Platform for Collaboration on Tax

By email to: GlobalTaxPlatform@worldbank.org

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PwC's Comments on the Draft Toolkit to help developing countries address the lack of comparables for transfer pricing analyses

PricewaterhouseCoopers International Limited, on behalf of the Network Member Firms of PwC (PwC), thanks the Global Tax Platform for the opportunity to provide comments on the draft toolkit to help developing countries address the lack of comparables for transfer pricing analyses.

The BEPS project seeks to prevent profit shifting and to preserve the tax base by focussing on transparency and aligning transfer pricing outcomes with value creation. In the implementation phase, the focus lies on a coherent and inclusive approach, evident in the namesake 'Inclusive Framework' in which developing countries stand on an equal footing with OECD members. Against this backdrop, the discussion draft focuses on the determination of comparable market prices from the perspective of developing economies' tax administrations, who often tackle a lack of local comparable data to derive market prices from as well as a lack of transfer pricing audit capacity.

While the initiative is welcomed and the need for further guidance recognised, we believe the discussion draft could provide additional context on the significant role of one-sided transfer pricing policies particularly in view of the transparency agenda visible in several BEPS work streams but notably Actions 8-10 (Aligning Transfer Pricing Outcomes with Value Creation) and Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting) of the BEPS project. This is especially pressing in light of the holistic functional analyses considered in the revision of Chapter I (in particular with regard to Risk) and Chapter V (a three tiered approach including the Master File concept), but also in light of the OECD discussion draft on BEPS Actions 8-10 – Revised Guidance on Profit Splits1, which references value chain analysis as a tool in helping to accurately delineate the actual transaction. Additional guidance could facilitate the necessary transparency tax authorities desire to put the contributions by local operations into a broader global context.

[1] Discussion Draft Published 4 July 2016 – Public Consultation held on 12 October 2016

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The comments in this submission only address in detail the toolkit, except in relation to question 6 where reference is made to the Discussion Draft Addressing the Information Gaps on Prices of Minerals sold in an Intermediate Form (Minerals DD).

Our main comments are summarized below:

- **General:**
  This toolkit is only one of several publications, some still in the pipeline, by partners of the Platform. On 23 December 2016, the World Bank Group published the handbook Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners. The UN is preparing the second edition of the Practical Manual on Transfer Pricing for Developing Countries for publication this year. Further, as a result of BEPS, we are still awaiting the updated version of the OECD Transfer Pricing Guidelines (TPG). We recognise the value of these efforts and the need for such toolkits, and see this joint initiative by the Platform as an opportunity to bring the separate publications together to provide coherent, unified guidance to tax administrations and taxpayers.

  We also believe there is a benefit in making the toolkit an on-going initiative allowing the opportunity of regular feed-back reviews and updates.

- **Cooperative compliance:**
  This toolkit provides guidance from the perspective of developing economies' tax administrations in an audit situation. Though we agree the audit and dispute aspect is very important, the toolkit should also address the compliance perspective of taxpayers, who face similar issues with lack of comparable data. Aware that new systems take time to implement and that capacity building is a long-term goal, we suggest to highlight this toolkit as a platform for a collaborative approach between taxpayer and tax administration, allowing for real-time reviews and taxpayer-tax authorities' co-operation rather than retrospective adjustments in tax audits.

- **Prescriptive rules:**
  We generally believe that using prescriptive rules in transfer pricing is not appropriate. In light of the differences between locally established methods, for example, the existing variations of the 'sixth method' under domestic law of certain countries (as recognised on p. 18 of the discussion draft), we question whether this approach provides important consistency in the application of those locally established methods. A unilateral application of such rules and thus a generalization of this model carries a danger of double taxation. This is especially true in cases where prescriptive rules and commodity prices deviate from the arm's length price and lack a mechanism for the taxpayer to demonstrate that a different approach may be considered the market price for a good or service. Further, the toolkit needs clarification on the access to domestic appeal procedures and MAP under the commodity pricing or other prescriptive approaches. This is raised particularly in light of the reference as an anti-avoidance measure, which may limit the access to MAP for the application of national regulations.

