EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Direct Tax Policy and Cooperation

Brussels, October 2016
Taxud/D2

DOC: JTPF/016/2016/EN

EU JOINT TRANSFER PRICING FORUM

COMPILATION OF COMMENTS ON REMAINING ITEMS IN THE DRAFT REPORT ON THE USE OF

COMPARABLES IN THE EU

(*Comments on DOC: JTPF/007/2016/EN Sections 5.3, 6, 7 & 10*)

Meeting of 20 October 2016

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Contents

Comments on section 5.3, section 6 and section 7

5. Specific aspects dealing with external comparables

5.3 Processing and interpreting external comparables

Germany

Draft recommendation 8.d) - Page 14

It would be misleading to emphasise the OECD TPG sentence according to which use of multiple year data is not a systematic requirement. Though indeed it is not a systematic requirement, in most cases the use of multiple year data - both concerning the tested party and concerning the comparables - is expected. *Consequently, the first sentence of the draft recommendation should be deleted and the second sentence should start with "In most cases, multiple year data should be used to better understand..."*

Denmark

Draft Recommendation 8.g) - Page 14 – As regard practice related to the use of multiple year data

g) The time period covered by a multiple year analysis will finally depend on the facts and circumstances of the case but should cover at a minimum 3 years. An aspect to be considered when setting the price at the transaction is the delay of availability of information on third party transaction (see e.g. section 2.4.5.2 of the Deloitte report).

It is common practice that a multiple year analysis covers 3-5 years, in most cases a 3 year period. We would, however, need to see the full Deloitte-study including appendixes before we can comment at the findings of the Deloitte-study. At this stage we simply suggest to delete the last sentence with reference to the Deloitte-study.

We therefore suggest that new text should read: *"The time period covered by a multiple year analysis will finally depend on the fact and circumstances of the case and should generally cover a period of 3-5 years".*

Finland

Draft Recommendation 8.g) - Page 14

As far as Draft Recommendation 8 g regarding multiple year data is concerned, we agree that the number of years covered in the comparability analysis depends on the facts and circumstances of the case. *Therefore, we would also prefer to recommend to use a range of years covered e.g. 3-5 years as a default instead of a 3 year period.*

Poland

Draft Recommendation 8.h) - Page 14

T**o be removed** –the tested transaction should determine the use or not of multiple year data on case-by-case basis. Recommendation may lead to conclusion that using multiple year data for purposes of applying CUP is forbidden, when in some specific situation it may be more appropriate to use such data.

Sweden

Draft Recommendation 8.d) - Page 14

Regarding draft recommendation 8d) the use of multiple year data: Sweden suggests that JTPF should give concrete examples regarding how a multiple year analysis should be performed. Should for example a weighted average be used if you have a "multiple year analysis" consisting of 3 years or should you use the figures for each of the 3 years?

NGM general

Draft Recommendation 8. (Use of multiple year data)

- There was general recognition among the NGMs that clear guidance on this item would be highly useful in practice.
- It was suggested that the section should more clearly support three main items
    1. Multiple year data should be generally accepted as a good practice
    2. The latest information available at the time of the transaction should be respected
    3. Consistency, notably with regard the time period used (i.e. 3 or 5 years for example) should be seen as a good practice and be endorsed
    4. (RB) Loss-making comparables should be accepted/rejected depending on the nature of the transaction under analysis (e.g. high/low functional & risk profile)
- The meaning of item h) was not fully understood; (RB) use of multiple year data should also be accepted (or, at least, should not be automatically rejected) for the purposes of applying the CUP method, depending on the information available, facts and circumstances.

EATLP

Draft Recommendation 8.b) (Use of multiple year data)

No doubt, use of multiple year data can add value to the comparability analysis. But here again it is relevant the issue that I commented in connection with draft recommendation 1 on the years that can be taken as a reference for comparable searches by tax administrations. The General Court of the EU, with regard to valuation procedures in the State aid (art. 107 TFEU) context, has pointed out that:

"Para. 93. As regards, first, the date on which the expert report was drawn up, the Commission may rely on the help of experts to determine the market price of an asset subsequently to the date of sale of that asset, *provided that the information taken into account precedes or is contemporaneous with the date and was available on that date*" (emphasis added) (Judgment of the General Court 9 December 2015, Greece / Commission, T-233/11 and T-262/11, EU:T:2015:948).

