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The Platform for Collaboration on Tax

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**Ref: DISCUSSION DRAFT: A TOOLKIT FOR ADDRESSING DIFFICULTIES IN ACCESSING COMPARABLES DATA FOR TRANSFER PRICING ANALYSES**

Dear Members of the Platform for Collaboration on Tax,

Thank you for the opportunity to comment on the Discussion Draft: A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses (the “Discussion Draft”) issued on 24 January 2017. We acknowledge and thank the Platform for Collaboration on Tax (the “Platform”) for the time and effort put into this comprehensive draft.

BIAC strongly supports the Platform in its role of coordinating of efforts between international organisations on tax matters, and greatly welcomes the work done by the Platform to create a toolkit (the “Toolkit”) that will address the difficulties in accessing and effectively utilising comparables data. Specifically, BIAC recognises the usefulness of the initiative in seeking to address transfer pricing disputes and controversies. We believe this will be of benefit to both tax authorities and taxpayers in developing countries, and can therefore act as a catalyst for investment, jobs, growth and development.

The Toolkit represents a very thorough review of Transfer Pricing issues, summarising general questions and common practices, which should be used as a valuable reference tool in tandem with OECD guidelines and other supranational / local regulations. However, BIAC believes that it is of great utmost importance, given these multiple resources, that the Toolkit recommends a priority rule to ensure the greatest possible clarity for tax authorities and taxpayers in the event of any differences. We have included further discussion on this point, in addition to other more specific comments, below for your consideration.

Again, we thank you for the opportunity to comment on this Discussion Draft, and look forward to working with you further on this project.

Sincerely,  
Will Morris, Chair  
BIAC Tax Committee

## General Comments

1. BIAC strongly believes that the effectiveness and value of the Toolkit is entirely linked to the ability for taxpayers and tax authorities to interpret the Toolkit in conjunction with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“TPG”), the United Nations Practical Manual on Transfer Pricing for Developing Countries (“UNM”), and local regulations. Therefore, we would recommend the addition of clear guidance at the beginning of the Toolkit which would allow taxpayers and tax authorities to understand which guidance should be relied on in the event of a discrepancy between the Toolkit and those documents. While the Toolkit provides valuable guidance in addressing transfer pricing questions, BIAC believes that deference should be given to the TPG and UNM in such instances, considering the wide support these documents have worldwide and the general acceptance and validity given by Tax Administrations and taxpayers to them as a reference for completing transfer pricing analyses.
2. BIAC continues to support the application of the arm’s length principle (“ALP”). We believe it would be appropriate to include some brief upfront comments on how to apply functional/asset/risk analyses (in line with the TPG and UNM) to ensure the main body of the text on comparables is read with this perspective. Without this guidance, a country may feel it is appropriate to seek recharacterisation where comparables are not immediately visible.
3. BIAC observes that a comparison between controlled and uncontrolled transactions is a critical element of the ALP and as such, it is necessary to establish clear, comprehensive independence criteria as search processes seek to eliminate transactions that have been entered into by entities that belong to a multinational group. However, BIAC believes that less rigid independence criteria when conducting benchmarking analysis could be a simplified option as long as it is applied uniformly. This simplified approach may also assist with improving the number of potential comparables (and thus may be of particular use where there are scarce comparables for a given transaction). In addition, in order to ensure that appropriate comparables are not overlooked or excluded, we would recommend broadening the independence criteria in Appendix 7 beyond the *Bureau van Dijk* indicators alone. On the sensitive issue of independence, it would seem appropriate to ensure that the indicators come from a range of sources.
4. A concern remains over the possibility of tax administrations making use of data collected to obtain comparables or to populate internal databases that are not generally available and/or not easily verified from publicly available data (often known as “secret comparables”). BIAC notes that certain countries specifically prohibit the use of secret comparables or generally refrain from using them in practice. However, this prohibition is not comprehensive. Secret comparables can penalise small local companies that will struggle to find acceptable comparables, and damage countries’ capabilities to attract foreign business as a result of the uncertainty they create.
5. Appreciating that it may be difficult to completely eliminate the use of secret comparables, BIAC strongly recommends that full transparency into the use of such information is

encouraged. At the very least, a detailed description of the analysis behind such comparables should be made publicly available. For example, this could include creating ranges of industry average Profit Level Indicators, or mark ups for common services, in a useful, searchable, anonymous and publishable format. Additionally, it is essential that taxpayers and tax authorities have access to the same tools and information available to allow each party to adequately defend their respective positions in a balanced way, and (even more importantly) this could avoid disputes arising in the first place. Given the scarcity of resources in some Tax Administrations, the adoption of measures for avoiding future litigation should be a common goal.

