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EU JOINT TRANSFER PRICING FORUM

DISCUSSION PAPER

COMPARABLES IN THE EU

Meeting of 18 February 2016

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I. Background

1. In line with the Programme of Work of the Joint Transfer Pricing Forum (« *JTPF* »), the JTPF members agreed during the meeting of 22 October 2015 to work on the use of comparables in the EU, with a focus on developing best practices and practical solutions for the interpretation of *(i)* available and accessible data used for comparability searches in the European Union ("*EU*"), as well as *(ii)* comparable searches.

2. This issue paper intends to inform an initial discussion of the topic. It elaborates on the theoretical and practical issues, which appear to be the most relevant in the current context, and suggests how they might be addressed in the future work of the JTPF.

3. The deliverables should aim at facilitating a common understanding by tax administrations and by taxpayers within the EU, and also at promoting transparency and trust in a business friendly environment. The objective would be to deliver specific and targeted tools based on best practices and to consider also some key implications of the outcome of the BEPS project in the transfer pricing area.

4. The reference framework for these deliverables relies on:

    - The **revised Chapter I of the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations** (hereafter, the "*OECD Transfer Pricing Guidelines*", «OECD TPG»)[1];

    - **Chapter III of the same OECD Transfer Pricing Guidelines** on "*Comparability analysis*";

    - The **Code of Conduct on the EU Transfer Pricing Documentation** (« *EU TPD* » - COM (2005) 543 Final[2]).

[1] This Chapter has been recently revised further to the issuance of the October 2015 OECD Report on BEPS Actions 8-10 (OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10-2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241244-en). In this respect, section D.1-NEW of this Chapter on "*Identifying the commercial or financial transactions*"[1], section D.2.-NEW on "*Recognition of the accurately delineated transaction*"[1] and section D.6.-NEW on "*Location savings and other local market features*" should be particularly considered.

[2] *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the JTPF on Transfer Pricing Documentation for associated enterprises in the EU – Proposal for a Code of Conduct on Transfer Pricing Documentation for associated enterprises in the EU* – See more particularly, section 3.1 on *Use of database searches for comparables* of this Communication as well as section III of the attached Code of Conduct regarding *General application rules and requirements for Member States*

5. Additionally, the **priority given to improving the EU transfer pricing framework** in the June 2015 *Action Plan for a Fair and Efficient Corporate Tax System in the European Union*[3] shall govern the design of the deliverables, and take into account the conclusions of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project in the transfer pricing area. Concretely, the JTPF should examine the proposed solutions to assess the impact of the conlcusions (such as delineation of the transactions or the risk analytical framework) further to the adoption of the OECD/G20 Report on BEPS Actions 8-10.

6. Issues and recommended approaches related to the use, interpretation and processing pan-European or cross-country comparable data in the European Union will be handled in a separate section (see Section III below).

II. Accurate delineation of the controlled transaction and risk analytical framework

7. The updated OECD TPG based on the October 2015 report on BEPS Actions 8-10 include some considerations having possibly some implications in terms of **comparability adjustments**: they are linked respectively to *(i)* the **accurate delineation of transactions** (para. 1.39); *(ii)* the **risk analytical framework** (para. 1.73); and (iii) **local market features and location savings** (para.1.143-1.147) and **particularities regarding intangibles** (paras. 6.129-6.130).

   It seems necessary to determine to which extent the above-mentioned conclusions will impact the current state of play in the EU and whether **some best practices** exist which could be discussed as **a basis for a common approach on these kinds of adjustments**.

