

PUBLIC INVITATION ON A SERIES OF DRAFTS ISSUES NOTES
May 10, 2006 : French Banking Federation comments

You will find hereafter the French Banking Federation comments on the first conclusions of the OECD regarding the difficult question of comparability. If we agree with the Medef comments, we would like to point out, with this paper, the specific banking aspects.

It is obvious that OECD worked enormously on this subject and undertook a significant work of census of the various local practices in term of comparability in transfer pricing area.

Beyond the comments relating to the various topics,

It appears necessary to us to remind that the OECD reports must remain guidelines above all, and that the addition of too many precise details, of too detailed examples, would harm the tax/legal safety of the companies. As OECD pointed out, transfer pricing are not an exact science. In this area it is better being roughly right than precisely false.

For all those reasons it is necessary to remind that the transfer pricing analysis must be made on a case-by-case basis and that only an economic analysis makes it possible to draw a certain number of conclusions from facts.

Too many precise details would make it possible to tax authorities to lock up the taxpayers in purely tax artificial models and in fine opposite with any economic reality like with the arm's length principle.

Theme 2 : Timing issues in comparability

The price of the transactions with Third Parties is established on the basis of the information available to the Parties on the market at the time of the realization of the transaction.

A distinction should be made between situations when it is necessary to work ex ante to determine transfer prices, and situations where calculations are made at year-end (for example, in the case of a profit split).

In both cases, anyway, information to be used is the information available at the time when the data are needed for the computation. Therefore, it does not seem appropriate to try and to impose to taxpayers to make adjustments to take into consideration data released ex post, even if the information that was used at the time of the computation was referring to former years data.

To our point of view, the Working Party should be clearer on that point.

Concerning the production of the justification to the Tax Authorities, the Tax Payer should be able to provide such information when requested in the course of a tax audit but we do not consider it is feasible and even appropriate to provide this information at the Tax Return Filing Date (too expensive to provide TP study for all transactions / business and timing issue for the collect of the information).

Theme 3 : Internal comparables

The document insists on the preference to be given to internal comparables rather than external ones. On our point of view, both kind of comparables should be equally considered and chosen by the taxpayer according to their respective relevance.

In conclusion, it is important not to establish a hierarchy in the choice of comparable (internal then external), in order not to incite the tax authorities to reverse the burden of proof and to make support with the taxpayers of new documentary charges.

Theme 4 : Determination of available sources of information and of their reliability

The use of secret/confidential information should be excluded in any case.

The OECD should rather put emphasis on the need for tax administrations to try and take into account the reasonable efforts made by taxpayers to find relevant information and accept that they can use another method when no comparable with sufficient public data is available.

Theme 5 : Uncontrolled transaction

The issue is so complex that tax administrations should be advised to evaluate the reasonable efforts made by taxpayers for their comparable searches, rather than apply too strictly the independence criterion.

Applying the independence criterion in too strict a way may lead to potentially comparable uncontrolled transactions being less comparable with regard to the other comparability criteria.

Theme 7 : Selecting or rejecting third parties or third party transactions: degree of objectivity of the list of external comparables

Even if this specific point does not raise, according to us, any material issue, we can remind that the OECD Guidelines should remain guidelines and not become too strict rules: in the present case, no further guidance has to be given, and it is important to leave the choice to taxpayers to use the best possible approach given the facts and circumstances of their own case.

In the event of disagreement with the taxpayer; tax administrations should justify their position and their alternative choice, and not make "cherry picking".

Theme 10 : Aggregation of transactions

It is important to simplify the analysis of the tax payer transfer pricing method and reduce the amount of fees incurred for the transfer pricing documentation; therefore when a method is applied , explained and justified by comparables (aggregated or not) the check by other methods should not be necessary.

The OECD must understand that transaction by transaction information is very hardly available, and that aggregated data have to be fully accepted.

Theme 12 : Documenting a search for comparables

Taking into account the comments on the themes 1 to 11, companies do not see the reasons why the OECD would define directions on the optimal structure of the documentation.

In conclusion, we consider that the organisation of the transfer pricing documentation has to remain the company's choice.