When countries choose to apply prescriptive rules for determining arm's length results, it is important that the outcomes under the prescriptive rules:

1. approximate an arm's length result;
2. provide the taxpayer with the possibility to demonstrate that the transfer pricing approach it has considered in the related party transaction is at arm's length; and
3. allow access to appeal procedures and MAP in case the prescriptive rule is used as an anti-avoidance measure.

- **Safe harbours:**
  In general, we support the use of bilateral and multilateral safe harbours and APAs. This should promote pro-active sharing of industry information to frame comparability, and over time lead to greater consensus on factors influencing comparability. Safe harbours should however not be used in a manner that overrides the arm's length principle by imposing unilateral or irrefutable directives for an assumed arm's length compensation. In this regard, we refer to our comments on prescriptive rules above.

- **Secret comparables and confidentiality:**
  The use of secret comparables to perform a transfer pricing adjustment should not be encouraged in the toolkit. Secret comparables may be used in a transfer pricing risk assessment or case selection as well as the circumstances described in paragraph 3.36 of the OECD TPG. In this regard, tax authorities should be mindful of the commercial sensitivity of taxpayer information in an open economy, as well as the competition law concerning disclosure of information. We further encourage developing economies to sign up to, and adhere to, the international standard on the (automatic) exchange of information and allow for provisions in domestic law that also meet those standards, providing access to a series of useful documentation, including the country-by-country (CbC) reports, if all requirements are met. In such cases developing economies may need to build the necessary capacity, including access to the electronic tools as well as training for tax authority staff.

- **Adjustment calculations:**
  Comparability adjustments should be applied in a balanced way and performed only when enhancing the reliability of the analysis rather than a formulaic approach. A thorough comparability, including functional, analysis should be preferred, leading to an understanding of the circumstances and conditions of the transactions. Whether comparability adjustments are needed also depends on the compliance burden and costs related to such adjustments and the relative value of the adjustments in enhancing reliability. It also requires good judgement. Reference could be

made to the guidance developed by the EU Joint Transfer Pricing Forum in its Draft Report on the Use of Comparables in the EU, in particular recommendation 7.[2]

This document includes two appendices with further comments. In the first appendix PwC has identified various approaches to many of the questions raised in the Draft Toolkit. A second appendix includes detailed comments that follow the structure of the document.
For any clarification of this response, please contact the undersigned or any of the contacts below. We look forward to discussing any questions you have on the points we raise above or on other specific matters raised by respondents to the draft toolkit and would welcome the opportunity to contribute to the discussion as part of a public consultation meeting.

Yours faithfully,

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[2] EU Joint Transfer Pricing Forum, Revised Draft Report on the Use of Comparables in the EU (doc. JTPF/007/2016/REV/EN).

Appendix 1: Questionnaire responses

In the following, we provide responses to the questions provided in the press release.

1. **Does this toolkit effectively help address the challenges identified by developing countries in finding the data needed to carry out a transfer pricing analysis as part of a tax audit?**

As a starting point, adherence to and compliance with the arm's length principle should be the overriding objective and in no way should provide for major deviations from the arm's length standard.
In this regard, we particularly welcome the use of safe harbours in order to meet and simplify some of the needs and problems of both tax administrations and taxpayers.
Of note is that the issues addressed with this toolkit are valid not only for developing economies, but also developed economies that face a lack of reliable information on local market comparables.

2. **How can [we make] better use of administrative information, in a way that maintains taxpayer confidentiality, be effectively facilitated at a country and regional level?**

The term 'administrative information' is unclear and may include secret comparables, i.e. market information that is accessible to the tax administration but not available in the public domain. On the use of secret comparables, please see our general comments in the main body of this submission.
Another issue to be considered is the impact of governmental regulators other than tax administrations, which may provide pricing information for certain products. While these prices are recognized as useful e.g. to estimate differences between local prices and international quotes, they should serve as information only to determine the arm's length price. Alternative sources should be admitted when they are shown to deviate from market prices. This is particularly true in cases where such reference prices serve to establish incentives or disincentives related to economic policies, rather than report the market value of a product or service.