Question 1:

a) Do you agree with the above-proposed scope and the relevant issues described?
b) Do you have further suggestions

[3] Communication from the Commission to the European Parliament and the Council on A fair and Efficient Corporate Tax System in the European ECOM(2015) 302 final http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/fairer_corporate_taxation/com_2015_302_en.pdf

III. Search for comparables[4]

3.1 Search for internal and external comparables – Interpretation and treatment of data

8. The **new sections D.1 and D.2 of Chapter I** of the OECD Transfer Pricing Guidelines shall be considered, in particular aspects relating to the delineation of the transaction and the risk analytical framework, especially their **impact on searches of internal comparables and external comparables**. What is at stake is to **identify any possible solutions or practices which would enhance the comparability searches in the EU** and accurately link them to the delineated transaction, as well as to the risks allocated (see above, *Part II "Delineation of the controlled transaction and risk analytical framework"*).

3.1.1 Internal comparables – Interpretation and treatment of data

3.1.1.1 Principles and common practices

9. Internal comparables relate to comparable transactions existing between a party to the controlled transaction and an independent third party.

10. There is a **general preference** in the OECD Transfer Pricing Guidelines, as well as in most of the EU Member States, for internal comparables over external comparables, where they exist and are valid (See. Para. 3.4 and 3.24 of the OECD TPG).

11. In practice, however, **the use of internal comparables remains quite limited** in the EU with rejections being often justified by the fact that the five comparability factor-test[5] is not met.

3.1.1.2 Specific and practical issues

The following approach and relevant issues could be explored:

12. It seems necessary to **take stock and provide an overview** of the current state of play and of particular reasons explaining the limited use of such internal comparables[6];

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[4] The "*search for comparables*" is the second phase of the comparability analysis, the first part relating to process of accurately delineating the controlled transactions, including by establishing the characteristics of the transaction (See para. 1.6, 1.33NEW and 1.37 NEW of the OECD Transfer Pricing guidelines). See also para. 3.1 of the same guidelines, according to which "*The search for comparables is only part of the comparability analysis. It should be neither confused with nor separated from the comparability analysis*".

[5] See OECD Transfer Pricing Guidelines para. 1.36-NEW regarding these five comparability factors or "economically relevant characteristics"

[6] Please note that the Commission has commissioned a study covering this point and which is currently in progress.

13. Identify **common reasons for rejection** and work on how these reasons could be **mitigated**;

14. Identify **best practices and solutions** which may be adopted;

15. Launch a reflection on a possible **search strategy to be designed for internal comparables**, requiring a transparent and comprehensive approach at the level of the MNEs for defending internal comparables (*e.g.* creation and access to an internal database of all potential internal comparable data, text descriptions etc.).

Question 2:

a) Does the assessment above reflect the current state of play on internal comparables within the European Union?

b) Do you agree with the above-proposed scope and the relevant issues described?

c) Do you have further suggestions?

3.1.2 External comparables – Interpretation and treatment of data

3.1.2.1 Principles and common practices

16. Despite a context, which is overall favourable in the EU in terms of availability of potential comparable data compared to other regions, **divergent approaches are regularly noticed both by taxpayers and tax administrations**. These divergences result from various factors (methodologies, scope, etc.) and exist, irrespective of the common reference to the OECD guidelines and EU TPD on and the use of pan-European comparables[7].

3.1.1.2 Specific and practical issues

17. A common approach could be discussed on external comparable searches covering the key steps of this search and how to handle data as part of *(i)* the initial retrieval of data, *(ii)* the quantitative screening of the potential comparables and *(iii)* the qualitative screening.

18. A first point to address relates to the **use of extensive database selections to provide quantity over quality and to so-termed "*database dumps*"**, *i.e.* extensive automated financial database searches for potential comparables which are then dumped on (or presented to) tax authorities without modification). This approach is commonly viewed as problematic[8], since the corresponding search would replace here a

[7] The Commission has recently commissioned a study on EU comparables which should cover this point.
[8] See for example: Transfer pricing - data dumps and comparability - US, UK, Canadian and Australian case studies ; Boston University School of Law Working Paper No. 11-44 (September 13, 2011) – See also Deloris R. Wright, *Certain Issues in the Use of Profit-based Methods*, 10 Geo. Mason L. Rev. 895, 905 (2002).

meaningful analysis, something which appears even more crucial given the conclusions of the BEPS project on Actions 8 to 10. In this respect, it should be noted that the former provisions of para. 1.51[9] of the OECD Transfer Pricing Guidelines requiring an appropriate balance between quantity and quality of comparable data to achieve a reliable comparability analysis ("*quantity does not make up for poor quality*"), have been deleted further to the adoption of the October 2015 OECD/G20 report on BEPS Actions 8-10 (revised Chapter I).

