

21 February 2017

Via E-Mail

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The World Bank

To: The Platform for Collaboration on Tax
1818 H Street, NW Washington, DC 20433 USA

DISCUSSION DRAFT: A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses (the “Toolkit”)

Dear Madam/Sir

The business federation SwissHoldings represents the interests of more than 60 Swiss-based multinational enterprises from the manufacturing and service sectors (excluding the financial sector).

SwissHoldings is pleased to provide comments on the draft Toolkit which the Platform for Collaboration on Tax (the “Platform”) released on January 24, 2017.

Our comments to the draft Toolkit are as follows:

General

1. We support all initiatives that help to avoid tax controversy, as well as to minimize compliance burdens for taxpayers.
2. However, we are concerned that the Toolkit (i) introduces several unclear concepts and positions that do not relate to its objectives, and (ii) advocates a number of inappropriate positions and Transfer Pricing (“TP”) adjustments that are both costly and complex to implement, while not necessarily fitting the purpose of the Toolkit. In these regards:
 - a) Tax authorities should build on the TP analysis of the taxpayer, rather than (i) trying to implement a number of complex and burdensome comparability adjustments (as contemplated by the Toolkit) and that neither tax authorities (including the developed ones) nor taxpayers wish to undertake these as a “new standard”, and /or (ii) performing a separate full analysis without consideration for the taxpayer’s business model or organization.
 - b) Delete any references to the application of (i) profit split methods, (ii) (general) anti-avoidance regulations or (ii) to the promotion of *non-arm’s length* limitations to the deduction of royalty payments.

3. We strongly support the comments made on page 52 around using a country's regulatory framework to increase the availability of local comparable data. This is fully within the capabilities of countries around the world to require the filing of all companies' financial returns to a central database. The UK's Company House requirements are an example of a potential model.
4. Further clarifications and /or emphasis on the following topics are required:
 - a) Acknowledge from the Toolkit introduction (i) that TP is not an exact science and also (ii) that taxpayers are facing the same practical difficulties as tax authorities do. Therefore, clear and simple compliance rules are required to avoid tax controversy and minimize the compliance burden.
 - b) Stronger emphasis to the tax authorities that the taxpayer's TP policy, TP analysis applied and documentation package submitted must always be the starting point of any review.
 - c) Further promote reasonable Safe Harbour rules in compliance with the arm's length principle.
 - d) Further promote the development of Advance Pricing Agreement ("APA") programs and in particular leverage on the opportunities resulting from the new international transparency standards.
 - e) In order to avoid controversy and double taxation, it should be clarified that the use of secret data or hindsight (the latter concept being not even covered by the Toolkit) should be prohibited for TP adjustments purposes.
 - f) The Toolkit's contents do not fully reflect the latest version of the BEPS outcome (e.g. definition of intangibles, valuation techniques, etc.). An update is required.
 - g) The Toolkit refers to both OECD and UN Guidelines, however is unclear which reference should prevail in situations where their respective approaches might be inconsistent. Clarification is required.
 - h) Finally, as *follow-up work*, we strongly recommend to address the practical challenges around TP adjustments subsequent to the original transactions (i.e. to ensure that the actual profit of the taxpayer for the transaction under review is at the "right" profit level at year-end). In this context, clarification, simplification and also alignment from an indirect tax and customs perspective is required.

Risk assessment and TP analysis by the tax authorities

5. We believe the Toolkit does not sufficiently draw the tax authorities' attention to the critical importance of first acknowledging the taxpayer's TP policy, transfer pricing analysis performed and other available information (e.g. taxpayer's existing APAs in other countries for functions /transactions similar to those deployed locally), before undertaking a totally different TP analysis and /or a counter benchmarking exercise. The South African approach described in Box 8 (page 30) should be recognized as the best practice.
 6. As mentioned above, taxpayers also face the same limitations on comparables data availability as tax authorities do. In line with their respective TP policies, many taxpayers already have developed a position about the right TP method and best possible benchmark
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to be used (with or without comparability adjustments), using the best information available at the time the benchmark is performed. Such taxpayer analyses should always be the starting point for tax authorities' review, and they should generally be accepted as long as they remain reasonable (being reminded that hindsight data should be disregarded for TP adjustment purposes).

7. With regards to comparability analyses, it is fundamental that tax authorities should in principle be prepared to *relax the comparability standards* where required (in particular, this implies accepting foreign comparables with similar market conditions, with or without additional country adjustments). In other words, tax authorities should be much more willing to accept a practical solution using data that is available rather than seeking "perfect comparables" that do not generally exist in the context of an often complex business reality.
8. If the benchmarking approach used by the taxpayer is reasonable and consistently applied (without any indications of "cherry-picking") tax authorities should accept it. Moreover, if comparability adjustments (e.g. working capital or country risk adjustments) are not performed by the taxpayer (based on judgment that they would not improve the quality of the results), this should generally be accepted by the tax authorities. Requiring any comparable adjustments as a standard would only increase (i) tax controversy, (ii) the complexity of the TP model and (iii) the administrative burden for both the taxpayer and tax authorities.
9. As noted on page 34, too strict independence criteria required by certain countries can unnecessarily complicate the search for comparables.
10. Appendix 15 describes the calculation of the interquartile range. It should be acknowledged that there are different acceptable methods of calculating the interquartile range though they might show slightly different results. The MS Excel calculation method is only one of them.

