing of important functions where information on comparable uncontrolled transactions is unavailable.\(^\text{10}\)

- Where no information on comparable uncontrolled transactions is available, a transactional profit split method is a method that may be useful in situations involving the pricing of transfers of intangibles.\(^\text{11}\) This may include the transfer of partially developed intangibles; or the transfer of all, or limited rights in a fully developed intangible.

5. Furthermore, aspects of Chapter I of the Transfer Pricing Guidelines may prompt consideration of transactional profit splits, but specific guidance has not yet been provided. Areas of particular interest in this regard include situations where multiple parties exercise control over a risk such that a sharing in the potential upside and downside of the risk may be appropriate, and the sharing of group synergies arising from deliberate concerted group action.

Scope of revised guidance

6. The revised guidance should follow the current structure in Chapter II of the Transfer Pricing Guidelines, but should clarify and supplement the following matters. Practical application should be illustrated through examples.

\(^{10}\) See the section on Intangibles in this report, paragraph 6.57.

\(^{11}\) Ibid, paragraphs 6.138-6.152
第一部分：有关交易利润分割法的现有指南及公众意见征询

现有指南
1. 《转让定价指南》第2章第3部分第C节中有关运用交易利润分割法的现有指南指出，交易利润分割法的主要优点是可以解决在业务高度整合时难以适用单向测试方法的问题，如全球性金融工具交易。此外，在交易双方均做出了独特且有价值的贡献(如提供了独一无二的无形资产)的情况下，交易利润分割法有可能是最合适的转让定价分析方法(参见《转让定价指南》第2.109段)。

2. 现有指南指出，如果交易双方均做出了独特且有价值的贡献的情况下，即使存在可靠的可比信息，可能也不足以支持其他转让定价方法对交易的评估。指南提出，对于交易利润分割法的选择，应该遵循《转让定价指南》第2.2段中提出的独立选择转让定价方法的总体要求。(参见《转让定价指南》第2.109段及第3.39段)。

3. 现有指南介绍了可用于利润分割的多个分配标准，其中主要侧重于基于资产和基于成本的分配标准(参见《转让定价指南》第2.134-139段)。指南还提及另一种可能的方法，通过该方法分配利润使得各方能以在交易中使用的资本取得相同的资本回报率(参见《转让定价指南》第2.145段)。

4. 《转让定价指南》第六章"关于无形资产的特别考量"中，多次提及交易利润分割法以及可能需要进一步明确交易利润分割法运用的各种情形。例如，现有指南建议：
   - 在很难找到类似功能的可比非受控交易信息的情形下，利润分割或价值评估方法可能适用于对上述情形中的利润分配是否符合独立交易原则进行评估。
   - 在无法取得可比非受控交易信息的情形下，交易利润分割法可能有助于分析涉及无形资产转让的定价问题。

5. 此外，《转让定价指南》第一章阐述的某些观点可能会促使各方考虑运用交易利润分割法，但《转让定价指南》尚未具体针对指导比率。对此，需要特别关注的情形包括：交易涉及的多方均对某一风险实施控制，由各自享有(或承担)该风险相关的潜在收益(或损失)可能是合理的；以及在集团内部或分配由集团层面的协同行动所产生的集团协同利益。

指南修订后的范围

6. 修订后的指南将沿用《转让定价指南》第二章现有的框架结构，但会就上述内容进行明确及补充，并且通过具体案例对实际应用进行说明。

10a参见本报告“无形资产”章节，第6.57段。
11参见本报告“无形资产”章节，第6.148段，第6.152段。
Most appropriate method

7. The December 2014 discussion draft on the use of transactional profit splits stated that the consideration of transactional profit splits did not imply any changes to the guidance for selecting the most appropriate method set out in paragraph 2.2 of the Guidelines. Nevertheless, comments on the discussion draft pointed to significant concerns at the potential for transactional profit split methods to be misused, particularly in cases where the nature of the transaction itself, based on the functional analysis of the parties, suggests that a sharing of combined profits would not be expected at arm’s length. Concerns were expressed that the profit split method would be used in the absence of reliable comparables, without considering whether the profit split method was itself appropriate.

Highly integrated business operations

8. While the current Guidelines state that transactional profit split methods may be found to be the most appropriate method where business operations are highly integrated, integration alone may be insufficient to warrant the use of such a method. All MNE groups are integrated to a greater or lesser degree, and so it is unclear how the criterion of integration should be applied.

Unique and valuable contributions

9. The existing guidance on the application of transactional profit split methods notes that such methods may be the most appropriate method in situations where both parties to the transaction make unique and valuable contributions. However, there is little further guidance in the current Guidelines about what constitutes a ‘unique and valuable contribution’ aside from an example where intangibles are contributed by both parties to the transaction.

10. Some commentators on the December discussion draft suggested that ‘unique’ contributions could be defined as those which cannot be benchmarked by reference to uncontrolled transactions, and ‘valuable’ contributions could be defined as those which are expected to yield future economic benefits. Others went further and proposed that ‘valuable’ contributions could be those which contribute to a key source of competitive advantage. A number of commentators on the December discussion draft supported the notion that the sharing of significant risks could constitute a ‘unique and valuable contribution’ and hence may result in the conclusion that a transactional profit split method is the most appropriate to the circumstances.

Synergistic benefits

11. The December discussion draft included a scenario describing a multisided digital economy business model. A number of commentators and Working Party No. 6 delegates consider that the scenario, rather than illustrating a specific feature of the digital economy, instead simply demonstrates the effect of synergistic benefits. In such cases, both parts of the business may make significant contributions towards the key value driver(s) of the MNE group. The guidance on group synergies provides that, where the synergistic benefits arise as a result of deliberate concerted action, such benefits must be shared by group members in proportion to their contribution to the creation of the synergy. While it may, in some circumstances be possible to benchmark the contributions of each part of the business, such a process may not be able to account for the potentially significant integration benefits which are achieved by the two parts acting in concert.

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12. See Section D.8 of Chapter I under Guidance for Applying the Arm’s Length Principle in this Report.
最合适的转让方法

7. 2014年12月有关交易利润分割法应用的讨论稿（以下简称“12月讨论稿”）指出，对交易利润分割法进行考核并不表示需要修改《转让定价指引》第2.2段中关于选择最合适转让定价方法的指导原则。

尽管如此，针对上述讨论稿收集的意见显示，对交易利润分割法可能被滥用存在明显的担忧。特别是在某些情况下，基于对交易方进行的功能分析，相关交易的性质表明对交易利润分割法进行分配并不符合独立交易原则。在缺乏可靠可比对象的情况下，交易利润分割法未经评估即被运用的情况令人担忧。

高度整合的商业经营模式

8. 尽管现有的《转让定价指引》指出，交易利润分割法可能是分析高度整合的商业经营模式最合适的转让定价方法。然而，仅仅是“整合”并不足以作为选择交易利润分割法的依据。所有跨国企业集团的业务均或多或少地存在整合，目前对于如何运用整合条件判断和选择方法仍未有明确的指导原则。

独特且有价值的贡献

9. 现有指南指出，交易各方均做出了独特且有价值的贡献的情况下，交易利润分割法也许是最合适的转让定价方法。然而，在现有的《转让定价指引》中，除了在一个参考案例中列举了交易双方对无形资产做出贡献外，对“独特且有价值的贡献”的定义没有进一步的指导原则。

10. 12月讨论稿的某些评论认为，“独特的贡献”（unique contribution）可被定义为无法用非受控交易进行衡量的贡献，而“有价值的贡献”（valuable contribution）则可被定义为有助于企业在未来获得经济利益的贡献。其他评论进一步提议“有价值的贡献”应该是企业竞争优势的关键来源。同时，还有部分评论指出，分担重大风险可形成“独特且有价值的贡献”，因此交易利润分割法可能可以成为这种情形下最合适的转让定价方法。

协同效应

11. 12月讨论稿介绍了两个有关多边数字经济商业模型的案例。部分评论及第六工作小组成员认为，该案例未对数字经济的具体特征进行说明，而是简要阐释了协同效应的影响。在上述情况下，交易双方可能对跨国企业集团中的关键经济活动因素做出重要贡献。有关集团协同效应的指导原则指出，如果协同效应产生集团层面的协同活动带来的结果，则应按照集团成员对协同效应所做出的贡献程度在上述成员间进行分配。尽管在某些情况下可以衡量交易双方的贡献程度，但这可能并不能反映出交易双方间协同活动而可能具有重大的整合效应。

[1] 见本报告第一章“独立交易原则的应用指南”第D.8节。
Profit splitting factors

12. The over-arching objective of the BEPS actions 8-10 is to ensure that transfer pricing outcomes are in line with economic value creation. Such an objective is achieved by accurately delineating the actual transaction and pricing it in accordance with the most appropriate method. The December discussion draft noted that transactional profit split methods could make a contribution to achieving this aim and asked about experiences in using various approaches to splitting profits that might indicate ways of ensuring both greater objectivity and alignment with value creation in circumstances where application of the transactional profit split method is appropriate.

13. While there is general agreement that the splitting of profits should be based on a functional analysis of the parties' contributions, the mechanism by which the value of those contributions is quantified is not always clear. Possible mechanisms that are used in practice to various extents include invested capital, costs, surveys of functional contributions, weighting of factors, as well as equalised expected rates of return. Commentators observed advantages and disadvantages in these mechanisms, based on issues such as availability of information, measurability, subjectivity, and practicality, and the observations emphasise the current lack of guidance on what is a key aspect of applying a profit split—how the profits should reliably be split.

Use of profit split to determine TNMM range, or converting to a royalty

14. The December discussion draft raised questions about the use of profit splits to vary the range of results derived from a TNMM analysis by reference to increase or decrease in consolidated profits achieved by the parties to the transaction. The draft also raised a question about using a profit split to determine the expected share of profits, and then converting the analysis to a running royalty. Some commentators also felt that these were useful suggestions.

PART II: SCOPE OF REVISIONS OF THE GUIDANCE ON THE TRANSACTIONAL PROFIT SPLIT METHOD

Most appropriate method

- The guidance on transactional profit splits and selecting the most appropriate method should emphasise the point made at paragraph 2.2 of the current Guidelines that the nature of the transaction, determined in accordance with the guidance in Section D of Chapter I, is a vital consideration for the selection of the most appropriate transfer pricing method even in the absence of information on reliable, comparable uncontrolled transactions. The sharing of profits or losses under a profit split may in some circumstances reflect a fundamentally different commercial relationship between the parties, in particular concerning risk allocation, to the paying of a fee for goods or services. In cases where the delineation of the actual transaction is such that a share of profits would be unlikely to represent an arm's length outcome, the revised guidance will emphasise the need to use and adjust the best available comparables rather than selecting a profit split method. An appropriate method using inexact comparables is likely to be more reliable in such cases than an inappropriate use of the transactional profit split method. As such, the guidance on how the most appropriate method standard should be applied in such difficult cases will be expanded. Selecting the most appropriate method is particularly acute where there is a lack of reliable comparables data, as is very often the case in developing countries, and is relevant to the work mandated by the G20 Development Working Group on the development of toolkits to help low income countries address the challenge of the lack of comparables.
利润分割因素

12. 《BEPS行动计划》第8-10项行动计划的首要目标是确保转让定价结果与经济价值创造相匹配。要实现这一目标，需要对实际进行的交易进行准确界定，然后根据最合适的转让定价方法确定转移价格。

12月讨论稿指出交易利他分割法可能有助于实现上述目标，并探求使用不同方法来判断进行分割的实用经验，以便在适用交易利他分割法的情况下，能够同时确保利他分割更具客观性以及利他分割与价值创造相匹配。

13. 一般认为对利润的分割应基于对交易各方所作贡献的功能分析结果。然而如何量化上述贡献的价值在很多情况下并不明确。在实践中，根据不同情况使用到的量化标准包括：资本投入、成本、功能贡献的考察，各种因素的权衡考虑以及平均收益率。12月讨论稿中的《转让定价指南》第一章中对上述量化标准的优缺点、权重的可选性、可比数据的主观性以及可操作性进行了讨论。评论强调，针对运用交易利他分割法时应该考虑的关键问题（即如何能可靠地分割利润），目前仍缺乏相关的指导原则。

运用交易利他分割法的转让定价分离原则，或转换为特许权使用费

14. 12月讨论稿中指出的其他具体操作提出问题：根据交易各方合并利润的增加或减少，使用交易利他分割法修正交易利他分离得出的区间结果；以及运用交易利他分割法确定预期的利润分配，并将分析结果转化为浮动的特许权使用费。一些评论认为这些内容具有参考价值。

第二部分：交易利他分割法指南的修订范围

最合适的分析法

- 在前述交易利他分割法以及选择最合适的转让定价方法时，修订后的指南应强调现有《转让定价指南》第2.2版的观点，即在选择最合适的转让定价方法时，即使在缺少可比的可比非受控交易信息的情况下，依据《转让定价指南》第一章第2节的指导原则确定的交易性质仍然是所需考虑的重点内容。在某些情况下，根据利他分割法对利润或亏损进行分配反映了商品或服务交易双方之间存在实质性差异的商业关系，尤其是风险的分配。在某些情形下，通过分析交易的实际影响，可能发现对利润进行分配并不符合独立交易原则。修订后的指南将强调此时应使用可获取的最可比的数据并进行相适应的调整，而非选择利他分割法。在上述情况下，即使相关的可比数据存在缺点，使用合理的转让定价方法仍比不恰当地利他分割法更为可靠。因此，修订后的指南对于如何在类似困难的情况下应用最合适的转让定价方法，将作深入探讨。在缺乏可靠的可比数据的情况下，选择最合适的转让定价方法尤为困难，而这种情况在发展中经济最为普遍。相关的工作将由G20工作组负责，为低收入国家开发一系列分析工具，帮助后者有效应对缺少可比数据所带来的挑战。
**Highly integrated business operations**

- Additional guidance will be provided on when significant integration of business operations may lead to the conclusion that a transactional profit split is the most appropriate method. To this end, the guidance should refer to the relevance of a value chain analysis in understanding the context of the controlled transaction(s). As part of this analysis, it may be helpful to distinguish between sequential integration of a global value chain (which may involve the parties performing different activities linked through transactions between them in a coherent value chain, and which may not warrant the use of a profit split without taking into account further features of the arrangements) and parallel integration, which may involve the parties performing similar activities relating to the same revenues, costs, assets, or risks, within the value chain or at a stage in the value chain. The reference to global trading of financial instruments in the current Guidelines, which may involve parallel activities on the same asset, revenue stream, and risks, suggests that the current Guidelines envisaged that splitting the combined profits arising from this type of parallel integration may be appropriate.

**Unique and valuable contributions**

- Additional guidance and examples will be provided to clarify what is meant by ‘unique and valuable’ contributions in order to distinguish those circumstances when transactional profit split methods are likely to be the most appropriate method. Additional guidance on unique and valuable contributions other than in the form of intangibles will be provided.

- Taking into account revisions to the guidance on intangibles, guidance will be provided to clarify the selection of a transactional profit split as the most appropriate method in cases involving the performance of important functions relating to the development, enhancement, maintenance, protection or exploitation of intangibles, i.e. when do such functions constitute ‘unique and valuable contributions’ for the purposes of identifying the most appropriate transfer pricing method.

- In developing this guidance due regard should be given to situations where independent enterprises make use of profit split models in comparable transactions.

**Synergistic benefits**

- Additional guidance will be provided on the circumstances to take into account in determining whether a transactional profit split method could be the most appropriate method for dealing with scenarios with significant group synergies, and how such profit split methods could be applied.

**Profit splitting factors**

- Additional guidance will be provided that explains how to fulfill the need for a strong correlation between profit allocation factors and the creation of value in order to ensure an outcome that is consistent with the arm’s length principle. Various mechanisms should be explained in detail, with examples of their application. In addition, the sensitivities and practical application of the various mechanisms, including the capability independently to verify the underlying data, should be compared, in order that guidance is provided about the appropriate application of the mechanisms.
高度整合的商业模式

- 在高度整合的商业模式下，交易利润分割法也许是最合适和最合适的转让定价方法。修订后的指南会对此提供进一步的指导原则，其中应指出价值链分析对于理解相关交易情况的重要性。进行价值链分析时，区分全球价值链中“串联”整合还是“并联”整合可能会有所帮助。“串联”整合是指执行不同业务活动的企业通过相互之间的交易安排紧密相连，形成一条连贯的价值链；如果不深入考虑相关交易安排的特性，则不能确保利润分割方法是合适的方法。“并联”整合是指在价值链中存在多个独立阶段，将执行具有相同收入、成本、资产或风险结构的类似活动的企业整合在一起。《转让定价指南》中提到的金融工具交易可能会涉及相关资产、收入和风险结果的类似活动，并认为对“并联”整合模式产生的合并利润进行分割可能是合理的方法。

独特且有价值的贡献

- 修订后的指南将增加更多的指导原则和案例明确“独特且有价值的贡献”的含义，以便更好地辨别出可以执行交易利润分割法作为最合适转让定价方法的具体情形。同时，修订后的指南会为独特且有价值的贡献（无形资产除外）提供进一步的指导。
- 对于涉及无形资产开发、价值提升、维护、保护或利用等重要功能的情形，修订后的指南会综合考虑修订后的无形资产指南，进一步明确在上述情况下选择交易利润分割法作为最合适的转让定价方法，即说明在何种情况下上述功能可构成“独特且有价值的贡献”。
- 修订后的指南应考虑企业在可比交易中使用利润分割模型的情形。

协同效益

- 对于存在显著协同效应的情况，修订后的指南将对确认交易利润分割法是否为最合适的方法所需考虑的事实情况以及如何运用交易利润分割法提供进一步的指导。

利润分割因素

- 修订后的指南将进一步说明如何使利润分割因素与价值创造间实现较强的关联性，从而保证利润分割结果符合独立交易原则。修订后的指南将通过运用案例详细说明不同的机制。此外，修订后的指南还会对各种机制的敏感性及实际可操作性进行比较，其中包括独立验证基础数据的能力，以便为合理运用不同机制提供指导。
Use of profit split to determine TNMM range, royalty rates and other payment forms

- Additional guidance will be provided on the circumstances to take into account in evaluating whether a transactional profit split method can be used to support results under a TNMM, or to determine royalty rates, or in other ways that are practical, respect the form of the contractual arrangements, and help simplify pricing outcomes.
通过利润分割确定交易净利润法的区间，特许权交易费以及其他费用形式

- 修订后的指南将补充说明在评估交易净利润法是否可用于支持交易净利润法的结果，确定特许权使用费率或其他实际应用时，所需考虑的各种实际情况；以及交易净利润法是否可用于尊重合同形式，并有助于简化定价结果。
INTANGIBLES

Revisions to Chapter VI of the Transfer Pricing Guidelines

SUMMARY

This chapter of the Report provides guidance specially tailored to determining arm's length conditions for transactions that involve the use or transfer of intangibles under Article 9 of the OECD Model Tax Convention. In doing so, the guidance contained in this Chapter addresses the opportunities for base erosion and profit shifting resulting from the transfer of intangibles among members of an MNE group. Under this guidance, members of the MNE group are to be compensated based on the value they create through functions performed, assets used and risks assumed in the development, enhancement, maintenance, protection and exploitation of intangibles. Tax administrations are given new tools to tackle the problem of information asymmetry to assist in determining the appropriate pricing arrangements for intangibles, and valuation techniques are recognised as useful tools when pricing transactions involving intangibles.

The guidance was developed under Action 8 of the OECD/G20 BEPS Project, which requested the development of rules to prevent BEPS by moving intangibles among group members by “(i) adopting a broad and clearly delineated definition of intangibles; (ii) ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation; (iii) developing transfer pricing rules or special measures for transfers of hard-to-value intangibles.”

This Chapter places the guidance on intangibles within the wider context of the guidance on accurately delineating the transaction and the analysis of risks contained in the first chapter of this Report relating to "Guidance on Applying the Arm's Length Principle", which is relevant in dealing with the difference between anticipated and actual returns to intangibles.

The framework for analysing risks contained in the Chapter "Guidance on Applying the Arm's Length Principle" depends on a very specific and meaningful control requirement, which takes into account both the capability to perform relevant decision-making functions together with the actual performance of such functions. If an associated enterprise contractually assuming a specific risk does not exercise control over that risk nor has the financial capacity to assume the risk, then the framework contained in the Chapter "Guidance on Applying the Arm's Length Principle" determines that the risk will be allocated to another member of the MNE group that does exercise such control and has the financial capacity to assume the risk. This control requirement is used in this Chapter to determine which parties assume risks in relation to intangibles, but also for assessing which member of the MNE group in fact controls the performance of outsourced functions in relation to the development, enhancement, maintenance, protection and exploitation of the intangible.

The guidance refers to the treatment of the return to funding contained in the Chapter "Guidance on Applying the Arm's Length Principle", and ensures that funding of the development, enhancement, maintenance, protection or exploitation of an intangible by an entity that does not perform any of the important functions in relation to the intangible and does not exercise control over the financial risk will generate no more than a risk-free return.

In relation to arm's length pricing when valuation is highly uncertain at the time of the
无形资产

针对《转让定价指南》第六章的修订

摘要

本章根据《OECD 税收协定范本》第 9 条的规定，专门针对涉及无形资产使用或转让的交易确定独立交易条件的事项提供指南，并对跨国企业集团成员间通过无形资产转让而造成税基侵蚀和利润转移的可能性做出了说明。根据本指南，跨国企业集团成员应根据其各自在无形资产开发、价值提升、维护、保护和使用过程中所履行的功能、投入的资产和承担的风险判断其对无形资产价值的贡献程度，确定其各自应当享有的收益。税务机关可以通过本指南来解决为无形资产确定合理定价安排中的信息不对称问题，其中价值评估方法是对相关交易进行定价时的有效工具。

本指南反映了 OECD 和 G20 开展的 BEPS 项目第 8 项行动计划的成果，要求通过制定相关的转让定价规则，以避免跨国企业集团成员间通过无形资产转让而造成税基侵蚀和利润转移。具体措施包括：1）采用较为宽泛且明确界定的无形资产评估标准；2）确保与无形资产转让或使用相关的利润分配与价值创造相关一致（而非脱离）；3）为交易中难以估价的无形资产完善转让定价规则或其他特殊方法。

本报告第一章“独立交易原则的应用指南”中探索了如何准确界定交易安排及开展风险分析，这为处理无形资产预测收益和实际收益的差异提供了指导意见。在此基础上，本章对无形资产的相关事宜提供了进一步的指导和说明。

“独立交易原则的应用指南”中提及的风险分析框架的核心是风险控制要求。“风险控制要求”同时考虑了企业执行相关决策功能的能力以及是否实际履行相关功能的现实情况。如果一家关联企业仅在协议层面上承担某一风险，实际并不对相应风险进行控制且不具备承担风险的财务能力，那么根据上述风险分析框架的原则，应判定跨国企业集团中对相关风险进行实际控制且具备承担风险的财务能力的成员企业作为实际上的风险承担者。本章通过运用风险控制这一要求来确定承担无形资产风险的企业，以及确定跨国企业集团中实际控制“无形资产开发、价值提升、维护、保护和利用等外活动”的成员企业。

本章参照“独立交易原则的应用指南”中有关成本收入的处理原则，确立了在无形资产开发、价值提升、维护、保护和利用的过程中，提供资金但不实际履行任何相关的重要功能和控制相应风险的企业，应获得无风险的收益。
transaction, the guidance recognises that third parties may adopt different approaches for taking account of uncertainties that are relevant for the value of an intangible, including to conclude a contract based on contingent payments dependent on the actual results achieved. The guidance also takes into account that, because of information asymmetries, it proves difficult for a tax administration to evaluate the reliability of the information on which the taxpayer priced the transaction, especially in relation to intangibles with a highly uncertain value at the time of the transfer. To address these challenges, an approach to pricing hard-to-value intangibles has been developed which allows the taxpayer to demonstrate that its pricing is based on a thorough transfer pricing analysis and leads to an arm's length outcome, while the approach at the same time protects the tax administrations from the negative effects of information asymmetry. It does so by ensuring that tax administrations can consider ex post outcomes as presumptive evidence about the appropriateness of the ex ante pricing arrangements, and the taxpayer cannot demonstrate that the uncertainty has been appropriately taken into account in the pricing methodology adopted. Guidance on the implementation of this approach will be provided during 2016, and the practical application of the exemptions, including the measurement of materiality and time periods contained in the current exemptions, will be reviewed by 2020 in the light of further experience.

In summary, the guidance contained in this chapter ensures that:

- Legal ownership of intangibles by an associated enterprise alone does not determine entitlement to returns from the exploitation of intangibles;
- Associated enterprises performing important value-creating functions related to the development, maintenance, enhancement, protection and exploitation of the intangibles can expect appropriate remuneration;
- An associated enterprise assuming risk in relation to the development, maintenance, enhancement, protection and exploitation of the intangibles must exercise control over the risks and have the financial capacity to assume the risks, in accordance with the guidance on risks in Section D.1.2 of the Chapter "Guidance on Applying the Arm's Length Principle", including the very specific and meaningful control requirement;
- Entitlement of any member of the MNE group to profit or loss relating to differences between actual and expected profits will depend on which entity or entities assume(s) the risks that caused these differences and whether the entity or entities are performing the important functions in relation to the development, enhancement, maintenance, protection or exploitation of the intangibles or contributing to the control over the economically significant risks and it is determined that arm's length remuneration of these functions would include a profit sharing element;
- An associated enterprise providing funding and assuming the related financial risks, but not performing any functions relating to the intangible, could generally only expect a risk-adjusted return on its funding;
- If the associated enterprise providing funding does not exercise control over the financial risks associated with the funding, then it is entitled to no more than a risk-free return;
- The guidance on the situations in which valuation techniques can appropriately be used is expanded;
- A rigorous transfer pricing analysis by taxpayers is required to ensure that transfers of hard-to-value intangibles are priced at arm's length.
针对交易时价值评估高度不确定的独立交易定价，本指南指出独立企业可能采用不同的方法对影响无形资产价值评估的不确定性进行考量和分析。在合同中设定基于实际结果的浮动付款条件。本指南也对由于信息不对称对税务关系造成的困境做出了说明，特别是在无形资产转让时点价值不确定性的情况下，税务关系很难有效地评估纳税人交易定价信息的可靠性。为了解决这些难题，本指南提出了专为难以估值的无形资产定价的方法。税务人可以通过该方法来计算其无形资产定价经过详尽的转让定价分析，且定价结果符合独立交易原则；与此同时，税务关系也可以摆脱信息不对称的困境。税务关系可以通过“事后”的结果为参考依据，来评估“事前”的定价安排是否合理，而且企业也无法证明在其使用定价方法时已恰当考虑了不确定性因素。该方法的实施细则会在2016年出台。同时，该方法的使用事项的实际应用，包括当前允许事项中的重要性会受到测试，会在2020年之前根据实际操作中获得的经验进行更新和完善。

综上所述，本章旨在确定下列事项：

- 关联企业使用无形资产的法律所有权并能使其享有利用无形资产的收益。
- 关联企业根据与无形资产开发、价值提升、维护、保护和利用相关的重要价值创造功能所应获得的补偿。
- 根据“独立交易原则的运用指南”第 D.1.2 节中有关风险的指导说明（包括风险控制要求），承担无形资产开发、价值提升、维护、保护和利用相关风险的关联交易，应相应风险进行控制且具备承担风险的财务能力；
- 跨国企业集团成员对于能够享有（或承担）无形资产实际收益和预期收益期间差异带来的相关利润（或亏损），取决于成员企业是否承担了造成上述差异的风险以及是否执行与无形资产开发、价值提升、维护、保护和利用相关的重要功能成为控制重大风险的贡献。同时，针对上述功能完成符合独立交易原则的补偿时应考虑利润分配因素；
- 关联企业对无形资产出资且承担相关财务风险，但不执行任何与无形资产相关的功能的。仅可获得经过风险调整的收益；
- 关联企业对无形资产出资但不对相关财务风险进行控制的。仅应获得无风险的收益；
- 补充说明价值评估方法的适用情形；
- 纳税人应以难以估值的无形资产进行深人的转让定价分析，确保相关交易的转让定价符合独立交易原则。
The current provisions of Chapter VI of the Transfer Pricing Guidelines are deleted in their entirety and are replaced by the following language.

6.1 Under Article 9 of the OECD Model Tax Convention, where the conditions made or imposed in the use or transfer of intangibles between two associated enterprises differ from those that would be made between independent enterprises, then any profits that would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

6.2 The purpose of this Chapter VI is to provide guidance specially tailored to determining arm's length conditions for transactions that involve the use or transfer of intangibles. Article 9 of the OECD Model Tax Convention is concerned with the conditions of transactions between associated enterprises, not with assigning particular labels to such transactions. Consequently, the key consideration is whether a transaction conveys economic value from one associated enterprise to another, whether that benefit derives from tangible property, intangibles, services or other items or activities. An item or activity can convey economic value notwithstanding the fact that it may not be specifically addressed in Chapter VI. To the extent that an item or activity conveys economic value, it should be taken into account in the determination of arm's length prices whether or not it constitutes an intangible within the meaning of paragraph 6.6.

6.3 The principles of Chapters I - III of these Guidelines apply equally to transactions involving intangibles and those transactions which do not. Under those principles, as is the case with other transfer pricing matters, the analysis of cases involving the use or transfer of intangibles should begin with a thorough identification of the commercial or financial relations between the associated enterprises and the conditions and economically relevant circumstances attaching to those relations in order that the actual transaction involving the use or transfer of intangibles is accurately delineated. The functional analysis should identify the functions performed, assets used, and risks assumed by each relevant member of the MNE group. In cases involving the use or transfer of intangibles, it is especially important to ground the functional analysis on an understanding of the MNE's global business and the manner in which intangibles are used by the MNE to add or create value across the entire supply chain. Where necessary, the analysis should consider, within the framework of Section D.2 of Chapter I, whether independent parties would have entered into the arrangement and if so, the conditions that would have been agreed.

6.4 In order to determine arm's length conditions for the use or transfer of intangibles it is important to perform a functional and comparability analysis in accordance with Section D.1 of Chapter I, based on identifying the intangibles and associated risks in contractual arrangements and then supplementing the analysis through examination of the actual conduct of the parties based on the functions performed, assets used, and risks assumed, including control of important functions and economically significant risks. Accordingly, the next section, Section A, provides guidance on identifying intangibles. Section B examines legal ownership and other contractual terms, together with guidance on the evaluation of the conduct of the parties based on functions, assets and risks. Section C outlines some typical scenarios involving intangibles, and Section D provides guidance on determining arm's length conditions including the application of pricing methods and valuation techniques, and provides an approach to determining arm’s length conditions for a specific category.

13 The assumption of risks refers to the outcome of the determination of which associated enterprise assumes a specific risk under the guidance provided in Section D.2.1 of Chapter I, taking into account control over risk and financial capacity to assume the risk. Contractual assumption of risk refers to the allocation of risk in contracts between the parties.
《OECD转让定价指南》第六章的现有内容全部删除，替换成本述文字。

6.1 根据《OECD税收协定范本》第9条规定，如果两家关联企业之间在无形资产使用或转让中达成或不达成的交易条件不同于独立企业之间会达成的条件，并且由于这些条件的存在，导致其中一家企业没有取得或不应取得的利润，则可以将这部分利润计入该企业的所得，并据以征税。

6.2 第六章专门针对涉及无形资产使用或转让的交易制定符合独立交易原则的交易条件提供指导。《OECD税收协定范本》第9条重点关注关联企业之间交易的条件，而非向这些交易赋予特定的名称。因此，需要重点考虑的是交易是否有实现经济价值从一方关联企业转移到另一方，以及相应利益是否由相关交易产生的无形资产、服务或其他项目或活动所产生的。某些能够实现经济价值转移的项目或活动可能未在第六章中专门分析，只要一个项目或活动能够实现经济价值的转移，不论其是否构成第6.6段中所定义的无形资产，都应在制定独立交易价格时予以考虑。

6.3 《转让定价指南》第一章至三章的原则同样适用于涉及或不涉及无形资产的交易。与其他转让定价一样，根据这些原则分析涉及使用或转让无形资产的案例时，应首先对关联企业间的商业或财务关系以及这些关系中的条件与相关经济情况进行清晰的描述，从而确保准确界定使用或转让无形资产的交易的情况。功能分析应当确定跨国企业集团中各个成员所执行的功能、使用的资产和承担的责任。在涉及使用或转让无形资产的案例中，需要尊重理解跨国企业集团的全球业务以及无形资产如何为整个集团供应链增加或创造价值，并以此作为进行功能分析的基础。必要时，相关分析应该根据第一章第D.2节所提供的框架进行，着重考虑独立企业是否会做出这样的安排及达成这样的交易条件。

6.4 为了确定使用或转让无形资产交易中的独立交易条件，应根据第一章第D.1节的相关指导进行功能分析和可比性分析：首先确定合同安排涉及的无形资产及相关风险，然后通过交易双方执行的功能、使用的资产以及承担的风险（包括对重要功能以及重大经济风险的控制）审视其实际行为是否与合同安排一致，作为上述分析的补充说明。下文中，第A节针对如何识别无形资产提供了指导，第B节探讨了无形资产的法律所有权和其他合同条款，并为根据交易双方的功能、资产和风险评估其实际行为提供了指导。第C节介绍了涉及无形资产的典型交易。第D节针对确定独立交易条件提供了指导，包括对定价方法和价值评估方法的运用。此外，第D节还针对如何为难以估值的特定无形资产确定独立交易条件作出了说明。相关案例，参见本章附录。

1) 风险的承担是指根据第一章第D.1.2.1节的指导原则判断实际承担特定风险的关联企业，其中需考虑关联企业是否对风险进行控制以及是否将有承担风险的财务能力。合同条款的风险是指交易双方在合同中约定的风险分配。
of hard-to-value intangibles. Examples illustrating the guidance are contained in the Annex to this Chapter.

A. Identifying Intangibles

A.1 In general

6.5 Difficulties can arise in a transfer pricing analysis as a result of definitions of the term intangible that are either too narrow or too broad. If an overly narrow definition of the term intangible is applied, either taxpayers or governments may argue that certain items fall outside the definition and may therefore be transferred or used without separate compensation, even though such use or transfer would give rise to compensation in transactions between independent enterprises. If too broad a definition is applied, either taxpayers or governments may argue that the use or transfer of an item in transactions between associated enterprises should require compensation in circumstances where no such compensation would be provided in transactions between independent enterprises.

6.6 In these Guidelines, therefore, the word "intangible" is intended to address something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances. Rather than focusing on accounting or legal definitions, the thrust of a transfer pricing analysis in a case involving intangibles should be the determination of the conditions that would be agreed upon between independent parties for a comparable transaction.

6.7 Intangibles that are important to consider for transfer pricing purposes are not always recognised as intangible assets for accounting purposes. For example, costs associated with developing intangibles internally through expenditures such as research and development and advertising are sometimes expensed rather than capitalised for accounting purposes and the intangibles resulting from such expenditures therefore are not always reflected on the balance sheet. Such intangibles may nevertheless be used to generate significant economic value and may need to be considered for transfer pricing purposes. Furthermore, the enhancement to value that may arise from the complementary nature of a collection of intangibles when exploited together is not always reflected on the balance sheet. Accordingly, whether an item should be considered to be an intangible for transfer pricing purposes under Article 9 of the OECD Model Tax Convention can be informed by its characterisation for accounting purposes, but will not be determined by such characterisation only. Furthermore, the determination that an item should be regarded as an intangible for transfer pricing purposes does not determine or follow from its characterisation for general tax purposes, as, for example, an expense or an amortisable asset.

6.8 The availability and extent of legal, contractual, or other forms of protection may affect the value of an item and the returns that should be attributed to it. The existence of such protection is not, however, a necessary condition for an item to be characterised as an intangible for transfer pricing purposes. Similarly, while some intangibles may be identified separately and transferred on a segregated basis, other intangibles may be transferred only in combination with other business assets. Therefore, separate transferability is not a necessary condition for an item to be characterised as an intangible for transfer pricing purposes.

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14 As used in this paragraph, a financial asset is any asset that is cash, an equity instrument, a contractual right or obligation to receive cash or another financial asset or to exchange financial assets or liabilities, or a derivative. Examples include bonds, bank deposits, stocks, shares, forward contracts, futures contracts, and swaps.
A. 无形资产的定义

A.1. 总论

6.5 对“无形资产”一词定义得过于狭隘或过于宽泛，都会给转让定价分析带来困难。如果采用过于狭隘的无形资产的定义，纳税人或政府可能认为某些项目不属于无形资产，因此在转让或使用时无须对其进行单独补偿。即使独立企业会为转让或使用上述项目支付代价，如果采用过于宽泛的无形资产的定义，纳税人或政府可能认为关联方需要就转让或使用某些项目作出单独补偿，即使在独立企业的交易中不会发生类似的支付。

6.6 因此在《转让定价指南》中，“无形资产”一词是指企业拥有或控制以便在商业活动中使用的没有实物形态的非金融资产，

独立企业间在可比情形下对其使用或转让会支付代价。涉及无形资产的转让定价分析的切入点应当是确定独立交易方在可比交易中会达成的交易条件，而不应拘泥于无形资产的会计或法律定义。

6.7 转让定价分析中需要重点考量的无形资产，并不一定属于根据会计准则需要被确认的无形资产。例如，在某些情况下，为开发无形资产而发生的内部支出（如研发费和广告费）在会计中被作为当期费用而并非资本化，因此由这些支出所产生的无形资产并不一定会体现在资产负债表上。然而，这些无形资产可能会产生显著的经济价值，因此从转让角度考虑可能需要予以考虑。此外，一些无形资产具有互补的效用，共同使用时提升的价值也不一定会体现在资产负债表上。因此，判断某一项资产是否应该在转让定价分析时被认定为《OECD 税收协定范本》第 9 条规定的无形资产，可以参考其会计上的特征，但并不能仅依据会计特征进行判定。此外，某一项在转让定价分析中被认定为无形资产，并不决定或取决于其在一般纳税期间中作为哪些当期费用或可抵销资产的性质。

6.8 是否可以获得法律、合同或其他形式的保护以及保护程度如何，都可能影响某一项目的价值以及应当归属于这一项目的回报。然而，此类保护是否存在并不构成该项目在转让定价中被定义为无形资产的必要条件。同样，有些无形资产可以被独立区分并转让，而有些无形资产则可能必须与其他商业资产共同转让。因此，是否可以独立转让也不是在转让定价中被定义为无形资产的必要条件。

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14 本小节中，金融资产指现金、权证性工具、获得现金或其他金融资产以及交换金融资产或负债的合同权利或义务，或金融衍生品，例如债务、股票或票据、股份、期权、期货、远期、期货期权、期货合同、期票合同、期权交易等。
6.9 It is important to distinguish intangibles from market conditions or local market circumstances. Features of a local market, such as the level of disposable income of households in that market or the size or relative competitiveness of the market are not capable of being owned or controlled. While in some circumstances they may affect the determination of an arm's length price for a particular transaction and should be taken into account in a comparability analysis, they are not intangibles for the purposes of Chapter VI. See Section D.6 of Chapter I.

6.10 The identification of an item as an intangible is separate and distinct from the process for determining the price for the use or transfer of the item under the facts and circumstances of a given case. Depending on the industry sector and other facts specific to a particular case, exploitation of intangibles can account for either a large or small part of the MNE's value creation. It should be emphasised that not all intangibles deserve compensation separate from the required payment for goods or services in all circumstances, and not all intangibles give rise to premium returns in all circumstances. For example, consider a situation in which an enterprise performs a service using non-unique know-how, where other comparable service providers have comparable know-how. In that case, even though know-how constitutes an intangible, it may be determined under the facts and circumstances that the know-how does not justify allocating a premium return to the enterprise, over and above normal returns earned by comparable independent providers of similar services that use comparable non-unique know-how. See Section D.1.3 of Chapter I. See also paragraph 6.17 for a definition of "unique" intangibles.

6.11 Care should be taken in determining whether or when an intangible exists and whether an intangible has been used or transferred. For example, not all research and development expenditures produce or enhance an intangible, and not all marketing activities result in the creation or enhancement of an intangible.

6.12 In a transfer pricing analysis of a matter involving intangibles, it is important to identify the relevant intangibles with specificity. The functional analysis should identify the relevant intangibles at issue, the manner in which they contribute to the creation of value in the transactions under review, the important functions performed and specific risks assumed in connection with the development, enhancement, maintenance, protection and exploitation of the intangibles and the manner in which they interact with other intangibles, with tangible assets and with business operations to create value. While it may be appropriate to aggregate intangibles for the purpose of determining arm's length conditions for the use or transfer of the intangibles in certain cases, it is not sufficient to suggest that vaguely specified or undifferentiated intangibles have an effect on arm's length prices or other conditions. A thorough functional analysis, including an analysis of the importance of identified relevant intangibles in the MNE's global business, should support the determination of arm's length conditions.

A.2 Relevance of this Chapter for other tax purposes

6.13 The guidance contained in this Chapter is intended to address transfer pricing matters exclusively. It is not intended to have relevance for other tax purposes. For example, the Commentary on Article 12 of the OECD Model Tax Convention contains a detailed discussion of the definition of royalties under that Article (paragraphs 8 to 19). The Article 12 definition of "royalties" is not intended to provide any guidance on whether, and if so at what price, the use or transfer of intangibles would be remunerated between independent parties. It is therefore not relevant for transfer pricing purposes. Moreover, the manner in which a transaction is characterised for transfer pricing purposes has no relevance to the question of whether a particular payment constitutes a royalty or may be subjected to withholding tax under Article 12. The concept of intangibles for transfer pricing purposes and the definition of royalties for purposes of Article 12 of the OECD Model Tax Convention are two
6.9 区分无形资产与市场条件或本地市场环境十分重要。本地市场特点，如本地市场中产品可支配收入水平、市场规模或市场的相对竞争程度，都不足以使企业拥有或控制。虽然在某些情况下，这些特点会影响特定交易的独立交易价格的确定，因而需要在可比性分析中进行考虑，但它们并非第六章所指的无形资产。参见《转让定价指南》第一章第 D.6 节。

6.10 确定一个项目是否属于无形资产有别于独立于任何情况下确定实际或转换该项目的独立交易价格。任何具体案例涉及行业和其他特定情况，无形资产的判断对于跨国企业价值创造的贡献可多可少。需强调的是，并不是所有企业资产在任何情况下都需要在货物或服务的支付条款以外单独获得补偿，更不是所有企业资产在任何情况下都能带来额外收益。例如，假设一家企业在提供某项服务时使用了并有独特的专有技术，即可比商业模式也拥有可比的专有技术。在这种情况下，即使专利技术构成无形资产，但根据实际情况可以确定该专利技术并不足以使企业获得超额回报，即高于使用可比非专利专有技术提供类似服务的独立服务提供者所能获得的正常利润。参见第一章第 D.1.3 节以及第 6.17 段对“独特的”无形资产的定义。

6.11 应该谨慎判断无形资产是否存在或何时存在，以及无形资产是否已经被使用或转让。例如，并非所有研发支出都可以产生无形资产或为无形资产提升价值，也并非所有的营销活动都能创造无形资产或无形资产提升价值。

6.12 与涉及无形资产的转让定价分析中，确认无形资产十分重要。功能分析需明确相关的无形资产，这些无形资产对受测交易的价值创造做出的贡献。企业在无形资产开发、价值提升、维护和保护以及利用时所执行的重要功能和承担的特定风险，以及这些无形资产与其他无形资产、有形资产和企业运营中价值创造过程中的相互影响和作用。尽管在某些情况下，可能需要针对多个无形资产进行合并分析来确定无形资产转让或转让交易的独立交易条件，但这并不能充分说明界定范围或不具有独特性的无形资产会对符合条件交易的原则或其他交易条件产生影响。深入的功能分析有助于独立交易条件的确定，包括对认定的相关无形资产在跨国企业全球业务中重要性的分析。

A.2 本章与其他税收方面的联系

6.13 本章所涵盖的指导原则仅针对解决转让定价问题，与其他税收问题并无关联。例如，《OECD 税收协定范本》第 12 条注释中详细讨论了特许权使用费的定义（第 8 至 19 条）。第 12 条定义的“特许权使用费”并不旨在解决独立企业之间就转让或使用无形资产是否应当进行补偿以及如何作价等问题，因此，该定义不适用于转让定价分析。此外，从转让定价角度如何定性一项交易，与相关支付根据《OECD 税收协定范本》第 12 条是否构成特许权使用费或是否需要纳税预提所得税并无必然联系。转让定价中的无形资产定义与《OECD 税收协定范本》第 12 条中的特许权使用费定义是两种不同的概念，因此无需保持一致。
different notions that do not need to be aligned. It may occur that a payment made between associated enterprises may be regarded as not constituting a royalty for purposes of Article 12, and nevertheless be treated for transfer pricing purposes as a payment to which the principles of this Chapter may apply. Examples could include certain payments related to goodwill or ongoing concern value. It may also occur that a payment properly treated as a royalty under Article 12 of a relevant Treaty may not be made in remuneration for intangibles for purposes of this Chapter. Examples could include certain payments for technical services. Similarly, the guidance in this Chapter is not intended to have relevance for customs purposes.

6.14 The guidance in this Chapter is also not relevant to recognition of income, capitalisation of intangible development costs, amortisation, or similar matters. Thus, for example, a country may choose not to impose tax on the transfer of particular types of intangibles under specified circumstances. Similarly, a country may not permit amortisation of the cost of certain acquired items that would be considered intangibles under the definitions in this Chapter and whose transfer may be subjected to tax at the time of the transfer in the transferee's country. It is recognised that inconsistencies between individual country laws regarding such matters can sometimes give rise to either double taxation or double non-taxation.

A.3 Categories of intangibles

6.15 In discussions of transfer pricing issues related to intangibles, it is sometimes the case that various categories of intangibles are described and labels applied. Distinctions are sometimes made between trade intangibles and marketing intangibles, between “soft” intangibles and “hard” intangibles, between routine and non-routine intangibles, and between other classes and categories of intangibles. The approach contained in this Chapter for determining arm’s length prices in cases involving intangibles does not turn on these categorisations. Accordingly, no attempt is made in these Guidelines to delineate with precision various classes or categories of intangibles or to prescribe outcomes that turn on such categories.

6.16 Certain categories of intangibles are, however, commonly referred to in discussions of transfer pricing matters. To facilitate discussions, definitions of two such commonly used terms, “marketing intangibles” and “trade intangibles” are contained in the Glossary and referred to from time to time in this discussion in these Guidelines. It should be emphasised that generic references to marketing or trade intangibles do not relieve taxpayers or tax administrations from their obligation in a transfer pricing analysis to identify relevant intangibles with specificity, nor does the use of those terms suggest that a different approach should be applied in determining arm’s length conditions for transactions that involve either marketing intangibles or trade intangibles.

The Glossary of these Guidelines is amended by deleting the definition of the term “marketing intangible” and replacing that definition with the following language:

“Marketing intangible”

“An intangible (within the meaning of paragraph 6.6) that relates to marketing activities, aids in the commercial exploitation of a product or service, and/or has an important promotional value for the product concerned. Depending on the context, marketing intangibles may include, for example, trademarks, trade names, customer lists, customer relationships, and proprietary market and customer data that is used or aids in marketing and selling goods or services to customers.”

6.17 In certain instances these Guidelines refer to “unique and valuable” intangibles. “Unique and valuable” intangibles are those intangibles (i) that are not comparable to intangibles used by or
有些关联企业之间的支付可能并不构成《OECD 税收协定范本》第 12 条所定义的特许权使用费，但根据本章的原则被认定为是转让定价角度给予无形资产的一种补偿，例如某些因商誉或持续经营价值而支付的补偿。而有些根据《OECD 税收协定范本》第 12 条被合理认定为特许权使用费的情况则可能在本章的原则下，不被认为是无形资产的一种补偿，例如对某些技术或服务支付的补偿。同样地，本章中的指导原则并不适用于讨论海关问题。

6.14 本章的原则也适用于无形资产收人的确认、开发成本的资本化、摊销或类似问题无关。举例而言，某个国家可以选择在特定情况下对特定种类的无形资产的转让不予征税。同样，尽管某资产按照本章定义应被认定为无形资产，某个国家可能不允许接受方多期摊销该资产的购入成本，即使此时在转让方所在国家，转让方在预期期必须在本国纳税缴纳缴款。众所周知，各国法律对这些问题不一致的规定有时可能导致双重征税或双重不征税的情况发生。

A.3 无形资产的分类

6.15 在无形资产相关的转让定价问题讨论中，有时无形资产的性质被描述为不同的种类并赋予不同的名称。无形资产有多种分类方式，如交易性无形资产和非交易性无形资产、“软性”无形资产和“硬性”无形资产、普通性无形资产和非常规性无形资产，以及其他类型和种类等。本章为确定无形资产相关交易的独立交易价格而采用的方法并不取决于这些分类标准。同样，《转让定价指南》也未对无形资产的种类和分类进行详细描述，或对由此不同分类可能带来的不同结果进行阐述。

6.16 然而，某些无形资产的分类在转让定价问题的讨论中经常被使用。为方便理解，《转让定价指南》在词汇表中列示了“交易性无形资产”和“交易性无形资产”这两个常用术语的定义，指南的相关讨论中也有多处引用。但需特别指出的是，纳税人和税务机关不能只是泛泛地引用交易性无形资产和非交易性无形资产这两个术语，而需在转让定价分析中具体识别和确定相关的无形资产。此外，使用这些术语并不意味着对涉及交易性无形资产或交易性无形资产的交易需要采用不同的方式来评估其是否符合独立交易原则。

《转让定价指南》的词汇表进行修订：删除“交易性无形资产”的原有定义并替换为以下内容：
“交易性无形资产”
“与市场活动相关的无形资产”，有助于产品或服务的商业运作，并且对产品而言具有重要的推广价值。在不同情况下，交易性无形资产可以包括商标、商号、客户名单、客户关系，以及在市场和客户数据中，这些无形资产可以用于或有助于向客户推广和销售产品或服务。”

6.17 某些情况下，《转让定价指南》会提到“独特且有价值的”无形资产。“独特且有价值的”无形资产是指符合以下条件的无形资产：(i) 与潜在可比交易中的交易方使用或可以获得的无形资产不可比；
available to parties to potentially comparable transactions, and (ii) whose use in business operations (e.g. manufacturing, provision of services, marketing, sales or administration) is expected to yield greater future economic benefits than would be expected in the absence of the intangible.

A.4 Illustrations

6.18 This section provides illustrations of items often considered in transfer pricing analyses involving intangibles. The illustrations are intended to clarify the provisions of Section A.1., but this listing should not be used as a substitute for a detailed analysis. The illustrations are not intended to be comprehensive or to provide a complete listing of items that may or may not constitute intangibles. Numerous items not included in this listing of illustrations may be intangibles for transfer pricing purposes. The illustrations in this section should be adapted to the specific legal and regulatory environment that prevails in each country. Furthermore, the illustrations in this section should be considered and evaluated in the context of the comparability analysis (including the functional analysis) of the controlled transaction with the objective of better understanding how specific intangibles and items treated as intangibles contribute to the creation of value in the context of the MNE's global business. It should be emphasised that a generic reference to an item included in the list of illustrations does not relieve taxpayers or tax administrations from their obligation in a transfer pricing analysis to identify relevant intangibles with specificity based on the guidance of Section A.1.

(i) Patents

6.19 A patent is a legal instrument that grants an exclusive right to its owner to use a given invention for a limited period of time within a specific geography. A patent may relate to a physical object or to a process. Patentable inventions are often developed through risky and costly research and development activities. In some circumstances, however, small research and development expenditures can lead to highly valuable patentable inventions. The developer of a patent may try to recover its development costs (and earn a return) through the sale of products covered by the patent, by licensing others to use the patented invention, or by an outright sale of the patent. The exclusivity granted by a patent may, under some circumstances, allow the patent owner to earn premium returns from the use of its invention. In other cases, a patented invention may provide cost advantages to the owner that are not available to competitors. In still other situations, patents may not provide a significant commercial advantage. Patents are intangibles within the meaning of Section A.1.

(ii) Know-how and trade secrets

6.20 Know-how and trade secrets are proprietary information or knowledge that assist or improve a commercial activity, but that are not registered for protection in the manner of a patent or trademark. Know-how and trade secrets generally consist of undisclosed information of an industrial, commercial or scientific nature arising from previous experience, which has practical application in the operation of an enterprise. Know-how and trade secrets may relate to manufacturing, marketing, research and development, or any other commercial activity. The value of know-how and trade secrets is often dependent on the ability of the enterprise to preserve the confidentiality of the know-how or trade secret. In certain industries the disclosure of information necessary to obtain patent protection could assist competitors in developing alternative solutions. Accordingly, an enterprise may, for sound business reasons, choose not to register patentable know-how, which may nonetheless contribute substantially to the success of the enterprise. The confidential nature of know-how and trade secrets may be protected to some degree by (i) unfair competition or similar laws, (ii) employment contracts, and (iii) economic and technological barriers to competition. Know-how and trade secrets are intangibles within the meaning of Section A.1.
且（ii）在投入商业运营（如生产、服务提供、营销、销售或行政活动）后，预期比不使用该无形资产时会产生更高的经济效益。

A.4 举例说明

6.18 本节将举例说明无形资产相关转让定价分析中通常应当考虑的项目。这些项目旨在进一步明确第 A.1 节的相关内容，但不能取代详细分析。这些项目并非面面俱到，也不会完整列出可以构成无形资产的具体项目。很多项目包含在以下举例说明中的项目也可能会在转让定价分析中被认定为无形资产。本节中的举例说明应当结合各个国家现行的法律法规环境。此外，本节中的举例说明应当结合受控交易的可比性分析（包括功能分析）进行考虑和评估，以更好地了解特定无形资产和未被认定为无形资产的项目如何为跨国企业全球业务的价值创造做出贡献。需要强调的是，纳税人和税务机关不能只是泛泛地引用本示例说明中所列的某个项目，他们仍需在转让定价分析中根据第 A.1 节的指导原则具体识别和确定相关无形资产。

(i) 专利

6.19 专利是一种法律工具，赋予其所有者在特定地域内及一定期限内独享某一种发明创造。专利可以是一种产品或一种流程。能够取得专利的发明通常是高风险、高成本的研发成果。然而在某些情况下，较低的研发支出也可能产生非常有价值的专利发明。专利开发方可以通过销售专利产品、授权其他方使用其专利发明或出售专利来弥补其开发成本（并获得收益）。在某些情况下，专利的排他性权利可以使专利所有者在使用专利的过程中获得超额利润。在另一些情况下，一项专利发明可以为拥有方带来竞争优势对于所没有的成本优势。但在另一些情况下，专利可能并不会带来显著的商业优势。专利属于第 A.1 节中所定义的无形资产。

(ii) 专有技术和商业机密

6.20 专有技术和商业机密是可以借助或提高一项商业活动的专有信息或知识。但并未通过注册获得如专利或商标的法律保护。专有技术和商业机密通常是通过积累下来的未泄露的行业、商业或科学信息。可以应用在企业的实际经营中。专有技术和商业机密可能涉及生产、市场营销、研发或任何其他商业活动。专有技术和商业机密的价值通常取决于企业对专有技术和商业机密的保密能力。在某些行业，为了获得专利保护而必须公开的信息可能帮助竞争对手研发出替代方案。因此，企业可能出于正当的理由不选择公开注册本可申请专利的专有技术，而该专有技术仍然可以为企业带来巨大的成功。专有技术和商业机密的保密性可以通过以下方式获得一定程度的保护：(i) 反不正当竞争法或类似法律；(ii) 保密合同；(iii) 竞争中的经济或技术壁垒。专有技术和商业机密属于第 A.1 节所定义的无形资产。
(iii) Trademarks, trade names and brands

6.21 A trademark is a unique name, symbol, logo or picture that the owner may use to distinguish its products and services from those of other entities. Proprietary rights in trademarks are often confirmed through a registration system. The registered owner of a trademark may exclude others from using the trademark in a manner that would create confusion in the marketplace. A trademark registration may continue indefinitely if the trademark is continuously used and the registration appropriately renewed. Trademarks may be established for goods or services, and may apply to a single product or service, or to a line of products or services. Trademarks are perhaps most familiar at the consumer market level, but they are likely to be encountered at all market levels. Trademarks are intangibles within the meaning of Section A.1.

6.22 A trade name (often but not always the name of an enterprise) may have the same force of market penetration as a trademark and may indeed be registered in some specific form as a trademark. The trade names of certain MNEs may be readily recognised, and may be used in marketing a variety of goods and services. Trade names are intangibles within the meaning of Section A.1.

6.23 The term “brand” is sometimes used interchangeably with the terms “trademark” and “trade name.” In other contexts a brand is thought of as a trademark or trade name imbued with social and commercial significance. A brand may, in fact, represent a combination of intangibles and/or other items, including among others, trademarks, trade names, customer relationships, reputational characteristics, and goodwill. It may sometimes be difficult or impossible to segregate or separately transfer the various items contributing to brand value. A brand may consist of a single intangible, or a collection of intangibles, within the meaning of Section A.1.

(iv) Rights under contracts and government licences

6.24 Government licences and concessions may be important to a particular business and can cover a wide range of business relationships. They may include, among others, a government grant of rights to exploit specific natural resources or public goods (e.g. a licence of bandwidth spectrum), or to carry on a specific business activity. Government licences and concessions are intangibles within the meaning of Section A.1. However, government licences and concessions should be distinguished from company registration obligations that are preconditions for doing business in a particular jurisdiction. Such obligations are not intangibles within the meaning of Section A.1.

6.25 Rights under contracts may also be important to a particular business and can cover a wide range of business relationships. They may include, among others, contracts with suppliers and key customers, and agreements to make available the services of one or more employees. Rights under contracts are intangibles within the meaning of Section A.1.

(v) Licences and similar limited rights in intangibles

6.26 Limited rights in intangibles are commonly transferred by means of a licence or other similar contractual arrangement, whether written, oral or implied. Such licensed rights may be limited as to field of use, term of use, geography or in other ways. Such limited rights in intangibles are themselves intangibles within the meaning of Section A.1.

(vi) Goodwill and ongoing concern value

6.27 Depending on the context, the term goodwill can be used to refer to a number of different concepts. In some accounting and business valuation contexts, goodwill reflects the difference between the aggregate value of an operating business and the sum of the values of all separately
(iii) 商标、商号和品牌

6.21 商标是一种独特的名字、符号、标识或图片，所有者可以用以区分自己和其他企业的商品或服务。商标的专有权利通常通过注册获得。注册商标的所有者可以排除他人使用该商标的权利，以避免在市场上产生混淆。如果企业一直使用商标并按规定进行注册续展，商标注册就可以无限期地延续。商标可用于某一特定的产品或服务，也可用于一系列产品或服务。商标可能在消费者市场层面最为人熟知，但也可能存在于各个市场竞争，商标属于第 A.1 节中所定义的无形资产。

6.22 商号（通常是指企业名称，但也有例外）可能具有与商标同样的市场渗透力，并且可以某种特定的商标形式进行注册。一些跨国企业的商号辨识度很高，可以在各种产品和服务的营销中使用。商号属于 A.1 节中所定义的无形资产。

6.23 “品牌”一词有时可与“商标”和“商号”交替使用。在某些情况下，品牌被认为是具有社会和商业重要性的商标或商号。品牌可以代表一系列无形资产和/或其他项目，包括商标、商号、客户关系、声誉特征、商誉等。有时很难甚至不可能分割或单独转让对品牌价值具有贡献的各个项目。品牌可能包含单个或一系列无形资产，属于 A.1 节中所定义的无形资产。

(iv) 合同权利和政府许可

6.24 政府许可和特许对特定企业可能非常重要，其中涵盖各种商业关系，包括政府授权企业开发特定自然资源或公共产品（如带宽频谱的使用权）或开展一项特殊商业活动等等。政府许可和特许属于 A.1 节中所定义的无形资产。但是，政府许可和特许应当区别于公司注册义务（即企业在某一辖区开展业务的先决条件）。公司注册义务不是第 A.1 节中所定义的无形资产。

6.25 合同权利也可能对特定企业非常重要，其中涵盖各种商业关系，包括与供应商和关键客户签订的合同、获得一名或多名雇员服务的合同安排等。合同权利属于 A.1 节中所定义的无形资产。

(v) 无形资产的许可和类似的限制权利

6.26 无形资产的限制权利通常通过书面、口头或默示的方式，以授权或其他类似合同安排进行转让。这些授权可能就使用范围、使用条件、使用地区或其他条件作出各种限制。无形资产的限制权利属于 A.1 节所定义的无形资产。

(vi) 商誉和持续经营价值

6.27 根据具体情况，商誉可以指代多种不同的概念。在会计和企业价值评估中，商誉是指企业整体价值与可辨认有形资产和无形资产价值之和之间的差额。
identifiable tangible and intangible assets. Alternatively, goodwill is sometimes described as a representation of the future economic benefits associated with business assets that are not individually identified and separately recognised. In still other contexts goodwill is referred to as the expectation of future trade from existing customers. The term ongoing concern value is sometimes referred to as the value of the assembled assets of an operating business over and above the sum of the separate values of the individual assets. It is generally recognised that goodwill and ongoing concern value cannot be segregated or transferred separately from other business assets. See paragraphs 9.93 to 9.95 for a discussion of the related notion of a transfer of all of the elements of an ongoing concern in connection with a business restructuring.

6.28 It is not necessary for purposes of this Chapter to establish a precise definition of goodwill or ongoing concern value for transfer pricing purposes or to define when goodwill or ongoing concern value may or may not constitute an intangible. It is important to recognise, however, that an important and monetarily significant part of the compensation paid between independent enterprises when some or all of the assets of an operating business are transferred may represent compensation for something referred to in one or another of the alternative descriptions of goodwill or ongoing concern value. When similar transactions occur between associated enterprises, such value should be taken into account in determining an arm’s length price for the transaction. When the reputational value sometimes referred to by the term goodwill is transferred to or shared with an associated enterprise in connection with a transfer or licence of a trademark or other intangible that reputational value should be taken into account in determining appropriate compensation. If features of a business such as a reputation for producing high quality products or providing high quality service allow that business to charge higher prices for goods or services than an entity lacking such reputation, and such features might be characterised as goodwill or ongoing concern value under one or another definition of such terms, such features should be taken into account in establishing arm’s length prices for sales of goods or the provision of services between associated enterprises whether or not they are characterised as goodwill. In other words, labelling a contribution of value from one party to another as goodwill or ongoing concern value does not render such contribution non-compensable. See paragraph 6.2.

6.29 The requirement that goodwill and ongoing concern value be taken into account in pricing transactions in no way implies that the residual measures of goodwill derived for some specific accounting or business valuation purposes are necessarily appropriate measures of the price that would be paid for the transferred business or licence. Together with their associated goodwill and ongoing concern value, by independent parties. Accounting and business valuation measures of goodwill and ongoing concern value do not, as a general rule, correspond to the arm’s length price of transferred goodwill or ongoing concern value in a transfer pricing analysis. Depending on the facts and circumstances, however, accounting valuations and the information supporting such valuations can provide a useful starting point in conducting a transfer pricing analysis. The absence of a single precise definition of goodwill makes it essential for taxpayers and tax administrations to describe specifically relevant intangibles in connection with a transfer pricing analysis, and to consider whether independent enterprises would provide compensation for such intangibles in comparable circumstances.

(vii) Group synergies

6.30 In some circumstances group synergies contribute to the level of income earned by an MNE group. Such group synergies can take many different forms including streamlined management, elimination of costly duplication of effort, integrated systems, purchasing or borrowing power, etc. Such features may have an effect on the determination of arm’s length conditions for controlled transactions and should be addressed for transfer pricing purposes as comparability factors. As they
商誉也可表述为不单独确认和核算的企业资产的未来经济利益，或预期可以从现有客户获得的未来收益。持续经营价值有时是指企业持续经营时的全体系价值超过单项资产单独价值之和；普通认为商誉和持续经营价值不能与现有企业资产分离，也不能作为独立的资产单独转让。关于业务重组中持续经营相关转让的讨论，参见第9.93—9.95段。

6.28 本章无需从转让定价的角度准确定义商誉或持续经营价值，或者明确商誉或持续经营价值是否构成无形资产。必须注意的是，独立企业之间为转让企业部分或全部资产所支付的对价中，可能会有相当一部分金额是作为对类似商誉或持续经营价值的补偿。当关联企业之间发生类似交易时，应当在确定独立交易价格时考虑这些价值。当企业的市场价值（有时称为商誉）通过商标或其他无形资产转让或授权的方式被转让给或与其关联企业共享，应当在确定独立交易价格时考虑该市场价值。如果一家企业的某些特征，如因生产高质量的产品或提供高质量的服务而闻名，使得这家企业的产品或服务比没有这类特征的企业价格更高，并且这些特征根据上述定义可能被认定为商誉或持续经营价值，则应当在确定关联企业之间销售商品或提供服务的独立交易价格时考虑这些特征，而不管它们是否真正被归为商誉。

换言之，一方企业对另一方企业的价值贡献即使被认定为商誉或持续经营价值，并不意味着无须对此贡献做出相应的补偿，参见第6.2段。

6.29 在交易定价时考虑商誉和持续经营价值，并不意味着某些特定的会计和企业价值评估中的商誉的计算方法，即整体价值与单项资产之和的差额即商誉的价值，是衡量独立企业之间可能为转让业务或资产而交易的商誉和持续经营价值所支付价格的合理方法。通常，会计和企业价值评估中对商誉和持续经营价值的衡量不等于转让定价分析中被转让商誉或持续经营价值的独立交易价格。但根据事实情况，会计价值评估以及相关辅助信息可以作为转让定价分析的有效切入点。由于缺乏对商誉的明确定义，纳税人在税务机关必须在转让定价分析中对相关无形资产加以具体描述，并考虑在可比环境下独立企业是否会为类似无形资产提供补偿。

(vii) 集团协同效应

6.30 在某些情况下，集团协同效应可以提高跨国企业集团的收入水平。这种集团协同效应可以有许多形式体现，包括简化的管理流程、减少高成本的重复工作、整合的系统、购买力或借款能力等。上述特征可能影响受控交易是否符合独立交易原则的评估，应当在转让定价分析中作为可比性因素进行考虑。
are not owned or controlled by an enterprise, they are not intangibles within the meaning of Section A.1. See Section D.8 of Chapter I for a discussion of the transfer pricing treatment of group synergies.

(viii) Market specific characteristics:

6.31 Specific characteristics of a given market may affect the arm's length conditions of transactions in that market. For example, the high purchasing power of households in a particular market may affect the prices paid for certain luxury consumer goods. Similarly, low prevailing labour costs, proximity to markets, favourable weather conditions and the like may affect the prices paid for specific goods and services in a particular market. Such market specific characteristics are not capable, however, of being owned or controlled, and are therefore not intangibles within the meaning of Section A.1., and should be taken into account in a transfer pricing analysis through the required comparability analysis. See Section D.6 of Chapter I for guidance regarding the transfer pricing treatment of market specific characteristics.

B. Ownership of intangibles and transactions involving the development, enhancement, maintenance, protection and exploitation of intangibles

6.32 In transfer pricing cases involving intangibles, the determination of the entity or entities within an MNE group which are ultimately entitled to share in the returns derived by the group from exploiting intangibles is crucial.\(^{15}\) A related issue is which entity or entities within the group should ultimately bear the costs, investments and other burdens associated with the development, enhancement, maintenance, protection and exploitation of intangibles. Although the legal owner of an intangible may receive the proceeds from exploitation of the intangible, other members of the legal owner's MNE group may have performed functions, used assets\(^{16}\), or assumed risks that are expected to contribute to the value of the intangible. Members of the MNE group performing such functions, using such assets, and assuming such risks must be compensated for their contributions under the arm's length principle. This Section B confirms that the ultimate allocation of the returns derived by the MNE group from the exploitation of intangibles, and the ultimate allocation of costs and other burdens related to intangibles among members of the MNE group, is accomplished by compensating members of the MNE group for functions performed, assets used, and risks assumed in the development, enhancement, maintenance, protection and exploitation of intangibles according to the principles described in Chapters I – III.

6.33 Applying the provisions of Chapters I – III to address these questions can be highly challenging for a number of reasons. Depending on the facts of any given case involving intangibles the following factors, among others, can create challenges:

(i) A lack of comparability between the intangible related transactions undertaken between associated enterprises and those transactions that can be identified between independent enterprises;

(ii) A lack of comparability between the intangibles in question;

(iii) The ownership and/or use of different intangibles by different associated enterprises within the MNE group;

\(^{15}\) As used herein, exploitation of an intangible includes both the transfer of the intangible or right in the intangible and the use of the intangible in commercial operations.

\(^{16}\) As used in this Section B, use of assets includes the contribution of funding and/or capital to the development, enhancement, maintenance, protection or exploitation of intangibles. See paragraph 6.56.
由于集团协同效应并不能由单一企业拥有或控制，集团协同效应不属于 A.1 节中所定义的无形资产。有关集团协同效应转让定价处理的讨论，参见第一章第 D.8 节。

（viii） 市场特殊因素

6.31 特定市场上的特殊因素可能影响该市场的独立交易条件。例如，特定市场上强大的家庭购买力可能影响某些奢侈品的购买价格。同样，特定市场上低廉的劳动力成本、市场邻近性、适宜的气候条件等均可能影响某些产品和服务的价格。但这些市场的特殊因素无法被企业拥有或控制，因此不属于 A.1 节所定义的无形资产，应当在转让定价分析时通过可比性分析加以考虑。有关市场特殊因素的转让定价处理指导原则，参见第一章第 D.6 节。

B. 无形资产所有权以及涉及无形资产开发、价值提升、维护、保护和利用的交易

6.32 在涉及无形资产的转让定价案件中，确定跨国企业集团中哪些企业最终享有集团利用无形资产所产生的收益十分关键。与之相关的问题是集团哪些企业应当最终承担无形资产的开发、价值提升、维护、保护和利用的相关的成本、投资和其他负担。尽管无形资产的法律所有权人可能收取了利用无形资产而产生的收益，其所属跨国企业集团的其他成员可能为无形资产价值贡献而履行了相关的功能。使用了相关的资产或承担了相关的风险。根据独立交易原则，这些成员企业应根据其所提供的功能、使用的资产和承担的风险，依据做出的贡献而获得相应的补偿。第 B 节明确了跨国企业集团成员对于集团利用无形资产所获得收益的最终分配与无形资产相关的成本和其他负担的最终分配必须遵循《转让定价指南》第一至三章所阐述的原则，并且与跨国企业集团成员在无形资产的开发、价值提升、维护、保护和利用的过程中所执行的功能、使用的资产以及承担的风险相一致。

6.33 由于种种原因，运用第一至三章的规定来解决这些问题相当困难。根据无形资产相关案例的情况，以下列举了可能导致困难的若干因素：

(i) 关联企业间的无形资产交易与能够找到的独立企业之间的交易缺乏可比性；
(ii) 涉及的无形资产之间缺乏可比性；
(iii) 跨国企业集团内的不同成员拥有或使用不同的无形资产；

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13在本章中，无形资产的利用包括无形资产或无形资产权利的转让，以及无形资产在商业运用中的使用。
14在第 B 节中，资产的使用包括与无形资产的开发、价值提升、保护或利用而融资或投资，参见第 6.32 节。
(iv) The difficulty of isolating the impact of any particular intangible on the MNE group’s income;

(v) The fact that various members of an MNE group may perform activities relating to the development, enhancement, maintenance, protection and exploitation of an intangible, often in a way and with a level of integration that is not observed between independent enterprises;

(vi) The fact that contributions of various members of the MNE group to intangible value may take place in years different than the years in which any associated returns are realised; and

(vii) The fact that taxpayer structures may be based on contractual terms between associated enterprises that separate ownership, the assumption of risk, and/or funding of investments in intangibles from performance of important functions, control over risk, and decisions related to investment in ways that are not observed in transactions between independent enterprises and that may contribute to base erosion and profit shifting.

Notwithstanding these potential challenges, applying the arm’s length principle and the provisions of Chapters I – III within an established framework can, in most cases, yield an appropriate allocation of the returns derived by the MNE group from the exploitation of intangibles.

