



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/017/2016/EN

EU JOINT TRANSFER PRICING FORUM

QUESTIONNAIRE ON THE USE OF COMPARABLES IN THE EU

Compilation of contributions received from Member States

Meeting of 20 October 2016

DISCLAIMER:

This document contains a compilation of contributions received from the Member States representatives, Members of the JTPF, on the use of comparables in the EU. The comments and contributions do not represent a consensus view of the JTPF's Members and are submitted to the discussion.

This document does not represent a formal Commission or Commission services position or policy.

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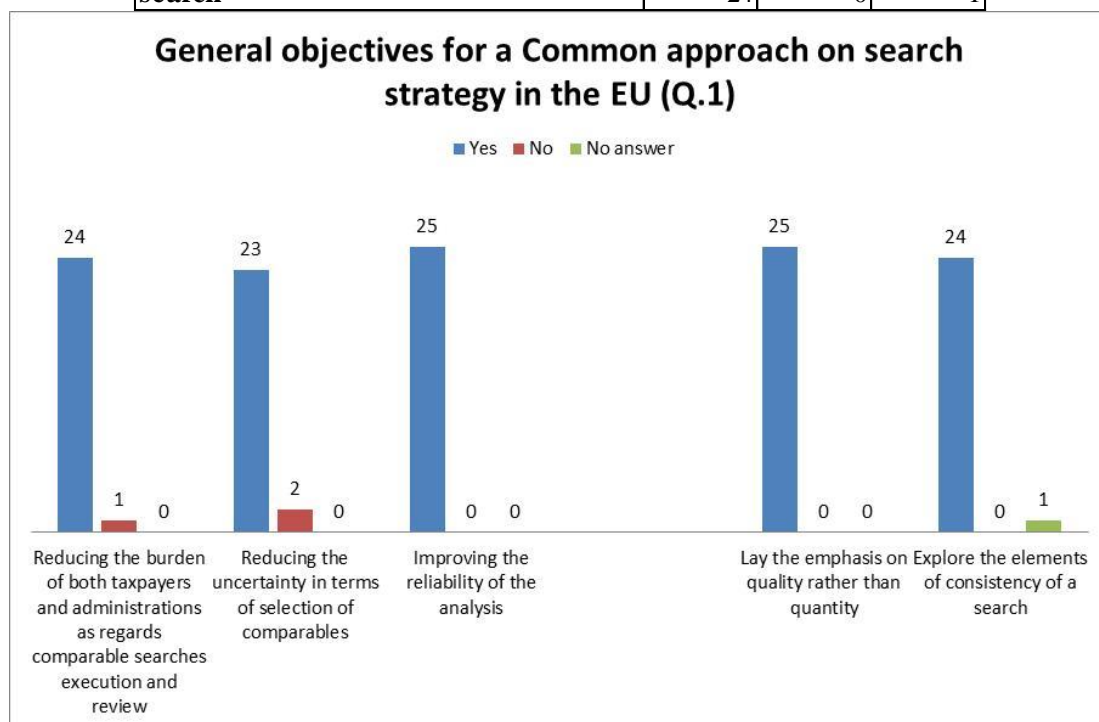
1. General overview – Strategy for search for comparables

1.1 General guidance – Elements to consider

Question 1: Possible relevant general objectives for a search strategy

Question asked to the Member States: Should a common approach for a search strategy of comparables in the EU be envisaged and developed by the JTPF: would you then consider the following general objectives as relevant?

	Yes	No	No answer
Reducing the burden of both taxpayers and administrations as regards comparable searches execution and review	24	1	0
Reducing the uncertainty in terms of selection of comparables	23	2	0
Improving the reliability of the analysis	25	0	0
Lay the emphasis on quality rather than quantity	25	0	0
Explore the elements of consistency of a search	24	0	1



Complementary comments (Question 1):

<p>We believe it is very helpful to agree a common approach for a search strategy at a high level. However, it should also be recognised that each case is different and a common approach may not always be fit for purpose.</p>
<p>In general, we consider consistency as an appropriate starting point. However, consistency of a search should not lead to the practice that comparables searches are always performed in a consistent (formal) way not taking into account specific facts and circumstances of the particular case.</p>
<p>It may be useful to provide with some recommendations regarding chronological order for making the search steps (especially for deductive approach), i. e. which should be done prior the other and to which phase – automatic or manual/ qualitative or quantitative - they should be referred to. This would serve for a more effective screening process, as in some cases taxpayers select large number of comparables (e. g. 800) for manual search phase and only then apply such criteria as elimination of companies with negative or very high profitability indicators etc. As this is done during the manual phase and there are no requirements embedded in international documents to provide with detailed information about the rejected companies (nomination of the reason for rejection is regarded as sufficient), it is very difficult to identify whether the mentioned or similar criteria were applied properly doing this manually.</p>
<p>Also the fact that tax authority may not be able to verify the authenticity of the information, if it does not have an access to the data (e. g. tax authority uses Amadeus and taxpayer made search using ORBIS), should be taken into account. Therefore, reference to the requirement/recommendation not to relocate automatic criteria to the qualitative search stage, if database interface allows to select such criterion through automatic procedure, might be beneficial.</p>
<p>There is general practice, that data and benchmarks provided by taxpayers in Advance Price Agreements cases are as detailed and narrow as possible (benchmarks consist of i.a. boolean query, websites verification).</p> <p>Besides, the Tax administration guidelines for the minimum number of steps to be taken in comparability analysis, which are:</p> <ol style="list-style-type: none">1. analysis of the general analysis and business environment of the taxpayer;2. analysis of the conditions set between related parties, in particular their functions, involved assets and risks, which will lead to identify economically important factors;3. test for possibility to use internal comparables;4. identification and verification of comparables of unrelated parties;5. selection of the most relevant transfer pricing method). <p>The importance of these steps is acknowledged and executed by administration in Transfer Pricing cases.</p>

Question 2: Elements of Good practice in Member States

Question asked to the Member States: Do the following aspects reflect good practice in your jurisdiction?

	Yes	No	No answer
Adopting a transparent and step-based search strategy	24	0	1
Support comparability analysis	23	0	1
<i>Particularly, with:</i>			
A search matrix	24	1	0
A rejection matrix	25	0	0
Indicating precisely the references of the database used	25	0	0
Archive evidence gathering	20	2	0



<p>Use of a Documentation electronic file - Intending to facilitate understanding of the calculation made and decisions taken and as the best way of storing information, it is consider a good practice to gather and maintain electronic files of the documents that support the comparability analysis.</p>
<p>It is worth noting that the current version of a website may not be reflective of activities undertaken during the benchmarking period. Also, a website business description may not accurately reflect activities undertaken for transfer pricing purposes - for example, a website for a manufacturer may talk about research and design activities but when a detailed review is performed, it may transpire that such activities would not constitute research and design for transfer pricing purposes.</p>
<p>Practice shows that taxpayers argue that according to international principles they are obliged to provide only the information on selected companies (as there is no requirement to exhaust all the possibilities in searching comparables and that not every comparable suitable to the situation is to be selected) but not on the rejected ones. Thus, elaboration on the information that should be provided to tax authority regarding comparables' search steps, rejected companies etc. (i.e. scrutinizing on the specific data fields, e. g. enabling to ask taxpayer to provide not only the names and reason for rejection in a nutshell, but information on the chosen PLI of the rejected companies, other valuable information on grounds of which the company was rejected as well), would avail by giving clarity and possibilities for proper application of the principle of proportionality in such cases.</p>

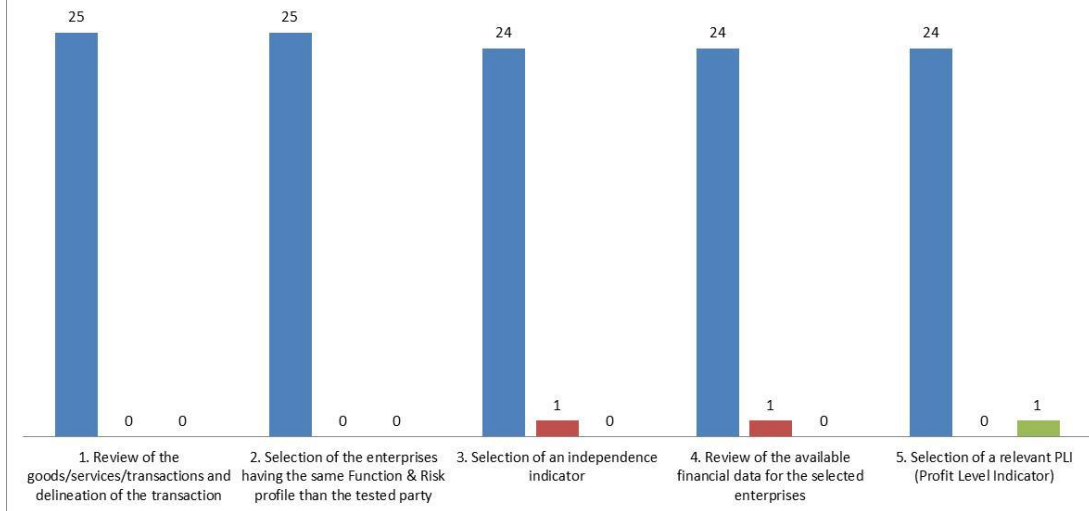
Question 3: Steps to consider for a search strategy

Question asked to the Member States: Are the following steps considered in your Member State when doing a search?

	Yes	No	No answer
1. Review of the goods/services/transactions and delineation of the transaction	25	0	0
2. Selection of the enterprises having the same Function & Risk profile than the tested party	25	0	0
3. Selection of an independence indicator	24	1	0
4. Review of the available financial data for the selected enterprises	24	1	0
5. Selection of a relevant PLI (Profit Level Indicator)	24	0	1

Steps considered for Comparable searches (Q.3)

■ Yes ■ No ■ No answer

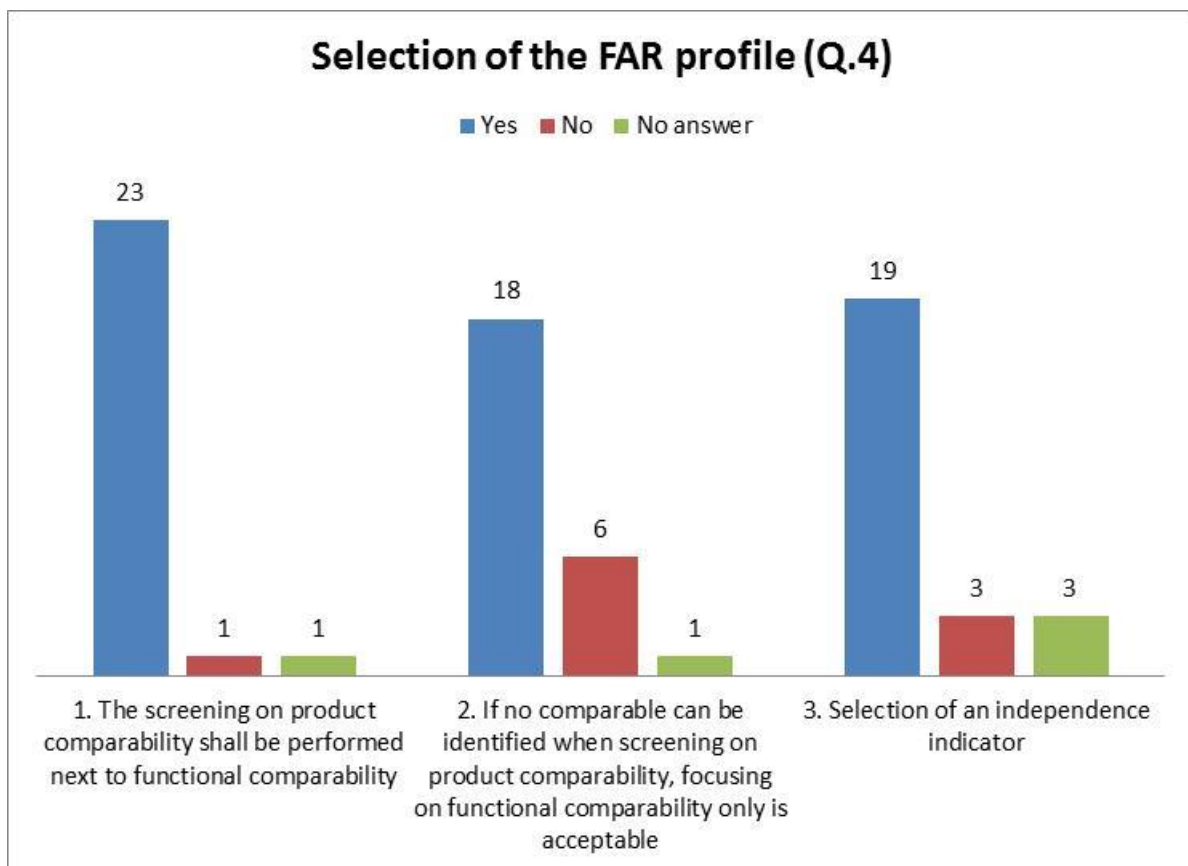


1.2 Practical guidance – Quantitative and manual screening

Question 4: Considerations for the selection of the Function/Asset/Risk (FAR) profile

Question asked to the Member States: How would you consider the following statement as regards the selection of the FAR (*Function/Asset/Risks*) profile in your jurisdiction?