19. Regarding external comparables, **some tax administrations have developed guidelines on how to perform search strategies with a level of detail, which can be viewed as a good practice. It involves** *(i)* examining characteristics of goods and services at stake and linking the result to a sufficiently precise search, generally based on industry codes, *(ii)* determining links between the tested transactions, the risks and functions at stake and the selected parameters, *(iii)* testing dependency, as well as *(iv)* performing qualitative and quantitative tests.

20. As regard **the subsequent quantitative screening of the external comparable sets**, identified best practices require that such screenings are **specifically documented** and **follow several steps in an established chronological order** (accurate description of the procedure followed by the taxpayer should be provided). Additionally, a **common approach** could be defined on some **specific aspects**, e.g. the use of **screening ratios** and/or **regression tests**.

21. With respect to the **qualitative screening**, similar identified best practices require that selected data is always individually *reviewed*, so far as practicable, and to **docume**nt this step in the process with a sufficient level of detail (rejection tables, general explanatory notes, follow up and updates).

22. It may be burdensome and not necessary to include extensive information in this respect in the Transfer Pricing documentation, although the search strategy should be described by the taxpayers in accordance with the above-mentioned best practices.

    However, broadly speaking, companies should be encouraged *(i)* to **make all the supporting documentation and underlying data** available to the tax administrations in case of a tax audit, APA, *etc*. and *(ii)* to use **tools ensuring a safe storage** of such data as well as their chronological recording. Lastly, *(iii)* **information on the architecture of the storage and the company's information** system should be made available to tax administrations, so that they can if necessary process and handle such

[9] Former para.1.51 of the OECD Transfer Pricing Guidelines: « *In some cases, it has been argued that the relative lack of accuracy of the functional analysis of possible external comparables (as defined in paragraph 3.24) might be counterbalanced by the size of the sample of third party data; however quantity does not make up for poor quality of data in producing a sufficiently reliable analysis. See paragraphs 3.2, 3.38 and 3.46*."

underlying data when checking the transfer pricing policy of the concerned Multinational.

Question 3:

a) Does the above assessment reflect the current state of play on external comparables within the European Union?

b) Do you agree with the above-proposed scope and the relevant issues described?

c) Do you have further suggestions?

3.2. Exploiting the outcome of the comparable search/Processing comparable data

3.2.1 Adjustments

3.2.1.1 Principles and common practices

23. The notion of **comparability adjustmen**t appears to be unchanged in the OECD guidelines (2015). As a general principle, "*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* » (para.1.40-NEW of the OECD Transfer Pricing Guidelines, formerly, in para. 1.36).
24. Apart from additional guidelines regarding adjustments linked to local markets' features, the **types of adjustments**, as well as the **terms and conditions** under which they apply **remain unchanged**. They are detailed in Section A.6 of Chapter III of the OECD TPG and cover in particular adjustments for accounting differences, asset intensity, working capital, risks and differences in geographical markets.

Question 4:

What is your experience as regards acceptance of comparability adjustments?

3.2.1.2 Possible adjustments

25. Two different types of issues can be distinguished when examining the current state of play in the EU regarding comparability adjustments.

- Firstly, recent developments mean that these adjustments should be re-assessed to determine whether some common position and guidance could be achieved, ensuring **more legal certainty**, particularly regarding **accounting adjustments** and the

adjustments which are most commonly accepted in the EU by Tax administrations (*e.g.* adjustments on working capital).