3. **How could the reliability of potential comparables from other geographic markets be tested?**

In our view there is no "one-size-fits-all" solution; instead, geographic and local considerations and case-by-case evaluations are required. In particular, the comparability of data will depend on whether the transaction takes place in a global market, regional market or a local market, being higher for global rather than regional transactions. In this regard, we welcome further work on the factors of comparability for non-domestic comparables.
Further, we support the notion to reduce overly strict independence criteria where there is a lack of reliable comparables.
Critical are different approaches to safe harbours (bilateral / multilateral / regional), which can serve the benefit of both tax administrations and taxpayers, in reaching an appropriate tax result and avoiding

double taxation. While references to safe harbours are made in the toolkit, the addition of the memorandum of understanding for competent authorities to establish bilateral safe harbours as provided in the revised Annex I to Chapter IV of the OECD TPG is deemed helpful. With regards to the use of unilateral safe harbours and the related danger of potential double taxation we refer to our general comments on prescriptive rules and safe harbours in the main body of this submission.

4. Are there best practices or other reliable approaches for dealing with a lack of comparables not addressed in the discussion draft?

For commodities transactions, a lack of local reference prices should only lead to the use of international quoted prices if they can accurately reflect the dynamics of the local market and, if necessary, after making adjustments. Quoted prices particularly in organized transparent markets (e.g. Chicago Board of Trade, London Metal Exchange, New York Mercantile Exchange, etc.) may in certain cases not fully reflect transactions of physical products, but rather the supply and demand of financial hedges. The use of standardized contracts and the possibility of settling an obligation through taking an offsetting position without delivery of physical goods allows for the participation of agents whose main purpose is to hedge variations in the general commodity price level, allowing large volumes of transactions not representative of actual goods and service deliveries. While these markets have a fundamental role in the process of price discovery, they might differ from transactions involving the exchange of physical products and often apply pricing formulas, thus providing a statistical framework that for specific tested transactions may serve as information only. This may be true also for fixed-price transactions common in the agricultural market, since fixed prices are negotiated taking into consideration the dynamics of the market in terms of quotes, premiums and discounts, at the moment in which the transaction is carried out.

To deduct applicable market prices and assure comparability versus the quotation price, the following should be taken into consideration:

- Internal comparable uncontrolled transactions between the tested parties and independent third parties where a premium or discount is applied to the quoted price
- Published prices by reporting agencies or brokers for transactions with specific characteristics (products of a certain quality, delivered in a specific place and under regular conditions).
- Comparability adjustments based on specifics of the tested transactions such as data on freight costs, quality premiums or discounts for non-standard products. This may be based on internal data with independent third parties of market data and standards.

5. What other adjustments for geographic market differences could be made, and in what circumstances? How could the reliability of such adjustments be empirically tested?

We have no additional suggested adjustments for geographic market differences.

However, of note is that an increase in profit potential – as is demonstrated in the examples in the toolkit – does not necessarily lead to an increased actual profit, and could even result in a loss, on realisation of the increased risk.

We question the adjustments as described in Appendix 13 as it suggests a correlation between higher country risk and higher profits. Although the OECD TPG consider the assumption of risks to be a crucial part of the functional analysis and the process of delineating a transaction, we disagree with the notion that the assumption of greater risks carries the effective realisation of greater profits. If anything, the assumption of greater risk could result in more volatile results. This is equally important in the context of country risk adjustments where some Revenue Authorities expect a premium because of country risk. Risk equally implies the potential for profit **and loss**. With regards to the country risk adjustment, we suggest expanding the range to account for the volatility rather than increasing the profitability of the tested party operating in a different market than the comparable.

