FIDAL

DIRECTION INTERNATIONALE

OECD PUBLIC CONSULTATION DOCUMENT ON TRANSFER PRICING COMPARABILITY DATA AND DEVELOPING COUNTRIES

11 MARCH 2014

Fidal is delighted to present its comments to the OECD on the above Discussion Draft. Our comments are organized in response to the OECD's specific request for comments and we are grateful for the opportunity to do so.

1. General remarks

We share the OECD's and Tax Administrations'' concerns on the need to address the issues arising as a result of the lack of substantial comparables data, especially in developing countries.

Transfer pricing is however an inexact science and taxpayers and their advisors use their best efforts to obtain the most reliable data available for both setting transfer prices and testing the results of the policies applied.

Despite the potential weaknesses, the OECD and the various Tax Administrations around the world should not make an *a priori* assumption that the lack of data naturally means that developing companies are by definition being disadvantaged as regards pricing policies being applied on a globally consistent basis across the business of a multi-national group, and thus losing tax revenue (para 10).

2. Expanding access to data sources for comparables

We are pleased to see that the OECD notes the use of secret comparables as inequitable for making transfer pricing adjustments (para 18). However, even if it were likely to be the case that such data when employed by Tax Administrations could be disclosed to taxpayers, we consider that its use under these conditions is flawed.

This is because, unlike rigorously conducted and replicable comparables search processes using the publically available databases, we are not convinced such data can have the same degree of reliability. Issues such as the manner in which the comparables have been identified from a given data population would have to be assessed and the selection or rejection of companies on relevant comparability criteria would have to be disclosed in order to maintain the same standards of reliability as with public data bases. Without such safeguards, the secret comparables identified may be 'cherry-picked' by the Tax Administration to a taxpayers' disadvantage. Additionally, the data necessary to determine fully whether any two transactions and/or entities are comparable may risk disclosing commercially sensitive information of and to competitors.

For these reasons we are against the use of secret comparables for any purpose, although we acknowledge that Tax Administrations may use them to identify taxpayers for audit.

3. More effective use of data sources for comparables

We agree with the need to assess specific country risk factors if using overseas market data. However we caution against broad brush or average country adjustments without considering in detail the additional costs or risks of operating in any given market and which entity in a multinational group bears those risks. For example, it would seem inequitable to allocate a greater relative share of operating profits to a limited or low risk distribution entity simply because its cost base included, say, relatively high transportation costs, as seems to be implied by the example from the New Zealand Tax Authority (para 21), when economically these costs are ultimately borne by the entrepreneurial company.

As to the use of data from other industries (para 23), this may be appropriate provided the functional and risk profile of the companies operating in these industries is similar to that of the tested party. We consider that the OECD should re-emphasise the need to not lose sight of the general comparability criteria in the extant Guidelines. We caution against the use of sector averages and consolidated global returns for the reasons already mentioned. Such data are inherently unreliable as the basis for setting prices, testing the results or proposing tax adjustments as they fail the tests for basic comparability in the extant Guidelines.

4. Approaches to reduce reliance on direct comparables

As noted in 3. Above, developing a reliable profit split is an inherently complex task given the inputs necessary and the detailed knowledge of the business and its value chain. As such we doubt that Tax Administrations will be able to invest the resources necessary (para 25). Additionally, such an approach without the use of comparables is in effect a formulary apportionment, which the OECD reiterated it does not favor. The suggestion of using similar transactions to provide reasonable alternatives might result in recharacterisations and the OECD should specify that this is subject to the existing restrictions in para 1.64-1.69 of the OECD Guidelines

We welcome the use of safe harbors for low risk transactions and we consider that such bi-lateral arrangements will be potentially helpful to taxpayers and Tax Administrations facing challenges in various developing jurisdictions where there is often an expectation of very high cost plus returns to relatively routine functions, such as contract software development, or where there is an expectation of sales returns increasing over time the longer a business is in-country without regard to its routine functions and low risks, for example (para 26).

Denial of corporate tax deductions for transactions with low or zero tax jurisdictions (para 28) seems to be beyond the remit of the OECD's transfer pricing guidance per se and does not seem to us to be an alternative method for identifying reliable comparables data.

5. Advance pricing agreements and mutual agreement proceedings

We welcome the OECD's encouragement of the development of APA programmes. Developed country Tax Administrations could be asked to assist their counter-parts in developing countries

to share knowledge and expertise to this end (para 30) and to enhance MAP discussions. OECD might take this opportunity to encourage the negotiation of more double tax treaties as well.