- Secondly, the **full implications of some of the recent OECD/G20 BEPS Project** (such as the addition of the location savings and the local market features[10]) in the transfer pricing area **shall be explored** as regards the specific implications it may have in the EU.

3.2.1.2.1 Accounting adjustments[11]

a) General cases

26. **– General cases**: Differences in domestic disclosure and reporting standards and/or practices, as well as elective rules within those standards, are still often reported as being a constraint when performing comparability analysis, particularly in a pan-European context.

    - Fewer adjustments are now required to take into account country differences in accounting standards given the **wider adoption of International Financial Reporting Standards ("*IFRS*") in the European Union**;

    - The JTPF should consequently consider whether **using IFRS-based accounts for comparable data searches** should be recommended or would at least be acceptable in the EU.

    - The **use of multiple-year data instead of single-year analysis** may also be specifically recommended as it also **mitigates accounting differences particularly timing differences** (see below, section 3.2).

Question 5: a) Do you agree with the above-proposed scope and the relevant issues described?

[10] para.1.143-1.147 of the revised OECD Transfer Pricing Guidelines

[11] **Examples of different reporting standards that complicate financial comparability include** [Source : *Pan-European Comparables Searches – Analysing the Search Criteria* ; Jaap Reyneveld, Edwin Gommers and Henrik Lund ; International Transfer Pricing Journal March/April 2007 p.79 & seq.]:
- timing differences (e.g. under the IFRS, goodwill and certain intangibles are recognized as assets that cannot be amortized. Instead, an impairment test is performed, and if that test indicates that the value of the asset has changed, the write-down is recognized in the income statement. However, local regulations may require that the asset be amortized using the straight-line method, or that acquisition amounts may even be expensed in the year of acquisition);
- stock option plans, which may be either posted as an expense on the income statement or recognized only as a balance sheet item; and difference in recognition of expenses in certain categories on the income statement, such as: – recognition of extraordinary items, either as part of EBIT (earnings before interest and taxes) or below the EBIT line;
- balance sheet items may be found in on- and off- balance sheet items that may significantly impact a profit level indicator, like return on assets (e.g. leasing companies); and
- an expense recognized as part of the cost of goods sold (COGS) in one income statement and as operating expenses in another.

b) Do you have further suggestions?

b) **Specific case of the Resale Price Method ("RPM")**:

27. Resale Price Margins are **more sensitive to the above-mentioned accounting differences**[12] than Net Margins and require some appropriate adjustments[13]. In general, the corresponding differences in reporting standards are difficult to adjust, due to the lack of information in databases and financial statements and, therefore, such adjustments raise issues.

Question 6:

Do you agree that precedents or best practices characterizing reasonable and acceptable accounting adjustments in RPM cases, which could be applicable for all Member States, would contribute to improving the current situation and should be identified?

3.2.1.2.2 Other adjustments

28. – Several general points could also be addressed as regards adjustments:

- First, **some general and commonly applied adjustments** in the EU could be explored in view of delivering a **stocktake of the current situation and establishing the pros and cons of such adjustments**. A common approach could subsequently be defined. The following adjustments could be considered in particular:
    - Stock/cost of sales.
    - Trade debtors/sales.
    - Costs relating to a particular function that is not carried out by some of the comparables or the tested party, *etc*.
- Second, in light of some of the best practices identified in the EU, a common approach could similarly be defined in order **to provide some more detailed guidance on the common characteristics** which should be met when performing adjustments in the EU. In this respect, the following have been identified:
    - Reasonableness of the adjustments;
    - Limited number of adjustments;
    - Specific attention should be paid to balance sheet adjustments which may be impacted by seasonal variations;
    - Other criteria to be discussed.

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[12] For example, see the OECD TPG 2.35: referring to R&D costs which can be reflected in operating expenses or in costs of sale.
More generally, differences between cost of goods and operating expenses impact gross profits which are no longer comparable contrary to (net) operating profits (EBIT), which remain comparable.
[13] See OECD TPG 2.35: « appropriate adjustments should be made to the data used in calculating the resale price margin in order to ensure that the same types of costs are used in each case to arrive at the gross margin ».

