

VNO NCW

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Subject
VNO-NCW comments on the public
consultation paper on Transfer Pricing
Comparability Data and Developing
Countries

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Dear Mr. Saint-Amans,

The Confederation of Netherlands Industry and Employers is happy to provide comments on the public consultation paper on Transfer Pricing Comparability Data and Developing Countries published on 11 March 2014.

VNO-NCW welcomes the intention behind the OECD proposals to increase availability of comparables, including improving access to comparables, and improving the usage of available sources in order to provide tax administrations with more relevant and reliable information to perform an efficient and robust risk assessment analysis.

However, the OECD proposals should not increase the already high compliance costs for taxpayers in the area of transfer pricing benchmarks. Besides it should also be analysed (as part of the solution) how double taxation can be prevented, e.g. when unilaterally applying secret comparables, profit split, value chain analysis, the “sixth method”, safe harbours, etc.

If no or limited local comparables are available, in practice a practical approach applying a broader use of available information, such as regional comparables or industry references in case of same or similar markets, can be quite efficient and effective in finding solutions in line with the arm’s length principle.

Expanding access to data sources for comparables

In line with the provisions of this paper, we recognize situations in practice in which identifying local comparables in a certain country/region proves to be a challenge due to limited number of comparable independent companies or lack of financial information on such comparables.

However, in our view the suggestion to “populate an internal comparables database” could create great temptations for tax authorities to make use of secret comparables and could create controversial and unfair situations. We therefore recommend that this approach is rejected, “unless the tax administration was able, within the limits of its domestic confidentiality requirements, to disclose such data to the taxpayer for his consideration at the time of setting the price so there would be an adequate opportunity for the taxpayer to take into account and defend its own position and to safeguard effective judicial control by the courts” (OECD Guidelines).

Therefore, we would suggest to not encourage the use of secret comparables, either to select audit targets or to form the basis of an assessment against a taxpayer. If, however, certain tax authorities do make use of secret comparables, the assessed taxpayer should be allowed to obtain full disclosure. Not only of the comparables, but of all information relating thereto, including the identity of the disclosing taxpayer, since that is the only way the assessed taxpayer can test the comparability of the comparable.

More effective use of data sources for comparables

In principle, we can only support the possibility mentioned in this paper of evaluating a transaction by testing the foreign counterparty (in case there are no local comparables) if this is a least complex entity. If the foreign counterparty is e.g. the functional principal, in our view testing this foreign counterparty is not in line with the current OECD Guidelines.

Also from a practical perspective, if the foreign counterparty is a more complex entity and thus exercising more functions or taking more risks and not only for the transaction under review, but also within other transactions/countries, then the issue that is wished to be solved here (i.e. lack of sufficient reliable local information) is still hard to solve. Obtaining segmented information for the transaction under discussion might be very difficult in practice and will most probably only have to be developed for this purpose. Besides a lot of business and financial information will have to be provided by the foreign complex entity which increases the compliance burden without a reasonable chance of a solution.

To avoid a situation where (the lack of) comparables determines the tested party, we recommend that the paper emphasizes that the selection of the tested party and the most appropriate transfer pricing method should follow a functional analysis and the characterization of the entities in a transaction. To overcome the lack of (local) comparables, we recommend looking at available data options on a wider scale,

including the application of regional comparables or industry references in similar markets, as suggested above.

Comparability adjustments should only be made in case of substantial deviations (materiality test).

We agree on the importance and difficulty of developing the skills required to ensure the proper use of commercial databases. Therefore, we encourage education initiatives (through the OECD's existing "Tax Inspectors Without Borders" or "Capacity Building" programs). We also note that experience could also be gathered from developed country tax authorities that have either developed or expanded their transfer pricing capability quite recently and have managed to enhance and improve their use of comparables data within the existing transfer pricing framework.

Approaches to reducing reliance on direct comparables

We would like to express our concern regarding any reference to solutions that do not fully take into account a functional analysis exercise (e.g. sixth method) as these could generate inconsistencies with arm's length principle and eventually trigger double taxation. Our view is based on the fact that such solutions do not consider key critical business drivers in the determination of an arm's length price.

Paragraph 25 of the Discussion Draft mentions both economic analysis and global value chain analysis but does not explain them, probably because these concepts are still under discussion for their possible more general application in transfer pricing matters. We feel that it is crucial – especially with regard to developing countries – that solutions be straightforward to understand and practical to implement. For that reason VNO-NCW would express strong reserves on both forms of analysis and finds it inappropriate to reference to them without clarity on their use, with the risk of unpredictable interpretation of these concepts by different countries.

Furthermore, we do support the use safe harbours, however, in view of avoidance of double taxation, they should be optional and not mandatory.

Advance pricing agreements and mutual agreement proceedings

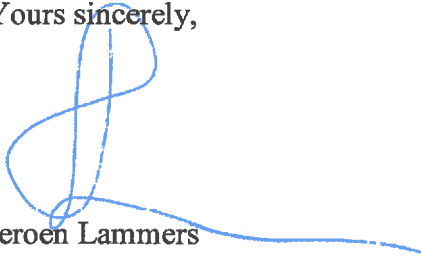
We support the use of APAs and MAPs for addressing tax controversy in a more efficient manner, but in practice these processes unfortunately often take a lot of time. Furthermore, we would like to note that APAs and MAPs to agree on structures that lack sufficiently detailed comparables to support the arm's length nature have a higher risk of not necessarily resulting in agreement between parties.

We recommend that the OECD emphasizes the use of a practical approach to missing comparables as a starting point for the completion of an arm's length transfer pricing model, before APAs or MAPs are entered into – as well as the need for more efficiency and agreed timeframes.

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We hope you will take these comments in consideration in developing actions to address the concerns over the lack of data on comparables expressed by developing countries. We are, of course, available to discuss the comments made here, should you find this useful.

Yours sincerely,



Jeroen Lammers
Manager Fiscal Affairs