What the General Court says is very obvious from the perspective of legal principles such as legal certainty, right of defence etc., and is also directly connected with the Charter of EU Rights. In a valuation procedure, the only data that can be used are those known and available at the time of the transaction, because using later data with a retrospective effect will place the taxpayer /person affected in a difficult position: the taxpayer could not use those data simply because they were not available at the time of submitting the tax return. The same line of case law can be found in some Member States (e.g. Spain with regard to valuation for tax purposes in general, although not in connection with transfer pricing cases).

It is clear that transfer pricing has peculiarities (i.e. availability of data in databases), but in the end, it entails a search of comparables to 'value' related party transactions and probably this case law has impact upon transfer pricing too, even if those peculiarities may require to think about some exceptions / further flexibility. If a taxpayer has a good transfer pricing documentation, if that taxpayer correctly explains what was done and the process of searching comparables and this accommodates with good practices, there is no reason to use data of the year of the audit (or of years later than that being audited) to correct what was done in good faith when the tax return was submitted.

There is the obvious problem of the up-date of databases and the fact that tax administrations do not have older versions or some databases simply do not permit to have those versions. But if taxpayers are required to have (and up-date) their transfer pricing documentation, there is no convincing reason why the tax authorities should not have old versions of databases (when available) to check what the taxpayer did, especially if, as it was explained in the Meeting of June 23, 2016, some tax administrations have older versions of databases. In this context, the observation by Spain that the tax administration should have access to what the taxpayer did and the databases used may be of help. In addition, a recommendation by the JTPF that tax administrations should use databases that are contemporaneous with the years being audited and not with the years when the audit is carried out could probably help avoid later conflicts and appeals. At least, a recommendation that tax administrations should keep older versions of databases to verify and replicate what the taxpayer did can be relevant.

That issue is also connected with the use of secret comparables since the same principles that are relevant to ban secret comparables can be applicable to comparables not available when the taxpayer submitted the tax return (e.g. in Spain, in line with the OECD TP Guidelines, there is case law on the prohibition of use of secret comparables because this

would breach the right of defense). In this context, the observation by Spain in the meeting that there are two different debates (the use of secret comparables and what information can be used in an audit) should probably be qualified. Since the same legal principles apply to both of them, I would simply see both issues as included within the same debate: 'secret compables' are just one type of the information that can or cannot be used to adjust what the taxpayer did.

Since this debate is directly linked with the Charter of EU Rights or domestic rights European Convention on Human Rights, this is probably an issue that deserves further consideration, maybe, in the context of the questions or subgroup proposed in section 8 of the (draft) document on comparables.

TPCA

Draft Recommendation 8. (Use of multiple year data)

There was general recognition among the NGMs that clear guidance on this item would be highly useful in practice.

It was suggested that the section should more clearly support three main items

1. Multiple year data should be generally accepted as a good practice

2. The latest information available at the time of the transaction should be respected

3. Consistency, notably with regard the time period used (i.e. 3 or 5 years for example) should be seen as a good practice and be endorsed

4. Draft Recommendation 8.h) sentence 1 – Page 14 sentence (1) can be supplemented by adding "preferably most recent years, if available" – in this aspect we endorse comments made by Adolfo Martin Jimenez (EATLP) in his paper

5. Draft Recommendation 8.e) – Page 14 we would welcome more guidance on calculating average (weighted average, simple average, calculation when data is not available for all years e.g. only 2 years are available of 3 year analysis?).

Draft Recommendation 8.h) – Page 14 ·The meaning of item h) was not fully understood

As regards CUP method in particular in the context of commodity transactions, sometimes the CUP will be achieved by using not only historical or spot prices but also by using future prices (market quotations for future transactions that will be binding and applied on the market) subject to necessary adjustments. Therefore, we would support the wording that multiple year data for the purposes of applying CUP should not be rejected when at arm's length situations such approach is accepted. Such wording can refer e.g. to some long-term contracts that may apply multiple year references (quotations).