6. Do the mineral pricing case studies accurately reflect market trading terms? Are there other adjustments that would be routinely made when these mineral products are sold?

We welcome the additional guidance and insight this document provides and would note that it includes useful examples, both in the case studies of the draft toolkit and in the Minerals DD, as we consider the latter is a particularly helpful tool for providing transparency to the pricing mechanism of this industry. We also stress that the Minerals DD should not be viewed and applied in isolation, but rather in accordance with the draft toolkit and existing transfer pricing guidance. Similarly, the formulaic approach proposed in the Minerals DD should be used as helpful guidance to determine the arm's length price, taking into account the facts and circumstances of the individual case. This is especially true for examples which deviate from the specifics of provided examples, for which the approach needs to be reviewed. We therefore recommend that the toolkit should discourage attempts to extrapolate the principles and conclusions reached in the examples to other minerals without a detailed analysis of the underlying transaction.

Appendix 2: Detailed Comments

The following provides comments not directly linked to the questions above, addressing primarily editorial concerns and suggestions under the different parts or sections. The comments follow the structure of the toolkit.

Part I: Introduction – Addressing the difficulties in performing comparability analyses

The first couple of paragraphs seem to put a lot of focus on the transfer 'price', while price is only a part of the conditions that may influence the profit allocation between related parties in accordance with the arm's length principle. We would suggest that the term 'price' be explained in that sense.

Part II: Issues arising when conducting a comparability analysis

Section 1, p.9: Selection of the most appropriate method

Original text: 'Once this [accurately delineating the transaction] is understood, it is necessary to select the most appropriate transfer pricing method and identify one or more potential uncontrolled transactions that may be considered comparable'.

We suggest clarifying that the selection of the most appropriate transfer pricing method to the circumstances of the case does not need to be performed straight after the delineation of the transaction. As indicated in the table under section 2 and in contrast to the typical process for determining a comparability analysis under the OECD TPG, the most appropriate method is only selected after accurately delineating the transaction and the initial review of comparables information (see paragraph 2.2 of the OECD TPG: There are four principles on the selection of the most appropriate transfer pricing method covering: strengths and weaknesses of the methods; appropriateness of the method in view of the controlled transaction, based in particular on a functional analysis; availability of reliable information (in particular comparables); and reliability of comparability adjustments).

We suggest to edit the above sentence as follows: 'Once this is understood **and one or more potential uncontrolled transactions that may be considered comparable have been identified**, it is necessary to select the most appropriate transfer pricing method'.

Section 2.2, p. 11: Clear priority of substance over form when the contractual relations and the conduct are misaligned

Original text: 'It is important to verify any contractual terms by reference to the conduct of the parties. While a transfer pricing analysis will typically start from the related party contracts, there is a clear priority of substance over form to the extent the two are misaligned.'

We believe the guidance as drafted could be misinterpreted in such a way that the tax administration is allowed to disregard or re-characterise the transaction as it sees fit. We also believe that this is not the intention of the guidance and would be contrary to the revised guidance under the BEPS action plan. Further there could be cases where the contract and the conduct of the parties are aligned, but the transaction as such may not have substance. Care should be taken that a tax administration does not replace a valid commercial transaction by its own interpretation of what the transaction should look like.

The sentences could be revised as follows: 'It is important to verify any contractual terms by reference to the conduct of the parties. While a transfer pricing analysis will typically start from the related party contracts, **when the** substance **and the** form are **clearly** misaligned **or inconsistent the transaction will be determined according to the conduct of the parties**.'

Section 2.2 (and Appendix 1): Functional analysis and questionnaire

The referenced questionnaire provides a detailed overview of the functions and risks that may occur in a multinational enterprise. The warning that the questionnaire should be tailored to the facts and circumstances of the specific case is welcomed. The risk still remains, however, that the list will be copied and sent to the taxpayer without adaption to the specific circumstances. We have noticed that the questionnaire does not address issues related to assets, which is one of the three factors under a functional analysis.