6.34 The framework for analysing transactions involving intangibles between associated enterprises requires taking the following steps, consistent with the guidance for identifying the commercial or financial relations provided in Section D.1 of Chapter I:

(i) Identify the intangibles used or transferred in the transaction with specificity and the specific, economically significant risks associated with the development, enhancement, maintenance, protection, and exploitation of the intangibles;

(ii) Identify the full contractual arrangements, with special emphasis on determining legal ownership of intangibles based on the terms and conditions of legal arrangements, including relevant registrations, licence agreements, other relevant contracts, and other indicia of legal ownership, and the contractual rights and obligations, including contractual assumption of risks in the relations between the associated enterprises;

(iii) Identify the parties performing functions (including specifically the important functions described in paragraph 6.56), using assets, and managing risks related to developing, enhancing, maintaining, protecting, and exploiting the intangibles by means of the functional analysis, and in particular which parties control any outsourced functions, and control specific, economically significant risks;

(iv) Confirm the consistency between the terms of the relevant contractual arrangements and the conduct of the parties, and determine whether the party assuming economically significant risks under Step 4 (i) of paragraph 1.60, controls the risks and has the financial capacity to assume the risks relating to the development, enhancement, maintenance, protection, and exploitation of the intangibles;

(v) Delineate the actual controlled transactions related to the development, enhancement, maintenance, protection, and exploitation of intangibles in light of the legal ownership of the intangibles, the other relevant contractual relations under relevant registrations and contracts, and the conduct of the parties, including their relevant contributions of functions, assets and risks, taking into account the framework for analysing and allocating risk under Section D.1.2.1 of Chapter I;
(iv). 难以分辨出某个特定的无形资产对跨国企业集团的收入造成的影响；
(v). 跨国企业集团若干个成员可能均开展了与无形资产的开发、价值提升、维护、保护和利用相关的活动，其方式和整合程度往往难以在独立企业间被观察到；
(vi). 跨国企业集团内部各个成员对无形资产价值贡献的年份可能与回报实现的年份不同；以及
(vii). 纳税人可能以独立企业不会采用的方式，通过关联企业间的合同条款将无形资产相关的所有权、风险承担以及出资与重要功能的执行、风险的控制以及投资相关决定分离开来，这可能会造成视之侵犯性和利的转移。

尽管存在上述可能的困难，根据建立的分析框架应用独立交易原则和第一至三章的规定在大多数情况下都能对跨国企业集团利用无形资产所获得的收益进行合理分配。

6.34 用于分析涉及关联企业间无形资产的交易的框架必须包括如下步骤。这些步骤与第一章第 D.1 节中关于确定商业性或财务性关系的指导原则相一致：
(i). 确定关联交易中使用或转让的无形资产，以及与无形资产开发、价值提升、维护、保护和利用相关的特定重大经济风险；
(ii). 了解完整的合同安排，侧重于根据法律安排中的条款和条件确定无形资产的所有权，包括相关的注册、授权协议、其他相关合同、其他能显示法律所有权的文件、合同中列明的权利和义务，包括合同约定的关联企业应承担的风险；
(iii). 通过功能分析确定在无形资产开发、价值提升、维护、保护以及利用的过程中执行功能（特别是第 A.56 段所述的重要功能），使用资产并管理风险的企业，尤其是能对相关外包功能及特定重大经济风险实施控制的企业；
(iv). 确认合同安排中的相关条款是否与企业的实际行为一致，并依照第 1.60 段步骤四 (i) 判断承担特定经济风险的企业是否对无形资产的开发、价值提升、维护、保护和利用的风险进行实际控制并拥有承担风险的财务能力；
(v). 根据相关注册和合同中规定的无形资产法律所有权和其他相关合同关系，以及关联企业的实际行为（包括企业的功能、资产、风险贡献），基于第一章第 D.1.2.1 节中有关分析和分配风险的框架，准确界定与无形资产的开发、价值提升、维护、保护以及利用相关的实际发生的受控交易。
(vi) Where possible, determine arm’s length prices for these transactions consistent with each party’s contributions of functions performed, assets used, and risks assumed, unless the guidance in Section D.2 of Chapter I applies.

B.1 Intangible ownership and contractual terms relating to intangibles

6.35 Legal rights and contractual arrangements form the starting point for any transfer pricing analysis of transactions involving intangibles. The terms of a transaction may be found in written contracts, public records such as patent or trademark registrations, or in correspondence and/or other communications among the parties. Contracts may describe the roles, responsibilities and rights of associated enterprises with respect to intangibles. They may describe which entity or entities provide funding, undertake research and development, maintain and protect intangibles, and perform functions necessary to exploit the intangibles, such as manufacturing, marketing and distribution. They may describe how receipts and expenses of the MNE associated with intangibles are to be allocated and may specify the form and amount of payment to all members of the group for their contributions. The prices and other conditions contained in such contracts may or may not be consistent with the arm’s length principle.

6.36 Where no written terms exist, or where the facts of the case, including the conduct of the parties, differ from the written terms of any agreement between them or supplement these written terms, the actual transaction must be deduced from the facts as established, including the conduct of the parties (see Section D.1.1 of Chapter I). It is, therefore, good practice for associated enterprises to document their decisions and intentions regarding the allocation of significant rights in intangibles. Documentation of such decisions and intentions, including written agreements, should generally be in place at or before the time that associated enterprises enter into transactions leading to the development, enhancement, maintenance, protection, or exploitation of intangibles.

6.37 The right to use some types of intangibles may be protected under specific intellectual property laws and registration systems. Patents, trademarks and copyrights are examples of such intangibles. Generally, the registered legal owner of such intangibles has the exclusive legal and commercial right to use the intangible, as well as the right to prevent others from using or otherwise infringing the intangible. These rights may be granted for a specific geographic area and/or for a specific period of time.

6.38 There are also intangibles that are not protectable under specific intellectual property registration systems, but that are protected against unauthorised appropriation or imitation under unfair competition legislation or other enforceable laws, or by contract. Trade dress, trade secrets, and know-how may fall under this category of intangibles.

6.39 The extent and nature of the available protection under applicable law may vary from country to country, as may the conditions on which such protection is provided. Such differences can arise either from differences in substantive intellectual property law between countries, or from practical differences in local enforcement of such laws. For example, the availability of legal protection for some intangibles may be subject to conditions such as continued commercial use of the intangible or timely renewal of registrations. This means that in some circumstances or jurisdictions, the degree of protection for an intangible may be extremely limited either legally or in practice.

6.40 The legal owner will be considered to be the owner of the intangible for transfer pricing purposes. If no legal owner of the intangible is identified under applicable law or governing contracts, then the member of the MNE group that, based on the facts and circumstances, controls decisions
(vi). 在可能的情况下，根据交易各方执行的功能、使用的资产和承担的风险而创造的价值为这些受控交易确定独立交易价格，但第一章第 D.2 节适用的情形除外。

B.1 无形资产所有权以及相关合同条款

6.35 法定权利和合同安排是无形资产相关交易进行转让定价分析的起点。交易的条款可能在书面合同、公开记录（如专利或商标注册）、企业间的往来邮件或其他通讯记录中找到。合同可能会具体说明关联企业所承担的与无形资产相关的职责、责任和权利，以及提供资金、负责研发、维护和保护无形资产及执行利用无形资产的功能（如生产、市场营销和分销）的企业。合同可能还会描述跨国公司与无形资产相关的收益和支出如何根据集团成员所做的贡献在集团中进行分配，以及相应的金额和支付方式。这些合同内规定的价格和其他条件均存在着符合或不符合独立交易原则的可能。

6.36 当缺乏书面条款或者事实情况（包括交易双方的客观行为）与合同条款不符或者未能提供充分证据时，实际的交易情况必须根据既定的事实情况（包括交易双方的客观行为）进行推断（参照第一章第 D.1.1 节）。因此，关联企业最好能够以书面形式记录其关于无形资产重要权利分配的决定和意图。有关上述决定和意图的文件资料（包括书面合同），通常应当在关联企业进行无形资产的开发、价值提升、维护、保护或利用的交易发生时或发生之前完成。

6.37 某些类型的无形资产的使用权会受到专门的知识产权法和注册制度的保护。一般而言，这些无形资产的注册法律授予所有人拥有使用无形资产的排他性的法律权利和商业权利，并且防止他人使用或者侵权的权利。这些权利也可通过限定地域和/或限定时期的方式被授予他人使用。

6.38 还有一些无形资产不受专门的知识产权注册制度的保护，但受反不正当竞争法或其他法律以及合同等形式的保护，以防止其被未经授权使用或复制。商业外观、商业秘密及专有技术可被归入此类无形资产。

6.39 根据所适用的法律，各个国家对无形资产保护的范围和性质有所不同，对无形资产提供保护的条件也各有不同。这些差异可能来自于各国知识产权立法的不同，也可能来自于地方层面对该类法律实际执行的不同。例如，某些无形资产需要满足一些条件才能获得法律保护，如必须能够在商业中持续使用或定期续展。这意味着在一些情况下或一些地区，对无形资产的保护程度在法律上或实践中都极其有限。
concerning the exploitation of the intangible and has the practical capacity to restrict others from using the intangible will be considered the legal owner of the intangible for transfer pricing purposes.

6.41 In identifying the legal owner of intangibles, an intangible and any licence relating to that intangible are considered to be different intangibles for transfer pricing purposes, each having a different owner. See paragraph 6.26. For example, Company A, the legal owner of a trademark, may provide an exclusive licence to Company B to manufacture, market, and sell goods using the trademark. One intangible, the trademark, is legally owned by Company A. Another intangible, the licence to use the trademark in connection with manufacturing, marketing and distribution of trademarked products, is legally owned by Company B. Depending on the facts and circumstances, marketing activities undertaken by Company B pursuant to its licence may potentially affect the value of the underlying intangible legally owned by Company A, the value of Company B’s licence, or both.

6.42 While determining legal ownership and contractual arrangements is an important first step in the analysis, these determinations are separate and distinct from the question of remuneration under the arm’s length principle. For transfer pricing purposes, legal ownership of intangibles, by itself, does not confer any right ultimately to retain returns derived by the MNE group from exploiting the intangible, even though such returns may initially accrue to the legal owner as a result of its legal or contractual right to exploit the intangible. The return ultimately retained by or attributed to the legal owner depends upon the functions it performs, the assets it uses, and the risks it assumes, and upon the contributions made by other MNE group members through their functions performed, assets used, and risks assumed. For example, in the case of an internally developed intangible, if the legal owner performs no relevant functions, uses no relevant assets, and assumes no relevant risks, but acts solely as a title-holding entity, the legal owner will not ultimately be entitled to any portion of the return derived by the MNE group from the exploitation of the intangible other than arm’s length compensation, if any, for holding title.

6.43 Legal ownership and contractual relationships serve simply as reference points for identifying and analysing controlled transactions relating to the intangible and for determining the appropriate remuneration to members of a controlled group with respect to those transactions. Identification of legal ownership, combined with the identification and compensation of relevant functions performed, assets used, and risks assumed by all contributing members, provides the analytical framework for identifying arm’s length prices and other conditions for transactions involving intangibles. As with any other type of transaction, the analysis must take into account all of the relevant facts and circumstances present in a particular case and price determinations must reflect the realistic alternatives of the relevant group members. The principles of this paragraph are illustrated by Examples 1 to 6 in the Annex to Chapter VI.

6.44 Because the actual outcomes and manner in which risks associated with the development or acquisition of an intangible will play out over time are not known with certainty at the time members of the MNE group make decisions regarding intangibles, it is important to distinguish between (a) anticipated (or ex ante) remuneration, which refers to the future income expected to be derived by a member of the MNE group at the time of a transaction; and (b) actual (or ex post) remuneration, which refers to the income actually earned by a member of the group through the exploitation of the intangible.

6.45 The terms of the compensation that must be paid to members of the MNE group that contribute to the development, enhancement, maintenance, protection and exploitation of intangibles is generally determined on an ex ante basis. That is, it is determined at the time transactions are entered into and before risks associated with the intangible play out. The form of such compensation may be fixed or contingent. The actual (ex post) profit or loss of the business after compensating other
6.40 从转让定价的角度，无形资产的法律所有权人被认定为无形资产的所有者；如果在适用的法律或相关合同中未明确规定无形资产的法律所有权人，从转让定价的角度，应当根据实际情况认定跨国企业中能对无形资产利用决策实施控制并且有实际能力限制其他人使用无形资产的相关成员企业是无形资产的法律所有权人。

6.41 在确定无形资产的法律所有权人时，从转让定价角度，某个无形资产以及与该无形资产相关的授权应被视为不同的无形资产，由不同的所有权人拥有。例如，在某公司，A 公司是某一商标的法律所有权人，并授予 B 公司排他性的商标授权。B 公司可以使用该商标进行生产、市场营销和销售等一系列商业活动。在这个案例中，商标是一项无形资产，由 A 公司所有；使用该商标生产、推广和销售相关产品的授权是另一项无形资产，由 B 公司持有。根据具体情况，B 公司根据其所得授权开展的市场营销活动可能会影响 A 公司所拥有的无形资产的价值，或 B 公司获得授权的价值，或同时影响上述两种无形资产的价值。

6.42 虽然法律所有权人以及合同安排是转让定价分析的重要起点，但其独立性取决于如何确定法律所有权人享受跨国企业集团利用无形资产而获得的回报。即从法律或合同角度而言此类回报可能归属于法律所有权人。法律所有权人最终所享受的回报取决于其执行的功能、使用的资产和承担的风险，以及跨国企业集团的其他成员通过其提供的功能、使用的资产和承担的风险所作出的贡献。例如，对一项无形资产，如果法律所有权人仅拥有知识产权，而未使用相关资产，也没有承担相关风险，而是仅仅作为拥有无形资产的公司，那么，除了因持有无形资产所有权而应得的符合独立交易原则的补偿外，该法律所有权人不能最终享有该跨国企业集团利用无形资产而获得的回报的任何其他部分。

6.43 对于确认和分析无形资产相关的受控交易以及确定此类交易相关的集团成员的合理补偿而言，法律所有权和合同关系仅仅是参考依据。确定法律所有权人的范围，确定所有做出贡献的成员所执行的功能、使用的资产和承担的风险的依据也因特定情况而定。对于涉及无形资产的交易制定符合独立交易原则的价格和交易条件的分析框架，如同分析其他类型的交易一样，该分析必须考虑到特定情况下所有相关事实和情况，且价格的确定必须反映相关成员的其他可行的选择。本节的分析具体体现在第六章附录的案例 1-6 中。

6.44 跨国企业集团成员在确定交易过程中无形资产的主体时，并无法确定开发或收购无形资产的风险在未来具体的实现方式和结果。因此有必要区分（a）预期（事前）收益，即某个跨国公司成员在进行交易时预期获得的未来收入，和（b）实际（事后）收益，即跨国企业集团成员通过无形资产利用实际获得的收入。
members of the MNE group may differ from these anticipated profits depending on how the risks associated with the intangible or the other relevant risks related to the transaction or arrangement actually play out. The accurately delineated transaction, as determined under Section D.1 of Chapter 1, will determine which associated entity assumes such risks and accordingly will bear the consequences (costs or additional returns) when the risks materialise in a different manner to what was anticipated (see paragraphs 6.69 to 6.70).

6.46 An important question is how to determine the appropriate arm's length remuneration to members of a group for their functions, assets, and risks within the framework established by the taxpayer's contractual arrangements, the legal ownership of intangibles, and the conduct of the parties. Section B.2 discusses the application of the arm's length principle to situations involving intangibles. It focuses on the functions, assets and risks related to the intangibles. Unless stated otherwise, references to arm's length returns and arm's length remuneration in Section B.2 refer to anticipated (ex ante) returns and remuneration.

B.2 Functions, assets, and risks related to intangibles

6.47 As stated above, a determination that a particular group member is the legal owner of intangibles does not, in and of itself, necessarily imply that the legal owner is entitled to any income generated by the business after compensating other members of the MNE group for their contributions in the form of functions performed, assets used, and risks assumed.

6.48 In identifying arm's length prices for transactions among associated enterprises, the contributions of members of the group related to the creation of intangible value should be considered and appropriately rewarded. The arm's length principle and the principles of Chapters I - III require that all members of the group receive appropriate compensation for any functions they perform, assets they use, and risks they assume in connection with the development, enhancement, maintenance, protection, and exploitation of intangibles. It is therefore necessary to determine, by means of a functional analysis, which member(s) perform and exercise control over development, enhancement, maintenance, protection, and exploitation functions, which member(s) provide funding and other assets, and which member(s) assume the various risks associated with the intangible. Of course, in each of these areas, this may or may not be the legal owner of the intangible. As noted in paragraph 6.133, it is also important in determining arm's length compensation for functions performed, assets used, and risks assumed to consider comparability factors that may contribute to the creation of value or the generation of returns derived by the MNE group from the exploitation of intangibles in determining prices for relevant transactions.

6.49 The relative importance of contributions to the creation of intangible value by members of the group in the form of functions performed, assets used and risks assumed will vary depending on the circumstances. For example, assume that a fully developed and currently exploitable intangible is purchased from a third party by a member of a group and exploited through manufacturing and distribution functions performed by other group members while being actively managed and controlled by the entity purchasing the intangible. It is assumed that this intangible would require no development, may require little or no maintenance or protection, and may have limited usefulness outside the area of exploitation intended at the time of the acquisition. There would be no development risk associated with the intangible, although there are risks associated with acquiring and exploiting the intangible. The key functions performed by the purchaser are those necessary to select the most appropriate intangible on the market, to analyse its potential benefits if used by the MNE group, and the decision to take on the risk-bearing opportunity through purchasing the intangible. The key asset used is the funding required to purchase the intangible. If the purchaser has the capacity and actually performs all the key functions described, including control of the risks
6.45 因跨国企业集团成员无形资产的开发、价值提升、维护、保护和利用所做出贡献而需向其支付补偿的相关条件通常会在事前决定，即在交易达成之后且无形资产相关风险尚未实现之前。该补偿可能以固定或者浮动付款条件的形式构成。向跨国企业集团其他成员支付补偿之后的实际（事后）利润或亏损可能与预期利润不同，这主要取决于无形资产的相关风险或者交易或安排的其他相关风险的实际发生程度。根据原第第 B.1 节对关联企业间的关联交易进行调整界定后，即使风险的实际发生与预期产生差异，也可确定实际承担风险及相应结果（承担成本或享受额外回报）的企业（参照第 6.69-6.70 段）。

6.46 关键的问题在于如何在纳税人的合同安排、权益资产的法律所有权和交易双方的实际情况所构成的框架内，确定与集团成员的功能、资产和风险相匹配的符合独立交易原则的补偿。第 B.2 节讨论了在涉及无形资产的情况下如何运用独立交易原则；其中，重点在于与无形资产相关的功能、资产和风险。除非另有说明，第 B.2 节中所提到的符合独立交易原则的回报或补偿均指预期（事前）的回报和补偿。

B.2. 无形资产相关的功能、资产和风险

6.47 如上所述，某一特定的集团成员是无形资产的法律所有权人这一事实并不意味着该法律所有权人有权享有补偿跨国企业集团成员执行的功能、使用的资产以及承担的风险后的剩余收益。

6.48 为关联交易确定交易价格时，应考虑集团成员对无形资产价值创造所做出的贡献及应获得的相应补偿。根据独立交易原则和第一至三章的原则，集团成员为无形资产的开发、价值提升、维护、保护和利用所执行的所有功能、使用的所有资产以及承担的所有风险应得到合理的补偿。因此，需要通过功能分析确定哪个（些）成员执行无形资产开发、价值提升、维护、保护和利用功能并实施控制；哪个（些）成员提供了必要的资金和其他资产；以及哪个（些）成员承担了无形资产相关的各种风险。当然，无形资产的法律所有权人可能会涉及上述三个方面，也可能不会。如第 6.113 段所述，在相关交易中根据执行的功能、使用的资产和承担的风险确定独立交易补偿时，也需要考虑会对无形资产价值创造或者跨国企业集团利用无形资产产生回报做出贡献的可比性因素。

6.49 集团成员通过执行的功能、使用的资产和承担的风险对无形资产价值创造贡献的重要性根据实际情况会有所不同。例如，假设某集团成员从第三方买入了一项充分开发且立刻可投入使用的无形资产。集团其他成员利用该项无形资产进行生产和销售，购入无形资产的企业则对无形资产进行积极的管理和控制。假设该无形资产无需进行进一步开发，只须少量或甚至不需要维护或保护，且该无形资产在购买时除预期用途外，几乎没有任何其他用途，该无形资产不存在相关开发风险，但可能存在一些与购买和利用该无形资产相关的风险。
associated with acquiring and exploiting the intangible, it may be reasonable to conclude that, after making arm's length payment for the manufacturing and distribution functions of other associated enterprises, the owner would be entitled to retain or have attributed to it any income or loss derived from the post-acquisition exploitation of the intangible. While the application of Chapters I – III may be fairly straightforward in such a simple fact pattern, the analysis may be more difficult in situations in which:

(i) Intangibles are self-developed by a multinational group, especially when such intangibles are transferred between associated enterprises while still under development;

(ii) Acquired or self-developed intangibles serve as a platform for further development; or

(iii) Other aspects, such as marketing or manufacturing are particularly important to value creation.

The generally applicable guidance below is particularly relevant for, and is primarily concerned with, these more difficult cases.

(a) Performance and Control of Functions

6.50 Under the principles of Chapters I – III, each member of the MNE group should receive arm's length compensation for the functions it performs. In cases involving intangibles, this includes functions related to the development, enhancement, maintenance, protection, and exploitation of intangibles. The identity of the member or members of the group performing functions related to the development, enhancement, maintenance, protection, and exploitation of intangibles, therefore, is one of the key considerations in determining arm's length conditions for controlled transactions.

6.51 The need to ensure that all members of the MNE group are appropriately compensated for the functions they perform, the assets they contribute and the risks they assume implies that if the legal owner of intangibles is to be entitled ultimately to retain all of the returns derived from exploitation of the intangibles it must perform all of the functions, contribute all assets used and assume all risks related to the development, enhancement, maintenance, protection and exploitation of the intangible. This does not imply, however, that the associated enterprises constituting an MNE group must structure their operations regarding the development, enhancement, maintenance, protection or exploitation of intangibles in any particular way. It is not essential that the legal owner physically performs all of the functions related to the development, enhancement, maintenance, protection and exploitation of an intangible through its own personnel in order to be entitled ultimately to retain or be attributed a portion of the return derived by the MNE group from exploitation of the intangibles. In transactions between independent enterprises, certain functions are sometimes outsourced to other entities. A member of an MNE group that is the legal owner of intangibles could similarly outsource functions related to the development, enhancement, maintenance, protection or exploitation of intangibles to either independent enterprises or associated enterprises.

6.52 Where associated enterprises other than the legal owner perform relevant functions that are anticipated to contribute to the value of the intangibles, they should be compensated on an arm's length basis for the functions they perform under the principles set out in Chapters I – III. The determination of arm's length compensation for functional contributions should consider the availability of comparable uncontrolled transactions, the importance of the functions performed to the creation of intangible value, and the realistically available options of the parties. The specific considerations described in paragraphs 6.53 to 6.58 should also be taken into account.
无形资产的购买方执行的重要功能包括在市场上选择最合适的无形资产，分析跨国企业集团使用无形资产可能带来的利益，以及决定是否承担风险来购买该无形资产。使用的重要资产是购买无形资产所需要的资金。如果购买方拥有执行上述重要功能的能力并且实际执行了相应的功能，包括实际控制和提取以及利用无形资产的特性，则可合理预期无形资产所有者在根据独立交易原则确定的关联交易的生产和分销功能后，可以获得收购后利用无形资产所带来的剩余收益或承担相应亏损。虽然第一至第三章的指导原则可直接应用于这类简单的情况，但在上述情况下，转让定价分析可能存在一定难度：
(i). 无形资产由跨国企业集团自行开发，特别是无形资产在开发阶段就在关联交易之间进行了转让；
(ii). 收购或自行开发的无形资产作为进一步开发的平台；或者
(iii). 其他方面，如市场营销或生产职能对价值创造非常重要。
下文所述的具有广泛适用性的指导原则主要针对这些较困难的情况。

### a. 功能的执行和控制

6.50  根据第一至第三章的原则，跨国企业集团内每个成员应当对其执行的功能获得符合独立交易原则的补偿。在涉及无形资产的情况下，执行的功能涉及无形资产的开发、价值提升、维护、保护和利用。因此，确定集团中由哪个（些）成员执行与无形资产的开发、价值提升、维护、保护和利用相关的功能是决定受控交易条件的重要考量之一。

6.51  需要确保跨国企业集团的所有成员都能对其执行的功能、贡献的资产和承担的风险获得合理的补偿。这意味着如果无形资产的法律所有权和收益最终享有的无形资产的全部效益，就必须在无形资产的开发、价值提升、维护、保护和利用中执行所有的功能、贡献所有的资产并承担所有的风险。但这并不意味着跨国企业集团的关联交易必须为无形资产的开发、价值提升、维护、保护和利用构建特别的组织架构。为了享有跨国企业集团利用无形资产的收益，法律所有者并不需要由其内部人员实际执行无形资产的开发、价值提升、维护、保护和利用的全部功能。在独立企业间的交易中，部分功能有时会外包给其他企业。因此，跨国企业集团内的无形资产的法律所有者同样也可以将无形资产开发、价值提升、维护、保护和利用的相关功能外包给独立企业或关联企业。

6.52  如果法律所有者以外的集团成员承担预期会对无形资产的价值有所贡献的相关功能，而应当根据第一至第三章的原则，就其承担的功能获得符合独立交易原则的补偿。
6.53 In outsourcing transactions between independent enterprises, it is usually the case that an entity performing functions on behalf of the legal owner of the intangible that relate to the development, enhancement, maintenance, protection, and exploitation of the intangible will operate under the control of such legal owner (as discussed in paragraph 1.65). Because of the nature of the relationships between associated enterprises that are members of an MNE group, however, it may be the case that outsourced functions performed by associated enterprises will be controlled by an entity other than the legal owner of the intangibles. In such cases, the legal owner of the intangible should also compensate the entity performing control functions related to the development, enhancement, maintenance, protection, and exploitation of intangibles on an arm’s length basis. In assessing what member of the MNE group in fact controls the performance of the relevant functions, principles apply analogous to those for determining control over risk in Section D.1.2.1 of Chapter I. Assessing the capacity of a particular entity to exert control and the actual performance of such control functions will be an important part of the analysis.

6.54 If the legal owner neither controls nor performs the functions related to the development, enhancement, maintenance, protection or exploitation of the intangible, the legal owner would not be entitled to any ongoing benefit attributable to the outsourced functions. Depending on the facts, the arm’s length compensation required to be provided by the legal owner to other associated enterprises performing or controlling functions related to the development, enhancement, maintenance, protection, or exploitation of intangibles may comprise any share of the total return derived from exploitation of the intangibles. A legal owner not performing any relevant function relating to the development, enhancement, maintenance, protection or exploitation of the intangible will therefore not be entitled to any portion of such returns related to the performance or control of functions relating to the development, enhancement, maintenance, protection or exploitation of the intangible. It is entitled to an arm’s length compensation for any functions it actually performs, any assets it actually uses and risks it actually assumes. See paragraphs 6.59 to 6.68. In determining the functions it actually performs, assets it actually uses and the risks it actually assumes the guidance in Section D.1.2 of Chapter I is especially relevant.

6.55 The relative value of contributions to development, enhancement, maintenance, protection, and exploitation of intangibles varies depending on the particular facts of the case. The MNE group member(s) making the more significant contributions in a particular case should receive relatively greater remuneration. For example, a company that merely funds research and development should have a lower anticipated return than if it both funds and controls research and development. Other things being equal, a still higher anticipated return should be provided if the entity funds, controls, and physically performs the research and development. See also the discussion of funding in paragraphs 6.59 to 6.64.

6.56 In considering the arm’s length compensation for functional contributions of various members of the MNE group, certain important functions will have special significance. The nature of these important functions in any specific case will depend on the facts and circumstances. For self-developed intangibles, or for self-developed or acquired intangibles that serve as a platform for further development activities, these more important functions may include, among others, design and control of research and marketing programmes, direction of and establishing priorities for creative undertakings including determining the course of "blue-sky" research, control over strategic decisions regarding intangible development programmes, and management and control of budgets. For any intangible (i.e., for either self-developed or acquired intangibles) other important functions may also include important decisions regarding defence and protection of intangibles, and ongoing quality control over functions performed by independent or associated enterprises that may have a material effect on the value of the intangible. Those important functions usually make a significant contribution to intangible value and, if those important functions are outsourced by the legal owner in
确定与功能贡献相匹配的符合独立交易原则的补偿时，应当考虑是否存在可比非受控交易，执行的功能对无形资产价值创造的重要性，以及交易双方的其他可行方案。此外，还应当考虑第 6.53-6.58 段提出的特定考量。

6.53 在独立企业间的外包交易中，代表无形资产法律所有权人执行无形资产开发、价值提升、维护、保护和利用的相关功能的企业通常在该法律所有权人的管理与控制之下开展活动（参见第 1.65 段的讨论）。然而，由于跨国企业集团成员间的关联关系，外包给关联企业执行的功能有可能由无形资产法律所有权人之外的企业所控制。在这样的情况下，无形资产的法律所有权人也应当根据独立交易原则补偿对无形资产开发、价值提升、维护、保护和利用执行控制功能的企业。在评估跨国企业集团内某个成员实际控制相关功能的执行时，应采用与第 1 章第 D.1.2 节确定风险实际控制的相同原则。判断某一特定企业是否有能力施加强控制并实际执行这些控制功能是分析的重点。

6.54 如果法律所有权人既不执行无形资产开发、价值提升、维护、保护和利用的相关功能，也不对这些功能进行控制管理，则法律所有权人不应享有任何归属于外包功能的任何持续性的收益。根据实际情况，法律所有权人应在执行或控制无形资产开发、价值提升、维护、保护和利用的其他关联公司支付的符合独立交易原则的补偿中享有利用无形资产获得的全部收益。不执行任何无形资产开发、价值提升、维护、保护和利用相关功能的法律所有权人不应享有任何与执行或控制上述功能相关的回报。法律所有权人应享有的符合独立交易原则的回报仅应与其执行的功能、使用的资产和承担的风险相关。参见第 6.59-6.68 段。第一章第 D.1.2 节针对判断法律所有权人实际执行的功能、使用的资产和承担的风险作出了指导说明。

6.55 对无形资产的开发、价值提升、维护、保护和利用做出贡献的相对价值视具体情况而定。特定情况下，跨国企业集团中做出较大贡献的成员应得到相对较多的回报。例如，某家公司为研发活动提供资金，其预期的收益应当低于既提供资金又控制研发活动时的预期收益。在其他情况不变的前提下，如果该公司不仅提供资金，又控制并实际执行研发活动，则应当获得更高的预期收益。有关出资的讨论，参见第 6.59-6.64 段。

6.56 在考虑跨国企业集团内各成员的功能贡献所应获得的符合独立交易原则的补偿时，一些重要功能具有特殊的重要性。在特定情况下，这些重要功能的性质需要根据具体情况进行判断。对于自行开发的无形资产，或者自行开发或收购的被用作进一步开发活动平台的无形资产，相关的重要功能可能包括设计和控制研究和营销流程、指导并制定创新活动的优先顺序（包括决定创新研究的过程）、控制无形资产开发项目的战略性决策，以及管理和控制预算等。
transactions between associated enterprises, the performance of those functions should be compensated with an appropriate share of the returns derived by the MNE group from the exploitation of intangibles.

6.57 Because it may be difficult to find comparable transactions involving the outsourcing of such important functions, it may be necessary to utilise transfer pricing methods not directly based on comparables, including transactional profit split methods and ex ante valuation techniques, to appropriately reward the performance of those important functions. Where the legal owner outsources most or all of such important functions to other group members, attribution to the legal owner of any material portion of the return derived from the exploitation of the intangibles after compensating other group members for their functions should be carefully considered taking into account the functions it actually performs, the assets it actually uses and the risks it actually assumes under the guidance in Section D.1.2 of Chapter I. Examples 16 and 17 in the Annex to Chapter VI illustrate the principles contained in this paragraph.

6.58 Because the important functions described in paragraph 6.56 are often instrumental in managing the different functions performed, assets used, and risks assumed that are key to the successful development, enhancement, maintenance, protection, or exploitation of intangibles, and are therefore essential to the creation of intangible value, it is necessary to carefully evaluate transactions between parties performing these important functions and other associated enterprises. In particular, the reliability of a one-sided transfer pricing method will be substantially reduced if the party or parties performing significant portions of the important functions are treated as the tested party or parties. See Example 6.

(b) Use of Assets

6.59 Group members that use assets in the development, enhancement, maintenance, protection, and exploitation of an intangible should receive appropriate compensation for doing so. Such assets may include, without limitation, intangibles used in research, development or marketing, (e.g., know-how, customer relationships, etc.), physical assets, or funding. One member of an MNE group may fund some or all of the development, enhancement, maintenance, and protection of an intangible, while one or more other members perform all of the relevant functions. When assessing the appropriate anticipated return to funding in such circumstances, it should be recognised that in arm's length transactions, a party that provides funding, but does not control the risks or perform other functions associated with the funded activity or asset, generally does not receive anticipated returns equivalent to those received by an otherwise similarly-situated investor who also performs and controls important functions and controls important risks associated with the funded activity. The nature and amount of compensation attributable to an entity that bears intangible-related costs, without more, must be determined on the basis of all the relevant facts, and should be consistent with similar funding arrangements among independent entities where such arrangements can be identified. See the guidance in Chapter I, Section D.1.2.1.6, and in particular example 3 in paragraphs 1.85 and 1.103, which illustrate a situation where the party providing funding does not control the financial risk associated with the funding.

6.60 Funding and risk-taking are integrally related in the sense that funding often coincides with the taking of certain risks (e.g., the funding party contractually assuming the risk of loss of its funds). The nature and extent of the risk assumed, however, will vary depending on the economically relevant characteristics of the transaction. The risk will, for example, be lower when the party to which the funding is provided has a high creditworthiness, or when assets are pledged, or when the investment funded is low risk, compared with the risk where the creditworthiness is lower, or the funding is
对任何无形资产而言（即自行开发或外购的无形资产），其他重要功能可能还包括无形资产的保护。其他重要功能可能还包括无形资产的保护和利用中的变动性作用的功能、资产和风险。因此，对无形资产的价值创造十分重要。所以，应仔细评估执行这些重要功能的企业的与其它功能企业的交易。尤其需要注意的是，如果执行大部分重要功能的企业被作为受托方，则基于单向测试的转让定价方法的可靠性将大幅降低，参见案例 6。

b). 资产的使用

6.59 集团成员企业在无形资产的开发、价值提升、维护、保护和利用中的变动性作用的功能、资产和风险十分重要。因此，对无形资产的价值创造十分重要。所以，应仔细评估执行这些重要功能的企业的与其他关联企业的交易。尤其需要注意的是，如果执行大部分重要功能的企业被作为受托方，则基于单向测试的转让定价方法的可靠性将大幅降低，参见案例 6。
unsecured, or the investment being funded is high risk. Moreover, the larger the amount of the funds provided, the larger the potential impact of the risk on the provider of the funding.

6.61 Under the principles of Section D.1.2 of Chapter I, the first step in a transfer pricing analysis in relation to risks is to identify the economically significant risks with specificity. When identifying risks in relation to an investment with specificity, it is important to distinguish between the financial risks that are linked to the funding provided for the investments and the operational risks that are linked to the operational activities for which the funding is used, such as for example the development risk when the funding is used for developing a new intangible. Where a party providing funding exercises control over the financial risk associated with the provision of funding, without the assumption of, including the control over, any other specific risk, it could generally only expect a risk-adjusted return on its funding.

6.62 The contractual arrangements will generally determine the terms of the funding transaction, as clarified or supplemented by the economic characteristics of the transaction as reflected in the conduct of the parties. The return that would generally be expected by the funder should equal an appropriate risk-adjusted return. Such return can be determined, for example, based on the cost of capital or the return of a realistic alternative investment with comparable economic characteristics. In determining an appropriate return for the funding activities, it is important to consider the financing options realistically available to the party receiving the funds. There may be a difference between the return expected by the funder on an ex ante basis and the actual return received on an ex post basis. For example, when the funder provides a loan for a fixed amount at a fixed interest rate, the difference between the actual and expected returns will reflect the risk playing out that the borrower cannot make some or all of the payments due.

6.63 The extent and form of the activities that will be necessary to exercise control over the financial risk attached to the provision of funding will depend on the riskiness of the investment for the funder, taking into account the amount of money at stake and the investment for which these funds are used. In accordance with the definition of control as reflected in paragraphs 1.65 and 1.66 of these Guidelines, exercising control over a specific financial risk requires the capability to make the relevant decisions related to the risk bearing opportunity, in this case the provision of the funding, together with the actual performance of these decision making functions. In addition, the party exercising control over the financial risk must perform the activities as indicated in paragraph 1.65 and 1.66 in relation to the day-to-day risk mitigation activities related to these risks when these are outsourced and related to any preparatory work necessary to facilitate its decision making, if it does not perform these activities itself.

6.64 When funding is provided to a party for the development of an intangible, the relevant decisions relating to taking on, laying off or declining a risk bearing opportunity and the decisions on whether and how to respond to the risks associated with the opportunity, are the decisions related to the provision of funding and the conditions of the transaction. Depending on the facts and circumstances, such decisions may depend on an assessment of the creditworthiness of the party receiving the funds and an assessment of how the risks related to the development project may impact the expectations in relation to the returns on funding provided or additional funding required. The conditions underlying the provision of the funding may include the possibility to link funding decisions to key development decisions which will impact the funding return. For example, decisions may have to be made on whether to take the project to the next stage or to allow the investments in

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Further guidance will be provided on the economically relevant characteristics for determining the arm's length conditions for financial transactions, including when the funding is used for project finance, in particular investments in the development of intangibles. This work will be undertaken in 2016 and 2017.
6.60 提供资金和承担风险是紧密结合的，因为提供资金通常会承担一些风险（如出资企业需要根据协议承担资金损失的风险）。然而，相关风险的本质和程度会根据交易的经济性质和特征而发生变化。例如，当向信用评级高的企业提供资金、出资有资产担保，或投资标的信用较高时，相比信用评级低的企业提供资金，出资未被担保，或投资标的信用较低时，出资方的相关风险会降低。此外，潜在风险的影响会随着出资方出资金额的增多而变大。

6.61 根据第一章第 D1.2 节的原则，转让定价风险分析的第一步是具体确定重大经济风险。此时，则需要区分出资方自身的权益风险以及由于出资方的运作而产生的权益风险，例如，当出资方用于无形资产开发时的开发风险；如果出资方可以实际控制出资相关的财务风险，但不承担或不实际控制任何其他特有风险，则出资方仅应获得一个风险调整后的出资回报。

6.62 合同安排一般决定了出资交易的条件，并通过反应在交易双方实际行为中的交易经济特征得以体现或被补充。一般而言，出资方所期待的回报应等于某个经过恰当风险调整后的回报。例如，这一回报可以依据资金成本或具有可比经济特征的可行替代投资方案所能获得的报酬来确定。为了对出资方所期待的回报进行调整，应考虑在出资方所接受出资时进行了预期的收益和风险的回报之间可能存在差异。例如，当出资方提供金额、利润固定的贷款时，实际和预期回报的差异反映了借款人无法偿还部分或全部款项的风险。

6.63 用于控制出资方承担风险的活动的强度和形式取决于出资方的出资风险，并应考虑实际出资的金额和资金的具体使用。根据《转让定价指南》第 1.65 和 1.66 段中对控制的定义，对一项特定的财务风险进行控制需要企业对风险承担机会具有相应的出资决策能力和决策功能的实现情况。此外，如果控制财务风险的企业本身不执行相关活动，而是将日常风险降到最低以及有助于决策制定的准备工作外包给其他企业，发包企业仍需执行第 1.65 和 1.66 段指出的相关活动。

6.64 本指南中与出资相关的决策以及交易的条件，是当企业接受出资进行无形资产开发活动时，对于采取、停止或放弃风险承担机会的决策以及对如何应对与企业相关的风险的决策。

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17 福米亚为确定金融交易合同交易条件提供有关经济特征的更多指导，包括出资方何时会用于项目融资，特别是用于无形资产的开发。这项工作会在 2016 和 2017 年进行。
costly assets. The higher the development risk and the closer the financial risk is related to the development risk, the more the funder will need to have the capability to assess the progress of the development of the intangible and the consequences of this progress for achieving its expected funding return, and the more closely the funder may link the continued provision of funding to key operational developments that may impact its financial risk. The funder will need to have the capability to make the assessments regarding the continued provision of funding, and will need to actually make such assessments, which will then need to be taken into account by the funder in actually making the relevant decisions on the provision of funding.

(c) Assumption of Risks

6.65 Particular types of risk that may have importance in a functional analysis relating to transactions involving intangibles include (i) risks related to development of intangibles, including the risk that costly research and development or marketing activities will prove to be unsuccessful, and taking into account the timing of the investment (for example, whether the investment is made at an early stage, midway through the development process, or at a late stage will impact the level of the underlying investment risk); (ii) the risk of product obsolescence, including the possibility that technological advances of competitors will adversely affect the value of the intangibles; (iii) infringement risk, including the risk that defence of intangible rights or defence against other persons' claims of infringement may prove to be time consuming, costly and/or unavailing; (iv) product liability and similar risks related to products and services based on the intangibles; and (v) exploitation risks, uncertainties in relation to the returns to be generated by the intangible. The existence and level of such risks will depend on the facts and circumstances of each individual case and the nature of the intangible in question.

6.66 The identity of the member or members of the group assuming risks related to the development, enhancement, maintenance, protection, and exploitation of intangibles is an important consideration in determining prices for controlled transactions. The assumption of risk will determine which entity or entities will be responsible for the consequences if the risk materialises. The accurate definition of the controlled transaction, based on the guidance in Section D.1 of Chapter I, may determine that the legal owner assumes risks or that, instead, other members of the group are assuming risks, and such members must be compensated for their contributions in that regard.

6.67 In determining which member or members of the group assume risks related to intangibles, the principles of Section D.1.2 of Chapter I apply. In particular, Steps 1 to 5 of the process to analyse risk in a controlled transaction as laid out in paragraph 1.65 should be followed in determining which party assumes risks related to the development, enhancement, maintenance, protection, and exploitation of intangibles.

6.68 It is especially important to ensure that the group member(s) asserting entitlement to returns from assuming risk actually bear responsibility for the actions that need to be taken and the costs that may be incurred if the relevant risk materialises. If costs are borne or actions are undertaken by an associated enterprise other than the associated enterprise assuming the risk as determined under the framework for analysing risk reflected in paragraph 1.60 of these guidelines, then a transfer pricing adjustment should be made so that the costs are allocated to the party assuming the risk and the other associated enterprise is appropriately remunerated for any activities undertaken in connection with the materialisation of the risk. Example 7 in the Annex to Chapter VI illustrates this principle.

(d) Actual, ex post returns
根据实际情况，这些决策可能取决于出资人对受资方的信用评级以及开发项目的风险会如何影响出资的回报或需要额外资金的评估。提供资金的基本条件可能包括出资决策与影响出资回报的决策之间的关联性。例如，企业可能需要决定是否将项目进行至下一个阶段或对项目进行重大资产投资。开发风险越高，财务风险与开发风险的联系越紧密，则出资方更需要对无形资产开发进展以及进展的结果具备评估能力。与此同时，可以更紧密地将控制出资与影响其财务风险的关键运营风险联系在一起。出资方需要对是否继续出资具备评估能力，并需要确实进行相应评估。出资方应当在实际决定是否出资时对这些评估予以考虑。

c. 风险的承担

6.65 在无形资产相关交易的功能分析中，一些重要的风险包括：（i）无形资产开发风险，包括高成本的研发或市场营销活动失败的风险，应考虑投资时点的影响（例如，投资在开发初期、中期还是后期进行会对潜在的投资风险产生影响）；（ii）产品过时风险，包括竞争对手获得领先技术时刻对现有无形资产价值的负面影响；（iii）侵权风险，维护无形资产或专利在其他方声称侵权时进行辩护需要花费大量的时间和资金，有时结果却不尽如人意；（iv）无形资产产品的服务产品的责任风险或其他类似风险；（v）无形资产利用风险，即无形资产收益的不确定性。风险的来源以及程度取决于具体的实际情况以及相关无形资产的性质。

6.66 在决定受控交易的价格时，对集团成员企业在无形资产开发、价值提升、维护、保护和利用过程中承担相关风险的判定是一项重要的考量。对风险的承担决定了风险实际发生时负责承担相应后果的企业。根据第一篇第 D.1 篇的指导原则对交易进行准确界定，有助于确定是法律所有者还是其他集团成员承担了风险。同时，承担风险的一方应就其作出的贡献获得相应的补偿。

6.67 判断某个或某些集团成员企业承担了无形资产风险，可应用第一篇第 D.1.2 篇的原则。确定在无形资产开发、价值提升、维护、保护和利用中承担风险的企业时，尤其应采用第 1.60 篇中有关受控交易风险分析过程的步骤 1 至步骤 5。

6.68 值得注意的是，若为资产承担风险而有权享有回报的企业，应确保其确实对所需执行的功能以及风险承担后的相应成本承担责任。如果承担资产功能的关联企业根据第 1.60 篇的风险分析框架确定的实际承担风险的企业不同，则应当进行转让定价调整，确保相关成本由实际承担风险的企业负担。其他关联企业应就其与风险相关的活动获得合理的补偿。第六章附录中的案例 7 对这一原则进行了解释说明。
It is quite common that actual (ex post) profitability is different than anticipated (ex ante) profitability. This may result from risks materializing in a different way to what was anticipated through the occurrence of unforeseeable developments. For example, it may happen that a competitive product is removed from the market, a natural disaster takes place in a key market, a key asset malfunctions for unforeseeable reasons, or that a breakthrough technological development by a competitor will have the effect of making products based on the intangible in question obsolete or less desirable. It may also happen that the financial projections, on which calculations of ex ante returns and compensation arrangements are based, properly took into account risks and the probability of reasonably foreseeable events occurring and that the differences between actual and anticipated profitability reflects the playing out of those risks. Finally, it may happen that financial projections, on which calculations of ex ante returns and compensation arrangements are based, did not adequately take into account the risks of different outcomes occurring and therefore led to an overestimation or underestimation of the anticipated profits. The question arises in such circumstances whether, and if so, how the profits or losses should be shared among members of an MNE group that have contributed to the development, enhancement, maintenance, protection, and exploitation of the intangible in question.

Resolution of this question requires a careful analysis of which entity or entities in the MNE group in fact assume the economically significant risks as identified when delineating the actual transaction (see Section D.1 of Chapter I). As this analytical framework indicates, the party actually assuming the economically significant risks may or may not be the associated enterprise contractually assuming these risks, such as the legal owner of the intangible, or may or may not be the funder of the investment. A party which is not allocated the risks that give rise to the deviation between the anticipated and actual outcomes under the principles of Sections D.1.2.1.4 to D.1.2.1.6 of Chapter I will not be entitled to the differences between actual and anticipated profits or required to bear losses that are caused by these differences if such risk materialises, unless these parties are performing the important functions as reflected in paragraph 6.56 or contributing to the control over the economically significant risks as established in paragraph 1.105, and it is determined that arm's length remuneration of these functions would include a profit sharing element. In addition, consideration must be given to whether the ex ante remuneration paid to members of the MNE group for their functions performed, assets used, and risks assumed is, in fact, consistent with the arm's length principle. Care should be taken to ascertain, for example, whether the group as a whole underestimates or overestimates anticipated profits, thereby giving rise to underpayments or overpayments (determined on an ex ante basis) to some group members for their contributions. Transactions for which valuation is highly uncertain at the time of the transaction are particularly susceptible to such under or overestimations of value. This is further discussed in Section D.4.

Some implications from applying Sections B.1 and B.2

If the legal owner of an intangible in substance:

- Performs and controls all of the functions (including the important functions described in paragraph 6.56) related to the development, enhancement, maintenance, protection and exploitation of the intangible;
- Provides all assets, including funding, necessary to the development, enhancement, maintenance, protection, and exploitation of the intangibles; and
- Assumes all of the risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible,
d. 实际（事后）收益
6.59 实际（事后）盈利能力通常与预期（事前）盈利能力不同，这可能是由于某些未预见事件的发生导致了风险的实际发生与预期不同。例如，某种有竞争力的产品退出市场；某一主要市场发生了自然灾害；某一重要资产由于计划外的原因发生故障；或竞争对手开发出划时代的技术等情况都可能使得无形资产相关的产品过时或需求降低。此外，用于计算事前收益和补足安排的财务预测可能恰当考虑了相关风险以及合理预见事件发生的可能性，而实际利润和预期利润的差异则体现了这些风险的实际实现程度。最后，用于计算事前收益和补足安排的财务预测也可能并未充分考虑不同后果发生的风险，从而高估或低估了预期收益。在这些情况下，问题在于未预见事件导致的利润或亏损是否应该在为无形资产的开发、价值提升、维护、保护和利用做出贡献的跨国企业集团成员之间分摊以及如何分摊。
6.70 要解决这个问题，需要仔细分析跨国企业集团中哪些（些）企业实际上承担了实际交易界定时确定的相关重大经济风险（参见第一章第 D.1 节）。根据该分析框架，实际承担重大经济风险的企业可能是合同中约定承担风险的关联企业（例如，无形资产的法律所有权人），也可能并不是投资的出资方。对于导致预期收益与实际收益差异的风险，如企业根据第一章第 D.1.2.1.4 和 D.1.2.1.6 节规定的原则被分配到该风险，则无权享有因该风险而带来的实际利润与预期利润之间的差额或被要求承担相应的损失，除非企业实际执行了第 6.56 段中的重要功能或对第 1.105 段中的重大经济风险进行了控制。同时，针对上述功能确定符合独立交易原则的补足应考虑利润分配因素。此外，还需考虑针对跨国企业集团成员所执行的功能、使用的资产和承担的风险而支付的附加补偿是否也符合独立交易原则。尤其需要注意集团是否实际上低估或高估了预期收益，因此造成对于某些集团成员的贡献补偿不足或过多（基于事前基础确定）。交易发生时估值高度不确定的交易尤其容易受到价值低估或高估的影响。第 D.4 节对此进行了进一步的讨论。
e. 应用第 B.1 和 B.2 节原则所产生的结果
6.71 如果无形资产的法律所有权实质上：
- 执行并控制无形资产开发、价值提升、维护、保护和利用相关的所有功能（包括第 6.56 段所列举的重要功能）：
then it will be entitled to all of the anticipated, \textit{ex ante} returns derived from the MNE group’s exploitation of the intangible. To the extent that one or more members of the MNE group other than the legal owner performs functions, uses assets, or assumes risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible, such associated enterprises must be compensated on an arm’s length basis for their contributions. This compensation may, depending on the facts and circumstances, constitute all or a substantial part of the return anticipated to be derived from the exploitation of the intangible.

6.72 The entitlement of any member of the MNE group to profit or loss relating to differences between actual (\textit{ex post}) and a proper estimation of anticipated (\textit{ex ante}) profitability will depend on which entity or entities in the MNE group in fact assume the risks as identified when delineating the actual transaction (see Section D.1 of Chapter I). It will also depend on the entity or entities which are performing the important functions as reflected in paragraph 6.56 or contributing to the control over the economically significant risks as established in paragraph 1.105, and for which it is determined that an arm’s length remuneration of these functions would include a profit sharing element.

B.3 Identifying and determining the prices and other conditions for the controlled transactions

6.73 Undertaking the analysis described in Section D.1 of Chapter I, as supplemented by this Chapter, should facilitate a clear assessment of legal ownership, functions, assets and risks associated with intangibles, and an accurate identification of the transactions whose prices and other conditions require determination. In general, the transactions identified by the MNE group in the relevant registrations and contracts are those whose prices and other conditions are to be determined under the arm’s length principle. However, the analysis may reveal that transactions in addition to, or different from, the transactions described in the registrations and contracts actually occurred. Consistent with Section D.1 of Chapter I, the transactions (and the true terms thereof) to be analysed are those determined to have occurred consistent with the actual conduct of the parties and other relevant facts.

6.74 Arm’s length prices and other conditions for transactions should be determined according to the guidance in Chapters I — III, taking into account the contributions to anticipated intangible value of functions performed, assets used, and risks assumed at the time such functions are performed, assets are used, or risks are assumed as discussed in this Section B of this Chapter. Section D of this Chapter provides supplemental guidance on transfer pricing methods and other matters applicable in determining arm’s length prices and other conditions for transactions involving intangibles.

B.4 Application of the foregoing principles in specific fact patterns

6.75 The principles set out in this Section B must be applied in a variety of situations involving the development, enhancement, maintenance, protection, and exploitation of intangibles. A key consideration in each case is that associated enterprises that contribute to the development, enhancement, maintenance, protection, or exploitation of intangibles legally owned by another member of the group must receive arm’s length compensation for the functions they perform, the risks they assume, and the assets they use. In evaluating whether associated enterprises that perform functions or assume risks related to the development, enhancement, maintenance, protection, and exploitation of intangibles have been compensated on an arm’s length basis, it is necessary to consider (i) the level and nature of the activity undertaken; and (ii) the amount and form of compensation paid. In assessing whether the compensation provided in the controlled transaction is consistent with the arm’s length principle, reference should be made to the level and nature of activity of comparable uncontrolled entities performing similar functions, the compensation received by comparable uncontrolled entities performing similar functions, and the anticipated creation of
提供无形资产开发、价值提升、维护、保护和利用所需的所有资产，包括资金；并且

承担并控制无形资产开发、价值提升、维护、保护和利用相关的所有风险

法律所有权人有权获得跨国企业集团利用无形资产所得的所有预期（事前）收益。当跨国企业集团中除法律所有权人之外还有其他成员企业时，其进行无形资产的开发、价值提升、维护、保护和利用中执行功能、使用资产或承担风险，则这些关联企业应当根据其贡献获得符合独立交易原则的补偿。根据实际情况，这一补偿可能会占据利用无形资产所得的预期收益中的全部或很大一部分。

6.72 跨国企业集团的成员是否能享有（承担）实际利润和预期利润差异所造成的利润（亏损），取决于跨国企业集团中哪些（些）企业实际承担了实际交易界定中确认的风险（参见第6.105节）。

此外，还取决于哪个（些）企业实际执行了第6.56段中的重要功能或对第1.105段中的重大经济风险进行了控制。针对上述功能确定符合独立交易原则的补偿时应考虑利润分配因素。

B.3. 识别和确定受控交易中的价格及其他条件

6.73 通过第一章第D.1节中所述的可比性分析并结合本章提供的补充指导，可以清晰评估无形资产的法律所有权、无形资产相关的功能、资产和风险，并准确识别需要确定价格和其他条件的交易。一般来说，跨国企业集团在相关注册和合同中所注明的交易需要通过独立交易原则确定其价格和其他条件。然而，可比性分析可能会揭示实际发生的交易未包含在或不同于法律注册或合同约定的交易。如第一章第D.1节所述，需要分析的交易（及其真实条款）应与交易双方的实际情况和其他相关事实相符。

6.74 关联交易的独立交易价格和其它条件的制定，应该根据第一至三章中的指导原则确定，并需要充分考虑本章第B节探讨的功能、资产和风险在发生时点对无形资产预期价值作出的贡献。本章第D节为确定涉及无形资产交易的独立交易价格和其它交易条款，提供了相关适用的转让定价方法和其它方面的补充性指导原则。

B.4 上述原则在具体情况中的应用

6.75 第6.74节所述的原则必须应用于各种涉及无形资产开发、价值提升、维护、保护和利用的情形。始终需要重点考虑的是，不拥有无形资产但对无形资产的开发、价值提升、保护和利用做出贡献的关联企业应当获得与其执行的功能、使用的资产和承担的风险相匹配的符合独立交易原则的补偿。在评估为无形资产的开发、价值提升、保护和利用执行功能或承担风险的关联企业是否获得了符合独立交易原则的补偿时，应当考虑以下几点；
intangible value by comparable uncontrolled entities performing similar functions. This section describes the application of these principles in commonly occurring fact patterns.

(a) Development and enhancement of marketing intangibles

6.76 A common situation where these principles must be applied arises when an enterprise associated with the legal owner of trademarks performs marketing or sales functions that benefit the legal owner of the trademark, for example through a marketing arrangement or through a distribution/marketing arrangement. In such cases, it is necessary to determine how the marketer or distributor should be compensated for its activities. One important issue is whether the marketer/distributor should be compensated only for providing promotion and distribution services, or whether the marketer/distributor should also be compensated for enhancing the value of the trademarks and other marketing intangibles by virtue of its functions performed, assets used, and risks assumed.

6.77 The analysis of this issue requires an assessment of (i) the obligations and rights implied by the legal registrations and agreements between the parties; (ii) the functions performed, the assets used, and the risks assumed by the parties; (iii) the intangible value anticipated to be created through the marketer/distributor's activities; and (iv) the compensation provided for the functions performed by the marketer/distributor (taking account of the assets used and risks assumed). One relatively clear case is where a distributor acts merely as an agent, being reimbursed for its promotional expenditures and being directed and controlled in its activities by the owner of the trademarks and other marketing intangibles. In that case, the distributor ordinarily would be entitled to compensation appropriate to its agency activities alone. It does not assume the risks associated with the further development of the trademark and other marketing intangibles, and would therefore not be entitled to additional remuneration in that regard.

6.78 When the distributor actually bears the cost of its marketing activities (for example, when there is no arrangement for the legal owner to reimburse the expenditures), the analysis should focus on the extent to which the distributor is able to share in the potential benefits deriving from its functions performed, assets used, and risks assumed currently or in the future. In general, in arm's length transactions the ability of a party that is not the legal owner of trademarks and other marketing intangibles to obtain the benefits of marketing activities that enhance the value of those intangibles will depend principally on the substance of the rights of that party. For example, a distributor may have the ability to obtain benefits from its functions performed, assets used, and risks assumed in developing the value of a trademark and other marketing intangibles from its turnover and market share when it has a long-term contract providing for sole distribution rights for the trademarked product. In such a situation the distributor's efforts may have enhanced the value of its own intangibles, namely its distribution rights. In such cases, the distributor's share of benefits should be determined based on what an independent distributor would receive in comparable circumstances. In some cases, a distributor may perform functions, use assets or assume risks that exceed those an independent distributor with similar rights might incur or perform for the benefit of its own distribution activities and that create value beyond that created by other similarly situated marketers/distributors. An independent distributor in such a case would typically require additional remuneration from the owner of the trademark or other intangibles. Such remuneration could take the form of higher distribution profits (resulting from a decrease in the purchase price of the product), a reduction in royalty rate, or a share of the profits associated with the enhanced value of the trademark or other marketing intangibles, in order to compensate the distributor for its functions, assets, risks, and anticipated value creation. Examples 8 to 13 in the Annex to Chapter VI illustrate in greater detail the application of this Section B in the context of marketing and distribution arrangements.
（i）所参与活动的程度和性质；（ii）补偿的金额和支付形式。在评估受控交易所涉及的补偿是否符合独立交易原则时，应考虑执行类似功能的可比非受控企业参与的活动的程度和性质。获得的补偿以及预计创造的无形资产的价值。百分比对这些原则在一般情况下的应用做了说明。

a). 营销性无形资产的开发和价值提升

6.76 必须应用这些原则的一种常见的情形包括：商标法律所有权人的关联企业通过执行市场营销或销售功能（如某种市场销售安排或某种分销/零售安排）使商标法律所有者受益。在这种情况下，需要确定营销企业或分销企业就其活动应得到怎样的补偿；其重点在于该营销企业或分销企业是否应就其提供的产品和服务获得补偿，还是应就其执行的功能、使用的资产和承担的风险而获得的补偿。其他营销性无形资产的价值而获得补偿。

6.77 对于这一问题的分析，需要评估：（i）法律制定文件和交易双方之间的协议所规定的权利和义务；（ii）交易双方执行的功能、使用的资产和承担的风险；（iii）通过营销企业或分销企业的活动预期所能创造的无形资产价值；以及（iv）根据营销企业或分销商执行的功能（同时考虑使用资产和承担风险）所提供的补偿。如果分销企业仅作为代理商，由商标或其他营销性无形资产的法律所有权人补偿其推广支出并指导和控制其活动，这种情况下，分析就比较简单明了：该分销企业通常仅获得针对其代理活动的合理补偿，由于其不会承担商标或其他营销性无形资产开发风险，因此也不会享有额外的补偿。

6.78 如果该分销企业实际承担营销活动的成本（即没有法律所有权人对其相关支出进行补偿的安排），则分析的重点应当在于该分销企业在未来在何种程度上能够享有其因执行的功能、使用的资产和承担的风险所获得的潜在收益。一般而言，在独立交易中，相比其他营销性无形资产法律所有权人的交易方是否能够享有无形资产价值提升的潜在收益，原则上取决于其拥有的权利的实质。例如，如果一个分销企业长期拥有品牌的独家分销权，通过提高产品销售量和市场份额可能提升了商标和其他营销性无形资产的价值，然而能够享有其执行的功能、使用的资产和承担的风险所带来的收益。这种情况下，分销企业可能提出了自身拥有的无形资产，即其分销权的价值。此时，分销企业能获得多少收益应根据独立分销企业在可比情况下获得的收益来决定。有时，某家分销企业的执行功能、使用的资产和承担的风险可能超过了享有相似权利的独立分销企业为其自身分销活动所花的，并且其创造的价值也超过了其他相似情况下的营销企业或分销企业所创造的价值。在这种情况下，独立分销企业可能会要求从商标或其他无形资产所有者处获得额外的补偿。这种补偿可能通过多种方式实现。
(b) Research, development and process improvement arrangements

6.79 The principles set out in the foregoing paragraphs also apply in situations involving the performance of research and development functions by a member of an MNE group under a contractual arrangement with an associated enterprise that is the legal owner of any resulting intangibles. Appropriate compensation for research services will depend on all the facts and circumstances, such as whether the research team possesses unique skills and experience relevant to the research, assumes risks (e.g. where “blue sky” research is undertaken), uses its own intangibles, or is controlled and managed by another party. Compensation based on a reimbursement of costs plus a modest mark-up will not reflect the anticipated value of, or the arm’s length price for, the contributions of the research team in all cases.

6.80 The principles set out in this section similarly apply in situations where a member of an MNE group provides manufacturing services that may lead to process or product improvements on behalf of an associated enterprise that will assume legal ownership of such process or product improvements. Examples 14 to 17 in the Annex to Chapter VI illustrate in greater detail the application of this Section B in the context of research and development arrangements.

(c) Payments for use of the company name

6.81 Questions often arise regarding the arm’s length compensation for the use of group names, trade names and similar intangibles. Resolution of such questions should be based on the principles of this Section B and on the commercial and legal factors involved. As a general rule, no payment should be recognised for transfer pricing purposes for simple recognition of group membership or the use of the group name merely to reflect the fact of group membership. See paragraph 7.12.

6.82 Where one member of the group is the owner of a trademark or other intangible for the group name, and where use of the name provides a financial benefit to members of the group other than the member legally owning such intangible, it is reasonable to conclude that a payment for use would have been made in arm’s length transactions. Similarly, such payments may be appropriate where a group member owns goodwill in respect of the business represented by an unregistered trademark, use of that trademark by another party would constitute misrepresentation, and the use of the trademark provides a clear financial benefit to a group member other than that owning the goodwill and unregistered trademark.

6.83 In determining the amount of payment with respect to a group name, it is important to consider the amount of the financial benefit to the user of the name attributable to use of that name, the costs and benefits associated with other alternatives, and the relative contributions to the value of the name made by the legal owner, and the entity using the name in the form of functions performed, assets used and risks assumed. Careful consideration should be given to the functions performed, assets used, and risks assumed by the user of the name in creating or enhancing the value of the name in its jurisdiction. Factors that would be important in a licence of the name to an independent enterprise under comparable circumstances applying the principles of Chapters I – III should be taken into account.

6.84 Where an existing successful business is acquired by another successful business and the acquired business begins to use a name, trademark or other branding indicative of the acquiring business, there should be no automatic assumption that a payment should be made in respect of such use. If there is a reasonable expectation of financial benefit to the acquired company from using the acquiring company’s branding, then the amount of any payment should be informed by the level of that anticipated benefit.
以补偿分销商执行的功能、使用的资产、承担的风险以及预期创造的价值，如获得更高的分销利润（通过降低采购价格实现）、降低合同费用、或分享商标或其他无形资产价值提升所带来的利润。第六章附录中的案例 8-13 详细描述了第 B 节的原则在研发安排中的应用。

b) 研发和流程改良的安排
6.79 上述论述中讨论的原则同样适用于跨国企业集团成员根据与集团研发活动创造的无形资产的法律所有权人之间的合同安排执行研发功能的情况。研发服务的合理补偿取决于各种情况，比如研发团队是否拥有与研究相关的独家技能和经验、是否承担风险（例如进行开拓性的研究）、是否使用自有无形资产、是否受交易一方的控制和管理。以成本加成的方法作为补偿的方法不能在任何情况下都反映出研发团队所作贡献的预期价值，或符合独立交易原则的补偿价格。
6.80 本节的原则同样适用于跨国企业集团成员为拥有产权或产品改良成果的法律所有权的关联企业提供的可能带来流程或产品改良的生产服务。第六章附录中案例 14-17 对第 B 节的原则在研发安排中的应用进行了详尽的说明。

c) 公司名称使用费
6.81 有关使用集团名称、商标和类似无形资产的补偿是否符合独立交易原则是很常见的问题。要解决这类问题，必须基于第 B 节的原则并考虑相关的商业和法律因素。一般而言，如果只是为了识别集团成员、或企业使用集团名称仅仅为了体现其是集团组织的一员，则从转让定价角度而言不需要支付费用。参见第 7.12 段。
6.82 如果某一集团成员是集团名称对应的商标或其他无形资产的所有者，且使用集团名称会给人以无形资产的法律所有权人之外的其他集团成员带来经济利益，那么可以合理认为在独立交易的情况下，受益方会为使用集团名称而支付补偿。同样，如果某集团成员拥有某项未注册商标及其所承载的商业信誉，其他企业使用该商标将会形成误导，而商标和非注册商标所有者以外的其他集团成员因使用该商标而获得明显经济利益，其他集团成员企业应当就使用该商标或商誉支付相应的补偿。
6.83 在确定使用集团名称所需支付的费用时，应当考虑使用这些集团名称所获得的经济利益、替代方案的成本和收益，以及法律所有权人和使用集团名称的企业就其执行的功能、使用的资产和承担的风险而对集团名称价值所作的贡献。应当仔细考量使用集团名称的企业在其所属地区中由于其执行的功能、使用的资产和承担的风险为该集团名称创造或提升的价值。也应当根据第一至三章的原则，考虑在可比条件下向独立企业授权集团名称时所涉及的重要因素。
6.85 It may also be the case that the acquiring business will leverage the existing position of the acquired business to expand the business of the acquirer in the territory of operation of the acquired business by causing the acquired business to use the acquirer’s branding. In that case, consideration should be given to whether the acquirer should make a payment to or otherwise compensate the acquired business for the functions performed, risks assumed, and assets used (including its market position) in connection with expanded use of the acquirer’s name.

C. Transactions involving the use or transfer of intangibles

6.86 In addition to identifying with specificity the intangibles involved in a particular transfer pricing issue, and identifying the owner of such intangibles, it is necessary to identify and properly characterise, at the beginning of any transfer pricing analysis involving intangibles, the specific controlled transactions involving intangibles. The principles of Chapter I apply in identifying and accurately delineating transactions involving the use or transfer of intangibles. In addition to the guidance on identifying the actual transaction (section D.1 of Chapter I) and on business restructurings (Chapter IX, especially Part II), Section C of this Chapter outlines some typical scenarios that may be useful in ascertaining whether intangibles or rights in intangibles are involved in a transaction. See Example 19. The characterisation of a transaction for transfer pricing purposes has no relevance for determinations under Article 12 of the OECD Model Tax Convention. See, e.g., paragraphs 8 to 19 of the Commentary to Article 12 of the OECD Model Tax Convention.

6.87 There are two general types of transactions where the identification and examination of intangibles will be relevant for transfer pricing purposes. These are: (i) transactions involving transfers of intangibles or rights in intangibles; and (ii) transactions involving the use of intangibles in connection with the sale of goods or the provision of services.

C.1 Transactions involving transfers of intangibles or rights in intangibles

(i) Transfers of intangibles or rights in intangibles

6.88 Rights in intangibles themselves may be transferred in controlled transactions. Such transactions may involve a transfer of all rights in the intangibles in question (e.g. a sale of the intangible or a perpetual, exclusive licence of the intangible) or only limited rights (e.g. a licence or similar transfer of limited rights to use an intangible which may be subject to geographical restrictions, limited duration, or restrictions with respect to the right to use, exploit, reproduce, further transfer, or further develop). The principles of Chapters I - III apply to transactions involving the transfer of intangibles or rights in intangibles. Supplemental guidance regarding the determination of arm's length conditions for such transactions is also contained in Sections D.1, D.2 and D.3 of this Chapter.

6.89 In transactions involving the transfer of intangibles or rights in intangibles, it is essential to identify with specificity the nature of the intangibles and rights in intangibles that are transferred between associated enterprises. Where limitations are imposed on the rights transferred, it is also essential to identify the nature of such limitations and the full extent of the rights transferred. It should be noted in this regard that the labels applied to transactions do not control the transfer pricing analysis. For example, in the case of a transfer of the exclusive right to exploit a patent in Country X, the taxpayer’s decision to characterise the transaction either as a sale of all of the Country X patent rights, or as a perpetual exclusive licence of a portion of the worldwide patent rights, does not affect the determination of the arm's length price if, in either case, the transaction being priced is a transfer of exclusive rights to exploit the patent in Country X over its remaining useful life. Thus, the functional analysis should identify the nature of the transferred rights in intangibles with specificity.
6.84  当一家成功企业被另一家成功企业收购，且被收购企业开始使用收购企业的名称、商标或其他象征收购企业的品牌时，不应认为被收购企业需要就此支付费用。如果收购企业合理地预见其通过使用收购企业的品牌将获得经济利益，则其所需支付的金额应当根据预期收益而定。
6.85  此外，收购企业可能借助被收购企业已有的市场地位，扩大其在被收购企业业务区域的潜能，因此要求被收购企业使用收购方的品牌。此时，应当考虑收购方是否应该向被收购企业支付费用，或以其他方式补偿被收购方使收购方名称被广泛使用而执行的功能、承担的风险和使用的资产（包括其市场地位）。

C. 涉及无形资产类型或转让的交易

6.86  在开展任何无形资产相关的转让定价分析之前，除了需要特别确认一审转让定价问题所涉及的无形资产和该资产的使用权人以外，确认并界定转让定价交易合理性的必要性也十分必要。《转让定价指南》第一章的原则同样适用于确认和准确界定涉及无形资产使用或转让的交易。除《转让定价指南》提供的关于确认实际交易（第一章第 1.1 节）和企业重组（第九章，尤其第九章第二部分）的指导原则之外，本章节还列举了确认一项交易中是否涉及无形资产或无形资产相关权利的某些典型情形（参见案例 19）。以转让定价分析为主导对某一交易的定性与《OECD 税收协定范本》第 12 条项下所涉及的定性没有关系。参见《OECD 税收协定范本》第 12 条的注释第 8-19 条。
6.87  从转让定价角度而言，无形资产的确认与分析一般与两种类型的交易相关，即（i）涉及无形资产或无形资产相关权利转让的交易；（ii）涉及无形资产使用的商品销售或服务交易。

C.1 涉及无形资产或无形资产相关权利转让的交易

（1）转让无形资产或无形资产相关权利
6.88  无形资产相关权利本身可能会通过受控交易转让。此类交易可能涉及相关无形资产的全部权利（如出售某项无形资产，或某项无形资产的永久性独立许可），也可能仅出售相关无形资产的部分权利（例如，带有限期限制、有限使用期限和其他在使用、利用、复制、转让或再开发等所限制条件的对使用某项无形资产的完全权利的许可或类似转让）。《转让定价指南》第一章至三章的原则适用于无形资产转让或无形资产相关权利转让的交易。本章第 D1、D2 和 D3 节为确定该类交易的独立交易条件提供了补充指导。
6.89  在涉及无形资产转让或无形资产相关权利转让的交易中，具体识别关联企业间转让的无形资产及相关权利的性质非常必要。对于有限制的权利转让，识别该类限制的实质和转让权利的全部范围也很关键。
6.90 Restrictions imposed in licence and similar agreements on the use of an intangible in the further development of new intangibles or new products using the intangibles are often of significant importance in a transfer pricing analysis. It is therefore important in identifying the nature of a transfer of rights in intangibles to consider whether the transferee receives the right to use the transferred intangible for the purpose of further research and development. In transactions between independent enterprises, arrangements are observed where the transferor/licensor retains the full right to any enhancements of the licensed intangible that may be developed during the term of the licence. Transactions between independent enterprises are also observed where the transferee/licensor retains the right to any enhancements it may develop, either for the term of its licence or in perpetuity. The nature of any limitations on further development of transferred intangibles, or on the ability of the transferee and the transferor to derive an economic benefit from such enhancements, can affect the value of the rights transferred and the comparability of two transactions involving otherwise identical or closely comparable intangibles. Such limitations must be evaluated in light of both the written terms of agreements and the actual conduct of the affected parties.

6.91 The provisions of Section D.1.1 of Chapter I apply in identifying the specific nature of a transaction involving a transfer of intangibles or rights in intangibles, in identifying the nature of any intangibles transferred, and in identifying any limitations imposed by the terms of the transfer on the use of those intangibles. For example, a written specification that a licence is non-exclusive or of limited duration need not be respected by the tax administration if such specification is not consistent with the conduct of the parties. Example 18 in the Annex to Chapter VI illustrates the provisions of this paragraph.

(ii) Transfers of combinations of intangibles

6.92 Intangibles (including limited rights in intangibles) may be transferred individually or in combination with other intangibles. In considering transactions involving transfers of combinations of intangibles, two related issues often arise.

6.93 The first of these involves the nature and economic consequences of interactions between different intangibles. It may be the case that some intangibles are more valuable in combination with other intangibles than would be the case if the intangibles were considered separately. It is therefore important to identify the nature of the legal and economic interactions between intangibles that are transferred in combination.