6. Specific aspects of comparability adjustments

6.1 Observation in practice:

Denmark

Draft Recommendation 9) - Page 15 – Observation in practice and point 6.3 Specifically comparability adjustments:

The current text in the draft is that there are "no relevant experience on location savings adjustments … risks related adjustments are rarely developed and could be further explored, e.g. balance sheet adjustments, assets intensive and risks adjustments"

We talked about this in the MS meeting on the 22 June and there are generally not made location savings adjustments as benchmarks are generally based on a comparison with local comparables. Furthermore, it is generally not possible to adjust for large differences in balance sheets, assets and risks, as this relates to another FAR profile than the tested party.

Our recommendation for the new drafted text is therefore: "It is generally not possible to adjust for large differences in balance sheets, assets and risks."

Finland

Draft Recommendations 9.b) and 9.c) - Page 16 – Observation in practice and point 6.3 Specifically comparability adjustments:

As far as Draft Recommendation 9 is concerned, we agree with the recommendation 9 b) to the extent where it is stated that "adjusting potential comparables should be kept as simple as possible and applied only if comparability is improved". However, in the brackets of 9 b) there is also a reference to a materially-affecting-difference-test. We are not aware of such test (unfamiliar with the notion which is not defined in the Draft either). Therefore, we prefer to delete the text in the brackets of 9b). Along the same lines, we prefer to delete Draft Recommendation 9 c ("More guidance should be developed on the above mentioned materially-affecting-difference-test.").

Germany

Draft Recommendations 9.c) - Page 16 – Observation on point 6.3 Specifically comparability adjustments (par.20):

As at this point in time it is difficult to assess whether meaningful further guidance can be developed, this sentence should read: "It should be explored whether more guidance can be developed on the above-mentioned materially-affecting difference test."

On paragraph 20 (6.3 Specific comparability adjustments) Mentioning specific adjustments would suggest that they are generally accepted. However, at this point in

time, there should first be further work on better understanding how such adjustments would work and whether they make sense, before mentioning them in a report. That means that we are interested in further discussing the types of adjustments mentioned in paragraph 20, but we believe it is too early to agree on having a list of these types of adjustments in a report.

Poland

Observation on point 6.3 Specifically comparability adjustments (par.20):

General comment – recommendation should be supported with reservation that adjustments made at the last stage of the overall analysis cannot lead to significant modification of the results. Significant modification on the last stage may indicate that previous steps were not set up properly, which may lead to unreliable results.

III. Chapter 6, paragraph 6.3 (Specific comparability adjustments – for discussion)

Practical guidelines on following adjustments will be welcomed:

a) working capital adjustments,

b) marketing costs adjustments,

c) asset intensity adjustments.

Sweden

Observations on section 6 and on point 6.3 Specifically comparability adjustments (par.20):

Regarding Section 6 we have the following comments:
IFRS is normally applied in the consolidated accounts but the comparable companies often use local GAAP in their annual reports etc. Therefore it would be valuable if JTPF could examine the differences in accounting standards within the EU. JTPF could for example examine the differences in accounting principles regarding when costs are reported as "costs of goods sold (COGS)" and when costs instead are reported as "operating expenses". The Resale Price method (RPM) is often rejected as a TP-method because of differences in how these costs are reported. It would be valuable to find out how big these differences really are within the EU.

Section 6.3 in the document (JTPF/007/2016/EN):

Sweden supports the proposal of further developing the practical guidance for risk related adjustments according to section 6.3 in the document (JTPF/007/2016/EN). Entrepreneur – Service Provider models are commonly used. Usually there are differences in risk when you compare a Service Provider to an independent comparable company. It is

common that a Service Provider in practice bears no risks while an independent company always bears risks. Practical guidance regarding risk adjustments in those cases would be helpful.