Further, under BEPS Action 13 on transfer pricing documentation, guidance on the master file[3] and local file concept was developed. The master file should contain a brief functional analysis at group level and the local file should contain 'a detailed comparability and functional analysis of the taxpayer and relevant associated enterprises with respect to each documented category of controlled transactions, including any changes compared to prior years'. We understand from footnote 48 that a toolkit on transfer pricing documentation will be developed. In anticipation of the toolkit on documentation we believe that this toolkit on comparability could make reference to the Master File and Local File concept as developed under BEPS Action 13. It would help the developing economies in accessing the appropriate information for risk assessment and case selection and would assist the multinational enterprise in streamlining the transfer pricing documentation.

Finally, the ongoing work of the Platform to provide additional guidance on the use of the profit split method (PSM) references value chain analysis as a tool in helping to delineate the actual transaction.

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[3] A reference to the master file can only found in appendix 8 and footnote 16 of the toolkit.

Additional guidance could facilitate the necessary transparency tax authorities desire to put the contributions by local operations into a broader global context.

Section 2.2: Assumption of risk

In line with the comment above, a developing economy (lacking audit and information capacity) would be best served in performing a detailed analysis as described on p. 12 with access to the Master File and the Local File as developed by guidance under BEPS Action 13 or a value chain analysis as proposed by the discussion draft on 'BEPS Actions 8-10 – Revised Guidance on Profit Splits'.

Section 2.2, p.13: Opportunistic behaviour of the taxpayer in choosing the transfer pricing method

Original text: 'many income tax systems are based on self-assessment under which the taxpayer chooses the transfer pricing method. Tax authorities must be alert to the possibility of opportunistic behaviour in this choice.'

We would welcome more balanced wording in this context. First, the taxpayer choosing the transfer pricing method is the norm, both under a self-assessment approach and under an audit approach. Secondly, this choice should be based on the four criteria defined in paragraph 2.2 of the OECD TPG, which limits the element of opportunism as currently suggested in the draft toolkit.

Section 2.4, p. 14: CUP method application

Original text: 'The CUP method is most often applied:
- where an internal comparable is available;
- […]
- for the licensing of some intangibles, particularly where the license is not unique and valuable, to benchmark a royalty rate.'

In line with previous comments, we suggest to revise the text as follows:

'The CUP method is most often **reliably** applied:

- where an internal comparable is available**, provided it meets the same functional analysis as the controlled transaction**;
- […]
- for the licensing of some intangibles, particularly where the license is not unique and valuable, to benchmark a royalty rate and **comparable market data is available**.'

Section 2.4, p. 15, 16: TNMM application

The guidance could clarify that 'net profit' should be interpreted as operational profit in most cases (EBIT).

The guidance could also better indicate how the Berry ratio can be used for limited risk intermediary enterprises with no intangibles, as follows.

Original text: 'Berry ratio for limited risk intermediary enterprises with no intangibles, i.e. where the tested party buys from and sells to associates (for example, sales facilitation services).'

We would suggest to slightly modify the bullet as follows: 'Berry ratio for limited risk intermediary enterprises with no **unique or valuable** intangibles, i.e. where the tested party buys from and sells to associates (for example, sales facilitation services).'

Section 2.4.2: Commodity pricing and prescriptive approaches

With regards to the definition and description of these approaches, we suggest to use the wording reflected under the BEPS Action 8-10 and which will be included under paragraphs 2.16A to 2.16E of the revised OECD TPG. See also our general comments above on prescriptive rules in the main body of this submission.

Section 3.2 (p.22): Sources of potential comparables data and typical types of data used

Original text: 'However, in practice, application of the arm's length principle is heavily reliant in practice on external comparables'

Suggest to remove the repetition of the term 'in practice' and revise as follows: 'However, in practice, application of the arm's length principle is heavily reliant on external comparables.'

