



Date: February 20, 2017
To: Whom It May Concern
From: David R. Jarczyk, ktMINE, CEO
Subject: Comments Regarding: A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses

There is a need to educate the transfer pricing community on the data available in the public domain prior to furthering discussions regarding adjustments, interpretations, and determining the arm's length nature of tested transactions. The purpose of this memorandum is to provide information on the availability of market data:

- 1) for independent transactions involving intangibles, and
- 2) for other independent transactions analyzed for transfer pricing purposes.

The spirit of comparability analyses is properly discussed in the following paragraph from the discussion draft:

“Comparability analyses are an important element in the implementation of the arm’s length principle, requiring a comparison of the conditions in transactions between associated parties (“controlled transactions”) with the conditions in comparable transactions between independent parties (“comparable uncontrolled transactions” or “comparables”). *It is important to emphasize that comparability analyses are not always primarily focused on the actual price of the transaction* (emphasis is mine). In many instances, transfer pricing rules operate to consider whether a transaction has occurred at all, or has occurred in a way that is substantively different from that which is described in contracts or documentation; *in ways that are substantively different from those which would occur at arm’s length; or are not commercially rational* (emphasis is mine).”¹

¹ OECD, IMF, UN, WBG, January 2017. *A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses*.



However, the discussion draft quickly turns to the incorrect assessment that there is a lack of reliable, usable information. Below I provide information on the availability of market data for transfer pricing purposes.

Data Available for Transactions Involving Intangibles

While it may be true that information on the arm's length nature and pricing of intangibles transactions are difficult to find for certain developing countries, many practitioners seem to misunderstand the very structure of license agreements. In fact, most license agreements are made to cover all geographies (i.e., worldwide territory rights) or regional geographies (i.e. regional territory rights, such as Africa, South America, and European Union).

In fact, based on ktMINE's research, over 75% of publicly available license agreements include territories for regions outside the United States.

Why is this the case? When independent parties get together to make a deal, their lawyers' job is to protect corporate interests. An owner of intangibles (i.e., Licensor) wants to ensure the intangible rights are exploited in a specific region which will not infringe upon or compete with its other business interests. A party looking to exploit intangibles (i.e., Licensee) wants to ensure it receives a clear understanding of the territory in which the intangible rights are permitted to be exploited and maximize its geographical reach in the hopes of maximizing profit. As such, we find that many independent market transactions allow for worldwide or broad regional rights. The contract terms surrounding pricing structure, functions, risks, and exploitation of intangibles factor into the negotiation of royalty rates, flat payments, milestone payments, etc.



Data Available for Other Transactions Analyzed for Transfer Pricing Purposes

It must be noted that independent contracts exist for a variety of transactions beyond those involving intangibles. These contracts provide a detailed representation of the functions performed, risks assumed, and assets employed by both parties. Furthermore, they provide specific definitions regarding pricing structure and the payments themselves. Many of these contracts are made to cover all geographies (i.e., worldwide territory rights) or regional geographies (i.e. regional territory rights, such as Africa, South America, and the European Union).

- Manufacturing Services
- Research and Development
- Trademark Licensing
- Technology Licensing
- Buying Agent Services
- Toll Manufacturing
- R&D Cost Sharing
- Marketing Distribution
- Franchise
- Joint Development
- Software
- International Distributor & Marketing Services
- Sub-License
- Asset Purchase
- Cross License
- Intangible Property
- Contract Manufacturing
- Confidentiality
- Commissionaire Services
- Commission Agent
- Administrative Services

Common Myths vs. Facts

MYTH: Global Market Information is Not Available

FACT: Based on ktMINE's research, over 75% of publicly available license agreements include territories for regions outside the United States.

MYTH: Information is only available for U.S. companies

FACT: Based on ktMINE's research, most companies that are party to publicly disclosed contracts are not U. S. companies.



MYTH: Information is only available for public companies

FACT: Based on ktMINE's research, publicly disclosed contracts are available for not only non-U.S. companies, but also for companies from most geographies. In fact, it is possible to find contracts between one private company to another private company.

Suggested Edits to Appendix Regarding ktMINE

Please make the following edits to the appendix of the discussion draft when discussing ktMINE's content coverage:

ktMINE provides transfer pricing users with 3 distinct data sets:

- Royalty Rates – With over 60,000 disclosed rates, support intercompany royalty rates and document findings with evidence found in independent party agreements.
- Agreements – Support intercompany transactions by referencing how independent parties have structured similar transactions and allocated risks and functions.
- Intangibles Portfolios & Intangibles Intercompany Movement – Gain access to a company's intangibles and licensing portfolio to assist in developing a value chain analysis and identifying legal intangibles ownership (which is the starting point for determining economic ownership).