6.94 For example, a pharmaceutical product will often have associated with it three or more types of intangibles. The active pharmaceutical ingredient may be protected by one or more patents. The product will also have been through a testing process and a government regulatory authority may have issued an approval to market the product in a given geographic market and for specific approved indications based on that testing. The product may be marketed under a particular trademark. In combination these intangibles may be extremely valuable. In isolation, one or more of them may have much less value. For example, the trademark without the patent and regulatory marketing approval may have limited value since the product could not be sold without the marketing approval and generic competitors could not be excluded from the market without the patent. Similarly, the value of the patent may be much greater once regulatory marketing approval has been obtained than would be the case in the absence of the marketing approval. The interactions between each of these classes of intangibles, as well as which parties performed functions, bore the risks and incurred the costs associated with securing the intangibles, are therefore very important in performing a transfer pricing analysis with regard to a transfer of the intangibles. It is important to consider the relative contribution to value creation where different associated enterprises hold rights in the intangibles used.
值得注意的是，交易是否命名并不会影响转让定价分析。例如，对于转让在 X 国利用某个专利的独家许可，无论授权人主张该交易是对 X 国专利权的整体出售，还是主张对全球专利权的一部分的永久独家许可，只要转让定价的实质是转让某项专利在剩余使用期限内在 X 国排他性利用的权利，则都不会影响该交易的独立交易价格的确定。因此，功能分析应当具体识别被转让无形资产的相关权利的性质。

6.90 在涉及某一无形资产的许可或类似的协议中，对于该无形资产用于开发新的无形资产或新产品的限制条款通常在转让定价分析中至关重要。因此，在识别被转让无形资产的相关权利的性质时，考虑受让方是否有权将被转让无形资产用于未来的研究和开发有重要意义。在独立企业间的交易中，已存在转让方/许可方保留在许可期内对被许可的无形资产进行任何改进的完全权利的情况，也存在受让方/被许可方保留在许可期内或永久对被许可的无形资产进行任何改进的权利的情况。对今后开发被转让无形资产的所作限制的实质，或对受让方和转让方从上述无形资产改进中获取经济利益的能力所作限制的实质，将影响被转让权利的价值以及涉及相同或高度相似的无形资产的两个交易的可比性。此类限制条件必须从协议的书面条款和相关声明的确认行为两方面加以评估。

6.91 《转让定价指南》第一章的第 D.1.1 节的规定，适用于识别无形资产或无形资产相关权利的转让交易的性质，被转让无形资产的性质，以及转让条款对无形资产使用的限制。例如，尽管书面约定无形资产为非独占性或限期许可，而许可双方的协议行为与该约定并不一致，税务机关对书面约定有不予认可。第六章附录中的案例 18 对本段的规定进行了举例说明。

（ii）无形资产组合的转让
6.92 无形资产（包括无形资产相关的有限权利）既可以单独转让，也可以与其他无形资产组合转让。分析涉及无形资产组合转让的交易时，通常涉及两个问题。

6.93 第一个问题是如何不同无形资产间相互作用的性质和经济影响。某些无形资产在与另一些无形资产组合后的价值可能高于这些无形资产单独评估时的价值。因此，识别被组合转让的无形资产间的法律和经济作用的性质非常重要。

6.94 例如，一款药剂产品往往涉及三种或更多的无形资产。一种药物活性成分可能享有三项或多项专利保护。该产品将需要通过一系列测试，并且政府监管机构可能会针对该产品在指定地理市场，按照测试结果确定的适用于症状造成规定颁发销售许可。产品还可能会以某个注册商标进行销售。上述无形资产组合起来看，可能具有极高的价值。但单独看，其中一项或几项无形资产的价值可能将大打折扣。例如，没有专利和销售许可的商标，其价值可能很有限。因为没有销售许可，产品就无法出售，而没有
6.95 A second and related issue involves the importance of ensuring that all intangibles transferred in a particular transaction have been identified. It may be the case, for example, that intangibles are so intertwined that it is not possible, as a substantive matter, to transfer one without transferring the other. Indeed, it will often be the case that a transfer of one intangible will necessarily imply the transfer of other intangibles. In such cases it is important to identify all of the intangibles made available to the transference as a consequence of an intangibles transfer, applying the principles of Section D.1 of Chapter I. For example, the transfer of rights to use a trademark under a licence agreement will usually also imply the licensing of the reputational value, sometimes referred to as goodwill, associated with that trademark, where it is the licensor who has built up such goodwill. Any licence fee required should consider both the trademark and the associated reputational value. Example 20 in the Annex to Chapter VI illustrates the principles of this paragraph.

6.96 It is important to identify situations where taxpayers or tax administrations may seek to artificially separate intangibles that, as a matter of substance, independent parties would not separate in comparable circumstances. For example, attempts to artificially separate trademarks or trade names from the goodwill or reputational value that is factually associated with the trademark or trade name should be identified and critically analysed. Example 21 in the Annex to Chapter VI illustrates the principles of this paragraph.

6.97 It should be recognised that the process of identifying all of the intangibles transferred in a particular transaction is an exercise of identifying, by reference to written agreements and the actual conduct of the parties, the actual transactions that have been undertaken, applying the principles of Section D.1 of Chapter I.

(iii) Transfers of intangibles or rights in intangibles in combination with other business transactions

6.98 In some situations intangibles or rights in intangibles may be transferred in combination with tangible business assets, or in combination with services. It is important in such a situation to determine whether intangibles have in fact been transferred in connection with the transaction. It is also important that all of the intangibles transferred in connection with a particular transaction be identified and taken into account in the transfer pricing analysis. Examples 23 to 25 in the Annex to Chapter VI illustrate the principles of this paragraph.

6.99 In some situations it may be both possible and appropriate to separate transactions in tangible goods or services from transfers of intangibles or rights in intangibles for purposes of conducting a transfer pricing analysis. In these situations, the price of a package contract should be disaggregated in order to confirm that each element of the transaction is consistent with the arm's length principle. In other situations transactions may be so closely related that it will be difficult to segregate tangible goods or service transactions from transfers of intangibles or rights in intangibles. Reliability of available comparables will be an important factor in considering whether transactions should be combined or segregated. In particular, it is important to consider whether available comparables permit accurate evaluation of interactions between transactions.

6.100 One situation where transactions involving transfers of intangibles or rights in intangibles may be combined with other transactions involves a business franchise arrangement. Under such an arrangement, one member of an MNE group may agree to provide a combination of services and intangibles to an associated enterprise in exchange for a single fee. If the services and intangibles made available under such an arrangement are sufficiently unique that reliable comparables cannot be identified for the entire service/intangible package, it may be necessary to segregate the various parts of the package of services and intangibles for separate transfer pricing consideration. It should be kept
专利，药品将无法避免市场内来自非专利药的竞争。同时，已获得管机机构销售许可的专利，其价值可能远远高于未获得销售许可时的专利。这些不同类型无形资产间的相互作用以及由需来执行功能、承担风险、支付获取无形资产的成本等都是对无形资产转让进行转让定价分析时需要考虑的重要问题。在关联企业双方对所使用的无形资产均享有权利的情况下，需要考虑各方对于价值创造的相对贡献。

6.95 第二个相关问题是，确保识别某一交易中被转让的所有无形资产。由于无形资产之间极高的关联度，可能会存在这样的情况，即无法实质性做到只转让某一项无形资产而不转让另一项无形资产。事实上，转让某一项无形资产必然意味着并转让其他无形资产的情况经常发生。在这种情况下，需要运用《转让定价指南》第一章中第 D.1 节中的原则，来识别某一项无形资产转让而使受让方得以使用的所有无形资产。例如，根据许可证转让商标使用权通常意味着与商标相关的声誉价值（有时也称商誉，由许可方建立）的授予。因此，确定任何权利许可费时，需要同时考虑商标及其相关的声誉价值。第六章附录中的案例 20 对本段的原则进行了举例说明。

6.96 有时，纳税人或税务机关可能会试图人为拆分一些独立企业在可比情形下不会实质性地拆分的无形资产，而对这种情形加以识别十分重要。例如，对于人为地将商标或商号从与之在实际关联的商誉或声誉价值中拆分出来的尝试加以识别，并以审慎的态度进行分析。第六章附录中的案例 21 对本段的原则进行了举例说明。

6.97 需要承认的是，识别特定交易中所有被转让的无形资产的过程，是根据书面协议和协议各方的实际行为，其结合第一章第 D.1 节中的原则，识别实际进行交易的一项工作。

（iii）与其他商业交易一并完成的无形资产或无形资产相关权利转让

6.98 在某些情况下，无形资产或无形资产相关权利可能会随同有形商业资产或服务一并转让。这种情况下，确认无形资产实际上是否已伴随着交易而被转让非常重要。此外，对某一特定交易中被转让的所有无形资产加以识别并在转让定价分析中对此进行考虑也十分重要。第六章附录中的案例 23-25 对本段的原则进行了举例说明。

6.99 出于转让定价分析的需要，有时将有形商品或服务的交易与无形资产或无形资产相关权利的转让进行拆分是可能且合理的。这种情况下，应当对一揽子合同的价格进行分解，以确定交易各部分均符合独立交易原则。在另一些情况下，由于交易整合度较高，以至于无法将有形商品或服务的交易与无形资产或无形资产相关权利的转让分开。考虑应该将交易合并还是单独分析的一个重要因素在于可获得的可比数据的可靠性。尤其需要考虑的是可获得的可比对象是否能够对交易间的相互影响进行准确评估。
in mind, however, that the interactions between various intangibles and services may enhance the value of both.

6.101 In other situations, the provision of a service and the transfer of one or more intangibles may be so closely intertwined that it is difficult to separate the transactions for purposes of a transfer pricing analysis. For example, some transfers of rights in software may be combined with an undertaking by the transferee to provide ongoing software maintenance services, which may include periodic updates to the software. In situations where services and transfers of intangibles are intertwined, determining arm's length prices on an aggregate basis may be necessary.

6.102 It should be emphasised that delineating the transaction as the provision of products or services or the transfer of intangibles or a combination of both does not necessarily dictate the use of a particular transfer pricing method. For example, a cost plus approach will not be appropriate for all service transactions, and not all intangibles transactions require complex valuations or the application of profit split methods. The facts of each specific situation, and the results of the required functional analysis, will guide the manner in which transactions are combined, delineated and analysed for transfer pricing purposes, as well as the selection of the most appropriate transfer pricing method in a particular case. The ultimate objective is to identify the prices and other relevant conditions that would be established between independent enterprises in comparable transactions.

6.103 Moreover, it should also be emphasised that determinations as to whether transactions should be aggregated or segregated for analysis usually involve the delineation of the actual transaction undertaken, by reference to written agreements and the actual conduct of the parties. Determinations regarding the actual transaction undertaken constitute one necessary element in determining the most appropriate transfer pricing method in the particular case.

C.2 Transactions involving the use of intangibles in connection with sales of goods or performance of services

6.104 Intangibles may be used in connection with controlled transactions in situations where there is no transfer of the intangible of or rights in the intangible. For example, intangibles may be used by one or both parties to a controlled transaction in connection with the manufacture of goods sold to an associated enterprise, in connection with the marketing of goods purchased from an associated enterprise, or in connection with the performance of services on behalf of an associated enterprise. The nature of such a transaction should be clearly specified, and any relevant intangibles used by either of the parties in connection with such a controlled transaction should be identified and taken into account in the comparability analysis, in the selection and application of the most appropriate transfer pricing method for that transaction, and in the choice of the tested party. Supplemental guidance regarding the determination of arm's length conditions for transactions involving the use of intangibles in connection with the sale of goods or the provision of services is contained in Sections D.1 and D.4 of this Chapter.

6.105 The need to consider the use of intangibles by a party to a controlled transaction involving a sale of goods can be illustrated as follows. Assume that a car manufacturer uses valuable proprietary patents to manufacture the cars that it then sells to associated distributors. Assume that the patents significantly contribute to the value of the cars. The patents and the value they contribute should be identified and taken into account in the comparability analysis of the transaction consisting in the sales of cars by the car manufacturer to its associated distributors, in selecting the most appropriate transfer pricing method for the transactions, and in selecting the tested party. The associated distributors purchasing the cars do not, however, acquire any right in the manufacturer's patents. In
6.100 无形资产或无形资产权利的转让交易可以与其他交易合并的一个例子是商业特许经营安排。在这种安排下，跨国企业集团的某一成员企业可能会同意向某一关联企业—并提供服务和无形资产，并收取一笔费用作为补偿。如果这一安排所提供服务和无形资产足够独特，以至于无法找到与该服务和无形资产组合足够可比的可比对象，那么也许有必要将该服务和无形资产组合拆分成多个部分，并对每个部分进行单独的转让定价分析。但需要注意的是，各类无形资产与服务之间的相互作用可能会提升彼此的价值。

6.101 而在其他情况下，一项服务的提供与一项或多项无形资产的转让可能紧密关联，以至于在转让定价分析时很难拆分交易。例如，某些软件相关权利的转让可能还包括了转让方继续提供软件维护服务（包括对软件的定期更新）。在这种服务与无形资产的转让彼此关连的情况下，可能有必要在合并的基础上确定独立交易价格。

6.102 需要指出的是，不论交易被界定为商品或服务提供，或无形资产转让，亦或上述两者兼有，并不一定导致某一特定转让定价方法的使用。例如，成本加成法未必适用于所有服务交易，也不是所有的无形资产交易都需要复杂的价值评估或运用利润率分割法。具体案例的情况以及功能分析的结果将为转让定价分析对交易的合并、界定和分析以及最合适的转让定价方法的选择提供指导。最终目标是要确认独立企业在可比交易中可能达成的价值和其他相关的交易条件。

6.103 此外，需要强调的是，分析中是否对交易进行合并或拆分的决定取决于对实际交易的界定。这种界定应该考虑交易的书面协议、协议各方的实际行为，以及每种情况下确定最适用的转让定价方法的一个必要步骤。

6.2 涉及无形资产使用的产品销售或提供服务交易

6.104 有时，虽然没有无形资产或无形资产相关权利的转让，但受控交易仍然可能涉及无形资产的使用。例如，在将生产的产品销售给关联方，或从关联方采购的产品进行销售中，或为关联方提供服务时，受控交易的一方或多方都可能使用了无形资产。无论在可比性分析时，还是在选择和应用最适合该交易的转让定价方法以及在选择被测试方时，都需要注意对这类交易的性质做出具体说明，识别受控交易各方在受控交易中所使用的相关无形资产，并将无形资产的因素考虑进去。本章第 D.1 和 D.4 节对如何确定涉及无形资产使用的产品销售或服务提供交易的独立交易性质问题提供了补充指导。

6.105 对于涉及产品销售的受控交易，有必要考虑交易一方使用无形资产的情况。下文的示例对此进行了说明。假设某汽车生产商在生产汽车过程中使用了有价值的专利，然后将汽车销售给关联分销商。
such a case, the patents are used in the manufacturing and may affect the value of the cars, but the patents themselves are not transferred.

6.106 As another example of the use of intangibles in connection with a controlled transaction, assume that an exploration company has acquired or developed valuable geological data and analysis, and sophisticated exploratory software and know-how. Assume further that it uses those intangibles in providing exploration services to an associated enterprise. Those intangibles should be identified and taken into account in the comparability analysis of the service transactions between the exploration company and the associated enterprise, in selecting the most appropriate transfer pricing method for the transaction, and in selecting the tested party. Assuming that the associated enterprise of the exploration company does not acquire any rights in the exploration company's intangibles, the intangibles are used in the performance of the services and may affect the value of services, but are not transferred.

D. Supplemental guidance for determining arm's length conditions in cases involving intangibles

6.107 After identifying the relevant transactions involving intangibles, specifically identifying the intangibles involved in those transactions, identifying which entity or entities legally own the intangibles as well as those that contribute to the value of the intangibles, it should be possible to identify arm's length conditions for the relevant transactions. The principles set out in Chapters I—III of these Guidelines should be applied in determining arm's length conditions for transactions involving intangibles. In particular, the recommended nine-step process set out in paragraph 3.4 can be helpful in identifying arm's length conditions for transactions involving intangibles. As an essential part of applying the principles of Chapter III to conduct a comparability analysis under the process described in paragraph 3.4, the principles contained in Sections A, B, and C of this Chapter VI should be considered.

6.108 However, the principles of Chapters I—III can sometimes be difficult to apply to controlled transactions involving intangibles. Intangibles may have special characteristics that complicate the search for comparables, and in some cases make pricing difficult to determine at the time of the transaction. Further, for wholly legitimate business reasons, due to the relationship between them, associated enterprises might sometimes structure a transaction involving intangibles in a manner that independent enterprises would not contemplate. See paragraph 1.11. The use or transfer of intangibles may raise challenging issues regarding comparability, selection of transfer pricing methods, and determination of arm's length conditions for transactions. This Section D provides supplemental guidance for use in applying the principles of Chapters I—III to determine arm's length conditions for controlled transactions involving intangibles.

6.109 Section D.1 provides general supplemental guidance related to all transactions involving intangibles. Section D.2 provides supplemental guidance specifically related to transactions involving the transfer of intangibles or rights in intangibles. Section D.3 provides supplemental guidance regarding transfers of intangibles or rights in intangibles whose value is highly uncertain at the time of the transfer. Section D.4 provides an approach to pricing hard-to-value intangibles. Section D.5 provides supplemental guidance applicable to transactions involving the use of intangibles in connection with the sale of goods or the provision of services in situations where there is no transfer of rights in the intangibles.
假设专利对汽车的价值有重要贡献，那么就汽车生产商与关联分销商销售汽车这一交易而言，专利及其贡献的价值在可比性分析中选择最合适转让定价方法以及选择被测试方时都必须加以识别和考虑。购入汽车的关联分销商并不存在获得生产商的专利相关的任何权利。在这种情况下，专利用在了生产过程中，而且可能影响汽车的价值，但是专利本身并没有被转让。

6.106 再如，假设一家检测公司获得或开发了有价值的地质数据和分析，以及复杂的探测软件和专利技术，并使用这些无形资产向一家关联企业提供咨询服务。那么，在对该公司和关联方的服务交易进行可比性分析时，为上述交易选择最合适的转让定价方法以及选择被测试方时，都应当将上述无形资产加以识别并考虑在内。如果这家检测公司的关联方没有获得该检测公司无形资产的任何相关权利，那么虽然这些无形资产在服务提供时得以使用，并且可能会影响服务的价值，但它并没有被转让。

D. 关于如何确认无形资产相关交易独立交易条件的补充指南

6.107 就识别涉及无形资产的相关交易而言，尤其是确定交易所涉及无形资产、无形资产的法律所有权人及其他对无形资产产生贡献的企业等信息问题，应当可以判断相关交易的条件能否符合独立交易原则。《转让定价指南》第一至三章的原则可用于判定无形资产相关交易是否符合独立交易原则，其中第 3.4 段中所描述的“九步法”有助于识别无形资产相关交易的独立交易条件，应用第三章的原则根据第 3.4 段描述的转让定价方法的可比性分析时，应格外关注第六章第 A、B、C 三节所描述的原则。

6.108 然而，第一至三章的原则有时难以应用于涉及无形资产的受控交易。无形资产自身具有的独特性可能会增加寻找可比对象的难度，有时甚至会增加在交易发生时难以定值的情况。此外，出于完全正当的商业原因，关联企业间在进行无形资产相关交易时，双方之间的特殊关系，有时可能会使独立企业之间不会进行的交易（参见第 1.11 段）。无形资产的使用和转让可能会在可比性分析方法的选择以及确定交易的独立交易条件等方面存在问题。本章第 D 节针对如何应用第一至三章的原则来确定涉及无形资产的受控交易的独立交易条件提供了补充说明。

6.109 第 D.1 节针对各种涉及无形资产的交易提供了具体性的补充指南。第 D.2 节特别针对无形资产或无形资产相关权利转让的交易提供了补充指南。第 D.3 节针对交易发生时无形资产或相关权利价值高度不确定的情况提供了补充指南。第 D.4 节针对难以资本化的无形资产提供了定价方法，第 D.5 节针对在销售产品或提供服务的关联交易中涉及无形资产的使用，但没有无形资产转让的情况提供了补充指南。
D.1 General principles applicable in transactions involving intangibles

6.110 Section D of Chapter I and Chapter III contain principles to be considered and a recommended process to be followed in conducting a comparability analysis. The principles described in those sections of the Guidelines apply to all controlled transactions involving intangibles.

6.111 In applying the principles of the Guidelines related to the content and process of a comparability analysis to a transaction involving intangibles, a transfer pricing analysis must consider the options realistically available to each of the parties to the transaction.

6.112 In considering the options realistically available to the parties, the perspectives of each of the parties to the transaction must be considered. A comparability analysis focusing only on one side of a transaction generally does not provide a sufficient basis for evaluating a transaction involving intangibles (including in those situations for which a one-sided transfer pricing method is ultimately determined).

6.113 While it is important to consider the perspectives of both parties to the transaction in conducting a comparability analysis, the specific business circumstances of one of the parties should not be used to dictate an outcome contrary to the realistically available options of the other party. For example, a transferor would not be expected to accept a price for the transfer of either all or part of its rights in an intangible that is less advantageous to the transferor than its other realistically available options (including making no transfer at all), merely because a particular associated enterprise transferee lacks the resources to effectively exploit the transferred rights in the intangible. Similarly, a transferee should not be expected to accept a price for a transfer of rights in one or more intangibles that would make it impossible for the transferee to anticipate earning a profit using the acquired rights in the intangible in its business. Such an outcome would be less favourable to the transferee than its realistically available option of not engaging in the transfer at all.

6.114 It will often be the case that a price for a transaction involving intangibles can be identified that is consistent with the realistically available options of each of the parties. The existence of such prices is consistent with the assumption that MNE groups seek to optimise resource allocations. If situations arise in which the minimum price acceptable to the transferor, based on its realistically available options, exceeds the maximum price acceptable to the transferee, based on its realistically available options, it may be necessary to consider whether the actual transaction should be disregarded under the criterion for non-recognition set out in Section D.2 of Chapter I, or whether the conditions of the transaction should otherwise be adjusted. Similarly, if situations arise in which there are assertions that either the current use of an intangible, or a proposed realistically available option (i.e. an alternative use of the intangible), does not optimise resource allocations, it may be necessary to consider whether such assertions are consistent with the true facts and circumstances of the case. This discussion highlights the importance of taking all relevant facts and circumstances into account in accurately delineating the actual transaction involving intangibles.

D.2 Supplemental guidance regarding transfers of intangibles or rights in intangibles

6.115 This section provides supplemental guidance regarding specific issues arising in connection with the transfer between associated enterprises of intangibles or rights in intangibles. Such transactions may include sales of intangibles as well as transactions that are economically equivalent to sales. Such transactions could also include a licence of rights in one or more intangibles or a similar transaction. This section is not intended to provide comprehensive guidance with regard to the transfer pricing treatment of such intangibles transfers. Rather, it supplements the otherwise applicable provisions of Chapters I – III, and the guidance in Sections A, B, C, and D.1 of this
D.1. 无形资产相关交易的总体原则

6.110 《转让定价指南》第一章第 D 节和第三章阐述了可比性分析时应考虑的原则以及推荐的分析步骤。上述内容同样也适用于所有涉及无形资产的受控交易。

6.111 将《转让定价指南》中关于可比性分析的内容和步骤的原则应用于无形资产相关交易分析时，应当考虑交易各方的其他可行方案。

6.112 在考量交易各方的其他可行方案时，必须从交易各方的角度加以考虑。基于单向测试的可比性分析（包括最终使用基于单向测试的转让定价方法进行分析的情形）往往不能为无形资产相关交易的评估提供足够的支持。

6.113 虽然进行可比性分析时应从交易双方的角度考量，但不应把交易一方独特的商业情况作为决定交易另一方其他可行方案的违背结果。比如，即使关联受让方因缺乏资源而无法有效利用无形资产，也不能假设转让方会以低于其他可行方案（包括不转让）的价格转让某项无形资产的全部或部分权利给关联受让方。如果受让方将获得的合同或多项无形资产的权利用于业务经营却预计无法为其创造利润回报，同样也不能指望受让方会接受相关无形资产权利的转让价格，因为这样的结果对受让方来说还不如不进行该交易。

6.114 无形资产相关交易的价格往往与交易各方其他可行方案相吻合。存在这样的价格也与跨国企业集团追求资源最优配置的假设相一致。在考虑交易双方其他可行方案的前提下，如果转让方可接受的最低价格高于受让方可接受的最高价格，需要考虑是否应该根据第十一章 D.2 节描述的“不入确认”对交易予以确认，或者是否需要调整该项交易的其他条件。同样，如果出现两项无形资产使用方式或者某个推荐的可行方案（即无形资产的其他使用方式）不能达到资源优化配置的目的，则需进一步考量上述判断是否符合真实情况和条件。因此，准确界定涉及无形资产的交易分析时，将所有相关因素和情况综合考虑是非常重要的。

D.2. 无形资产或相关权利转让的补充指南

6.115 本节针对关联交易转让无形资产或相关权利时可能产生的特别问题提供补充指南。此类交易包括无形资产的转让，也包括经济意义上等同于转让的交易。此类交易也包括对一项或多项无形资产进行授权许可或者类似性质的交易。
Chapter, in the context of transfers of intangibles or rights in intangibles, by providing guidance with regard to certain specific topics commonly arising in connection with such transfers.

(i) Comparability of intangibles or rights in intangibles

6.116 In applying the provisions of Chapters I – III to transactions involving the transfer of intangibles or rights in intangibles, it should be borne in mind that intangibles often have unique characteristics, and as a result have the potential for generating returns and creating future benefits that could differ widely. In conducting a comparability analysis with regard to a transfer of intangibles, it is therefore essential to consider the unique features of the intangibles. This is particularly important where the CUP method is considered to be the most appropriate transfer pricing method, but also has importance in applying other methods that rely on comparables. In the case of a transfer of an intangible or rights in an intangible that provides the enterprise with a unique competitive advantage in the market, purportedly comparable intangibles or transactions should be carefully scrutinised. It is critical to assess whether potential comparables in fact exhibit similar profit potential.

6.117 Set out below is a description of some of the specific features of intangibles that may prove important in a comparability analysis involving transfers of intangibles or rights in intangibles. The following list is not exhaustive and in a specific case consideration of additional or different factors may be an essential part of a comparability analysis.

(a) Exclusivity

6.118 Whether the rights in intangibles relevant to a particular transaction involving the transfer of intangibles or rights in intangibles are exclusive or non-exclusive can be an important comparability consideration. Some intangibles allow the legal owner of the intangible to exclude others from using the intangible. A patent, for example, grants an exclusive right to use the invention covered by the patent for a period of years. If the party controlling intangible rights can exclude other enterprises from the market, or exclude them from using intangibles that provide a market advantage, that party may enjoy a high degree of market power or market influence. A party with non-exclusive rights to intangibles will not be able to exclude all competitors and will generally not have the same degree of market power or influence. Accordingly, the exclusive or non-exclusive nature of intangibles or rights in intangibles should be considered in connection with the comparability analysis.

(b) Extent and duration of legal protection

6.119 The extent and duration of legal protection of the intangibles relevant to a particular transfer can be an important comparability consideration. Legal protections associated with some intangibles can prevent competitors from entering a particular market. For other intangibles, such as know-how or trade secrets, available legal protections may have a different nature and not be as strong or last as long. For intangibles with limited useful lives, the duration of legal protections can be important since the duration of the intangible rights will affect the expectation of the parties to a transaction with regard to the future benefits from the exploitation of the intangible. For example, two otherwise comparable patents will not have equivalent value if one expires at the end of one year while the other expires only after ten years.

(c) Geographic scope

6.120 The geographic scope of the intangibles or rights in intangibles will be an important comparability consideration. A global grant of rights to intangibles may be more valuable than a grant
本节并非旨在针对无形资产转让交易中的转让定价处理提出广泛的指导意见，而是针对这类转让中常见的问题提出导引。以对《转让定价指南》第一至三章和本章第 A、B、C 节以及第 D.1 节描述的指导原则进行补充和说明。

（1）无形资产或无形资产相关权利的可比性

6.116 将《转让定价指南》第一至三章的原则应用于无形资产或无形资产权利转让的交易时，应注意的是无形资产通常具有独特性，不同的无形资产在产生回报和创造未来收益方面的潜能也会大相径庭。因此，对无形资产转让交易进行可比性分析时，必须考虑无形资产的的独特性。这不仅限于使用可比非受控价格法时尤其重要，对应用基于可比对象的其他转让定价方法时也很重要。如果转让的无形资产及相关权利能使企业在市场上具有独特的竞争优势，则需要仔细审核被认为是可比的无形资产或交易。此外，对于潜在可比对象是否具有相似的获利能力的评估也至关重要。

6.117 下文描述的无形资产的特征对无形资产或无形资产相关权利转让的可比性分析可能十分重要。以下列举事例并不详尽；在特定情况下，可比性分析还需对其他因素进行考量。

(a) 排他性

6.118 交易中的无形资产及相关权利是否具有排他性是一个重要的可比性分析考虑因素。一些无形资产允许其法律所有人阻止他人使用该无形资产。例如，专利权可以使被授权方在一段时期内独享一项发明的使用权。如果掌控该无形资产权利的一方能够阻止其他企业进入市场，或者不让其他企业使用能够提供市场领先优势的无形资产，则该企业就拥有较高的市场支配力和影响力。拥有非排他性无形资产权利的一方则无法排除所有的同行竞争对手，从而无法具备同样的市场支配力和影响力。因此，无形资产及相关权利是否具有排他性是可比性分析中应考量的重要因素。

(b) 法律保护范围和期限

6.119 对于受让无形资产的法律保护的范围和期限也是一个重要的可比性分析考虑因素。一些无形资产的法律保护能阻止竞争对手进入该市场。另一些无形资产（例如专有技术或商业机密）所受的法律保护可能不同。相关的保护措施力度较弱，保护期限也较短。对于使用期限有限的无形资产，法律保护的期限非常重要。因为无形资产权利的期限会直接影响交易双方对利用该无形资产的未来收益的预期。例如，有两项在其他方面均可比的专利，一项一年后到期，而另一项十年后到期，那么它们的价值显然不会相同。

(c) 地域范围
limited to one or a few countries, depending on the nature of the product, the nature of the intangible, and the nature of the markets in question.

(d) Useful life

6.121 Many intangibles have a limited useful life. The useful life of a particular intangible can be affected by the nature and duration of the legal protections afforded to the intangible, as noted above. The useful life of some intangibles can also be affected by the rate of technological change in an industry and by the development of new and potentially improved products. It may also be the case that the useful life of particular intangibles can be extended.

6.122 In conducting a comparability analysis, it will therefore be important to consider the expected useful life of the intangibles in question. In general, intangibles expected to provide market advantages for a longer period of time will be more valuable than similar intangibles providing such advantages for a shorter period of time, other things being equal. In evaluating the useful life of intangibles it is also important to consider the use being made of the intangible. The useful life of an intangible that forms a base for ongoing research and development may extend beyond the commercial life of the current generation product line based on that intangible.

(e) Stage of development

6.123 In conducting a comparability analysis, it may be important to consider the stage of development of particular intangibles. It is often the case that an intangible is transferred in a controlled transaction at a point in time before it has been fully demonstrated that the intangible will support commercially viable products. A common example arises in the pharmaceutical industry, where chemical compounds may be patented, and the patents (or rights to use the patents) transferred in controlled transactions, well in advance of the time when further research, development and testing demonstrates that the compound constitutes a safe and effective treatment for a particular medical condition.

6.124 As a general rule, intangibles relating to products with established commercial viability will be more valuable than otherwise comparable intangibles relating to products whose commercial viability is yet to be established. In conducting a comparability analysis involving partially developed intangibles, it is important to evaluate the likelihood that further development will lead to commercially significant future benefits. In certain circumstances, industry data regarding the risks associated with further development can be helpful to such evaluations. However, the specific circumstances of any individual situation should always be considered.

(f) Rights to enhancements, revisions, and updates

6.125 Often, an important consideration in a comparability analysis involving intangibles relates to the rights of the parties with regard to future enhancements, revisions and updates of the intangibles. In some industries, products protected by intangibles can become obsolete or uncompetitive in a relatively short period of time in the absence of continuing development and enhancement of the intangibles. As a result, having access to updates and enhancements can be the difference between deriving a short term advantage from the intangibles and deriving a longer term advantage. It is therefore necessary to consider for comparability purposes whether or not a particular grant of rights in intangibles includes access to enhancements, revisions, and updates of the intangibles.

6.126 A very similar question, often important in a comparability analysis, involves whether the transferee of intangibles obtains the right to use the intangibles in connection with research directed to developing new and enhanced intangibles. For example, the right to use an existing software platform
6.120 无形资产或无形资产相关权利所涉及的地域范围对可比性分析也很重要。根据产品性质，无形资产的性质以及所在市场的特性，一项无形资产在全球范围内的授权可能比在某一或某些国家内的授权具有更高的价值。

(d) 使用期限

6.121 许多无形资产的使用期限有限。如上所述，一项特定无形资产的使用期限受其法律保护的性质和期限影响，有些无形资产的使用期限还受行业内技术变革的速度、新产品或潜在改良产品的开发等因素的影响。某些情况下，特定无形资产的使用期限可以被延长。

6.122 因此，进行可比性分析时，所涉及的无形资产的预期使用期限是个重要的考虑因素。一般而言，在其他条件一致的情况下，预计能够在较长时间内产生市场优势的无形资产将比预计仅能在较短时间内产生市场优势的无形资产更有价值。评估无形资产的使用期限时，还需考虑无形资产的利用方式。作为后续研发基础的某项无形资产，其使用期限可能长于基于该无形资产的现有产品的商业寿命。

(e) 开发阶段

6.123 进行可比性分析时，无形资产的开发阶段可能是个重要的考虑因素。在受控交易中，无形资产往往会在被充分证明能够产生具有商业价值的产品之前被转让。医药行业中常见的例子，化合物被申请专利，并且其专利（或使用专利的权利）在受控交易中被转让；在这种化合物还没有被进一步研究、分析、测试以证明其可构成针对某一特定病症的有效的药物之前，转让就已发生。

6.124 一般而言，具有商业价值的产品相关的无形资产比尚未具有商业价值的产品相关的无形资产更具价值。对尚未完全开发的无形资产进行可比性分析时，评估其后续开发能否在未来产生显著收益也很重要。在特定情况下，后续开发风险的行业数据将有助于相关评估分析。然而，任何情形下都应考虑一些特殊因素。

(f) 使用无形资产改进、修改和更新的权利

6.125 通常，交易方是否有权使用无形资产的后续改进、修改和更新在针对无形资产相关交易进行可比性分析时也很重要。在某些行业，如果不能对无形资产进行持续的开发和价值提升，则该无形资产保护的产品可能很快会被淘汰或失去竞争力。因此，是否拥有使用无形资产改进和修改的权利就意味着从该无形资产取得的短期还是长期的市场优势。因此，进行可比性分析时，有必要考虑对某项无形资产的授权是否包括使用该无形资产的后续改进、修改和更新的权利。
as a basis for developing new software products can shorten development times and can make the difference between being the first to market with a new product or application, or being forced to enter a market already occupied by established competitive products. A comparability analysis with regard to intangibles should, therefore, consider the rights of the parties regarding the use of the intangibles in developing new and enhanced versions of products.

(g) Expectation of future benefit

6.127 Each of the foregoing comparability considerations has a consequence with regard to the expectation of the parties to a transaction regarding the future benefits to be derived from the use of the intangibles in question. If for any reason there is a significant discrepancy between the anticipated future benefit of using one intangible as opposed to another, it is difficult to consider the intangibles as being sufficiently comparable to support a comparables-based transfer pricing analysis in the absence of reliable comparability adjustments. Specifically, it is important to consider the actual and potential profitability of products or potential products that are based on the intangible. Intangibles that provide a basis for high profit products or services are not likely to be comparable to intangibles that support products or services with only industry average profits. Any factor materially affecting the expectation of the parties to a controlled transaction of obtaining future benefits from the intangible should be taken into account in conducting the comparability analysis.

(ii) Comparison of risk in cases involving transfers of intangibles or rights in intangibles

6.128 In conducting a comparability analysis involving the transfer of intangibles or rights in intangibles, the existence of risks related to the likelihood of obtaining future economic benefits from the transferred intangibles must be considered, including the allocation of risk between the parties which should be analysed within the framework set out in Section D.1.2 of Chapter I. The following types of risks, among others, should be considered in evaluating whether transfers of intangibles or combinations of intangibles are comparable, and in evaluating whether the intangibles themselves are comparable.

- Risks related to the future development of the intangibles. This includes an evaluation of whether the intangibles relate to commercially viable products, whether the intangibles may support commercially viable products in the future, the expected cost of required future development and testing, the likelihood that such development and testing will prove successful and similar considerations. The consideration of development risk is particularly important in situations involving transfers of partially developed intangibles.

- Risks related to product obsolescence and depreciation in the value of the intangibles. This includes an evaluation of the likelihood that competitors will introduce products or services in the future that would materially erode the market for products dependent on the intangibles being analysed.

- Risks related to infringement of the intangible rights. This includes an evaluation of the likelihood that others might successfully claim that products based on the intangibles infringe their own intangible rights and an evaluation of the likely costs of defending against such claims. It also includes an evaluation of the likelihood that the holder of intangible rights could successfully prevent others from infringing the intangibles, the risk that counterfeit products could erode the profitability of relevant markets, and the likelihood that substantial damages could be collected in the event of infringement.

- Product liability and similar risks related to the future use of the intangibles.
6.126 另一个在可比性分析中很重要的类似问题是无形资产的受让方是否有权在该无形资产基础上研发新的无形资产或提升现有无形资产。例如，如果受让方可以利用已有软件平台来开发新软件产品，便可以缩短开发时间，成为新产品或新应用程序的市场先驱，避免被动进入竞争激烈的市场。因此，是否有权使用被授权的无形资产开发新产品或提升现有产品，应当在可比性分析时予以考虑。

（g）对未来收益的预期

6.127 上述每一项可比性考虑因素都会影响交易各方对利用无形资产获得未来收益的预期。如果使用某种无形资产和使用另一种无形资产所带来的预期收益有重大差异，除非能够进行可靠的可比性调整，否则这种无形资产很难被视为具有充分的可比性，进而用于转让定价分析。具体而言，应当考虑利用该无形资产开发的产品或潜在产品的实际或潜在获利能力，与高利润的产品或服务相关的无形资产和仅能保持行业平均利润水平的产品或服务相关的无形资产一般不具备可比性。因此，进行可比性分析时，任何会对受让交易双方对未来收益的预期产生实质性影响的因素都应考虑在内。

（ii）转让无形资产或无形资产权利时的风险比较

6.128 对无形资产或无形资产的转让进行可比性分析时，必须考虑与取得被转让无形资产未来经济收益相关的风险，包括应当按照第一章第一节D.1.2节所提供的框架分析的交易双方的风险匹配。评估某项无形资产或无形资产组合的转让是否可比以及无形资产本身是否可比，应着重关注以下类型的风险。
- 无形资产未来开发的风险：包括评估无形资产是否与具备商业价值的产品相匹配、无形资产是否可在未来支持具备商业价值的产品、未来所需的开发和测试的预计成本，以及上述研发和测试成功的可能性等。在转让尚未完全开发的无形资产相关交易中，后续开发风险的分析尤为重要。
- 产品淘汰以及无形资产贬值的风险：包括评估竞争对手未来推出的产品或服务将对相关无形资产的产品市场形成极大侵蚀的可能性。
- 无形资产侵权风险：包括评估其他方提出诉讼，主张基于相关无形资产的产品侵犯了其所拥有的无形资产的权利的可能性，以及评估对此保护可能发生的成本。该风险还包括评估无形资产权利的所有者成功阻止他人侵权的可能性、仿冒产品影响相关产品市场的盈利水平的风险，以及向侵权者索赔损害补偿的可能性。
(iii) Comparability adjustments with regard to transfers of intangibles or rights in intangibles

6.129 The principles of paragraphs 3.47 to 3.54 relating to comparability adjustments apply with respect to transactions involving the transfer of intangibles or rights in intangibles. It is important to note that differences between intangibles can have significant economic consequences that may be difficult to adjust for in a reliable manner. Particularly in situations where amounts attributable to comparability adjustments represent a large percentage of the compensation for the intangible, there may be reason to believe, depending on the specific facts, that the computation of the adjustment is not reliable and that the intangibles being compared are in fact not sufficiently comparable to support a valid transfer pricing analysis. If reliable comparability adjustments are not possible, it may be necessary to select a transfer pricing method that is less dependent on the identification of comparable intangibles or comparable transactions.

(iv) Use of comparables drawn from databases

6.130 Comparability, and the possibility of making comparability adjustments, is especially important in considering potentially comparable intangibles and related royalty rates drawn from commercial databases or proprietary compilations of publicly available licence or similar agreements. The principles of paragraphs 3.30 to 3.34 apply fully in assessing the usefulness of transactions drawn from such sources. In particular, it is important to assess whether publicly available data drawn from commercial databases and proprietary compilations is sufficiently detailed to permit an evaluation of the specific features of intangibles that may be important in conducting a comparability analysis. In evaluating comparable licence arrangements identified from databases, the specific facts of the case, including the methodology being applied, should be considered in the context of the provisions of paragraph 3.38.

(v) Selecting the most appropriate transfer pricing method in a matter involving the transfer of intangibles or rights in intangibles

6.131 The principles of these Guidelines related to the selection of the most appropriate transfer pricing method to the circumstances of the case are described in paragraphs 2.1 to 2.11. Those principles apply fully to cases involving the transfer of intangibles or rights in intangibles. In selecting the most appropriate transfer pricing method in a case involving a transfer of intangibles or rights in intangibles, attention should be given to (i) the nature of the relevant intangibles, (ii) the difficulty of identifying comparable uncontrolled transactions and intangibles in many, if not most, cases, and (iii) the difficulty of applying certain of the transfer pricing methods described in Chapter II in cases involving the transfer of intangibles. The issues discussed below are particularly important in the selection of transfer pricing methods under the Guidelines.

6.132 In applying the principles of paragraphs 2.1 to 2.11 to matters involving the transfer of intangibles or rights in intangibles, it is important to recognise that transactions structured in different ways may have similar economic consequences. For example, the performance of a service using intangibles may have very similar economic consequences to a transaction involving the transfer of an intangible (or the transfer of rights in the intangible), as either may convey the value of the intangible to the transferee. Accordingly, in selecting the most appropriate transfer pricing method in connection with a transaction involving the transfer of intangibles or rights in intangibles, it is important to consider the economic consequences of the transaction, rather than proceeding on the basis of an arbitrary label.

6.133 This Chapter makes it clear that in matters involving the transfer of intangibles or rights in intangibles it is important not to simply assume that all residual profit, after a limited return to those
未来使用无形资产产生的相关产品责任风险和其他类似风险。

(i) 无形资产或无形资产相关权利转让的可比性调整

6.129 第 3.47 至 3.54 段中关于可比性调整的原则同样适用于无形资产或无形资产相关权利转让的交易。无形资产间的差异可能产生重大的经济影响，而这种影响可能难以通过可靠的可比性调整消除。尤其在可比性调整的金额占据无形资产获得的大部分补偿的情况下，根据具体情况，可能有理由怀疑该调整结果的可靠性，以及作为可比对象的无形资产事实上并不具有足够的可比性。如果无法进行可靠的可比性调整，则或许有必要选择对可比无形资产或可比交易依赖度较低的其他转让定价方法。

(iv) 数据库中可比对象的使用

6.130 在考虑通过商业数据库或专业数据库（通过搜集公开的许可协议和类似协议而建立）获得的潜在可比的无形资产及其许可权使用费率时，可比性以及可比性调整的可能性至关重要。评估上述来源数据的有效性时，可以充分运用第 3.30-3.34 段的原则。值得注意的是，应重点评估商业数据库或专业数据库是否披露足够详细的信息，以便对无形资产的具体特征进行分析。此类评估应根据第 3.38 段的指导原则对具体情况加以考虑，包括所应用的方法。

(v) 对于涉及无形资产或无形资产权利的交易选择最适合的转让定价方法

6.131 第 2.1-2.12 段描述了根据具体情况选择最适合的转让定价方法的原则。这些原则同样适用于无形资产或无形资产权利转让的案例。为涉及无形资产或无形资产权利转让的案例选择最适合的转让定价方法时，应注意以下几点：(i) 相关无形资产的特点；(ii) 大多数情况下寻找可比非受控交易和可比无形资产的困难程度，以及(iii) 将第 2.1-2.12 段的某些转让定价方法应用到涉及无形资产转让的案例中的困难程度。下文所讨论的问题对按照《转让定价指南》选择转让定价方法至关重要。

6.132 将第 2.1-2.11 段的原则应用于涉及无形资产或无形资产权利转让的交易时，应注意不同的交易方式可能产生相似的经济影响。例如，提供服务时使用无形资产可能与转让该项无形资产（或转让该无形资产的权利）具有相似的经济影响，因为这两种交易均可能将无形资产的价值转移给受让方。因此，在为无形资产或无形资产权利转让的选择最合适的转让定价方法时，应当考虑交易的经济影响，而
providing functions, should necessarily be allocated to the owner of intangibles. The selection of the
most appropriate transfer pricing method should be based on a functional analysis that provides a
clear understanding of the MNE's global business processes and how the transferred intangibles
interact with other functions, assets and risks that comprise the global business. The functional
analysis should identify all factors that contribute to value creation, which may include risks borne,
specific market characteristics, location, business strategies, and MNE group synergies among others.
The transfer pricing method selected, and any adjustments incorporated in that method based on the
comparability analysis, should take into account all of the relevant factors materially contributing to
the creation of value, not only intangibles and routine functions.

6.134 The principles set out in paragraphs 2.11, 3.58 and 3.59 regarding the use of more than one
transfer pricing method apply to matters involving the transfer of intangibles or rights in intangibles.

6.135 Paragraphs 3.9 to 3.12 and paragraph 3.37 provide guidance regarding the aggregation of
separate transactions for purposes of transfer pricing analysis. Those principles apply fully to cases
involving the transfer of intangibles or rights in intangibles and are supplemented by the guidance in
Section C of this Chapter. Indeed, it is often the case that intangibles may be transferred in
combination with other intangibles, or in combination with transactions involving the sale of goods or
the performance of services. In such situations it may well be that the most reliable transfer pricing
analysis will consider the interrelated transactions in the aggregate as necessary to improve the
reliability of the analysis.

(vi) Supplemental guidance on transfer pricing methods in matters involving the transfer of
intangibles or rights in intangibles

6.136 Depending on the specific facts, any of the five OECD transfer pricing methods described in
Chapter II might constitute the most appropriate transfer pricing method to the circumstances of the
case where the transaction involves a controlled transfer of one or more intangibles. The use of other
alternatives may also be appropriate.

6.137 Where the comparability analysis identifies reliable information related to comparable
uncontrolled transactions, the determination of arm's length prices for a transfer of intangibles or
rights in intangibles can be determined on the basis of such comparables after making any
comparability adjustments that may be appropriate and reliable.

6.138 However, it will often be the case in matters involving transfers of intangibles or rights in
intangibles that the comparability analysis (including the functional analysis) reveals that there are no
reliable comparable uncontrolled transactions that can be used to determine the arm's length price and
other conditions. This can occur if the intangibles in question have unique characteristics, or if they
are of such critical importance that such intangibles are transferred only among associated enterprises.
It may also result from a lack of available data regarding potentially comparable transactions or from
other causes. Notwithstanding the lack of reliable comparables, it is usually possible to determine the
arm's length price and other conditions for the controlled transaction.

6.139 Where information regarding reliable comparable uncontrolled transactions cannot be
identified, the arm's length principle requires use of another method to determine the price that
uncontrolled parties would have agreed under comparable circumstances. In making such
determinations, it is important to consider:

- The functions, assets and risks of the respective parties to the transaction.
不是基于该交易的名称或标签。

6.135 针对涉及无形资产或无形资产权利转让的交易，本章明确了不应简单认为利用无形资产所获得的收益在向承担相关功能的企业提供有限的回报后，所有剩余收益都自然由无形资产的所有者享有。应通过功能分析充分了解跨国企业的全球运营流程，以及被转让的无形资产与组成全球业务的其他功能、资产以及风险之间的相互作用，进而选出最适合的转让定价方法。功能分析还应识别出所有价值创造因素，其中还可能包括承担的风险、特定的市场特征、地域、商业战略以及跨国企业集团内部的协同效应等。转让定价方法的选择及其中基于比率性分析所做出的任何调整应考虑所有对价值创造产生重大影响的因素，而不应该仅局限于无形资产和常规功能。

6.134 第 2.11 段、第 3.58 段和第 3.59 段关于使用多种转让定价方法的原则同样适用于涉及无形资产或无形资产权利转让的交易。

6.135 第 3.9-3.12 段以及第 3.37 段提供了有关在转让定价分析中合并交易的指导原则。这些原则完全适用于涉及无形资产或无形资产权利转让的交易。此外，本章第 3 段还对这些原则进行了补充说明。事实上，无形资产经常可能会与其他无形资产一并转让，或者随同产品销售或服务提供等交易一并转让。这种情况下，为了提高分析的可靠性，最可靠的方法可能就是将所有相互关联的交易合并进行转让定价分析。

(vi) 有关无形资产或无形资产权利转让事项的转让定价方法的补充指导

6.136 根据具体情况，《转让定价指南》第二章介绍的五种 OECD 转让定价方法可能成为涉及一项或多项无形资产的受控转让交易的最合适的转让定价方法。其他方法的使用也可能合理。

6.137 如果可比性分析识别出关于可比非受控交易的可靠信息，则无形资产或无形资产权利转让的独立交易价格可按上述可比对象的基础上，经过合理且可靠的可比性调整加以确定。

6.138 然而，分析无形资产或无形资产权利转让的事例时，可比性分析（包括功能分析）往往显示没有可靠的可比非受控交易可用于确定符合独立交易原则的价格和其他条件。这种情况一般发生在无形资产具备独特性，或者无形资产太过重要而不会在关联交易之中才会转让的情况下。这种情况也可能是缺乏潜在可比的数据信息或者其他原因所造成的。尽管缺少可靠的可比对象，但通常还是有可能为受控交易确定符合独立交易原则的价格和其他交易条件。

6.139 如果无法找到可靠的可比非受控交易的信息，独立交易原则要求使用其他方法来确定非受控交易方在可比情况下会达成的价格。这种情况下，需要考虑：“
• The business reasons for engaging in the transaction.

• The perspectives of and options realistically available to each of the parties to the transaction.

• The competitive advantages conferred by the intangibles including especially the relative profitability of products and services or potential products and services related to the intangibles.

• The expected future economic benefits from the transaction.

• Other comparability factors such as features of local markets, location savings, assembled workforce, and MNE group synergies.

6.140 In identifying prices and other conditions that would have been agreed between independent enterprises under comparable circumstances, it is often essential to carefully identify idiosyncratic aspects of the controlled transaction that arise by virtue of the relationship between the parties. There is no requirement that associated enterprises structure their transactions in precisely the same manner as independent enterprises might have done. However, where transactions are utilised by associated enterprises that are not typical of transactions between independent parties, the effect of those structures on prices and other conditions that would have been agreed between uncontrolled parties under comparable circumstances should be taken into account in evaluating the profits that would have accrued to each of the parties at arm’s length.

6.141 Care should be used, in applying certain of the OECD transfer pricing methods in a matter involving the transfer of intangibles or rights in intangibles. One sided methods, including the resale price method and the TNMM, are generally not reliable methods for directly valuing intangibles. In some circumstances such mechanisms can be utilised to indirectly value intangibles by determining values for some functions using those methods and deriving a residual value for intangibles. However, the principles of paragraph 6.133 are important when following such approaches and care should be exercised to ensure that all functions, risks, assets and other factors contributing to the generation of income are properly identified and evaluated.

6.142 The use of transfer pricing methods that seek to estimate the value of intangibles based on the cost of intangible development is generally discouraged. There rarely is any correlation between the cost of developing intangibles and their value or transfer price once developed. Hence, transfer pricing methods based on the cost of intangible development should usually be avoided.

6.143 However, in some limited circumstances, transfer pricing methods based on the estimated cost of reproducing or replacing the intangible may be utilised. Such approaches may sometimes have valid application with regard to the development of intangibles used for internal business operations (e.g. internal software systems), particularly where the intangibles in question are not unique and valuable intangibles. Where intangibles relating to products sold in the marketplace are at issue, however, replacement cost valuation methods raise serious comparability issues. Among other concerns, it is necessary to evaluate the effect of time delays associated with deferred development on the value of the intangibles. Often, there may be a significant first mover advantage in having a product on the market at an early date. As a result, an identical product (and the supporting intangibles) developed in future periods will not be as valuable as the same product (and the supporting intangibles) available currently. In such a case, the estimated replacement cost will not be a valid proxy for the value of an intangible transferred currently. Similarly, where an intangible carries legal protections or exclusivity characteristics, the value of being able to exclude competitors
交易各方所执行的功能、拥有的资产和承担的风险
开展交易的商业原因
交易各方的角色和对于交易参与方而言其他可行的方案
无形资产所带来的竞争优势，尤其包括与无形资产相关的产品和服务或潜在产品和服务的相对盈利能力
交易带来的预期未来经济收益
其他可比性因素，例如本地市场特性、选址节约、人员配置、跨国企业集团的协同效应

6.140 在确定独立企业之间在可比条件下会接受的价格和其他条件时，应该特别关注由于受控交易的参与方存在关联关系而使得受控交易产生特殊性。关联企业的交易模式并不需要和独立企业可能采用的交易模式完全一致。然而，如果关联方之间采用的交易模式并非独立企业之间采用的典型模式，那么在分析交易各方应当获取的符合独立交易原则的利润时，应考虑关联交易模式对非受控交易方在可比情况下可能达到的价格和其他交易条件的影响。

6.141 将 OECD 转让定价方法应用于涉及无形资产或无形资产权利转让的交易时应该慎重。基于单向测试的转让定价方法（包括再销售价格法和交易净利润法）通常不是直接评估无形资产价值的可靠方法。某些情况下，可以采用这些方法确定某些功能的价值，进而得出无形资产的剩余价值，以达到间接对无形资产进行估价的目的。然而，上述应用应当遵循第 6.133 段的原则，并注意确保对其收入产生有贡献的资产功能、风险和资产都得到合理识别和评估。

6.142 一般情况下，并不鼓励使用基于无形资产开发成本的转让定价方法，来评估无形资产的价值。一旦开发完成，无形资产开发成本和其价值或者转让价格之间几乎没有关联。所以，一般应该避免使用以无形资产开发成本为基础的转让定价方法。

6.143 然而，在少数情况下，可以使用基于无形资产重置成本的转让定价方法。此类方法可应用于针对内部业务运营开发的无形资产（例如，内部软件系统），特别是非“独特且有价值”的无形资产。这种情况下，市场上已有产品的无形资产，重置成本估值法存在严重的可比性问题。此外，还要考虑评估由于无形资产开发延期造成时间上的延迟对无形资产价值所产生的影响。通常，早期向市场推出产品可能会带来显著的先发优势。
from using the intangible will not be reflected in an analysis based on replacement cost. Cost based valuations generally are not reliable when applied to determine the arm's length price for partially developed intangibles.

6.144 The provisions of paragraph 2.9A related to the use of rules of thumb apply to determinations of a correct transfer price in any controlled transaction, including cases involving the use or transfer of intangibles. Accordingly, a rule of thumb cannot be used to evidence that a price or apportionment of income is arm's length, including in particular an apportionment of income between a licensor and a licensee of intangibles.

6.145 The transfer pricing methods most likely to prove useful in matters involving transfers of one or more intangibles are the CUP method and the transactional profit split method. Valuation techniques can be useful tools. Supplemental guidance on the transfer pricing methods most likely to be useful in connection with transfers of intangibles is provided below.

(a) Application of the CUP Method

6.146 Where reliable comparable uncontrolled transactions can be identified, the CUP method can be applied to determine the arm's length conditions for a transfer of intangibles or rights in intangibles. The general principles contained in paragraphs 2.13 to 2.20 apply when the CUP method is used in connection with transactions involving the transfer of intangibles. Where the CUP method is utilised in connection with the transfer of intangibles, particular consideration must be given to the comparability of the intangibles or rights in intangibles transferred in the controlled transaction and in the potential comparable uncontrolled transactions. The economically relevant characteristics or comparability factors described in Section D.1 of Chapter I should be considered. The matters described in Section D.2(i) to (iv) of this Chapter are of particular importance in evaluating the comparability of specific transferred intangibles and in making comparability adjustments, where possible. It should be recognised that the identification of reliable comparables in many cases involving intangibles may be difficult or impossible.

6.147 In some situations, intangibles acquired by an MNE group from independent enterprises are transferred to a member of the MNE group in a controlled transaction immediately following the acquisition. In such case the price paid for the acquired intangibles will often (after any appropriate adjustments, including adjustments for acquired assets not re-transferred) represent a useful comparable for determining the arm's length price for the controlled transaction under a CUP method. Depending on the facts and circumstances, the third party acquisition price in such situations will have relevance in determining arm's length prices and other conditions for the controlled transaction, even where the intangibles are acquired indirectly through an acquisition of shares or where the price paid to the third party for shares or assets exceeds the book value of the acquired assets. Examples 23 and 26 in the Annex to Chapter VI illustrate the principles of this paragraph.

(b) Application of transactional profit split methods\(^{18}\)

6.148 In some circumstances, a transactional profit split method can be utilised to determine the arm's length conditions for a transfer of intangibles or rights in intangibles where it is not possible to identify reliable comparable uncontrolled transactions for such transfers. Section C of Chapter II contains guidance to be considered in applying transactional profit split methods. That guidance is fully applicable to matters involving the transfer of intangibles or rights in intangibles. In evaluating

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\(^{18}\) Paragraphs 6.148 to 6.152 are likely to be revised to reflect the outcome of the work on the application of transactional profit split methods, mandated by Action 10 of the BEPS Action Plan. This work will be undertaken in 2016 and 2017.
所以，未来开发的同类产品（以及相关无形资产）与已售产品（以及相关无形资产）的价值将不同。这种情况下，估算的重置成本并不能准确代表被转让的现有无形资产的价值。同样，当无形资产受法律保护或具有排他性时，基于重置成本的分析无法体现市场竞争对手可能持有的无形资产所带来的价值。因此，尚未完全开发的无形资产的独立交易价格时，成本法一般并不是可靠的价值评估方法。

6.144 第 2.9A 段介绍了应用经验法则确定受控交易（包括涉及无形资产转让或使用的交易）的合理的转让价格。经验法则不能用于证明交易的价格或收入分配是否符合独立交易原则，涉及无形资产许可方和被许可方之间收入分配的情况亦然。

6.145 对于涉及无形资产转让的交易，可比非受控价格法和交易利润分割法通常是有效的转让定价方法。价值评估方法也能提供帮助。下文针对适用于无形资产转让交易的最有效的转让定价方法提供了补充。

（a）可比非受控价格法的应用

6.146 当可以找到可靠的可比非受控交易时，可比非受控价格法可用于为无形资产或相关权利的转让交易确定符合独立交易原则的条件。当可比非受控价格法应用于无形资产转让交易时，第 2.13-2.26 段的原则也同样适用。此外，还应重点考虑受控和受限于的可比非受控交易中涉及无形资产或无形资产许可的可比性，以及第一章第 D.1 节所描述的经济相关特征和可比性因素。本章 D.2 节（i）——（iv）的指导原则在评估所转让的无形资产的可比性以及可能需要进行的可比性调整时尤其重要。但必须承认的是，在大多数情况下很难或者无法识别出无形资产交易的可靠的可比对象。

6.147 有时，跨国企业集团从第三方企业购买无形资产后，会立刻通过受控交易将该无形资产转让给集团中的另一成员企业。这种情况下，购买该无形资产所支付的对价（经过合理的调整，包括剔除购入资产的未转让部分的价值）作为可比非受控价格法下的可比非受控价格，用以确定受控交易的独立交易价格。这种情况下，即使无形资产转让是通过收购股权间接实现，或者支付给第三方的股权资产的对价超过收购无形资产的账面价值，第三方的资产收购价格可作为确定受控交易中独立交易价格和交易条件的参考。参见第六章附录案例 23 和案例 26。

（b）交易利润分割法的应用

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根据《BEPS行动计划》第 10 项行动的要求，第 6.148 至 6.152 段的内容很可能被修订，以反映有关应用交易利润分割法的工作成果。该等工作将于 2016 和 2017 年进行。
the reliability of transactional profit split methods. However, the availability of reliable and adequate data regarding combined profits, appropriately allocable expenses, and the reliability of factors used to divide combined income should be fully considered.

6.149 Transactional profit split methods may have application in connection with the sale of full rights in intangibles. As with other applications of the transactional profit split method, a full functional analysis that considers the functions performed, risks assumed and assets used by each of the parties is an essential element of the analysis. Where a transactional profit split analysis is based on projected revenues and expenses, the concerns with the accuracy of such projections described in paragraphs 6.163 to 6.168 should be taken into account.

6.150 It is also sometimes suggested that a profit split analysis can be applied to transfers of partially developed intangibles. In such an analysis, the relative value of contributions to the development of intangibles before and after a transfer of the intangibles in question is sometimes examined. Such an approach may include an attempt to amortise the transferor's contribution to the partially developed intangible over the asserted useful life of that contribution, assuming no further development. Such approaches are generally based on projections of cash flows and benefits expected to arise at some future date following the transfer and the assumed successful completion of further development activities.

6.151 Caution should be exercised in applying profit split approaches to determine estimates of the contributions of the parties to the creation of income in years following the transfer, or an arm's length allocation of future income, with respect to partially developed intangibles. The contribution or value of work undertaken prior to the transfer may bear no relationship to the cost of that work. For example, a chemical compound with potentially blockbuster pharmaceutical indications might be developed in the laboratory at relatively little cost. In addition, a variety of difficult to evaluate factors would need to be taken into account in such a profit split analysis. These would include the relative riskiness and value of research contributions before and after the transfer, the relative risk and its effect on value, for other development activities carried out before and after the transfer, the appropriate amortisation rate for various contributions to the intangible value, assumptions regarding the time at which any potential new products might be introduced, and the value of contributions other than intangibles to the ultimate generation of profit. Income and cash flow projections in such situations can sometimes be especially speculative. These factors can combine to call the reliability of such an application of a profit split analysis into question. See Section D.4 on hard-to-value intangibles.

6.152 Where limited rights in fully developed intangibles are transferred in a licence or similar transaction, and reliable comparable uncontrolled transactions cannot be identified, a transactional profit split method can often be utilised to evaluate the respective contributions of the parties to earning combined income. The profit contribution of the rights in intangibles made available by the licensor or other transferor would, in such a circumstance, be one of the factors contributing to the earning of income following the transfer. However, other factors would also need to be considered. In particular, functions performed and risks assumed by the licensee/transferee should specifically be taken into account in such an analysis. Other intangibles used by the licensor/transferor and by the licensee/transferee in their respective businesses should similarly be considered, as well as other relevant factors. Careful attention should be given in such an analysis to the limitations imposed by the terms of the transfer on the use of the intangibles by the licensee/transferee and on the rights of the licensee/transferee to use the intangibles for purposes of ongoing research and development. Further, assessing contributions of the licensee to enhancements in the value of licensed intangibles may be important. The allocation of income in such an analysis would depend on the findings of the functional analysis, including an analysis of the relevant risks assumed. It should not be assumed that
6.148 在无法获取可信非受控交易的某些情况下，交易利润分割法可以用来确定无形资产或无形资产转让交易的独立交易条件。第二十章 C 节提供了有关交易利润分割法的指导原则。该指导原则完全适用于无形资产或无形资产权利的转让交易。但在评估运用交易利润分割法的可靠性时，应充分考虑是否能够获得充分、可靠的合作利润数据，可合理分摊的费用以及分摊合并收入的因素是否可靠等。
6.149 交易利润分割法可以应用于转让无形资产全部权利的交易。和其他应用交易利润分割法的情形一样，要通过完整的功能分析考量交易双方所执行的功能、承担的风险和拥有的资产，这是交易利润分割法分析过程中不可或缺的一部分。如果交易利润分割法的分析是基于对收入和成本的预测，则应当考虑第 6.163-6.168 节所述的预测准确性的问题。
6.150 有时，利润分割法也适用于尚未完全开发的无形资产的转让交易。在分析过程中，可能需要对交易双方在转让前对无形资产开发的相对贡献进行评估；运用该方法时，可能在无形资产后续不再开发的假设前提下，将转让方所做的相关贡献在部分开发完成的无形资产基础上进行评估。上述分析通常是在无形资产转让交易完成后并且假设后续开发获得成功的前提下，对未来某一时间段的现金流量和预期收益进行预测。
6.151 针对涉及尚未完全开发的无形资产的交易过程，运用利润分割方法估算交易双方在相关无形资产转让后的未来年度内对收入创造的贡献或者基于独立交易原则对未来年度收入进行分配时，需要格外注意。转让前对无形资产开发的贡献或价值可能与其成本毫无关系。比如，某种可能被进一步研制成重要药物的化合物也许是在实验室里以极低的成本开发出来。此外，在利润分割法分析中，还需要特别关注各种难以评估的因素，包括交易双方在转让前对无形资产开发的贡献的相对风险及价值、其他研发活动的相对风险及对无形资产价值的影响、无形资产价值贡献的适当摊销率、新产品引进时的成本、以及相关贡献（非无形资产）对最终利润创造的价值。收益和现金流量预测在这种情形下的不确定性可能会很高；这些因素会综合影响利润分割法应用的可靠性。参阅第 D.4 节有关难以评估的无形资产的内容。
6.152 对于涉及完全开发的无形资产部分权利的转让交易（如特许权类似安排），如果找不到可靠的可比非受控交易，通常可以使用交易利润分割法评估交易双方对合同利润的贡献。许可方/转让方所支付的无形资产权利对合同的贡献是影响转让后收益的因素之一。其他因素同样也不可忽视，如被许可方/受让方承担的功能和风险；许可方/转让方和被许可方/受让方在业务经营中使用的其他无形资产以及其他相关因素，都应在分析中加以考虑。
all of the residual profit after functional returns would necessarily be allocated to the licensor/transferor in a profit split analysis related to a licensing arrangement.

(c) Use of valuation techniques

6.153 In situations where reliable comparable uncontrolled transactions for a transfer of one or more intangibles cannot be identified, it may also be possible to use valuation techniques to estimate the arm's length price for intangibles transferred between associated enterprises. In particular, the application of income based valuation techniques, especially valuation techniques premised on the calculation of the discounted value of projected future income streams or cash flows derived from the exploitation of the intangible being valued, may be particularly useful when properly applied. Depending on the facts and circumstances, valuation techniques may be used by taxpayers and tax administrations as a part of one of the five OECD transfer pricing methods described in Chapter II, or as a tool that can be usefully applied in identifying an arm's length price.

6.154 Where valuation techniques are utilised in a transfer pricing analysis involving the transfer of intangibles or rights in intangibles, it is necessary to apply such techniques in a manner that is consistent with the arm's length principle and the principles of these Guidelines. In particular, due regard should be given to the principles contained in Chapters I – III. Principles related to realistically available options, economically relevant characteristics including assumption of risk (see Section D.1 of Chapter I) and aggregation of transactions (see paragraphs 3.9 to 3.12) apply fully to situations where valuation techniques are utilised in a transfer pricing analysis. Furthermore, the rules of these Guidelines on selection of transfer pricing methods apply in determining when such techniques should be used (see paragraphs 2.1 to 2.11). The principles of Sections A, B, C, and D.1 of this Chapter also apply where use of valuation techniques is considered.

6.155 It is essential to consider the assumptions and other motivations that underlie particular applications of valuation techniques. For sound accounting purposes, some valuation assumptions may sometimes reflect conservative assumptions and estimates of the value of assets reflected in a company's balance sheet. This inherent conservatism can lead to definitions that are too narrow for transfer pricing purposes and valuation approaches that are not necessarily consistent with the arm's length principle. Caution should therefore be exercised in accepting valuations performed for accounting purposes as necessarily reflecting arm's length prices or values for transfer pricing purposes without a thorough examination of the underlying assumptions. In particular, valuations of intangibles contained in purchase price allocations performed for accounting purposes are not determinative for transfer pricing purposes and should be utilised in a transfer pricing analysis with caution and careful consideration of the underlying assumptions.

6.156 It is not the intention of these Guidelines to set out a comprehensive summary of the valuation techniques utilised by valuation professionals. Similarly, it is not the intention of these Guidelines to endorse or reject one or more sets of valuation standards utilised by valuation or accounting professionals or to describe in detail or specifically endorse one or more specific valuation techniques or methods as being especially suitable for use in a transfer pricing analysis. However, where valuation techniques are applied in a manner that gives due regard to these Guidelines, to the specific facts of the case, to sound valuation principles and practices, and with appropriate consideration of the validity of the assumptions underlying the valuation and the consistency of those assumptions with the arm's length principle, such techniques can be useful tools in a transfer pricing analysis where reliable comparable uncontrolled transactions are not available. See, however, paragraphs 6.142 and 6.143 for a discussion of the reliability and application of valuation techniques based on intangible development costs.
需要关注转让协议中关于被许可方/受让方对无形资产的使用和进一步研发的限制性条款。此外，评估被许可方/受让方对受让无形资产价值的提升同样也十分重要。在利润率法分析中，收益的分配应以功能分析（包含针对相关风险的分析）为基础，而不能单纯认为单纯交易净利润分析将失去作用。在各方获得与其承担的功能相匹配的利润后，剩余利润应全部归许可方/转让方所有。

（c）价值评估方法的应用

6.153 当无形资产转让交易缺乏可靠的可比非受控交易时，也许可以使用价值评估方法来测算关联企业间转让无形资产的独立交易价格。若能合理使用，以收益为基础的评估方法能发挥重要作用，尤其是通过计算利用无形资产所产生的未来收益或者现金流量的折现值来进行价值评估的方法。根据具体情况，纳税人和税务机关可能会在使用《转让定价指南》第二章介绍的五种 OECD 转让定价方法的过程中，运用价值评估方法；也可能单独运用该方法来确定独立交易价格。

6.154 运用价值评估方法对涉及无形资产或无形资产权利的转让交易进行转让定价分析时，需要遵循独立交易原则和《转让定价指南》中的其他原则。其中，第 1-3 条的原则特别重要，包括现时可行的选择、经济相关特征（包括风险的承担、第 1-3 条）以及交易合并（第 3-9-12 条）等方面的相关原则。这些原则完全适用于利用价值评估方法进行转让定价分析的情形。此外，在判断何时应使用价值评估方法时，《转让定价指南》中有关如何选择转让定价方法的规则（第 2-1-2 条），以及本章第 A、B、C 节以及第 D.1 节的原则均适用。

6.155 对于应用价值评估方法的假设有和动因的分析十分关键。基于合理的会计考量，一些价值评估的假设可能反映出企业资产负债表中对资产价值的保守估计和假设有。企业的准确性假设可能会导致某些会计和税务对转让定价而言过于谨慎，而价值评估方法与独立交易原则也不完全一致。因此，如果未对相关的假设进行充分考虑，而直接运用以会计为目的的评估结果来进行转让定价分析中的独立交易或者假设有错误，需要特别指出的是，会计上所用价格分摊中包含的无形资产价值评估并不能直接应用于转让定价分析，应采取谨慎的态度并仔细考虑相关的假设前提。

6.156 《转让定价指南》无对价值评估专业人员所运用的价值评估方法进行全面的总结；也无关于支持或否定价值评估或企业对专业人员使用的各种评估标准，或者详细描述或明确支持某种或多种价值评估方法，或者主张价值评估方法更适用于转让定价分析。然而，在没有可靠的可比非受控交易的情况下，根据《转让定价指南》的相关规定，具体的交易情况以及合理的价值评估原则和实际应用了价值评估方法，并恰当地考虑了价值评估假设条件的有效性及其与独立交易原则假设的一致性，价值评估
6.157 Valuation techniques that estimate the discounted value of projected future cash flows derived from the exploitation of the transferred intangible or intangibles can be particularly useful when properly applied. There are many variations of these valuation techniques. In general terms, such techniques measure the value of an intangible by the estimated value of future cash flows it may generate over its expected remaining lifetime. The value can be calculated by discounting the expected future cash flows to present value. Under this approach valuation requires, among other things, defining realistic and reliable financial projections, growth rates, discount rates, the useful life of intangibles, and the tax effects of the transaction. Moreover it entails consideration of terminal values when appropriate. Depending on the facts and circumstances of the individual case, the calculation of the discounted value of projected cash flows derived from the exploitation of the intangible should be evaluated from the perspectives of both parties to the transaction in arriving at an arm's length price. The arm's length price will fall somewhere within the range of present values evaluated from the perspectives of the transferor and the transferee. Examples 27 to 29 in the Annex to Chapter VI illustrate the provisions of this section.

(d) Specific areas of concern in applying methods based on the discounted value of projected cash flows

6.158 When applying valuation techniques, including valuation techniques based on projected cash flows, it is important to recognize that the estimates of value based on such techniques can be volatile. Small changes in one or another of the assumptions underlying the valuation model or in one or more of the valuation parameters can lead to large differences in the intangible value the model produces. A small percentage change in the discount rate, a small percentage change in the growth rates assumed in producing financial projections, or a small change in the assumptions regarding the useful life of the intangible can each have a profound effect on the ultimate valuation. Moreover, this volatility is often compounded when changes are made simultaneously to two or more valuation assumptions or parameters.

6.159 The reliability of the intangible value produced using a valuation model is particularly sensitive to the reliability of the underlying assumptions and estimates on which it is based and on the due diligence and judgment exercised in confirming assumptions and in estimating valuation parameters.

6.160 Because of the importance of the underlying assumptions and valuation parameters, taxpayers and tax administrations making use of valuation techniques in determining arm's length prices for transferred intangibles should explicitly set out each of the relevant assumptions made in creating the valuation model, should describe the basis for selecting valuation parameters, and should be prepared to defend the reasonableness of such assumptions and valuation parameters. Moreover, it is a good practice for taxpayers relying on valuation techniques to present as part of their transfer pricing documentation some sensitivity analysis reflecting the consequential change in estimated intangible value produced by the model when alternative assumptions and parameters are adopted.