- Lastly, when referring to comparability adjustments, particularly in para. 3.39 of the OECD TPG applying to the TNMM method[14], the **notion of "material effect"** which triggers the need for a comparability adjustment is not explained: this may be **further explored and contextualized in the EU**, as has been done by some third countries (*e.g.* the USA)[15].

Question 7: a) Do you agree with the above-proposed scope and the relevant issues described? b) Do you have further suggestions?

3.2.2 Multiple year comparables

3.2.2.1 Principles and common practices

29. The OECD Transfer Pricing Guidelines discuss the use of multiple year data in para. 1.111 (former 1.56) and specifically in para. 3.77 ff.

30. As underlined above, the **use of multiple year data mitigates the impact of possible accounting standard differences** (as regards timing differences). It may also be particularly **appropriate** when **performing pan-European comparable searches**.

31. In the EU however, the above-described approaches are **not systematically formalized and described in the available guidelines** or administrative instructions.

3.2.2.2 Specific and practical issues

32. Some specific concerns are commonly expressed as regards the **practical implementation and use of multiple year comparables**. Providing common guidance in this respect at the level of the JTPF would ensure more consistency and clarity for stakeholders. It could also contribute to mitigating certain risks of arbitrage or manipulation when determining transfer prices.

33. The following aspects could be covered:
    - Defining the period to consider: should a **minimum standard period** be considered (*e.g.* three years) with possible reference to longer periods referring to specific investment or business cycle in the sector (*e.g.* ranging from 5 to 7-8 years in certain particular circumstances); alternatively, in case a shorter period is considered within a cycle, should the beginning or the end of the cycle be covered?

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[14] Transactional Net Margin Method

[15] See USA Federal tax regulations, Treasury regulations (26 C.F.R.-1.482-1(d)(2)—issued by the US Department of the Treasury

- How to **review the period in question**: using multiple-year reference period can lead to certain shortages in data, which can be **refined later on**. Is this acceptable?

Question 8:

a) Do you agree that common guidance would be useful in this respect?

b) Did you encounter other practical problems when using multiple year data?

3.2.3 How to interpret a range of results

3.2.3.1 Principles and common practices

34. As a result of the comparability analysis, a transfer pricing report usually produces a list of companies proposed as comparables and, accordingly, a **range of relevant financial indicator figures** (*e.g.* prices, margins or profit shares), set for each of these companies, which are produced by the application of the most appropriate transfer pricing method (the "***range***")[16].

35. The OECD Transfer Pricing Guidelines **refer to this concept in Chapter III** (para. 3.56 *et seq*., under Chapter A7 "The Arm's Length Range"): this range should reflect a number of uncontrolled transactions, each of which is relatively equally comparable to the controlled transaction, based on a comparability analysis conducted in accordance with the same chapter.

36. Although it is quite **recent**, the notion of range appears to be broadly applied under a general common approach in the European Union[17]. The **practices of the tax administrations** in the EU appear to share some **common key aspects**:
    - it is expected that the taxpayer provides them with a **clear description of the underlying reasons for identifying a specific arm's length range** in the transfer pricing documentation,
    - it is expected that the range be **verified and validated in a first place**, before possibly using some statistical tools to test and refine the set in order to improve its reliability,
    - as regards the use of statistical tools, the **interquartile range is the most commonly applied and accepted**, without being compulsorily used in all Member States. The reference to the median of such a range can also be viewed as an emerging common standard[18].

[16] Regarding the definition of the range – See OECD Transfer Pricing Legislation – A suggested approach, June 2011 – Section 6. Arm's Length Range, page 21 - http://www.oecd.org/ctp/tax-global/3.%20TP_Legislation_Suggested_Aproach.pdf

[17] It may be worth noting that the concept has given rise to more discussions and been formalized further in the law in non-EU countries such as India (see introduction of the concepts of "range" and "multiple year data" in Indian transfer pricing rules (Budget 2014-2015, October 2015)).