	Yes	No	No answer
1. The screening on product comparability shall be performed next to functional comparability	23	1	1
2. If no comparable can be identified when screening on product comparability, focusing on functional comparability only is acceptable	18	6	1
3. Selection of an independence indicator	19	3	3



Question 5: Comments provided by Member States on how to consider the risk dimension at the stage of the screening in the comparable search

Question asked to the Member States: Would you consider any additional comments or example of established and/or envisaged practice regarding the risk dimension at this stage of the screening (to be distinguished from practices possibly existing regarding potential adjustments- see hereafter)

At this stage it is possible to evaluate the risk assumed by the comparables, taking into account the type of asset used in the activity (e.g. intangibles, fixed...), number of employees, commercial expenses...
The envisaged practice is to consider the contractual terms and compare them with actual economic activities to find where the risks are allocated. Besides, manual check is welcome to ensure that functions, risks and assets are similar enough.
Regarding Q3(2) and the last part of Q.4 with respect to risk, when looking at a database e.g. Amadeus, it is very difficult to properly assess the risk profile by simply looking at publicly available information e.g. trade description provided in a database and/or a website.
Risk is a comparability factor (taking into account NEW TPG 1.36) e.g. a company with no inventory (i.e. no inventory risk) should be screened by accepting companies with no inventory.
Re. Q4(b) above: [it may be acceptable depending on facts and circumstances, but it is not always acceptable]
It will depend on the fact and circumstances of the case
Usually this is done through the selection of the companies that undertake specific comparable activities, presuming that they conduct business in a similar way and assume similar level of risks inherent to the business.
Financials as e.g. inventory can give an indication on risks assumed
The answer under Q4 is depending on method. Yes if profit based method. Level of working capital (inventory, AR, AP)
The regulation provides for the minimum number of comparability factors to be taken into consideration when conducting comparability analysis, which are: <ol style="list-style-type: none"> 1. characteristics of goods/products and services; 2. the transaction process, including functions conducted by unrelated parties in such transactions, in the scope of functions, involved assets and risks; 3. conditions set in the agreement between parties; 4. economic conditions in time and place of the transaction; 5. economic strategy.
Risks should be considered in relation with the functions of the company and its assets (intangible assets, R&D costs...)
Example: use of financial indicators, such as an inventory indicator / credit indicator in order to measure the inventory risk / credit risk.

Question 6: Positions on quantitative screenings and diagnosis ratio approaches

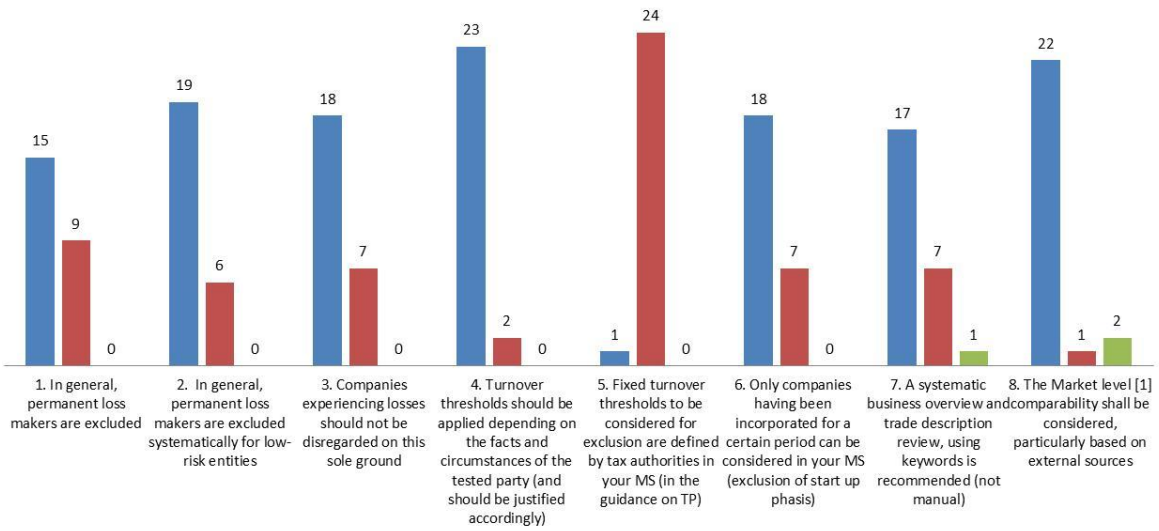
Question asked to the Member States: Regarding the following other aspects what are the existing guidance, practice, or experience in your jurisdiction as part of screening and diagnosis ratios/approaches?

	Yes	No	No answer
1. In general, permanent loss makers are excluded	15	9	0
2. In general, permanent loss makers are excluded systematically for low-risk entities	19	6	0
3. Companies experiencing losses should not be disregarded on this sole ground	18	7	0
4. Turnover thresholds should be applied depending on the facts and circumstances of the tested party (and should be justified accordingly)	23	2	0
5. Fixed turnover thresholds to be considered for exclusion are defined by tax authorities in your MS (in the guidance on TP)	1	24	0
6. Only companies having been incorporated for a certain period can be considered in your MS (exclusion of start up phasis)	18	7	0
7. A systematic business overview and trade description review , using keywords is recommended (not manual)	17	7	1
8. The Market level [1] comparability shall be considered, particularly based on external sources	22	1	2

[1] Market level. Goods, services, or property may be provided to different levels of buyers or users -producer to wholesaler, wholesaler to wholesaler, wholesaler to retailer-, or for ultimate consumption. Market conditions, and thus prices, generally vary at these levels (e.g. differences in price can generally be noted at the wholesale and retail levels).

Qualitative screening and diagnosis ratios/approaches (Q.6)

■ Yes ■ No ■ No answer



Complementary information provided regarding loss position and turnover threshold definition in the respective Member States:

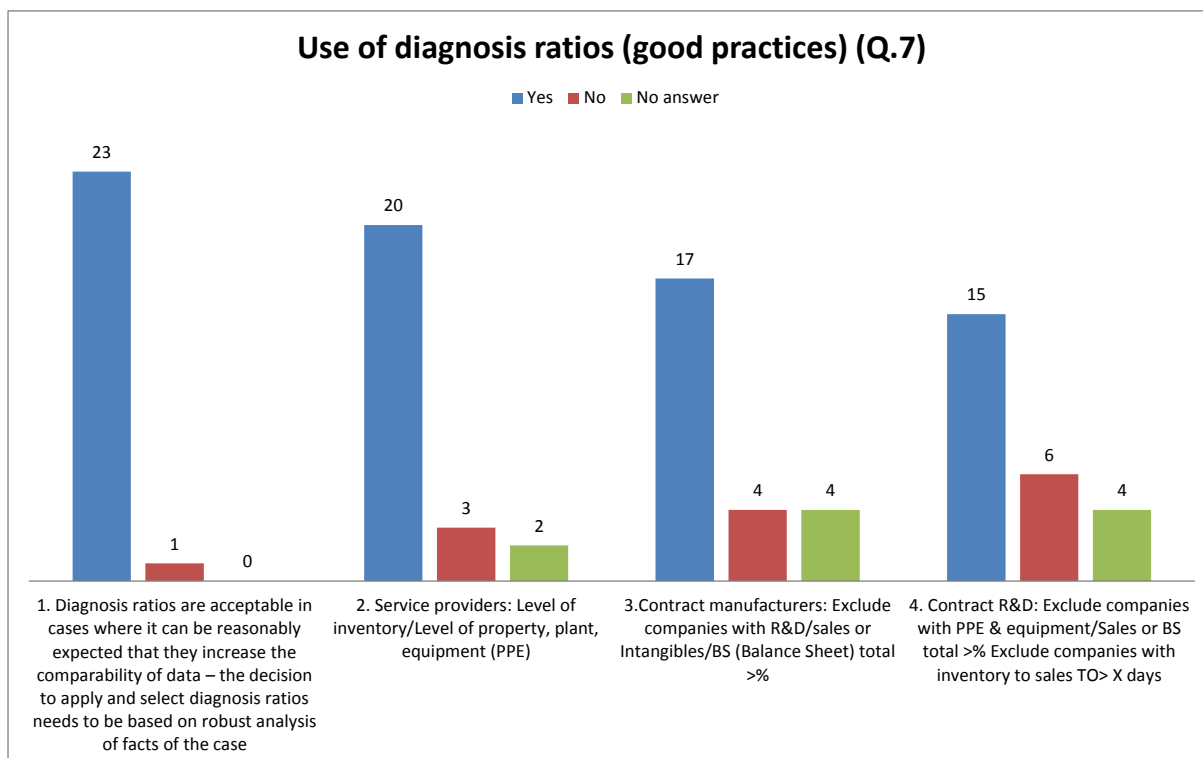
Number of years of losses considered	15 Member States have replied	Answer provided: 'Not available'
		Depends
		Depends on the overall market situations for the respective years. Business cycles should not be disregarded
		There is no a general rule. It depends on the number of periods analysed in the comparability analysis and the number of comparables obtained, but we can eliminate companies with losses in two out of three periods or three out of five periods, specially if the losses are obtained in the last periods.
		Depending on the time period covered by the comparable search.
		Typically reject consistent loss makers
		More than half of the periods that are selected for comparability analysis (e. g. if 5 years are taken into account, then a loss maker would be the one which suffered losses during 3 out of 5 years)
		No more than one year during the period of three years at least.
		one year (max) can be accepted
		2 consecutive years, for low-risk entities zero
		2 years of 3
		2-3 years or 3 years
		Average operative profit in a 3-year period negative or 1 out of 3 years with losses, depending on facts and circumstances
		Turnover thresholds - Threshold and criteria (if any) considered in the respective MS
5 Member States have replied 'Not available' (in which case, there is aparently a case-by-case analysis)		
There is no also a general rule. In some cases we use the criteria selected by ORBIS database to differentiate the size of a company		
Turnover thresholds may be part of transfer pricing study but are neither mandatory nor do current regulations provide any guidance on this issue.		
From 1 mln € to 10 mln €, depending on facts and circumstances		
No thresholds		

Market level comparability and/or information on the market - External sources considered or recommended in the respective MS	12	Significant difference is not acceptable.
		3 Member States have replied 'Not available" or 'No specific sources'
		4 Member States refer to information available on the Internet and internal databases, as well as website reviews or other relevant industry data (e.g. for commodities, interest rates) - Specific note from one MS: Websites of the companies and other information available online about the businesses of the selected companies is always invoked in order to distinguish retailer from wholesaler. In case selected company undertakes both types of activities and there is no possibility to distinguish them or to prove that the other activity is of irrelevant size and if a tested company relates only to one of the mentioned business models, then such comparable should be rejected.
		1. Particular industry/products /services reports. 2. Information gathered from direct questions to public institutions dealing with particular industry/products /services. 3. Data provided by Central Statistical Office, for example statistic information about markup of companies conducting particular type of business (particular classification code). Used rather as a sanity check, due to the fact that provided data do not differentiate between related and unrelated parties.
		Sales/services; B to B; B to C; wholesale/retail
		Others (2 MS): Trade Description Review; publicly available statistical and financial reports
		Relevant marketing information

Question 7: Position on selected practices regarding diagnosis ratios (Qualifying good practice or not)

Question asked to the Member States: Is it good practice to use the following diagnosis ratios in your MS?