6.161 It may be relevant in assessing the reliability of a valuation model to consider the purposes for which the valuation was undertaken and to examine the assumptions and valuation parameters in

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19 In the case of a financial valuation based on projections, the analysis will often be based on projections of cash flows. Annual based measures of income, such as those determined for accounting or tax purposes, may not properly reflect the timing of cash flows which can create a difference in outcome between an income and a cash flow based approach. However, in light of a number of considerations, the use of income projections rather than cash flow projections may, in some cases, yield a more reliable result in a transfer pricing context as a practical matter. Care must be taken, however, to ensure that either income or cash flow measures are applied in a consistent manner and in appropriate circumstances. References to cash flow in this document should therefore be read broadly to include both cash flow and income measures, appropriately applied.
方法可以在转定价分析中发挥重要的作用。有关基于无形资产开发成本的价值评估方法的应用及其可靠性的讨论，参见第 6.142 和 6.143 段。

6.157 如使用得当，用于估算利用被转让无形资产所产生的预计未来现金流量折现值的价值评估方法会非常有用。这种方法要求可得地确定财务预测、增长率、折现率、无形资产的使用期限以及交易的税负影响等因素。在适当的情况下，还需要考虑终值的影响。根据具体的事宜情况，计算利用无形资产所产生的预计未来现金流量的折现值时，必须从交易双方的角度出发以获得符合独立交易原则的价格。该价格将位于从转让方和受让方角度计算得出的折现值组成的区间内。参见第 6.142 段和附录的案例 27-29。

(d) 应用现金流折现法进行价值评估时需要特别注意的事项

6.158 在应用价值评估方法（包括现金流折现法）时，必须认识到运用这些方法所得到的估计值可能会发生变化。在评估模型中的一项或多项假设或者参数的微小改变都有可能会导致无形资产价值评估结果大相径庭。折现率或者增长率的些许变化，或者关于无形资产使用期限假设的改变，都可能对价值评估结果造成深远影响。另外，多项价值评估假设或参数的改变往往会产生价值评估结果的波动。

6.159 通过价值评估模型确定的无形资产价值的可靠性受以下因素的影响：模型所基于的假设与估计的可靠性以及在确认假设和估计参数时所作的尽职调查与判断。

6.160 鉴于价值评估模型所采用的基本假设和参数的重要性和复杂性，纳税人和税务机关在利用价值评估方法确定被转让无形资产的独立交易价格时，应明确建立价值评估模型所使用的每一个相关假设、描述参数选择的依据，并准备所采用假设和参数的一致性的解释和说明。此外，纳税价值评估方法的纳税人最好能在其转让定价报告中对所用的价值评估模型进行敏感性分析，以反映无形资产的评估价值会如何随着假设和参数的改变而改变。

基于财务预测的价值评估方法通常通过对预测现金流量进行分析，会计或税务人根据乘数发生时对收入的确认可能无法正确反映出现金流量的时效性。因此，分立以收入和现金流量为基础的价值评估方法的结果就会不同。但在实际的转让定价分析中，在满足一些假设的条件下，使用收入预测可能比现金流流量预测得到更加可靠的价值评估结果。当然，无论是收入预测还是现金流量预测都应在适当的情况下使用，并保持一致性。因此，本文中所述的现金流量应该从广义的角度理解，包含了现金流量和收入的含义，进而进行合理地应用。
different valuations undertaken by the taxpayer for non-tax purposes. It would be reasonable for a tax administration to request an explanation for any inconsistencies in the assumptions made in a valuation of an intangible undertaken for transfer pricing purposes and valuations undertaken for other purposes. For example, such requests would be appropriate if high discount rates are used in a transfer pricing analysis when the company routinely uses lower discount rates in evaluating possible mergers and acquisitions. Such requests would also be appropriate if it is asserted that particular intangibles have short useful lives but the projections used in other business planning contexts demonstrate that related intangibles produce cash flows in years beyond the 'useful life' that has been claimed for transfer pricing purposes. Valuations used by an MNE group in making operational business decisions may be more reliable than those prepared exclusively for purposes of a transfer pricing analysis.

6.162 The following sections identify some of the specific concerns that should be taken into account in evaluating certain important assumptions underlying calculations in a valuation model based on discounted cash flows. These concerns are important in evaluating the reliability of the particular application of a valuation technique. Notwithstanding the various concerns expressed above and outlined in detail in the following paragraphs, depending on the circumstances, application of such a valuation technique, either as part of one of the five OECD transfer pricing methods or as a useful tool, may prove to be more reliable than application of any other transfer pricing method, particularly where reliable comparable uncontrolled transactions do not exist.

(1) Accuracy of financial projections

6.163 The reliability of a valuation of a transferred intangible using discounted cash flow valuation techniques is dependent on the accuracy of the projections of future cash flows or income on which the valuation is based. However, because the accuracy of financial projections is contingent on developments in the marketplace that are both unknown and unknowable at the time the valuation is undertaken, and to this extent such projections are speculative, it is essential for taxpayers and tax administrations to examine carefully the assumptions underlying the projections of both future revenue and future expense.

6.164 In evaluating financial projections, the source and purpose of the projections can be particularly important. In some cases, taxpayers will regularly prepare financial projections for business planning purposes. It can be that such analyses are used by management of the business in making business and investment decisions. It is usually the case that projections prepared for non-tax business planning purposes are more reliable than projections prepared exclusively for tax purposes, or exclusively for purposes of a transfer pricing analysis.

6.165 The length of time covered by the projections should also be considered in evaluating the reliability of the projections. The further into the future the intangible in question can be expected to produce positive cash flows, the less reliable projections of income and expense are likely to be.

6.166 A further consideration in evaluating the reliability of projections involves whether the intangibles and the products or services to which they relate have an established track record of financial performance. Caution should always be used in assuming that past performance is a reliable guide to the future, as many factors are subject to change. However, past operating results can provide some useful guidance as to likely future performance of products or services that rely on intangibles. Projections with respect to products or services that have not been introduced to the market or that are still in development are inherently less reliable than those with some track record.
6.161 在判断价值评估模型的可靠性时，一方面应考虑该评估的目的，另一方面也应检验纳税人在其他非税务目的的评估中所假设的假设和参数。如果某项无形资产在转让定价分析中的价值评估所采用的假设和参数与其他情形下的价值评估所采用的不同，税务机关可要求纳税人对上述差异做出相关解释。举例来说，如果某家企业在并购所做价值评估中通常采用较低的折现率，而在转让定价分析中采用较高的折现率；或者如果转让定价分析中某项无形资产的使用期限较短，而其他商业计划所作的预测表明，相关无形资产在上述“使用期限”之外依然能产生现金流量，那么税务机关就可以要求纳税人做出解释。相关于单纯以转让定价分析为目的的价值评估结果，跨国企业集团在商业运作决策中所采用的价值评估结果的可靠性可能更高。

6.162 以下章节阐述了对评估现金流量折现法的某些关键假设应给予关注的若干特殊事项。这些事项对判断某一价值评估方法的应用是否合理至关重要。尽管存在上下文中所提出的种种顾虑，该价值评估方法不论是作为 OECD 五种转让定价方法的一部分，或者单独作为一项有效工具，都可能比其他转让定价方法更加可靠，尤其在不存在可靠的可比非受控交易的情况下。

(1) 财务预测的准确性

6.163 利用现金流量折现法所得的被转让无形资产的估值的可靠性取决于未来现金流量或者收入预测的准确性。而这些财务预测的准确性又取决于评估时间点未知和不可知的市场发展情况；因此，这些预测具有不确定性，纳税人和税务机关应对决定未来收入和成本预测的相关假设进行仔细地审视。

6.164 评估财务预测时，这些预测的来源和用途十分重要。某些情况下，纳税人出于商业规划的目的会定期对财务数据进行预测。这些分析可能被管理层用于进行运营和投资决策。相较于仅以税务或转让定价分析为目的的财务预测，非税务目的的商业计划中的财务预测往往可靠性更高。

6.165 评估财务预测的可靠性时，同样应当分析财务预测所涵盖的时间跨度，受测无形资产预期可能产生正现金流量的时间越长，收入和费用预测的可靠性可能就会越低。

6.166 评估财务预测可靠性时，应进一步考虑无形资产及其相关的产品或服务是否具有相应的财务业绩记录。由于许多因素都可能发生改变，使用历史记录衡量未来的财务业绩时应始终保持谨慎。然而，
6.167 When deciding whether to include development costs in the cash flow projections it is important to consider the nature of the transferred intangible. Some intangibles may have indefinite useful lives and may be continually developed. In these situations it is appropriate to include future development costs in the cash flow forecasts. Others, for example a specific patent, may already be fully developed and, in addition not provide a platform for the development of other intangibles. In these situations no development costs should be included in the cash flow forecasts for the transferred intangible.

6.168 Where, for the foregoing reasons, or any other reason, there is a basis to believe that the projections behind the valuation are unreliable or speculative, attention should be given to the guidance in Section D.3 and D.4.

(2) Assumptions regarding growth rates

6.169 A key element of some cash flow projections that should be carefully examined is the projected growth rate. Often projections of future cash flows are based on current cash flows (or assumed initial cash flows after product introduction in the case of partially developed intangibles) expanded by reference to a percentage growth rate. Where that is the case, the basis for the assumed growth rate should be considered. In particular, it is unusual for revenues derived from a particular product to grow at a steady rate over a long period of time. Caution should therefore be exercised in too readily accepting simple models containing linear growth rates not justified on the basis of either experience with similar products and markets or a reasonable evaluation of likely future market conditions. It would generally be expected that a reliable application of a valuation technique based on projected future cash flows would examine the likely pattern of revenue and expense growth based on industry and company experience with similar products.

(3) Discount rates

6.170 The discount rate or rates used in converting a stream of projected cash flows into a present value is a critical element of a valuation model. The discount rate takes into account the time value of money and the risk or uncertainty of the anticipated cash flows. As small variations in selected discount rates can generate large variations in the calculated value of intangibles using these techniques, it is essential for taxpayers and tax administrations to give close attention to the analysis performed and the assumptions made in selecting the discount rate or rates utilised in the valuation model.

6.171 There is no single measure for a discount rate that is appropriate for transfer pricing purposes in all instances. Neither taxpayers nor tax administrations should assume that a discount rate is based on a Weighted Average Cost of Capital ("WACC") approach or any other measure should always be used in transfer pricing analyses where determination of appropriate discount rates is important. Instead the specific conditions and risks associated with the facts of a given case and the particular cash flows in question should be evaluated in determining the appropriate discount rate.

6.172 It should be recognised in determining and evaluating discount rates that in some instances, particularly those associated with the valuation of intangibles still in development, intangibles may be among the most risky components of a taxpayer's business. It should also be recognised that some businesses are inherently more risky than others and some cash flow streams are inherently more volatile than others. For example, the likelihood that a projected level of research and development expense will be incurred may be higher than the likelihood that a projected level of revenues will ultimately be generated. The discount rate or rates should reflect the level of risk in the overall
过去的经营状况依然能够为无形资产相关产品或服务在来年度的表现提供有用的指导原则。在某在开发中或未上市的产品或服务的预测，其可靠性必然低于对已有业绩记录的产品或服务的预测。

6.167 在决定是否应在现金流流量预测中包含开发费用时，应重点考虑被转让无形资产的性质。某些无形资产可能具有有限的使用期限，且可能会被持续开发。在某情况下，应根据未来的开发费用纳入现金流量预测中。其他情况下，无形资产（如特定的专利）可能已被充分开发，且不能作为其他无形资产的开发平台，则相关开发费用不应被纳入未来转让无形资产的现金流量预测中。

6.168 鉴于上述原因或其他原因，当价值评估所依据的财务预测被认为是不可靠或是不确定性不高时，应特别注意第 D.3 和 D.4 节中的相关指导原则。

（2）增长率假设

6.169 对于某些现金流量预测，应谨慎观察其增长率假设。对未来现金流量的预测通常根据当前现金流量（若无形资产尚未完全开发，则假定相关产品推出后的初始现金流量）加上一定的增长率而定。在此情况下，应当仔细考虑该增长率的假设基础。通常，产品收入无法长期保持稳定的增长。对于某些简单模型中采用的线性增长率，如果既不能通过类似产品或市场的经验，也不能通过对未来市场的合理评估证明其合理性，则应当谨慎采用线性模型。一般而言，利用现金流量折现法进行价值评估时，应根据类似产品的行业经验和企业经验验证收入和费用的可能增长模式。

（3）折现率

6.170 将预计现金流量转化为现值的折现率是价值评估模型的另一关键要素。折现率体现了资金的时间价值和预期现金流量的风险或不确定性。所选择的折现率的微小差异会引起使用该种价值评估方法得到的无形资产的价值发生很大变化。纳税人和税务机关应密切关注在选择价值评估模型的折现率时所进行的分析和采用的假设。

6.171 存在可适用于任何转让定价分析的折现率计算方法。当折现率在转让定价分析中非常关键时，纳税人或税务机关不应轻易假设基于加权平均资本成本（即 Weighted Average Cost of Capital，英文缩写为 WACC）或其他方法所得到的折现率始终适用于各种转让定价分析，而应当根据具体情况、相关风险以及待分析的现金流量的评估，来决定合理的折现率。

6.172 确定和测算折现率时应认识到，某些情况下（特别是对仍在开发中的无形资产进行价值评估的情况下），无形资产可能是纳税人中最具风险的要素之一。另外，某些业务的经营风险本身就高于其他业务，而一些现金流的波动性也比其他现金流量高。
business and the expected volatility of the various projected cash flows under the circumstances of each individual case.

6.173 Since certain risks can be taken into account either in arriving at financial projections or in calculating the discount rate, care should be taken to avoid double discounting for risk.

(4) Useful life of intangibles and terminal values

6.174 Valuation techniques are often premised on the projection of cash flows derived from the exploitation of the intangible over the useful life of the intangible in question. In such circumstances, the determination of the actual useful life of the intangible will be one of the critical assumptions supporting the valuation model.

6.175 The projected useful life of particular intangibles is a question to be determined on the basis of all of the relevant facts and circumstances. The useful life of a particular intangible can be affected by the nature and duration of the legal protections afforded the intangible. The useful life of intangibles also may be affected by the rate of technological change in the industry, and by other factors affecting competition in the relevant economic environment. See paragraphs 6.121 and 6.122.

6.176 In some circumstances, particular intangibles may contribute to the generation of cash flow in years after the legal protections have expired or the products to which they specifically relate have ceased to be marketed. This can be the case in situations where one generation of intangibles forms the base for the development of future generations of intangibles and new products. It may well be that some portion of continuing cash flows from projected new products should properly be attributed to otherwise expired intangibles where such follow on effects exist. It should be recognised that, while some intangibles may have an indeterminate useful life at the time of valuation, that fact does not imply that non-routine returns are attributable to such intangibles in perpetuity.

6.177 In this regard, where specific intangibles contribute to continuing cash flows beyond the period for which reasonable financial projections exist, it will sometimes be the case that a terminal value for the intangible related cash flows is calculated. Where terminal values are used in valuation calculations, the assumptions underlying their calculation should be clearly set out and the underlying assumptions thoroughly examined, particularly the assumed growth rates.

(5) Assumptions regarding taxes

6.178 Where the purpose of the valuation technique is to isolate the projected cash flows associated with an intangible, it may be necessary to evaluate and quantify the effect of projected future income taxes on the projected cash flows. Tax effects to be considered include: (i) taxes projected to be imposed on future cash flows, (ii) tax amortisation benefits projected to be available to the transferee, if any, and (iii) taxes projected to be imposed on the transferor as a result of the transfer, if any.

(vii) Form of payment

6.179 Taxpayers have substantial discretion in defining the form of payment for transferred intangibles. In transactions between independent parties, it is common to observe payments for intangibles that take the form of a single lump sum. It is also common to observe payments for intangibles that take the form of periodic payments over time. Arrangements involving periodic payments can be structured either as a series of installment payments fixed in amount, or may take the form of contingent payments where the amount of payments depends on the level of sales of products supported by the intangibles, on profitability, or on some other factor. The principles of Section D.1.1
例如，研发费用达到预计水平的可能性或许高于收入最终达到预计水平的可能性。折现率应当反映各种特定情形下的整体业务的风险水平以及各类现金流量预测的预期波动。

6.173 由于在制定财务预测或计算折现率时可能已经同时考虑某些风险，因此应注意避免对于这些风险的重复折现。

（4）无形资产的使用期限和终止

6.174 价值评估方法通常分析的是在相关无形资产使用期限内利用无形资产所产生的预计现金流量。这种情况下，无形资产实际使用期限的确定将是价值评估模型的关键假设之一。

6.175 无形资产的预计使用期限应根据所有相关事实及情况决定，可能会受其法律保护的性质和期限的影响，也可能受行业内技术变革速度以及其他影响相关经济环境竞争格局的因素的影响。参见第6.121段和第6.122段。

6.176 有时，特定的无形资产可能在法律保护期限失效后或与其相关的其他资产停止销售后的数年内仍产生现金流量。例如，某一代无形资产构成开发下一代无形资产和新产品的基础时，就可能出现这种情况，也有可能出现预计新产品产生的现金流量中有一部分应归属于已过保护期但仍具有持续影响的无形资产。

应当承认，虽然某些无形资产的使用期限在价值评估时点上还不能确定，但这并不意味着该无形资产应无期限地享有非常规的利润率。

6.177 由于，如果某项无形资产在有合理财务预测的期间之外还能产生持续的现金流量，则有时还应计算出与该无形资产相关的现金流量终止值。在价值评估计算中使用终结值时，应清楚阐明该计算所依据的假设并详细地审慎这些假设，特别是所假定的增长率。

（5）税收假设

6.178 当价值评估方法用于分离出与无形资产相关的现金流量时，可能需要评估和量化预计未来所得税对于预计现金流量的影响。应考虑的税收影响包括：（i）预计对现金流量所征税的税额；
（ii）预计受让方可获得的递延所得税利益，以及（iii）预计应缴纳的转让行为所得税的税额。

（vii）付款方式

6.179 转让无形资产时，借款人对于付款方式的确定拥有充分的自主权。在独立企业的交易中，无形资产交易的常见付款方式是一次性付款和分期付款。
of Chapter I should be followed in evaluating taxpayer agreements with regard to the form of payment.

6.180 In evaluating the provisions of taxpayer agreements related to the form of payment, it should be noted that some payment forms will entail greater or lesser levels of risk to one of the parties. For example, a payment form contingent on future sales or profit will normally involve greater risk to the transferor than a payment form calling for either a single lump-sum payment at the time of the transfer or a series of fixed installment payments, because of the existence of the contingency. The chosen form of the payment must be consistent with the facts and circumstances of the case, including the written contracts, the actual conduct of the parties, and the ability of the parties to bear and manage the relevant payment risks. In particular, the amount of the specified payments should reflect the relevant time value of money and risk features of the chosen form of payment. For example, if a valuation technique is applied and results in the calculation of a lump-sum present value for the transferred intangible, and if a taxpayer applies a payment form contingent on future sales, the discount rate used in converting the lump-sum valuation to a stream of contingent payments over the useful life of the intangible should reflect the increased risk to the transferor that sales may not materialize and that payments would therefore not be forthcoming, as well as the time value of money consequences arising from the deferral of the payments to future years.

D.3 Arm’s length pricing of transactions involving intangibles for which valuation is highly uncertain at the time of the transaction

6.181 Intangibles or rights in intangibles may have specific features complicating the search for comparables and in some cases making it difficult to determine the value of an intangible at the time of the transaction. 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. To this aim, the guidance and recommended process in Section D of Chapter I and the principles in Chapter III as supplemented by the guidance in this chapter for conducting a comparability analysis are relevant.

6.182 Depending on the facts and circumstances, there is a variety of mechanisms that independent enterprises might adopt to address high uncertainty in the valuation of the intangible at the time of the transaction. For example, one possibility is to use anticipated benefits (taking into account all relevant economic factors) as a means for establishing the pricing at the outset of the transaction. In determining the anticipated benefits, independent enterprises would take into account the extent to which subsequent developments are foreseeable and predictable. In some cases, independent enterprises might find that subsequent developments are sufficiently predictable and therefore the projections of anticipated benefits are sufficiently reliable to fix the pricing for the transaction at the outset on the basis of those projections.

6.183 In other cases, independent enterprises might find that pricing based on anticipated benefits alone does not provide adequate protection against the risks posed by the high uncertainty in valuing the intangible. In such cases independent enterprises might, for instance, adopt shorter-term agreements, include price adjustment clauses in the terms of the agreement, or adopt a payment structure involving contingent payments to protect against subsequent developments that might not be sufficiently predictable. For these purposes, a contingent pricing arrangement is any pricing arrangement in which the quantum or timing of payments is dependent on contingent events, including the achievement of predetermined financial thresholds such as sales or profits, or of predetermined development stages (e.g. royalty or periodic milestone payments). For example, a
分期付款可以是分期定额付款方式，或是浮动金额的付款方式。后者支付的金额主要取决于该无形资产相关产品的销售额、盈利能力和其他因素。评估纳税人与付款方式相关的协议条款时，应参照第一章第 D.1.1 节的相关原则。

6.180  在评估纳税人与付款方式相关的协议条款时，应注意某些付款方式可能会令交易的一方承担更高或更低的风险。例如，由于存在不确定性，基于未来销售额或利润的浮动付款方式通常比转让时一次性支付或分期定额付款的支付方式让受让人承担更高的风险。所选择的付款方式须与实际情况和事例相符。包括书面合同，交易双方的交易行为以及交易双方可以承受及管理相关付款风险的能力。需要指出的是，付款金额应反映出支付的时间价值以及所选付款方式的风险特征。例如，当使用某种价值评估方法计算出一次性付清无形资产转让价格的现值，并且合同采用股权与未来销售额挂钩的浮动付款方式时，由于两种付款方式的不同，一次性付款的现值应转换为在无形资产使用期限内的一系列浮动分期付款时，所使用的折现率应该反映转让方所额外承担的风险。具体包括：因销售不能实现而导致的支付无法实现，以及未来年度内因付款延迟而产生的资金时间成本。

D.3  在交易时无形资产价值评估基准日不确定的情况下独立交易价格

6.181  无形资产或无形资产相关权利本身具有的某些特征可能会增加寻找可比对象的难度。某些情况下还会造成交易发生日无形资产的价值难以确定。如果交易发生时无形资产或无形资产相关权利的价值不确定性，就需要重新确定独立交易价格。纳税人和税务机关应共同研究解决这一问题，可以参考独立企业在可比情形下交易定价时，考虑到价值评估不确定性而可能采取的做法。为此，第一章第 D.节中的指导原则和推荐步骤、第三章所描述的原则以及本章提供的相关补充指南均可提供参考。

6.182  根据实际的情况和条件，独立企业在为交易定价时可能采取很多机制来应对无形资产价值的不确定性。例如，可以采用预付款（考虑所关的经济因素）来确定交易初始时的价格。在确定预测收益时，独立企业会考虑后续发展可预见性和可预测性程度。有时，独立企业可能会考虑到后续发展和预测收益的预测足够可靠，从而可以依据这些预测确定交易初始时的价格。

6.183  根据实际情况，独立企业可能发现单独依靠预测收益的定价方法并非提供足够的保护，以避免无形资产价值评估时的不确定性所带来风险。在这些情况下，为避免后续发展的不可预测性，独立企业可能采用短期合同或者在合同中加入价格调整条款或采用浮动付款方式。由于这些目的，浮动定
royalty rate could be set to increase as the sales of the licensee increase, or additional payments could be required at such time as certain development targets are successfully achieved. For a transfer of intangibles or rights in intangibles at a stage when they are not ready to be commercialised but require further development, payment terms adopted by independent parties on initial transfer might include the determination of additional contingent amounts that would become payable only on the achievement of specified milestone stages in their further development.

6.184 Also, independent enterprises may determine to assume the risk of unpredictable subsequent developments. However, the occurrence of major events or developments unforeseen by the parties at the time of the transaction or the occurrence of unforeseen events or developments considered to have a low probability of occurrence which change the fundamental assumptions upon which the pricing was determined may lead to renegotiation of the pricing arrangements by agreement of the parties where it is to their mutual benefit. For example, a renegotiation might occur if arm’s length if a royalty rate based on sales for a patented drug turned out to be vastly excessive due to an unexpected development of an alternative low-cost treatment. The excessive royalty might remove the incentive of the licensee to manufacture or sell the drug at all, in which case the licensor will have an interest in renegotiating the agreement. It may be the case that the licensor has an interest in keeping the drug on the market and in retaining the same licensee to manufacture or sell the drug because of the skills and expertise of the licensor or the existence of a long-standing co-operative relationship between them. Under these circumstances, the parties might prospectively renegotiate to their mutual benefit all or part of the agreement and set a lower royalty rate. In any event, whether renegotiation would take place, would depend upon all the facts and circumstances of each case.

6.185 If independent enterprises in comparable circumstances would have agreed on the inclusion of a mechanism to address high uncertainty in valuing the intangible (e.g., a price adjustment clause), the tax administration should be permitted to determine the pricing of a transaction involving an intangible or rights in an intangible on the basis of such mechanism. Similarly, if independent enterprises in comparable circumstances would have considered subsequent events so fundamental that their occurrence would have led to a prospective renegotiation of the pricing of a transaction, such events should also lead to a modification of the pricing of the transaction between associated enterprises.

D.4 Hard-to-value intangibles ("HTVI")

6.186 A tax administration may find it difficult to establish or verify what developments or events might be considered relevant for the pricing of a transaction involving the transfer of intangibles or rights in intangibles, and 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. The developments or events that might be of relevance for the valuation of an intangible are in most cases strongly connected to the business environment in which that intangible is developed or exploited. Therefore, the assessment of which developments or events are relevant and whether the occurrence and direction of such developments or events might have been foreseen or reasonably foreseeable requires specialised knowledge, expertise and insight into the business environment in which the intangible is developed or exploited. In addition, the assessments that are prudent to undertake when evaluating the transfer of intangibles or rights in intangibles in an uncontrolled transaction, may not be seen as necessary or useful for other than transfer pricing purposes by the MNE group when a transfer takes place within the group, with the result that those assessments may not be comprehensive. For example, an enterprise may transfer intangibles at an early stage of development to an associated enterprise, set a royalty rate that does not reflect the value of the intangible at the time of the transfer, and later take the position that it was not possible at the time of the transfer to predict the subsequent success of the product with full certainty. The difference
价安排是指付款金额或者时点取决于或有事项，包括销售费用和利润等确定的财务指标或预定的开发阶段（如特许权使用费或下述进度付款）的实现。例如，可以将特许权使用费用率定义为随被许可方销售额的增加而提高，或在特定开发目标实现时取现外付款。若转让尚未具有商业价值需进一步开发的无形资产或相关权利时，独立企业可能会在付款条款中约定仅当完成后续开发的特定阶段时才需要支付额外的金额。

6.184  此外，独立企业也可能会承担不可预见的后续发展所带来风险。然而，如果发生交易时未预见的重大事件或发展或者预计为小概率的事件或发展改变了定价所依据的基本假设，则双方可能会出于共同利益对定价安排进行重新协商。例如，某种专利药品按销售额确定其特许权使用费，但由于低成本替代疗法的意外出现而使上述特许权使用费过高，那么就有可能按照公平交易原则重新进行谈判。超过可用来抵扣的特许权使用费完全丧失或销售药品的活跃性，从而有意愿对协议重新协商。而许可方可能希望继续销售该专利药品，并且鉴于被许可方现有的相关技术和知识或双方长久以来的合作关系，可能希望继续使用原被许可方生产或销售药品。在这种情况下，双方可能会出于共同利益对协议的全部或部分条款进行重新协商，并设定一个较低的特许权使用费费率。最终是否进行重新协商将取决于实际情况和条件。

6.185  税务机关在评估涉及无形资产或相关权利的关联交易，且在交易开始时价值高度不确定的情况下，应遵循独立企业在可比情形下的安排和处理机制（如引入价格调整条款）。同样，如果独立企业在可比情况下认为未来某些事件的发生会导致对交易价格重新协商，那么此类事件同样也应导致对关联交易的价格作出修改。

D.4. 难以估值的无形资产

6.186  针对涉及无形资产或相关权利转让的交易，税务机关可能很难确认或核实与上述交易定价相关的发展或事件，以及这些发展或事件的发生程度和发展趋势。这些因素或许在交易发生时就应该被预见到，或者合理预测出来。大多数情况下，与无形资产价值评估相关的发展或事件与开发或利用该无形资产的商业环境密切相关。因此，对上述相关发展和事件及其发生和发展的判断和评估，需要对开发和利用相关无形资产的商业环境拥有专业的知识、技术和见解。此外，在非受控交易中，交易方可能针对无形资产或相关权利的转让开展谨慎的分析。而跨国企业可能认为除了转让定价以外的目的，对集团内部类似的交易开展同等程度的分析没有必要或作用不大。因此跨国企业所进行的分析可能并不全面。
between the *ex ante* and *ex post* value of the intangible would therefore be claimed by the taxpayer to be attributable to more favourable developments than anticipated. The general experience of tax administrations in these situations is that they may not have the specific business insights or access to the information to be able to examine the taxpayer’s claim and to demonstrate that the difference between the *ex ante* and *ex post* value of the intangible is due to non-arm’s-length pricing assumptions made by the taxpayer. Instead, tax administrations seeking to examine the taxpayer’s claim are largely dependent on the insights and information provided by that taxpayer. These situations associated with information asymmetry between taxpayers and tax administrations can give rise to transfer pricing risk. See paragraph 6.191.

6.187 In these situations involving the transfer of an intangible or rights in an intangible *ex post* outcomes can provide a pointer to tax administrations about the arm’s-length nature of the *ex ante* pricing arrangement agreed upon by the associated enterprises, and the existence of uncertainties at the time of the transaction. If there are differences between the *ex ante* projections and the *ex post* results which are not due to unforeseeable developments or events, the differences may give an indication that the pricing arrangement agreed upon by the associated enterprises at the time the transaction was entered into may not have adequately taken into account the relevant developments or events that might have been expected to affect the value of the intangible and the pricing arrangements adopted.

6.188 In response to the considerations discussed above, this 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. Under this approach, *ex post* evidence provides presumptive evidence as to the existence of uncertainties at the time of the transaction, whether the taxpayer appropriately took into account reasonably foreseeable developments or events at the time of the transaction, and the reliability of the information used *ex ante* in determining the transfer price for the transfer of such intangibles or rights in intangibles. Such presumptive evidence may be subject to rebuttal as stated in paragraphs 6.193 and 6.194, if it can be demonstrated that it does not affect the accurate determination of the arm’s-length price. This situation should be distinguished from the situation in which hindsight is used by taking *ex post* results for tax assessment purposes without considering whether the information on which the *ex post* results are based could or should reasonably have been known and considered by the associated enterprises at the time the transaction was entered into.

6.189 The term hard-to-value intangibles ("HTVI") covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises, (i) no reliable comparables exist, and (ii) at the time the transactions 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.

6.190 Transactions involving the transfer or the use of HTVI in paragraph 6.189 may exhibit one or more of the following features:

- The intangible is only partially developed at the time of the transfer,
- The intangible is not expected to be exploited commercially until several years following the transaction;
例如，某家企业在开发的早期阶段就把无形资产转让给了关联企业，设定了一个无法反映其价值的公允价值，并在转让过程中没有获得成功。随后，纳税人主张无法在转让时对产品未来是否能获得成功做出完全准确的预测。由此，纳税人可能以实际开发成果来说明其无法反映无形资产在交易前和交易后的价值差异。在这些情况下，税务机关通常并不具备特定的商业洞察力或其他信息渠道，以检验纳税人的解释是否合理或根据无形资产在交易前和交易后的价值差异来判定纳税人是否违反独立交易原则。实际上，税务机关对于纳税人的解释在很大程度上依赖于纳税人提供的解释和信息。纳税人在转让无形资产中存在的情形会增加转让定价风险。参见第 6.191 段。

6.187 在无形资产或相关权利的转让交易中，事后的结果可能在判断关联企业的转让定价安排的独立性以及交易时点的不确定性等方面对税务机关提供线索。如果事前的预测与事后的结果之间的差异并非源自不可预见的发展或事件，那么该差异可能表明，关联企业在事前定价安排中并没有充分考虑预计会对无形资产价值及所采用的定价安排产生影响的相关发展或事件。

6.188 针对上述事项，本章为税务机关提供了一种符合独立交易原则的方法，可以确保税务机关能够判断在哪些情况下纳税人的定价安排符合独立交易原则，并且考虑了相关可预见发展或事件对难以评估的无形资产评估的影响。使用这种方法对无形资产或相关权利的转让交易进行分析。相关事后证据可以在以下方面提供推定证据，包括交易时点的不确定性；纳税人是否考虑了交易时点的可预见发展或事件；以及用于确定转让价格的前提信息是否可靠。如果这些推定证据如第 6.193 和 6.194 段所述不会影响独立交易价格的准确设定，则可能不被采用。这种情况应该与依据事后结果进行税务评估的情况区分开来，因为事后评估并未考虑事后结果所依据的信息是否能够或应当在交易发生时点被关联企业了解和考虑到。

6.189 难以评估的无形资产是指在关联企业间转让时具有如下特征的相关无形资产或无形资产权利：(1) 不存在可靠的可靠对象，以及(2) 交易发生时，利用所转让无形资产所获得的未来现金流量和收入预测，以及无形资产价值评估所基于的假设都具有高度的不确定性，从而很难在转让时点预测无形资产能否获得成功。

6.190 涉及转让或使用难以评估的无形资产（见第 6.189 段的定义）的交易，可能会具有以下特征：

- 无形资产在转让时点未被完全开发；
The intangible does not itself fall within the definition of HTVI in paragraph 6.189 but is
integral to the development or enhancement of other intangibles which fall within that
definition of HTVI;

- The intangible is expected to be exploited in a manner that is novel at the time of the
  transfer and the absence of a track record of development or exploitation of similar
  intangibles makes projections highly uncertain;

- The intangible, meeting the definition of HTVI under paragraph 6.189, has been transferred
to an associated enterprise for a lump sum payment;

- The intangible is either in use in connection with or developed under a CCA or similar
  arrangements.

6.191 For such intangibles, information asymmetry between taxpayer and tax administrations,
including what information the taxpayer took into account in determining the pricing of the
transaction, may be acute and may exacerbate the difficulty encountered by tax administrations in
verifying the arm’s length basis on which pricing was determined for the reasons discussed in
paragraph 6.186. As a result, it will prove difficult for a tax administration to perform a risk
assessment for transfer pricing purposes, to evaluate the reliability of the information on which
pricing has been based by the taxpayer, or to consider whether the intangible or rights in intangibles
have been transferred at undervalue or overvalue compared to the arm’s length price, until ex post
outcomes are known in years subsequent to the transfer.

6.192 In these circumstances, the tax administration can consider ex post outcomes as presumptive
evidence about the appropriateness of the ex ante pricing arrangements. However, the consideration
of ex post evidence should be based on a determination that such evidence is necessary to be taken
into account to assess the reliability of the information on which ex ante pricing has been based.
Where the tax administration is able to confirm the reliability of the information on which ex ante
pricing has been based, notwithstanding the approach described in this section, then adjustments
based on ex post profit levels should not be made. In evaluating the ex ante pricing arrangements, the
tax administration is entitled to use the ex post evidence about financial outcomes to inform the
determination of the arm’s length pricing arrangements, including any contingent pricing
arrangements, that would have been made between independent enterprises at the time of the
transaction, considering the guidance in paragraph 6.185. Depending on the facts and circumstances
of the case and considering the guidance in Section B.5 of Chapter III, a multi-year analysis of the
information for the application of this approach may be appropriate.

6.193 This approach will not apply to transactions involving the transfer or use of HTVI falling
within the scope of paragraph 6.189, when at least one of the following exemptions applies:

1. The taxpayer provides:

   1. Details of the 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 appropriateness of its
consideration of reasonably foreseeable events and other risks, and the probability of
occurrence; and,

   2. Reliable evidence that any significant difference between the financial projections
and actual outcomes is due to: a) unforeseeable developments or events occurring
• 无形资产在交易发生的若干年内预计不会进行商业利用；
• 无形资产本身并不符合第 6.189 段中关于难以估值的无形资产的定义，但对其他符合定义的难以估值的无形资产的开发和价值提升必不可少；
• 无形资产在转让时点预计通过某种创新方式被利用，但因缺少类似无形资产的开发和利用记录而使相关预测存在高度不确定性；
• 无形资产符合第 6.189 段中关于难以估值的无形资产的定义，但以一次性付款的方式转让给关联企业；
• 无形资产的使用与成本分摊协议或类似安排有关，或根据成本分摊协议或类似安排进行开发。

6.191 对于这类无形资产，税务人和税务机关之间的信息不对称可能很严重，其中包括税务人在交易定价时所考量的信息等，例如第 6.186 段所述，这种信息不对称可能使税务机关在须益企业在定价时是否符合独立交易原则变得更加困难。因此，税务机关将很难从转让定价角度评估相应的风险，判断税务人定价时所依据的信息是否可靠，或是考量无形资产或相关权利的转让价值与独立交易价值相比是否过低或过高。

6.192 在这些情况下，税务机关可以将事后结果视为评估事前定价安排是否合理的推定证据。然而，是否对相关的事后证据进行考量，取决于在评估事前定价依据的信息可靠性时是否有必要对上述证据进行综合。尽管本文对事后方法进行了描述，但如果税务机关能够确认事前定价依据的信息的可靠性，则不应对事后的利润水平进行调整。在评估事前定价安排时，税务机关有权以财务结果等事后证据作为参考来确定符合独立交易原则的定价安排。即根据第 6.185 段中的指导原则独立企业之间在交易发生时可能达成的定价安排。根据实际情况和条件，以及第三章第 B.5 节的指导原则，可以在运用该方法时对多维度数据进行分析。

6.193 当涉及第 6.189 段所定义的难以估值的无形资产的转让或授权交易符合以下一个或多个豁免条件时，该方法不适用：

1. 纳税人提供：
   1. 转让时用于确定定价安排的相关事前预测的具体资料，包括计算定价时如何考虑风险因素（如概率加权），考虑某些可合理预见事件和其他风险的适当性，以及发生的概率；
after the determination of the price that could not have been anticipated by the associated enterprises at the time of the transaction; or, b) the playing out of probability of occurrence of foreseeable outcomes, and that these probabilities were not significantly overestimated or underestimated at the time of the transaction;

2. The transfer of the HTVI is covered by a bilateral or multilateral advance pricing arrangement in effect for the period in question between the countries of the transferee and the transferor;

3. Any significant difference between the financial projection and actual outcomes mentioned in (i).2 above does not have the effect of reducing or increasing the compensation for the HTVI by more than 20% of the compensation determined at the time of the transaction;

4. A commercialisation period of five years has passed following the year in which the HTVI first generated unrelated party revenues for the transferee and in which commercialisation period any significant difference between the financial projections and actual outcomes mentioned in (i).2 above was not greater than 20% of the projections for that period.\textsuperscript{56}

6.194 The first exemption means that, although the \textit{ex post} evidence about financial outcomes provides relevant information for tax administrations to consider the appropriateness of the \textit{ex ante} pricing arrangements, in circumstances where the taxpayer can satisfactorily demonstrate what was foreseeable at the time of the transaction and reflected in the pricing assumptions, and that the developments leading to the difference between projections and outcomes arose from unforeseeable events, tax administrations will not be entitled to make adjustments to the \textit{ex ante} pricing arrangements based on \textit{ex post} outcomes. For example, if the evidence of financial outcomes shows that sales of products exploiting the transferred intangible reached \textit{1000} a year, but the \textit{ex ante} pricing arrangements were based on projections that considered sales reaching a maximum of only \textit{100} a year, then the tax administration should consider the reasons for sales reaching such higher volumes. If the higher volumes were due to, for example, an exponentially higher demand for the products incorporating the intangible caused by a natural disaster or some other unforeseen event that was clearly unforeseeable at the time of the transaction or appropriately given a very low probability of occurrence, then the \textit{ex ante} pricing should be recognised as being at arm's length, unless there is evidence other than the \textit{ex post} financial outcomes indicating that price setting did not take place on an arm's length basis.

6.195 It would be important to permit resolution of cases of double taxation arising from application of the approach for HTVI through access to the mutual agreement procedure under the applicable Treaty.

D.5 Supplemental guidance for transactions involving the use of intangibles in connection with the sale of goods or the provision of services

6.196 This section provides supplemental guidance for applying the rules of Chapters I – III in situations where one or both parties to a controlled transaction uses intangibles in connection with the sale of goods or the provision of services, but where no transfer of intangibles or interests in intangibles occurs. Where intangibles are present, the transfer pricing analysis must carefully consider the effect of the intangibles involved on the prices and other conditions of controlled transactions.

\textsuperscript{56} In some business sectors it is not unusual for an intangible to be transferred with a contingent clause relating to a second, or further, use. In respect of the type of intangibles where this occurs, the time period begins again with the new commercialisation.
2. 有可靠证据表明财务预测和实际结果之间的重大差异是由以下原因造成：a）定价完成后发生了关联交易双方在交易发生时都未能预见的发展或事件；或者 b）可预见结果的实际发生情况与预测不符，且该结果发生的概率在交易时未被明显高估或低估。

ii）难以估值的无形资产的转让被涵盖在转让方和受让方国家达成的双边或多边预约定价安排中；

iii）受上文 ii）中提到的财务预测和实际结果之间的重大差异的影响，对难以估值的无形资产的补偿增加或减少额不超过交易时决定的补偿金额的 20%；

iv）在难以估值的无形资产首次为受让人带来第三方收入当年之后的五年商业化时期内，上文 ii）中提到的财务预测和实际结果之间的重大差异不超过预测结果的 20%。

6.194 第一项豁免条款是指，尽管财务结果等事前证据表明事前定价安排的合理性有待商榷，但如果纳税人能够证明交易双方的可预见发展和事件均已反映在定价假设中，并且导致财务预测和实际结果发生差距的主要原因是某些不可预见事件的发生，则税务机关将无权基于事后结果对事前定价安排进行调整。例如，如果财务结果显示出转让无形资产相关的产品的销售达到了每年 1000，而事前定价安排所基于的预测是销量每年不超过 100，那么税务机关应考虑实际销售量如此之高的原因。如果是由于不可预见的自然灾害或其他事件导致产品需求大幅增长，或是产品在市场初期被合理认定为发生的概率很小，那么除非有事后财务结果之外的其他证据表明该定价并不基于独立交易原则，否则事前定价应被认定为符合独立交易原则。

6.195 针对难以估值的无形资产应用相关方法引起的双重征税问题，应允许在适用的税收协定条款下采取相互协商程序解决。

D.5. 涉及产品销售或服务提供交易中使用无形资产的补充条款

6.196 当受控交易中一方或双方在产品销售或服务提供中使用了无形资产，但没有发生无形资产或相关权利的转让时，本条为如何应用第一至三章原则提供了补充指导。
(i) Intangibles as a comparability factor in transactions involving the use of intangibles

6.197 The general rules of Section D.1 of Chapter I and Chapter III also apply to guide the comparability analysis of transactions involving the use of intangibles in connection with a controlled transaction involving the sale of goods or the provision of services. However, the presence of intangibles may sometimes raise challenging comparability issues.

6.198 In a transfer pricing analysis where the most appropriate transfer pricing method is the resale price method, the cost-plus method, or the transactional net margin method, the less complex of the parties to the controlled transaction is often selected as the tested party. In many cases, an arm’s length price or level of profit for the tested party can be determined without the need to value the intangibles used in connection with the transaction. That would generally be the case where only the non-tested party uses intangibles. In some cases, however, the tested party may in fact use intangibles notwithstanding its relatively less complex operations. Similarly, parties to potentially comparable uncontrolled transactions may use intangibles. Where either of these is the case, it becomes necessary to consider the intangibles used by the tested party and by the parties to potentially comparable uncontrolled transactions as one comparability factor in the analysis.

6.199 For example, a tested party engaged in the marketing and distribution of goods purchased in controlled transactions may have developed marketing intangibles in its geographic area of operation, including customer lists, customer relationships, and customer data. It may also have developed advantageous logistical know-how or software and other tools that it uses in conducting its distribution business. The impact of such intangibles on the profitability of the tested party should be considered in conducting a comparability analysis.

6.200 It is important to note, however, that in many cases where the tested party uses such intangibles, parties to comparable uncontrolled transactions will also have the same types of intangibles at their disposal. Thus, in the distribution company case, an uncontrolled entity engaged in providing distribution services in the tested party’s industry and market is also likely to have knowledge of and contacts with potential customers, collect customer data, have its own effective logistical systems, and in other respects have similar intangibles to the tested party. Where that is the case, the level of comparability may be sufficiently high that it is possible to rely on prices paid or margins earned by the potential comparables as an appropriate measure of arm’s length compensation for both the functions performed and the intangibles owned by the tested party.

6.201 Where the tested party and the potential comparable have comparable intangibles, the intangibles will not constitute unique and valuable intangibles within the meaning of paragraph 6.17, and therefore no comparability adjustments will be required with regard to the intangibles. The potential comparable will, in these circumstances, provide the best evidence of the profit contribution of the tested party’s intangibles. If, however, either the tested party or the potential comparable has and uses in its business unique and valuable intangibles, it may be necessary either to make appropriate comparability adjustments or to revert to a different transfer pricing method. The principles contained in Section D.2(i) to (iv) apply in evaluating the comparability of intangibles in such situations.

6.202 It is appropriate for both taxpayers and tax administrations to exercise restraint in rejecting potential comparables based on the use of intangibles by either the parties to potentially comparable transactions or by the tested party. Potential comparables should generally not be rejected on the basis of the asserted existence of unspecified intangibles or on the basis of the asserted significance of goodwill. If identified transactions or companies are otherwise comparable, they may provide the best available indication of arm’s length pricing notwithstanding the existence and use by either the tested
当受控交易涉及无形资产时，转让定价分析必须仔细考虑无形资产对受控交易价格以及其他交易条件的影响。

（i）无形资产作为涉及无形资产使用的相关交易的可比性因素

6.197 当受控产品销售或服务提供交易涉及无形资产的使用时，第一章第 D.1 节和第三章的一般规则也同样适用。然而，受控交易中无形资产的存在有时可能会带来可比性方面的难题。

6.198 当选定再销售价格法、成本加成法或交易净利润法作为最适合的转让定价分析方法时，受控交易中经营利润仅为简单的一方通常被选为被测试方。在许多情况下，被测试方的独立交易价格或利润水平可以在无需评估交易中无形资产价值的情况下确定，但一般仅限于仅非被测试方使用无形资产的情况。然而在某些情况下，虽然被测试方的经营活动较为简单，但实际可能会使用无形资产。同样，潜在可比非受控交易的各方或许均使用了无形资产。在上述情况下，应将被测试方及潜在可比非受控交易的各方所使用的无形资产作为可比性因素在分析中加以考虑。

6.199 例如，被测试方通过受控交易采购相关产品并负责产品进一步的市场销售和分包活动，而被测试方可能在其业务区域开发了营销性无形资产，包括客户名单、客户关系及客户数据等；甚至还开发了有利于其开展分包活动的理财产品、软件和技术等。在进行可比性分析时，应当考虑这些无形资产对被测试方的盈利能力的影响。

6.200 但要注意的是，在许多情况下，当被测试方使用这些无形资产时，可比非受控交易的各方也拥有类似或相同的无形资产。因此，在前文分销企业的例子中，同一行业提供分销服务的独立企业也可能拥有与被测试方相似的无形资产，包括对潜在客户的了解和维护信息、收集到的客户数据、有效的物流系统等。在此情况下，被测试方和这些潜在可比企业之间的可比性就较高，可以根据潜在可比企业支付的价格或所获得的利润衡量被测试方就其承担的功能和拥有的无形资产所获得的补偿是否符合独立交易原则。

6.201 当被测试方和潜在可比企业拥有可比的无形资产时，该无形资产不会构成第 6.17 段所定义的“独特且有价值的”无形资产，因此不需要对相关无形资产进行可比性调整。在这种情况下，潜在的可比方不符合被测试方的无形资产对其利润做出贡献。然而，如果被测试方或潜在可比企业在其业务中拥有并使用了独特且有价值的无形资产，就有可能有必要进行适当的可比性调整或选择其他转让定价方法。在此情况下，应参考第 D.2 节 (i) - (iv) 的原则评估无形资产的可比性。

6.202 纳税人和税务机关根据潜在可比交易方或被测试方对无形资产的使用情况，对剔除可比企业进行限制的做法是适当的。通常，不应因存在未确认的无形资产或重大差异而轻易排除某些可比企业或可比交易。
party or the parties to the potentially comparable transactions of relatively insignificant intangibles. Potentially comparable transactions should be disregarded on the basis of the existence and use of non-comparable intangibles only where the intangibles in question can be clearly and distinctly identified and where the intangibles are manifestly unique and valuable intangibles.

(ii) Determining arm’s length prices for transactions involving the use of intangibles in connection with the sale of goods or the performance of services

6.203 The principles of Chapters I – III apply in determining arm’s length prices for transactions involving the use of intangibles in connection with sales of goods or the performance of services. Two general categories of cases can arise. In the first category of cases, the comparability analysis, including the functional analysis, will reveal the existence of sufficiently reliable comparables to permit the determination of arm’s length conditions for the transaction using a transfer pricing method based on comparables. In the second category of cases, the comparability analysis, including the functional analysis, will fail to identify reliable comparable uncontrolled transactions, often as a direct result of the use by one or both parties to the transaction of unique and valuable intangibles. Transfer pricing approaches to these two categories of cases are described below.

(a) Situations where reliable comparables exist

6.204 It will often be the case that, notwithstanding the use of intangibles by one or both parties to a controlled sale of goods or provision of services, reliable comparables can be identified. Depending on the specific facts, any of the five OECD transfer pricing methods described in Chapter II might constitute the most appropriate transfer pricing method where the transaction involves the use of intangibles in connection with a controlled sale of goods or provision of services and reliable comparables are present.

6.205 Where the tested party does not use unique and valuable intangibles, and where reliable comparables can be identified, it will often be possible to determine arm’s length prices on the basis of one-sided methods including the CUP, resale price, cost plus and TNMM methods. The guidance in Chapters I – III will generally be sufficient to guide the determination of arm’s length prices in such situations, without the need for a detailed analysis of the nature of the intangibles used by the other party to the transaction.

6.206 The principles described in Section D.2(i) to (iv) of this Chapter should be applied in determining whether the use of intangibles by the tested party will preclude reliance on identified comparable uncontrolled transactions or require comparability adjustments. Only when the intangibles used by the tested party are unique and valuable intangibles will the need arise to make comparability adjustments or to adopt a transfer pricing method less dependent on comparable uncontrolled transactions. Where intangibles used by the tested party are not unique and valuable intangibles, prices paid or received, or margins or returns earned by parties to comparable uncontrolled transactions may provide a reliable basis for determining arm’s length conditions.

6.207 Where the need to make comparability adjustments arises because of differences in the intangibles used by the tested party in a controlled transaction and the intangibles used by a party to a potentially comparable uncontrolled transaction, difficult factual questions can arise in quantifying reliable comparability adjustments. These issues require thorough consideration of the relevant facts and circumstances and of the available data regarding the impact of the intangibles on prices and profits. Where the impact on price of a difference in the nature of the intangibles used is clearly material, but not subject to accurate estimation, it may be necessary to utilise a different transfer pricing method that is less dependent on identification of reliable comparables.
如果可比交易或可比企业在其他方面可比，即使被测试方或潜在可比交易方使用了相对不重要的无形资产，仍可以作为验证纳入独立交易价格最合适的证明。只有当潜在可比交易中的无形资产可予以清晰辨认且是“独特有价值”的无形资产时，才能以存在不可比无形资产的理由将潜在可比交易排除。

(ii) 涉及无形资产的产品销售或服务提供交易的独立交易定价

6.203 第一至三章的原则适用于确定涉及无形资产的产品销售交易或服务交易的独立交易价格。通常存在以下两类情况：在第一类情况下，可比性分析（包括功能分析）表明存在足够可靠的可比信息，能够使用基于可比信息的转让定价方法来确定受控交易的独立交易条件；在第二类情况下，由于交易一方或双方使用的独特且有价值的无形资产，可比性分析（包括功能分析）通常无法找到可靠的可比非受控交易。下文阐述了在这两种情况下如何运用转让定价方法。

(a) 存在可靠的可比信息的情况

6.204 通常情况下，尽管一方或双方在可比的产品销售或服务提供交易中使用了无形资产，仍可以找到可靠的可比信息。根据具体的情况，当评估涉及无形资产的受控产品销售交易或受控服务提供交易时，如果存在可靠的可比信息，《转让定价指南》第二章中描述的五种 OECD 转让定价方法均可能成为最合适的转让定价方法。

6.205 当被测试方不使用独特且有价值的无形资产且可以找到可靠的可比信息时，可以通过基于单向测试的转让定价方法（包括可比非受控价格法、再销售价格法、成本加成法和交易净利润法）确定独立交易价值。在这种情况中，第一至三章的指导原则通常足以帮助确定独立交易价格，而无需详细分析交易中另一方使用的无形资产的性质。

6.206 应运用第 D.2 节 (i) - (iv) 的原则确定被测试方使用的无形资产是否会影响对可比非受控交易的使用或是否需要进行可比性调整。只有当被测试方使用的无形资产是“独特且有价值”时，才需要进行可比性调整或转而采用经少依赖可比非受控交易的其他转让定价方法。当被测试方使用的无形资产并非“独特且有价值”的无形资产时，可比非受控交易各方支付或收到的价格或者取得的利润或回报可以为确定独立交易条件提供可靠的依据。

6.207 当被测试方在受控交易中使用的无形资产与潜在可比非受控交易方使用的无形资产存在差异时，需要进行可比性调整，从而产生了如何在可比性调整中量化这些差异的实际困难。解决这些问题需要对相关的事实和情况以及体现有关无形资产对价格和利润的影响的数据作深入分析。
6.208 It should also be recognised that comparability adjustments for factors other than differences in the nature of the intangibles used may be required in matters involving the use of intangibles in connection with a controlled sale of goods or services. In particular, comparability adjustments may be required for matters such as differences in markets, locational advantages, business strategies, assembled workforce, corporate synergies and other similar factors. While such factors may not be intangibles as that term is described in Section A.1 of this Chapter, they can nevertheless have important effects on arm's length prices in matters involving the use of intangibles.

(b) Situations where reliable comparables do not exist

6.209 In some circumstances where reliable uncontrolled transactions cannot be identified, transactional profit split methods may be utilised to determine an arm's length allocation of profits for the sale of goods or the provision of services involving the use of intangibles. One circumstance in which the use of transactional profit split methods may be appropriate is where both parties to the transaction make unique and valuable contributions to the transaction.

6.210 Section C of Chapter II contains guidance to be considered in applying transactional profit split methods. That guidance is fully applicable to matters involving the use of intangibles in connection with the sale of goods or the provision of services in controlled transactions.

6.211 In applying a profit split method in a case involving the use of intangibles, care should be taken to identify the intangibles in question, to evaluate the manner in which those intangibles contribute to the creation of value, and to evaluate other income producing functions performed, risks assumed and assets used. Vague assertions of the existence and use of unspecified intangibles will not support a reliable application of a profit split method.

6.212 In appropriate circumstances, transfer pricing methods or valuation techniques not dependent on the identification of reliable comparable uncontrolled transactions may also be utilised to determine arm's length conditions for the sale of goods or the provision of services where intangibles are used in connection with the transaction. The alternative selected should reflect the nature of the goods or services provided and the contribution of intangibles and other relevant factors to the creation of value.

**ADDITIONAL GUIDANCE IN CHAPTER II OF THE TRANSFER PRICING GUIDELINES RESULTING FROM THE REVISIONS TO CHAPTER VI**

The following language is inserted following paragraph 2.9.

2.9A The application of a general rule of thumb does not provide an adequate substitute for a complete functional and comparability analysis conducted under the principles of Chapters I – III. Accordingly, a rule of thumb cannot be used to evidence that a price or an apportionment of income is arm's length.
如果所使用无形资产的价值差异对价格的影响明显重大，但是无法对该差异作出准确的估计，此时就需要使用其他对可比信息依赖度不高的转让定价方法。6.208 还应该认识到，在涉及无形资产的产品销售或服务提供的受控交易中，除了使用的无形资产在性质上有差异之外，也会由其他因素需要进行可比性调整。这些因素可能包括：市场差异、地域性优势、商业策略、配售策略、集团内部效率和其他类似的因素。虽然根据本章 A.1 节的描述，这些因素可能不会构成无形资产，但对确定无形资产相关交易的独立交易价格可能产生重要影响。

(b) 可比的可比信息不存在的情况

6.209 在某些情况下，针对涉及无形资产的产品销售或服务提供的受控交易，如找不到可靠的可比非受控交易，则可能运用交易利润分割法确定独立交易原则的合理利润分配。交易利润分割法可能适用于交易双方均做出独立且有价值的贡献的情况。

6.210 第二章第 C 节提供了有关运用交易利润分割法的指导原则，完全适用于涉及无形资产的产品销售或服务提供的受控交易。

6.211 对涉及无形资产使用的交易运用利润分割法时，应特别注意以下问题：识别相关无形资产、评估这些无形资产对创造价值所做贡献以及评估其他产生收益所需要承担的风险和资产。如果无法确定无形资产是否存在或被使用，可能无法可靠运用交易利润分割法。

6.212 在适当的情况下，也可以运用不依赖于可比的可比非受控交易信息的转让定价方法和价值评估方法，来确定涉及无形资产的产品销售或服务提供的独立交易条件。选择的其他方法应该能够反映出交易商品或服务的性质以及无形资产和其他因素对价值创造的贡献。

基于《转让定价指南》第四章修订内容在第二章增加的相关指导原则

以下内容增加至第 2.9 段后。

2.9A 一般而言，经验法则的运用不能替代按第一至三章原则进行的完整的功能分析和可比性分析，因此，经验法则不能单独以证明价格或者利润分配符合独立交易原则。
The provisions of the Annex to Chapter VI of the Transfer Pricing Guidelines are deleted in their entirety and are replaced by the following language.

EXAMPLES TO ILLUSTRATE THE GUIDANCE ON INTANGIBLES

Example 1

1. Premiere is the parent company of an MNE group. Company S is a wholly owned subsidiary of Premiere and a member of the Premiere group. Premiere funds R&D and performs ongoing R&D functions in support of its business operations. When its R&D functions result in patentable inventions, it is the practice of the Premiere group that all rights in such inventions be assigned to Company S in order to centralise and simplify global patent administration. All patent registrations are held and maintained in the name of Company S.

2. Company S employs three lawyers to perform its patent administration work and has no other employees. Company S does not conduct or control any of the R&D activities of the Premiere group. Company S has no technical R&D personnel, nor does it incur any of the Premiere group’s R&D expense. Key decisions related to defending the patents are made by Premiere management, after taking advice from employees of Company S. Premiere’s management, and not the employees of Company S, controls all decisions regarding licensing of the group’s patents to both independent and associated enterprises.

3. At the time of each assignment of rights from Premiere to Company S, Company S makes a nominal 100 Euro payment to Premiere in consideration of the assignment of rights to a patentable invention and, as a specific condition of the assignment, simultaneously grants to Premiere an exclusive, royalty free, patent licence, with full rights to sub-license, for the full life of the patent to be registered. The nominal payments of Company S to Premiere are made purely to satisfy technical contract law requirements related to the assignments and, for purposes of this example, it is assumed that they do not reflect arm’s length compensation for the assigned rights to patentable inventions. Premiere uses the patented inventions in manufacturing and selling its products throughout the world and from time to time sublicences patent rights to others. Company S makes no commercial use of the patents nor is it entitled to do so under the terms of the licence agreement with Premiere.

4. Under the agreement, Premiere performs all functions related to the development, enhancement, maintenance, protection and exploitation of the intangibles except for patent administration services. Premiere contributes and uses all assets associated with the development and exploitation of the intangible, and assumes all or substantially all of the risks associated with the intangibles. Premiere should be entitled to the bulk of the returns derived from exploitation of the intangibles. Tax administrations could arrive at an appropriate transfer pricing solution by delineating the actual transaction undertaken between Premiere and Company S. Depending on the facts, it might be determined that taken together the nominal assignment of rights to Company S and the simultaneous grant of full exploitation rights back to Premiere reflect in substance a patent administration service arrangement between Premiere and Company S. An arm’s length price would be determined for the patent administration services and Premiere would retain or be allocated the balance of the returns derived by the MNE group from the exploitation of the patents.

Example 2

5. The facts related to the development and control of patentable inventions are the same as in Example 1. However, instead of granting a perpetual and exclusive licence of its patents back to Premiere, Company S, acting under the direction and control of Premiere, grants licences of its patents to associated
关于无形资产指南的案例说明

案例 1

1. **Premiere**是一家跨国企业集团的母公司。S 公司是 Premiere 的全资子公司，也是 Premiere 集团的成员之一。Premiere 投资研发所需资金，并持续承担研发功能以支持其商业运营。当 Premiere 研发成果成为可申请专利的发明时，Premiere 集团一般会将上述发明涉及的所有相关权利转让给 S 公司，以便能够集中和简化全球专利的管理。所有专利都以 S 公司名义注册，并由 S 公司负责对注册专利的维护。

2. S 公司雇佣三个律师对其专利进行日常管理，除此之外没有其他员工。S 公司不参与或控制 Premiere 集团的任何研发活动。S 公司既没有研发技术人员也不承担任何 Premiere 集团的研发费用。有关专利保护的重要决策由 Premiere 的管理层在考虑 S 公司员工提出的意见后做出。Premiere 的管理层，而非 S 公司的员工，控制着将专利授权给独立企业和关联企业使用的决定权。

3. 当 Premiere 将每项专利转让给 S 公司时，S 公司会向 Premiere 支付 100 欧元作为受让该专利的名义对价。与此同时，这项转让有一个特别附加条件，即在该项专利的注册使用期限内无偿授予 Premiere 该专利的独占许可权以及再许可权。S 公司向 Premiere 支付的名义对价是基于技术合同法对上述转让的要求。在本案例中，假设支付的名义对价并非专利转让的独立交易价格。Premiere 在全球范围内利用该专利生产及销售产品，并多次将其专利使用权进一步许可给其他公司使用。S 公司并未将专利用于商业用途，此外，根据与 Premiere 签订的许可合同条款，S 公司无权将该专利许可给他人使用。

4. 在该合同下，Premiere 除了不管理该项专利以外，也不执行与该项无形资产开发、价值提升、维护、保护和利用相关的所有功能。用以开发和利用该项专利的所有资产全部由 Premiere 提供并使用，并且 Premiere 承担所有或者绝大部分与该项无形资产的相关风险。在这一情况下，Premiere 应获得利用该项无形资产的绝大部分收益。税务机关可以通过界定 Premiere 和 S 公司交易的实质来确定合理的转让定价方案。根据上述事实，专利名义上属于 S 公司，但 S 公司同时又将全部的专利使用权授予 Premiere，其交易实质是 Premiere 和 S 公司之间的专利管理服务的安排。那么，应计算出该项专利管理服务的独立交易价格，而集团利用该项专利权所取得的收入减除上述价格的余额应归属于或分配给 Premiere 公司。

案例 2

5. 本案例在专利的开发和控制方面的情况与案例 1 相同。但是，S 公司并没有给 Premiere 永久性的独占许可，而是在 Premiere 的指导和控制下，在全球范围内将专利许可给关联企业和独立企业使用并收取特许权使用费。
and independent enterprises throughout the world in exchange for periodic royalties. For purposes of this example, it is assumed that the royalties paid to Company S by associated enterprises are all arm’s length.

6. Company S is the legal owner of the patents. However, its contributions to the development, enhancement, maintenance, protection, and exploitation of the patents are limited to the activities of its three employees in registering the patents and maintaining the patent registrations. The Company S employees do not control or participate in the licensing transactions involving the patents. Under these circumstances, Company S is only entitled to compensation for the functions it performs. Based on an analysis of the respective functions performed, assets used, and risks assumed by Premiere and Company S in developing, enhancing, maintaining, protecting, and exploiting the intangibles, Company S should not be entitled ultimately to retain or be attributed income from its licensing arrangements over and above the arm’s length compensation for its patent registration functions.

7. As in Example 1 the true nature of the arrangement is a patent administration service contract. The appropriate transfer pricing outcome can be achieved by ensuring that the amount paid by Company S in exchange for the assignments of patent rights appropriately reflects the respective functions performed, assets used, and risks assumed by Premiere and by Company S. Under such an approach, the compensation due to Premiere for the patentable inventions is equal to the licensing revenue of Company S less an appropriate return to the functions Company S performs.

Example 3

8. The facts are the same as in Example 2. However, after licensing the patents to associated and independent enterprises for a few years, Company S, again acting under the direction and control of Premiere, sells the patents to an independent enterprise at a price reflecting appreciation in the value of the patents during the period that Company S was the legal owner. The functions of Company S throughout the period it was the legal owner of the patents were limited to performing the patent registration functions described in Examples 1 and 2.

9. Under these circumstances, the income of Company S should be the same as in Example 2. It should be compensated for the registration functions it performs, but should not otherwise share in the returns derived from the exploitation of the intangibles, including the returns generated from the disposition of the intangibles.

Example 4

10. The facts related to the development of the patents are the same as described in Example 3. In contrast to Example 1, Company S in this example has employees capable of making, and who actually make, the decision to take on the patent portfolio. All decisions relating to the licensing programme were taken by Company S employees, all negotiations with licensees were undertaken by Company S employees, and Company S employees monitored compliance of independent licensees with the terms of the licenses. It should be assumed for purposes of this example that the price paid by Company S in exchange for the patents was an arm’s length price that reflected the parties’ respective assessments of the future licensing programme and the anticipated returns to be derived from exploitation of the patents as of the time of their assignment to Company S. For the purposes of this example, it is assumed that the approach for hard-to-value intangibles in Section D.4 does not apply.

11. Following the assignments, Company S licensed the patents to independent enterprises for a few years. Thereafter the value of the patents increases significantly because of external circumstances unforeseen at the time the patents were assigned to Company S. Company S then sells the patents to an unrelated purchaser at a price exceeding the price initially paid by Company S to Premiere for the patents.
假设在本案例中，关联企业支付给 S 公司的特许权使用费符合独立交易原则。
6. S 公司是专利的法律所有权人，但 S 公司对该专利开发、价值提升、维护、保护和利用方面的贡献仅限于其三个员工注册专利和维护专利注册的相关活动。S 公司的员工并不控制或者参与专利的相关许可交易。在这种情况，S 公司应仅就其实际履行的功能获取相应补偿。在分析 Premiure 和 S 公司各自在无形资产开发、价值提升、维护、保护和利用方面所履行的功能、使用的资产及承担的风险后，S 公司最终因许可安排取得的或者被分配到的收入应不超过其承担的专利注册功能的独立交易报酬。
7. 与案例 1 类似，本安排的真实性是专利的管理服务协议。如果 S 公司为获得专利权所支付的费用能够正确反映 Premiure 和 S 公司各自履行的功能、使用的资产及承担的风险，那么这个安排就可以达到合适的转让定价结果。在这种方法下，Premiure 因专利获得的补偿应该等于 S 公司获得的许可收入减去与 S 公司所承担功能相匹配的服务后的全部金额。
案例 3
8. 本案例事实部分与上述案例 2 一致。但在将专利许可给关联企业和独立企业使用几年后，S 公司在 Premiure 的指示和控制下将专利出售给某独立企业，其价值包含 S 公司是法律所有权人期间的增值。在 S 公司是该专利的法律所有权人期间，S 公司的功能仅限于案例 1 和 2 中描述的专利注册功能。
9. 在这种情况下，S 公司的收入应该与案例 2 中的收入一致。S 公司应该依据其注册功能获取相应补偿，而不应分享于 S 公司无形资产取得的所得，包括处置该无形资产取得的所得。
案例 4
10. 对专利开发的相关情况与上述案例 3 一致。与案例 1 不同的是，本案例中 S 公司有相应的员工有能力就这一系列专利的使用做出决策，并且实际上他们也做出了这些决策。所有与专利许可相关的决策及与被许可方的谈判都由 S 公司的员工负责。而且 S 公司的员工还要监督非关联被许可人是否遵守许可条款。为说明该案例，假设 S 公司为相关专利支付的费用符合独立交易原则，以体现各方对未来许可项目的评估以及将专利许可给 S 公司之后对其进行研发所取得的预期回报。假设在本案例中，第 D.4 节中针对难以估值的无形资产的方法不适用。
11. 在案例中，S 公司将该专利许可给非关联方使用若干年。此后，由于外部环境的变化，该专利价值发生了显著增加，但该外部变化是 S 公司在出让专利权时所未能预料的。S 公司于是将该专利以超出 S 公司初始支付给 Premiure 的价格卖给给非关联的购买者。
Company S employees make all decisions regarding the sale of the patents, negotiate the terms of the sale, and in all respects manage and control the disposition of the patents.

12. Under these circumstances, Company S is entitled to retain the proceeds of the sale, including amounts attributable to the appreciation in the value of the patents resulting from the unanticipated external circumstances.

Example 5

13. The facts are the same as in Example 4 except that instead of appreciating, the value of the patents decreases during the time they are owned by Company S as a result of unanticipated external circumstances. Under these circumstances, Company S is entitled to retain the proceeds of the sale, meaning that it will suffer the loss.

Example 6

14. In Year 1, a multinational group comprised of Company A (a country A corporation) and Company B (a country B corporation) decides to develop an intangible, which is anticipated to be highly profitable based on Company B's existing intangibles, its track record and its experienced research and development staff. The intangible is expected to take five years to develop before possible commercial exploitation. If successfully developed, the intangible is anticipated to have value for 10 years after initial exploitation. Under the development agreement between Company A and Company B, Company B will perform and control all activities related to the development, enhancement, maintenance, protection and exploitation of the intangible. Company A will provide all funding associated with the development of the intangible (the development costs are anticipated to be $100 million per year for 5 years), and will become the legal owner of the intangible. Once developed, the intangible is anticipated to result in profits of $550 million per year (years 6 to 15). Company B will license the intangible from Company A and make contingent payments to Company A for the right to use the intangible, based on returns of purportedly comparable licensees. After the projected contingent payments, Company B will be left with an anticipated return of $200 million per year from selling products based on the intangible.

15. A functional analysis by the country B tax administration of the arrangement assesses the functions performed, assets used and contributed, and risks assumed by Company A and by Company B. The analysis through which the actual transaction is delineated concludes that although Company A is the legal owner of the intangibles, its contribution to the arrangement is solely the provision of funding for the development of an intangible. This analysis shows that Company A contractually assumes the financial risk, has the financial capacity to assume that risk, and exercises control over that risk in accordance with the principles outlined in paragraphs 6.63 and 6.64. Taking into account Company A’s contributions, as well as the realistic alternatives of Company A and Company B, it is determined that Company A’s anticipated remuneration should be a risk-adjusted return on its funding commitment. Assume that this is determined to be $110 million per year (for years 6 to 15), which equates to an 11% risk-adjusted anticipated financial return. Company B, accordingly, would be entitled to all remaining anticipated income after accounting for Company A’s anticipated return, or $440 million per year ($550 million minus $110 million), rather than $200 million per year as claimed by the taxpayer. (Based on the detailed functional analysis and application of the most appropriate method, the taxpayer incorrectly chose Company B as the tested party rather than Company A).

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Footnote:
2) For purposes of this example, it is not necessary to derive these results. The example assumes that making a funding 'investment' of $100 million per year for 5 years in a project with this level of risk should earn at least a 1% interest rate of $5 million per year for the following 10 years. This corresponds to an 11% return on funding.
S公司员工负责制定与专利转让相关的所有策略，包括转让条件，以及其他方面与专利转移相关的管理工作。

12. 在这种情况下，S公司有权获得转让专利的收益，包括那些由外部不可预测因素引起的所有增加所带来的收益部分。

案例5

13. 其他事实和案例4一样，但在S公司持有专利期间由于不可预见的因素导致该专利贬值而非增值。在这种情况下，由于S公司应支付该专利的收益，那么也意味着将承担相应的损失。

案例6

14. 第一年，A公司（在A国设立的公司）和B公司（在B国设立的公司）组成的跨国企业集团决定研发一项无形资产，从B公司现有的无形资产、以往的研究成果以及经验丰富的研究人员来看，该无形资产预期将会产生很高的收益。该无形资产预期需要经过五年的时间才可以投入商业使用。如果研发成功，该无形资产在初期投入后预计有十年的使用价值。根据A公司和B公司达成的开发协议，B公司将承担并管理与该无形资产相关的开发、价值提升、维护、保护和利用工作。A公司将提供该无形资产开发的所有资金（预计未来五年每年的研发费用为1亿美元）并且成为该无形资产的法律所有权人。一旦研发成功，该无形资产将在未来每年（第6到第15年）可以赚取5.5亿美元的利润。B公司将从A公司取得该无形资产的使用权，并依据合同被许可方取得的回报，以浮动付款方式向A公司支付特许权使用费。在扣除用于支付A公司的特许权使用费后，B公司预计通过该专利产品的销售每年可获得的剩余回报约为2亿美元。

15. B国的税务机构对A公司和B公司各自应负担的功能、使用和投入的资产以及承担的风险进行功能分析。通过分析确定了实际的交易情况，即虽然A公司拥有无形资产的法律所有权，其在交易中的贡献仅限于投入无形资产的研发资金。分析显示，A公司应承担相应的财务风险，具有承担该风险的财务能力，并按照第6.63与6.64段所述的相关原则对该风险实施控制。考虑到A公司的贡献，以及A公司和B公司实际可行的选择，A公司的预期报酬应该是一个经风险调整后的出资回报。假设A公司每年（第6到第15年）收入总额为1.1亿美元，即经风险调整后的预期投资年收益率为11%。那么，B公司的收入应为总收入减去A公司预期收益后的余额，即每年4.4亿美元（5.5亿美元减去1.1亿美元），而不是纳税人自己申报的每年2亿美元。（这一结论基于详细的功能分析并选取最合适的方法，纳税人错误地选择了B公司作为被测试方，而不是A公司。）

21本案例无意说明该收益的计算过程，假设计划与本案例相同的风险水平，连续五年每年投资1亿美元，在独立交易原则下，未来十年每年的预计盈利为1.1亿美元。
Example 7

16. Primero is the parent company of an MNE group engaged in the pharmaceutical business and does business in country M. Primero develops patents and other intangibles relating to Product X and registers those patents in countries around the world.

17. Primero retains its wholly owned country N subsidiary, Company S, to distribute Product X throughout Europe and the Middle East on a limited risk basis. The distribution agreement provides that Primero, and not Company S, is to bear product recall and product liability risk, and provides further that Primero will be entitled to all profit or loss from selling Product X in the territory after providing Company S with the agreed level of compensation for its distribution functions. Operating under the contract, Company S purchases Product X from Primero and resells Product X to independent customers in countries throughout its geographical area of operation. In performing its distribution functions, Company S follows all applicable regulatory requirements.

18. In the first three years of operations, Company S earns returns from its distribution functions that are consistent with its limited risk characterisation and the terms of the distribution contract. Its returns reflect the fact that Primero, and not Company S, is entitled to retain income derived from exploitation of the intangibles with respect to Product X. After three years of operation, it becomes apparent that Product X causes serious side effects in a significant percentage of those patients that use the product and it becomes necessary to recall the product and remove it from the market. Company S incurs substantial costs in connection with the recall. Primero does not reimburse Company S for these recall related costs or for the resulting product liability claims.