NGM general

Draft Recommendations 9. - Pages 15-16

- The item was discussed at some length
- There was generally recognized that various adjustments are seen in practice
- Although detailed guidance is probably not feasible at this stage, it was suggested to list these adjustments/practices in the paper as a point of reference and explain the rationale behind them (without trying to come up with any more detailed or prescriptive wording on how to apply them in practice). BB: why not? We constantly talk about tools, but a description or list of possible adjustments is not a tool, how to apply them is a tool. (RB) I agree on providing a description on main adjustments and how/when/why to apply them (typical situations, practical examples, benefits of applying them, etc.), but not on a prescriptive way. Freedom should be given to the taxpayer in order to decide whether to perform or not capital adjustments, always providing reasons and support to do so.

- In addition to the examples made in para. 20, adjustments for IP and underlying cost structure (notably in case of a CUP where the underlying cost base is different between the internal and external party) was mentioned
- It was also suggested to further clarify that the guidance on adjustments should apply equally to internal and external comparables

- On the various recommendations, the following was suggested
    a) Was considered ok
    b) Suggested to exchange "simple" with "clear" or "clearly explained"
    c) Although there was no objection to the content, it was questioned whether this should be a recommendation (or rather part of the regular text)
    d) It was proposed to delete the first sentence and only keep the following wording; (RB) it might be worthy to elaborate a little on the reasons for performing adjustments either in the comparable companies (general practice) or in the tested party (rarely performed but useful in some cases), depending on the circumstances of the analysis.
    e) Was found ok, (RB) although further details could be provided on what is meant by "reasonable accurate".

TPCA

Draft Recommendation 9.

- ·The item was discussed at some length
- ·There was generally recognized that various adjustments are seen in practice
- ·Although detailed guidance is probably not feasible at this stage, it was suggested to list these adjustments/practices in the paper as a point of reference and explain the rationale behind them (without trying to come up with any more detailed or

prescriptive wording on how to apply them in practice). In addition to the examples made in para. 20, adjustments for IP and underlying cost structure (notably in case of a CUP where the underlying cost base is different between the internal and external party) was mentioned

- ·It was also suggested to further clarify that the guidance on adjustments should apply equally to internal and external comparables

- ·On the various recommendations, the following was suggested

  a) Was considered ok
  b) Suggested to exchange "simple" with "clear" or "clearly explained"
  c) Although there was no objection to the content, it was questioned whether this should be a recommendation (or rather part of the regular text)
  d) It was proposed to delete the first sentence and only keep the following wording;
  e) Was found ok,

Prysmian

Observations on section 6.1

I would like to stress that it would be a good practice that Tax authorities - as a first step – analyse the comparables search of the Company and only in case of rejection a new Comparable search is made. During our meeting some Tax Authorities were not aligned to this statement but I think this is a very important point.

With reference to Section 6.1.: it is worth noting that working capital adjustments are not used in certain countries. In general, working capital adjustments are highly questionable from a technical point of view, in many circumstances they may not increase the level of comparability and may even be counterproductive. So they should be used only in case they increase the reliability of the results.

7. State of play and way forward on pan-European comparables

Croatia

The Croatian comments on Chapter 7 and Draft Recommendation 10 of Draft report on the use of comparables in the EU (JTPF/007/2016/EN) are as follows:

- The conclusion in the last sentence of paragraph 23 that *the survey "Pan-European versus country-specific searches and pan-European versus countryspecific databases: not a clear-cut issue" showed that almost none of the EU Member States required a local comparables search* couldn't be accepted without reserve.

- Also, the conclusion in Draft Recommendation 10, letter a: *"Applying pan-European comparable searches can benefit both taxpayers and tax authorities in terms of reducing compliance costs, as well as increasing transparency, consistency and quality through an homogeneous documentation within the EU"* couldn't be accepted without reserve.

- The truth is that in the Croatian Profit Tax Act and the Profit Tax Regulation is not specifically determined to prefer domestic comparables instead of non-domestic comparables. The same situation is probably in some other Member States.

- However, the taxpayers searching for comparables, same as the tax administration, should follow the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, and the EU TPD.