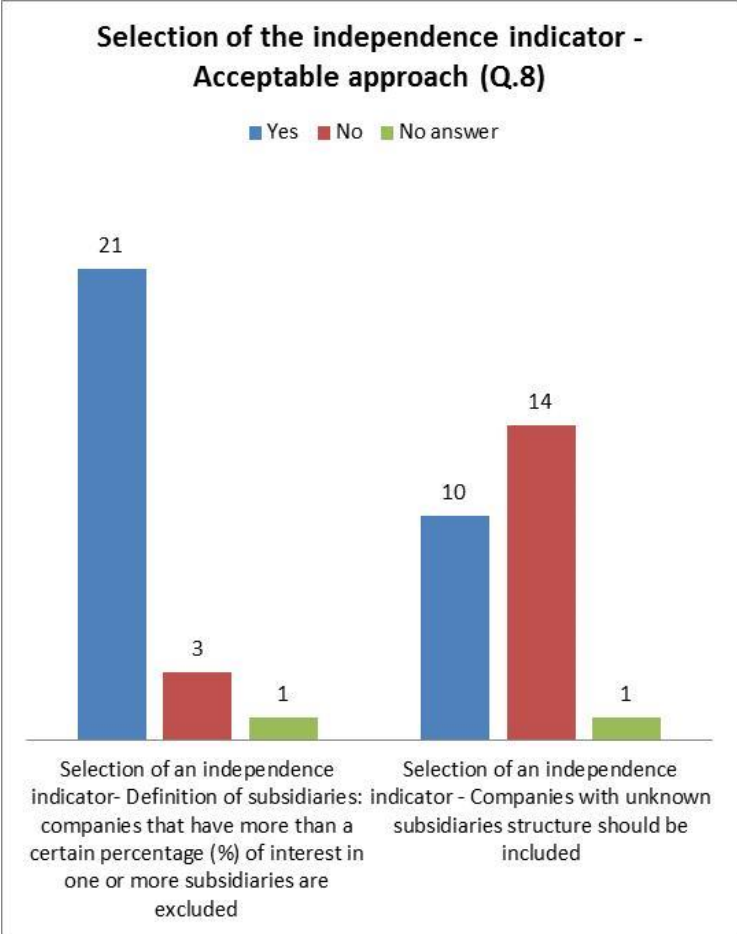
1. Diagnosis ratios are acceptable in cases where it can be reasonably expected that they increase the comparability of data – the decision to apply and select diagnosis ratios needs to be based on robust analysis of facts of the case	23	1	0
2. Service providers: Level of inventory/Level of property, plant, equipment (PPE)	20	3	2
3. Contract manufacturers: Exclude companies with R&D/sales or Intangibles/BS (Balance Sheet) total >%	17	4	4
4. Contract R&D: Exclude companies with PPE & equipment/Sales or BS total >% Exclude companies with inventory to sales TO> X days	15	6	4



Question 8: Selection of an independence indicator – Acceptable approaches amongst the Member States

Question asked to the Member States: Is the selection of an indicator an acceptable approach?

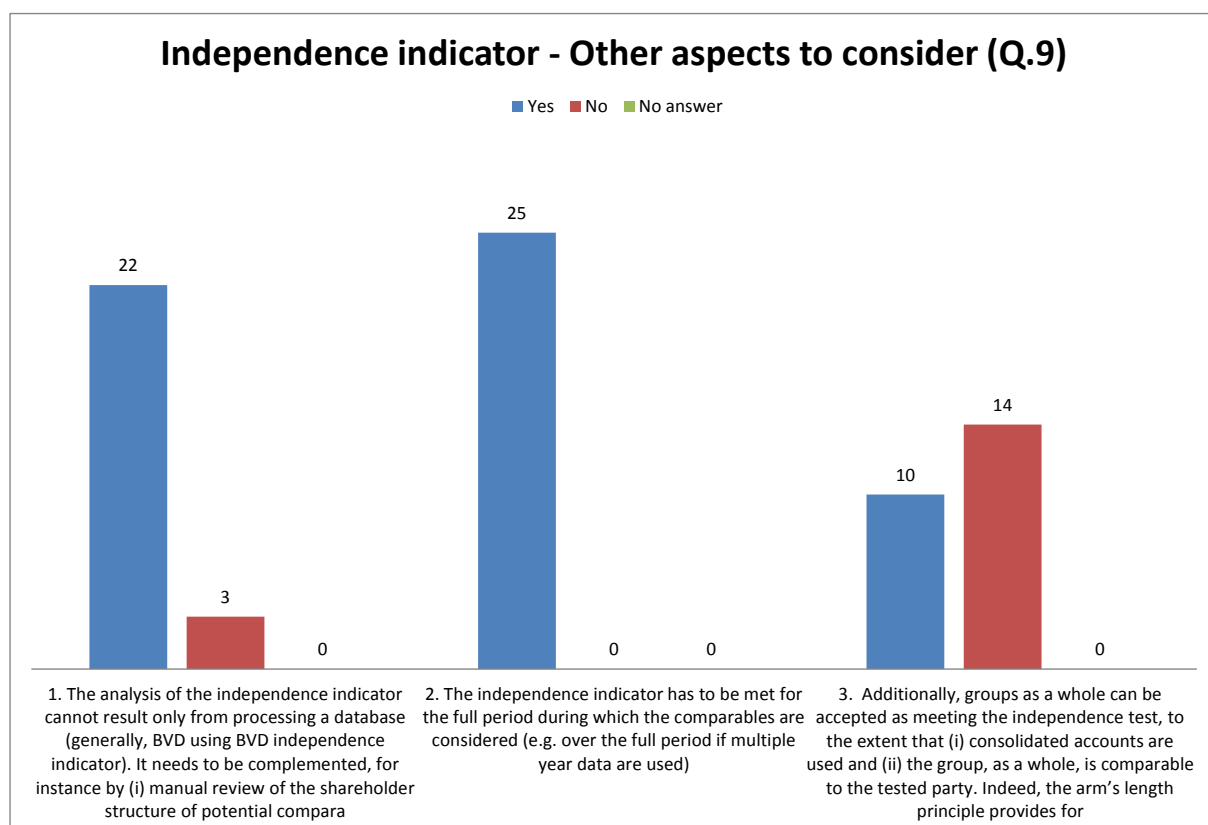
	Yes	No	No answer
Selection of an independence indicator- Definition of subsidiaries: companies that have more than a certain percentage (%) of interest in one or more subsidiaries are excluded	21	3	1
Selection of an independence indicator - Companies with unknown subsidiaries structure should be included	10	14	1



Question 9: Other considerations on the independence indicator

Question asked to the Member States: Would you consider the following aspects when applying the independence indicator?

	Yes	No	No answer
1. The analysis of the independence indicator cannot result only from processing a database (generally, BVD using BVD independence indicator). It needs to be complemented , for instance by (i) manual review of the shareholder structure of potential comparables, based on information available in the internet –check of companies’ website- and (ii) a check in other databases (e.g. OneSource, Hoover’s or other databases)	22	3	0
2. The independence indicator has to be met for the full period during which the comparables are considered (e.g. over the full period if multiple year data are used)	25	0	0
3. Additionally, groups as a whole can be accepted as meeting the independence test , to the extent that (i) consolidated accounts are used and (ii) the group, as a whole, is comparable to the tested party . Indeed, the arm’s length principle provides for the consideration of independent parties. It does not provide for the exclusive consideration of single-entities groups, i.e., groups comprising several legal entities, potentially across different jurisdictions should be accepted under the 2 above conditions (i) and (ii).	10	14	0

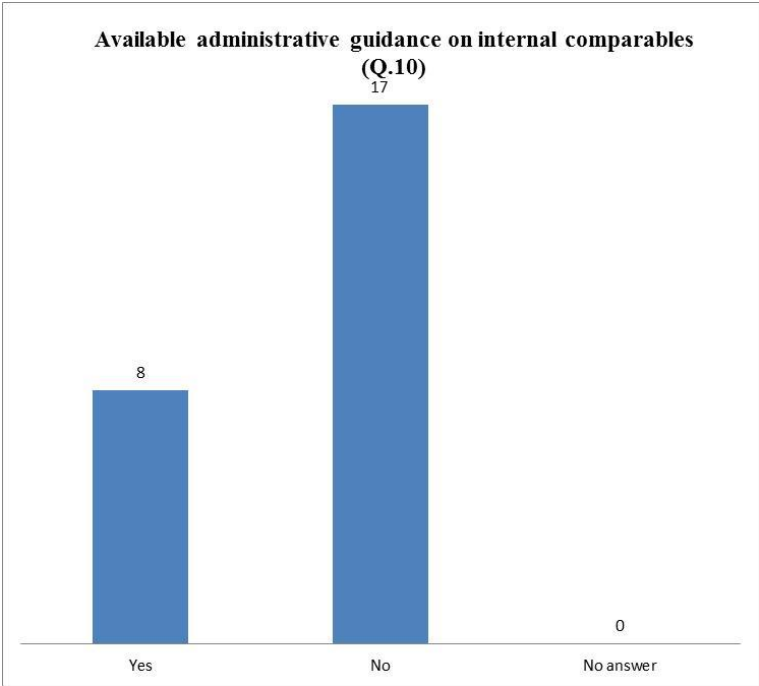


2. Internal comparables

Question 10: General consideration – Existing administrative guidelines on how to use internal comparables

Question asked to the Member States: Is there any available administrative guidance on the use of internal comparables

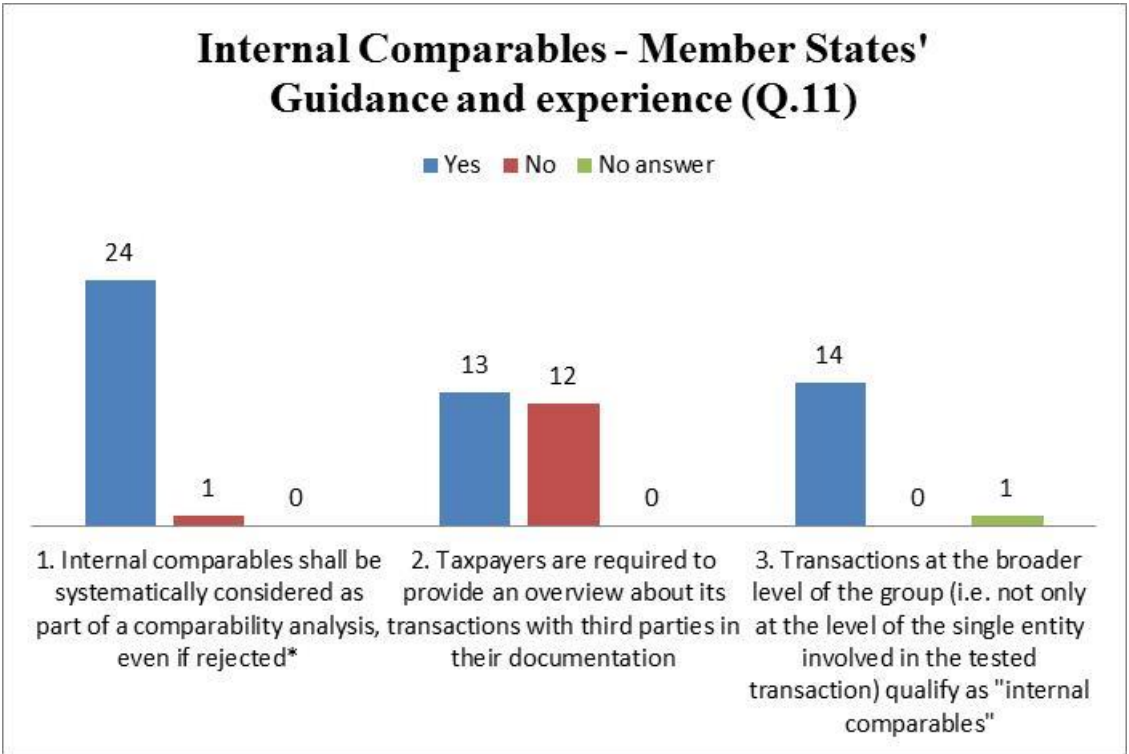
Yes	No	No answer
8	17	0



Question 11: Practice and experience as regards internal comparables (targeted aspects)

Question asked to the Member States: What is the practice in your respective jurisdictions regarding the following particular aspects?