19. Under these circumstances, there is an inconsistency between Primero’s asserted entitlement to returns derived from exploiting the Product X intangibles and its failure to bear the costs associated with the risks supporting that assertion. A transfer pricing adjustment would be appropriate to remedy the inconsistency. In determining the appropriate adjustment, it would be necessary to determine the true transaction between the parties by applying the provisions of Section D.1 of Chapter I. In doing so, it would be appropriate to consider the risks assumed by each of the parties on the basis of the course of conduct followed by the parties over the term of the agreement, the control over risk exercised by Primero and Company S, and other relevant facts. If it is determined that the true nature of the relationship between the parties is that of a limited risk distribution arrangement, then the most appropriate adjustment would likely take the form of an allocation of the recall and product liability related costs from Company S to Primero. Alternatively, although unlikely, if it is determined on the basis of all the relevant facts that the true nature of the relationship between the parties includes the exercising control over product liability and recall risk by Company S, and if an arm’s length price can be identified on the basis of the comparability analysis, an increase in the distribution margins of Company S for all years might be made to reflect the true risk allocation between the parties.

Example 8:

20. Primair, a resident of country X, manufactures watches which are marketed in many countries around the world under the R trademark and trade name. Primair is the registered owner of the R trademark and trade name. The R name is widely known in countries where the watches are sold and has obtained considerable economic value in those markets through the efforts of Primair. R watches have never been marketed in country Y, however, and the R name is not known in the country Y market.

21. In Year 1, Primair decides to enter the country Y market and incorporates a wholly owned subsidiary in country Y, Company S, to act as its distributor in country Y. At the same time, Primair enters into a long-term royalty-free marketing and distribution agreement with Company S. Under the agreement,
案例 7

16. **Primero** 是一家跨国企业集团的母公司，从事医药行业并在 M 国开展业务。Primero 从事 X 产品的专利及其他无形资产的开发，并在全球不同国家注册这些专利。

17. **Primero** 设立在 N 国的全资子公司 S，在承担有限风险的前提下，负责向欧洲和中东分销 X 产品。根据分销协议，承担产品召回和产品责任风险由 Primero 公司而并不是 S 公司承担。分销协议同时规定，Primero 支付给 S 公司承担分销功能所对应的报酬之后，在上述区域内销售 X 产品的剩余利润或者损失都归属于 Primero。根据协议，S 公司先从 Primero 购买 X 产品，然后将 X 产品销售给其经营地区所在国家的独立顾客，在履行其分销功能时，S 公司会遵守所有相关法律监管上的要求。

18. 在运营的前三年，S 公司通过分销功能赚取回报。该回报与其有限风险分销商的定位及分销合同条款相匹配。其回报也反映出 Primero 而非 S 公司有权享有 X 产品的无形资产所获取的剩余收益。三年后，有相当一部分使用 X 产品的病人出现了严重的不良反应，因此需要将 X 产品召回并退出市场。S 公司承担了有关召回的巨大费用。但 Primero 并未对 S 公司的这些召回费用或引起的产品责任赔偿进行补偿。

19. 在这种情况下，一方面 Primero 主张享有利用 X 产品的无形资产所获取的收益，另一方面却没有承担与其相应的风险所带来的损失，两者存在矛盾。因此，对其进行转让定价调整来消除这种矛盾是合理的。进行适当调整时，有必要运用第一章第三 D.1 段的规定来判定双方交易的真实性性质，依据协议期间进行交易双方的合同行为来考虑交易双方各自所承担的风险，对风险实施的控制以及其他相关因素。如果交易的真实性质是承担有限风险的分销安排，那么最合适调整就是将回收产品召回和产品责任发生的费用从 S 公司转移到 Primero。相反，如果根据所有相关事实判定交易的真实性质显示，控制产品责任和召回的风险都由 S 公司承担（虽然这种情况不太可能发生），并且如果通过可比性分析可以确定独立交易的价格，那么这些年 S 公司的分销利润就可能需要相应提高以反映出双方真实的风险分配情况。

案例 8

20. **Primair** 是 X 国的居民企业，从事手表生产并使用 R 注册商标和商号在全球许多国家进行销售。Primair 是 R 商标和商号的注册所有权人。经过 Primair 的努力，R 品牌在其进行销售的国家具有较高知名度，而且在这些市场中取得了非常可观的经济效益。但是，R 品牌手表并没有在 Y 国销售，其品牌在 Y 国的市场也不为所知。

21. 第一年，Primair 决定进入 Y 国市场，并在 Y 国设立全资子公司 S 作为该手表的分销商。同时，Primair 与 S 公司签订了一份长期免受合用费的市场推广和分销协议。
Company S is granted the exclusive right to market and distribute watches bearing the R trademark and using the R trade name in country Y for a period of five years, with an option for a further five years. Company S obtains no other rights relating to the R trademark and trade name from Primair, and in particular is prohibited from re-exporting watches bearing the R trademark and trade name. The sole activity of Company S is marketing and distributing watches bearing the R trademark and trade name. It is assumed that the R watches are not part of a portfolio of products distributed by Company S in country Y. Company S undertakes no secondary processing, as it imports packaged watches into country Y ready for sale to the final customer.

22. Under the contract between Primair and Company S, Company S purchases the watches from Primair in country Y currency, takes title to the branded watches and performs the distribution function in country Y, incurs the associated carrying costs (e.g. inventory and receivables financing), and assumes the corresponding risks (e.g. inventory, credit and financing risks). Under the contract between Primair and Company S, Company S is required to act as a marketing agent to assist in developing the market for R watches in country Y. Company S consults with Primair in developing the country Y marketing strategy for R watches. Primair develops the overall marketing plan based largely on its experience in other countries, it develops and approves the marketing budgets, and it makes final decisions regarding advertising designs, product positioning and core advertising messages. Company S consults on local market issues related to advertising, assists in executing the marketing strategy under Primair's direction, and provides evaluations of the effectiveness of various elements of the marketing strategy. As compensation for providing these marketing support activities, Company S receives from Primair a service fee based on the level of marketing expenditure it incurs and including an appropriate profit element.

23. Assume for the purpose of this example that, based upon a thorough comparability analysis, including a detailed functional analysis, it is possible to conclude that the price Company S pays Primair for the R watches should be analysed separately from the compensation Company S receives for the marketing it undertakes on behalf of Primair. Assume further that based upon identified comparable transactions, the price paid for the watches is arm's length and that this price enables Company S to earn an arm's length level of compensation from selling the watches for the distribution function it performs, the assets it uses and the risks it assumes.

24. In Years 1 to 3, Company S embarks on a strategy that is consistent with its agreement with Primair to develop the country Y market for R watches. In the process, Company S incurs marketing expenses. Consistent with the contract, Company S is reimbursed by Primair for the marketing expenses it incurs, and is paid a mark-up on those expenses. By the end of Year 2, the R trademark and trade name have become well established in country Y. The compensation derived by Company S for the marketing activities it performed on behalf of Primair is determined to be arm's length, based upon comparison to that paid to independent advertising and marketing agents identified and determined to be comparable as part of the comparability analysis.

25. Under these circumstances, Primair is entitled to retain any income derived from exploiting the R trademark and trade name in the country Y market that exceeds the arm's length compensation to Company S for its functions and no transfer pricing adjustment is warranted under the circumstances.

Example 9

26. The facts in this example are the same as in Example 8, except as follows:

- Under the contract between Primair and Company S, Company S is now obligated to develop and execute the marketing plan for country Y without detailed control of specific elements of the plan by Primair. Company S bears the costs and assumes certain of the risks associated with the
根据这份协议，S公司取得五年内标注R商标的手表在Y国的独家营销与分销权，以及在Y国使用R商标的独家使用权。另外，该协议还可以选择续签五年。除上述权利之外，S公司并未从Primair取得与R商标和商号相关的其他权利，并且S公司不得将标注R商标和商号的手表再次出口。S公司仅有的业务就是推广和分销使用R商标和商号的手表。假设R品牌手表不是S公司在Y国销售的产品组合的一部分，由于进口到Y国的手表包装完整，可以直接销售给终端消费者，所以S公司不需要对手表进行任何二次加工。

22. 根据Primair和S公司签订的协议，S公司以Y国货币向Primair购买手表，取得手表的所有权并在Y国进行分销，承担相关的成本（例如，存货和应收账款）和相应的风险（例如，存货、应收账款融资的风险）。根据Primair和S公司签订的协议，S公司要作为销售代理在Y国协助开发R品牌手表的市场。S公司将会向Primair询问R手表在Y国的市场开发战略。Primair主要依据在其他国家的经验制定整体市场推广计划，然后编制和批准市场推广预算，最后决定广告设计、产品定位和核心的广告词。S公司就本地市场销售情况提供咨询意见，再由Primair的指导下执行市场战略，并对市场战略中各因素的有效性加以评估。作为对上述市场推广和交易工作的补偿，S公司向Primair收取一笔服务费。该服务费通过实际发生的市场推广费加成适当的利润率计算得出。

23. 假设在本案例中，通过全面的可比性分析（包括详细的功能分析）可能得出这样的结论，S公司购买R品牌手表支付给Primair的价款应该与S公司代表Primair做市场推广而收取的服务费分开分析。此外，假设根据以往的可比收益率，购买手表的价格应该符合独立交易原则，且该价格使得S公司从销售该手表中获取了与其履行的分销功能、使用的资产及承担的风险相匹配的且符合独立交易原则的补偿。

24. 在第一至三年，S公司主要依据与Primair的协议向Y国市场推广R手表。在此过程中，S公司发生的相应的市场推广费用。依据协议，S公司向Primair收取了发生的市场推广费用，并在此基础上加以一定利润，到第二年底，R商标和商号已经在Y国打响了知名度。作为可比分析的一部分，通过与选取的可比的独立广告和市场推广代理商收取的报酬进行比较，确定S公司为Primair开展的市场推广活动所取得的补偿符合独立交易原则。

25. 上述情况下，在扣除与S公司功能相符的独立交易补偿后，S公司R商标和商号在Y国市场所获取的销售收入应全部归属于Primair，这样的情况无需进行转让定价调整。

案例9

26. 本案例事实部分和案例8相同，但以下情况有所不同：

- 根据Primair和S公司签订协议，S公司负责开发和执行Y国的市场推广方案，此过程中Primair并不对方案细节提供具体指导。而且S公司承担市场推广活动的相应费用以及与市场推广活动相关的风险。
marketing activities. The agreement between Primair and Company S does not specify the amount of marketing expenditure Company S is expected to incur, only that Company S is required to use its best efforts to market the watches. Company S receives no direct reimbursement from Primair in respect of any expenditure it incurs, nor does it receive any other indirect or implied compensation from Primair, and Company S expects to earn its reward solely from its profit from the sale of R branded watches to third party customers in the country Y market.

A thorough functional analysis reveals that Primair exercises a lower level of control over the marketing activities of Company S than in Example 8 in that it does not review and approve the marketing budget or design details of the marketing plan. Company S bears different risks and is compensated differently than was the case in Example 8. The contractual arrangements between Primair and Company S are different and the risks assumed by Company S are greater in Example 9 than in Example 8. Company S does not receive direct cost reimbursements or a separate fee for marketing activities. The only controlled transaction between Primair and Company S in Example 9 is the transfer of the branded watches. As a result, Company S can obtain its reward for its marketing activities only through selling R branded watches to third party customers.

- As a result of these differences, Primair and Company S adopt a lower price for watches in Example 9 than the price for watches determined for purposes of Example 8. As a result of the differences identified in the functional analysis, different criteria are used for identifying comparables and for making comparability adjustments than was the case in Example 8. This results in Company S having a greater anticipated total profit in Example 9 than in Example 8 because of its higher level of risk and its more extensive functions.

27. Assume that in Years 1 through 3, Company S embarks on a strategy that is consistent with its agreement with Primair and, in the process, performs marketing functions and incurs marketing expenses. As a result, Company S has high operating expenditures and slim margins in Years 1 through 3. By the end of Year 2, the R trademark and trade name have become established in country Y because of Company S's efforts. Where the marketer/distributor actually bears the costs and associated risks of its marketing activities, the issue is the extent to which the marketer/distributor can share in the potential benefits from those activities. Assume that the inquiries of the country Y tax administrations conclude, based on a review of comparable distributors, that Company S would have been expected to have performed the functions it performed and incurred its actual level of marketing expense if it were independent from Primair.

28. Given that Company S performs the functions and bears the costs and associated risks of its marketing activities under a long-term contract of exclusive distribution rights for the R watches, there is an opportunity for Company S to benefit (or suffer a loss) from the marketing and distribution activities it undertakes. Based on an analysis of reasonably reliable comparable data, it is concluded that, for purposes of this example, the benefits obtained by Company S result in profits similar to those made by independent marketers and distributors bearing the same type of risks and costs as Company S in the first few years of comparable long-term marketing and distribution agreements for similarly unknown products.

29. Based on the foregoing assumptions, Company S's return is arm's length and its marketing activities, including its marketing expenses, are not significantly different than those performed by independent marketers and distributors in comparable uncontrolled transactions. The information on comparable uncontrolled arrangements provides the best measure of the arm's length return earned by Company S for the contribution to intangible value provided by its functions, risks, and costs. That return therefore reflects arm's length compensation for Company S's contributions and accurately measures its share of the income derived from exploitation of the trademark and trade name in country Y. No separate or additional compensation is required to be provided to Company S.
双方签订的协议没有明确 S 公司承担市场推广费用的金额，只规定了 S 公司应尽最大努力对手表进行宣传。S 公司的市场推广费用既无法从 Primair 直接获得，也无法从 Primair 获得间接或其他形式的补偿。S 公司只能通过在 Y 国市场向第三方顾客销售 R 品牌手表的收益中获取补偿。经过全面的分析表明，由于 Primair 并未审核或批准市场方案的预算或者制定市场推广方案的具体内容，所以 Primair 对 S 公司市场推广活动的控制程度要比案例 8 中的程度低。此外，S 公司承担的风险及其获得补偿的方式也与案例 8 中不同。双方所签协议的具体安排也不同。而且在案例 9 中，S 公司所承担的风险比案例 8 中更大。Primair 并不承担 S 公司市场推广活动所产生的费用；S 公司也没有另行收取市场推广服务费。双方之间的协议是受控交易是案例 9 中的典型例子。因此 S 公司只能通过将 R 品牌手表销售给第三方顾客所获得的报酬来补偿其市场推广活动。

- 基于这些不同，Primair 和 S 公司在本案例中的行为和案例 8 中的价格低。尽管在功能分析中识别出的两个案例的差异，本案例需要采用与案例 8 不同的标准预期可比企业以及适用的可比性规则。案例 9 中，由于 S 公司承担更高的风险及具备更全面的功能，因此其预期可获得的利润比案例 8 中更多。

27. 假设从第 1 年到第 3 年，S 公司根据与 Primair 签订的协议制定了战略计划，在实施过程中执行了市场推广功能并承担了相关费用。因此，S公司在前三年产生了大量的运营成本，利润水平也较低。到第 2 年年底时，S 公司通过努力使 R 商标和品牌在 Y 国市场所认可。尽管营销商/分销商实际承担营销活动的成本和相应的风险，但问题在于营销商/分销商可以在多大程度上分享这些营销活动的潜在收益。假设 Y 国税务机关在调查中，通过对可比分销商的分析，得出的结论是 S 公司所履行的功能以及相应的市场推广费用水平与假设 S 公司与 Primair 没有关联关系的情况下大致一致的。

28. 根据 S 公司签订的 R 手表长期独占分销权协议，如果 S 公司履行相应的功能，承担相应的成本和风险，就有机会从市场推广和分销活动中获益或承担损失。假设，根据合理可靠的可比数据分析得结论，承担相同类型的类似风险和成本的独立营销商和分销商，在签订类似不知名产品的可比长期市场推广和分销协议后的几内年，S 公司所获取的收益与其是类似的。

29. 根据前面的假设条件，S 公司所获取的收益体现了独立交易原则，且 S 公司的市场推广活动（包含承担的相应费用）与独立营销商和分销商在可比非受控交易中所做的没有明显区别。可比非受控交易的相关信息，为 S 公司通过其承担的功能、风险和成本对无形资产价值的贡献所获取的独立交易收益提供了最好的衡量标准。因此，这一收益体现了对 S 公司所做贡献的符合独立交易原则的合理补偿，同时也准确反映了 S 公司在 Y 国应用商标和品牌所应获得的收入，所以无须再向 S 公司支付单独的或额外的补偿。
Example 10

30. The facts in this example are the same as in Example 9, except that the market development functions undertaken by Company S in this Example 10 are far more extensive than those undertaken by Company S in Example 9.

31. Where the marketer/distributor actually bears the costs and assumes the risks of its marketing activities, the issue is the extent to which the marketer/distributor can share in the potential benefits from those activities. A thorough comparability analysis identifies several uncontrolled companies engaged in marketing and distribution functions under similar long-term marketing and distribution arrangements. Assume, however, that the level of marketing expense Company S incurred in Years 1 through 5 far exceeds that incurred by the identified comparable independent marketers and distributors. Assume further that the high level of expense incurred by Company S reflects its performance of additional or more intensive functions than those performed by the potential comparables and that Primair and Company S expect those additional functions to generate higher margins or increased sales volume for the products. Given the extent of the market development activities undertaken by Company S, it is evident that Company S has made a larger functional contribution to development of the market and the marketing intangibles and has assumed significantly greater costs and assumed greater risks than the identified potentially comparable independent enterprises (and substantially higher costs and risks than in Example 9). There is also evidence to support the conclusion that the profits realised by Company S are significantly lower than the profit margins of the identified potentially comparable independent marketers and distributors during the corresponding years of similar long-term marketing and distribution agreements.

32. As in Example 9, Company S bears the costs and associated risks of its marketing activities under a long-term contract of exclusive marketing and distribution rights for the R watches, and therefore expects to have an opportunity to benefit (or suffer a loss) from the marketing and distribution activities it undertakes. However, in this case Company S has performed functions and borne marketing expenditures beyond what independent enterprises in potentially comparable transactions with similar rights incur for their own benefit, resulting in significantly lower profit margins for Company S than are made by such enterprises.

33. Based on these facts, it is evident that by performing functions and incurring marketing expenditure substantially in excess of the levels of function and expenditure of independent marketer/distributors in comparable transactions, Company S has not been adequately compensated by the margins it earns on the resale of R watches. Under such circumstances it would be appropriate for the country Y tax administration to propose a transfer pricing adjustment based on compensating Company S for the marketing activities performed (taking account of the risks assumed and the expenditure incurred) on a basis that is consistent with what independent enterprises would have earned in comparable transactions. Depending on the facts and circumstances reflected in a detailed comparability analysis, such an adjustment could be based on:

- Reducing the price paid by Company S for the R brand watches purchased from Primair. Such an adjustment could be based on applying a resale price method or transactional net margin method using available data about profits made by comparable marketers and distributors with a comparable level of marketing and distribution expenditure if such comparables can be identified.

- An alternative approach might apply a residual profit split method that would split the combined profits from sales of R branded watches in country Y by first giving Company S and Primair a basic return for the functions they perform and then splitting the residual profit on a basis that takes into account the relative contributions of both Company S and Primair to the generation of income and the value of the R trademark and trade name.
案例 10

30. 本案例中，S 公司承担的市场开发功能远比案例 9 中的更加广泛。其他具体情况与案例 9 相同。

31. 尽管营销商或分销商实际承担市场推广活动的成本和相应风险，但问题在于营销商或分销商可以在很大程度上分享这些活动的潜在收益。通过全面的可比性分析，找出了几个在类似长期的营销和分销安排下从事营销和分销功能的独立企业。假定在第 1 年到第 5 年，S 公司承担的市场推广费用远远超过上述可比独立营销商和分销商。进一步假定，S 公司发生的较高费用是由于其潜在可比企业履行了更多或者更广泛的市场推广功能，并且 Primair 和 S 公司期望这些额外的活动可以带来更高的盈利回报或提高产品的销量。鉴于 S 公司开展市场开发活动的强度，与选取的潜在可比独立企业相比，S 公司显然对市场开发和营销投入资源做出了更大的功能贡献，也承担了更多的成本和更高的风险（明显高于案例 9 中的成本和风险）。此外，也有证据表明在相同年度，S 公司实现的盈利水平远低于所选潜在可比独立营销商和分销商在类似的长期营销和分销协议下实现的利润率。

32. 在案例 9 中，依据 R 手表长期的独家推广和分销协议，S 公司承担其市场推广活动的成本和相应的风险，并有机会可以从这些活动中获取收益（或者承受损失）。但在本案例中，S 公司执行的功能和承担的市场推广费用超过独立企业在具有类似授权的可比交易中为其自身利益所承担的功能和费用，从而使 S 公司的利润率远低于上述企业。

33. 基于这些事实，由于 S 公司执行的功能和承担的市场推广费用明显超过独立营销商或分销商在可比交易中承担的功能和费用，S 公司显然没有从销售 R 手表所赚取的利润中得到足够的补偿。在这种情况下，Y 国的税务机关依据独立企业在可比交易中获取的利润，提对 S 公司实施的市场推广活动（考虑承担的风险和发生的费用）所获取的补偿进行转让定价调整是恰当的。依据可比性的可比性分析所反映的实际情况，可以采用的调整方案包括：

- **降低 S 公司向 Primair 采购 R 品牌手表的价格。** 如果能够找到合适的可比信息，那么基于可比营销商和分销商在可比的市场推广和分销费用水平下产生的利润，可以运用可销售价格法或者交易净利润法对其进行调整。

- **另一个可选的方法是运用剩余利润分割法对 R 品牌手表在 Y 国的销售利润进行分割。** 首先依据 S 公司和 Primair 执行的功能按分别给予常规利润，然后再依据 S 公司和 Primair 对取得收入及其 R 商标和商号创造的价值所做的贡献程度对剩余利润进行分割。
Directly compensating Company S for the excess marketing expenditure it has incurred over and above that incurred by comparable independent enterprises including an appropriate profit element for the functions and risks reflected by those expenditures.

34. In this example, the proposed adjustment is based on Company S’s having performed functions, assumed risks, and incurred costs that contributed to the development of the marketing intangibles for which it was not adequately compensated under its arrangement with Primair. If the arrangements between Company S and Primair were such that Company S could expect to obtain an arm’s length return on its additional investment during the remaining term of the distribution agreement, a different outcome could be appropriate.

Example 11

35. The facts in this example are the same as in Example 9, except that Company S now enters into a three-year royalty-free agreement to market and distribute the watches in the country Y market, with no option to renew. At the end of the three-year period, Company S does not enter into a new contract with Primair.

36. Assume that it is demonstrated that independent enterprises do enter into short-term distribution agreements where they incur marketing and distribution expenses, but only where they stand to earn a reward commensurate with the functions performed, the assets used, and the risks assumed within the time period of the contract. Evidence derived from comparable independent enterprises shows that they do not invest large sums of money in developing marketing and distribution infrastructure where they obtain only a short-term marketing and distribution agreement, with the attendant risk of non-renewal without compensation. The potential short-term nature of the marketing and distribution agreement is such that Company S could not, or may not be able to, benefit from the marketing and distribution expenditure it incurs at its own risk. The same factors mean that Company S’s efforts may well benefit Primair in the future.

37. The risks assumed by Company S are substantially higher than in Example 9 and Company S has not been compensated on an arm’s length basis for bearing these additional risks. In this case, Company S has undertaken market development activities and borne marketing expenditures beyond what comparable independent enterprises with similar rights incur for their own benefit, resulting in significantly lower profit margins for Company S than are made by comparable enterprises. The short term nature of the contract makes it unreasonable to expect that Company S has the opportunity of obtaining appropriate benefits under the contract within the limited term of the agreement with Primair. Under these circumstances, Company S is entitled to compensation for its at risk contribution to the value of the R trademark and trade name during the term of its arrangement with Primair.

38. Such compensation could take the form of direct compensation from Primair to Company S for the anticipated value created through the marketing expenditures and market development functions it has undertaken. Alternatively, such an adjustment could take the form of a reduction in the price paid by Company S to Primair for R watches during Years 1 through 3.

Example 12

39. The facts in this example are the same as in Example 9 with the following additions:

- By the end of Year 3, the R brand is successfully established in the country Y market and Primair and Company S renegotiate their earlier agreement and enter into a new long-term licensing agreement. The new agreement, which is to commence at the beginning of Year 4, is for five
直接补偿 S 公司实际发生的市场推广费用超过可比独立企业所发生的部分，并加上与所履行的功能和承担的风险相符合的适当利润。

34. 在本案例中，建议调整的依据是根据 S 公司与 Primair 签订的协议，S 公司在推广无形资产过程所履行的功能、承担的风险和收入的成本并没有得到足够的补偿。如果 S 公司和 Primair 的协议规定在分销协议的剩余期限内，S 公司因额外投入可以获得符合独立交易原则的回报，那么结论会有所不同。

案例 11

35. 本案例与案例 9 的背景基本相同，所不同的是 S 公司针对在 Y 国进行市场推广及分销此手表所签署的免费许可协议为期三年，并且期满不能续约。三年协议结束后，S 公司未与 Primair 签署新协议。

36. 假设已经证明独立企业确实会签署承担市场推广和分销费用的短期分销协议，但前提是能保证在合同期内获得与之履行的功能、使用的资产及承担的风险相匹配的补偿。可比独立企业分析显示，如果企业仅仅签订了一份短期分销协议，而且期满不得续约也无要求就续约而获得补偿，他们就不会在市场推广与分销活动中投入巨额资金。市场推广与分销协议的短期性质使得 S 公司不能或者可能无法在投入资金并自担风险从事的市场推广及分销活动中获益。同时，这也意味着 Primair 未来能从 S 公司的投入中获得更多的好处。

37. 在本案例中，S 公司所承担的风险远大于其在案例 9 中的风险，而且 S 公司并未因承担额外风险而获得符合独立交易原则的补偿。也就是说，S 公司承担了超过可比独立企业所承担的市场推广功能和市场营销费用，导致 S 公司的利润率远低于可比企业。S 公司与 Primair 的分销协议过期，使 S 公司无法在短期内获得合理的预期回报。在这种情况下，S 公司应当在其与 Primair 的分销协议期内将其相应的补偿，弥补其对 R 商标及商号价值所作的贡献和所承担的风险。

38. 补偿可以有两种形式：可以根据 S 公司支出的市场营销费用及承担的市场推广功能所预计创造的价值，直接由 Primair 补偿给 S 公司；也可以降低合约执行期间一年至三年中 S 公司向 Primair 支付的产品采购价格。

案例 12

39. 本案例的情况与案例 9 的背景基本相同，但还有以下的情况：
years with Company S having an option for a further five years. Under this agreement, Company S agrees to pay a royalty to Primair based on the gross sales of all watches bearing the R trademark. In all other respects, the new agreement has the same terms and conditions as in the previous arrangement between the parties. There is no adjustment made to the price payable by Company S for the branded watches as a result of the introduction of the royalty.

- Company S's sales of R brand watches in Years 4 and 5 are consistent with earlier budget forecasts. However, the introduction of the royalty from the beginning of year 4 results in Company S's profit margins declining substantially.

40. Assume that there is no evidence that independent marketers/distributors of similar branded products have agreed to pay royalties under similar arrangements. Company S's level of marketing expenditure and activity, from Year 4 on, is consistent with that of independent enterprises.

41. For transfer pricing purposes, it would not generally be expected that a royalty would be paid in arm's length transactions where a marketing and distribution entity obtains no rights for transfer pricing purposes in trademarks and similar intangibles other than the right to use such intangibles in distributing a branded product supplied by the entity entitled to the income derived from exploiting such intangibles. Furthermore, the royalty causes Company S's profit margins to be consistently lower than those of independent enterprises with comparable functions performed, assets used and risks assumed during the corresponding years of similar long-term marketing and distribution arrangements. Accordingly, a transfer pricing adjustment disallowing the royalties paid would be appropriate based on the facts of this example.

Example 13

42. The facts in this example are the same as those set out in Example 10 with the following additions:

- At the end of Year 3, Primair stops manufacturing watches and contracts with a third party to manufacture them on its behalf. As a result, Company S will import unbranded watches directly from the manufacturer and undertake secondary processing to apply the R name and logo and package the watches before sale to the final customer. It will then sell and distribute the watches in the manner described in Example 10.

- As a consequence, at the beginning of Year 4, Primair and Company S renegotiate their earlier agreement and enter into a new long term licensing agreement. The new agreement, to start at the beginning of Year 4, is for five years, with Company S having an option for a further five years.

- Under the new agreement, Company S is granted the exclusive right within country Y to process, market and distribute watches bearing the R trademark in consideration for its agreement to pay a royalty to Primair based on the gross sales of all such watches. Company S receives no compensation from Primair in respect of the renegotiation of the original marketing and distribution agreement. It is assumed for purposes of this example that the purchase price Company S pays for the watches from the beginning of Year 4 is arm's length and that no consideration with respect to the R name is embedded in that price.

43. In connection with a tax audit conducted by country Y tax administrations in Year 6, it is determined, based on a proper functional analysis, that the level of marketing expenses Company S incurred during Years 1 through 3 far exceeded those incurred by independent marketers and distributors with similar long term marketing and distribution agreements. It is also determined that the level and intensity of marketing activity undertaken by Company S exceeded that of independent marketers and
在第三年年末，R品牌已经在Y国市场成功推广。Primair与S公司重新商谈，并重新签订了一份长期许可协议。此协议会在第四年年初开始执行。为期五年，期满后S公司有权再续约五年。根据该新协议，S公司将按R品牌手表销售额的一定比例向Primair支付特许权使用费。除此之外，此份新协议的其他条款/条件与之前的短期协议相同。而且，虽然引入了特许权使用费安排，但S公司采购此品牌手表的价格不变。

在第四至第五年，S公司销售R品牌手表的销售额与之前的预算一致。然而，由于S公司从第四年开始支付特许权使用费，导致S公司利润率大幅度下降。

40. 假设有证据表明类似品牌产品的独立市场营销商和分销商同意在类似安排下支付特许权使用费。从第四年开始，S公司市场营销支出及活动水平与独立企业相一致。

41. 从转让定价角度来看，如果一家从事市场推广与分销的企业并未取得对商标或其他无形资产的权利，且有权在分销某品牌产品时使用那些无形资产，而产品是由享有无形资产收益的一方提供的。那么在独立交易中通常不会支付特许权使用费。此外，支付特许权使用费会导致S公司的利润率长年远低于签订类似长期市场推广与分销协议。在功能履行、资产使用及风险承担方面都具有可比性的独立企业的利润率。因此，基于本案例的情况，对支付的特许权使用费不予认可是一种合理的转让定价调整方式。

案例13

44. 本案例的情况与案例10的背景基本相同，但还有以下的情况：

- 在第三年年末，Primair停止生产手表，而是委托第三方以自己的名义进行生产。S公司从此受托生产商直接进口不贴牌手表，进行二次加工贴上R商标标识，并对产品进行包装，然后销售给最终消费者。S公司销售及分销此产品的模式与案例10相同。

- 鉴于以上情况，在第四年年初，Primair与S公司重新商谈并签署了一份长期许可协议。新协议自第四年初开始生效，为期五年。S公司有权在期满后续约五年。

- 根据新协议，S公司被授予在Y国对R品牌手表进行加工、市场推广及分销的独家经营权，并按该品牌手表销售额的一定比例向Primair支付特许权使用费。在与Primair签订市场推广与分销协议时，S公司不会向Primair支付任何补偿。在本案例中，假设S公司于第四年年初起，向手表生产商支付的手表采购价格符合独立交易原则，采购价格不包括与使用R的商标相关的对价。

43. Y国税务机关在第六年对S公司进行了税务审计。根据适当的功能分析，税务机关认为S公司在第一至第三年间发生的市场推广费用超过签订类似长期市场推广与分销协议的独立市场营销商及分销商所发生的费用水平。
distributors, and that the relatively greater activity has been successful in expanding volumes and/or increasing the Primair group's overall margins from sales in country Y. Given the extent of the market development activities undertaken by Company S, including its strategic control over such activities, it is evident from the comparability and functional analysis that Company S has assumed significantly greater costs and assumed greater risks than comparable independent enterprises. There is also evidence that the individual entity profit margins realised by Company S are significantly lower than the profit margins of comparable independent marketers and distributors during the corresponding years of similar long-term marketing and distribution arrangements.

44. The country Y audit also identifies that in Years 4 and 5, Company S bears the costs and associated risks of its marketing activities under the new long-term licensing arrangement with Primair, and because of the long-term nature of the agreement, Company S may have an opportunity to benefit (or suffer a loss) from its activities. However, Company S has undertaken market development activities and incurred marketing expenditure far beyond what comparable independent licensees with similar long-term licensing agreements undertake and incur for their own benefit, resulting in significantly lower anticipated profit margins for Company S than those of comparable enterprises.

45. Based on these facts, Company S should be compensated with an additional return for the market development functions it performs, the assets it uses and the risks it assumes. For Years 4 through 5, the possible bases for such an adjustment would be as described in Example 10. For Years 4 and 5 the bases for an adjustment would be similar, except that the adjustment could reduce the royalty payments from Company S to Primair, rather than the purchase price of the watches. Depending on the facts and circumstances, consideration could also be given to whether Company S should have received compensation in connection with the renegotiation of the arrangement at the end of Year 5 in accordance with the guidance in Part II of Chapter IX.

Example 14

46. Shuyona is the parent company of an MNE group. Shuyona is organised in and operates in country X. The Shuyona group is involved in the production and sale of consumer goods, in order to maintain and, if possible, improve its market position, ongoing research is carried out by the Shuyona group to improve existing products and develop new products. The Shuyona group maintains two R&D centres, one operated by Shuyona in country X and the other operated by Company S, a subsidiary of Shuyona operating in country Y. The Shuyona R&D centre is responsible for the overall research programme of Shuyona group. The Shuyona R&D centre designs research programmes, develops and controls budgets, makes decisions as to where R&D activities will be conducted, monitors the progress on all R&D projects and, in general, controls the R&D function for the MNE group, operating under strategic direction of Shuyona group senior management.

47. The Company S R&D centre operates on a separate project by project basis to carry out specific projects assigned by the Shuyona R&D centre. Suggestions of Company S R&D personnel for modifications to the research programme are required to be formally approved by the Shuyona R&D centre. The Company S R&D centre reports on its progress on at least a monthly basis to supervisory personnel at the Shuyona R&D centre. If Company S exceeds budgets established by Shuyona for its work, approval of Shuyona R&D management must be sought for further expenditures. Contracts between the Shuyona R&D centre and the Company S R&D centre specify that Shuyona will bear all risks and costs related to R&D undertaken by Company S. All patents, designs and other intangibles developed by Company S are registered by Shuyona, pursuant to contracts between the two companies. Shuyona pays Company S a service fee for its research and development activities.
同时，S公司开展市场推广活动的频率及强度也远高于其他独立营销商及分销商。Primair集团在Y国扩大销售量和（或）在向Y国销售中为集团取得更高的整体利润与这些高密度的市场活动是分不开的。可比性分析及功能分析表明，根据S公司开展的市场推广活动程度（包括其对这些市场活动的战略控制程度），S公司承担了相对于可比公司更高的运营成本及更大的风险。同时有数据显示，S公司在该新协议期间实现的利润率远低于签订类似长期市场推广和销售协议的可比独立营销商及分销商的利润率。

44. Y国税务机关的税务调查发现，根据新签订的长期协议，S公司在第四年及第五年承担了其进行市场营销活动相关的成本及风险，并有机会从这些活动中受益（或产生亏损）。然而，与签订了类似长期许可协议并为其本身利益而开展市场推广活动的可比独立企业相比，S公司开展了更多的市场推广活动并发生了更多的市场营销支出，从而导致S公司的预期利润率远低于可比企业。

45. 因此，以上情况，S公司应当就其履行的市场推广功能、使用的资产及承担的风险获得额外补偿。可按案例10所述的方案对第一至第三年进行转让定价调整。对第四年及第五年的转让定价调整方法也类似，只是调整方法可以考虑减少S公司支付给Primair的特许权使用费，而非降低手表产品的采购价格。另外，根据案例的研究结论，还应根据第九章第二部分的指导原则考虑S公司是否应当就其在第三年年末重新谈判协议而取得补偿。

案例14

46. Shuyona为某一跨国企业集团的母公司。Shuyona公司设立于X国并在X国开展经营活动。Shuyona集团的业务是生产及销售消费品。为了保持并尽可能提高公司的市场地位，Shuyona公司在现有产品的价值提升及新产品的开发一直进行研究。Shuyona集团设立了两个研发中心，其中一处由设立在X国的Shuyona公司运营（以下简称“Shuyona研发中心”），另外一处则由设立在Y国的Shuyona公司的子公司S公司运营（以下简称“S公司研发中心”）。Shuyona研发中心负责集团的整体研究项目，包括研究项目设计、预算制定及控制、研发领域决策、所有研发项目的进度监控，以及集团研发中心的建设。每个研发中心的运营由Shuyona集团高级管理层负责战略领导。

47. S公司研发中心以项目为单位，执行由Shuyona研发中心分配的研发任务。S公司研发中心人员对研究项目的修改意见须得到Shuyona研发中心的正式批准。S公司研发中心至少每月向Shuyona研发中心的管理人员报告项目进度。如果S公司的项目开支超过Shuyona公司制定的预算，超出部分须申请Shuyona研发中心管理层的批准。Shuyona研发中心与S公司研发中心签订的合同明确规定，Shuyona公司将承担所有S公司研发项目的风险及成本。根据双方签订的合同，所有S公司研究人员开发的专利、设计及无形资产都将归在Shuyona公司名下。
48. The transfer pricing analysis of these facts would begin by recognising that Shuyona is the legal owner of the intangibles. Shuyona controls and manages both its own R&D work and that of Company S. It performs the important functions related to that work such as budgeting, establishing research programmes, designing projects and funding and controlling expenditures. Under these circumstances, Shuyona is entitled to returns derived from the exploitation of the intangibles developed through the R&D efforts of Company S. Company S is entitled to compensation for its functions performed, assets used, and risks assumed. In determining the amount of compensation due Company S, the relative skill and efficiency of the Company S R&D personnel, the nature of the research being undertaken, and other factors contributing to value should be considered as comparability factors. To the extent transfer pricing adjustments are required to reflect the amount a comparable R&D service provider would be paid for its services, such adjustments would generally relate to the year the service is provided and would not affect the entitlement of Shuyona to future returns derived from exploiting intangibles derived from the Company S R&D activities.

Example 15

49. Shuyona is the parent company of an MNE group. Shuyona is organised in and operates exclusively in country X. The Shuyona group is involved in the production and sale of consumer goods. In order to maintain and, if possible, improve its market position, ongoing research is carried out by the Shuyona group to improve existing products and develop new products. The Shuyona group maintains two R&D centres, one operated by Shuyona in country X, and the other operated by Company S, a subsidiary of Shuyona, operating in country Y.

50. The Shuyona group sells two lines of products. All R&D with respect to product line A is conducted by Shuyona. All R&D with respect to product line B is conducted by the R&D centre operated by Company S. Company S also functions as the regional headquarters of the Shuyona group in North America and has global responsibility for the operation of the business relating to product line B. However, all patents developed through Company S research efforts are registered by Shuyona. Shuyona makes no or only a nominal payment to Company S in relation to the patentable inventions developed by the Company S R&D centre.

51. The Shuyona and Company S R&D centres operate autonomously. Each bears its own operating costs. Under the general policy direction of Shuyona senior management, the Company S R&D centre develops its own research programmes, establishes its own budgets, makes determinations as to when R&D projects should be terminated or modified, and hires its own R&D staff. The Company S R&D centre reports to the product line B management team in Company S, and does not report to the Shuyona R&D centre. Joint meetings between the Shuyona and Company S R&D teams are sometimes held to discuss research methods and common issues.

52. The transfer pricing analysis of this fact pattern would begin by recognising that Shuyona is the legal owner / registrant of intangibles developed by Company S. Unlike the situation in Example 14, however, Shuyona neither performs nor exercises control over the research functions carried out by Company S, including the important functions related to management, design, budgeting and funding that research. Accordingly, Shuyona's legal ownership of the intangibles does not entitle it to retain or be attributed any income related to the product line B intangibles. Tax administrations could arrive at an appropriate transfer pricing outcome by recognising Shuyona's legal ownership of the intangibles but by noting that, because of the contributions of Company S in the form of functions, assets, and risks, appropriate compensation to Company S for its contributions could be ensured by confirming that Company S should make no royalty or other payment to Shuyona for the right to use any successfully developed Company S intangibles, so that the future income derived from the exploitation of those intangibles by Company S would be allocated to Company S and not to Shuyona.

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48. 针对以上情况进行转让定价分析时，首先确定 Shuyona 公司是相关无形资产的法律所有权人。Shuyona 公司控制并管理其自身以及 S 公司的研发工作，履行研发活动中的重要功能，包括制定预算、成立研究项目、设计项目、提供资金以及控制支出等。因此，Shuyona 公司有权取得利用 S 公司研发的无形资产的回报。而 S 公司有权获得与之履行的功能、使用的资产及承担的风险相匹配的补偿。在确定 S 公司的补偿金额时，S 公司研发人员的工作技能及效率、研究项目的性质，以及其他影响无形资产价值的因素都应当作为可比性因素加以考虑。如果需要进行转让定价调整以体现可比研发服务提供商可取得的服务费，该调整一般只针对服务提供年度，不会影响 Shuyona 公司未来利用 S 公司所研发的无形资产获得收益的权利。

案例 15

49. Shuyona 为某一跨国企业集团的母公司。Shuyona 公司设立于 X 国并在 X 国开展经营活动。Shuyona 集团的业务是生产及销售消费品。为了保持并尽可能提高公司的市场地位，Shuyona 集团对现有产品的改良及新产品的开发一直进行研究。Shuyona 集团设立了两处研发中心，其中一处由设立在 X 国的 Shuyona 公司运营（以下简称“Shuyona 研发中心”），另外一处则由设立在 Y 国的 S 公司运营（以下简称“S 公司研发中心”），S 公司是 Shuyona 的子公司。

50. Shuyona 集团出售两个系列产品。所有 A 系列产品的研发由 Shuyona 研发中心进行。所有 B 系列产品的研发都由 S 公司研发中心进行。S 公司同时也是 Shuyona 集团在北美地区的总部，负责全球范围内 B 系列产品的商业运营。但是，S 公司研发的所有专利成果须注册在 Shuyona 公司名下。Shuyona 公司对 S 公司研发中心开发的专利不支付或者仅象征性地向 S 公司支付费用。

51. Shuyona 研发中心及 S 公司研发中心独立运营，自行负担研发费用。根据 Shuyona 公司高级管理层制定的公司总体政策，S 公司研发中心独立开展研究项目，制定研发预算，决定研发项目的终止或者修改，并自行雇用员工为研发中心工作。S 公司研发中心的汇报对象是 S 公司 B 系列产品的管理团队，而无需向 Shuyona 研发中心进行汇报。Shuyona 公司和 S 公司研发团队有时会一起开会，讨论研究方法及常见问题。

52. 针对以上情况进行转让定价分析时，首先确认 Shuyona 公司是 S 公司研发的无形资产的法律所有权人注册人。与案例 14 中的情况不同，Shuyona 公司不会开展或者控制 S 公司的研发工作，包括管理、设计、制定预算及提供研发活动资金等重要功能。因此，Shuyona 拥有的无形资产的所有权不再使其享有与 B 系列产品无形资产相关的任何收益。据此，税务机关可以得出适当的转让定价结论，一方面确认 Shuyona 公司是无形资产的法律所有权人，但另一方面确定，由于 S 公司在功能、资产及风险等方面的贡献，对 S 公司的合理补偿可以这样实现，即 S 公司不需要使用其成功开发的无形资产的权利向 Shuyona 公司支付任何特许权使用费或其他费用。因此 S 公司未来利用这些无形资产所获得的收益也应归属于 S 公司，而不是 Shuyona 公司。
55. If Shuyona exploits the product line B intangibles by itself, Shuyona should provide appropriate compensation to Company S for its functions performed, assets used and risks assumed related to intangible development. In determining the appropriate level of compensation for Company S, the fact that Company S performs all of the important functions related to intangible development would likely make it inappropriate to treat Company S as the tested party in an R&D service arrangement.

Example 16

54. Shuyona is the parent company of an MNE group. Shuyona is organised in and operates exclusively in Country X. The Shuyona group is involved in the production and sale of consumer goods. In order to maintain and, if possible, improve its market position, ongoing research is carried out by the Shuyona group to improve existing products and develop new products. The Shuyona group maintains two R&D centres, one operated by Shuyona in Country X, and the other operated by Company S, a subsidiary of Shuyona, operating in Country Y. The relationships between the Shuyona R&D centre and the Company S R&D centre are as described in Example 14.

55. In Year 1, Shuyona sells all rights to patents and other technology related intangibles, including rights to use those intangibles in ongoing research, to a new subsidiary, Company T, organised in Country Z. Company T establishes a manufacturing facility in Country Z and begins to supply products to members of the Shuyona group around the world. For purposes of this example, it is assumed that the compensation paid by Company T in exchange for the transferred patents and related intangibles is based on a valuation of anticipated future cash flows generated by the transferred intangibles at the time of the transfer.

56. At the same time as the transfer of patents and other technology related intangibles, Company T enters into a contract research agreement with Shuyona and a separate contract research agreement with Company S. Pursuant to these agreements, Company T contractually agrees to bear the financial risk associated with possible failure of future R&D projects, agrees to assume the cost of all future R&D activity, and agrees to pay Shuyona and Company S a service fee based on the cost of the R&D activities undertaken plus a mark-up equivalent to the profit mark-up over cost earned by certain identified independent companies engaged in providing research services.

57. Company T has no technical personnel capable of conducting or supervising the research activities. Shuyona continues to develop and design the R&D programme related to further development of the transferred intangibles, to establish its own R&D budgets, to determine its own levels of R&D staffing, and to make decisions regarding whether to pursue or terminate particular R&D projects. Moreover, Shuyona continues to supervise and control the R&D activities in Company S in the manner described in Example 14.

58. The transfer pricing analysis begins by identifying the commercial or financial relations between the parties and the conditions and economically relevant circumstances attaching to those relations in order that the controlled transaction is accurately delineated under the principles of Chapter I, Section D.1. Key assumptions in this example are that Company T functions as a manufacturer and performs no activities in relation to the acquisition, development or exploitation of the intangibles and does not control risks in relation to the acquisition of the intangibles or to their further development. Instead, all development activities and risk management functions relating to the intangibles are performed by Shuyona and Company S, with Shuyona controlling the risk. A thorough examination of the transaction indicates that it should accurately be delineated as the provision of financing by Company T equating to the costs of the acquired intangibles and the ongoing development. A key assumption in this example is that, although Company T contractually assumes the financial risk and has the financial capacity to assume that risk, it does not exercise control over that risk in accordance with the principles outlined in paragraphs 6.63 and 6.64. As a result, in addition to its manufacturing reward, Company T is entitled to no more than a risk-free
53. 如果 Shuyona 公司要利用 S 公司开发的 B 系列产品相关的无形资产，Shuyona 公司应当向 S 公司就其在研发该无形资产中承担的功能、使用的资产及承担的风险支付恰当的补偿。在确定应当支付给 S 公司的补偿金额时，考虑到 S 公司承担了无形资产研发相关的所有重要功能，因此很可能不应将 S 公司视为研发服务安排转让定价分析时的被测试方。

案例 16

54. Shuyona 为某一跨国企业集团的母公司。Shuyona 公司设立于 X 国并仅在 X 国开展经营活动。Shuyona 集团的业务是生产及销售消费品。为了保持并尽可能提高公司的市场地位，Shuyona 集团对现有产品的改良及新产品的开发一直进行研究。Shuyona 集团设立了两处研发中心，一处由设立在 X 国的 Shuyona 公司运营（以下简称“Shuyona 研发中心”），另一处由设立在 Y 国的 S 公司运营（以下简称“S 公司研发中心”），S 公司是 Shuyona 公司的子公司。两个研发中心的关系参见案例 14。

55. 第一年，Shuyona 公司将其专利及相关技术无形资产的所有权利（包括将这些无形资产用于正在研发项目的权利）转让给其新设在 Z 国的子公司 T 公司。T 公司在 Z 国设立工厂并开始在全球范围内向 Shuyona 集团各成员国供应产品。本案例中，假设 T 公司为取得被转让的专利及相关无形资产权利而支付的价款是在转让时点根据被转让无形资产未来预计的现金流量计算形成。

56. 在转让专利和其他技术相关的无形资产的同时，T 公司与 Shuyona 公司及 S 公司分别签订委托研究协议。依照这两份协议，T 公司同意承担将来研发项目失败相关的财务风险以及未来所有研发活动的费用，并同意向 Shuyona 公司和 S 公司支付研发服务费。此服务费按照研发活动成本加成一定利润率确定。加成率按照选取的某些提供研发服务的独立企业的加成率确定。

57. T 公司不具备开展或监督研发活动的技术人员。因此，Shuyona 公司会继续开发并设计研发项目，包括对已受让无形资产进一步开发，并将其自身的研发预算、确定其自身的人力资源及自行决定某一研发项目的推进或者终止。此外，Shuyona 公司将如案例 14 所述，继续监督并控制 S 公司的研发活动。

58. 进行转让定价分析时，首先要确认上述活动安排中各方之间的商业或财务关系，以及与上述关系相关联的情形与经济环境，以确保按照第一章第 D.1 节的原则对上述受控交易进行准确界定。在本案例中，最关键的前提是 T 公司是一家生产商，没有在无形资产的取得、开发和利用过程中开展任何活动，也没有在无形资产的取得或者进一步开发的过程中控制相关风险。所有与无形资产有关的开发活动和风险管理功能均由 Shuyona 公司和 S 公司承担，并由 Shuyona 公司控制风险。通过对交易进行全面的审视，上述交易应被准确界定为 T 公司提供研发资金，相当于取得无形资产以及后续研发的成本。
return for its funding activities. (For further guidance see Section D.1 of Chapter I, and in particular paragraph 1.103.)

**Example 17**

59. Company A is a fully integrated pharmaceutical company engaged in the discovery, development, production and sale of pharmaceutical preparations. Company A conducts its operations in country X. In conducting its research activities, Company A regularly retains independent Contract Research Organisations to perform various R&D activities, including designing and conducting clinical trials with regard to products under development by Company A. However, such CROs do not engage in the blue sky research required to identify new pharmaceutical compounds. Where Company A does retain a CRO to engage in clinical research activities, research personnel at Company A actively participate in designing the CRO’s research studies, provide to the CRO results and information derived from earlier research, establish budgets and timelines for CRO projects, and conduct ongoing quality control with respect to the CRO’s activities. In such arrangements, CROs are paid a negotiated fee for services and do not have an ongoing interest in the profits derived from sales of products developed through their research.

60. Company A transfers patents and related intangibles related to Product M, an early stage pharmaceutical preparation believed to have potential as a treatment for Alzheimer’s disease to Company S, a subsidiary of Company A operating in country Y (the transaction relates strictly to the existing intangibles and does not include compensation for future R & D services of Company A). It is assumed for purposes of this example that the payment of Company S for the transfer of intangibles related to Product M is based on a valuation of anticipated future cash flows. Company S has no technical personnel capable of designing, conducting or supervising required ongoing research activities related to Product M. Company S therefore contracts with Company A to carry out the research programme related to Product M in the same manner as before the transfer of intangibles to Company S. Company S agrees to fund all of the ongoing Product M research, assume the financial risk of potential failure of such research, and to pay for Company A’s services based on the cost plus margins earned by CROs like those with which Company A regularly transacts.

61. The transfer pricing analysis of these facts begins by recognising that, following the transfer, Company S is the legal owner of the Product M intangibles under relevant contracts and registrations. However, Company A continues to perform and control functions and to manage risks related to the intangibles owned by Company S, including the important functions described in paragraph 6.56, and is entitled to compensation for those contributions. Under these circumstances, Company A’s transactions with CRO’s are not comparable to the arrangements between Company S and Company A related to Product M and may not be used as a benchmark for the arm’s length compensation required to be provided to Company A for its ongoing R&D activity with respect to the Product M intangibles. Company S does not perform or control the same functions or control the same risks in its transactions with Company A, as does Company A in its transactions with the CROs.

62. While Company S is the legal owner of the intangibles, it should not be entitled to all of the returns derived from the exploitation of the intangibles. Because Company S lacks the capability to control research related risks, Company A should be treated as bearing a substantial portion of the relevant risk and Company A should also be compensated for its functions, including the important functions described in paragraph 6.56. Company A should be entitled to larger returns than the CROs under these circumstances.

63. A thorough examination of the transaction in this example may show that it should accurately be delineated as the provision of financing by Company S equating to the costs of the acquired intangibles and the ongoing development. As a result, Company S is entitled to only a financing return. The level of the
该案例设定的一个关键假设是尽管 T 公司根据合同约定承担财务风险并具备承担风险的能力，但 T 公司并没有按照本指南第 6.63、6.64 段所述的规则对风险实施控制。鉴于此，除非履行生产功能获得的回报外，T 公司仅能获得一个无风险的出资回报（参见第一章第 D.1 节，特别是第 1.103 段的内容）。

案例 17

59. A 公司是一家综合性制药公司，主要从事医药制剂发明、研发、生产和销售。A 公司在 Y 国开展经营活动。A 公司通常委托独立研究机构开展各项研发活动，包括针对 A 公司正在开发的产品设计与执行临床试验。不过，这类受托研究机构并不参与新药化合物的初步研究。A 公司选择受托研究机构进行临床试验活动时，A 公司的研发人员会积极参与相关的研发的设计，并向受托研究机构提供早期研发的成果及相关信息，同时为受托研究机构的项目制定预算和时间安排，并进行持续的质量控制。针对上述安排，A 公司向受托研究机构支付约定的服务费，受托研究机构并不从其研发的相应产品销售额中分享利润。

60. A 公司将 M 产品的专利权和相关的无形资产转让给 S 公司，M 产品是一种有望治疗阿尔兹海默症的初期药剂。S 公司是 A 公司在 Y 国运营的子公司（该交易仅涉及现有的无形资产，不涵盖 A 公司未来研发服务的相关补偿）。本案例假设，S 公司就 M 产品相关的无形资产转让交易所支付的对价根据无形资产的预计未来现金流量计算形成。S 公司没有可以从事设计、执行或监督 M 产品研发活动的技术人员。因此，S 公司与 A 公司签订合同，由 A 公司继续执行无形资产转让之后的 M 产品相关的后续研发活动。S 公司同意向 M 产品研发相关的研究费用及与研发失败相关的财务风险，并按照成本加成支付给 A 公司服务费。该成本加成率参考 A 公司提供服务的受托研究机构所取得的加成率确定。

61. 针对以上情况进行转让定价分析时，首先确认 S 公司在转让交易发生后成为 M 产品无形资产的法律所有权人。虽然如此，A 公司继续执行并控制与 S 公司拥有的无形资产相关的功能并承担相应的风险，包括本指南第 6.56 段中所描述的重要功能；因此，A 公司有权就这些贡献获得补偿。在这样的情形下，A 公司与受托研究机构的交易与 S 公司同 A 公司之间有关 M 产品的交易不存在可比性，不能作为确定 A 公司为 M 产品进行无形资产研发应获得的独立交易补偿的参考。A 公司就受托研究机构的交易活动履行了执行、控制及管理的功能，但 S 公司在 M 产品的交易中不履行这类功能。

62. 虽然 S 公司是上述无形资产的法律所有权人，但其不应享有利用这些无形资产所获得的全部收益。由于 S 公司缺乏研究相关风险的能力。在这种情况下，A 公司应当作为研发活动大部分风险的承担方，获得与其履行的功能（包括本指南第 6.56 段中描述的重要功能）相当的补偿。A 公司在这些情形下应当获得比受托研究机构更高的报酬。
financing return depends on the exercising of control over the financing risk in accordance with the
guidance in Section D.1 of Chapter I and the principles outlined in paragraphs 6.63 and 6.64. Company A
would be entitled to retain the remaining income or losses.

Example 18

64. Primarni is organised in and conducts business in country A. Company S is an associated
enterprise of Primarni. Company S is organised in and does business in country B. Primarni develops a
patented invention and manufacturing know-how related to Product X. It obtains valid patents in all
countries relevant to this example. Primarni and Company S enter into a written licence agreement
pursuant to which Primarni grants Company S the right to use the Product X patents and know-how to
manufacture and sell Product X in country B, while Primarni retains the patent and know-how rights to
Product X throughout Asia, Africa, and in country A.

65. Assume Company S uses the patents and know-how to manufacture Product X in country B. It
sells Product X to both independent and associated customers in country B. Additionally, it sells Product X
to associated distribution entities based throughout Asia and Africa. The distribution entities resell the units
of Product X to customers throughout Asia and Africa. Primarni does not exercise its retained patent rights
for Asia and Africa to prevent the sale of Product X by Company S to the distribution entities operating in
Asia and Africa.

66. Under these circumstances, the conduct of the parties suggests that the transaction between
Primarni and Company S is actually a licence of the Product X patents and know-how for country B, plus
Asia and Africa. In a transfer pricing analysis of the transactions between Company S and Primarni,
Company S's licence should be treated as extending to Asia and Africa, and should not be limited to
country B, based on the conduct of the parties. The royalty rate should be recalculated to take into account
the total projected sales by Company S in all territories including those to the Asian and African entities.

Example 19

67. Company P, a resident of country A conducts a retailing business, operating several department
stores in country A. Over the years, Company P has developed special know-how and a unique marketing
concept for the operation of its department stores. It is assumed that the know-how and unique marketing
concept constitute intangibles within the meaning of Section A of Chapter VI. After years of successfully
carrying on business in country A, Company P establishes a new subsidiary, Company S, in country B.
Company S opens and operates new department stores in country B, obtaining profit margins substantially
higher than those of otherwise comparable retailers in country B.

68. A detailed functional analysis reveals that Company S uses in its operations in country B, the
same know-how and unique marketing concept as the ones used by Company P in its operations in country
A. Under these circumstances, the conduct of the parties reveals that a transaction has taken place
consisting in the transfer from Company P to Company S of the right to use the know-how and unique
marketing concept. Under comparable circumstances, independent parties would have concluded a license
agreement granting Company S the right to use in country B, the know-how and unique marketing concept
developed by Company P. Accordingly, one possible remedy available to the tax administration is a
transfer pricing adjustment imputing a royalty payment from Company S to Company P for the use of
these intangibles.

Example 20

69. Ilecha is organised in country A. The Ilecha group of companies has for many years manufactured
and sold Product Q in countries B and C through a wholly owned subsidiary, Company S1, which is
63. 通过对本案例中的交易进行全面审视，可以看出应将上述交易准确界定为 S 公司提供研发资金，相当于取得无形资产以及后续研发的成本。因此，S 公司仅涉及研发活动的报酬，该报酬的多少取决于 S 公司根据第 6.1 节的指导原则以及本指南第 6.63、6.64 段的原对财务风险实施控制的程度。A 公司将享有剩余利润（或分担损失）。

**案例 18**

64. Primani 公司在 A 国设立并开展经营活动。S 公司是 Primani 公司的关联企业，在 B 国设立并开展经营活动。Primani 公司开发了 X 产品相关的一项专利及专有生产技术，并在与本案例相关的所有国家申请了专利权。Primani 公司与 S 公司达成书面许可协议，Primani 公司授予 S 公司使用 X 产品相关的专利及专有生产技术的权利，允许其在 B 国生产并销售 X 产品，同时 Primani 公司保留 X 产品在亚洲、非洲和 A 国使用专利和专有技术的权利。

65. 假设 S 公司在 B 国使用这些专利和专有技术生产 X 产品，并向 B 国的第三方客户和关联方销售。另外，S 公司还将 X 产品销售给亚洲和非洲的关联分销商，再由这些分销商将 X 产品销售给亚洲和非洲的最终客户。Primani 公司并未行使在其在亚洲和非洲所应享有的专利权，以阻止 S 公司将其产品销售给亚洲和非洲的分销商。

66. 在这种情况下，交易双方的行为表明 Primani 公司和 S 公司之间的交易实际上是 Primani 公司将 X 产品的专利及专有技术授权给 S 公司在 B 国以及亚洲和非洲范围内使用。在对 S 公司和 Primani 公司的转让定价分析中，根据协议双方的行为，S 公司获得的授权应当被视为涵盖了亚洲及非洲，而不仅仅限于 B 国。因此转让权使用费应当以 S 公司在所有地区的全部预计销售额为基础重新计算，应包括 S 公司在亚洲和非洲的预计销售额。

**案例 19**

67. P 公司是一家设立在 A 国的居民企业，从事零售行业。在 A 国经营着数家百货商店。经过数年经营，P 公司在如何运营百货商店方面形成了自己独特的专有技术和市场营销理念。假设这种专有技术和市场营销理念属于本指南第六章第 A 节所述的无形资产。在 A 国成功经营多年后，P 公司在 B 国设立了子公司 S。S 公司在 B 国开设了数家百货商店。S 公司的盈利水平明显高于 B 国的其他可比零售商。

68. 通过详细的功能分析表明，S 公司在 B 国的商业运营中运用了与 P 公司在 A 国经营时相同的专有技术和市场营销理念。在这种情形下，交易双方的行为表明 P 公司和 S 公司之间就专有技术和市场营销理念的使用权发生了交易。在相似情形下，独立企业会通过签署许可协议来授权 S 公司在 B 国使用由 P 公司开发的专有技术和市场营销理念的权利。据此，税务机关可采取的措施是通过转让定价调整，计算出 S 公司应就这些无形资产的使用向 P 公司支付的特许权使用费。
organised in country B. Ilcha owns patents related to the design of Product Q and has developed a unique trademark and other marketing intangibles. The patents and trademarks are registered by Ilcha in countries B and C.

70. For sound business reasons, Ilcha determines that the group’s business in countries B and C would be enhanced if those businesses were operated through separate subsidiaries in each country. Ilcha therefore organises in country C a wholly owned subsidiary, Company S2. With regard to the business in country C:

- Company S1 transfers to Company S2 the tangible manufacturing and marketing assets previously used by Company S1 in country C.
- Ilcha and Company S1 agree to terminate the agreement granting Company S1 the following rights with relation to Product Q: the right to manufacture and distribute Product Q in country C; the right to use the patents and trademark in carrying out its manufacturing and distribution activities in country C; and, the right to use customer relationships, customer lists, goodwill and other items in country C (hereinafter, “the Rights”)
- Ilcha enters into new, long-term licence agreements with Company S2 granting it the Rights in country C.

The newly formed subsidiary thereafter conducts the Product Q business in country C, while Company S1 continues to conduct the Product Q business in Country B.

71. Assume that over the years of its operation, Company S1 developed substantial business value in country C and an independent enterprise would be willing to pay for that business value in an acquisition. Further assume that, for accounting and business valuation purposes, a portion of such business value would be treated as goodwill in a purchase price allocation conducted with regard to a sale of Company S1’s country C business to an independent party.

72. Under the facts and circumstances of the case, there is value being transferred to Company S2 through the combination of (i) the transfer of part of Company S1’s tangible business assets to Company S2 in country C, and, (ii) the surrendering by Company S1 of the Rights and the subsequent granting of the Rights by Ilcha to Company S2. There are three separate transactions:

- the transfer of part of Company S1’s tangible business assets to Company S2 in country C;
- the surrendering by Company S1 of its rights under the licence back to Ilcha; and
- the subsequent granting of a licence by Ilcha to Company S2.

For transfer pricing purposes, the prices paid by Ilcha and by Company S2 in connection with these transactions should reflect the value of the business which would include amounts that may be treated as the value of goodwill for accounting purposes.

**Example 21**

73. Första is a consumer goods company organised and operating in country A. Prior to Year 1, Första produces Product Y in country A and sells it through affiliated distribution companies in many countries around the world. Product Y is well recognised and attracts a premium compared to its
案例 20

69. Ilcha 公司在 A 国设立。长期以来，Ilcha 集团通过其设立在 B 国的全资子公司 S1。在 B 国及 C 国生产并销售 Q 产品。Ilcha 公司拥有 Q 产品的设计专利并且开发了独特的商标及其他营销性无形资产。Ilcha 公司在 B 国及 C 国对上述专利及商标进行了注册。出

70. 于合理的商业考虑，Ilcha 公司认为如果在 B 国及 C 国分别设立子公司运营两国的业务，集团在两国的业务会得到更好的提升。因此，Ilcha 公司在 C 国成立了另一家全资子公司 S2，通过如下安排使 S2 公司经营 C 国的业务：

- S1 公司向 S2 公司转让 S1 公司之前在 C 国使用的有形生产性资产和营销性资产；
- Ilcha 公司和 S1 公司协商一致，Ilcha 公司终止授予 S1 公司关于 Q 产品的下列权利：在 C 国生产 Q 产品的权利；在 C 国生产及分销 Q 产品的权利；在 C 国进行生产及分销时使用专利及商标的权利；在 C 国使用公司客户关系、客户资产、公司商誉和其他事项的权利（以下统称“权利”）；
- Ilcha 公司与 S2 公司签署新的长期许可协议，授予 S2 公司在 C 国拥有上述权利。

这样安排之后，新成立的 S2 公司在 C 国负责 Q 产品的业务，而 S1 公司继续在 B 国负责 Q 产品的业务。

71. 假设通过数年的经营，S1 公司在 C 国创造了巨大的商业价值。独立企业愿意在收购 S1 公司的 C 国业务时针对该部分商业价值支付对价。而且，从会计及企业价值评估的角度来看，S1 公司如果将 C 国业务转让给独立企业，在进行收购价格分摊时会将一部分商业价值视为商誉。

72. 基于本案例的实际情况，S2 公司通过以下两种安排获得 S1 公司转让的商业价值：（1）将 S1 公司在 C 国的部分有形资产转让给 S2 公司；（2）S1 公司放弃相关权利，随后 Ilcha 公司将该权利授予 S2 公司。该安排应当分解为以下三项交易：

- S1 公司将其在 C 国的部分有形资产转让给 S2 公司；
- S1 公司不再履行其在待分配下的权利，并归还给 Ilcha 公司；
- Ilcha 公司随后向 S2 公司授予相关权利。

从转让定价的角度来看，Ilcha 公司及 S2 公司就说以上交易所支付的对价应当反映出所转让业务的商业价值，包括可能在会计上看为商誉的价值。
competitors, to which Första is entitled as the legal owner and developer of the trademark and related goodwill giving rise to that premium.

74. In Year 2, Första organises Company S, a wholly owned subsidiary, in country B. Company S acts as a super distributor and invoicing centre. Första continues to ship Product Y directly to its distribution affiliates, but title to the products passes to Company S, which reinvoes the distribution affiliates for the products.

75. Beginning in Year 2, Company S undertakes to reimburse the distribution affiliates for a portion of their advertising costs. Prices for Product Y from Company S to the distribution affiliates are adjusted upward so that the distribution affiliate operating profit margins remain constant notwithstanding the shift of advertising cost to Company S. Assume that the operating profit margins earned by the distribution affiliates are arm's length both before and after Year 2 given the concurrent changes in product pricing and the reimbursement of advertising costs. Company S performs no functions with regard to advertising nor does it control any risk related to marketing the products.

76. In Year 3, the prices charged by Första to Company S are reduced. Första and Company S claim such a reduction in price is justified because Company S is now entitled to income related to intangibles. It asserts that such income is attributable to intangibles in respect of Product Y created through the advertising costs it has borne.

77. In substance, Company S has no claim to income derived from the exploitation of intangibles with respect to Product Y. It performs no functions, assumes no risk, and in substance bears no costs related to the development, enhancement, maintenance or protection of intangibles. Transfer pricing adjustments to increase the income of Första in Year 3 and thereafter would be appropriate.

Example 22

78. Company A owns a government licence for a mining activity and a government licence for the exploitation of a railway. The mining licence has a standalone market value of 20. The railway licence has a standalone market value of 10. Company A has no other net assets.

79. Birinciil, an entity which is independent of Company A, acquires 100 percent of the equity interests in Company A for 100. Birinciil's purchase price allocation performed for accounting purposes with respect to the acquisition attributes 20 of the purchase price to the mining licence; 10 to the railway licence; and 70 to goodwill based on the synergies created between the mining and railway licences.

80. Immediately following the acquisition, Birinciil causes Company A to transfer its mining and railway licences to Company S, a subsidiary of Birinciil.

81. In conducting a transfer pricing analysis of the arm's length price to be paid by Company S for the transaction with Company A, it is important to identify with specificity the intangibles transferred. As was the case with Birinciil's arm's length acquisition of Company A, the goodwill associated with the licences transferred to Company S would need to be considered, as it should generally be assumed that value does not disappear, nor is it destroyed as part of an internal business restructuring.

82. As such, the arm's length price for the transaction between Companies A and S should take account of the mining licence, the railway licence, and the value ascribed to goodwill for accounting purposes. The 100 paid by Birinciil for the shares of Company A represents an arm's length price for those shares and provides useful information regarding the combined value of the intangibles.
案例 21

73. Förssta 公司设立于 A 国，在 A 国从事消费品经营。在第一年之前，Förssta 公司在 A 国生产 Y 产品，并通过关联分销商将 Y 产品销往世界各地。Y 产品有很高的知名度，与竞争产品相比享有溢价。溢价归属于 Förssta 公司。Förssta 公司是该品牌和产生该溢价的商誉的开发者及法律所有权人。

74. 第二年，Förssta 公司在 B 国设立了全资子公司 S 公司，作为集团的超级分销商和开票中心。同时，Förssta 公司仍然直接将 Y 产品发给关联分销商，但产品的所有权先由 Förssta 公司转移给 S 公司，再由 S 公司转移给关联分销商，并开具发票。

75. 从第二年起，S 公司开始负担关联分销商对其产品的部分广告费用。不过，S 公司向关联分销商分销 Y 产品的价格也相应上调，使得关联分销商的营业利润率并未由于广告费用的转嫁而改变。假设由于产品价格调整和广告费分摊同步进行，分销商的营业利润率在第二年前后均符合独立交易原则。S 公司在 Y 产品的广告推广活动中不履行任何功能，也不控制与产品营销相关的任何风险。

76. 第三年，Förssta 公司降低了销售给 S 公司的 Y 产品价格。Förssta 公司和 S 公司主张价格下调是合理的，因为 S 公司通过承担广告费用创造了 Y 产品相关的无形资产，S 公司现在应有权获得无形资产相关的收益。

77. 事实上，S 公司无权获得利用 Y 产品相关无形资产所产生的收益。S 公司没有就无形资产的开发、价值提升、维护和保护履行任何功能或承担任何风险，实质上也没有负担任何成本。因此，通过转让定价调整来提高 Förssta 公司在第三年及之后的收入是合理的。

案例 22

78. A 公司拥有政府颁发的采矿牌照和铁路开发牌照。采矿牌照单独的市场价格为 20，而铁路开发牌照单的市场价格为 16。A 公司没有其他净资产。

79. Birincil 公司和 A 公司没有关联关系。Birincil 公司以 100 的价格收购了 A 公司 100%的股权。在会计核算上，对 Birincil 公司的收购价格分摊如下：20 为采矿牌照的买价，10 为铁路开发牌照的买价，70 为两张牌照协同效应产生的商誉。

80. 上述收购交易后，Birincil 公司立即要求 A 公司将其拥有的采矿及铁路开发牌照转让给 Birincil 公司的子公司，S 公司。

81. 在对 S 公司与 A 公司的交易进行转让定价分析时，确定被转让的无形资产标的十分重要。通常，企业内部重组既会导致价值消失，也很难定价。因此，正如 Birincil 公司收购 A 公司的独立交易中需要考虑商誉一样，在 A 公司和 S 公司的关联交易中也应考虑商誉和品牌一起转让的商誉。
Example 23

83. Birincil acquires 100 percent of the equity interests in an independent enterprise, Company T for 100. Company T is a company that engages in research and development and has partially developed several promising technologies but has only minimal sales. The purchase price is justified primarily by the value of the promising, but only partly developed, technologies and by the potential of Company T personnel to develop further new technologies in the future. Birincil's purchase price allocation performed for accounting purposes with respect to the acquisition attributes 20 of the purchase price to tangible property and identified intangibles, including patents, and 80 to goodwill.

84. Immediately following the acquisition, Birincil causes Company T to transfer all of its rights in developed and partially developed technologies, including patents, trade secrets and technical know-how to Company S, a subsidiary of Birincil. Company S simultaneously enters into a contract research agreement with Company T, pursuant to which the Company T workforce will continue to work exclusively on the development of the transferred technologies and on the development of new technologies on behalf of Company S. The agreement provides that Company T will be compensated for its research services by payments equal to its cost plus a mark-up, and that all rights to intangibles developed or enhanced under the research agreement will belong to Company S. As a result, Company S will fund all future research and will assume the financial risk that some or all of the future research will not lead to the development of commercially viable products. Company S has a large research staff, including management personnel responsible for technologies of the type acquired from Company T. Following the transactions in question, the Company S research and management personnel assume full management responsibility for the direction and control of the work of the Company T research staff. Company S approves new projects, develops and plans budgets and in other respects controls the ongoing research work carried on at Company T. All Company T research personnel will continue to be employees of Company T and will be devoted exclusively to providing services under the research agreement with Company S.