Relevance of the Toolkit's contents to its purpose

11. Since the main purpose of the Toolkit is to help tax authorities finding *solutions* to the *lack of local comparables*, this necessarily implies that the scope of the Toolkit should primarily focus on the practical implementation of *one-sided authorized TP methods*. Therefore:
 - a) Any reference to formulary apportionment (page 6) has to be removed from the Toolkit;
 - b) Any reference to the profit split method should be removed from the Toolkit. We remind the Platform that since 2010 the profit split method is no longer treated as a last resort method, and that the mere absence of internal or external comparables cannot justify its application. Referring to the profit split (see page 51 for example) as an answer to the absence of comparables for one-sided TP methods fully contradicts the "most appropriate method" rule.
 - c) It would be helpful to clarify that in general profit split is not appropriate for companies performing limited /routine functions and bearing limited risk in the context of the group's value chain. Moreover, we would like to highlight that proper application of a profit split method is a much more complex exercise as compared to the question whether and /or how to perform comparability adjustments.
 - d) Any proposals to limit the deductibility of royalty payments by applying artificial caps have to be removed. This is not in line with the arm's length principle.
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- e) It is not relevant for the Toolkit to address any (general) anti-avoidance rules. Those are aimed at tackling artificial set-ups whose purpose is to avoid tax. Conversely, the Toolkit is intended to address difficulties in benchmarking, which is a stage of the TP analysis occurring long after having analyzed and confirmed the substance of the transaction to be benchmarked. In this regard, the Toolkit does not fit its purpose.
- f) For the same reasons, Section 3.1 “testing the benefits received” in Part III should be removed, or alternatively it should be merged into Part II (Section 2 – “delineation of the transaction”). Again, it is not at the time of the benchmarking exercise that one should address the effective benefit or substance of the transaction.

Safe Harbour rules

- 12. We strongly believe that - reasonable - Safe Harbour rules in compliance with the arm’s length principle are an extremely efficient method to tackle the issue of comparability. The risks associated with Safe Harbours are overly emphasized (page 56). We also believe that the “most significant benefit” of the Safe Harbour does not accrue to the taxpayer but rather to the tax authorities who can have comfort on an arm’s length level of return applied without having to devote scarce resources to routine cases.
- 13. If reasonably applied, Safe Harbours would create a significant *win-win* situation for both taxpayers and tax authorities (this principle also applies to developed countries). Safe Harbours can help minimizing tax controversy and compliance burden, and at the same time they ensure a reasonable reward and profit allocation for the covered transactions.
- 14. By reasonable, we mean having an “arm’s length” profit level (not too high or too low, ideally the median of a reasonable benchmarking study for a transaction type /function within an industry sector) with clear and simple compliance rules (e.g. “opt-in” or “opt-out” models, etc.). We recommend to set the Safe Harbour profit level for a longer time frame (at least over 3 to 5 years, in line with usual durations for APA), rather than adjusting it every year.
- 15. In line with the OECD TP Guidelines, a 5% mark-up on costs is a reasonable Safe Harbour rate for “routine” service transactions.
- 16. Given that the Brazilian transfer pricing rules are generally not considered as compliant with the arm’s length principle and in practice lead to double taxation issues remained unsolved (e.g. tax treaty enforcement issues), we recommend to either specify these issues in the Toolkit or completely delete the Brazilian example as not recommendable practice.

Advance Pricing Agreements

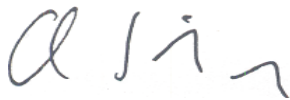
- 17. The development of APA programs should be promoted by the Toolkit rather than debated or even discouraged.
 - 18. Moreover, considering new tax transparency standards (e.g. disclosure and exchange of rulings/APAs, etc.) available APA data from other jurisdictions is an additional reasonable data source to test the TP methodology and profit level of the taxpayer in the respective country.
 - 19. This information could also help tax authorities to efficiently build a database on which they could rely to either perform their risk assessment, design Safe Harbour rules, or even engage into (APA) negotiations with taxpayers.
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We kindly ask you to take our comments and proposals into due consideration.

Yours sincerely

SwissHoldings

Federation of Industrial and Service Groups in Switzerland



Christian Stiefel
CEO



Dr. Gabriel Rumo
Member Executive Committee

- cc - SwissHoldings Board
- Nicole Primmer, Senior Policy Manager, BIAC
 - William Morris, Chair of the BIAC Tax Committee
 - Krister Andersson, Chair BUSINESSEUROPE Tax Policy Group
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