	Yes	No	No answer
1. Internal comparables shall be systematically considered as part of a comparability analysis, even if rejected*	24	1	0
2. Taxpayers are required to provide an overview about their transactions with third parties in their documentation	13	12	0
3. Transactions at the broader level of the group (i.e. not only at the level of the single entity involved in the tested transaction) qualify as "internal comparables"	14	10	1



Question 12: Practice on rejection of internal comparables (identified justifications)

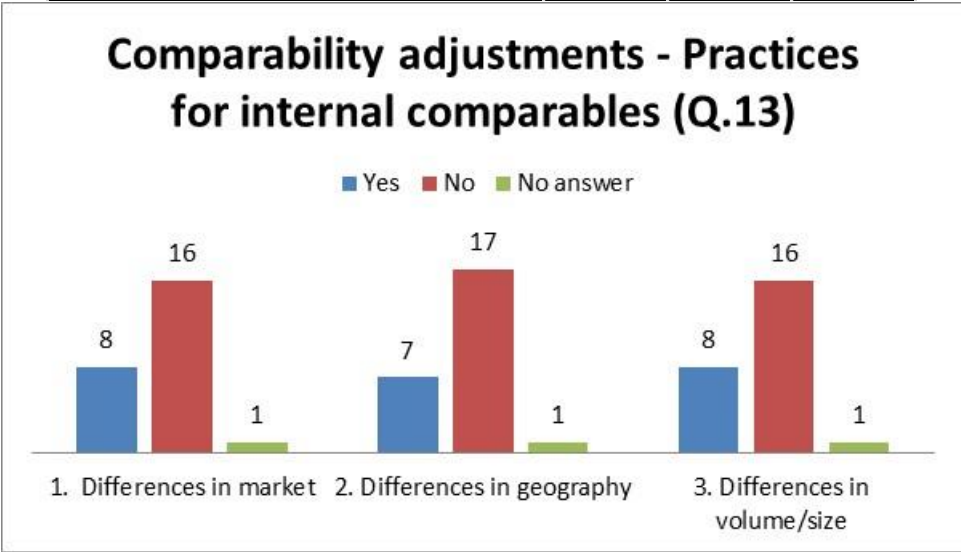
Question asked to the Member States: In case internal comparables are rejected, which reasons for rejection did you encounter in practice?

The most common reason provided by taxpayers is that the internal comparable is not sufficiently comparable. Generally, adequate information is not provided by taxpayers to support this assertion.
OECD TPG comparability factor test is not met.
Volume differences/different amount of turnover, type of transaction, or quality, differences on geographic market- Differences in prices, assets, risk, frequency etc.
Other (complementary) goods, other business strategy, other geographical market.
Different functions, risks. Mainly rejected because of different trade level (wholesaler vs. retailer) or different functional profile of customer
<ul style="list-style-type: none"> - Transaction volume differs - Different trade/Transaction level - Different market - Different contractual arrangements
If a significant difference exist (especially risks) and it is not possible to make a reasonable adjustment between controlled transaction and internal comparable transaction.
Incidental character of the transactions; Not enough substance, just small transactions, prices covering just variable costs, periodic capacity filling
If those are not similar enough in terms of FAR.
If the internal comparable(s) do not fulfill the comparability factors (NEW TPG 1.36) they are not accepted. Reasons for elimination have included e.g. volume differences and differences on geographic market.
The internal comparables did not meet one or more of the comparability factors prescribed by the OECD TPG.
Internal comparables are rejected where there are lack of data or materially differences in the comparability factors, e.g. significant differences in market, volume
Main arguments: there were no transactions with third parties undertaken or they were of different types or were not comparable due to significant differences in conditions. In very rare cases taxpayers provide with information regarding availability of internal comparables within the company group (usually the issue of internal comparables is analysed only from the perspective.
In general differences in volume/size, and market/geography. Examples: Differences in market level of country/region to which the internal comparables and tested transaction referred; internal comparables referred to transactions which were multiple times smaller than tested transaction; company commencing activity in new market use comparables from more developed markets in which it already operates (differences in market levels, and no recognition between differences in situation of company entering the market and company already in the market).
Different activities, functions, risks...
Differences in the economically relevant characteristics.

Question 13: Practice on comparability adjustments applied to internal comparables

Question asked to the Member States: What are the existing practices regarding comparability adjustments, which possibly mitigate the risk of rejection of internal comparables, particularly in case where "group internal comparables"

	Yes	No	No answer
1. Differences in market	8	16	1
2. Differences in geography	7	17	1
3. Differences in volume/size	8	16	1



Complementary comments (3 MSs have answered):

No adjustments have been done in practice although such are recommended if appropriate and possible

In the asset management industry, adjustments are often made to take account of economies of scale. For certain loan transactions, differences in government bond rates may be used to reflect different country risks.

There is no particular guidance regarding such adjustments. Adjustments as described above are no general practice in our Member State. However, depending on the facts and circumstances respective adjustments may lead to a higher degree of comparability and may therefore be acceptable.

Theoretically we accept such adjustment but practically we have not met yet such cases.

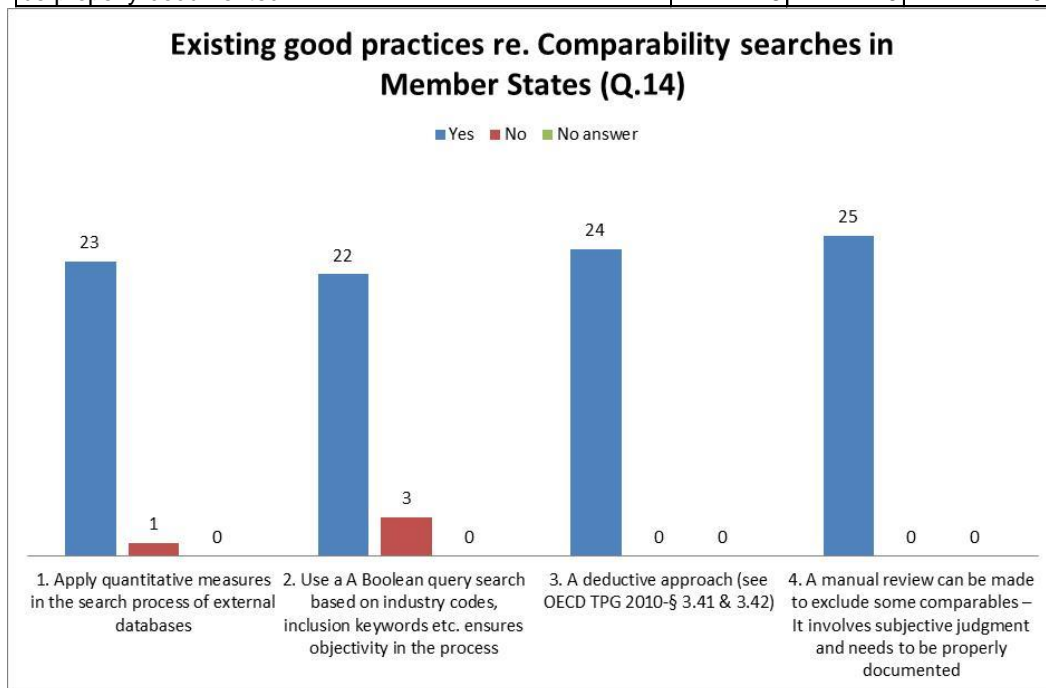
3. External comparables

3.1 General aspects

Question 14: Position on general approach and practices

Question asked to the Member States: can you indicate whether the approaches below would reflect good practice in your MS?

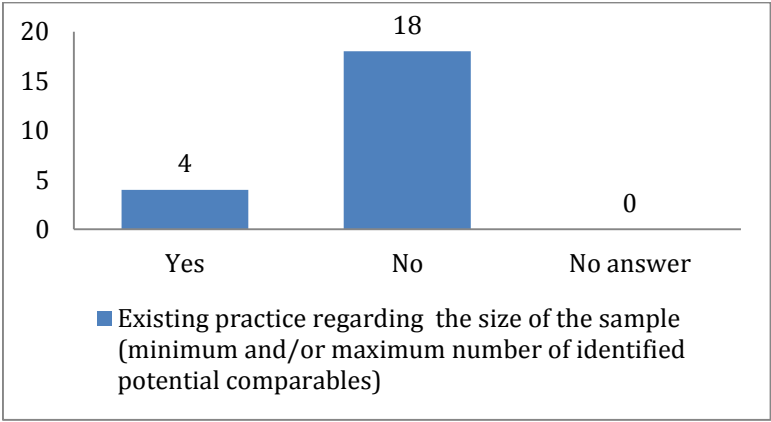
	Yes	No	No answer
1. Apply quantitative measures in the search process of external databases	23	1	0
2. Use a Boolean query search based on industry codes, inclusion keywords etc. ensures objectivity in the process	22	3	0
3. A deductive approach (see OECD TPG 2010-§ 3.41 & 3.42)	24	0	0
4. A manual review can be made to exclude some comparables – It involves subjective judgment and needs to be properly documented	25	0	0



Question 15: Existing practice on defining an acceptable size for the range of comparables

Question asked to the Member States: Is there any common practice or guidance in your MS according to the size of the sample so that the range can be considered as "reasonably" comparable?

	Yes	No	No answer
Existing practice regarding the size of the sample (minimum and/or maximum number of identified potential comparables)	5	20	0



Question 16: Other general comment regarding general aspects of an external comparable search and existing practice

Question asked to the Member States: would you have any other general comments from Member States on practice(s) improving the reliability, objectivity and consistency of searches within the EU?