85. In conducting a transfer pricing analysis of the arm's length price to be paid by Company S for intangibles transferred by Company T, and of the price to be paid for ongoing R&D services to be provided by Company T, it is important to identify the specific intangibles transferred to Company S and those retained by Company T. The definitions and valuations of intangibles contained in the purchase price allocation are not determinative for transfer pricing purposes. The 100 paid by Birincil for the shares of Company T represents an arm's length price for shares of the company and provides useful information regarding the value of the business of Company T. The full value of that business should be reflected either in the value of the tangible and intangible assets transferred to Company S or in the value of the tangible and intangible assets and workforce retained by Company T. Depending on the facts, a substantial portion of the value described in the purchase price allocation as goodwill of Company T may have been transferred to Company S together with the other Company T intangibles. Depending on the facts, some portion of the value described in the purchase price allocation as goodwill may also have been retained by Company T. Under arm's length transfer pricing principles, Company T should be entitled to compensation for such value, either as part of the price paid by Company S for the transferred rights to technology intangibles, or through the compensation Company T is paid in years following the transaction for the R&D services of its workforce. It should generally be assumed that value does not disappear, nor is it destroyed, as part of an internal business restructuring. If the transfer of intangibles to Company S had been separated in time from the acquisition, a separate inquiry would be required regarding any intervening appreciation or depreciation in the value of the transferred intangibles.

Example 24

86. Zhu is a company engaged in software development consulting. In the past Zhu has developed software supporting ATM transactions for client Bank A. In the process of doing so, Zhu created and
82. 因此，A 公司与 S 公司间交易的独立交易价格应考虑可比交易的性质、同业开发交易的性质，以及会计算中归属于商誉的价值。Birincil 公司为收购 A 公司股权支付的 100 体现了该股权的独立交易价格，并且也为上述无形资产的组合价值提供了偿信。

案例 23

83. Birincil 公司以 100 的价格收购了一家非关联企业 T 公司 100%的股权。T 公司主要从属研究与开发，目前正在开发几个有前景的技术，但是仅有少量销售。收购价格的确定主要依据 T 公司拥有的有前景但尚未开发的技术的价值，以及 T 公司的员工未来进一步开发新技术的潜力。在会计核算上，对 Birincil 公司的收购价格分摊如下：20 为有形资产和已辨识的无形资产（包括专利），80 为商誉。

84. 上述收购交易后，Birincil 公司立即要求 T 公司将其拥有的已开发和部分开发的技术（包括专利、商业秘密和专有技术）全部转让给 Birincil 公司的子公司 S 公司。与此同时，S 公司与 T 公司签订一份合同，双方研究协议。根据该协议，T 公司的员工将代表 S 公司专门继续开发已转让的技术和开发新技术。S 公司将会按照研发服务成本加成的方法给予 T 公司补偿，并且开发完成或价值提升后的无形资产的所有权归属 S 公司。因此，S 公司将为所有未来的研究提供资金，并承担未来部分或全部的研究成果不能被开发成为具有商业价值的产品而带来的财务风险。S 公司拥有大量的研究人员，其中包括负责对 T 公司收购的技术进行管理的人员。上述安排之后，S 公司的研究及管理人员对 T 公司研究人员的计划和管理责任，包括指导和控制。S 公司负责新项目的审批、预算的规划和制定，并从其他方面控制 T 公司正在进行的研究工作。所有 T 公司的研究人员将继续受聘于 T 公司，并按照与 S 公司签订的协议向 T 公司提供研发服务。

85. 针对 T 公司向 S 公司转让无形资产以及提供持续性研发服务的独立交易价格进行转让定价分析时，分解哪些无形资产被转让给了 S 公司，哪些仍保留在 T 公司是十分重要的。从转让定价角度来看，在进行收购价格分摊时所采用的无形资产定义和价值评估并不起决定性作用。Birincil 公司为收购 T 公司股权支付的 100 体现了该股权的独立交易价格，并为 T 公司的业务价值提供了偿信。这块业务的完整价值应当体现在转让 S 公司的有形和无形资产价值之中，或体现在 T 公司保留的有形和无形资产以及劳动力价值之中。本案例中，在进行收购价格分摊时被被视为 T 公司商誉的大部分可能连同其他无形资产被转移到了 S 公司；而一小部分商誉也可能会被保留在 T 公司。根据独立交易原则，T 公司应当就该部分商誉价值获得补偿，补偿可以通过 S 公司支付给 T 公司的技术或无形资产对价体现，也可以通过以后年度 T 公司提供研发服务收取的补偿来体现。通常，企业内部重组既不会导致价值消失，也不会损失价值。如果向 S 公司转让无形资产与收购 T 公司的交易在时间上有一段间隔，则还需要单独分析被转让无形资产价值在该段时间间隔内是否有增值或者贬值。
retained an interest in proprietary copyrighted software code that is potentially suitable for use by other similarly situated banking clients, albeit with some revision and customisation.

87. Assume that Company S, an associated enterprise of Zhu, enters into a separate agreement to develop software supporting ATM operations for another bank, Bank B. Zhu agrees to support its associated enterprise by providing employees who worked on the Bank A engagement to work on Company S's Bank B engagement. Those employees have access to software designs and know-how developed in the Bank A engagement, including proprietary software code. That code and the services of the Zhu employees are utilised by Company S in executing its Bank B engagement. Ultimately, Bank B is provided by Company S with a software system for managing its ATM network, including the necessary licence to utilise the software developed in the project. Portions of the proprietary code developed by Zhu in its Bank A engagement are embedded in the software provided by Company S to Bank B. The code developed in the Bank A engagement and embedded in the Bank B software would be sufficiently extensive to justify a claim of copyright infringement if copied on an unauthorised basis by a third party.

88. A transfer pricing analysis of these transactions should recognise that Company S received two benefits from Zhu which require compensation. First, it received services from the Zhu employees that were made available to work on the Bank B engagement. Second, it received rights in Zhu’s proprietary software which was utilised as the foundation for the software system delivered to Bank B. The compensation to be paid by Company S to Zhu should include compensation for both the services and the rights in the software.

Example 25

89. Prathamika is the parent company of an MNE group. Prathamika has been engaged in several large litigation matters and its internal legal department has become adept at managing large scale litigation on behalf of Prathamika. In the course of working on such litigation, Prathamika has developed proprietary document management software tools unique to its industry.

90. Company S is an associated enterprise of Prathamika. Company S becomes involved in a complex litigation similar to those with which the legal department of Prathamika has experience. Prathamika agrees to make two individuals from its legal team available to Company S to work on the Company S litigation. The individuals from Prathamika assume responsibility for managing documents related to the litigation. In undertaking this responsibility they make use of the document management software of Prathamika. They do not, however, provide Company S the right to use the document management software in other litigation matters or to make it available to Company S customer.

91. Under these circumstances, it would not be appropriate to treat Prathamika as having transferred rights to Company S as part of the service arrangement. However, the fact that the Prathamika employees had experience and available software tools that allowed them to more effectively and efficiently perform their services should be considered in a comparability analysis related to the amount of any service fee to be charged for the services of the Prathamika employees.

Example 26

92. Osnovni is the parent company of an MNE Group engaged in the development and sale of software products. Osnovni acquires 100 percent of the equity interests in Company S, a publicly traded company organised in the same country as Osnovni, for a price equal to 160. At the time of the acquisition, Company S shares had an aggregate trading value of 100. Competitive bidders for the Company S business offered amounts ranging from 120 to 130 for Company S.
案例 24

86.  Zhu 是一家从事软件开发咨询的公司。Zhu 公司曾经为其客户银行 A 开发了一套支持 ATM 交易的软件。在软件开发的过程中，Zhu 公司开发了一套具有版权的专用软件代码并保留了相应的权利。该软件代码也可能适用于其他情况类似的银行客户，尽管在使用时需做一些修改和定制。

87.  假设 Zhu 公司的一家关联企业 S 公司与另一家银行 B 单独签订了一份软件开发协议，以支持 B 银行 ATM 的运行。为了支持关联企业，Zhu 公司同意 S 公司使用过银行 A 项目的员工来为银行 B 提供项目。这些员工能获取银行 A 项目的软件设计和在此过程中开发的特殊技术，包括专有软件代码。S 公司在进行银行 B 项目时，使用了这些专有软件代码及 Zhu 公司员工提供服务。最终，S 公司向银行 B 交付了 ATM 网络的管理软件系统。由于 S 公司使用了 Zhu 公司开发的 ATM 网络管理软件系统，若没有获取使用许可，S 公司可能被要求支付一定的费用，甚至被停止使用该软件。

88.  在对这项交易进行转让定价分析时，应明确 S 公司从 Zhu 公司获得了两项利益，Zhu 公司应获得相应补偿。首先，Zhu 公司员工为 S 公司在银行 B 项目上提供了服务。其次，S 公司使用了 Zhu 公司开发的专用软件代码，并将其作为基础应用于银行 B 的软件系统中。因此，S 公司应就上述服务以及软件使用权向 Zhu 公司支付补偿。

案例 25

89.  Prathamika 公司是一家跨国企业集团的母公司。Prathamika 公司曾经处理几起大型诉讼，其内部法律顾问在为 Prathamika 公司处理大型诉讼案件方面已驾轻就熟。在处理此类诉讼的过程中，Prathamika 公司开发了专为法规管理设计的软件工具。

90.  S 公司是 Prathamika 公司的关联企业。S 公司涉及一起复杂诉讼，而此诉讼与 Prathamika 公司法律顾问部门之前处理过的内容相似。Prathamika 公司同意向 S 公司派遣两名法律顾问员工处理 S 公司的诉讼事宜，负责管理与该诉讼相关的文档。在工作过程中，他们使用了 Prathamika 公司的文档管理软件。不过，他们并没有允许 S 公司在其他诉讼案件中使用该文档管理软件。S 公司的客户也无权使用该软件。

91.  基于本案例的情况，不应认为 Prathamika 公司在该服务安排中向 S 公司转让了无形资产相关权利，因为 S 公司是在其他诉讼案件中使用该文档管理软件，而 S 公司的客户无权使用该软件。

案例 26

92.  Osorni 公司是一家跨国企业集团的母公司，从事软件产品开发和销售业务。Osorni 公司以 160 的价格收购了另一家公司的子公司 S 的 100% 股权。在收购时点，S 公司股价的总市值为 100。竞标对手对收购 S 公司的股价区间为 120 至 130。
93. Company S had only a nominal amount of fixed assets at the time of the acquisition. Its value consisted primarily of rights in developed and partially developed intangibles related to software products and its skilled workforce. The purchase price allocation performed for accounting purposes by Osnovni allocated 10 to tangible assets, 60 to intangibles, and 90 to goodwill. Osnovni justified the 160 purchase price in presentations to its Board of Directors by reference to the complementary nature of the existing products of the Osnovni group and the products and potential products of Company S.

94. Company T is a wholly owned subsidiary of Osnovni. Osnovni has traditionally licensed exclusive rights in all of its intangibles related to the European and Asian markets to Company T. Pursuant to the arrangements of this example it is assumed that all arrangements related to the historic licences of European and Asian rights to Company T prior to the acquisition of Company S are arm’s length.

95. Immediately following the acquisition of Company S, Osnovni liquidates Company S, and thereafter grants an exclusive and perpetual licence to Company T for intangible rights related to the Company S products in European and Asian markets.

96. In determining an arm’s length price for the Company S intangibles licensed to Company T under the foregoing arrangements, the premium over the original trading value of the Company S shares included in the acquisition price should be considered. To the extent that premium reflects the complementary nature of Osnovni group products with the acquired products in the European and Asian markets licensed to Company T, Company T should pay an amount for the transferred Company S intangibles and rights in intangibles that reflects an appropriate share of the purchase price premium. To the extent the purchase price premium is attributable exclusively to product complementarities outside of Company T’s markets, the purchase price premium should not be taken into account in determining the arm’s length price paid by Company T for Company S intangibles related to Company T’s geographic market. The value attributed to intangibles in the purchase price allocation performed for accounting purposes is not determinative for transfer pricing purposes.

*Example 27*

97. Company A is the Parent of an MNE group with operations in country X. Company A owns patents, trademarks and know-how with regard to several products produced and sold by the MNE group. Company B is a wholly owned subsidiary of Company A. All of Company B’s operations are conducted in country Y. Company B also owns patents, trademarks and know-how related to Product M.

98. For sound business reasons related to the coordination of the group’s patent protection and anti-counterfeiting activities, the MNE group decides to centralise ownership of its patents in Company A. Accordingly, Company B sells the Product M patents to Company A for a lump-sum price. Company A assumes responsibility to perform all ongoing functions and it assumes all risks related to the Product M patents following the sale. Based on a detailed comparability and functional analysis, the MNE group concludes that it is not able to identify any comparable uncontrolled transactions that can be used to determine the arm’s length price. Company A and Company B reasonably conclude that the application of valuation techniques represents the most appropriate transfer pricing method to use in determining whether the agreed price is consistent with arm’s length dealings.

99. Valuation personnel apply a valuation method that directly values property and patents to arrive at an after-tax net present value for the Product M patent of 80. The analysis is based on royalty rates, discount rates and useful lives typical in the industry in which Product M competes. However, there are material differences between Product M and the relevant patent rights related to Product M, and those typical in the industry. The royalty arrangements used in the analysis would therefore not satisfy the
93. 在收购时点，S 公司仅拥有少量的固定资产。S 公司的价值主要体现在已开发和部分开发的软件产品相关的无形资产及其熟练劳动力中。在会计核算上，对 Osnowi 公司的收购价格分摊如下：10 为有形资产，60 为无形资产，90 为商誉。在向 Osnowi 公司董事会申请用 160 的价格进行收购作出解释时，Osnowi 公司表示其考虑的是 Osnowi 集团的现有产品和 S 公司的现有及潜在产品的互补性。

94. T 公司是 Osnowi 公司的一名全资子公司。一直以来，Osnowi 公司将其欧洲和亚洲市场相关的所有无形资产独家授予 T 公司使用。在本案例中，假定在收购 S 公司之前，Osnowi 公司与 T 公司达成的有关欧洲与亚洲市场的所有许可安排均符合独立交易原则。

95. 完成收购后，Osnowi 公司立即将 S 公司进行清算，并以永久独占许可的方式授予 T 公司在欧洲及亚洲市场使用 S 公司产品相关无形资产的权利。

96. 根据上述安排，在确定 T 公司取得原 S 公司无形资产使用许可的独立交易价格时，应考虑反映在收购价格中的高于 S 公司资产原市值的溢价。如果上述溢价是基于 Osnowi 集团产品与许可给 T 公司的有关欧洲及亚洲市场的产品互补性，T 公司在受让原 S 公司无形资产及无形资产相关权利时，所支付的对价应体现上述收购溢价的支付份额。如果上述收购溢价是基于 T 公司在欧洲及亚洲市场使用 S 公司产品互补性，T 公司在受让 S 公司无形资产及无形资产相关权利时，所支付的对价应体现上述收购溢价的支付份额。如果上述收购溢价是基于 T 公司在欧洲及亚洲市场使用 S 公司产品互补性，T 公司在受让 S 公司无形资产及无形资产相关权利时，所支付的对价应体现上述收购溢价的支付份额。

案例 27

97. A 公司是一家在 X 国运营的跨国企业集团的母公司。A 公司拥有该跨国企业集团生产和销售的多种产品的专利、商标和专有技术。B 公司是 A 公司的一家全资子公司。B 公司所有的运营都在 Y 国。B 公司拥有 M 产品相关的专利、商标和专有技术。

98. 出于协调集团专利保护和打击假冒伪劣商品的合理商业目的，跨国企业集团决定将其专利的所有权都集中到 A 公司进行管理。因此，B 公司以一次付清的价格将 M 产品相关的专利转让给了 A 公司。交易之后，A 公司承担与 M 产品专利相关的全部现有功能，并承担全部风险。根据详细的可比性分析和功能分析，跨国企业集团认为无法找到任何可以非受控交易来确定此次转让的独立交易价格。因此，A 公司和 B 公司合理得出结论，即价值评估法是此种情况下确定交易价格是否符合独立交易原则的最合适的转让定价方法。

99. 评估人员对相关资产和专利直接进行了估价，得出 M 产品相关的专利的税后净现值为 80。该结果根据 M 产品所在行业普遍使用的特殊权费率、折现率及使用寿命周期计算得出。
comparability standards required for a CUP method analysis. The valuation seeks to make adjustments for these differences.

100. In conducting its analysis, Company A also conducts a discounted cash flow based analysis of the Product M business in its entirety. That analysis, based on valuation parameters typically used by Company A in evaluating potential acquisitions, suggests that the entire Product M business has a net present value of 100. The 20 difference between the 100 valuation of the entire Product M business and the 80 valuation of the patent on its own appears to be inadequate to reflect the net present value of routine functional returns for functions performed by Company B and to recognise any value for the trademarks and know-how retained by Company B. Under these circumstances further review of the reliability of the 80 value ascribed to the patent would be called for.

**Example 28**

101. Company A is the Parent company of an MNE group with operations in country S. Company B is a member of the MNE group with operations in country T, and Company C is also a member of the MNE group with operations in country U. For valid business reasons the MNE group decides to centralise all of its intangibles related to business conducted outside of country S in a single location. Accordingly, intangibles owned by Company B are sold to Company C for a lump sum, including patents, trademarks, know-how, and customer relationships. At the same time, Company C retains Company B to act as a contract manufacturer of products previously produced and sold by Company B on a full-risk basis. Company C has the personnel and resources required to manage the acquired lines of business, including the further development of intangibles necessary to the Company B business.

102. The MNE group is unable to identify comparable uncontrolled transactions that can be used in a transfer pricing analysis of the arm’s length price to be paid by Company C to Company B. Based on a detailed comparability and functional analysis, the MNE group concludes that the most appropriate transfer pricing method involves the application of valuation techniques to determine the value of the transferred intangibles. In conducting its valuation, the MNE group is unable to reliably aggregate particular cash flows associated with all of the specific intangibles.

103. Under these circumstances, in determining the arm’s length compensation to be paid by Company C for the intangibles sold by Company B, it may be appropriate to value the transferred intangibles in the aggregate rather than to attempt a valuation on an asset by asset basis. This would particularly be the case if there is a significant difference between the sum of the best available estimates of the value of individually identified intangible and other assets when valued separately and the value of the business as a whole.

**Example 29**

104. Pervichnyi is the parent of an MNE group organised and doing business in country X. Prior to Year 1, Pervichnyi developed patents and trademarks related to Product F. It manufactured Product F in country X and supplied the product to distribution affiliates throughout the world. For purposes of this example assume the prices charged to distribution affiliates were consistently arm’s length.

105. At the beginning of Year 1, Pervichnyi organises a wholly owned subsidiary, Company S, in country Y. In order to save costs, Pervichnyi transfers all of its production of Product F to Company S. At the time of the organisation of Company S, Pervichnyi sells the patents and trademarks related to Product F to Company S for a lump sum. Under these circumstances, Pervichnyi and Company S seek to identify an arm’s length price for the transferred intangibles by utilising a discounted cash flow valuation technique.
然而，M 产品及其相关专利与行业典型的产品及其专利权存在显著差异。因此，价值评估时参考的特许权使用费安排不符合可比受控价格法所要求的可比性标准，需要根据这些显著差异对评估结果进行调整。

在进行转让定价分析时，公司还使用了现金流量折现法对 M 产品的整体业务进行了价值评估。该价值评估以 A 公司在评估前并购对象时采用的参数作为基础，得出 M 产品的整体业务净现值为 100。M 产品整体业务的估值 100 与专利的估值 80 之间的差异为 20，但该差异似乎并不能充分反映 B 公司履行合同所花费的现金流量，并且也不足以体现 B 公司保留的商标及专利技术的价值。在这种情况下，有必要对专利估值的可靠性作进一步分析。

案例 28

101. A 公司是一家跨国企业集团的母公司，在 S 国运营。B 公司是该集团的成员公司，在 U 国运营。C 公司也是该集团的成员公司，在 U 国运营。出于合理的商业目的，该跨国企业集团决定将其在 S 国以外的业务相关的全部无形资产集中管理。因此，B 公司将其中拥有的专利资产（包括专利、商标、专有技术及客户关系）以一次支付的价格转让给了 C 公司。B 公司之前以承担完全风险的方式生产产品，之后 B 公司承担 C 公司的合同生产商，继续生产相同的产品。C 公司拥有管理所收购业务所需的员工和其他资源，包括进一步开发 B 公司业务所需的无形资产的能力。

102. 该跨国企业集团无法找到可比受控交易来决定 C 公司向 B 公司支付的独立交易价格。根据详细的成本分析和功能分析，跨国企业集团认为价值评估法是当前用以确定无形资产转让价格的最合适的转让定价方法。进行价值评估分析时，跨国企业集团无法准确分离每一项无形资产所对应的现金流量。

103. 在这种情况下，在确定 C 公司应向 B 公司转让无形资产所产生的独立交易价格时，或许对被转让的无形资产进行合并估值（而非逐一估值）更为恰当。尤其是在对可辨认的无形资产和其他资产逐一评估得出的最可靠估值之和与对整体业务估值产生巨大差异时，合并估值可能更为恰当。

案例 29

104. Pervichnyi 公司是一家跨国企业集团的母公司，在 X 国成立并运营。在第一年之前，Pervichnyi 公司开发了 F 产品相关的专利及商标。Pervichnyi 公司在 X 国生产 F 产品并将销售给世界各地的关联分销商。在本案例中，假设销售给关联分销商的产品价格始终符合独立交易原则。

105. 第一年初，Pervichnyi 公司在 Y 国成立了一家全资子公司 S。为了节省成本，Pervichnyi 公司将 F 产品的全部生产转移到 S 公司。在 S 公司成立时，Pervichnyi 公司以一次支付的价格将 F 产品相关专利及商标转让给 S 公司。
106. According to this valuation analysis, Pervichnyi could have generated after tax residual cash flows (after rewarding all functional activities of other members of the MNE group on an arm's length basis) having a present value of 600 by continuing to manufacture Product F in Country X. The valuation from the buyer's perspective shows that Company S could generate after tax residual cash flows having a present value of 1100 if it owned the intangibles and manufactured the product in country Y. The difference in the present value of Pervichnyi's after tax residual cash flow and the present value of Company S's after tax residual cash flow is attributable to several factors.

107. Another option open to Pervichnyi would be for Pervichnyi to retain ownership of the intangible, and to retain Company S or an alternative supplier to manufacture products on its behalf in country Y. In this scenario, Pervichnyi calculates it would be able to generate after tax cash flow with a present value of 875.

108. In defining arm's length compensation for the intangibles transferred by Pervichnyi to Company S, it is important to take into account the perspectives of both parties, the options realistically available to each of them, and the particular facts and circumstances of the case. Pervichnyi would certainly not sell the intangibles at a price that would yield an after tax residual cash flow with a present value lower than 600, the residual cash flow it could generate by retaining the intangible and continuing to operate in the manner it had done historically. Moreover there is no reason to believe Pervichnyi would sell the intangible for a price that would yield an after tax residual cash flow with a present value lower than 875. If Pervichnyi could capture the production cost savings by retaining another entity to manufacture on its behalf in a low cost environment, one realistically available option open to it would be to establish such a contract manufacturing operation. That realistically available option should be taken into account in determining the selling price of the intangible.

109. Company S, would not be expected to pay a price that would, after taking into account all relevant facts and circumstances, leave it with an after tax return lower than it could achieve by not engaging in the transaction. According to the discounted cash flow valuation, the net present value of the after tax residual cash flow it could generate using the intangible in its business would be 1100. A price might be negotiated that would give Pervichnyi a return equal to or greater than its other available options, and give Company S a positive return on its investment considering all of the relevant facts, including the manner in which the transaction itself would be taxed.

110. A transfer pricing analysis utilizing a discounted cash flow approach would have to consider how independent enterprises dealing at arm's length would take into account the cost savings and projected tax effects in setting a price for the intangibles. That price should, however, fall in the range between a price that would yield Pervichnyi after tax residual cash flow equivalent to that of the options realistically available, and a price that would yield Company S a positive return to its investments and risks, considering the manner in which the transaction itself would be taxed.

111. The facts of this example and the foregoing analysis are obviously greatly oversimplified by comparison to the analysis that would be required in an actual transaction. The analysis nevertheless reflects the importance of considering all of the relevant facts and circumstances in performing a discounted cash flow analysis, evaluating the perspectives of each of the parties in such an analysis, and taking into consideration the options realistically available to each of the parties in performing the transfer pricing analysis.
有鉴于此 Perichyni 公司和 S 公司意图通过现金流量折现法确定转让无形资产的独立交易价格。

106. 根据该价值评估法，如果 Perichyni 公司继续在 X 国生产 F 产品，能得到的税后剩余现金流
       量（已考虑根据独立交易原则补给其他集团内成员公司所承担的功能）现值为 600。从实务角度
       考虑，如果 S 公司拥有无形资产并在 Y 国生产该产品，S 公司能产生的税后剩余现金流流量现
       值为 1100。出于种种原因，从 Perichyni 公司角度来看，S 公司付出的税后剩余现金流流量现
       值存在差异。

107. Perichyni 公司也可以选择由 Perichyni 公司保留无形资产的所有权，S 公司或其他供应商作
       为 Perichyni 公司的合约生产商在 Y 国生产该产品。在此种情形下，Perichyni 公司计算出其可能
       得到的税后剩余现金流流量现值为 875。

108. 在确定 Perichyni 公司向 S 公司转让的无形资产的独立交易价格时，需要从交易双方不同的
       角度加以考量，并考虑双方现实可行的选择以及具体交易事实和情形。Perichyni 公司不会以税
       后剩余现金流流量现值低于 600 的价格出售其无形资产，因为如果保留该无形资产并继续按
       照进入该方式运营，能够产生的剩余现金流流量现值为 600。而 S 公司也不以税后剩余现金流
       流量现值低于 875 的价格购买其无形资产。如果 Perichyni 公司可以找到一家位于低成本区域
       的公司替代代工生产，即可节省生产成本，再对其实可行的选择就是合意生产。在确定无形资
       产的价格时，应对该现实可行的选择加以考虑。

109. 在考虑所有相关事实和情况的基础上，如果购买该无形资产相比不购买无形资产并能产生更
       多的税收收益，那么 S 公司不会支付给购入该无形资产。根据现金流量折现法，如在其业务中
       使用该无形资产，S 公司可实现的税后剩余现金流流量现值为 1100。因此，在谈判中，双方都
       乐于接受的价格应该能使 Perichyni 公司获得同等或者高于其他现实可行的选择所带来的收益，
       同时使 S 公司在考虑了其他相关因素（包括转让交易税负）后仍能对其投资获得正收益。

110. 在使用现金流量折现法进行转让定价分析时，应考虑正常交易中独立企业在无形资产定价时
       如何看待成本节约和预计的税务影响。独立交易价值的区间下限应使得 Perichyni 公司能够得
       到高于其他现实可行的选择所带来的税后剩余现金流流量上限应使其 S 公司在考虑交易税负后
       仍可以就其投资获得正收益。

111. 与真实交易所需进行的分析相比，本案例的情况以及述分析显然过于简单。不过，这些分析旨
       在强调运用现金流量折现法评估价值时应考虑所有相关的事实及情况，从交易双方的角度进行
       评估，以及在转让定价分析中需考虑交易双方现实可行的选择。
LOW VALUE-ADDING INTRA-GROUP SERVICES

Revisions to Chapter VII of the Transfer Pricing Guidelines

SUMMARY

Action 10 of the BEPS Action Plan instructs the G20 and OECD countries to develop transfer pricing rules to provide protection against common types of base eroding payments, such as management fees and head office expenses.

This chapter of the Report introduces an elective, simplified approach for low value-adding services. Besides that, it introduces some changes and clarifications to other paragraphs of Chapter VII of the Transfer Pricing Guidelines. Sections A to C and the changes to some of the paragraphs in these sections are included in this Report to provide context to the new Section D on low value-adding intra-group services of Chapter VII of the Transfer Pricing Guidelines.22

Section D on low value-adding intra-group services provides guidance on achieving the necessary balance between appropriately allocating to MNE group members charges for intra-group services in accordance with the arm's length principle and the need to protect the tax base of payor countries. In particular, this Report proposes an elective, simplified approach which:

- Specifies a wide category of common intra-group services which command a very limited profit mark-up on costs;
- Applies a consistent allocation key for all recipients for those intra-group services; and
- Provides greater transparency through specific reporting requirements including documentation showing the determination of the specific cost pool.

The approach aims to guarantee payor countries that the system through which the costs are allocated leads to an equal treatment for all associated enterprises that are operating in similar circumstances. Moreover, the approach aims to guarantee that no overpricing takes place due to general agreement on the categories of costs included in the cost base and general agreement on the moderate mark-up of 5% that should be charged. Finally, the transparency of the approach makes clear to payor countries whether intermediary companies, which may have no or low functionality and may aim to inflate the intra-group service charges, have been interposed.

The guidance provides that, because of the construction of the elective, simplified approach, the benefits test by the payor country is simplified and moderated. If the elective, simplified approach is applied, the assumption that businesses are only willing to incur costs if there is a business reason to do so and the assurance that the approach leads to an equal treatment of these costs for MNE group members in similar circumstances, replaces the detailed testing of the benefits received that is customary for other

22 Section D is the sole part of the guidance reflected in this Chapter that should be considered part of the transfer pricing outcomes following from Actions 8-10 of the BEPS Action Plan as endorsed by all BEPS Associate Countries.
低附加值集团内部服务

针对《转让定价指南》第七章的修订

摘要

《BEPS行动计划》第10项行动计划要求G20和OECD成员国制定相应的转让定价规则，防止关联企业间通过几类常见形式的款息支付（如管理费和总部费用）侵蚀税基。

本章介绍了针对低附加值服务的一种可供选择的简化的转让定价方法。此外，本章就《转让定价指南》第七章的部分段落进行了修改以及内容上的明确。本报告包含《转让定价指南》第七章中第A至C节内容及其他部分段落的修改，以及基于此基础上在《转让定价指南》第七章中新增的关于低附加值集团内部服务的第D节内容。

第D节旨在针对低附加值集团内部服务提供指南，以期在遵循独立交易原则合理地向跨国企业集团成员企业分摊集团内部服务费与保护支付国税基的需求之间达到必要的平衡。具体而言，本报告提出了如下可供选择的简化方法：

- 明确常见的集团内部服务范围，此范围内的服务费用仅需基于成本加成非常有限的利润；
- 对所有集团内部服务接收方使用的费用分摊标准；以及
- 通过具体的报告要求提高透明度，包括记录如何确定具体成本池的有关文档。

上述方法旨在向支付国保证，用于成本分摊的机制对于在相似情况下经营的所有关联企业是公平一致的。此外，在对被包含在成本分摊基数中的成本类型，以及使用和负担的成本加成率5%达成一致的情况下，上述方法旨在保证对于服务费用的定价不会过高。最后，该方法的透明度能够清楚地向支付国表明在是否存在中间体公司的介入，这些中间体公司可能不具备或具备较低的功能，而且可能会抬高集团内部服务的费用。

本指南指出，为了上述可供选择的简化方法的设立，支付国的受益性测试被简化了。如果可供选择的简化方法被应用，企业仅在具备合理经营理由的前提下才愿意承担成本的假设，以及上述简化方法可以保证跨国企业集团在相似情况下经营的成员企业对这些成本的处理方法一致，可以替代针对集团内部服务费用的详细的受益性测试。

第D节是本章指南中唯一应作为由所有参与国批准的《税基侵蚀和利润转移行动计划》第8至第10项行动计划的转让定价成果的一部分。
intra-group service charges. This approach allows tax administrations to free up resources for identifying and examining transfer pricing cases where the risk of encountering BEPS issues is more substantial.

Nevertheless, a number of countries have indicated that excessive charges for intra-group management services and head office expenses constitute one of their major BEPS challenges. In order to give comfort to these countries that the elective, simplified approach will not lead to base-eroding payments, the approach indicates that countries considering implementing the approach may do so in combination with the introduction of a threshold. If the payments for low-value adding intra-group services required under the approach exceed this threshold, then the tax administrations may perform a full transfer pricing analysis that would include requiring evidence demonstrating the detailed benefits received. In combination with the G20 Development Working Group mandate given to International Organisations on the development of toolkits which can be implemented by developing countries and which will protect these countries from base-eroding payments, the objective of this measure will assist developing countries in protecting their tax base from excessive intra-group service charges.

In order for the simplified approach as discussed in this chapter of the Report to be effective it must be adopted and applied on a geographic scale that is as broad as possible and it must be respected in both intra-group service provider and intra-group service recipient countries. Acknowledging the importance of both swift and broad introduction, the countries participating in the BEPS project have agreed to a two-step approach for implementation. The first step consists of a large group of countries enabling this elective mechanism by endorsing its applicability in their countries before 2018. The second step recognises that further analysis of the design of the threshold and other implementation issues of concern to some countries would be helpful in order to achieve even more widespread adoption of the simplified approach. Therefore, follow-up work on the design of the threshold and other implementation issues will be undertaken. This work will be finalised before the end of 2016 and will allow additional countries to join the group of countries already enabling the elective mechanism. As part of the follow-up work on implementation, clarity will be provided about the countries joining the safe harbour approach to low value-adding intra-group services. Currently, the significant majority of the BEPS Associate Countries have indicated that they will enable the simplified approach as soon as the introduction of such an approach is feasible in their domestic situation. The other BEPS Associate Countries have indicated that they are considering the introduction of the approach, but that for them the final decision is dependent on the outcomes of the follow-up work on implementation.
该方法的应用使得税务机关可以将更多资源用于识别和审查在税基侵蚀和利润转移问题上更具实质性风险的转让定价案件。

然而，很多国家指出，关联企間内管理服务费和总部费用的安排是其面临的主要BEPS难题之一。为了让这些国家相信所选的简化方法将不会引起导致税基侵蚀的支付，简化方法也指出，有意向使用简化方法的国家可以同时考虑设定一个门槛，在适用简化方法时，可以支付的低附加值集团内部服务费过了设定的门槛，则税务机关可以执行全面的转让定价分析，包括要求提供能够证明服务接受方获得具体利益的资料。此方法的应用，加上G20工作组小组授权国际组织与机构开发适用于发展中国家使用能够使其免受基于支付相关服务费用而导致税基侵蚀的一系列工具，将能协助发展中国家保护其税基不会因为过度支付集团内部服务费用而受到侵蚀。

为使本章讨论的简化方法能够得到有效实施，该方法必须被尽可能广泛的国家和地区接受和应用，也必须同时被集团内部服务提供方和服务接受方所在国家认可。考虑到迅速广泛引进此方法的重要性，参与BEPS项目国家同意分两步来具体落实。第一步是在2018年之前，由多国通过认可该方法在其本国的适用来启动这一机制。第二步是针对门槛的设定以及一些国家在实施中可能出现的其他重要问题进行进一步的分析，这将有助于简化方法在更大范围内被采用。关于门槛的设定和解决实施中会出现的其他问题的后续工作将会陆续展开。该工作将于2016年底前完成，将有利于更多的国家启动这一可供选择的机制。在简化方法实施的后续工作中，对于那些低附加值集团内部服务引发安全港规则，同时又想引入简化方法的国家将会给出清晰的指导。目前，绝大部分BEPS项目成员国已表示一旦引进的简化方法在其国内可被执行，他们将立即启动这一方法。而其他BEPS项目成员国则表示他们仍在考虑是否引进该方法，最终的决定取决于实施该方法的后续工作的进展情况。
The current provisions of Chapter VII of the Transfer Pricing Guidelines are deleted in their entirety and replaced by the following language.

A. Introduction

7.1 This chapter discusses issues that arise in determining for transfer pricing purposes whether services have been provided by one member of an MNE group to other members of that group and, if so, in establishing arm’s length pricing for those intra-group services. The chapter does not address except incidentally whether services have been provided in a cost contribution arrangement, nor, in such a case, the appropriate arm’s length pricing. Cost contribution arrangements are the subject of Chapter VIII.

7.2 Nearly every MNE group must arrange for a wide scope of services to be available to its members, in particular administrative, technical, financial and commercial services. Such services may include management, coordination and control functions for the whole group. The cost of providing such services may be borne initially by the parent, by one or more specially designated group members (“a group service centre”), or other group members. An independent enterprise in need of a service may acquire the services from a service provider who specialises in that type of service or may perform the service for itself (i.e. in-house). In a similar way, a member of an MNE group in need of a service may acquire it from independent enterprises, or from one or more associated enterprises in the same MNE group (i.e. intra-group), or may perform the service for itself. Intra-group services often include those that are typically available externally from independent enterprises (such as legal and accounting services), in addition to those that are ordinarily performed internally (e.g. by an enterprise for itself, such as central auditing, financing advice, or training of personnel). It is not in the interests of an MNE group to incur costs unnecessarily, and it is in the interest of an MNE group to provide intra-group services efficiently. Application of the guidance in this chapter should ensure that services are appropriately identified and associated costs appropriately allocated within the MNE group in accordance with the arm’s length principle.

7.3 Intra-group arrangements for rendering services are sometimes linked to arrangements for transferring goods or intangible property (or the licensing thereof). In some cases, such as know-how contracts containing a service element, it may be very difficult to determine where the exact border lies between the transfer of intangibles or rights in intangibles and the provision of services. Ancillary services are frequently associated with the transfer of technology. It may therefore be necessary to consider the principles for aggregation and segregation of transactions in Chapter III where a mixed transfer of services and property is involved.

7.4 Intra-group services may vary considerably among MNE groups, as does the extent to which those services provide a benefit, or an expected benefit, to one or more group members. Each case is dependent upon its own facts and circumstances and the arrangements within the group. For example, in a decentralised group, the parent company may limit its intra-group activity to monitoring its investments in its subsidiaries in its capacity as a shareholder. In contrast, in a centralised or integrated group, the board of directors and senior management of the parent company may make important decisions concerning the affairs of its subsidiaries, and the parent company may support the implementation of these decisions by performing general and administrative activities for its subsidiaries as well as operational activities such as treasury management, marketing, and supply chain management.

B. Main issues

7.5 There are two issues in the analysis of transfer pricing for intra-group services. One issue is whether intra-group services have in fact been provided. The other issue is what the intra-group charge for
《OECD转让定价指南》第七章的现有内容删除，替换成下述文字。

A. 引言

7.1 本章从转让定价角度探讨在跨国企业集团成员与集团内其他成员是否有提供服务的活动存在以及确定这些集团内部服务的价格是否符合独立交易原则时产生的问题。除偶尔提及外，本章并不讨论服务活动是否以成本分摊协议的形式提供，以及成本分摊协议下的定价是否符合独立交易原则的问题。成本分摊协议将在第八章详细探讨。

7.2 几乎每个跨国企业集团都需要为其成员安排提供多种多样的服务，尤其是行政、技术、财务及商务等服务。这些服务可能包括为整个集团提供的管理、协调和控制功能，提供这些服务的成本通常可能是由母公司、一个或多个特别指定的集团成员（即“集团服务中心”）或其他集团成员承担。当一个独立企业需要某一服务时，它可以由集团提供服务的提供者处获取，也可以从集团内其他集团成员处获取。当一个跨国企业集团成员需要服务时，它可以或者是由独立企业或一个或多个集团内关联企业处获取，或自行提供。集团内部服务一般包括由外部独立企业提供的服务（例如法律和会计服务），以及通常由集团内部服务（即企业内部服务的集中审计、业务咨询、人员培训等）。对于跨国企业集团而言，承担不必要的成本并不符合其利益诉求，它们更希望能有效提供集团内部服务。在运用本章指南时，必须合理明确所提供的服务，并且将与之相关的成本在符合独立交易原则的前提下在跨国企业集团内进行合理分摊。

7.3 集团内部服务安排有时会与转让有形或无形资产（或无形资产使用许可）相联系。在某些情况下，比如合同条款许可合同服务费用时，可能很难准确地判断转让有形资产或无形资产相关权利与提供服务之间的界限。由于转让技术常常需要同时提供一些辅助服务，因此，在同时涉及转让无形资产和提供服务时，有必要考虑借鉴第三章中的交易合并与拆分原则。

7.4 集团内部服务形式多样且复杂，集团成员间的收益或损失的收益或损失差异也很大。各种情况的结果完全取决于具体的交易条件和情况以及集团内部的安排。例如在分散管理型集团内，母公司在集团内开展的业务可能仅限于以股东身份管理其对子公司的投资。而在集中型一体化集团中，母公司董事会或高管可能对涉及子公司的事务做出重要决策。为了支持这些重要决策的履行执行，母公司还可能会为子公司开展日常行政管理活动，如资金管理、市场营销和供应链管理等。

B. 主要问题

7.5 分析集团内部服务转让定价时存在两个主要问题。问题之一是是否真正提供了集团内部服务。
such services for tax purposes should be in accordance with the arm's length principle. Each of these issues is discussed below.

B.1 Determining whether intra-group services have been rendered

B.1.1 Benefits test

7.6 Under the arm's length principle, the question whether an intra-group service has been rendered when an activity is performed for one or more group members by another group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance or maintain its business position. This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in-house for itself. If the activity is not one for which the independent enterprise would have been willing to pay or perform for itself, the activity ordinarily should not be considered as an intra-group service under the arm's length principle.

7.7 The analysis described above quite clearly depends on the actual facts and circumstances, and it is not possible in the abstract to set forth categorically the activities that do or do not constitute the rendering of intra-group services. However, some guidance may be given to elucidate how the analysis would be applied for some common types of services undertaken in MNE groups.

7.8 Some intra-group services are performed by one member of an MNE group to meet an identified need of one or more specific members of the group. In such a case, it is relatively straightforward to determine whether a service has been provided. Ordinary an independent enterprise in comparable circumstances would have satisfied the identified need either by performing the activity in-house or by having the activity performed by a third party. Thus, in such a case, an intra-group service ordinarily would be found to exist. For example, an intra-group service would normally be found where an associated enterprise repairs equipment used in manufacturing by another member of the MNE group. It is essential, however, that reliable documentation is provided to the tax administrations to verify that the costs have been incurred by the service provider.

B.1.2 Shareholder activities

7.9 A more complex analysis is necessary where an associated enterprise undertakes activities that relate to more than one member of the group or to the group as a whole. In a narrow range of such cases, an intra-group activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member (usually the parent company or a regional holding company) performs solely because of its ownership interest in one or more other group members, i.e., in its capacity as shareholder. This type of activity would not be considered to be an intra-group service, and thus would not justify a charge to other group members. Instead, the costs associated with this type of activity should be borne and allocated at the level of the shareholder. This type of activity may be referred to as a "shareholder activity", distinguishable from the broader term "stewardship activity" used in the 1979 Report. Stewardship activities covered a range of activities by a shareholder that may include the provision of services to other group members, for example services that would be provided by a coordinating centre. These latter types of non-shareholder activities could include detailed planning services for particular operations, emergency management or technical advice (troubleshooting), or in some cases assistance in day-to-day management.

7.10 The following are examples of costs associated with shareholder activities, under the standard set forth in paragraph 7.6:
另一个问题是如何从税收角度为集团内部服务确定符合独立交易原则的价格。下文对这两个问题分别进行了探讨。

### B.1 确定集团内部服务是否已经提供

####  B.1.1 受益性测试

7.6 按照独立交易原则，当集团内某一成员为一个或多个其他成员开展了一项活动时，是否可确认提供了集团内部服务取决于该活动是否为集团内各成员带来了经济或商业价值，以提升或维持各自的商业地位。这可以通过如下方式确定：即独立企业互为可比情形下是否愿意为其他企业提供的某项活动支付费用，或由内部部门自行开展该项活动。如果独立企业既不希望提供该项服务费用，也不愿自行开展该项活动，按照独立交易原则，这项活动通常就不能认定为集团内部服务。

7.7 上述分析清晰地显示，是否提供了集团内部服务需根据具体条件和情况而定，因而不可能抽象地列出哪些活动构成或不构成集团内部服务。然而，对于跨国企业集团内常见的服务类型，可以提供一些指导原则以供分析之用。

7.8 一些集团内部服务由跨国企业集团内某个成员提供，以满足集团内一个或多个成员特定的需要。在这种情况下，较为直观地确定是否提供了服务。通常，如果独立企业在可比情形下可以自行开发或通过独立第三方提供该项活动以满足特定的需求，那么集团内部服务就会被认定存在。例如，跨国企业集团内某个成员为另一成员企业维修生产设备，通常就可认定为集团内部服务。然而，企业应向税务机关提供可靠的文件材料来证实服务提供方已发生的成本。

####  B.1.2 股东活动

7.9 当某个关联企业开展的活动涉及多个集团成员或整个集团时，就需要进行更为复杂的分析。在少数情况下，某些集团内活动虽然系为了集团成员而开展，但这些成员实际并不需要这些活动（而且在非关联情况下也不会为这些活动支付费用）。这样的活动一般是某个集团成员（通常为母公司或区域控股公司）出于在一个或多个集团成员中拥有所有者利益而履行的相关职责义务，不能被认定为集团内部服务，因而也不能就此向其他集团成员收取费用。与这类活动相关的成本应该由股东承担，在股东之间进行分摊。

这种活动即所谓的“股东活动”，是股东活动区别于1979年报告中更广泛的“管理活动”（即stewardship activity，有时也称为“管理活动”）。管理活动包含了一系列股东可能开展的活动，包括为其他集团成员提供服务，例如协调中心提供的服务。管理活动还包括一些非股东活动，如为特定工作提供细化的计划服务，紧急事件管理、技术咨询（问题解决）或某些情况下日常辅助管理。

7.10 按照第7.6段的标准，以下列举了一些与股东活动相关的成本；
a) Costs relating to the juridical structure of the parent company itself, such as meetings of shareholders of the parent, issuing of shares in the parent company, stock exchange listing of the parent company and costs of the supervisory board;

b) Costs relating to reporting requirements (including financial reporting and audit) of the parent company including the consolidation of reports, costs relating to the parent company's audit of the subsidiary's accounts carried out exclusively in the interest of the parent company, and costs relating to the preparation of consolidated financial statements of the MNE (however, in practice costs incurred locally by the subsidiaries may not need to be passed on to the parent or holding company where it is disproportionately onerous to identify and isolate those costs);

c) Costs of raising funds for the acquisition of its participations and costs relating to the parent company's investor relations such as communication strategy with shareholders of the parent company, financial analysts, funds and other stakeholders in the parent company;

d) Costs relating to compliance of the parent company with the relevant tax laws;

e) Costs which are ancillary to the corporate governance of the MNE as a whole.

In contrast, if for example a parent company raises funds on behalf of another group member which uses them to acquire a new company, the parent company would generally be regarded as providing a service to the group member. The 1984 Report also mentioned "costs of managerial and control (monitoring) activities related to the management and protection of the investment as such in participations". Whether these activities fall within the definition of shareholder activities as defined in these guidelines would be determined according to whether under comparable facts and circumstances the activity is one that an independent enterprise would have been willing to pay for or to perform for itself. Where activities such as those described above are performed by a group company other than solely because of an ownership interest in other group members, then that group company is not performing shareholder activities but should be regarded as providing a service to the parent or holding company to which the guidance in this chapter applies.

B.1.3 Duplication

7.11 In general, no intra-group service should be found for activities undertaken by one group member that merely duplicate a service that another group member is performing for itself, or that is being performed for such other group members by a third party. An exception may be where the duplication of services is only temporary, for example, where an MNE group is reorganising to centralise its management functions. Another exception would be where the duplication is undertaken to reduce the risk of a wrong business decision (e.g. by getting a second legal opinion on a subject). Any consideration of possible duplication of services needs to identify the nature of the services in detail, and the reason why the company appears to be duplicating costs contrary to efficient practices. The fact that a company performs, for example, marketing services in-house and also is charged for marketing services from a group company does not of itself determine duplication, since marketing is a broad term covering many levels of activity. Examination of information provided by the taxpayer may determine that the intra-group services are different, additional, or complementary to the activities performed in-house. The benefits test would then apply to those non-duplicative elements of the intra-group services. Some regulated sectors require control functions to be performed locally as well as on a consolidated basis by the parent; such requirements should not lead to disallowance on grounds of duplication.
a) 与母公司治理结构相关的活动成本，例如母公司股东大会、母公司发行股票、母公司上市及监事会成本；
b) 与母公司报销要求（包括财务报销和审计）相关的成本；包括合并报表、出母公司利益而对子公司账目进行审计的成本以及与跨国企业准备合并财务报表相关的成本（然而实践中，如果需要花费异常庞大的工作量去确定如何母公司应当所发生的成本，则可能不需要这些成本转移给其母公司或控股公司）；
c) 为收购集团新成员而募集资金的成本以及与母公司投资者关系相关的成本；例如与母公司股东沟通策略相关的成本，与母公司财务风险、资金和其他利益相关者相关的成本；
d) 母公司为满足税务合规性的要求而发生的相关成本；
e) 跨国集团整体的公司治理相关的辅助性成本。

但如果母公司代表某一集团成员募集资金，该成员利用募集资金收购一家新企业，那么通常认为母公司为该集团成员提供了服务。1984年报告还提到“管理和保护对集团成员的投资者所发生的相关管理和控制（监督）活动的成本”。对于这些活动是否在《转让定价指南》定义的“股东活动”范畴内，需要根据独立企业，在可比情形下是否愿意购买或自行实施这些活动来判断。如果某个集团成员开展上述活动并不是因为其在其他集团成员中拥有所有者利益，那么对于开展上述活动的集团成员而言，这些活动就不是股东活动；而应视为该集团成员向母公司或控股公司提供了本章指南所分析的集团内部服务。

B.1.3 重复性

7.11 通常，某个集团成员重复一项已由其他成员自行开展或已由第三方为该成员提供的活动不能构成集团内部服务。但也有例外的情况：例如，某跨国企业集团正在重组并准备将集团管理功能集中，为此发生了一些暂时性的重复服务；或者重复性服务是为降低经营决策出错的风险（例如对于某一事项提供二次法律意见）。对潜在的重复性服务进行考量时，必须确定该服务的详细性质、了解企业违背高效运营原则发生重复费用的原因。举例而言，某企业自行开展市场营销活动，同时也向其集团成员支付市场营销服务费，但并不必然表明发生了重复服务，因为市场营销是一个广泛术语，涵盖了很多层次的活动。通过审慎检查提供的信息，可能会发现这些集团内部服务与企业自身开展的活动有所不同，或是额外或辅助性的活动，然后即可通过受益性测试对集团内部服务中不重复的部分进行分析。一些受管制的行业要求子公司和母公司都要执行控制功能，对于这样的监管要求，不能直接将相关服务认定为重复性服务而不予承认。
B.1.4 Incidental benefits

7.12 There are some cases where an intra-group service performed by a group member such as a shareholder or coordinating centre relates only to some group members but incidentally provides benefits to other group members. Examples could be analysing the question whether to reorganise the group, to acquire new members, or to terminate a division. These activities could constitute intra-group services to the particular group members involved, for example those members who may make the acquisition or terminate one of their divisions, but they may also produce economic benefits for other group members not directly involved in the potential decision since the analysis could provide useful information about their own business operations. The incidental benefits ordinarily would not cause these other group members to be treated as receiving an intra-group service because the activities producing the benefits would not be ones for which an independent enterprise ordinarily would be willing to pay.

7.13 Similarly, an associated enterprise should not be considered to receive an intra-group service when it obtains incidental benefits attributable solely to its being part of a larger concern, and not to any specific activity being performed. For example, no service would be received where an associated enterprise by reason of its affiliation alone has a credit-rating higher than it would if it were unaffiliated, but an intra-group service would usually exist where the higher credit rating were due to a guarantee by another group member, or where the enterprise benefitted from deliberate concerted action involving global marketing and public relations campaigns. In this respect, passive association should be distinguished from active promotion of the MNE group's attributes that positively enhances the profit-making potential of particular members of the group. Each case must be determined according to its own facts and circumstances. See Section D.8 of Chapter I on MNE group synergies.

B.1.5 Centralised services

7.14 Other activities that may relate to the group as a whole are those centralised in the parent company or one or more group service centres (such as a regional headquarters company) and made available to the group (or multiple members thereof). The activities that are centralised depend on the kind of business and on the organisational structure of the group, but in general they may include administrative services such as planning, coordination, budgetary control, financial advice, accounting, auditing, legal, factoring, computer services; financial services such as supervision of cash flows and solvency, capital increases, loan contracts, management of interest and exchange rate risks, and refinancing; assistance in the fields of production, buying, distribution and marketing; and services in staff matters such as recruitment and training. Group service centres also often carry out order management, customer service and call centres, research and development or administer and protect intangible property for all or part of the MNE group. These types of activities ordinarily will be considered intra-group services because they are the type of activities that independent enterprises would have been willing to pay for or to perform for themselves.

B.1.6 Form of the remuneration

7.15 In considering whether a charge for the provision of services would be made between independent enterprises, it would also be relevant to consider the form in which an arm's length consideration would take had the transaction occurred between independent enterprises dealing at arm's length. For example, in respect of financial services such as loans, foreign exchange and hedging, all of the remuneration may be built into the spread and it would not be appropriate to expect a further service fee to be charged if such were the case. Similarly, in some buying or procurement services a commission element may be incorporated in the price of the product or services procured, and a separate service fee may not be appropriate.


B.1.4 附带收益

7.12 在某些情况下，股东或协调中心等集团成员提供的集团内部服务不仅与某些集团成员有关，但附带给其他成员也带来收益。例如，分析是否需要进行集团重组、收购新的集团成员或终止某个事业部等决策。这些活动对涉及的特定成员可以构成集团内部服务，他们可能会进行并购或解散某个部门的集团成员。同时，这些活动也可能为集团内与该决策不直接相关的其他成员带来收益。使其他成员从上述分析中获得与经营运作相关的有用信息。通常，这种附带收益不会被平等地分析构成集团内部服务。原因在于独立企业通常不会为这些活动所带来的收益支付费用。

7.13 同样，如果关联企业获取的附带收益仅仅因为其是集团的一员，而非出于任何特定的活动，那么该关联企业不应被视为接受了集团内部服务。例如，关联企业仅由于其关联关系而获得比无关联关系情况更高的信用评级时，不应认为接受了集团内部服务。但如果企业更高的信用评级是由于另一集团成员的担保，或企业受益于集团层面的协同活动（包括集团的全球市场营销和公共关系活动）时，通常认为存在集团内部服务。因此，被利用的关联关系与主要通过宣传集团品牌来提高集团成员的盈利能力的活动需要区分对待。具体情况要具体分析。有关跨国企业集团的协同效应，参见第一章第D.8节。

B.1.5 集中服务

7.14 其他与集团整体相关的活动包括由母公司或一个或多个集团服务中心（如区域总部）为集团（或多个集团成员）集中提供的活动。可集中的活动取决于业务种类和集团组织架构，通常包括：行政管理、薪酬、管理、预算控制、财务咨询、会计、审计、法律、保险、计算机构筑等；财务服务，如现金流和债务管理、投资、贷款合同、利息和汇率风险管理，再融资等；生产现场辅助、采购、分销与市场营销、员工服务等，如员工招聘与培训。集团服务中心还常常为集团所有或部分子公司承担订单管理、客户服务平台和呼叫中心、无形资产研发、管理及保护等职能。这些类型的活动通常被认为是集团内部服务，因为独立企业愿意支付或自行开展上述活动。

B.1.6 报酬形式

7.15 在考虑独立企业询问服务是否会收取费用时，还应考虑如果独立企业按独立交易原则进行交易时会采取何种符合独立交易原则的报酬形式。以财务服务为例，如贷款、外汇与对冲交易等，所有的报酬可能体现在差价中。在此情况下进一步收取服务费是不合理的。同样，在一些购买或采购服务中，所采购产品或服务的价格中可能已经包含了佣金部分。因此，另外收取服务费也是不合理的。
7.16 Another issue arises with respect to services provided “on call”. The question is whether the availability of such services is itself a separate service for which an arm’s length charge (in addition to any charge for services actually rendered) should be determined. A parent company or one or more group service centres may be on hand to provide services such as financial, managerial, technical, legal or tax advice and assistance to members of the group at any time. In that case, a service may be rendered to associated enterprises by having staff, equipment, etc., available. An intra-group service would exist to the extent that it would be reasonable to expect an independent enterprise in comparable circumstances to incur “stand-by” charges to ensure the availability of the services when the need for them arises. It is not unknown, for example, for an independent enterprise to pay an annual “retainer” fee to a firm of lawyers to ensure entitlement to legal advice and representation if litigation is brought. Another example is a service contract for priority computer network repair in the event of a breakdown.

7.17 These services may be available on call and they may vary in amount and importance from year to year. It is unlikely that an independent enterprise would incur stand-by charges where the potential need for the service was remote, where the advantage of having services on-call was negligible, or where the on-call services could be obtained promptly and readily from other sources without the need for stand-by arrangements. Thus, the benefit conferred on a group company by the on-call arrangements should be considered, perhaps by looking at the extent to which the services have been used over a period of several years rather than solely for the year in which a charge is to be made, before determining that an intra-group service is being provided.

7.18 The fact that a payment was made to an associated enterprise for purported services can be useful in determining whether services were in fact provided, but the mere description of a payment as, for example, “management fees” should not be expected to be treated as prima facie evidence that such services have been rendered. At the same time, the absence of payments or contractual agreements does not automatically lead to the conclusion that no intra-group services have been rendered.

B.2 Determining an arm’s length charge

B.2.1 In general

7.19 Once it is determined that an intra-group service has been rendered, it is necessary, as for other types of intra-group transfers, to determine whether the amount of the charge, if any, is in accordance with the arm’s length principle. This means that the charge for intra-group services should be that which would have been made and accepted between independent enterprises in comparable circumstances. Consequently, such transactions should not be treated differently for tax purposes from comparable transactions between independent enterprises, simply because the transactions are between enterprises that happen to be associated.

B.2.2 Identifying actual arrangements for charging for intra-group services

7.20 To identify the amount, if any, that has actually been charged for services, a tax administration will need to identify what arrangements, if any, have actually been put in place between the associated enterprises to facilitate charges being made for the provision of services between them.

B.2.2.1 Direct-charge methods

7.21 In certain cases, the arrangements made for charging for intra-group services can be readily identified. These cases are where the MNE group uses a direct-charge method, i.e. where the associated enterprises are charged for specific services. In general, the direct-charge method is of great practical convenience to tax administrations because it allows the service performed and the basis for the payment to
7.16 另一个问题关于提供“应需/临时”服务。该问题在于何时保证服务的可获取性本身是否已经构成了一个独立的服务，进而应认定相应的符合独立交易原则的价格（在为已实际提供的服务收取的费用以外另行收费）。母公司或一个或多个集团服务中心可能在任何时刻为集团成员提供财务、管理、技术、法律或税务咨询或辅助等方面的服务。在这种情况下，通过配置资源、设备等，随时准备提供服务可能本身即构成一种服务。要判断是否为集团内部服务，应合理预计独立企业间可比情形下是否会为预先获取服务而支付相应的“临命”费用。实践中的例子包括：独立企业在向律所支付律师费时，因确认在发生诉讼的情况下可以得到法律咨询与代理。另一个例子是计算机网络发生故障时的优先维修权合同。

7.17 这些服务可以应需/待命形式提供，在数量和重要性上每年也会发生变化。如果对这类服务的潜在需求非常小，或使用应需/待命服务的优势完全可以忽略不计，或所谓应需/待命服务可以迅速便捷地从其他方面获取且无需“应需/待命”合同安排的情况下，独立企业就不会愿意发生应需/待命服务费用。因此，在确定是否有集团内部服务提供前，应判断应需/待命安排给集团带来的收益，需要考虑几年内该应需/待命服务的使用情况，而不应局限于支付费用的当年度。

7.18 已由关联企业就其声称提供服务进行支付这一事实，有助于确定该服务是否已实际提供。但对支付进行描述（如“管理费”），并不能直接构成已经提供服务的初步证据。与此同时，如果没有付款或者没有合同，也不能说明不存在集团内部服务。

B.2 确定符合独立交易原则的服务收费

B.2.1 概述

7.19 一旦确定了集团内部服务已提供，如同其他集团内部交易一样，都需要确定费用金额是否符合独立交易原则。集团内部服务的收费方式和费用应参照独立企业在可比情形下收取和接受的金额。因此，不能因为上述交易发生在关联企业之间，而在税务处理上将该交易与独立企业间的可比交易区别对待。

B.2.2 确认集团内部服务收费的实际安排

7.20 为确定服务的实际收费金额，税务机关需要确认关联合同确实存在，服务供需双方确定费用的实际安排。

B.2.2.1 直接收费法

7.21 在跨国企业集团内使用直接收费法，即关联企业为获得特定的服务而支付费用的情况下，集团内部服务收费安排比较容易确定。通常，直接收费法在实践中为税务机关提供了极大的便利，原因在于该方法可以清楚地确定服务和费用计算的依据。
be clearly identified. Thus, the direct-charge method facilitates the determination of whether the charge is consistent with the arm’s length principle.

7.22 An MNE group may be able to adopt direct-charging arrangements, particularly where services similar to those rendered to associated enterprises are also rendered to independent parties. If specific services are provided not only to associated enterprises but also to independent enterprises in a comparable manner and as a significant part of its business, it could be presumed that the MNE has the ability to demonstrate a separate basis for the charge (e.g. by recording the work done, the fee basis, or costs expended in fulfilling its third party contracts). As a result, MNEs in such a case are encouraged to adopt the direct-charge method in relation to their transactions with associated enterprises. It is accepted, however, that this approach may not always be appropriate if, for example, the services to independent parties are merely occasional or marginal.

B.2.2.2 Indirect-charge methods

7.23 A direct-charge method for charging for intra-group services can be difficult to apply in practice. Consequently, some MNE groups have developed other methods for charging for services provided by parent companies or group service centres. In such cases, MNE groups may find they have few alternatives but to use cost allocation and apportionment methods which often necessitate some degree of estimation or approximation, as a basis for calculating an arm’s length charge following the principles in Section B.2.3 below. Such methods are generally referred to as indirect-charge methods and should be allowable provided sufficient regard has been given to the value of the services to recipients and the extent to which comparable services are provided between independent enterprises. These methods of calculating charges would generally not be acceptable where specific services that form a main business activity of the enterprise are provided not only to associated enterprises but also to independent parties. While every attempt should be made to charge fairly for the service provided, any charging has to be supported by an identifiable and reasonably foreseeable benefit. Any indirect-charge method should be sensitive to the commercial features of the individual case (e.g. the allocation key makes sense under the circumstances), contain safeguards against manipulation and follow sound accounting principles, and be capable of producing charges or allocations of costs that are commensurate with the actual or reasonably expected benefits to the recipient of the service.

7.24 In some cases, an indirect-charge method may be necessary due to the nature of the service being provided. One example is where the proportion of the value of the services rendered to the various relevant entities cannot be quantified except on an approximate or estimated basis. This problem may occur, for example, where sales promotion activities carried on centrally (e.g. at international fairs, in the international press, or through other centralised advertising campaigns) may affect the quantity of goods manufactured or sold by a number of affiliates. Another case is where a separate recording and analysis of the relevant services for each beneficiary would involve a burden of administrative work that would be disproportionately heavy in relation to the activities themselves. In such cases, the charge could be determined by reference to an allocation among all potential beneficiaries of the costs that cannot be allocated directly, i.e. costs that cannot be specifically assigned to the actual beneficiaries of the various services. To satisfy the arm’s length principle, the allocation method chosen must lead to a result that is consistent with what comparable independent enterprises would have been prepared to accept.

7.25 The allocation should be based on an appropriate measure of the usage of the service that is also easy to verify, for example turnover, staff employed, or an activity based key such as orders processed. Whether the allocation method is appropriate may depend on the nature and usage of the service. For example, the usage or provision of payroll services may be more related to the number of staff than to turnover, while the allocation of the stand-by costs of priority computer back-up could be allocated in proportion to relative expenditure on computer equipment by the group members.
因此，直接收费法有助于确定收取的费用是否符合独立交易原则。

7.22 跨国企业集团在同时为关联方和非关联方提供相似服务的情况下，可能可以使用直接收费法。如果作为跨国企业集团的主要业务，相关特定服务不仅提供给关联方，而且以可比的方式提供给非关联方，通常可以推定认为跨国企业集团完全有能力证明分别收费的基础（例如履行第三方合同，记录工作完成量、费用依据和成本支出）。因此，应鼓励跨国企业集团在这样的情况下对关联交易采用直接收费法。然而，这种方法并非总是适用，例如，跨国企业集团只是在偶尔或少量的情况下，为建立第三方提供服务。

B.2.2.2 间接收费法

7.23 在实践中，跨国企业集团很难采用直接收费法。因此，一些跨国企业集团不得不使用其他方法确定由母公司或集团服务中心提供的服务的收费。在这样的情况下，跨国企业集团可能会发现可使用的方法很少，通常只能使用成本分摊和分配的方法。这些方法通常需要进行一定程度的预测和运用近似值，按照第B.2.3节的原则计算符合独立交易原则的费用标准。这种方法通常称为间接收费法，在充分考虑服务为目的带来的价值以及独立企业间提供的可比服务等因素下，应当可以使用间接收费法。在同时向关联方和非关联方提供的特定服务构成主要业务活动的情况下，这种计算费用的方法通常不能被接受。在尽力实现提供服务公平收费的同时，任何收费都应当有可确认以及可合理预见的收益。任何间接收费法都应当充分考虑具体情况下独立交易原则的分摊标准，设置防止操纵的措施和遵循合理的会计原则，并且计算得出的收费或分摊的成本与服务接受方实际或合理预期的收益相符。

7.24 在某些情况下，因服务性质的性质而不得不使用间接收费法，一种情形是提供给各关联方服务的价值无法按实际比例量化，只有依靠近似值估算。例如集中进行的产品促销活动（例如国际展会、国际罢工发布会或主要宣传广告宣传活动）会影响众多关联企业的生产和销售的数量。另一种情形是为每一个服务受益方分别记录和分析相关服务时，使得对于服务受益方的行政管理负担。在这种情况下，不能直接挂钩的服务成本，即成本不能明确地指定给服务的实际受益人，可以在所有潜在的服务受益方中采用一定方式分摊。为符合独立交易原则，选用的分摊方法结果必须与可比独立企业可接受的成本相一致。

7.25 分摊应依据针对服务使用的合理且符合原则的方式进行，例如销售额、雇员数或基于某项活动的分摊标准（如所处理的订单数量）。分摊方法是否合理取决于服务的性质及使用情况，例如使用或提供的服务管理与雇员数更加相关，而非销售额；而针对计算机优先支援的应需/待命服务成本的分摊可以按照集团成员的计算机设备相关支出比例划分。
7.26 When an indirect-charge method is used, the relationship between the charge and the services provided may be obscured and it may become difficult to evaluate the benefit provided. Indeed, it may mean that the enterprise being charged for a service itself has not related the charge to the service. Consequently, there is an increased risk of double taxation because it may be more difficult to determine a deduction for costs incurred on behalf of group members if compensation cannot be readily identified, or for the recipient of the service to establish a deduction for any amount paid if it is unable to demonstrate that services have been provided.

B.2.2.3 Form of the compensation

7.27 The compensation for services rendered to an associated enterprise may be included in the price for other transfers. For instance, the price for licensing a patent or know-how may include a payment for technical assistance services or centralised services performed for the licensee or for managerial advice on the marketing of the goods produced under the licence. In such cases, the tax administration and the taxpayers would have to check that there is no additional service fee charged and that there is no double deduction.

7.28 In identifying arrangements for charging any retainer for the provision of “on call” services (as discussed in paragraphs 7.16 and 7.17), it may be necessary to examine the terms for the actual use of the services since these may include provisions that no charge is made for actual use until the level of usage exceeds a predetermined level.

B.2.3 Calculating the arm’s length compensation

7.29 In trying to determine the arm’s length price in relation to intra-group services, the matter should be considered both from the perspective of the service provider and from the perspective of the recipient of the service. In this respect, relevant considerations include the value of the service to the recipient and how much a comparable independent enterprise would be prepared to pay for that service in comparable circumstances, as well as the costs to the service provider.

7.30 For example, from the perspective of an independent enterprise seeking a service, the service providers in that market may or may not be willing or able to supply the service at a price that the independent enterprise is prepared to pay. If the service providers can supply the wanted service within a range of prices that the independent enterprise would be prepared to pay, then a deal will be struck. From the point of view of the service provider, a price below which it would not supply the service and the cost to it are relevant considerations to address, but they are not necessarily determinative of the outcome in every case.

B.2.3.1 Methods

7.31 The method to be used to determine arm’s length transfer pricing for intra-group services should be determined according to the guidelines in Chapters I, II, and III. Often, the application of these guidelines will lead to use of the CUP or a cost-based method (cost plus method or cost-based TNMM) for pricing intra-group services. A CUP method is likely to be the most appropriate method where there is a comparable service provided between independent enterprises in the recipient’s market, or by the associated enterprise providing the services to an independent enterprise in comparable circumstances. For example, this might be the case where accounting, auditing, legal, or computer services are being provided subject to the controlled and uncontrolled transactions being comparable. A cost based method would likely be the most appropriate method in the absence of a CUP where the nature of the activities involved, assets used, and risks assumed are comparable to those undertaken by independent enterprises. As indicated in Chapter II, Part II, in applying the cost plus method, there should be a consistency between the
7.26 在使用间接收费法时，收取的费用与提供的服务之间的关系可能比较模糊，且可能很难评估服务带来的收益。实际上，这可能意味着被收取服务的企业本身没有将服务与收取的费用关联起来。因此，双重收费的风险就会增加。原因在于：如果服务提供方的服务回报不易确定，那么就很难确定其承担的集团成员服务成本对应的税前扣除额。或服务接受方如果不能证明服务是否已提供，就不能确定已付服务费的税前扣除额。

B.2.2.3 补偿形式

7.27 为关联企业提供服务的补偿可能包含在其他交易的价格中。例如专利或专有技术许可的价格中可能包括技术转让服务。为被许可方集中提供的服务，或与特许生产产品的市场营销相关的管理咨询服务等费用。在这种情况下，税务机关和纳税人应该检查是否收取了额外的服务费用以及是否做了双重扣除。

7.28 在确定收取“商誉”服务费用的安排时（参见第7.16段和第7.17段），有必要检查实际使用该服务的合同条款，其中可能包含实际服务使用量不足固定量免收费用的条款。

B.2.3 计算独立交易原则的指导

7.29 在确定符合独立交易原则的集团内部服务报酬时，须从服务的提供方与接受方两个角度考虑。相关的考虑因素包括：服务接受方的价值，可比独立企业可比情形下愿意支付的服务收入金额，以及服务提供方的成本。

7.30 例如，从需求某服务的独立企业的角度看，市场上的服务提供方可能愿意或不愿意、能够或不能够接受独立企业准备支付的服务价格。如果服务提供方可以在符合独立企业支付意愿价格的区间内提供服务，那么交易就可能达成。从服务提供方角度看，提供服务的最低价格及服务成本是两个需要考虑的相关因素。但这两点并非在每种情况下都是决定结果的关键性因素。

B.2.3.1 方法

7.31 针对集团内部服务，应该按照第一章的指导原则来确定定点方法以及符合独立交易原则的价格。通常，在这些指导下会运用可比非受控价格法或基于成本的方法（成本加成法或基于成本的交易净利法）来为集团内部服务定价。如果在服务接受方所在的市场中，存在独立企业之间提供的可比服务，或关联企业在可比情况下提供该服务给独立企业，可比非受控价格法很可能会是最合适的方法。例如，提供会计、审计、法律或计算机服务可能属于这种情况。在选用可比非受控价格法的条件不具备时，所提供的服务的性质、使用的资产、承担的风险与独立企业之间服务较为可比时，采用基于成本的方法可能比较合理。如第二章第二节所述，采用成本加成法时，关联交易与非关联交易间包括的成本类别应当具有一致性。
controlled and uncontrolled transactions in the categories of cost that are included. In exceptional cases, for example where it may be difficult to apply the CUP method or the cost-based methods, it may be helpful to take account of more than one method (see paragraph 2.11) in reaching a satisfactory determination of arm's length pricing.

7.32 It may be necessary to perform a functional analysis of the various members of the group to establish the relationship between the relevant services and the members' activities and performance. In addition, it may be necessary to consider not only the immediate impact of a service, but also its long-term effect, bearing in mind that some costs will never actually produce the benefits that were reasonably expected when they were incurred. For example, expenditure on preparations for a marketing operation might prima facie be too heavy to be borne by a member in the light of its current resources; the determination whether the charge in such a case is arm’s length should consider expected benefits from the operation and the possibility that the amount and timing of the charge in some arm’s length arrangements might depend on the results of the operation. The taxpayer should be prepared to demonstrate the reasonableness of its charges to associated enterprises in such cases.

7.33 Where a cost based method is determined to be the most appropriate method to the circumstances of the case, the analysis would require examining whether the costs incurred by the group service provider need some adjustment to make the comparison of the controlled and uncontrolled transactions reliable.

7.34 When an associated enterprise is acting only as an agent or intermediary in the provision of services, it is important in applying a cost based method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves. In such a case, it may not be appropriate to determine arm’s length pricing as a mark-up on the cost of the services but rather on the costs of the agency function itself. For example, an associated enterprise may incur the costs of renting advertising space on behalf of group members, costs that the group members would have incurred directly had they been independent. In such a case, it may well be appropriate to pass on these costs to the group recipients without a mark-up, and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function.

B.2.3.2 Considerations on including a profit element

7.35 Depending on the method being used to establish an arm’s length charge for intra-group services, the issue may arise whether it is necessary that the charge be such that it results in a profit for the service provider. In an arm’s length transaction, an independent enterprise normally would seek to charge for services in such a way as to generate profit, rather than providing the services merely at cost. The economic alternatives available to the recipient of the service also need to be taken into account in determining the arm’s length charge. However, there are circumstances (e.g. as outlined in the discussion on business strategies in Chapter I) in which an independent enterprise may not realise a profit from the performance of services alone, for example where a supplier’s costs (anticipated or actual) exceed market price but the supplier agrees to provide the service to increase its profitability, perhaps by complementing its range of activities. Therefore, it need not always be the case that an arm’s length price will result in a profit for an associated enterprise that is performing an intra-group service.

