

Mexico City, February 6, 2015

Via e-mail

transferpricing@oecd.org

Mr. Andrew Hickman

Head of Transfer Pricing Unit

Centre for Tax Policy and Administration

Dear Mr. Hickman,

On behalf of IFA Grupo Mexicano, A.C. (Mexican Branch of the International Fiscal Association) kindly find below the comments on the Public Discussion Draft on Action 10 of the BEPS Action Plan – “*Transfer Pricing Aspects of Cross-Border Commodity Transactions*” (the “Draft”).

1) Comments to section A) of the Draft

The use of the CUP method for pricing commodity transactions and the use of quoted prices in applying the CUP method

Section A) of the Draft provides a proposal of clarifying the guidance in the existing Transfer Pricing Guidelines, stating that the CUP method would generally be the most appropriate transfer pricing method for commodity transactions and that under the CUP method, the arm’s length price for the controlled commodity transaction can be determined, not only by reference to comparable uncontrolled transactions, but also by reference to a quoted price.

As established in the Draft, where a quoted price is available for a commodity, and the terms and conditions of that comparable uncontrolled transaction are comparable to those of the controlled transaction, the quoted price may provide reliable information for applying the CUP. Where there are differences that have a material effect between the terms and conditions of the controlled transaction and the uncontrolled transaction represented by the quoted price, further analysis should be performed before concluding that the CUP should be the most appropriate method.

In this regard, it is understood that the Draft establishes that when applying the CUP method in commodity transactions by considering a quoted price, a functional analysis should be carried out in order to identify the functions, risks and assets incurred by each party in the controlled transactions so as to identify the

substance of the transaction, and determine if the transactions from which the quoted price are obtained are considered comparable from a transfer pricing standpoint. In case such transactions are not comparable, any comparability adjustments should be carried out, or furthermore, other method could be applied.

Notwithstanding the aforementioned, it is reasonable to consider that there are intra-group transactions that independent enterprises may not carry out, which is also applicable for commodity transactions.

In relation with the abovementioned, paragraph 1.11 of the OECD Transfer Pricing Guidelines establishes the following:

1.11 A practical difficulty in applying the arm's length principle is that associated enterprises may engage in transactions that independent enterprises would not undertake. Such transactions may not necessarily be motivated by tax avoidance but may occur because in transacting business with each other, members of an MNE group face different commercial circumstances than would independent enterprises. Where independent enterprises seldom undertake transactions of the type entered into by associated enterprises, the arm's length principle is difficult to apply because there is little or no direct evidence of what conditions would have been established by independent enterprises. The mere fact that a transaction may not be found between independent parties does not of itself mean that it is not arm's length.

Considering that there could be intra-group commodity transactions that independent enterprises may not carry out, in some cases the CUP method would not be applicable for pricing commodity controlled transactions, or would represent high difficulties, even if reasonable adjustments are applied to the quoted price.

We suggest to clearly establish in the document that the tax administrations must consider that there are intra-group transactions that independent enterprises may not carry out, or there is not public information available, which is also applicable for commodity transactions resulting in the difficulty of applying the CUP method.

In addition, considering that in such cases the CUP method may not be applicable, the document should also include the possibility for applying other transfer pricing methods for pricing commodity transactions.

2) Comments to section B) of the Draft

Deemed pricing date for commodity transactions

The Draft includes that one of the challenges faced by tax administrations is the ability to verify the pricing date in commodity transactions, proposing guidance deeming the pricing date to be the quoted price, incorporating any comparability adjustments, on the shipment date as evidenced by the bill of lading or equivalent documents. This would mean that the price for the commodities being transacted would be determined by reference to the quoted price on the shipment date, subject to any appropriate comparability adjustments.

It is important to mention that in commodity transactions, either controlled or uncontrolled, there is a difference in timing between the date when entering into an agreement and shipment dates, thus, considering the proposal for pricing commodities being transacted by reference to the quoted price on the shipment date would not be reasonable. Additionally, adjusting the differences between the quoted price on the transaction date and the shipment date may result in high difficulties for the taxpayer.

In this regard, we suggest OECD reviewing this guidance of considering that the price for the commodities being transacted would be determined by reference to the quoted price on the shipment date.

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The participation of IFA Grupo Mexicano, A.C. is made on its own behalf exclusively as an IFA Branch, and in no case in the name or on behalf of Central IFA or IFA as a whole.

We hope you find these comments interesting and useful. We remain yours for any questions or comments you may have.

Sincerely,

IFA Grupo Mexicano, A.C.