The table below gives an overview of the various comments received in this respect from Member States;

<p>It comes harder during time-being to find independent comparables, as they are structured differently from groups. Differences might be too subjective to be adjusted. Taxpayer is always sure they are different from others. e-trading is not documented properly and has an influence on prices.</p> <p>Maybe solution should be changes in taxation - simple tax system, for example based on expenses: costs + 15%</p>
<p>Size loss to be reasonable</p>
<p>Even if there is only one comparable and it performs the same functions, bears the same risks, offers the similar Products or services, it can be accepted as reliable.</p>
<p>Where a TNMM approach is used, we would expect a minimum of 5 comparables but a larger sample size is generally required. Where the CUP method is used, 1 or 2 CUPs may be sufficient.</p>
<p>1.) Deductive approach is usually followed in practice. However, additive approach may be used when appropriate. The approaches may also be combined e.g. a deductive search may be supplemented by adding comparables found by other means.</p> <p>2.) Please note that manual review should be made in all cases.</p>
<p>Usually if selected companies have huge differences in their financial statement numbers (e. g. balance sheet regarding fixed assets etc.), as the tested party is the one with the simplest functions, when drawing a benchmarking study such selected companies are not included in the study due to significant disparities in business model. In other cases where benchmarking study was conducted regarding full responsibility entities, however, the tested party assumed different amount of risks, there might be applied an option to choose a portion of the interval computed in the study (e. g. if tested party conducted limited business model – then the second quartile of the interval; if the tested party performed wide range of functions inherent to the business model – then not lower than numbers starting from the median of the interval should be chosen), if there are no other possibilities to make comparables more reliable.</p>
<p>We are convinced that if a narrowed search on comparables is performed, the ranges should not be extremely wide, based on the simple fact that liquid and well functioning markets should not lead to extremely diversified results.</p>

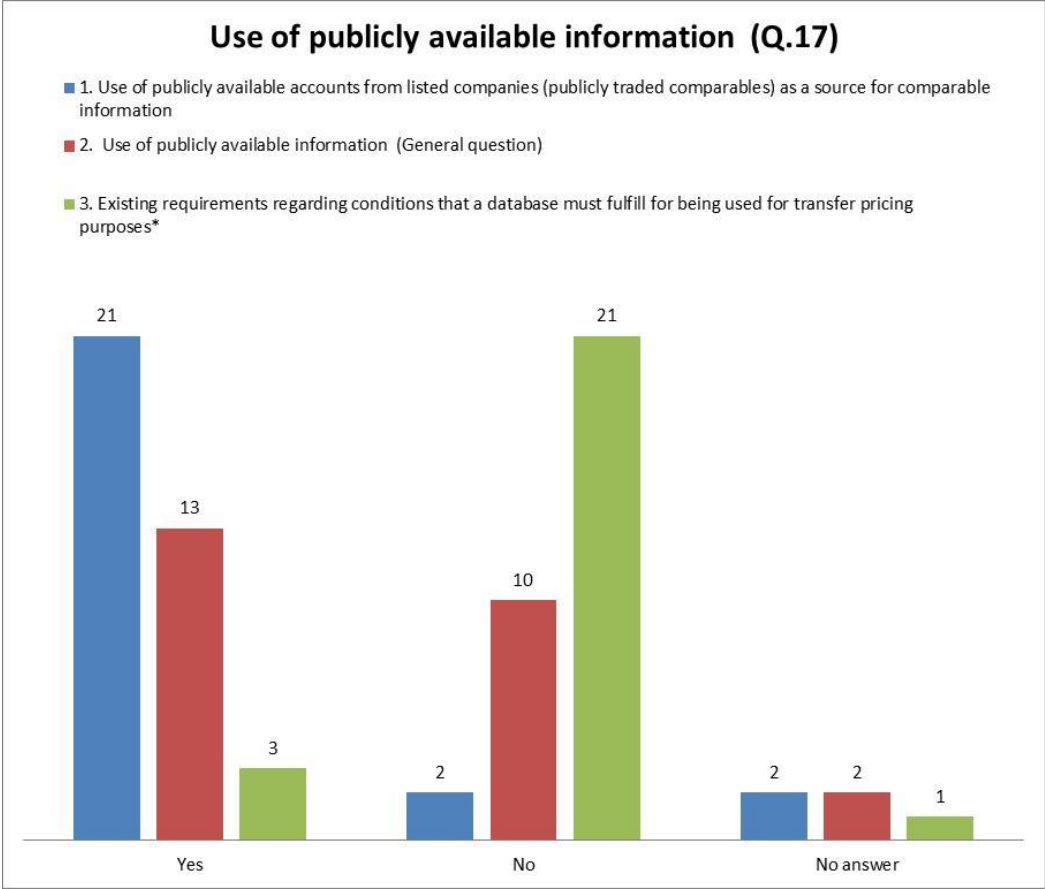
3.2 Specific aspects – Use of public information and alternative databases

Question 17: Use of publicly information in Member States - Current state of play

Question asked to the Member States: Is it possible in your MS to use publicly available accounts from listed companies (publicly traded comparables) as a source for comparable information?

	Yes	No	No answer
1. Use of publicly available accounts from listed companies (publicly traded comparables) as a source for comparable information	21	2	2
2. Use of publicly available information (General question)	13	10	2
3. Existing requirements regarding conditions that a database must fulfill for being used for transfer pricing purposes*	3	21	1

* e.g. transparency as regards the origin of data, adjustments that are made by the database provider to this data etc.



Question 18: Use of publicly information in Member States – Use of alternative databases

Question asked to the Member States: Apart from the external commercial database which are commonly used in the EU (e.g. BVD databases), are there any relevant examples of "alternative" databases used in your jurisdiction?

Intangible databases from "Big 4" (i.e. Lexis Nexis), Bloomberg
There are alternative databases but we have not used them extensively.
We work on testing RoyaltyStat, Bloomberg, Thomson Reuters
We work on testing RoyaltyStat, Bloomberg, Thomson Reuters
company register, historical data of the central bank
6 Member States have answered negatively (9 answers in total)
Info Credit (former Tegieli; database collecting financial reports of Polish companies)

3.3 Specific aspects – Comparability adjustments

Question 19: Existing practice and position on the "material difference" test (OECD TPG 2010)

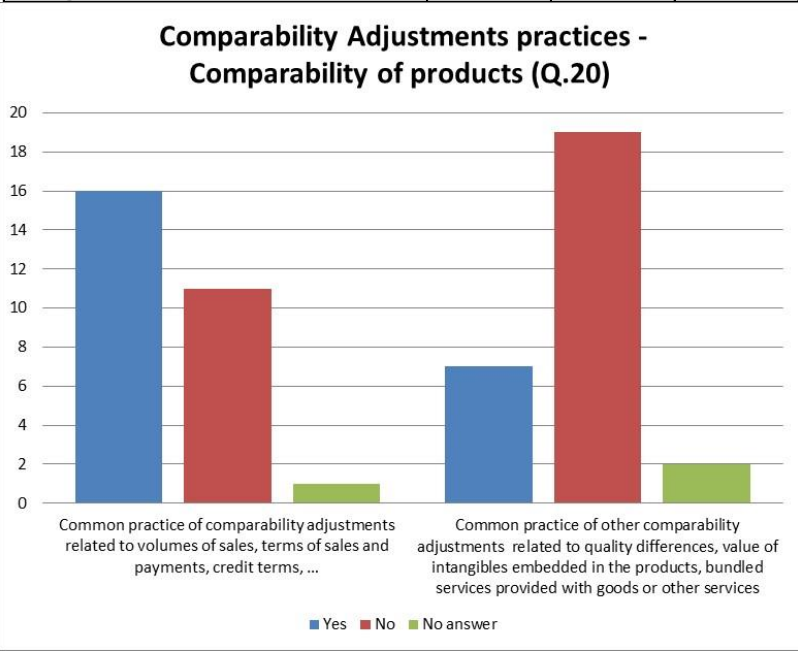
Question asked to the Member States: Are there existing best practice/definition, examples or test available in your MS as regards how the notion of 'material' difference in the New OECD TPG §1.40 (par. can be assessed)?

Use judgement.
There are no information on the subject publicly available in our country. However, the issue of materiality in practice is approached on case by case basis referring to general principles of prudence and proportionality. During evaluation procedure taxpayers are asked to explain how they established which conditions have significant impact on the price and how they affect the price. In case some conditions are not evaluated as important, taxpayers have to substantiate how they came to such conclusions as well.
No particular best practice/guidance etc. is in place. However, depending on the facts and circumstances comparability adjustments may be acceptable if they lead to a higher degree of comparability.
We initially rely on best available comparables selected. Material difference is assessed defining the search criteria.
We observe the necessity and possibility of adjustments case by case.
There is a general practice, that if specific "material" difference cannot be reflected in proper set of screening criteria, there is a need to make further adjustments. For example, use of websites to determine which of the companies listed after screening have similar profile/functions to specific situation, and can be described as 'comparable' (database do not provide enough information on, for example, the specific range of activity).
9 Member States have answered negatively (16 answers in total)

Question 20: Use of comparability adjustments – Differences related to product

Question asked to the Member States: Can you indicate whether the following comparability adjustments related to the comparability of products are applied in your jurisdiction?

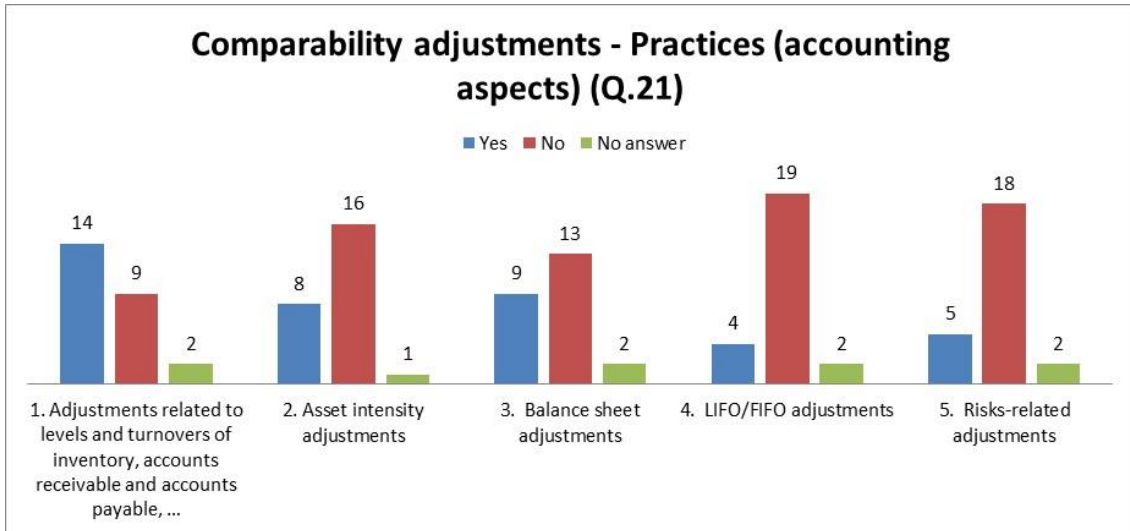
	Yes	No	No answer
Common practice of comparability adjustments related to volumes of sales, terms of sales and payments, credit terms, ...	16	11	1
Common practice of other comparability adjustments related to quality differences, value of intangibles embedded in the products, bundled services provided with goods or other services	7	19	2



Question 21: Use of comparability adjustments – Differences related to internal operations and accounting treatments

Question asked to the Member States: Can you indicate whether the following comparability adjustments apply in our jurisdiction?