6. The Toolkit recommends the use of the Profit Split Method (“PSM”) as an alternative where there is a lack of comparables. Although there is recognition that the selection of a profit split method based purely on the lack of data risks leading to a significant departure from the ALP, BIAC is concerned that this recommendation in the Toolkit will still result in tax authorities quickly defaulting to a PSM in scenarios where it may be inappropriate. Additionally, the application of the residual profit split method still requires comparables data in order to allocate the routine return as the first step. Similarly, the application of the PSM using a contribution analysis is often dependent on comparable data. As such, BIAC would welcome further qualifications within the Toolkit recommendations to ensure that the use of the profit split method is limited to cases where more appropriate methods are not available and that further guidance on appropriate allocation keys is provided so that it is not used as a tool to apportion profits arbitrarily.
7. BIAC welcomes the case studies included in the Toolkit and believes these examples will provide taxpayers and tax authorities with valuable guidance. However, BIAC notes that each case study results in a recharacterisation of the respective transactions, which is not representative of the very small number of actual transactions that will require recharacterisation. BIAC recommends that a statement to this effect be added, as well as additional case studies be included to demonstrate examples where transfer pricing adjustments are made but the transactions remain respected. Ideally, these would be more prominent than the examples that result in recharacterisation, to re-enforce the OECD position that recharacterisation is only appropriate in exceptional circumstances.
8. BIAC strongly supports the efforts of the Platform to encourage the use of safe harbours. In particular, BIAC agrees that the establishment of bilateral safe harbours significantly reduces the risk (and limits the quantum) of double taxation and we believe that such safe harbours are therefore a very useful tool in achieving tax certainty for taxpayers and tax authorities. BIAC stresses, however, that such safe harbours must be consistent with the facts and circumstances of all cross-border transactions within groups, and should therefore be elective and based on the ALP. The risk of double taxation will arise where safe harbours are not based on ALP.
9. BIAC believes that the use of “comparability adjustments” is a valuable tool, especially in scenarios where there may be a lack of quality data, and agrees with the Platform’s assertion that such adjustments should only be used after careful consideration of the applicable facts and circumstances. Cooperation between taxpayers and tax authorities will be paramount to using comparability adjustments to increase the reliability of results given the high degree of subjectivity that can be involved. Additionally, technical difficulties may

arise in the application of such adjustments due to the complexity and required industry specificity of the calculations. To that end, BIAC recommends a program of training for tax authorities as part of capacity building initiatives to ensure effective and consistent application in line with the ALP and economic reality.

10. BIAC encourages the Platform to further analyse the use of “foreign comparables” so that definitive conclusions may be drawn as to their reliability. Faced with a lack of local comparables, the use of foreign comparables, while not without its challenges, may provide the best solution. This is especially true in the context of margin-based methods. BIAC observes, however, that sufficient studies have not been undertaken as of yet to gauge the degree of reliability and agrees with the Platform that this is an issue that would benefit from further study.
  
11. BIAC supports the use of anti-avoidance measures where they are implemented in a way that is appropriately targeted and do not result in undue compliance burdens. BIAC encourages the Platform to provide additional guidance in this area because such measures should only be applied to high-risk issues and not used as a means for arbitrary collection. However, we do not consider that anti avoidance is an appropriate topic for a toolkit discussing transfer pricing comparables (which appears to be recognised in the Toolkit itself; *“the topic of anti-avoidance measures is extremely broad, and thus beyond the scope of this toolkit”*). Accordingly, we believe that section 3.7 should be removed, and addressed more comprehensively in a separate toolkit. In particular, the suggestion that royalties should be capped as a percentage of EBITDA seems misplaced in a discussion of transfer pricing comparables, and is out of line with the international consensus (intangibles are fundamentally different to monetary capital, which itself was the scope of a significant amount of discussion and work in relation to BEPS Action 4 before that recommendation was finalised).