7.36 For example, it may be the case that the market value of intra-group services is not greater than the costs incurred by the service provider. This could occur where, for example, the service is not an ordinary or recurrent activity of the service provider but is offered incidentally as a convenience to the MNE group. In determining whether the intra-group services represent the same value for money as could be obtained from an independent enterprise, a comparison of functions and expected benefits would be relevant to assessing comparability of the transactions. An MNE group may still determine to provide the service intra-group rather than using a third party for a variety of reasons, perhaps because of other intra-
在例外情况下，如难以适用可比非受控价格法和基于成本的方法，考虑可取的办法（参考第2.11段）可能有助于得出令人满意的独立交易价格。

7.32 对各集团成员进行财务分析可能对于确定相关服务与成员间的利益或关系的必要性是有关的。另外，由于有些成本在其发生时不会立即带来合理的预计收益，所以除了预期收益的当期影响外，可能还有必要考虑其长期影响。例如，某营销活动的营销费用从某个成员现有资源角度来看，可能会初步认为对该成员负担太重而无法承担。判断在这种情况下是否符合独立交易原则，需要考虑该活动的预期利益以及这样的可能性，即在一些符合独立交易原则的安排中，收益的金额和时间会取决于该活动的成本。纳税人在此情况下应当说明对关联企业收费的合理性。

7.33 如果考虑了具体情况后将基于成本的方法确定为最合适的办法，为了使关联交易和非关联交易的比较更为可靠，分析时需要确定集团内部服务提供方发生的成本是否需要调整。

7.34 当关联交易仅仅是提供服务过程中的代理或中介时，在使用基于成本的方法时，重要的收益或成本要与关联交易所行驶的代理功能相匹配，而不是与提供的服务本身相匹配。在此情况下，将符合独立交易原则的价格确定为服务成本加上加成，而不是代理功能本身的成本加上加成，可能是不合适的。例如，关联交易代表集团成员租赁或使用，相关的租赁成本是独立企业情况下会发生的成本，在此情况下，应该把这些成本不加成就转给集团内的接受方。只对发挥其代理功能时发生的成本进行加成。

B.2.3.2 对利润因素的考量

7.35 根据不同方法确定集团内部服务符合独立交易原则的收费，可能会引出同样的问题，即收取的费用是否应该按照服务提供方产生利润。在独立交易情况下，独立企业为提供服务收取的费用一般都会产生利润，而不是按成本提供服务。在确定符合独立交易原则的费用时，也需要从经济结果上考虑服务提供方能得到的其他替代选择。但是，存在这样的情况（如第一章对定价策略的讨论所提到的），独立企业可能在提供服务本身方面并不获利，如供应商在产品成本超过市场价格时仍然提供服务，也许是因为这样可以拓展业务范围从而增加其获利能力。因此，采用符合独立交易原则的价格并不必然使提供集团内部服务的关联企业获得利润。

7.36 例如，集团内部服务的市场价格可能并不高于服务提供方产生的成本，举例来说，服务提供方的服务可能并不是其常规或经常性活动，而只是偶尔为了跨国公司集团提供便利。在判断集团内部服务的货币价值与从独立企业得到的服务的货币价值是否相同的过程中，应将关联企业与独立企业的功能和预期收益进行比较，这有助于确认交易的可比性。跨国企业集团可能出于多方面的原因，仍然决定在集团内部提供。
group benefits (for which arm’s length compensation may be appropriate). It would not be appropriate in such a case to increase the price for the service above what would be established by the CUP method just to make sure the associated enterprise makes a profit. Such a result would be contrary to the arm’s length principle. However, it is important to ensure that all benefits to the recipient are properly taken into account.

7.37 While as a matter of principle tax administrations and taxpayers should try to establish the proper arm’s length pricing, it should not be overlooked that there may be practical reasons why a tax administration in its discretion exceptionally might be willing to forgo computing and taxing an arm’s length price from the performance of services in some cases, as distinct from allowing a taxpayer in appropriate circumstances to merely allocate the costs of providing those services. For instance, a cost-benefit analysis might indicate the additional tax revenue that would be collected does not justify the costs and administrative burdens of determining what an appropriate arm’s length price might be in some cases. In such cases, charging all relevant costs rather than an arm’s length price may provide a satisfactory result for MNEs and tax administrations. This concession is unlikely to be made by tax administrations where the provision of a service is a principal activity of the associated enterprise, where the profit element is relatively significant, or where direct charging is possible as a basis from which to determine the arm’s length price.

C. Some examples of intra-group services

7.38 This section sets forth several examples of transfer pricing issues in the provision of intra-group services. The examples are provided for illustrative purposes only. When dealing with individual cases, it is necessary to explore the actual facts and circumstances to judge the applicability of any transfer pricing method.

7.39 One example involves debt-factoring activities, where an MNE group decides to centralise the activities for economic reasons. For example, it may be prudent to centralise the debt-factoring activities to better manage liquidity, currency and debt risks and to provide administrative efficiencies. A debt-factoring centre that takes on this responsibility is performing intra-group services for which an arm’s length charge should be made. A CUP method could be appropriate in such a case.

7.40 Another example of an activity that may involve intra-group services is manufacturing or assembly operations. The activities can take a variety of forms including what is commonly referred to as contract manufacturing. In some cases of contract manufacturing the producer may operate under extensive instruction from the counterparty about what to produce, in what quantity and of what quality. In some cases, raw materials or components may be made available to the producer by the counterparty. The production company may be assured that its entire output will be purchased, assuming quality requirements are met. In such a case the production company could be considered as performing a low-risk service to the counterparty, and the cost plus method could be the most appropriate transfer pricing method, subject to the principles in Chapter II.

7.41 Research is similarly an example of an activity that may involve intra-group services. The terms of the activity can be set out in a detailed contract with the party commissioning the service, commonly known as contract research. The activity can involve highly skilled personnel and vary considerably both in its nature and in its importance to the success of the group. The actual arrangements can take a variety of forms from the undertaking of detailed programmes laid down by the principal party, extending to agreements where the research company has discretion to work within broadly defined categories. In the latter instance, the additional functions of identifying commercially valuable areas and assessing the risk of unsuccessful research can be a critical factor in the performance of the group as a whole. It is therefore crucial to undertake a detailed functional analysis and to obtain a clear understanding of the precise nature
供服务而不是使用第三方服务，如可能因为集团其他的内部利益（对此符合独立交易原则的补偿可能是合适的）。在此情况下，不能只为了确保关联企业获利，而使服务价格高于由可比非受控价格法确定的价格。这一结果有悖于独立交易原则。但是，确保考虑服务受方得到的所有收益是很重要的。

7.37 虽然从理论上说，税务机关和纳税人应尽一切可能确定符合独立交易原则的定价，但也不应忽略实际的原因，税务机关在某些情况下可能会因放弃对提供服务，而接受独立交易原则计算价格并征税，而是允许纳税人再适当的情况下只对提供服务的成本进行分摊。例如，成本收益分析显示，在某些情况下计算符合独立交易原则的价格所增加的行政负担及成本与因此增加的税收收入不相匹配。在这种情况下，按所有相关成本而不是符合独立交易原则的价格收取费用，能给跨国企业提供税务机关提供令人满意的结果。但当提供某些服务构成关联企业的主要业务时，税务机关一般不可能做出这种让步，因为此时利润因素相对比较重要，或直接收费可以作为计算符合独立交易原则的价格的基础。

C. 集团内部服务的实例

7.38 这一节例举了一些提供集团内部服务的转让定价问题的例子。这些例子仅作说明之用。在处理具体案例时，需要根据实际的事实和情况来决定转让定价法的适用性。

7.39 一个例子涉及债务保理活动，跨国企业集团因为经济原因决定对该活动进行集中化管理。例如，出于集中管理，将债务保理活动集中化，以更好地管理资产流动性、货币和债务风险，以及提高管理效率。承担这一任务的债务保理中心应对其提供的集团内部服务，收取符合独立交易原则的费用。可比非受控价格法可适用于该案例。

7.40 生产和组装业务是集团内部服务的另一个例子。这类活动可以有多种形式，包括通常所说的合约生产。在一些合约生产的情况下，生产商在生产产品的品种、数量和质量方面都会从合约对方得到明确的指示，有时，原材料或零部件可能由合约对方提供。如果生产方的产品符合质量要求，还可能获得其全部成品都被收购的保证。此时，可以认为该生产商在为合约方提供低风险的服务，根据《转让定价指南》第二章的原则，成本加成法是最为合适的转让定价方法。

7.41 同样，服务活动也是一个类似的集团内部服务实例。有关服务活动的条款可与服务委托方在具体的合约中订立，这便是通常所说的合约服务。服务活动可能涉及高技能人员；服务活动的性质以及对集团成功的重要性在不同情况下可能会大相径庭。实际工程可以采取各种形式，服务公司可以根据委托方规定的详细计划工作，也可以在限定比较宽泛的范围内自主工作。在后者的情下，需要额外承担的功能对集团整体的业绩而言非常关键，比如说识别商业价值的领域和分析研发失败可能带来的风险等。因此，在考虑选择合适的转让定价方法前，应进行详细的功能分析，切实了解服务活动的切实性质和开展方式。
of the research, and of how the activities are being carried out by the company, prior to consideration of the appropriate transfer pricing methodology. The consideration of options realistically available to the party commissioning the research may also prove useful in selecting the most appropriate transfer pricing method. See Section B.2 of Chapter VI.

7.42 Another example of intra-group services is the administration of licences. The administration and enforcement of intangible property rights should be distinguished from the exploitation of those rights for this purpose. The protection of a licence might be handled by a group service centre responsible for monitoring possible licence infringements and for enforcing licence rights.

D. Low value-adding intra-group services

7.43 This section provides specific guidance relating to a particular category of intra-group services referred to as low value-adding intra-group services. Section D.1 contains the definition of low value-adding intra-group services. Section D.2 sets out an elective, simplified approach for the determination of arm's length charges for low value-adding intra-group services, including a simplified benefits test. Section D.3 contains guidance on documentation and reporting requirements that should be met by an MNE group electing to apply this simplified approach. Finally, Section D.4 addresses some issues with regard to the levying of withholding taxes on charges for low value-adding intra-group services. In summary, the simplified approach recognises that the arm's length price for low value-adding intra-group services is closely related to costs, allocates the costs of providing each category of such services to those group companies which benefit from using those services, and then applies the same mark-up to all categories of services. MNE groups not electing to apply the simplified approach set out in this section should address transfer pricing issues related to low-value-adding services under the provisions of Sections A and B, above.

D.1 Definition of low value-adding intra-group services

7.44 This section discusses the definitional issues related to low value-adding intra-group services for applying the elective, simplified approach discussed under Section D.2. It starts by indicating the characteristics that services must have in order to qualify as low-value-adding intra-group services for applying the elective, simplified approach. It then identifies a series of activities that do not qualify as low value-adding intra-group services for the elective, simplified approach. Finally it contains a list of examples of services that likely would have the characteristics to qualify as low value-adding intra-groups services for the application of the simplified approach.

7.45 Low value-adding intra-group services for the purposes of the simplified approach are services performed by one member or more than one member of an MNE group on behalf of one or more other group members which

- are of a supportive nature

- are not part of the core business of the MNE group (i.e. not creating the profit-earning activities or contributing to economically significant activities of the MNE group)

- do not require the use of unique and valuable intangibles and do not lead to the creation of unique and valuable intangibles, and

- do not involve the assumption or control of substantial or significant risk by the service provider and do not give rise to the creation of significant risk for the service provider.
对委托方其他现实可行的选择进行考量，也可能会有助于确定最合适的转让定价方法。参见第六章第B.2节。

7.42 集团内部服务的另一个例子是允许权的管理。无形资产权利的管理和执行应与无形资产权利的利用区分开来。许可权的保护可以由集团服务中心来进行，该中心负责监控可能的许可侵权行为和非执行许可权。

D. 低附加值集团内部服务

7.43 本节所提供的指导原则涉及一类特定的集团内部服务，即低附加值集团内部服务。第D.1节介绍了对低附加值集团内部服务的定义。第D.2节对低附加值集团内部服务进行交易目的交易原则的定义，提出一种供选择的简化方法，其中包含计算的经济性测试。第D.3节就跨国企业集团选择适用简化方法时应遵循的文档和报告要求提供指导。最后，第D.4节对低附加值集团内部服务收费征收税收所得税的一些问题做出了说明。概括而言，简化方法认为低附加值集团内部服务符合独立交易原则的价格与成本密切相关。在受益集团企业之间分摊每一类别的服务成本，对所有类别的服务采用相同的加成率。对于不选择使用上述简化方法的跨国企业集团，应依据第A、B节中的规定处理与低附加值服务相关的转让定价问题。

D.1 低附加值集团内部服务的定义

7.44 本节讨论了低附加值集团内部服务的定义问题，以适用第D.2节中讨论的可供选择的简化方法，针对可适用简化方法的低附加值集团内部服务，本节首先列出了上述服务必须具备的特征；随后说明了一系列不符合附加值集团内部服务定义、无法使用简化方法的活动；最后列举了一系列可能符合低附加值集团内部服务条件，可以适用简化方法的服务的示例。

7.45 可适用简化方法的低附加值集团内部服务是指跨国企业集团的一个或多个成员企业为该集团中的一个或多个成员企业提供的一项服务，并且这类服务具备以下特征：

- 属于支持性质；
- 不构成跨国企业集团的核心业务（即不会形成营利活动，也不会构成跨国企业集团的重大经济活动）；
- 不需要使用独特且有价值的无形资产，也不会形成独特且有价值的无形资产；
- 服务提供方不承担和控制实质性或显著的风险，同时也不会给服务提供方带来显著的风险。
7.46 The guidance in this section is not applicable to services that would ordinarily qualify as low value-adding intra-group services where such services are rendered to unrelated customers of the members of the MNE group. In such cases it can be expected that reliable internal comparables exist and can be used for determining the arm's length price for the intra-group services.

7.47 The following activities would not qualify for the simplified approach outlined in this section:

- services constituting the core business of the MNE group
- research and development services (including software development unless falling within the scope of information technology services in 7.49)
- manufacturing and production services
- purchasing activities relating to raw materials or other materials that are used in the manufacturing or production process
- sales, marketing and distribution activities
- financial transactions
- extraction, exploration, or processing of natural resources
- insurance and reinsurance
- services of corporate senior management (other than management supervision of services that qualify as low value-adding intra-group services under the definition of paragraph 7.45).

7.48 The fact that an activity does not qualify for the simplified approach, as defined under paragraph 7.45, should not be interpreted to mean that that activity generates high returns. The activity could still add low value, and the determination of the arm's length charge for such activity, if any, should be determined according to the guidance set out in paragraphs 7.1 to 7.42.

7.49 The following bullet points provide examples of services that would likely meet the definition of low value-adding services provided in paragraph 7.45:

- accounting and auditing, for example gathering and reviewing information for use in financial statements, maintenance of accounting records, preparation of financial statements, preparation or assistance in operational and financial audits, verifying authenticity and reliability of accounting records, and assistance in the preparation of budgets through compilation of data and information gathering
- processing and management of accounts receivable and accounts payable, for example compilation of customer or client billing information, and credit control checking and processing
- human resources activities, such as
  - staffing and recruitment, for example hiring procedures, assistance in evaluation of applicants and selection and appointment of personnel, on-boarding new employees, performance evaluation and assistance in defining careers, assistance in procedures to dismiss personnel, assistance in programmes for redundant personnel;
7.46 本节的指导原则并不适用于虽然符合低附加值集团内部服务的定义，但却是为跨国企业集团成员的非关联客户提供服务。在这种情况下，可以预期存在可比的内部可比交易，能够用于确定集团内部服务的定价是否符合独立交易原则。

7.47 下列活动不符合适用本节所述的简化方法的条件：
- 构成跨国企业集团核心业务的服务；
- 研发服务（包括软件开发，属于第7.49段所述的信息技术服务范围的除外）；
- 制造和生产服务；
- 采购用于制造和生产过程中的原材料或其他材料的活动；
- 销售、市场营销和分销活动；
- 金融交易；
- 自然资源的开采、勘探或加工；
- 保险和再保险；
- 企业高级管理层提供的服务（符合第7.45段中关于低附加值集团内部服务定义的管理监督服务除外）。

7.48 即使某些活动按照第7.45段中的定义并不能适用简化方法，也不能因此推断认为该活动会产生高回报。该活动可能仅仅只具有低附加值，因此在确定该活动的符合独立交易原则的定价时，可以根据第7.1至7.42段中指导原则进行。

7.49 以下列举了一些可能属于第7.45段中所定义的低附加值集团内部服务：
- 会计和审计：例如财务报表信息的收集和审核、会计记录的编制、财务报表的准备、业务和财务审计协助或办理、会计记录真实性和可靠性的核实；通过数据整理和信息收集协助预算编制；
- 处理和管理应收账款和应付账款：例如客户账单信息的编制、客户信用控制的检查和处理；
- 人力资源活动：
  - 人员配置和招聘，例如招聘流程、协助申请职位的人员的评估、录取和派遣、新员工入职、绩效评估和职业界定、协助完成人员招聘流程以及参与简言人员项目；
training and employee development, for example evaluation of training needs, creation of internal training and development programmes, creation of management skills and career development programmes;

- remuneration services, for example, providing advice and determining policies for employee compensation and benefits such as healthcare and life insurance, stock option plans, and pension schemes; verification of attendance and timekeeping, payroll services including processing and tax compliance;

- developing and monitoring of staff health procedures, safety and environmental standards relating to employment matters;

- monitoring and compilation of data relating to health, safety, environmental and other standards regulating the business

- information technology services where they are not part of the principal activity of the group, for example installing, maintaining and updating IT systems used in the business; information system support (which may include the information system used in connection with accounting, production, client relations, human resources and payroll, and email systems); training on the use or application of information systems as well as on the associated equipment employed to collect, process and present information; developing IT guidelines, providing telecommunications services, organising an IT helpdesk, implementing and maintaining of IT security systems; supporting, maintaining and supervising of IT networks (local area network, wide area network, internet)

- internal and external communications and public relations support (but excluding specific advertising or marketing activities as well as development of underlying strategies)

- legal services, for example general legal services performed by in-house legal counsel such as drafting and reviewing contracts, agreements and other legal documents, legal consultation and opinions, representation of the company (judicial litigation, arbitration panels, administrative procedures), legal research and legal as well as administrative work for the registration and protection of intangible property

- activities with regard to tax obligations, for example information gathering and preparation of tax returns (income tax, sales tax, VAT, property tax, customs and excise), making tax payments, responding to tax administrations' audits, and giving advice on tax matters

- general services of an administrative or clerical nature

7.50 The following examples illustrate an important element of the definition of low value-adding intra-group services, namely, that they should not include services which are part of the MNE's core business. Services that may seem superficially similar in nature (in the example, credit risk analysis) may or may not be low value-adding intra-group services depending on the specific context and circumstances. The examples also illustrate the point that services may not qualify as low value-adding intra-group services because in their specific context they create significant risk or unique and valuable intangibles.

a) Company A, situated in country A, is a shoe manufacturer and wholesale distributor of shoes in the North-West region. Its wholly-owned subsidiary B, situated in country B, is a wholesale distributor in the South-East region of the shoes manufactured by A. As part of its operations, A routinely performs a credit risk analysis on its customers on the basis of reports purchased from a credit reporting agency. A
- 员工培训和发展：例如评估培训需求、制定内部培训和发展项目、制定管理技能和职业发展项目；
- 薪酬服务：例如为职工薪酬和福利提供建议和制定政策，包括医疗保健和人寿保险、股票期权和储蓄基金计划与养老保险计划；确定入职率和记录工时；薪酬服务，包括薪酬处理和满足相关税务合规性要求；
- 开发和监控与就业相关的员工健康程序、安全和环保标准；
- 监控和汇总与健康、安全、环保及其他经营规范相关的数据
- 不构成集团核心业务的信息技术服务；例如安装、维护和更新企业经营活动中使用的信息技术系统；信息系统支持（包括用于会计、生产、客户关系、人力资源、薪酬和电子邮箱系统的信息系统）；针对如何使用或应用信息系统以及与信息收集、处理和展示相关的设备提供员工培训；制定IT使用指南、提供电信服务、组织信息技术服务平台、实施和维护信息技术安全系统；支持、维护和监管信息技术网络（局域网、广域网和互联网）
- 内外部沟通和公共关系维护（但不包括具体的广告或市场营销活动及其基础战略的制定）
- 法律服务：例如由内部法律顾问提供的一般法律服务，如起草和审核合同、协议和其他法律文书；提供法律咨询建议及公司参与司法诉讼、仲裁程序以及制定有关资产的注册和保护相关的行政工作
- 与纳税义务相关的活动：例如收集税务信息和准备纳税申报表（所得税、增值税、财产税、关税和行为税）、缴纳税款、应对税务机关的调查以及提供税务咨询服务
- 一般行政或文秘性质服务

7.50 以下例子说明了低附加值集团内部服务定义中的一项重要因素，即这些服务不应构成跨国企业集团的核心业务。一些表面上看似性质相似的服务（如信用风险分析）是否属于低附加值集团内部服务取决于特定的背景和环境。这些例子也说明了一些服务在特定的背景下会产生显著的风险或形成独特且有价值的无形资产，因此可能不属于低附加值集团内部服务。

a）位于A国的A公司是一家鞋类产品生产商，并在西北地区分销其生产的鞋子。A公司的全资子公司B位于B国，负责在东南亚地区分销A公司生产的鞋子。在日常运营中，A公司会根据向第三方信用评级机构购买的报告定期对其客户进行信用风险分析。
performs, on behalf of B, the same credit risk analysis with respect to B's customers, using the same methods and approaches. Under the facts and circumstances, it could be reasonably concluded that the service A performs for B is a low value-adding intra-group service.

b) Company X is a subsidiary of a worldwide investment banking group. Company X performs credit risk analysis with respect to potential counterparties for transactions involving financial derivatives contracts and prepares credit reports for the worldwide investment banking group. The credit analyses performed by Company X are utilised by the group in establishing the prices of financial derivatives for the group's clients. The personnel of Company X have developed special expertise and make use of internally developed, confidential credit risk analysis models, algorithms and software. Under the facts and circumstances of this case, it could not be concluded that the service Company X performs for the worldwide investment banking group is a low value-adding intra-group service.

7.51 The definition of low value-adding intra-group services refers to the supportive nature of such services, which are not part of the core business of the MNE group. The provision of low value-adding intra-group services may, in fact, be the principal business activity of the legal entity providing the service, e.g., a shared service centre, provided the services do not relate to the core business of the group. As an example, assume that an MNE is engaged in the development, production, sale and marketing of dairy products worldwide. The group established a shared services company, the only activity of which is to act as a global IT support service centre. From the perspective of the IT support service provider, the rendering of the IT services is the company's principal business activity. However, from the perspective of the service recipients, and from the perspective of the MNE group as a whole, the service is not a core business activity and may therefore qualify as a low value-adding intra-group service.

D.2 Simplified determination of arm's length charges for low value-adding intra-group services

7.52 This subsection sets out the elements of a simplified charge mechanism for low value-adding intra-group services. This simplified method is premised on the proposition that all low value-adding service costs incurred in supporting the business of MNE group members should be allocated to those members. The basic benefits of using the simplified approach include: (1) reducing the compliance effort of meeting the benefits test and in demonstrating arm's length charges; (2) providing greater certainty for MNE groups that the price charged for the qualifying activities will be accepted by the tax administrations that have adopted the simplified approach when the conditions of the simplified approach mentioned in paragraph 7.45 have been met; and (3) providing tax administrations with targeted documentation ensuring efficient review of compliance risks. An MNE group electing to adopt this simplified method would as far as practicable apply it on a consistent, group-wide basis in all countries in which it operates.

7.53 Where a tax administration has not adopted the simplified approach, and as a consequence the MNE group complies with the local requirements in that jurisdiction, such compliance would not disqualify the MNE group from the application of the simplified approach to other jurisdictions. In addition, not all MNE groups are vertically integrated and may instead have regional or divisional sub-groups with their own management and support structures. Therefore, MNE groups may elect to adopt the simplified method at the level of a sub-holding company and apply it on a consistent basis across all subsidiaries of that sub-holding company. When the MNE group elects for and applies the simplified approach, charges for low value-adding intra-group services that are or have been determined in conformity with the guidance in this subsection are determined to be in accordance with the arm's length principle. A possible alternative approach for dealing with the issues discussed in this subsection would be the use of Cost Contribution Arrangements, covered in Chapter VIII.
同时，Ａ公司也按照同样的方法，对Ｂ公司的客户进行信用风险分析。基于这些事实和情况，可以合理地得出结论：Ａ公司为Ｂ公司提供的服务属于低附加值集团内部服务。

b) Ｘ公司是一家全球性投资银行集团的子公司。Ｘ公司会对涉及金融衍生品合约交易的潜在交易双方进行信用风险分析，并且为其所属的全球性投资银行集团提供信用分析报告。集团运用Ｘ公司准备的信用分析报告确定其客户销售金融衍生品的价格。Ｘ公司的员工开发了专业知识和技术，并使用内部开发的机密的信用风险分析模型、算法和软件。基于这些事实和情况，不能认为Ｘ公司为全球性投资银行集团提供的服务属于低附加值集团内部服务。

7.51 低附加值集团内部服务的定义说明该类服务属于支持性服务，不能构成跨国企业集团的核心业务。事实上，低附加值集团内部服务可以是提供这些服务的法律实体（如共享服务中心）的主要业务活动，但应与集团核心业务无关。举例来说，假设一家从事全球范围内乳制品的研发、生产和销售的跨国企业集团，成立了一家共享服务中心。该共享服务中心唯一的职能就是为集团提供全球信息技术支持服务。从信息技术支持服务提供方的角度来看，提供信息技术支持服务是该公司的主要业务。但服务接受方以及从跨国企业集团整体的角度来看，信息技术支持服务并不构成集团的核心业务，因此信息技术支持服务符合低附加值集团内部服务的要求。

D.2 确定低附加值集团内部服务符合独立交易原则的收费的简化方法

7.52 本节介绍了适用于低附加值集团内部服务的简化收费机制的组成要素。使用该简化方法的前提假设是为跨国企业集团成员提供业务支持所产生所有低附加值服务成本应分摊在这些成员企业之间进行分摊。运用该简化方法的好处包括：（1）降低企业为满足受审性测试与证明其服务收费符合独立交易原则的合规成本；（2）当第7.45段提及的适用简化方法的条件满足时，可以使得跨国企业集团获得更高的确定性，针对符合条件的服务的收费将会被认可简化方法的税务机关所接受；以及（3）向税务机关提供有针对性的文档资料，帮助其有效地审核合规性。选择采用简化方法的跨国企业集团将尽可能在集团所有经营国统一采用该方法。

7.53 如果某税务机关尚未认可简化方法，跨国企业集团将采用在其他地区适用简化方法。此外，不是所有跨国企业集团都采用垂直一体化的组织形式，也有可能按区域或事业部划分子集团，并拥有独立的管理和支持结构。因此，跨国企业集团可以在某个子集团层面及其下属的子公司统一采用简化方法。当跨国企业集团选择并适用简化方法时，根据本节指导原则确定的低附加值集团内部服务收费可以被确定为符合独立交易原则，处理本节所讨论的问题时，还可以使用第八章所述的成本分摊协议作为替代方法。
D.2.1 Application of the benefits test to low value-adding intra-group services

7.54 As discussed in paragraph 7.6, under the arm's length principle an obligation to pay for an intra-group service arises only where the benefits test is satisfied, i.e., the activity must provide the group member expected to pay for the service with economic or commercial value to enhance or maintain its commercial position, which in turn is determined by evaluating whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in-house for itself. However, because of the nature of the low value-adding intra-group services discussed in this section, such determinations may be difficult or may require greater effort than the amount of the charge warrants. Tax administrations should therefore generally refrain from reviewing or challenging the benefits test when the simplified approach has been applied under the conditions and circumstances discussed in this section and in particular in conformity with the documentation and reporting discussed in Section D.3 below.

7.55 While low value-adding intra-group services may provide benefits to all recipients of those services, questions may arise about the extent of the benefits and whether independent parties would have been willing to pay for the service or perform it themselves. Where the MNE group has followed the guidance of the simplified approach the documentation and reporting discussed in Section D.3 below, it should provide sufficient evidence that the benefits test is met given the nature of low value-adding intra-group services. In evaluating the benefits test, tax administrations should consider benefits only by categories of services and not on a specific charge basis. Thus, the taxpayer need only demonstrate that assistance was provided with, for example, payroll processing, rather than being required to specify individual acts undertaken that give rise to the costs charged. Provided such information outlined in paragraph 7.64 is made available to the tax administration, a single annual invoice describing a category of services should suffice to support the charge, and correspondence or other evidence of individual acts should not be required. With regard to low value-adding intra-group services that benefit only one recipient entity in the MNE group, it is expected that the benefits to the service recipient will be capable of separate demonstration.

D.2.2 Determination of cost pools

7.56 The initial step in applying the simplified approach to low value-adding intra-group services is for the MNE group to calculate, on an annual basis, a pool of all costs incurred by all members of the group in performing each category of low value-adding intra-group services. The costs to be pooled are the direct and indirect costs of rendering the service as well as, where relevant, the appropriate part of operating expenses (e.g., supervisory, general and administrative). The costs should be pooled according to category of services, and should identify the accounting cost centres used in creating the pool. Pass-through costs in the cost pool should be identified for the purposes of applying paragraph 7.61. The cost pool should exclude costs that are attributable to an in-house activity that benefits solely the company performing the activity (including shareholder activities performed by the shareholding company).

7.57 As a second step, the MNE group should identify and remove from the pool those costs that are attributable to services performed by one group member solely on behalf of one other group member. In creating a pool of payroll costs, for example, if group company A provides payroll services solely to group company B the relevant costs should be separately identified and omitted from the pool. However, if group company A performs payroll services for itself as well as for company B, the relevant costs should remain within the pool.

7.58 At this stage in the calculation, the MNE group has identified a pool of costs associated with categories of low value-adding services which are provided to multiple members of the MNE group.
D.2.1 针对低附加值集团内部服务的受益性测试的应用

7.54 如第7.6段所述，按照独立交易原则，只有当符合受益性测试要求时，才会产生对低附加值集团内部服务的支付义务。也就是说，提供的服务必须为预期会付的集团成员带来经济或商业价值，以提升或维持其商业地位；这可以通过如下方式确定，即独立企业在可比情形下是否愿意为另一独立企业提供的该项活动支付费用，或企业内部部门是否愿意开展这项活动。然而，鉴于本节所描述的低附加值集团内部服务的性质，要得到上述结论可能很困难或者可能需要付出努力比该服务的收费更多。因此，如果纳税人在特定条件下和情况下运用了简化方法，并且根据上述第D.3节的要求准备了相应的文档资料和报告，税务机关一般而言不应再核查或质疑其受益性测试。

7.55 虽然低附加值集团内部服务可能会使所有服务接受方受益，但随之而来的问题是服务提供方的受益程度如何，以及独立第三方企业是否愿意购买或者自行实施这些服务。如果跨国企业集团已经按照简化方法的指导原则准备了第D.3节所述的文档资料和报告，关于低附加值集团内部服务的性质，应当认为已经充分证明完成了受益性测试。在评估受益性测试时，税务机关应该仅基于服务的类别来考核受益性，而非具体的费用基础。因此，纳税人应证明其提供了某种协同学服务，例如处理薪金，而无需详细其执行的每项所产生的成本的具体活动。如果第7.64段提及的信息可以提供给税务机关，一张列明服务类别的年度发票就可以为集团内部服务的收费提供足够的支持和证明，不应要求纳税人再提供通信往来或其他证明服务提供的单限活动的证明。对于仅使跨国企业集团内部某一成员单独受益的低附加值集团内部服务，则应当对服务接受方获得的收益予以单独说明。

D.2.2 确定成本

7.56 对低附加值集团内部服务采用简化方法时，第一步应当按年计算并归集跨国企业集团所有成员企业在提供每项低附加值集团内部服务时产生的所有成本。归集的成本包括提供服务时直接和间接发生的成本，以及与提供服务相关的、一部分合理的经营费用（如监督和管理费用）。这些成本应按服务类型进行归集，并确定在创建成本池时所使用的会计成本中心。应当区分成本池中的传递成本（pass-through cost），以运用第7.61段所述的方法。成本池不应包含仅使活动执行企业自身受益的活动（包括由被控公司执行的服务活动）的成本。

7.57 第二步，如果集团内的某一成员单独为另一个成员提供服务，那么跨国企业集团应从成本池中区分并剔除该类服务的成本。例如在创建职工薪酬成本池时，如果集团成员A公司仅为集团成员B公司提供职工薪酬服务，那么相应产生的成本应单独区分并从成本池中剔除。然而，如果A公司既为自身也为B公司提供职工薪酬服务，那么相关成本应保留在成本池中。

7.58 在计算归集成本的这一阶段，跨国企业集团确定了成本池，其中包含向集团内部多个成员企业提供各类低附加值服务的相关成本。
D.2.3 Allocation of low value-adding service costs

7.59 The third step in this simplified charge method for low value-adding intra-group service costs is to allocate among members of the group the costs in the cost pool that benefit multiple members of the group. The taxpayer will select one or more allocation keys to apply for this purpose based on the following principles. The appropriate allocation key or keys will depend on the nature of the services. The same allocation key or keys must be used on a consistent basis for all allocations of costs relating to the same category of services. In accordance with the guidance in paragraph 7.24, the allocation key or keys selected with respect to costs for each relevant category of services should reasonably reflect the level of benefit expected to be received by each recipient of the particular services. As a general rule, the allocation key or keys should reflect the underlying need for the particular services. By way of examples, the allocation key for services related to people might employ each company's share of total group headcount, IT services might employ the share of total users, fleet management services might employ the share of total vehicles, accounting support services might employ the share of total relevant transactions or the share of total assets. In many cases, the share of total turnover may be a relevant key.

7.60 The examples of allocation keys provided in the previous paragraph are not intended to be an exhaustive list. Depending on the facts and circumstances more sophisticated allocation keys might be used. However, a balance should be struck between theoretical sophistication and practical administration, bearing in mind that the costs involved are not generating high value for the group. In this context, there may be no need to use multiple allocation keys if the taxpayer can explain the reasons for concluding that a single key provides a reasonable reflection of the respective benefits. For reasons of consistency, the same allocation key or keys should be applied in determining the allocation to all recipients within the group of the same type of low value-adding intra-group services, and it is expected that the same reasonable key will be used from year to year unless there is a justified reason to change. Tax administrations and taxpayers should also bear in mind that changing the reasonable allocation key can give rise to considerable complexities. It is expected that the taxpayer will describe in its documentation (see paragraph 7.64 below) the reasons for concluding that the allocation key produces outcomes which reasonably reflects the benefits likely to be derived by each service recipient.

D.2.4 Profit mark-up

7.61 In determining the arm's length charge for low value-adding intra-group services, the MNE provider of services shall apply a profit mark-up to all costs in the pool with the exception of any pass-through costs as determined under paragraphs 2.93 and 7.34. The same mark-up shall be utilised for all low value-adding services irrespective of the categories of services. The mark-up shall be equal to 5% of the relevant cost as determined in Section D.2.2. The mark-up under the simplified approach does not need to be justified by a benchmarking study. The same mark-up may be applied to low value-adding intra-group services performed by one group member solely on behalf of one other group member, the costs of which are separately identified under the guidance in paragraph 7.57. It should be noted that the low value-adding intra-group services mark-up should not, without further justification and analysis, be used as benchmark for the determination of the arm's length price for services not within the definition of low value-adding intra-group services, nor for similar services not within the elective, simplified scheme.

D.2.5 Charge for low value-adding services

7.62 Subject to the provisions of paragraph 7.55, the charge for services to any member of the electing MNE group shall be the sum of (i) the costs incurred by another group member in providing services specifically to the member under the second step as detailed in paragraph 7.57, plus the selected profit mark-up, and, (ii) the share of pooled costs allocated to the member under the third step as detailed in paragraph 7.59 using the selected allocation key, plus the selected profit mark-up. The charge is payable to
D.2.3 低附加值服务成本的分摊

7.59 对低附加值集团内部服务成本采用简化方法时，第三步是将成本池中的成本分摊给集团内多个受益成员企业。纳税人可基于上述原则，选择采用一个或多个分摊标准进行成本分摊。分摊标准的合理性取决于服务的性质。针对相同类型的服务，分摊成本时应统一使用相同的分摊标准。根据第7.24段的指导原则，针对各种服务所选用的成本分摊标准，应合理反映出每个服务接受方预期获得的受益性水平。一般而言，分摊标准应该反映出对特定服务的需求。举例而言，与人员相关的服务成本分摊标准可以是每个公司的人数占集团总人数的比重，信息技术服务可以采用每个公司的服务使用者占所有使用者的比重，车队管理服务可以采用每个公司接受管理的车辆占所有车辆的比重，会计支持服务可以采用每个公司相关交易额占所有相关交易额的比重或每个公司资产占全部资产的比重。在很多情况下，收入的比重可能是一个适当的分摊标准。

7.60 上述段落中所述的分摊标准并不详尽。根据具体的事宜和情况，还可以采用更为复杂的分摊标准。然而，考虑到这些服务所涉及的成本并不能为集团带来较高的价值，因此在选择分摊标准时，仍然需要在复杂的理论和实际执行之间取得平衡。因此，如果纳税人能够解释使用单个分摊标准可以合理反映各服务接收方的受益情况，则没有必要采用多个分摊标准。考虑到一致性，同类型的低附加值集团内部服务可以采用相同的分摊标准向集团内所有服务接收方分摊成本，并且如果纳税人没有正当理由，该分摊标准将在以后年度继续使用。同时，税务机关和纳税人应注意的是改变分摊标准可能会相当复杂。此外，纳税人应该在相关的文档资料（参见下文第7.64段）中说明所采用的分摊标准能够合理体现各服务接受方受益原因。

D.2.4 利润加成

7.61 为了确定低附加值集团内部服务水平符合独立交易原则的收费，跨国企业集团中的服务提供方向成本池中的所有成本（根据第2.93段和第7.34段确定的传递成本除外）使用一个利润率。所有低附加值服务不论具体类型，都应使用同一加成率。根据第D.2.2节的分析，该加成率应等于在相关成本上加成5%。适用简化方法时，不需要通过可比性分析来证明该加成率的合理性。该加成率同样适用于集团内某一成员单独为另一个成员提供低附加值服务的情况，尽管根据第7.57段所述，此类服务产生的成本需要单独区分。值得注意的是，如果没有进一步的论证和分析，该低附加值集团内部服务加成率不应作为判定以下两类服务的收费是否符合独立交易原则的基准；低附加值集团内部服务定义范围外的服务或适用简化方法范围外的类似服务。

D.2.5 低附加值服务的收费

7.62 根据第7.57段的内容，向跨国企业集团成员企业提供独立交易原则的服务应由以下费用组成：(i) 第7.57段第三步中所述的集团内部某一成员单独向另一成员提供特定服务产生的成本，加上所选定的利润加成；以及(ii) 根据第7.59段第三步所选定的分摊标准对服务的成本进行分摊后的成本份额，加上所选定的利润加成。
the group member that incurred the costs in the pool, and where there is more than one group member incurring those costs, in proportion to each member’s share of the pooled costs.

D.2.6 Threshold for the application of the simplified approach

7.63 Tax administrations adopting the simplified approach to low-value-adding intra-group services set out in this section may include an appropriate threshold to enable them to review the simplified approach in cases where the threshold is exceeded. Such a threshold might, for example, be based on fixed financial ratios of the recipient party (e.g. proportion of intra-group services costs to total costs or turnover or pre-intra-group service charge profit) or be determined by reference to a group-wide ratio of total service costs to turnover of the MNE group or some other appropriate measure. Where such a threshold is adopted, the tax administration would not be obliged to accept the simplified approach if the level of low-value-adding intra-group service fees exceeds the threshold and may require a full functional analysis and comparability analysis including the application of the benefits test to specific service charges.

D.3 Documentation and reporting

7.64 An MNE group electing for application of this simplified methodology shall prepare the following information and documentation and make it available upon request to the tax administration of any entity within the group either making or receiving a payment for low-value-adding intra-group services.

- A description of the categories of low value-adding intra-group services provided; the identity of the beneficiaries; the reasons justifying that each category of services constitute low value-adding intra-group services within the definition set out in Section D.1; the rationale for the provision of services within the context of the business of the MNE; a description of the benefits or expected benefits of each category of services; a description of the selected allocation keys and the reasons justifying that such allocation keys produce outcomes that reasonably reflect the benefits received, and confirmation of the mark-up applied;

- Written contracts or agreements for the provision of services and any modifications to those contracts and agreements reflecting the agreement of the various members of the group to be bound by the allocation rules of this section. Such written contracts or agreements could take the form of a contemporaneous document identifying the entities involved, the nature of the services, and the terms and conditions under which the services are provided;

- Documentation and calculations showing the determination of the cost pool as described in Section D.2.2, and of the mark-up applied thereon, in particular a detailed listing of all categories and amounts of relevant costs, including costs of any services provided solely to one group member;

- Calculations showing the application of the specified allocation keys.

D.4 Levy of withholding tax on charges for low-value-adding intra-group services

7.65 The levy of withholding taxes on the provision of low-value-adding intra-group services can prevent the service provider recovering the totality of the costs incurred for rendering the services. When a profit element or mark-up is included in the charge of the services, tax administrations levying withholding tax are encouraged to apply it only to the amount of that profit element or mark-up.
收取的服务费用应当支付给发生相应服务成本的集团成员企业。如果相关服务成本是由多个集团成员
企业产生，则应按这些成员企业所发生成本占归集的成本总额的比例，将上述服务费用在多个成员企
业间进行分摊。

D.2.6 适用简化方法的门槛
7.63 税务机关接受低附加值集团内部服务适用本节所述的简化方法时，可以设定一个合理的门
槛。超过这一门槛时，税务机关可以对该简化方法进行审核。举例而言，可以将门槛设定为服务接受方
的某个财务比率（如集团内部服务成本占企业总成本、总营业额或扣除集团内部服务费用前的利润的比重）。
或者参考集团层面的某个比率（如跨国企业集团内部服务成本总额占集团营业额的比重或其他合理
的衡量标准）。当设定这样的门槛后，如果低附加值集团内部服务的服务费超过了该门槛，税务机
关将不再有义务接受简化方法的应用，而可以要求纳税人进行全面的功能分析和可比性分析，包括对特定服
务收费的受益性测试。

D.3 文档资料和报告
7.64 选择适用本简化方法的跨国企业集团应准备下列信息和文档资料，以备各集团成员企业（无论是
低附加值集团内部服务的提供方还是接受方）的主管税务机关审查。
- 针对所提供的低附加值集团内部服务的类型的说明；受益方的身份；说明各类服务均构成第
  D.1节所定义的低附加值集团内部服务的原因；在跨国企业集团现有业务背景下提供这些集团
内部服务的基本理由；各类服务所产生或预期产生的利益情况的描述；关于所选分摊标准的
描述和证明这些分摊标准能够合理反映服务接受方受益情况的理由说明；以及对于所适用的
加权率的确认；
- 有关服务提供的书面合同或协议及相应的修订内容，能反映出集团内各成员企业一致同意遵
守本章所述的分摊规则。这些书面合同或协议可采用同期资料的形式，以明确服务涉及的所
有企业；提供服务的性质以及所遵循的合同条款；
- 有关确定第D.2.2节所述成本池及其加权比率的文档资料和计算过程，特别是关于所有服务类
型的详细清单和相关成本的金额，包括所有自向单一集团成员提供服务所产生的成本；
- 体现具体分摊标准应用的计算过程。

D.4 向低附加值集团内部服务收费征税推定所得税
7.65 向低附加值集团内部服务收费征税推定所得税，可能会使得服务提供方不能弥补其发生的成本总
额。因此，建议征税推定所得税的税务机关仅对服务费中的利润或成本加成部分征推定所得税。
COST CONTRIBUTION ARRANGEMENTS

Revisions to Chapter VIII of the Transfer Pricing Guidelines

SUMMARY

Cost Contribution Arrangements ("CCAs") are special contractual arrangements among business enterprises to share the contributions and risks involved in the joint development, production or the obtaining of intangibles, tangible assets or services with the understanding that such intangibles, tangible assets or services are expected to create benefits for the individual businesses of each of the participants. If contributions to and benefits of the CCA are not valued appropriately, this will lead to profits being shifted away from the location where the value is created through the economic activities performed.

Action 8 of the BEPS Action Plan covers the transfer pricing of intangibles and requires the development of rules to prevent BEPS by moving intangibles among group members without arm’s length compensation, as well as an update to the guidance on CCAs. The guidance contained in this chapter deals with that latter part of Action 8 and will replace the guidance currently in Chapter VIII of the Transfer Pricing Guidelines.

This chapter of the Report provides general guidance for determining whether the conditions established by associated enterprises for transactions covered by a CCA are consistent with the arm’s length principle. In doing so, the guidance contained in this chapter addresses some of the opportunities for BEPS resulting from the use of CCAs.

Parties performing activities under arrangements with similar economic characteristics should receive similar expected returns, irrespective of whether the contractual arrangement in a particular case is termed a CCA. The guidance ensures that CCAs cannot be used to circumvent the new guidance on the application of the arm’s length principle in relation to transactions involving the assumption of risks, or on intangibles. The analysis of CCAs follows the framework set out in that guidance to ensure that:

- The same analytical framework for delineating the actual transaction, including allocating risk, is applicable to CCAs as to other kinds of contractual arrangements.
- The same guidance for valuing and pricing intangibles, including hard-to-value intangibles, is applicable to CCAs as to other kinds of contractual arrangements.
- The analysis of CCAs is based on the actual arrangements undertaken by associated enterprises and not on contractual terms that do not reflect economic reality.
- An associated enterprise can only be a participant to the CCA if there is a reasonable expectation that it will benefit from the objectives of the CCA activity and it exercises control over the specific risks it assumes under the CCA and has the financial capacity to assume those risks.
- Contributions made to a CCA, with specific focus on intangibles, should not be measured at cost where this is unlikely to provide a reliable basis for determining the value of the relative
成本分摊协议

针对《转让定价指南》第八章的修订

摘要

成本分摊协议是一种特殊的合同安排，是合同各参与方用来约定在共同研发、生产或受让无形资产、有形资产和服务时各自应作出的贡献和需承担的风险，并预期上述无形资产、有形资产或服务会为各参与方创造收益。若成本分摊协议未对各自参与方的贡献和预期收益进行合理的评估，将会导致开展经济活动创造价值的当事方的相应利润被转移。

《BEPS 行动计划》第 8 项行动计划阐述了无形资产的转让定价问题，要求具备相关的转让定价规则，以防止集团成员企业间通过转让无形资产支付不合理的补偿而导致税基侵蚀和利润转移。此外，该行动计划还要求对成本分摊协议的相关指南进一步补充和说明。本章内容即是针对成本分摊协议相关指南的更新，之后将取代《转让定价指南》第八章的现有内容。

本章就评估成本分摊协议下所构建的关联交易是否符合独立交易原则提供了一般性指导，并对成本分摊协议造成税基侵蚀和利润转移的情况进行了说明。

无论具体的合同安排是否被命名为成本分摊协议，在具有相似经济特征的合同安排下开展经济活动的各参与方应获得相似的预期收益。本指南确保成本分摊协议不得用于规避基于独立交易原则对承担风险交易的分析以及无形资产的相关新指南的运用。根据上述指南中规定的分析框架对成本分摊协议进行分析时，应确保以下事项：

- 用于准确界定关联企业间实际发生的交易情况（包括风险分配情况）的分析框架同样适用于成本分摊协议。
- 对无形资产（包括难以估值的无形资产）的价值评估和定价的相关指导原则同样适用于成本分摊协议。
- 针对成本分摊协议的分析应基于关联企业的实际安排确定，而非根据无经济实质的合同条款确定。
- 仅当关联企业能合理预期从成本分摊协议成果中获得收益，并能实际控制协议约定承担的风险以及拥有承担风险的财务能力时，该关联企业才能作为成本分摊协议的参与者。
- 不应依据成本支出情况来评估各参与方对成本分摊协议的贡献，因为该方法不能为确定参与方的相对价值贡献提供可靠的分析基础，并导致产生的结果不符合独立交易原则。涉及无形资产的成本分摊协议尤为如此。
contributions of participants, since this may lead to non-arm’s length results.

In summary the guidance ensures that CCAs are appropriately analysed and produce outcomes that are consistent with how and where value is created.
概言之，本指南旨在确保针对成本分摊协议进行合理的分析，并确保相应的转让定价结果与价值创造的方式和来源相一致。
The current provisions of Chapter VIII of the Transfer Pricing Guidelines are deleted in their entirety and replaced by the following language.

A. Introduction

8.1 This chapter discusses cost contribution arrangements (CCAs) between two or more associated enterprises. The purpose of the chapter is to provide some general guidance for determining whether the conditions established by associated enterprises for transactions covered by a CCA are consistent with the arm's length principle. The analysis of the structure of such arrangements should be informed by the provisions of this chapter and other provisions of these Guidelines and should be based on an adequate documentation of the arrangement.

8.2 Section B provides a general definition and overview of the concept of CCAs, and Section C gives guidance as to the application of the arm's length principle to CCAs. Section C includes guidance on how to measure contributions to a CCA, whether balancing payments are needed (i.e., payments between participants to adjust their proportionate shares of contributions), and guidance on how contributions and balancing payments should be treated for tax purposes. It also addresses the determination of participants in the CCA and issues related to the entry or withdrawal of participants, and the termination of CCAs. Finally, Section D discusses suggestions for structuring and documenting CCAs.

B. Concept of a CCA

B.1 In general

8.3 A CCA is a contractual arrangement among business enterprises to share the contributions and risks involved in the joint development, production or the obtaining of intangibles, tangible assets or services with the understanding that such intangibles, tangible assets or services are expected to create benefits for the individual businesses of each of the participants. A CCA is a contractual arrangement rather than necessarily a distinct juridical entity or fixed place of business of all the participants. A CCA does not require the participants to combine their operations in order, for example, to exploit any resulting intangibles jointly or to share the revenues or profits. Rather, CCA participants may exploit their interest in the outcomes of a CCA through their individual businesses. The transfer pricing issues focus on the commercial or financial relations between the participants and the contributions made by the participants that create the opportunities to achieve those outcomes.

8.4 As indicated in Section D.1 of Chapter I, the delineation of the actual transaction undertaken forms the first phase in any transfer pricing analysis. The contractual agreement provides the starting point for delineating the actual transaction. In this respect, no difference exists for a transfer pricing analysis between a CCA and any other kind of contractual arrangement where the division of responsibilities, risks, and anticipated outcomes as determined by the functional analysis of the transaction is the same. The guidance on identifying the other economically relevant characteristics is equally applicable to CCAs as to any other type of contractual arrangement, including an assessment as to whether the parties contractually assuming risks are actually assuming these risks based on the framework for analysing risk set out in paragraph 1.60 of these Guidelines. As a consequence, parties performing activities under arrangements with similar economic characteristics should receive similar expected returns, irrespective of whether the contractual arrangement in a particular case is termed a CCA. However, there are specific characteristics of CCAs that warrant special consideration.

8.5 A key feature of a CCA is the sharing of contributions. In accordance with the arm's length principle, at the time of entering into a CCA, each participant's proportionate share of the overall contributions to a CCA must be consistent with its proportionate share of the overall expected benefits to
(OECD 转让定价指南)第八章的现有内容全部删除，替换成下述文字。

A.
引言

8.1 本章讨论两个或多个关联企业之间的成本分摊协议，旨在针对如何确定关联企业之间达成的成本分摊协议所涉及的交易条件是否符合独立交易原则提供一般性的指导。对成本分摊协议的结构进行分析时，应参照本章规定及《转让定价指南》的其他相关规定，并对成本分摊协议的相关文件进行充分考量。

8.2 本章第 B 节对成本分摊协议做了一般性定义和概述。第 C 节就如何在成本分摊协议中运用独立交易原则提供了指导，主要涉及如何衡量成本分摊协议各参与方的贡献程度、平衡支付（即各参与方之间的贡献份额的比例而产生的支付）是否必要，以及如何从税务角度处理贡献程度和平衡支付等方面的内容。第 C 节还探讨了成本分摊协议参与方的确定、加入和退出，以及成本分摊协议终止等问题。

B.
成本分摊协议的定义

B.1 概述

8.3 成本分摊协议是一种合同安排，是合同各参与方用来约定在共同研发、生产或受让无形资产、有形资产和服务时各自应做出的贡献和需承担的风险，并预期上述无形资产、有形资产或服务会为各参与方创造收益。成本分摊协议并不要求所有参与方都必须是独立的法人实体或者参与方的固定营业场所，不要求参与方通过共同经营的方式共同利用无形资产或共享收益或利润。参与方可以在各自的业务经营中行使对成本分摊协议成果享有权的权益。转让定价关注的重点是各参与方之间的商业或财务关系以及与参与方获得成果所做出的贡献。

8.4 正如第一章第 D.1 节所述，任何转让定价分析都需要首先对真实交易加以界定，而对合同关系的分析是界定真实交易的第一步。从转让定价分析角度出发，成本分摊协议和其他类型的合同安排并不存在任何差异，都需要对交易进行功能分析以分配责任、风险和预期成果。适用于确定其他合同安排的相关经济特征的指导原则同样适用于成本分摊协议，包括根据本报告第 1.60 段提供的风险分析框架判断合同约定承担风险的当事方是否实际承担了相关风险。因此，无论具体的合同安排是否被命名为成本分摊协议，但在具有相似经济特征的合同安排下开展经济活动的各参与方应获得相同的预期收益。当然，成本分摊协议还存在着需要特别考虑的特殊特征。

8.5 成本分摊协议的主要特点是共担贡献。根据独立交易原则，每一参与方在确立成本分摊协议时，其贡献份额占贡献总额的比例应与其根据协议获得的预期收益份额占整体预测收益的比例相一致。
be received under the arrangement. Further, in the case of CCAs involving the development, production or obtaining of intangibles or tangible assets, an ownership interest in any intangibles or tangible assets resulting from the activity of the CCA, or rights to use or exploit those intangibles or tangible assets, is contractually provided for each participant. For CCAs for services, each participant is contractually entitled to receive services resulting from the activity of the CCA. In either case, participants may exploit the interest, rights or entitlement without paying additional consideration (other than the contributions and balancing payments described in sections C.4 and C.5, respectively) to any party for such interest, rights or entitlement.

8.6 Some benefits of the CCA activity can be determined in advance, whereas others will be uncertain. Some types of CCA activities will produce current benefits, while others have a longer time frame or may not be successful. Nevertheless, in a CCA there is always an expected benefit that each participant seeks from its contribution, including the attendant rights to have the CCA properly administered. Each participant’s interest in the results of the CCA activity should be established from the outset, even where the interest is inter-linked with that of other participants, e.g., because legal ownership of developed intangibles or tangible assets may be vested in only one of them but all of them have certain rights to use or exploit the intangibles or tangible assets as provided in the contractual arrangements (for example, perpetual, royalty-free licences for the territory in which the individual participant operates).

8.7 In some cases CCAs can provide helpful simplification of multiple transactions (bearing in mind that the tax consequences of transactions are determined in accordance with applicable local laws). In a situation where associated enterprises both perform activities for other group members and simultaneously benefit from activities performed by other group members, a CCA can provide a mechanism for replacing a web of separate intra-group arm’s length payments with a more streamlined system of netted payments, based on aggregated benefits and aggregated contributions associated with all the covered activities (see also paragraphs 3.9 to 3.17 of these Guidelines). A CCA for the sharing in the development of intangibles can eliminate the need for complex cross-licensing arrangements and associated allocation of risk, and replace them with a more streamlined sharing of contributions and risks, with ownership interests of the resulting intangible(s) shared in accordance with the terms of the CCA. However, the streamlining of flows that may result from the adoption of a CCA does not affect the appropriate valuation of the separate contributions of the parties.

8.8 As an illustration of a CCA, take the example of an MNE group which manufactures products through three enterprises which each operate a production site and have their own R&D teams engaged in various projects to improve production processes. These three enterprises enter into a CCA aimed at generating production process improvements, and as a result pool their expertise and share the risks. Since the CCA grants each participant rights to the outcomes of the projects, the CCA replaces the cross-licensing arrangements that may have resulted in the absence of a CCA and if the enterprises had individually developed certain intangibles and granted rights to one another.

B.2 Relationship to other chapters

8.9 As indicated in paragraph 8.4, there is no difference in the analytical framework for analysing transfer prices for CCAs compared to analysing other forms of contractual relations. The guidance in Section D of Chapter I is relevant to the analysis of all transactions between associated enterprises, and applies to identify the economically relevant characteristics of the commercial or financial relations between the parties as expressed in a CCA. The contractual terms of the CCA provide the starting point for delineating the transaction between the parties and how the responsibilities, risks, and anticipated outcomes were intended to be allocated at the time of entering into the arrangements. However, as set out in that guidance, the evidence of the conduct of the parties may clarify or supplement aspects of the agreement. The framework for analysing risk in Section D.1.2.1 of Chapter I is relevant to determining whether parties
对于涉及研发、生产和受让无形或有形资产的成本分摊协议，每一参与方都应根据合同获得成本分摊协议活动所产生之无形或有形资产的所有权或使用权。对于涉及服务的成本分摊协议，每一参与方根据合同有权限获得成本分摊协议活动产生的服务。总之，各参与方可以利用这些权益或权利而无需向其他方支付额外费用（第 C.4 和 C.5 节所述的贡献和平衡支付除外）。

8.6 部分从成本分摊协议活动中所获得的利益可以事先确定，其他的利益则具有不确定性。有些成本分摊协议活动在短期内会产生利益，而另一些成本分摊协议活动可能耗时更长或可能不会成功。尽管如此，每个参与方仍希望从成本分摊协议活动中获利，包括参与方对成本分摊协议进行适当的管理。虽然每一参与方的利益与其他参与方的利益密切相关，但各参与方可以从成本分摊协议获得的利益结果仍应在一开始就予以确定。例如，所研发的无形成形资产的法律所有权可能仅属于某一参与方，但所有参与方根据合同安排都在一定程度上享有使用或利用这一无形或有形资产（例如，某个参与方在其经营中免费获得的永久经营许可）。

8.7 在某些情况下，成本分摊协议有助于简化多重交易（应注意交易相关的税收主要取决于当地适用的法律）。如果关联企业既为其他集团成员开展活动，同时又受益于其他集团成员从事的活动，成本分摊协议考虑所有活动的总贡献和总收益的基础上，提供了一种更为集中的支付方法，来取代集团内部单独的独立交易支付（参见《转让定价指南》第 3.9-3.17 段）。一个涉及无形资产开发的成本分摊协议可以避免参与方之间复杂的支付及风险分配，从而使参与方采用更为集中的贡献分摊和风险分配的方式，同时依据成本分摊协议的条款共享所开发的无形资产的所有权利益。然而，通过成本分摊协议简化交易流程，并不会影响对参与方各自贡献进行合理的价值评估。

8.8 举例而言，某跨国企业集团拥有三家企业。这三家企业均拥有独立的研发团队，负责开发各自可以根据改进生产流程的项目。三家企业还签订了一份在改进生产流程的成本分摊协议，从而分享经验并共担风险。如果设有成本分摊协议，这三家企业必须独立开发某些无形资产并互相授予使用许可，现在通过成本分摊协议授予所有参与方该无形资产成果的权益，因此不再需要交叉许可。

B.2 与其他章节的关系

8.9 如第 8.4 段所述，成本分摊协议的转让定价分析框架与其他类型的合同协议关系分析框架类似。第一篇第 D 节对分析各种关联企业间的交易作出了指导，可用于确定成本分摊协议参与方之间商业或财务关系的相关经济特征。分析成本分摊协议中的合同条款，是准确界定交易并确定协议签订时交易各方计划如何分配责任、风险和预期收益的切入点。然而，上述指导原则也指出，交易各方的实际行为可以进一步明确合同安排或提供补充性证据。
assume risks under the CCA, as discussed in Section C.2 of this chapter, and the consequences for providing funding without assuming risk or performing other functions. Chapter VI provides guidance regarding the determination of arm's length conditions for transactions that involve the use or transfer of intangibles. Paragraphs 6.60 to 6.64 give relevant guidance on exercising control over the financial risk if the funding is used for investment in R&D projects. The guidance in Sections D.3 and D.4 of Chapter VI on hard-to-value intangibles is equally applicable to CCAs. Chapter VII provides guidance on issues that arise in determining for transfer pricing purposes whether services have been provided by a member of an MNE group to other members of that group and, if so, in establishing arm's length prices for those intra-group services. This chapter's objective is to provide supplementary guidance where resources and skills are pooled and the consideration received is, in part or whole, the reasonable expectation of mutual benefits. Thus, the provisions of Chapters VI and VII, and indeed all the other chapters of these Guidelines, will continue to apply to the extent relevant, for instance in measuring the value of a contribution to a CCA as part of the process of determining the proportionate shares of contributions. MNEs are encouraged to observe the guidance of this chapter in order to ensure that their CCAs operate in accordance with the arm's length principle.

### B.3 Types of CCAs

8.10 Two types of CCAs are commonly encountered: those established for the joint development, production or the obtaining of intangibles or tangible assets ("development CCAs"); and those for obtaining services ("services CCAs"). Although each particular CCA should be considered on its own facts and circumstances, key differences between these two types of CCAs will generally be that development CCAs are expected to create ongoing, future benefits for participants, while services CCAs will create current benefits only. Development CCAs, in particular with respect to intangibles, often involve significant risks associated with what may be uncertain and distant benefits, while services CCAs often offer more certain and less risky benefits. These distinctions are useful because the greater complexity of development CCAs may require more refined guidance, particularly on the valuation of contributions, than may be required for services CCAs, as discussed below. However, the analysis of a CCA should not be based on superficial distinctions: in some cases, a CCA for obtaining current services may also create or enhance an intangible which provides ongoing and uncertain benefits, and some intangibles developed under a CCA may provide short-term and relatively certain benefits.

8.11 Under a development CCA, each participant has an entitlement to rights in the developed intangible(s) or tangible asset(s). In relation to intangibles, such rights often take the form of separate rights to exploit the intangible in a specific geographic location or for a particular application. The separate rights obtained may constitute actual legal ownership; alternatively, it may be that only one of the participants is the legal owner of the property but the other participants have certain rights to use or exploit the property. In cases where a participant has such rights in any property developed by the CCA, there is no need for a royalty payment or other further consideration for the use of the developed property consistent with the interest to which the participant is entitled under the CCA (however, the contributions of a participant may need to be adjusted if they are not proportionate to their expected benefits; see Section C.5).

### C Applying the arm’s length principle

#### C.1 In general

8.12 For the conditions of a CCA to satisfy the arm's length principle, the value of participants' contributions must be consistent with what independent enterprises would have agreed to contribute under comparable circumstances given their proportionate share of the total anticipated benefits they reasonably expect to derive from the arrangement. What distinguishes contributions to a CCA from any other intra-
如第 C.2 节所述，可以采用第一章第 D.1.2.1 节中的风险分析框架来确定成本分摊协议中各方是否承担风险，或仅提供资金而不承担风险或仅转让无形资产或执行其他功能的情况下。第六章就集团内部使用或转让无形资产时如何确定符合独立交易原则的条件提供了指导。第 6.60-6.64 段针对研发项目出资相关的财务风险的控制作出相关指导。第六章第 D.3 和 D.4 节对难以估值的无形资产的指导同样适用于成本分摊协议。第七章针对从转让定价角度确定跨国企业集团内部服务是否已提供以及如何建立相应的独立交易价格提供了指导。本章旨在针对共享资源和技术和取得的回报在一定程度上或完全符合共同利益的合理预期情况下提供补充性指导说明。因此，第六章和第七章以及其他章节的规定在相关范围内仍然适用。例如在确定贡献份额比例过程中，如何量化交易各方对成本分摊协议的贡献价值。应鼓励跨国企业遵循本章的指导原则，确保其成本分摊协议符合独立交易原则。

B.3 成本分摊协议的类型

8.10 常见的两种成本分摊协议包括：为共同开发、生产和受让无形资产签订的成本分摊协议（“开发型成本分摊协议”）；以及为获取服务签订的成本分摊协议（“服务型成本分摊协议”）。虽然每个特定的成本分摊协议都需要考虑其本身的事实与情况，但这两种类型的成本分摊协议的主要区别在于前者预期会为参与方带来持续的未来收益，而后者通常仅产生当前收益。开发型成本分摊协议，尤其在涉及无形资产的情况下，往往具有收益不确定且无法在短期内实现的高风险，而服务型成本分摊协议通常提供固定但低风险的收益。如下文所述，这些差异非常重要，因为具有更高复杂性的开发型成本分摊协议较服务型成本分摊协议而言，需要更为细化的指导与说明。尤其是价值评估方法。然而，针对成本分摊协议的分析不应局限于表面差异；在某些情况下，为当前需要而签订的服务型成本分摊协议也可能产生或提升未来潜在且不确定收益的无形资产；而开发型成本分摊协议产生的无形资产也可能会提供短期且相对稳定的收益。

8.11 开发型成本分摊协议的每个参与方都有开发完成的无形资产或有形资产的权利。就无形资产而言，这些权利往往表现在在特定地域或特定应用方面利用该无形资产的任何单独权利。这些单独的权利可能构成法律上的所有权；或者，也可能只有某一特定参与方是该无形资产的法律所有人，但其他参与方拥有使用或利用该无形资产的权利。如果某一参与方根据成本分摊协议而拥有此类权利，就不需要为使用该资产支付特许权使用费或其他补偿，这与成本分摊协议给予参与方的权益相一致（然而当他们的预期收益与贡献不成比例时，参与方的贡献可能会需要调整。参见第 C.5 节）。

C. 独立交易原则的应用

C.1 总论

8.12 为了成本分摊协议的条件符合独立交易原则，参与方所做出的贡献必须与独立企业在可比情形下为了从成本分摊协议中取得合理的预期收益而愿意做出的贡献相一致。成本分摊协议的贡献与一般的集团内部资产转让或服务提供无区别。
8.13 The expectation of mutual and proportionate benefit is fundamental to the acceptance by independent enterprises of an arrangement for sharing the consequences of risks materialising and pooling resources and skills. Independent enterprises would require that the value of each participant's proportionate share of the actual overall contributions to the arrangement is consistent with the participant's proportionate share of the overall expected benefits to be received under the arrangement. To apply the arm's length principle to a CCA, it is therefore a necessary precondition that all the parties to the arrangement have a reasonable expectation of benefit. The next step is to calculate the value of each participant's contribution to the joint activity, and finally to determine whether the allocation of CCA contributions (as adjusted for any balancing payments made among participants) accords with their respective share of expected benefits. It should be recognised that these determinations are likely to bear a degree of uncertainty, particularly in relation to development CCAs. The potential exists for contributions to be allocated among CCA participants so as to result in an overstatement of taxable profits in some countries and the understatement of taxable profits in others, measured against the arm's length principle. For that reason, taxpayers should be prepared to substantiate the basis of their claim with respect to the CCA (see Section E).

C.2 Determining participants

8.14 Because the concept of mutual benefit is fundamental to a CCA, it follows that a party may not be considered a participant if the party does not have a reasonable expectation that it will benefit from the objectives of the CCA activity itself (and not just from performing part or all of the subject activity), for example, from exploiting its interest or rights in the intangibles or tangible assets, or from the use of the services produced through the CCA. A participant therefore must be assigned an interest or rights in the intangibles, tangible assets or services that are the subject of the CCA, and have a reasonable expectation of being able to benefit from that interest or those rights. An enterprise that solely performs the subject activity, for example performing research functions, but does not receive an interest in the output of the CCA, would not be considered a participant in the CCA but rather a service provider to the CCA. As such, it should be compensated for the services it provides on an arm's length basis external to the CCA. See paragraph 8.18. Similarly, a party would not be a participant in a CCA if it is not capable of exploiting the output of the CCA in its own business in any manner.

8.15 A party would also not be a participant in a CCA if it does not exercise control over the specific risks it assumes under the CCA and does not have the financial capacity to assume these risks, as this party would not be entitled to a share in the output that is the objective of the CCA based on the functions it actually performs. The general principles set out in Chapter I of these guidelines on the assumption of risks apply to situations involving CCAs. Each participant makes particular contributions to the CCA objectives, and contractually assumes certain risks. Guidance under Section D.1 of Chapter I on delineating the actual transaction will apply to the transfer pricing analysis in relation to these risks. This also means that a party assuming risks under a CCA based on an analysis under step 4(i) of the framework for analysing risks in paragraph 1.60 ("assumes the risk under the CCA") must control the specific risks it assumes under the CCA and must have the financial capacity to assume these risks. In particular, this implies that a CCA
在于各参与方期望获得的全部或部分补偿来自其通过整合相关资源和技术创新所创造的预期共同收益按其贡献比例分摊获得的部分。此外，尤其对开发型成本分摊协议而言，参与方同意共同承担预期相关风险所产生的有利或不利影响。因此，成本分摊协议与其他安排存在差异，例如，集团内部无形资产的许可交易，许可方自行承担开发风险并预期在无形资产开发完成后通过特许权使用费获得补偿，而成本分摊协议所有参与者在未使用资产开发做出贡献的同时，也共担相关风险实现后的风险，并决定各参与者通过所做出的贡献可获得无形资产的相关权利。

8.13 存在共同权益且可按比例获得收益的预期是独立企业间接受将无形资产和技术进行整合并共担风险的基本条件。独立企业要求每一参与者对贡献份额在实际贡献总额的比例与其根据协议获得的预期收益比例占整体预期收益的比例相一致。因此，在将独立交易原则运用于成本分摊协议时，首要的前提条件是所有参与方都可合理预期获得未来收益，然后计算每一参与者在联合活动中的贡献的价值，最后再确定将成本分摊协议的贡献份额按参与者贡献的份额（根据参与者平衡支付调整之后）是否与预期收益的份额相一致。应认识到该计算可能带有一定程度的不确定性，尤其在涉及开发型成本分摊协议的情况下。根据独立交易原则，成本分摊协议参与者之间的贡献分摊可能会造成某些国家的税负增加，而另外一些国家的税负则会减少。为此，纳税人应该准备充分的资料证明其参与成本分摊协议的各项主张的基础（参见第5节）。

C.2 确定参与方

8.14 成本分摊协议以共同利益这一概念为基础，因此，如果某一方并不能合理预期从成本分摊协议活动成果（并非仅限于其执行的成本分摊协议项下的部分或全部活动）中受益（例如，无法利用无形资产或有形资产的权益或权利，或使用成本分摊协议提供的服务），可能不应不将其视为成本分摊协议的参与方。成本分摊协议必须赋予参与方拥有成本分摊协议规定的无形资产、有形资产或服务的权益或权利，并且参与方可以合理预期从成本分摊协议中受益。例如，某一企业仅进行成本分摊协议的相关活动（如研究活动），但并不拥有成本分摊协议成果的所有权，则该企业将被视为成本分摊协议的参与方，而不是成本分摊协议的参与者。因此，作为成本分摊协议的外部服务提供商，该企业应基于独立交易原则就其提供的服务获得合理的补偿。有关内容，参见第 8.18 节。同理，如果某一方不能以任何方式在其经营过程中利用成本分摊协议的成果，其也不应被视为成本分摊协议的参与者。

8.15 根据其实际履行的功能，如果某一方并未对成本分摊协议约定其承担的风险实施控制且不具有承担这些风险的财务能力，则该当事人将不被视为成本分摊协议的参与方，也不能分享成本分摊协议的成果。《转让定价指南》第一章关于风险承担的定义同样适用于成本分摊协议。每个参与方都对成本分摊协议的目标成果做出特殊的贡献，并根据协议规定承担相应的风险。第一章第 D.1 节有关界定实际交易的指导原则也适用于针对这些风险进行的转让定价分析。换言之，根据本指南第 1.60 段风险分析框架中的步骤 4 (i) 分析得出的成本分摊协议下的风险承担方（即根据成本分摊协议承担风险），必须对其所承担的风险实施控制，并且具备承担这些风险的财务能力。
participant must have (i) the capability to make decisions to take on, lay off, or decline the risk-bearing opportunity presented by participating in the CCA, and must actually perform that decision-making function and (ii) the capability to make decisions on whether and how to respond to the risks associated with the opportunity, and must actually perform that decision-making function. While it is not necessary for the party to perform day-to-day risk mitigation activities in relation to activities of the CCA, in such cases, it must have the capability to determine the objectives of those risk mitigation activities to be performed by another party, to decide to entrust that other party to provide the risk mitigation functions, to assess whether the objectives are being adequately met, and, where necessary, to decide to adapt or terminate the arrangement, and must actually perform such assessment and decision-making. In accordance with the principles of prudent business management, the extent of the risks involved in the arrangement will determine the extent of capability and control required. The guidance in paragraphs 6.60 to 6.64 is relevant for assessing whether a party providing funding has the functional capability to exercise control over the financial risk attached to its contributions to the CCA and whether it actually performs these functions. See Examples 4 and 5 in the Annex to this chapter for an illustration of this principle.

8.16 To the extent that specific contributions made by participants to a CCA are different in nature, e.g. the participants perform very different types of R&D activities or one of the parties contributes property and another contributes R&D activities, the guidance in paragraph 6.64 is equally applicable. This means that the higher the development risk attached to the development activities performed by the other party and the closer the risk assumed by the first party is related to this development risk, the more the first party will need to have the capability to assess the progress of the development of the intangible and the consequences of this progress for achieving its expected benefits, and the more closely this party may need to link its actual decision-making required in relation to its continued contributions to the CCA to key operational developments that may impact the specific risks it assumes under the CCA. A development CCA in which benefits are uncertain and distant is likely to give rise to greater risks than does a services CCA in which benefits are current.

8.17 As described in the previous paragraphs, it is not necessary for the CCA participants to perform all of the CCA activities through their own personnel. In some cases, the participants in a CCA may decide to outsource certain functions related to the subject activity to a separate entity that is not a participant under the standard of paragraph 8.14 above. In such situations, the participants to the CCA should individually meet the requirements on exercising control over the specific risks they assume under the CCA. Such requirements include exercising control over the outsourced functions by at least one of the participants to the CCA. In circumstances in which the objective of the CCA is to develop an intangible, at least one of the participants to the CCA should also exercise control over the important development, enhancement, maintenance, protection and exploitation functions that are outsourced. When the contribution of a participant to the CCA consists of activities other than controlling the outsourced functions, the guidance in paragraph 8.15 is relevant for assessing whether this party has the functional capability to exercise control over the specific risks it assumes under the CCA, in particular if these risks are closely linked to the outsourced functions.