	Yes	No	No answer
1. Adjustments related to levels and turnovers of inventory, accounts receivable and accounts payable, ...	14	9	2
2. Asset intensity adjustments	8	16	1
3. Balance sheet adjustments	9	13	2
4. LIFO/FIFO adjustments	4	19	2
5. Risks-related adjustments	5	18	2



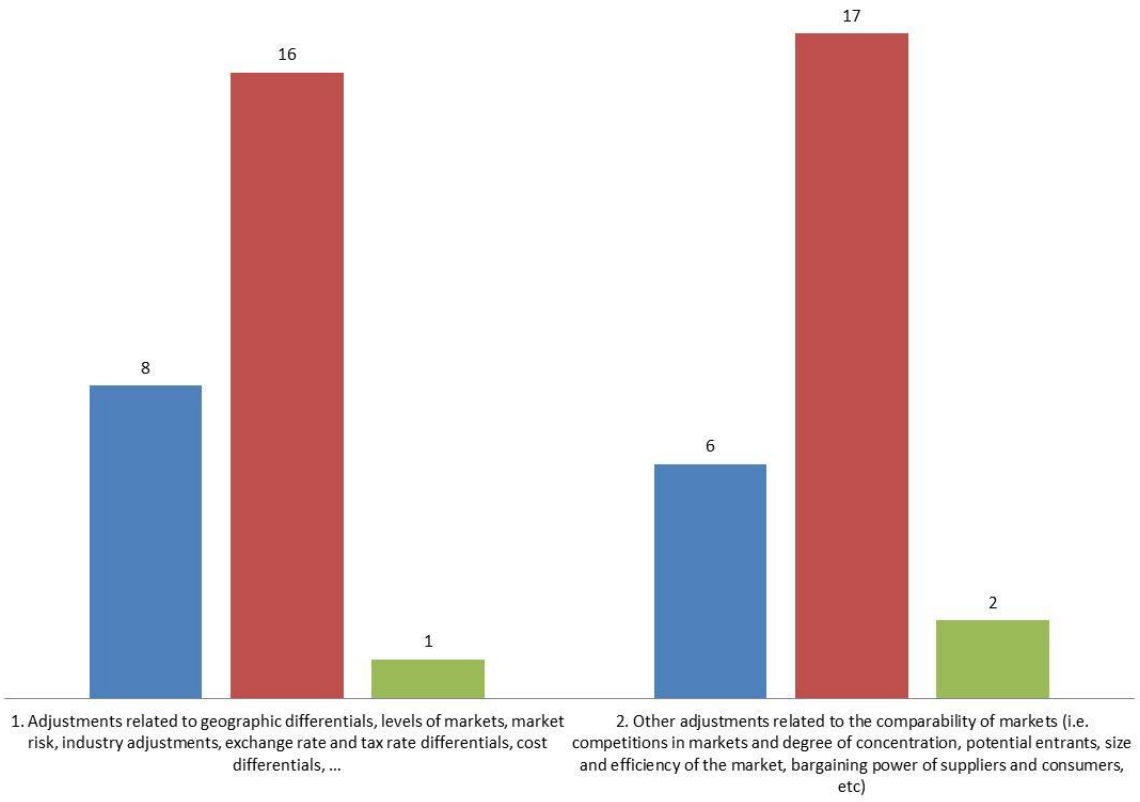
Question 22: Use of comparability adjustments – Differences related to markets

Question asked to the Member States: Can you indicate whether the following comparability adjustments apply in our jurisdiction?

	Yes	No	No answer
1. Adjustments related to geographic differentials, levels of markets, market risk, industry adjustments, exchange rate and tax rate differentials, cost differentials, ...	8	16	1
2. Other adjustments related to the comparability of markets (i.e. competitions in markets and degree of concentration, potential entrants, size and efficiency of the market, bargaining power of suppliers and consumers, etc)	6	17	2

Comparability Adjustments practices - Comparability of the markets (Q.22)

■ Yes ■ No ■ No answer



Question 23: Use of comparability adjustments – Differences related to risks

Question asked to the Member States: What is the current/foreseeable practice in your MS regarding any possible risk-related adjustments and/or adjustments related to location savings?

Question 24: Use of comparability adjustments – Differences related to location savings

Question asked to the Member States: What is the current/foreseeable practice in your MS regarding any possible risk-related adjustments and/or adjustments related to location savings?

Answers to Question 23:

There will be cases
Our Member State would expect the effect of location savings to be reflected in the comparables drawn from that territory, so no adjustments should be made
n/a
No practice with such adjustments
It is considered on a case by case basis.
n/a
We have not seen risk-related adjustments related to location savings
No practice available so far where any adjustments related to location savings as such were performed. Usually this aspect is eliminated by choosing a particular geographic region which is deemed to be comparable (e. g. Baltic region), so no further adjustments are considered as necessary.
No practice is currently available as regards risk related adjustments or location savings
No adjustments
No practice
Differences in terms of geography and market comparability are identified and solved in the screening stage (for example the region/market level)
If adjustments are made by the companies, administration examines if they are appropriate.
In our practice, we generally prefer using quantitative screenings rather than adjustments.

Answers on Questions 23 & 24 together:

No practice or experience for 8 MS. 1MS mentioned there will be cases, another that this should be considered on a case-by-case basis. 3 MSs mention that the effect of location savings can be expected to be reflected in the comparables drawn from that territory, so that no adjustments should be necessary. The location savings aspect is considered with particular attention by at least one MS.
If possible, location savings are considered at the stage of screening (proper set of screening criteria; especially impact of geography and market level are examined). If location savings cannot be taken into account at screening stage, some adjustment may be considered, depend on a specific case-by-case situation.

Question 25: Use of comparability adjustments – Specific issues resurgint from accounting differences – Impact of database contents and use of the Resale Price Method

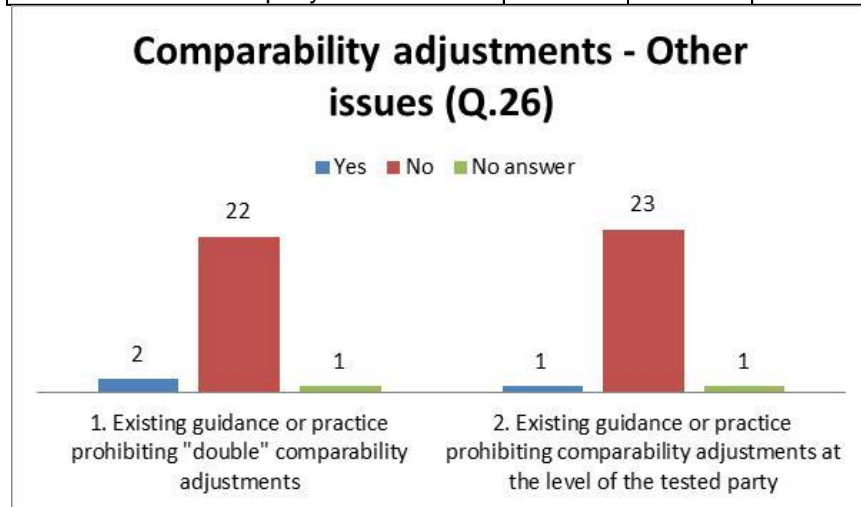
Question asked to the Member States: Beside the above-mentioned adjustments, are there any specific issues and treatments/adjustments applied in relation with accounting differences, *i.e.* related to differences in domestic accounting rules/reporting standards? Please explain:

Some Member States mention there was no practice so far.
Differences considered at the stage of the comparability analysis or impacting the method choice:
The correspondence between domestic accounting standards and other accounting systems is considered during comparability analysis.
1) There could be differences in accounting polices e.g. depreciations, production costs, financial expenses etc. that may influence the method applied
2) The Resale Price method is often rejected due to the differences mentioned above
Regarding possible adjustment treatments:
Generally not but it depends on the facts and circumstances
If foreign GAAP used, eg US GAAP, adjustments should be made to convert to domestic GAAP (domestic or IFRS) or demonstrate differences between foreign and domestic GAAP are small.
The use of IFRS is accepted if the differences in particular positions do not significantly modify the final numbers (there is no strict and general level of percentage points to define “significant modification” referring to IFRS vs domestic rules – those differences are analyzed case-by-case).
Generally not but it depends on the facts and circumstances

Question 26: Comparability adjustments – Other issues

Question asked to the Member States: Other issues : Is there any guidance or practice in your jurisdiction prohibiting one of the following aspects? If YES, could you elaborate or illustrate more below?

	Yes	No	No answer
1. Existing guidance or practice prohibiting "double" comparability adjustments	2	22	1
2. Existing guidance or practice prohibiting comparability adjustments at the level of the tested party	1	23	1



Complementary comments:

The "double" comparability adjustments are prohibited by detailed examination of screening process, final results and proposed adjustments. Cases of "double" comparability adjustments cover situation when proposed adjustment was previously covered by proper set of screening criteria (the adjustment may be rejected if proper set of screening criteria will effectively take into account a particular case specific).

- Our practice prohibits double adjustment, because in this case it is not more a comparable
- In practice, adjustment at the level of the tested party are not allowed

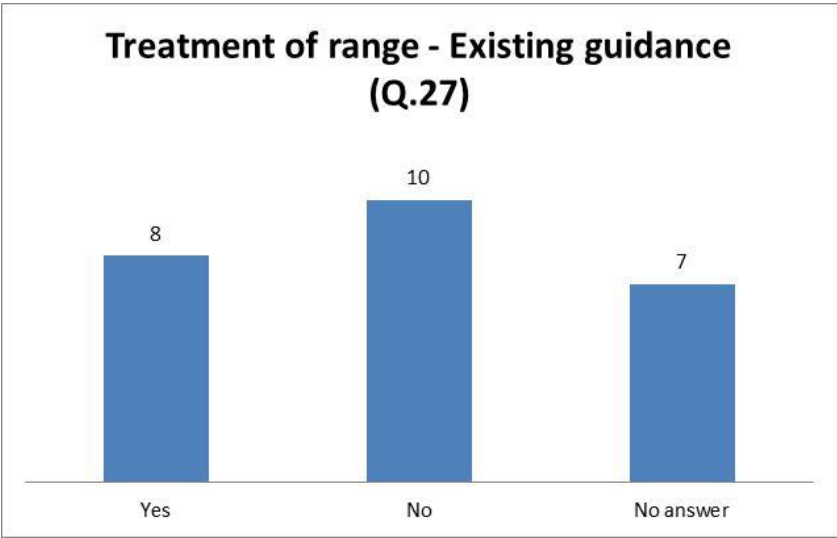
4. Ranges

4.1 General aspects

Question 27: Treatment and interpretation of ranges – Existing guidance

Question asked to the Member States: Do you have administrative guidance in your MS on how to deal with such ranges?

Yes	No	No answer
8	10	7

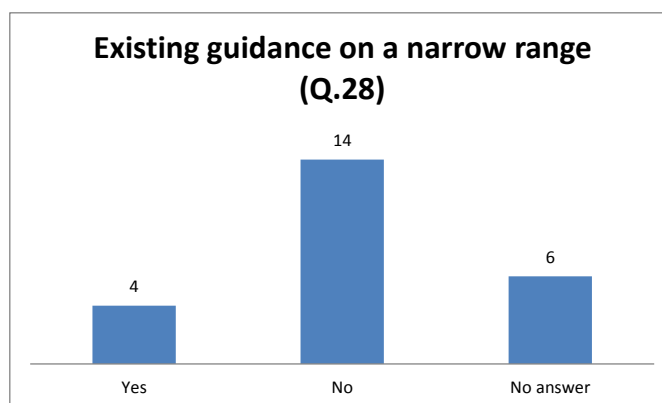


18 Member States replied - 9 Member States answered they currently have no specific guidance (1 country amongst these 9 Member States is contemplating introducing such guidance soon)
3 Member States made reference to their general guidance or to a general approach, as follows:
We have not any guidance on ranges.
Yes, it is a general rule which sets out that the range comprises of all comparable uncontrolled transactions
Just general guidance, adjustment to the nearest point

Question 28: Specific guidance requiring to produce a narrow range - Definition

Question asked to the Member States: Are there some specific requirements/guidance in your Member State as regards the necessity for the MS to produce a narrow range? If yes, is there any definition of this "narrow" range in your Member State and how is it defined? Are there some specific requirements/guidance in your Member State as regards the necessity for the Member State to produce a narrow range? If yes, is there any definition of this "narrow" range in your Member State S and how is it defined?