Section 4.1.1: Information in the hands of the tax authority

The guidance provides a balanced view on the use of secret comparables. The use of such secret comparables to perform transfer pricing adjustments should however be discouraged. Such secret comparables can at most be used for transfer pricing risk assessment or case selection for audit, see paragraph 3.36 of the OECD TPG.

Section 4.1.2 (p.32): Customs data

Original text: 'However, mis pricing can also affect customs values.'

We welcome the general use of the term arm's length pricing or non-arm's length pricing. These terms are neutral and thus preferable over other terms which could be misbalanced towards intent to incorrectly set the transfer price.

Suggestion for revision: ‘However, **non-arm’s length pricing** can also affect customs values.’

Section 5: Determination of and making comparability adjustments where appropriate

See general comments above on comparability adjustments in the main body of this submission.

Section 6.1: Arm’s length range

Section 6.1 on arm’s length range suggests on p. 47 ‘capping’ a wide range by determining the highest point in the range as not exceeding a certain percentage of the lowest point of the range. The term capping is understood to include both floor and ceiling, which should be included in a definition. In this case, two issues may arise. The first relates to whether such capping is in accordance with the arm’s length principle and the arm’s length range approach, in particular when all the comparables left in the set are equally reliable, but still lead to a wide range. The second relates to the fact that the other tax administration may not accept the capping of the range, leading to controversy and possibly unresolved double taxation. When a country decides to have a range cap in its domestic law, appropriate appeal procedures and access to MAP should be warranted. In case the analysis results in a wide range, it may be more appropriate to make use of statistical approaches. Further the taxpayer should be able to demonstrate that the wide range is still an arm’s length range.

Part III: Approaches to applying internationally accepted principles in the absence of comparables

Section 1: Objective

On p. 52, mention is made that many developing economies that report a lack of capacity negotiate an arm’s length result. This statement suggests that tax administrations in the first instance conduct their own analysis and conclude with an arm’s length outcome in all cases. This may be misleading, as a separate analysis is not the initial purpose of an audit.

Section 3.1: Testing the benefit received

We agree with and understand the benefit test in the framework of services (under the revised OECD TPG as a result of the BEPS Action 8-10 Report) and possibly in the framework of intangibles (although the OECD TPG do not refer to a benefit test in the framework of intangibles).

The benefit test is part of the discussion about whether a service is or has been rendered. As such, the benefit test has a place in the first part of the comparability analysis, namely the delineation of the actual transaction. It is not clear to us, however, how the benefit test leads to the correct determination of an arm’s length result in the absence of comparables. It only indicates that a transaction would have been performed between independent enterprises under similar conditions.

Section 4: Safe Harbours

See our general comments on safe harbours in the main body of this submission and response to question 3 in Appendix 1.

Section 4.3: Other prescriptive rules

See our general comments on prescriptive rules in the main body of this submission. As above, when countries choose to apply prescriptive rules for determining arm's length results, it is important that the outcomes under the prescriptive rules:

1. approximate arm's length result;
2. provide the taxpayer with the possibility to demonstrate that the transfer pricing approach it has considered in the related party transaction is at arm's length; and
3. allow access to appeal procedures and MAP in case the prescriptive rule is used as an anti-avoidance measure.

Section 5: Profit split methods

It is unclear why the PSM is discussed as an approach that can be applied under internationally accepted principles in the absence of comparables. Although the use of the PSM does not require the existence of comparables as such, the lack of comparables is not a factor for selecting the PSM, as also indicated in the toolkit. The guidance of the toolkit correctly states that both parties must make unique and valuable contributions to the transaction or the operations might be highly integrated. The question remains of course whether these are the only situations in which the PSM can be reliably applied (see also next paragraph of this comment). The fact that no comparables exist or are difficult to retrieve is not a sufficient reason to select the PSM as the appropriate transfer pricing method. The inclusion of the discussion on the PSM in a section on absence of comparables (in all cases) might therefore be confusing or lead to the application of the PSM under inappropriate circumstances.