- In paragraph 3.35 of the Guidelines is stated: *"Taxpayers do not always perform searches for comparables on a country-by-country basis, e.g. in cases where there are insufficient data available at the domestic level and/or in order to reduce compliance costs where several entities of an MNE group have comparable functional analyses. Non-domestic comparables should not be automatically rejected just because they are not domestic. A determination of whether non-domestic comparables are reliable has to be made on a case-by-case basis and by reference to the extent to which they satisfy the five comparability factors. Whether or not one regional search for comparables can be reliably used for several subsidiaries of an MNE group operating in a given region of the world depends on the particular circumstances in which each of those subsidiaries operates"*. In paragraph 25 of the EU TPD is stated: *"Member States should evaluate domestic or non-domestic comparables with respect to the specific facts and circumstances of the case. For example, comparables found in pan-European databases should not be rejected automatically. The use of non-domestic comparables by itself should not subject the taxpayer to penalties for non-compliance."*

- Having this in mind, it is possible to conclude that in cases where there are sufficient data available at the domestic level, is no need to use non-domestic sources. If the tested party is the local company, it would be reasonable to search domestic comparables first of all, because there is no need to make many adjustments. If the tested party is located in other country, it would be reasonable to search comparables in that country or in similar markets, if available.

- Searching for non-domestic comparables usually increase compliance costs, opposite to the conclusion in Draft Recommendation 10, letter a). It is connected with the access costs to one or more databases, both for the taxpayers and the tax administration. On the other hand, e.g. the Financial Agency (FINA) in Croatia collects financial statements of all croatian companies and update the public database with a free access. All the relevant figures in the balance sheet and profit and loss

statements, same as the audit opinion, audit report and the accounting policies description are available in the FINA database, as opposite some other commercial (and expensive) databases.

Our position is that the search process should consist of the following steps:

The first step of comparable analysis should be the country-specific search, primarily using the country-specific databases if available and, if not, some of the public databases, such as AMADEUS or similar from other editors, searching for domestic comparables.

Due to lack of local, independent comparables (very often in countries with small market), the second step could be the search in countries with the comparable markets. It would be very important to determine what criteria should be fulfilled to accept some market as comparable, such as GDP per capita or labour costs.

In case that first two steps fail to result with significant sample of comparables, the last step could be the Pan-European search. In that case it would be very important to determine and to propose in the Guidelines how to make adjustments on the macro level between different countries/markets, to make the benchmark analysis reliable.

Czech Republic

Section 7 and Draft Recommendation 10

From our point of view, using of pan-European comparables could be problematic. Although there is only one market in EU, the conditions in each country may exhibit slight or ever significant variations. From our point of view, in many cases it will be better to use local comparables (in one country or in one region – Visegrad 4, Baltic countries, Scandinavian countries etc.) at first and use pan-European comparables only if it is not possible to find a sufficient amount of comparables in the above mentioned narrower region (selection of comparable countries).

Moreover, generally we have more information about taxpayers in our country, therefore the benchmark analysis is more accurate.

Denmark

Draft recommendation 10

As far as Draft Recommendation 10 is concerned, a strong reference to competition law is made. In addition, a correlation between transfer pricing and competition law is presumed. Such correlations would require an in-depth knowledge both in transfer pricing and competition law. We would not be in a position to create such link between transfer pricing and competition law. Therefore, we prefer to delete such reference to competition law. In addition, we would not prefer having the example presented in 10 b).

The Deloitte study needed to be at our disposal in order to be able to evaluate references made to it. In addition, the conclusions presented in Draft Recommendation 10 are seem fairly general and are based solely on one single study. We have already at this point serious doubts concerning Recommendation 10 d) and 10 f).

Germany

Section 7 and Draft Recommendation 10 (starting paragraph 21, pan-European comparables,):

We would like to see the full Deloitte study before coming to any conclusions on the use of pan-European comparables.

Additionally, there are specific items we need to further look into, such as the reference to competition law in letter b of draft recommendation 10. At this point in time it also does not seem plausible that comparing distributors of cars with distributors of industrial goods would make sense, as is suggested at the end of letter b of draft recommendation 10.

Letter f of draft recommendation 10 seems strange ("conclusions"... "confirm" that "Memer States" "shall defend"...).