8.18 In cases where CCA activities are outsourced, an arm's length charge would be appropriate to compensate the entity for services or other contributions being rendered to the CCA participants. Where the entity is an associated enterprise of one or more of the CCA participants, the arm's length charge would be determined under the general principles of Chapters I – III, including inter alia consideration of functions performed, assets used, and risks assumed, as well as the special considerations affecting an arm's length charge for services and/or in relation to any intangibles, as described in Chapter VI (including the guidance on hard-to-value intangibles).
具体而言，参与方必须（i）对于是否承担、终止或延期参与成本分摊协议而获得的“蕴含风险的机会”具备决策能力并且必须实际履行上述决策能力；（ii）对于是否以及如何应对“机会中所蕴含的风险”具备决策能力并且必须实际履行上述决策能力。虽然参与方不必针对成本分摊协议的相关活动开展日常风险缓释活动，但必须具备以下方面的评估和决策能力并实际履行这些能力：确定委托另一方开展的风险缓释活动的目标，委托委托另一方开展风险缓释功能、评估是否完全达成上述目标，以及必要时决定是否修订或终止业务安排。按照审慎的商业管理原则，成本分摊协议所涉及风险的大小也将决定参与方应具备的能力及控制力的高低。当成本分摊协议参与方提供资金时，可参照本指南第 6.50-6.64 段分析该参与方是否具备对所提供资金相关的财务风险实施控制的能力，以及是否实际履行了这些能力。附件部分的案例 4 和 5 对这一原则进行了解释说明。

8.16 在某些成本分摊协议中，参与方做出的贡献具有不同性质，例如参与方执行不同类型的研发活动或其中一方提供资产而另一方从事研发活动，此时第 6.64 段的指导原则同样适用。具体而言，如果从事研发任务的一方所履行的研发活动的风险越高，并且提供资产的一方所承担的风险与研发风险的关系越紧密，那么后者需要具备评估无形资产开发进度以及该进度对实现预期收益能力的影响能力，也需要后者将对成本分摊协议做出持续贡献的决策与影响相应风险承担情况的关键研发阶段更紧密地联系起来。根据贡献具有不确定性且无法在短期内实现，开发型成本分摊协议可能会比可产生即期收益的服务型成本分摊协议的风险更高。

8.17 如上所述，成本分摊协议的参与方不必完全由自己的员工从事成本分摊协议的相关活动。在某些情况下，成本分摊协议的参与方可能决定将相关工作外包给另一独立实体，且按上述第 8.14 段的标准提供外包活动的公司并不属于成本分摊协议的参与方。在这种情况，各参与方均需要对成本分摊协议的决定由其承担的特定风险实施控制，包括至少有一个参与方对外包功能实施控制。当成本分摊协议的目标是开发无形资产时，至少应有一个参与方对与无形资产开发、价值提升、维护、保护和利用相关的外包功能实施控制。如果某一参与方对成本分摊协议的贡献是从事除了外包功能实施控制之外的活动，第 8.15 段的指导原则有助于评估该参与方是否拥有对成本分摊协议约定其承担的特定风险实施控制的能力，尤其当这些风险与外包功能密切相关的。

8.18 当将成本分摊协议的某些活动外包时，应向成本分摊协议中提供服务或作出其他贡献的参与方支付符合独立交易原则的合理报酬。若该实体是一个或多个参与方的关联企业，应根据第一至第二章的一般性原则计算确定应支付的符合独立交易原则的报酬，尤其是对该实体所执行的功能、使用的资产和承担的风险的考量，以及第六章（包括对难以估值的无形资产的指导原则）和第七章涉及的其他可能影响服务或无形资产的独立交易价格的特别考量。
C.3 Expected benefits from the CCA

8.19 The relative shares of expected benefits might be estimated based on the anticipated additional income generated or costs saved or other benefits received by each participant as a result of the arrangement. An approach that is frequently used in practice, most typically for services CCAs, would be to reflect the participants' proportionate shares of expected benefits using a relevant allocation key. The possibilities for allocation keys include sales (turnover), profits, units used, produced, or sold; number of employees, and so forth.

8.20 To the extent that a material part or all of the benefits of a CCA activity are expected to be realised in the future and not solely in the year the costs are incurred, most typically for development CCAs, the allocation of contributions will take account of projections about the participants' shares of those benefits. The use of projections may raise problems for tax administrations in verifying the assumptions based on which projections have been made and in dealing with cases where the projections vary markedly from the actual results. These problems may be exacerbated where the CCA activity ends several years before the expected benefits actually materialise. It may be appropriate, particularly where benefits are expected to be realised in the future, for a CCA to provide for possible adjustments of proportionate shares of contributions over the term of the CCA on a prospective basis to reflect changes in relevant circumstances resulting in changes in relative shares of benefits. In situations where actual share of benefits differ markedly from projections, tax administrations might be prompted to enquire whether the projections made would have been considered acceptable by independent enterprises in comparable circumstances, taking into account all the developments that were reasonably foreseeable by the participants, without using hindsight. When the expected benefits of a CCA consist of a right in an intangible that is hard to value at the start of the development project or if pre-existing intangibles that are hard to value are part of the contributions to the CCA project, the guidance in Sections D.3 and D.4 of Chapter VI on hard-to-value intangibles is applicable to value the contributions of each of the participants to the CCA.

8.21 If an arrangement covers multiple activities, it will be important to take this into account in choosing an allocation method, so that the value of contributions made by each participant is properly related to the relative benefits expected by the participants. One approach (though not the only one) is to use more than one allocation key. For example, if there are five participants in a CCA, one of which cannot benefit from certain services activities undertaken within the CCA, then in the absence of some form of set-off or reduction in contribution, the contributions associated with those activities might be allocated only to the other four participants. In this case, two allocation keys might be used to allocate the contributions. Whether any particular allocation key or keys are appropriate depends on the exact nature of the CCA activity and the relationship between the allocation key(s) and the expected benefits. The guidance in Chapter VII on the use of indirect methods of determining an arm's length charge for services (paragraphs 7.23 - 7.26) may be helpful in this regard. In contrast, the three enterprises operating production sites in the illustration of a CCA in paragraph 8.8 are all anticipated to benefit from the multiple projects to improve production processes, and may adopt an allocation key based on, for example, relative size of production capacity. If one of the enterprises chooses not to implement the outcome of a particular project, this should not affect the relative share of benefits or the allocation key used. However, in such circumstances careful consideration should be given to the reason the enterprise chose not to implement the outcome, whether it ever had any reasonable intention of so doing, whether the expected benefits should have been adapted as the CCA arrangement developed and when its intention changed.

8.22 Whatever the method used to evaluate participants' relative shares of expected benefits, adjustments to the measure used may be necessary to account for differences between the respective shares of expected and actual benefits received by the participants. The CCA should require periodic reassessment of contributions vis-à-vis revised share of benefits to determine whether the future contributions of
C.3 成本分摊协议的预期收益

8.19 对预期收益份额的估计可以依据各参与方因参与成本分摊协议而获得的预期额外收入、成本节约或其他收益来确定。在实际操作中，一种常用的方法是使用具有相关性的分摊标准来推算各参与方所享有的预期收益份额。这种方法在服务型成本分摊协议中的使用最为典型。可作为分摊标准的参数包括销售额（营业额）、利润、使用量、生产量、销售量、员工数量等。

8.20 成本分摊协议的所有或重大收益预期不仅在费用发生年度实现，也会在未来年度实现，最为典型的就是开发型成本分摊协议，因此，贡献的分摊需考虑对参与方收益份额的预期。这些预测可能会给税务机关在核实预测所基于的假设以及处理预测与实际结果存在显著差异时带来问题。如果成本分摊协议预期在预期收益实现前若干年就已结束，问题可能会更加严重。尤其当预期收益在未来年度才能实现时，可以考虑在成本分摊协议中规定，未来可在协议期间内对参与方的贡献份额进行可能的调整，以反映相关环境的变化导致参与方的预期收益份额发生变化。当实际的收益份额与预测差异显著时，税务机关可能会提出质疑，鉴于参与方都希望获得成本分摊协议的所有相关利益，因此愿意接受该预期收益份额分配方案。当成本分摊协议的预期收益包括项目开发之初难以估值的无形资产的权益，或者难以估值的项目已经完成开发的无形资产作为成本分摊协议的部分贡献时，第六章第 D.3 节和第 D.4 节关于难以估值的无形资产的指导原则可以用于评估成本分摊协议各参与方的贡献。

8.21 如果某项成本分摊协议涵盖多种业务，选择分摊方法时就要考虑到这一因素；这样才能使每个参与方获得的贡献份额与其预期的收益相匹配。方法之一是采用多个分摊标准（还可以考虑其他方法）。例如，某项成本分摊协议共有五个参与方。假设其中有一方不能从成本分摊协议所进行的某些服务活动中受益，如果未采取某种形式来相应抵消或减少对没有从这些活动中获得收益的一方的贡献份额，则这些活动相关的贡献可以在其他四个参与方之间分摊。在该情况下，可能需要两个分摊标准。运用哪个或哪些分摊标准取决于成本分摊协议活动的实际性质以及分摊标准与预期收益之间的关系。第 7.23-7.26 段的分摊标准为整个集团的进一步服务交易的独立交易价格的指导。该部分可能有助于选择相应的分摊标准。相比之下，第 8.8 段的案例中参与成本分摊协议的三家生产部门都预期将从多个改善生产流程的项目中受益。因此可以采用与产量相关的分摊标准。如果其中一家企业选择不实施某一项目的结果，也不应影响其应享有的收益份额或使用的分摊标准。然而，在这种情况下，应仔细考虑企业选择不实施结果的原因，判断该做法是否具有任何合理的目的，并考虑企业的意图在成本分摊协议项目中发生改变时，是否应对预期收益分配进行调整。

8.22 无论采用什么方法来评估参与方预期收益的相应份额，为了消除参与方预期收益份额和实际收益份额之间的差异，可能有必要对所采用的方法进行调整。成本分摊协议应定期根据调整后的预期收益份额与贡献之间的关系进行评估，以决定是否需要对参与方的未来贡献进行相应的调整。
participants should be adjusted accordingly. Thus, the allocation key(s) most relevant to any particular CCA may change over time leading to prospective adjustments. Such adjustments may reflect either the fact that the parties will have more reliable information about foreseeable (but uncertain) events as time passes, or the occurrence of unforeseeable events.

C.4 The value of each participant’s contribution

8.23 For the purpose of determining whether a CCA satisfies the arm’s length principle – i.e. whether each participant’s proportionate share of the overall contributions to the CCA is consistent with the participant’s proportionate share of the overall expected benefits – it is necessary to measure the value of each participant’s contributions to the arrangement.

8.24 Contributions to a CCA may take many forms. For services CCAs, contributions primarily consist of the performance of the services. For development CCAs, contributions typically include the performance of development activities (e.g., R&D, marketing), and often include additional contributions relevant to the development CCA such as pre-existing tangible assets or intangibles. Irrespective of the type of CCA, all contributions of current or pre-existing value must be identified and accounted for appropriately in accordance with the arm’s length principle. Since the value of each participant’s relative share of contributions should accord with its share of expected benefits, balancing payments may be required to ensure this consistency. The term ‘contributions’ as used in this Chapter includes contributions of both pre-existing and current value made by participants to a CCA.

8.25 Under the arm’s length principle, the value of each participant’s contribution should be consistent with the value that independent enterprises in comparable circumstances would have assigned to that contribution. That is, contributions must generally be assessed based on their value at the time they are contributed, bearing in mind the mutual sharing of risks, as well as the nature and extent of the associated expected benefits to participants in the CCA, in order to be consistent with the arm’s length principle. In determining the value of contributions to a CCA the guidance elsewhere in these Guidelines should be followed.

8.26 In valuing contributions, distinctions should be drawn between contributions of pre-existing value and current contributions. For example, in a CCA for the development of an intangible, the contribution of patented technology by one of the participants reflects a contribution of pre-existing value which is useful towards the development of the intangible that is the objective of the CCA. The value of that technology should be determined under the arm’s length principle using the guidance in Chapter I-III and Chapter VI, including, where appropriate, the use of valuation techniques as set out in that Chapter. The current R&D activity under the development CCA performed by one or more associated enterprises would constitute a current contribution. The value of current functional contributions is not based on the potential value of the resulting further application of the technology, but on the value of the functions performed. The potential value of the resulting further application of the technology is taken into account through the value of pre-existing contributions and through the sharing of the development risk in proportion to expected share of benefits by the CCA participants. The value of the current contributions should be determined under the guidance in Chapters I-III, VI and VII. As noted in paragraph 6.79, compensation based on a reimbursement of cost plus a modest mark-up will not reflect that anticipated value of, or the arm’s length price for, the contribution of the research team in all cases.

8.27 While all contributions should be measured at value (but see paragraph 8.28 below), it may be more administrable for taxpayers to pay current contributions at cost. This may be particularly relevant for development CCAs. If this approach is adopted, the pre-existing contributions should recover the opportunity cost of the ex ante commitment to contribute resources to the CCA. For example, a contractual arrangement (i.e. the CCA) that commits an existing R&D workforce to undertake work for the benefit of
因此，与成本分摊协议相关的分摊标准可能随著时间推移发生变化，因而在未来可能需要对分摊标准进行调整。这样的调整反映了随著时间的推移参与方对可预见但具有不确定性的事宜掌握了更可靠的信息，或者反映了发生了不可预见的事件。

C.4 每个参与方的贡献的价值

8.23 为确定成本分摊协议是否符合独立交易原则，即每个参与方的贡献占成本分摊协议总贡献的比例与与其享有的一期预期收益占协议预期总收益的比例相一致，就有必要评估参与者对成本分摊协议贡献的价值。

8.24 对成本分摊协议的贡献有多种形式。对于服务型成本分摊协议来说，其贡献主要由服务行为组成。对于开发型成本分摊协议来说，其贡献主要由开发活动（如研发、市场营销）组成，同时也往往包括与开发型成本分摊协议相关的其他贡献，如已有的有形资产或无形资产。无论成本分摊协议属于何种类型，必须识别所有贡献（包含“当前贡献”和“既有贡献”）并按照独立交易原则予以合理补偿。由于各参与方的贡献份额的价值要与其预期收益相一致，可能需要进行平衡支付以确保一致性。本章使用的“贡献”一词包括参与者在成本分摊协议中提供的既有贡献和当前贡献。

8.25 根据独立交易原则，每个参与方贡献的价值应与独立企业在可比情形下愿意贡献的价值相一致。也就是说，“贡献”通常须按照贡献时点的价值计量，并考虑风险共同分担的情况以及参与方的相关预期收益的性质和程度等因素，以符合独立交易原则。在确定成本分摊协议中的贡献价值时，应遵循《转让定价指南》其他部分的指导原则。

8.26 在衡量贡献的价值时，应对既有贡献和当前贡献之间的差异加以区分。例如，在某项开发无形资产的成本分摊协议中，某一参与方提供的专利技术即构成既有贡献。这项技术有助于开发成本分摊协议下的目标无形资产。其价值应以独立交易原则为基础并根据第1至第3章以及第6章的指导原则来确定。在上述情况下可以使用第6章提到的价值评估方法。而成本分摊协议下由一个或多个关联企业进行的研发活动即构成当前贡献。当前功能性和贡献的价值并非根据相关专利技术被进一步应用带来的潜在价值确定，而是基于所履行功能的价值确定。在对既有贡献进行价值评估以及各参与方按预期收益比例共担开发风险时，则会考虑专利技术被进一步应用带来的潜在价值。当前贡献价值的确定应根据第1至第3章和第6至第7章的指导原则进行。根据第6.79段所述，任何情况下，仅在成本上加成某个不高的利润率作为研发团队所做贡献的补偿并不能反映其贡献的预期价值，也不符合独立交易原则。

8.27 虽然所有的贡献均应以价值进行衡量（参见第8.28段），但从纳税人的管理角度而言，按成本支付当前贡献是更为可行的方法。这对于开发型成本分摊协议来说可能更是如此。如果采用该方法，既有贡献应获得与事先专为成本分摊协议保留资源而承担的机会成本相等同的报酬。
the CCA should reflect the opportunity cost of alternative R&D endeavours (e.g. the present value of the arm’s length mark-up over R&D costs) in the pre-existing contributions, while contributing current activities at cost (see Example 1A in the Annex to this chapter).

8.28 Whereas it cannot be assumed that the value of pre-existing contributions corresponds to costs, it is sometimes the case that cost could be used as a practical means to measure relative value of current contributions. Where the difference between the value and costs is relatively insignificant, for practical reasons, current contributions of a similar nature may be measured at cost in such cases for services CCAs. However, in other circumstances (for example where contributions provided by the participants vary in nature and include a mixture of service types and/or intangibles or other assets) measuring current contributions at cost is unlikely to provide a reliable basis for determining the value of the relative contributions of participants, and may lead to non-arm’s length results. For development CCAs, the measurement of current contributions at cost (apart from the administrative guidance in paragraph 8.27) will generally not provide a reliable basis for the application of the arm’s length principle. See Examples 1-3 in the Annex to this chapter for illustration of this guidance. Where uncontrolled arrangements are claimed to be comparable to the arrangements between the associated enterprises in the CCA, and those uncontrolled arrangements provide for contributions to be made at cost, it is important to consider the comparability of all of the economically relevant characteristics of the transactions in the broader context of the arrangement, including the impact of any broader arrangement of economically related transactions which may exist between the parties to the uncontrolled transaction, and the sharing of risks. Particular attention should be paid to whether other payments are made in the uncontrolled arrangements; for example, stage payments or compensating contributions may be made in addition to the reimbursement of costs.

8.29 Since contributions are based on expected benefits, this generally implies that where a cost reimbursement basis for valuing current contributions is permitted, the analysis should initially be based on budgeted costs. This does not necessarily mean fixing the costs, since the budget framework may accommodate variability arising from factors such as varying demand levels (for instance budgeted costs may be expressed as a fixed percentage of actual sales). Additionally, there are likely to be differences between budgeted costs and actual costs during the term of the CCA. In an arm’s length situation, the terms agreed between the parties are likely to set out how such differences should be treated since, as stated in paragraph 2.96, independent parties are not likely to use budgeted costs without agreeing what factors are taken into account in setting the budget and how unforeseen circumstances are to be treated. Attention should be paid to the reason for any significant differences between budgeted costs and actual costs, since the difference may point to changes in the scope of activities which may not benefit all the participants in the same way as the activities originally scoped. In general terms, however, where cost is found to be an appropriate basis for measuring current contributions, it is likely to be sufficient to use actual costs as the basis for so doing.

8.30 It is important that the evaluation process recognises all contributions made by participants to the arrangement. This includes contributions made by one or more parties at the inception of the CCA (such as contributions of pre-existing intangibles) as well as contributions made on an ongoing basis during the term of the CCA. Contributions to be considered include property or services that are used solely in the CCA activity, but also property or services (i.e. shared property or services) that are used partly in the CCA activity and also partly in the participant’s separate business activities. It can be difficult to measure contributions that involve shared property or services, for example where a participant contributes the partial use of assets such as office buildings and IT systems or performs supervisory, clerical, and administrative functions for the CCA and for its own business. It will be necessary to determine the proportion of the assets used or services that relate to the CCA activity in a commercially justifiable way with regard to recognised accounting principles and the actual facts, and adjustments, if material, may be
例如，某项分控协议（如成本分摊协议）指定某个现有的研发团队负责相关的工作，则在新设立的项目中，该项目的贡献按成本核算（如研究成本加上符合独立交易原则的加后的现值），而当前贡献则按成本核算（参考本书前文部分的案例1A）。

8.28 虽然未有既定的有贡献价值与成本相对应，但有时成本可以作为可行的标准来衡量目前贡献的相对价值。当贡献的价值与成本之间的差异并不显著时，由于实际考虑，服务型成本分摊协议中的贡献，若将贡献在项目中的差异与成本的评估一致，需要确保在参与者不构成贡献的条件下，且可能结果不符合独立交易的原则的结果。对于开发型成本分摊协议，基于成本计价贡献的价值（第8.27段的实际情况要求除外）一般为独立交易原则的运
用提供可靠的基础。相关指导原则的案例说明，参考本书前文部分的案例1-3。当主张非受控安排与关联企业在成本分摊协议中的安排一致，且这些非受控安排的贡献在按成本计价时应更广泛的交易安排
背景下重点考虑交易的所有相关经济特征的可比性，包括非受控交易双方之间可能存在更广泛的其他经济交易安排的安排以及风险分担。应特别注意在非受控安排中是否存在其他支付；例如，除成本补偿之外的分期支付或补偿支付。

8.29 由于贡献以预期收益为基础，通常在可以采用成本补偿方式评估当前贡献的价值的情况下，相应的分析应首先以预算成本为基础。但并不意味着要确定总成本，因为预算框架可以反映因需求水平变动等因素导致的成本变动（例如，预算成本可能是基于销售额的固定百分比），此外，可成本分摊期间，预算成本和实际成本之间可能会存在差异。在独立交易的情形下，交易各方达成的合同条款很可能包含按处理这些差异。根据《转让定价指南》第2.29段所述，如果未就预算的因素以及处理不可预测情形的方式达成一致，独立交易不可能在采用预算成本、应特别关注造成预算成本和实际成本之间存在重大差异的原因；差异可能表明成本分摊协议的业务范围发生了变化，而这些变化可能不会像原来的业务活动那样使所有参与者都受益。因此，当成本被视为计算当前贡献的适当依据时，也许可以将实际成本作为基础进行分析。

8.30 在评估过程中，确认成本分摊协议参与者的所有贡献是非常重要的。这包括一个或多个参与者在成本分摊协议初期对协议的贡献（如提供有无形资产）以及在协议期间做出的持续性贡献，其中包括仅用于成本分摊协议活动中的资产或服务，也包括部分用于成本分摊协议活动，部分用于参与者单独经营活动的资产或服务（即共享资产或服务）。涉及共享资产或共享服务的贡献很难进行评估。例如，当某个参与者提供一些资产（如办公楼和信息技术系统）的使用权限，或者同时为成本分摊协议和自身的经营活动执行监督、文书以及行政管理功能，这就需要基于事实情况和公认的会计准则采用具有商业合理性的方法确定资产和服务的比例。如果涉及不同管辖地区，可能需要进行必要的调整以消除重大差异并保持一致性。
necessary to achieve consistency when different jurisdictions are involved. Once the proportion is determined, the contribution can be measured in accordance with the principles in the rest of this chapter.

8.31 For development CCAs, contributions in the form of controlling and managing the CCA, its activities and risks, are likely to be important functions, as described in paragraph 6.56, in relation to the development, production, or obtaining of the intangibles or tangible assets and should be valued in accordance with the principles set out in Chapter VI.

8.32 The following scenario illustrates the guidance on determining participants, the share of benefits, and the value of contributions.

8.33 Company A based in country A and Company B based in country B are members of an MNE group and have concluded a CCA to develop intangibles. Company B has entitlement under the CCA to exploit the intangibles in Country B, and Company A has entitlement under the CCA to exploit the intangibles in the rest of the world. The parties anticipate that Company A will have 75% of total sales and Company B 25% of total sales, and that their share of expected benefits from the CCA is 75:25. Both A and B have experience of developing intangibles and have their own research and development personnel. They each control their development risk under the CCA within the terms set out in paragraphs 8.14 to 8.16. Company A contributes pre-existing intangibles to the CCA that it has recently acquired from a third-party. Company B contributes proprietary analytical techniques that it has developed to improve efficiency and speed to market. Both of these pre-existing contributions should be valued under the guidance provided in Chapters I-III and VI. Current contributions in the form of day-to-day research will be performed 80% by Company B and 20% by Company A under the guidance of a leadership team made up of personnel from both companies in the ratio 90:10 in favour of Company A. These two kinds of current contributions should separately be analysed and valued under the guidance provided in Chapters I-III and VI. When the expected benefits of a CCA consist of a right in an intangible that is hard to value at the start of the development project or if pre-existing intangibles that are hard to value are part of the contributions to the CCA project, the guidance in Sections D.3 and D.4 of Chapter VI on hard-to-value intangibles is applicable to value the contributions of each of the participants to the CCA.

C.5 **Balancing payments**

8.34 A CCA will be considered consistent with the arm’s length principle where the value of each participant’s proportionate share of the overall contributions to the arrangement (taking into account any balancing payments already made) is consistent with the participant’s share of the overall expected benefits to be received under the arrangement. Where the value of a participant’s share of overall contributions under a CCA at the time the contributions are made is not consistent with that participant’s share of expected benefits under the CCA, the contributions made by at least one of the participants will be inadequate, and the contributions made by at least one other participant will be excessive. In such a case, the arm’s length principle would generally require that an adjustment be made. This will generally take the form of an adjustment to the contribution through making or imputing a (further) balancing payment. Such balancing payments increase the value of the contributions of the payor and decrease that of the payee.

8.35 Balancing payments may be made by participants to ‘top up’ the value of the contributions when their proportionate contributions are lower than their proportionate expected benefits. Such adjustments may be anticipated by the participants upon entering into the CCA, or may be the result of periodic re-evaluation of their share of the expected benefits and/or the value of their contributions (see paragraph 8.22).

8.36 Balancing payments may also be required by tax administrations where the value of a participant’s proportionate contributions of property or services at the time the contribution was made has
一旦确定了比例，相应的贡献便可以按照本章其他部分的原则进行评估。

8.31 根据第 6.56 条所述，在开发型成本分摊协议中，控制和管理成本分摊协议及其业务活动和风险的贡献形式可能是与研发、生产或销售无形资产或有形资产相关的“重要功能”；对此应根据第六章的原则进行评估。

8.32 以下案例对确定参与方、收益份额以及贡献价值的指导原则进行说明。

8.33 A 国的 A 公司与 B 国的 B 公司是同一个跨国企业集团的成员企业，双方签订了开发无形资产的成本分摊协议。根据成本分摊协议，B 公司拥有在 B 国利用无形资产成果的权利，而 A 公司可以在除 B 国以外的其他国家和地区利用无形资产成果。双方预计 A 公司取得的收入将占相关总收入的 75%、B 公司的收入则占相关总收入的 25%；A 公司和 B 公司从成本分摊协议获得的预期收益份额比为 75:25。A 公司与 B 公司均具备开发无形资产开发经验和均拥有自己的研发团队。根据第 8.14-8.16 段的相应条款，双方均控制研发风险。A 公司为该成本分摊协议活动提供了其最近从第三方购入的既有无形资产。B 公司贡献的是其开发成功的专有分析技术，可提高研发和缩短产品上市时间。这两种既有贡献应按照第三至第六章的指导原则进行评估。当前贡献是日常的研发活动，占 80%的研发活动由 B 公司开展，其余 20%的研发活动由 A 公司开展；由来自双方公司的人员组成的领导团队负责指导，该领导团队中 A 公司和 B 公司的人员比例为 90:10，A 公司占多数。上述两种贡献应根据第三至第六章的指导原则进行单独分析和评估。当成本分摊协议的预期收益包含项目开发之初难以估算的无形资产的权益，或者难以估算的既有无形资产作为成本分摊协议的贡献时，第六章第 D.3 节和第 D.4 节关于难以估算的无形资产的指导原则可以用于评估成本分摊协议各参与方的贡献。

C5 平衡支付

8.34 经平衡支付调整后，当每个参与方的贡献占成本分摊协议总贡献的比例与其享有的预期收益占协议预期总收益的比例相一致时，即可认为该成本分摊协议符合独立交易原则。如果情况并非如此，那么至少有一个参与方的贡献不足，同时至少有一个参与方的贡献过高。在这种情况下，根据独立交易原则，通常需要进行调整。一般情况下通过平衡支付对参与方的贡献进行调整。这种平衡支付方式提高了支付方的贡献价值，同时降低了收入方贡献价值。

8.35 当参与方的贡献比重低于其预期收益比重时，参与方会进行平衡支付以“补足”其贡献的价值。上述支付调整预计会在参与方签订成本分摊协议时进行，或者可能在对参与方的预期收益份额和/或贡献份额进行周期性评估后实施（参见第 8.22 段）。

8.36 当参与方根据其投入的资产或服务，对按比例做出贡献的价值存在误判，或者对参与方应享有
been incorrectly determined, or where the participants' proportionate expected benefits have been incorrectly assessed, e.g. where the allocation key when fixed or adjusted for changed circumstances was not adequately reflective of proportionate expected benefits. Normally the adjustment would be made by a balancing payment from one or more participants to another being made or imputed for the period in question.

8.37 In the case of development CCAs, variations between a participant's proportionate share of the overall contributions and that participant's proportionate share of the overall expected benefits may occur in a particular year. If that CCA is otherwise acceptable and carried out faithfully, having regard to the recommendations of Section E, tax administrations should generally refrain from making an adjustment based on the results of a single fiscal year. Consideration should be given to whether each participant's proportionate share of the overall contributions is consistent with the participant's proportionate share of the overall expected benefits from the arrangement over a period of years (see paragraphs 3.75-3.79). Separate balancing payments might be made for pre-existing contributions and for current contributions, respectively. Alternatively, it might be more reliable or administrable to make an overall balancing payment relating to pre-existing contributions and current contributions collectively. See Example 4.

8.38 In the example in paragraph 8.33, the participants, Companies A and B, expect to benefit from the CCA in the ratio 75:25. In the first year, the value of their pre-existing contributions is 10 million for Company A and 6 million for Company B. As a result, a net balancing payment is required to be made to Company B by Company A of 2 million (i.e. 4.5 million from Company A to Company B less 2.5 million from Company B to Company A) in order to increase Company A's contribution to 12 million (75% of the total contributions) and reducing Company B's contribution to 4 million (25% of the total).

C.6 Accurately delineating the actual transaction

8.39 As indicated in paragraph 8.9, the economically relevant characteristics of the arrangement identified under the guidance in Section D of Chapter I may indicate that the actual transaction differs from the terms of the CCA purportedly agreed by the participants. For example, one or more of the claimed participants may not have any reasonable expectation of benefit from the CCA activity. Although in principle the smallness of a participant's share of expected benefits is no bar to eligibility, if a participant that is performing all of the subject activity is expected to have only a small fraction of the overall expected benefits, it may be questioned whether the reality of the arrangements for that party is to pool resources and share risks or whether the appearance of sharing in mutual benefits has been constructed to obtain more favourable tax results. The existence of significant balancing payments arising from a material difference between the parties' proportionate shares of contributions and benefits may also give rise to questions about whether mutual benefits exist or whether the arrangements should be accurately delineated, taking into account all the economically relevant characteristics, as a funding transaction.

8.40 As indicated in paragraph 8.33, the guidance in Chapter VI on hard-to-value intangibles may equally apply in situations involving CCAs. This will be the case if the objective of the CCA is to develop a new intangible that is hard to value at the start of the development project, but also in valuing contributions involving pre-existing intangibles. Where the arrangements viewed in their totality lack commercial rationality in accordance with the criteria in Section D.2 of Chapter I, the CCA may be disregarded.

C.7 The tax treatment of contributions and balancing payments

8.41 Contributions, including any balancing payments, by a participant to a CCA should be treated for tax purposes in the same manner as would apply under the general rules of the tax system(s) applicable to that participant if the contributions were made outside a CCA, to carry on the activity that is the subject of
的预期收益评估不正确时，例如为应对环境变化而确定或调整的分摊标准未能合理地反映参与方应享有的预期收益时，税务机关也可能要求进行平衡支付。一般情况下，可以通过一个或多个参与方向其他参与方进行平衡支付实现调整，以解决所属期间贡献与预期收益不匹配的问题。

8.37 对于开发型成本分摊协议而言，参与方的贡献占成本分摊协议总贡献的比例与其享有的预期收益占预期总收益的比例有可能在某一年度出现不一致。如果根据第 E 节的建议，成本分摊协议符合相应的要求并被如实地履行，税务机关一般应避免针对单个纳税年度进行调整，而应关注较长的一段时间内，每一参与方的实际贡献占协议总贡献的比例是否与其享有的预期收益占协议总贡献的比例相一致（参见第 3.74-3.79 段）。对既有贡献和当前贡献的平衡支付可能需要分别进行；在某些情况下，对既有贡献和当前贡献进行一笔整体平衡支付可能更为可靠且便于管理。参见附录部分的案例 4。

8.38 在第 8.33 段的案例中，成本分摊协议的参与方 A 公司和 B 公司预期会以 75:25 的比例获得收益。在协议的第一年，A 公司的既有贡献价值为 1,000 万，而 B 公司的既有贡献价值为 600 万；则 A 公司需向 B 公司进行净额为 200 万的平衡支付（即 A 公司应向 B 公司提供 450 万的平衡支付抵减 B 公司应向 A 公司提供 250 万平衡支付后的结果）以将 A 公司的贡献价值推至 1200 万（贡献总价值的 75%）并且将 B 公司的贡献价值减少至 400 万（贡献总价值的 25%）。

C6 须知界定实际交易

8.39 正如第 8.9 段所述，根据第一篇第 D 节的指导原则所识别的成本分摊协议的实际经济特征可能存在，实际发生的交易与参与方所达成的成本分摊协议的条款存在差异。例如，一个或多个声称与参与方的企业没有从成本分摊协议中取得任何合理的预期收益。尽管原则上，属于预期收益份额的多少并不影响成本分摊协议参与方的资格，但如果某参与方承担了所有或大部分分摊协议活动，而其预期收益仅为全部预期收益的很小一部分，则该成本分摊协议的实质很可能被质疑，它是否具有可比的基础是否是参与方的共同资源和共同风险，或者是否通过协议的条款共同利益来获取更有利的税收结果，因参与方的贡献比与收益比之间的重大差异而需要进行大额平衡支付也可能引起质疑，即是否确实存在共同收益，或者考虑了相关的相关经济特征后是否应该将该成本分摊协议界定为融资交易。

8.40 正如第 8.33 段所述，第六章针对难以估值的无形资产的指导原则同样可以适用于成本分摊协议。当成本分摊协议的目标是开发新的无形资产且其价值在开发项目之初难以估计，或者需要针对涉及既有无形资产的贡献进行估值时，可以适用该原则。按照第一篇第 D.2 节的标准，如果成本分摊协议从整体上看缺乏商业合理性时，该协议安排可以被否认。

C7 贡献和平衡支付的税务处理

8.41 针对参与方根据成本分摊协议所做出的贡献（包括任何平衡支付）的税务处理方式，应当与没有签署成本分摊协议的各方，为实现成本分摊协议相同的目的而开展业务的情况下适用的一般税收制度规则相同。
the CCA. The character of the contribution will depend on the nature of the activity being undertaken by the CCA, and will determine how it is recognised for tax purposes.

8.42 In services CCAs, a participant’s contribution to the CCA will often give rise to benefits in the form of cost savings (in which case there may not be any income generated directly by the CCA activity). In development CCAs, the expected benefits to participants may not accrue until some time after contributions are made, and therefore there will be no immediate recognition of income to the participants on their contributions at the time they are made.

8.43 Any balancing payment should be treated as an addition to the contribution of the payor and as a reduction in the contribution of the recipient. As with contributions generally, the character and tax treatment of any balancing payments will be determined in accordance with domestic laws, including applicable tax treaties.

D. CCA entry, withdrawal or termination

8.44 Changes in the membership of a CCA will generally trigger a reassessment of the proportionate shares of participants’ contributions and expected benefits. An entity that becomes a participant in an already active CCA might obtain an interest in any results of prior CCA activity, such as completed or work in-progress intangibles or tangible assets. In such cases, the previous participants effectively transfer part of their respective interests in the results of the prior CCA activity to the new entrant. Under the arm’s length principle, any such transfer of intangibles or tangible assets must be compensated based on an arm’s length value for the transferred interest. Such compensation is referred to in this chapter as a “buy-in payment”.

8.45 The amount of a buy-in payment should be determined based upon the value (i.e. the arm’s length price) of the interest in the intangibles and/or tangible assets the new entrant obtains, taking into account the new entrant’s proportionate share of the overall expected benefits to be received under the CCA. There may also be cases where a new participant brings existing intangibles or tangible assets to the CCA, and that balancing payments may be appropriate from the other participants in recognition of this contribution. Any balancing payments to the new entrant could be netted against any buy-in payments required, although appropriate records must be kept of the full amounts of the separate payments for tax administration purposes.

8.46 Similar issues could arise when a participant leaves a CCA. In particular, a participant that leaves a CCA may dispose of its interest in the results, if any, of past CCA activity (including work in progress) to the other participants. Any such transfer should be compensated according to the arm’s length principle. Such compensation is referred to in this chapter as a “buy-out payment”.

8.47 The guidance in Chapters I-III and VI is fully applicable to determining the arm’s length amount of any buy-in, buy-out or balancing payments required. There may be instances where no such payments are required under the arm’s length principle. For example, a CCA for the sharing of administrative services would generally only produce benefits to participants on a current basis, rather than any valuable on-going results.

8.48 Buy-in and buy-out payments should be treated for tax purposes in the same manner as would apply under the general rules of the tax system(s) (including conventions for the avoidance of double taxation) applicable to the respective participants as if the payment were made outside a CCA as consideration for the acquisition or disposal of the interest in the results of the prior CCA activity.

8.49 When a CCA terminates, the arm’s length principle requires that each participant retains an interest in the results, if any, of the CCA activity consistent with their proportionate share of contributions
贡献的特征将取决于成本分摊协议中该项活动的性质，并从税收角度对此进行确认。
8.42 在服务型成本分摊协议中，参与方对协议的贡献往往会以成本节约的形式或其带来收益（在这些情况下，成本分摊协议活动可能不会直接产生收入）。在开发型成本分摊协议中，参与方的预期收益可能会在投入期间（之后）产生，因此，不会在参与方做出贡献的时点立刻确认相应的收入。
8.43 任何平衡支付应被视为支付方的贡献增加以及收款方的贡献抵减。与一般贡献相同，任一平衡支付的特征和税务上的处理方式将根据国内法以及相关税收协定确定。
D. 成本分摊协议的签订、退出或终止
8.44 如果成本分摊协议的参与方发生变化，通常需要对各参与方的贡献和预期收益率份额进行重新评估。作为参与方加入一个已生效的成本分摊协议，可以获得加入之前成本分摊协议相关活动结果而产生的利益，如果开发完成或仍在开发过程中的无形资产或有形资产。在这种情况下，原参与方实际上向新加入者转让了其在以前成本分摊协议活动所形成的一部分利益。根据独立交易原则，任何无形资产或有形资产的转让都必须根据被转让权益的独立交易价格进行补偿。这种补偿在本章被称为“加入支付”。
8.45 加入支付的金额应根据新加入者所取得的无形资产和有形资产相关权益的价值（即独立交易价格），同时考虑新加入者将享有的预期收益占协议预期总收益的比例确定。在某些情况下，新加入者为加入成本分摊协议投入既有的无形资产或有形资产，这时其他参与方可能会按照加入支付以体现新加入者的贡献。平衡支付和加入支付可以相抵并根据净值计算，但是必须保存适当的记录，说明两种支付的金额，以备税务机关审查。
8.46 参与方退出成本分摊协议时会产生类似问题。特别是退出成本分摊协议的参与方可能将其在过去（以及现存）成本分摊协议活动所形成的利益转让给其他参与方。任何此类转让均应按照独立交易原则进行补偿。这种补偿在本章被称为“退出补偿”。
8.47 第一至第三章和第六章的指导原则完全适用于确认独立交易原则的加入支付、退出补偿或平衡支付的金额。根据独立交易原则，有时可能并不需要进行这些支付。例如，共享管理服务的成本分摊协议通常只会为参与方提供当前的短期利益，而不会创造持续的、具有特定价值的成果。
8.48 针对加入支付和退出补偿的税务处理方式，应当与没有签署成本分摊协议的各方为取得或处置执行类似于成本分摊协议中的活动所形成的利益时适用的一般税收制度规则（包括避免双重征税协定）相同。
8.49 当成本分摊协议终止时，基于独立交易原则，各参与方获得的成本分摊协议活动所形成的利益应与协议期间其对协议的贡献程度（通过实际发生或因协议终止而产生的平衡支付进行调整）相一致。
to the CCA throughout its term (adjusted by any balancing payments actually made, including those made as a result of the termination), or is appropriately compensated for any transfer of that interest to other participants.

E. Recommendations for structuring and documenting CCAs

8.50 Generally, a CCA between controlled parties should meet the following conditions:

a) The participants would include only enterprises expected to derive mutual and proportionate benefits from the CCA activity itself, (and not just from performing part or all of that activity). See paragraph 8.14.

b) The arrangement would specify the nature and extent of each participant's interest in the results of the CCA activity, as well its expected respective share of benefits.

c) No payment other than the CCA contributions, appropriate balancing payments and buy-in payments would be made for the particular interest or rights in intangibles, tangible assets or services obtained through the CCA.

d) The value of participants' contributions would be determined in accordance with these Guidelines and, where necessary, balancing payments should be made to ensure the proportionate shares of contributions align with the proportionate shares of expected benefits from the arrangement.

e) The arrangement may specify provision for balancing payments and/or changes in the allocation of contributions prospectively after a reasonable period of time to reflect material changes in proportionate shares of expected benefits among the participants.

f) Adjustments would be made as necessary (including the possibility of buy-in and buy-out payments) upon the entrance or withdrawal of a participant and upon termination of the CCA.

8.51 The transfer pricing documentation standard set out in Chapter V requires reporting under the master file of important service arrangements and important agreements related to intangibles, including CCAs. The local file requires transactional information including a description of the transactions, the amounts of payments and receipts, identification of the associated enterprises involved, copies of material intercompany agreements, and pricing information including a description of reasons for concluding that the transactions were priced on an arm's length basis. It would be expected that in order to comply with these documentation requirements, the participants in a CCA will prepare or obtain materials about the nature of the subject activity, the terms of the arrangement, and its consistency with the arm's length principle. Implicit in this is that each participant should have full access to the details of the activities to be conducted under the CCA, the identity and location of the other parties involved in the CCA, the projections on which the contributions are to be made and expected benefits determined, and budgeted and actual expenditures for the CCA activity, at a level of detail commensurate with the complexity and importance of the CCA to the taxpayer. All this information could be relevant and useful to tax administrations in the context of a CCA and, if not included in the master file or local file, taxpayers should be prepared to provide it upon request. The information relevant to any particular CCA will depend on the facts and circumstances. It should be emphasised that the information described in this list is neither a minimum compliance standard nor an exhaustive list of the information that a tax administration may be entitled to request.

8.52 The following information would be relevant and useful concerning the initial terms of the CCA:

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或者在向其他参与方转让利益时，转让方获得了合理的补偿。

E. **关于成本分摊协议架构及文档准备的建议**

8.50 受控企业间的成本分摊协议一般应符合以下条件：

a）参与方应仅限于希望从成本分摊协议中获得共同利益并按比例获得效益的企业（而不是因为其承担了部分或全部活动）。参见第 8.14 段；

b）协议应说明每个参与方获得成本分摊协议活动所形成的权益的性质和范围，以及各自期望的收益份额；

c）对于通过成本分摊协议而获得的无形资产、有形资产、服务的特定权益或权利，除了成本贡献、适当的平衡支付和加入支付外，无须进行其他支付；

d）参与者应做出的贡献将根据《转让定价指南》的相关指导确定，必要时应进行平衡支付以确保参与方的贡献份额与其从成本分摊协议中获得的预期收益份额相一致；

e）协议可以在一段合理的时间之后，通过平衡支付和/或调整贡献的分摊方法，以反映各参与方间预期收益份额的重大变化；

f）当有参与方加入、退出成本分摊协议或成本分摊协议终止时，应进行必要的调整（包括加入支付和退出补偿的可能性）。

8.51 根据第五章的转让定价文档标准，应当在主体文档中披露重要的服务交易以及涉及无形资产的重要协议（包括成本分摊协议）。本地文档要求披露关联交易信息，包括：关联交易的描述、收取或支付的关联交易金额、发生关联交易的企业、各个相关交易合同副本、以及定价信息，包括关联交易定价政策中所涉及的交易的原因描述。为了满足文档的合规要求，成本分摊协议的参与方预计需要准备和取得的信息包括成本分摊协议活动的性质、协议期限以及证明协议符合独立交易原则的相关资料，这意味着每个参与方应当都能获得成本分摊协议活动的全部信息。其他参与方的身份信息和地址，成本分摊协议及其预期收益必须所依据的预测信息，以及成本分摊协议活动的预算支出和实际支出等相关信息。这些信息的详细程度应与成本分摊协议的复杂程度以及对于纳税人的影响程度相当。如果这些信息未在主体文档本地文档中披露，纳税人应做好准备以便在税务机关提出要求时提供这些信息，因为上述信息能够影响税务机关理解成本分摊协议，涉及具体成本分摊协议的资料信息具体细节和情形而定。需要强调的是，这里所列的信息既非最低的合规性标准，也不是税务机关有权要求纳税人提供的所有信息的完整列表。

8.52 可以考虑以下信息作为成本分摊协议的基础条款：

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a) a list of participants

b) a list of any other associated enterprises that will be involved with the CCA activity or that are expected to exploit or use the results of the subject activity

c) the scope of the activities and specific projects covered by the CCA, and how the CCA activities are managed and controlled

d) the duration of the arrangement

e) the manner in which participants’ proportionate shares of expected benefits are measured, and any projections used in this determination

f) the manner in which any future benefits (such as intangibles) are expected to be exploited

h) the form and value of each participant’s initial contributions, and a detailed description of how the value of initial and ongoing contributions is determined (including any budgeted vs actual adjustments) and how accounting principles are applied consistently to all participants in determining expenditures and the value of contributions

i) the anticipated allocation of responsibilities and tasks, and the mechanisms for managing and controlling those responsibilities and tasks, in particular, those relating to the development, enhancement, maintenance, protection or exploitation of intangibles or tangible assets used in the CCA activity

j) the procedures for and consequences of a participant entering or withdrawing from the CCA and the termination of the CCA

8.53 Over the duration of the CCA term, the following information could be useful:

a) any change to the arrangement (e.g. in terms, participants, subject activity), and the consequences of such change

b) a comparison between projections used to determine the share of expected benefits from the CCA activity with the actual share of benefits (however, regard should be had to paragraph 3.74)

c) the annual expenditure incurred in conducting the CCA activity, the form and value of each participant’s contributions made during the CCA’s term, and a detailed description of how the value of contributions is determined.
a) 参与方的名单；
b) 成本分摊协议涉及的其他关联企业，或者预计会使用或利用成本分摊协议活动成果的其他关联企业的名单；
c) 成本分摊协议涉及的活动范围、具体项目以及管理和控制活动的方式；
d) 成本分摊协议的期限；
e) 参与方按比例划分的预期收益份额的计算方法，以及在确定份额过程中运用的预测信息；
f) 预期未来收益（如无形资产）的利用方式；
g) 各参与方初始贡献的形式和价值，并详细说明如何确定初始和后续贡献的价值（包括预计调整与实际调整，并详细说明对所有参与方在确定费用支出和贡献价值时如何一致地运用会计准则）；
h) 涉及成本分摊协议活动的责任和任务的预期分配以及管理和控制这些责任和任务的机制，以及涉及无形资产和有形资产开发、价值提升、维护、保护或利用的成本分摊协议，尤其需要提供上述信息；
i) 参与方增加或退出成本分摊协议以及成本分摊协议终止的程序和后果；以及
j) 平衡支付或协议条款调整的规定，以反映经济环境变化。

8.53 在成本分摊协议执行期内，下列信息可能有所帮助：

a) 协议的任何变化（例如条款、参与方、目标活动）及其影响；
b) 成本分摊协议活动预期收益份额的预测和与实际结果的比较（需要考虑《转让定价指南》第3.74段的相关原则）；以及
c) 成本分摊协议活动所发生的年度费用支出，在成本分摊协议执行期内各参与方贡献的形式和价值，并详细说明如何确定贡献的价值。
ANNEX TO CHAPTER VIII – EXAMPLES TO ILLUSTRATE THE GUIDANCE ON COST CONTRIBUTION ARRANGEMENTS

Example 1

1. Example 1 illustrates the general principle that contributions should be assessed at value (i.e., based on arm’s length prices) in order to produce results that are consistent with the arm’s length principle.

2. Company A and Company B are members of an MNE group and decide to enter into a CCA. Company A performs Service 1 and Company B performs Service 2. Company A and Company B each “consume” both services (that is, Company A receives a benefit from Service 2 performed by Company B, and Company B receives a benefit from Service 1 performed by Company A).

3. Assume that the costs and value of the services are as follows:

<table>
<thead>
<tr>
<th>Costs of providing Service 1 (cost incurred by Company A)</th>
<th>100 per unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of Service 1 (i.e., the arm’s length price that Company A would charge Company B for the provision of Service 1)</td>
<td>120 per unit</td>
</tr>
<tr>
<td>Costs of providing Service 2 (cost incurred by Company B)</td>
<td>100 per unit</td>
</tr>
<tr>
<td>Value of Service 2 (i.e., the arm’s length price that Company B would charge Company A for the provision of Service 2)</td>
<td>105 per unit</td>
</tr>
</tbody>
</table>

4. In year 1 and in subsequent years, Company A provides 30 units of Service 1 to the group and Company B provides 20 units of Service 2 to the group. Under the CCA, the calculation of costs and benefits are as follows:

<table>
<thead>
<tr>
<th>Cost to Company A of providing services (30 units * 100 per unit)</th>
<th>3000</th>
<th>(60% of total costs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost to Company B of providing services (20 units * 100 per unit)</td>
<td>2000</td>
<td>(40% of total costs)</td>
</tr>
<tr>
<td>Total cost to group</td>
<td>5000</td>
<td></td>
</tr>
<tr>
<td>Value of contribution made by Company A (30 units * 120 per unit)</td>
<td>3600</td>
<td>(63% of total contributions)</td>
</tr>
<tr>
<td>Value of contribution made by Company B (20 units * 105 per unit)</td>
<td>2100</td>
<td>(37% of total contributions)</td>
</tr>
<tr>
<td>Total value of contributions made under the CCA</td>
<td>5700</td>
<td></td>
</tr>
</tbody>
</table>

| Company A and Company B each consume 15 units of Service 1 and 10 units of Service 2: |
|---------------------------------|-----------------|-----------------|
| Benefit to Company A:           |                 |                 |
| Service 1: 15 units * 120 per unit | 1800            |                 |
| Service 2: 10 units * 105 per unit | 1050            |                 |

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第八章附录—关于成本分摊协议指南的案例说明

案例1
1. 案例1对一般性原则予以说明，即应根据价值（以独立交易价值为基础）对贡献进行评估，才能使成本分摊协议的相关安排符合独立交易原则。
2. A公司和B公司是同一家跨国集团的成员企业，双方决定签订一项成本分摊协议。A公司提供服务1，B公司提供服务2，A公司和B公司均“支付”这两项服务（即A公司从B公司提供的服务2中受益，而B公司则在A公司提供的服务1中受益）。
3. 假设这两项服务的成本和价值如下所示：

| 提供服务1的成本（即A公司发生的服务成本） | 100/单位 |
| 提供服务2的成本（即B公司发生的服务成本） | 100/单位 |
| 服务1的价值（即A公司向B公司提供服务1应收取的独立交易价格） | 120/单位 |
| 服务2的价值（即B公司向A公司提供服务2应收取的独立交易价格） | 105/单位 |

4. 在第一年及之后年度中，A公司向集团提供了30单位的服务1，B公司向集团提供了20单位的服务2。在成本分摊协议中，成本和收益的计算如下所示：

| A公司提供服务的成本（30单位×100/单位） | 3000 （占总服务成本的60%） |
| B公司提供服务的成本（20单位×100/单位） | 2000 （占总服务成本的40%） |
| 集团的总服务成本 | 5000 |

| A公司贡献的价值（30单位×120/单位） | 3600 （占总贡献价值的63%） |
| B公司贡献的价值（20单位×105/单位） | 2100 （占总贡献价值的37%） |
| 成本分摊协议框架下的总贡献价值 | 5700 |

A公司和B公司均“支付”了15单位的服务1和10单位的服务2

<p>| A公司的受益价值： |
| 服务1：15单位×120/单位 | 1800 |
| 服务2：10单位×105/单位 | 1050 |</p>
<table>
<thead>
<tr>
<th>Total</th>
<th>2850</th>
<th>(50% of total value of 5700)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit to Company B</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Service 1: 15 units * 120 per unit</td>
<td>1800</td>
<td></td>
</tr>
<tr>
<td>Service 2: 10 units * 105 per unit</td>
<td>1050</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>2850</td>
<td>(50% of total value of 5700)</td>
</tr>
</tbody>
</table>

5. Under the CCA, the value of Company A and Company B's contributions should each correspond to their respective proportionate shares of expected benefits, i.e. 50%. Since the total value of contributions under the CCA is 5700, this means each party must contribute 2850. The value of Company A’s in-kind contribution is 3600 and the value of Company B’s in-kind contribution is 2100. Accordingly, Company B should make a balancing payment to Company A of 750. This has the effect of “topping up” Company B’s contribution to 2850; and offsets Company A’s contribution to the same amount.

6. If contributions were measured at cost instead of at value, since Companies A and B each receive 50% of the total benefits, they would have been required contribute 50% of the total costs, or 2500 each, i.e., Company B would have been required to make a 500 (instead of 750) balancing payment to A.

7. In the absence of the CCA, Company A would purchase 10 units of Service 2 for the arm’s length price of 1050 and Company B would purchase 15 units of Service 1 for the arm’s length price of 1800. The net result would be a payment of 750 from Company B to Company A. As can be shown from the above, this arm’s length result is only achieved in respect of the CCA when contributions are measured at value.

**Example 1A**

8. The facts are the same as Example 1. In accordance with the guidance in paragraph 8.27, an alternative way to achieve the identical result under Example 1 is through the use of a two-step process as set out below.

9. Step 1 (contributions measured at cost): Company A should bear 50% of the total cost of 5000, or 2500. The cost of Company A’s in-kind contribution is 3000. Company B should bear 50% of the total cost, or 2500. The cost of Company B’s in-kind contribution is 2000. Company B should thus make an additional payment to Company A of 500. This reflects a balancing payment associated with current contributions.

10. Step 2 (accounting for additional contributions of value to the CCA): Company A produces 20 of value above costs per unit. Company B produces 5 of value above costs per unit. Company A consumes 10 units of Service 2 (50 of value over cost), and Company B consumes 15 units of Service 1 (300 of value over cost). Accordingly, Company A should be compensated 250 for the additional 250 of value that it contributes to the CCA. This reflects a balancing payment associated with pre-existing contributions.

11. The two-step method provides for a sharing of costs plus a separate and additional payment to the participant that makes an additional contribution of value to the arrangement. In general, the additional contribution of value might reflect pre-existing contributions, such as intangibles owned by one of the
### 合计

<table>
<thead>
<tr>
<th></th>
<th>2850</th>
</tr>
</thead>
<tbody>
<tr>
<td>(占总贡献价值5700的)</td>
<td></td>
</tr>
</tbody>
</table>

### B公司的受益价值（单位：元）

<table>
<thead>
<tr>
<th>服务 1：15单位×120/单位</th>
<th>1800</th>
</tr>
</thead>
<tbody>
<tr>
<td>服务 2：10单位×105/单位</td>
<td>1650</td>
</tr>
<tr>
<td>合计</td>
<td>2850</td>
</tr>
</tbody>
</table>

（占总贡献价值5700的）

5.  根据双方签订的成本分摊协议，A公司和B公司的受益价值应与其按比例享有的预期收益份额相匹配。即每一方的贡献均占总贡献价值的50%。由于该成本分摊协议的总贡献价值是5700，每一方的贡献价值须为2850。A公司提供服务1的价值是3600，而B公司提供服务2的价值是2100。因此，B公司应向A公司提供一笔金额为750的平衡支付。该平衡支付具有使B公司贡献价值“补足”至2850的效果；同时又将A公司的贡献价值抵减至同一金额。

6.  如果贡献是按成本而不是按价值计量，则A公司和B公司的受益价值各占总贡献价值的50%。他们需要各自承担50%的总服务成本，即2500，换言之，B公司需要向A公司提供一笔金额为500（而不是750）的平衡支付。

7.  在未签订成本分摊协议的情况下，A公司会以独立交换价值1050来购买10单位的服务2，B公司会以独立交换价值1800来购买15单位的服务1。B公司支付给A公司的差价是750。如上文所述，仅当根据价值对贡献进行计量时，成本分摊协议的价格安排才能符合独立交换原则。

**案例1A**

8.  本案例事实部分与案例1相同。根据第8.27段的指导原则，案例1中的结果也可以通过以下两步法实现。

9.  **步骤一**（基于成本计量贡献）：A公司应承担总服务成本5000的50%，即2500。A公司贡献的服务成本为3000，B公司应承担总服务成本的50%，即2500。B公司贡献的服务成本为2000。因此，B公司应向A公司另外支付500，这体现了与“当期成本”相关的平衡支付。

10. **步骤二**（考虑对成本分摊协议的额外价值贡献）：A公司创造的单位价值高出其成本20，B公司创造的单位价值高出其成本5。A公司“消费”了10单位的服务2，也就是其获得的服务价值超出服务成本50。B公司“消费”了15单位的服务1，即获其服务价值超出服务成本300。因此，A公司应就其向成本分摊协议所做的额外价值贡献250获得差额补偿。这部分支付体现了与“既有贡献”相关的平衡支付。

11.  两步法首先在各参与方之间分摊成本，随后向相关参与方支付其为成本分摊协议做出的额外价值贡献。一般而言，额外的价值贡献可能反映了与实现成本分摊协议目标相关的既有贡献，例如某一参与者拥有的相关无形资产。因此，两步法可能在分析开发型成本分摊协议时最有用。
participants, that are relevant to the purpose of the CCA. Thus, the two-step method might be most usefully applied to development CCAs.

**Example 2**

12. The facts are the same as Example 1, except that the per-unit value of Service 1 is 103 (that is, both Service 1 and Service 2 are low-value services). Assume, therefore, that the calculation of the costs and value of the services is as follows:

| Cost to Company A of providing services (30 units * 100 per unit) | 3000 | (60% of total costs) |
| Cost to Company B of providing services (20 units * 100 per unit) | 2000 | (40% of total costs) |
| Total cost to group | 5000 |
| Value of contribution made by Company A (30 units * 103 per unit) | 3090 | (59.5% of total contributions) |
| Value of contribution made by Company B (20 units * 105 per unit) | 2100 | (40.5% of total contributions) |
| Total value of contributions made under the CCA | 5190 |

Company A and Company B each consume 15 units of Service 1 and 10 units of Service 2:

| Benefit to Company A: | |
| Service 1: 15 units * 103 per unit | 1545 |
| Service 2: 10 units * 105 per unit | 1050 |
| Total | 2595 | (50% of total value of 5190) |

| Benefit to Company B |
| Service 1: 15 units * 103 per unit | 1545 |
| Service 2: 10 units * 105 per unit | 1050 |
| Total | 2595 | (50% of total value of 5190) |

13. Under the CCA, the value of Company A and Company B’s contributions should each correspond to their respective proportionate shares of expected benefits, i.e. 50%. Since the total value of contributions under the CCA is 5190, this means each party must contribute 2595. The value of Company A’s in-kind contribution is 3090. The value of Company B’s in-kind contribution is 2100. Accordingly, Company B should make a balancing payment to Company A of 495. This has the effect of ‘topping up’ Company B’s contribution to 2595; and offsets Company A’s contribution to the same amount.
案例 2

12. 本案例事实部分与案例 1 相同，有所不同的是服务 1 与服务 2 均为低附加值服务。服务 1 的单位价值为 103，服务 2 的单位价值为 105。因此，假设服务成本与受益的计算如下所示：

<table>
<thead>
<tr>
<th>公司</th>
<th>提供服务的成本（单位×100/单位）</th>
<th>（占总服务成本的%）</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>3000</td>
<td>60%</td>
</tr>
<tr>
<td>B</td>
<td>2000</td>
<td>40%</td>
</tr>
<tr>
<td>合计</td>
<td>5000</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>公司</th>
<th>贡献的价值（单位×103/单位）</th>
<th>（占总贡献价值的%）</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>3090</td>
<td>59.5%</td>
</tr>
<tr>
<td>B</td>
<td>2190</td>
<td>40.5%</td>
</tr>
<tr>
<td>合计</td>
<td>5190</td>
<td></td>
</tr>
</tbody>
</table>

A 公司和 B 公司均“消费”15 单位的服务 1 和 10 单位的服务 2

A 公司的受益价值：
- 服务 1：15 单位×103/单位 1545
- 服务 2：10 单位×105/单位 1050
- 合计 2595 （占总贡献价值 5190 的）

B 公司的受益价值：
- 服务 1：15 单位×103/单位 1545
- 服务 2：10 单位×105/单位 1050
- 合计 2595 （占总贡献价值 5190 的）

13. 根据双方签订的成本分摊协议，A 公司和 B 公司各自的贡献价值应与其按比例分享的预期收益份额相匹配，即每方的贡献均占总贡献价值的 50%。由于该成本分摊协议的总贡献价值是 5190，则每方的贡献价值须为 2595。A 公司提供服务 1 的价值是 3090，而 B 公司提供服务 2 的价值是 2100。因此，B 公司应向 A 公司提供一笔金额为 495 的平衡支付，该平衡支付具有使 B 公司贡献价值“补足”至 2595 的效果；同时又将 A 公司的贡献价值抵减至同一金额。
14. In this example, since all contributions to the CCA are low-value services, for practical reasons, contributions may be valued at cost since this will achieve results which are broadly consistent with the arm's length principle. Under this practical approach, the cost of Company A's in-kind contribution is 3000; the cost of Company B's in-kind contribution is 2000; and each participant should bear the costs associated with 50% of the total cost of contributions (2500). Accordingly, Company B should make a balancing payment to Company A of 500.

**Example 3**

15. The facts are the same as Example 1, except that the per-unit value of Service 2 is 120 (that is, both Service 1 and Service 2 are equally valuable, and neither are low-value services).

| Cost to Company A of providing services (30 units * 100 per unit) | 3000  | (50% of total costs) |
| Cost to Company B of providing services (20 units * 100 per unit) | 2000  | (40% of total costs) |
| Total cost to group | 5000 |
| Value of contribution made by Company A (30 units * 120 per unit) | 3600  | (60% of total contributions) |
| Value of contribution made by Company B (20 units * 120 per unit) | 2400  | (40% of total contributions) |
| Total value of contributions made under the CCA | 6000 |

**Company A and Company B each consume 15 units of Service 1 and 10 units of Service 2:**

**Benefit to Company A:**

| Service 1: 15 units * 120 per unit | 1800 |
| Service 2: 10 units * 120 per unit | 1200 |
| Total | 3000 | (50% of total value of 6000) |

**Benefit to Company B:**

| Service 1: 15 units * 120 per unit | 1800 |
| Service 2: 10 units * 120 per unit | 1200 |
| Total | 3000 | (50% of total value of 6000) |

16. Under the CCA, the value of Company A and Company B's contributions should each correspond to their respective proportionate shares of expected benefits i.e. 50%. Since the total value of contributions under the CCA is 6000, this means each party must contribute 3000. The value of Company A's in-kind contribution is 3600. The value of Company B's in-kind contribution is 2400. Accordingly, Company B should make a balancing payment to Company A of 600. This has the effect of 'topping up'
14. 本案例中，由于对该成本分摊协议的贡献均值为低附加值服务，基于实际操作的考虑，可以基
于成本计算贡献价值，这样获得的结果总体上符合独立交易原则。按照该方法，A公司提供服务的成
本为3000，B公司提供服务的成本为2000，而每一参与方均应承担总服务成本的50%，即2500。因此，
B公司应向A公司提供一笔金额为500的平衡支付。

案例3

15. 本案例事实部分与案例1相同，不同的是服务2的贡献价值也仅为120，即服务1与服务2的价
值相等，而且二者均不适用于低附加值服务。

<table>
<thead>
<tr>
<th>服务单位</th>
<th>金额（单位：元）</th>
<th>备注</th>
</tr>
</thead>
<tbody>
<tr>
<td>A公司提供服务成本（100单位）</td>
<td>3000</td>
<td>（占总服务成本的60%）</td>
</tr>
<tr>
<td>B公司提供服务成本（200单位）</td>
<td>2000</td>
<td>（占总服务成本的40%）</td>
</tr>
<tr>
<td>总服务成本</td>
<td>5000</td>
<td></td>
</tr>
<tr>
<td>A公司贡献的价值（200单位）</td>
<td>3600</td>
<td>（占总贡献价值的60%）</td>
</tr>
<tr>
<td>B公司贡献的价值（200单位）</td>
<td>2400</td>
<td>（占总贡献贡献的40%）</td>
</tr>
<tr>
<td>成本分摊协议框架下的总贡献价值</td>
<td>6000</td>
<td></td>
</tr>
</tbody>
</table>

A公司和B公司均“消费”15单位的服务1和10单位的服务2

<table>
<thead>
<tr>
<th>服务单位</th>
<th>金额（单位：元）</th>
<th>备注</th>
</tr>
</thead>
<tbody>
<tr>
<td>A公司的受益价值：</td>
<td></td>
<td></td>
</tr>
<tr>
<td>服务1：15单位×120每单位</td>
<td>1800</td>
<td></td>
</tr>
<tr>
<td>服务2：10单位×120每单位</td>
<td>1200</td>
<td></td>
</tr>
<tr>
<td>合计</td>
<td>3000</td>
<td>（占总贡献价值6000的50%）</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>服务单位</th>
<th>金额（单位：元）</th>
<th>备注</th>
</tr>
</thead>
<tbody>
<tr>
<td>B公司的受益价值：</td>
<td></td>
<td></td>
</tr>
<tr>
<td>服务1：15单位×120每单位</td>
<td>1800</td>
<td></td>
</tr>
<tr>
<td>服务2：10单位×120每单位</td>
<td>1200</td>
<td></td>
</tr>
<tr>
<td>合计</td>
<td>3000</td>
<td>（占总贡献价值6000的50%）</td>
</tr>
</tbody>
</table>

14. 根据双方签订的成本分摊协议，A公司和B公司各自的贡献价值应与其按比例享有的预期收
益份额相匹配，即每一方的贡献均值占总贡献价值的50%。该成本分摊协议的总贡献价值是6000，则每
一方的贡献价值须为3000。A公司提供服务1的价值是3600，而B公司提供服务2的价值是2400。因
此，B公司应向A公司提供一笔金额为600的平衡支付。该平衡支付具有使B公司贡献价值“补足”至3000的效果；同时又将A公司的贡献价值抵减至同一金额。
Company B’s contribution to 3000; and offsets Company A’s contribution to the same amount. Example 3 illustrates that, in general, assessing contributions at cost will not result in an arm’s length outcome even in those situations in which the arm’s length mark-up on the cost of contributions is identical.

Example 4

17. Company A and Company B are members of an MNE group and decide to undertake the development of an intangible through a CCA. The intangible is anticipated to be highly profitable based on Company B’s existing intangibles, its track record and its experienced research and development staff. Company A performs, through its own personnel, all the functions expected of a participant in a development CCA obtaining an independent right to exploit the resulting intangible, including functions required to exercise control over the risks it contractually assumes in accordance with the principles outlined in paragraphs 8.14 to 8.18. The particular intangible in this example is expected to take five years to develop before possible commercial exploitation and if successful, is anticipated to have value for ten years after initial exploitation.

18. Under the CCA, Company A will contribute to funding associated with the development of the intangible (its share of the development costs are anticipated to be $100 million per year for five years). Company B will contribute the development rights associated with its existing intangibles, to which Company A is granted rights under the CCA irrespective of the outcome of the CCA’s objectives, and will perform all activities related to the development, maintenance, and exploitation of the intangible. The value of Company B’s contributions (encompassing the performance of activities as well as the use of the pre-existing intangibles) would need to be determined in accordance with the guidance in Chapter VI and would likely be based on the anticipated value of the intangible expected to be produced under the CCA, less the value of the funding contribution by Company A.

19. Once developed, the intangible is anticipated to result in global profits of $550 million per year (years 6 to 15). The CCA provides that Company B will have exclusive rights to exploit the resulting intangible in country B (anticipated to result in profits of $220 million per year in years 6 to 15) and Company A will have exclusive rights to exploit the intangible in the rest of the world (anticipated to result in profits of $330 million per year).

20. Taking into account the realistic alternatives of Company A and Company B it is determined that the value of Company A’s contribution is equivalent to a risk-adjusted return on its R&D funding commitment. Assume that this is determined to be $110 million per year (for years 6 to 15). However, under the CCA Company A is anticipated to reap benefits amounting to $330 million of profits per year in years 6 to 15 (rather than $110 million). This additional anticipated value in the rights Company A obtains (that is, the anticipated value above and beyond the value of Company A’s funding investment) reflects the contribution of Company B’s pre-existing contributions of intangibles and R&D commitment to the CCA. Company A needs to pay for this additional value it receives. Accordingly, balancing payments from Company A to Company B to account for the difference are required. In effect, Company A would need to make a balancing payment associated with those contributions to Company B equal in present value, taking into account the risk associated with this future income, to $220 million per year anticipated in years 6 to 15.

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23 For purposes of this example, it is not necessary to derive these results. The example assumes that making a funding ‘investment’ of $100 million per year for five years in a project with this level of risk should earn at arm’s length anticipated profits of $110 million per year for the following 10 years. The results used herein are included for the purpose of demonstrating the principles illustrated in this example only and no guidance as to the level of arm’s length return to participants in CCAs should be inferred.

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案例 3 表明，基于成本衡量贡献价值所产生的结果往往并不符合独立交易原则，即使在成本加成率符合独立交易原则且完全相等的情况下，也同样如此。

**案例 4**

17. A 公司和 B 公司是同一个跨国企业集团的成员企业。双方决定签订一项成本分摊协议来开发无形资产。考虑到 B 公司现有的无形资产，过往的研发成果以及经验丰富的研发团队，可以预期该无形资产会带来丰厚的利润。作为开发成本分摊协议的参与方，A 公司通过其员工执行该无形资产成果并独立承担应履行的全部功能，包括根据第 8.14 和 8.18 段的原则，执行参与方对合同约定的风险及义务控制所需履行的功能。在本案例中，无形资产预计需经过 5 年的研发才可投入商业使用，如果研发成功，该无形资产在初始投入使用后预计有十年的使用价值。

18. 按照该成本分摊协议，A 公司将提供开发该项无形资产所需的资金（A 公司在未来五年内每年预计要承担 1 亿美元的开发成本）。B 公司则提供与现有无形资产相关的开发权，并开展无形资产开发、维护和利用相关的所有活动。无论无形资产开发是否成功，成本分摊协议均赋予 A 公司利用 B 公司现有无形资产的权利。B 公司贡献的价值（包括其开展的活动以及投入的既有无形资产）需根据第六章的指导原则加以确定，可能根据该成本分摊协议所开发的无形资产的预期价值扣除 A 公司所提供资金的贡献价值来计算确定。

19. 一旦开发成功，该无形资产预计将在全球范围内每年（第 6 至第 15 年）带来 5.5 亿美元的利润。根据成本分摊协议的规定，B 公司在 B 国对该无形资产的研发成果拥有独占使用权（预计在第 6 至第 15 年间，每年为 B 公司创造 2.2 亿美元的利润），A 公司则拥有世界其他地区的独占使用权（预计每年将为 A 公司创造 3.3 亿美元的利润）。

20. 考虑到 A 公司和 B 公司拥有的现实可行的选择，A 公司的贡献价值相当于其为研发活动提供的资金可获得的较高风险调整后的回报。假设该预期回报确定为每年（第 6 至第 15 年）1.1 亿美元。然而，根据成本分摊协议的规定，A 公司自第 6 至第 15 年间每年可获得 3.3 亿美元（而非 1.1 亿美元）的收益。A 公司获得的额外的预期价值（即 A 公司的预期回报的价值超过其投入资金的价值）是 B 公司先期投入成本分摊协议的无形资产及其研发投入的价值体现。A 公司需要向 B 公司支付其额外获得的回报。因此，A 公司应向 B 公司做出平衡支付以消除贡献与收益之间的不匹配现象。总之，在考虑了无形资产未来收益的现实可行的选择后，A 公司在未来第 6 至第 15 年间每年需向 B 公司做出平衡支付，每年支付的金额相当于 2.2 亿美元现值。

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23 本案例仅供说明之用，其结果并不具有必然性。本案例假设了 A 公司在 5 年内每月向项目投入 1 亿美元资金的“观察”，并承担相应的风险；按照独立交易原则，A 公司在接下来的 10 年里每年预期获得 1.1 亿美元的资金。本案例的结果旨在阐述所适用的原则，不应当用于在新成本分摊协议参与方应获得的符合独立交易原则的回报水平。
Example 5

21. The facts are the same as in Example 4 except that the functional analysis indicates Company A has no capacity to make decisions to take on or decline the risk-bearing opportunity represented by its participation in the CCA, or to make decisions on whether and how to respond to the risks associated with the opportunity. It also has no capability to mitigate the risks or to assess and make decisions relating to the risk mitigation activities of another party conducted on its behalf.

22. In accurately delineating the transactions associated with the CCA, the functional analysis therefore indicates that Company A does not control its specific risks under the CCA in accordance with the guidance in paragraph 8.15 and consequently is not entitled to a share in the output that is the objective of the CCA.
案列 5

21. 本案列事实部分与案列 4 相同，所不同的是功能分析表明 A 公司没有决策能力来决定是否作为成本分摊协议的参与方承担或拒绝承担“蕴含风险的机会”；以及是否和如何应对“机会所蕴含的风险”。此外，A 公司也没有能力减缓风险或对委托他方执行的风险减缓活动进行评估和决策。

22. 在对成本分摊协议所涉及的交易进行准确界定时，功能分析显示，根据第 8.15 段的指导原则，A 公司未对该成本分摊协议相关的特定风险实施控制，因此，A 公司不应分享成本分摊协议成果所带来的利益。
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