Also, in light of the further work by the OECD on developing additional guidance on the use of the PSM, we believe that the guidance on the use of PSM by the Platform should be aligned. This is suggested in order not to arrive at divergent approaches between developed and developing economies in the application of the PSM.

Section 6: Valuation techniques

We welcome the reference to valuation techniques and its guidance in the OECD TPG (as revised under BEPS Action 8-10).

Section 7: Advance Pricing Arrangements

We welcome the guidance on APAs. We acknowledge that the conclusion of (in particular bilateral or multilateral) APAs can be very resource intensive and time consuming (from the perspective of the

taxpayer and the tax administration). However, we believe that in line with the development of the revised guidance on safe harbours and the Memoranda of Understanding for low risk activities, a fast track APA-policy for similar low risk transactions could be developed.

Section 8: Anti-avoidance and other tax base protection measures

See previous comments on section 4.3.

Part IV: Summary, conclusions and recommendations for further work

Section 3: Recommendations for further work

We welcome the list of topics where further work may be done and share our willingness to contribute to this further work.

In addition to the current list of topics, we propose adding the need to examine the possibility of fast track APAs for low risk activities, similar to the (bilateral) Memoranda of Understanding on safe harbours.

Case studies

All three case studies concern step one of the revised OECD TPG under BEPS Action 8-10: the delineation of the transaction. Further, the case studies illustrate situations where the taxpayer seems to have incorrectly delineated the transaction, potentially implying that every transfer pricing case poses a high risk that the taxpayer has the intention to file an incorrect tax return. We suggest to provide more balanced examples which additionally illustrate the following cases where:

- the taxpayer has delineated the transaction correctly, but both taxpayer and tax administration face difficulties in finding reliable comparables;
- the taxpayer has delineated the transaction correctly, but the taxpayer and the tax administration disagree about the return based upon comparables:
- the taxpayer has performed a comparability analysis to the best of the available comparables; and
- the tax administration has performed another benchmark study.

Appendices

Appendix 12

Appendix 12 presents an empirical analysis comparing firm profitability across certain manufacturing and distribution industries in Europe. The analysis finds that there is variability of profitability results in different countries for a given industry. It is not clear what practical conclusions can be drawn from such an analysis for tax administrations. It is our view that the comparability of a foreign firm should not be determined by aggregate industry-level testing but should instead be based on the facts and circumstances of the transaction under review. Furthermore, the analysis presented in Appendix 12 relies on data for Europe, which is well known to be heavily represented in public databases. Conducting similar analyses

for developing countries may be difficult as large volumes of firm-level data are not generally available in public databases for these countries.

Appendix 13

Both examples seem to perform a country risk adjustment based on long-term government bonds. It would seem appropriate to include further examples using other adjustment parameters.

The adjustments have the effect that the return of the tested party is increased because of the higher risk factor of the country where the tested party is located. From the point of view of an active party dealing with the tested party in the 'higher risk' country, that active party may assume higher risk such as non-repatriation of royalty payments, blocking of goods at frontiers, social movements and unrests or riots, etc. It remains highly doubtful who should receive the 'benefit of the increased risk'.

Appendix 15

The interquartile range calculated via Excel is just one of various methodologies for estimating Quartiles. Being a statistical approach, the toolkit should provide options (e.g. referenced in a footnote) rather than favouring one approach via exclusive display. This would allow for the evaluation of various quartiles as well as methodologies for estimating the defined range.

Appendix 19

This appendix contains illustrative safe harbour legislation for routine manufacturing activities. Similar illustrative legislation could be made available for other low risk activities. We also suggest to replace the term 'routine' with the term 'low risk'.

Appendix 20

Reference is made to the OECD TPG – safe harbour on low value-adding intra-group services under the revised Chapter VII (BEPS Action 8-10). The safe harbour margin / mark-up under the elective simplification approach on low value-adding intra-group services is fixed at 5% (no range).