Poland

DISCLAIMER

Due to the fact, that some conclusions made in the document are based on draft version of executive summary of Deloitte's study, Polish experts withhold the right to supplement or modify their response after receiving the final version of the report (especially on methodology used by Deloitte).

Section 7 and Draft Recommendation 10

General comments

1. The use of pan-European comparables should be allowed if no proper comparables on local or regional level can be found (3 steps search strategy: local comparables, if none regional comparables, if none pan-European comparables). It is justified to ask for local comparables in the first place, as being the most relevant in terms of specify of every market. Chapter 7 and DR 10 give a strong preference towards pan-European searches, which may lead to conclusion that no use of local searches is recommended (which cannot be accepted).

2. The situation to be avoid is that taxpayer, based on JTPF recommendation, do not acknowledge local market on which tested party operates at all. As a result local search is abandoned on the sole ground of not being pan-European.

3. Even if the final result of local search is "no comparables found" it should be conducted. Also the entire process leading to conclusion that no local comparables can be found should be properly documented by taxpayer.

4. Making general recommendations on the basis of one specific study made by one specific company may trigger some concerns about transparency from the general public (especially in terms of vested interest of the company conducting the search). It is worth considering to hold at all the direct reference in the text to only one conducted study at this stage (the need of further investigation on the topic may occur after receiving full version of the report).

5. Pan-European searches in many cases may not reduce compliance costs, and even such costs could be increased (especially having in mind SMEs, also in the scope of the overall idea of Draft Recommendation 4 letter a). For single transactions it is more cost-effective to provide local search, due to the fact that company may conduct such search by oneself or use less costly local advisory firms or databases.

Specific comments

Paragraph 23. and Paragraph 24. – to be removed – direct reference to Deloitte's study may provide an impression, that Deloitte is preferable/recommended company in terms of pan-European search (see also General comments – 4).

Moreover, paragraph 23. ends with the conclusion *"that almost none of the EU Member States required a local comparables search"* The next paragraph 24. starts with the sentences: *"The Deloitte study has updated these two surveys. The main conclusions are confirmed and supported…"*

Such conclusion cannot be supported, especially taking into consideration the Deloitte study itself (page 20, point 5.13.2 of Deloitte's draft study - *"If most local tax administrations still do not strictly require to produce local comparables, there are however quite a few, as was revealed in the survey performed otherwise (Milesones 25 – 28), that tend to either require to search first for local comparables or mark a preference for the use of local comparables. These countries are, most notably, Eastern European countries, but also France, Italy, Portugal, Spain and the UK."*). Almost half of EU Member States cannot be described as "*quite a few"* especially when the sentence *"that almost none of the EU Member States required a local comparables search"* is claimed to be true.

Moreover sentence 3 and 4 of paragraph 24. can be supported, if pan-European search is conducted as a result of lack of local or regional comparables (see also General comments – 1).

Draft recommendation 10 point a)

Sentence 1 – general claim that applying pan-European comparable searches can be beneficial in terms of reducing compliance costs cannot be supported, as for many cases it is more cost-effective to use local/regional comparable searches (see also General comments – 5). In terms of transparency, if the search strategy is properly documented, local, regional and pan-European searches provide for the same level of transparency. In terms of quality and consistency of the search, local comparables may reflect the relevant market better than pan-European searches (for example local comparables share the same legal environment, location

savings, market conditions as tested party). Referring to homogeneous documentation within EU, pan-Europeansearch itself do not provide such homogeneity, national regulations in terms of documentation must be taken into consideration.

Sentence 2 – there is no general rule that pan-European searches are required in case of request of bilateral or multilateral APAs or as a part of joint tax audits. For many tested parties local search provide for the best comparability. Limiting disputes in bi-/multilateral cases cannot be executed by limiting the comparability.

Draft recommendation 10 point b) – to be removed

Sentence 3 – seemed to be a statement, it is difficult to read any recommendation (only information about state-of-play in competition law area).

Sentence 4 and 5 – the wording of recommendations brings concerns about relation with the principle of quality over quantity enshrined in Draft Recommendation 1.