	Yes	No	No answer
Answer	4	14	6



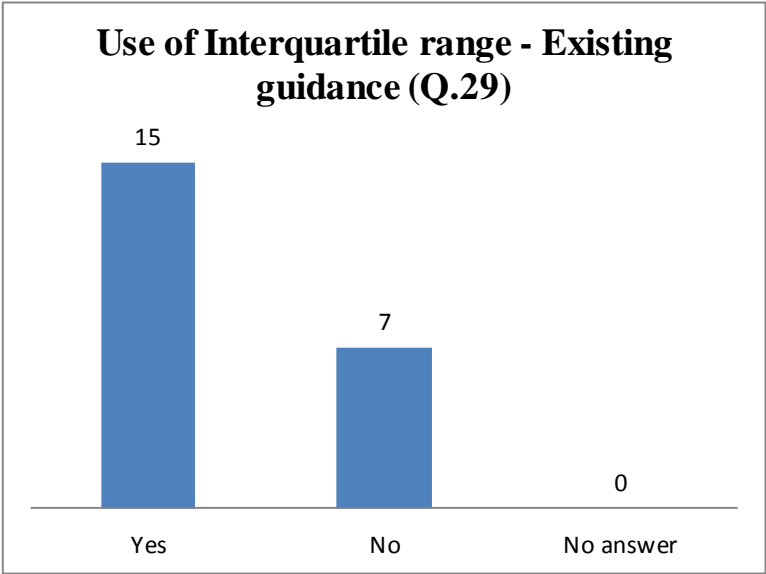
<p>20 Member States replied - 12 Member States answered they currently have no specific guidance or requirements. Amongst these 12 Member States, 3 Member States provide for the following precision:</p>
No - needs to be seen on a case by case basis
No, it depends on facts and circumstances.
no definition, just statement about to do comparables search again in case of too broad range
We have specific requirements for interquartile range.
Reference to the guidance, in particular 'After the range has been determined, it must be assessed whether the compensation for the transaction to be assessed is within this range. If the compensation is within the range, no adjustment will take place. If the compensation is outside the range and the taxpayer cannot explain the deviation on good grounds, an adjustment will be applied. "
A narrow range has to be produced in cases where the comparables are comparable only to a limited extent. The range may be narrowed through (i) control calculations applying other TP methods, (ii) plausibility checks, (iii) mathematical approaches (interquartile range) or (iv) any other reasonable procedure employed by the taxpayer.
If an arm's length range is composed, it is considered that every number within the range is of equal reliability (unless parties manage to prove otherwise). When calculating the range, statistical tools for the elimination of extreme values should be invoked. The use of statistical tools is not regulated in domestic legislation, but is widely used in practice. The most common method – quartiles : a court decision of 2013 in our country legitimized application of statistical tools. This entitles tax administrator to require calculation of interquartile range from taxpayer and to apply quartiles itself in all the cases whenever there is sufficient amount of values in the range). If taxpayer choses not to use quartiles or uses other tools (e. g. 10th percentile), in these cases taxpayer must provide with a justified rationale for the option. Generally usage of less common statistical methods implies of additional risk that taxpayer has set the price non in accordance to the market conditions.

4.2 Specific conditions

Question 29: Interquartile range - Identified practice

Question asked to the Member States: Is there any guidance or practice in your jurisdiction regarding the use of an interquartile range?

Yes	No	No answer
15	7	0



Question 30: General conditions to apply an interquartile range

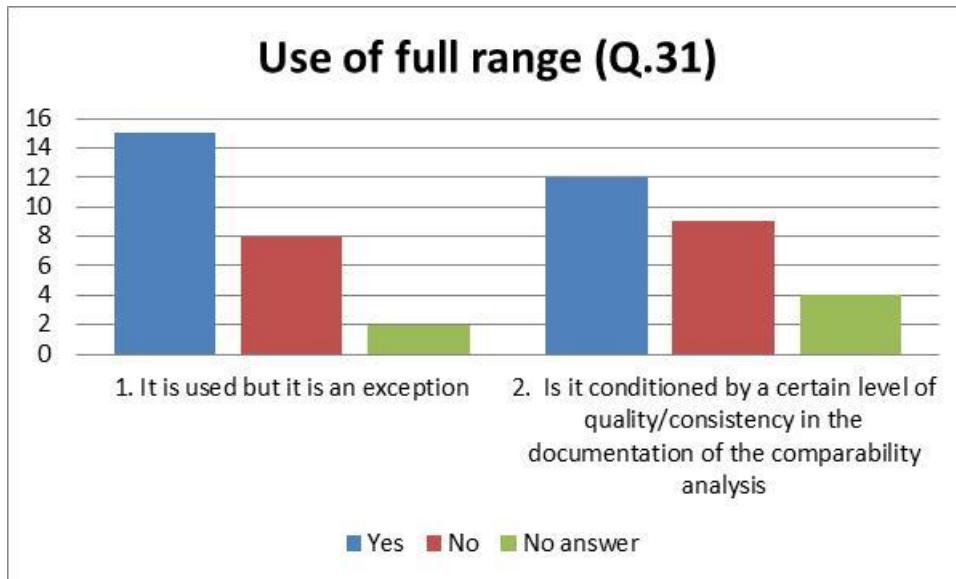
Question asked to the Member States: If yes, is the use of an interquartile range subject to or connected to certain conditions? Please explain

Summary of answers (some MSs have referred to several terms in their answer)	
4	Use with limited extent - A set of comparables is less comparable
4	Interquartile range is applied when the full range is less reliable
1	Generally, the Interquartile range is used (it assures a greater level of reliability)
1	Others, eg extraordinary exception when for some reasons the range may be modified
1	No requirement, practice of taxpayer
1	A sizeable of comparables is needed
1	No, but we do not exclude that there may be an extraordinary
1	If the taxpayer did not make FAR on the final set of comparables, interquartile range is required.
1	Median is the arm's length remuneration which should be applied by companies. But the arm's length range can also be applied : Interquartile range (Q1 to Q3). Companies excluded are the less profitable (Q1 : 25 % of the companies which have worse results) and the most profitable (Q3 : 25 % of the companies which have the best results).
1	In situations when available comparable data suffers from shortages in terms of quality or quantity, the use of median is recommended (especially when there is not enough comparable entities – the interquartile range as a statistic tool will be inefficient in such cases). In tax audit practice there is condition to justify any movement within interquartile range beyond median. There is general taxpayers practice to use interquartile range.

Question 31: Conditions to apply a full range

Question asked to the Member States: In cases where the full range can be used, is it an exception in your country?

	Yes	No	No answer
1. It is used but it is an exception	15	8	2
2. Is it conditioned by a certain level of quality/consistency in the documentation of the comparability analysis	12	9	4



Question 32: Circumstances justifying the possible use of a full range

Question asked to the Member States: Are there any problems or specific circumstances, which can justify the use of a full range in your Member State? Please explain.

Summary of answers (some Member States having referred to several terms in their answer)	
3	Not accepted
1	Accepted when transactions are equally reliable
3	Accepted when transactions show a high degree of comparability based on the five factors
1	Exceptional
2	Very limited number of comparables (2 or 3)/width of range
1	OECD rules apply

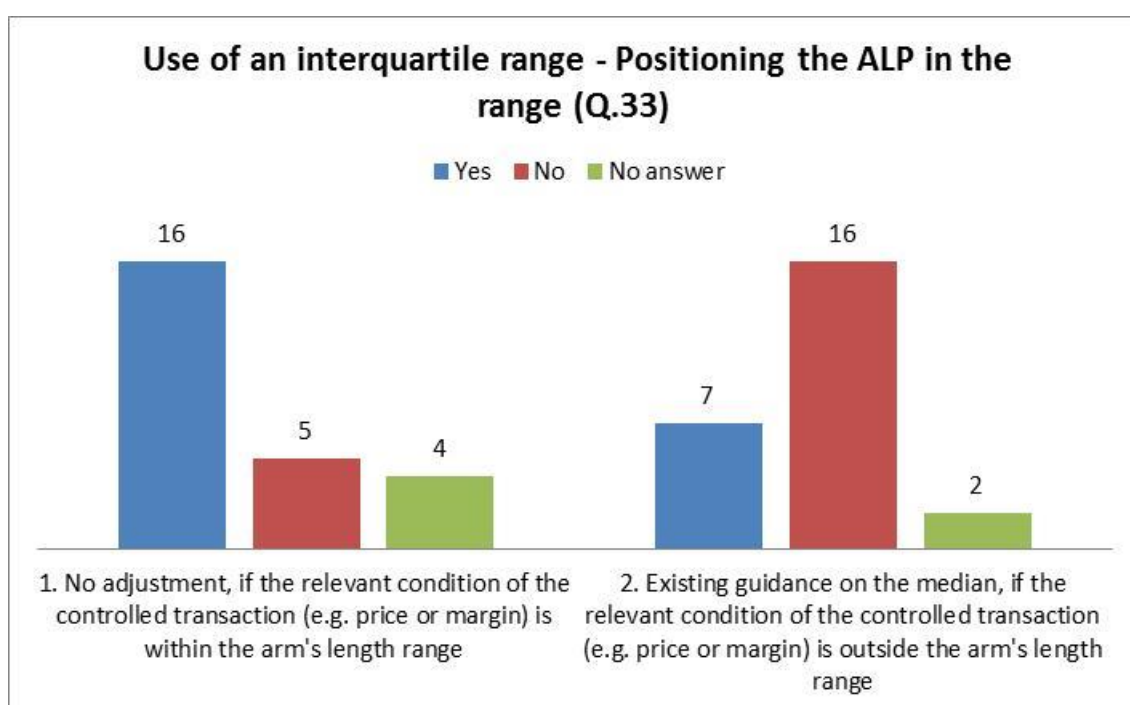
Complementary answers received:

<p>In case of very good quality of comparable data and few comparables, the use of full range is justified.</p> <p>There may be problems in every step of comparability analysis, but in case of a full range, the problem may be if the range is too broad or if it includes still comparable data. The adjustments may be subjective.</p>
<p>Where all transactions are equally reliable, then it is difficult to justify restricting</p>
<p>We do not prohibit the use of the full range but there would need to be a clear rationale for using the full range. We would expect it to apply only on an exceptional basis.</p>
<p>In practice, full range could be used e.g. when the number of comparables is very limited (e.g. 2 or 3 comparables).</p>
<p>Yes. If the comparables involved are very comparable and reliable, and the length of the range corroborates that high comparability, the full range might be used</p>
<p>Where all the figures that comprise the range is based on comparables where a high degree of comparability can be established, according to the five comparability factors – exact comparables, the use of the full range is allowed. Where, comparability defects remain as discussed at paragraph 3.57 in OECD TPG – inexact comparables, the interquartile range is used to minimize the risk of error due to unknown or unquantifiable remaining comparability defects and thereby to improve comparability. This is often the case in practice where comparables are extracted from a database.</p>
<p>The application of the full range is limited to cases where only fully comparable comparables can be identified.</p>
<p>OECD rules applies.</p>
<p>Number of comparables, width of range</p>
<p>To Q0-Q4 quartiles represent the extremities of the range result. For this reason they are not considered as comparable.</p>
<p>In general, the use of full range is questioned due to unreliable results based on obtaining too broad ranges (especially when the singular extreme situation significantly modifies the full range).</p>
<p>3 MSs do not accept the full range expressly.</p>

Question 33: Interquartile range – Positioning of the ALP within the range

Question asked to the Member States: If the relevant condition of the controlled transaction (e.g. price or margin) is outside of the arm's length range, is there guidance in your MS to adjust at the median?

