



## INVITATION TO COMMENT ON COMPARABILITY ISSUES

### Introduction

1. As part of its procedures for monitoring the implementation of the 1995 Transfer Pricing Guidelines (“the 1995 TP Guidelines”), the Working Party No. 6 of the OECD Committee on Fiscal Affairs has selected two areas to be considered in priority:

- The application of transactional profit methods (i.e., the transactional profit split methods and the transactional net margin method) and
- Comparability issues encountered when applying the transfer pricing methods authorised by the 1995 TP Guidelines (whether traditional transaction methods or transactional profit methods).

2. We believe it is essential for our work to obtain input from the business community and from other interested non-governmental parties. As a first step we are therefore issuing an open invitation to you to contribute to this OECD project by providing us with your experience or comments on a number of issues in relation to comparability that were identified by the Working Party and are listed below, as well as on any other related issue you would wish to raise. An invitation to comment on issues related to profit methods will be issued later this year.

3. We ask you to identify yourself in this questionnaire as we may need to follow-up on your responses. Subject to prior authorisation by the commentators, we may publish some of the contributions received on our internet site.

4. Input can be provided by individual taxpayers or on a more collective basis by industry bodies or by professional advisory firms. If you would like further information or would like to discuss the substantive issues please do not hesitate to contact Caroline Silberztein, Head of the Transfer Pricing Unit ([Caroline.Silberztein@oecd.org](mailto:Caroline.Silberztein@oecd.org) ; Telephone 33 (0)1 45 24 14 94) or John Neighbour, Head of the Tax Treaty and Transfer Pricing Division ([John.Neighbour@oecd.org](mailto:John.Neighbour@oecd.org); Telephone 33 1 45 24 96 37).

5. Please send your reply either by fax, mail or e-mail to the following address **by 30 June 2003**:

Caroline Silberztein - DAF/CTPA/TTP  
OECD Centre for Tax Policy and Administration  
2, rue André-Pascal 75775 Paris Cedex 16  
France

Fax: 33 (0)1 44 30 63 13

E-mail: [Caroline.Silberztein@oecd.org](mailto:Caroline.Silberztein@oecd.org) and copied to [Charlotte.Todd@oecd.org](mailto:Charlotte.Todd@oecd.org)

## INVITATION TO COMMENT ON COMPARABILITY ISSUES

### Contact for follow-up:

Name:

Organisation:

Country:

E-mail address:

Telephone:

Fax:

Please indicate whether you are responding to this questionnaire :

- As an academic or student
- As a corporate taxpayer
- On behalf of other taxpayer(s) (e.g. advisory firm, law firm, business association, etc.)
- Other (please specify)

Where you are replying on behalf of others please construe the term “you” to mean “your organisation” or “your clients” as appropriate.

Do you authorize the OECD to publish your contribution on our internet site?

- Yes
- No

## LIST OF ISSUES FOR CONSIDERATION

### Notes for commentators:

1. Issues identified below are numbered “COMP XX”. In order to facilitate the analysis of the contributions, you are asked to refer to the existing numbering each time you provide comments on an issue that is already identified.
2. Please feel free to comment only on some of the issues depending on your areas of interest, and/or to add any other issue if the list appears to be incomplete.
3. For each of the issues you wish to comment on, we would be interested in knowing:
  - Whether you think this is a real issue
  - Whether you think this is an important issue
  - Any experience you may have with respect to this issue
  - Any suggestion you may have for improving the existing guidance in the 1995 TP Guidelines with respect to this issue

### **Issue: COMP 1 – Requirement to perform an analysis of *transactions* vs. an analysis of third party information gathered at company level**

**DESCRIPTION:** All the OECD transfer pricing methods, whether traditional or profit based methods, are transactional methods. In practice, third party information is not often available at transactional level. Can third party data at company level meet the arm’s length standard and if so under what conditions and to what extent? Should existing guidance in paragraph 1.42 of the Guidelines on combined transactions be extended to provide guidance on aggregated third party transactions?

### **Issue: COMP 2 – Need to rely on transactions that took place between independent enterprises**

**DESCRIPTION:** Should information on third party enterprises that are part of another MNE group and as such engaged in controlled transactions with associated enterprises be systematically rejected, or should such information be regarded as providing useful information and, if this is the case, to what extent? Should existing guidance in paragraph 1.70 of the Guidelines be clarified / developed?

**Issue: COMP 3 – Need to obtain third party information relevant to the review of the five comparability factors**

**DESCRIPTION:** Can taxpayers obtain sufficient public information on third parties that are potentially comparable in order to review them in light of the five comparability factors? How do taxpayers deal with the practical issues they encounter in this respect?

**Issue: COMP 4 – Need to ensure objectivity of the list of external comparables**

**DESCRIPTION:** Is it desirable / possible to ensure that potentially relevant external comparables are not excluded either because of the application of a too drastic comparability standard, or because of “cherry-picking” third party information?

**Issue: COMP 5 – Determination of the years to be covered and use of multiple year data**

**DESCRIPTION:** It is often the case in practice that taxpayers rely on previous year data to determine future transfer pricing, because third party information is only published after the year end. How do taxpayers deal with this issue? Please comment on retroactive adjustments and use of multiple year data.

**Issue: COMP 6 – Choice of relevant sources of information, including but not limited to commercial database**

**DESCRIPTION:** Can commercial database fulfil the arm’s length principle and if so to what extent? Please comment on the pros and cons of commercial database, as well as on the use of alternative sources of information. How do taxpayers deal with countries where there is limited public information?

## **Issue: COMP 7 – Definition of comparability adjustments where they are appropriate**

**DESCRIPTION:** Should further guidance be developed on comparability adjustments, e.g. when to perform which adjustment, and how? How to determine whether adjustments are reliable enough to satisfy the arm's length principle? How to deal with cases where numerous or highly sophisticated adjustments are performed to information on uncontrolled transactions that may not prima facie satisfy a very high standard of comparability (e.g. due to difficulties in obtaining information on the five comparability factors)?

## **Issue: COMP 8 – Interpretation and use of data collected**

**DESCRIPTION:** Diverging practices exist on the definition of the arm's length range and use of statistical tools. Do you consider the range should include all the data obtained or should the extreme results be excluded? Should the top and bottom of the range be systematically removed (e.g. by using an inter-quartile or similar type of range)? How should loss-making comparables be dealt with?

Should the answers to these questions be different depending on the "quality" of the comparables (e.g. in cases where a less stringent comparability standard would be applied by a taxpayer operating in a highly integrated business where it is very difficult to find independent comparables that fully satisfy the existing comparability standard)?

## **Issue: COMP 9 – Specific comparability issues when applying transactional profit methods**

**DESCRIPTION:** Interestingly, taxpayers often explain recouring to profit methods as a means to overcome some of the issues that arise in practice with respect to traditional methods. Concerning the use of the transactional net margin method, it is often argued that a net margin approach is less sensitive to some of the discrepancies that may exist between the controlled transaction and the third party transactions being compared – for instance net margin indicators are less sensitive to differences in accounting standards as well as to some differences in products or functions. As far as the transactional profit split methods are concerned, it may be particularly difficult to obtain external market data on profit splits achieved by independent parties and in practice this difficulty often leads taxpayers to implement a profit split method without such external comparable data – some taxpayers in fact argue that using a profit split method is a solution to the lack of external comparable data.

In your opinion, is there is a need to develop further guidance on specific comparability issues in the context of profit methods? Please comment on both the transactional net margin method and the transactional profit split methods.