Draft recommendation 10 point c)

Sentence 1 – concerns about the meaning of the sentence.

Sentence 2 - **to be removed** – Sentence may provide misleading guidance to limit searches to other than local in every case (impression that "best" comparables are provided only by non-local searches, which cannot be accepted).

Draft recommendation 10 point d) – to be removed

Conclusion that EU market is homogeneous cannot be supported on the basis of presented executive summary of Deloitte's study (see also General comments, and comments on par. 23. and 24.).

Draft recommendation 10 point e)

Recommendation bring some uncertainty about the kind of searches to be documented. Further clearing in wording is requested, especially to clear situation when there are none local comparables (see also General comments – 3 and 1).

Draft recommendation 10 point f) – to be removed

Unclear recommendation. Examples and further clarification is requested if such recommendation is to be withhold (having in mind the general comments of using local/regional/pan-European searches).

NGM general

Section 7 and Draft Recommendation 10 (pan-European comparables)

- The recommendation was not discussed at length due to time restrictions
- However, it was widely agreed that the paper should endorse the use of pan-European comparables

(RB) In this regard it should be greatly valuable for MNEs to get the commitment of the Member States to accept the use of pan-European comparables instead of requiring local ones. The preliminary results included in the Deloitte study (Data visualization section, at the end of the document) show that, for a wide range of business sectors, local results are very close to pan-European ones, except for certain countries (e.g. Greece). This should encourage the use pan-European comparables, unless properly justified. It would imply simplification, cost reduction, decrease of administrative burden for MNEs.

EATPL

Section 7 and Draft Recommendation 10 (pan-European comparables)

- This section seems to assume that pan-European comparables are only helpful for MNEs (see mention to MNEs in para. 21 and recommendation 10.c). They can also simplify comparable searches for SMEs (e.g. doing business in two, or three States only) and this should be recognized.

- It would be important to stress in the text or in the recommendations (e.g. Recommendation 10.a) that in the context of pilot projects on joint-audits (presentation by Germany and the Netherlands in the EU JTPF), the use of pan-European comparables was seen as the only practical way to avoid conflicts and reach reasonable outcomes. In the second sentence of 10.a) it is mentioned that the use of pan-European comparables 'is required in the case of request of bilateral or multilateral APAs or as parts of joint audits". The fact that there is no legal framework to conduct joint-audits in most Member States may require that some changes are made to that sentence. A possible way of avoiding that problem is to refer to the fact that, as a practical issue, pan-European comparables are used in pilot programs of joint-audits in the Member States that have presented their experience in the EU JTPF (presumably also in other Member States that have similar programs).

- Requiring (in legislation or administrative practice) to prioritize use of domestic comparables instead of pan-European ones may cause problems in terms of the EU freedoms (TFEU), provided there are no relevant differences in market conditions between domestic and pan-European comparables (as it seems to be the case in general within the EU).

TPCA

Section 7 and Draft Recommendation 10 (pan-European comparables)

. The recommendation was not discussed at length due to time restrictions

·However, it was widely agreed that the paper should endorse the use of pan-European comparables

We would like to add one general remark about discussion of comparables (internal or external, local, pan-European etc). Representatives of tax administrations argue that the most important is quality of comparables, but they forget who decides about which comparables are good or not. In the end tax administrations decide about it and it sometimes can be very subjective. Taking into account that the burden of proof should be on tax administrations side, rejection of taxpayer's comparables should always be properly justified and documented by the tax administration. In this context, we would like to suggest adding another recommendation:

If the tax administration rejects pan-European comparables, it should provide local comparables based on publicly available data and justify the selection of comparables. Local comparables might not always be related to the place of residence of the taxpayer but may stem from the relevant market on which the transaction is concluded. In the case of commodity transactions, various market references might be agreed at arm's length (not only local) and should be accepted by the tax administrations.

8. Assessing the reliability of the comparability analysis

Finland

In page 20 there is a question whether further work should be done an analysis of value creation may help to increase the reliability of a comparability analysis. In our view, a carefully executed functional analysis and delineation of the actual transaction are the basis in order to have a reliable comparability analysis. Therefore, no further work is needed.