

European Business Initiative on Taxation (EBIT)

**Comments on the OECD Public Discussion Draft BEPS Action 10:
Discussion draft on the transfer pricing aspects of cross-border
commodity transactions**

At the time of writing this submission, EBIT Members included: AIRBUS, BP, CATERPILLAR, DEUTSCHE LUFTHANSA, DIAGEO, GSK, INFORMA, JTI, LDC, MTU, NUTRECO, REED ELSEVIER, ROBECO, ROLLS-ROYCE, SAMSUNG ELECTRONICS, SCA, SCHRODERS and TUPPERWARE.

EBIT comments on the OECD's Discussion Draft on BEPS Action 10: Discussion draft on the transfer pricing aspects of cross-border commodity transactions

Andrew Hickman
Head, Transfer Pricing Unit
OECD/CTPA
2, rue André Pascal
75016 Paris
FRANCE

Submitted by email to: TransferPricing@oecd.org

Brussels, 6 February 2015

Dear Andrew,

EBIT is grateful for this opportunity to provide comments to the OECD on its Public Discussion Draft on “BEPS Action 10: Discussion draft on the transfer pricing aspects of cross-border commodity transactions” which was issued on 16 December 2014 (hereinafter “the Discussion Draft”).

- We generally support the OECD's initiatives to provide more detailed guidance on the application of the CUP method in relation to commodity transactions as well as identifying common (reasonably accurate) adjustments to quoted prices. It should be noted that even with more detailed guidance on potential adjustments to quoted prices, the adjusted quoted prices should still be considered reference prices and not per definition the price to which the intercompany price should be adjusted to. This would lead to numerous transfer pricing adjustments imposed by tax administrations and would in absence of automatic corresponding transfer pricing adjustment mechanisms between jurisdictions result in double taxation. Also we would welcome guidance on the use of bandwidths/ranges from the reference prices in order to mitigate disputes with tax administrations.
- Furthermore preparing documentation supporting the reference prices and the adjustments to quoted prices can be an extensive and time consuming exercise for which MNCs may have to dedicate substantial internal/external resources. We would welcome that the OECD would refrain from the comment that: “the CUP analysis is generally the most appropriate transfer pricing method”. There are circumstances/situations where other transfer pricing methods can be applied in an equally reliable manner. For avoidance of doubt, with this additional guidance for cross-border commodity transactions, the commodities industry should not be subject to more stringent standards than other industries for transfer pricing documentation and it should not be implied that the CUP method is elevated to the primary method for this industry.
- The adoption of a deemed pricing date for commodity transactions between associated enterprises “in the absence of evidence of the actual pricing date agreed by the transacting parties” does not correspond to the complex economic reality of the commodities business: a commodity purchased at a certain point in time (X) with a future delivery date (X+3 months) will most likely already have been sold (X+15 days) in the meantime. Adopting a deemed pricing date (X+3 months) instead of the quoted commodity price on the pricing date (X) will open the door for undue influence / manipulation in the system. Deeming the delivery date as the pricing date for the contract is not only not evidenced in third party situations, it could also result in profits or losses are being recognized by an MNC for tax purposes, without any actual commercial profits

EBIT comments on the OECD's Discussion Draft on BEPS Action 10: Discussion draft on the transfer pricing aspects of cross-border commodity transactions

or losses supporting such an adjustment. For example Company A sells to Company B at 100 for delivery at X+3 months. After 1 month Company B sells to its customer at 110 for delivery at X+2 months. In the case that at the shipping date (X+3 months) the market reference price is 120, the tax authorities could adjust the intercompany price from Company A to Company B to 120. The tax administration would allocate additional profits of 20 to Company A, although profits of 10 was never achieved by the Group as a whole. Therefore, the acceptance of a deemed pricing date could not only result in potential double taxation, but could also allow for tax administrations to tax non-existing Group profits. We strongly urge the OECD to reject the adoption of the deemed pricing date or ensure that its application is limited to very exceptional cases, e.g. in cases whereby the counterparties perform only very limited functions.

- Clarification / guidance is needed about what is considered to be “absence of evidence”: in a lot of countries there is currently not a specific requirement to document the purchases and sales of movable goods carried out with a signed contract. Tax authorities should accept that the actual execution of a transaction can be evidenced with other documents such as the order receipts, the conduct of the parties (in line with the functional and risk profile), the proposals and acceptance exchanged via e-mails, the transport documentation, the custom documentation evidencing the contract date, etc.

EBIT trusts that the above comments are helpful and will be taken into account by the OECD in finalising its work in this area. We are committed to a constructive dialogue with the OECD and are always happy to discuss.

Yours sincerely,

European Business Initiative on Taxation – February 2015

For further information on EBIT, please contact its Secretariat via Bob van der Made, Telephone: + 31 6 130 96 296; Email: bob.van.der.made@nl.pwc.com).

Disclaimer / Copyright: This document contains the collective views of the EBIT business working group and is provided to you courtesy of EBIT. PwC acts as EBIT's secretariat but PwC is not a Member of EBIT. Nothing in this document can be construed as an opinion or point of view of any individual member of EBIT or of PwC. Any reproduction, in part or in total, of this document, in any form whatsoever, is subject to prior written authorisation of EBIT. Such authorisation can be obtained by EBIT's Secretariat via: bob.van.der.made@nl.pwc.com