[18] An interquartile range discards the results of the bottom quarter and top quarter of the results. The median is the mid-point of the interquartile range. The median will generally produce a different result to the average of the range being considered.

37. Similarly, para. 3.57 of the 2010 OECD Transfer Pricing Guidelines states that **the use of an interquartile range (or other percentiles) might enhance the reliability of a range** in which non-quantifiable comparability defects remain as a result of the limitations in available information on the comparables used.

3.2.3.2 Proposed scoping – Issues for consideration

38. The **analysis and interpretation of the range appears to be a crucial step before concluding on the arm's length price**. The existing best practices tend to establish that there is **some room for further precision**. Formalizing some common positions in this respect could lead to more legal certainty and prevent disputes. The following issues could be considered, particularly in light of best practices currently existing in the EU:

    - General guidance on **how the range is defined and interpreted in the EU** could be developed and contribute to more clarity;
    - The **terms and conditions of use of statistics tools**, of the use of a full or limited range, and how to point at best in the range could also be further clarified;
    - Some specific points on which **slight or clear divergences are noticeable could be discussed**: the necessity to conclude on a limited number of data which should characterize a reliable range, the minimum and/or maximum number of comparables, the impact of statistical tools in this respect, the treatment of isolated extreme cases, and whether and how location savings could be "captured" within a range.

Question 9:

a) Do you agree with the above-proposed scope?

b) Do you have further suggestions?

3.3. Comparables in the EU

3.3.1. Background

3.3.1.1 OECD Transfer pricing guidelines

39. The OECD Transfer pricing guidelines provide the following general framework as regards the **use of foreign and cross-country comparables** (para. 3.35 et seq., section A.4.3.2 *Foreign source or non-domestic comparables*):

- As part of comparability search, the use of foreign source or non-domestic comparables is described as a pragmatic solution, to be followed in case of insufficient availability of domestic data or for compliance cost efficiency in particular. According to the OECD transfer pricing guidelines "*Non-domestic comparables should not be automatically rejected just because they are not domestic*».
- The **reliability test for non-domestic comparables** is then defined by reference to the "***five comparability factors***" in the above-mentioned paragraph 3.35 but also to a "***relevant market/reasonably homogeneous market***" test (para. 112 and 113-NEW). The relevant market is determined by reference to the "*available substitute goods or services*" (para.110-NEW, ex para. 1.55).

40. In the same OECD Transfer Pricing Guidelines, the search of comparables in "*other geographical markets*", whether comparable or not is, however, considered as a pragmatic solution to broaden the search in different circumstances at the scale of a "*comparable geographical market*" or "*other geographical markets*" (para. 3.38). In this respect, the OECD Transfer Pricing Guidelines underline the objective of « *finding the most reliable data, recognising that they will not always be perfect* ».

3.3.1.2 EU practices

41. Further to two specific studies performed on the specific use of pan-European comparables [19], the Code of Conduct on the EU Transfer Pricing Documentation concluded that the comparables in pan-European data bases should not be rejected automatically (« *EU TPD* » - COM (2005) 543 Final[20], para. 13 and 25). The JTPF « ***agreed that tax administrations should evaluate domestic or non-domestic comparables with respect to the specific facts and circumstances of the case***" (para. 13 EU TPD). The Code of Conduct on the EU Transfer Pricing Documentation was adopted by the Council on 27th June 2006.

42. The EU TPD **is, however, rarely referred to in this respect in the Transfer Pricing administrative guideline**s issued by Tax Administrations in the EU. **Practices can significantly differ here[21]**.

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[19] See « *Pan-European versus Country Specific searches and Pan-European; versus Country Specific databases: not a clear-cut issue* » Contribution by Prof. Dirk van Stappen, JTPF/006/BACK/2004/EN – « *Is Europe One Maket?* », contribution by Dr. Klaus Kroppen, JTPF/007/BACK/2004/EN.