	Yes	No	No answer
1. No adjustment , if the relevant condition of the controlled transaction (e.g. price or margin) is within the arm's length range	16	5	4
2. Existing guidance on the median , if the relevant condition of the controlled transaction (e.g. price or margin) is outside the arm's length range	7	16	2



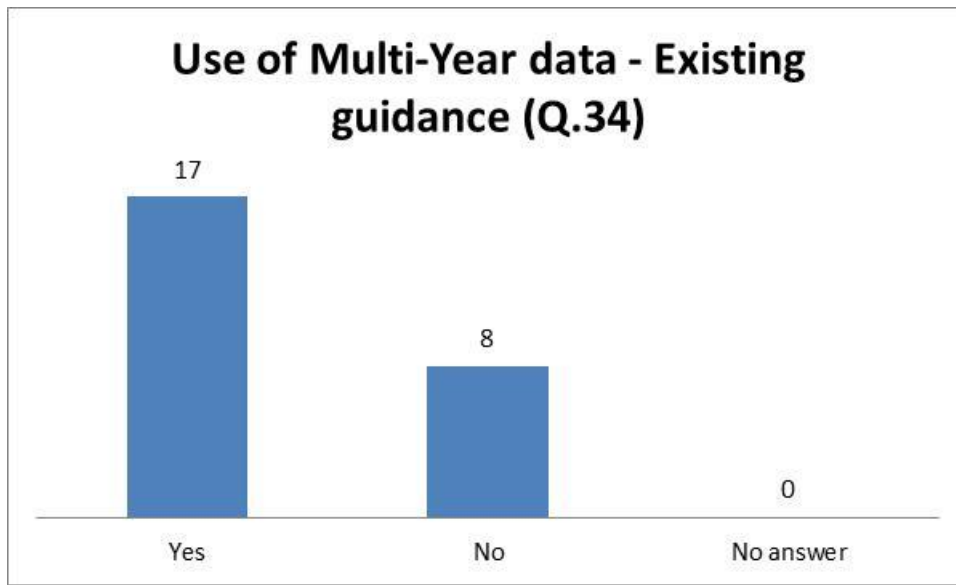
NB: the question refers to the existence of guidance/guidelines on the median if the relevant condition of the controlled transaction (e.g. price or margin) is outside of the arm's length range – It does not specifically address practices of Member States who may use the median or other reference, in particular based on the OECD TPG.

5. Multiple year data

Question 34: Guidance or practice recommending the use of Multiple Year data

Question asked to the Member States: Is there any guidance or practice in your jurisdiction recommending the use of multiple year data?

Yes	No	No answer
17	8	0



Question 35: Period covered – Existing guidance

Question asked to the Member States: If yes, do you have rules or administrative guidance on how to define the period covered (e.g. with reference to business or investment cycle)? Please explain.

	There is no specific administrative guidance but rather practices or policy (in which case, 1 MS refers to 3-4 year)
2	Just general guidance. There is no period covered
1	Both types of analysis can be used (year by year of multiple year data basis) depending on circumstances to
5	At least 3 years (some MSs refer to 5 years)
1	Reference to the business , economic or product cycles, marketing strategy or any other factor affecting the results of the business operations in medium or long term.
1	No rule or administration guidance, except the OECD transfer pricing guidelines
1	Application of the OECD guidelines, and accordingly possible adjustments envisaged in the domestic guidance
1	General practice: the benchmark should cover 3-5 year period (with a theoretical possibility to accept even longer period, due to specific business cycle/industry)

Complementary comments:

Even though, there is no such guidance, multiple year data is widely used and accepted in practice (usually 3 years period is combined calculating simple or weighted average of the PLI). Tax administrator may require taxpayer to substantiate the usage of specific number of years data (e. g. explain the cyclicity of the respective business type).

However, taxpayer may not set / verify the transfer price according to the comparable data that derives from the future periods, e. g. if controlled transaction was carried out in 2015 and taxpayer verifies the price ex post (in 2016), it may use data of the years up to 2015 inclusive (2012, 2013, 2014 and/or 2015 if it is possible to find proper data of the last year at the time when benchmarking study is prepared) in the benchmarking study. That is to say, taxpayer may not use the same benchmark analysis for period 2014-2015 where comparable data referred to period 2013-2015 (as in 2014 taxpayer was not able to get information on 2015).

In our transfer pricing decree of 2013 the secretary of state write:

“2.4 Use of multiple year data (paragraph 3.75 - 3.79)

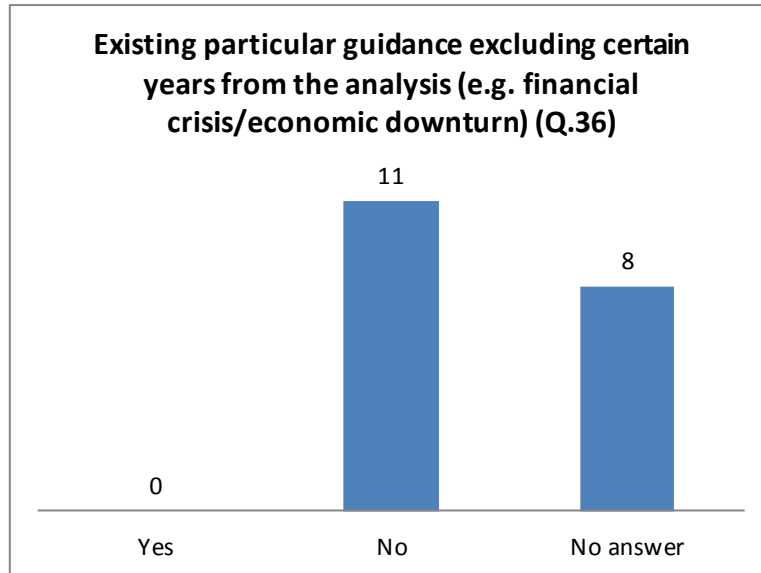
When assessing a transaction it might be useful to look at data covering multiple years. The use of multiple year data can prevent adjustments being applied in a certain year while the group receives - when several years are taken into consideration - a compensation that is in line with the arm's length principle. However, application of multiple year data can also lead to insights developed subsequently being used to assess a situation which occurred previously (hindsight). The OECD Guidelines indicate that tax administrations are not allowed to apply such insights developed with hindsight. That is why when multiple year data are used, only data of the respective year and previous years can be used. An elaboration of this is working with a progressing average. This will lead to the following system:

- First it is verified whether the compensation for the transaction to be assessed is within the arm's length range determined for the respective year. If the compensation is within the annual range
- If the compensation is outside the annual range, then such verification is repeated on the basis of
- If the compensation to be assessed is outside the arm's length annual range as well as outside

Question 36: Period covered – Possible exclusion of certain years

Question asked to the Member States: If yes, do you have some guidance on excluding some certain years from analysis (for example period characterising a financial crisis or an economic downturn)? Please explain.

Yes	No	No answer
0	12	8



6. Relevant market for comparable searches – Specific situation

Question 37: Specific circumstances/activities justifying the reference to a domestic market

Question asked to the Member States: Two specific situations were described by one of the Member State during our meeting of February 18, 2016, i.e.: Case no.1: A specific case where the National Health service system was involved, i.e. one party doing the vast majority of the purchasing in a country. Using pan European comparables appeared to be difficult because there are specific differences on the market.

Have you already encountered situations where, you due to specific circumstances, the Pan European search was not considered as relevant and, if so, which solution did you chose? Could you elaborate?

<p>This arose from discussions between our Member States and tax authorities of third countries. Because of perceived problems with the Pan-European comparables being drawn from health care providers operating in a market different to the one in our Member State, it was agreed less comparable transactions (from our country) should be included in the set in order to calculate a blended range.</p>
<p>There were practical cases when comparable companies with the same business model could not be found within European region. In one case when mark up for plastic respiratory system manufacturer was tested, companies operating in other economic areas (manufacturers of other plastic products) were chosen, however, acting within the same geographic territory (i. e. Europe).</p>
<p>yes, in specific sectors such us nuclear sector, where given the type of the services provided it was nort possible to fine EU comparable.</p>
<p>We restricted the geographic search to the domestic market.</p>
<p>Situations, when Pan-European search doesn't reflect the region/market level specific and provide misleading results (significant differences between Pan-European and regional search; differences in market level in EU-countries). In our Member State, from 1 January 2017, the new rules concerning TP documentation will be in force. Taxpayers reaching certain thresholds of revenue/costs will be obliged to prepare TP documentation (gradually: local file; special CIT-TP form; benchmark study; for groups of consolidated revenue more than 750 mIn EUR - all preceding documents plus country-by country report). Benchmark study shall consist of comparable entities, of which the registered office or central administration is situated on our country. If no such data will be available to taxpayer, the description showing that particular case or transaction is arm's length has to be attached to TP documentation.</p>

Question 38: Specific circumstances – Involvement of non-EU countries

Question asked to the Member States: Case no.2: Situations involving non-EU states who do not consider the EU as one Market or can be prescriptive in the fact that one country comparables are needed. These situations occur particularly as part of some APAs' negotiations.

Have you already encountered a similar situation at your level? Which were the third countries involved and what was their exact position? What were the solutions agreed? Please elaborate in the box below.

There are clearly differences between entities working in different geographic markets, so - other things being equal, country-specific comparables are likely to be regarded as more reliable than Pan European comparables. The US and Japan are two jurisdictions that have questioned the reliability of pan-European comparables.
Our Member State has no experience regarding bilateral or multilateral APA. Therefore, we do not command information towards third countries' position.
However, when companies based in our country (Baltic region) carry out controlled transactions with their associated entities established in neighboring countries (such as Ukraine, Russia, Belarus), data from the markets of these particular countries is used (using the capacity of Amadeus).
Third countries: USA.
In our experience in APA's negotiations, we haven't already met similar cases.
No such situation encountered.

7. Final remarks

Question 39: Any other information or comments

We appreciate the work that the EU JTPF is doing to improve the process of identifying comparables. Choosing comparables is a challenge for both tax authorities and taxpayers. It is worth highlighting that the selection of comparables and the search criteria will be very much determined depending on the facts of each case - what is appropriate in one case might not necessarily be appropriate in another case. For royalty searches, Member States are currently very dependent on databases that primarily contain US agreements. It would be useful if a similar database for European agreements was developed.
Please note, that we have based all our answers in this questionnaire on the assumption that a database search is performed using a low risk entity as a tested party when applying TNMM.
Re. Question 33 above - Additional comment on situations being "outside of the AL range": There is no specific guidance on this, as it depends on the economic circumstances and business cycles, but it is a common practice of the PTA and the companies on a TP analysis.
Complementary comment on Q6: It will depend on the fact and circumstances of the case
It would be beneficial to elaborate on the requirements for databases that could/should be used for benchmarking studies. For instance, explanation whether databases that encompass offers rather than factual deals (e. g. franchise) could be used and to what extent such information can be invoked and/or what additional actions in order to validate the information should be undertaken.

Currently State Revenue Service in our country works on the project aiming to collect additional information about unrelated enterprises and transactions in Baltics.

The idea is following:

- to get balance sheets and corporate reports of unrelated enterprises directly from commercial registers (in our country such information is not confidential!) (FIRST STAGE, optimistic 2016-2017);
- to use such information in the work of tax administration or competent authority and share such information, so long as it is in line with the law (SECOND STAGE).
- to gather and to use information on unrelated transactions and practices (the former in our country might be confidential!) (THIRD STAGE, optimistic 2017-2018);

Further, we are planning to apply for EU's financial support in order to facilitate any network platform and modern tools of translations.

The JTPF report should mention that the arm's length principle requires - as a first step - to identify the commercial and financial relations between the associated enterprises, including the conditions and economically relevant circumstances attaching to those relations in order that the controlled transactions is accurately delineated, in accordance with Section D in Chapter I in OECD TPG. It is first thereafter that the conditions and economically relevant circumstances of the controlled transaction as accurately delineated is compared to the conditions and the economically relevant circumstances of the comparable uncontrolled transactions.

Furthermore it should be noted in the JTPF report that the comparability analysis should be made in accordance with the 9 steps described in paragraph 3.4 in Chapter III in OECD TPG.

We prefer the domestic market and any further extension just in the case of insufficient comparables.

Reference to the specific guidance for SMEs:

http://www2.impots.gouv.fr/documentation/prix_transfert/guide-app-pme.pdf