[20] *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the JTPF on Transfer Pricing Documentation for associated enterprises in the EU – Proposal for a Code of Conduct on Transfer Pricing Documentation for associated enterprises in the EU*

[21] Some administrative guidelines do not address the point; others such as the International Manual of the HMRC (United Kingdom - INTM 485090) refer to domestic comparables in the first instance and to global comparables by default, subject to an availability and relevant market test and to possible adjustments; others such as the French Administrative Guidelines define a specific test, requiring that the comparable enterprises "*operate in the same sector, on the same geographical territory and during the same period as the one during which the transfer pricing shall be validated*" (France - BOFIP 5549-PEP-BOI-BIC-BASE-80-10-20140218 para. 260)

43. Apart from the administrative guidelines**, there are a wide range of practices**[22] reported:
(i) accepting pan-European and even foreign comparables without setting any conditions (*10 MSs*);
(ii) giving a strong preference for local comparables, without accepting pan-European comparables (*3 MSs*),
or, *(iii)* having a preference for local comparables and accepting pan-European comparables by default, subject to meeting a test of non-availability of local comparables and of reliability of pan-European comparables (*10MSs*).

3.3.1.3 Impact of the revised OECD Guidelines (October 2015 OECD Report on BEPS Actions 8 to 10)

44. The October 2015 OECD report on BEPS Actions 8 to 10[23] **contains detailed guidelines on the importance and impact "*of the features of local markets*", particularly when giving rise to location saving**s (see. Para. 1.110-NEW and section D.6 Chap. I, para. 1.139- NEW et seq.). Some **specific analysis and comparability adjustment** are envisaged in the Guidelines when foreign comparables are used in a context where location savings exist (and local comparables are not available).

3.3.2 Proposed scope – Issues for consideration

45. The above-described situation illustrates **a variety of situations and positions as regards the use of pan-European comparables,** as well as a recent significant evolution in relation with potential location savings. Consequently, the following issues could be considered:

- The current situation as regards the use of comparables, which shows a **wide range of practices and potential disparity**, should be analysed in light of the recommendation of the 2005 EU TPD. In particular, this should aim at understanding and assessing the reasons for such different approaches despite the general recognition of the EU TPD by the EU Member States' tax administrations;
- The cases **where EU comparables are accepted subject to a non-availability and reliability test of the foreign comparables** (10 MSs, as mentioned above) **should be analysed in more detail**, in order to analyse the implications in terms

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[22] Source : *Deloitte 2015 Transfer Pricing Country Guide* – Answers to the question « *Are foreign comparables acceptable to local tax authorities?* » for 26 EU Member States (i.e. all 28 Member States, excepted Cyprus and Malta)

[23] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10-2015 Final Reports,* OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241244-en

of compliance costs and legal certainty for business but also risks of dispute within the EU;

- **Complementary guidance** could be envisaged, in particular as regards (i) **factors or tests** which could strengthen and enhance the use of pan-European comparables (*e.g*. by reference to the above-mentioned reliability test and best practices) and also (ii) the **interpretation of "relevant market" in the EU** (for instance, by reference to practices in the area of EU Competition Law or of some EU Member States);

- Given the recent developments and conclusions of the OECD Report on BEPS Actions 8-10, the EU TPD recommendation on pan-European comparables needs to be revisited from different angles, *i.e. (i)* the impact of the recently **revised and complementary guidelines on location savings and local markets' featur**es (OECD Transfer Pricing Guidelines para. 1.139- *NEW et seq*.), and also *(ii)* on how the pragmatic approach consisting in **accepting non-local comparables even if "*they (are) not always perfect*"** could be implemented in the EU (para. 3.38 of the OECD Transfer Pricing Guidelines).

Question 10:

a) Do you agree with the above-proposed scope?

b) Do you have further suggestions?